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Working to restore the efficiencies of arbitration

By Zee Claiborne

Commercial arbitration began as an economical and fair alternative to court trials. Critics claim that it has become increasingly lengthy, expensive and more like litigation. Many arbitrators, ADR providers and counsel are working to manage the process and restore the advantages of arbitration: limited discovery, efficient hearings and the prompt issuance of a final award. Ideally, this effort starts at the preliminary conference, which is a good time to collaborate with the arbitrators and design a process that fits the case.

In a recent international arbitration involving millions of dollars in claimed damages, the attorneys worked with the arbitrators to manage the process and obtain the best possible result while keeping costs to a minimum. This complex case arose out of a stock purchase agreement under which a foreign company purchased a U.S. company. The sellers' claims included breach of the agreement by the purchasers, which allegedly resulted in their loss of the business and related IP. The participants managed the case, starting with agreements they reached at the preliminary conference, the first conference call with the arbitrators. What could have taken at least a month at trial was reduced to a week of arbitration hearings plus a day of closing arguments.

Managing discovery

Discovery is the most expensive part of any arbitration, especially now that most commercial cases involve significant amounts of electronically stored information (ESI). It is important to prepare a discovery plan that is in proportion to the size of the dispute at hand. In this case, managing voluminous documents from many sources written in more than one language was both a challenge and essential to efficient management.

While international cases often involve very little or no discovery, the attorneys in this case were all from the U.S. and accustomed to some limited discovery. Counsel exchanged more than 1.5 million documents, mostly ESI. Then teams of attorneys and legal assistants reviewed and pared down this number to the few hundred relevant, nonprivileged documents to be used as exhibits at the hearings. Each team presented all documents efficiently in electronic form for ease of review by the arbitrators during the hearings and the deliberations. One side even provided their briefs and exhibits on iPads to be used by the arbitrators and returned at the conclusion of the case.

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Given the complexity of the case and the number of documents, it is no surprise that there were a number of discovery disputes. These involved document production by both the parties and third parties, the forensic examination of certain computers, and disputes arising out of the privilege logs. In order to streamline the resolution of these disputes, counsel agreed at the outset to an informal process to be handled by a single arbitrator, the chair of the arbitration panel. When a dispute arose, the attorneys did not file formal motions. They simply wrote an email to the chair outlining the issues with a simultaneous copy to the opposing side. As soon as the chair heard from both sides, she could make a ruling and issue an order. Telephone hearings were held for some particularly complex and contentious matters, but were not necessary in every dispute.

Counsel took the depositions of some percipient witnesses as well as experts. Though the depositions were costly, taking a limited number of depositions actually helped streamline the hearings. Examining a witness for the first time at arbitration is slow and time-consuming. The depositions of key witnesses resulted in brief and focused direct and cross-examinations during the hearings.

Counsel wasted no time on interrogatories and requests for admission. Written discovery is not favored in arbitration since it can be expensive and often fails to elicit significant information. The attorneys agreed not to use it in this case.

Arbitrators are empowered under the rules of most providers to manage discovery and avoid costly scorched earth maneuvers. Here, counsel and the arbitrators discussed the handling of the case in detail at the outset in an effort to craft a process tailored to the dispute.

Managing the hearings

Shortly before the hearings began, counsel also reached agreements concerning the conduct of the hearings, such as:

1. adhering to a reasonable page limit when submitting opening briefs that clearly outlined the facts, claims, defenses and applicable law;

2. limiting motion practice;

3. using demonstrative exhibits to clarify the relationships among the parties and elements of the damages claimed;

4. splitting the hearing time 50/50 between the parties;

5. limiting the time for opening statements;

6. limiting objections since, with the exception of the law relating to privileges and work product, strict conformity to the rules of evidence is not required under the rules of most arbitration providers;

7. allowing some witnesses to testify out of order to accommodate international travel schedules;

8. agreeing to page limits again when submitting closing briefs;

9. scheduling closing arguments on a date after submission of the closing briefs in order to sharpen a final question and answer session with the arbitrators.

This process called for discipline by the attorneys for both sides and avoided the submission of unimportant documents and rambling witness examinations.

Since the arbitration process is contractual, the parties are free to stipulate to procedures appropriate for a cost-effective and fair handling. This flexibility is one of the main benefits of arbitration and can be utilized to manage the process. Although one side lost this case, both sides benefitted because of the professional and efficient way these experienced and skilled attorneys worked with the arbitration panel to manage the proceedings.

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