REIMAGINING ARBITRATION

By Richard Chernick, Esq.

The rapid growth of commercial arbitration has not been without drawbacks. As counsel have become more sophisticated in dispute process design, arbitrations now often incorporate many elements of a court trial. Litigation constructs such as detailed pleadings, broad-based discovery, provisional relief, dispositive motions and formal rules of evidence are often now a part of arbitration. The inevitable consequence of these changes has been increased expense and delay.

To preserve the benefits of arbitration, it is necessary to address this issue from several perspectives, starting with the arbitration clause. A thoughtful process usually should include a negotiation or mediation step, reasonable limits on the scope of discovery, overall time limits on the arbitration, and the designation of one rather than three arbitrators whenever possible.

Limitations on discovery are crucial. The administering institution selected in the clause, and its rules, will initially define the scope of discovery. The clause may add restrictions or additions to rules-based discovery. The key is to choose a discovery process that is proportionate to the magnitude of the dispute, limit excessive e-discovery and give the arbitrator power to assure a reasonable scope of discovery.

Set specific time limits on arbitration and make sure they are enforced. An outside limit could be specified (for example, one year from the commencement of the arbitration to the issuance of the final award) or the provider's rules may be relied on where they impose such limits. Care should be taken not to set unreasonable limits, and discretion should be accorded to the arbitrator to vary these limits in exceptional circumstances.

Use "fast-track arbitration" where appropriate. Some institutional rules provide streamlined versions of their standard rules (such as AAA's Expedited Procedures within its Commercial Rules or JAMS Streamlined Rules).

Finally, specify the form of the award, and do not provide for judicial review for errors of law or fact. There is usually no reason to seek to expand the limited judicial review provided in the grounds for *vacatur* set forth in the FAA. Alternatively, a tripartite panel provides some protection against aberrational awards, or the parties may choose the appellate arbitration procedure offered by many providers.

Selection of outside counsel to conduct the arbitration is also crucial. Select counsel who understand the arbitration process and how it differs from litigation and are willing to conduct the process with the goal of achieving economy and efficiency.

The selection of an arbitrator willing and able to participate in the design process and effectively manage the agreed process is crucial in achieving economy and efficiency. The experienced "managerial arbitrator" can also advise against inappropriate process choices.

A managerial arbitrator will use the preliminary conference as an opportunity to shape the process to suit the case. The determinations made at the preliminary conference will be documented in a scheduling order prepared by the arbitrator. In all of these matters, ar-

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bitrators are empowered to manage the process and to make the necessary rulings if counsel cannot reach agreement.

Issues as to the scope and jurisdictional base of the arbitration must first be addressed: arbitrability (as to parties and issues), the status of party-appointed arbitrators (neutral/non-neutral), compliance with applicable disclosure rules, governing law, applicable rules, applicable arbitration law (FAA or state arbitration act) and the venue of the arbitration hearing.

The arbitrator will also assist the parties in reaching agreement on the exchange of information (document exchange, securing documents in the possession of third parties, depositions; e-discovery issues, designation and discovery of expert witnesses, protection of confidentiality of documents exchanged for the hearing, etc.) and efficient procedures to resolve discovery disputes.

Finally, hearing and prehearing issues will be addressed: dispositive motions, identification of witnesses and use of witness statements in lieu of direct examination, identification of exhibits and format for presentation at the hearing, applicability of the rules of evidence, hearing times and possible limitations, transcript and designation of an "official record," bifurcation of issues, briefing pre- and post-hearing and provision for final argument, remedies sought and form of award, attorney fees and costs and any agreed appellate procedure.

As to each of these issues the job of the arbitrator is to shape the process to suit the case and to avoid inappropriate process choices, particularly in the case of motions and discovery.

Careful pre-dispute planning and thoughtful process choices after the dispute actually arises will assure that the parties achieve their objective of a tailored, efficient process that assures a reliable but economical resolution of their dispute. ■

Richard Chernick, Esq. *is an arbitrator and mediator. He is Vice President and Managing Director of the JAMS arbitration practice. He is a former chair of the ABA Dispute Resolution Section. He can be reached at rchernick@jamsadr.com.*