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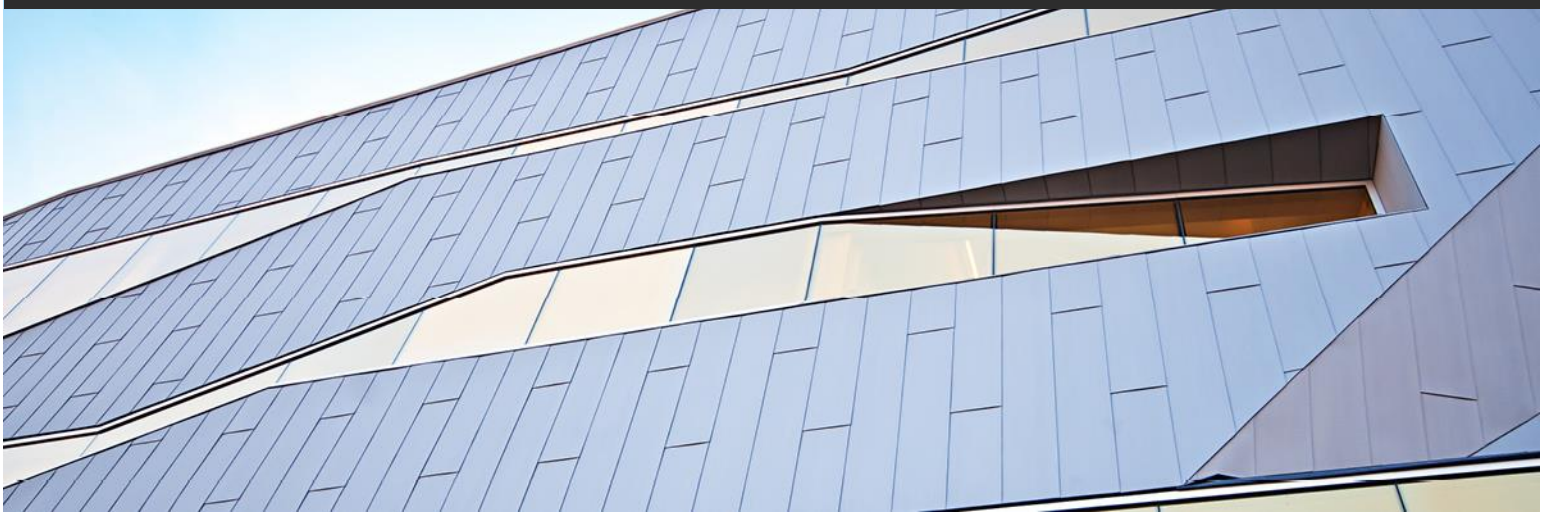

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Alternative Dispute Resolution: The Pros and Cons of the Anti-Hero

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By Howard K. Jeruchimowitz and Mhare O. Mouradian

I. Introduction

This article explores the perceived pros and cons of arbitrating a real estate litigation/shopping center matter in contrast to litigating the matter in court. Many leases or contracts contain arbitration clauses and often these clauses are boilerplate provisions, which were an afterthought and rarely negotiated let alone thought about. Yet, according to an American Arbitration Association (AAA) report, in 2019 and 2020, nearly 10,000 commercial arbitrations were filed with claims totaling about $18 billion. With so many arbitrations filed and that much in claims, it is amazing that arbitration provisions are an afterthought. This article encourages a closer look at your arbitration provisions and the advantages and disadvantages of arbitration. And if there is going to be an arbitration, then this article explores thoughtful ways to negotiate it.

II. Courts/Judicial Process Favors Arbitration

Whether a dispute is arbitrated is ultimately up to the parties and whether their agreement provides for such arbitration. But if there is a question whether the parties agreed to arbitrate, courts tend to favor that approach and believe arbitration has substantial benefits. Here are some examples:

- *Bank of Am. v Phulip Kushner Assocs*., 2008 N.J. Super. Unpub. LEXIS 2270, *8 (N.J. Sup. Ct. June 18, 2008) (dealing with a lease dispute, the court recognized that "New Jersey has endorsed arbitration as a favored means of dispute resolution.") (citing *Barcon Assocs., Inc. v. Tri-County Asphalt Corp*., 86 N.J 179, 186, 430 A.2d 214 (1981) (New Jersey courts favor arbitration because it offers many advantages to the parties.").
- And the New Jersey court continued: "Arbitration is 'a substitution, by consent of the parties, of another tribunal for the tribunal provided by the ordinary processes of law,' and its object is 'the final disposition, in a speedy, inexpensive, expeditious, and perhaps less formal manner, of the controversial differences between the parties." *Barcon*, 86 N.J. at 187 (citations omitted). "Arbitration can attain its goal of providing final, speedy, and inexpensive settlement of disputes only if judicial interference with the process is minimized; it is, after all, 'meant to be a substitute for and not a springboard for litigation.'" Id.
- *Amstar Mortg. Corp. v. Indian Gold, LLC*, 517 F. Supp. 2d 889, 893 (S.D. Miss. Sept. 25, 2007) ("The Federal Arbitration Act ("FAA") was enacted to overcome judicial resistance to arbitration by establishing a national policy in favor of arbitration and placing arbitration agreements on the same footing as other contracts." (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006)). "The pro-arbitration policy leads the courts to resolve doubts in favor of arbitration." Id. (citing *Primerica Life Ins. Co. v. Brown*, 304 F.3d 469, 471 (5th Cir. 2002)).

  Pepin v. Am. Univ. Ins. Co., 540 A.2d 21, 22 (R.I. 1988):

  "We have repeatedly stated that the purpose of arbitration is to provide a quick and inexpensive means finally to resolve a dispute. For example, in *Dutson v. Nationwide Mutual Insurance Co*., 119 R.I. 801, 805, 383 A.2d 597, 599 (1978), we stated, "The whole purpose of arbitration is to provide an alternative procedure whereby two or more parties can finally resolve their differences in an expeditious and economical proceeding." Similarly, in *Soprano v. American Hardware Mutual Insurance Co*., 491 A.2d 1008, 1011 (R.I. 1985), we stated, "One of the most significant advantages of arbitration * * * is that it is a relatively prompt means of concluding a dispute."

And the American Bar Association in February 2021 overwhelmingly adopted a resolution supporting "the use of arbitration of business-to-business disputes, both domestically and internationally, as an efficient and economical method of dispute resolution."

III. Perceived Benefits of Arbitration

Arbitration is a method of resolving disputes outside of court, which can have a number of advantages.

Control: Parties have more control of the arbitration process in that they draft and curate language in an arbitration clause, choose the arbitrator(s), location, and timing of the arbitration, and the parties choose the type of decision sought at the conclusion of the arbitration. This eliminates forum or judge shopping.

Specialized Experience: Arbitrators are usually decisionmakers who have experience dealing with the matters in dispute. In fact, parties typically seek out individuals with the knowledge, experience, and expertise to account for all relevant factors in dispute, which often is favorable to clients. For example, in shopping center litigation, the dispute often revolves around specific lease language, or issues related to exclusives, co-tenancy or specific industry matters like appraisals for a rent reset or a CAM dispute. Having arbitrators with specialized knowledge in the industry seems far better for both parties than leaving the matter in the hands of a singular assigned judge or random jury.

Less Expensive: This type of alternative dispute resolution often tends to be less expensive in that the parties usually split the arbitrator's fee. Arbitration typically costs less than preparing for trial, making arbitration often more cost effective for clients.

Faster: Arbitration is much faster than litigation. Arbitration can occur in a matter of months – sometimes as soon as an arbitrator is selected – while litigation, which is dependent on discovery, court schedules, and various other factors, typically takes years.

Less formal: Arbitration generally is also less formal and more easily adapted to the needs of the involved parties in that the complex rules of evidence and procedure do not apply in arbitration proceedings. Additionally, less discovery is usually involved.

Private/Confidential: Another clear benefit of arbitration is that the arbitration hearing occurs privately – without a public record and only with the involved parties to the dispute.

Finality: Arbitration also concludes with a final, unappealable result – providing a sense of finality to those involved in that the matters over which the arbitration occurs can officially be laid to rest.

IV. Perceived Disadvantages

What might appear as an advantage, some might argue is an illusion in modern cases.

Not for every case: There might be some cases not suitable for arbitration where, for example, the dispute is over a legal interpretation of the meaning of a contract, or other specific reason for that case. Therefore, parties might want a judge to interpret the legal meaning of a shopping center lease just like any other contract. Also, depending if you are the plaintiff or defendant, having a case go to arbitration or court may depend on the claims or the defenses. For example, if the landlord or tenant has a legal defense to the lease dispute, that party may want the defense decided by a judge rather than arbitrators. Or, if the landlord or tenant is seeking damages based on an expert opinion, the defending party may want to challenge the expert in a court rather than in an arbitration.

Not as cost effective or quick as proponents claim it is: Although there might be some speed and there might be some cost savings, the question is whether there is a significant amount to not go to court and have it resolved in arbitration. In the era of electronic discovery, unless discovery is really curtailed, the savings in arbitration may just not be there. Also, if there is a multi-party lawsuit and some parties are not in the arbitration but in the larger lawsuit, the arbitration might slow down the resolution of the underlying lawsuit. Take, for example, a mechanics lien/construction case in a shopping center where, in such a case, the underlying mechanics lien and/or foreclosure would be handled in court, the subcontractor, contractor and/or owner in the case first must sort out claims in an arbitration. Similarly, a multi-party shopping center dispute with multiples leases or a Reciprocal Easement Agreement, may be delayed if only some parties are subject to arbitration. Such a resolution in the court case will be delayed significantly and the costs in the arbitration, including attorney's fees spent for the arbitration, may make

the overall case more expensive and possibly more difficult to settle. This might be a reason to consider whether arbitration is situational.

Separately, once an arbitration is over, the prevailing party must still then confirm the award. This might result in additional challenges from the non-prevailing party and place the private award in the public realm. When you add that judicial component in, have the parties really saved that much time and expense?

Less formal rules: There is no doubt arbitrations are less formal and much more testimony will come in that might be barred in a courtroom like hearsay or testimony about parties' intent even if the contract is unambiguous. This lack of formality leaves a sense of uneasiness for parties on what the arbitration panel will or will not consider and, based on the case, this might put one party or both parties at a disadvantage.

Lose appeal rights: Except for limited issues that can be appealed, the arbitration is final. Although there are variations and practitioners should review relevant state and federal law, typically appeals are limited to the grounds set forth in the Federal Arbitration Act (9 USCS § 10): 1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Therefore, if there were errors in the underlying arbitration, they cannot be appealed and the losing party is giving up a significant judicial right it has when it agreed to an arbitration. Note, however, parties can agree in an arbitration provision to preserve appeal rights including that the AAA allows for appeals within the AAA if the parties agreed to it.

Accountability: Because there is limited appeal right for arbitration awards and verry informal rules (unless otherwise agreed to by the parties), along with arbitrations being confidential, some parties might wonder and criticize that the arbitration panel is not accountable. However, one could counter that arbitrators would not be selected if they had a bad reputation.

Split the baby: Statistically, this is not true. Yet it is a stereotype that many think that arbitrators cut down awards or relief, so the plaintiff wins something but not everything requested and/or defendants are not completely exonerated. This criticism fails to account for the fact that judges and juries make compromise judgments too. But with a true lack of accountability, some parties would rather trust their lawsuit will be decided fully and fairly based on the law and the facts in a courtroom.

V. Is Arbitration Situational?

A frequent issue between disputing parties is whether to arbitrate or go to court. Yet sometimes, the parties spend considerable amounts of time and money trying to determine who should ultimately make that decision. If one party seeks to arbitrate a claim and the other challenges the arbitrability of the claim, who should decide if the claim(s) is arbitrable – the arbitrator, or the court?

In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947, 115 S. Ct. 1920, 1926, 131 L. Ed. 2d 985 (1995), the U.S. Supreme Court held that courts — not arbitrators — must decide questions of arbitrability unless there is "clear and unmistakable evidence" of the parties' intent to submit questions of arbitrability

to the arbitrator. Such evidence is often found in what has come to be known as a "delegation" clause in the contract between the parties, which specifies that the arbitrator should decide this threshold issue.

On Nov. 3, 2023, the Supreme Court agreed to hear yet another case (*Suski v. Coinbase*, 55 F.4th 1227 (9th Cir. 2022)), raising the same question — whether a court or an arbitrator should decide the question of the arbitrability of a dispute. It's clear that this issue remains continuous if the Court is willing to hear a fourth case on this subject.

Court cases typically encourage settlement more than arbitration because, more often than not, parties favor the outcomes of a settlement where they decide the terms over final decisions decided by others, including a judge, jury, or an arbitrator. At the end of an arbitration, there is one clear winner and one clear loser – and those decisions are ultimately unappealable. While it is true that parties favor arbitration because it is cost-efficient, fast, and private – the same can be said for settlements.

A. *When to Compel Arbitration? What Happens if the Other Side Files a Lawsuit in Civil Litigation?*

Arbitration rights can be voluntarily relinquished or waived if a company does not diligently pursue arbitration. In 2022, the U.S. Supreme Court unanimously held in *Morgan v. Sundance* that the right to arbitration can be waived like any other contractual right, ridding parties of the requirement of demonstrating prejudice in addition to the intention to waive the arbitration right. 596 U.S. 411, 419, 142 S. Ct. 1708, 1714, 212 L. Ed. 2d 753 (2022). In doing so, the Court reasoned that the Federal Arbitration Act's policy favoring arbitration "*does not authorize federal courts to invent special, arbitration-preferring procedural rules*." Id. at 418. Rather, the policy is "merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts." *Id.*

For this reason, especially following *Morgan v. Sundance*, a party seeking to compel arbitration should immediately communicate their intent to do so, and thereafter properly move to compel.

If the other side files a civil lawsuit, the party should raise arbitration as a defense and move to compel the arbitration. The party seeking to arbitrate should not actively participate in the litigation by engaging in active discovery, for example, or they might unintentionally waive their arbitration rights. *See Hurley v. Deutsche Bank Tr. Co. Americas*, 610 F.3d 334, 339 (6th Cir. 2010) (where the court found waiver after a party filed several motions and engaged in extensive discovery). In another case, the court found waiver after a party "took several actions that were inconsistent with its right to arbitrate," including filing two motions to dismiss and serving initial disclosures. *McCoy v. Walmart, Inc.*, 13 F.4th 702, 704 (8th Cir. 2021).

B. *What is Mass Arbitration?*

A mass arbitration is where a large number of individual arbitrations are filed (or threatened to be filed) asserting similar claims. This has emerged as a way of resolving a large number of individual claims. In a civil litigation where one or more parties compel arbitration on arbitrable issues, the multi-party litigation will be stayed until the arbitration concludes. A court cannot force all parties into an arbitration.

Importantly, however, the U.S. Supreme Court held in *KPMG LLP v. Cocchi*, 565 U.S. 18, 22, 132 S. Ct. 23, 25–26, 181 L. Ed. 2d 323 (2011) that a court must compel arbitration of the arbitrable claims where both arbitrable and non-arbitrable claims exist. A court cannot avoid doing so in an effort to dodge piecemeal or fragmentary litigation.

C. *Arbitration Forums*

There are several organizations available to administer an arbitration, including AAA, JAMS, ICC, USAM, CPR, and SMA, as a few examples. Two of the larger organizations are AAA and JAMS. One of the key differences between the two organizations is the type of arbitrators they offer. JAMS, for example, is well-known for having retired judges to handle sophisticated disputes (among other things). AAA, on the other hand, is known for having excellent construction arbitrators to handle multi-faceted disputes (among other things).

VI. Drafting Tips

There are many components of a boilerplate arbitration provision to consider refining to create an appropriate arbitration provision. For example, are there steps before arbitration, such as an executive meeting or mediation? Are there time parameters for events to occur? What is the timing for an arbitration? What arbitration organization will the arbitration be conducted under and what rules? What is the location? Is there a scope of discovery? What type of decision? Are there appeal rights? And so much more.

Consider the following arbitration provision with suggested ideas or concepts in bold:

A. *Initial Dispute Resolution.*

The parties agree to use best efforts to settle any dispute, claim, question, or disagreement directly through consultation and good faith negotiations which shall be a precondition to either party initiating a lawsuit or arbitration. **[Consider adding a time frame when this has to occur and if it fails to occur, then consider waiver language]**

B. *Agreement to Binding Arbitration.*

If we do not reach an agreed upon solution within a period of thirty (30) days from the time informal dispute resolution is pursued pursuant to Section [_](A) above, then either party may initiate binding arbitration, which shall take place in _____. **[Consider adding time frame when this has to occur and if fails to occur, then consider waiver language]** All claims arising out of or relating to this Agreement (including their formation, performance and breach), the parties' relationship with each other and/or your use of the Service shall be finally settled by binding arbitration administered on a confidential basis by _____ [JAMS, AAA or other group], in accordance with the _____ Rules and Procedures, excluding any rules or procedures governing or permitting class actions. **[Consider whether agreement up front to type of discovery, including e-discovery. or if depositions]** Each party will have the right to use legal counsel in connection with arbitration at its own expense. The parties shall select a single neutral arbitrator **[or multiple arbitrators and procedure for selecting arbitrators]** in accordance with the _____Rules and Procedures. **[Consider type of arbitrator or specific arbitrator]** The arbitrator(s), and not any federal, state, or local court or agency, shall have exclusive authority to resolve all disputes arising out of or relating to the interpretation, applicability, enforceability or formation of this Agreement, including, but not limited to, any claim that all or any part of this Agreement is void or voidable. The arbitrator shall be empowered to grant whatever relief would be available in a court under law or in equity. The arbitrator's award shall be in writing and provide a statement of the essential findings and conclusions, shall be binding on the parties and may be entered as a judgment in any court of competent jurisdiction. The interpretation and enforcement of this Agreement shall be subject to the Federal Arbitration Act. **[Consider timing of when events in arbitration must occur, timing for**

decision, and if needs to be reasoned] Judgment on the arbitration award may be entered in any state or Federal court sitting in _____ or in any other applicable court. **[Consider if want appeal rights within confines of AAA for example]**