Focus Business Litigation/Trial Skills

Arbitration: Still an Effective Method of Resolving Business Disputes?

BY KAREN WILLCUTTS

In recent years, arbitration has come under increasing fire as an effective method of resolving business disputes. The primary criticism is that arbitration no longer offers the savings in time and money that the parties envisioned when they included arbitration clauses in their contracts. There are, however, steps that attorneys can take to save time and money and increase their clients' satisfaction with the process.

Be realistic and involve the client from the outset. Many times parties are dissatisfied with arbitration because they have unrealistic expectations, often stemming from the arbitration clause. For example, an arbitration clause that allows extremely limited discovery and requires a final hearing in 90 days might be realistic in a fairly simple, low-dollar dispute, but is almost never realistic in a complex business dispute. Corporate counsel responsible for drafting arbitration clauses should seriously consider avoiding such limitations and, instead, allow their arbitration counsel the flexibility to craft a process appropriately tailored to the complexity of the dispute.

When confronted with an overly-restrictive clause, arbitration counsel should promptly discuss it with in-house counsel and seek permission to negotiate more appropriate parameters with opposing counsel. It is also helpful to include in-house counsel in the preliminary scheduling conference and other conferences with the arbitrator so that in-house counsel can understand the issues that may be causing increased expense or delay and can add his or her input.

Consider expedited procedures. If the contract does not identify the rules to be used, review the available rules and procedures and consider whether the dispute can be handled through one of the streamlined or expedited processes offered by the major arbitration providers. If so, try to obtain opposing counsel's agreement to select that process.

Craft an appropriate scheduling order. Thorough preparation for the preliminary scheduling conference is essential. Counsel must be well-acquainted with the underlying facts and should try to determine the volume of documents to be exchanged, whether significant e-discovery will be required and how many depositions will be needed. During the scheduling conference, establish reasonable limits on discovery, including limits on the number of document requests and interrogatories, if any. The use of a corporate representative deposition, in lieu of interrogatories, along with limits on the total hours of deposition testimony, can save time and money.

Cooperate in discovery. Cooperation in the discovery process can greatly increase efficiency and reduce costs. Most arbitrators try to ensure that each party gets the information to which it is entitled and will not tolerate discovery abuse. If the rules require an initial, voluntary exchange of relevant documents and information, do it! Then, tailor any additional discovery requests, which can be handled informally through letters, to seek only specific information and documents not already provided.

In arbitrations involving huge numbers of potentially relevant documents, work with the arbitrator to devise a "phased" document production, in which the more easily retrievable documents are produced first. After that, the party seeking more documents must convince the arbitrator that the time and expense of advancing to the next phase of document production is justified.

Finally, make a good faith effort to resolve any disputes before filing a motion to compel. And if such efforts fail, promptly bring the matter to the arbitrator's attention. Waiting too long to bring a discovery dispute to the arbitrator's attention inevitably causes delay and may necessitate postponing the final hearing date.

Limit dispositive motions. Because there is no right to appeal an arbitration award in most circumstances, most arbitrators are reluctant to grant dispositive motions. As a result, dispositive motions usually gain little for the increased cost and delay. Dispositive motions can be useful in limiting the issues for the final hearing but should generally only be filed to address true questions of law.

Make it easy for the arbitrator to rule in your favor. Once the final hearing stage approaches, help the arbitrator rule in your favor and efficiently write a well-reasoned award. First, prior to any deadline for amending pleadings, make sure that causes of action are stated clearly and concisely and bogus claims or defenses are eliminated. Additionally, provide the arbitrator with a pre-hearing brief that succinctly outlines the elements of each cause of action or defense. Finally, consider submitting a proposed award in Word® format that the arbitrator can use to draft the final award.

Conclusion. In examining the value of arbitration, keep in mind the significant benefits the arbitration process affords besides just savings in time and expense. In arbitration, parties choose their decision makers, the proceedings are private, and the decision is generally final. These benefits can still be achieved in a timely and cost-effective manner with advance planning, hard work and cooperation. **HN**

Karen Willcutts is a mediator, arbitrator and special master with JAMS' Dallas office. She is a former Associate Judge for Dallas County and is a former chair of the Antitrust and Business Litigation Section of the State Bar of Texas. She can be reached at kwillcutts@jamsadr.com.

You are invited to the "Civility Matters" CLE

Tuesday, January 3, 2012
Noon at Belo

Speakers:
Hon. Jane Boyle, U. S. District Judge
Hon. Douglas Lang, Fifth District Court of Appeals
Robert H. Mow, Jr., K&L Gates
Cheryl Camin Murray, Winstead PC
Windle Turley, Turley Law Firm

Ethics 1.00, pending

Sponsored by the Professionalism Committee and the Tort & Insurance Practice Section.