



COMMIT

Alternative Dispute Resolution: When, Why and How

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Today's Agenda

- Arbitration
 - What is it, and how is it different from litigation?
 - Advantages and Disadvantages Of Arbitration
- Considering Arbitration
 - Effect of company size
 - Effect of access to information/evidence
- Planning for Arbitration
 - Scope and legal standards (what law, objective versus subjective standards in evaluating parties' conduct)
 - Administration, Choice of Law and Rules, Venue
 - Arbitration Provisions: How detailed should they be?
- Substantive Considerations





What is Arbitration?

- “A proceeding voluntarily chosen by parties who want a dispute determined by an impartial judge of their own mutual selection, whose decision, based on the merits of the case, they agree to accept as final and binding.”
 - Britton, The Arbitration Guide
- “Arbitration is a process by which parties voluntarily refer their disputes to an impartial third person (an arbitrator) selected by them for a decision based on the evidence and arguments to be presented before the arbitration tribunal.”
 - Domke on Commercial Arbitration





Federal Law Encourages Arbitration

- Federal Arbitration Act (“FAA”)
 - Congress enacted the FAA “to place arbitration agreements upon the same footing as other contracts” and noted that these agreements are similarly “valid, irrevocable, and enforceable”
 - *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); 9 U.S.C. § 2
 - “A written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract”
 - 9 U.S.C. § 2





State Laws Encourage Arbitration

- All 50 states have statutes that address arbitration
- The Uniform Arbitration Act was the model for 49 state arbitration statutes
- The National Conference of Commissioners on Uniform State Laws introduced the Revised Uniform Arbitration Act (“RUAA”) in 2000
- The Alternative Dispute Resolution Act of 1998
- New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
 - Near universal acceptance





Courts and Private Parties Agree

- The Supreme Court fully endorsed arbitration in 1854
 - *Burchell v. Marsh*, 58 U.S. 344 (1954)
- Courts favor arbitration and enforcing arbitration agreements according to their terms
- Arbitration is used more and more because of the complexity of commercial cases, the need for expediency in the business world, and the burden on the court system
 - Most users believe arbitration is better, cheaper and faster than litigation
 - 86% of corporate counsel are satisfied with international arbitration
 - 73% of corporations prefer international arbitration to trans-national litigation
 - 80% of attorneys and 83% of business people report that arbitration is a fair and just process





Characteristics of Effective Arbitration

- Expertise
 - The majority of parties find arbitrators more likely to understand the subject of the arbitration than judges
- Lack of Bias
- Compliance with Awards
 - The rate of voluntary compliance with arbitral awards is more than 90%
- Decisive Results
 - No “splitting the baby” – only 7% of cases awarded damages in the mid range of 41-60% of the amount claimed





Pluses/Minuses of Arbitration

- Privacy
 - Generally private
 - With privacy comes a lack of precedent
- Less formal evidentiary standards
 - Greater leeway to prove one's case
 - Arguably lacks protections against “prejudicial” evidence
- Finality and Appeal
 - Arbitration usually may only be set aside on very limited grounds
 - Puts all of the “eggs” in one basket
 - Reduces cost
 - Parties can contract for appellate rights
 - Spreads risk
 - Increases cost





Arbitration v. Litigation

- Party Control
 - Arbitration is a “creature of contract”
 - Litigation is a creature of law
 - Choice of Arbitrator(s)
 - Experienced arbitrator v. random judge or jury
 - Panel v. one person
- Cost
 - Higher direct costs than of a court proceeding
 - Legal fees and expenses are often lower than in in litigation
 - ***Effectiveness of Lead Arbitrator and Administrator key to fair cost control***
- Shorter time to Final Adjudication
 - Median time to trial in federal civil cases is 27.5 months
 - Complex arbitrations take approximately 15 months





Remedies Available in Arbitration

- The arbitrator's authority to grant relief is derived from the arbitration agreement and the applicable law
- The only general limitation is that the remedy given must be “rationally related to a plausible interpretation of the contract”
 - *Advanced Micro Devices, Inc. v. Intel Corp.*, 9 Cal 4th 362, 382 (1994)
- Arbitration awards will be modified or vacated when
 - The arbitrator exceeds his power pursuant to the arbitration agreement, violates a statute, or grants relief that is against public policy
- Provisional remedies may be available
 - Either before the arbitration panel
 - Or in ancillary court proceedings





Considering Arbitration?

- In the context of *this* deal, will arbitration be to your, or your counterparty's, advantage in terms of
 - Effect of speed and cost effects?
 - Effect of disclosure limitations?
 - Who will have most of the evidence?
 - If it is the other side – how hard will it be for you to prove your case?
 - Do you want trier of fact “expertise”?
 - How important is privacy?
 - Commercially – trade secrets, etc.
 - Generation of additional disputes by virtue of publicity
 - Do you want precedential outcome, or prefer not to have one?





Contract Provisions Mandating Arbitration

- Range from simple to complex
- Typical simple provision
 - *“Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.”*
- More “legislative” provisions outline specific elements of the proceeding that the parties choose to control, such as
 - See sample complex arbitration provision provided in Tab __





Negotiating Arbitration Provisions

- Scope and Purpose of the Arbitration
 - Limited Purpose?
 - *“With respect to any dispute relating to the interpretation, enforcement or breach of this Agreement (other than any such dispute relating to patents, product liability matters or Patent Rights), either Party may initiate a binding alternative dispute resolution proceeding, without recourse to courts of law, in accordance with the rules of the AAA. With respect to all disputes relating to patents, product liability matters or Patent Rights, either Party may commence any action, suit, or proceeding in accordance with Section [] hereof.”*
 - Briefing and discovery
 - Collaboration and licensing transactions: Which party has greater performance obligations?
 - Available remedies
 - High/Low or Bracketed Arbitration
 - Baseball Arbitration





Negotiating Arbitration Provisions

- Choice of:
 - Arbitration Organization
 - Number of Arbitrators / Arbitrator with Specific Expertise
 - *“If the issues in dispute involve scientific matters, any arbitrator chosen hereunder shall have educational training and/or experience sufficient to demonstrate a reasonable level of relevant scientific knowledge.”*
 - Venue
 - Law
 - Language
- Prescribe a time to decision or not?
- Simple award or “reasoned decision”?
- Right to, and scope of, any appeals
- Cost sharing and shifting





Prominent Arbitration Organizations/Rules

- American Arbitration Association (“AAA”) – New York, New York
- International Centre for Dispute Resolution (“ICDR”) – New York, New York
- The International Institute for Conflict Prevention & Resolution (“CPR”) – New York, New York
- JAMS – Irvine, CA
- London Court of International Arbitration (“LCIA”) – London, England
- World Intellectual Property Organization Arbitration and Mediation Center (“WIPO”) – Geneva, Switzerland
- International Chamber of Commerce (“ICC”) – Paris, France
- Permanent Court of Arbitration – The Hague in the Netherlands
- United Nations Commission on International Trade Law (“UNCITRAL”) – Rules only; no administrators



Thank You

