ARBITRATION CONTRACT CLAUSES

By John H. Wilkinson

The recent trend toward arbitration of larger and larger commercial cases has led to a number of expensive elements that have traditionally been reserved for litigation. Devising an arbitration process that is significantly more efficient than litigation is not an easy task in the context of a complex commercial dispute. However, the scorched-earth mentality that frequently follows the inception of a dispute can often be countered, before the fact, through effective drafting of the arbitration clause in the underlying commercial contract.

An initial caution. Parties have expanded their arbitration contract clauses (Contract Clauses) in an effort to place meaningful limits on discovery and other aspects of any ensuing arbitration. Although this approach has the benefit noted above, it also has significant drawbacks that should be discussed at the outset, namely: (a) the drafter of the Contract Clause is setting forth the timing and discovery rules for a dispute that has not yet arisen, and (b) the dispute that ultimately emerges might better lend itself to a very different approach with respect to timing and discovery. In this regard, the following considerations are pertinent. It makes most sense to include discovery and timing limitations (Limitations) in a Contract Clause under circumstances where the contracting parties have a good idea as to the size and complexity of any dispute that might thereafter arise. If the parties are unsure as to what the scope of a later dispute might be, they can still put Limitations in the Contract Clause but, then, condition the applicability of the Limitations on there being substantial arbitrable claims, as defined by the parties in the particular context of their commercial relationship. Also, include a provision that the arbitrators are empowered to modify the Limitations upon a clear and compelling showing of good cause.

Set forth below is a discussion of some of the various types of Limitations that one might consider including in a Contract Clause.

> **"The ultimate efficiency is settlement through mediation before any arbitration is even initiated."**

General scope of document discovery. It often makes sense for a Contract Clause to contain some broad language as to what the general scope of document discovery in an ensuing arbitration is going to be. Thus, for example, the Contract Clause might limit such discovery to "documents directly relevant to one or more of the issues," "documents needed for fair resolution of an issue of importance," "necessary documents that can be located and produced at a cost that is reasonable in the context of all surrounding facts and circumstances," or "documents for which there is a direct, substantial, and demonstrable need." This wording provides helpful guidelines for the parties and gives arbitrators a practical tool that can effectively be used to help keep document discovery under control.

E-discovery. Addressing e-discovery in the Contract Clause can be an effective means to place some realistic limits on the otherwise bottomless pit of e-disclosure. The New York State Bar Association and the Chartered Institute of Arbitrators provide examples of early language that might be used to put meaningful limits on e-discovery in appropriate circumstances, such as:

- "Production of electronic documents shall generally be limited to those located in sources that are used in the ordinary course of business. It will normally not be appropriate to order restoration of backup tapes; erased, damaged, or fragmented data; archived data; or data normally deleted in the ordinary course of business."
- "Electronic documents shall normally be furnished on the basis of generally available technology in a searchable format that is usable by the party receiving it and convenient and economical for the producing party."
- "When the cost and burden of e-discovery are disproportionate to the likely importance of the requested materials, the arbitrator may deny the requests or require that the requesting party advance the reasonable cost of production to the other side."

Restrictive clauses of this kind can be effectively incorporated at the time

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of the drafting of the Contract Clause.

Depositions. The absence of any depositions in a complex arbitration can significantly lengthen the cross-examination of key witnesses and unnecessarily extend the completion of the hearing on the merits. On the other hand, runaway deposition programs are extremely expensive, wasteful, and time consuming.

Balancing the foregoing considerations, it can sometimes make sense to include in the Contract Clause a provision such as the following with respect to depositions:

> Each side may take 4* discovery depositions in connection with an arbitration arising from or related to this agreement. Each side's depositions are to consume no more than a total of 15* hours. There are to be no speaking objections at the depositions. The total period for the taking of all depositions shall not exceed 6* weeks. (*The asterisked numbers can, of course, be changed to match the particular circumstances of each case.)

Prevailing party. Many Contract Clauses specify that: (a) the prevailing party in an arbitration is entitled to recover the reasonable costs and attorney fees incurred in connection with the arbitration, and (b) if the prevailing party wins on some but not all claims, then it is to recover an appropriate proportion of its reasonable costs and attorney fees.

This type of provision furthers efficient, cost-effective arbitration because (a) it discourages frivolous claims and counterclaims, and (b) it reduces the chances of scorched-earth discovery and hearing tactics.

Mediation in advance of arbitration. The ultimate efficiency in resolving a dispute is settlement through mediation before any arbitration is even initiated. Such mediation can be difficult to put in process in the charged atmosphere after a dispute arises because at that point both sides may be fearful that a suggestion of mediation will be taken by the other side as a sign of weakness. This problem disappears if the requirement of mediation prior to arbitration is contained in the Contract Clause of the underlying commercial contract. But if the parties opt to take that route, they should provide a tight deadline (perhaps 30 days) for the entire mediation as a way to preclude use of the mediation as a means to delay.

Appeal. As arbitration awards have involved increased amounts of money, there has been significantly more activity in the courts in trying to overturn them. This has substantially added to the time and cost of arbitration while seldom changing the result.

One approach that achieves the goal of a meaningful, expeditious, and cost-effective appeal from an arbitration award is to include in the Contract Clause a provision adopting the JAMS (Judicial Arbitration and Mediation Services, Inc.) Optional Arbitration Appeal Procedure (Appeal Procedure), which permits a cost-effective, expeditious appeal based on the same legal principles as would have pertained in court.

Deadlines. Contract Clauses are increasingly including provisions that place specific time limits on various phases of any arbitration arising under the agreement and, sometimes, an overall time limit for the period from the filing of the arbitration demand to the entry of an award.

Some practitioners are concerned that a failure to meet a Contract Clause's arbitration deadlines might leave the ensuing award vulnerable to a motion to vacate. Language such as the following addresses this concern while maintaining the possibility that a failure to meet such deadlines will have serious repercussions:

> Failure to meet any of the foregoing deadlines will not render the award invalid, unenforceable, or subject to being vacated. The arbitrator(s), however, may impose appropriate sanctions and draw appropriate adverse inferences against the party primarily responsible for the failure to meet any such deadlines.

While there are a number of possible approaches to making arbitration faster and more cost-effective, the most practical and effective means of achieving this goal may prove to be the inclusion of appropriate provisions in Contract Clauses. GPSOLO

