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IN PRACTICE

ALTERNATIVE DISPUTE RESOLUTION

Achieving the Promise of Arbitration

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In recent years, arbitration has been under attack by some lawyers and clients. The claim is that the process has decayed to the point that it is approaching the time and expense of full-scale litigation, with discovery abuses, extended motion practice, hearing delays and long waits for awards. There is some substance to these criticisms, but the flaws are often anecdotal, and the problems at times magnified in the retelling. However, since perceptions can be as damaging as reality in how parties approach the arbitration option, this article suggests ways that arbitration can continue to achieve its promise of efficiency and maintain the confidence of the users.

Delays and extended discovery often emanate from counsel rather than the arbitrator or the process. Attorneys, schooled in litigation, expect that every witness will be deposed before trial, every document will be reviewed, metadata will be activated, and hard drives stripped before the first juror is seated for an extended trial, or a settlement reached on the courthouse steps. Each of these procedures can be the subject of years of billable hours compiled by the trial partner, junior partners, associates and paralegals. Often, the preparation costs on both sides exceed the amount of the claims. When the matter is shifted to an arbitration setting, some attorneys still expect the same preparation, and the attorney might think that this is what the client desires. But not all cases, even substantial commercial matters, need this intense effort, and in arbitration these costs can and should be limited.

Arbitration clearly has benefits that litigation cannot provide. First, the parties can choose their arbitrator, rather than have a judge or jury chosen by the luck of the draw, with no particular expertise in the subject matter of the dispute. The arbitrator's background, special expertise and experience can be examined before he or she is selected. Next, scheduling can be made to fit the parties' needs. Also, discovery can be limited to that which is demonstrably required in the case. Arbitration can dispense with artificial extended time limits found in court rules. Awards are prompt and generally not appealable. These and other benefits can help the parties achieve a fair result with efficiencies and cost savings not available in litigation.

Some of these benefits, however, have been diluted by arbitrators who too easily accede to counsel's requests to duplicate litigation. In the words of William K. Slate II, the president and CEO of the American Arbitration Association, the country's pre-eminent administrator of arbitration services, there are growing suggestions that arbitration is suffering from "out of control arbitration costs and delay." He notes this perception as the "single biggest challenge facing arbitration today both domestically and internationally."

In his recent remarks to hundreds of the nation's top arbitrators, Slate challenged them to help put a "halt to the insidious elements, both real and perceived, that are eating away at the arbitral process." This claim of "creeping litigation" increasing "cost and delay" is now the target of AAA's efforts. He asked for arbitrators to limit uncontrolled discovery, to analyze the elements truly necessary to arbitrate the case, and to control the process so it can be expeditious and effective. Not satisfied with a general criticism, he formulated a definitive plan to change the process.

This is a wake-up call both to arbitrators and users of the process. Clients, through their attorneys, should let the arbitrators know that appropriate discovery management is welcome, time limits can be compressed and hearings expedited. The process by its very nature works better than traditional litigation when it is not forced into a litigation mold. The AAA has advanced a

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proactive plan to expedite arbitration. As arbitrators, we now look to counsel and clients, the users of the dispute resolution system, to welcome these changes and help reverse the decay to private litigation.

The AAA has proposed information exchange guidelines that are now used in its international subsidiary, the International Centre for Dispute Resolution (ICDR); conference calls in lieu of written motions; rapid decision processes; expedited arbiter selection and more. It is seeking ideas from its nationwide cadre of arbitrators to return arbitration to its roots of an efficient, expeditious and economical method of dispute resolution.

There are two other processes that can assist ADR professionals to make mediation and arbitration more efficient: Early Case Assessments and Economical Litigation Agreements.

Unfortunately, the acceptance of Early Case Assessment by potential litigants has been glacial. One of two modes may be used: (1) a single mediator who assesses the problem for both sides and helps resolve it, often without counsel; and (2) a private assessor who consults with a single party and who may then meet with a representative of the other side, but will not represent the party as an advocate in litigation. It is the equivalent of nonbinding arbitration or evaluative mediation without counsel. It resembles an "intervention" if one were dealing with a litigation-procedure addict.

The process can be used before or during litigation or arbitration, or as an adjunct to mediation. When used with arbitration or with litigation, it is best employed early in the process, not where the case is close to being adjudicated. When litigation expenses have already been incurred, and the focus is on winning, as opposed to settling, this may remove calming elements of the process. But, if attempted before or in conjunction with traditional facilitative mediation, the assessor(s) can work in an atmosphere of cooperation where the parties can focus on resolution for the benefit of the companies' future rather than beating the adversary in a courtroom.

The data are thin on this process, except as collaborative mediation in the matrimonial field. In theory, it should work and may be even more user-friendly in commercial matters than in a highly contentious family law forum. It has the potential of being the least abrasive form of an evaluative interface between disputing parties; but until there is a study of its effectiveness, we must assume the jury is still out.

The Economical Litigation Agreement or "prenup" contractually positions a neutral at the heart of discovery disputes, including those involving costly e-discovery. The neutral acts as a discovery master, but with adjudicative authority, and can arbitrate particular discovery demands and permit, bar or limit such discovery where it makes no economic sense. The effect is to hold down the cost of commercial litigation. This concept is one example of a broader use of a neutral in complex litigation to forestall rampant discovery costs. Arbitrators already can do this, but may be tainted if they hear private reasons for discovery demands. Another discovery neutral can avoid this problem and can even work the case into a mediation mode. Interrogatories can be limited or eliminated, depositions are subject to prohibition or approval as to number and duration, and even documentary demands are reviewed for necessity. The result will be lower costs and disciplined preparation.

Of course, there are many techniques for tightening the ADR process, and nothing can replace a talented ADR professional. But the public should know that the ADR industry has heard the criticisms, and is self-correcting to provide, in the words of the title of the CPR organization's monthly magazine, "Alternatives to the High Cost of Litigation."■