ARBITRATION VARIATIONS

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“The other side wants to arbitrate. Should we? Is this to our advantage? Are we ready to give over that much control to a neutral? Can we do better in mediation or by negotiating directly with opposing counsel?” Arbitration has long been a routine consideration of counsel in managing clients’ disputes, but with the availability of other forms of alternative dispute resolution, the answer to the question “should we arbitrate?” has become more complex. Of the alternative dispute resolution processes available, arbitration most closely mirrors the court procedures and gives the parties the least control of the outcome. Participants put on testimony and introduce documents in a semi-formal setting. Generally they are given an opportunity to present final argument. The arbitrator’s final decision is based on an analysis of the facts and law as presented by the parties. Arbitration awards are enforceable by court order, but unlike court trials the right of appeal is extremely limited.

Why then choose arbitration? Arbitration gives the parties more control than court procedures. Arbitration also provides the opportunity to choose the decision-maker and to obtain a resolution from a neutral with expertise in the specific subject matter. Unlike trial court judges who balance the many conflicting demands of a court docket, the neutral gives the arbitration his or her undivided attention. Arbitration is generally speedier and less expensive than full-blown litigation and is calendared at the convenience of the parties and the neutrals. Importantly, unlike other alternative dispute resolution processes, the parties are assured that arbitration will always result in a resolution.

Fortunately for counsel struggling with the question of whether to arbitrate, the growing acceptance of alternative dispute processes has resulted in new arbitration options. These options preserve the benefits of arbitration over the court processes and provide more party control over the procedure. With the exception of non-binding forms of arbitration, these options also retain the assurance of finality. Should you arbitrate? Look at what’s new in arbitration and see what might fit with your case.

Non-Binding Arbitration

Some regard non-binding arbitration as a contradiction in terms, since arbitration is generally recognized as a binding process. Non-binding arbitration can be characterized as neutral evaluation with a more formalized approach. Its purpose is generally to facilitate negotiations by allowing the parties to test the strength of their positions and to receive an opinion as to the likely outcome at trial. Many court annexed programs, as well as private alternative dispute resolution providers offer this advisory procedure.

In determining whether this variation of arbitration is a viable approach, counsel should recognize that the complexity of the case will affect the cost and time that will be invested. The streamlined approach of arbitration allows a simple case can be presented in a few hours and a more complex case within a few days. However, unless the stakes are very high, it probably does not make sense to utilize this procedure where the complexity of the issues require significantly more time to present and finality is not assured.

Incentive Arbitration

In this variation on non-binding arbitration, the parties agree to impose a penalty on a party who rejects the arbitrator's award, if the party does not then improve his position through litigation. The parties contract for a specified percentage or formula to determine what constitutes "beating" the arbitration award. Some court-annexed arbitrations provide this incentive by defining the penalty as an award of costs, or attorneys fees not otherwise obtainable in the litigation.

Bracketed or High-Low Arbitration

In this type of arbitration the parties negotiate before the arbitration to set parameters for the arbitrator. They might agree that the arbitrator will decide only liability: if the defendant is found liable it will pay a predetermined amount and if no liability is found, defendant will pay a lesser predetermined amount. Alternatively, the parties may allow the arbitrator to deliver an opinion on both liability and damages, while agreeing on a minimum and maximum actual payment if liability is found.

The parties may agree to inform the arbitrator of the bracketed range of payment. Sometimes they will not disclose the range, and at times not even the existence of the bracketing agreement is disclosed to the arbitrator.

Baseball or Final Offer Arbitration

Final offer arbitration is characterized by each party making an offer of settlement at a particular figure. The arbitrator must then, after the submission of the evidence choose between the two figures. The arbitrator is essentially asked to determine which of the figures is most appropriate based on the evidence heard. Because the arbitrator is put to a forced choice, the parties are motivated to offer figures which are as reasonable as possible.

Final offer arbitration is often referred to as "baseball" arbitration because the approach is also used in negotiating salaries in major league baseball. Not surprisingly, where the parties establish their positions but keep the arbitrator in the dark about the numbers, the process is called "night baseball."

Med-Arb

Some of the most innovative approaches to customizing the arbitration process come from the gaining popularity of mediation. In the various med-arb alternatives, the mediator becomes an arbitrator and renders an enforceable decision if the mediation attempt fails. Joining the mediation and arbitration processes encourages the parties to create their own best settlement under the pressure of having one imposed by the neutral. The procedure also provides the parties with the assurance that the dispute will be resolved.

The med-arb process can be "separate" or "integrated". In the "separate" process the mediation goes to completion before the neutral takes on the arbitrator's role to resolve any remaining issues. The neutral in an "integrated" med-arb attempts to facilitate the mediation process, but makes binding decisions along the way on issues where the parties deadlock. Integrated med-arb is useful where the parties have a series of issues which must be settled in order to reach

agreement on the overall dispute. The integration of the decision-making process prevents a stalemate on one issue from derailing the negotiations.

Med-Arb with Two Neutrals

Med-arb is a very efficient process. However, its binding nature has the potential for discouraging candor in the mediation phase. To counteract this effect, the parties sometimes alter the "standard" med-arb approach by agreeing prior to the mediation to use another neutral for the arbitration phase if the mediation is unsuccessful. Alternatively, the parties might agree that either can demand a different neutral for the arbitration phase. This approach is known as "med-arb opt-out". When considering med-arb opt out, the parties need to recognize that much of the efficiency of med-arb will be lost and the costs will be increased. This disadvantage can be somewhat overcome by allowing the arbitrating neutral to observe the joint sessions of the mediation so that the neutral becomes somewhat familiar with the issues. The parties may then need only a brief hearing to supplement their earlier mediation presentations with testimony and allow for any questioning by the arbitrator.

Final Offer Med-Arb

Final offer med-arb is utilized where the parties want to use only one neutral, but want to control their risk in the arbitration phase if mediation fails. At the end of the mediation session, the parties give their final offers of settlement. Because the neutral has had the benefit of ex parte communications in caucus, he or she is given no discretion other than to choose between the two offers.

Arb-Med

The most recent variation on combining the mediation and arbitration processes is arb-med. In this procedure the parties allow the arbitrator to act as a mediator after the hearing. The neutral reveals the arbitration decision only if the parties are unable to reach agreement in mediation. This process puts considerable power in the neutrals hands to effectuate a settlement.

In a litigator's arsenal of dispute resolution approaches, arbitration retains a unique position. Unlike mediation, arbitration generally assures finality of the dispute. Arbitration provides cost and time savings, and a measure of control not available through traditional litigation. With the advent of new approaches to arbitration, counsel can now also limit their downside risk and expand their involvement in the result. When opposing counsel next suggests arbitration, first ask "Which arbitration option did you have in mind?"