

Selecting The Right Organization And Arbitrator*

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Few decisions in the arbitration process are more important than which organization will administer the arbitration and who will serve as arbitrator.

Organizations providing arbitration services vary significantly, including in the quality of available arbitrators, the arbitrator selection processes, available administrative services, procedural and substantive rules, access to arbitrators, and fees.

Not Selecting an Organization

When parties don't select an organization, they are left on an *ad hoc* basis to arrange for everything, from arbitrator selection to hearing location, scheduling, and rules of procedure -- without the help of any organization.

While an *ad hoc* arbitration could save on administrative expenses, gaining non *ex-parte* access to the arbitrator and resolving procedural disputes without the help of an administrative intermediary could be tricky.

If the parties in an *ad hoc* arbitration are unable to agree on how to proceed, a court may assist in applying the arbitration statutes to such issues as the appointment of an arbitrator. However, court intervention comes at a price. It involves increased time and expenses, formality, and the loss of party control -- all the things arbitration is meant to avoid.

When to Select the Organization

The earliest point at which parties typically address the issue of forum selection is in the pre-dispute agreement (also known as the "arbitration clause"), before a dispute arises.

At that stage, it is best advised to name the organization only, rather than also trying to specifying the arbitrator, as the

dispute might not be adequately predicted in advance and the arbitrators' availability may change over time.

If the parties didn't select the organization before the dispute, they can do so after a dispute arises, in the submission agreement (the agreement to submit an existing dispute to arbitration).

One advantage in deciding at this stage is that the parties can specify the organization in light of the issues to be submitted to it. Of course, if the parties are embroiled in litigation, agreeing on arbitration and the choice of the organization might not be an easy task.

Factors to Consider in Selecting the Organization

Administrative Services: Virtually all organizations provide such basic essential services as arbitrator selection, scheduling the hearing, arranging for a hearing room, and resolving minor procedural issues. If the parties need services beyond those, such as pre-hearing conferences or motions, they should consider the types of administrative services offered in deciding whether the organization is the right fit for their dispute.

Arbitrator Selection: Each organization has its own panel of arbitrators. While parties occasionally select a forum to engage a particular arbitrator (if the organization permits this practice), the more likely scenario is to decide on an arbitrator from the organization's panel through its selection process rules. The size and qualifications of the arbitration panels vary with each organization.

Some panels, such as the NASD's, are so large that parties are unlikely to see the same arbitrators from case to case. The securities industry panels generally reflect specialized expertise imposed by the Code of Arbitration Procedure, subject to review by the Securities and Exchange Commission.

In customer disputes, the sole arbitrator must be a "public" arbitrator (not affiliated with the securities industry) as is the majority of a three-arbitrator panel.

Others, such as the American Arbitration Association, require their panelists to participate in ongoing training in arbitration process and updates in the law. Yet others maintain exclusive panels in which the majority of arbitrators historically have been retired judges.

Smaller local organizations, such as the Middlesex Multi-Door Courthouse, maintain diverse arbitration panels primarily comprised of attorneys and retired judges, as well as professors and other professionals who are experienced in specific practice areas and dispute resolution.

Research Your Potential Arbitrators

In selecting the arbitrator, learn as much as you can about the organization's panel of arbitrators. Some, such as the NASD, allow parties to research the arbitrators' past awards. In so doing, one can discover not only the arbitrators' history of awards, but the names of the counsel of record in those cases (who can be contacted for references).

Review the arbitrators' resumes for substantive expertise or relevant experience. If they have published, read what they have written, as well as major cases they may have litigated.

Learn about their professional or industry associations. Contact others who might know something about them. Compile information within your firm to build files on them. The more information you have about potential arbitrators, the better.

Match the Right Arbitrator to your Case

Your arbitrator is both your judge and jury. Determine what kind of neutral you want to assess the facts and apply the law to your case. Is your case weak on the law with compelling facts? Are the facts and law complicated, requiring a higher level of industry or legal expertise? Take what you have learned about the potential arbitrators to best match their expertise and skills to the needs of your case.

Pre-hearing Conferences

The Pre-hearing conferences typically are held by telephone conference call and address issues relating to the exchange of information and documents, identification of witnesses, stipulation of facts, briefing of issues, and setting the hearing date.

The availability of pre-hearing conferences depends on the organization or arbitrator. Some organizations provide pre-hearing conference(s) in every case. Others don't in any case. Yet others will, but only in complicated or high-dollar cases.

It is best advised to inquire about pre-hearing conferences in advance if scheduling one might be necessary.

The Organization's Rules

Parties can select the organization for its rules, or agree to alter or supplement the rules as needed. Theoretically, the parties also may apply the rules of one organization in a case administered by another organization, although most organizations do not encourage this practice.

Discovery

The organization's discovery rules or those agreed upon by the parties may be vague and flexible, or so specific that they resemble civil litigation discovery provisions. The more specific the rules, the less arbitrator discretion is involved in resolving discovery disputes (which can help or hinder, depending on the skills of the arbitrator).

More specific rules also cut down on litigation surprises, which generally can be considered a good thing. On the other hand, the more complex the discovery process, the more it may cost in time and attorneys' fees.

Fees

Fee structures vary between organizations and may change over time. Typically, one can expect some form of a filing or administrative fee, hearing date fees for the arbitrator and postponement fees chargeable to a party "causing" a postponement of a scheduled hearing.

In cases that span over a long period of time, the arbitrator compensation may exceed the administrative fees. The size of the case can also influence the fees. Review the fee structure in the organization's rules before selecting the forum.

The Location of the Organization

While a local organization can provide better access to administrative services and the ability to better research a local arbitration panel, it will not necessarily determine the site of the hearing. Rather, the organization's rules typically provide the mechanism for deciding the site. If you are dealing with a smaller organization, it is best advised to consult the case

administrator on the issue of the location, keeping in mind that most arbitrators are willing to travel.

Privacy

Although contractual arbitration is generally considered to be a private process, organizations differ on their ability to protect privacy.

Under the NASD rules, for example, the awards involving public customers and their contents may be made publicly available. However, arbitrators are still expected to keep confidential any information about the proceeding not otherwise made public.

Representation

Organizations vary on the issue of representation and it is best advised to consult the rules of the organization as well as the case administrator if qualified or out of state representation is an issue.

Portions of this article are adapted from Roth, et. al., Arbitration Practice and Update 2002 (MCLE 2002), and Roth, et. al., The Alternative Dispute Resolution Practice Guide, (West Group 1993-2002).