ALTERNATIVE DISPUTE RESOLUTION

Simplified Justice or a Shield for Smoking Guns?

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Advocates of Alternative Dispute Resolution (ADR) tout the savings realized by avoiding lengthy pretrial discovery programs and gridlock created by backlog in the courts.

In traditional litigation, the years and years of discovery wars between the parties over interrogatories, document requests, depositions, motions to dismiss, motions for summary judgment and diversionary tactics consume tens and hundreds of thousands of the parties' dollars, not to mention countless hours better spent on running their businesses.

Advantage or Disadvantage?

ADR's biggest selling point is the speed with which matters are brought to a head. In ADR, the parties often conduct a mutually-agreed-upon, scaled-down version of discovery. This might consist of production of relevant documents and perhaps several depositions or informal discussions with the principal witness limited to certain issues.

In arbitrations conducted by the American Arbitration Association, however, discovery is the exception, not the rule. If one of the parties objects to discovery, the other party must apply to the arbitrator who, recognizing the expedited nature of arbitration, usually limits the extent and type of discovery.

If the arbitrator denies the request or limits the scope of discovery, the party requesting discovery is out of luck. The Connecticut courts have repeatedly declared that a party to an arbitration is not entitled to conduct discovery because, by consenting to arbitration, it has opted for a dispute resolution procedure different from traditional litigation.

Speedy and less expensive dispute resolution must be weighed, therefore, against the risk of failure. For, if the arbitrator declines to order discovery or severely limits it, the result can be trial by ambush.

In such a case, the parties enter the hearing with hardly any insight into the nature of each other's case. They can, at most, obtain in advance the names of witnesses expected to testify and a copy of documents expected to be marked as exhibits at the hearing.

Theoretically, in simple cases, such disclosures might apprise each party adequately of the type of case its opponent plans to present. Under these circumstances, the parties may know each other's employees and the pertinent documents sufficiently to be able to gauge their opponent's evidence or position.

I say "theoretically" because any case that cannot be resolved by the parties in a business context is hardly ever "simple." Each party has certain documents and suspicions which it has not previously related to the other party during the course of their business relationship.

Additionally, the parties' perceptions of the meaning, intent and content of documents and conversations often diverge. After a dispute has arisen, these perceptions are colored further.

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These divergent interpretations and unknown documents are revealed for the first time during the course of the arbitration hearing and may not allow the parties enough time to prepare to counter the unexpected evidence. To avoid this pitfall, it is necessary for the lawyers to be exceptionally prepared for surprises and for their clients to attend the hearing in order to identify inaccurate or untruthful testimony and explain what actually did occur.

Additionally, the lack of discovery can lead to hearings that are prolonged and not sharply focused because the parties are learning about each other's case as it is being presented.

As a result, cross-examination of witnesses sometimes has a tendency to turn into roving depositions, with the attorneys pursuing lines of questioning which lead nowhere. At a trial, on the other hand, the parties will have taken depositions for years and should be able to conduct crisper cross-examinations.

In general, ADR will provide a swifter, less expensive and more civil alternative to litigation, thanks to the elimination of full-fledged discovery. Some situations, however, might require full discovery to ensure victory.

In deciding whether to opt for ADR, you should consider: (a) whether you are in the right, (b) what your opponent's position and version of the facts may be, (c) whether your opponent has evidence such as a taped conversation or document which is fatal to your case or its own case, and (d) whether you have certain documents or knowledge harmful to your case, which probably will remain unknown to your opponent if discovery is limited or eliminated altogether.

Bear in mind, however, that it is often difficult to make these assessments when the dispute arises, let alone anticipate them at the time you agree to submit any dispute to arbitration, which is usually when you are entering into the underlying contract.

Thus, the absence of discovery as utilized in traditional litigation can be a two-edged sword which may help or harm your ultimate success in ADR.

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