# ARBITRATION

## UNLOCKING THE PROMISE OF ARBITRATION

At the turn of the last century, arbitration was all the rage as a more efficient dispute resolution process. Arbitration, its proponents promised, would help parties achieve finality faster, ensure focused arbiters with relevant expertise, streamline the overall timeline, and minimize costly discovery. As a result, many companies included mandatory arbitration clauses in contracts as a matter of course.

Nearly two decades later, the bloom is off arbitration in many corporate legal circles. Some argue that the promise of arbitration has often not been realized and, worse, that the dispute resolution "alternative" to litigation has ended up more burdensome than the litigation process it sought to replace.

But statistics provide some meaningful pushback to these criticisms. According to the American Bar Association, as of 2011, the typical domestic commercial arbitration took about seven months, while U.S. District Court civil cases averaged about 23 months. "There is definitely an expectation that if you have an arbitration clause, things are going to happen more quickly and cheaply than they would in litigation," says Aryeh Portnoy, a partner in Crowell & Moring's Litigation Group. "But that does not mean that in practice it always happens that way." Portnoy says that one key to avoiding problems is to address several issues early on, long before there is an actual dispute—that is, during the writing of the contract.

Portnoy explains that the problem is not arbitration per se, but rather the way the process is set up in the contract's arbitration clauses. "The dispute resolution process is a creature of that contract," he says. "If the parties use a short and standard form dispute resolution clause, the generic wording of that sort of provision may fail to define the process clearly enough, opening the door to a range of potential disagreements and arguments." Portnoy suggests paying more attention to three areas:

- **Arbitrator selection.** Clauses should define the selection process and put time limits on it. How many candidates can be proposed? How many can be stricken? What fallback process will be used if no arbiter is selected within the set time? Clauses should also describe any special expertise arbitrators will need to have—will they have to be retired judges, for example, or licensed architects or engineers? Overall, it's important to strike a balance between being too broad and too specific. Going too far in either direction can create potential for arguments that slow the process. Portnoy points to a recent engagement in which "it took six months just to appoint the arbitrator. That never happens in a court—you've got your judge on day one." The goal, he says, is to set up a practicable pool of qualified and competent arbitrators to select from efficiently.

- **Discovery.** Clauses should specify the type and scope of discovery, based on the type of disputes likely to arise. They should also define limits for depositions, an especially costly discovery device. These clauses, Portnoy adds, "should also include some wiggle room to allow the parties and arbitrator to modify discovery as needed to ensure fairness."

- **Expedited track.** Many arbitration bodies have a specific process for "expedited matters." Companies may want arbitration clauses that call for proceeding under those rules.

In short, arbitration is an area where an ounce of upfront prevention can be worth a pound of cure. "It is prudent to think through these things at the contract phase and set up a structure so that if there is a disagreement, you have some certainty as to how it will be handled," says Portnoy. In the coming years, companies that take those steps will be in a far better position to use arbitration as the effective tool that it once promised to be.

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