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Commercial Arbitration: Expeditious Resolution, Or Wormhole of Unpredictability?

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It is a common view, amongst business people anyway, that arbitration is an expedited and cost-effective way to resolve commercial disputes. In exchange for various procedural protections (rules of evidence, appeals, etc.), a private arbitration allows the parties to avoid the inevitable delays and burdens associated with a public litigation.

Similarly, the parties get a person with relevant expertise to decide their dispute, and so they can expect a fair and informed decision. Those certainly are laudable goals consistent with the motivation behind arbitration generally. And in practice, sometimes it works out that way. All too often, however, the parties are confronted with the unexpected and disconcerting reality that their supposedly streamlined arbitration takes on the form of a typical commercial litigation with all the trimmings of discovery, delay and cost. And to boot, they may have arbitrators who do not understand their issues, yet render significant decisions not subject to appeal or any meaningful review.

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The good news is that parties have substantial control over how their arbitration can look. The bad news is that the opportunity occurs so early in their relationship and at a time when parties rarely focus on such nitty-gritty things as arbitration procedure, which means the chance often is missed. In short, as pop star Meghan Trainor might say, it's all about that arbitration clause. In the majority of cases, the scope and contours of an arbitration is predetermined before the first harsh word is sent in that email missive decrying that someone is not living up to their promise, and long before anyone involves counsel experienced in handling commercial arbitrations.

Unlike traditional litigation, which is governed by statutes, procedural rules, and decades of case law, all of which is taught to first-year law students, arbitration is a creature of contract. For sure there are limited statutes addressing arbitration in the most rudimentary manner, but they focus on the enforceability of awards, rather than arbitration procedure. For that, the parties must think ahead and include in their contract how they want their arbitration to look. The market for arbitration, like all markets, has provided consumers with options. Parties can elect to employ "canned" arbitration rules from a variety of organizations that specialize in administering arbitrations. While helpful, it is not quite as simple as merely selecting one of these organizations and leaving it at that. By way of example, in the United States, the American Arbitration Association (AAA) has a dominant role and often is selected as the arbitration forum. But it would be insufficient simply to say in a contract that, "In the event of a dispute, the parties will arbitrate under the auspices of the AAA." That is because even at the AAA there is no one set of talismanic rules that apply to everything. It has "Consumer Arbitration Rules," "Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes)," "Optional Appellate Arbitration Rules," and the list goes on. And even within each set of rules there are choices, such as the number of arbitrators, whether the award will be "reasoned" (a written decision explaining the outcome, rather than stating only that one side won), scope of discovery, hearing location, and more. And that is just the AAA. There are ICC arbitrations, UNCITRAL, JAMS, and many others. The parties even are free to employ their own rules that do not conform to any pre-packaged organization, known as "ad hoc" arbitrations. Clearly, having an effective, and predictable, arbitration takes some thought, and that thought must occur at the time

the parties enter into their contract. If they brush it aside, either because they do not want to think about the divorce while planning the wedding, they cannot agree on the specifics, or they simply lack the experience to craft an effective clause, they could live to regret it. For members of the arbitration bar, it may sound like heresy, but the parties are better off having no arbitration at all and resort to litigation in court, rather than deal with an arbitration based on a weak clause.

Why, one might ask? What manner of disaster will befall the parties if they "just agree to arbitrate" and worry about the details later? The answer is unpredictability, time and cost. Precisely the things arbitration is designed to avoid. And the bonus is they still will bear the drawbacks of arbitration, such as lack of appellate review. If the arbitration clause does not clearly spell out what happens and when, then surely the parties will reach an impasse once they are in the mode of fighting with each other. They will dispute how arbitrators are selected, where the hearing will occur, whether there will be depositions, and everything else if they believe they would be disadvantaged by agreeing to whatever it is the other side wants. As the saying goes, they will fight over the shape of the table. Parties and lawyers failing to agree in a commercial dispute hardly is newsworthy, but in court there are defined rules, and there is a judge to employ them who generally has a track record, so the parties can predict how she will react. Not so in arbitration.

A good illustration stems from the one example of parties failing to provide for arbitrator selection. If that is not spelled out, either in the arbitration clause itself or by reference to a set of rules that clearly define how the panel is to be selected, the parties may find themselves having to go to court to seek an order compelling arbitration, and appointing a panel. Assuming the applicable jurisdiction allows for judges to appoint arbitrators upon application of the parties, the parties now are faced with the prospect of having to start a lawsuit. Obviously that costs money, is public, and takes time. Whereas the parties can by agreement impose on an arbitrator a deadline for issuing a decision, the same is far from true with a judge, who is not paid to cater to these specific litigants, and has many other cases. More importantly, however, the identity of the arbitrator has just become a bit of crapshoot. Going in, the parties may have anticipated they would hand their fate to a panel with particular expertise. But the judge who now is deciding how the arbitration will operate may not feel compelled to appoint an unknown person with the expertise desired by the parties. It is not uncommon for judges to refer such matters to people they know, such as their former partners, colleagues, or retired judges looking for work as mediators or arbitrators, and that person may have absolutely no experience with the applicable industry or issues. By failing to sculpt the shape of the arbitration at the outset, the parties now have lost a fair bit of control over how the dispute is going to be resolved, which is perhaps the core benefit of choosing to arbitrate in exchange for forgoing some of the procedural protections of litigation.

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At this point, one might be wondering why any rational businessperson would choose to insert an arbitration clause in their important contracts at all, but that would be missing the point. Arbitration can be an excellent way to resolve disputes quickly, efficiently, and in private. But that can happen only if the parties include an effective arbitration clause in their contract. Delineating every aspect of an effective arbitration clause is beyond the scope of this article, but there are key concepts that should be considered, and they include the following.

Arbitrator Selection. This cannot be overstated. If the arbitration has any hope of being successful, the parties *must* provide a specific mechanism for selecting their panel. There is no doubt that once the bullets start to fly, the parties will agree on precious little. In terms of a process, it can be as simple as following the AAA rules for arbitrator selection, though that does cede control from the parties in picking their arbitrator. Or, the parties can identify criteria and create their own process. Typical criteria include requiring a certain number of years' experience in a particular industry, having a law degree, having practiced in a certain area for a period of time, or having been a judge. The parties even can pre-determine a specific list of people from whom the panel must be drawn, though there are pitfalls with this approach if such people prove unavailable when a dispute arises, potentially years later. The limits are bound only by the parties' creativity and the nature of the contract at issue. For instance, if the contract concerns a particularly technical and obscure matter, then it probably is more important to have a panel with specific expertise in the subject matter. If it is a generic sales contract, then a lawyer with UCC experience could be ideal.

Included in the process is deciding whether there will be a single arbitrator, or a panel of some other number, often three. Employing a single arbitrator has the advantage of speed, less cost and less complexity (e.g., scheduling, persuading only one person you

are correct). A multi-person panel has the advantage of hedging against an arbitrary or palpably wrong decision, because consensus is required to decide the case. There is no right answer, but a choice must be made, otherwise the parties will spend time and money fighting about it.

In terms of picking the actual people, the parties have many options. They can use the default rules for whatever organization they have chosen to administer the case. For instance, under the AAA, for three-arbitrator panels, each side picks one person and then those two people choose the "chair" of the panel. Another option is for the parties to exchange lists of candidates until the requisite number of people appear on both lists. This could take more time, but it has the virtue of the parties choosing the same people, which increases the level of confidence in the decision.

Truly, selection of solid arbitrators is of paramount importance. Once installed, the panel will have plenary control over the proceedings, and absent exceedingly rare situations (fraud, collusion) there will be no review or overturning anything the arbitrator does within the confines of the case. This is not limited to the final decision on the merits, but things like the scope of discovery, scheduling, nature of submissions, admission of evidence and every other aspect of case administration will be in the hands of the panel. So choose your arbitrators wisely!

Discovery. A hotly contested aspect of commercial arbitration is the scope of discovery, which is often the most expensive and time consuming portion of litigation, and hence a motivator to arbitrate. That said, it is the rare case where both sides do not want some modicum of disclosure. Exchanging documents, conceptually, is not usually a contentious issue. But the scope of that discovery can be. Parties should give thought to whether they want to limit the scope of document discovery, either by limiting the number of requests or the types of documents to be produced (because of its volume and explosive potential, email often is a hot-button issue). Or perhaps a cost-shifting provision that makes a requesting party think twice before requiring the other side to engage in an arduous process to search for and produce voluminous documents of marginal relevance.

But document discovery is not usually where the fight is most intense. The main event focuses on depositions. If the arbitration clause sets the scope of deposition discovery, then there will be a fair bit more predictability to the proceedings. One straightforward and easy way to handle it is to provide that each side will depose the other's hearing witnesses, plus some additional modest number. But most clauses do not address the issue. Imagine a scenario where the parties have not provided for how deposition discovery will occur, and compounds that by failing to provide for how their arbitrator will be selected. Further, imagine the court or arbitration body overseeing the case selects a single arbitrator, someone neither side knows. Now, one side will argue that it needs 25 depositions, and the other will say there should be none, or at most one or two. The look and feel of this arbitration, both in terms of cost and time, will be affected in a fundamental way by the resolution of this issue, yet neither side will be able to predict the outcome, and it will be decided by someone they did not choose themselves. That scenario undermines the main benefits of arbitration, and could have been cured if the parties had included in their arbitration clause something about how depositions will work, or at least select a set of rules that is clear on depositions (most canned sets of rules are not).

Schedule. Lawsuits can go on forever, and the dirty little secret is that arbitrations can too. If the panel does not take control of the case and force it forward on a reasonable schedule (bearing in mind that arbitrators are paid by the hour), it is far from unusual for arbitration proceedings to drag on for over a year, and sometimes a fair bit longer. And the final hearings themselves can continue for extended periods of time, often not on consecutive days, so the parties may find themselves being forced to come back again and again for continued hearings over a very long period of time. Obviously that is disruptive to any business.

Thankfully, the schedule is entirely in the parties' control, but only if they address it in their arbitration clause. Set an amount of time for discovery, how many days the hearing will take, specify that the hearing will be on consecutive days. Or simply set the amount of time that will run from when the arbitration is filed until a final decision; such clauses focus arbitrators on compressing the case, as the more time taken for discovery and hearings, the less the panel has to render its decision and write the opinion.

Drafting exhaustive arbitration clauses obviously cannot and should not be the focus of negotiations on significant business transactions. But parties choosing to lob in an incomplete and generic arbitration clause into the "miscellaneous" section of their key contracts do so at their peril. If a company has a general form of contract it uses repeatedly, it would be well-advised to consult experienced counsel to draft a cogent arbitration clause covering the issues important to that company. As to the more bespoke deals, parties at least should run the clause by the lawyers at their firms who have experience in such matters. That very small investment could pay huge dividends later, if even one sour deal ends up being resolved quickly and inexpensively due to an effective arbitration clause.