Private Arbitration: One Tool for Businesses During the Pandemic

By David Slossberg

As we near the end of 2021 and consider the possibilities for 2022, all of us had hoped that the Covid pandemic would be in the rearview mirror. While Delta and Omicron have dampened those hopes, we have come to learn how amazingly resilient and adaptive we are in all facets of our lives. For those trying to run businesses during these difficult times, private arbitration has provided a lifeline by which parties can timely and efficiently resolve disputes, while the courts, with limited resources and greater restrictions, fall behind.

Arbitration essentially is a private trial before an arbitrator who acts as a judge. Generally, the arbitrator hears testimony, receives documentary evidence, and issues a binding, written opinion. Unless the arbitrator exceeds his or her authority, or issues a decision that is arbitrary or capricious, the decision will not be overturned in court.

The arbitrator derives authority from what is granted to them by agreement of the parties. That starts with arbitration provisions in business contracts, which often select the location of the proceedings and the applicable law. Those agreements commonly specify the rules that apply to the arbitration, such as those provided by the American Arbitration Association (AAA). Those rules, like those of civil procedure in the courts, govern how the arbitration will be conducted.

One useful tool is to map out, at the preliminary hearing before the arbitrator, the timeline for the arbitration, including the conduct of discovery and the dates for hearings. In state and federal courts, trials are being scheduled to take place often years after the filing of the action. Arbitrations often can be heard and decided within just six months, and, even in the most complicated cases, in less than a year.

Further, while it is not the first choice of most litigants, the arbitrator can schedule hearings by video conference, proven to be surprisingly effective.

Parties to contracts should pay special attention to what they are willing to have the arbitrator decide. Broad arbitration provisions authorizing arbitration for any issues "arising out of or relating to the agreement," are interpreted by the courts to include virtually any dispute that arises between the parties due to the contractual relationship. However, there are some circumstances where the parties will want to draw the clause more narrowly, perhaps to be limited to certain types of damages claims or to exclude injunctive relief. Indeed, one of the great advantages of arbitration is the parties, by agreement, can dictate the scope and subject matter of the proceedings.

The parties also can agree to select an arbitrator with experience that may be helpful in deciding the matter. When arbitration proceeds under the AAA rules, the AAA will provide a list of arbitrators from which to choose that includes lawyers and former judges who are, based on experience, deemed suitable for the case. In some situations, particularly those larger cases that justify the expense, the parties may elect to have the matter decided by a panel of arbitrators, typically a panel of three arbitrators, where each party selects one arbitrator and those two naming a third neutral as the lead.

At its core, arbitration provides the parties significant flexibility to shape the proceedings that meets the challenges of these times, when factors like Covid create greater obstacles. This allows businesses to function and thrive through the prompt and cost-effective resolution of their business disputes.

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