WEDNESDAY, JANUARY 26, 2011

DAILY REPORT

A SMART READ FOR SMART READERS

Controlling time and cost in arbitration

R. WAYNE THORPE AND JOHN W. HINCHEY
Special to the Daily Report

HISTORICALLY MANY BUSINESSES often have chosen to arbitrate business-to-business disputes in a variety of commercial settings including construction, insurance, banking, intellectual property, health care and so forth.

The basic premise of this approach has been to obtain fair, final, timely and cost-effective resolutions to business disputes from arbitrators with more time and expertise than courts usually can provide.

In recent years, however, some in the business community have complained that arbitration of commercial disputes is becoming just as time consuming and costly as litigation.

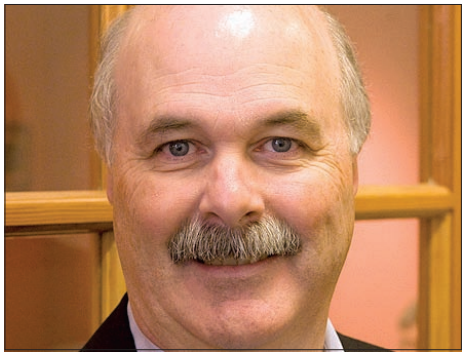
In 2009-2010, two international surveys of corporate counsel in the United States and United Kingdom[1] produced the following findings:

• In disputes that are not international in character, and, when given a choice, 58 percent of all responders would opt for litigation; only 38 percent would choose arbitration; and approximately 10 percent say, "it depends."

• More than 40 percent of corporations plan to increase their budgets for electronic discovery in coming years; they firmly believe that applicable discovery rules should be stricter in limiting the scope of electronic discovery.

• Disclosure of documents, written submissions, constitution of the tribunal and hearings are the main stages of the arbitral process that contribute to delay.

• Parties contribute most to the length of the proceedings, but it is the tribunal and the arbitration institution that should exert control over them to keep the arbitral process moving quickly.



R. WAYNE THORPE has been an Atlanta lawyer and mediator/arbitrator for more than 30 years. For the past 12 years he has been a full-time mediator and arbitrator with JAMS, experienced in a wide variety of cases including business/commercial, class actions, construction, environmental, employment, health care, government and products and professional liability. He has mediated more than 1,000 cases and arbitrated more than 400. He is chair of the ABA Section of Dispute Resolution.

JOHN HINCHEY is recognized as a national and international leader in the practice of construction law with extensive experience in resolving significant construction disputes as a mediator and arbitrator with the JAMS Global Engineering and Construction Panel. He is a retired partner at King & Spalding. He focuses his practice on international and domestic construction arbitration and dispute resolution.

The cures

The College of Commercial Arbitrators[2] decided in 2008 to address these complaints head-on and drill down on the causes and possible cures. In October 2009, they convened a National Summit on Business-to-Business Arbitration in Washington, which brought together parties/in-house counsel, outside counsel, arbitrators and provider organizations to analyze and address the concerns of the business community about commercial arbitration. The result was

See ***Cost****, page* ***5***

Controlling time and cost in arbitration

Cost, from page **4**

a significant 75-page document titled "Protocols for Expeditious, Cost-Effective Commercial Arbitration — Key Action Steps for Business Users, Counsel, Arbitrators and Arbitration-Provider Institutions."[3] The protocols provide nearly 50 concrete proposals for steps that can be taken by parties, counsel, arbitrators and provider organizations to better enable arbitration to achieve fair outcomes in a timely and cost-effective manner. The overarching principles in the protocols are the following:

Be deliberative and proactive. Promoting economy and efficiency in arbitration begins with deliberate, aggressive action by businesses and counsel at the time of contract planning and negotiation and continuing throughout the arbitration process. This concept is reflected in many of the particular protocols, perhaps most pointedly in protocol No. 3 for arbitrators: "Actively manage and shape the arbitration process; enforce contractual deadlines and timetables." Parties and their lawyers often contribute to delay and potential added cost by seeking extensive discovery and a hearing a year or more after filing; but, then, in hindsight they often will say that they expect a managerial arbitrator to save them from their own requests.

Control discovery. U.S.-style discovery is the chief culprit of current complaints about arbitration morphing into litigation. Arbitration providers should offer meaningful and limited alternative discovery routes that the parties might take. (Protocol for providers No. 3.)

The parties and their counsel should work to reach pre-dispute agreements on the acceptable scope of discovery, and arbitrators should exercise the full range of their power to implement an efficient discovery plan. (Protocol for outside counsel No. 5; protocol for arbitrators No. 6.)

Control motion practice. Some see current motion practice as adding another layer of courtlike procedures, resulting in heavy costs and delay. Others see current motion practice as missing an opportunity for reducing costs and delay. The key is recognizing whether in a particular case a substantive motion would advance or reduce the goal of lower cost and greater efficiency in the particular case.

Control the schedule. Since work expands to fill the time allotted, it is critical to place presumptive time limits on activities in arbitration or on the overall process, coupled with "fail safe" provisions that ensure the process moves forward in the face of inaction by a party. At hearings, for example, the use of a "chess clock" approach is of proven value in expediting examinations and presentations.

The central lesson. In the final analysis, the central lesson of the protocols is that the core value of arbitration is choice. The business users and in-house counsel who draft the deal start with the greatest range of choice in what procedures and limitations they place in the arbitration agreement—because arbitration is a creature of contract. Even after an arbitration starts, parties and their lawyers, and if necessary an arbitrator, have to make choices about what discovery is really needed, which motions can meaningfully advance the case, and how long all of these activities must really take. With certain choices, many arbitrations can be concluded in 90 to 120 days, and almost all in less than a year. Court litigation, by contrast, does not typically offer this range of choice. The unique and inherent value of the protocols is that they are perhaps, to date, the most succinct and comprehensive analysis of the causes, cures and remedies for cost and delay in commercial arbitration.

[1]See Fulbright & Jaworski survey, http://www.litigationtrends@fulbright.com; and White & Case/Queen Mary School of International Arbitration, University of London report, http://www.arbitrationonline.org/research/2010/index.html.

[2]The College of Commercial Arbitrators was established as a U.S. nonprofit corporation in 2001. Its mission is to promote the highest standards of conduct, professionalism and ethics in commercial arbitration, to develop "best practices" guidelines and materials, and to provide peer training and professional development. Its membership currently consists of approximately 200 leading commercial arbitrators in the U.S, and abroad. See CCA website, http://thecca.net/bio.aspx?id=browse. Both authors are fellows in CCA.

[3]The protocols were chiefly drafted and edited by Thomas J. Stipanowich, CCA Fellow, William H. Webster Chair in Dispute Resolution and professor of law at Pepperdine University School of Law and Academic Director of the Straus Institute for Dispute Resolution; the Hon. Curtis E. von Kann, CCA Fellow and former District of Columbia Superior Court judge; and Deborah Rothman, CCA Fellow and full-time arbitrator and mediator. The complete protocols may be found and downloaded from the College of Commercial Arbitrators website, http://www.thecca.net/CCA_Protocols.pdf.