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LEX MUNDI

THE WORLD'S LEADING ASSOCIATION OF INDEPENDENT LAW FIRMS



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Litigation Master Series Session IV

Arbitration vs. Litigation: “Weighing The Pros and Cons of Each Form of Dispute Resolution”

and

**“Global Litigation Concerns:
Location, Location, Location”**

Arbitration vs. Litigation: “Weighing The Pros and Cons of Each Form of Dispute Resolution”

Speakers

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What do arbitration and litigation have in common?

- Both are binding
- Both are distributive: the parties win or lose

Does arbitration offer advantages regarding selection of decision maker?

- Litigation involves blind draw
- Parties can select/have input into selection of arbitrator(s)
- Able to consider qualifications and experience
- Not limited by geographical boundary (county, district, etc.)

Is confidentiality of the procedure a consideration?

- Public has access to proceedings in courtrooms and to most documents filed
- Arbitration filings, proceedings, and award can remain confidential

Does arbitration offer advantages regarding scheduling?

- Much more input into dates
- Obtain date(s) certain for the hearing
- Obtain undivided attention of arbitrator(s) during pretrial proceedings and the hearing

Do you prefer more or less formality in the proceedings?

- Consider style of presentation of arguments and evidence to arbitrator as opposed to presentation to judge or jury
- Consider input into start times, recesses, ending times
- Consider ability to present testimony via telephone or affidavit as opposed to in person

Do differences in available discovery work to your advantage or disadvantage?

- Contrast Federal Rules of Civil Procedure and comparable state court rules to arbitration rules
- Contrast available sanctions in the case of non-cooperative party

Do differences in the availability of discovery from non-parties work to your advantage or disadvantage?

- Subpoenas to non-parties for documents and discovery depositions are available and enforceable in state and federal court
- Some courts have concluded that non-parties do not have to comply with an arbitrator's subpoena for discovery

Does the availability or unavailability of dispositive motions work to your advantage or disadvantage?

- The availability of dispositive motions in state and federal courts may eliminate some or all issues
- Some arbitration rules do not expressly provide for dispositive motions
- Some arbitrators are very reluctant to grant dispositive motions due to:
 - Very limited right of appeal
 - Obligation to provide “full hearing”

Do differences in the enforceability of subpoenas for attendance of witnesses and/or production of documents at trial or hearing work to your advantage or disadvantage?

- Permissible scope of and procedure for enforcing court issued subpoenas well established
- What “hoops” must you jump through to attempt to enforce an arbitrator’s subpoena to a non-party?

Do differences in the rules of evidence work to your advantage or disadvantage?

- Federal and state rules of evidence well established and provide foundation for many appeals
- Arbitration evidentiary rules generally much more lax
- Do arbitrators “let everything in” in attempt to make award appeal proof?

Do the differences in the right to appeal work to your advantage or disadvantage?

- No “appeal as of right” from arbitration award; must commence a court action
- Grounds for appeal from arbitration award extremely limited

If you decide upon arbitration, are there differences between arbitrations administered by third parties and private arbitrations?

- Third party administrators provide arbitrators, rules, and venues for hearing
- Private arbitrations afford you total control over the process, applicable rules, etc.
- Third party administration involves additional costs

If you decide upon arbitration, are you better served with one arbitrator or three arbitrators?

- Consider the cost of three arbitrators
- In the case of three arbitrators, are you better served with:
 - Three neutrals
 - An “interest” arbitration in which two arbitrators advocate for a party and only one arbitrator is truly neutral

Apart from these other considerations, is arbitration ultimately less expensive and speedier than litigation?

- Do savings from some aspects of the arbitration (date certain, informality, undivided attention of arbitrator, etc.) exceed cost of administration and arbitrator's fee?
- Will you obtain a decision sooner and, if so, is this a reason to opt for arbitration?

Mediation /Facilitation vs. Arbitration/Litigation

**“Weighing The Pros and Cons of Each Form of
Dispute Resolution”**

What are some fundamental differences?

- Mediation/facilitation is voluntary
- A party can end the mediation/facilitation at any time
- Mediation/facilitation is non-binding unless/ until an agreement is reached

Mediation/facilitation is integrative not distributive

- The outcome of a mediation/facilitation can be integrative (win-win for both parties)
- Arbitration and litigation are designed to be distributive (one party usually wins and the other loses)

Mediation/facilitation is possible at all stages

- Mediation/facilitation can be undertaken before or after claims/lawsuits are filed
- Mediation/facilitation is even available after a decision is reached
- Arbitration and litigation require one of the parties to “fire the first shot”

Mediation/facilitation is completely confidential

- Most mediation/facilitation rules and agreements include safeguards for preserving confidentiality
- Settlement agreements resulting from mediation/facilitation can include confidentiality terms with sanctions for violations

Mediation/consolidation is conducted by an experienced third party

- The mediator/facilitator may be experienced in the subject matter and/or in assisting negotiations
- The mediator/facilitator may be able to suggest terms for resolution that did not occur to the parties
- With permission from the parties, the mediation/facilitator may recommend the terms for settlement

The parties can control all of the particulars of the mediation/facilitation

- Selection of the mediator/facilitator
- Timing
- Formality or informality
- Number of sessions

Mediation/facilitation afford the possibility of creative solutions

- Arbitration and litigation are generally limited to affording monetary relief
- The remedies available in mediation/facilitation are virtually boundless. Examples include:
 - Reforming and restructuring an existing contract
 - Agreements regarding doing business together in the future, including the volume of future business
 - Non-compete terms
 - Resolving some but not all issues and agreeing to arbitrate or litigate only unresolved issues

Parties have successfully used hybrid procedures, including:

- Evaluative mediations, whereby the mediator/ facilitator is required to advise the parties of her recommendation for an equitable resolution if settlement is not reached
- “Arb-med” procedures whereby the parties agree to mediate following an arbitration award
- “Med-arb” procedures whereby the parties agree to convert a failed mediation to an arbitration
 - For economy, the parties may agree that the mediator/facilitator switches roles and becomes the arbitrator

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Litigation Master Series Session IV

**“Global Litigation Concerns:
Location, Location, Location”**



Factors in Determining Where to Sue or Coping with A Foreign World Where you have been sued

Speakers

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What Factors Influence Choice of Court?

- **Local Customs and Procedural Laws**
 - European “Inquisitorial” Style of proceedings vs. North American “Adversarial Style”
 - Availability of Procedures such as Discovery
 - The Taking of Evidence – Judicial Cooperation
 - Witness testimony
 - Affidavits
 - Obtaining foreign evidence (“letters rogatory”)
 - Judge vs. Jurat systems

What Factors Influence Choice of Court?

- **Reliability of the Chosen Court**
 - Home field advantage?
 - Corruption?
 - Neutrality?
 - Speed of process

What Factors Influence Choice of Court?

- **Availability and Compellability of Necessary Parties**
 - Are proper/necessary parties compellable in the chosen forum?
 - Parent/subsidiary considerations
 - Parties to relevant Agreements? Corporate Veil issues?
 - Potential third parties
- **Where are the potential assets against which enforcement may be sought?**

What Factors Influence Choice of Court?

- **Costs and Fee Shifting**
 - Determine the rules for costs in the chosen jurisdiction

What Factors Influence Choice of Court?

- **Other Practical Considerations**
 - Governing law provisions
 - Language issues, availability of translation
 - Applicability of precedents (domestic, foreign)
 - Enforcement of a contract: chosen court's likely approach to fundamental legal and validity issues

Enforcing a Judgment

- **Determine enforceability**
 - Domestic vs. Foreign enforcement issues
 - Where are the assets
 - Where are the parties

Key Development: Hague Convention on Choice of Court Agreements

- **Enforcing choice of court agreements**
- **Enforcing judgments**

**We will now answer any questions
you may have**

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