Is Arbitration the Way of the Future for Commercial Disputes?

Robert Napper
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By Robert Napper

Hogan & Hartson is so convinced that arbitration is the way of the future in complex commercial disputes that it recently built a state-of-the-art room dedicated to arbitration in its downtown Miami office.

The room has flat-screen TVs and computer hardware and software, all geared toward creating a comfortable atmosphere for stressful meetings, said Daniel E. Gonzalez, the firm’s director of international litigation and arbitration. The room provides equipment for everything from digital presentations to video depositions.

The room already has served Hogan & Hartson attorneys a handful of times, and more sessions are scheduled, according to Gonzalez.

“The purpose of the room is to offer an added convenience for our clients in settling arbitrations,” Gonzalez said. “Really the room is there for both sides to feel comfortable.”

More than 70 attorneys with the firm nationwide solely handle arbitrations, and the firm is dedicated to arbitration as an alternative dispute resolution tool, Gonzalez said.

“There is something to be said for trying a case in front of a sophisticated panel that can handle complex commercial issues,” he said.

Most major commercial contracts now contain clauses requiring arbitration, but there is increasing grumbling among lawyers about the requirement.

Miami attorney Michael Kreitzer, who represents primarily construction companies and developers, is no fan. He cites one of his cases in which an arbitrator entered an award he says
was so biased against his client that a circuit judge called it “outrageous” and overturned it.

But getting the arbitration ruling thrown out was highly unusual. Kreitzer, who heads litigation for Bilzin Sumberg Baena Price & Axelrod, said it is hard to prove an arbitrator’s bias and nearly impossible to get an unjust decision overturned in court.

“That particular case was an extraordinary event,” he said.

Kreitzer also decried the more flexible rules of evidence and discovery allowed in arbitration compared to the courtroom.

“It really is like trying a case in the wild, wild West,” he said. “The simple fact is that arbitrators are not bound to follow the law.”

Even though Kreitzer said he’s lost confidence in arbitration, he and his clients often are bound to it by contract.

Kreitzer contended most lawyers in Miami are actively steering their clients away from contracts with arbitration requirements.

“These clauses are entered into before the love is lost between parties, so basically our clients are going in blind,” he said.

ADVANTAGES TO PARTIES

Arbitration increasingly has become the norm in commercial contracts. A typical requirement is for disputes to be heard by a panel of one to three arbitrators, who often are senior lawyers or retired judges.

Supporters say arbitration takes less time and costs less than a trial, partly because of the looser discovery and evidence rules.

In addition, advocates say parties benefit by having cases heard by arbitrators who are expert in the field of law in dispute.

Arbitration decisions are not subject to the standard appeals process, and parties like the fact that arbitration hearings and decisions are confidential, with no potentially bothersome public records.

Arbitration is particularly popular in international litigation because awards can be valid anywhere in the world. The winning side can take an award obtained in Latin America and present it to a court in Europe to collect, Gonzalez said.
That may not be the case with court judgments. For example, a winning judgment in a U.S. federal court may not be accepted by a court in Latin America, Gonzalez said.

Arbitration also is popular internationally because commercial parties often are seeking neutral turf to settle disputes, so one side does not feel it is at a disadvantage in another side’s home country, said Barry Davidson, a partner at Hunton & Williams in Miami.

“Personally, I prefer a good state or federal judge over arbitration,” said Davidson, a litigator who has handled dozens of arbitrations. “But I do believe arbitration is sometimes the best way to handle disputes.”

Many South Florida lawyers and arbitrators hope Miami will become a major hub for arbitration, rivaling New York, Washington and London. Hogan & Hartson’s Gonzalez cites Miami’s convenient location to Latin America and the Caribbean.

**CUMBERSOME LOGISTICS**

But the standard three-arbitrator panels are beginning to draw criticism from some attorneys due to scheduling complications.

Even though Davidson regularly practices arbitration, he understands how attorneys can be frustrated with the logistical headaches.

“Arbitration may be becoming increasingly unpopular because many feel it is so cumbersome,” he said.

Davidson cited a recent arbitration he handled involving a dispute between the government of Belize and the owner of a phone company in Palm Beach County.

While it might have seemed logical to hold proceedings in one of the two countries, a pre-existing contract required arbitration in Canada. “It can be very goofy like that,” he said.

Just trying to schedule arbitration hearings can be grueling, and there is no protection against prolonged interruptions.

“Most people involved in arbitrations are very successful, busy people, so it can be hard to get everyone in one room for a long period of time,” Davidson said. “Many times you will have three days of hearings and then have to stop for a week or a month.”

Some lawyers say arbitration proceedings can drag out longer than trials.

Mandatory arbitration also can cost clients more time and money, Kreitzer said. The parties must pay the arbitrators’ fees, which can be substantial.
Some arbitrators charge up to $500 an hour. Davidson said his clients have had to pay as much as $40,000 in fees for a single case.

“For my clients, arbitration has proved more costly than anyone thought possible,” he said.

ARBITRATION ADVOCATES?

But Jose I. Astigarraga, a partner at Astigarraga Davis in Miami and a strong advocate of arbitration, said it is a relatively new industry going through growing pains, and some issues are being addressed. As more attorneys become familiar with arbitration, he said they will begin to tweak the process and it will become more efficient.

Astigarraga said he is seeing more openness by parties to using single-arbitrator panels, which can ease scheduling conflicts. Also, he said the process of interviewing and selecting arbitrators is becoming more in-depth.

“We are seeing a more rigorous approach upfront in initial interviews of arbitrator candidates to deal with any scheduling issues that may arise later,” he said.

Interest around the world in arbitration remains strong, Astigarraga said. He argued that his clients prefer the confidentiality of arbitration and the ability to enforce an award in many courts around the world. He also said arbitration generally is quicker and offers both neutral ground and arbitrators.

“The fact is many of our clients are not interested in settling a dispute in a United States court,” he said. “It all depends on where a party’s assets are and where an award can be enforced. In a lot of cases, a judgment in a U.S. court is not going to do them any good.”

Many judges and attorneys are jumping into the field, and international interest is rising. Astigarraga is scheduled to speak about arbitration at conferences in China, Brazil and three other countries in the next five months.

“I still see a steady level of activity in the industry and a steady amount of newcomers wanting to learn about arbitration,” he said.

A recent national survey backs him up. A survey by the Minneapolis-based National Arbitration Forum, in conjunction with the several sections of the American Bar Association, indicated alternative dispute resolution, including arbitration, is very popular among lawyers.

Nearly 90 percent of those polled said their clients’ interests are sometimes best served by alternative dispute resolution, and more than 58 percent of respondents said they will most likely offer ADR solutions to clients in the future.
For Hogan & Hartson, the practice of arbitration is building.

“In the old times, arbitration was often referred to as ‘splitting the baby,’” Gonzalez said. Now, arbitration is seen as “finding the best people to hear arguments on highly technical matters in order to get the most reasoned result.”

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ONE THOUGHT ON “IS ARBITRATION THE WAY OF THE FUTURE FOR COMMERCIAL DISPUTES?”

natural garcinia cambogia

on February 4, 2014 at 6:49 AM said:

Fantastic post however, I was wondering if you could write a little more on this topic? I’d be very thankful if you could elaborate a little bit further. Many thanks!