Conflict Resolution

What solo litigators need to know about arbitration.

BY JOHN K. BOYCE III

INTRODUCTION

It is a solo's nightmare. It is Friday afternoon, and you are getting ready to go to the coast. Your client walks in, slaps a thick contract down on your desk, and says he has been sued. If all else fails, read the agreement. Buried toward the end, in paragraph 24(q), is a heading titled "Arbitration" followed by a boilerplate. Do you pass it off to an associate down the hall and say, "Figure it out?" Nope, you don't have an associate. Do you panic? After all, you've never handled one. No, because arbitration could be the best thing that has happened to your client.

What is arbitration? In a nutshell, it is the process in which a dispute is submitted to one umpire or a panel of three—the arbitrators—for a final and binding determination, known as the award. Typically, to maintain the integrity of the process and to handle the numerous administrative details that inevitably arise, a neutral administrator (a district clerk of sorts), such as the American Arbitration Association, is used, although not required by law. View arbitration not as diminishing your client's rights, but as a mere change in the "venue." Above all, arbitration is designed to be an efficient, transparent, and cost-effective way to resolve disputes.

You are right to note the clause because, normally, arbitration takes place only in the context of a consensual relationship between the parties, i.e., an arbitration clause in a contract. Although parties may enter into such an arrangement either at the beginning of their contractual relationship or at some later date after a controversy has arisen, 99 percent are pre-dispute.

Note the major differences between arbitration and litigation:

INFORMAL PROCEDURES

There is no thick Code of Civil Procedure, and strict rules of evidence do not apply. While your knowledge of the minimal rules is indispensable, arbitration is not designed to be a trap for the unwary.[1] Because the learning curve is much shorter than in litigation, you will not be as disadvantaged going against an experienced litigator. Arbitration equalizes the playing field.

ACCESS

Arbitration provides a full and fair opportunity to resolve disputes, particularly for smaller claims or those with no monetary damages that would not get a hearing in court. This is particularly true in consumer or employment disputes. Your client gets a hearing, period.

OBJECTIVE AND KNOWLEDGEABLE ARBITRATORS

Parties select arbitrators because of their knowledge of and experience with the subject matter. They therefore can render less problematic awards based on thoughtful and thorough review. As you would imagine, selection is critical.

CONFIDENTIALITY

Hearings are closed, and proceedings are not a matter of public record. This can be important in domestic or estate disputes for families who do not want their dirty laundry on the front pages of the local newspaper. By the same token, businesses value this feature in disputes involving proprietary information or trade secrets.

ECONOMY

The costs of arbitration proceedings are generally less than litigation—even when including the not insubstantial fees of the administrator and panel—primarily due to the absence of formal discovery, extensive motion practice, rescheduling, or interlocutory and post-award appeals. Arbitration is efficient.

SPEED

The AAA reports that the vast majority of cases are disposed of within 12 months from the date of filing, with 90 percent of all arbitration hearings concluded in two days or less.

FINAL AND BINDING AWARDS ARE ENFORCEABLE IN COURT

Finally, awards are reducible to enforceable judgments through a simple motion to confirm timely filing in court.

For these reasons, arbitration is highly favored under both Texas and federal law.[2]

ANATOMY OF AN ARBITRATION

The beauty of arbitration is derived from its flexibility to customize each arbitration to the needs of the parties.

Pre-Hearing

To begin the process, attorneys file abbreviated, notice-type pleadings with the institutional provider that then presents them with a list of panel candidates, not unlike conventional voir dire.

Once the parties have selected the panel by striking any conflicts from a list, the parties have a preliminary conference. This is similar to the scheduling conference found in civil rules, except that the attorneys generally have much more input on the contents of the order. While most of the time this is done by telephone, in complex arbitrations it is done in person with all parties or attorneys in attendance. This conference is an open, informal discussion to set the final hearing, to identify the scope of the dispute, and to set deadlines for the exchange of witness lists, documents, and discovery.

After the preliminary hearing has been held, the panel typically issues a scheduling-like order that sums up all decisions, much of it derived from the attorneys themselves. This scheduling order serves as the governing document for the case.

During the next phase of the process, the parties engage in discovery permitted by the order. If the panel has done a good job during the preliminary hearing, the discovery controversies will be kept to a minimum.[3] On the other hand, the efficiency of the process is such that if and when a dispute arises, a hearing can be held promptly, often by telephone with the panel, and an order issued immediately.

Generally, the parties have to make a stronger showing than in litigation for the need of depositions, which usually has been specifically addressed at the preliminary hearing. It avoids the "Rambo"-style tactics of burying the other side in expensive, wasteful, and time-consuming discovery.

Hearing

The hearing proceeds several months down the line, much like any formal trial. Attorneys advocate for their clients' position in hearings similar to what they do in court proceedings: opening arguments, presentation of evidence, resting, more evidence, closing arguments, and so forth.

The panel has broad discretion on the conduct of the proceedings.[4] Absent of specific direction in the arbitration clause (such as a directive that the panel use the Federal Rules of Evidence), the panel determines the admissibility, relevance, and materiality of evidence.[5] Panels do observe applicable rules on privileges, such as attorney-client.[6] Given the informality of the process and the specialized knowledge of the panel, a great deal of evidence, i.e., hearsay, that comes in at the hearing probably would be disallowed in court. Even affidavits are permissible. There are no evidentiary games.

Post-Hearing

Once the hearing is "closed," the arbitrators typically have a certain amount of time to render their decision, the award, and a short explanation of the result.[7] Arbitrators have broad discretion in rendering awards. Once the award is delivered to the parties, the arbitrators seek to reduce it to an enforceable judgment through a confirming motion in court. Judicial review of the award is extraordinarily limited, and, generally, is limited to procedural defects.[8]

CONCLUSION

The next time your client walks in your office with arbitration, relax. Have confidence that you will be dealing with a process that is "better, faster, and cheaper" than litigation. That means happier clients. And on second thought, you may be able to take that trip to the coast, after all. **TBJ**

NOTES

1. For example, there are no default procedures in arbitration for parties who do not answer by a certain date.
2. For all these reasons, "[t]he law strongly favors arbitration," *New Concept Constr. Co., Inc. v. Kirbyville Consolidated Indep. Sch. Dist.*, 119 S.W.3d 468, 471 (Tex. App.—Beaumont 2003, pet. denied), *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 55-56 (Tex. 2008); *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983); *Safer v. Nelson Financial Group*, 422 F.3d. 389, 293 (5th Cir. 2005). Although many practitioners see arbitration as the "new kid on the block," such agreements have not only been around but have also been the object of judicial favor for a long time. *See, e.g., Brazoria County v. Knutson*, 176 S.W.2d 740, 743 (Tex. 1944).
3. Although there is no formal discovery, AAA Rule 21 allows the arbitrator to "manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute ..."
4. AAA Rule 32.
5. AAA Rule 34 (b).
6. AAA Rule 34 (c).
7. AAA Rule 45 provides for 30 days.
8. Under Section 10(a) of the FAA, the court may enforce an arbitration award unless one or more of the following statutory grounds are proven:
   1. Where the award was procured by corruption, fraud, or undue means;
   2. Where there was evident partiality or corruption of the arbitrators;
   3. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or
   4. Where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

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has been conducting arbitrations for more than 20 years. He is a fellow of the College of Commercial Arbitrators. Among others, he serves on the panels of the American Arbitration Association (Large Complex Case) and the CPR Institute. He is a past chair of the State Bar of Texas ADR Section and a graduate of the University of Texas School of Law.