BY CHARLES E. RUMBAUGH

Tips on Preliminary Hearings—Part I

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

Recently, I received some questions on various aspects of the preliminary hearing process, the essential "prelude" to the convening of an arbitration in the commercial world. Section R-22 of the current American Arbitration Association (AAA) rules referenced in the "Commercial Dispute Resolution Procedures" provides a means to realize the crucial role of the preliminary hearing, review questions, and discuss potential "roadblocks" to a successful hearing. Utilizing those AAA rules as a framework, this first in a series also looks at significant components of the preliminary hearing; in the future, this corner will address additional elements of that hearing—all of which are important.

The preliminary hearing is usually conducted for background purposes, pursuant to Section R-22. This hearing is normally suggested by most arbitral organizations, like AAA, in the letter to the parties and the arbitrator as part of the confirmation, whereby the arbitrator is (or multiple arbitrators are) duly appointed as arbitrator(s) with the concurrent transmittal of the Notice of Confirmation of Appointment form. The basis for the hearing is found in AAA Rule 22 (incorporated into typical AAA arbitration agreements), the substantive part of which provides that:

(1) At the request of any party or at the discretion of the arbitrator or the AAA, the arbitrator may schedule as soon as possible a preliminary hearing with the parties and/or their representatives. The preliminary hearing may be conducted by telephone at the arbitrator's discretion.…
(2) During the preliminary hearing, the parties and the arbitrator should discuss the future conduct of the case, including clarification of the issues and claims, a schedule for the hearings, and any other preliminary matters.

Part (1) stated above emphasizes the immediacy of the preliminary hearing, which begins with the mentioned AAA case manager's (CM) confirmation letter. This letter should do the following: (a) note that a hearing will be arranged with the parties/representatives and the arbitrator, (b) provide a summary of what is expected to occur at the hearing, and (c) include a request for responses on available dates/times in order to schedule it.

I usually recommend that all arbitrations, except those utilizing the expedited procedures, have a preliminary hearing. These hearings help establish the early "ground rules" and operate as an invaluable tool in the orderly management of the proceedings (which will be discussed later). When the CM finds a "match" on the dates/times for the hearing, the hearing will be noticed and a copy of the AAA "Report of Preliminary Hearing and Scheduling Order" form (the Order) will be sent to the parties/representatives.

Most preliminary hearings are conducted by conference call, but they also can be held with the parties/representatives physically situated in a pre-selected conference room. In some cases, a hybrid process has been used, where some individuals are present in person and others are available via conference call. In any event, all parties must be present or represented at the hearing. If the parties would like a format other than the normal conference telephone call, they should advise the CM so that it can be arranged—the key is to do what is convenient for both parties.

The parties/representatives should become well-versed with the Order and the applicable provisions, including R-22, before the hearing. These rules contain critical information for all parties to see how the dispute will proceed through the arbitration process. The Order also serves as the best AAA-suggested "agenda" on the day of the preliminary hearing; it is an excellent, exhaustive checklist of the key items to address between the two parties. The "minutes" from the hearing usually results in an arbitrator's issuance of a signed or "completed" order or letter that covers the items discussed and agreed upon at the hearing.

At the preliminary hearing, the calendaring of the actual arbitration hearing and its location is of utmost importance, and the arbitrator will expect available dates to be discussed and agreed upon. In some cases, it is advisable to agree upon alternative arbitration dates as back-up dates, in the event the parties/representatives need to "verify" the initial dates with other individuals/clients—this is

particularly important in multi-party arbitrations and/or where numerous witnesses are expected. In these latter situations, a very short period is provided to conduct the verification. I have found that the "back-up" alternatives will usually eliminate the need for an additional preliminary hearing for scheduling purposes and to move the process along in a timely way. If the "alternative" dates become the operative dates for the arbitration, other scheduling items are usually appropriately adjusted and a revised arbitrator order or letter is issued.

Usually, the discussion then proceeds to any "exchange of information" that the parties may desire or require. Although not labeled as such in Rule 23, some view this rule as perhaps being "somewhat equivalent to discovery." However, the "conditions" in the Section that may activate an exchange must be thoroughly understood by the parties/representatives *before* the hearing. Depending upon the strategy of the parties, the "potential" exchange of information could range from the minimal to the extensive. While this corner plans to cover the exchange process more in future articles in the series, it is recommended that if there is to be an exchange, the scope and dates should be discussed at the hearing and not left to future agreement/actions of the parties (or to chance). If the latter is the case, the parties may not have the necessary assurance that the arbitration process is being well-managed and ultimately, this could result in an additional preliminary hearing, lost time, and added costs. Furthermore, prior to the hearing, the parties/representatives are encouraged to attempt to agree on the scope of any exchange so the arbitrator merely "memorializes" it in the arbitrator's resulting order—this happens more often in larger arbitrations.

The exchange of witnesses and intended scope of testimony (including identification of expert witnesses with their individual curriculum vitae) and the exhibits that are intended to be introduced into evidence (for case/defense in chief) at the arbitration should be covered at the hearing. Section R-23(b) specifies that at least five business days before the arbitration the parties/representatives shall exchange copies of proposed exhibits. Depending upon the complexity of the dispute, you may find it best to set an earlier exchange date with a continuing duty to update information, so that the parties/representatives are better prepared. Similarly, any rebuttal/impeachment witnesses/exhibits may be exchanged as they are identified, with a continuing duty to update as necessary. The exchange/delivery of the "intended order" in which witnesses will be called also could be discussed at this time. Finally, perhaps the "goal" of preliminary hearings could be summarized in this statement: "Let's attempt to achieve as few surprises at the arbitration, so the parties/representatives can arrive at the arbitration prepared to present/defend the claims/counterclaims." This ensures a worthwhile hearing.

The preliminary hearing also covers, among other things, any pre-hearing motions, clarification of claims/counterclaims, any necessary interim measures (R-36), possible stipulations of facts and joint exhibits, necessity of any court reporter (R-28), form of the award (R-44), retention of jurisdiction issues/requirements (R-45), and any pre-hearing/post-hearing briefs.

You may find that conducting an efficient arbitration is usually consistent with the parties'/representatives' objectives. This may be accomplished in part by having a preliminary hearing that addresses and answers the important issues touched upon in this brief article. In future articles, I will probe other aspects of the preliminary hearing process, and why it is a very important component in the equation to good arbitration case management from the perspective of the arbitrator(s) *and* the parties/counsel.

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

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