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Six Steps to Fair and Efficient Arbitration

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Commercial arbitration was designed as an economical alternative to court trials. Discovery was limited, hearings proceeded unencumbered by the rules of evidence and an award was to be issued no more than 30 days after close of hearings. Finality was assured because there was no lengthy appeal. However, as arbitration has grown in popularity as a way to resolve business disputes, many have expressed concern that arbitration has become increasingly time-consuming and expensive — just like the trials it was meant to replace.

Even experienced counsel don't always take advantage of the ability to tailor the arbitration process to fit a particular case. Flexibility is one of arbitration's main benefits. Arbitration is contractual, so parties are free to stipulate to procedures appropriate for efficient handling.

1. PREPARE A CLEAR STATEMENT OF CLAIMS

At the time of filing and certainly before a preliminary conference, it is important to file a statement of the case, including a short summary of the background facts and a list of all claims. While the damages claim may not be complete and may have to be calculated after working with experts, the numbers can be brought up to date later. The arbitrators can set a date for amending the claims and counterclaims to specify and quantify damages.

Lengthy, litigation-style, formulaic pleadings are neither required nor helpful. Claims, answering statements and counterclaims should be written in a straightforward and concise manner to avoid confusion and wasted time. It is important that counsel and the arbitration panel be clear on the claims and defenses asserted.

2. DESIGN THE PROCESS AT THE PRELIMINARY CONFERENCE

The preliminary conference is a good time to collaborate with the arbitrators to design an effective process. This is the time to agree on the hearing dates and location, set a time to submit a discovery plan, and schedule dates to exchange witness lists, arbitration exhibits and prehearing briefs. These arrangements are particularly important in laying the foundation for efficient hearings.

First, set hearing dates and stick to the schedule. Arbitration hearings are best held on consecutive days. It may make sense to schedule an extra day or two in case the hearings take more time than expected because continuances can be extremely expensive. There is a huge cost involved in preparing for hearings and then having to remobilize months later. Also, it is often difficult to reschedule because several calendars must be considered. Furthermore, most experienced arbitrators will charge a fee for time reserved and unused, especially if the hearings are continued or canceled at the last minute. Save money and time for your client by moving forward on schedule.

Second, limit motion practice. Motions in limine and dispositive motions can be wasteful at arbitration, especially if there has been little discovery. One of the grounds for vacating an arbitration award is the arbitrators' refusal to hear relevant evidence. Arbitrators will want to prepare an award that ultimately will be confirmed and their rulings will be in-

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fluenced by an interest in protecting the final award.

Third, consider whether the hearings should be bifurcated — into liability and damages phases, for example — or otherwise set to move forward in phases. The attorneys may want confer with the arbitrators to reach agreements on the order of proof, so the hearings move forward smoothly. For example, in a complex case involving claims of breach of fiduciary duty and fraud arising out of the handling of partnerships or other entities, claimants and respondents can agree to divide the hearings into phases. They can handle each discreet issue completely before moving to the next phase, rather than adhering to the usual order where claimants present their entire case and respondents' case follows.

Finally, if there are witnesses who may be unavailable, discuss how to preserve their testimony or make plans to have them testify via video. Most arbitrators will allow these arrangements in order to assist counsel in presenting the case efficiently.

In all of these matters, arbitrators can make the necessary rulings if counsel cannot reach agreement.

3. LIMIT DISCOVERY

Discovery is the most expensive part of any arbitration, especially now that so much of it involves electronically stored information. In the early days, arbitration discovery was limited to a broad exchange of relevant and nonprivileged documents as well as witness information. As arbitration has evolved, so has discovery.

Here again, it is in the parties' best interests to rein in costs. Establish a discovery plan, being mindful that discovery should be proportional to the complexity of the dispute. Agree to limit electronic discovery in order to avoid enormous costs.

Both sides will be required to identify witnesses and establish a procedure for exchanging biographies and reports of expert witnesses. While counsel sometimes request an opportunity to issue interrogatories and requests for admission, written discovery is not favored in arbitration because it can be expensive and often fails to elicit significant information.

Taking some depositions may save hearing time. Experienced arbitrators know that listening to an attorney examine a witness extensively is a poor use of hearing time. Agree on some depositions, limited in number and duration. If agreement is not possible, an experienced arbitrator can make a ruling and allow each side five depositions, not to exceed seven hours, for example.

The discovery process should be designed to exchange information efficiently. Arbitrators are empowered to manage discovery and avoid scorched earth maneuvers.

4. LIMIT TIME FOR HEARINGS

Agree on a limited number of hearing days. The "chess clock" approach, where the parties divide time equally, is one of the best ways to avoid unnecessary costs.

This approach worked well in a recent licensing dispute involving patents for medical devices. The attorneys adhered to the schedule and presented the case with time left over. Time limits discipline everyone to focus on the most important documents and testimony.

There are many other approaches to encouraging efficiency. Sometimes, counsel will present percipient or expert direct testimony in writing, with an opportunity for live cross-examination. Also, documents can be admitted without formalities if there are no objections to items on the exhibit list. Demonstrative exhibits can help arbitrators get up to speed quickly on the chronology of events or on damages theories.

5. AVOID UNNECESSARY OBJECTIONS

The rules of evidence generally do not apply in arbitration, so raising numerous objections is not useful. It may be important to object to hearsay in order to alert the panel to it, but that objection will only go to the weight of the evidence and will not preclude it. Save objections for important matters and avoid repeated interruptions.

6. SELECT DECISIVE ARBITRATORS

None of these techniques for making arbitration economical will work unless the arbitrators are experienced, decisive and willing to make necessary rulings. Good arbitrators actively manage a case.

Arbitrators should be available to make discovery decisions promptly through e-mails or conference calls — not ex parte, of course — and often on shortened notice. Usually, one arbitrator will be designated to make decisions on routine discovery issues, while the others weigh in on important matters. In a recent contract dispute, involving two high-tech companies doing business on different sides of the country, it was necessary to confer by phone with the attorneys weekly.

Arbitrators should be skilled at moving the hearings along and making rulings as needed in accordance with the rules. Active arbitrators assist in dealing effectively with cumulative evidence and avoiding gamesmanship.

Review the biographies of the proposed arbitrators, including examples of cases they have handled. Ask for references. In large cases, it is customary to interview potential arbitrators about their experience, style and managerial skills.

CONCLUSION

Using these suggestions and designing with others to streamline the process will lead to a cost-effective resolution and greater client satisfaction with the process, win or lose.

In Practice articles inform readers on developments in substantive law, practice issues or law firm management. Contact Vitaly Gashpar with submissions or questions at vgashpar@alm.com.