

CORPORATE COUNSEL

An **ALM** Website

corpcounsel.com | Thursday, June 1, 2017

Partnering with Outside Counsel to Effectively Manage Commercial Arbitrations

PRESENTED BY JAMS

Hon. Karen Brown Willcutts (Former), FCI Arb, JAMS

In-house counsel sometimes find themselves frustrated because commercial arbitrations are taking longer and costing more than expected. The good news is that there are ways in-house counsel can partner with outside counsel to more effectively manage the process. Addressing with outside counsel at the outset factors such as the terms of the arbitration agreement, the breadth of the pleadings, the extent of discovery, dispositive motions, outside counsel's calendar, and motion practice can go a long way toward creating realistic expectations, achieving greater efficiency, and reducing costs.

Review the arbitration clause with outside counsel.

In some situations, the arbitration agreement may contain provisions that are inappropriate for

the particular dispute because they are either too limiting (e.g., 60 days to get to hearing) or too expansive (e.g., unlimited discovery). If the clause does not fit the case, in-house and outside counsel should discuss whether to try to negotiate changes with the opposing party so that the parameters can be appropriately tailored to the dispute.

Be willing to scrutinize the pleadings.

Unfortunately, some litigators take a "kitchen sink" approach to pleadings and throw in every claim or defense they can think of, regardless of whether they are supported by the facts and the law. Whether it's a standard laundry list of affirmative defenses or unnecessary alternative causes of action, such overreaching pleadings can end up prompting



additional discovery requests and motions to dismiss or for summary disposition from the opposing party. In-house counsel should review the pleadings before they are filed and be willing to question any that appear to be out of bounds.

Plan for and attend the preliminary scheduling conference.

- **Discovery and dispositive motions**

During the preliminary scheduling conference, many arbitrators will discuss limits on discovery and whether dispositive motions will be allowed. Before the conference, ask outside counsel how much written discovery and how many depositions are truly necessary and whether the cost in time and money is justified by the potential benefits. Similarly, since some arbitrators are reluctant to grant dispositive motions, discuss whether the chance of prevailing on a dispositive motion is great enough to justify the increased cost and delay. When considering a motion for partial summary disposition, if eliminating a particular claim or defense is not likely to streamline discovery and/or shorten the hearing, it is probably more efficient to raise the issue in pre- or post-hearing briefing.

- **Counsel's calendar**

Discuss how long it should take to get to a hearing and determine whether outside counsel's calendar is too full to accommodate a timely hearing. In-house counsel should weigh the importance of retaining that particular counsel against the increased delay and potentially higher costs that result from choosing counsel whose calendar is already overbooked.

- **Sit in on the preliminary scheduling conference.**

In-house counsel should sit in on the preliminary scheduling conference if at all possible. Even though she may not actively participate in the conference, her very presence can help ensure that her goals and expectations are taken into account. By the same token, information revealed during the conference, especially in complex cases, may cause her to realize that her expectations are not reasonable and may need to be adjusted.

- **Monitor motion practice.**

In-house counsel should ask to be consulted before motions are filed, especially discovery motions. Sometimes zealous advocates fight over issues that the client is actually willing to compromise on and, by taking a more pro-active role, in-house counsel can help curtail unnecessary motions.

- **Be proactive, not reactive.**

Don't wait until an arbitration is 50% over budget and six months past the expected completion date to react. Although arbitrations can sometimes take unexpected turns that cannot be prevented or anticipated, taking steps to partner with outside

counsel from the outset to plan and manage the process can greatly increase the odds of having an efficient and cost-effective arbitration.

Hon. Karen Brown Willcutts (Former), FCI Arb is neutral based in Dallas. She brings over 30 years of experience as a trial lawyer, judge, mediator and arbitrator to resolve a wide range of civil litigation matters. You may reach her at kwillcutts@jamsadr.com.

