

Getting a Handle on It: Drafting Tips for In-House Counsel to Control Costs of Commercial Dispute Resolution

By Laura C. Abrahamson, Esq., FCIARB

Commercial arbitration's rapid growth in the last 20 years is a testament to its advantages over traditional litigation: speed, cost and flexibility. Courts have also played an essential role in propelling arbitration's advancement. Backed by Supreme Court jurisprudence, commercial parties can confidently specify the dispute-resolution process they want in their contracts, knowing that courts will enforce their agreement.

But as parties submit larger and more sophisticated cases, it is crucial to ensure that the process still serves the parties' best interests. If the process spirals out of control, arbitration's advantages can be lost.

The good news is that sophisticated counsel can design a process that suits complex cases. Parties can also get help from "managerial" arbitrators, who can help design their process and implement their agreement.

But no matter who is involved, the contract language is the key. Drafting the dispute resolution clause is often left to the end of negotiations. Having the right model clause prepared in advance can dramatically reduce cost and time to resolve disputes.

Seven key drafting elements that can help control the arbitration process are:

Tiered dispute resolution: Not every dispute needs to go straight to an arbitration; a structured negotiation may be all that is needed to

resolve a disagreement. By adding a tiered dispute clause, you can provide steps, or tiers, before arbitration can commence. Those tiers can include mediation, senior executive meetings, or early neutral evaluation. By adding in tiers, you can dedicate resources more efficiently.

Drafting tip: Make sure you avoid creating jurisdiction traps or unnecessary delay by providing either party the ability to proceed to arbitration within a tight time – 30 or 60 days – after making a demand for the first tier. Example: "Notwithstanding anything else contained herein, either party shall have the right to commence arbitration at any time after the expiration of 30 days after service of a demand for [a senior executive meeting]."

Build in time constraints: Time is money, so where appropriate, consider building in deadlines to help control costs. There are numerous opportunities to impose such limits.

Take, for example, the nomination of arbitrators. Consider drafting a clause that limits how much time is allotted to select the arbitrators. If parties cannot agree on the selection, the contract may also clarify whether an institution like JAMS will select the arbitrators and use that to build in additional time limits.

Drafting tip: Make sure any arbitrator selected is required to meet the time constraints built in your model clause. Example: "Any arbitrator



nominated must be able to serve within the timeframes specified herein before accepting appointment."

The time it takes to hold the first procedural conference can also be limited, as well as the time to convene a hearing on the merits and the time to issue an award.

Drafting tip: Use your clause to limit the length of a hearing and ensure it is heard on consecutive business days to further increase cost efficiency. Example: "Unless the parties agree otherwise, the tribunal will hold a hearing on the merits within 6 to 9 months of its constitution, which will be set for consecutive days (excluding weekends and holidays) and last for no more than 10 days."

First procedural hearing: The first procedural conference is ideal for ensuring that an arbitration runs efficiently. Consider adding a clause

requiring the tribunal to hold a procedural conference within 30 days of its constitution, either in person or by video.

Drafting tip: Adding the requirement that parties attend the procedural conference with counsel allows in-house counsel to help establish the most cost-effective arbitration schedule, including pushing for the earliest hearing on the merits. Example: "Unless the parties agree otherwise, the Tribunal will hold a procedural conference with the parties and their counsel within 30 days of its constitution either in person or by Zoom or an equivalent video technology to set the schedule for the arbitration, including the date(s) for the hearing on the merits."

Schedule: Parties can draft the arbitration clause to drive the most cost-effective schedule.

Drafting tip: Consider requiring a "Memorial style" process that favors getting all the evidence out early. Under this process, which is more common in international arbitration, a claimant files its memorial (legal brief) with its evidentiary support (witness statements, documents and expert reports) within a few months of the arbitration's commencement. The respondent files its counter-memorial with evidentiary support a few months later. The tribunal can then call for reply submissions, if appropriate, or simply move to a hearing.

Example: "Unless otherwise agreed by the parties, at the first in-person or virtual procedural hearing, the tribunal will set a schedule for conducting the proceeding, which shall include the service by the Claimant of a Memorial together with written witness statements, documents and expert reports within 2 to 3 months, service by the Respondent of a Counter Memorial together with witness

statements, documents and expert reports within 1 to 2 months, and service of reply and sur-reply memorials as appropriate within 2 weeks."

Discovery limits: Discovery, particularly e-discovery, can exponentially increase the cost of arbitration. Well-crafted clauses can eliminate or significantly curtail discovery. Consider prohibiting depositions, requests for admissions and/or interrogatories. You may also want to specify no document requests or require parties to apply to the arbitrator for narrowly tailored requests limited to items relevant and material to the outcome. Rule 16.2 of the JAMS Comprehensive Arbitration Rules & Procedures (the Expedited Procedures) contains some limits corporate counsel can incorporate into their model clause.

Drafting tip: Explicitly make cost a factor for the arbitrator to consider before allowing discovery. Arbitrators will follow specific limits on discovery set out in the parties' arbitration agreement.

Submission of Evidence: Smart drafting can also help streamline the arbitration hearing. Requiring parties to submit direct examinations through written witness statements eliminates the need for depositions, reduces the length of the hearing (cross-examination and redirect) and allows parties to decide which witnesses need cross-examination. Requiring experts to submit a joint report or find areas of agreement (by hot tubbing or other methods) allows the arbitrator to focus on areas of disagreement.

Drafting tip: In addition to requiring direct testimony to be submitted through written witness statements, expressly limit the testimony of fact witnesses at the hearing to cross-examination and rebuttal.

Diversity: There is a strong business case for choosing a diverse panel

of neutrals; generally, parties that leverage diverse backgrounds and experiences can find more creative solutions and optimize outcomes. In-house counsel has a vital role in promoting diversity in dispute resolution by signing the Equal Representation in Arbitration Pledge, encouraging diversity in outside counsel teams and arbitrator selection.

Drafting tip: Incorporate the JAMS sample clause requiring consideration of diversity in arbitrator selection. Example: "The parties agree that, wherever practicable, they will seek to appoint a fair representation of diverse arbitrators (considering gender, ethnicity and sexual orientation) and will request administering institutions to include a fair representation of diverse candidates on their rosters and list of potential arbitrator appointees."

The future of commercial arbitration is bright. If counsel and arbitrators continue to ensure that the process is fast, cost-effective and flexible, it will remain so.

Laura C. Abrahamson, Esq., is a Fellow of the Chartered Institute of Arbitrators and a full-time JAMS neutral based in Los Angeles. Prior to joining JAMS, she was in private practice and spent almost 25 years in-house in senior leadership roles at Fortune 500 companies.

