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To avoid delay, submit to arbitration

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The lion's share of arbitration matters are "demand cases," when an agreement to arbitrate future disputes is a provision of the parties' contract. By contrast, submission agreements offer a different approach. Once a dispute arises, the parties agree to submit it to binding arbitration even if they do not have a contractual agreement to arbitrate.

Although many lawyers traditionally have been concerned that once a dispute has arisen, negotiation of a submission agreement will become difficult, the fact is that sophisticated parties and seasoned lawyers are often negotiating such agreements these days — and for good reason. Submission agreements allow the parties to choose their decision-makers, the types of pre-hearing discovery and other procedures to be used, how the hearing will be conducted, the running time to a final result, the types of relief to be granted as well as numerous other features of a custom-designed process. Under a submission agreement, the parties can control the process and reap the benefits of fair and cost-effective arbitration.

Backlogs in the courts have made arbitration an increasingly popular option. An open letter to House Speaker John Boehner and Vice President Joe Biden sent by the chief judges of 87 of the nation's 94 federal district courts last year warned that several years of flat funding followed by the sequestration cuts that took effect March 1, 2013, "had a devastating impact on court operations nationwide" and, in particular, "are resulting in slower processing of civil and bankruptcy cases which impacts individuals and businesses seeking to resolve disputes in the federal courts."

Once the outlines of a particular dispute are known, it often is possible for counsel to negotiate a more specific and appropriate dispute resolution process for their particular case than could have been outlined by transactional lawyers drafting arbitration provisions for unknown disputes that might arise in the future. Submission agreements, when negotiated by thoughtful and creative lawyers, offer both sides the opportunity to create a process that their clients might find preferable to litigating in court.

For example, a large and complex commercial case was originally filed in court and had been pending there for a substantial period of time. The case involved nine-figure damages claims and very sophisticated parties represented by excellent and experienced counsel. The parties agreed to arbitrate the claims, starting with hearings six months later. Pursuant to their submission agreement, counsel were to select only arbitrators who could meet that schedule, each side was allotted 70 hours of hearing time, and the three-arbitrator tribunal was required to issue a reasoned award within 30 days following receipt of post-hearing briefs. The parties also agreed that liability would not be contested so that the focus of the hearings would be on damages. Although the case involved large claims and complex issues, a case that would have taken years to prepare and litigate in court was completed efficiently in well under a year.

In an intellectual property case involving a dispute arising out of a stock purchase agreement, the parties and counsel also were able to reach agreement on efficient handling of their arbitration. They agreed to streamlined arbitration rules despite the fact that the claimed damages were in the millions of dollars. In addition, they pared the hearing time down to one week, split that time on a 50/50 basis, and submitted expert reports in lieu of lengthy direct examination.

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Other examples of submission agreements include cases where the parties agree to use "baseball" arbitration requiring the arbitrators to select one of the last best offers made at mediation; to arbitrate subject to high-low limits; to participate in expedited arbitrations of certain key issues while reserving the balance of their disputes for further litigation or settlement discussions; to settle commercial disputes by providing for performance of agreed actions and simultaneously for fast-track arbitrations of any issues that might arise during performance of their agreement (essentially, a "dispute review board" outside a construction context), or to utilize "med-arb" or "arb-med" processes.

Submission agreements may address some of the following:

Description of the claims to be arbitrated. The heart of any submission agreement is a careful description of the claims to be submitted to arbitration. Clear drafting is key because this description will govern the scope of the arbitrators' authority and resulting award, avoiding needless litigation over whether a particular issue is covered by the agreement and whether the arbitrators exceeded their powers when issuing an award. In general, the best way to avoid this problem is to outline a broad scope of issues.

Arbitrator selection. The parties can agree on whether they want one or three arbitrators and can set requirements to ensure neutrality. A requirement that the candidates make ethical disclosures is usual, especially under the stringent requirements of states like California. Further, the agreement can specify prior experience such as candidates must have at least 10 years of law practice relating to energy matters, or whatever the subject matter of the dispute might be.

Selection of rules. Most submission agreements specify the provider to administer the arbitration as well as the applicable arbitration rules. The parties are free to name the ones they prefer. For example, a party might select rules that provide for injunctive or emergency relief due to a fear of immediate, irreparable loss or damage when a former partner starts to disclose confidential customer information or IP. Often rules provide for prompt appointment of an emergency arbitrator to hear and resolve requests for relief before appointment of the arbitrator who will handle the case. Parties also may want to consider using rules that provide expedited procedures for large cases and/or an arbitration appeal procedure.

Time to the result. For parties concerned about efficient resolution of their dispute, the ability to negotiate an agreed outer limit on the permissible duration of their dispute resolution process is an important feature of submission agreements. The parties can mutually agree on timing — how long should be allotted for an exchange of information before the hearings start, how long the hearings will be and how much time the tribunal will have to issue the final award. The agreement may also require that only arbitrators who can meet the desired schedule will be considered for appointment.

Customized discovery plan. Discovery is the most expensive part of any arbitration, especially now that most commercial cases involve significant amounts of electronically stored information. It is important to negotiate a plan for the exchange of information that is in proportion to the size of the dispute at hand. Another consideration is whether percipient and/or expert depositions are needed. Discovery in arbitration usually does not include written discovery. Interrogatories and requests for admission are not favored since they can be expensive and often fail to elicit significant information.

Sometimes, the parties might agree to dispense with U.S.-style discovery altogether and agree instead on a model more commonly used in European and other international arbitrations — an initial "laydown" of documents the parties intend to rely on, followed by limited and targeted requests for additional documents. These steps are then followed by exchanges of prepared written direct testimony and statements of the claims and defenses, with the hearing limited to cross-examination and re-direct of some witnesses.

Confidentiality. Although arbitrators and provider organizations are under a duty to preserve the privacy of the proceedings, most arbitral rules do not require the parties to observe confidentiality. Despite vigorous disagreements on the merits, commercial parties might agree that it would be best if the existence of the dispute were kept confidential from their competitors, distributors, suppliers or customers.

Potential collateral benefit. Diplomats who negotiate concerning difficult international disputes often speak of first negotiating "confidence-building measures." Every experienced mediator knows that full agreement on key issues may be achieved after the parties have agreed on a series of less important matters. Down the road, parties to a submission agreement might be able to agree on some of the substantive issues that are at the heart of their dispute. Even if that happy result does not come to pass and the case does need to be arbitrated to binding resolution, the parties will have ensured that the process will be a customized one that they designed and controlled.

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