As You Like It: the case for learning to love the flexibility of arbitration

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New York lawyers tend to hold a reflexive preference for New York courts. And why not? The Commercial Part of New York Supreme Court is peopled with sophisticated judges schooled in complex disputes; the Southern and Eastern Districts of New York are home to some of the finest trial courts in the world.

Arbitration, by contrast, is a poor cousin. Domestic arbitration, to borrow John Kennedy's put-down of Washington, D.C. ("a city of Southern efficiency and Northern charm"), carries most of the infirmities of court litigation, with few of its benefits.

International arbitration fares no better. Here, to quote another political wit, Churchill's maxim about democracy is ripe for paraphrase: arbitration is the worst form of international dispute resolution, except for all the others that have been tried from time to time.

So when your company is poised to do business with a foreign counterparty, is there any reason to cheer when the counterparty proposes arbitration, rather than litigation in New York court, as the contractual mode of dispute resolution? Strangely enough, there may be. And it all comes down to the fact that arbitration affords you choices that litigation cannot offer.

Begin with the issue of who decides your case. In court, the judge is assigned randomly; in arbitration, you select your arbitrator. True, if it's a panel of three, the other side will have the same privilege. But the value of getting to pick one of your three fact-finders should not be underestimated. For one thing, s/he will typically have a substantial say in who the third member of the tribunal will be – the standard selection procedure involves the two party-appointed arbitrators selecting the Chair.

Next, the parties can agree on a series of procedures to expedite the process. A number of institutions can conduct and supervise arbitrations. Each such institution provides a roadmap for running the arbitration. There is nothing to stop the parties, however, from deviating from that roadmap in ways that make sense for a particular dispute.

For example, if the parties prefer to have only one round of briefing and exchange of witness statements (rather than the customary two), they can simply agree to do so. If time is of the essence in resolving a dispute, the parties can also impose strict deadlines on themselves – and even on the arbitrators – for filing pleadings and deciding the case.

Of course, once a dispute emerges, parties often find themselves on opposite sides of these issues: one party might prefer a quick resolution, while the other favors delay. Under those circumstances, arbitrators will feel compelled to give the party that is not in a hurry as much time as it needs. They do so because they fear that a losing party complaining of insufficient time may challenge the arbitral procedure as unfair.

This is why arbitration's flexibility is usually best invoked in the arbitration clause of the underlying contract itself. At the contractual drafting stage, both parties often can agree in principle on procedures to minimize the time and cost of any eventual dispute.

Corporate counsel on the whole take remarkably little advantage of this contractual flexibility. Standard arbitration clauses in contracts are generally no more than two or three sentences long: "Any dispute arising under or out of this agreement shall be fully and finally resolved by binding arbitration, under the rules of ____. There shall be ___ arbitrators; the venue/seat of the arbitration shall be ___."

When one considers all the expense and aggravation that could be saved in a dispute by placing limits on certain parameters of time and action, it behooves us to expend a little more effort than we traditionally have done crafting suitable arbitration clauses. File under “an ounce of prevention is worth a pound of cure.”

Another area in which arbitration – at least the international variety – stands apart from domestic litigation is in the approach to discovery. International arbitration provides no set rules for the conduct or standards of discovery. Even the procedures of the various arbitral institutions and existing international rules and guidelines (such as the IBA Rules on the Taking of Evidence in International Arbitration) are, at best, vague.

In order to understand why, it is worth taking a moment to remind ourselves of arbitration’s heritage. International arbitration is, almost by definition, a compromise procedure between parties from different legal traditions. Many of those legal traditions, particularly in countries with a civil law system, differ markedly from ours. Procedures that we take for granted – cross-examination, depositions, even document production – are unheard of in many other countries.

As international arbitration has developed over the past few decades, therefore, it has taken on a hybrid quality. Cross-examination in hearings has become standard, while extensive direct examination remains rare (the parties usually supply pre-hearing witness statements in lieu of direct examination); rules of evidence do not exist in any meaningful sense; expert testimony is frequent, but without any testing of an expert’s credentials.

The same hybrid phenomenon has developed with discovery. Depositions, interrogatories, and requests to admit are virtually unheard of; document discovery is permissible, but in much more limited form and scope than in a domestic arbitration.

Arbitrators will almost always reject a document request calling for “all” documents pertaining to some issue or other; they will likely uphold only requests that call for a discrete or specific category of materials. Once again, this represents something of a compromise between the virtual absence of discovery in many civil law systems, and the “pretty much anything goes” liberalism of American state and federal procedure.

In similar vein, there is no rule or guideline on e-discovery. Some institutional rules, as well as the IBA Rules on evidence, make passing reference to it, without setting forth any specific requirements for retaining or producing electronic materials.

Because arbitrators are not judges and arbitrations are private proceedings between parties, subpoenas to third parties in an arbitration are unenforceable without recourse to a court. By the same token, arbitrators cannot compel either a non-party or a party to produce documents. If a party instructed to produce a document refuses to do so, the arbitrators may make an adverse inference about the nature of that document as it pertains to the non-producing party’s case.

Finally, because arbitral awards are rarely published, and because there is no recognized hierarchy for the purpose of establishing binding or persuasive precedent, the decision as to what is discoverable and what is not will vary from one arbitration to the next. Yet another reason to choose your arbitrator wisely.

This might all sound like a recipe for procedural disorder, at best. Often it turns out exactly that way. But once again there lies an untapped virtue beneath the ostensible confusion: if the parties agree on discovery procedures ahead of time, they and the arbitrators will be bound by them in the event of a dispute.

As with so much else in litigation, it is easy for opposing sides to drop into a defensive and mutually antagonistic crouch on every issue. But in the contractual drafting phase, the parties ought to be able to agree, *ex ante*, on discovery procedures to govern a prospective dispute that hopefully will never come to pass.

It should also be relatively easy to trace the contours of any such agreement: both parties would presumably be well served by procedures that are quick, efficient, and limited. In this respect, arbitration should be a fast friend. They can automatically dispense with the panoply of discovery devices available to litigants in court – although, by the same token, they can explicitly provide for depositions and the like in an arbitration if they agree that it would be useful to do so.

The parties can furthermore circumscribe document discovery as they see fit. Do they want to provide for a procedure in the event of arbitration in which the parties proffer only their own evidence, without any discovery? So be it. Do they wish to limit discovery requests to a total of 10 each? Why not? What the parties say goes.

Contrast this state of affairs with litigation. Even if they wanted to, the parties would be hard pressed to carve out wholesale provisions of the CPLR or the Federal Rules of Civil Procedure. Viewed from this perspective, the variables of arbitration – suitably controlled – begin to look more attractive. The key is to supply the structure early, in the mutual interest of limiting the time and cost of a putative dispute.

There are two further benefits to arbitration over litigation: finality and enforceability. Once issued, an arbitral award is not subject to appeal. It may be challenged in court under very limited circumstances, but *de novo* review is unavailable, and the arbitrators' word therefore usually final.

As with so much else in arbitration, the parties may derogate from this rule too: the American Arbitration Association and its international arm, the International Center for Dispute Resolution, recently provided for optional appellate rules that would permit the parties to submit an award to an appeals panel. Parties that see fit to do so are well advised to provide for this option in their agreement: as with everything else discussed above – only probably more so in this particular instance – it is difficult to conceive of a winning party agreeing to an appeal of an award after the fact.

The second, probably less-recognized, advantage of arbitration over litigation is its enforceability outside the United States. The edifice of international arbitration is built on a 1958 treaty, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It is known colloquially – and appropriately for this readership – as the New York Convention. There are now more than 150 signatories to the Convention; you are unlikely to be doing business with a counterparty from a country that is not a party to it.

The New York Convention provides that an arbitral award made in the jurisdiction of one signatory party will be quickly and readily recognized and enforced in the jurisdiction of another signatory party. This fast-track recognition mechanism is what has permitted arbitration to flourish in the era of globalization.

Notably, however, there is no such widespread convention for the enforcement of court judgments. Litigants seeking to enforce an American court judgment abroad face a variety of procedures and hurdles, depending upon the jurisdiction in question. Recognition is far from assured.

When contracting with a counterparty whose assets lie outside the United States, it therefore makes sense to consider arbitration in the dispute resolution clause. It is usually the means best calculated to afford access to those assets in the event of a disagreement.

Arbitration is far from perfect. Its imperfections, however, stem in considerable part from its unstructured, rule-averse nature, born of arbitration's need to bridge the gap between different legal systems.

That very lack of structure is what gives arbitration the flexibility to be better than it is. With a little care and planning, New York parties can secure the benefits of arbitration without the drawbacks of litigation – a dispute resolution procedure that is quick, affordable and enforceable. What's not to like?