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4 Tips For Keeping Thrifty Arbitration Clients Happy

By **Caroline Simson**

Law360, New York (June 2, 2016, 2:26 PM ET) -- International arbitration was traditionally touted as a cost-efficient and expeditious way of resolving disputes, but these days the cost of proceedings can quickly spiral out of control unless the parties are careful to keep their clients' bottom line in mind.

Reducing the costs of arbitration is something that every international arbitration attorney must consider at some point or another, and for good reason — even if you are able to secure successful outcomes for your clients, they're not likely to be pleased to learn that it took six months more than expected and exponentially more in fees.

"It's no secret that international arbitration has become more litigious and more expensive in recent years," said Mayer Brown partner B. Ted Howes, leader of the firm's U.S. international arbitration practice and a member of the firm's global leadership team for international arbitration. "Clients are looking for ways to streamline the process and lower expenses, and we need to respond to their demands."

The issue is so important that some major institutions, such as the Singapore International Arbitration Centre and the International Chamber of Commerce's International Court of Arbitration, offer simple fee calculators that take into account whether there will be one arbitrator or three arbitrators presiding over the case, and the amount in dispute, to come up with a potential range of fees.

But there are steps that practitioners can take at all stages of a dispute or potential dispute — when an arbitration clause is drafted, immediately before the arbitration, and during the arbitration — to ensure that they've done everything they can to keep their costs down and clients happy. Here, experts provide a few tips to ensure that clients aren't left footing an unwanted and unanticipated bill.

Don't Create Issues

When drafting an arbitration clause, it's generally a good idea to rely on the model clauses provided by many arbitral institutions. But it may be tempting to add certain provisions that are ostensibly aimed at ensuring any potential arbitration proceedings are run smoothly and fairly. However, those additional clauses may do more harm than good.

One example of that is a provision stating that arbitrators may not decide contrary to law. That builds in a potential grievance for the party who is unhappy with the arbitrator's decision, and causes tension between that provision and the limited grounds on which a party may challenge an award under the

New York Convention, according to Neil Popovic, team leader of Sheppard Mullin Richter & Hampton LLP's international arbitration team.

Another example might be some special rules about the exchange of evidence that vary from the standard rules adopted by the arbitral institution chosen to administer the dispute.

Nevertheless, Popovic said that it's important to balance the benefits of using the model clauses provided by arbitral institutions against the needs of the client.

"If you're going to customize, you need to do it in a way that is thoughtful and mindful of any ambiguities you may be creating, or any inconsistencies you may be creating that would yield some issue that the parties could spend time, money and energy disputing," he said.

Be Organized

It's also useful to try to plan the arbitration out with as much detail as possible, with an eye toward trying to head off any potential delays, or at least to incorporate them into the schedule.

At the beginning of an arbitration, the parties sit down with the arbitrators to establish a plan, and it's not helpful to anyone to show up without a concrete schedule in mind, according to WilmerHale senior counsel James Carter, the chairman of the board of the New York International Arbitration Center.

Issues like what witnesses will be called, what subpoenas are needed, and the extent of document discovery can be planned months in advance, and the arbitrators are generally receptive to such a schedule — even encouraging in some cases.

Parties may also agree to a more narrow degree of document discovery than is typical in U.S. litigation, which can help expedite the proceedings. One example of that would be to agree to abide by the International Bar Association's Rules on the Taking of Evidence in International Arbitration, which provide, in general, that expansive American- or English-style discovery is generally inappropriate in international arbitration.

"I find these days that arbitrators lean quite heavily on the parties to get them to agree to that, and when arbitrators want something, the parties will often give it to them," said Howes. "The IBA rules are more or less becoming the norm anyway."

Be Creative

While dispositive motions such as motions to dismiss and motions for summary judgment aren't written into any of the international arbitration rules, that doesn't mean similar measures are off-limits to parties. International arbitrators generally have wide discretion in the exercise of their authority, and that means they may be willing to consider such a measure if it's likely to expedite or simplify the proceeding.

In arbitrations where it's clear that a claim is barred for some reason, such as being outside the statute of limitations, an effort by the parties to have the arbitrators consider that issue at the outset makes sense. Another way to separate certain issues for early resolution would be to ask that the proceeding be bifurcated, according to Howes.

"If you think there's a really specious claim against your client, a good way to shorten the process and save money up front is to ask the arbitrators to bifurcate that claim," he said. "You can't always do it, and it's much harder in international arbitration than in litigation, but it's doable."

The tactic can even be used in an offensive manner, by seeking an expedited partial award on a claim. While that's harder than a defensive dispositive move, it can work on a narrow issue. One example of that would be taking an audit of a company embroiled in the dispute where the contract between the parties clearly provides for the opportunity to do so, but another party objects, he said.

Another strategy that's often employed in investment arbitration is to separate any jurisdictional issues from the start so that those issues are decided first. It's also a concept that can apply when deciding liability and damages, according to Howes.

Be Agreeable

In domestic litigation, attorneys are at the mercy of the judge's schedule and have little control over the case schedule. But in arbitration, an arbitrator's authority only exists due to the agreement of the parties, which means they can agree on and stick to a short timeline.

The problem is that once a dispute rears its ugly head, it's unlikely that the parties are going to agree on anything. Nevertheless, there are still some things that the parties may be able to agree on in the initial stages of an arbitration.

One of those things is to rely on written witness statements rather than depositions, according to Carter. That's a step that can save significant time, since parties come to the hearing in an arbitration with a pretty good idea of what the witnesses are going to say, he said.

"You can cut down the hearing time enormously, and that's the biggest single cost in all this," he said.

But being agreeable doesn't just help when it comes to procedural issues. It can also help to set the tone for the entire arbitration, according to Popovic.

"You can save a lot of time and money by being courteous and extending procedural courtesies to each other, and not prolonging disputes that don't really need to be disputes," he said. "I think the tribunal can set the tone for that and indicate that it really is not going to tolerate uncivil behavior."

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