Roundtable: Arbitration – Is It Still A Viable Alternative To Litigation?

The Editor interviews ***John W. Hinchey,*** *Partner, King & Spalding, LLP;* ***Lee A. Rosengard,*** *Partner, Stradley Ronon Stevens Young, LLP;* ***Kevin R. Casey,*** *Partner, Stradley Ronon Stevens Young, LLP, and the* ***Hon. William A. Dreier,*** *Member, Norris, McLaughlin & Marcus, P.A.*

Editor: Given your experience in the field, do you believe that arbitration is becoming too costly?

Hinchey: In recent years, the business community has complained that arbitration of commercial disputes is becoming just as time-consuming and costly as litigation. In 2009-2010, two international surveys of corporate counsel in the United States and United Kingdom[1] produced the following findings:

> In disputes that are not international in character, and, when given a choice, 58 percent of all responders would opt for litigation; only 38 percent would choose arbitration; and approximately 10 percent say, "it depends."
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> More than 40 percent of corporations plan to increase their budget for electronic discovery in coming years; they firmly believe that applicable discovery rules should be stricter in limiting the scope of electronic discovery.
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> Disclosure of documents, written submissions, constitution of the tribunal and hearings are the main stages of the arbitral process that contribute to delay; and
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> Parties contribute most to the length of the proceedings, but it is the tribunal and the arbitration institution that should exert control over them to keep the arbitral process moving quickly.

Casey: Commercial arbitration in the United States is certainly under attack. Many corporate counsel want to resolve disputes through mediation, but prefer litigation over arbitration absent a mediated settlement. A main criticism is that arbitration is looking more like litigation, with expanded discovery and motion practice and lengthy hearings negating the cost advantage desired of arbitration. Therefore, *some* arbitrations have become as costly as litigation – eliminating one of arbitration's advantages.

Dreier: It is true that with the insistence upon extensive discovery in arbitrated matters, the cost of the arbitration is generally rising. On one side, the attorneys argue that they do not want to go into an arbitration "flying blind." On the other side, there is the argument that depositions, e-discovery and attendant motion practice do little to affect the outcome, and raise the cost significantly, especially where, in arbitration, there is no fear of a runaway jury.

Where particular fact witness depositions are absolutely necessary, or a particular hard drive must be examined, arbitrators usually permit, but limit, such discovery. But documentary exchanges (often voluntary) and demands for admissions and expert depositions usually provide adequate preparation. Further, a good arbitrator can shorten the hearing by limiting repetitive proof, accepting expert reports in lieu of direct testimony, using video conference testimony to reduce travel costs, and otherwise reducing expenses.

Editor: What are the advantages of ADR over litigation?

Rosengard: Even a costly arbitration offers several advantages over litigation. The parties can pick an arbitrator with expertise, thereby avoiding the need to educate. Arbitration is faster and more likely to preserve business relationships (less adversarial) than litigation. Arbitration is confidential (i.e., it avoids the risk that sensitive trade secrets will be disclosed) and private (a loss is not aired as "dirty linen" in public). Perhaps the greatest attribute of arbitration is flexibility. The parties can contract for whatever procedure, evidence practice, discovery, injunctive or attorney fee remedies, and review that they want. Arbitration may be binding or not; the parties may choose to submit only some issues for resolution (e.g., sever damages or other issues). With all of its advantages, and with the arbitration field addressing the cost issue, the process of arbitration will likely continue its historic growth – likely with improved options.

Dreier: The greatest benefits of arbitration are:

- the choice of a knowledgeable arbitrator whose background and experience can be assessed in advance of selection by the parties, rather than the chance assignment of a judge and jurors,
- flexible scheduling, where your time and that of witnesses and counsel are taken into consideration in establishing hearing dates, and
- the finality of the decision, without appeals, retrials, and endless delay. Arbitration still provides businesses with a less expensive and more expeditious resolution of their disputes than litigation.

Editor: What do you recommend to reduce the time and cost of ADR?

Hinchey: The College of Commercial Arbitrators[2] decided to address these complaints head on and drill down on the causes and possible cures in 2008. In October 2009, they convened a National Summit on Business-to-Business Arbitration in Washington D.C and subsequently issued the *Protocols*.[3] It is a significant 75 page document, and its overarching principles are the following:

- Be deliberate and proactive. Promoting economy and efficiency in arbitration depends on deliberate, aggressive action by businesses and counsel at the time of contract planning and negotiation and continuing throughout the arbitration process.
- Control discovery. U.S.-style discovery is the chief culprit of current complaints about arbitration morphing into litigation. Arbitration providers should offer meaningful and limited alternative discovery routes that the parties might take. The parties and their counsel should work to reach pre-dispute agreements on the acceptable scope of discovery, and arbitrators should exercise the full range of their power to implement an efficient discovery plan.
- Control motion practice. Some see current motion practice as adding another layer of court-like procedures, resulting in heavy costs and delay. Others see current motion practice as missing an opportunity for reducing costs and delay. The key is recognizing whether in a particular case a substantive motion would advance or reduce the goal of lower cost and greater efficiency in the particular case.
- Control the schedule. Since work expands to fill the time allotted, it is critical to place presumptive time limits on activities in arbitration or on the overall process, coupled with "fail safe" provisions that ensure the process moves forward in the face of inaction by a party. At hearings, for example, the use of a "chess clock" approach is of proven value in expediting examinations and presentations.
- The central lesson. In the final analysis, the central lesson of the *Protocols* is that the core value of arbitration is *choice*. The business users and in-house counsel who draft the deal start with the greatest range of choice in what procedures and limitations they place in the arbitration agreement - because arbitration is a creature of contract. Court litigation, by contrast, does not offer this range of choice. The unique and inherent value of the *Protocols* is that they are perhaps, to date, the most succinct and comprehensive analysis of the causes, cures, and remedies for cost and delay in commercial arbitration.

Dreier: For an even less expensive and often more satisfying method of resolving disputes, do not overlook mediation. It permits your business to participate in the process of supervised settlement, without having the decision imposed upon you. Over 97 percent of cases eventually settle before final hearing. Before investing in the high cost of litigation or even the more effective process of arbitration, why not avoid most of the preparation process and attempt to settle using a qualified mediator?

Editor: What are the core strategies of early case assessment within the context of ADR? How do they differ when applied to litigation?

Casey: Early case assessment (ECA) techniques are being used by companies more frequently upon notice of a claim. The process involves identifying and marshalling (i) the key facts that drive the dispute, (ii) the significant players in the organization whose input is necessary to evaluate the claim, (iii) the company's business issues that impact on responding to the claim, (iv) the costs and risks of continuing with the dispute and (v) the available choices, whether they be taking steps to reach an early settlement or litigating the matter to conclusion. The goal is to see disputes in the context of the enterprise's overall business. One cannot identify the core strategies of ECA within the separate contexts of ADR and litigation. Indeed, the decision to use ADR or, alternatively, resort to litigation is the *outcome* of an ECA process. ECA brings structure to that analysis by informing decision makers of the options available to them in an expedited way at the earliest stages of the conflict.

Rosengard: One core strategy that permeates ECA is the need to identify what the company's overall interests are; how those interests can be accommodated in light of the pendency of the claim; and how, and under what circumstances, litigation is to be avoided. By evaluating risks of a litigation at an early stage, by comparing them to the business benefits of an early resolution, and by considering the true costs of litigating when compared to the advantages of settlement, key company constituents can reach a reasoned answer to the question of whether or not to attempt to reach an early resolution. ECA envisions a joint effort by inside and outside counsel. Together, they can develop a model for what constitutes a successful outcome for the client and measure the benefits and risks of engaging in either ADR or full-blown litigation.

Dreier: The acceptance of Early Case Assessment 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, 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 non-binding arbitration or evaluative mediation without counsel. The process can be used before or during litigation or arbitration, or as an adjunct to mediation. When used with arbitration, the effect is the same as with litigation, the process is under the gun of a case soon to be adjudicated. The pressures of mounting litigation expenses and the focus on "winning," as opposed to "settling," may both sharpen the process and remove its calming elements. If attempted before or in conjunction with traditional facilitative mediation, the assessor(s) can work in an atmosphere of cooperation where the parties' mindsets can be resolution for the benefit of future business, rather than beating the adversary in a courtroom.

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[1] *See* Fulbright & Jaworski Survey http://www.litigationtrends@fulbright.com; and White & Case/Queen Mary School of International Arbitration, University of London Report. http://www.arbitrationonline.org/research/2010/index.html.

[2] The College of Commercial Arbitrators (CCA) was established as a U.S. non-profit corporation in 2001. Its mission is to promote the highest standards of conduct, professionalism and ethics in commercial arbitration, to develop "best practices" guidelines and materials, and to provide peer training and professional development. Its membership currently consists of approximately two hundred leading commercial arbitrators in the United States and abroad. *See,* CCA Website: http://thecca.net/bio.aspx?id=browse

[3] The Protocols were chiefly drafted and edited by Thomas J. Stipanowich, CCA Fellow, William H. Webster Chair in Dispute Resolution and Professor of Law at Pepperdine University School of Law and Academic Director of the Straus Institute of Dispute Resolution; The Hon. Curtis E. von Kann, CCA Fellow and former District of Columbia Superior Court Judge, and Deborah Rothman, CCA Fellow and full-time arbitrator and mediator. The complete Protocols may be found and downloaded from the College of Commercial Arbitrators website: http://www.thecca.net/CCA_Protocols.pdf.

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