Law360

April 23, 2013

5 Arbitration Assumptions That Aren't Always True

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Arbitration is often thought to be preferable to litigating in court, and in some circumstances, it may be. Deciding to arbitrate, however, should be the result of a careful analysis of arbitration's benefits and disadvantages. That analysis requires examining some common perceptions about arbitration. Below, we explore five of the most common assumptions about arbitration and suggest some practical considerations.

1) The Money

Assumption: Parties often assume arbitration will be cheaper than litigating in court. There is a perception that arbitration will not require the exhaustive and expensive discovery that is now routine in commercial litigation in courts. Parties expect that arbitration will entail less written discovery, fewer depositions and a more practical approach to document production. Parties also assume that there will be limited availability of dispositive motions in arbitration. And, as a result of the cost associated with the arbitrator's review and resolution of motions, parties assume that there will be less of the motions practice often conducted in court.

Reality: Regardless of the forum, however, the key features of a commercial case presentation are the same. Whether plaintiff or defendant, a party must at minimum: (i) marshal the relevant facts; (ii) determine and understand the applicable law; (iii) select and prepare witnesses; (iv) prepare exhibits; (v) complete offensive and defensive discovery; and (vi) conduct the trial proceedings before the fact finder. The cost of that work is unaffected by the choice of tribunal. Moreover, if the dispute is purely a question of law rather than fact, the availability of summary disposition in court may be beneficial, as well as cost-saving. On the other hand, if the dispute will turn on complex factual issues, the evidence of which may lay in the possession of the opposing party, the availability of various discovery mechanisms may be advantageous.

In addition to the legal fees, the parties must pay the expenses of the arbitration and its logistics. Literally, everything is for sale. So, one must compensate the members of the arbitration panel (including any associated expenses), pay the ASP's fees, hire the court reporter, arrange rooms, chairs, desks, etc., and provide for the A/V equipment.

2) The Speed

Assumption: Arbitration is perceived to be faster. Civil dockets in many jurisdictions are severely backlogged. In some state jurisdictions, a matter may linger on for years before being tried on the merits. This is especially true in jurisdictions where judges are not routinely assigned to "live with" a case from cradle to grave. In a private arbitration, however, the parties' dispute is the sole focus of the arbitration. The parties and the panel are very motivated to set a hearing date quickly to resolve the dispute.

Reality: However, arbitration has its delays as well. Unlike litigation, the scheduling of the hearing is a negotiation between the parties, their counsel, and the arbitration panel. While this is a good practice in theory, the hammer of a court and its ability to calendar matters makes for much more flexibility on the parties' calendars than this negotiated technique.

Once the case starts, the speed of the presentation is still a matter of the volume of the evidence. Indeed, without a jurist who is well-versed both in the substance and the application of the rules of evidence and civil procedure, extraneous and duplicative presentations often result. The focus imposed by a court — and the ability of a judge to enforce her admonitions with sanctions — has a positive effect.

3) Public Knowledge

Assumption: There is a perception that the arbitration will be private and there is no public access to a docket. Moreover, an arbitration agreement often contains a confidentiality provision, requiring the parties to keep the proceedings private.

Reality: In practice, many arbitrations start with a lawsuit. The plaintiff brings a lawsuit seeking relief under a contract or other theory. The opposing party then moves to stay the proceedings and to compel arbitration. That motions practice is a matter of public record. So, while public access to the arbitration is not available, the existence of the dispute and its general contours will be a matter of public record. Similarly, once the arbitration is complete, the underlying lawsuit must be dismissed with an order that recites the resolution achieved in arbitration.

4) Clearer Result

Assumption: Parties assume the result will be clearer in arbitration. One of the reasons underlying this assumption is that the parties can choose decision makers with the specialized knowledge or skill relevant to the dispute. The use of these "subject-matter experts" gives the perception that the award will be thorough, well-informed and right, thus eliminating the risk of submitting the dispute to a judge or jury who may not understand the heart of the dispute.

Reality: The clarity of result depends on the quality of the question the parties pose to the forum. In both instances, the parties must take care that the question they put to the panel is the one they really want answered. Stated differently, there is a reason that arbitration panels are accused of "splitting-the-baby" rather than getting down to the issue and rendering a just result. They are in the business of cultivating future business. Rendering decisions that completely disadvantage one party vis-à-vis another — even where that is the correct result — is disfavored. For the party that is in the right, a "split-the-baby" verdict is completely unsatisfying.

5) Ease of Trial

Assumption: Parties assume arbitration will be more efficient and less formal. Since the parties have chosen a decision maker with subject-matter expertise, less time is needed to educate the arbitrator than would be needed with a judge or jury. In addition, the informality of the proceedings and the absence of the rules of civil procedure often result in quicker and easier access to the arbitrator when there is a dispute or need for a decision. The arbitration can be held anywhere suitable accommodations are found. Witnesses can appear at hearings via video, which minimizes the disruption to the witness. There is also greater flexibility in the hearing schedule; it may convene as long as necessary to accommodate the evidence and the parties' schedule.

Since the rules of evidence are more relaxed in arbitration, the arbitrator, unlike a judge, spends less time hearing and deciding evidentiary objections and spends more time listening to the evidence.

Reality: However, consider the old adage: "Never tear down a fence without knowing why it was built." In the absence of rules regarding discovery procedures and remedies, the exchange of information can be asymmetrical. Similarly, without time-tested rules to govern the introduction and exclusion of evidence, the quality and efficiency of the presentations depends on the willingness of the lawyers themselves to manage the case presentations. Often, the presence of rules promotes proficiency and certainty; remember, "good fences make good neighbors."

Also, the resolution of the inevitable discovery disputes may be very difficult in arbitration. There is no judge to resolve them. Often, arbitrators are unfamiliar with civil procedure, evidentiary rules or handling discovery disputes. They may not provide the structure or guidance to ensure a decisive and efficient resolution. Rather, the resolutions may depend solely on the ability of the warring parties to agree.

Strategic Considerations Before Agreeing to Arbitrate

The decision to arbitrate is typically foreordained by the negotiation of the underlying contract. For the transactional lawyers and business people who create those agreements, we urge focused thought and deep analysis — not to mention consultation with a seasoned litigator — before agreeing to an arbitration clause. For instance, here are some considerations when weighing the benefits of arbitration over litigation:

- Will the dispute turn on legal questions suitable for summary disposition?
- Will there be a need to collect information from third -parties?
- Will time be of the essence in resolving the dispute?
- Will there be a desire to keep the dispute private?
- Will the dispute be particularly adversarial such that the presence of a decision maker with compulsory authority will be helpful?
- Will it be necessary to conduct more than five or six depositions to gather the evidence needed and on which you will have the burden of proof?
- Will the decision maker need to have specialized knowledge of the subject matter of the dispute?

We do not mean to suggest that arbitration is not a good method of dispute resolution. It is. However, we do intend to debunk the notion that it is always the best method. For a party whose claims are dependent on legal analysis of competing assertions, the procedural and legal aspects of the court system may be better suited. Similarly, in a case where the fact questions are more than binary, e.g. either a yes or no answer, then litigation may be best. Or, if it is anticipated that the dispute may be particularly adversarial, the authority of a judge may be preferable over the cooperative atmosphere of arbitration. And, if critical factual information lay in the possession of the opponent or third-parties, arbitration may not be as efficient, as prehearing discovery may be limited. In sum, an election of arbitration over litigation in court should be grounded more in the parties' needs and expectations and less in commonly held assumptions.

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