

Creating Parameters for Arbitration

by Laura A. Athens

Arbitration offers a private, confidential process that often is more expeditious and less expensive than a court proceeding. Arbitration is a useful alternative when mediation is unlikely to result in resolution because no “middle ground” exists and the parties, for philosophical or ideological reasons, desire diametrically opposed outcomes.

The beauty of arbitration is that it is a “creature of contract.” Arbitration with parameters involves specific and detailed parameters designed by the parties and their legal counsel. It is an innovative concept that enables the parties to customize the arbitration to meet their unique needs and fit their particular case. Arbitration can be as short or long, as simple or complex, and as formal or informal as the parties wish. If the parties have no pre-existing arbitration clause or agreement, they are free to create an arbitration agreement outlining the parameters of arbitration when the controversy arises. If an arbitration agreement already exists, they may agree to alter it.

The parties generally have wide latitude in selecting arbitration parameters. Parameters may include agreement concerning the type and amount of discovery, the number of witnesses, the amount of documentary evidence, the length of the arbitration hearing, the form of decision and remedies, and the time line for completion of the arbitration proceedings.

Selection of the Arbitrator or Panel

In arbitration, the parties have a great deal of control over the selection of the arbitrator, whereas they have virtually no control over who will decide their case in court. If a matter involves complex legal or technical issues, the parties may choose an arbitrator who has subject matter expertise and is well-versed in the substantive law. Selecting a knowledgeable arbitrator who is familiar with the issues involved means that the parties will spend less time educating an arbitrator about the particular field of law.

Arbitrations can be decided by a single arbitrator or panel of arbitrators. Panels are usually composed of three arbitrators. Each party chooses an arbitrator, then the two arbitra-

tors may choose or the parties may mutually agree on a third arbitrator. Another option would be a three-member appellate panel review of the decision of a single arbitrator.

Discovery

The scope and duration of discovery is subject to agreement by the parties or may be submitted to the arbitrator’s discretion. It is advantageous for the parties to place limits on the time frame and the type and amount of discovery to make arbitration more efficient. The parties may agree to forego depositions or limit the number and length of depositions. Likewise, they may agree to exchange documents voluntarily, rather than filing requests for production of documents and interrogatories.

Scheduling of the Arbitration

An advantage of arbitration over judicial proceedings is that arbitration is very flexible. The arbitration can be scheduled to meet the needs of the parties and their legal counsel. Sessions can be convened for a full day, a half day, in the evening or on weekends. Even if the arbitration is scheduled to coincide with a typical business day, the parties may agree to stay late to finish a witness’s testimony or interrupt the testimony of one witness to accommodate another. To streamline the process, the parties may agree to limit the number of witnesses, submit a limited number or joint exhibits, or submit solely documents and affidavits with no witness testimony.

Hearing Procedures

The rules of evidence applicable in court are generally not applicable in arbitration proceedings. Therefore, arbitrators have broad discretion in handling evidentiary issues and determining whether evidence is relevant or material. Most arbitrators consider the rules of evidence, but tend to liberally admit evidence subject to a later determination as to the weight the evidence should be accorded.

Another factor to consider is whether the arbitrator will have the power to subpoena witnesses and compel them to bring documents and other tangible evidence. If the arbitra-

tor requests testimony by an independent impartial expert witness, the parties may choose to approve the request and share the costs incurred. The parties may elect to allow their expert witnesses to testify in the presence of each other, with time to comment on the testimony presented by the opponent's expert.

Depending on the nature of the controversy and issues involved, arbitration may include unique parameters, such as the arbitrator's observation or inspection of the setting in which the dispute arose or observation of the parties themselves, if appropriate. For example, in the field of education law, a dispute may arise as to whether a student should be placed in a general or special education classroom. In such a case, the arbitrator may benefit from observing the student in both the general and special education environments. In an insurance case involving a suspicion of arson, it may be useful for the arbitrator to have an opportunity for a firsthand inspection of the premises. Such an observation or inspection could be guided by an expert or could be videotaped with later commentary by an expert witness.

Forms of Relief

The parties may determine the forms of relief that the arbitrator is authorized to award. For example, the arbitrator may decide liability only or decide damages as well. The parties may agree to allow or disallow compensatory damages, declarative and injunctive relief, attorney fees and costs, punitive and exemplary damages.

Decision

The date for issuance of the arbitrator's decision should be within a time frame established by the parties unless there is reasonable cause for delay. The parties should decide in advance whether they want the arbitrator to issue a reasoned or summary award. A reasoned award provides a written explanation of the arbitrator's findings and conclusions. It can be a brief explanation or a more detailed decision, including a statement of issues presented, findings of fact and conclusions of law. A summary or standard award simply states the ultimate relief awarded without any recitation of facts or explanation. Depending on the parties' needs, a reasoned award may or may not be required. While a reasoned award gives the parties an understanding of the rationale for the arbitration award, more challenges to the award may result because of disagreement with the arbitrator's findings or conclusions.

Arbitration awards are generally final and binding. Although it is unusual, parties may request non-binding arbitration to obtain an assessment of the case merits without being bound by a conclusive resolution. If the decision of the arbitrator is final and binding, it is typically non-appealable unless the parties have provided otherwise in the arbitration agreement. The parties may permit submission of a motion for reconsideration to the arbitrator to correct an error of law or fact, or choose not to permit any post-arbitration submissions. The parties may also decide whether they want limited judicial review, and whether they want

to limit judicial review to exceptional circumstances such as fraud, misconduct or exceeding the scope of authority.

The parties may exercise control over the potential size of an award by negotiating "high/low parameters," i.e., maximum and minimum amounts that can be awarded. No matter what the arbitrator decides, the award cannot exceed the agreed-upon high number or fall below the agreed-upon low number. The parties should decide in advance whether the plaintiff will receive the exact amount of an arbitrator's award that is within the "high/low parameters" or the high or low number that is closest to the arbitrator's award.

Arbitration is a private, expeditious, cost-efficient means of resolving almost any dispute. Even if parties do not have a pre-dispute arbitration agreement, they can agree to arbitrate when a controversy arises. By designing their own unique parameters for arbitration, the parties can enhance the effectiveness of the arbitration and increase the likelihood of their satisfaction with the process.

Checklist of Arbitration Parameters

- Powers of the arbitrator
- Scope, type and time for discovery
- Choice of law
- Geographic location of the hearing
- Length of the hearing and hearing dates
- Who will be present at the arbitration
- Number of witnesses
- Whether any testimony will be by telephone or video conferencing
- Whether the witnesses will be sequestered or permitted to hear each other's testimony
- Whether there will be a court reporter or tape recording of the arbitration
- Which party will proceed first
- Which party will have the burden of proof
- When and how exhibits and witness lists will be exchanged prior to the hearing
- Whether the parties will file a stipulation of facts
- Whether pre-arbitration and/or post-arbitration briefs will be filed
- Whether there will be opening statements and closing arguments
- Forms of relief
- Date decision will be rendered
- Summary or reasoned decision
- Binding or non-binding arbitration
- Scope of judicial review and standards of review

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