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Arbitration: Have It Your Way Or, You Won't Know Whether You Like It Until You Know What It Is

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ARBITRATION

Have It Your Way

Or,

You Won't Know Whether You Like It Until You Know What It Is

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I. INTRODUCTION

A. Arbitration and other means of alternative dispute resolution are popular topics as dissatisfaction with the judicial system continues.

a. These alternative dispute systems, and particularly arbitration, have few "required" characteristics. Instead, the essence of arbitration is a decisionrendering system designed to meet the needs of the parties in resolving particular disputes.

b. Clients have heard of the advantages of arbitration you should know too.

B. In considering the use of arbitration, first identify the differences or optional differences between arbitration and litigation; identify those "defects" in the judicial system which you wish to cure--the "causes" of your dissatisfaction. Second, outline the system that you want to resolve your disputes.

C. Only by identifying the potential differences between litigation and arbitration, and comparing the benefits and detriments of the judicial system with your designed arbitration, can you decide whether arbitration

is desirable as a means of deciding a dispute.

II. WHAT IS ARBITRATION?

A. The simplest arbitration.

a. Two kids take their dispute to Mom or Dad.

B. The complex arbitration private court.

C. The "typical arbitration:

a. Common law arbitration: Two parties select a third person to resolve a dispute. There are no formal rules except as the arbitrator from time to time defines. Each person simply tells his story, or, if other persons are called as witnesses, they may testify in a question and answer format. The formality of the proceeding increases as the arbitrator or parties add rules and define procedures.

a. There are minimal requirements for an arbitration to be a "statutory. arbitration: a written agreement to submit dispute to arbitration and that judgment upon the award can be rendered by any court having jurisdiction. With this minimal agreement, the arbitration statutes will fill in some of the picture as to what and how it will occur, but most is left to the arbitrator. Alternatively, the agreement can provide details of procedures such as appointment of arbitrators, written awards, expenses, etc. The details of the agreement can be reduced by simply incorporating an existing set of rules such as those of the AAA

b. Basic fairness and due process are the fundamental elements.

b. Arbitration under the American Arbitration Association (AAA). The AAA has a limited number of rules defining the system and procedures. Instead of the parties setting up and "running" the system, the AAA provides a set of rules for the administration and conducting of the arbitration, and provides the administration.

a. What is the AAA?

b. How does the AAA operate?

c. Arbitration pursuant to a detailed agreement which, for practical purposes, may be practically a private court.

a. In definition, although not in practice, arbitration

need not be substantially different than a court.

D. A formal definition of arbitration is simply the submission of a disagreement to one or more third persons for resolution.

E. The definition of arbitration gives you ample breadth to define a system and procedures that fully meet your needs and objectives--so long as the opposing party agrees. Arbitration is a system of dispute resolution agreed upon by the parties. (Compare: courtordered arbitration.)

a. Arbitration can take practically any form that you want it to take:
from the simplest--each party write out or tell the arbitrator its position and the arbitrator decides; to as complex as the most complex judicial proceeding, *e.g.*, private trial.

b. We should not allow our preconceived ideas as to what constitutes arbitration limit our design of an arbitration system to meet our needs and objectives.

c. The key is whether the system resolves or aids in the resolution of the dispute in a manner that is more desirable to you than the judicial system.

d. Judicial proceedings are well defined, and give a feeling of certainty. Arbitration procedures are less defined and more flexible.

III. HOW DOES ARBITRATION DIFFER FROM LITIGATION THE PROS AND CONS OF ARBITRATIONS POSSIBLE PROVISIONS FOR YOUR ARBITRATION AGREEMENT

A. Usually, the arbitrator is selected by the parties. The arbitrator may have expertise applicable to the dispute, and may not be a

a. If the parties cannot agree or if agreed procedures do not result in the appointment of an arbitrator, the Court will appoint an arbitrator under the arbitration statutes.

B. Arbitration is voluntary.

a. Cf., Statutory condition precedent to litigation.

C. Usually, arbitration is in a conference room, not a courtroom or on

a site.

a. Note the importance of atmosphere as to relationship between the parties, particularly if they want a dispute resolved without hostility.

D. Usually, there are no pretrial motions in arbitration, *e.g.*, Rules 12, 56, etc.

E. Usually, there is no discovery or very limited discovery in arbitration, unless the parties otherwise agree.

F. Arbitrators may be restricted in type of relief they can grant, *e.g.*, punitive damages, injunction, specific performance.

G. Usually, arbitration is faster: no case backlog, and very limited pretrial proceedings (motions/discovery).

H. Arbitrations are confidential, unless the parties otherwise agree. A trial is public, except in extreme circumstances.

I. There is a very limited scope of review of arbitrator's decisions unless the parties otherwise agree.

J. Usually, evidence is liberally admitted and the Rules of Evidence are not followed unless the parties otherwise agree.

K. An arbitrator may choose to simply render a decision, without findings of fact and conclusions of law, unless the parties otherwise agree.

L. Arbitrators may be more inquisitorial in their approach than judges, particularly if they have expertise in the area of dispute.

M. There may be multiple arbitrators in an arbitration, but never jurors. (Perhaps there could be.)

N. The parties can agree the results of an arbitration are non binding; courts do not give advisory opinions.

O. Arbitration is normally cheaper than a trial, because of, *e.g.*, elimination of pretrial motions, discovery, appeals, etc.

P. Arbitrators generally have greater expertise about the subject matter in dispute than does a judge or jury. The parties can name the arbitrator or define the qualifications of the arbitrator. Normally, a party has no control over as to the judge that will hear the case, and very limited control as to who the jurors will be.

Q. Arbitrators have a reputation for "cutting the pie in half." Compare, Colorado comparative negligence statute. Compare juries and judges.

R. Arbitrators may not adhere to the law. Query, if true, is the result

different?

IV. WHY USE ARBITRATION?

A. Generally, the decision to use arbitration is because of perceived or actual disadvantages of or differences with litigation. Thus, agreeing to arbitration is usually an attempt to avoid perceived disadvantages/defects in the litigation process. See part III, supra.

B. Whether a particular circumstance or procedure is desirable or undesirable depends upon the beholder. However, the following often are perceived as particular disadvantages to the judicial system of resolving disputes:

a. Juries.

b. Long duration from the dispute arising until a final decision, including appeals, is obtained.

c. Quality of the judge, and lack of expertise in the subject.

d. Pretrial discovery.

e. Pretrial proceedings.

f. Law, not fairness is the objective.

g. Arbitration reduces cost, leveling the field for parties of unequal financial resources.

h. Cost, including by reason of the above.

i. Lack of privacy of proceedings.

j. Delay.

Note: Each factor under III, supra, is a factor favoring either litigation or arbitration depending upon the case and whose side you are on. Many of the factors can be made a part of or avoided in arbitration, by agreement.

C. Unless some of the above disadvantages can be eliminated by arbitration or unless other advantages can be obtained by arbitration, there

is no reason to use arbitration instead of the court system. If your designed arbitration is practically a court, be sure that you have a reason to use arbitration.

a. A judge is practically free.

b. Are the procedures and rules of court in fact a burden and of no benefit?

D. The "perceived" disadvantages of arbitration include:

a. Disputes are decided solely on the facts as to what is perceived as fair, and the law is disregarded.

b. Arbitrators split the pie-simply compromise the claim.

a. Cf., comparative negligence statute.

c. There is no discovery; trial is by ambush.

d. The proceedings are too informal.

e. Arbitrators take into account too much personal knowledge and experience without fully knowing whether applicable to the dispute and without giving notice and opportunity for rebuttal.

f. The quality of the arbitrators is sometimes poor.

g. There is opportunity for meaningful appeal.

h. Irrelevant and prejudicial testimony is allowed.

Again, Section III sets forth each factor to be considered.

IV. APPLICABLE LAW:

A. Colorado Uniform Arbitration Act, CR.S. §1322201, et. seq. (or other state law).

§203 Validation of arbitration agreement
§204 Proceeding to compel or stay arbitration
§205 Appointment of arbitrators by court
§206 Majority only action by arbitrators
§207 Hearing

§208 Representation by attorney
§209 Witnesses, subpoenas, depositions
§210 Award
§211 Change of award by arbitrators
§212 Fees and expenses of arbitration
§213 Confirmation of an award
§214 Vacating an award
§215 Modification or correction of award
§216 Judgment or decree on award
§217 Judgment Roll docketing
§218 Applications to court
§219 Court jurisdiction
§220 Venue
§221 Appeals (from trial court)

B. Federal Arbitration Act, 9 U.S.C. § 1, et seq. (arbitration involving maritime transactions or foreign or interstate commerce, excluding workers engaged in foreign or interstate commerce).

C. State and federal common law.

D. Which law = which court?

VI. DESIGNING YOUR ARBITRATION:

A. Consider each aspect, in terms of what is "best" for the resolution of your disputes. Consider the cost of alternatives, as well as whether your adversary will agree. Cure your objections to the judicial process.

B. The elements to consider in designing your arbitration are the points defined in Part III, and should include:

a. Should the decision be binding on the parties? Courts will enforce an agreement to submit disputes to nonbinding arbitration because the judgment of a third party usually will be persuasive in evaluating a case.

b. Should the proceeding be private? Do you want the public to have access to any information about the dispute and proceedings?

c. How many arbitrators should there be? One is cheaper, but, if no appeal is allowed, perhaps three are desirable. Perhaps threenot all lawyers--bring different perspectives to the issues.

d. How should the arbitrators be selected? By mutual agreement? By a judge? By the AAA? Each party select one, and they pick a third?

e. Should there be discovery between the parties: interrogatories, requests for production of documents, requests for admission, depositions? In some disputes discovery is essential. In most lawsuits, discovery is abused. In other disputes, discovery is not needed, or discovery should be limited.

f. Should there be discovery to third parties? Judicial proceedings specifically provide for such discovery. Arbitration has no jurisdiction over third parties, although courts may permit discovery to third parties in and of arbitration.

g. Should there be appeals? Arbitration is a concept of finality, not appeals. Generally, appeals only on most flagrant grounds.

   a. Perhaps three arbitrators is the tradeoff for no appeals.

   b. But, can you provide for appeals?

h. Should arbitrators be neutral? All three or just one? What is a neutral arbitrator?

i. Should there be pretrial motions? Should the rules of civil procedure be followed?

j. Should arbitrators be lawyers? Should lawyers be forbidden? Should arbitrators have special expertise? Should there be qualifications.

k. Where should the arbitration be held?

l. Should there be a deadline for holding the arbitration? For rendering an opinion? Should the decision state the reasons?

m. Should lawyers be excluded?

n. See Part III.

C. In sum, what aspects of a dispute resolution system are desirable: desirable to you and desirable for your particular dispute?

VII. WHAT SYSTEM OF ARBITRATION SHOULD YOU AGREE TO, AND WHEN?

A. When should you agree to arbitration, and to a particular form thereof: before a dispute arises or after a dispute arises?

a. Before a dispute arises (*e.g.* when negotiating a contract):

a. It is much easier to get the adversary to agree to arbitration and specific terms thereof prior to a dispute arising-while any dispute is in the abstract.

b. However, before a dispute arises it is more difficult to focus yourself to define the specific terms that would be helpful to your client - when you do not know what kind of disputes there might be in the future.

b. After the dispute arises:

a. When you know exactly what the dispute is, it's easier to decide (i) whether you want arbitration, and (ii) if so, the procedures, etc. thereof.

b. But, once a dispute arises, often if you want arbitration or specific terms, your opponent is automatically opposed.

c. If you would want anything other than a "standard" arbitration, perhaps do not agree in advance.

d. Perhaps advance agreements to arbitrate should be limited to disputes involving less than a defined number of dollars. If a greater dollar amount is involved, you may want to agree only if customized terms can be agreed upon-otherwise, the courts are preferable.

B. What terms should you agree to?

a. In many instances, a principal objective of arbitration is reduced cost. These savings can be eliminated by prolonged negotiation and drafting of the arbitration agreement, as well as by the procedures themselves. The simpler the arbitration agreement, generally the easier to get the consent of your opponent.

b. Often, define what you want in terms of the amount in issue. Perhaps as to disputes involving less than $50,000, a

standard AAA-type arbitration. As to disputes involving millions, you may want a private court.

C. Should you agree to arbitration?

a. "Small" disputes--yes. Keep it simple and quick and you'll be better off.

b. "Large" disputes--yes, if you can get the special arrangements that you need. In "large" disputes, you may want many of the procedures, etc. of the judicial system, plus quality arbitrators with expertise. You can get these in arbitration, but you must pay for them.

c. "Intermediate" disputes--yes, perhaps only if you can get specific terms you want, but often it is not worth trying to agree in advance. And, the cost of negotiating terms and the cost of the process itself may offset any benefit you anticipated.

VIII. CONSTRUCTING AN ARBITRATION CLAUSE

A. Basic Arbitration Clause:

i. **Future Disputes:**

E.g., The parties agree to submit to binding arbitration any controversy, claim or dispute between them arising out of or relating to this Agreement. Judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof.

ii. **Existing Disputes:**

The undersigned parties hereby agree to submit to arbitration the following controversy: ________________________________ ____ __________________. Judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof.

Comment:

a. These are binding arbitration clauses. The details of what will occur and how it will occur and enforcement will be provided by the arbitrator, the common law, and the federal or state arbitration statutes.

B. Possible clauses to add onto the basic arbitration

agreement - the accessories.

i. Conduct the arbitration under the auspices of the American Arbitration Association (or other similar organization): *E.g.*, The arbitration shall be conducted pursuant to the [commercial] rules of the American Arbitration Association.

Comment: Having an "AAA arbitration" has several effects:

a. The AAA arbitration rules are applicable. However, most of these rules are effective only if the parties do not otherwise agree.

b. AAA rules define basic procedures.

c. AAA will provide administration.

d. The parties obtain access to the AAA panel of arbitrators.

ii. Narrow the scope of disputes subject to arbitration:

a. Dollar amount - See III.A.

b. Type of disputes - See III.B.

iii. Define place of arbitration:

E.g., The arbitration shall be held in Denver, Colorado.

Comment:

a. Without such a clause, the arbitrator(s) decide the locale, or the power to make the determination may be delegated to an administrator (see AAA rules).

iv. Choice of Law:

E.g., The law of the state of Colorado shall govern the dispute, both as to procedure and substance.

Comment:

a. It is uncertain whether such a clause can override procedural aspects of otherwise applicable arbitration statutes.

b. Absent such clause, the substantive law is governed by common law choice of law rules.

c. See V.

v. Number of Arbitrators:

E.g., Arbitrations hereunder shall be before a three person panel of neutral arbitrators.

Comments:

a. Absent such a clause, normally there would be one arbitrator.

b. If the parties have agreed to AAA arbitration, the determination of number of arbitrations is left to the AAA unless the parties agree.

c. If the power is not delegated to *e.g.* AAA, and the parties cannot agree, the court would determine.

d. See VI.

vi. Qualifications or Classes of Arbitrators:

See VII.

vii. Procedures for Selection/Appointment of Arbitrators:

E.g. The parties agree that the arbitrator shall be appointed by [Chief Judge, Denver District Court] [President of Bar Association] [President of Trade Association].

Comments:

a. Parties can agree to any method or procedure. If it is an AAA arbitration, and the parties do not have a selection clause, the AAA rules provide the procedure.

b. If no agreed procedure, and no delegation to, *e.g.*, AAA, the court will appoint.

c. See VIII.

viii. Mediation or Negotiation as a Condition Precedent to Arbitration:

See IX.

ix. Discovery:

E.g., In any arbitration hereunder, discovery between/among the parties shall be permitted in accordance with Rules 2637 of the Federal Rules of Civil Procedure. Any discovery dispute shall be finally determined by the arbitrators.

Comments:

a. Absent agreement of the parties, the arbitrator may not have power to order discovery.

b. Arbitrators have no powers over third parties, except to subpoena witnesses for the hearing or for deposition if they will not be available for the hearing.

c. See XII.

x. Rules of Evidence:

E.g., The Colorado Rules of Evidence shall be applicable to the arbitration proceedings. Provided, however, no error by the arbitrators in application of these rules of evidence shall be grounds as such for vacating the arbitrators' award.

Comments:

a. Absent a rules of evidence clause, the "common law" of evidence on arbitrations permits practically anything in, unless clearly irrelevant, etc.

b. See XIII.

xi. Costs and fees:

E.g., The arbitrator shall award to the prevailing party, if any, as determined by the arbitrator, all of its costs and fees. Costs and fees" means all reasonable pre and post-award expenses of arbitration, including arbitrators' fees, administrative fees, travel expenses, out-of-pocket expenses such as copying and telephone, court

costs, witness fees and attorney's fees.

Comments:

a. If it is an AAA arbitration, the AAA has a cost and fees rule, unless the parties otherwise agree.

b. If no agreement, the result is the same as in litigation.

c. See XIV.

xii. Speed:

See XV.

xiii. Confidentiality:

See XVII.

Comment:

a. Absent such a clause, at least the hearing is not open to the public.

xiv. Awards:

See XIX.

xv. Findings and Conclusions:

See XX.

I. CONCLUSION

Don't reject arbitration because of preconceived thoughts of what arbitration is. Don't accept arbitration because of preconceived thoughts as to what arbitration ought to be. Define arbitration in terms of your needs and objectives, and adopt it when arbitration is more favorable to your client than judicial proceedings.

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