



Arbitration – Is it Time for Lawyers and Clients to Embrace?

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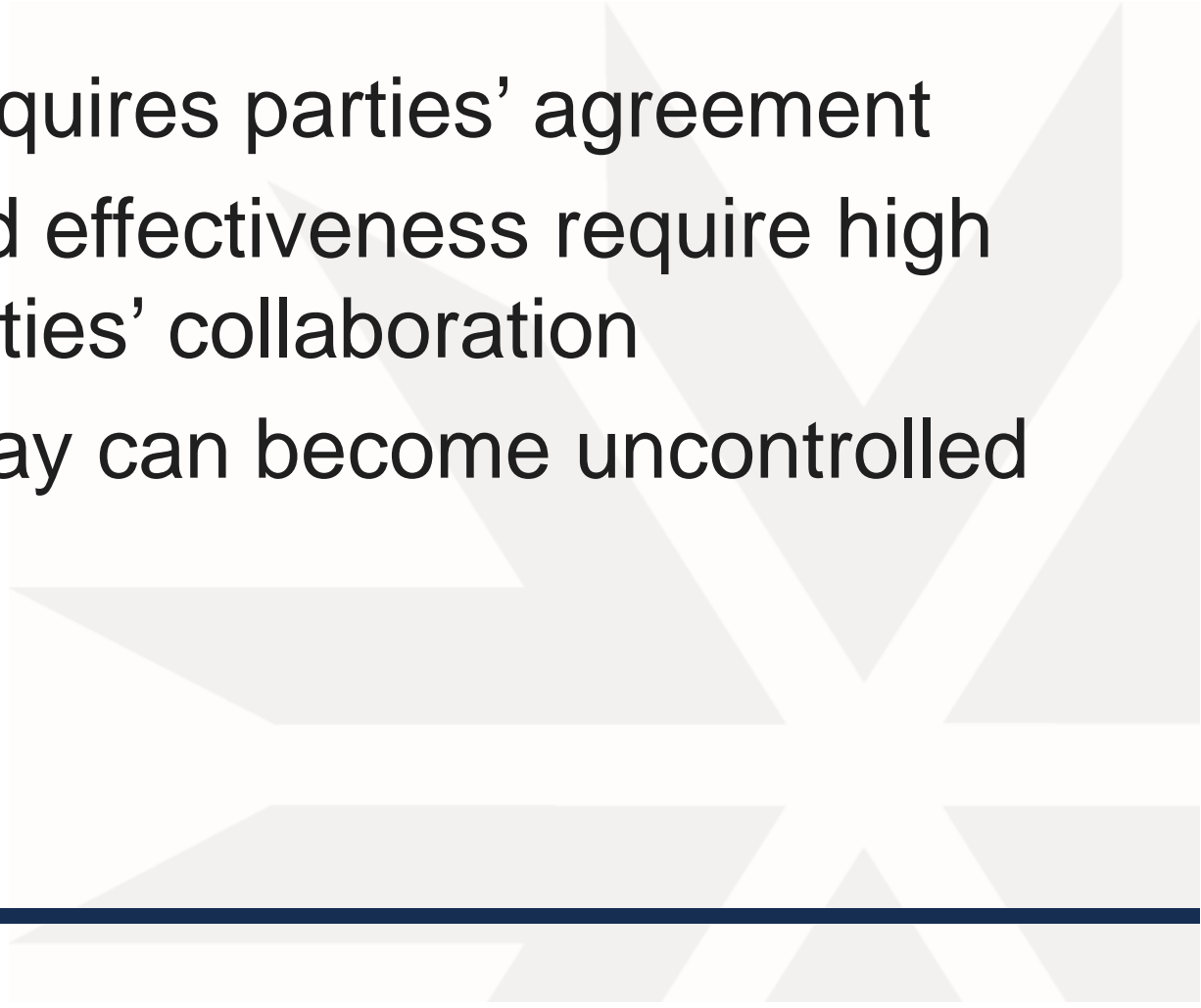
Present Context – Covid Pandemic

- Courts do not require and even discourage some filings for duration of pandemic
 - When “the new normal” appears, significant backlogs are to be expected
 - Docket overload and low priority for commercial cases
 - Build on experience with new methods and new economies to enhance efficiencies in arbitration
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Advantages of Arbitration – At All Times

- Parties, especially with ongoing business relationships, want disputes resolved quickly
 - [Collective] Party Autonomy
 - [Influencing] Selection of decision-maker(s)
 - [Influencing] Control of process
 - Practically Universal Enforceability
 - Potential for earlier settlement
 - Confidentiality
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Hazards of Arbitration

- Availability requires parties' agreement
 - Efficiency and effectiveness require high degree of parties' collaboration
 - Cost and Delay can become uncontrolled
 - Finality
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- A decorative background graphic consisting of several large, light gray, semi-transparent triangles and trapezoids arranged in a pattern that resembles a stylized 'X' or a series of overlapping geometric shapes. At the bottom of the slide, there is a horizontal bar with a red segment on the left and a dark blue segment on the right.

Timing of Resort to Arbitration

- Dispute resolution provision in underlying commercial contract
 - Critical importance of Arbitration Clause in commercial contract
- Once dispute arises
 - Before or after commencement of litigation
 - Limited Issue(s) or general remedial claim(s)

Creating the Arbitration Clause

- Concept – the arbitration agreement expresses BOTH the parties' willingness to resolve disputes by arbitration AND the elements of the arbitration process which they agree in advance to adopt
 - If there are concerns with any of the potential hazards, they are most efficiently addressed at time of negotiation of the arbitration clause in the commercial contract.
 - Problems become embedded – do not overlook importance of details in the arbitration clause
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Drafting the Arbitration Clause

- Must be mandatory (...disputes “shall” be resolved by final and binding arbitration...)
 - Maximize breadth of potential disputes covered by arbitration clause (...any dispute, controversy or claim arising out of or related to this contract ...)
 - Pre-conditions to initiation of arbitration (negotiation, mediation) can create problems and consider whether they should be omitted from dispute resolution clause.
 - Most institutions provide suggested clauses (standard and optional) on-line
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Infinite Variability of Process

- Governing statutes and institutional Rules are highly diverse
- Most statutes and Rules are further variable by the parties' agreement
 - in the arbitration clause itself
 - supplementary agreement after dispute has arisen or after arbitration is initiated

Governing Statutes

- Usually the generally applicable statute in the “seat” (ie stipulated place) of the arbitration
 - UNCITRAL Model Law 1985
 - widely accepted in international arbitrations
 - adopted by federal Commercial Arbitration Act and applicable to maritime matters
 - London Arbitrations – governed by unique Arbitration Act 1996 (UK)
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One or Three Arbitrators?

- Tribunal costs may more than triple
- Collaboration early to appoint sole arbitrator can pay significant dividends later
- Must be a procedure for selection/appointment of sole arbitrator if parties unable to agree
- Make sure early that desired or proposed arbitrator is willing and available to accept the appointment, and that proposed fees are agreeable to the parties
- Take advantage of competition among potential arbitrators

Institutional or *Ad Hoc* Arbitration

- Wide array of arbitral institutions available, domestically and internationally
- Easy drafting of the arbitration clause, this simplicity may well be negated by complexity and cost if arbitration becomes necessary
- Institutions are fiercely competitive among themselves take advantage before selecting
- Seek references for individuals in both institutional and *ad hoc* situations
- Check the proposed institution's fees and rules in detail BEFORE selecting
- Always consider whether *ad hoc* arbitration is better suited (particularly in terms of potential cost) to these parties and this transaction – but check the law of the proposed seat

Arbitrator's Jurisdiction

- The subject-matter of the dispute must be within the scope of the arbitration agreement.
- Objections to jurisdiction must be prompt
- Jurisdiction initially determined by arbitrators, may be subject to judicial review

Procedures

- Determined by parties' agreement, with arbitrator(s) resolving disputes as to procedures
 - Most frequent contentious issues are documentary and oral discovery
 - Tension between desire to manage cost and duty to ensure each party's fair opportunity to present its case
 - Caution – Strict rules of evidence may not necessarily apply in an arbitration
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Miscellaneous Matters

- Awards
 - May be multiple awards in any arbitration
 - Must be in writing and must contain reasons
- Remedies
 - Scope of remedial powers may not be expressed in governing statute or Rules
 - Desired scope or limitation of remedial powers can and should be stipulated in arbitration agreement

Miscellaneous Matters (Cont'd)

- Costs
 - 100% allocation against unsuccessful party is not unknown
 - Arbitrator's discretion may be excluded or limited in arbitration clause or after initiation of arbitration
- Appeals
 - Some statutes permit appeals on the merits, by agreement or with leave of the court
 - Some institutions provide an "appellate arbitral" service

