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Controlling Costs in Commercial Arbitrations

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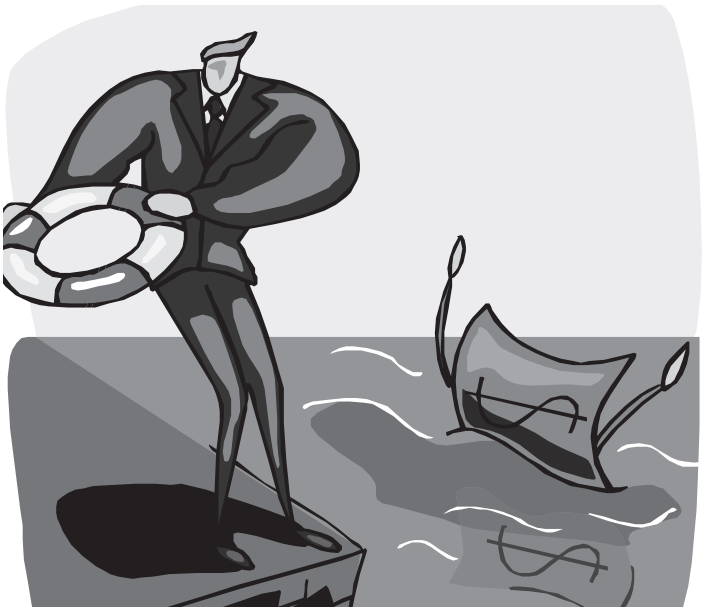
In recent years, businesses that use arbitration increasingly have voiced the complaint that arbitration has become like litigation: too costly and protracted. To address these concerns, the parties and attorneys involved must make conscious decisions before and after a dispute arises. They should create an arbitration process that contains procedures best suited to resolve the dispute fairly and meet the parties' expectations in an expeditious and cost-effective manner.

ARBITRATION

Long before a dispute occurs, parties should draft a clear arbitration clause. This helps avoid uncertainty and disagreement as to the clause's meaning and effect. As a general rule, broad-form arbitration clauses, under which all disputes between the parties arising out of the agreement are submitted to arbitration, are preferable to narrow-form clauses, which frequently result in extended and expensive disagreement over whether the arbitration clause covers the dispute in question. To avoid later disagreement, lawyers should spell out venue, choice of law and procedure.

The arbitration clause must address discovery, a significant cause of increased expense in arbitrations. Even when the dispute may involve millions of dollars, parties can tailor discovery to develop essential evidence and control costs. The parties should include specific language addressing the number of depositions and production of documentary evidence or adopt the discovery procedures of an ADR provider.

The arbitration clause also should address selection and appointment of the arbitrator. Disputes with respect to arbitrator selection, in particular a three-arbitrator panel, can result in significant delay and added expense. Clearly setting forth the selection procedure can help prevent such problems. Parties should consider relying on a sole arbitrator unless the amount in controversy or issues involved dictate otherwise.



After Arbitration Begins

The manner in which the initial scheduling conference is conducted is vitally important. When a party's goal is to control costs and the length of the proceeding, its attorney should communicate that to the arbitrator and the opposing side. A general counsel or other party representative should participate in the scheduling conference. Too often, attorneys and arbitrators who are comfortable appearing in court under federal and state procedural rules will adopt those rules for an arbitration proceeding unless a party makes its wishes known otherwise.

Attorneys should meet and confer prior to the scheduling conference to reach agreement on as many deadlines as possible. The arbitrator will conduct the initial scheduling conference by conference call. Counsel should hammer out a timetable for disposition containing the tightest realistic deadlines given the nature of the case. All parties, attorneys and arbitrators should coordinate their calendars to avoid delays. Most arbitrators consider six to eight months a reasonable amount of time to prepare a case for hearing.

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Limit discovery to what is absolutely essential. Attorneys should not merely follow the process available in litigation. The scope of discovery in arbitration is limited to relevant evidence. Strict adherence to this rule will avoid fishing expeditions. Arbitrators require informal exchange of documents, and they strictly limit interrogatories and requests for production. Arbitrators also may limit depositions to key fact witnesses, decision-makers and experts.

Here are 10 cost-saving methods that an arbitrator can adopt at the scheduling conference:

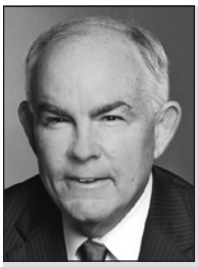
1. Use e-filing for all pleadings.
2. Produce documents in electronic format only.
3. Maximize the use of information technology systems, including video conferencing and Skype.
4. Establish a process for the IT experts to confer and distill e-discovery to relevant evidence.
5. Limit documents required to be filed or delivered to the arbitrator.
6. Establish a presumption that all documents are authentic and admissible unless specifically challenged.
7. Agree to a joint sequentially numbered exhibit binder.
8. Provide for the exchange of the list of witnesses and the timing of testimony.
9. Arrange for the parties to share audio/visual equipment.
10. Establish time limits for testimony and split the time equally.

Attorneys should modify their motion practice in arbitration. Hearings on motions significantly increase the cost of arbitrations. The arbitrator may require lead counsel to confer before filing any motions. Attorneys can keep costs down by resolving procedural and discovery disputes via informal telephone or video conferences with the arbitrator. They also can limit dispositive motions to purely legal issues that may resolve one or more claims in the arbitration. Attorneys should know that filing a dispositive motion that might involve a fact issue is an unjustified expense and has little chance of success in arbitration. Arbitrators rarely grant such motions because failure to consider relevant evidence is one of the few remaining grounds for vacatur of an arbitration award.

Hearings requiring the presence of the arbitrator, parties, attorneys and witnesses are expensive and should be as short as possible. Counsel should provide the arbitrator with briefing and a proposed award in advance of the hearing to allow him or her to become fully informed as to the issues the hearing will address. Brief opening statements may be appropriate, but written closing statements generally are more helpful to arbitrators.

The major expense incurred after the hearing is the arbitrator's preparation of the award. A well-reasoned award can require significant time and effort and can add to the delay in resolving a case. Lawyers can speed up the process by submitting forms of award within a week of the proceeding. A simple award supported by findings of fact and conclusions of law will provide a basis for the arbitrator's analysis and protect grounds for appellate review. Such an award generally is less expensive and time-consuming than a reasoned award.

Effective and informed decision-making by businesses seeking arbitration is essential to accomplishing the goals of an arbitration program. For arbitration to be a cost-effective and efficient alternative to litigation, knowledgeable, prepared counsel for the parties should take an active role in the process. TNL



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