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Arbitration is not Arbitrary

By William T. McCaffery

Alternative Dispute Resolution (ADR) is often touted as a productive alternative to traditional litigation: cases can get resolved more quickly, which necessarily means less cost wasted on otherwise unnecessary litigation expense. When people talk about ADR, they are generally talking about mediation or arbitration, but in recent years, it seems that parties to litigation favor mediation over arbitration and the productive use of arbitration has significantly diminished; but why?

The simple answer to this question is that parties are reluctant to relinquish control of the case and its settlement to an unknown third-party. This is the same reason settlement is favored over leaving a case to trial to be decided by a jury: parties are wary of the unknown and prefer controlling the resolution rather than leaving it to chance.

However, leaving the resolution of a case to a qualified arbitrator is quite different from leaving the resolution of a case to six unknown jurors who have no prior experience or knowledge in the matter at issue and who are unfamiliar with the legal process and the fair and reasonable resolution of litigated claims. To the contrary, an arbitrator is not an unknown; an arbitrator is specifically selected by the parties for his or her particular experience, demeanor, qualifications, and background. This fact will generally remove the "unknown" aspect from the resolution of a case by an arbitrator.

Unlike a jury, which is truly an unknown until just before a trial begins, an arbitrator can be researched and vetted in advance. He or she can be selected specifically because he/she has specific knowledge and experience in the area of law at issue in the case. Under such circumstances, it is rare that an arbitrator will reach a decision on the case that is not supported by the facts or issue an award that is wholly unreasonable.

Moreover, an arbitrator's ultimate power over the resolution of a case can be curtailed by implementing restrictions on the arbitration, such as making it a "high/low" arbitration, which sets a floor and a ceiling for any award that could be made by an arbitrator. Such restrictions enable the parties to maintain certain controls over the resolution of a case while leaving the final determination to an independent third-party.

Unlike mediation, which simply offers the *hope* of resolution, arbitration offers the certitude of resolution. Bringing a case to arbitration will

necessarily result in the resolution of that case and the resolution can generally be expected to be for an amount that is justifiable, fair, and reasonable. Of course, there will be occasions where the result is more favorable than would have been expected and certainly occasions where the result will be less favorable than would have been hoped. But even those occasions where the award is greater than expected, the award is generally not wildly greater than expected as can be the case with a jury. In fact, an award for an amount greater than expected may very well be offset by the litigation costs that are saved by bringing the case to a timely resolution.

Furthermore, it is also likely that over the course of several cases, with some achieving favorable results, others less favorable, and most being resolved for an appropriate amount, the cases will overall average to a fair monetary resolution.

According to statistics published by the United States District Court for the Eastern District of New York, in 2013 57% of the cases that were referred to mediation settled at mediation. While this is a positive statistic in favor of mediation, the fact remains that barring exceptional circumstances, essentially 100% of the cases that are arbitrated are settled. There is certitude of resolution that can only be achieved through arbitration.

While the case for arbitration is strong, it seems that in recent years, parties and, in particular, insurance carriers, have been reluctant to allow cases to be arbitrated, instead preferring to maintain the control that is retained with mediation. However, it is important for parties and carriers to prudently make use of the powerful litigation resolution tool that is arbitration.

At arbitration, parties are represented by their trusted and capable attorneys; the case is adjudicated by an independent third-party that is thoroughly familiar with the law and subject matter at issue in the litigation; the arbitrator is someone with whom the parties are familiar and have specifically approved for the task of hearing the case; techniques such as "high-low" limitations provide restrictions and allow certain controls to remain over the ultimate disposition of the case; rules of procedure and evidence need not be enforced, which can be a key consideration in certain cases; arbitration assuredly brings conclusion to litigation and an end to continuing litigation expenses. If one of the keys to the cost effective resolution of claims is the timely resolution of those claims, then the usefulness of arbitration in achieving the timely resolution of claims should not be overlooked.

In recent years, it seems that arbitration is a rarely used tool, largely due to the perceived lack of control the parties have over the ultimate resolution of the case. However, with a clear appreciation of just how much control is retained by the parties in an arbitration proceeding along with the understanding of just how much can be saved in litigation costs through arbitration, perhaps this tool can be used more frequently in order to achieve the timely and cost effective resolution of claims.

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