

Realizing the Many Benefits of Arbitration

By ZEE CLAIBORNE

April 13, 2023

One of the promises of commercial arbitration is a prompt and efficient resolution of business disputes for both domestic and international matters. The arbitration provision in a contract typically calls for a three-step process: settlement negotiations among officers of each company, followed by mediation and, if unsuccessful, arbitration with a sole arbitrator or tripartite panel of arbitrators. Ideally, the arbitrators should have a background in the issues at hand, as well as alternative dispute resolution (ADR) experience and the ability to skillfully manage the case.

Although arbitration is increasingly popular in commercial settings, parties often raise concerns about the cost. The following are 10 suggestions for an efficient, less costly process:

1. Make the most of the preliminary conference.

This is when counsel for all parties meets with the arbitrator or panel for the first time to discuss the claims in the case and agree on the timing of an exchange of information as well as the number of days and dates for the hearings. This meeting is extremely important for efficient case management. Give thought to the process and work with the arbitrator to set a reasonable schedule to be outlined in a subsequent scheduling order that will serve as a blueprint for case management. Adhering to the schedule will save time and cut costs.



ZEE CLAIBORNE

2. Limiting discovery. An arbitrator usually will limit discovery in accordance with the rules of most providers, such as JAMS, AAA and CPR. In order to save money, it makes sense to agree to exchange only relevant and material documents and to limit the number of depositions. Some rules limit the parties to one deposition, although the arbitrator may allow more in a complex case. Written discovery, such as interrogatories and requests for admission, often reveal little significant information, so it usually makes sense to omit those.

3. Limit dispositive motions. This can be a useful tactic unless there is a solid legal reason for dispositive motions. A lengthy motion that attempts to

eliminate numerous claims often raises questions of fact leading to denial of the motion. Further, motions are expensive. Handle the key issues of the case in briefing and at the hearing whenever possible.

4. Splitting the hearing time. Consider agreeing to split the hearing time between the parties. That way, each side makes an efficient presentation and omits testimony about claims and documents that may not be central to the case.

5. Have experts prepare written reports. When a case involves many experts, counsel often agrees to use their written reports as their direct examination. Then, after a brief introduction, experts can testify live on cross-examination at the hearing.

6. Submit an exhibits list. Be sure to do this before the first day of hearings. Pare down the exhibit list in order to focus on the key documents and save hearing time. Indicate those to which there may be an objection. The rest will be admitted automatically. An arbitrator may want to receive exhibits electronically in advance of the hearing.

7. Preparing a witness list. On the witness list, include a short description of the testimony of each. Again, focus on witnesses key to your case, and make an effort to avoid cumulative testimony. Note whether the witness will testify in person or electronically. If the parties are splitting the time, indicate the expected length of each witness's testimony.

8. Being flexible. Allow some witnesses to testify electronically if necessary to guarantee their appearance. Cross-examination of those witnesses can be as effective as if they were in person.

9. Provide a list of damages. Focus on the damages claims in the demand or cross-complaint. A clear list of damages will help participants narrow their attention to issues at the heart of the case. Spending time on ancillary claims may waste time and add cost.

10. Consider conducting the hearing via videoconferencing. Finally, consider holding the hearing on a videoconferencing platform. Arbitrators are accustomed to holding virtual hearings, and witness testimony can be handled very effectively on a platform such as Zoom. The savings of time and travel costs can be very significant, especially in international arbitrations.

Zela "Zee" G. Claiborne, Esq., is a JAMS arbitrator and mediator. She handles business disputes, both domestic and international.

