May 3, 2012

InsideCounsel.com

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Using Arbitration for a Quicker and More Cost-Effective Resolution

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Inside counsel face many pressures today, not the least of which is cost containment in litigation. Using alternative fee arrangements, closely managing outside law firm expenses and bringing other matters in-house are ways that counsel have met the challenge. Litigation, however, is inevitable, and costly. While arbitration has received its share of criticism in recent years for failing to meet its promise of a "better, faster, cheaper" alternative to litigation, arbitration still remains, for most cases, a less expensive and faster alternative.

With proper planning, inside counsel can play a crucial role designing the arbitration process that starts with a well-drafted arbitration clause, written long before a dispute has arisen.

Issues such as arbitrability (what disputes are covered by the arbitration clause?) and the scope of the arbitration (who decides certain threshold questions such as jurisdiction?) are often ignored in the clause, forcing the parties to go to court for clarification and thus increasing the expense. If the drafter intends all disputes to be resolved by arbitration, a broad statement such as, "Any controversy, claim or dispute arising out of or relating to…" should be used. And if the parties want the arbitrator, not a court, to decide threshold issues, that intent should be made clear, as should the powers of the arbitrator to award any consequential or punitive damages.

To avoid wasted time at the outset of a matter, consider where the arbitration should be administered and heard. Drafters sometimes fail to specify the governing law of the dispute and this can have unintended consequences regarding, for example, the enforceability of broad indemnification clauses.

Wise counsel should also consider the number and qualification(s) of the arbitrator(s). Should the matter be decided by one or three arbitrators? What qualifications should they have? How will the arbitrator(s) be appointed? And will any party-appointed arbitrators in a tripartite panel be non-neutral or neutral? Waiting until an arbitration has been commenced to start arguing over these matters can have unintended consequences.

There are several arbitral institutions (e.g., AAA, JAMS, the International Chamber of Commerce (ICC), etc.) to which counsel can turn for advice on clause drafting, and whose Rules provide order and structure and manageability to the process. Or parties can choose to self-administer the arbitration in a so-called ad hoc proceeding. In that case, the parties' agreement might want to specify the procedural guidelines for the proceedings. Otherwise, their procedures will be governed by the law of the place of the arbitration. Be careful, however because in some jurisdictions, including mainland China, ad hoc clauses are unenforceable.

One of the biggest cost-drivers in arbitration is discovery, especially electronic discovery. In response to this problem, arbitration providers have introduced protocols to guide the process but the scope of discovery, limits on e-discovery, etc., can also be spelled out in the contract or by reference to provider Rules or Protocols.

Other factors to consider in drafting an arbitration clause include whether the parties desire a reasoned award, whether interim relief should be permitted (most institutional rules give the arbitrator the power to order interim relief or provisional remedies), whether negotiation or mediation should be a condition precedent to the commencement of an arbitration, whether dispositive motions will be considered, deadlines and confidentiality of the process.

In sum, arbitration can be, and despite the criticism, almost always is, a cost-effective alternative to litigation. Care must be taken at the clause drafting stage, for which inside counsel is uniquely qualified to guide the process.

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