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Choosing the Battlefield – Litigation v. Arbitration

By David B. Weinstein, Christopher Torres, and Joseph H. Picone | December 16, 2019 | Association of Corporate Counsel Tampa Bay Weekly Update

Decisions about the forum where disputes will be resolved are complex and multifaceted, and they have long-lasting or even permanent ramifications. These decisions require early and careful consideration as your client could be "living with them" for years. Consequently, you should carefully consider whether an arbitration provision can provide your client with a more favorable battlefield in the event of a conflict.

This article briefly addresses arbitration advantages and disadvantages, and provides certain arbitration-specific and litigation-specific drafting considerations that may help better protect your client's interests before a conflict arises.

Understand Your Client's Goals and Potential Areas of Risk

To determine whether arbitration can be an advantageous battlefield for your client, you must understand your client's goals. Speak with and listen to client business or technical specialists to understand the most important issues and potential areas of risk in the event a conflict arises. Understanding your client's goals will help you craft the most favorable arbitration agreement.

Arbitration Advantages to Consider

Depending on your client's goals and potential risks in any arrangement you may consider the following potential advantages that arbitration may provide.

No jury trial: Arbitration allows for control over factfinder selection. Parties may select specific individuals who will preside over the conflict, or select arbitrators with specialized expertise, where they have drafted arbitration clauses that pay attention to such details. Arbitration also avoids exposure to "runaway juries" or outlier awards.

Confidentiality: The confidential nature of arbitration can protect trade secrets, avoid disclosures of internal policies, product imperfections, and unflattering publicity. Confidentiality, however, is not automatic as institutional arbitration rules may not address confidentiality and attorneys or clients may discuss their cases in the press. Consequently, you may want to consider including an express confidentiality clause in your arbitration agreement.

Flexibility: The ability to choose the forum, governing law, scope of discovery, recoverable damages, and rules of evidence allows predictability and control over the proceedings. Obviously, decisions concerning these issues should be considered early—ideally while drafting the arbitration agreement.

Efficiency: Arbitration can be speedier, but many things can cause delays, such as opting for court-like discovery, or selecting busy arbitrators or remote venues. Arbitration can also be less expensive, but many things can increase expense, including arbitrator and forum fees.

Enforceability: Arbitral awards are routinely enforced, which is particularly important in cross-border disputes. Enforcement against parties other than contractual counterparties to the arbitration, however, can be difficult.

Arbitration Disadvantages to Consider

Arbitration, however, is not always the most favorable battlefield. It has certain disadvantages that you will also want to consider.

No jury trial: Sometimes you want the option or prospect of a jury trial for settlement leverage or if you have a particularly good "story." A jury's tendency to award outlier verdicts with higher damages may also be advantageous if your client is the plaintiff.

Less robust interim relief: It is difficult to obtain and enforce interim relief such as injunctions against non-parties in arbitration. Judicial compulsion may also be necessary to ensure that a party will comply with any interim relief.

Less robust discovery: Typically, arbitration affords far less discovery, and third-party discovery is challenging without subpoenas. Discovery may be limited or discretionary depending on the arbitral tribunal's default rules.

More challenging venue for dispositive motions: While some arbitrators are willing to entertain and grant summary judgment motions, many prefer a full merits hearing to avoid one of the few potential grounds for review. Also, pleadings motions are generally unavailable in arbitrations given the minimal burden to initiate a claim.

Limited appellate review: In the absence of an arbitral appellate panel, few options exist for appeal of arbitral decisions. Statutory grounds for vacatur focus on defects that taint the arbitration process (i.e., fraud, corruption, impartiality of the arbitrator, refusal to consider relevant evidence), not errors in the application or interpretation of relevant law.

Arbitration-specific Drafting Considerations

While not a complete list, there are certain features particular to arbitration you may want to consider when drafting an arbitration agreement or provision.

Arbitral tribunal: Arbitral tribunals, such as AAA and JAMS, have different default rules and procedures that apply when an arbitration agreement is silent. The parties' expressed will controls over the tribunal's default rules. Consider the rules you believe may be desirable to your client.

Identity/qualification of Arbitrators: Parties may name a specific arbitrator in the agreement or include provisions describing the method of selecting an arbitrator. Consider identifying an arbitrator with relevant qualifications and experience. If the agreement is silent, the institution's rules will decide the arbitrators.

Location: Location can greatly influence the proceeding by affecting questions of law and the availability of judicial intervention or enforcement of awards. Consider the location of witnesses and documents, the geographic pool of qualified arbitrators, and applicable procedural and substantive law. The arbitral institution will choose the locale if it is unspecified.

Procedures and remedies: An arbitration agreement may limit the availability of interim relief and scope of discovery. Institutional rules will control these issues if the agreement is silent. Careful drafting can decrease cost and uncertainty concerning the scope of discovery. Arbitration provisions should also address limitations on remedies, such as the availability of class arbitration and monetary or non-monetary relief. Class arbitration is not available when the agreement is silent or ambiguous.

Confidentiality: Do not assume that arbitration will be confidential. Many institutional rules offer procedures for confidentiality but do not mandate it. Consider including a specific confidentiality provision governing any sensitive issues.

Litigation-specific Drafting Considerations

Also, while not a complete list, there are certain features particular to litigation that you may want to consider when drafting litigation-related provisions.

Venue and forum selection: Venue and forum selection provisions address where disputes will be resolved. This requires an early assessment of the courts, legal issues, expenses, witnesses and evidence, and other important adjudication issues. Venue and forum selection provisions are generally enforceable, and apply unless unfair or unreasonable. Consider whether your preferred venue and forum will be exclusive and mandatory or nonexclusive and permissive.

Choice of law: Choice of law provisions govern the substantive issues relating to the contact and contract claims. The forum state governs procedural issues. It is important to decide early on what choice of law you want as different jurisdictions can differ on substantive legal issues. It is also important to avoid competing common law determinations regarding your preferred choice of law. Consequently, consider choice of law language that includes, "without regard to conflict of law principles" to help avoid such a dilemma.

Waiver of jury trial: A jury trial waiver is generally enforced if executed in a voluntary, knowing, and intelligent manner. The jury waiver provision should be express, unequivocal, prominent, and

bilateral. Consider the complexity of the case, venue and forum of the litigation, and the time and expense of a jury trial.

Indemnification: Indemnification involves compensating a party for loss or damages. The duty to defend is not always incorporated into the duty to indemnify. Consequently, it should also be addressed. And while the concept of hold harmless language may be synonymous with the duty to indemnify, it may not cover third-party claims.

Attorneys' fees and costs: Attorneys' fees and cost provisions are generally enforceable. One should consider the true value of any such provision in the relationship between the parties as attorneys' fees and cost provisions can incentivize litigation, instead of deterring it.

This article is a limited and very small sampling of the advantages and disadvantages of arbitration, and arbitration-specific and litigation-specific drafting considerations. These issues have serious and long-lasting implications on a client and should be carefully considered. A careful drafter who understands his or her client's goals and has thought about the many contingencies a client may face in a contract dispute can proactively select the battlefield that is most favorable to their client.

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