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CHICAGO LAW PARTNERS

In Brief

Shall We Arbitrate?

Issue No. 5

When an association enters into a contract with another party, such as a hotel, supplier, or other contractor, the parties often include a provision setting forth the terms under which they will resolve any future disputes between them. A well-drafted provision will address several matters, including: (i) choice of law (whose laws will apply); (ii) venue (where the dispute will be resolved); and (iii) the method or methods for resolving disputes (*e.g.*, mediation, arbitration, litigation, or a combination thereof). Although it is popular to believe that arbitration is "better" than litigation, contracting parties should carefully consider their options before making that assumption.

As an alternative to litigation, arbitration can be faster, both in terms of how quickly a claim can move through the discovery and pre-hearing process and in terms of how long the arbitration hearing takes. With increased speed, the parties may be able to spend less time, money and other resources wrapped up in the process. Arbitration is not, however, as simple as it used to be. More complex claims, with increased discovery, have become more common. Although arbitrations are not bound by the rules of evidence applicable in state and federal courts, the absence of evidentiary rules can be as much a disadvantage as an advantage, and arbitration can end up involving as much time and expense as litigation.

Most consider it advantageous that arbitrations are presided over by a mutually chosen arbitrator or group of arbitrators with knowledge of the business or industry involved in the dispute at hand. Such added knowledge generally means that arbitrators are less likely than a judge or jury to make an unfair or disproportionate decision. In addition, arbitrators have the ability to "split the baby" and to come up with creative and potentially more "win-win" type awards than a judge or jury ever could. "Splitting the baby," however, is not always desirable, especially when an association has a strong case and wants the satisfaction of a clean win. Moreover, in contrast to a trial court decision, the parties' rights of appeal from an arbitration ruling are very narrow, making an arbitrator's decision an essentially final judgment.

As a practical matter, arbitrators generally lack the authority to provide equitable relief; thus, those that elect to resolve their disputes exclusively through arbitration may give up certain rights. If, for example, a hotel were to cancel an association's annual meeting to make room for a larger group,

the aggrieved association could not, through arbitration, seek an injunction blocking the cancellation. Its only recourse would be a claim for damages, which, even if successful, would likely not make the association whole given the potential extent and nature of its loss. Indeed, when a hotel cancels an annual meeting, the association not only loses sleeping rooms, but, often, it also loses its venue for educational programming and exhibit space. In addition, the association is likely to incur costs in notifying attendees of the alternative meeting location ... if it can find one. Even if the association is not forced to cancel the meeting altogether, however, the fallout from having to move the meeting will almost certainly result in a loss of goodwill that is virtually impossible to recoup.

Arbitrations generally are private, which may or may not be advantageous to an association. There are no public hearings or related proceedings to be followed by reporters or other interested parties. And, typically, arbitration awards are not published. Such privacy generally favors the wrongdoer - which would prefer that its wrongful action not be disclosed. An association that believes it was mistreated likely would prefer to have the opportunity to air its story in public - and thereby place some pressure on the other party to settle.

In most cases, associations that believe arbitration will benefit them under the appropriate circumstances should consider adopting a non-mandatory provision. By choosing that course, the parties acknowledge, at the outset, that they may later agree to submit a matter to arbitration as an alternative to litigation. The agreement should further provide that, if arbitration is elected, the decision of the arbitrator(s) shall be binding. Binding arbitration makes the arbitrator's award final and allows the arbitration award to be enforced by any court having jurisdiction over the parties. If the parties elect "non-binding arbitration," either party can start the process all over again in court without committing a breach of contract, thereby negating the advantages that arbitration has to offer.

While arbitration and other dispute resolution provisions are often buried among the "miscellaneous" terms of an agreement, don't make the mistake of equating "miscellaneous" with trivial. Not all provisions are the same, and the differences between them could be meaningful for your organization should it find itself in a dispute.

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If you have any questions regarding this newsletter, please contact Susan Feingold Carlson (312-929-1956 or scarlson@clpchicago.com), or any other CLP attorney for more information.)

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