

A pineapple with its green crown sits in a field of vibrant green grass. The background is a clear blue sky with soft, white clouds. The entire scene is framed by a white horizontal band in the center, which contains the conference title.

THE HOSPITALITY LAW CONFERENCE: SERIES 2.0

April 12-13, 2018 • Houston, TX

HOTEL-RELATED ARBITRATION AND OTHER DISPUTE
RESOLUTION MECHANISMS
(AS ALTERNATIVES TO LITIGATION)

2018 HOSPITALITY
LAW CONFERENCE:
HOUSTON

APRIL 12-13



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MEDIATION

ADVANTAGES:

- The parties control the process from the selection of the mediator, the timing of the sessions and the outcome; the mediator is not the “decider”, just a facilitator.
- The obvious advantage is that mediation, properly conducted for parties honestly willing to find some middle ground in order to move on, can be fast and cost effective.



MEDIATION

ADVANTAGES (continued)

- Mediation tends to be somewhat “friendly” in that by its nature it plays down the adversarial nature of the dispute as the mediator seeks to find common ground for agreement; the relationship between the parties is left intact.



MEDIATION

DISADVANTAGES

- Mediation can serve as uncontrolled or undisciplined discovery of a party's position where the party is forthcoming during the process in the hope of reaching a compromise and that information is later used in an arbitration or litigation.
- Mediation can come apart in the “memorialization” phase wherein the lawyers attempt to embody the mediated settlement in a legal document; sometimes the devil in the details emerges, details that may not have been considered in friendly mediation.



EXPERT DETERMINATION

ADVANTAGES:

- Expert determination is likely to ensure the technical accuracy and appropriateness of the solution.
- Expert determination is likely to reinforce party autonomy as the parties themselves can control the process and freely appoint the expert as well as define the expert's mission and tasks.
- Expert determination is likely to ensure confidentiality as the opinion will very rarely be made publicly available.



EXPERT DETERMINATION

DISADVANTAGES:

- Non-lawyers may not be sensitive to evidentiary issues or contract nuances that are screened in a judicial setting.
- It isn't clear if a court will enforce the decision, but the contract wherein expert resolution is provided can make it clear that the decision is final, binding and non-appealable



ARBITRATION

ADVANTAGES:

- The parties to the dispute usually agree on the arbitrator, so the arbitrator will be someone that both sides have confidence will be impartial and fair.
- The dispute will normally be resolved much sooner, as a date for the arbitration hearing can usually be arrived at a lot faster than a court date.
- Arbitration is usually less expensive than litigation (or is supposed to be!). Partly that is because the fee paid the arbitrator is a lot less than the expense of paying expert witnesses to come and testify at trial. (Most of the time the parties to arbitration split the arbitrator's fee equally). There are also lower costs in preparing for the arbitration than there are in for preparing for a trial.



ARBITRATION

ADVANTAGES: (continued)

- Arbitration is faster than litigation (or is supposed to be!) because the parties are not subject to the court calendar.
- Unlike a trial, arbitration is essentially a private procedure, so that if the parties desire privacy then the dispute and the resolution can be kept confidential.
- If arbitration is binding, there are very limited opportunities for either side to appeal, so the arbitration will be the end of the dispute. That gives finality to the arbitration award that is not often present with a trial decision.
- Arbitration is appropriate where the parties are in different countries – i.e., in an “international dispute” - and none of the parties is willing to submit to the jurisdiction of the courts of another party’s country.



ARBITRATION

DISADVANTAGES:

- If arbitration is binding, both sides give up their right to an appeal. That means there is no real opportunity to correct what one party may feel is an erroneous arbitration decision.
- If the matter is complicated but the amount of money involved is modest, then the arbitrator's fee may make arbitration uneconomical. Remember that the parties may be paying fees of an administrative agency, hourly rates of each of three arbitrators, their own counsel fees and expert witness fees.
- Costly experts may be used in arbitration to the same extent as in litigation.
- Rules of evidence may prevent some evidence from being considered by a judge or a jury, but an arbitrator may consider that evidence. Thus, an arbitrator's decision may be based on information that a judge or jury would not consider at trial.



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ARBITRATION

DISADVANTAGES: (continued)

- If certain information from a witness is presented by documents, then there is no opportunity to cross-examine the testimony of that witness.
- Discovery may be more limited with arbitration. In litigation, discovery is the process of requiring the opposing party -- or even a person or business entity who is not a party to the case - to provide certain information or documents. As a result, many times arbitration is not agreed to until after the parties are already in litigation and discovery is completed. By that time, the opportunity to avoid costs by using arbitration may be diminished.



ARBITRATION

DISADVANTAGES: (continued)

- If arbitration is mandatory or required by a contract, then the parties do not have the flexibility to choose arbitration only when both parties so agree. Mandatory arbitration allows one party to force the other party to use arbitration, leverage that may favor the party with the deeper pocket.
- The standards used by an arbitrator are not clear, although generally the arbitrator is required to follow the law. However, sometimes arbitrators may consider the "apparent fairness" of the respective parties' positions instead of strictly following the law, which could result in a less favorable outcome for the party who is favored by a strict reading of the law. This consideration is often overlooked in evaluating the applicability of arbitration.



THANK YOU!



