

**ARBITRATOR-DIRECTED ARBITRATION:
A DIFFERENT APPROACH TO ADR
By Mark C. Friedlander*, Schiff Hardin LLP**

The genesis of this article is my own experiences as an arbitrator and advocate in construction arbitrations, combined with the increasingly negative feedback that I have received from my clients and their insurance companies regarding binding arbitration as an alternative dispute resolution method. Although I have always been a strong proponent of arbitration rather than court litigation, at least for resolving disputes in the construction industry (which is where I concentrate my practice), my clients and other contacts in the construction and insurance industries have increasingly complained that arbitration does not result in the savings in cost and time that they expected. From my perspective as an arbitrator and advocate in arbitrations, I understand and sympathize with their point of view.

As an arbitrator, I have presided over arbitrations that have taken many more days than necessary because counsel for the parties were extremely inefficient in presenting their cases. I observed that they often:

- Spent exorbitant time on relatively minor issues;
- Failed to perceive what the truly important issues were;
- Didn't properly understand the legal bases of their claims and defenses;
- Wasted time on unnecessary foundation and other evidentiary issues;
- Elicited far more cumulative and explanatory information and detail than I needed; and
- Played what I refer to as "jury games," such as attacking a witness's credibility on collateral issues and trying to embarrass witnesses with unimportant contradictions.

From conversations with many of my highly experienced colleagues who also serve as arbitrators, I have learned that my observations often mirrored their own.

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Yet as an advocate in arbitrations, I understand and sympathize with the lawyers' tendency to take excessive time to make every possible point and argument in support of their client's case. Even when I know the arbitrator to be highly competent, I have no idea whether he perceives and evaluates the issues as I do, and I do not want to risk omitting anything that he might find important. Ideally, prior to and during the hearing, I would like to engage in a dialogue with the arbitrator, even in the presence of opposing counsel, to find out what the arbitrator believes to be important; how he is perceiving the facts, issues and arguments; and what information he desires to hear in order to make his decision.

Construction Arbitration in Crisis

In the construction industry, arbitration is facing a crisis, or at least a crucial juncture. The newest editions of the American Institute of Architects' standard form construction documents for the first time will cease using binding arbitration as the default dispute resolution mechanism. Many liability insurance companies, while still supporting non-binding forms of alternative dispute resolution, are now recommending that their insureds refuse to agree to binding arbitration.

Arbitration was once the darling of the construction industry, intentionally sacrificing the traditional procedures and safeguards of courtroom litigation for the sake of efficiency, speed and cost-effectiveness. But construction industry members increasingly perceive that the arbitration process has been co-opted by the legal profession, with lawyers firmly entrenched in all levels of the rule-making, administration and operation of arbitration, changing the arbitration process and rules so that it more closely resembles the trial and litigation practice with which they are familiar and comfortable. There is considerable truth to these observations, as even a cursory examination of the evolution of arbitration rules and arbitrator rosters indicates.

Users of construction arbitration often perceive that its drawbacks outweigh its advantages compared to litigation in court. They point out that modern arbitration allows preliminary motions, most forms of discovery, and hearings that increasingly resemble trials. They see long delays for scheduling, discovery, or sometimes simply because a party requests one. They resent that unlike court, the parties often must pay significant filing fees and arbitrator salaries, without the checks and balances of a meaningful appeals process.

Arbitrator-Directed Arbitration

The following proposal is an effort to save construction arbitration by returning to its roots: a procedure emphasizing speed and economy without sacrificing due process or quality decision-making. The following proposed rules for "arbitrator-directed arbitration" are probably best suited for medium and smaller sized arbitrations rather than the very large disputes whose economy of scale can support greater inefficiency. I propose the following set of Supplemental Rules to vest control of the arbitration process in the arbitrator and to improve the communications between the arbitrator and the parties to facilitate the presentation and settlement of disputes.

The following rules introduce two concepts which are very different from construction arbitration as is practiced today. The first concept is that the arbitrator, rather than the parties,

will have the primary responsibility for questioning witnesses, with any questions from the parties' counsel being asked afterwards. The second new concept is that at an early stage and throughout the arbitration process, the arbitrator will candidly share his preliminary views of and thoughts about the facts and the law with the parties and their counsel. I believe that the arbitrator commencing the questioning of the witnesses would save considerable hearing time, as much as half to two-thirds of the total time devoted to witness testimony in my experience. I further believe that the arbitrator frankly sharing his views as the proceeding commences would create much greater predictability of result; facilitate fair, early settlements; and focus the presentation of evidence and arguments on the issues that truly matter.

Arbitrator-directed arbitration is not recommended for every construction dispute or for every arbitrator. I recommend it for smaller and other arbitrations in which speed and cost-effectiveness are paramount concerns. It requires the arbitrator to have extensive knowledge and experience not only in construction law and issues, but also in the arbitration process. It is loosely modeled on trials conducted under civil law, rather than common law, in Western Europe in which the judge is the primary inquisitor, supplemented by the facts and law called to his attention by counsel for the parties.

I propose the following rules to implement arbitrator-directed arbitration:

Rule 1 - Supplementing Other Rules. These rules for arbitrator-directed arbitrations are intended to supplement any other applicable rules governing the arbitration and shall supersede those rules only to the extent that the intent or language of these rules is inconsistent with any other applicable rules.

Rule 2 - The Initial Preliminary Conference. As soon as practical, the arbitrator shall meet with counsel for both parties. Clients may but need not be present. At the discretion of the arbitrator, it is intended that the following communications occur at the initial preliminary conference.

- a. The arbitrator shall explain to the parties how arbitrator-directed arbitration works and, after obtaining the parties' input, what procedures will be followed in the hearing and pre-hearing proceedings.
- b. The arbitrator shall elicit from the parties brief descriptions of the factual background and the disputed issues. At the arbitrator's discretion, the inquiries and descriptions will be in the format of a dialogue rather than a formal statement by the party or its counsel.
- c. The arbitrator and the parties shall identify and discuss the various sources of information and evidence relevant to the disputed issues, including people, documents and other sources. At the discretion of the arbitrator, arrangements may be made to procure the availability of some or all of the sources of information at or before the arbitration hearing, including but not limited to issuance of subpoenas, scheduling document exchanges and making suggestions to counsel to procure other information.

Rule 3 - Subsequent Preliminary Conference(s). At the discretion of the arbitrator, subsequent preliminary conferences shall be scheduled and held for any or all of the following purposes: to provide additional or more detailed information to the arbitrator; to implement, facilitate or revise any previous decisions or instructions regarding sources of relevant information; and for the arbitrator to provide the parties with his preliminary thoughts about the facts and law pertaining to the disputed issues. The arbitrator shall encourage the parties to offer feedback and comment on the initial opinions that the arbitrator has expressed, and it is within the discretion of the arbitrator to engage in or limit dialogue with the parties and/or to encourage or require formal or other submittals from the parties on any of the disputed issues or preliminary arbitrator opinions.

Rule 4 - The Final Preliminary Conference. At the final preliminary conference before the evidentiary hearing, the arbitrator and parties shall discuss the evidence and procedures for the hearing. With the input of the parties, the arbitrator shall identify any evidence or other information that he desires to have presented at the hearing and shall make arrangements through the parties or their counsel for the evidence or information to be made available at the hearing. Arrangements shall also be made for any additional evidence or other information that either of the parties desires to present or have present at the hearing.

Rule 5 - The Evidentiary Hearing. The arbitrator shall control the presentation of evidence at the evidentiary hearing, including determining the sequence, dates and time for the appearance of witnesses.

- a. The arbitrator shall initiate the questioning of each witness and may, in his discretion, interrupt the questioning of a witness for the purpose of obtaining supplemental information from other people or sources that are present or otherwise available. During or after the arbitrator's questioning of a witness, either party may suggest questions or provide information to the arbitrator for the arbitrator's use in questioning the witness. When the arbitrator has completed his examination of the witness, both parties may then, in a sequence determined by the arbitrator, ask any questions of the witness designed to elicit relevant, material and supplementary information, not repetitive or cumulative testimony.
- b. The parties are encouraged, and the arbitrator may direct them, to present any direct or affirmative testimony by a witness within the party's control, including but not limited to the witness's relevant expertise and credentials, by affidavit or in similar written format rather than verbally at the hearing. The arbitrator may require that such affidavits or other written summaries of testimony be provided in advance of the hearing or the witness's appearance.
- c. The arbitrator shall have broad discretion to fashion formats and sequence of testimony to maximize the clarity and brevity of the testimony. Such formats and sequences may include, but are not limited to, requiring multiple witnesses to testify simultaneously or bifurcating a witness's testimony into two or more separate appearance to address separate issues.

- d. At the end of the hearing, and/or at other times in the arbitrator's discretion, the parties shall have opportunities to provide verbal and/or written input to the arbitrator on any of the legal or factual issues pertaining to the dispute. The format and timing of such input shall be determined by the arbitrator in his discretion.
- e. In controlling the format and procedures of the hearing, the arbitrator shall not act in a manner so as to deny any party due process of law or violate any applicable arbitration statute. The arbitrator shall not prevent any party from offering any relevant, material non-cumulative evidence or argument in support of or in opposition to any of the legal or factual issues in dispute.

Advantages of Arbitrator-Directed Arbitration

It is anticipated that these rules for arbitrator-directed arbitrations would result in two significant advantages that decrease the cost and increase the speed of the arbitration process. The first advantage is that the evidentiary hearings and legal argument would be significantly shorter and more efficient, focusing on the information that the arbitrator needs to know in order to resolve the dispute rather than on tangential information and litigation "games" that often consume much of the hearings.

The second advantage is that the parties would be far more able to predict the likely outcome of the arbitration and therefore to settle the dispute at an early stage. This additional predictability results from the arbitrator freely sharing his preliminary opinions with the parties during the preliminary conferences, and possibly during the evidentiary hearing -- unlike typical current practice in which the arbitrator usually avoids offering any feedback that might enable the parties to predict how he is likely to rule.

Even in a worst-case scenario (from the standpoint of a party), when the arbitrator for whatever reason does not appear to understand or agree with the party's interpretation of the relevant facts or law, arbitrator-directed arbitration offers an improvement over traditional arbitration rules and practices. In a traditional arbitration, the misunderstood party would likely remain unaware of the arbitrator's opinions and conclusions until after the arbitration is concluded and an award is issued, when it is too late to react to the arbitrator's "misunderstandings" and to persuade him of the validity of the party's position. Arbitrator-directed arbitration, with its early disclosure of and dialogue regarding the arbitrator's preliminary opinions, allows the party to become aware of the arbitrator's "misunderstandings" before conclusion of the evidentiary hearing, in time for the party to produce evidence or to direct the arbitrator's attention to information that may persuade him to change his mind.

Conclusion

Arbitrator-directed arbitration deviates significantly from American litigation practices, but its procedures are not without precedent. The current rules allow arbitrators to question witnesses at any time. It is not unusual in other accepted forms of hearings on technical issues, such as coroner inquests, for the fact finder take the lead role. The judge-led or arbitrator-led approach is the norm under civil law systems in Western Europe.

Similarly, I believe that it is time to reexamine the traditional practice of judges and arbitrators keeping their opinions to themselves until the end of the hearing. For users of alternative dispute resolution who primarily desire speed and low cost, this traditional approach to dispute resolution fails to meet the needs of the marketplace by sacrificing cost-effectiveness in favor of promoting the somewhat naïve belief that the decision-making process does not begin until all the evidence has been received. The desire of disputing parties to obtain realistic early feedback is apparent from the increasing usage of many nonbinding forms of alternative dispute resolution which provide a form of early neutral evaluation of the parties' positions.

Particularly with the changes in the AIA document, a significant dissatisfied sector of the dispute resolution market is likely to start choosing litigation over arbitration. I suggest that arbitrator-directed arbitration be offered as an alternative to those dissatisfied with arbitration due to the delays and lack of efficiency in the process. Arbitrator-directed arbitration represents a return to the construction industry values that led to arbitration being the default dispute resolution mechanism in the first place.

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