

ARBITRATION: THE EMPEROR'S NEW CLOTHES



Over the past 30 years, mandatory arbitration clauses have been increasingly popular. They are now regularly included in all forms of commercial agreements. Examples of these agreements include insurance policies, agreements for the purchase and sale of real estate, agreements related to professional services, and agreements relating to a securities brokerage account. Arbitration clauses are included in form contracts that have been approved by the AIA and the Florida Association of Realtors, among other organizations. They are used by transactional lawyers whenever these lawyers believe that traditional litigation is not in their clients' interest. However, based on my experience, these assumptions are incorrect and arbitrations often produce unanticipated and unacceptable results.

The idea that arbitrations are faster than normal litigation is a myth. Delays start with selection of arbitrators. There are several methods for selecting arbitrators. Sometimes, an agreement will specify who will perform the arbitration. An alternative is for each party to select an arbitrator and they will select a neutral arbitrator. However, more often than not, the selection of the arbitrator will require the organization sponsoring the process, e.g., The American Arbitration Association, to select a proposed list of arbitrators. That list and the qualifications of the proposed arbitrators will be reviewed by each party. Challenges will be made. Sometimes, a second round of names is required before a panel of arbitrators can be assembled.

Weeks and months later, the selected panel will convene a hearing to decide procedures. Often, the same motions that are filed in the litigation process are filed and heard by the panel. Each hearing requires the members of the panel, usually three but sometimes one, to prepare and to clear dates for availability. That process means expense and delay.

The next phase is to decide whether discovery through document production and witness depositions will be allowed and if so, to what extent. Again, this means that the very thing that was to be avoided, delay and expense, will occur. Often the discovery is virtually the same as it would be in a lawsuit.

Finally, when discovery is complete and the case is ready, it proceeds to hearing. However, arbitration is not a trial in the formal sense. The Rules of Evidence do not apply. Often, hearsay and speculation, things virtually always excluded in normal litigation, are offered to the panel.

The proceeding may extend over several days and several separate sessions. Results may vary from the law so long as there is not a "manifest" disregard of the law. Even worse, the appeal rights from an arbitration award are extremely limited.

Finally, the costs and fees of the panel can be overwhelming. Often panel members charge significant hourly rates and when multiplied times three can produce fees of ten thousand dollars per day or more for each day of the hearing. These fees can add up and can make arbitration significantly more expensive than routine litigation where your tax dollars pay for a judge. Today, with the emergence of commercial divisions in various courts, the skill of the trial judge can be excellent and well beyond the skill of most ordinary panel members.

In the past few years, the failures of arbitration are becoming more apparent. Congress is currently considering eliminating mandatory arbitration in areas where the consumer is forced to agree to an arbitration clause.

Based on recent experience, I have stopped recommending arbitration clauses because they no longer meet the expectation of the parties. The emperor is not wearing any clothes. ♪



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