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ALTERNATIVE DISPUTE RESOLUTION

Arbitration Clause Is Key To Successful Arbitration

Editor's Note: Due to an editing error, an incomplete version of this article ran in a recent Alternative Dispute Resolution special section in the Law Tribune. We apologize for the mistake, and republish the full article below."

By Frederick S. Gold

It is all the rage these days to complain that arbitration has become too much like litigation. Arbitration takes too long. It is too expensive. It involves too much discovery. It requires too many briefs. It takes too much time to schedule a hearing and too much time to get a decision. It has acquired all the detriments of court litigation but without the right to appeal. Complaints of this sort abound.

In many respects, such complaints are valid. At least they accurately reflect the reality of how many arbitrations are conducted these days, under the governance of various sets of rules used by many arbitration providers.

But those rules are creatures of contract. They apply only because the arbitration covenant in the parties' underlying agreement -- or the arbitration covenant upon with the parties agreed after the dispute arose -- say they shall apply. Parties are free to agree on different rules. There are actually many options in the marketplace for streamlined or modified rules that eliminate many of these problems. Further, the parties are free to modify *any* set of arbitration rules in a way that eliminates unwanted elements. The parties' arbitration agreement, whatever its particulars, must be enforced as written.

But there are at least three fundamental problems with application of the theory that arbitration procedures may easily be adapted to suit the parties' purposes. First, it is not always true that, when the parties' business deal (which includes the arbitration clause) is reached, the parties or their lawyers are able to know what kind of arbitration will be best suited for a future dispute.

Re-Examine Particulars

Second, even if it may be possible for an experienced litigator to predict, at the time of contract, how best to tailor an arbitration clause to accommodate a foreseeable dispute, it is less likely that the transactional lawyers who represent clients at the time of contract will be able to do so. Transactional lawyers sometimes tend, out of habit, to dust off an arbitration clause from a recent deal; or worse, to use the same clause they have been using for a long time, all without giving thought to the notion that the particulars of the arbitration covenant should be re-examined for every deal.

Third, the dynamics of the negotiation process might make it difficult to achieve agreement between the parties on any kind of customized arbitration clause. One side may feel its interests will be best served by one kind of arbitration; the other side by another. In the give and take of the negotiation process, one side may even be determined to insist on whatever the other side does not want, and to reject whatever the other side does. This dynamic can make it difficult or impossible for the parties to agree on anything other than the boilerplate invocation of a familiar set of off-the-shelf rules. And those rules may turn out to be exactly what one or more of the parties does not want.

There is no one-size-fits-all solution to these problems. But suggested below are seven principles to keep in mind with respect to the generic and ubiquitous challenge of best serving your client's interests in the selection of arbitration rules, procedures and providers. If there is a common theme to these principles, it is simply this: Think about these issues as early as possible, and

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do what you can to address them at the time of contract. The more enlightened the analysis at the time of contract, the greater the likelihood that dispute resolution by arbitration will turn out to be preferable to litigation in the courtroom.

1) Consider streamlined rules. Many of the current laments about arbitration can be avoided by selecting off-the-shelf streamlined rules made available by a number of providers. As a genre, such rules tend to resemble what the more common commercial arbitration rules looked like twenty-five or thirty years ago. Specifically, they tend to limit or prohibit discovery; to provide for a single neutral arbitrator; and to specify deadlines for each stage of the process. If this is what you want, all you have to do is name the right rules in your contract.
2) The business lawyer and litigator should consult at the time of contract. The business lawyer should have some insight about the extent – and the limits – of the client's war chest in the event of a dispute. The litigator should have some insight about what kind of dispute is most likely to arise. The collaboration between those two lawyers should yield a sense of what the optimal arbitration rules will be for your client in the particular situation.
3) Consider at the time of contract whether the client is likely to want discovery, and if so, how much. If the case is likely to involve substantial, complex discovery, including extensive document production and multiple depositions, maybe you really are better off being in court. Judges tend to have more experience policing complicated discovery disputes and tend as a group to be better at doing so than arbitrators. And if a judge makes a meaningful mistake on this subject or others, there is always appellate recourse. Arbitration was born in substantial part as a way to avoid the time and expense of lengthy discovery. It is still a valid metric to say that the desire to avoid extensive discovery, where such discovery will not be needed, should be a key determinant in favor of arbitration.
4) Consider the issue of arbitrator selection at the time of contract. A single, neutral arbitrator saves the most time. Consider whether you might actually be able to identify a particular arbitrator (or a presumptive choice) in the contract. If not, consider what you can say in the contract to make the arbitrator selection process quick and efficient. Be wary of three arbitrator panels, and especially wary of party appointed arbitrators. Both introduce added delay and added expense. If you decide you want either of those latter mechanisms, be sure you can explain your reasons for that choice to yourself and your client.
5) Consider a contract provision that says the arbitration will be governed by a specified set of arbitration rules, but not conducted by or under the auspices of any provider. Most providers allow the use of their rules in this fashion, for a nominal fee. If you take this approach, you obviously need to be confident you can install an appropriate arbitrator (or arbitrators), and rely on him, her or them to apply the rules, all without the administrative assistance of the provider. Lawyers are sometimes surprised at how easy it can be to accomplish all this, if the adverse parties have a common interest in doing so.
6) Consider provisions in certain rules that create mechanisms to limit risk. The creativity of these mechanisms is almost boundless. For example, there are arrangements under which the arbitrator must decide the case in the ordinary course, but pursuant to an agreement blind to the arbitrator, a decision above a certain number will cap the payor's obligation at that maximum sum, while a decision below a certain number will guarantee the payee that minimum sum. There are also arrangements under which each side submits a written proposal for what the result should be, and either (a) the arbitrator must select one proposal or the other; or (b) the two proposals are blind to the arbitrator; the arbitrator decides the case in the ordinary course; and whichever of the two proposals comes closer to the arbitrator's number becomes the binding result. Usually, such creative mechanisms are agreed upon at the time of arbitration, not the time of contract. But it is prudent at the time of contract at least to give some thought to whether your chosen provider has experience in making provisions of this kind available and whether it is knowledgeable about how they would work.
7) Never select a set of arbitration rules or any other dispute resolution mechanism blindly. At the time of contract, ask yourself and your client the hard questions. What are you doing and why are you doing it? How will it advance the client's strategic interests? The fact that you or a colleague used a particular arbitration clause in last week's contract is never a sufficient reason to use it in this one. ■