ALM | LAW.COM

New York Law Journal

Dispute Resolution Through the Lens of the Tech and Finance Sectors

By Myrna Barakat Friedman
October 25, 2023

During a recent Practising Law Institute panel discussion, I gathered corporate lawyers, litigators and arbitrators to discuss certain trends in arbitration agreements and arbitration more generally. It was a unique opportunity to encourage a dialogue among the various constituents, and led to some fascinating exchanges on the arbitration ecosystem's desire and ability to adapt to the needs of certain industries.

Two sectors come to mind namely financial institutions and technology as ripe to use arbitration but often still reluctant to do so. In this article, I discuss developments in arbitration procedural rules as they relate to four issues that seem to be the key bases of such reluctance: the "optionality" of confidentiality, speed and expedited procedures, early dismissal opportunities and appealability of an arbitral award.

Confidentiality 'Optionality'

Arbitration is a private process but not necessarily a confidential one. While arbitrators must treat arbitration matters as confidential, the parties are not always required to do so. The scope of party confidentiality obligations depends on the rules of the arbitration administering institution,

the parties' arbitration agreement itself, and any other agreement the parties may elect to enter into once a dispute arises. It will also be subject to applicable law, which will vary based on the seat of the arbitration and the law governing the arbitration.

Even in situations where the confidentiality obligations of the parties are strictly defined, the award (and additional arbitration matters) may become public at the time enforcement of the award is sought in court. That said, confidentiality tends to be a core feature of arbitration, one that all constituents have historically wanted to protect. To that end, domestic and international

administering institutions have established clear confidentiality rules. Further, parties may add confidentiality protections in their arbitration agreement and enter into a confidentiality stipulation once arbitration is initiated.

Although the general view is that confidentiality is core to arbitration, parties may actually prefer to make public certain elements relating to the resolution of a dispute, at least in some cases. For example, parties transacting in bond and other financial markets may want arbitral awards to be public for their potential precedential value.

Similarly, as new technologies are developed, there may be greater legal uncertainty related to novel issues surrounding such developments. The technology sector may welcome some greater transparency in the arbitral process. While arbitral awards (unlike court rulings) are not by their very nature precedent-setting, publicizing arbitral awards can at least give transaction parties, and arbitrators of future disputes, an indication of how a matter may be analyzed going forward.

Consistent with this view, a growing trend exists for domestic and international administering institutions to publish redacted versions of certain awards. Regardless of their own position on the matter, the institutions will generally defer to the parties to the extent they agree between themselves that an award be made public.

Procedural Speed and Efficiency

The financial and technology industries are not alone in stressing the need for speedy and efficient processes. However, it may be of greater importance to them given how quickly new technologies arise and their market valuations fluctuate.

Technology companies also tend to be more fragile and swift dispute resolution may at times be necessary for their funding, competitive positioning and, more generally, survival. And while some financial disputes can be quite complex, others may be more akin to simple collection actions, where financial institutions may look to avoid procedural burdens of litigation. To address those needs, a growing number of administering institutions have established expedited procedures that parties can elect to use.

Their rules generally also allow for the appointment of an emergency arbitrator to address time-sensitive, urgent requests for relief. Further, administering institutions often provide a framework to allow for joinder and consolidation of cases in specific circumstances.

These provisions can have a significant streamlining impact on the resolution of disputes involving multiple parties and contractual arrangements. These relatively new accommodations will need to be refined to tackle some questions they may raise as parties look to apply them; they nonetheless offer a solid starting point for arbitration parties' desire for speedy and efficient adjudicative processes.

Early Dismissal

The ability to dispose of meritless claims as well as meritless defenses early in the adjudicative process tends to be a key issue for financial institutions eager to focus on substantive issues, and not waste time and resources on matters that are clearly determinable.

For example, a bank will want early resolution of a dispute involving a simple debt claim where the fact of non-payment is uncontested, especially since borrowers will often assert questionable lender liability claims as a defense to non-payment. In response to these concerns, arbitral institutions have adopted varying procedural rules that give arbitral panels early dismissal powers.

Although the standards to grant motions to dismiss may be high, in many cases they offer sophisticated parties the tool they need to empower an arbitral tribunal to decide on some issues early on and zero-in on the more nuanced issues in due course. It's also an indicator that parties themselves can provide for a framework

for an early dismissal process in their arbitration agreements.

Appealability of Awards

Arbitration constituents generally view the finality of arbitration awards as a core attribute of arbitration, one that further supports speed and efficiency. Generally, once an arbitral award is issued, a party's sole recourse is to request that a court vacate or refuse to enforce that award. Even then, in reviewing an award, under the Federal Arbitration Act, courts are substantially limited to the procedural aspects of the arbitration and will not revisit the merits of the dispute.

Some financial institutions are leery of arbitration in certain cases because they fear the possibility that it will result in a decision that "splits the baby" instead of one based solely on legal merit. Regardless of whether this fear is well-founded, it appears to persist and might be addressed by a more widespread acceptance of a right to appeal.

During our Practising Law Institute discussions, a clear consensus existed among all of my arbitrator colleagues and the litigators that finality is an essential attribute of arbitration. They believe that giving parties an option to appeal an arbitral award is contrary to the fundamentals of arbitration. I take a different view. I believe party autonomy to be the most fundamental principle of arbitration, from which everything else flows. I view the parties' ability to take control of the process that will determine their fate to be of utmost importance.

So long as the parties are sophisticated players, I support any process they select that doesn't offend basic ethical tenets. I consider our role as arbitrators to be both adjudicators of disputes as well as "empowerers" of party control. I therefore favor parties agreeing to an appeal process, if they so choose, and administering institutions providing a platform and framework for such a process (as a number of them currently do). I am confident that all my colleagues who sit as neutrals, faced with an arbitration agreement that calls for an appeal process, would comply with, and uphold, such an arbitration agreement. However, their resistance to it is a philosophical position that I believe merits close review.

Numerous arbitration features are particularly attractive to the financial and technology sectors. The ability to select adjudicators who are knowledgeable in the intricacies of the subject matter stands out. Similarly, the jurisdictional neutrality that arbitration offers parties engaged in multi-jurisdictional transactions and disputes is increasingly important for such global sectors. It would be a lost opportunity if arbitration constituents force industry players to choose between the benefit of these features and the appealability of awards offered by courts.

Arbitration will never replicate (nor want to replicate) litigation in many respects. Some court features, such as expedited processes and early dismissal, have been adopted by arbitration administering institutions to encourage speed and efficiency. These procedural changes will vary from one arbitral institution to the other.

Several of the party concerns generally raised can be addressed by, on one hand, naming an arbitral administering institution that has adopted procedural rules that are in line with the parties' needs, and, on the other hand, carefully drafting arbitration agreements tailored to the specifics of the transactions to effectively complement the rules of the selected administering institution.

Myrna Barakat Friedman *is commercial arbitrator, mediator and dispute prevention neutral. She can be reached at mbarakat@mbcap.com (BarakatADR.com).*