



Resolving Environmental Disputes Outside of a Courtroom

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Abstract: Environmental disputes can be effectively handled in an ADR process. The source of the dispute does not matter. Complex Superfund site response cost disputes are routinely addressed now by allocation neutrals. In simple property transfers or major mergers or acquisitions involving numerous properties, the allocation of environmental risks and the interpretation and application of environmental indemnities are often the subject of arbitration. A variety of environmental or statutory or common law claims are mediated or arbitrated. Environmental matters can be the subject of a wide variety of agreements involving the sales of energy credits, environmental assessments, remediation projects or development of wind or solar farms, and licensing of intellectual property to name just a few. Process agreements may utilize institutional arbitration rules for contract disputes involving environmental matters, or they can be developed ad hoc and in quite creative ways. Thoughtful litigants, arbitrants, or disputants may find that mediation, facilitated mediation, administered arbitration, ad hoc arbitration, or allocation process orders or agreements will allow them to reduce costs and increase speed to resolution without compromising a fair and just outcome.

Introduction

Forget the wired courtroom. The real action in environmental dispute resolution does not involve an Article III judge. Instead, it involves innovative or tried-and-true dispute resolution mechanisms involving neutrals who can coalesce parties and facilitate resolution of disputes. Litigants are moving to these alternatives even where cost savings may not be that great because they want to avoid the vagaries of a judicial resolution knowing that a right of appeal is no longer a security blanket.

This paper contains a discussion of environmental disputes that might be considered for ADR and ADR process issues that should be considered.

Candidates for ADR

Most lawsuits are never tried. Just fewer than 99% of the cases filed in the United States federal district courts are resolved by motion or settlement. The Administrative Office of the United States Courts reported that of the 274,362 cases that were “terminated” during the 12-month period ending September 30, 2015, only 2,968 cases, or 1.1%, actually reached trial (877 non-jury trials and 2,091 jury trials. http://www.uscourts.gov/sites/default/files/table4.10_0.pdf. This statistic means that there was most likely a dispositive motion or a settlement that resulted in the “termination” of the action.

The Administrative Office of the United States Courts also publishes statistics on civil cases filed by “nature of suit.” There is a category for “environmental matters” under federal statutes. In the fiscal year ending September 30, 2015, there were 845 such actions filed. For those of you who care about comparisons, that is up from 614 such actions filed in 2014 and down from 1,436 environmental cases filed in 2013.

So what are these “environmental matters”? And how can they be resolved?

Superfund Claims

Superfund claims provide a great example of the creativity occurring in the development of ADR processes. Under the 1981 federal Superfund law, liability is strict, retroactive and can be joint and several. Causation is not an issue in most Superfund cases because the disposal location is also the location where hazardous substances were deposited. The statute makes liable a person who arranged for disposal of a hazardous substance, who transported such waste and who selected the disposal site, every current owner and operator, and every former owner and operator at the time of a disposal. Courts have interpreted these categories of liable parties quite broadly.

In a contribution action under the Superfund law, the statute directs district court judges to conduct an allocation “according to equitable factors as the Court deems appropriate.” Fault, toxicity, volume, care, involvement, cooperation, and knowledge are among the factors that courts have considered in performing equitable allocations. Hence, at large multi-party sites (e.g., landfills, battery reclaiming facilities, used oil recycling facilities, solvent reclamation facilities), the only question is how much each party should pay. In the first twenty years of Superfund, parties answered this question by suing everyone. Hence, Superfund suits with hundreds of parties named in third, fourth, and fifth party complaints were not unusual.

The costs of such litigation became prohibitive. To reduce costs, Superfund litigants developed the Allocation Case Management Order (CMO) for matters in litigation or an Allocation Process Agreement for matters not in litigation. While no two allocation process documents are alike, they have these features:

1. They involve a third party neutral to allocate and perhaps then mediate the dispute.

2. They typically involve questionnaires and a process to follow up with individual parties to ensure that questionnaire responses feature equivalent levels of due diligence. It is counterintuitive to advocates, but the success of the process is dependent in part on how forthcoming parties are in divulging information without the need for follow up by the neutral.
3. The process may involve deposition discovery taken by a neutral with some mechanism to provide for cross examination of witnesses usually during a resumption of the deposition after the neutral's initial examination and the circulation of the transcript. Parties do not have to attend the initial examination. The hope is that resumptions will not be necessary and a cost savings will result.
4. They typically involve submission of expert reports.
5. They involve the preparation of "position papers" and rebuttal or reply papers.
6. For matters in litigation, they may or may not be mandatory, meaning that a party may be able to "opt in" or "opt out" of the process depending upon the circumstances and the Court's determination on how best to manage the process. For allocation processes outside of a litigation context, parties are invited to participate in the process.
7. They almost always contain an ambitious schedule, but typically involve a mechanism to extend deadlines.
8. They may involve hearing processes where oral argument is heard by the neutral.
9. They typically involve a preliminary allocation report which will typically address shares of "orphans" or non-ADR participants.
10. There is a comment period and then a final report is prepared.
11. There is a facilitation session with the neutral to attempt to effect a final resolution of the matter.
12. The process may be binding or non-binding, on all issues or some issues, depending upon the agreement of the parties but is usually non-binding.
13. They involve equal contributions to a trust fund by each participant to pay the costs of the process.
14. They may involve the facilitation of expert presentations during the advocacy process.
15. They may give the neutral the right to rule on liability issues.
16. They typically involve creation of a document repository.

See, for example, CMOs issued in *Charter Township of Oshtemo et al. v. American Cyanamid et al.*, Case No. 1:92 CV 843 (W.D. Mich. 1993); *Global Landfill Agreement Group v. 280 Development Corporation, et al.*, Case No. 2:96cv05338 (NHP) (D. N.J.

1997); *The Dow Chemical Company, et al v. Acme Wrecking Company, Inc. et al.*, Civil Action C-1-97-0307 (S.D. Ohio 1997); *United States v. Beckman Coulter, Inc. et al.*, Case No. 98:CV 4812 (D. N.J. 1998). The use of a neutral to conduct third party witness depositions in the context of a PRP group allocation process is also reflected by the order of the district court granting a petition under F.R.Civ.P. 27. *In Re Verified Petition To Perpetuate Testimony Regarding Butterworth Landfill Superfund Site*, Case No. CV: 1:97-740 (W.D. Mich. 1997). (Please contact me if you would like a copy of any of these orders.)

The proof of the pie is in the eating. All of the above cases were successfully facilitated and were resolved before trial. Why? In my judgment, it is because of these factors:

1. All parties know it is very likely that they will be found liable.
2. Parties are seeking to avoid large transaction costs.
3. Parties want documentary information to be gathered in an efficient manner.
4. Parties are tired of prolonged depositions taken to turn over every stone irrespective of the materiality of the information.
5. Parties want to take advantage of a knowledgeable neutral.
6. Parties believe they can obtain a fair result.
7. Parties expend the time and expense for an allocation process because they want it to succeed.

Citizen Suits

Environmental statutes provide for “citizen suits” in certain defined circumstances. Illustratively, persons or groups with standing can bring these actions under the Section 304 of the Clean Air Act, 42 U.S.C. § 7604; Section 505 of the Clean Water Act, 33 U.S.C. § 1365; Section 7002 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972; Section 11(g) of the Endangered Species Act, 16 U.S.C. § 1540(g); and Section 310 of the federal Superfund law, 42 U.S.C. § 9659. These suits are brought to require a government agency or a private defendant to take some action that the plaintiff believes is required by the environmental statute in issue. Citizen suits typically require notice to the Environmental Protection Agency (EPA) before the “private attorney general” is allowed to proceed with litigation. Damages are not recoverable but injunctive relief is awardable, and can be costly to a defendant.

Mediation of these disputes is challenging because the gulf separating parties on both liability and relief is typically wide and bridging it may require a process of education and consensus building. In other words, more than one mediation session may be necessary and mediators have to be alert to identifying process steps that can help the parties achieve a resolution. Good facilitation skills for the neutral are essential

especially if the matter has public visibility or large numbers of public interest groups are involved.

Attorneys' fees can be awarded in a successful citizen suit. Hence, if the main claim can be successfully mediated, the attorneys' fees claim still has to be resolved. But once again, information sharing and consensus-building are ways to achieve resolution of attorneys' fees claims.

Arbitration of Contract Disputes Involving Environmental Matters

Because of strict liability provisions in environmental statutes, parties who buy or sell real property or businesses which own real property will typically allocate environmental risk in the sales agreement. There may be an indemnity. There may be a release of liability. There may be an "as is" clause. There may be exclusions to an indemnity. The indemnity might expire after a period of time. These are among the clauses that could generate a dispute. And arbitration is a good way to resolve any such disputes.

There is not typically any unusual feature of an arbitration of a dispute arising out of the environmental provisions of a sales agreement. One arbitrator may only be needed for smaller-dollar disputes. Three arbitrators might be preferable for larger claims. However, typically the operative agreement is entered into at a time when the parties are not thinking about dispute resolution but about the success of the business deal. That does not mean that parties cannot discuss the number of arbitrators should a dispute arise if having three arbitrators will be disproportionately costly given the amount in controversy.

These arbitrations will typically involve expert witnesses. In my experience, having these witnesses give testimony at the same time—some refer to this practice as "hot tubbing"—is an effective way to identify the technical differences between the arbitrants and highlights the flexibility that arbitration can bring to the dispute resolution process for these kinds of disputes.

There are a number of other contractual contexts in which disputes over environmental matters can be resolved by arbitration. Among them, consider the following:

- An environmental assessment of environmental liabilities associated with a property or a business is conducted negligently.
- Disputes arising out of the sale of environmental "credits" or "attributes." Particularly in the energy sector, but also in the area of wetlands "banks," a holder of credits or attributes because of a reduced carbon footprint or the development of renewable energy, or a person who has conducted wetlands mitigation without any obligation to do so, can sell these credits or attributes. They may or may not be brokered. But there is the potential for disputes among the parties that would be well-suited for arbitration.

- Remediation sometimes does not go as planned. Remediation contractors and the persons that retain them will typically have a dispute resolution clause that may involve arbitration.
- Consumers or industrial purchasers of equipment that is advertised as having certain energy efficiency attributes may find that the energy efficiency does not live up to the advertising, resulting in an unfair and deceptive trade practice claim or a false advertising claim or perhaps a warranty or other similar contract-based claim.
- The environmental pollution liability insurance market or reinsurance market is also a candidate for arbitration of disputes either between an insured and insurer or between or among insurers.
- Renewable energy projects like wind farms and solar farms may generate disputes between owners and contractors, or between the purchaser and seller, among other persons who may be involved in the generation or sale of power or the construction or maintenance of these projects.
- Climate change concerns have resulted in “carbon capture and sequestration” projects (to capture carbon emissions and store them rather than emit them to the atmosphere) that raise the potential for engineering and performance disputes, among others.
- “Fracking” (whereby rock is fractured by a liquid injected under pressure to extract oil and gas from the subsurface) can involve contracts involving a number of entities (well drillers, suppliers, providers of equipment, insurance carriers, owners, operators).
- Intellectual property in the environmental arena—for example, patented technologies, copyrighted manuals, trademarks and servicemarks—might be the subject of licensing agreements or infringement or validity claims.
- Charitable donees of land, or trustees, may have agreements that protect them from environmental liability, or indemnities.

Whatever the contractual context, successful environmental-dispute arbitrations almost always involve an experienced arbitrator. Particularly in complex technical cases, a successful arbitration is one where the tribunal can grasp the issues requiring resolution and manage the process sensibly both in the pre-hearing and hearing phases.

Process Issues for Mediation or Arbitration of Environmental Disputes

Generally speaking, the more that is at stake, the more attention that parties should pay to process issues in an environmental ADR proceeding. There are a number of questions that have to be answered in designing an ADR process.

Mediation: Mediation is an appropriate tool for a number of disputes, but to maximize the likelihood of success, parties must give attention to these process concerns.

Status of Discovery: The more that is known about the material facts of a case, the greater is the likelihood that a case will settle. There is a trade off here, of course. The more that is known about the facts, (usually) the greater the cost of discovery. The challenge to be met is developing sufficient information at a reasonable cost to permit the mediator to assist the parties in a meaningful evaluation of the strengths and weaknesses of the case. Mediating too early may doom the success of mediation. Mediating late may increase the cost of litigation without improving the likelihood of success of the mediation.

Damages or Relief: It is very important that the parties have a clear understanding of damage or relief claims before mediation commences. There is a practical reason why this is important: parties should not be taking up valuable time at a mediation trying to understand a claimant's damage calculation or relief being sought. More importantly, to prepare properly for a mediation, a party needs to know what it is demanding, or how much is being sought from it, and why. It may be prudent to delay the start of an environmental-dispute mediation because the claimant had not articulated its damages claim or there is a lack of understanding of the damages claim. If parties to a mediation have radically different views of the value of the case that is being mediated, the likelihood of settlement is diminished. But if those views are based merely on an inadequate understanding of each party's position as opposed to sincere differences on what the proofs will show or what the law will permit, the mediator or the parties or both has or have failed to prepare properly for the mediation.

Position Papers: My practice is to encourage the submission of meaningful position papers that are exchanged among the mediation participants, followed up by reply papers. The cost of the mediation is increased slightly by the reply paper component but reply papers can be quite valuable in narrowing the issues and focusing the approach at the mediation.

Confidential Statement of Settlement Position: It is useful to provide for the mediator's eyes only a summary of settlement discussions theretofore, a good faith estimate of the costs to complete or conduct litigation (through an appeal), and a statement of any facts or factors which the party wishes to emphasize, and why, to enable the mediator to prepare properly for the mediation session.

Confidentiality: The execution of a mediation agreement that confirms that the parties recognize the settlement-confidential nature of the process is an important step. But remember that if the case does not settle, material facts learned in the mediation will likely find their way into discovery or examination at trial.

Cost Sharing: It is important to articulate up front how the costs of the mediation will be shared, unless a court order establishes the cost-sharing arrangement.

Opening Statements: They can be useful or useless depending upon the nature of the case and the quality of the opening statement. A participant must evaluate the significance of an opening in relation to the audience that is sought to be reached.

Requirement of an Appearance by a Party Representative with Settlement Authority: It is essential that a person with full settlement authority (i.e., there is no need to make a telephone call to obtain approval to settle) is present to maximize the likelihood that settlement will be reached, especially if a contingent fee arrangement is involved. (This term is included in the mediation agreement but also may be required by a court order or a state statute.) And typically parties attend a mediation with a representative that has such settlement authority. However, unless a court order or state statute requires the presence of such a person, having present a person with the appropriate level of settlement authority may be difficult to enforce.

Use of Experts: They can be quite effective during a mediation if they are well prepared and thoughtful. From the mediator's perspective, it is important that each participant identify up front whether an expert will be present and why so that other participants can be prepared to respond, as may be appropriate. Having a party say, "I cannot respond without speaking to my expert," where the expert is not present, will obviously delay the completion of mediation.

Selection of the Mediator: Mediators operate on different scales of involvement from the mere passive conduits of offers to the active evaluators of the case. Different styles may be appropriate for different cases. The integrity and credibility of the mediator, however, are critical to the success of any environmental-dispute mediation. Hence, the style of the mediator must not interfere with the assessment of the integrity and credibility of the mediator by each participant. It is also very important that the mediator have the time required to prepare for and conduct the mediation. Mediators who rush from mediation to *mediation may not be suitable for an environmental mediation.*

Mediator's Recommendation: If a settlement is not reached, will the parties seek a mediator's recommendation? If so, this factor should be taken into account in selecting the mediator.

Mediation Agreement: The material process terms described above are reflected in a mediation agreement signed by the parties. The agreement will also likely cover the place and day or days of mediation to which the parties are committing. Where a court order is involved, the terms of the order may embrace some of the relevant process terms.

Preparation for Mediation: Many parties do not prepare properly for mediation because they do not conduct a realistic appraisal of the strengths and weaknesses of their case before the mediation. Such an appraisal may require a frank internal examination where weaknesses are not understated and strengths are not overstated. On the eve of a trial, a lawyer concerned about malpractice will send his or her client a candid evaluation of the likely outcome of trial. Lawyers tend to err on the side of highlighting what can go wrong so no client is surprised by an adverse outcome, including a "worst case" outcome.

Proper preparation for mediation should mean that the lawyer has conducted such an assessment even where discovery has not started or is not yet completed.

Facilitated Mediation

Facilitated mediation can be a valuable tool in resolution of environmental disputes. In a facilitated mediation, the mediator supervises information exchanges, interviews witnesses, and supervises the exchange of expert reports and presentations. A facilitated mediation is usually conducted in a pre-litigation setting.

Agreement: For a facilitated mediation to maximize the likelihood of success, parties have to agree to cooperate fairly in the process. For example, document production has to be accompanied by a reasonable level of due diligence since there is little ability to determine if the production is adequate. This and other relevant terms are embodied in a mediation agreement.

Statement of Issues: To help the parties focus their case, one process step that is helpful is the exchange of a statement of claims to be mediated and the issues on which discovery is to be undertaken.

Document Exchanges: The mediator may have to play a role in ensuring that document requests are properly tailored to accomplish the purpose of the facilitated mediation. The process agreement must give the mediator the ability to resolve document discovery disputes.

Interrogatories: If interrogatories are permitted in the process, the mediator must be given the authority to decide objections. The number of interrogatories is usually the subject of the mediation agreement.

Assertion of Privileges: The mediation agreement should address the process that will be followed if a party asserts a privilege with respect to documents. If a privilege log must be produced, the *agreement should so indicate, stating the required disclosures in the privilege log.*

Witness Interviews: Since there is no subpoena power, witnesses must be asked to appear. For third-party witnesses, the moral suasion of the mediator may be critical to effect the appearance of the witness. Parties have to decide whether the witnesses will be placed under oath. They must further decide whether a court reporter will be present to transcribe the testimony. Whether witness interviews by telephone will be permissible and how the administration of an oath and the transcription of the testimony are to be accomplished are other issues for resolution. Usually, the mediator will take the lead in questioning followed by questions from the parties' representatives. In this later stage, the mediator must keep order, especially if a witness is not represented by counsel.

Expert Presentations: A facilitated mediation usually involves written expert reports followed by an opportunity for expert presentations and questioning by the experts of the experts. The mediator must supervise this process thoughtfully to identify material areas of agreement and disagreement and the bases therefor.

Selection of the Mediator: The mediator selection process is particularly critical in a facilitated mediation. The personality and experience of the mediator might be determinative of the success of the facilitated mediation. Time availability is also critical if the process is going to work correctly.

Scheduling: The parties should endeavor to make a realistic appraisal of the time they will need to make information exchanges, complete interviews, have expert exchanges and conduct the mediation. If the schedule is not realistic, a participant that needs more time will get it since the mediator typically has no effective way to enforce a schedule.

Mediator's Recommendation: If the mediation does not result in a settlement, the parties may wish to seek a mediator's recommendation (or what some call the "early neutral evaluation"). This possibility may play a role in the selection of the mediator.

Binding Decision: The mediator's recommendation could be made binding by agreement of the parties. Parties can use the same person to mediate a dispute and then to render a binding arbitration decision but the neutral as mediator may be less effective since the mediator will likely have to be much more circumspect in his or her discussions with participants on the strengths and weaknesses of the case. The decision to use a mediator to wear two hats needs to be made on a case-by-case basis.

Arbitration

For environmental matters, there are commercial arbitration rules that can be adopted by parties without more. Indeed, for valuation of "data" in the event of a dispute between an original registrant and a generic registrant under the Federal Insecticide, Fungicide, and Rodenticide Act, arbitration is required and is administered by the American Arbitration Association. 29 C.F.R. Part 1440.

However, if parties intend to design their own environmental arbitration process, the following questions and thoughts may have value in the consideration of appropriate arbitration agreement terms. The questions below should be evaluated by readers in the context of binding, quasi-binding (where, for example, there is a penalty should a party not prevail in litigation with an award that exceeds the arbitration award by some agreed upon margin), and non-binding arbitration processes. As to quasi-binding or non-binding arbitration processes, they typically involve larger numbers of parties and a lengthy time period—sometimes 3-5 years—and, in my experience, have always been successful because parties receive more attention than they will receive from a judge and thoughtful analyses from experienced neutrals. Most arbitrations, however, are going to be binding.

Costs of the Arbitration: How will they be borne? Will they be subject to reallocation depending upon the results of the arbitration?

Do You Think You are Saving Money? Do not assume that you will save dollars by arbitrating instead of litigating. You should save time, but you may not save money. Where the process is quasi-binding or non-binding, no party will want to go through the rigors of the process only to see it fail because of a failure of preparation. Hence, parties tend to incur expert and discovery costs that might not be any less than those that would

be incurred in litigation. Money can be saved as long as the parties are prepared to make discovery and hearing choices that allow them to present the essence of the case with sufficient thoroughness without having to pursue every discovery avenue along the way.

Binding or Non-Binding: Will the decision be binding? If it is non-binding, will litigation be permitted on a de novo basis? If so, will there be a limited amount of time after an arbitration award within which a lawsuit may be filed? Will there be any penalty (for example, paying the other side's legal fees) if the result at trial is not better than the arbitration result by some reasonable margin? How will the parties ensure that the trial court is not made aware of the arbitration result? Is it practical to believe that the award can be kept from the trial court? Will any of the discovery taken in the arbitration be usable in subsequent litigation? Can any of the arbitration hearing transcript be used for any purpose? Will the statute of limitations be tolled for the arbitration process period?

Panel: Will there be a single arbitrator? Three arbitrators? If three, will each party name an arbitrator (who will not be neutral) who then together will select the neutral arbitrator? Or will all three arbitrators be selected as neutrals with one serving as chair of the panel? How will the arbitrators be selected? The parties presumably will prepare an initial list to be exchanged. How will the list be pared down (if necessary) for interviews? Who will take the lead in interviews? Or will the parties rotate the lead? Will the arbitrators be lawyers or non-lawyers or a combination? Will the arbitrators be required to have a particular technical expertise? Will the arbitrators be required to be available for consecutive hearing days? The importance of having a chairperson who will devote the time required by the process cannot be underestimated. Especially where there are difficult, complex, or lengthy legal and factual issues that require thoughtful consideration, panelists who have full-time other jobs or who are always on a tight schedule may frustrate the goals of the process.

Ex Parte Contacts with Panel Members: They should be prohibited, of course.

Technical Assistance: Will the arbitrators be permitted to retain experts (in appropriate cases) to assist the panel? If so, under what terms or safeguards?

Panel Members' Agreement: The panel members should sign an agreement. The agreement should cover, among other things, the respective obligations of the parties, the specific terms of compensation for services and expenses, confidentiality, scheduling, what happens in the event that the arbitrator or a panel member has to be replaced for any reason, and the avoidance of ex parte contacts on substantive issues. Institutional rules may be controlling here if the parties have adopted such rules.

Scheduling: Scheduling is set by agreement of the parties. Will the arbitrator or panel have the discretion to modify the schedule if the parties are unable to agree on a schedule change? Will the award have to be rendered on or before a certain date? Must the hearing begin by a certain date? What time frames will govern filing of motions and responses to such motions? Again, institutional rules, if adopted, may answer these questions.

Service: Will there be special rules for service of papers?

Choice of Law: To the extent that it is material, will there be agreement on what law will be applicable?

Pre-Hearing Conference and Statement of the Case: A pre-hearing conference almost always will be necessary before which each party must present its theory of the case.

Scope of Arbitration: What is going to be decided? Must reasons be given? Will the parties agree on the standard that the arbitrators must follow with respect to a fact sought to be proven? Is there agreement on who has the burden of proof on a particular issue or issues? Is there going to be a preliminary decision with a right to comment or a final award? If the former, how long a period of time will occur between the preliminary and final decision and what rights do the parties have to submit comments on the preliminary decision? Will the parties consider a “high-low” clause where the tribunal must decide the matter within a fixed range, or a baseball arbitration clause where the parties provide an outcome to the arbitrator and the arbitrator must choose the outcome the arbitrator regards as most reasonable?

Discovery: The parties may have to write their own rules for discovery (numbers of interrogatories, length of depositions, handling of objections, and so on) or they can be guided by federal or a state’s rules of civil procedure, although generally discovery is more limited in arbitration and the applicable civil procedure discovery provisions are not applied.. The good faith of the parties will dictate how well discovery proceeds. The good sense of the arbitrator or a panel’s chairperson will ensure the proper resolution of discovery disputes. If sanctions are to be provided for, the parties should articulate this fact in the arbitration agreement. Electronic discovery issues can be quite vexing. If material to the presentation or resolution of issues, they should be thoughtfully addressed in an ad hoc arbitration process agreement.

Privilege Assertions: If document discovery is withheld because of privilege, will general assertions of privilege suffice, or will the process require a privilege log setting forth with specificity what documents are being withheld?

Subpoena Power: Unless state law provides for it, the arbitrator may not have subpoena power. Hence, if the process contemplates third party witness testimony, the ability of the parties to secure a witness’s appearance cannot be guaranteed.

Confidentiality: Is the process a confidential one? How will the parties ensure that participants maintain confidentiality? Does invocation of state mediation/arbitration statutes create settlement-confidential protection for the process? Are there any exceptions to confidentiality (accountants, experts, insurers)? Must they sign a confidentiality agreement? How will the parties respond to subpoenas for arbitration generated information, including transcripts, in related or unrelated matters, or where a governmental agency seeks them as part of an investigation?

Motion Practice: Will dispositive motions be permitted on purely legal questions? What standard will govern the review of dispositive motions?

Expert Discovery: How extensive must they be? When will they be exchanged? Will they be provided to the panel? Are there any limitations on attachments to the reports? Will reply reports be permitted? Will depositions of experts be permitted? In what sequence relative to fact witness discovery or preparation of reports? What will be the order of expert depositions: will the parties rotate taking each other's experts or will expert schedules control the sequence?

Hearing Issues: Where will the hearing be held? How many hearing days will be permitted? Will the hearing days be consecutive or controlled by the schedule of the arbitrator or the panel? Will a chess clock be employed limiting the parties to a fixed number of hours per side? How many hours? If the parties cannot agree, who decides the number of hours? Who will keep track of the time during the hearing? Who goes first in the hearing? How is that determined? Will the hearing be transcribed? In real time?

Pre-hearing submissions: Will there be a pre-hearing memorandum? What should it cover? Will reply memoranda be permitted? Will the parties set page lengths that they will honor?

Evidence/Motions in Limine: What rules of evidence will be adopted? Will there be provision for motions in limine? Does the entire panel rule on such motions or evidence objections or will only the chairperson on the panel have that authority?

Post-hearing submissions: What form will they take? Will replies be permitted? Will the parties set page lengths that they will honor?

Mediation Component: Will a mediation component be built into the process to give the parties the potential to avoid the cost of an arbitration hearing? What tends to happen in the process is that dispositive issues will narrow in number and sharpen in focus as the hearing approaches. Hence, depending upon the parties' willingness to engage in objective evaluations of their position, adding a mediation component, or at least providing the option for it in the schedule, may be beneficial. Whether the arbitrator or one of the panel members can serve a mediation role is more problematic. It can be done with the consent of the parties but the effectiveness of the mediator/arbitrator may be compromised if there is not a clear understanding of how evaluative the mediator can be.

Document Handling: Will documents produced by parties be returned to them at the conclusion of the process?

Appeals: Will an appellate arbitration component be provided for? If so, will it borrow from the rules of an administering authority or will ad hoc appellate rules be developed? In the former case, there are AAA Appellate Arbitration Rules, JAMS Optional Appeal Procedures, and CPR Appellate Rules to draw on for process terms.

Conclusion

Environmental disputes can be effectively handled in an ADR process. Thoughtful litigants, arbitrants, or disputants may find that mediation, facilitated mediation, administered arbitration, ad hoc arbitration, or allocation process orders or agreements will allow them to reduce costs and increase speed to resolution without compromising a fair and just outcome.

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