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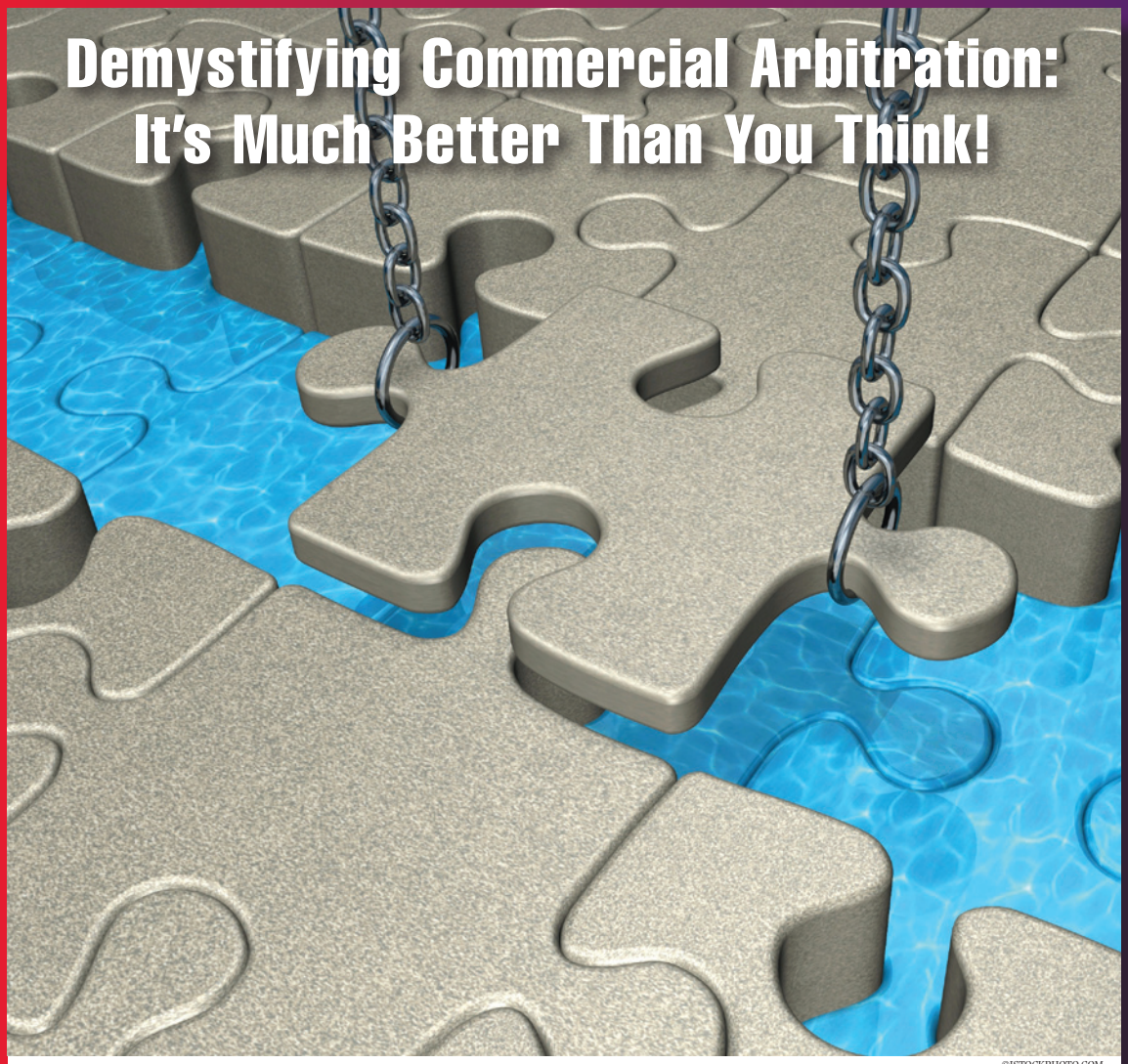
Demystifying Commercial Arbitration: It's Much Better Than You Think!



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When lawyers become more familiar and comfortable with the arbitration process, they will come to appreciate it

By Peter Michaelson

These days, arbitration gets a bad rap. But for a process that may well date back some 5,700-plus years to Biblical times, complaints are no surprise. ("Bet Din and Judges," *Jewish Virtual Library,* citing to Exodus 18:13, 17-26 and Deuteronomy 1:9, 13-17.) No adjudicatory process is perfect: far from it. What surprises this author, who has been arbitrating complex commercial cases since 1991, is just how little is known by the practicing bar about commercial arbitration and its principal advantages, and just how extensive misconceptions are. This article summarily discusses both—to demystify arbitration and encourage its consideration and proper use.

A very common, almost universal, complaint is cost. Over the past 20 years or so, complex commercial arbitration has effectively been "litigationalized," with all the baggage of litigation having been carried over by trial counsel into arbitration. No doubt exists that arbitration can be very expensive—to the point of rivaling the cost of complex federal litigation. But sentiments to the effect that, for resolving complex commercial matters, arbitration must always mimic complex litigation and thus

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be expensive are pure misconceptions.

In the author's experience, parties and counsel frequently select arbitral processes that they likely expect will be both extensive and expensive—often out of their own ignorance of the significant flexibility and efficiencies available in arbitration; then, once the proceeding is well underway, they realize that, not surprisingly, their arbitration really is rather complex and quite expensive; and finally, once the arbitration has concluded, complain about the high complexity and expense of the process, and are thus are strongly biased against its use going forward.

Complaints about cost are not new. In 1930, Sir Roland Burrows, KC, stated: "Arbitration can cost just as much or as little as the parties wish it to cost." (*CIArb Costs of International Arbitration Survey 2011*, Chartered Institute of Arbitrators, p.16.) Yet, as Sir Burrows acknowledged, arbitration can also be very inexpensive. Cost is dictated by just how extensive the arbitration process is. If the parties to a given dispute want an arbitration process that resembles federal litigation, with substantially all the attendant bells and whistles, and are willing to incur the concomitant expense, they can agree to it. Alternatively, if parties want a highly economical and expedient process that is time- and cost-efficient—with minimal and targeted discovery, sharply constrained hearings and no motion practice, or simpler yet, just a hearing based solely on documentary submissions—they can agree to that. If they want something between these extremes, they can have that. The parties have total autonomy in specifying the process they want to follow. Unlike litigation, where a judge assumes control over a lawsuit upon its commencement and then applies essentially a "one size fits all" approach embodied in either the federal or state rules of civil procedure, the parties to an arbitration are advantageously free to fully engineer the arbitral process as they see fit to meet their needs. Party autonomy is a fundamental tenet of arbitration—one not available in litigation.

Discovery—the highest cost-driver in nearly all complex litigations—can be drastically limited in arbitration, thus potentially yielding considerable process efficiencies and cost savings. Arbitration rules regarding discovery are very simple, as evident in Rule R-31(a) of the 2007 Commercial Rules of the American Arbitration Association (AAA Commercial Rules):

> The parties may offer such evidence as it relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to the legal rules of evidence shall not be necessary.

Parties can dramatically compress an entire arbitral process by appropriately limiting the available time each side has to present its case at the evidentiary hearing.

The arbitrator controls discovery; the parties agree on its extent. If the parties want full-blown discovery pursuant to the Federal Rules of Civil Procedure, they can have it: interrogatories; depositions; document requests; requests for admission; everything. Alternatively, parties can agree to just a joint, sharply focused mutual document exchange and only those documents on which each intends to rely, nothing more: no interrogatories, no depositions, no other discovery. Should the parties believe that some intermediate level of discovery is appropriate, particularly involving ediscovery, they can choose that instead. CPR recently promulgated a protocol providing multiple levels, categorized as Modes A-D, of increasingly extensive discovery of physical and electronic documents which parties can mutually select and contractually agree to use during arbitration. (*CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration*, CPR Institute for Dispute Resolution and Prevention, 2009, Schedules 1 and 2.)

Efficient, cost-effective modalities can be used to receive witness testimony, such as, e.g., prefiled direct testimony, witness statements, deposition testimony (with limits on length and number) and video-linked testimony, such as through Skype or other web-based video-conference services. In appropriate cases, experts can even be "hot-tubbed." There, opposing experts are convened, and collectively sworn and presented together through which, under questions of either counsel or the tribunal, the experts will establish a dialogue amongst themselves and, if possible, reach a consensus concerning their opinions, thus exposing their specific points of agreement and disagreement. Each of the "hot-tubbed" experts can also be presented, in succession, with the same question to facilitate ready comparison of their opinions.

Motion practice provides further opportunities to achieve efficiencies. Certain motions can be not only disruptive to an adjudicatory process but also quite expensive. However, these same motions, such as to bifurcate or for partial summary judgment, when interposed early can advantageously eliminate issues from the dispute or parse threshold issues out for early disposition. Thus, the remainder of the proceeding can be significantly simplified, and the parties can potentially achieve cost savings far greater than the attendant cumulative expense of the motion. Arbitrators exercise considerable discretion in deciding if and when to accept such motions, as reflected in rule R30(b) of the AAA Commercial Rules: "The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute...."

Arbitrators often attempt to prevent the filing of futile motions and thus save the parties the expense. Specifically, a tribunal can require any party that wants to file such a motion to first submit a three- to five-page letter brief requesting leave to file that motion. The brief sets forth the factual and legal basis for that motion; why the motion, if granted, is likely to expedite the proceeding; and, most importantly, why the tribunal is more likely than not to grant the motion. The opposing party will be accorded a reciprocal opportunity to file a similar brief opposing the request. The arbitrator(s) then considers the briefs and, in turn, either grants the requestor leave to file the motion or not.

Advantageously, parties can dramati-

cally compress an entire arbitral process by appropriately limiting the available time each side has to present its case at the evidentiary hearing. Knowing this limit at the inception of the entire proceeding forces counsel to sharply concentrate their efforts from the onset on the core issue(s) in contention, excluding all secondary and tangential issues from discovery, briefing, motions and the hearing itself, thus significantly simplifying and shortening the entire proceeding. Illustratively, in an arbitration of a large, complex pharmaceutical patent-licensing dispute being handled through CPR, the parties, in their arbitration agreement, had agreed that, at the hearing, each side had only two hours to present its arguments and another 30 minutes for rebuttal.

The most important advantage to any party in arbitration is its complete autonomy to select its own neutral—a feature totally absent from litigation. The quality of an ADR process is only as good as the neutral conducting it. Selecting the right neutral can be difficult, tedious and even frustrating, but ultimately quite rewarding. The right neutral, with requisite arbitration experience ("arbitration chops") and substantive expertise, can readily assist the parties in fashioning a process appropriately matched to their needs, that meets, if not exceeds, their expectations for efficiency and fairness. (See, e.g., P. Michaelson,"Neutral Selection: Perspectives from a Neutral," *Just Resolutions*, American Bar Association Dispute Resolution Section, March 2014.)

Arbitration can be confidential. Arbitrators are ethically bound to maintain all details of an arbitration in complete confidence. (Code of Ethics for Arbitrators in Commercial Disputes, American Arbitration Association, 2004, Canon VI(B).) The parties are not. However, the parties can agree to maintain strict confidentiality between themselves so no details of the arbitral proceeding become public knowledge. Further, should the parties not want any reasoning to appear in their award, for fear of its subsequent discoverability, they can simply instruct the tribunal to render a bald award. These advantages are just not available in litigation.

Theoretically, with all these advantages, it seems axiomatic that, when a dispute arises that requires a third-party fact-finder to resolve it, the parties' counsel would eagerly devise an arbitral process that efficiently does so. Yet, little can be farther from the truth. Professor Frank Sander, then with Harvard Law School, recognized this fallacy by stating in 2007: "The theoretical advantages of arbitration over court adjudication are manifold....These theoretical advantages [however] are not always fully realized." (*CIArb Costs* at p. ii.)

Litigation, for all its deficiencies, is still the major vehicle through which most disputes are resolved. Why? Human nature. Counsel were schooled in litigation; law school education intimately revolves around court decisions and judicial functioning. Litigation is in counsels' blood. Counsel may like litigation; they may despise it; they may favor certain aspects of it and detest others. Regardless, counsel intimately know litigation and are comfortable with it—warts and all. For some disputes, litigation makes perfect sense, particularly where, e.g., a public, precedential decision affecting third parties is needed. For others, it does not.

Counsel have far less comfort with arbitration than litigation. Why? Perhaps simple ignorance brought on by inexperience or lack of knowledge, which, in turn, breeds discomfort and engenders skepticism of arbitration and sharp timidity to use it. Counsel strongly favor litigation as, over their careers, they have acquired considerable expertise and competence in it, even to the point where its usage may be less than ideal or even misguided.

Many potential corporate users are so averse to arbitration that they have an antithetical, reflexive in-house policy that flatly prohibits its use. Even where a properly constructed proceeding could save substantial time and money, corporations would not even consider it. Yet, when in-house counsel are questioned as to why their corporation is so strongly against arbitration, they do not have a clue. The underlying reason has long since been forgotten, but yet the policy is ingrained and persists.

Arbitration is a creature of contract, not defined through federal or state rules or judicial fiat. The particular process to use in a given situation is only limited by the imagination and creativity of the parties and their counsel. Process costs money: the more process, the more money. Correlatively, the more process, the more safeguards the process provides, and the less attendant risk to the parties. In this author's experience, the additional risk incurred by parties as they reasonably constrain their process is often far more conceptual than real, and often outweighed by the ensuing time- and cost-savings. If the parties want economy and efficiency, they can have it. Alternatively, if they want more process and less risk—as large disputes may mandate those aspects—they can have that. All they have to do is mutually agree on just what they need and devise the accompanying process.

In some instances, with a "bet the company" dispute or with hundreds of millions or now billions of dollars at stake, a procedurally extensive, time intensive and expensive arbitral process, even including an appellate phase, may make considerable sense. In other situations, with far less at stake, a compact time- and cost-efficient limited process may be ideal.

Counsel's task is simple: get the best results from commercial arbitration by tailoring its process to the characteristics of the dispute. Do not employ more process than minimally needed: "fit the process to the fuss."

Parties that ultimately do just that might be pleasantly surprised. They will like commercial arbitration and realize that it's much better than they first thought. ■

Peter Michaelson, of Michaelson ADR Chambers, LLC with offices in New York City and Rumson, New Jersey, is an arbitrator and mediator primarily handling domestic and international IP (particularly patent), IT and technology-related disputes across a wide range of industries, e.g., infrastructure (including investment), telecom, biotech, pharmaceuticals and energy. He is a panelist for various well-known ADR institutions, a Fellow and Chartered Arbitrator of the Chartered Institute of Arbitrators and Chair of its New York Branch, and a Fellow of the College of Commercial Arbitrators. For further information, see www.plmadr.com.