Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
September 2010 Issue

Barbara A. Reeves Neal

Ordered to arbitration? Take advantage!

Trial lawyers tend to be disappointed when ordered to arbitration and deprived of that familiar and favorite forum, the jury trial. The author offers several tips to take advantage of the opportunities that arbitration can offer

These days it seems that hardly anyone has a good word to say for arbitration. In consumer matters, arbitration clauses are often inserted into "agreements" on a take-it-or-leave-it basis, imposed by a party in a position of power upon a party without power. This has produced a backlash against arbitration by people who feel that they are being forced into arbitration and deprived of their day in court.

In commercial dealings, arbitration has become increasingly cumbersome and costly. Standard arbitration agreements and practices have taken on all the trappings of litigation: protracted discovery, motion practice and the overlay of the rules of evidence. Litigators, accustomed to the rules and procedures of the courtroom, import those into arbitration, demanding more depositions, serving document production requests, filing dispositive motions and even motions in limine. With so many arbitrators conducting arbitration hearings with the precision of a courtroom, it's no wonder that arbitration is getting a bad name.

Trial lawyers tend to be disappointed when ordered to arbitration and deprived of that familiar and favorite forum, the jury trial. But like other setbacks in life, this one presents advantages as well as drawbacks. As Winston Churchill observed — to an optimist, every calamity is an opportunity. Be an optimist and make arbitration work for you!

Arbitration has been a dispute resolution tool for millennia, used by Phoenician merchants to resolve disputes. Arbitration began as an efficient and economical binding dispute resolution procedure. Labor and employers used it as a way to settle disputes since the early 1800s. It was designed to provide cost savings, shorter resolution times, a more satisfactory process, expert decision makers, privacy and confidentiality and relative finality. Arbitration arose because people wanted an expeditious but fair, and final, result, so that wrongs could be righted and everyone could get back to earning a living and living their lives without being bogged down in the court system.

But the ultimate beauty of arbitration is that the parties can structure a method of resolving disputes tailored to their needs and budget if they know how to take advantage of the opportunities. Following are tips to consider when structuring arbitration.

Pick the judge

In court, the parties must accept a judge assigned at random, with only one preemptory challenge as a remedy. Or, a top-notch judge may be drawn, only to have the other side exercise a challenge.

Parties in arbitration can choose the judge they want, if the two sides can agree on a choice, and failing this, they can avoid the arbitrators they don't want by striking their names from a list of potential arbitrators.

Every trial lawyer knows how much difference the right judge can make. In arbitration, parties have a lot more to say about this choice than in court.

Customize the process

Arbitrators have a saying: You get the arbitration that you design. You can have fast-track arbitration with expedited procedures and limited or no discovery, or you can have arbitration with more bells and whistles. You can insert a requirement that the parties mediate the dispute before or during the arbitration in an effort to settle the matter. Unlike the courts where one size is presumed to fit all, in arbitration you can tailor the resolution procedure to the dispute.

Arbitration providers may offer a choice of rules as a starting place. JAMS, for example, offers Streamlined, Comprehensive, Employment and Construction Rules – each designed for the particular needs of particular types of cases. Beyond that, the parties can agree to modify just about any aspect of the procedure that their imagination may suggest. (JAMS Rule 2 states: "The Parties may agree on any procedures not specified herein that are consistent with the applicable law and JAMS policies.") For example, if the parties believe that resolution of certain key issues might clear the way to settlement of the case, they can agree to bifurcate those issues and try them first. (While courts have some power to bifurcate, judges seldom exercise the power, especially where juries are concerned.) They can expand or shrink discovery and schedule proceedings in the way most compatible with their own needs, rather than being constrained by judicial procedures.

Keep discovery efficient and economical

In court, after the complaint is filed, the document requests,

See Reeves Neal, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
September 2010 Issue

interrogatories and depositions notices go out. Time passes as deadlines to respond are extended and motions to compel are filed when responses consist of pages of objections with no useful information.

The arbitration rules, on the other hand, typically require an early, informal exchange of discovery (for example, JAMS Comprehensive Rule 17(a) requires "the voluntary and informal exchange of all non-privileged documents and other information (including electronically stored information ('ESI')) relevant to the dispute or claim immediately after commencement of Arbitration.") This obligation is continuing. (Rule 17(c).) Names of witnesses, including experts, as well as expert reports, also must be produced promptly and without request. (Rule 17(a).)

These requirements for early, full, voluntary discovery obviate the need for prolonged discovery paper wars. The arbitrator should be available for an "arbitrator assisted" meet-and confer if a discovery dispute arises, either in person or by telephone. A simple telephone conference with the arbitrator should resolve most discovery disputes, avoiding the need for the extensive filings, full-blown cycles of motions, responses, replies and court hearings. (Rule 17(d).)

Also, parties in arbitration can avoid, if they wish, the expense and time consumed in deposing, defending or attending the deposition of every person who may have some knowledge about the case. The JAMS Comprehensive Rules as a default position limit each side to one deposition (Rule 17(b). The arbitrator can order additional depositions, but the proponent must show a reasonable need plus the absence of undue burden on the other side (17(b).) Thus depositions can be confined to those which are truly necessary and useful.

One note: Select arbitrators with strong case-management skills and an arbitration provider with rules and case managers known for efficient case administration. Make sure your arbitrator knows your expectations regarding how you envision the arbitration proceedings. If your arbitrator is not on board with your ideas of expeditious proceedings, the best-laid plans can be for naught.

Get to trial and through trial faster

Even with modern, individual-calendar civil courts, it takes a year to two years to get to trial. And then there's always the possibility of the appeal.

Arbitrations, in contrast, can often be set for trial within a few months. Even in larger and more complex cases, six months from commencement to arbitration hearing is doable. So cases can get to trial in arbitration much faster than in court.

Trial courts typically "stack" trials, setting two or three cases on a single day, to assure that at least one doesn't settle and proceeds to trial. But if two or more cases are ready on the assigned date, a continuance for one is assured and counsel and their clients must prepare for trial twice, or more.

In arbitration, on the other hand, there is little risk the case won't start trial on the scheduled date. The arbitrator typically sets aside time for one case, and no other. Litigants in arbitration won't have to ready a case completely for trial, preparing their own witnesses and sending subpoenas to others, only to find trial continued and these preparations necessarily repeated later.

Arbitration saves time during trial, too. The arbitrator can allow witnesses to testify out of order if appropriate in order to accommodate a witness's schedule or to keep the hearing moving. (JAMS Comp. Rule 22) In some instances, the arbitrator will receive testimony by affidavit or declaration. (JAMS Comp. Rule 22(e).) Strict conformity to the law of evidence is not required (Rule 22(d)), except for attorney client and work product privileges. Distant witness's testimony can be presented by video conference.

At the same time, parties have the right to a decision based on controlling principles of law and equity (JAMS Comp. Rule 24(c),(h)) as well as the right to any remedy or relief available under those principles, including injunctive relief and exemplary damages (Rule 24(c).) The arbitrator may also grant whatever interim measures are deemed necessary, including injunctive relief. (JAMS Comp. Rule 24(e).) The arbitrator may allocate arbitration fees and arbitrator compensation. (JAMS Comp. Rule 24(f).)

Achieve early finality

In court, the jury verdict is only a whistle stop along the long track to conclusion. Post-trial motions may require 60 more days and up to 180 days can pass before the deadline to notice an appeal. Then, one to three more years may pass before the appeal is concluded, and, in the event of an appellate reversal, or a Supreme Court petition, yet more years.

In arbitration, the final award must be rendered within 30 days after the hearing is closed, and that award is the concluding event in the case, unless one of the very narrow grounds for vacatur is present, or the parties have elected an optional appeal from arbitration. If plaintiff is the winner, he can collect his award (and his attorney can collect his/her fee.) Even if he loses, he has attained closure and can get on with life. Likewise, for the defendant, closure is attained, win or lose, and attention can be turned to other matters.

The beauty of arbitration, and its fundamental advantage over litigation, is the opportunity to choose the dispute resolution procedure and the decision-maker that you want, and free

See Reeves Neal, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
September 2010 Issue

of the time-consuming procedures of litigation in court. Lawyers who are unhappy with the current state of arbitration should advise their clients on how they can structure the arbitration process to serve their goals and priorities.

Note – The College of Commercial Arbitrators is in the process of issuing *Protocols for Expeditious, Cost-Effective Commercial Arbitration (draft, March 2010)(CCA Protocols)* designed for counsel and arbitrators who practice commercial arbitration. Many of the protocols are equally applicable to consumer arbitration, and can greatly improve arbitration as a dispute-resolution tool. The final *Protocols* should soon be available at www.thecca.net.

Barbara A. Reeves Neal, Esq., associated with JAMS, has been a full-time neutral for five years and practices at JAMS. She is a well-known mediator and arbitrator, as well as a special master/referee. She uses her legal, analytical and conciliation skills to craft the best possible resolution of each case. She has an exceptionally broad legal background that qualifies her in a wide-range of subject areas. She is adept at handling large, complex cases as well as those cases in which the parties have significant emotional involvement. Barbara received her J.D., cum laude, from Harvard Law School. For additional details, please visit www.jamsadr.com/reeves.