COLLEGE OF COMMERCIAL ARBITRATORS
ASSOCIATES PROGRAM MEETING NOTES
Meeting Date: April 11, 2023

A. HOUSEKEEPING

1. Next two meetings: June 20 and August 29, 2023
2. New class of associates chosen but not yet informed of their selection. (They have since been contacted.)

B. INITIAL SCHEDULING HEARING AND CASE MANAGEMENT ORDER (Ty Holt)

1. Before the initial hearing, thoroughly review case documents.
    a. Is it an *ad hoc* or administered proceeding?
        i. In *ad hoc* proceedings we are expected to manage everything from start to finish, whereas if administered by AAA, JAMS, or CPR, the organizations will provide administrative support.
        ii. Important to understand what you are expected to do.
    b. Review the claim documents.
    c. Review the arbitration agreement – are there any unique limitations on the proceeding (e.g., timing, scope of discovery)?
2. In advance of the initial hearing, send out a draft scheduling order or topics to be discussed at the hearing.
    a. Ty asks counsel to meet and confer and submit a draft scheduling order at least 3 days before the initial hearing OR come prepared to discuss the topics at the initial hearing.
        i. <u>Other Approaches</u>: Harrie Samaras, Mark Lassiter, and Sandy Jeskie typically do not send out a draft order beforehand but will circulate the list of issues to be covered. Reason is that, for example, the parties may agree to dozens of depositions in advance of the initial conference.
    b. Draft scheduling orders may take different forms, depending on the type of case.
        i. Ty shared different forms of scheduling orders that he has used.
        ii. *E.g.,* a scheduling order in an *ad hoc* case that came to Ty after the parties had engaged in litigation resembles a court's scheduling order.
        iii. Or a scheduling order may resemble AAA panel form, adapted based on the case and based on personal practices or preferences.

iv. Simpler form of order in Consumer cases.

v. But topics are similar:

a) Confirm authority of arbitrator(s)

b) Identify applicable law

c) Mediation

d) Hearing date

e) Other case management topics, including discovery, dispositive motions, prehearing conferences, etc.

3. Conducting the initial hearing:

a. Approach: Lighter on "management" and heavier on listening and collaboration.

i. Need to get to know the parties! Figure out how they are getting along and what is on their minds.

ii. Adopt a collaborative tone. Hold back on being too decisive too soon, until you understand what the parties need.

b. Goal: Establish a complete schedule for the entire process.

i. Set the hearing date, then go from there.

ii. Ty's practice in complex cases:

a) Status conferences scheduled every 30-60 days.

b) If there is nothing to discuss, the conference can be canceled. But Ty's experience is that often there are topics to be discussed.

c) Constant monitoring helps the parties stay on schedule with respect to the hearing date.

c. Discovery:

i. Some arbitrators say they never allow discovery, whereas others say "whatever the parties want."

ii. Ty's approach is to have a collaborative conversation at the initial hearing, with the goal of reaching agreement on what the parties need and when they need it.

a) Caveat: make sure the arbitration agreement permits what the parties want. Can't just order it if it is not permitted.

iii. Additional perspectives and practices:

a) Harrie – it is important to understand the nature of the parties' dispute. That way, you can "shake the tree" to

test what the parties want in terms of discovery and why. It will be a much more substantive dialogue if you understand the nature of the parties' dispute.

b) Mark – one possibility is to allocate the number of hours for depositions rather than limiting the number of depositions. Mark has also spelled out protocols for depositions in some of his cases (*e.g.,* what objections are allowed given rules of evidence do not typically apply in arbitrations).

c) Sandy – most parties do not read the rules. Pointing out the AAA rules regarding discovery can help temper the parties' desire for full-blown, litigation-style discovery.

4. Issuing the scheduling order:

a. Remember it is the arbitrator's role to document the interactions with counsel.

i. Ty will take notes, redline the draft scheduling order, circulate to counsel, and ask them to accept it as the schedule.

b. After the initial conference, start with "Scheduling Order No. 1." Every subsequent scheduling order can then follow numerically.

i. Not all conferences will result in the issuance of a formal order.

ii. Ty's practice is to send out an email or order after every meeting or conference.

C. COMMON CASE MANAGEMENT ISSUES (Gene Commander)

1. Gene's comments regarding the initial hearing:

a. Gene noted that AAA's new streamlined three arbitrator option for large commercial cases provides for the chair to manage the process, including presiding over discovery and dispositive motions, as the sole arbitrator. All three arbitrators would then participate in the evidentiary hearing. It is intended as a cost-saving rule that parties can choose.

b. Gene also takes a proactive, interactive approach at the initial hearing, and schedules interim status conferences.

i. Gene recommends holding these conferences by Zoom.

ii. In complex cases, Gene also invites the parties to attend the scheduling or status conferences. At the outset, he tells parties and counsel that he hopes to earn their trust and confidence because it is the parties' case. This has been very well received.

2. Discovery Issues:

a. ESI protocol – leave this to the parties and their experts to craft.

i. Encourage rolling productions, to get as much produced as fast as you can.

ii. Include protective orders with clawback provision

b. Mandatory disclosures

i. Gene refers them to FRCP 16 and 26. Counsel are familiar, and they can use the FRCP disclosure process as a guide, with the duty to supplement.

c. Third party discovery subpoenas:

i. Custodian of records subpoenas: while arbitrators have limited authority to issue them, Gene issues them freely.

a) He encourages the parties to talk to each other and to figure out ways of getting the third party's cooperation for voluntary production. But if that does not work, ask them to prepare a subpoena.

b) Gene recommends to the attorney issuing the subpoena to issue it with a cover letter making clear that the issuing party will work with the third party to minimize burdens. The letter should also attach the objections the third party might raise.

c) Note: as discussed below, Mark has a form of subpoena he has adapted for use, incorporating language from federal or state subpoenas.

ii. In anticipation that third-party discovery subpoenas will be contested, Gene schedules phase 1 of the evidentiary hearing to have the third-party deponent appear. This can be dealt with in the scheduling order.

d. Privilege

i. Use privilege logs, to force the parties to talk about the issue of privilege.

ii. There may be situations where you need to use a neutral third party to review privileged documents and make recommendations, because the arbitrator can't look at the privileged documents then forget about them.

3. Using a neutral third-party expert:

a. In a case involving a claim for equitable accounting, the parties agreed to retain a neutral third party, who issued a report and made the report available to the panel.

b. Each side's expert then took the third-party's findings and used that as the common starting point for their expert reports.

4. Specificity of statement of claims and computation of damages:
    a. Gene treats these as items to be supplemented.
    b. *E.g.,* updating damages as a form of "rolling disclosure" – they're not final until the hearing. This will permit the parties a fair opportunity to prepare.
        i. In one case where the parties were permitted to specify claims/damages on a rolling basis, a respondent's counterclaim quadrupled and included transactions that had occurred in the past 9 months.
        ii. Both parties are better able to prepare if they know what they're up against.
5. Attorney as witness:
    a. Not uncommon for an attorney for one of the parties to be identified as a witness.
    b. Ask the parties to figure it out. If they can't, ask them to put together options for the arbitrator(s) to decide.
6. Use periodic status (or case management) conferences to provide guidance:
    a. There will be disputes about a number of things, such as supplemental disclosures of witnesses.
    b. Figure out what is going on and give guidance. In addition, if you see something, email the parties – e.g., at our next conference, please be prepared to address x, y and z.
7. Dispositive motions – discussion cut short due to time, but refer the parties to Rule 34. They must ask for permission to file.

D. FINAL PRE-CONFERENCE HEARING (Mark Lassiter)

1. Mark's thoughts on common case management issues:
    a. Protective orders – if you enter a protective order, affirm it in the Award. It is useless otherwise because arbitrators lack enforcement power after the Final Award is issued.
        i. Tip – attach the protective order to the Final Award. Say "I affirm the terms of the parties' protective order" and pass it onto the Court to enforce.
    b. Duty to Supplement – make this clear in the scheduling order. Bold it!
    c. Subpoenas – do not use the AAA form. When the parties go to the Court to enforce, it will be better to have a form that looks like other subpoenas, which instruct the subpoenaed party of their rights and obligations. Mark incorporates the language of the FRCP or state

statute. He gives them a blank form of subpoena they can use, but tells them they can't issue it until it has been agreed to.

2. What is the distinctive value arbitrators bring, when chances are that the case will never get to an evidentiary hearing?
    a. Answer: our process skills.
    b. The 3 P's:
        i. Personal satisfaction: that everyone – parties, counsel, court reporter, third-party witnesses – feel that our interactions with them were positive, that we were receptive, and we treated them with dignity.
        ii. Process satisfaction: that we provided notice and opportunity to be heard in a meaningful way.
        iii. Product satisfaction: in the Award or scheduling orders.
3. Checklist[1] for the Final Hearing:
    a. Mark's PPT includes important considerations for today's electronic hearings (not only by Zoom but also in-person hearings).
        i. Need to address what equipment will be used, shared.
        ii. Particular set-up in the hearing room before arbitration can begin.
    b. Final Pre-Hearing Conference: Mark does not do this kind of a conference in consumer or small cases, but in other cases, hold the conference 4-6 weeks in advance. Address matters such as:
        i. Status of discovery
        ii. Updated exchange of witnesses and evidence
        iii. Special needs (interpreter, ADA)
        iv. Who will be present? Will experts be present for any part?
        v. If by Zoom, will it be recorded? Any remote hearing issues?
        vi. Technology and room set up
        vii. Pre-hearing briefs, opening statements, or both?
        viii. Mark asks for cell phone numbers so you know how to communicate in case of emergency.
            → See Mark's PPT for additional items!
    c. Pre-hearing briefs: ask the parties to be precise on the issues to be decided. What are the elements of the case?

[1] Mark recommends *The Checklist Manifesto* by Atul Gawande.

d. Exhibits: *see* article for identifying and admitting exhibits in large and complex cases.

i. *See also* Sandy Jeskie's Supplement to the Scheduling Order for Witnesses Appearing via Zoom

4. Post-Hearing:

a. Mark is not a fan of post-hearing briefs. Seldom sees things that he did not see before, and don't want parties to slip in things that were not presented. These briefs also slow things down. He seldom encourages party-drafted proposed award or findings of fact/conclusions of law.

i. Remember that arbitrators can make mistakes in law.

b. Closing brief – either a closing argument or closing brief, but not both.

i. Harrie – often defers the closing argument (done by Zoom) until after the closing brief is submitted. She limits the length of the closing brief and specifies the questions to be answered in the most neutral way, so she does not show her hand.

ii. Sandy – usually doesn't have closings at the end of the evidentiary hearing and also prefers to defer them.

c. Close of the hearing is important to establish. Close it as soon as possible.

5. Cautionary note about granting MSJ: be careful that you do not lose jurisdiction in granting!

a. Avoid terms like "Interim Ruling."

b. In the final paragraph, make clear that you are reserving jurisdiction and identify the claims or issues as to which you are reserving jurisdiction.