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## What providers can do to promote efficiency

Topping the list is adopting rules limiting arbitration time, extensive discovery and motion practice.

BY RICHARD CHERNICK  
AND ZELA CLAIBORNE

**T**he growth of commercial arbitration during the past three decades is principally attributable to the U.S. Supreme Court's broad embrace of the arbitration process and its rejection of legal doctrines that try to limit the effective use of arbitration. Arbitration was further transformed during the 1980s and 1990s by a series of decisions that have made it more accessible and its enforcement more predictable. This development in turn has encouraged businesses to consider arbitration for many of their larger and more important disputes and has encouraged individual neutrals and providers to promote arbitration as an effective alternative to the court system.

Popularity has not been without drawbacks. As counsel have become more sophisticated in dispute process design, arbitrations now often have many elements of a complicated court trial, and the complexity of managing and conducting arbitrations has increased. Detailed pleadings, broad-based discovery, requests for provisional relief, dispositive motions and application of rules of evidence

are more common, as are requests for reviews of arbitration orders and awards. One only has to see the number of process issues included in the 2000 revision of the Uniform Arbitration Act, [www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.pdf](http://www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.pdf), to see this dynamic change. This

have realized that they cannot have their cake and eat it, too. The more processes parties employ, the longer and the more expensive the arbitration. It is even possible that it will take as much or more time than equivalent court litigation. In these circumstances, when there is no effective right to appeal arbi-

**Rules can limit discovery requests to relevant documents reasonably limited in subject matter and time.**

trend also explains why there are so many more decided cases addressing arbitration issues.

One consequence of these changes has been increased expense and delay. Many traditional users of arbitration

tral awards, the litigation choice may become preferable.

In order to preserve the benefits of arbitration, it is necessary to address the processes that drive expense and delay, such as discovery and motion

practice. Each of the stakeholders in the arbitration process (inside counsel, outside counsel, arbitrators and provider organizations) has a role to play in addressing solutions that restore vitality and efficiency to the arbitration process. The focus here will be on the opportunities provider organizations have to restore effectiveness to the process.

In the past, many providers have suggested dispute-resolution clauses that outline a stepped process intended to promote efficiency. In general, the process begins with required negotiations among company executives, followed by mediation and then by arbitration. Virtually all providers encourage the use of mediation to settle the case or at least to pare down the issues to be arbitrated.

### RULE REVISIONS

As criticism of costly arbitration has grown stronger, some providers are also responding by offering more than one kind of arbitration procedure and revising their rules with the goal of helping parties design a process to fit the case. The American Arbitration Association has fast-track rules for small-dollar cases as well as rules for large cases that give arbitrators the power to control the process. CPR Institute offers an economical litigation agreement and rules aimed at providing an efficient process. And JAMS has a new optional expedited procedure available for even the largest cases, which provides for an arbitration to be completed within 150 days. The College of Commercial Arbitrators, a select group of arbitrators working through various providers, has promulgated "Protocols for Expedious, Cost-Effective Commercial Arbitration," a document available on its Web site, [www.thecca.net](http://www.thecca.net), that will be useful to attorneys drafting arbitration clauses or handling arbitrations as well as to providers and arbitrators.

There is also the issue of discovery. As arbitration has evolved, so has discovery. Discovery is often 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 information about the witnesses expected to testify. Now, counsel often serve elaborate requests for voluminous documents and seek numerous depositions. For arbitration to be truly cost-effective as well as efficient, it is in everyone's best interest to rein in costs by establishing a discovery plan that is proportional to the complexity of the dispute.

Providers can assist by encouraging the use of rules that limit requests for documents to those that are material and reasonably limited in subject matter and time. Those limitations should apply to electronic discovery as well and should provide that electronic documents are to be produced in searchable format easily utilized by the parties. Furthermore, when a party requests voluminous documents, arbitrators should be empowered to deny the request or shift production costs to the requesting party.

Although counsel sometimes seek to serve requests for admission or interrogatories, written discovery is not favored in arbitration both because it often fails to elicit significant information and because it can be very expensive. Also, although some depositions may save hearing time by preparing counsel for efficient witness examination during the hearings, providers would do well to empower arbitrators to limit the number and duration of depositions. Furthermore, when the reports (or proposed direct testimony) of expert witnesses are produced to the opposing side in advance of the hearings, expert depositions should not be necessary unless the parties agree or the arbitrators exercise their discretion to order them.

Providers may also adopt rules that limit the use of time-consuming motions. Motions in limine and dispositive motions can be wasteful in arbitration, particularly when there has been little discovery. One of the grounds for vacating an arbitration award is the arbitrators' refusal to hear relevant evidence (9 U.S.C. 10(a)(3)). Motions should be limited to those

that focus on clear issues of law, and arbitrators should be empowered to deny requests to bring motions that involve issues of fact or are unlikely to resolve significant matters before the hearings.

Even if providers set forth all of the above in their rules, none of these techniques for making arbitration economical will work unless the arbitrators are experienced, decisive and willing to make the necessary rulings promptly. Arbitrators must be trained to be managerial and handle matters efficiently. That includes setting a schedule for discovery and hearings during the preliminary conference and ensuring that the case stays on track. Continuances are extremely expensive. When discovery disputes arise, arbitrators should be available by phone or e-mail—not *ex parte* of course—to make decisions promptly and on short notice. During the hearings, arbitrators must move the case along, dealing effectively with cumulative evidence and avoiding gamesmanship. At the end of the hearings, arbitrators should be expected to provide for prompt briefing (or, in appropriate cases, no post-hearing briefs) and a timely award.

By adopting these suggestions and designing others, providers can assist in returning arbitration to its intended purpose: a cost-effective, efficient alternative to litigation. This must be an industrywide effort, with all stakeholders—outside counsel, inside counsel, arbitrators and providers—playing a role.

*Richard Chernick is managing director of the arbitration practice at JAMS, The Resolution Experts, and was the founding president of the College of Commercial Arbitrators. He can be reached at [rchernick@jamsadr.com](mailto:rchernick@jamsadr.com). Zela Claiborne is a member of the JAMS arbitration panel and a fellow of the College of Commercial Arbitrators. She can be reached at [zclaiborne@jamsadr.com](mailto:zclaiborne@jamsadr.com).*