Parties and Counsel:

Make Commercial Arbitration More Efficient, Less Expensive

The American Arbitration Association® (AAA®) has released the results of its recent survey of arbitrator evaluations of parties and their attorneys. Interestingly, the arbitrators made some of the same observations as parties who respond to the AAA's client surveys on cost and efficiency, including the importance of the choices made by counsel regarding the arbitration process. Moreover, the arbitrators highlighted the important role that counsel plays in achieving or frustrating these goals.

The Arbitrator Survey

The AAA surveys its arbitrators when they issue an award in a commercial arbitration. Questions include such things as the arbitration clause, discovery, motion practice, the amount of time spent in different phases of the case, the number of postponements, the arbitrator's impressions about how important speed and economy were to the parties and their counsel, and what factors contributed to increased time and cost in the arbitration.

The total number of arbitrator surveys returned between February 1, 2015 and January 6, 2018 was 422. For those cases, the median claim amount was $2,478,540.[1]

What Factors Impact Time and Costs in Commercial Arbitration?

It is probably no surprise that arbitrators cited discovery practice (39% of survey responses) and motions (36% of responses) as the main factors that increased the time and cost of the arbitrations.

Arbitrators cited "difficult/uncooperative parties" (27% of responses) as the third factor. However, uncooperative parties combined with "difficult/uncooperative" counsel (15.2% of responses) jumps to the forefront with an overall 42% of survey responses citing lack of cooperation as the main factor that increased the arbitration's time and cost. Many arbitrators commented about "difficult counsel," "combative parties," and "antagonism between the parties."

The fourth factor increasing the time and costs of arbitrations was postponements (20% of responses).

The most frequent suggestions that arbitrators made to improve the efficiency of arbitrations were that the parties cooperate in discovery, scheduling, and related matters and limit the amount of discovery they take.

[1] To avoid duplication, only one survey response was counted for each arbitration. Thus, if there were a panel of three arbitrators, the AAA entered only the Chair's survey response. If the Chair did not respond, then the AAA tabulated the first response submitted by a wing arbitrator.

Dispositive Motions

Most arbitration clauses in the cases surveyed did not address motion practice, including dispositive motions. Interestingly, in the few situations where the agreements did address motions, the overwhelming majority of agreements permitted motions (97%), with only a fifth (about 20%) placing restrictions on them.

AAA Commercial Rule R-33 permits dispositive motions, but only if the moving party first demonstrates that the motion is likely to succeed and dispose of or narrow the issues in the case. As a practical matter, this Rule requires arbitrators to screen dispositive motions before allowing them to be fully briefed to avoid unproductive expense and delay. This Rule notwithstanding, however, the surveyed arbitrators reported that parties filed dispositive motions in about 50% of the arbitrations. The survey did not ask the arbitrators how they handled these dispositive motions or what percentage they granted in full or in part.

Discovery and Discovery Motions

Arbitrators reported that most of the arbitration agreements did not address discovery and therefore did not impose a time limit on or restrict the type of discovery allowed. Still, about 25% of the arbitration clauses limited discovery to the exchange of documents. In the other direction, a small but significant percentage of the arbitration clauses (just under 10%) provided for the same kind and extent of discovery as was available in court litigation. Arbitrators reported that, even when the arbitration clause limited discovery, in the majority of instances (57%), the parties in the arbitration agreed to expand discovery beyond those limitations.

In nearly all cases, discovery involved the exchange of documents. The survey showed that depositions also were common and took place in nearly two-thirds of the reported arbitrations (66%). Discovery frequently included the deposition of either experts or non-parties (40% of cases). Interrogatories were relatively unpopular, being used in less than 20% of the reported cases. Discovery disputes happened often, however, with arbitrators ruling on discovery disagreements (whether brought by written motion or orally) in about 70% of the cases. Arbitrators commented on discovery's negative impact on speed and cost: "extensive ESI disputes," "management issues," and "voluminous document requests" all added to the arbitration's time and expense. On the positive side, arbitrators included as best practices "streamlining of discovery" and resolving discovery disputes "without the necessity of motions."

Even with few clause limitations on discovery, discovery generally was completed in a timely manner in a majority of the surveyed cases. Arbitrators reported that discovery concluded in less than six months in about 60% of their cases, took between six and 11 months in about 30%, and took more than one year in only about 10%.

Suggestions For A More Efficient, Less Expensive Commercial Arbitration

What can you, as outside counsel or a potential party to a commercial arbitration, do to make it a more efficient and less expensive process? The arbitrator survey results recommend two different sets of actions: (1) focus on the arbitration agreement pre-dispute and (2) focus on the process once the arbitration is filed.

The Arbitration Agreement

Set controls

An advantage of arbitration is that it allows the business client considerable control over the process, including how much discovery there will be, what motions will be entertained, the length of the hearing, and the time frame

in which the dispute will be resolved. One way parties can exercise this control is by directly addressing such matters in their arbitration agreement. Accordingly, counsel should pay attention to the terms in the arbitration agreement during the drafting process.

Specify arbitrator qualifications

One of the main benefits of arbitration is that you can select your arbitrator, and you can require your arbitrator to have certain qualifications. If that is important, you should include those qualifications in your agreement, being careful not to be so specific that you unduly narrow the pool of potential arbitrator candidates.

Provide for arbitral organization and rules

To avoid potential disagreements and to provide a structure for the entire arbitration process, your arbitration agreement also should provide for administration by a recognized arbitration provider and a specific set of arbitration rules. You should review those rules beforehand to ensure they are suitable for your industry and the kind of disputes that are likely to arise under your agreement. For example, the AAA has different sets of rules for commercial cases, large complex commercial cases, construction cases, and employment cases, to name just a few.

Once you select the arbitration rules that will apply, you will be in a better position to decide whether those rules satisfy any concerns you have about making the arbitration efficient. For example, the AAA Commercial Rules provide that, when a case involves claims of less than $1,000,000, one arbitrator will decide the case unless the parties agree otherwise. Cases above that claim amount are decided by a three-arbitrator panel. In your arbitration agreement, you can change that threshold; for example, you can choose to have three arbitrators only when the case involves claims exceeding $2,000,000 or $3,000,000. Having a single arbitrator can save the parties significant arbitrator compensation and result in the arbitrator's deciding motions more quickly (without the need to confer with panel members), and it usually enables the parties to conclude the evidentiary hearing sooner. AAA statistics show that commercial cases with three-arbitrator panels take, on average, at least three to four months longer to resolve than a single-arbitrator case and cost almost four times as much in arbitrator compensation.[2]

In particular, the parties should consider what the applicable rules say about discovery and motion practice, the two biggest contributors to an arbitration's time and expense. Under the AAA Commercial Rules, arbitrators have broad discretion to decide how much discovery to permit and whether to entertain a particular dispositive motion. If you want to ensure a leaner process, your arbitration agreement might provide that discovery will be limited to the exchange of documents, or that no more than a certain number of, or hours of, depositions may be taken, or that dispositive motions will not be permitted. Of course, these limitations should not be chosen lightly, but, just as for the number of arbitrators, you can build a threshold into your arbitration agreement so that the amount of discovery increases as monetary claim amount increases. Ideally, your arbitration clause should anticipate the kind of disputes that may arise and what discovery will be needed to properly address them.

A simpler idea is just to include a sentence stating that the parties want an arbitration run as efficiently as is reasonably possible. Although that is not a very specific statement, it is something you can point out to the

2 Of course, parties may choose three-arbitrator panels in more complex cases, and the complexity of the case may explain why those cases take longer and cost more in arbitrator compensation.

arbitrator to support a request for limiting discovery or motion practice. Arbitral authority comes from the parties' contract, and such a statement, albeit general, is likely to have an impact on the arbitrator's management of the case.

The arbitrator survey results show that few businesses address arbitration procedures to any significant degree in their arbitration agreements. While this is not necessarily a problem, parties can use the arbitration agreement to more properly reflect and require the process they want.

After An Arbitration Has Begun

In an existing arbitration, it can be harder to reach agreement on issues such as limiting discovery and motion practice because the parties often have very different interests and views about the discovery needs and merits of the case. But agreements are still possible and should be explored, with the parties' picking their battles carefully. Keep in mind that "arbitration is a group enterprise and the arbitrator cannot achieve these ends [speed, economy and a just resolution] without the cooperation of the parties and their counsel." *See* "Muscular Arbitration and Arbitrators Self-Management Can Make Arbitration Faster and More Economical," Mitchell Marinello and Robert Matlin, *Dispute Resolution Journal,* vol. 67, no. 4, at 70 (June 2013) ("Muscular Arbitration").

As the survey results show, cooperation–between the parties and between counsel–substantially influences the overall efficiency of the arbitration process. Counsel's maintaining a good professional relationship with the other side is important and likely to make the entire process go more smoothly. Many arbitrators noted that counsel's cooperative attitudes were the type of best practices that make arbitration efficient and cost effective. Arbitrators commented that "attorneys worked together to make things better," "counsel cooperated on discovery and schedules," and "counsel were generally cooperative with each other, working out disputes…without the Panel's assistance." Indeed, there was a positive correlation between the arbitrator's view of a case's efficiency and the arbitrator's perception of the importance the parties and their counsel placed on having an efficient and cost-effective arbitration process.

Prior to the preliminary hearing with the arbitrator, the parties should discuss the discovery needs of the case and try to agree on things such as the exchange of documents, the number of and time allowed for depositions (if any), the identity of witnesses, how long the arbitration hearing is expected to take, when it should be scheduled, and where it should take place. Compromise is important, and the arbitrator will note it. Not agreeing on discovery and the case schedule is usually counter-productive, as it takes the decision-making out of the parties' hands and puts it into the arbitrator's, with the arbitrator probably less informed about the case than counsel. Ask yourself whether you and your client are likely to be better served by a compromise with your adversary or the decision of an arbitrator faced with opposing positions. Moreover, in AAA cases, the parties are invited to participate in the preliminary hearing itself, allowing them to hear directly from the arbitrator, to be engaged in the process, and to oversee outside counsel. After the preliminary hearing, once the scheduling order is in place, the parties and counsel should stick to the schedule with as little modification as possible, particularly with respect to the hearing dates, to keep the case efficient and on track.

***Remember:* the arbitrator's goal is to decide the case on the merits; do not bog the arbitrator down with disputes on matters of limited significance to that fundamental goal.** Indeed, arbitrators commented that some of the best practices they saw included "allowing the parties to agree on most issues."

Finally, parties should retain counsel familiar with the arbitration process, as they may better appreciate the cooperation the arbitrators will expect and how to protect the efficiencies that arbitration brings. One arbitrator specifically noted, "The lawyers were excellent so that contributed the most" to the efficient process. Remember that arbitration is not litigation, and "importing litigation procedures into arbitration is one of the main causes of the increased cost and time involved in arbitration." (Muscular Arbitration, at 69-70.) This is reflected in one arbitrator's comment that "the best practices used were communication and discussions between counsel that limited discovery and other disputes. Both sides were well prepared for the hearings and efficient in their presentations, allowing us to use eight instead of the anticipated 10 or more days." As noted previously, preparation is key, with arbitrators' commenting that best practices included each party's being "well prepared for the arbitration hearing." Finally, as one arbitrator put it, "Both sets of counsel were highly professional and had a great deal to do [with] the efficient handling of the case."

Conclusion

The results of the arbitrator survey show the impact that parties and their counsel can have on the cost and efficiency of commercial arbitrations. Where counsel and their clients are cooperative and knowledgeable about the arbitration process, they can work together and with the arbitrator to make commercial arbitration more cost effective and efficient than litigation.