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ARBITRATION – IS IT GOOD OR BAD FOR YOU?
VOLUME II - DISADVANTAGES

Last month's newsletter discussed some of the advantages of arbitration. Although the advantages generally outweigh the disadvantages, arbitration in the consumer and commercial sense has received a number of criticisms. If Solomon were to act as your arbitrator you will in all likelihood obtain a well thought out and fair ruling. Yet even Solomon had his detractors. Some criticized him as being a bit of a showman. One individual was overheard as saying "I wonder what old Sollie would have done if the two women would have said "great idea but we want to do the cutting?" I am sure that the inscrutable logic of Solomon would have prevailed and he would have responded appropriately but since I do not possess his wisdom I will not venture on what his response might have been. In short, there is simply no perfect forum to settle a dispute.

You may ask why is this the case? The simple answer is to be human means less than perfection. When a dispute arises for the most part you have two or more relatively equally intelligent people viewing the same set of facts and laws with positions that are diametrically opposed. These two or more individuals will then explain to the best of their ability the dispute to their attorneys, often omitting facts that are not in their favor. The attorneys will then discuss and debate amongst themselves. On rare occasion the attorneys may even schedule an all hands meeting in an effort to negotiate a settlement. If the parties do not settle the dispute the parties will have three options: (1) forget about it and accept the other party's position; (2) file a lawsuit; or (3) employ some alternative dispute resolution process.

If the parties determine to take their dispute to a neutral third party for resolution – litigation or arbitration – fairness is no longer a strong desire of either party. Most people believe that they are fair and at this point they are convinced that the other side is not being fair to them. The parties are now on a mission to win! This is just one of the many reasons our dispute resolution process is known as "adversarial".

It doesn't matter whether the dispute will be resolved via litigation or arbitration, both parties will try their best to present only the facts and the law that favors their side of the dispute. The party that is the most successful at presenting the law and facts in their most favorable light generally wins. What the truth is, the Court and the arbitrator may never know and the result may or may not resemble true justice. All dispute resolution processes are by their very nature imperfect.

The purpose of this newsletter is to discuss some of the perceived imperfections or disadvantages of arbitration.

- **Flexibility I**: There is little doubt that flexibility is one of the primary advantages of the arbitration process. It is also one of the chief disadvantages of this process. Sometimes flexibility can lead to uncertainty and often lawyers and their clients get a little carried away in their attempt to design a process that is prompt and efficient. Sometimes the final process and procedure is less than clear. Why is this the case? Anybody who has spent a lot of time reading contracts will tell you that sometimes what appeared crystal clear at the time of creation does not appear so clear a year to two later. Most commitments to arbitrate are set forth in a contract. Sometimes as a separate agreement and other times as a provision – or several provisions – of a contract. When the agreement to arbitrate is less than totally expositive it leaves the parties in the position of filling in the gaps. If the desire to arbitrate is strong amongst the parties the attorneys can generally agree and fill in the gaps. If the desire of the parties is mixed or the parties are just cantankerous, the parties will spend time disputing the dispute resolution process. Not exactly the result that was intended when the parties determined to use arbitration. Many of the more experienced counselors are aware that gaps and lack of clarity that can occur. Even with this risk the perceived benefits of preparing and setting their own arbitration parameters make the risk acceptable. In order to alleviate and/or mitigate any gaps, ambiguities or confusion by this self defined process, many will submit to the rules and regulations of a pre-existing arbitration association. In such a situation they will specifically state that any ambiguities by

and between the provisions of the arbitration agreement and the rules of the organization hearing the matter (e.g., American Arbitration Association, JAMS, etc.) will be governed by the rules of the arbitration organization (i.e., an order of precedence provision).

- **Flexibility II**. The second and probably the most troublesome disadvantage of flexibility occurs when certain classes of disputes are to be resolved by use of arbitration and other classes via litigation. This can occur voluntarily by the party's election and other times involuntarily through mandates in the law. Certain classes of disputes or individuals fall into a semi-protected class and on occasion the law prohibits contractually mandated arbitration. The theory being that the right to a jury trial for these individuals is sacred and simply cannot be waived.

Another problem occurs when there is more than one dispute by and between the parties. Pursuant to a contract one type of dispute is to be resolved via arbitration and the other via litigation. Here is a simple example. The parties enter into a lease and the provisions of the lease provide that all disputes by and between the parties are to be resolved via arbitration. The lease provides one exception to the mandatory use of arbitration, which is the non-payment of rent. It is possible for the landlord and tenant to have a legitimate dispute under the lease and at the same time the tenant determines that it has the right not to pay the rent. The landlord disagrees and commences an action in Court known as unlawful detainer (i.e., a matter that is given a priority in the Courts but is still a quasi form of litigation). The tenant at the same time commences arbitration for resolution of the other disputes which in the mind of tenant justifies the non-payment of the rent. Both parties are technically correct, the tenant has not paid the rent and landlord has the right to pursue an unlawful detainer. The tenant has the right to pursue arbitration and could receive a ruling confirming his right to offset the rent. The landlord has the right to pursue unlawful detainer and could receive a ruling allowing the landlord to evict the tenant.

Both decisions are given full faith and credit via the lease and the law. Most lawyers avoid such adversity by specifically nominating litigation when multiple issues exist and one is potentially an issue in which litigation is the proper forum.

- **Time**: There is little doubt that one of the chief advantages of arbitration is a timely and efficient resolution. On occasion this short timeframe could be less than desirable. This short time frame is a disadvantage when one side deems it desirable to engage in some rather extensive but justifiable discovery prior to proceeding to a hearing and the other side objects. Given the short time frame, it is possible that the time for discovery may be insufficient and work to the disadvantage of one party. This is an issue in the more complex matters which involves many witnesses, facts and significant legal analysis. In order to accommodate this dilemma many attorneys are now providing for reasonable delays to the hearing, erring on the side of reasonable discovery as determined by the arbitrator.
- **Cost and initiation**: Since arbitration cost less and is more easily initiated than litigation it may engender more disputes by and between the parties. As a general rule, there are very few matters (other than small claims) where parties represent themselves (in pro per). Most laymen find the Court system too complex and intimidating to venture into it on their own. Although I have never seen any statistics on this I assume that one is more likely to see a party represent themselves in arbitration. It is a much more relaxed environment and many parties are not so intimidated by the surroundings. What is the problem in dealing with in pro per parties? If the hearing involves a complex set of facts and interpretation of less than clear legal principles the arbitration may be costly. Judges are free but arbitrators are not. Often in these circumstances, the arbitrators may choose to spend a great deal of time ensuring that fairness occurs and that the in pro per party understands the process and law. As an adversarial party you may end up paying for your opponent's education. Even assuming that all parties are represented by counsel a complex set of facts and interpretation of less than clear legal principles could involve a substantial amount of the arbitrator's time. In these situations the arbitrator(s) may have to deliberate/arbitrate for days. When this occurs their bill could be substantial.
- **Binding vs. Non-binding**: If the arbitration is non-binding, the parties will have to make a knowledgeable decision as to the strategy. Do they go all out in the hope of handing the opponent a defeat and forcing him to the settlement table? On the other hand, do they hold something back, don't put on their best case and if they are not satisfied with the outcome file for a trial de novo (i.e., a new trial in the Court system). If the arbitration is non - binding and the party's intent is to file for a trial de novo if not satisfied with the results, the arbitration does nothing but add costs to the process.
- **Finality**: If the issue is one of very complex legal principles of substantive and procedural law, especially those that are not well settled, binding arbitration could lead to an award that may be technically incorrect. Although the very same thing could occur in litigation, the losing party always has the right to appeal the decision to a higher Court. Most binding arbitrations are just that, binding and there is little right to appeal an incorrect decision.
- **Motions**: Although motions are for the most part viewed as very costly and are subject to abuse, they can serve a very legitimate purpose. Matters from time to time are raised that are meritless. Law and motion is the ideal vehicle to dispense with unmeritorious matters. Since for the most part arbitrations do not allow for motions the parties will have their day in the arbitration room notwithstanding that their matter is unmeritorious.
- **Arbitrator vs. Jury Award**: It is a well-perceived fact that juries provide some very unusual awards. It is a perception amongst most litigators that as a general rule, arbitrators do not award unduly large sums for damages. This could be perceived as a disadvantage if you are on the plaintiffs' side. This perception has been solidified by the preeminent author O.B. Again, "How to Make a Half Million Dollars". Per O.B. the quickest way to make a half million is simply buy some coffee and spill it on yourself and sue! As O.B. states: "If you can complain, allege pain, to a jury explain, I can make it rain!"
- **Bias**: The entire validity of any dispute resolution process is predicated on the fact that the judge/arbitrator is neutral. Judges are public servants and subject to severe sanctions if they violate their neutrality. As a result, upon the discovery or sometimes even the allegation of bias many a Judge will dismiss him/herself from the case. Judges as a

general rule seek to avoid even the mere appearance of bias. An arbitrator is not a public servant but a private individual. There is no doubt that the vast majority of arbitrators is very ethical and will dismiss themselves if there is the slightest hint of any bias. There are two troublesome perceptions: (a) that some arbitration associations favor the companies that utilize their services on a frequent basis; and (b) that consumers and plaintiffs are at a disadvantage in any arbitration because of (a). These perceptions, rightfully or wrongfully have come under increased scrutiny in the last few years. I personally have not seen this bias and have found arbitrators to be amazingly fair and ethical to all parties. I mention this perception here only because some very astute individuals insist that it exists.

- **Jury**: Although nothing prohibits the parties from paying for a private jury, the typical arbitration will not include a jury. When you are the plaintiff and your cause is righteous but the law and the facts are less than desirable juries sometimes do what they perceive as fair for the purpose of accomplishing justice and are not so consumed with the black letter of the law. Arbitrators are more likely to strictly stay within the black letter of the law and the facts as presented. Another perception is that Judges are more likely to stay within the black letter of the law than arbitrators. These perceptions could be a disadvantage to either party but more than likely the "deep pockets" will benefit from a lack of a jury.
- **Complex issue involving a third party**: Disputes are often not isolated events and sometimes parties other than those who agreed to the use arbitration are intimately involved. Sometimes these parties will agree to an arbitration and sometimes they will not. Unless all the parties agree to use arbitration either by consenting after the fact or as a signatory to an arbitration agreement that party cannot be compelled to join the arbitration. In litigation, parties that are essential to the matter can be compelled to join by motion of either party to the action. In other words, if the final resolution of the matter requires the inclusion of a third party that is not obligated to arbitrate and such party refuses to voluntarily join the arbitration, the arbitration may be ineffectual. Under these circumstances, it is unlikely that the arbitrators ruling will provide a final resolution to the dispute at hand.
- **False Sense**. Often arbitration is offered and sold as a less intimidating and hostile manner in which to resolve a dispute. The foregoing is true but arbitration is still a fight that can produce dire results to the loser. In the end, the arbitrator will determine if there is a winner, a loser or a draw. If you are on the losing end, the arbitration has the same force and effect (some say stronger since there is little right to appeal) as a Court ruling and will be enforced by the Courts!
- **Limited Remedies**. Some arbitration provisions have attempted to limit the remedies of a plaintiff. This sort of provision has come under increasing criticism especially by consumer groups as being patently unfair and against public policy. This sort of limitation is also being challenged by some of the associations that provide arbitration services and some have concluded that any arbitration provision that limit the consumer's remedies will not be enforced.

CONCLUSION

Arbitration or any ADR procedure is not a panacea for the resolution of disputes. Properly crafted arbitration provisions can reduce cost and lead to a more rapid settlement of disputes. Arbitration should not be entered into lightly. In certain circumstances, arbitration may not be conducive to you or your business objectives. The next newsletter will specifically address some of the advantages of mediation.