

1 USER-FRIENDLY ARBITRATION

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Much is made of the relative user-friendliness of various computer products. I think the concept is a useful one in the Alternative Dispute Resolution area, as well. Arbitration, especially when contrasted with the court systems, can be most user-friendly. This article will detail some of the ways arbitration can be friendly to its users.

Courts are generally operated on the doctrine of "No Idle Judge." This means that parties, counsel, witnesses, and others are often put in a "holding pattern" so that they will be available if a judge should become available for them. While perhaps laudable in principle, this doctrine leads to numerous inefficiencies and additional costs to parties, counsel, witnesses, jurors and others. For example, even in a court where there is little or no backlog, this principle causes multiple cases to be set for trial on the same day. In addition, court procedures are largely inflexible, since they are based on statutes or rules. Because of the civil service regulations applicable to some court personnel, even the hours at which a trial may be conducted are set in stone in most courts. To avoid--or drastically reduce-- many of these costs, parties and their counsel are turning to arbitration in increasing numbers. Some of the user-friendly aspects of arbitration provide ways around the inflexibility and unpredictability of the courts. They include the following:

Party-controlled Arbitrator selection

If the parties to a dispute can agree on a particular arbitrator (or three)--and that person is available and willing to serve, the parties can literally choose their own 'judge.' Even if they don't agree, the American Arbitration Association (AAA), for example, will send the parties lists of potential arbitrators (and their biographies) from which both parties may strike unattractive candidates. If the parties or their counsel let the AAA know what qualities they feel are important for the arbitrator of their dispute, the lists can be tailored to include arbitrators possessing those qualities. If the matter warrants it, prospective arbitrators may be interviewed before selection (so long as *all* parties are represented).

Flexible case management

In arbitrations of substantial size or complexity, most arbitrators will meet with counsel early in the process to *discuss* how the case should be handled. Within reason, anything the parties agree on will be fine with the arbitrator. If there are pre-hearing matters about which the parties cannot agree (~, dispositive motions, extent of discovery, bifurcation), the arbitrator will certainly decide these matters. But, the parties can at least have an agreed *schedule* for their presentation to the

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arbitrator. Similarly, if problems come up on the way toward hearing, the arbitrator can frequently resolve them in a telephone conference with counsel.

Reliable scheduling

Whether for the hearing itself, or for pre-hearing matters, dates set with an arbitrator can be counted on. Arbitrators do not schedule more than one matter for the same time. Assuming a realistic time estimate in the beginning, arbitrators (at least, *full-time* arbitrators) can commit sufficient contiguous days to the parties so that the matter may be heard all at once.' While the tradeoff for this reliability may be having to pay an arbitrator's cancellation fees, most parties would agree that this outcome is preferable to the costs associated with potentially innumerable-- and unpredictable-- continuances in a court system.

Flexible scheduling

Most courts are limited in the hours during which business may be conducted. Even if the judge is willing to go outside normal business hours (or days), court staff and the court building itself usually conform to a rather rigid set of hours. Arbitration, in contrast, can take place at any time which the parties and the arbitrator agree on. For example, "Power Half-days" have become popular. These involve scheduling hearings for a part of the day (say, 8:00A.M. to 1:00 P.M., or 1 :00 to 6:00 P.M.) and conducting them without a meal break. Most of the time, as much testimony comes in as in a "full" day with lunch and other normal breaks. Of equal importance, parties, witnesses, and counsel have the balance of the day to prepare for the next day or, if fully prepared, turn their attention to something else. Along the same lines, lengthy hearings may be scheduled for four days a week. This practice is most attractive to out-of-town counsel, but is appealing for the same reasons as the Power Half-day.

Witnesses, particularly experts, are often very busy and hard to pin down for testimony. In arbitration, the parties can agree (or the arbitrator can order) that witnesses may be taken out of order *at specific dates and times*. This not only benefits the party calling the witness, but allows the opposing party to have its expert (or other) witness present to hear the "out-of-order" witness--without the need for that person to sit around for days.

If counsel and the arbitrator agree, hearing days may be shortened so that participants in the arbitration may attend certain *other* important events. Examples in my own experience include: son's high-school graduation; daughter's first soccer game; early start of televised World Series game.

Flexible venue

Unless a private judge is hired, a court trial will take place in the courthouse. By and large, courthouses tend to be crowded, old buildings, unsuited to the high technology trials of today. Indeed, in some courthouses it is almost impossible to obtain a photocopy quickly. In

arbitration, the hearings can be anywhere the parties agree to have them. While many arbitration hearings take place at the offices of the AAA (or other administering agency), many also occur at places as various as the offices of counsel for one of the parties, a destination resort (always a favorite with arbitrators), specially equipped conference rooms permitting video testimony, and, in at least one instance, a federal prison (an important witness was a guest of the Attorney General). If exhibits have been collected in a database, hearings can be held where they can be summoned up on the computer screens of all participants.

Flexible form of judgment

The arbitrator's award can be rendered in a number of ways. The traditional, or "bare bones" award simply identified the winning party and what--or how much--it had won. On the other end of the spectrum, some arbitrators routinely provide (unless the parties agree otherwise) a detailed "opinion" giving the outcome and all of their reasons for reaching that outcome. And, there are several gradations in between. Sometimes the type of award is governed by the parties' agreement to arbitrate, or the applicable rules, but the parties are almost always able to get the specific type of award they want--if they agree. Some rules require notice to the arbitrator by a certain time if the parties want an "opinion." Many arbitrators nonetheless honor "late" requests for this type of award.

User-friendly attitude

While no arbitrator will agree to something that will impair the integrity or fairness of the arbitration process, most arbitrators want to craft a process that will be efficient and as easy on the participants as possible. The "invisible hand" is at work here, of course. I trust that no one has ever selected an arbitrator *only* because he/she was flexible about scheduling, but that quality has certainly been a factor in many selections. Unlike civil servants, arbitrators-- especially full-time arbitrators-- depend for their livelihood on maintaining a good reputation--for flexibility as well as fairness, intelligence and industry. So, if you are in an arbitration (or drafting an agreement submitting a dispute to arbitration) and you believe you know a better way to accomplish something than the standard method, just ask!