# Are Time and Cost Efficiencies in Arbitration a Fantasy?

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Harrie Samaras and Judy Weintraub

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In many cases, the distinction between litigation and arbitration has become blurred as more litigation practices are infused into arbitration. Clients thus lose the cost and time savings that they sought by selecting arbitration in the first place. These efficiencies are achievable if counsel make them a priority, and learn and implement the necessary practices to achieve them. Here are 10 practices to turn the fantasy of time- and cost-efficient arbitration back into a reality. We invite our readers to share with us any other best practices for achieving an effective and efficient arbitration.

**1. Build a proper foundation with an appropriate dispute resolution provision.**

Parties often arbitrate their dispute because of a predispute arbitration clause in a contract. If this clause is not drafted carefully, however, they may waste time and money disputing basic logistical and process issues, such as how the arbitrator is chosen, where the arbitration will occur, or whether a certain issue is covered by the arbitration provision. A properly drafted provision can also contain limits to discovery and other features that ensure a speedier and less costly proceeding. To avoid unnecessary disputes as those described, the drafter/negotiator should be familiar with arbitration and understand the consequences of implementing the process as described in the provision — or should consult with someone who has actual arbitration experience (either an arbitration practitioner or arbitrator).

**2. Revisit the agreement.**

Arbitration is a "creature of contract." If an arbitrable dispute arises and the process provided in the contract would unnecessarily increase the time and cost of arbitrating, the parties can modify the process. Successfully reworking the process often depends on the relationship between counsel, as well as the parties' ability to assess and understand the practical realities of following the existing process in the context of the dispute that has arisen. Because clients are sensitive to time and cost pressures, another option is for in-house counsel to discuss modifications directly with their counterparts. Any agreed-upon changes for the outstanding dispute might be memorialized in the scheduling order that will govern the proceedings.

**3. Choose a panel with strong management skills.**

Even a properly drafted arbitration provision won't necessarily produce an efficient proceeding without diligent management. In performing their due diligence on arbitrator candidates, the parties should include strong case management skills on their list of must-haves. Counsel can obtain relevant information by talking with former panel

members with whom the candidates have previously served, or with counsel who have previously appeared before the arbitrator candidates, in addition to interviewing the arbitrator candidates. The American Arbitration Association offers an enhanced neutral selection process that enables the parties to interview potential arbitrators or pose agreed-upon written questions to ascertain, for example, the candidate's relative experience in similar disputes, and the arbitrator's procedural handling practices.

**4. Consider efficient case presentation early.**

If arbitration is to be cost- and time-efficient, counsel must consider early on how they will present their case. Issues of case presentation are typically covered at the initial preliminary hearing and in the scheduling order that follows. Procedures to consider building into your planning include: time limits for presenting evidence and arguments; exhibit books for all participants with premarked exhibits; reliable and ample technology to present evidence; video or Web testimony; witness statements; and expedited examination methods.

**5. Limit discovery and motion practice.**

Discovery should be limited in a manner that is consistent with client goals and with the panel's need to understand and fairly decide the disputed issues. For example, forms of discovery like interrogatories and requests for admissions do not typically produce necessary or even useful information for the time and expense they take to prepare and pursue. Counsel should strive to agree on an efficient discovery plan, making compromises that will ensure a fair process (e.g., the number, length, scheduling and place of depositions, and the form, scope and timing of document exchange). Once a scheduling plan is in place (typically after the initial preliminary hearing), counsel should quickly address discovery disputes that arise — either resolving the dispute or determining that it cannot be resolved. If the parties cannot resolve the dispute, counsel should engage the panel. The timing and manner for involving the panel may already be covered by the scheduling order. Cost- and time-effective ways for resolving discovery issues include: designating only the chair to decide the dispute (on three-arbitrator panels), teeing up issues orally on a conference call rather than in writing, and summarizing opening positions in a short letter with any rebuttal done by phone.

Before filing a motion to dismiss, to strike, for summary judgment or to exclude (in limine), carefully consider the benefits and likelihood of having the motion granted on the one hand, and the cost and time of preparing it, reviewing and responding to a reply brief, preparing for panel argument, and having it considered by the panel, on the other hand. If the panel does not suggest this on its own, consider proposing at the preliminary conference a requirement that if a party wants to file a motion it must first seek permission so the panel can assess its potential effect on the case and whether it is worth the time and cost.

**6. Memorializing and formalizing priorities.**

Clients, particularly in-house counsel, can help significantly in achieving time and cost efficiencies in the arbitration, including providing outside counsel with clear parameters for prehearing and hearing procedures (e.g., discovery, motions, time limits, witness presentation), which they can then use in pre-preliminary hearing discussions about the scheduling order with opposing counsel, or in advocating limits to the arbitration process at the preliminary hearing. Consider client-to-client discussions if counsel cannot achieve an efficient process to propose to the panel. Clients choosing to participate at the preliminary hearing are also in a unique position to provide the arbitration panel directly with information about time and cost concerns that can inform and influence the arbitration panel's scheduling decisions.

**7. Choose an experienced arbitration practitioner.**

Despite some similarities between arbitration and litigation, the processes have distinct characteristics and benefits. The benefits cannot be achieved, however, unless counsel are knowledgeable and experienced in arbitration procedures and practices, effective advocates before arbitration panels, and able to meet client business goals, including speed and economy. To achieve cost and time efficiencies, while ensuring a fair process, counsel should replace time- and expense-ridden litigation practices (e.g., extensive discovery, motion practice, uncompromising strategies) with the skills, strategies and confidence to select options that will fairly prepare and present their client's case. Also, counsel should be committed to the schedule and adhere to the set deadlines.

**8. Prepare and maintain a budget.**

Hand in glove with obtaining an efficient procedural framework for the arbitration is developing a sufficiently itemized and clear budget that permits a fair implementation of the arbitration procedures, along with a disciplined plan for

tracking and limiting expenditures. Counsel and client alike should be vigilant throughout the arbitration to ensure that cost- and time-inefficient strategies are avoided and expenditures not included in the budget are the rare exception, not the rule. Alternative fee arrangements, including those that incentivize outside counsel to conduct the arbitration and resolve conflict as efficiently and expeditiously as possible, can help maximize predictability and minimize cost.

**9. Consider opportunities for settlement.**

As with litigation, settlement opportunities often arise during the course of the arbitration. Periodically discuss those opportunities with your client. Unless the case has been thoroughly mediated already and it appears that arbitration is the only hope for resolution, counsel and their clients can pursue negotiations or mediation in parallel with the arbitration. Arbitration counsel, in-house counsel and business executives can all successfully pursue settlement strategies.

**10. Conduct a "lessons learned" review.**

At the conclusion of the arbitration, counsel and client, together and separately, might conduct a thorough analysis of the lessons learned (positive and negative) from the arbitration. Consider the financial, strategic and temporal impact of each decision made during the course of the arbitration. If necessary, the client may want to make adjustments to arbitration policies, agreements and practices to ensure the next arbitration will meet time, cost and business goals. Outside counsel may want to encourage better arbitration advocacy practices and training of others at their firms from the experience.

One of the great features of arbitration is the ability to fashion a proceeding that meets a client's needs. We have presented several techniques for streamlining an arbitration proceeding. For additional good practices, see http://www.thecca.net/CCA_Protocols.pdf. The experienced practitioners who are reading this article undoubtedly have additional tips for making arbitration more effective. We encourage you to share your best practices with us. For those interested in contributing or receiving a compilation of the best practices we receive, send us an email by October 1 at our email addresses.

***Harrie Samaras*** *is the founder of ADR & Law Office of Harrie Samaras and co-founder of Advanced Business Law Resources. She focuses her practice on commercial cases, including disputes involving intellectual property, business and technology and other commercial contracts. She can be reached at hsamaras@ablr.biz.*

***Judy Weintraub*** *is the founder of Weintraub Legal Services and ACCORD LLC, and co-founder of Advanced Business Law Resources. She has more than 25 years' experience negotiating complex commercial transactions and has handled more than 50 mediations and arbitrations. She can be reached at jweintraub@ablr.biz.*

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