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## **Costs of Arbitration and the Options for Controlling Those Costs**

*Christopher Martin*

CHRISTOPHER MARTIN: Thank you. Actually, I dropped the tag “adjunct” when I came to Northwestern, which is a nice thing. I decided I didn’t—I liked teaching more than my day job, so I moved to Northwestern a couple of years ago. Before that, I taught at Notre Dame and before that, Loyola. So I’ve been doing this for a while. But I did practice for fifteen years before getting into teaching full time, and most of it—some in the environmental litigation where we did do some arbitration and also some—the bulk of it in commercial litigation and a lot of it here in Chicago. And I am here to talk about costs.

I’ll tell a quick story related to an arbitration. I had a client who had—I won’t get into too many details, but she had no money but had started this daycare business with federal grants and all kinds of assistance. And she got herself into some problems, and we decided that arbitration would be the way to go, and so we did.

We set up the arbitration. We did an agreement. We arbitrated it, and we were successful. And to make a long story short, she ended up recovering about \$1.4 million going backwards over several years and saved who knows how much going forward, at least that much going forward.

So anyway, for her, it was the difference between shuttering the doors of the business or continuing on in very nice fashion. So after the arbitration was over, I’m getting hugs and it’s a celebration out in the hallway, right? So about three or four days later, I’m back in my office. My phone rings, and the receptionist says, “Your client is on line one.” And I’m sitting there thinking, “Fantastic, she wants to tell me I’m the world’s greatest lawyer once again.” So I pick it up, “Hi, Client, how are you?” A little silence and then she said, “I just got your bill.” I’m thinking, “Oh, you’re kidding me, after we just got you a great result.”

But that’s the way clients are. They are very concerned about costs. And in running businesses, they have to be. And I think as lawyers, sometimes we’re more in tune to the legal arguments and what we’re

trying to do and don't keep in mind the real costs to the businesses and the people that we represent.

And with that said, there are a few causes. There are a few contributors to high costs. One is the cost of arbitration fees themselves. And so most people, the natural reaction is let's go cheap, let's find a cheap arbitrator. But it really depends on the type of client you have and what you're trying to do, okay.

In the big, sophisticated international arbitrations, you need that neutral who is experienced. You'll save more money by spending a lot of money on a neutral, or a panel of neutrals, than you will trying to save money on who you hire. But fees are the first important component.

And because of that, I would encourage you as lawyers to do some work in advance. Have a database or a bank of people that you can rely on as third-party neutrals that you can call on for different situations, for small clients who are risking everything, for large corporations. There are different people that fit different needs. And so if you plan in advance, use some of that administrative time that every once in a while you'll bill to your firm. Get that good database. Do some research and find the good people that you want to use.

Once you have more experience, you'll know some of these people. You'll have judges who retire and align themselves with JAMS or the American Arbitration Association (AAA) or someone who you know who they are and you've got the experience with them as judges, and that helps out quite a bit.

The second component is counsel costs, which is the one I got the call on from that one client. Be mindful of that. As attorneys, there's not a lot you can do other than always keeping your client informed of the status of things and getting out regular bills. It seems like a simple thing, but a lot of attorneys don't get their bills out on a regular basis, and instead, the client gets one large bill at the end. So there's not something that we can really do to control costs other than the type of work that we do, which we're going to get to in just a second here.

Then as lawyers, here's the thing that we don't normally think about, and it's a huge cost. It's the internal costs and disruptions of the business, okay, particularly depending on the size of the business. Some of them have in-house counsel who can do a lot of work in preparing for an arbitration and do a lot of the things that you need them to do on the inside.

If you've got smaller clients, it's often a man or woman who is running the show who's got to stop his or her day and take time out of the day and pull people off of the floor or off of the work site and bring

them in and do the work, and there's a tremendous cost involved in all of that. And there are ways to control those costs as well.

So the first thing is effective planning. Probably not a shock to you that if you plan well and plan effectively for an arbitration, you can be far more efficient. That starts with the arbitration contract or clause. And I think people have already spoken to that, so I'm not going to spend a lot of time on that because we've got other cost things to cover.

But it's a key part of the initial negotiation of a contract that includes an arbitration clause, and more importantly, if you have parties that decide to arbitrate outside of an established arbitration clause and you already know what the dispute is, planning and doing an effective job of putting together that arbitration contract can save all of the parties a ton of money.

The language is incredibly important. You need to define the scope of your arbitration early and completely. This is part of—speaking from this, this is an arbitration that parties have decided to arbitrate after the dispute has arisen. That becomes a complicated process because at that time, there's some animosity that has already started to build up most likely.

And the reasons they've decided to arbitrate could be many. It could be a desire for confidentiality in the process and in the eventual award that you wouldn't get in court. Or it could be a desire to have lower costs, although it's not always guaranteed certainly that you're going to have lower costs by using arbitration rather than a traditional litigation.

But it's important for you as lawyers to understand the difference between arbitration and litigation and that you can do a tremendous service for your client by setting aside any early animosity in the process and really getting together and putting together an effective and cost-effective agreement moving forward that both sides can live with.

And a lot of the cost issues we're going to talk about are related to—the more cost savings you get in putting together an arbitration, you are potentially taking on more risk. More risk that you're not going to get the information that you would like to have and more risk that you won't have the time or the resources that you need to do the arbitration. But at the same time, there are obviously the benefits that come on the other side of the low costs.

As part of the language in an agreement, parties can agree to limit the award. Or something that I did on many occasions when I was doing arbitrations, you can agree in advance that we're going to set a floor and a ceiling. And I don't know—unfortunately, I wasn't able to

be here. I had to teach class this morning. I wasn't able to be here for the first part. So if other people have covered this, I apologize, but you can set a floor and a ceiling.

So in other words, we can have a dispute where I'm suing you for \$5 million and you're saying, "I owe you nothing," right. We can agree in advance to arbitrate and we will cap any award at \$3 million, but as a minimum, you will recover \$1 million or something along those lines so that you take out some of the risk of arbitration. I'm not going to walk away from this with nothing, and on the other side, I'm not going to recover everything that I can, but I'm going to get something. I'm sorry, from the other side, you're going to say I have the potential of walking away without paying anything, but at least here I'm limiting the amount of damages that I might have. So things like that can all go into the language in the initial negotiation of the contract.

One of the biggest costs—and you may have touched on this already—associated with arbitration and frankly associated with litigation is discovery. As attorneys, we have this desire to leave no stone unturned, right? We're in the discovery process. We're going to go dig. We're going to do everything we can to find every piece of information that we can possibly use to advance our client's cause. In the litigation setting, you still have to be concerned about costs, and there are costs associated with doing any discovery, but it's all there and available to you. Part of limiting our costs in arbitration is the idea that we're going to limit discovery in some way.

Now, as fledgling attorneys, you're probably thinking, that's good, but I might not get everything that I need, and that's exactly the conundrum that we come across. But depending on the type of dispute that we've got, it may be advantageous to go ahead and say, "Look, both sides are up against the same thing. Let's limit discovery in a way that's sensible, and we'll keep the costs down for both sides."

So how do you do that? You can prohibit requests for admissions where you ask the other side for admissions to certain facts, and instead, get together as parties and see what facts you can stipulate to. That's usually a much more efficient and cost-effective approach of getting admissions.

And admissions are important because then you don't have to establish those things at trial or in the arbitration. So if you can get the other side to admit that it is a business operating in the State of Illinois, you don't have to put on that evidence, right? So we want to get as many admissions as we can, but the process of going through discovery and having them object to the questions that you've asked and all of that can be time consuming. So let's get rid of that and see if we

can stipulate to facts to the extent that we can, and that is a far more efficient method of attorneys operating.

Interrogatories. We can prohibit them. We can also limit the number of interrogatories. So a lot of jurisdictions will limit the number of interrogatories, and if you want to go over those, you have to go to the judge and get permission to do that. In arbitration, we can go ahead and decide we're going to limit each side to a certain number of interrogatories, and again, that can help.

Limiting or prohibiting depositions can be a huge cost savings. It's also a huge risk. But depositions are incredibly expensive. Often, people are flying places. So not just in terms of the lawyer preparing and taking the deposition. You've got the cost again of the business of bringing people in to sit for those depositions. You're taking them away from their jobs. You're putting them up in hotel rooms, and all of that is being paid for by the client. So if we can limit or prohibit those depositions, then we're saving a lot of money.

And again, making these decisions is based on the case that you've got in front of you. So if it's a business who's got everything riding on it—I win, I stay in business or I lose, I'm out of business—you're going to look at that very different than just a contract dispute that neither side wants to lose, but both sides can afford to lose.

And in that case, you might decide I can afford to lose, and I want to limit what this is going to cost and the risk involved and the cost, so I'll take on a little more risk in the amount of information that I might recover. Something that I think a lot of lawyers kind of skip over because they just assume that this is a non-starter; you can have a voluntary informal exchange of information. And depending on the relationship you've got with opposing counsel in an arbitration, if you can—if you've got something of a relationship built up and a little bit of trust—you can go ahead and say, "Look, we can both save our clients money by informally agreeing to produce these things. You know that I'm going to get a spreadsheet of your sales figures, right? So why don't you just give those to me, and I know you're going to get this from me." So you can actually as a lawyer proactively go out there and work with the other side in a cooperative way.

That is not always possible, but it can be. And so I would just ask you to think about that in your practice. Sometimes you can get a tremendous amount of information. Kind of like the—similar to the stipulation of facts instead of doing the discovery to have people admit to certain facts.

Limiting document requests and requiring parties to state the materiality of documents is another way. So normally as lawyers, we just

ask for a bunch of documents, and you only have to have some relevance to the action to be able to ask for the documents. So here in an arbitration, instead of just relevance, we can say you can get documents that are material to what we're doing. Big difference between relevant and material. Material goes directly to the dispute that's between the parties.

Now, there's all kinds of issues that are raised by electronic discovery and things like that now, and we don't have time to get into all of that. But just be aware that by simply limiting production to material documents, you can actually limit the scope of discovery quite a bit.

And then we're going to touch on, in a minute, one of the biggest cost savings—picking your arbitrator or your panel of arbitrators to settle disputes. But in this context of discovery, I cannot tell you how important it is to have a person that both parties trust that you can go to with disputes. Because there are two ways to resolve discovery disputes, and one of the most costly things in litigation or in arbitration is the discovery dispute.

I asked you for this. You didn't give it to me. So now I'm going to spend time to meet and confer. I'm going to put together a ten-page letter telling you why you didn't comply with what I asked you to do. And when you still don't comply, I'm going to file a motion, and then you're going to oppose the motion, and then I'm going to file my reply brief, and we're going to go in for a hearing. And if I can, I'm going to get sanctions against you. That's the way litigation happens.

But if you've got a good neutral—and I've seen judges do this in litigation as well—he will say, "Don't do it, first come to me." If you've got a good neutral and you can agree as parties that we are going to jump on the phone and do a conference call and get together with that neutral and just informally say, "Look, I asked them for these documents. He said they don't exist, and there's no possible way they don't exist. I've got to get these documents." Let the other person say their piece and have someone who can make the call in an informal way.

You can save your clients a tremendous amount of money. And here's the secret to this whole thing. You'll probably end up at the exact same result that you would have had if you had gone through a motion process. Judges and retired judges and people who are very good at what they do as arbitrators—you're not going to pull too many fast ones on them.

So they'll know. As soon as they hear the two sides—this is my problem, this is my response—they're going to know, and they can make an informed decision. Again, there's a little bit of risk involved

in doing that. But there's a huge upside in terms of the cost savings because discovery is incredibly expensive.

Okay. So now some cost savings during an active arbitration. I came in during the last speaker who mentioned the biggest cost saving you can have is to settle your dispute. He was touching on that. Arbitration actually is an excellent tool for putting pressure on the parties to get to an agreement. A big part of that is the cost involved. Some of it is the risk.

"If we settle this, I'm not getting everything I want, but I'm getting enough." The other side will say, "I'm not paying as little as I want, but I've got certainty in what I'm doing." But a lot of times, it's really hard to get the parties to that point, and arbitration can be an excellent tool to get there.

So we want to encourage the settlement process, but at the same time, if we don't settle and we get to the arbitration, there are things that we can do in the arbitration that hopefully we've covered in the arbitration agreement. And you can always agree to things as you move through the process, but hopefully we covered some of these things already in the agreement.

One of them is time limits. And again, depending on the complexity of the problem, if we can limit the amount of time that we spend in front of an arbitrator, we're limiting the amount of fees that we're paying to the arbitrator. We're limiting the amount of fees the clients are paying to their outside counsel who are representing them, and we're limiting the amount of time that the witnesses and the people that are involved have to be pulled away from their jobs to both prepare and testify.

So there's something that's called a chess clock approach. So you can agree we're going to have one day for each side. This is assuming that we've got two parties. We've got one day and a total of six hours with our arbitrator. You get three hours, I get three hours, and it's literally like playing chess where you hit the clock. So whether you're examining witnesses or cross-examining witnesses, both sides will get the same amount of time.

And if you do that and you limit the time, then we've got some certainty on how long this thing's going to go. We got certainty before we even get there on how long this thing's going to last and what it would cost. Use of fast track, which you probably already talked about today, again, has big risks but big cost savings. A lot of fast track has to do with a very truncated schedule, very truncated discovery or elimination of a lot of discovery tools, but you can get to where you're going fast.

Just as an aside, you know, once you get out there and practice, one thing you'll find about clients that I've found fascinating over the years, they will say, "I want you to fight, fight, fight, fight, fight, fight," right? When they actually get into a room somewhere and they just get to say their piece, they get someone to listen to them about what their grievance is, and they're fine. Even if they lose, they say, "You know what, I had my day."

You'll find this when you go to settlement conferences with judges. You'll be just a week or two before trial or maybe even the same day of trial, and the judge will say, "Let's bring everyone into my chambers, we're going to try and see if we can take one last crack in resolving this." A lot of times your client will say their piece, the judge will say, "I hear what you're saying, I am empathetic, but you know what, legally you're going to end up losing this case," and the client is fine.

And you know, I'm convinced that a lot of it is not—it's not the determination of the judge. The chance that I at least got to say what's on my mind, and then someone told me what the result is going to be. And so arbitration can be used in the same way. Sometimes it's the opportunity for them to get there and just simply state their case, and that makes them happy. And when that's the case, if you have a client that you feel just wants their day in court, by all means use fast track. Get there as fast as you can.

Remember that the other side is limited as well. You have risks in the amount of discovery that you can take and other things. The other side is faced with those same risks, okay. Sometimes we make litigation and disputes more difficult than they need to be.

Once you have a little bit of experience, you can start to get a sense of where this thing really should go, and sometimes your clients won't let it go there. You'll tell your client, "This has got to settle. You don't have a great position. There's a lot of risk involved. Let's just settle this and move on." But they don't want to, right?

I never did family law, but I always thought that family law is kind of like that. I've talked to family law attorneys, and they will tell you that the parties hate each other. So one will say, "Fight, go make their life miserable. Tell me all the details." That attorney can usually tell the client where this thing's going to end up at that first meeting. We're going to divide the property this way. You'll get visitation rights to the kids here and here and here. They can do it at the first meeting, but instead we're going to fight for a year and run up the fees. And so when you have a client who you sense just wants that day in court, fast track can be an excellent way to save them some money.

Okay, getting back to arbitrators really quick, in the arbitration process—and this goes before you get there, but if you’ve made the right decisions on choosing someone, this is one of the biggest, next to discovery, this might be the biggest cost savings of all. If you get a neutral or an arbitrator who has great case management skills, they will keep things on track, they will get you in and out, and they will manage what’s going on in front of them in a way that won’t let the arbitration get out of control. And that will save you a ton of money. It will save your client a ton of money.

And again, that same person, going back to discovery, might be one of these people that will bring the parties together on a teleconference and resolve disputes quickly. Give me thirty minutes, tell me what’s on your mind, and I will tell you who wins the discovery dispute. That’s the kind of arbitrator that you want in terms of cost-effectiveness.

Early establishment of all of the parameters of the arbitration will save you a lot of money in the arbitration process. So, specifically and clearly setting what the issues are, the claims, the defenses, all of that stuff—that’s all in the pre-arbitration agreement that you’ve entered into either in the initial contract between the parties or as a result of the dispute that’s going on.

Again, I would encourage you to use that. If you’ve got good arbitrators, use them in the same way that you might use a judge. So you may very well say, “Look, we’re a month out from arbitration, why don’t we get the parties and see if we can meet with them similar to a settlement conference and kind of informally mediate this thing.”

Maybe we can just resolve this through a mediation. It’s always great when the attorneys can go back and forth and informally do this, but sometimes that third party can really help, particularly when you’ve got one of those clients that wants to get in there and make their case. That mediation or pre-arbitration conference can prevent you from even getting to the arbitration, and that saves a lot of money.

And finally, in the arbitration, there are things that you can do particularly with technology now that you couldn’t do several years ago. You can have witnesses appear via Skype or some other teleconference program. So instead of flying someone in from Philadelphia, they sit at their desk, open up their laptop, and can appear and be examined and cross-examined for much less money. So use technology to the best that you can in an arbitration process, and you’ll save money that way.

In addition you can, again with risks involved, agree to written expert statements, “You need your expert, I’ll get my expert, and we’ll just enter in their statements.” You don’t get a chance to cross-examine them, but you know what they’re going to say. And so that can be a way that you can decide to save some money in the arbitration process itself. For arbitrators, if we’ve got actual arbitrators in here, there are lots of options that you can follow to get some cost savings for both sides, including offering a lot of options. I think what the parties want more than anything else are multiple options. How can we get to the end game?

And all of these things will be on kind of a sliding continuum where it’s more expensive, less risk, and kind of go the other direction where you’ll have more risk but less expense. But you want the arbitrator to give you lots of options, which also, incidentally, can be a great marketing tool for arbitrators.

So when you have a website where people can jump on and they see that they’re going to have—they can meet with you and have lots of options for getting to the end game. I think that’s a positive all the way around. Publishing rules early to the parties. Having just absolutely transparent rules on what’s going to happen is extremely important. And setting and following strict deadlines could not be any more important.

I was out in California first for about four or five years before I moved back to Chicago and Cook County. It’s maddening when you get back here because it’s just a different culture. Here, when you serve somebody with discovery, you basically—with a lot of it, you get nothing back. And then you wait a couple of weeks, and then you have to go to court and say they haven’t given me any discovery. The judge asks, “Have you served the answers yet?” “No, your Honor, I’ve just been busy.” “Okay, serve them the answers.” In California, you will get killed for doing that, but here you don’t.

So in an arbitration setting, you want that arbitrator who will set deadlines and be very strict with them because that will save you, provided you are diligent in the work that you do, which I’m sure you will be—that will save your client a lot of money.

And then for arbitrators and for places like JAMS and AAA, they just require training and process management, and really training and a commitment to cost savings for the parties. Develop an understanding of the same problems that we, as attorneys, need to understand. This is incredibly important.

So that is a whirlwind talk about different ways that you can save money or ways to think about being efficient in an arbitration. When

you get out there, I would encourage you to really take these things to heart and to spend—you might have to spend an hour of billable time looking into different ways to be efficient in arbitration, but it may save your client fifteen hours on the back end.

I can't give better advice than to simply put yourself in your client's shoes. You are an advocate. So wear that hat proudly. Put yourself in your client's shoes and ask what would they think about the process and the costs and everything involved and the risk, okay.

So always keep the risk in mind in arbitration. More than likely the other side is taking on a similar risk. So thank you very much.

