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The Muscular Arbitrator: Preserving Arbitration's Promise Through Active Case Management

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Arbitration has long been promoted as a faster, more economical, and more flexible alternative to litigation. Parties select arbitration with the expectation that their disputes will be resolved efficiently by an experienced decision-maker, free from many of the procedural burdens associated with court proceedings.

Yet too often, arbitration begins to resemble the very process it was intended to replace; broad discovery, serial motion practice, protracted hearings, and escalating costs have become increasingly common, diminishing many of arbitration's traditional advantages.

When that occurs, the problem is rarely the arbitration rules themselves. More often, it stems from how the proceeding is managed.

Although counsel frequently contribute by importing litigation practices into arbitration, the arbitrator ultimately bears responsibility for maintaining a process that remains faithful to the parties' agreement. The difference between an arbitration that fulfills its promise and one that becomes litigation in another forum often lies in the effectiveness of the arbitrator's case management.

This philosophy has become known as the "muscular arbitrator." The term should not be misunderstood. It does not describe an arbitrator who is aggressive, inflexible, or impatient. Nor does it suggest sacrificing fairness or due process in the name of efficiency.

Rather, it refers to an arbitrator who actively manages the proceeding with discipline, preparation, and sound judgment - one who recognizes that arbitration is a distinct form of dispute resolution requiring thoughtful procedural control.

Active case management is not an exercise of personal preference. It is part of the responsibility the parties entrust to the arbitrator when they agree to arbitrate. The arbitrator's role extends beyond deciding the merits of the dispute. Equally important is managing the process so that the arbitration remains fair, efficient, and proportionate to the issues presented.



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Setting the Course at the Preliminary Conference

The preliminary conference provides the arbitrator with the first and perhaps most important opportunity to establish the tone of the proceeding. Arbitrations seldom become inefficient overnight. Rather, inefficiency develops incrementally when expectations are unclear, schedules remain fluid, and procedural issues are left unresolved.

Preparation should begin even before the conference itself. Through the administering institution or case manager, the arbitrator should encourage counsel to confer beforehand regarding the governing law, the status of the pleadings, anticipated discovery,

expert testimony, confidentiality issues, and whether the dispute is likely to be resolved on documentary submissions or require an evidentiary hearing.

These discussions often narrow disagreements before the preliminary conference even begins and allow the parties to focus on the issues that truly require the arbitrator's attention.

The conference itself should accomplish far more than setting dates. It should define the claims and defenses, identify the principal factual and legal disputes, establish realistic but firm deadlines, and clarify the procedures that will govern the case.

Just as importantly, it allows the arbitrator to communicate expectations regarding cooperation, proportionality, and the efficient resolution of procedural disputes. Counsel who understands from the outset that deadlines will be enforced and unnecessary motion practice discouraged are far more likely to tailor their conduct accordingly.

The resulting procedural order should serve as more than a scheduling document. It becomes the roadmap for the arbitration, addressing discovery, briefing, expert disclosures, witness statements, hearing logistics, and post-hearing submissions. A comprehensive procedural order minimizes uncertainty, reduces later disputes, and provides the structure necessary to keep the arbitration moving toward resolution.

Discovery: Preserving Proportionality

Once the framework has been established, attention turns to the phase that most frequently determines whether arbitration remains efficient or begins to resemble traditional litigation: discovery.

Discovery serves an important purpose. Parties must have a meaningful opportunity to obtain the information necessary to prove or defend their claims. The challenge is ensuring that discovery remains proportional to the dispute rather than becoming an end in itself.

The guiding principle is straightforward: every discovery request should advance resolution of the case. Before authorizing expansive discovery, the arbitrator should work with counsel to identify the factual disputes that genuinely matter, the legal issues likely to determine the outcome, and the evidence necessary to resolve those questions.

Too often, parties seek information based upon what might someday become relevant rather than what is actually material to the issues before the tribunal.

Document requests should therefore be focused rather than expansive. Requests should be narrowly tailored by subject matter and time period and supported by a demonstration of relevance and materiality. Broad demands seeking "all documents relating to" a particular issue frequently generate substantial expense while producing comparatively little evidence of real significance. Requiring counsel to refine overly broad requests encourages thoughtful advocacy while reducing unnecessary cost.

Depositions warrant similar scrutiny. Unlike litigation, depositions are not a routine feature of arbitration. Many domestic arbitration rules discourage them, and numerous international arbitration regimes permit them only sparingly. That distinction reflects arbitration's underlying philosophy: efficiency should not be sacrificed simply because procedural tools are available.

This is not to suggest that depositions are never appropriate. Complex commercial disputes, cases involving numerous witnesses, or matters in which credibility is central may justify limited deposition practice. Even then, proportionality should govern.

Limiting the number of depositions, restricting their duration, and focusing them on essential witnesses often provides the information reasonably necessary while avoiding the cascading expense associated with unrestricted discovery.

An incremental approach frequently proves particularly effective. Rather than authorizing extensive discovery at the outset, the arbitrator may permit limited discovery initially while reserving the authority to expand it upon a showing of genuine need. Experience demonstrates that additional discovery often proves unnecessary once the parties exchange the most significant information.

Equally important is the management of discovery disputes themselves. Formal motion practice over discovery can turn into litigation within the arbitration, consuming substantial attorney time while delaying the merits of the case.

Wherever practical, discovery disagreements should be addressed through concise letter submissions followed by prompt telephonic or virtual conferences. If additional information is necessary, the arbitrator can request focused supplemental submissions, but extended briefing should remain the exception rather than the rule.

Managing Motion Practice

The same philosophy applies to dispositive motions. Lawyers accustomed to judicial practice often view arbitration as another opportunity to pursue motions to dismiss or summary judgment. While

such motions occasionally serve a legitimate purpose, they can also introduce substantial delay without materially advancing resolution of the dispute.

Accordingly, dispositive motions should remain the exception rather than the norm. Before permitting full briefing, the arbitrator should require the moving party to demonstrate that the proposed motion is reasonably likely either to dispose of the entire case or substantially narrow the issues to be presented at the hearing.

Many institutional arbitration rules now incorporate some variation of this preliminary application process, reflecting the recognition that unrestricted motion practice frequently undermines arbitration's principal advantages.

Requiring a short pre-motion submission serves several purposes. It allows the arbitrator to evaluate whether the proposed motion justifies the additional time and expense, provides the opposing party with an opportunity to respond briefly, and often encourages counsel themselves to assess realistically whether the motion will meaningfully advance the proceeding. Frequently, the answer is no.

Throughout discovery and motion practice, consistency is critical. Parties are far more likely to cooperate voluntarily when they recognize that deadlines will be enforced, procedural disputes resolved promptly, and unnecessary applications discouraged. Prompt rulings reinforce the arbitrator's active management of the proceeding while maintaining momentum toward a fair and efficient hearing.

Conducting an Efficient Hearing

By the time the hearing begins, the issues should be defined, discovery substantially complete, and procedural disputes largely resolved. The hearing itself should therefore focus on deciding the case rather than revisiting matters that could have been addressed earlier.

Preparation is the foundation of an efficient hearing. Before the first witness is called, the arbitrator should require the parties to exchange exhibit lists, pre-mark exhibits whenever possible, identify stipulated facts, disclose anticipated evidentiary objections, and provide witness schedules.

A brief pre-hearing conference can resolve logistical issues, address objections that need not wait until the hearing, and confirm the anticipated order of proof. Time invested in preparation invariably reduces interruptions once testimony begins.

One of the most effective tools for streamlining the hearing is the use of written witness statements. Rather than spending hours eliciting direct testimony that merely repeats information already known to the parties, witnesses can submit sworn declarations in advance, reserving live testimony for cross-examination, redirect, and questions from the arbitrator.

Long used in international arbitration and increasingly employed in complex domestic matters, this approach shortens hearings while often producing clearer and more organized evidence.

Expert testimony benefits from similar discipline. Expert reports should ordinarily stand as direct testimony, allowing the hearing to focus on the opinions that actually divide the experts. In appropriate cases, requiring the experts to prepare a joint statement identifying areas of agreement and disagreement significantly narrows the issues before testimony begins.

Some disputes also lend themselves to concurrent expert testimony or "hot-tubbing" where experts testify together and respond directly to one another's opinions under the arbitrator's supervision. Although not appropriate in every case, this format often provides a more meaningful exploration of technical issues than sequential examinations.

Equally important is avoiding cumulative evidence. Parties understandably seek to reinforce their positions through multiple witnesses, but repetition rarely improves the quality of proof.

Once a point has been established, additional testimony saying essentially the same thing seldom advances the fact-finding process. An engaged arbitrator should encourage counsel to present the witnesses who truly matter rather than those who merely repeat what has already been said.

Time management also deserves careful attention. Increasingly, arbitrators are employing a "chess clock" approach, allocating each party a defined amount of hearing time to use as it sees fit.

Within that allocation, counsel determines how much time to devote to opening statements, witness examinations, cross-examinations, and closing arguments. This approach rewards preparation, encourages concise presentations, and ensures that each party enjoys an equal opportunity to present its case.

Opening statements should frame the dispute, not preview every exhibit or anticipated question. Likewise, closing arguments should synthesize the evidence and explain how it satisfies the applicable legal standards rather than simply repeat the testimony the arbitrator has already heard.

Throughout the hearing, the arbitrator should not hesitate to intervene when questioning becomes

repetitive, strays from relevant issues, or revisits matters that have already been adequately explored. Such intervention is not an intrusion upon advocacy; it is an essential component of effective case management.

Maintaining Efficiency After the Hearing

The conclusion of the hearing does not necessarily mark the end of effective case management. Post-hearing proceedings can either preserve the efficiencies achieved throughout the arbitration or erode them through unnecessary briefing and delay.

Before directing post-hearing submissions, the arbitrator should first determine whether they are needed at all. In many cases, thorough closing arguments provide a sufficient basis for decision. Where the legal or factual issues are more complex, however, targeted briefing may be beneficial.

When post-hearing briefs are appropriate, they should be carefully structured. One effective technique is to require the parties to jointly propose the issues to be decided. After reviewing and refining that list as necessary, the arbitrator can direct each party to organize its submission around those common issues. This approach prevents the parties from talking past one another, promotes focused analysis, and facilitates preparation of a well-organized award.

Simultaneous briefing, followed where appropriate by simultaneous reply briefs, is generally preferable to sequential submissions. It minimizes gamesmanship, encourages direct engagement with the issues, and avoids prolonged briefing schedules that unnecessarily delay the award.

Prompt issuance of the award is equally important. One of arbitration's principal advantages is the expectation of a timely decision. Once the hearing and any authorized briefing have concluded, the arbitrator should endeavor to issue the award within the timeframe established during the preliminary conference or required by the applicable rules. Timely decisions reinforce confidence in the arbitral process and demonstrate respect for the parties' investment of time and resources.

Efficiency Must Never Compromise Fairness

The defining challenge of active case management is maintaining the proper balance between efficiency and due process. Every procedural decision must preserve each party's fundamental right to present its claims and defenses fully and fairly.

An arbitration award may become vulnerable to challenge if a party can credibly argue that it was denied a meaningful opportunity to present its case. Accordingly, efficiency can never become an end in itself.

This is where judgment distinguishes an effective arbitrator from a merely efficient one. Rules should be applied consistently, but not mechanically. Deadlines should be enforced, yet reasonable accommodations may be appropriate when unforeseen circumstances arise. Discovery should remain proportional, but not so limited that material evidence cannot be obtained.

Hearings should be carefully managed, but never at the expense of developing genuinely disputed issues.

Parties should leave the arbitration believing that they were heard, treated with respect, and afforded a fair opportunity to present their positions—even if they disagree with the outcome. Procedural fairness enhances confidence in both the award and the arbitration process itself.

Conclusion

Arbitration was never intended to replicate litigation in a private setting. Its value lies in offering a process that is fair, efficient, proportionate, and tailored to the needs of the dispute. Those advantages, however, are not self-executing. They depend upon an arbitrator who is willing to exercise the authority entrusted to them to manage the proceeding thoughtfully and decisively.

The muscular arbitrator is neither aggressive nor inflexible. Rather, the term describes an arbitrator who understands that effective case management is inseparable from effective decision-making.

By establishing clear expectations at the outset, maintaining proportionality throughout discovery, limiting unnecessary motion practice, conducting focused hearings, and issuing timely awards, the arbitrator preserves the very qualities that led the parties to choose arbitration in the first place.

Ultimately, the arbitrator's responsibility extends beyond deciding the dispute. It includes safeguarding the integrity of the process itself. When arbitrators actively manage proceedings with fairness, discipline, and sound judgment, arbitration remains what it was always intended to be: a meaningful alternative to litigation, not simply litigation under another name.

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