

## "So, Why Don't You Agree To Arbitrate..."

When a dispute arises, an offer such as the above may be tempting, and arbitration does enjoy wide popularity as an alternative to courtroom litigation. Generally, arbitration is viewed as a more expedient and cost-effective approach than litigation. However, there are advantages and disadvantages to an arbitration proceeding and this article discusses, in general terms, these important issues in the context of commercial disputes.

### Arbitration vs. Mediation

First, it is important to note that arbitration is often confused with mediation. They are fundamentally different processes. The most important distinction is that arbitration is a final and binding process, whereas mediation is only a step by which the parties attempt to resolve their dispute by reaching a settlement. If mediation is not successful, the parties are free to proceed to arbitration or litigation. A mediator cannot compel a decision; an arbitrator will make one. A major disadvantage of mediation is that a party may agree to mediate with no real intention of negotiating in good faith. Instead, the party may view mediation as a "free discovery" opportunity to assess the strengths and weaknesses of an opponent's position as a prelude to arbitration or litigation.

### Establishing the Rules

Whether the parties will arbitrate a dispute is usually determined by an agreement entered into before or after the dispute arises. The parties have wide latitude in deciding the parameters of the process. They may agree, for example, to modify the standard rules of the American Arbitration Association and agree upon the applicable rules, location, and format for the proceedings. In that respect, there are three common formats for arbitration proceeding. Generally, and particularly smaller monetary amounts are involved, applicable arbitration rules will provide for one arbitrator to hear and decide the matter. If a case involves larger, more complex issues and monetary amounts, applicable rules generally provide for a panel of three arbitrators. A popular alternative is for each party to designate an arbitrator and for the two arbitrators so designated to select the third arbitrator, who will act as chair of the proceeding. Many question the efficacy of this approach, as the two party-appointed arbitrators typically cancel each other out and the decision is left to the third, neutral, arbitrator. In other words, the parties may as well have agreed to have the matter heard by a single arbitrator.

### Arbitration Pros and Cons

In addition to considerable latitude in determining the process by which a matter will be arbitrated, another perceived benefit of arbitration is its finality. There is no automatic right of appeal, unlike litigation. An arbitration award will only be set aside under extreme circumstances, such as fraud, misconduct, or where an arbitrator who acts beyond the scope of his authority. Further, under all applicable rules or by express agreement of the parties, they will have significant input into choosing who will serve as arbitrator or a member of the arbitration panel. This allows the parties to designate individuals with particular experience in the subject

matter of the arbitration. If one is concerned about the ability of an opponent to appeal to the emotions or prejudices of a jury, this aspect of arbitration may be particularly appealing.

Discovery is generally quite limited in arbitration proceedings when compared to that available in litigation. Many arbitration rules sharply limit the rights of the parties to discover documents or conduct depositions. While this generally expedites proceedings, it may impede the presentation of the case if critical discovery is not allowed. To guard against this possibility, parties often provide that discovery and arbitration will be conducted in accordance with court rules for the jurisdiction. Although that may allow for more thorough prehearing discovery, it also generally has the effect of making the proceeding as expensive and time-consuming as litigation. Before agreeing to arbitrate a dispute, the parties and their counsel must give careful consideration to the rules that will apply.

### Arbitration in the Medical Liability Setting

In addition to serving as a vehicle to resolve commercial disputes, arbitration may be applied to resolve medical liability cases. Currently, Ohio Revised Code § 2711.21-24 provides for the binding arbitration of medical malpractice claims. This process has not been widely accepted by the public or physicians. The requirements for an arbitration agreement are rather cumbersome and, frankly, of limited utility. For example, a healthcare provider is prohibited from presenting an arbitration agreement to patient for approval if the patient's condition prevents him from making a rational decision whether to agree to arbitrate. Many patients presenting at a hospital have, or could claim, to be so injured or under the effect of medication that they are incapable of making a rationale decision.

An attempt to make arbitration a more effective tool as a way of resolving malpractice disputes is reflected in Senate Bill 88, which would establish a mandatory non-binding arbitration pilot program. This legislation is of interest for several respects. While, for the reasons set forth above, the concept of "non-binding arbitration" may seem like a misnomer, the legislation actually builds monetary incentives into the program by providing for penalties if the party rejects an arbitration award, proceeds to trial, and does not achieve a better result than was specified by the arbitration panel. To guard against the vagaries that often accompany a jury determination, the members of the arbitration panel would be experienced in healthcare matters. If a party rejects the arbitrator's evaluation of a claim, and proceeds to trial, statements made by the party or parties representatives, as well as witnesses' testimony, are inadmissible in subsequent court proceedings. Due to space limitations, it is not possible in this article address all of the features of the pending legislation. It should be noted that the bill is designed to encourage the resolution of medical liability claims prior to trial. In view of the potential impact of the passions or prejudices of a jury in a malpractice case, SB 88 presents a fair alternative to the jury trial as a tool to resolve medical liability claims.

### Conclusion

With respect to general commercial disputes, arbitration may well present an attractive alternative to litigation. However, before agreeing to arbitrate any matter, it is imperative to consider the following questions: What rules should apply? How should arbitrators be chosen?

Are there any discovery needs that should be addressed by agreement? Are you willing to forfeit the right to a jury trial and appeal? While it appears that SB 88 might be attractive in the medical liability setting, the answer in traditional commercial litigation is not as clear and the matter must be given careful consideration.

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