

In-House Counsel's Key Role in Arbitration: Ensuring the Process Meets Company Expectations

By Richard L. Mattiaccio

In-house attorneys tend to confront questions about arbitration at two discrete junctures: during the contracting process and at the onset of a dispute. A company is best served when its in-house counsel plays a proactive role at these and at every other stage of the process.

During the contracting process, the in-house attorney often needs to address so many mixed business and legal questions that the dispute resolution clause sometimes gets very little attention. When it does, there is a decent chance that the suggestion of arbitration may prompt a “never again” reaction from someone on the team who once had experience with an arbitration that took longer, cost more than expected or that did not produce the hoped-for result. The logical follow-up question, “Has that never happened to you in litigation” is rarely asked. That, and much more, should be asked.

In an ideal world, in order to bring adequate resources to bear on the question, a company should consider dispute resolution as a matter of corporate policy and strategy with a sharp focus on contracts that it signs on a regular basis. The focus of this article is on the more typical, real-world situations of a contract dispute that triggers the operation of an arbitration clause adopted without the luxury of much time or attention at the time of contract formation.

The most important asset any attorney can bring to bear in dealing with these questions is an understanding of the company's values, objectives and priorities. Outside counsel can provide some support, for example by outlining the various options made available by the major arbitration providers, analyzing the pros and cons of each option and how each option compares to litigation in court.¹ In the final analysis, however, in-house counsel's insight into the company's objectives and priorities will make the most important contribution to the process of choosing the dispute resolution mechanism that is best suited to a company. In-house counsel plays an equally important role in shaping and managing the arbitration process once the contracting parties find themselves in a dispute. This is true even if sophisticated arbitration counsel has been engaged and even if in-house counsel's training has been purely transactional.

The following suggestions are offered as guideposts for the in-house attorney who has limited resources available to devote to these questions but who nonetheless wants to make sure that her company chooses the right dispute resolution mechanism and maintains a reasonable level of control over the arbitration process.

At the Time of Contract Negotiations, In-House Counsel's Reality Check for the Business People

Business people rarely want to focus on the dark side when they are entering into a new relationship. In-house counsel has the unenviable but important duty to provide a reality check by diplomatically and clearly focusing the team on plausible scenarios in which the relationship might not go well in some material way. Once that conversation is under way, it is a small next step to the discussion of a dispute resolution process that would make sense in terms of an exit strategy or possibly even getting the business relationship back on track.

At the time of this always too-brief discussion, in-house counsel needs to have a good sense of the ever-more-customized procedures being offered by the major arbitration providers. A quick consultation beforehand with outside counsel who is experienced in these procedures could save time and produce one or more acceptable options. In addition, major providers offer online guides that can provide a good overview for attorneys or business people.²

In-house counsel also needs to become immersed in arbitration law or, more plausibly, have a conversation with an outside attorney who has taken that plunge, to determine the best “seat” for arbitration. Contracting parties can designate a seat of arbitration that is different from the actual place where the hearings will be conducted and that differs as well from the choice of substantive law governing the contract. The seat of arbitration can be the same as the place of hearing, but should be chosen based on the arbitration law of the seat and, specifically, on how much judicial supervision of (or “intrusion into”) the arbitral process is considered ideal. There can be significant variation in judicial supervision, certainly from country to country in the international arena, but also from state to state in the domestic context. Judicial supervision may provide comfort to some companies—to others, it may undermine the very reason to agree to arbitration. A brief discussion with outside counsel is often the best way to work through these issues to get to an approach that best fits a company's priorities and expectations.

At the Time of a Dispute, Building an Arbitration-Specific Team with a Leading Role for the In-House Lawyer

When a dispute does arise, an in-house attorney who has a purely or predominantly transactional background may tend to take a back seat to outside counsel—the

litigators”—for the actual handling of the dispute. That would be a mistake, and a missed opportunity.

Arbitration is, by its nature, a less formal and technical process than litigation in court, and that alone should encourage in-house attorneys of all backgrounds to take a proactive role.

Moreover, providers and arbitrators are interested in what in-house attorneys have to say about the process and whether it is working for their company. Even more important, arbitration and litigation are very different processes that call for very different strategies. Some arbitrators tend to roll their eyes—figuratively, if they can contain themselves—when attorneys engage in stereotypically aggressive litigators’ tactics.

Leaving the handling of a case in arbitration entirely to litigators who are used to the courtroom can run counter to a company’s interests if those litigators have trouble modulating their tone and adjusting their tactics to fit their new audience. A company’s in-house counsel can add value by selecting outside counsel and by guiding the planning of the case with the differences between litigation and arbitration clearly in mind.³ An in-house attorney with a good sense of effective presentation technique in a boardroom-type setting also can add much to an arbitration team’s style of presentation in the hearing.

Another way in-house counsel can add value to the arbitration process is to take a close look at the dispute resolution mechanism provided in the contract and consider whether to negotiate different or additional ground rules tailored to the actual dispute as it has arisen. This may be helpful not so much to gain a strategic advantage—it is too late for that—but to contain costs, especially if that seems to be a priority for both sides in view of the stakes in the dispute.

Notice pleading is allowed, of course, but it is a trap, because a party needs to understand its case fully by the time arbitrators are being selected. In-house counsel can make sure that the team takes the time and steps necessary to (a) analyze the case, (b) identify the important witnesses and document sources, (c) preserve those documents and sources and interview those witnesses, (d) anticipate the other side’s claims or defenses in pleadings and case strategy, and (e) prepare a detailed statement of claim to be filed with a demand, statement of claim or counterclaim. If that means the other side files first, so be it. If the arbitrators are selected wisely, it will not matter on which side of the “v.” a party appears.

During the Arbitration, In-House Counsel’s Involvement in Every Phase

In-house counsel is welcome to join the early planning meetings with the arbitration provider. Decisions made during these conference calls can have a major impact on the most outcome-determinative decision in

the case—identifying the attributes and backgrounds of arbitrators the provider will propose—as well as on the cost and duration of the arbitral process.

Arbitrator selection is generally considered the most important step in the arbitration process. In-house counsel should thoroughly discuss the process with outside counsel and make sure that outside counsel has fully thought through and discussed with the company the characteristics that are most important to the company’s interests, and that every effort is made, within the limits of the selection process, to pick arbitrators with those characteristics. In commercial arbitration, where most awards are unpublished, arbitrator reputations generally are known by word of mouth. This suggests the value of using outside counsel or consultants with deep experience in arbitration.

A hands-on approach by in-house counsel can help to challenge outside counsel to be practical and creative in discovery. Arbitrators are sensitive to criticism that arbitration has become “too much like litigation,” particularly in discovery. As a result, they are increasingly open to suggestions to reduce the related expense. At the same time, outside counsel with litigation backgrounds continue to tend to push for discovery along the lines available in U.S. litigation, unless their in-house counsel encourage them to think and work outside the box.

The preliminary conference often results in a detailed procedural order and schedule that takes the case through the evidentiary hearing. Before the conference, in-house and outside counsel should agree, at least, on a schedule their side can propose, including alternative dates to be held in reserve for use during the conference. It is usually a good idea to let outside counsel take the lead in telephone conferences with the arbitrators, and to have a separate line of communication open so that in-house and outside counsel can confer as matters arise during the conference. If that is not practicable or sufficient, there is nothing wrong with asking that a particular decision be deferred to allow time to consult. The order is the road map for the case, so it is more important to get it right than to get it done on the first call.

In-house counsel also can inject a dose of cost-saving discipline in motion practice. Arbitrators remain generally skeptical of dispositive motions and tend to grant dispositive motions only if they are convinced it will reduce net time and expense. In-house counsel should be confident that the company can make such a showing before authorizing outside counsel to make or seek permission to make the motion.

In-House Counsel’s Role as an Open Channel for Settlement Discussions

It may be that not every case can or should be settled. Then again, not every case that gets as far as the evi-

dentiary hearing should go to a decision on the merits simply because the blood is boiling on both sides. Outside attorneys have their hands full presenting the case or defenses, cross-examining witnesses, and responding to the arbitrators' questions. Even if one side suddenly wants peace, it might not find anyone with whom to negotiate terms.

The in-house attorneys are sometimes the only people at the hearing table who can remain cordial with their counterparts. Arbitrators notice and approve of cordiality in all contexts, so it is always good to have at least one person on each side who maintains a smile and a cool head. Of course, there should be ground rules regarding direct communications between parties in the absence of outside counsel—they can be informal, but they need to be clear from the start.

It has been famously suggested, in the litigation context, that a lawyer defending a deposition witness should speak no more than would a potted plant in the room.⁴ That is as it may be, but there is no potted plant rule for in-house counsel in arbitration. A company can only benefit from the active involvement of the attorney who has the deepest insight into its values and priorities. In-house counsel's involvement at all stages, in coordination with the company's outside counsel, also benefits the process by making providers and arbitrators more aware of and responsive to the needs and expectations of the parties to arbitration.

Endnotes

1. It is beyond the scope of this article to survey the broad spectrum of arbitration clause choices available to counsel drafting a dispute resolution clause. Leading arbitration providers offer online drafting guides and tools. See, e.g., the American Arbitration Association (AAA) ClauseBuilder tool, available at https://www.clausebuilder.org/cb/faces/index?_afLoop=44744150967521&_afWindowMode=0&_adf.ctrl-state=4u8zhfew7_4; AAA Drafting Dispute Resolution Clauses, A Practical Guide (2013), available at https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002540; CPR Model Clauses, available at <http://www.cpradr.org/RulesCaseServices/CPRModelClauses.aspx>; ICC Standard Arbitration Clauses, available at <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/standard-icc-arbitration-clauses/>; JAMS International Clause Workbook (2014), available at <http://www.jamsadr.com/rulesclauses/xpqGC.aspx?xpST=RulesClausesGeneral&key=a1e1913c-e29c-4f04-a7c3-70c0a9bf4a38&activeEntry=ec165cc9-2c58-4b04-8c98-b1712dd4f05f>. The CPR Arbitration Committee is in the process of developing a desktop guide for drafting arbitration clauses.
2. See, e.g., A Guide to Commercial Mediation and Arbitration for Business People, American Arbitration Association (2013), available at <https://www.adr.org/aaa/ShowPDF?doc=ADRSTAGE2019455>; ICC Commission on

Arbitration and ADR, Effective Management of Arbitration—A Guide for In-House Counsel and Other Party Representatives, available at <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2014/Effective-Management-of-Arbitration-A-Guide-for-In-House-Counsel-and-Other-Party-Representatives/>; CPR Rules & Case Services, available at <http://www.cpradr.org/RulesCaseServices.aspx>; IBA Arbitration Country Guides, available at <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=a646cf32-0ad8-4666-876b-c3d045028e64>.

3. See, STIPANOWICH, ET AL, PROTOCOLS FOR EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION 24-42 (2010), available at http://www.thecca.net/sites/default/files/CCA_Protocols.pdf; David E. Evans and India Johnson, The Top 10 Ways to Make Arbitration Faster and More Cost Effective, available at https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_025844. See also Richard L. Mattiaccio, Arbitration Tips and Traps for Corporate Counsel, Corporate Counsel (2014), available at <http://www.thecca.net/sites/default/files/Arbitration%20Tips%20and%20Traps%20for%20Corporate%20Counsel.pdf>. Arbitration Do's and Don'ts for the Trial Lawyer, NYLitigator, Fall 2014, Vol. 19, No. 2 (NYSBA), available at <http://www.thecca.net/sites/default/files/NYSBA%20NY%20Litigator%20Fall%202014%20-%20Arbitration%20Dos%20and%20Donts%20for%20the%20Trial%20Lawyer.PDF>.
4. The seminal opinion on attorney conduct in depositions, *Hall v. Clifton Precision*, 150 F.R.D.525 (E.D. Pa. 1993) (Gawthrop, U.S.D.J.) (unreported but repeatedly cited) did not, in fact, set such a standard, but did serve to focus discussion regarding aggressive attorney behavior. The suggestion that a lawyer is not a "potted plant" is properly attributable to Brendan V. Sullivan, Jr. Esq., during his defense of Oliver North before a Joint Committee of the House and Senate investigating the Iran-Contra scandal. See <http://www.nytimes.com/1987/07/10/world/iran-contra-hearings-note-of-braggadocio-resounds-at-hearing.html>.

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