BY CHARLES E. RUMBAUGH

# Tips on Preliminary Hearings—Part III

**This is the last article in a three-part series appearing in *CM* magazine from January to March 2002 on preliminary hearings, usually associated with the early stages of a "unique" ADR method of commercial arbitration.**

Previous ADR tip articles in this series provided highlights of the preliminary hearing part of the arbitration process, including various aspects of the incumbent "exchange of information" provisions embodied in the current AAA "Commercial Dispute Resolution Procedures." With this article, I would like to conclude the preliminary hearing series, sharing some excellent reader feedback and giving an overview of the major issues in a preliminary hearing in the form of a "checklist/outline" that could be used as an agenda and a record of actions to take. As one reader stated, "The preliminary hearing in any arbitration, large or small, is probably the most important activity available to the arbitrator to enable him/her to properly plan and control the entire arbitral proceedings." Arbitrators have a responsibility to the parties and their representatives to properly manage this "activity."

While again deferring to the arbitration agreement/clause and applicable arbitral rules for definitive guidance on specific issues and questions—and using the previous tips as background—here is a proposed "checklist/outline" for a preliminary hearing agenda.

- Establish or reaffirm the applicable arbitral rules from the beginning of the process.

- File any necessary (supplemental) disclosures with the arbitral association by the parties—in order to disclose any prior relationship(s) with the arbitrator(s)—and file potential witness disclosures (for conflict of interest checks).

- File any amended/expanded itemization of claims/counterclaims (with dollar amounts), motions to join/exclude entities/individuals as parties to the arbitration, and/or motions on arbitrability. Know the damages (legal/contractual) and forms of equitable relief sought—this is helpful to the parties and appropriate for the process.

- Schedule the location, date, and time of the hearing—consider conducting the arbitration at a cost-effective site.

- Determine the nature, scope, and timing of any "exchange of information" under the applicable arbitral rules. What documents or categories of documents will be exchanged/inspected? Will there be a specific/generic "production of documents or things" served on the parties? Will there be depositions and interrogatories? Set times for compliance and filing of any objection(s) with a final "discovery" cutoff date.

Under this "exchange of information" obligation, the use/issuance of subpoenas to *third persons* for the purposes of "discovery" also could be discussed. This issue sometimes gets overlooked, since subpoenas to third persons in a litigated dispute are "routinely" issued, while in an arbitration it is more infrequent—again, depending on applicable rules. *Subpoenas normally should not be summarily issued for discovery purposes*.

- Consider the bifurcation of the arbitration hearing process on liability/entitlement issues, counterclaim(s), and/or damages. Retention of jurisdiction—including interim award(s)—also may be considered, depending upon damage/relief being sought.

- Schedule the exchange of exhibits (such as diagrams, photographs, declarations, affidavits, and witness statements) *intended for use as "evidence" at the actual arbitration hearing*. These pieces of evidence should include expected witnesses with a brief description of their intended testimonies, curriculum vitae for experts, and an intended order of witnesses to be called. The use, issuance, and timing of arbitration hearing subpoenas for third persons *to compel their appearance at the hearing* could be discussed. Joint exhibits and stipulations should be encouraged.

Sometimes, the arbitrator handles the pre-arbitration delivery of exhibits through the arbitral association. Any issues associated with evidence admissibility including "objections" thereto should be surfaced in the process with the basis for rulings on "objections" possibly being decided at another preliminary hearing.

Any rebuttal/impeachment documents or witnesses should be identified and exchanged as soon as they are potentially intended to be utilized, to minimize surprises and delay.

It is customary to impose a continuing duty to update with reasons for delay—*a "good cause" finding may be required to justify any late items being admitted into evidence.*

- Reserve and schedule additional preliminary hearing date(s) to hear motions relative to any item that may be of concern, (e.g., to resolve exchange, production, and discovery issues or to object to evidence intended to be introduced at the arbitration hearing). Parties should raise any concerns with the arbitrator as early as possible to minimize cost, delay, and surprises.

- Submit pre-hearing and/or post-hearing briefs with a decided length limitation.

- Decide if a "record" of the proceedings via a required court reporter is required or desired by the parties.

- Confirm that all arbitrator communications will take place through the arbitral association with no *ex parte* communication. Copies of communications should be delivered simultaneously to all parties.

- Discuss the form of the award (e.g., reasons for the award required from the arbitrator or merely "who is awarded what" to be specified in the award).

As a final step to close this process, the arbitrator should issue a letter or order that includes the agreements and decisions determined during the preliminary hearing. Following this checklist/outline will help to ensure a smooth, successful arbitration proceeding. Each party/representative should be prepared to advance their proposed strategy/approach across a myriad of issues that often arise at preliminary hearings. Likewise, arbitrator(s) should be prepared to raise, discuss, and rule on these issues—that is what the parties and representatives expect and deserve. ***CM***

*This article is adapted from an "ADR Tip," written by Charles Rumbaugh and Michael Powell, published in the July-September 2001 issue of the* Dispute Resolution Times *by the American Arbitration Association. AAA rules are at* ***www.adr.org****.*

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