IS YOUR ARBITRATION CLAUSE OUTMODED?

By Zela "Zee" G. Claiborne, Esq.

Although arbitration is a "creature of contract" and many arbitrations proceed in the manner outlined in the arbitration clause, it is not unusual for the parties and their counsel to alter the terms of the original clause to suit the dispute at hand. Often a dispute has arisen years after the arbitration clause was drafted, and circumstances have changed. The clause may no longer be appropriate. Although the parties and their lawyers may have strong disagreements on the merits of the case, they understand that stipulating to a customized process that suits the dispute is a huge benefit to everyone involved. This flexibility is one of the strong points of the arbitration process.

The following suggestions are just a few of the ways to alter an outmoded clause:

1. Select One Arbitrator

One goal of these stipulations is streamlining the arbitration process to make it more cost-effective. When the clause calls for a panel of three arbitrators, counsel can make the process less costly and often more efficient by stipulating to use a sole arbitrator. Although the parties may prefer a tripartite panel for a complex, "bet-the-company" case, choosing an experienced solo arbitrator can save time and money and does not involve extreme risk. Counsel have an opportunity to review the arbitrator's disclosures, to contact others about their experiences with the arbitrator and even to interview the arbitrator if there are concerns about fairness and the handling of the case. Interviewing arbitrators has become a common practice, and a good way to do it is to meet with the candidate in the presence of the other side to ask various questions about how the candidate manages cases, while, of course, avoiding queries about the merits of the dispute.

2. Select a Provider to Administer the Case

Arbitration participants often express a preference for a particular ADR provider based on factors such as experienced case managers, efficient administrative procedures, cost and a comfortable, high-quality hearing space. While the arbitration clause may identify a particular provider, the parties may have had a negative experience with that provider in the past and may want to switch. Therefore, it is not unusual for counsel to stipulate to a different, preferred provider. As long as both parties agree, this is an easy process that will make the experience smoother and less frustrating for both sides. Case managers are trained to assist with such a change.

3. Select Arbitration Rules

Certain arbitration rules may be specified in the arbitration clause and, again, may be changed after counsel have had a chance to review the rules and select those that seem to be most appropriate to the dispute. Some rules give the arbitrator more authority to manage the case with a firm hand than others. For example, the rules may specifically limit discovery in order to streamline the case, offer ways to expedite the process and give the arbitrator the power to sanction for a failure to comply with the rules and the orders of the arbitrator.

4. Other possible modifications

The parties may want to change the timeline for the arbitration. For example, some clauses specify that the hearings must begin 60 days after arbitrator selection. While this timeline may work for many cases, 60 days is not enough time to prepare for a complex case. Further, some clauses may specify that the hearings are limited to one day. Again, this is fine for a small case, but it may not allow for a full and fair hearing of a complex matter.

Counsel also may want to consider provisions that limit depositions and dispositive motions, that provide for direct testimony to be presented in writing with live cross-examination, that provide for use of the chess clock to allocate time for the presentation of each party's case, that call for "baseball" arbitration or that allow for appellate review. These are just some of the possibilities. Often, counsel discuss these possibilities with the arbitrator at the Preliminary Conference, and most arbitrators will offer assistance with this process based on their years of experience.

Taking advantage of the flexibility of arbitration is the best way to insure that the process is efficient and fair. Win or lose, counsel and their clients will benefit from a customized arbitration process that they helped design. ■

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