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Don't Fear Arbitration—Embrace and Control the Process

From the Experts

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In his address to the annual meeting of the American Arbitration Association in 2010, the Association's then-president, William Slate, raised eyebrows when in his keynote address he challenged AAA neutrals and corporate counsel attending the conference to be more aggressive in taking charge of the arbitration process, which many believed had become too cumbersome, expensive and lengthy—in short, too much like federal litigation. Slate promised that the AAA would enact new rules to combat these tendencies and would more aggressive encouraging its neutrals to help AAA and its international alternate dispute resolution wing, the ICDR, to redouble their efforts to deliver what had been for decades the guaranteed promise of arbitration: that it be faster, cheaper and more desirable than litigation.

Many of the neutrals attending that meeting were clearly taken aback by Slate's intensity and seeming criticism of them, and objected to what some perceived as a scolding. Some rose to protest that, after all, the arbitration process "belongs to the parties," and if those parties wanted more discovery, more motion practice, more document exchange, more electronic data discovery . . . well then, they ought to have them. More than one neutral from the audience put the blame for the trend not on the neutrals, but on the overly aggressive, leave-no-stone-unturned, hourly billing outside counsel retained to press the arbitrations.

However, the room fell silent when one corporate counsel from a large multinational corporation responded to one such comment by replying to the offended neutral: "If the cost and the duration of our arbitrations exceed what we budgeted and planned for, we will not blame our outside counsel, we will blame you!"

Myths and folklore swirl around arbitration these days. On the one hand, it is ballyhooed as an ever more popular alternative to litigation—not perfect, but certainly preferable to the costly discovery and motion practices in most federal and state court proceedings, which always seems to far exceed in time, costs and fees what the parties originally anticipated. In fact, that is the case. Repeated studies of multiple arbitration forums in the United States and in Europe have proved that not only are arbitrations typically cheaper than court cases, due to the prevalent limitations on motions and discovery, but they are also concluded on the average in a fraction of the time it takes to finish court cases.

On the other hand, some corporate counsel, believing some of the antiarbitration myths, have begun to eschew arbitration, repeating anecdotes heard at seminars: that arbitrators are weak, indecisive baby-splitters; that they allow the proceedings to get out of hand and permit unlimited discovery, including electronic data discovery. And, after all, they will say, a panel of three arbitrators adds three "billing units" to what also will be charged by their very expensive outside counsel to press or defend the

arbitration. Who needs it?

And so corporate counsel, hearing these examples and charged with both limiting litigation costs and safeguarding their companies, wonder which is the better choice. Based upon all reasoned empirical studies and experience, the answer is, hands down, arbitration.

Why? First and foremost, the most significant arbitration tribunals, as Slate promised, have uniformly striven to streamline, expedite and exercise more control over their procedures and to encourage, if not push, their neutrals to do the same. Example: In 2013, the ICDR, responsible for arbitrations that involve international parties or issues, substantially revamped its rules for the first time in decades to make those goals even more achievable in several ways. The ICDR's new International Arbitration Rules (IAR) give parties access to an emergency arbitrator at the time the case is filed to hear a motion for emergency relief. This can be done within 24 to 48 hours, with notice to the other side to make a determination regarding the specific request for emergency relief. This for the first time obviates the need to go to the courts for emergency relief. There is no more waiting 60 to 90 days for the arbitrators to be appointed before a party can obtain emergency relief.

But that's not all. The ICDR also has promulgated its Guidelines for the Exchange of Information. The purpose of these guidelines is to make it clear to ICDR arbitrators that they have the authority and the responsibility to manage arbitration proceedings to limit, not expand, discovery in arbitration. They now explicitly have the authority to limit document discovery and depositions, two of the most egregious "budget killers" in litigation, as well as that fearful dollar-consuming monster that now stalks federal litigation, electronic data discovery.

In fact, the new rules explicitly state that depositions, interrogatories and requests to admit generally are not appropriate procedures in obtaining information and arbitration. Moreover, ICDR rules now have "expedited procedures" to provide for the appointment of a single arbitrator—not a panel of three—in any case for which no disclosed claim or counterclaim exceeds $250,000. In its new rules for commercial arbitrations, promulgated in October 2013, the AAA enacted similar changes.

In both sets of rules, neutrals are encouraged to seize control of the process from the beginning. In the initial telephonic "preliminary hearing" in which the panel of arbitrators "meets" with the parties through their counsel, the scope of discovery, if any, and the motions that will be permitted, if any, are discussed.

As an arbitrator myself, I make it a regular practice to invite a representative of each corporate party to attend that preliminary hearing (in addition to counsel), just to ensure that the parties can be asked: "Well, Ms. Corporate Counsel, you have heard your outside counsel say that he wants 20 depositions. That seems like a bit much. Is that what you want, or can we do it with three depositions, or maybe five? And what about electronic data discovery . . . do we want that here, or can we do without it?"

In other words, all parties and counsel, as well as the arbitrators, are encouraged (and even pushed) from the beginning to have an active and robust participation in expediting the procedure and cutting its cost. And if neutrals do not seem to be doing this job, qualified case managers with the AAA or ICDR are there to remind them.

But the greatest method of limiting arbitration costs and ensuring an expedited procedure is for corporate and outside counsel to pay attention long before arbitration begins—that is, during the drafting of the arbitration agreement itself. What this means is that when transaction documents and agreements are being negotiated and drafted, the arbitration clause should not be an afterthought added by throwing in some boilerplate language at the last minute with a minimum of deliberation. A bland, nondetailed arbitration clause that specifies simply that "all disputes shall be submitted to arbitration" will inevitably create more problems than it solves. What parties are subject to litigation? What about subsidiaries? What about individuals within the corporation inextricably bound with effectuating the transaction? And issues to be arbitrated . . what does "all disputes" really mean?

Today, too many arbitrations begin with expensive and time-consuming legal skirmishes over what the clause for arbitration really means. Many parties confront too late the question of what issues in the parties' relationship, now broken, are arbitrable. Had the parties thought about this issue while negotiating and drafting the agreement, perhaps they could have provided an outline as to what disputes would be arbitrable, and avoided those time-consuming and expensive opening legal battles. They also could have specified how many arbitration panel members they wanted, one or three; put a time limit on the completion of the arbitration, with penalties to be paid if it's broken; and addressed, in advance, what discovery would be permitted in the event of a dispute, including electronic data information.

All of this requires some thought and discussion, but not addressing these issues in the arbitration clause, or at least thinking about them, can in of itself result in a more expensive and out-of-control arbitration. Both the AAA and the ICDR websites have numerous suggested arbitration clauses designed to assist drafters of agreements to consider these issues and hopefully avoid these problems.

In summary: Corporate counsel, be not afraid of arbitration. Instead, embrace it—and together, with ever more sophisticated and determined arbitral forums and neutrals, seize control of the process and make it what it was always intended to be: faster and less expensive than litigation.

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