HEADNOTES

REPLY BRIEF

Something Else We Need to Do about Arbitration

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Gregory P. Joseph's Headnote in the Summer 2013 issue of LITIGATION ("We Need to Do Something about Arbitration") is compelling in its suggestion that a rule allowing parties to provide for judicial review of arbitration awards would be good policy. No argument here.

But there is a larger trend that I suggest plays a role, whether we realize it or not, in what Joseph calls arbitration's "lingering uncertainty." The problem is that arbitration is becoming the mirror image of the judicial process, when it should be something else. Judicial review would contribute to the trend that we are creating a parallel universe. Let's look instead at how to create a real alternative.

I am talking about eliminating discovery. Thirty years ago, discovery avoidance was the driving factor in the use of an arbitration clause in a commercial contract. The business deal was this: Let's skip discovery time and expense; let's show up with witnesses and documents for a prompt trial; let's get a good arbitrator or arbitrators; let's live with the result; and whatever the outcome, we'll both be better off than if we suffered discovery on the front end and appeals on the back end. Expedition and cost saving were paramount. And by the way, the whole process had the added benefit of being private.

The world has changed. Discovery in arbitration is now the rule, not the exception. Arbitration rules almost always provide for it. Arbitrators and parties expect it. Thirty years ago, electronic discovery did not exist. Now it has transformed the arbitration process no less so than the judicial process.

And I haven't even mentioned depositions yet. We say to ourselves: Who could possibly try a case without knowing exactly what each witness is going to say about every potentially relevant document? Without depositions, how could we ever cross-examine at trial? What about the advocacy skills it took us so many years to learn? So depositions become, with the support of the rules and the consent of the arbitrator(s), an integral part of the arbitration process as well.

In other words, we have allowed arbitration to become the worst of all worlds. It includes the added time and expense represented by the virtual equivalent of federal rules discovery, while stripping away the protection of the appellate process. There is no upside in this bargain. I understand the impulse to solve the problem by adding judicial review. Fine, but if we do that, how will arbitration be different from going to court? It won't be. Indeed, judicial review adds another downside that arbitration used to be designed to avoid: It makes the whole process public.

There is another way. What if parties used arbitration when they wanted neither discovery nor judicial review? Sometimes that makes sense. Sometimes the old-fashioned way is the best way. Sometimes expedition, cost savings, and privacy deserve to rule the day. That is, all within reason. The parties will still want the adversary process of a trial. It will be called an arbitration hearing. It will allow each side its proverbial day in court. But unlike a federal lawsuit, it will not threaten to become an expensive, long-term, and public ordeal, ever one step away from overwhelming the parties' ability to focus on their business. There will be a prompt and relatively inexpensive resolution. It will have finality. The parties can move on. Problem solved.

Consider a 10-year requirements contract. Consider a long-term service agreement. Consider a short-term supply contract in the context of a larger purchase and supply relationship on which the parties hope to rely for a long time. What these situations have in common is that they represent business relationships in which the two parties have worked together, they already know something about each other (they have probably already exchanged reams of emails), and they have an interest in trying to preserve their relationship. This is the classic paradigm for a private, no-discovery, no-appeal arbitration.

But it rarely works that way anymore. The fact that almost all arbitration rules now provide for discovery means that parties invariably get caught up in that process without ever having thought about whether it makes sense to do so. Because discovery is now the default position of the rules, the only way to avoid

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it is to include a "no discovery" provision in the contract, as part of the arbitration clause. Almost no one thinks to do that. Almost no one has the courage to do that. It is too risky. What if it turns out later on that discovery is needed? My answer is that, at the time of contract, if you think you might need discovery, eliminate the arbitration clause altogether. Plan to go to court instead. You will have judges and magistrates who know how to police discovery, and you will have appellate protection. But if, at the time of contract, you can fairly foresee that a potential dispute is likely to be streamlined, of a kind not requiring delving into the depths of the other side's gigabytes of data, have the courage to insert an arbitration clause with a "no discovery" provision. Discuss it first with the client. You may be surprised how eager the client will be to do it. In fact, the client may wonder why no one ever explained before that doing it is possible. And I promise you will be able to try the case without having taken a deposition. You may even enjoy it more.

I acknowledge things are not always cut and dried. Discovery in arbitration need not be all or nothing. There can be limited document production with no depositions. There can be deposition limits, stricter than under the federal rules. There can be compromises, brokered or otherwise. There can be a limited-discovery or no-discovery arbitration, plus an agreed-upon right of judicial review (under a possible future rule like the one Gregory Joseph suggests), where the parties want a streamlined arbitration but are not concerned about privacy.

But, as a general matter, arbitration is where I want to be if I want little or no discovery. In that event, I am also more likely to prefer expedition, cost savings, and privacy. If I am interested in the mechanisms of Rules 26 through 37, I am more likely to want to be in court, with the protection of judicial review.

It's nice to have choices, especially if the alternatives are really different. ■