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It's All In the Details

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Companies use arbitration clauses hoping for a faster, cost-effective and more predictable resolution of disputes than traditional litigation. However, if not well thought out, an arbitration clause can become a minefield of unpleasant surprises and result in an arbitration that drags on even longer than regular litigation. Following are some considerations that will help maximize the effectiveness of your arbitration clause:

How Did We End Up Paying Punitives?

The jurisdiction you choose in a contractual arbitration clause can determine whether a plaintiff can obtain punitive damages on related tort claims and how much it can obtain. Sometimes, a party can control this issue without even broaching the subject.

If you elect to arbitrate in California, the arbitrator can award punitive damages unless the arbitration forum's separate rules forbids it. *Baker v. Sadick*, 162 Cal.App.3d 618 (1984). Moreover, the arbitrator's award of punitive damages may not be subject to review under the state and federal proportionality requirements. Thus, if you elect to arbitrate in California, you are accepting that an arbitrator might make a nearly unreviewable award of much larger punitive damages than would potentially result from the court system. See *Rifkind & Sterling v. Rifkind*, 28 Cal.App.4th 1282 (1994), which found that unlike court awards of punitive damages, due process does not require heightened review of arbitral award of punitive damages; *O'Flaherty v. Belgum*, 115 Cal.App.4th 1044 (2004).

Alternatively, if you elect to arbitrate in New York, an arbitrator generally cannot award punitive damages. *Garrity v. Lyle Stuart Inc.*, 40 N.Y.2d 354 (1976). This is not always the case, though. For example, NASD arbitration rules expressly allow punitive damages, and they trump the general New York prohibition on awards of punitives by arbitrators. *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52 (1995); *Lian v. First Asset Mgmt.*, 273 A.D.2d 163 (2000).

Given the stakes in selecting where to arbitrate, you should consider whether an arbitrated dispute might result in your company seeking punitive damages or fending them off.

Is XYZ the Right Forum for My Dispute?

If you want your arbitration to be more efficient, make sure to select an arbitration forum that meets your goal. Forums like AAA, JAMS and FINRA (formerly NASD) all have their own rules, any of which might be beneficial depending on circumstances. But, you should resist the knee-jerk tendency to always pick the same forum. In particular, reject the notion that a forum that is good at addressing, for example, employment disputes is necessarily good at resolving trade-secret disputes.

With each forum comes different arbitrators, so carefully review the list from which you can chose. Also, be wary of requiring a "specialist" arbitrator. Certain arbitration forums can provide highly specialized arbitrator panels. If your contract involves oil, you might be tempted to specify an oil-and-gas panel. But, if you don't know anyone on that list, is it wise to include such a requirement in your agreement? Most litigators would suggest that selecting a forum with highly skilled generalists is better than taking your chances on an industry specialist drawn from a narrow list of unknowns.

Additionally, consider whether the forum rules are sufficiently specific. Otherwise, your lawyer could end up fighting over everything from selecting the arbitrator to the scope of discovery to timetables for resolution.

Three's a Crowd

While there is often safety in numbers, that aphorism does not justify your paying for three arbitrators when one would do. Many arbitration clauses provide for an arbitration panel composed of one "neutral" arbitrator with a "party" arbitrator for each side. While there are excellent party arbitrators, is it worth the additional expense so you can have "your" arbitrator in the room with the neutral during deliberations? Will your lawyer's arguments be helped or harmed when filtered through a party-arbitrator in deliberations? And since you are already paying for your attorney, do you want the added expense of your party arbitrator participating with your lawyer in pre-trial discussions? As a general rule, one good arbitrator will suffice.

Not Another Deposition!

You may have been subjected to a multiday deposition and the last thing you want in a future dispute is a repeat of that painful, costly experience. So you select arbitration as a way to avoid limitless depositions. But before you lock yourself in, give some thought to what that future dispute could look like.

In an arbitration, you will need to specify the number and nature of depositions or else you could end up with too many or too few. For example, you might want to select JAMS, which, absent arbitrator approval, allows only the deposition of the opposing party or individual under the control of the opposing party. You can complement this deposition limitation and still retain the efficacy of your trial by providing that party-employed witnesses will be available for trial upon request.

Absent proper planning, a rote limitation of the number of depositions could later haunt you, depending on the nature of your future litigation or the parties involved. Under California law, a party can often resist bringing even its current out-of-state employees to trial. New York law, on the other hand, requires a party to bring its employees to trial when requested by the other side. And most states will not authorize their arbitrators to compel the presence at trial of an out-of-state witness who is not an employee of either party. So, if your potential dispute involves the testimony of a crucial former employee or non-parties who live out of state, you must ensure that your arbitration clause includes the right to depose them.

Similarly, you should provide for depositions of expert witnesses (and consider whether you will require expert reports) to avoid being blindsided by testimony from your opponent's expert.

Arbitration Isn't Always Faster

A slow but busy arbitrator can make your dispute last longer than traditional litigation. Establish timelines to keep your dispute on the fast-track.

Start with a timetable to resolve injunction disputes. Set timetables for discovery, commencement of the arbitration, and for the arbitrator to issue a decision. While an arbitrator might miss an occasional deadline, most will comply with a schedule established by the parties. It is not necessary to draft an entire schedule from scratch - and some of the arbitration rules include the necessary timetables - but a barebones timetable is essential if you want to be finished sooner than if you had a full court trial.