IT'S ALL ABOUT THAT CLAUSE, 'BOUT THAT CLAUSE

By Bruce A. Friedman, Esq.

As a former trial lawyer, I know well the unpopularity of arbitration among litigators. The list of reasons rolls easily off the tongue of any experienced trial lawyer:

1. The arbitrator does not have to follow the law;
2. There is no right to appeal;
3. There is the absence of case determinative motions;
4. Discovery is limited or not available;
5. Arbitration is as expensive as litigation;
6. The rules of evidence do not apply; and
7. The belief that arbitrators are prone to "split the baby."

Now that I have become a neutral serving as an arbitrator, my perspective on arbitration has changed. If done right, an arbitration is an efficient procedure for resolving cases. The differences between arbitration and litigation are more nuanced than the general criticism of arbitration. The issue is not black and white. There are many attributes of arbitration worthy of even a jaded trial lawyer's consideration:

1. An arbitration can be confidential;
2. A party and counsel have input into the choice of arbitrator;
3. An arbitrator can be required to follow the law;
4. There can be an appeal of an arbitration award;
5. Arbitration can be streamlined and less expensive;
6. Arbitration can include discovery;
7. An arbitrator can consider case terminating law and motion;
8. The rules of evidence can apply; and
9. Hearing dates are final in an arbitration. There is no "hurry up and wait" that one finds in the crowded courthouse.

All of the foregoing attributes of arbitration, however, can only be achieved if the arbitration clause is properly drafted to provide for them.

1. The clause can provide that the arbitration is confidential;
2. It can require that the arbitrator follow the law of a given jurisdiction;
3. It can require a reasoned decision;
4. There can be an appeal process in the clause with one to three or more former appellate justices;
5. The qualifications of the arbitrator can be set forth in terms of a former judge, or a certain level of legal and/or industry experience;
6. The clause can provide the arbitrator with authority to decide case terminating motions such as motions, to dismiss or summary judgment;
7. The clause can provide for discovery co-extensive with the Federal Rules of Civil Procedure or a designated state or streamline discovery by limiting it or eliminating it; and
8. The clause can provide that the rules of evidence will apply to the proceeding.

The point is that it is all about the arbitration clause when it comes to arbitration vs. litigation. Unfortunately, trial lawyers are not consulted by transactional lawyers to review and comment on the "standard" arbitration clause in the contract they are drafting. Trial lawyers often do not know that they can get what they want in an arbitration clause if it is properly negotiated and drafted. It's encouraged that litigators and transactional lawyers engage in a conversation on the subject of the arbitration clause. It is often the least negotiated clause in the contract, yet it can be the most important in terms of dispute resolution. Obviously, it is easier to get someone to agree to what you want in the clause when there is no dispute between the parties. In the end, it is all about getting a clause that best protects your client's interest in resolving disputes under the contract. ■

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