Commercial Arbitration At Its Best — The CPR Arbitration Commission's Recommendations For Improving The Arbitration Process

By Stephen P. Younger

Arbitration can provide an efficient and flexible alternative to litigation. When properly structured, arbitration can speed the resolution of disputes. In arbitration, parties choose their own decision-makers and procedures. Despite its advantages, concerns about the arbitration process have acted as deterrents to its full use. Lack of confidence in the qualifications of arbitrators, apprehension about the limited appeals process, fear of irrational outcomes and concerns about delays and expense in poorly designed arbitrations cause some businesses to avoid the process.

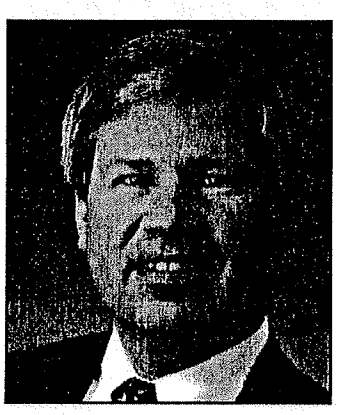
To address these concerns, the CPR Institute of Dispute Resolution assembled the Commission on the Future of Arbitration — a group of more than fifty leading arbitration experts. The Commission is publishing its findings in a book, which offers critical insights and best practices for the effective use of arbitration techniques. It also discusses how arbitration can best fit with other ADR processes. To promote efficiency and flexibility in the arbitration process, CPR has also revised its Arbitration Rules.

The Commission concluded that the key to successful arbitration reform is providing users with choice. Conflict management should be on every corporation's checklist for transactional planning, since contract clauses give businesses a unique opportunity to structure ADR processes. The choice of arbitrators, process alternatives, and remedies must be tailored to individual business needs and goals.

The Three-Step ADR Process

The Commission found that ADR is often structured as a three-step process. Most companies first seek to resolve disputes through direct negotiation, which is the logical first step of conflict management. If unaided negotiation fails, it should generally be followed by mediation. In mediation, parties have the advantage of communicating directly to resolve their disputes. Even if mediation fails, it can be an ideal foundation for an effective and efficient arbitration.

If the matter requires adjudication, arbitration is often preferable to a court trial. Arbitration is an adversarial process in which parties use private arbitrators to decide the dispute. Businesses choose arbitration because of its perceived advantages over going to court, *i.e.*, speed, economy, flexibility and the ability to choose the decisionmaker. When quick arbitration follows mediation as the third step in the ADR continuum, it can take away the delay factor which some parties use as a bargaining edge in mediation.



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Arbitrator Selection

The Commission found that the selection of a highly competent arbitrator or panel of arbitrators plays a crucial role in ensuring a satisfactory arbitration process. Attributes of highly effective arbitrators include: fairness, objectivity, open-mindedness, diligence, efficiency, and decisiveness. An effective arbitrator simplifies, clarifies and prioritizes issues. By actively managing the process and making expectations clear at the outset, good arbitrators ensure fair, efficient and civil hearings.

To find arbitrators with the desired qualities, parties should choose individuals who have the appropriate education and professional training, and have extensive arbitration experience. Arbitrators are often selected from lists published by independent ADR organizations. Information on prospective arbitrators can be found through arbitrator biographies, personal interviews, and discussions with third-party references. Parties should set time limits for selecting an arbitrator and create default appointment procedures.

The Commission concluded that the role of mediator and arbitrator generally should not be combined. Wearing both these hats may undermine the effectiveness of one or both processes. Such a combination of the neutral roles could lead to a coerced agreement, misuse of confidential information and fewer candid communications between parties. However, there may be situations where informed parties find the risks of these mixed roles acceptable, but this option should only be selected after careful consideration and informed choice.

Selecting A Tripartite Panel

Parties generally choose between either a single arbitrator or tripartite panel to adjudicate their dispute in arbitration. Single arbitrators are usually less costly than a tripartite panel and are more readily available for hearings. In certain situations, however, a panel of arbitrators may be preferable because it affords a mix of perspectives and expertise. Moreover, some regard the presence of multiple decisionmakers as a protection against irrational awards and unacceptable compromise outcomes.

Tripartite panels may be structured to include two arbitrators designated by individual parties and a third arbitrator selected by the two party-designated arbitrators; this is conventional in many forms of international arbitration. The most difficult problem with such panels is that party-appointed arbitrators may turn out to be partisan advocates who can disrupt and delay the arbitration process. Unfortunately, some arbitration rules do not require party-appointed arbitrators to be completely objective. The Commission concluded that when employing a tripartite panel, businesses should take care to specify the roles and responsibilities of the respective arbitrators.

Standards Governing Arbitrators' Conduct

Federal and state laws, arbitration agreements and arbitration rules combine to fix various standards for arbitrators' actions. The statutory standards of arbitrator conduct prohibit actions that would prevent a fundamentally fair hearing. Some statutes include affirmative requirements for arbitrators such as disclosure or oath-taking. A failure to disclose conflicts of interest may create a ground for reversal of awards under federal and state laws. Arbitration agreements and arbitration rules often set forth more specific requirements concerning arbitrator performance. The ethical standards detailed in the 1977 Code of Ethics for Arbitrators in Commercial Disputes provide specific guideposts for arbitrator conduct where it applies. Because of the lack of clarity created by these overlapping rules and in some cases an absence of rules, business users of arbitration should establish clear and practical guidelines regarding arbitrator conduct.

Confidentiality

Parties must take steps to protect their privacy needs in arbitration. Although public policy tends to protect arbitrators from having to testify, the law does not prevent discovery by third parties into arbitration communications. To maintain the privacy of hearings, the Commission concluded that participants should be asked to restrict access to the hearing room, limit outside communications, and restrict access to the record. In addition, participants in arbitration should develop specific agreements concerning the handling of trade secrets and other confidential information as is done with confidentiality stipulations in conventional litigation.

Arbitration Awards

As a rule, arbitrators enjoy broad authority to structure an award. This discretion can be limited by agreement of the parties. Furthermore, arbitrators are given broad discretion in awarding damages. According to federal law and most state laws — other than New York — arbitrators can award punitive damages. However, such awards are relatively rare in commercial cases. Arbitrators may also award attorneys' fees if the agreement or incorporated rules so specify.

Irrational Awards And Unacceptable Compromise Outcomes

According to the Commission, what is sometimes perceived as an inappropriate compromise may actually be due to a failure of the arbitrators to effectively address the issues. Arbitrators also have the power to work justice between the parties. Arbitrators may modify one or more elements of the proffered damages calculations based on their view of the proof or may reduce an award to reflect the claimant's partial responsibility for damages. Thus, there are a wide variety of reasons for a particular award which may not be apparent in the absence of a reasoned opinion.

Nonetheless, to lower the risk of potential abuse of arbitral discretion, parties should pick capable arbitrators, set specific standards for the arbitrators' decision, and place limits on awards of monetary damages. Participants can also require that arbitrators include a reasoned opinion although some view this option as creating a greater risk of an appeal.

Judicial Review Of An Award

Statutory standards for the judicial review of an award are very limited. Statutes tend to focus on ensuring a fundamentally fair arbitration process rather than reviewing the merits of an arbitrator's decision. Judicial review is available if awards were procured by corruption, fraud or undue means. Other grounds for vacating an award may include: evident partiality or corruption in arbitrators, failure to postpone hearing for cause, refusal to hear pertinent and material evidence, and other prejudicial or capricious arbitrator misbehavior. An award may also be set aside if it was rendered in manifest disregard of the law or public policy. There are various overlapping and at times conflicting standards for judicial review of arbitration awards in the federal and state courts. Only unified statutory reform of the review process would clarify this issue.

Advantages And Disadvantages Of Expanding The Scope Of Judicial Review

The majority view is that courts can expand the scope of review of an award if the parties agree. There are advantages and disadvantages to expanding the scope of judicial review. Judicial review provisions in an arbitration agreement are most likely to be perceived as beneficial in complex, high stakes matters. Judicial review may reduce the likelihood that an irrational award will be enforced. It can cause arbitrators to use more care in making decisions. On the other hand, judicial review can increase costs, delay resolution and undermine the finality that makes arbitration a valuable method of dispute resolution. Thus, such expanded review should only be adopted after careful consideration.

Conclusion

Businesses should employ a wide range of ADR techniques as effective alternatives to litigation. The careful selection of arbitrators, arbitration procedure and remedies can avoid the potential problems of an out-of-control arbitration, and ensure a satisfactory and fair resolution.

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