Oakland County Bar Association
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Let's Arbitrate

by Norman L. Lippitt

Increasingly lawyers and their clients are choosing arbitration as a faster, less expensive and, ideally, fairer alternative to trial. Indeed, many contracts contain mandatory arbitration clauses, which, if properly drafted, will be judicially enforced.[1]

Since leaving the bench in 1989, I have served both as an arbitrator and as an attorney in a variety of arbitration proceedings. They include real estate, contract, construction, will contests, legal malpractice, employment and matrimonial disputes[2] – even a medical malpractice case.

Why arbitration? Well, there are a number of possible reasons. Increasingly busy courts encourage alternative dispute resolution, especially in complicated commercial disputes. Other factors that may influence the decision to arbitrate include time constraints, costs and geography. In some cases, opposing attorneys may believe that the issues are simply too complex for the average jury or for a judge not experienced in the particular industry involved in the dispute. As least with a good arbitrator, win or lose, there is the satisfaction of knowing the case was understood.

I find myself increasingly in favor of arbitration for my own cases. I do not favor arbitration in every case but certainly in complex cases where I face a worthy opponent and we simply have a difference of opinion on the likely outcome.

For all you thespians out there, I do not mean to say that dramatic jury performances no longer have their place. They do. But make no mistake about it, trial courts today do not always have the time – and in some cases, the resources – to hear complicated commercial disputes. Therefore, if you and your opponent want to seriously litigate complex issues before an impartial judge who understands the law governing the dispute and who knows what you are looking for because he/she has been there and done that, by all means consider arbitration.

Assuming the contract in dispute does not have a mandatory arbitration clause, the first consideration always has to be the virtual loss of the client's right of appeal. In some cases, the preservation of that right may be so important that arbitration is out of the question. In other cases arbitration is a calculated risk.[3] Yet, if one feels strongly that the legal issues involved in the dispute are not issues of first impression or issues involving matters of jurisprudence that should be decided by a higher court, I say give it up. After all, what are the odds of reversal or remand anyway?[4]

Once arbitration is mandated and/or the parties agree, hopefully the attorneys have the choice of choosing the number of arbitrators and the forum. I favor arbitration pursuant to the Michigan Revised Judicature Act and applicable Michigan Court Rules.[5] I do not favor the use of an arbitration administrative agencies such as the American Arbitration Association ("AAA") or JAMS unless mandated by contract. Even if the contract mandates the use of these agencies, I would encourage lawyers and their clients to dispense with them. My reasons are simple: in most cases we do not require their facilities; they are expensive; and their panels, except in certain specialized cases (i.e., construction disputes), are composed of unknowns. However, on occasion I have found them helpful for disputes where I acquired a distinguished out-of-town arbitrator. In one case THIS was particularly helpful in that regard.

I also favor a single arbitrator rather than a panel of three. I believe it is problematic when the respective parties each select an arbitrator and those arbitrators in turn select the neutral. I find it equally problematic when the attorneys select the neutral. In either case, the parties' arbitrators, more often than not, tend to be influenced by the party that selected them. Yes, we all engage in the "I will be fair" platitude; however, the fact remains that even the best of us want to please. That creates an inherent conflict and in many cases an unnecessary layer of advocates.

Once the decision has been made to select a single arbitrator, the real work begins. The concept is fine, but agreeing on the arbitrator is, to say the least, a difficult task. In that regard, allow me the indulgence of telling you what is already going through your mind as you read this article and, more importantly, what is going through your mind as you offer up names to your opponent. *If Mr. A is my first choice, perhaps I should offer him last and instead suggest Mr. B and Mr. C first? Should I call Messrs. A, B and C to feel them out before offering up their names? Should I talk to all my colleagues and everyone else I know to ask what their experience with Messrs. A, B and C has been? Do I try to determine what my opponent's relationship with Messrs. A, B and C has been before I agree upon a selection? Do I allow the judge to simply appoint the arbitrator? No – that will not work because he may appoint someone neither of us likes.* Do I have it about right? Do you have a headache yet? Of course you do!

Here is my suggestion: you and your opponent agree on the ground rules first. However, be careful not to eliminate every qualified candidate – that is, unless you opt for a total stranger, which would not be my first choice. I suggest you sit down together and develop a list of six to 10 candidates who you agree have the knowledge and experience to serve as your arbitrator. Do not reject someone you would not choose for other reasons. Then, once you have the joint list, do all the due diligence you care to do, but under no circumstances would it be appropriate to call the prospects. At a second session, you and your opponent should disclose to one another the following:

- The extent of your personal relationship with the candidates, if any.
- What you know of his/her reputation including, by way of example, scholarship, knowledge of the rules of evidence, demeanor and willingness to make hard calls rather than Solomon-like divide-the-baby decisions.
- Cases in which you have opposed one another.
- Cases where you have co-counseled with one another.
- Matters or bar activities in which you have participated together.
- Cases where your firm has recommended him/her, because of conflict or otherwise.
- Any other contact either you or your client may have had with the prospect.

Once you have made honest disclosure to one another about past relationships, it should not be difficult to narrow down the list. Then, I suggest you send a similar but not identical questionnaire under a joint letter to all of the prospects still under consideration. When you receive the responses, review them and make your joint selection.

Unfortunately, once you have selected your arbitrator your work is not done. Probably even before selection, procedures should be agreed upon in writing.[6] The following are matters to consider:

- Mutually convenient dates for arbitration.
- Location.
- Fee-sharing arrangement.
- Court reporter? (real time?)
- Pre-arbitration briefs?
- Dispositive motions?
- Witness lists?
- Exhibits (should they be agreed upon in advance)?
- Sequestering of witnesses?
- Rebuttal witnesses?
- Strict rules of evidence?
- Deposition testimony?
- Proposed findings of fact and conclusions of law?
- Time limitation on arbitrator's opinion.
- Well-reasoned written opinion or simply who wins?

It is my view that if the matter is important – which it should be – then it is worth doing it right. With the rules you have agreed upon in place, your arbitrator is now in a position to call it like he/she sees it. If you have chosen carefully and you truly want a decisive and final decision putting an end to the dispute, you have created the appropriate atmosphere to avoid a proceeding where your arbitrator simply tries to please everyone.

Once you have decided to arbitrate, I also believe it is a mistake to ask or expect your arbitrator to facilitate settlement. If you want a facilitator, then by all means hire one. Indeed, some facilitators refuse to arbitrate because they believe it will create enemies, which, in turn, will affect their business. Either you want an impartial decision or you do not. Presumably your opponent is equally sophisticated. With a good arbitrator, do not assume you have an advantage other than your belief that your case has merit that outweighs your opponent's case. Do not compromise the arbitration process with ex-parte settlement discussions, particularly where your client participates. Such discussions may cause your arbitrator to form opinions. Limit your arbitrator to the record, and hope for a favorable result. Whatever happens, if you have chosen well, you will be rewarded with an honest, unbiased decision by an arbitrator who fully understands that you may never use him again.

Finally, if you cannot agree on an arbitrator and do not mind the extra expense, what about a private jury trial? The jurors will constitute your arbitration panel. You can select the jurors, as some of us have done in conducting mock trials. There are consultants available to assist you in the selection process. You can pay the jurors for their time as well as hire a retired judge to preside. You also can use standard jury instructions or make up your own. You can use the Michigan Court Rules, alter them, or make up your own rules to suit your taste. Consider it.

Footnotes

(1) Parties wishing to conform their agreements to MCL 600.5001(2) must put their agreements in writing and require that a circuit court may enforce them. Otherwise, their agreements will be treated as agreements for common-law arbitration. In addition, common-law arbitration agreements continue to be unilaterally revocable before an arbitration award is made. *World Architects & Engineers v Strat*, 474 Mich 223, 235; 713 NW2d 750 (2006).

(2) MCL 600.5070, et seq.

(3) The trial court's decision to enforce, vacate or modify an arbitration award is reviewed de novo on appeal. *Tokar v Albery*, 258 Mich App 350, 352; 671 NW2d 139 (2003). However, at the circuit court level the statutory arbitration award may only be vacated if the award was procured by corruption, fraud or other undue means; there was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator or misconduct prejudicing a party's rights; the arbitrator exceeded his or her powers; the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a parties' rights; there was an evident miscalculation of figures or an evident mistake in the description of a person, a thing, or property referred to in the award; the arbitrator has awarded on a matter not submitted to the arbitrator, and the award may be corrected without affecting the merits of the decision on the issues submitted; or the award is imperfect in the manner of form not affecting the merits of the controversy. MCR3.602(J)(1)(a)(b)(c)(d);(K)(1)(a)(b)(c).

(4) The Michigan Court of Appeals does not track cases affirmed compared to reversals and remands except in summary disposition matters.

(5) MCL 600.5001, et seq.; MCL 600.5070, et seq.; MCR 3.602

(6) The American Arbitration Association also publishes rules and procedures that include commercial mediation procedures, commercial arbitration rules, expedited procedures, procedures for large complex commercial disputes, optional rules for emergency measures of protection and administrative fees.