Positively Neutral

Arbitration and Mediation for Attorneys and Their Business Clients

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Happy New Year. I hope everyone had an enjoyable holiday season and I wish you a happy and healthy 2023.

I am delighted to focus this year's first newsletter on a real life example of how attentive and creative attorneys can benefit their clients' interests with a tailored dispute resolution process that fits specific needs.

In commercial disputes, one of the first things attorneys do is pick up the operative agreement, turn to the dispute resolution section, and determine whether the proceedings are destined for court or arbitration. Usually, once presented with the contractual road map, the attorneys typically move forward with the forum the parties designated in their agreement.

Sometimes, even in the face of seemingly straightforward contract language, an attorney–not being a fan of arbitration–will cobble together an argument that challenges arbitrability, thereby setting off a layer of satellite, often expensive, litigation, in which a court is called upon to address the arbitrability issue.

Only rarely does it work the other way. It is unusual for attorneys–with no contractual provision mandating arbitration–to take it upon themselves to submit a dispute to arbitration because they perceive it to be in their clients' best interest to do so. Surprises do happen, however, as I recently witnessed.

Not long ago I was engaged to serve as an arbitrator in a family owned business dispute/divorce. The two attorneys–each an extremely experienced and prominent practitioner–had unsuccessfully attempted to resolve the dispute through mediation. While the dispute remained, the attorneys did agree that litigation was not the optimal next step. Instead, they decided that their clients would benefit from submitting the dispute to arbitration.

While I was not privy to their thought process or discussions, there may have been several motivating reasons for the attorneys to prefer arbitration: a desire to resolve the dispute more promptly than could be achieved via the judicial system; a preference for a private resolution process rather than the public filings and court hearings that would occur in litigation; and an opportunity to select an arbitrator experienced in business divorce matters, rather than leaving the selection process to the vagaries of the court system.

Whatever the motivating reason(s), counsel took it upon themselves to fashion a tailored arbitration submission agreement. They included within it provisions specifying the length of the arbitration hearings, how the allotted time would be divided, and establishing parameters for certain relief, fees and costs.

The takeaway for all practitioners is that attorneys need not limit themselves to whatever dispute resolution process may or may not have been drafted at the time of contract formation. Rather, they have an opportunity, when a dispute arises, to assess the nature of the dispute and the surrounding circumstances. In some instances the matter may best lend itself to resolution through arbitration. No matter how deep the substantive differences between their clients, attorneys may agree that there exists a mutual benefit in reaching an agreement as to the dispute resolution process to follow.