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Cost-Effective Protocols by the College of Commercial Arbitrators: The Choice is Yours

By:

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INTRODUCTION

In the fall of 2010 the College of Commercial Arbitrators ("the College) introduced their "*Protocols for Expeditious, Cost-Effective Commercial Arbitration - Key Action Steps for Business Users, Counsel, Arbitrators and Arbitration-Provider Institutions,*" ("Protocols") which provide guidelines for reducing the time and cost of commercial arbitration to ensure that arbitration remains an attractive alternative to litigation. This article summarizes those Protocols.

I. THE 2009 NATIONAL SUMMIT ON REDUCING TIME AND COST

The College of Commercial Arbitrators was established as a U.S. non-profit corporation in 2001. Its mission is to promote the highest standards of conduct, professionalism and ethics in commercial arbitration, to develop "best practices" guidelines and materials, and to provide peer training and professional development. Its membership currently consists of approximately two hundred leading commercial arbitrators in the United States and abroad.[1]

In response to mounting complaints that international and domestic commercial arbitration has become as slow and costly as litigation, the College decided to convene a National Summit on Business-to-Business Arbitration. The goals were to identify the chief causes of the complaints and to explore concrete, practical remedies. The concept of a National Summit arose from two key insights: (1) lengthy, costly arbitration results from the interaction of business users, in-house attorneys, the institutions that provide arbitration services, outside counsel and arbitrators; and (2) that all of these "stakeholders" must collaborate in identifying and achieving desired efficiencies and economies in arbitration. The College invited to the National Summit in-

[1] For a current listing of the College members, see, CCA Website: http://thecca.net.

house counsel from numerous major companies that utilize arbitration, skilled advocates who represent such parties in arbitration in a wide variety of geographic regions and commercial specialties, and individuals who occupy key positions in leading institutional providers of arbitration services.

The National Summit was convened in Washington, D.C. at the end of October, 2009. A measure of the perceived importance of the Summit was the fact that five of the principal organizations involved in commercial arbitration, namely, the Chartered Institute of Arbitrators, the International Institute for Conflict Prevention and Dispute Resolution ("CPR), the American Bar Association Section of Dispute Resolution, the American Arbitration Association, and JAMS joined the College as co-sponsors of the Summit, along with the Straus Institute for Dispute Resolution of Pepperdine University School of Law and seventy-two Fellows of the College.

II. THE SUMMIT PROTOCOLS

The Summit discussions revealed that promoting efficiency and economy in arbitration must be a mutual effort among four sets of stakeholders: (a) business users and in-house counsel; (b) institutional arbitration providers; (c) outside counsel; and (d) arbitrators. Based on discussions among representatives of these four constituencies, the College developed and published the Protocols in the fall of 2010 which turned out to be a significant 76 page document, excluding Appendices.[2]

The lessons of the *Protocols* are premised on the National Summit consensus that the pace and costs of commercial arbitrations are driven by specific steps that each constituency can take to reduce the time and expense of commercial, business-to-business arbitration. For example, if the arbitration provider whose rules control a case provides no option for limited discovery, and if the parties and their counsel are battling every issue, the arbitrator's ability to contain discovery costs is seriously constricted. The Protocols, therefore, contemplate that the four constituencies will strive to cooperate and coordinate their actions, yielding maximum impact. The overarching principles for each constituency in the Protocols are the following:

*1.**BE DELIBERATE AND PROACTIVE.*** Promoting economy and efficiency in arbitration depends, first and foremost, on deliberate, aggressive action by the stakeholders, starting with choices made by businesses and counsel at the time of contract planning and negotiation, and continuing throughout the arbitration process

*2. **CONTROL DISCOVERY.*** Discovery is the chief object of current complaints in the United States about arbitration morphing into litigation. Therefore, arbitration providers should offer meaningful alternative discovery routes that the parties might take. The parties and their counsel should strive to reach pre-dispute agreement with their adversary on the acceptable scope of discovery. Otherwise, individual counsel may have an incentive for extensive discovery if the party they are representing would perceive that to be (or actually is) an advantage. Arbitrators should also exercise the full range of their power to implement a discovery plan.

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[2] The Protocols were chiefly drafted and edited by Thomas J. Stipanowich, CCA Fellow, William H. Webster Chair in Dispute Resolution and Professor of Law at Pepperdine University School of Law and Academic Director of the Straus Institute of Dispute Resolution; The Hon. Curtis E. von Kann, CCA Fellow and former District of Columbia Superior Court Judge, and Deborah Rothman, CCA Fellow and full-time arbitrator and mediator. The complete *Protocols* may be found and downloaded from the College of Commercial Arbitrators website: http://www.thecca.net/CCA_Protocols.pdf.

3. ***CONTROL MOTION PRACTICE.*** Substantive motions can be the enemy or the friend of the effort to achieve lower costs and greater efficiencies. Some see current motion practice as adding another layer of court-like procedures, resulting in heavy costs and delay. Others see motion practice as a potential opportunity for reducing costs and delay. Clear legal issues might be disposed of at the outset, preventing parties from conducting discovery and then offering their proofs on issues. Recognizing whether in a particular case a substantive motion would advance the goal of lower cost and greater efficiency is among the most challenging tasks these Protocols present to the constituencies. They aim to promote cooperation and close consideration of the role a motion might play.

4. ***CONTROL THE SCHEDULE.*** Since work expands to fill the time allowed, it is critical to place presumptive time limits on activities in arbitration or on the overall process, coupled with "fail safe" provisions that ensure the process moves forward in the face of inaction by a party. At hearings, for example, the use of a "chess clock" approach is of proven value in expediting examinations and presentations.

5. ***USE THE PROTOCOLS AS A TOOL, NOT A STRAITJACKET.*** While there are certain categories of cases that are alike, except for the identity of the parties and other participants, most commercial arbitrations with a substantial amount at stake are distinct in at least some way, be it the twist of circumstance that sparked a dispute or the array of legal issues presented. These Protocols offer actions that might apply to the broad range of cases, and yet embedded in them is recognition that parties' needs vary with circumstances and that a well-run arbitration will at some level be custom-tailored for the particular case.

6. ***REMEMBER THAT ARBITRATION IS A CONSENSUAL PROCESS.*** Arbitration is rooted most often in an arbitration agreement made when the parties were in a constructive, business-enhancing mode. When a dispute arises, the reaction will vary. Some parties, looking to do business again in the future or accepting of the occurrence of a dispute, will be able to cooperate productively towards a common goal of cost containment. Other parties, by the point of a dispute, are entrenched in their respective perspectives of what occurred and why the other side is to blame. Parties in this mind-set face a daunting challenge to look beyond grievances in order to find cost savings that might benefit each side. These Protocols aim to meet the diverse settings in which cases arise, recognizing that the prescribed behavior ultimately cannot be imposed, but can only be encouraged.

III. THE CENTRAL LESSON

Commercial users of arbitration are legitimately concerned that the traditional ways of resolving business-to-business disputes are taking too long and costing too much. At the same time, it must be remembered that processes that lead to cost and time savings may derogate from the quality of arbitration as a means of reaching a fair and just result. For example, costs can be saved by having a sole arbitrator rather than three; by not having an arbitral institution administer the proceedings; by dispensing with terms of reference or award scrutiny; by imposing strict limits on written submissions, the number of witnesses or rounds of witness statements; or by issuing a truncated award without reasons. However, each of these cost savings measures will not necessarily contribute to and may derogate from the quality of the process. Time can be saved by implementing an accelerated or fast-track timetable for the arbitration, but cutting time may result in an injustice to one or both parties. Hence, a cost-benefit analysis should be done for virtually all procedural choices that are made in the context of arbitration.

In the final analysis, the central lesson of the National Summit is that the core value of arbitration is not necessarily cheapness or speed, but rather *choice*. The business users and in-house counsel who draft the deal start with the greatest range of choice in what procedures and limitations they place in the arbitration agreement -- because arbitration is a creature of contract. Of course, the business users and in-house counsel can be greatly aided by arbitration providers and institutions who offer a range of draft agreement clauses, rules and guidelines. The outside counsel who play a key role as expert advisors to the users should be certain that they are fully aware of and advise their clients of the costs, benefits and potential risks of all of the procedural options available to them, so that fully informed choices can be made. Finally, the arbitrators must be good arbitration process managers, and fully committed to an optimal balancing of efficiency, economy and fairness. Court litigation, by contrast, does not offer this range of choice. The unique and inherent value of the Protocols is that they are perhaps, to date, the most succinct and comprehensive analysis of the causes, cures and remedies for cost and delay in commercial arbitration.

IV. CONCLUSION

It is the sincere hope of the College of Commercial Arbitrators that the publication and implementation of these Protocols will be both a call and a plan for action by all constituencies involved in business arbitration, whether in domestic or international cases, encouraging prompt adoption of effective measures to dramatically reduce process costs and delay, and restoring arbitration to its rightful place as a valuable and efficient alternative to litigation in the resolution of business disputes.

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