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## Short tips and tools in arbitration

By Linda A. Michler

This article is not meant to be a comprehensive do's and don'ts in arbitration, rather a short tips and tools on four very important topics: arbitration clause drafting, planning and executing a preliminary hearing, stepped up processes, and virtual hearing witness examination.

### Drafting Arbitration Clauses in the 'Age of COVID-19' – top 3 tips or tools

1. In addition to a clause determining the way arbitrators/ADR organization will be picked, consider addressing the following (and not only in the age of Covid-19): 1. Information Security – must be reasonable. Reasonableness is based on sensitivity of information, burden and costs, value of the case, and efficiency.

2. Considerations: asset management, access controls, encryption, communication security, physical environmental security, operational security, incident management (some depend on whether virtual or in-person or a mixture of virtual and in-person).

3. Parties should agree on the measures, and agree early, preferably before the first case management conference. If cannot agree, tribunal has authority to decide.

### Planning and executing a preliminary arbitration hearing

1. Take a little more time, energy, and creativity putting together a persuasive, well-framed statement of claim. Filing a detailed statement of claim, along with the formal demand (usually a simple form), is a strategic opportunity for the claimant to persuade the tribunal well in advance of the evidentiary hearing because it is one of the few documents provided to the tribunal even before the initial case management conference (or preliminary hearing) in the proceeding. In the absence of formal pleading rules like in court, an advocate has a lot of flexibility and leeway in crafting the statement of claim, and, hence, can take a fair amount of liberties with the text without the fear of having to later defend the equivalent of a motion to strike for immaterial and redundant matter. This document can be a helpful piece of advocacy for the claimant.

2. In drafting the demand/statement of claim, it is very common to insert, almost as boilerplate, a request that the tribunal award reasonable attorneys' fees in the prayer for



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relief. Doing so can have unintended consequences. Generally, a tribunal is not permitted to award attorneys' fees unless the parties have contractually authorized such an award in the arbitration clause or if the governing substantive law provides for such an award. However, if the parties independently request an award of attorneys' fees in their arbitration pleadings, under at least one provider's procedural rules, those requests can operate to provide authority to the tribunal to render such an award.

3. Advocates should be mindful that, unlike court pleadings, the demand/ statement of claim are almost always reflexively marked as exhibits at or before the evidentiary hearing by the parties and/or the tribunal and are often deemed admitted as part of the evidentiary record. Thus, any statements made in these pleadings that end up being inconsistent with the actual evidence adduced at the hearing may create certain evidentiary difficulties at the end of the proceeding. That said, it is still ultimately up to the tribunal to determine the evidentiary weight to be accorded the pleadings.

### Stepped up Processes

Step 1 – Before determining any processes in a two-step mediation and arbitration (med-arb) start with contemplating whether it is a good idea for you as the ADR professional to assume the role of mediator and then as arbitrator. Think carefully about the inherent drawbacks. For more information, please see the articles I wrote for the *Lawyers Journal* in issues dated January 15 and February 26, 2021.

### Witness examination during virtual hearings

1. Exchange all documents before first day of hearing. Send by email (and if parties or panel prefer, send by mail too.) The parties will be able to introduce an unexpected document on the day of the hearing. Zoom and any other virtual process (Go to meeting, Teams, etc.) has a way to do that, but for continuity and ease of the process requesting the documents counsel plans to use before is needed.

2. Include requirement of list of attendees to be disclosed a few days prior to hearing. That way if someone is in the room that the arbitrator(s) cannot see, it is obviously a violation. Parties need to be told that no one is to be present unless announced to all and that texting for advice etc. is prohibited.

Zoom can scan a room to some extent and that should be done. There is equipment available to scan rooms too and depending on case, should be considered. Same rules for prohibiting recording by anyone other than the ADR administrator organization/ tribunal.

3. Review the rules of procedure for the arbitration. Sometimes it is better not to use strict court rules or evidence, and parties, counsel and arbitrators can decide by conference of the parties and counsel. Keep in mind a party may not agree or the rules of the tribunal under which the arbitration is being conducted may not permit.

4. Consider simultaneous testimony of witnesses on the same subject matter (typically expert witnesses). There are advantages including less movement in and out of rooms and perhaps smoother and less time being used.

Sample clause: Counsel shall meet and confer in an effort to have experts on the same subjects testify at the same time at the hearing. If schedules permit, expert testimony shall be scheduled so that Claimant's expert will testify by direct examination on one subject, followed by Respondent's expert by direct examination on the same subject. This may be followed by questions from the Panel to clarify or narrow the issues. Respondent's counsel will then have an opportunity to cross examine Claimant's expert and Claimant's counsel will then have an opportunity to cross examine Respondent's expert. The process will then continue for the next subject of expert testimony. If the expert's schedules do not allow for this procedure, counsel should inform the Panel no later than \_\_\_\_.

5. Consider using expert reports as a substitute for extensive direct examination.

Sample clause: Disclosure of expert testimony: When selecting experts and preparing expert disclosures, counsel should be mindful that at the pre-hearing conference, the Panel will ask counsel to consider: 1) having experts on the same subject matter testify simultaneously, and 2) using expert reports as a substitute for extensive direct examination of experts.

6. Require the parties to provide stipulated joint exhibits to the extent possible.

7. Liberally use summary exhibits to summarize detailed facts. In addition to a stipulation of facts, require the parties to provide a stipulated chronology of events. ■

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