BY KENNETH C. GIBBS AND BARBARA REEVES NEAL

It's Time to Fix Arbitration Discovery

ARBITRATION IS UNDER ATTACK TODAY for being too cumbersome and too costly. Standard arbitration agreements and practices have taken on all the trappings of litigation—protracted discovery, extensive motion practice, and invocation of the rules of evidence. Litigators, accustomed to the rules and procedures of the courtroom, import those habits into arbitration, demanding broader discovery and motion practice. Some arbitrators respond by conducting arbitration hearings with the precision of a courtroom, feeling compelled to do so by the parties' preferences. A recent survey indicated that corporate counsels are *removing* arbitration clauses from their contracts because they have concluded that arbitration is as cumbersome and costly as litigation. The latest edition of the American Institute of Architects construction forms, the nation's most widely used template for building contracts, eliminates the default binding arbitration provision, long a sine qua non of construction contracts. Parties must henceforth affirmatively agree to arbitration by checking a box or, by default, go to court.

It is time to return arbitration to its fundamentals. Arbitration began as an efficient and economical binding dispute resolution procedure. It was designed to provide cost savings, shorter resolution times, a more satisfactory process, expert decision makers, privacy and confidentiality, and relative finality. Arbitration has had a long history in real estate and construction disputes, for which there is an acute need to close transactions, keep construction on schedule, and obtain financing without the fear of being tied up in court for years.

Why has arbitration become so expensive? A recent report by a committee of the New York State Bar Association[1] attributed the cost explosion to the increasing use of wide-ranging discovery. Litigators have a tendency to try cases in arbitration with the same thoroughness and rigor as they would be tried in court. Arbitration, traditionally designed to operate with little or no discovery, gradually found itself burdened with extensive discovery and its commensurate costs. Even when the arbitration clause or rules limit discovery, it is not unusual for the lawyers to agree to expansive discovery.

If arbitration continues along this path, it is destined to collapse of its own weight. Recognizing this, a number of arbitration providers and the College of Commercial Arbitrators have developed arbitration protocols, rules, and recommendations about controlling discovery in arbitration.[2] These efforts are good first steps, but implementing them will require businesses, in-house counsel, and outside counsel—the consumers of arbitration—to take a leap of faith and support the arbitrators and arbitration providers in their efforts to balance efficiency and fairness—and return arbitration to its fundamentals.

The first step is more effective and focused discovery. Based on the reports of the major arbitration providers, the following seven recommendations are a good place to start:

1) Draft or select arbitration clauses that limit discovery and that provide arbitrators with the ability to exercise their judgment to control the process. Do not incorporate the Code of Civil Procedure and broad discovery. An arbitrator can advise against invoking these rules but lacks the authority to control the process. The arbitration clause you draft will determine the arbitration you get.

2) Designate an arbitration provider that uses rules that are compatible with your goal of an efficient, cost-effective arbitration, and allow high-quality arbitrators to actively manage it from start to finish.

3) Focus document production requests narrowly with respect to relevant date ranges, number of custodians, and material evidence. Eliminate common boilerplate language such as wide-ranging demands for "all documents that refer to…."

Litigators have a tendency to try cases in arbitration with the same thoroughness and rigor as they would be tried in court.

4) The parties should cooperate in producing documents in a convenient and usable (i.e., searchable) format.

5) Agree upon search terms and use sampling to confirm the effectiveness of the terms. Cooperate in agreeing to the clawback of inadvertently produced privileged documents, eliminating the necessity for extensive and detailed review of all the electronic files being produced. Document review is incredibly expensive and often accomplishes little if the search terms have been properly defined.

6) Institute cost shifting if a requesting party demands broad and expensive production. Grant the arbitrator the authority to allocate costs after the usefulness of the production has been determined.

7) Balance need and burden, and give the arbitrator the ability to do so. Educate your client on the benefits of cost-effective arbitration and how it differs from litigation.

The beauty of arbitration and its fundamental advantage over litigation is the opportunity to choose the dispute resolution procedures and the decision maker (the arbitrator) that you want. Lawyers who are unhappy with the current state of arbitration should advise their clients on how they can structure the arbitration process to better serve their goals and priorities. ■

[1] NEW YORK STATE BAR ASSOCIATION, ARBITRATION DISCOVERY IN DOMESTIC COMMERCIAL CASES: GUIDANCE FOR ARBITRATORS IN FINDING THE BALANCE BETWEEN FAIRNESS AND EFFICIENCY (2009).

[2] *See* JAMS RECOMMENDED ARBITRATION DISCOVERY PROTOCOLS (2009); AAA AND ICDR GUIDELINES FOR ARBITRATORS CONCERNING EXCHANGES OF INFORMATION; CPR PROTOCOL ON DISCLOSURE OF DOCUMENTS AND PRESENTATION OF WITNESSES IN COMMERCIAL ARBITRATION (2009).

Kenneth C. Gibbs and Barbara Reeves Neal are arbitrators and mediators with JAMS.