

## Chess Clock Arbitrations – Are the Constraints Worth It?

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Arbitration is perceived as being able to provide faster and cheaper dispute resolution, which is often not the case. One area where costs may be controlled is the hearing itself. The use of a chess clock for the arbitration is one method of controlling hearing costs, which involves agreeing in advance to the total amount of hearing time and the time to be allocated to each party. Practical considerations, benefits and challenges of this process are discussed.

When parties choose arbitration over litigation, the expectation is that it will result in a faster and less expensive dispute resolution process. However, as has been discovered by many who have participated in an arbitration process, this is not always the case.

The cost of arbitration is driven by a number of factors, not the least of which is the cost of the arbitration hearing itself. For complex disputes requiring lengthy hearings, the cost for the attendance of the arbitration tribunal, counsel and experts, plus the business cost incurred due to the time commitment required by the parties, can be significant. Reducing and controlling the length of the arbitration hearing is one way to contain costs, as well as to have certainty over the process and the timing. Compression of the arbitration hearing may be achieved through the use of witness statements for the direct evidence. A further method of controlling the length of the arbitration hearing, while maintaining fairness to all parties involved, is the use of a chess clock allocation of time.

A chess clock is a hearing management tool in which the parties are assigned allocations of time in which to present their case, through direct and cross examination of fact witnesses and experts, as well as opening statements and oral argument. Generally, this involves the pre-determination of the total amount of time available for the arbitration hearing and then an allocation of a certain number of hours or a percentage of the total hours to each party. While the allocations of time would normally be equal for each party, this may not always be the case depending on the nature of the claims and the specific circumstances. Consideration should also be given to allocating time to the Tribunal each day for questions they have of the witnesses, so that this time is not taken out of the time allocated to a particular party.

While the Tribunal may direct time limits for certain aspects of the oral hearing, such as for opening statements, during a chess clock hearing the parties have the autonomy to use their allocation of time as they see fit. Combined with the use of witness statements for direct evidence, the focus of the allocated time is usually on cross-examination. However, a party may choose to use a larger portion of its time allocation for certain witnesses or may choose not to cross-examine some witnesses at all.

Any time used by a party during the hearing is deducted from the total hearing time allocated to it. It is a good idea for the parties to agree in advance on who will be responsible for recording the time used each day in the hearing by each party. This could be a Tribunal member, the court reporter (if there is one), one of the parties or a clerk that is brought in to assist the Tribunal. The time used by each party should be circulated to the parties each day, or on another agreed upon basis, so that the parties are fully aware of their remaining time and any disputes regarding the time used can be addressed promptly.

Successful use of a chess clock arbitration process depends on thorough advanced preparation of the case. Before agreeing to time allocations, counsel must know which witnesses and experts will be called and estimate the amount of time required for each direct examination, cross examination and re-direct examination. Key documents must be identified and organized to allow for efficient identification during direct or cross examination. The tight time constraints do not allow for counsel to rummage for documents or wait for slow electronic documents to load on a screen. All hearing processes need to be well planned, precise and efficiently executed.

The chess clock process should be explained to all witnesses, so that they understand the process and the importance of providing concise testimony. During cross-examination, unresponsive or unnecessarily long answers can unfairly eat up a party's time allocation, and could damage the witness' credibility where it is clear that the witness understood the process. The Tribunal will want to ensure that the process is fair to the parties and may want to grant additional time to a party if a witness was unresponsive and unreasonably wasted time during cross-examination.

The consequences of running out of time should be determined by the Tribunal and understood by the parties in advance of the hearing. The extension of the hearing may not be possible. However, when faced with a party that has run out of time where the hearing is not yet complete, a Tribunal may be loath to deny a party the chance to put forth its entire case, especially if it appears that the overall hearing is ahead of schedule. Agreeing in advance to give the Tribunal the discretion to provide a party additional time, in certain circumstances, may be a way to prevent time-consuming disputes during the hearing.

#### **Benefits of a Chess Clock Arbitration:**

1. Reduces the risk of the arbitration running out of time;
2. Ensures fairness, by preventing one party from using a disproportionate amount of the total hearing time;
3. Gives autonomy to the parties to choose the best strategy for the use of its allocated time;
4. Improves the ability to plan and schedule witnesses, as the process forces parties to carefully plan the case in advance of the hearing;
5. Creates discipline in preparation to focus on key elements of the case, presenting the key witnesses and evidence;
6. Narrows the focus of cross-examination to critical issues; and
7. Creates certainty of the process, to allow the parties to plan accordingly, and controls costs.

#### **Challenges of a Chess Clock Arbitration:**

1. Time restrictions place additional pressure on counsel;
2. Requires more thorough preparation to ensure that time is used effectively;
3. Difficult decisions may need to be made regarding witnesses or evidence that will not be tendered at the arbitration hearing, due to time constraints;
4. The control of witnesses during cross-examination can be difficult, especially where non-responsive or long, narrative answers are given; and
5. The use of electronic documents may be an impediment, if the document retrieval process is not efficient. Well organized, paper exhibits can be easier to manage and referred to quickly.

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