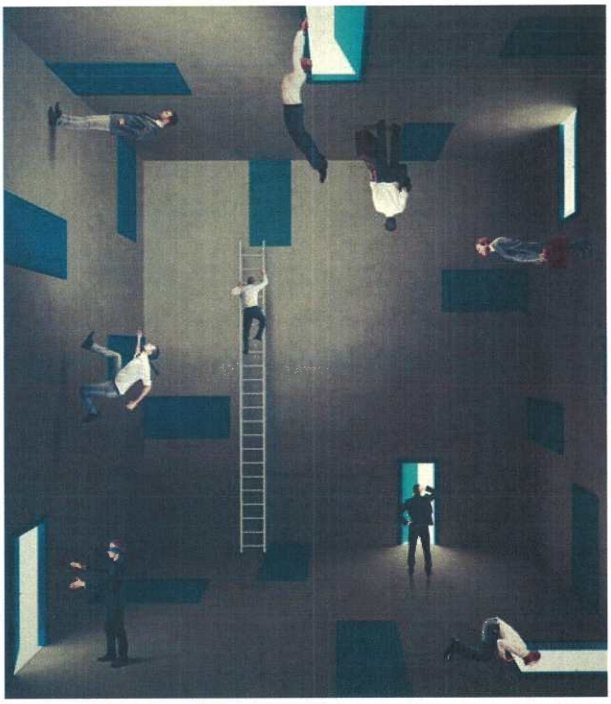
PERSPECTIVES

EFFECTIVE MANAGEMENT OF LARGE COMPLEX CASES IN ARBITRATION



BY **DAVID L. EVANS**
> MURPHY & KING

Arbitration is often a preferred alternative to litigation of large complex commercial cases. Many studies have shown that arbitration offers procedures that are more economical and efficient than court proceedings. For example, a recent survey conducted by the American Arbitration Association (AAA), the largest provider of alternative dispute resolution (ADR) services, found that in large complex cases that ended in an award on the merits, the period for discovery was less than nine months in more than 85 percent of the cases. (As reported by 417 arbitrators (involving 366 cases) after serving on commercial, construction and individually negotiated employment cases awarded in 2013 that had a claim or counterclaim of at least $500,000.) This is significant because the bulk of litigation costs are incurred during the discovery phase.

In addition to the time and cost advantages, arbitration enhances the prospects of reaching the 'correct' outcome. Court systems throughout the US are overburdened, and judges have less time and staff to devote to the management and analysis of complex cases. Lay juries may not have the education or experience necessary to understand corporate disputes. Arbitrators, on the other hand, are often selected by the parties from a pool of professionals with knowledge of the relevant industry and training in the management of commercial disputes.

Still, the myth persists that arbitration has become laden with many of the practices associated with court litigation, including burdensome electronic and document discovery, depositions and extensive motion practice. It's easy to understand how such myths linger: there are always outlier cases that produce results that are antithetical to the fundamental tenets of arbitration. In most instances, these are self-inflicted wounds stemming from the willingness of companies, or their attorneys, to employ tactics that are countenanced in court but have no place in arbitration.

Fortunately, businesses wishing to avoid outlier status need only consider a few relatively simple steps to ensure that even the largest disputes are propelled along the straightest line towards resolution. To be sure, this requires institutional will, proactive risk management and an open and continuous dialogue with counsel. And, importantly, it starts with 'dispute-wise' planning well before a controversy surfaces.

"Fortunately, businesses wishing to avoid outlier status need only consider a few relatively simple steps to ensure that even the largest disputes are propelled along the straightest line towards resolution."

Here are a few 'dos' and 'don'ts' for companies wishing to resolve large complex cases in a cost-effective and less disruptive manner.

Do not randomly select an arbitration clause

The multi-million dollar deal is approaching the closing, the financial terms are settled and the lawyers are now inserting 'boilerplate' into the agreement. Close to midnight, an associate is dispatched to secure an arbitration clause. She finds one from an old deal, and cuts and pastes it into the agreement without any serious consideration. Why even contemplate the prospect of a dispute?

This all-too-common scenario almost ensures that the lawyer's clients will not realise the benefits of arbitration in the event of a dispute. Once a dispute has arisen, it is much more difficult for the parties to find common ground on anything, and the procedures for arbitration are no exception. Accordingly, it is important that companies, in consultation with counsel, consider the types of disputes most likely to arise under the contract and specify the arbitration procedures most suited to their successful resolution. It is well worth bringing in a litigation attorney at this point, because transactional lawyers may have little experience in conflict resolution.

Businesses should ask these basic questions: If there is a failure to perform, who would likely be most at risk? Should there be a phased dispute resolution process (management negotiations, mediation, and, finally, arbitration)? What discovery information would be essential to the prosecution and defence of a claim, and should discovery be limited to the exchange of only that information? How many arbitrators should preside over the matter (one or a panel of three) and what qualifications are most important? What is the preferred venue (seat) for the arbitration? Will there be a need for immediate emergency relief? Should there be a time limit for the proceeding, or various phases? Should the prevailing party be entitled to reimbursement for its attorneys' fees and costs? All of these issues, and more, should be evaluated for inclusion in an arbitration clause.

Do prepare and enforce an arbitration budget

While effective budgeting seems obvious, it is not uncommon for large arbitrations to proceed without a full understanding of the likely transaction costs. Companies should require counsel to prepare and regularly update a budget for the phases of the case (i.e., claim/counterclaim, discovery, witness preparation, experts, hearings, motions and briefs); justify the line items as necessary for the case and track billings against the budget. Businesses should also evaluate alternative fee arrangements such as blended rates, fixed or contingent fees, and other incentives to pursue the case in the most efficient and economical manner.

Do not assume any litigator can arbitrate

There are effective trial lawyers who understand the difference between arbitration and litigation. But many do not. Lawyers unfamiliar with arbitration tend to assume that the same arsenal of court procedures can be replicated in arbitration. To some extent this reflects an understandable anxiety about going to trial without having unearthed every piece of paper that might be relevant, deposed every possible witness, and filed every potentially applicable motion to winnow the case. Before retaining counsel for a large complex matter, businesses should ask prospective counsel about