

Getting a Handle on It: Drafting Tips for In-house Counsel to Control Costs of Commercial Dispute Resolution

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Prepare a Preferred Dispute Resolution Section in advance

- Corporate goals for alternative dispute resolution: fair, fast, lower cost
- Contracts are key
- Having right model clause prepared in advance can dramatically reduce costs and time to resolve disputes



Key Clauses to Control Arbitration Process

- Tiered disputes
- Time constraints
- First Procedural Hearing
- Schedule
- Discovery Limits
- Evidence



Tiered Dispute Clauses

- Consider whether to add a tiered dispute resolution clause
 - Senior Executive Meetings
 - Mediation
- Avoid:
 - Jurisdiction traps
 - Delay
 - ✓ By providing that either party may proceed to arbitration within tight time [30 or 60 days] after serving demand for prior tier



Tiered Dispute Clauses - Example

“Notwithstanding anything else contained herein, any party shall have the right to commence arbitration at any time after the expiration of 30 days after service of demand for a senior executive meeting. Any disputes concerning the propriety of the commencement of the arbitration shall be finally settled by the arbitral tribunal”



Building in Time Constraints to Control Costs



- Time = Money
- Consider building time constraints into clauses to help control costs:
 - ✓ Nomination of arbitrators
 - ✓ Time to first Procedural conference
 - ✓ Time to get to hearing on merits
 - ✓ Length of hearing on merits
 - ✓ Time to issue award
 - ✓ Require arbitrator(s) to be able to meet time constraints to accept appointments

Building in Time Constraints to Control Costs

Examples – Selection of Arbitrators

Selection of arbitrators:

- a. *For disputes involving less than **\$2MM USD**, [choose either [the parties agree to seek to reach agreement on the identity of the sole arbitrator within 20 days after initiation of the arbitration. If the parties do not reach agreement on the sole arbitrator, then [JAMS or other institution selected] shall appoint the sole arbitrator [consider adding from their panel of [name subject matter] experts] within 40 days after initiation of the arbitration]*

OR



Building in Time Constraints to Control Costs

Examples – Selection of Arbitrators

*[the parties agree that the sole arbitrator shall be one of the persons on Schedule X hereto. Within **[15]** days after receiving the request for arbitration, the respondent shall select one of those persons, and such person shall serve as arbitrator. In the event such person is unable to serve, the respondent shall, within **[3]** business days after receipt from that person of such inability, select another person from the list in Schedule X hereto and such person shall serve as arbitrator. If necessary this process shall continue until the arbitrator is so designated. In the event that none of the arbitrators listed on Schedule X hereto is able to serve within the time frames specified, the sole arbitrator shall be appointed by [JAMS or other institution selected] within **45** days after initiation of the arbitration];*



Building in Time Constraints to Control Costs

Examples – Selection of Arbitrators

- b. For disputes involving more than **\$2MM USD**, the claimant shall nominate an arbitrator in its request for arbitration. The respondent shall nominate an arbitrator within **15** days of receipt of the request for arbitration. The two arbitrators nominated by the parties shall nominate a third arbitrator [**consider whether to add who shall be of a different nationality than either of the parties**] within **20** days after the nomination of the later-nominated arbitrator. The third arbitrator shall act as chair of the tribunal. If any of the three arbitrators are not nominated within the time prescribed above, then [JAMS or other institution selected shall appoint the arbitrator(s) within **5** business days of the lapsed time period.*
- c. Any arbitrator nominated must be able to serve within the time frames specified before accepting appointment.*



Building in Time Constraints – Procedural Conference and Hearing Example

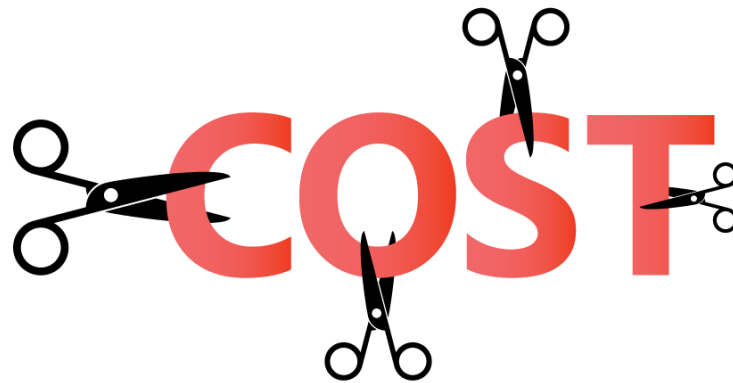
Timing of Hearings:

Unless the parties agree otherwise, the Tribunal will hold a hearing on the merits within [6 to 12] months of its constitution, which will be set for consecutive days (excluding weekends and holidays) and last for no more than [10] days



Using the First Procedural Conference to Control Costs

- Arbitration clause can design and structure the early Procedural Conference to effectively control costs
- Consider:
 - In-House counsel attendance with or without business clients
 - Requiring tribunal to set schedule for entire hearing at first Procedural Conference



Using the First Procedural Conference to Control Costs - Example

*Unless the parties agree otherwise, the Tribunal will hold a procedural conference with the parties and their counsel within **30** days of its constitution either in person or by Zoom or an equivalent video technology to set the schedule for the arbitration, including the date for the hearing on the merits.*



Schedule

- Using arbitration clause to drive the most cost-effective schedule
- Consider requiring “memorial style” schedule:
 - Claimant files its Memorial (legal brief) with its evidentiary support (witness statements, documents and expert reports) within **[3-4]** months
 - Respondent files its Counter-Memorial with evidentiary support a **[2-3]** months later
 - Tribunal can provide for reply submissions if appropriate or simply move to hearing



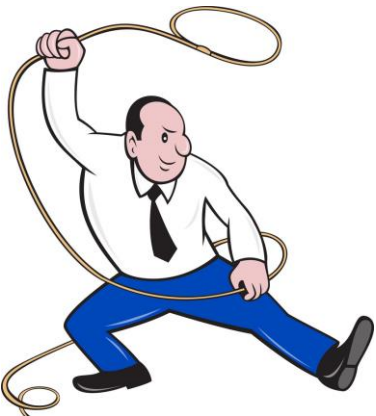
Schedule - Example

Unless otherwise agreed by the parties, at the first in person or virtual procedural hearing the tribunal will set a schedule for conducting the proceeding which shall include the service by the Claimant of a Memorial together with written witness statements, documents and expert reports within [3-4] months, service by the Respondent of a Counter Memorial together with witness statements, documents and expert reports within [2-3] months and service of reply and sur-reply memorials as appropriate within [1-2] months.



Limiting Discovery Time and Cost

- Discovery, particularly e-discovery can exponentially increase the cost of arbitration
- Use arbitration clause to eliminate or significantly curtail discovery:
 - Consider:
 - ✓ Specifying no depositions, requests for admissions, interrogatories
 - ✓ Specifying no document requests or requiring parties to apply to arbitrator for narrowly tailored requests limited to items that are relevant and material to outcome
 - ✓ Explicitly make cost a factor



Limiting Discovery Time and Cost - Example

The parties agree that there will be no depositions (other than as necessary to record testimony of witnesses who cannot be ordered to appear at the hearing), requests for admission and interrogatories and there is no right to seek production of documents, but the arbitral tribunal may consider applications by a party for specific documents, and if it determines good cause for a narrowly tailored, limited production have been shown, it may order such production so long as the documents are relevant and material to the outcome of the case and the tribunal ensures production of such documents is not unreasonably costly or burdensome. [In particular, any request for production of electronic documents must be narrow and limited.]



Cost-effective Submission and Presentation of Evidence

- The arbitration clause can provide mechanisms to streamline the arbitration hearing:
 - Providing for direct examination to be submitted by written witness statements
 - ✓ Eliminates need for depositions
 - ✓ Reduces length of hearing (cross examination and redirect)
 - ✓ Allows parties to decide which witnesses need cross-examination
 - Requiring experts to try to find areas of agreement
 - ✓ Joint expert reports
 - ✓ Hot tubbing
 - ✓ Reduce time and cost of expert



Cost-effective Submission and Presentation of Evidence - Example

Unless otherwise agreed by the parties,

- a. Direct testimony shall be submitted in the form of written witness statements*
- b. Testimony of fact witnesses at the hearing shall be limited to cross-examination and rebuttal and*
- c. Experts shall submit joint reports and shall be encouraged to find areas of agreement, by hot tubbing or other methods.*



Using the Arbitration Clause to Promote Diversity

Clear evidence business case for value of diverse panels

In-house counsel has an important role to play in promoting diversity in dispute resolution by:

- Signing “The Pledge”
- Encouraging diversity in outside counsel teams
- Including JAMS clause requiring consideration of diversity in arbitrator selection:

The parties agree that, wherever practicable, they will seek to appoint a fair representation of diverse arbitrators (considering gender, ethnicity and sexual orientation) and will request the administering institution to include a fair representation of diverse candidates on their rosters and lists of potential arbitrator appointments.



Questions

Thank You!

