To Arbitrate or Litigate? That is the Question.

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Foster Swift Commercial Litigation News
July 11, 2013

Whether 'tis nobler in the mind to suffer the slings and arrows of outrageous jury awards,
Or to take arms against this sea of litigation, and by opposing, end the court's involvement.

- Bill Shakespeare, Esq.

INTRODUCTION

There has been a recent trend of using arbitration as the favored method for resolving contract disputes. But that does not mean contract drafters should blindly add arbitration provisions without first evaluating whether arbitration is really the best process to resolve an anticipated dispute. This article sheds some light on some of the significant criteria and areas for evaluating whether an anticipated dispute is better suited for arbitration or the traditional court system.

REVISED UNIFORM ARBITRATION ACT

Michigan recently passed the Revised Uniform Arbitration Act (the "Revised Act"), which took effect on July 1, 2013. Prior to the Revised Act, the arbitration statute in Michigan had not substantively changed in over 50 years. In that time span, there have been dozens of United States Supreme Court cases regarding arbitration, and the complexity of arbitration has only increased.

Some key provisions of the Revised Act include:

- Explicit authorization of e-records;
- Allowance of the arbitrator to issue orders for provisional remedies, including equitable relief, temporary restraining orders and injunctions;
- Allowance of motions for summary disposition;
- Specifying the arbitrator’s duty to disclose conflicts;
- Clarification of the basis for punitive damages and awards of attorney fees; and
Permitting consolidation of separate arbitration proceedings.

The Revised Act provides for some significant changes, and makes Michigan the 14th state to adopt a modernized arbitration framework. Nonetheless, parties still have a great deal of latitude in defining and determining how the dispute resolution process will occur.

CONFIDENTIALITY

The contract can specify whether the arbitration is confidential and whether the arbitration decision will be issued in writing. Litigation, however, is a public event and the documents regarding the dispute will be available to the public. A confidential arbitration will help deny the parties the ability to use the dispute to sway public opinion. The importance of confidentiality can be high and organizations will sometimes require a dispute to be submitted to arbitration in lieu of a traditional court setting for this reason.

CUSTOMIZATION OF THE RULES

The rules for an arbitration proceeding should be customized for the particular types of disputes that may foreseeably occur under the given circumstances. Discovery can be narrowed in scope, damages can be limited and the format of the arbitration can be specified in the contract. This can provide for many options and flexibility for the parties involved.

SUBJECT-MATTER EXPERTISE

In arbitration, parties can choose arbitrators that are familiar with industry practices and have specific expertise in the area of the dispute. This could expedite the resolution process and could allow for a fair resolution of the dispute. On the other hand, expertise is generally expensive and paying an expert to arbitrate means costs can accumulate quickly, especially when a panel of three industry experts or attorneys each charge hourly rates in addition to the venue fee. As such, although arbitration is generally thought of as being faster and less expensive, this may not always be true. A poorly-drafted arbitration agreement may fail to provide for the procedural framework and conduct of the arbitration proceeding. Without a predetermined procedure, the informal nature of the arbitration may lead to inefficiencies and ultimately, higher costs to the parties.

DRAFTING THE ARBITRATION SECTION OF THE CONTRACT

The arbitration section of the contract can provide for arbitration in a broad or narrow sense – will all disputes be subject to arbitration or just some specific disputes? Clarity in drafting the arbitration language is important, since Michigan jurisprudence favors an arbitration clause in a contract.

Furthermore, arbitration can be binding or non-binding. If the arbitration is binding, the arbitrator's decision is generally final and cannot be changed by a court unless there is some particular circumstance that allows for it, such as fraud or some other similar level of deceit. Non-binding arbitration is generally used as a settlement mechanism. It allows parties to reject the arbitration decision and proceed to a trial. This may also be used as
an assessment of the merits of the claim, but it can be expensive. The parties would pay for arbitration and then have to pay the costs of litigation.

WHAT DOES THIS MEAN FOR YOU?

If you are a non-lawyer reading this, you might be thinking "How does this affect me and what do I do now?"

While an attorney should evaluate each specific situation, here are some issues to consider:

- Do you have confidential business practices that could be revealed to competitors or the public through discovery and litigation?
- What is the relationship you have with the person or entity you are contracting with? Is this a long-standing business relationship, or is this a new business relationship where you are evaluating the other party’s business acumen?
- Could it be cost prohibitive to bring a claim? Do you have the resources to defend a lawsuit – or pursue one – when the process could be drawn out and expensive?
- Do you anticipate settling claims early and often? Or would you rather follow each claim to a formal conclusion?
- Is your business or organization difficult to understand, such that you would want a specialist or expert making decisions?
- Do you know how often disputes arise in your industry?
- Do you wish to give up your legal and Constitutional rights in order to possibly have a speedier and less costly resolution?

All of these questions need to be answered as part of the arbitration or litigation analysis. Because, at the end of the day, if you are ever going to give up a Constitutional right, you should have a good reason as to why you are doing it.

CONCLUSION

It can sometimes seem as though neither arbitration nor litigation will allow for a complete solution. Therefore, organizational leaders should carefully consider the advantages and disadvantages of contract provisions providing for arbitration.