CCA PROTOCOLS

Over the last several years, arbitration has been subject to a good deal of criticism. The criticism is focused on two historically inherent advantages of arbitration over court litigation – faster result and lower expense. Unfortunately, some of the criticism is well founded – in many instances arbitrations have been drawn out and expensive. There are different opinions about what was causing this trend. Due to the popularity of arbitration, many fine trial lawyers without arbitration training or experience have been drawn into the arbitration process. They have tended to treat the arbitration process as litigation, seeking full-blown courthouse discovery. Arbitrators confronted with this situation face a tough challenge to persuade counsel of proceeding with traditional arbitration methodology with abbreviated discovery.

Faced with the reality of having many commercial enterprises turning away from arbitration due to the time and expense involved, the College of Commercial Arbitrators (www.thecca.net) conducted a business-to-business summit. All of the stakeholders were present, including the users of arbitration, arbitration providers, arbitrators and outside counsel. Based on the results of the summit, the College of Commercial Arbitrators developed protocols which address what each stakeholder can do to bring the arbitration process back to its roots.

Protocol for Business Users and In-House Counsel

1. Use arbitration in a way that best serves economy, efficiency and other business priorities. Be deliberate about choosing between "one-size-fits-all" arbitration procedures with lots of "wiggle room" and more streamlined or bounded procedures.
2. Limit discovery to what is essential; do not simply replicate court discovery.
3. Set specific time limits on arbitration and make sure they are enforced.
4. Use "fast-track arbitration" in appropriate cases.
5. Stay actively involved throughout the dispute resolution process to pursue speed and cost-control as well as other client objectives.
6. Select outside counsel for arbitration expertise and commitment to business goals.
7. Select arbitrators with strong case management skills.
8. Establish guidelines for early "fleshing out" of issues, claims, defenses, and parameters for arbitration.

9. Control motion practice.

10. Use a single arbitrator in appropriate circumstances.

11. Specify the form of the award. Do not provide for judicial review for errors of law or fact.

12. Conduct a post-process "lessons learned" review and made appropriate adjustments.

Protocol for Arbitration Providers

1. Offer business users clear options to fit their priorities.

2. Promote arbitration in the context of a range of process choices, including "stepped" dispute resolution processes.

3. Develop and publish rules that provide effective ways of limiting discovery to essential information.

4. Offer rules that set presumptive deadlines for each phase of the arbitration; train arbitrators in the importance of enforcing stipulated deadlines.

5. Publish and promote "fast-track" arbitration rules.

6. Develop procedures that promote restrained, effective motion practice.

7. Require arbitrators to have training in process management skills and commitment to cost- and time-saving.

8. Offer users a rule option that requires fact pleadings and early disclosure of documents and witnesses.

9. Provide for electronic service of submissions and orders.

10. Obtain and make available information on arbitrator effectiveness.

11. Provide for expedited appointment of arbitrators.

12. Require arbitrators to confirm availability.

13. Afford business users an effective mechanism for raising and addressing concerns about arbitrator case management.

14. Offer process orientation for inexperienced users.

Protocol for Outside Counsel

1. Be sure you can pursue the client's goals expeditiously.
2. Memorialize early assessment and client understandings.
3. Select arbitrators with proven management ability. Be forthright with the arbitrators regarding your expectations of a speedy and efficient proceeding.
4. Cooperate with opposing counsel on procedural matters.
5. Seek to limit discovery in a manner consistent with client goals.
6. Periodically discuss settlement opportunities with your client.
7. Offer clients alternative billing models.
8. Recognize and exploit the differences between arbitration and litigation.
9. Keep the arbitrators informed and enlist their help promptly; rely on the chair as much as possible.
10. Help your client made appropriate changes based on lessons learned.
11. Work with providers to improve arbitration processes.
12. Encourage better arbitration education and training.

Protocol for Arbitrators

1. Get training in managing commercial arbitrations.
2. Insist on cooperation and professionalism.
3. Actively manage and shape the arbitration process; enforce contractual deadlines and timetables.
4. Conduct a thorough preliminary conference and issue comprehensive case management orders.
5. Schedule consecutive hearing days.
6. Streamline discovery; supervise pre-hearing activities.
7. Discourage the filing of unproductive motions, limit motions for summary dispositions to those that hold the reasonable promise for streamlining or focusing the arbitration process, but aggressively on those.
8. Be readily available to counsel.

9. Conduct fair but expeditious hearings.

10. Issue timely and careful awards.

The Arbitrator that I am looking for will:

- Have recurrent training in the substantive law of arbitration and in managing arbitrations
- Insist on cooperation and professionalism from day one
- Radiate and project impartiality and objectivity, and that this matter is all that is on his or her mind at the time
- Actively manage the arbitration process and shape it to fit the parties' needs - not necessarily counsels' needs.
- Conduct a thorough preliminary conference, issue Scheduling Orders that truly manage the case and enforce contractual deadlines and dates set in the Scheduling Order
- Schedule consecutive (and sufficient) hearing days, streamline discovery and supervise pre-hearing procedures - will be on top of and use technology.
- Discourage a motion practice and limit dispositive motions to those that will limit the issues or streamline the process - will act aggressively on those.
- Be readily available and extremely responsive - an advantage of the arbitration process is the ability to have a dialogue with the Arbitrator and that he or she is the focal point from day one to Award.
- Conduct a fair, expeditious and efficient hearing and issue a timely, careful and concise Award.

Summary

Arbitration has additional advantages over litigation other than just cost savings and shorted resolution time. These include having expert decision makers, privacy, confidentiality and relative finality. Arbitration of commercial disputes has grown because businessmen have realized that by using arbitration rather than traditional trial, they avoid unpredictable juries and judges with little or no commercial experience. Yet, arbitration has been a victim of its own success, and is in danger of losing its advantages unless the stakeholders in arbitration appreciate the reasons for the growing dissatisfaction and adopt practices to shorten the arbitration process and reduce its expense.