

Drafting an Arbitration Provision

The VirtualCourthouse Way

By Judge Arthur M. Monty Ahalt (ret.)*

VirtualCourthouse provides a fresh new approach to arbitration. An approach which provides flexibility and cost savings not available through AAA, JAMs, National Arbitration Forum. Have you noticed that arbitration has become more time consuming and more expensive as each year passes? How has that happened when the whole notion, 50 years ago was, for Arbitration to reduce the cost and time of litigation? Well, one observation would lay the blame at the foot of trying to provide too many rules to cover too many possibilities. Take a look at any major ADR provider's rules - in many cases they are more involved than courts rules of procedure.

Here is how the unaware gets caught up in that dilemma. Client engages a lawyer to draft a contract. Lawyer suggests to client that it is best to insert a provision in the contract agreeing to arbitrate any dispute. Client is aware of all of the horror stories about the cost of litigation and says "by all means keep me out of court ". Lawyer inserts a provision which says - "Any dispute between the parties will be arbitrated in accordance with the rules of the American Arbitration Association." Two years go by and the parties have a major disagreement. One party looks up the AAA rules and finds out that the AAA rules require the claim to be filed with AAA. The parties now have no choice about how much will be charged or who the arbitrator will be. AAA's panels of neutrals are not competitively formed. AAA restricts the number of neutrals - never a good idea as that type of activity keeps prices high and many highly qualified neutrals off of AAA panels. They have agreed to a dispute resolution service that provides little flexibility - many would say more expensive than court. Many attorneys find the AAA administrative process to be cumbersome, unwieldy and time consuming.

What then is the best way to draft an arbitration provision in a contract? The first order of business is to understand the legal territory. Generally speaking, arbitration agreements are enabled by Federal and State law -the Federal Arbitration Act or the Uniform Arbitration Act. Both Federal and State Acts provide similar provisions, although there are significant differences in some special areas. Both Acts are similar in that they provide for:

- Enforcement of agreements to arbitrate;
- The appointment of an arbitrator where the parties cannot agree;

- **The subpoena of witnesses;**
- **The confirmation of awards by judgment in court.**

When drafting arbitration provision in a contract the important items to consider.

- **Administration Cost**
- **Identity of the neutral**
 - - **Greatest number of qualified neutrals to select from**
 - **Closed panels increase costs and are anti- competitive**
 - **Allowing the parties the opportunity to agree on a neutral**
- **Neutral compensation**
- **Simplification of the rules without sacrificing important legal rights**
- **Flexibility - Does an ADR provider have the ability to change?**
 - - **Reduce Costs**
 - **Adopt new technology**

The key issue here is to provide the maximum amount of flexibility so that a fair, fast and inexpensive conclusion can be reached. When the parties reserve the right or alternative to select the ADR solution provider until a dispute arises they build in cost flexibility. The alternative is to select and name an ADR solution provider that has the same flexibility built in. VirtualCourthouse provides that flexibility.

The VirtualCourthouse Rules are flexible yet binding -

- 1. The rules of arbitration or mediation are what the parties agree. The neutral will ask the parties if they have agreed upon rules. If the parties cannot agree on the rules or disagree on specific rules then the rules will be as the neutral determines appropriate for the parties.*
- 2. Neutral Selection. The neutral (arbitrator, mediator) will be determined by the agreement of the parties. The parties by agreement may request VirtualCourthouse to designate a neutral. Before VirtualCourthouse designates a neutral VirtualCourthouse will consult with the parties. If the parties cannot agree then either party may petition a court of competent jurisdiction to appoint a neutral.*

Provide your client with the best alternative chose a VirtualCourthouse contract provision now - [click here for contract provisions](#).

Some folks will maintain that these provisions are not strong enough to make sure that they stay out of court. But, stay out of court at what price. If the parties or anyone wants to be truly adversarial than the matter ought to be in the court system. Arbitration at all costs is not very wise. It is very common these days for cases to start in court and end up in arbitration after discovery and court ordered mediation have taken place. The court system with its rules and procedures while allowing adversaries to be adversaries still is based on the underpinnings of sound fair minded judges.

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