Realizing the Potential

Cost Savings of Arbitration: It's in the Process

By Hon. Stuart A. Nudelman (Ret.) and Jann Johnson

Arbitration can be cost-effective, but without the right process, your arbitration savings go out the window. Bad process yields inefficient arbitration and ratchets up your costs. Designing the right process for the arbitration is the most critical factor in cost-effective settlements.

Keys to designing a cost saving arbitration process:

Take Control

Arbitration is simply one means for resolving disputes. It is popular because arbitration has the potential to yield tremendous cost savings. But it is up to counsel and their clients to take charge of the process to prevent it from spiraling out of control and eroding potential savings.

Taking charge means "fitting the forum to the fuss." Parties have the opportunity to save money by dealing with process and procedural issues up front and determining the best way for the arbitration to unfold.

Taking charge also means reigning in actions that can increase costs. Parties must be mindful of conducting excessive discovery, failing to stipulate, using multiple arbitrators, allowing excessive motion practice, postponing hearing dates, and filing meritless appeals.[1] Parties can prevent these cost-increasing practices by carefully contracting and devising their own tribunal customized to their needs, which contains language that prevents or reduces cost-increasing practices.

Use Arbitration Experts

Often counsel are not familiar with how to write pre-dispute arbitration clauses included in a contractual agreement. If a contract calls for an arbitration clause, counsel cannot be complacent as they draft this language. This all-important clause should define and stipulate the controls and mechanisms that will ensure that the arbitration process is efficient and appropriate for potential disputes.

Once a dispute arises, if there is a pre-dispute arbitration clause, parties have the opportunity to revisit this clause to confirm that the language will support the efficient resolution of the dispute. If not, counsel may draft and stipulate to changes allowing for the best arbitration process for that dispute.

If there is no pre-dispute clause and parties have simply agreed to arbitration, counsel has an opportunity to draft an Agreement to Arbitrate. In the Agreement, counsel can stipulate to and define variables such as scope of discovery, arbitrator powers, arbitration rules and whether the award will be reasoned or not…which can impact the efficiency and the cost of the arbitration.

Expert advice can streamline these tasks. Highly skilled case managers at ADR Systems of America are a free resource to counsel on their options in process design, arbitration rules and arbitrators. Involving a professional case manager early in the process can jump-start and facilitate communication between counsels, and assist busy lawyers with the pre-arbitration administrative tasks necessary for a well-executed arbitration. A third-party, neutral ADR services provider such as ADR Systems can help get the parties to the table faster, and reduce costs by helping to design the appropriate arbitration process.

Leverage Soft Cost Savings

There are both "hard" and "soft costs" associated with arbitration. The cost of the arbitrator is a hard cost, usually based on a pre-determined hourly or daily rate. On the other hand, arbitration also involves soft costs, which are not fixed. Consider the arbitration hearing. Parties or

lawyers attending the hearing can be scheduled to minimize travel time and travel cost. Similarly, carefully choosing the location of the hearing can reduce costs associated with facilities, catering and administration. Keeping soft costs in check, parties can reap substantial savings. When drafting the Agreement to Arbitrate, parties have the opportunity to leverage soft cost savings.

Parties will lower soft costs if the Agreement to Arbitrate controls how an arbitrator will enforce, for example, discovery violations. The arbitrator will work more efficiently—lowering costs—when rules are clearly spelled-out in the Agreement. Arbitration is a private, confidential process. Companies will often choose arbitration to avoid the potential negative publicity associated with litigation, thereby also reaping soft cost benefits.

Generally, arbitration saves time and money. Studies have shown that arbitration cases conclude in about one-third the time of litigated cases.[2] If the arbitration process is carefully crafted, and the Agreement to Arbitrate is complete and controls participant actions with clear rules, there is tremendous potential for cost savings over traditional litigation.

[1] Mitchell Marinello, Protecting the Natural Cost Advantages of Arbitration, 23(1) IN-HOUSE LITIGATOR 1, (p. 1) (2008).

[2] Mark Fellows, The Same Result As In Court, More Efficiently: Comparing Arbitration and Court Litigation Outcomes, The Metropolitan Corporate Counsel, July, (p. 32) (2006).

About the Authors

Hon. Stuart A. Nudelman (Ret.) is known for his creative settlements in resolving complex, emotionally charged matters. He has over a 90% settlement rate with mediation and has successfully arbitrated numerous complex, multi-party arbitrations as a sole arbitrator. His areas of expertise include business/ commercial; medical, accounting, and legal malpractice; construction and defect allegations; products liability; personal injury, and employment matters. Judge Nudelman is available through ADR Systems of America: 312-239-1552.

Jann Johnson, an attorney, with an MS in Management and Organizational Behavior, practices in the areas of employment and business law. Previously, she worked for Accenture as a Manager in Marketing & Communications, and has continued to work with Accenture on projects regarding Inclusion & Diversity and Commercial & Contract Management. Ms. Johnson is available at: 630-667-7640.

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