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Arbitrations should meet parties' needs

As a career trial lawyer (and now mediator and arbitrator), I understand the satisfaction of a lawsuit that is hard fought and won. Clients and their lawyers instinctively and competitively believe in their case and want to see it through to victory. Litigation, however, is quite commonly disappointing to victor and vanquished alike. The process regularly engenders great turmoil, years of escalating expense, endless discovery and e-discovery battles and ever-growing, enlarged and bitter conflicts. There are substantial risks involved in ceding one's control over key decisions to the litigation process.

Because of the rampant dissatisfaction with litigation, parties and their counsel have begun turning to mediation to attempt to consensually resolve disputes without litigation. Mediation does have a high success rate and regularly is met with far greater levels of satisfaction than litigation. Some mediated disputes, however, do not result in settlement and some parties to a conflict will not agree to the resolution of a dispute that does not involve adjudication of the merits of the dispute.

Advantages of structuring arbitration

When circumstances demand adjudication of disputes, parties may seem to be faced with an undesirable choice between the arduous path of litigation versus the potentially equally difficult path of arbitration. The perils of litigation versus the perils of arbitration, however, represent a false dichotomy. Arbitrations can, and should, be structured by the parties and the arbitrating body to ensure great advantages over litigation. A carefully structured arbitration permits advance agreement on critical processes and substantive components to ensure parties a far more satisfactory adjudication of their disputes.

Arbitration can be far preferable to litigation when the parties carefully structure the key procedural and substantive components. Listed below are the key areas for agreement in structuring arbitration in tort and commercial cases.

Time

It is usually in the interest of parties to arbitration to agree on critical time elements to avoid replicating the endless, runaway litigation effect. Parties can agree in advance on time elements such as how much calendar time, if any, will be devoted to prehearing discovery, deadlines for commencing and conducting the arbitration hearing, a deadline by which the award will be entered and even a deadline for petitions to correct awards entered. Agreement regarding time elements ensures a much speedier and less expensive adjudication than conventional litigation.

Arbitrator

Unlike the assignment of a courtroom judge, parties and their counsel have real and meaningful protection when it comes to selecting arbitrators. Parties may condition their agreement to arbitrate on the selection of a mutually agreeable arbitrator. In an arbitration I participated in, the parties agreed to select three neutral arbitrators from a panel of 19 put forward by the arbitrating body with eight blind strikes apiece without cause. Somewhat surprisingly, each side struck eight different prospective arbitrators, ensuring that the three chosen were not the highly disfavored arbitrators of either. Both sides were able to investigate and choose prudently, eliminating one of the real concerns of litigation (e.g., the finder of fact who appears biased against insureds or insurers).

The choice between one or three arbitrators is likewise one that is impactful and that the parties, given the nature of the dispute, can often agree upon. Tripanel arbitrations, in which each party selects an arbitrator and then the two "party" arbitrators choose a "neutral arbitrator," have benefits that may not be obvious. Experience demonstrates that giving two "partisan arbitrators" the opportunity to adjudicate with a "neutral" does promote robust debate and analysis and may avoid "outlier" awards that are unjust or ill-conceived. A professional alternative dispute resolution provider is an excellent resource for this third "neutral" arbitrator and can help to expedite the arbitration process and keep the arbitration moving along.

ADR CORNER

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Irving Levinson is a mediator and arbitrator exclusively with ADR Systems of America and the executive director of business mediation of the DePaul's Center for Dispute Resolution. For at least three decades, he has tried cases throughout the United States and is now focusing his efforts on mediating and arbitrating commercial disputes. He is also of counsel for K&L Gates LLP. Each month, he will share his tips for engaging in effective alternative dispute resolution.

Discovery and evidentiary agreements

Parties may exercise great flexibility and creativity in reaching discovery and evidentiary agreements governing their arbitration. Parties may agree to leave all discovery and evidentiary issues for determination by the arbitrators. Alternatively, they may agree, to limit the number of and tone of depositions for each side. Similar agreements can be negotiated on the number and/or type of interrogatories, scope of document production and other discovery parameters.

Similarly, the parties could, on their own, or through the arbitrating body, agree on a variety of evidentiary rules, including admissibility of depositions, governing rules of evidence (e.g., federal or state) or even as to the admissibility of specific pieces of evidence. These agreements are case specific and can involve real horse-trading between the parties. The potential to "horse trade" in advance of arbitration provides significantly greater process control than permitted in litigation.

Preselecting acceptable arbitration awards

Arbitrations also permit parties the flexibility to contractually limit their respective risks. Parties may agree to high/low ranges, which are often called parameters. With parameters, the claimant is assured of at least a minimal recovery and the defending party limits the real risk of a disastrous worst case award.

Type of award

Another advantage of arbitration over litigation that limits exposure is the agreement by parties in advance on the type of award and how the award will be delivered to the parties. Will the arbitrator produce an award of one page or less, a "reasoned award" or an award with specific findings of fact and conclusions of law? The parties may negotiate in advance regarding whether injunctive awards or punitive damage awards will be permitted or prohibited by agreement of the parties.

Each case has different needs and issues. Parties can and should take advantage of the opportunity to fashion their arbitration in a way that meets their mutual needs. One key mutual need is to avoid a process that mimics litigation at its worst, a process that runs away from both parties and from sense and sensibility.

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