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IN PRACTICE

ALTERNATIVE DISPUTE RESOLUTION

BY DAVID J. McLEAN

Getting to the Finish Line

Is arbitration really a swifter, more economical vehicle for resolving disputes?

As a senior litigator whose dispute resolution practice includes significant arbitrations, clients and colleagues often ask me to estimate the time it will take to resolve a complex case through arbitration. Often, the assumption that underlies their inquiry is that it will be faster and more efficient to handle a complex matter in arbitration than in court.

My frequent response is that it will take more time to arbitrate than to go to court. At that point, my clients look at me strangely, as if to wonder how I could be right. In their defense, I must acknowledge that common wisdom holds that arbitration provides a speedy and efficient means to resolve disputes. There may have been a time when that was so, and there may be occasions today where that remains the case, but my experience over two decades of representing parties in commercial arbitrations suggests this is not the case.

Where complicated factual and legal matters are concerned, such as in complex commercial disputes, business fraud or intellectual property matters, a typical matter in arbitration might consume two years or more. If the arbitration is "accelerated" or "expedited," you may get to the finish line in 18 months, but rarely sooner. I have seen parties try to rush things along, setting early deadlines, but these matters tend to take their usual course in the end. For example, I recently had an "expedited" arbitration where the parties' initial schedule projected trial in 12 months. Along the way, one party came to realize that our schedule was too ambitious. A continuance was sought and granted. The actual hearing commenced 17 months after the arbitration demand had been filed and the actual hearing concluded months later. Eighteen months or longer is a pretty good rule of thumb.

Another way to estimate the time necessary to resolve a complex case through arbitration is to assume you were in federal court through the pretrial phase of the dispute and then to estimate based on how long you think a federal court would devote to the matter. The time spent on an arbitration conducted under the AAA's complex rules, for example, will not be much less. First, arbitrators tend to allow the same kinds and amount of discovery, and the parties engage in similar discovery battles (motions to compel, etc.), as occurs in federal court. Second, to the extent there may be fewer depositions and discovery battles in arbitrations, any cost-saving may be consumed by the increased inefficiencies of resolving discovery battles before three-arbitrator panels. They tend to be less efficient than a single judge. Even where only the neutral arbitrator hears discovery disputes, he is likely to be more tolerant than a federal magistrate about hearing both sides of any pretrial dispute, may take longer to decide, and may be more disposed to a compromise ruling on pretrial matters.

Even if your case is one where it is reasonable to complete all discovery, expert work and pretrial matters in a 12-month period — which is ambitious given the complexity of these cases and the number of witnesses typically involved — additional time will be required on either side of that agenda. In other words, the case will not be over in 12 months. At the front end, before discovery begins, it can take a month or more to select the third arbitrator and actually convene your panel. (I am assuming a three-arbitrator panel, as is typical in complex cases. For arbitrations conducted before a solo neutral, the time may be slightly less, but even then, the best arbitrators are in high demand than their schedules are often booked weeks or months in advance.) Indeed, it could take longer. I am involved as counsel for a party in a pending arbitration where three months have elapsed and we still don't have a panel! On the back end, there is often a gap in time from when pretrial proceedings are completed and the final status conference has occurred, and when the hearing is convened.

And then there's the arbitration hearing. It is almost certain, in my experience, that any cost savings measured in attorney time spent in the prehearing

McLean is the managing partner of Latham & Watkins of Newark.

phases of arbitration are outweighed by the increased inefficiencies of an arbitration trial. Unlike federal court, where the judge is pressuring the parties to move along and may only give you two weeks to try a complex commercial case, in arbitration the tendency is to let in all the evidence and let either side go on until it rests, without prodding and notwithstanding that its evidence is cumulative. Arbitrators, perhaps because they are paid by the hour, seem to have a much higher tolerance for boredom than do judges.

Whatever the reasons, the hearing itself may extend longer than initially planned. We know that arbitration awards are final and nonappealable, but one of the several statutory bases for vacating an arbitration award is on the ground the panel refused to consider material evidence. Too often, presenting evidence in arbitration consumes more than the time initially allotted, the result being that additional nonconsecutive weeks of hearings need to be scheduled, which involves further delays. A frequent refrain in arbitration is "we need more time," and usually, the arbitrators will grant it.

In complex cases, parties often write post-hearing briefs. Such briefing can add six weeks or more to the back of your schedule, counted from the last day of actual hearing. Then, once the briefing is completed and the record closes, you begin the wait for the actual award. The clock is still running and it is not unusual for panels to take three to six months to issue their award. Add all these factors together, deduct for a few lucky breaks on timing, and you are still left with a rather long haul. Complex arbitration cases are often around for two years or more, even when both sides are proceeding in good faith towards a timely resolution.

Where that leaves us is where I began. Measured in terms of time lapsed and commensurate legal fees, what your case would involve in federal court is probably a good proxy for what it will cost in arbitration. Indeed, it may cost more. To be sure, there are many benefits of arbitrating a case, but swiftness and cost savings are often not among them. ■