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How to increase odds of client satisfaction post-arbitration

By Eric E. Van Loon

Full-scale courthouse litigation is pricing itself out of the market of corporate affordability. Except for truly "bet the company" matters, the costs of extensive discovery, dispositive motions, expert reports and challenges, not to mention a full hearing, are becoming prohibitive.

Arbitration should be a quicker, cheaper, more thoughtful way to resolve business disputes. Yet, increasingly, some arbitrations are becoming as elaborate, prolonged, expensive and unsatisfactory as the courthouse alternative they were supposed to avoid.

Following are nine steps counsel can take to increase the odds that their clients will feel greater satisfaction after an arbitration.

1. Choose an efficient and knowledgeable neutral. Prospective arbitrator interviews rightly inquire about subject matter experience. Make efficiency, a firm hand and process streamlining techniques equally important criteria when selecting the arbitrator.

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2. Involve in-house counsel directly in the initial procedural hearing. The initial scheduling hearing sets the tone, and often the requirements, for the rest of the process. Direct in-house counsel participation can be a counterweight to counsel's understandable tendency to want to leave no stone unturned for a comprehensive evidentiary presentation. It helps give clients, who are footing the bill, more effective participation in determining the balance between a cost-effective and a comprehensive process.

3. Limit discovery, especially depositions. As in litigation, an arbitration discovery process can be a major cost driver (in both dollars and time). Both JAMS and AAA rules provide for limited depositions, but the parties, by mutual consent, can and often do propose more than the rules provide. If the parties have selected an arbitrator inclined toward efficiency, one likely to resist even a joint proposal for many depositions, some protection is already in place. Better yet is for counsel to think hard about how information to present the essence of their case can be developed through the fewest number of depositions and to push for reasonable limits.

4. Agree to limit, or eliminate, dispositive motions. Summary disposition motions are rarely successful in arbitration, mainly because summary disposition is inappropriate where key issues of material fact are in dispute, because appeal is rarely available, and because one limited ground for overturning an award is arbitrator failure to give a party an opportunity to present its case. Nonetheless, litigants often offer and brief such motions in order to seek to educate the arbitrator(s) on key issues, or to narrow the scope of the hearing. Some efficiency-oriented arbitrators require a short petition seeking leave for any such motion and request opposition to such leave, before allowing a dispositive disposition request. To seize the initiative and reduce unnecessary client expense, consider approaching opposing counsel before the initial scheduling hearing to make a joint proposal limiting or prohibiting dispositive motions.

5. Stipulate chronologies and undisputed facts to the maximum extent possible. A remarkable proportion of many arbitration hearings is used to establish the evidentiary basis for facts that are not in dispute. Attorneys can save client expense, time and frustration by asking the arbitrator to require stipulations of the basic factual chronology and all facts not reasonably in dispute.

6. Agree to eliminate challenges to exhibit admissibility, except when absolutely necessary. If the parties have chosen the arbitrators(s) wisely, they will be more than able to weigh evidence "for what it's worth."

Eliminating typical objections, consideration of them, and rulings on them, will speed the arbitration process significantly. It will keep the hearing focused on what is truly important to an intelligent resolution on the merits. It also can help the client representative feel that his time at the hearing is being well-spent.

7. Consider the possibility of requiring written direct testimony (especially expert) submitted in advance. This is commonplace in Europe and in international arbitration. While it is important to retain the ability to introduce the witness and establish his credibility, limiting direct testimony can shorten the hearing process immeasurably, while focusing decision-maker attention on the key matters in dispute.

8. Request a "reasoned opinion" of a not-to-exceed or approximate length. Consider in advance what length might be sufficient for clients to understand (only in a miscarriage of justice circumstance, of course) why an award is entered against them. A joint request to aim for, say, 20 or 30 pages can shorten panel deliberation, reduce cost and bring a quicker result (even though this could also deprive the panel of the opportunity to provide, at the client's expense, the definitive magnum opus on the subject of the dispute).

9. Be especially efficiency-conscious when the arbitration clause allows prevailing party attorneys' fees. Especially in this circumstance, it is prudent to conduct the process as if the client could be found to be the non-prevailing party in the end. While it is tempting for litigators to believe that "the other party will have to pay our expenses anyway," this attitude can escalate costs — and sometimes produce disastrous results.

Two countervailing considerations could be good reasons to disregard these suggestions:

- Clients want to feel that their strongest/best possible case has been presented; and
- A thoughtful, detailed award can demonstrate that every argument was considered thoroughly, even when a ruling goes against the client.

Ultimately, the client may decide that these factors (presenting comprehensive evidence and/or having a full elucidation of how every argument was resolved) trump efficiency and cost savings. Yet, even in these circumstances, isn't it better for clients to have alternative approaches laid out, to evaluate them carefully, and to make the decision themselves?

Client satisfaction after an arbitration can stem from a variety of factors. A favorable ruling is, of course, high on the list. Understanding the decision, whichever way it goes, is another.

In addition, I would submit, is feeling that the process was business-like, cost-sensitive, efficient and focused on the heart of the dispute.

These nine suggestions can contribute to the client's satisfaction, once the arbitration is over and the client has moved on. And that, in addition to the comprehensiveness of the presentation, can be a key to the client's satisfaction.

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