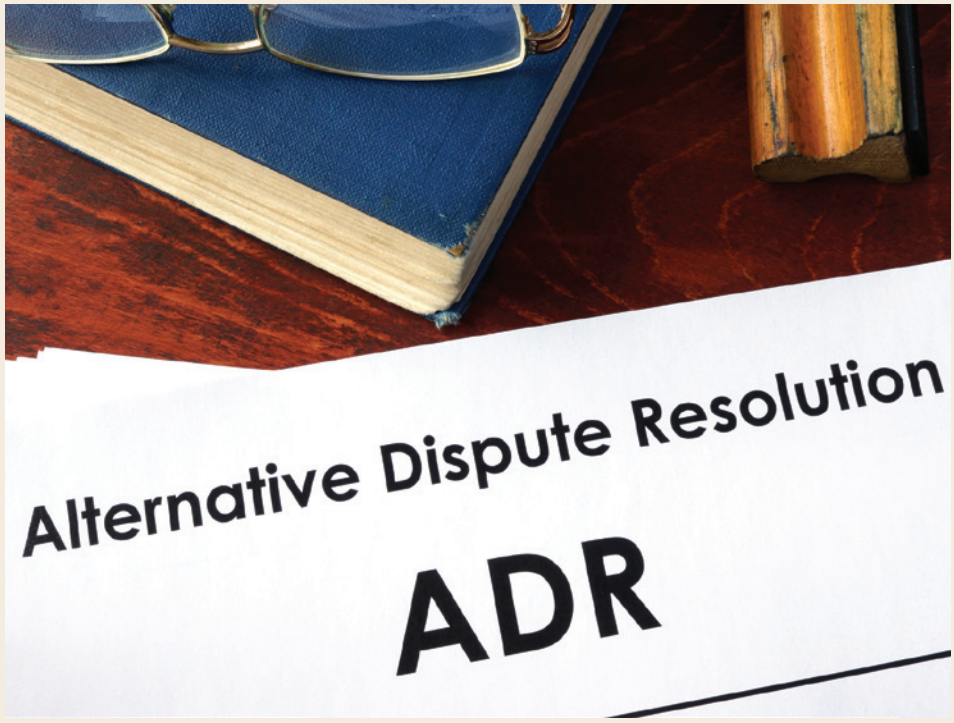
LAW | REAL ESTATE | FINANCE
DailyBusinessReview.com
An ALM Publication NOVEMBER 21, 2017
DAILY BUSINESS REVIEW
PRACTICE FOCUS / ALTERNATIVE DISPUTE RESOLUTION

The Key to Saving Time and Money in Dispute Resolution: Staying Out of Court

Commentary by Patricia Thompson


Thompson



SHUTTERSTOCK

Delayed dispute resolution is harmful to the parties and the economy. Not only is it true that justice delayed is justice denied, but lengthy litigation is exhausting, unduly harassing and prohibitively expensive for individuals and all but the largest businesses. Moreover, in a recent five-year study covering 10 high population states, including Florida, a group of economists at Micronomics Economic Research and Consulting found that federal court lawsuits lasted more than a year longer than arbitrations decided during the same period, excluding litigation appellate time. The survey estimated this litigation delay caused direct business losses exceeding $10 billion, resulting from causes such as the cost of management's involvement in the litigation; the effect of prolonged litigation uncertainty on management decision-making, creditworthiness, and investor concerns; and lost use of resources tied up by litigation. In most jurisdictions, state court litigation takes even longer than federal, thereby exacerbating the greater delay and cost to the parties over that incurred in the typical arbitration.

BOARD OF CONTRIBUTORS

Consequently, businesses should reexamine how they can better save time and money by arbitrating rather than litigating business, consumer, and employment disputes, provided they use well drafted, fairly balanced arbitration agreements.

However, merely inserting "standardized" arbitration agreements into every transactional document and employment agreement is not enough to insure the speedy, cost-efficient resolution of related disputes. Without a well worded arbitration agreement and a strong arbitrator, parties can easily morph an arbitration into a proceeding that looks like an expensive and lengthy lawsuit. To avoid such a result, authorities suggest that arbitration agreements be thoughtfully tailored to fairly but efficiently limit the availability of discovery and motion practice, which activities have been proven to be the two most time intensive

and expensive aspects of litigation. Parties also should carefully investigate and then select arbitrators with expertise in the law at issue, as well as experience and training in the efficient management of arbitration proceedings and final hearings.

But more attention to the drafting of an arbitration agreement is necessary for any related arbitration to live up to the cost savings and efficiency that this form of dispute resolution was created to achieve.

Case law has many examples of arbitrations delayed—sometimes for years—pending resolution of court proceedings in which the parties litigated the meaning and enforceability of boiler-plate arbitration provisions that defeated the purpose of having such an agreement. Consequently, the drafters of arbitration agreements should consider the following examples of how best to avoid the type of mistakes that can spawn expensive lawsuits.

Clearly define the scope of the arbitration agreement.

• To avoid litigation, the arbitration agreement should make clear:Whether its scope applies to all disputes or controversies arising out of or related to the relationship of the parties or the transaction at issue, including statutory, tort, equitable, common law or contract-based claims, including those arising before as well as after the arbitration agreement;

• That objections to the scope and validity of the arbitration agreement and the underlying contract must be arbitrated rather than resolved by a court; and

• Whether it binds entities related to the contracting parties, whether it requires consolidation of all related disputes to avoid multiple, parallel proceedings, whether any contemplated non-parties to the agreement may enforce it, and whether it precludes class actions.

Define the arbitrator's authority.

The arbitration agreement should leave no question as to the arbitrator's authority. It should:

• Give the arbitrator sole authority to determine whether the parties have satisfied conditions to arbitration, as well as the enforceability of the underlying contract(s), and the scope and enforceability of the arbitration agreement; and

• Clarify that the arbitrator has broad authority to award damages, injunctive and other equitable remedies, and assess fees, costs and sanctions.

Draft a fundamentally fair agreement.

One-sided or substantively unconscionable arbitration agreements invite litigation to invalidate the agreement. In turn, because "bad facts make bad law," such litigation may result in an erosion of the inclination of most federal and state courts to broadly enforce arbitration agreements in consumer and employment contracts. If one is in doubt as to what constitutes a fair agreement, the rules, sample provisions, and other suggestions for use in crafting consumer, employment and other types of arbitration agreements offered by well-known dispute resolution organizations like JAMS and the American Arbitration Association are good resources for drafting language that is clearly worded, balanced, and commercially reasonable.

Also, in the consumer or employment context, it may be wise to preface an arbitration provision with an introduction that explains how dispute resolution by arbitration benefits both parties to the agreement, including factors such as the more private and less intrusive nature of arbitration, as well as its expediency, relative cost savings, flexibility, and use of expert decision makers.

Avoid inconsistent contract terms.

Litigation often results when language in a boiler plate arbitration agreement conflicts with other standard provisions in the underlying or related contract documents. Commonly inconsistent provisions to avoid may concern:

• Choice of law and availability of remedies,

• Inapplicable references to courts and judicial venues for dispute resolution, and

• Confusion as to selection or number of arbitrators or the applicable arbitral rules.

There is not one way to arbitrate a dispute and no one form of arbitration is best for every circumstance. Critics of arbitration may be basing their objections on results of poorly drafted agreements or badly managed arbitration proceedings. Or, it is possible that proponents of litigation over arbitration may have an interest in the litigation process that is different than the interests of the actual litigants. Nevertheless, more likely than not, a well drafted arbitration agreement should foster a more cost-effective, flexible, and swift resolution of disputes, by using language that is consciously crafted to avoid litigation or a litigation-like proceeding.

Patricia H. Thompson is an arbitrator and mediator with JAMS in Miami. She is a former chair of two construction-related committees in the Tort and Insurance and Litigation sections of the ABA. Ms. Thompson can be reached at pthompson@jamsadr.com.