Bespoke Litigation: An Alternative to Traditional Arbitration?

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In theory, arbitration can offer an attractive alternative to traditional litigation. With discovery, motion practice, and judicial review limited, arbitration is intended to provide a cheaper, more efficient alternative to litigation. Unfortunately, arbitration of complex matters sometimes fails to achieve those goals. If not controlled by the arbitration panel, arbitration of complex disputes can take as long or longer than court adjudication of matters of similar complexity. The increasing prevalence of motion practice and broad discovery in arbitration is exacerbating the problem. Sophisticated parties and practitioners therefore often negotiate customized agreements that seek to limit the scope and contours of any arbitration. Others, leaving arbitration altogether, are inserting bespoke litigation clauses that seek to curtail some of the perceived inefficiencies of judicial proceedings.

Arbitration's Challenge in Dealing with Complex Disputes

If arbitrations run off the rails, the wreck is often contributable to the complexity of the dispute. Sophisticated outside counsel bring the same tools of zealous advocacy to arbitration that they employ in traditional litigation, making arbitration procedures and practice complex and drawn out. The result is that—unless controlled by the arbitration panel—the scope and complexity of discovery can be similar to that undertaken in traditional litigation. Even motion practice, which traditionally is minimized in arbitration, can become a focus of pre-hearing activity in an arbitration. *See, e.g.*, Richard H.C. Clay and J. Tanner Watkins, *Methods for Cost Efficient Resolution in Arbitration*, For the defense, August 2010, at 2.

Of course, the cost of treating arbitrations as litigations by another name is exacerbated when, as is typical, the arbitrators are paid by the hour. Some cynical critics note that arbitrators have an incentive to extend or delay the process to increase their own compensation. One oft-cited arbitration was conducted for 45 days, spread over 18 months, and topped $5 million in legal fees, with each arbitrator taking home $480,000. Mary Swanton, *System Slowdown: Can Arbitration Be Fixed?* Inside Counsel, May 2007, at 51.

In addition to paying for the arbitrators, the parties must also pay overhead costs. In court, taxpayers foot much of the bill, but in an arbitration the parties are responsible for all costs. In long arbitrations, those costs can be substantial. Expenses increase further when the parties first litigate whether a resistant party can be compelled to arbitrate. As one general counsel put it, a party can spend more than a year and substantial legal fees "simply to enforce in court [its] right not to go to court." Lou Whitman, *Arbitration's Fall From Grace*, Law.com, July 13, 2006.

The extra expenses attributable to the parties' attempts to incorporate litigation practices into their arbitration does not yield any benefit for the loser in the arbitration. Under each domestic law (as embodied in the Federal Arbitration Act and the arbitration acts of various states) and international law (as embodied in the New York Convention on the Enforcement of Foreign Arbitral Awards), the grounds for vacating an award are extremely narrow—as compared with the grounds for vacating a judgment.

Bespoke Arbitration

Sophisticated parties therefore are increasingly experimenting with ways to incorporate provisions into arbitration agreements intended to limit cost and delay, a practice known as "bespoke arbitration." Lawyers now more frequently advise their clients "to be very specific in their arbitration clauses, limiting the number of depositions each side is allowed, when documents should be turned over and how many days of testimony there should be." Gina Passarella, *Litigators Losing Love of Arbitration Argue for Trials*, Law.com, September 1, 2010. Businesses are turning to customized arbitration agreements to realize the cost savings that traditional arbitration had originally promised.

Such provisions often seek to limit discovery (particularly the scope of electronic discovery), depositions and motion practice. Other provisions attempt to limit strictly the length of the arbitration, or narrow individual aspects such as discovery. That can be done either by carefully drafting the rules under which the parties agree to arbitrate or through a general directive to the arbitrator. For example, a California federal court recently upheld an arbitration agreement in which the defendants had included a provision requiring that "[o]ne arbitrator shall use all reasonable efforts to minimize discovery and . . . render a

written decision within thirty (30) calendar days of the hearing." *Wolf v. Langemeier*, 2010 WL 3341823, at *3 (E.D. Cal. Aug. 24, 2010). The court enforced the agreement while acknowledging that it might significantly curtail the parties' right to full discovery. As a New Jersey federal court recently confirmed, "it is well-established that an arbitration panel may limit discovery in keeping with the terms of the agreement between the parties." *Walzer v. Muriel Siebert & Co.*, 2010 WL 4366197, at *13 (D.N.J. Oct. 28, 2010).

Bespoke Litigation

Some practitioners have turned away from arbitration altogether. Instead of opting out of the public dispute resolution system (as arbitration and modified arbitration do), they believe that parties should embrace the courts as the means to resolve any dispute, but within the confines of self-imposed conditions and limitations designed to curtail the delay and expense typically associated with traditional litigation. By waiving the right to a jury, agreeing to curtail discovery and deposition practice, and even limiting motion practice by prior agreement, they hope to achieve the cost savings and efficiency promised by arbitration while avoiding some of the risks associated with arbitral decision making.

Although not as developed as customized arbitration clauses, tailoring litigation to the parties' specific needs—known as "bespoke litigation"—is not a new concept. Courts routinely enforce choice-of-law and forum-selection clauses, *see, e.g., Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), as well as waivers of objection to personal jurisdiction. *See, National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315-16 (1964). Similarly, pre-dispute jury trial waivers and bench trial agreements which, with some exceptions, are generally enforceable, are increasingly utilized as alternatives to arbitration clauses. *See e.g.*, Jane Spencer, *Companies Ask People to Waive Right to Jury Trial*, Wall. St. Journal, Aug. 17, 2004 (noting the rapid rise of jury trial waivers both among businesses and between businesses and consumers).

Such waivers should be valid. The United States Supreme Court concluded in *United States v. Mezzanatto*, 513 U.S. 196, 203 (1995), that in criminal proceedings, at least in the federal system, there is a "background presumption that legal rights. . . are subject to waiver by voluntary agreement of the parties." If this is the rule in criminal litigation, where life and liberty are at stake, it should certainly apply to civil disputes. Indeed, courts already enforce private agreements that alter the rules of evidence, such as waivers of hearsay objections, objections to the authenticity of documents, and other evidentiary rules. *See, e.g.*, *United States v. Bonnett*, 877 F.2d 1450, 1458–59 (10th Cir. 1989) (enforcing agreement waiving hearsay objections); *Tupman Thurlow Co. v. S.S. Cap Castillo*, 490 F.2d 302, 309 (2d Cir. 1974) (enforcing agreement waiving objection to authenticity of documents).

Unlike the rights to a jury trial or the enforcement of evidentiary rules, the procedural rules governing discovery typically direct parties to confer to determine the scope and limits of their own dispute. By requiring the parties to confer concerning the scope of discovery, for example, Rule 26 of the Federal Rules of Civil Procedure explicitly contemplates that the parties will tailor the scope of discovery to their particular needs. Likewise, Rule 29 allows parties to limit or modify the discovery process. *See, e.g.*, Fed. R. Civ. P. 29 (parties may by written stipulation modify procedures governing discovery, with few exceptions). In short, the Federal Rules affirm the parties' control of the discovery process and should support the enforceability of discovery limitations made in pre-dispute agreements.

There are, however, some clear limits on bespoke litigation. Courts uniformly agree, for example, that subject matter jurisdiction cannot be forfeited or waived. *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934) ("[L]ack of federal jurisdiction cannot be waived or be overcome by an agreement of the parties"). Because the standard rules of contract law apply, the underlying agreement setting forth the relevant provisions must also be enforceable. If the agreement is not enforceable, the provisions seeking to adjust the manner in which the dispute will be litigated are not enforceable either.

Conclusion and a Caution

For those who are skeptical that arbitration of a complex dispute will be cost effective or efficient, customizing arbitration agreements, or even agreeing to bespoke litigation, are two alternatives to achieve a faster and more efficient dispute resolution.

Before taking either path, however, counsel should consider carefully whether a particular provision will limit the ability to fully develop an available claim or defense. Although bespoke litigation can be more efficient and less costly than other forms of dispute resolution, the savings will hardly matter if a party cannot effectively litigate its claims or defenses.