

Are Arbitrators and Mediators With Specific Expertise Really a Benefit in Business Cases?

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One of the widely extolled benefits of using a mediation or arbitration process to resolve disputes rather than proceeding in court is the ability of the parties to choose an arbitrator or mediator with experience in a particular area of law or industry. Indeed, many arbitration or mediation clauses call for such expertise. Is it really a benefit? Are there potential downsides? The answer is yes and yes, but, so long as the needs of your client are carefully assessed, it generally is a benefit and takes advantage of the customization available in mediation and arbitration that is not available in court.

1. What kind of “expertise” are we talking about?

At the outset, it is important to identify the types of experience and expertise that parties should consider as they assess the best neutral for a particular arbitration or mediation:

(a) Litigation experience versus transactional experience: Will your client benefit from a mediator or arbitrator with years of purely commercial litigation experience as an advocate or a judge? Or will it be beneficial if the neutral has had at least some experience negotiating transactions? This kind of question is often overlooked; many neutrals come out of a commercial litigation or judicial back-

ground and have not worked extensively in the problem-solving, forward-looking world of contract/deal negotiation and structuring.

(b) Experience with general legal issues: If your case involves a regulatory question in the life sciences such as pharmaceuticals or a nuanced re-insurance question, will your client benefit from an arbitrator or mediator with extensive direct experience advising clients in these areas? Litigating them?

(c) Substantive industry experience: If your dispute involves a particular industry, such as oil and gas, pharmaceuticals, health care payor-provider relationships or software, is knowledge of the industry important? If so, it is important to circle back to (a) above—is it business experience that will be helpful? Familiarity with structuring negotiation of the types of contracts in the area? Experience as inside counsel? Litigating disputes in the industry? All of the above?

The considerations can be different in mediation and arbitration and are briefly considered below.

2. Mediation:

In a business dispute, a mediation can require a challenging two track analysis that simultaneously looks to the future and the past – an evaluation of business



terms or consideration of a negotiated termination that makes sense to both parties now, regardless of the previous arrangement, and an evaluation of any dispute about those past arrangements in a litigation context should the negotiation fail, along with a commensurate risk and cost assessment. It can be helpful to select a mediator who has both extensive experience with the negotiation of transactions and deal terms that can help the parties work around difficulties – even if the point of the exercise is to end the relationship -- and commercial litigation and evaluation experience. Such a mediator can help guide a proactive process on both fronts and understand both the litigator

and business mindsets. A mediator without hands-on business negotiation experience may have fewer tools with which to assist the parties to consider their options and reach a resolution or actively assist in running a mediation business negotiation session if that is what the clients think will be helpful. In addition, hands-on experience with transactional and collaboration implementation issues can help the mediator contribute to both business solutions and case evaluation.

In addition, familiarity with an industry and the types of contracts and arrangements prevalent there can help mediators get to the heart of issues very quickly and contribute to an evaluation of common, often deliberately ambiguous contract terms -- such as the widely used "commercially reasonable efforts" -- all with the aim of helping the parties develop a fair, business-friendly solution that is at least reasonably consistent with industry norms and expectations and what is "market."

3. Arbitration

No matter how evaluative a mediator, he or she has only the power of persuasion to convince the parties that it is better to resolve their differences through a mediated agreement than proceed with arbitration or litigation. Not so with arbitrators, who have the power to impose a decision that at least one party would refuse to accept voluntarily. There are winners and losers in arbitration, and the decisions are generally final.

In light of this authority, some litigators have expressed their concern that an arbitrator with industry expertise will, in unknown ways, substitute their industry knowledge for the litigator's argument or experts. The litigator wants to maintain full

control over the education of the arbitrators about the industry and the dispute. Perhaps it is possible for an arbitrator to "know too much" and not give a fair shake to the client's narrative.

I posit that these concerns are easily ameliorated and that the benefits exceed the risks for many reasons, including the following:

(a) Arbitration experience: Trained arbitrators today understand the need to suspend judgment until all of the evidence is in and follow the law governing the agreements in dispute. Choosing an arbitrator with adequate arbitration experience and training will help ensure that these parameters are met, and the opportunity to interview an arbitrator candidate expressly about these points and related concerns should not be foregone.

(b) Speed and efficiency: One criticism leveled against the arbitration process in general is that it has become "litigation-lite" and no faster than court. This perception has many facets to it and space constraints do not permit fully addressing those concerns here. Certainly, however, parties should consider that choosing arbitrators with business negotiation and industry expertise may in a particular case help speed up the process tremendously since such arbitrators are better positioned to quickly grasp the key fact and legal issues underlying the dispute and help the parties set up an appropriately stream-lined process. Tutorials about technical issues -- in a gene therapy research dispute, for example -- are still advisable since these exercises inevitably identify underlying disputes about the facts between the parties, but an arbitrator with experience in a field will be better situated to understand the

tutorials, identify the basis for the disputes and ask additional questions that may help streamline the issues that need to be assessed, aid in setting up a sensible discovery process and considering which witnesses will be the most helpful.

(c) Fair and business-friendly result: Another concern voiced by practitioners about arbitration is the possibility of a rogue result that makes no sense to their business clients or is inconsistent with the law -- and unappealable. Parties should consider whether or not having an arbitrator with business negotiation and/or industry experience will help deliver a result that is informed by and consistent with industry expectations and norms as well as the law. After all, commercial arbitration developed as a result of merchants in, for example, nineteenth century New York desiring a more informed, practical venue for the resolution of their disputes that took advantage of adjudicators with industry knowledge. Knowing that an arbitrator understands the context of a dispute from hands-on experience and familiarity with contract terms may add greater predictability and certainty to the ultimate result.

Ms. Weiner is a JAMS neutral who mediates and arbitrates a wide variety of complex commercial disputes, but has special expertise in the life sciences (including pharmaceuticals, medical devices, diagnostics and vaccines) and healthcare.

