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PERSPECTIVE

For just outcomes, the arbitration process can hold more promise than trial

By Wayne Brazil

The purpose of this piece is to highlight in one compact place the advantages of arbitration — not to thoroughly assess the strengths and weaknesses of litigation and arbitration.

The Neutral

Unlike in litigation, where parties have nothing to say about who presides over the pretrial and trial processes, in arbitration parties select the person or persons who will perform these critical functions.

There are, of course, wide ranges of attributes and styles among both arbitrators and judges. Some judges and some arbitrators are very good. Some are also pretty bad. The difference in arbitration is that the parties have a great deal to say about who is in charge. Parties can eliminate the risk of getting a lazy or biased or incompetent judge by selecting an arbitrator who possesses the qualities that are most important to them; e.g., intellect, discipline, integrity, expertise.

And in arbitrations, parties can use the selection of an arbitrator to control how quickly they get to a hearing. They can assure that the person they select is available when they want their hearing — and will be readily available to address problems that arise during the pre-hearing period.

The Pre-Hearing Process

In arbitrations, parties know that the same neutral (or the same three neutrals) will preside from filing to disposition. So the arbitrator knows the case well when he or she is making management or discovery decisions. There is no risk that a new, less predictable judicial mind will enter the fray and that a new learning curve will have to be indulged.

The document production process can be more streamlined and efficient in arbitrations. The rules of many arbitration providers require parties to exchange relevant documents shortly after the demand is filed or after the initial case management conference is held. These exchanges provide counsel with early access to important evidence — laying a foundation for early assessments of the wisdom of pursuing settlement. They also equip counsel to make better-framed and -targeted follow-up document requests.

Deposition activity is presumptively more restrained in arbitrations — reducing the risk of wasting time deposing witnesses of marginal evidentiary consequence.

Pre-hearing motions are less likely to be filed in arbitrations. Motions challenging pleadings are generally unwelcome and unproductive. And motions challenging the merits of claims or defenses often cannot be filed without first securing leave from the arbitrator, which is likely to be granted only when it is clear that the proffered motion is viable and likely to significantly increase the efficiency of the proceeding as a whole.

The Hearing Process

In arbitrations, exhibits are presumptively admitted, so no time is wasted laying obvious foundations or making time-consuming proffers.

The relative informality of an arbitration, the absence of courtroom pressure and the absence of a need to make and preserve a record for appeal enable parties, witnesses and lawyers to focus on substance rather than obsess about form.

Because objections (except to preserve privileges) are discouraged, there are fewer interruptions and distractions. More fulsome answers to questions are permitted (but extended narratives are not). Testimony comes in more cleanly and coherently.

Arbitrations also afford the decision- maker with an opportunity to blend strengths of the adversary system with strengths of civil law systems — an opportunity trial judges do not enjoy. As in trials in continental Europe, hearsay evidence can be admitted in arbitrations. Its reliability and significance can be assessed realistically, in full evidentiary and legal context, after the hearing has been completed and the post-hearing briefs have been filed (it would be in those briefs that lawyers would challenge the reliability of particular evidence — if it was sufficiently consequential to justify the effort).

As the continental Europeans long ago concluded, this process provides the decision-maker with efficient access to potentially important evidence without creating a risk of analytical error. In trials, where the rules of evidence (including the hearsay rule) must be enforced and records must be preserved, there is considerable risk that a judge who is forced to rule immediately on objections could err — thus preventing consequential evidence from being considered and/or creating a basis for overturning the trial outcome on appeal.

Arbitrators also are freer than American trial judges to ask questions. This freedom increases the odds that the decision-maker will accurately understand the evidence or the line of reasoning that underlies a contention or a suggested inference.

As a result of all of these characteristics, an arbitration can yield a richer information base to support the decision-maker's analyses and conclusions.

The Decision-Making Process

An arbitrator is less vulnerable than a jury to extraneous influences and considerations, and

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the outcome of an arbitration is more likely than a jury verdict to track closely to the law and the evidence.

But arbitrations offer advantages even over judge trials.

An arbitrator's attention and time are freer from distractions from other pressing duties than a judge's. Arbitrators have more periods of sustained concentration when making findings and drawing conclusions.

As mentioned, there is no need in arbitrations to make potentially significant decisions about the admissibility of evidence on the spur of the moment in the heat of trial battle. Decisions about relevance, probative weight and even possible prejudice are not made until the proceedings have been completed and there is a rich and more reliable context in which to make these kinds of determinations.

In arbitrations, credibility determinations are more richly informed and not made until all the evidence has been admitted and the post-hearing briefs have been studied. Credibility determinations do not turn on hastily made and unreliable inferences from appearances or mannerisms, or from the immediate impact of emotion. Instead, reliability determinations are the product of analysis of how well testimony fits in the whole context-picture that emerges when the interplay between all of the documentary, testimonial and circumstantial evidence is understood.

No law clerk plays any role in the vast majority of arbitrations. Thus, except in unusual circumstances approved in advance by all parties, no law clerks participate in any aspect of the decision-making process. It is the arbitrator's mind that examines, directly, the documents and that reviews, directly, the testimony. The decision-making devil is in the details. A decision-maker who does not know the evidentiary details does not know the case.

In arbitrations, it is only the arbitrator's mature legal mind that conducts the analyses and makes the decisions. And it is only the arbitrator who does the writing, who makes the findings of fact and sets forth the bases for them, and who lays out the reasoning that leads to the disposition. Independently setting forth one's reasoning, with citations to the evidence and law, is a powerful source of intellectual discipline that reduces the risk of error. Nothing comparable happens in a jury trial, and most judges are compelled by the demands of their roles either to depend on help from law clerks or to devote less time and uninterrupted effort to the decision-making process.

There are, of course, disadvantages of arbitration and very important reasons for having trials. But viewed holistically, the arbitration process has features that can increase the likelihood of yielding the outcome that comports most closely with the evidence and the law. ■