To ADR or Not to ADR: That Is the Question

by Loretta Gastwirth

To ADR or not to ADR? The answer is it depends. While that answer may drive clients crazy, there are circumstances corporate lawyers may want to consider to ensure that alternative dispute resolution (ADR) is right for their clients.

Most clients and their transactional lawyers abhor talking about the end of a business relationship while trying to make the deal that builds one. But sticking the proverbial "head in the sand" and inserting a boilerplate clause that might seem non-controversial in negotiating a deal may present more problems in the end. Transactional lawyers and clients are focused on the economic advantages of the deal. The economics of what happens if the deal doesn't work should also be considered.

Mediation

Whether arbitration is a good fit for clients is a more considered discussion; inserting a mediation clause in a contract, however, is a no-brainer. A mediated resolution could save clients tons of money in the long run, so why not insert that clause? Business people make business decisions and negotiate for a living. Courts do not make business decisions. They follow the law. The outcome of a litigation is win or lose, not, e.g., whether parties can negotiate a payout of monies owed, return defective products, or trade goods or services—items which can be negotiated in a mediated settlement.

An ADR clause that will require the parties to mediate before resorting to litigation or arbitration is becoming more prevalent in agreements. Some people say it's too early to mediate before swords are drawn, but that is not always the case. Business people know what the conflict is, their positions and when the conflict has reached the point of no resolution long before they even hire litigators.

Agreeing to mediate and drawing upon the considered skills of neutral and wise people that both sides respect for their intellect and knowledge of the facts and law makes eminent sense. Even if a mediation is unsuccessful, the parties will have had an opportunity to hear each other and learn from the mediator (not just their lawyers) what they are in for if they cannot resolve their differences. A good mediation will give the parties a reality check as to their positions and possible outcomes. Also, a good mediator can tell the parties to come with information—accountants, experts, financial information─so that a resolution can be reached.

Arbitration v. Litigation

What if the matter is not resolved in mediation, where to next─arbitration or litigation? Factors such as the kind of business the client is engaged in, how much will typically be involved in any controversy and the need for a speedy resolution should be considered. Are the clients the sellers or buyers of low-cost items with never much in dispute? Are the parties' agreements complicated long-term contractual relationships with potentially substantial sums in controversy? What is the

client's ability to sustain the costs of litigation or arbitration? What are its needs for an expedited end to the dispute?

Arbitration is an excellent way for business people to get their problems resolved within a few months or a year—not years, as is often the case in court. This matters most to clients on two fronts. First, time is money. Clients cannot afford to divert their attention away from their business to spend endless time with litigators.

Second, a knock-down, drag-out litigation is expensive. Good arbitrators know why parties select arbitration—it is not meant to be litigation bogged down with expensive litigation type of discovery. There will be document discovery in arbitration; however, there will likely not be interrogatories or depositions. So although arbitration may seem to have larger upfront costs beyond litigators' fees—*i.e.,* the extra cost of paying an arbitrator or arbitrators and arbitration filing fees—there is a long-term savings in that the controversy is over sooner and without the excessive costs of discovery, motions, and appearances. At this point, the conversation should segue into a discussion of the client's finances.

Costs of Arbitration

Can one streamline the costs of arbitration? Absolutely. Unless a multi-million dollar controversy is likely to ensue, and the client doesn't care about the costs of arbitration, counsel should always insert a clause that says the matter will be arbitrated by a single arbitrator. Without that clause, the default rules of different arbitral forums may require a three-member panel for a controversy exceeding certain amounts. A three-member panel will cost the client three times the amount of arbitration fees and may not make a single bit of difference in any outcome. Arbitrator "wings" on arbitration panels almost never disagree with one another as to a final award.

Arbitration and mediation fees and expenses can be controlled. Parties can avoid filing fees of thousands of dollars (often a percentage of the amount sought) and high per hourly rate arbitrator or mediator fees, and instead turn to low cost forums. The Nassau County Bar Association offers arbitration and mediation services through the NCBA Arbitration and Mediation Panels.

The filing fee is a fraction of its competitors—$500—and its Panels of arbitrators and mediators have agreed to a fixed hourly rate of $300 per hour with a six-hour refundable deposit if the time is not used. NCBA Panel members are well trained and often serve on a number of courts and other Panels, and they know what Long Island businesses need. The venue is local and easily accessible here on Long Island. Under CPLR 7504, if nothing is stated as to which body will administer the arbitration and the arbitrator selection process, and if the parties can't otherwise agree to an arbitrator, a party may apply to the court and the court will appoint one. Counsel can avoid those costs with a simple arbitration administration clause.

Regardless of whether the NCBA Arbitration and Mediation Panels are selected, arbitration clauses for Long Island businesses should state that the arbitration or mediation will be held here on Long Island. This not only makes life easier for local clients and lawyers to get to the venue, it also saves travel costs when hearings in arbitration last several days or more. Otherwise, the client may end up in Minnesota—or wherever else the other party to the contract is located.

What if a situation demands immediate relief—an injunction or an attachment order—to preserve the status quo? A contract containing an ADR provision should always provide for emergency relief. An additional sentence reserving the right to seek immediate injunctive or similar relief in court can be added. CPLR 7502(c) in fact provides for injunctive relief in aid of arbitration. The parties may also consider whether they wish to obtain immediate relief from an arbitrator. For example, AAA Rule R-38 permits a party to request the AAA to appoint an emergency arbitrator before arbitrators are selected who is empowered to emergency relief on an expedited basis.

Advice to Counsel

Two points of caution are needed here.

First, although an arbitrator can compel parties to produce documents, parties and arbitrators may, in certain circumstances, lack the ability to subpoena documents from or require non-party witnesses to appear.

Arbitration is a great forum for a client in a transaction in which the client will have the documents and witnesses needed to prove its case in-house. That is becoming more the case since emails have outpaced telephone conversations and face-to-face meetings. If the controversy that the client is likely to be in involves the other party to the transaction giving away the client's trade secrets to another party, and indeed, one located in another jurisdiction, and the client needs to engage in non-party discovery, arbitration may not be the best place for her. When subpoenas must be served outside the state in which the arbitration is taking place, parties must rely upon federal and state courts and their various laws and procedures to either issue or enforce out-of-state subpoenas, and this may entail additional expense and time. Moreover, there is uncertainty as to whether pre-hearing discovery is obtainable under Section 7 of the Federal Arbitration Act which authorizes arbitrators to issue trial subpoenas.[i]

A second cautionary point is that an arbitral award is "final and binding."

Arbitrators can be mistaken as to the law or facts[ii] and it has been said that parties have a "snowball's chance in hell" of vacating it[iii] based on statutory[iv] and other grounds, such as "manifest disregard of the law" under federal law[v] or "irrationality" under New York State law.[vi] The finality aspect of arbitral awards, however, is often a most attractive feature to businesses that want the matter over and decided quickly with overall less expense. Selecting arbitrators that both the client and lawyer respect for their intellect and experience is paramount.

Sample ADR Clause

> *In the event of any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof and/or the parties' relationship arising therefrom, the parties agree first to try in good faith to settle the dispute by mediation and any applicable statute of limitations shall be tolled until ten (10) days after the mediation has concluded. If the matter is not resolved through mediation within thirty (30) days of serving notice of intent to mediate, then the parties shall submit their dispute to binding arbitration before one arbitrator. The mediation and arbitration shall be held in Nassau County, Long Island, New York, in proceedings administered by and*

before, and in accordance with, the rules of, the Alternative Dispute Resolution Mediation and Arbitration Panels of the Bar Association of Nassau County, N.Y., Inc. and judgment on the arbitrator's award may be entered by and in any Court having jurisdiction thereof. In addition to the rights and remedies provided herein, the parties may seek injunctive and other provisional emergency relief from a Court in aid of arbitration or mediation and any such Court action shall be brought exclusively before a State Court located in Nassau County, New York or the United States District Court for the Eastern District of New York located in Long Island, New York and each party irrevocably consents to the exclusive jurisdiction, and waives any objection to the venue, of said Court. Each party consents to service of process in the commencement of any action, mediation or arbitration proceeding by overnight mail delivery service with an additional copy sent by first-class mail, postage pre-paid, to the parties' respective addresses as provided in this Agreement.

While this article contains only some of the factors to be considered in selecting how a party's dispute is to be resolved, and certainly there will be many others depending on the client's business, not considering them may leave the client in a forum that is not compatible with her goals or business.

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See, e.g., Life Receivables Trust v. Syndicate 102 at Lloyd's of London, 549 F.3d 210, 218 (2d Cir. 2008) (suggesting that arbitrators may have the power to compel a non-party to appear with documents before a single arbitrator); *In re Security Life Ins. Co. of Am.*, 228 F.3d 865, 870-71 (8th Cir. 2000) (finding that arbitrators have the power to subpoena documents for production prior to a hearing); *Amtel Corp. v. LM Ericsson Telefon, AB*, 371 F. Supp. 2d 402, 403 (S.D.N.Y. 2005) (stating that the Federal Arbitration Act does not authorize arbitrators to issues subpoenas for non-party discovery depositions).

ii

Silverman v. Benmor Coats, Inc., 61 N.Y.2d 299 (1984) ("[A]n arbitrator is not bound by principles of substantive law or by rules of evidence . . . and may do justice as he sees fit."); *Rockland County Board of Cooperative Education Services v. BOCES Staff Association*, 308 A.D.2d 452 (2d Dept. 2003) (holding that simply because a court might find differently than the arbitrator is not a ground for vacatur).

iii

David E. Robbins, *Securities Arbitration Procedure Manual*, § 13-22, p. 13-124, 626 (5th Ed. 2014).

iv

These include corruption or fraud in the award, arbitrators' evident partiality and arbitrators exceeding their powers. *See* C.P.L.R. 7501; Federal Arbitration Act, 9 U.S.C. § 10.

v

Schwartz v. Merrill Lynch & Co., Inc., 665 F.3d 444, 451-52 (2d Cir. 2011) ("This Court,

in the wake of *Hall Street Associates [and Stolt–Nielsen]*, 'concluded that manifest disregard remains a valid ground for vacating arbitration awards . . . .' "). The test is " 'whether the governing law alleged to have been ignored by the arbitrators was well defined, explicit, and clearly applicable,' and, second, whether the arbitrator knew about 'the existence of a clearly governing legal principle but decided to ignore it or pay no attention to it.' " *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 121 n.1 (2d Cir. 2011) (quoting *Westerbeke Corp. v. Daihatsu Motor Co., LTD.*, 304 F.3d 200, 208 (2d Cir. 2002).

vi

See, e.g., Hackett v. Milbank, Tweed, Hadley & McCloy, 86 N.Y.2d 146, 154-55 (1995) (discussing limited statutory grounds for vacatur under CPLR 7511 but stating that an award may be vacated if "the court concludes that it is totally irrational" (quoting *Maross Constr. v. Central N.Y. Regional Transp. Auth.*, 66 N.Y.2d 341, 346 (1985)).