

Arbitration 301: Turning ADR into EDR

Turning ADR into EDR is in the hands of the parties and the arbitrator. Here are some helpful tips.

By Erika Birg

Tips for the respondent: Look for early advantages

Make sure you are in the right place.

Just as in court, a good respondent (defending party) first makes sure they are in the right place pursuant to the agreement. If there is no agreement to arbitrate, or to arbitrate in the form chosen by the claimant, then move to dismiss for lack of jurisdiction.

As noted above, arbitrators derive all of their authority from the parties' contract and from the governing rules of the administrator. If the parties' contract, for example, requires three arbitrators who are corporate lawyers in Florida, and the arbitrators in this case are three litigators in Alaska, they are likely without jurisdiction and the arbitration may be dismissed. Make sure the arbitrator has the necessary authority to decide your dispute.

Look for flaws in the statement of claim.

A fraud-in-the-inducement claim, for example, may be barred by the contract's entire agreement or merger clause. The statute of limitations and related legal defenses also still apply. Do not be afraid to make narrow, law-based arguments early to narrow the issues for the hearing.

Although not all arbitrators will grant early dispositive motions, when they are compelling, it gets the issue on the record for any potential confirmation/vacatur motions in court. "Manifest disregard of the law" is a possible basis for vacating an arbitration decision in many jurisdictions (not all), but you generally are required to have presented the law and for the arbitrator to have ignored it willfully.

Assert viable counterclaims; but otherwise say little.

Under many rules, including the American Arbitration Association's, the respondent is not required to file an answering statement, and any claims not admitted are deemed denied. That can be a useful strategic tool if you believe that the matter is going to go to a hearing without much discovery and no dispositive motions.

If you do file an answering statement, particularly if you are going to file counterclaims, then get to the point. Taking an analytical, calculated approach to demonstrating why the claimant cannot succeed and why you are entitled to relief is generally a winning strategy.

Tips for everyone: Make a plan and execute

You are in control.

In arbitration, generally the parties are in control and the arbitrators want the parties to decide as much as possible regarding the process. Attempt to put together a discovery plan before the scheduling conference. If the parties disagree as to what is needed, then be able to articulate exactly why your approach is the best.

Most often, unless the parties agreed in advance to wide-ranging discovery, then the side wanting to limit discovery is likely to have the better chance of success.

Ways to minimize expense of discovery include limiting the number of document requests (usually 10 is enough to get what you need); limiting the number of fact witness depositions and limiting the length to several hours (instead of full or multiple days); coordinating any expert disclosures and depositions in a timely manner so as to get to a prompt hearing; eschew interrogatories (many arbitrators will not grant them); and be realistic about how much time will be necessary for everyone to present their case.

Cooperation goes a long way to creating EDR. And if you cannot cooperate, a strong arbitrator who is committed to an efficient process may do it for you.

EDR is achievable if the parties and the arbitrator are committed to it.



[Erika C. Birg](#)

Erika C. Birg is a partner in Nelson Mullins Riley & Scarborough's Atlanta office. She focuses her practice on helping companies protect their businesses before, during, and after litigation and has significant experience in resolving business-to-business disputes through litigation, alternative dispute resolution, and state and federal appeals involving business torts, contract disputes, trade secrets, computer fraud and non-compete matters. She is a member of the The American Arbitration Association's National Roster of Arbitrators for Commercial Disputes.

Reprinted with permission from the June 22, 2016 edition of Inside Counsel© 2016 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited, contact 877-257-3382 or reprints@alm.com.