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Private Arbitration for Business Disputes in the Time of COVID

What are the benefits of private arbitration, and have they only been enhanced in the time of COVID? The benefits have only grown. Here is what I have observed that is new.

By **Judith P. Meyer** | September 04, 2020 at 01:09 PM

Judith Meyer of J.P. Meyer Mediation & Arbitration. Courtesy photo

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The New Benefits That COVID Has Brought to Arbitration

Courts are overwhelmed. Courts are funded by taxpayer dollars and are, in the time a pandemic, not a priority for additional funding. Since COVID, many

courts have shut down except for maintaining essential functions of handling criminal matters, domestic violence, custody rulings and those explosive public matters that require immediate attention. The courts, for compelling reasons, back-burner commercial disputes. Commercial disputes are of the parties own making, and, almost by definition, they concern only money. Dispositive motions might linger or be denied because courts do not have the time to hear them. Discovery may be ordered because it is simpler to deny a motion refusing discovery than to allocate precious time to listen to the concerns of the party who is refusing to produce documents or witnesses.

An underlying, and not incorrect, assumption is that the parties can, and should, work out their own issues, and if ignored by the court they will have heightened incentive to do just that. Where the parties cannot work out their own differences—and sometimes the issues are too highly charged or outsized for the parties to negotiate—endless streams of motions might be filed, most of them denied or unheard by the court because to take the time to do so would leave no time for those pressing matters of public urgency. In state courts, unlike federal courts where a single judge handles an entire case with the help of a federal magistrate, the various motions in a single state court case can go before many judges, with yet another judge assigned for trial. There is no single judge developing her own history in a case with an intimate understanding of the dispute and a coherent direction in which to guide the parties.

The takeaway: Private arbitrators focus on your dispute, your discovery needs, and your dispositive motions in the moment. The parties have one or more dedicated arbiter to get them from A to Z in a fraction of the time that a jurist might need. Commercial disputes should be adjudicated or settled, not

left to linger or mushroom out of control. Arbitration offers the opportunity for counsel to take control.

Zoom and the Virtual Platform: Take Advantage of Technology

Courts typically do not have the funds to be innovators in technology. Tax dollars do not stretch that far. Courts that closed in March 2020 are slowing coming back into in-person session, limiting their dockets and wearing masks. Not every lawyer or litigant is comfortable with that scenario or willing to take that risk.

In mid-March, with COVID looming large, I had to make the decision to learn a virtual platform or wait for the “all clear” whistle on COVID. Not knowing if that wait would be a month or two years, and guessing it was somewhere in between, I signed up for Zoom classes and joined four practice groups to navigate the intricacies of a new technical skill. I viewed a virtual platform for mediations and arbitrations as an inadequate and very imperfect lifeline for preserving some portion of my practice. Many mediations, and one exceedingly long arbitration later, I am a convert. Virtual works. It works well, and as with computers and smartphones, the technology will only get better and better. I envision the not too far off time when I sit in my office with several 40-inch screens—one for the “speaker view” closeup of the witness or party; one for the “gallery view” of everyone at the hearing; and, one for documents that the parties wish to present. There will be no visual obstructions blocking my view of the witness, participating counsel and the documents on which a witness is examined will be on-screen.

In what ways does the virtual world work better than in person?

- In one highly charged sexual harassment case, a clinically depressed claimant (who claimed her depression was caused by the harassment)

could stay in the safety and comfort of her own bedroom and not face employer representatives, whom she was too upset to confront, even though the alleged harasser was not there.

- During a long day, virtual reality allows you all the comfort food and environmental support you need, in the privacy of your home or office. During breaks, you can do yoga or meditate. In one hearing, counsel began the day at his desk in the morning, moved to his couch in the afternoon and was comfortably laying on the top of his bed's comforter in the evening.

- In "speaker view" you get an intense close-up of a witness or participant, far closer than you would have in any physical reality, literally 18 inches away. Every blink, grimace, nod, reddened neck, or tensed muscle is as front-and-center as a movie close-up.

- On a virtual platform, there are no stressors of missed or delayed flights, expensive hotel rooms, interminable travel time, jet lag and all the things that come with moving vast distances in real space.

- Stress levels are lowered because you control your own environment. And dress is casual below the waist. You can arbitrate barefoot.

- Virtual reality affords an increased sense of independence and control. When you take a break—for coffee or exercise, or until the next hearing day—there are no elevators to wait for, no cars to retrieve from expensive garages and no traffic-obstructed commute back to your office. One click, and you are wherever you wish to be.

The takeaway: I never thought that I would view virtual reality as anything other than a temporary lifeline. I now view it as a more-than-viable alternative to holding in-person hearings. COVID will go away with herd immunity or a vaccine. The virtual world is here to stay. And it will only get better and more user-friendly.

Not to Be Overlooked: The Traditional Benefits of Arbitration

When making the recommendation to consider arbitration, be mindful of the traditional benefits of arbitration. Generally understood benefits of arbitration

include the parties' ability to shape the process in advance of and during the dispute by, for example, by identifying the qualifications of the arbitrator, selecting means of reducing costs, streamlining discovery, customizing the process, and obtaining a final decision without lengthy and convoluted formal court pretrial, trial and appeal steps. Crowded court calendars—and especially in the time of COVID—should lead parties to select arbitration. In arbitration, the parties discuss what motions are appropriate and seek the arbitrator's permission to file them. A motion filed will be a motion heard in real time without delay. There will be no free-for-all of many discovery motions filed by all sides. It just will not happen in arbitration.

Parties may approach arbitration with different needs and preferences, including the balancing of efficiency and cost-effectiveness with more extensive due process, and parties may have conflicting priorities and expectations. Experienced arbitrators routinely help address these issues by working with the parties to "flesh out" procedures for that particular case. There is always the possibility that even a well-designed process can be frustrated by an uncooperative party, but this is equally true of court litigation or mediation. And in arbitration that lack of cooperation will not go unaddressed, while in court you wait in line for a jurist available to address it.

Every lawyer will tell you they have won trials they should have lost and lost trials they should have won. Are juries better at fact-finding than arbitrators? Are judges inexperienced in the subject matter of a dispute better able to grasp oil-and-gas, technology, patent, construction, or re-insurance disputes than an arbitrator deeply versed in these fields? Unless you are seeking punitive damages or there is some out-of-the-park egregious behavior, commercial cases are mind-numbing for juries. And many issues in

commercial cases—such as contract interpretation—are not for juries to decide.

There is also a critical reason parties choose arbitration—the privacy of the process and the lack of precedent. Not every litigant wants to make law. Not every dispute needs to set the precedent for the outcome of the next dispute. Some companies do not want their books opened to the public and want at least some of their disputes settled privately. One of the benefits parties seek is the fact that arbitrations create no public records, and awards create no precedent.

As to the lack of appeal, many appeals are based on rulings on evidentiary objections. Because the rules of evidence are only lightly applied in arbitration, no such appeals are necessary.

For those who want the ability to have awards scrutinized, some provider organizations offer appellate arbitration panels—and in some jurisdictions it is possible for parties to contract for a higher level of judicial review.

It is true that the litigation discovery process gives parties the opportunity to unearth “unknown unknowns.” Of course, it is the endlessness of these unknown unknowns that make litigation unbearably time-consuming and over-the-top expensive. And if parties want endless discovery, guess what? Remembering that the fundamental cornerstone of arbitration is party choice, parties that want to discover until the cows come home can express exactly that in their arbitral agreement, and frequently do. It is the arbitrator’s duty to enforce the parties’ agreement pursuant to its terms, and only unknowing lawyers would fail to express in an arbitration clause that which the parties find appropriate in their case.

I have always had a lingering hesitation about arbitration: because it is not supported by taxpayer dollars arbitrators charge a fee. It is well worth paying for privacy, efficiency and speed. However, to the extent that that private arbitrators charge fees, those fees can be shifted by agreement of the parties to the losing side. Contractual fee-shifting of fees and costs is an incentive for parties to look even more closely at the merits of their dispute and is a fine motivator for negotiations that result in settlement. And, in commercial cases, any settlement mutually embraced by the parties is likely better than any result handed down by arbitrator or judge.

So, new urgencies created by COVID, new virtual platforms that are increasingly user-friendly and *real*, and all the traditional reasons—an experienced arbiter, party control, efficiency, speed —make private arbitration a fine choice for businesses that have disputes.

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