To Arbitrate or Not? It's Time to Reconsider

by Ronald S. Hodges, Partner, and Kiara W. Gebhart, Associate, Shulman Hodges & Bastian LLP

Hopefully you are one of the lucky few to have dodged the unfortunate event of litigation. Regrettably, the climate today has resulted in cynics opining there are only two types of companies in California: those that have been sued and those that will be. Given the unfortunate reality that doing business in California necessarily includes the cost and uncertainty of litigation, it is imperative that companies frequently take steps to minimize the cost of litigation and improve their chance of success. The starting point is a discussion on how you prefer to have litigation matters handled. Before embarking on such a discussion you must understand the alternative dispute resolution ("ADR") options available so necessary changes can be made to your company's standard forms (contracts, invoices, etc).

Prior to 2005, businesses had more ADR options than today; (1) a jury waiver to ensure the ruling is made by a judge rather than a jury; (2) a judicial reference agreement referring any dispute to a "referee"; (3) a binding arbitration agreement; or, (4) exclude an ADR provision from your documents altogether and allow the matter to play out in court.

If your ADR provision includes a jury waiver or judicial reference agreement, it is necessary to revise. Even if your documents already include a boilerplate ADR provision, it is likely outdated given the recent changes to this area of the law.

In 2005, the California Supreme Court ruled that pre-dispute contractual jury waivers are unenforceable, reasoning that such a waiver would only be allowed if "prescribed by statute," which it is not. The Court also decided to apply the prohibition on jury waivers retroactively. Accordingly, if your jury waiver pre-dates August 2005, it is still unenforceable despite the potentially overwhelming benefit both parties intended when reaching an arms-length (fair) agreement.

So why is an arbitration agreement enforceable while a jury waiver is not? The Supreme Court reasoned that while both effectively result in the waiver of a jury trial, there is statutory authority for the former but not the latter. The Court emphasized California's strong policy favoring arbitration – and the absence of any policy favoring bench trials over jury trials. Arbitration conserves judicial resources while jury waivers do not.

After 2005, businesses continued to accomplish essentially the same result by including "judicial reference" provisions in their contracts. These provisions have the advantage of permitting the parties to define by contract the qualifications and background of the referee. Despite its obvious attraction, in February 2011, the California Supreme Court held that a court has discretion to refuse to enforce pre-dispute reference agreements. In other words, a court may refuse to honor the prior contractual agreement of the parties.

In light of all this, how do you best minimize the cost and uncertainty of litigation? The answer depends on the needs of your particular business as well as your tolerance for the respective risks of conventional litigation versus arbitration.

If you are simply unwilling to risk the uncertainty inherent in a "jury of your peers" deciding your legal dispute, you may prefer arbitration. A well-drafted arbitration provision can reduce the uncertainty of a jury trial, and provide great control over the selection of your arbitrator. It can even specify the particular qualifications of the arbitrator or that the arbitrator be selected from a pre-determined list. The wide variety of options available for the selection of an arbitrator can effectively provide for endless "challenges" to unsuitable arbitrators. Should you find yourself in court on the same dispute, your ability to "challenge" (i.e. replace) the assigned judge would be severely limited.

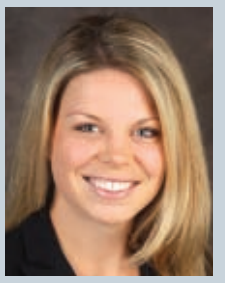
ADR provisions can also be tailored to reduce the cost of resolving a dispute by limiting certain types of discovery and by limiting or excluding any right to appeal. For example, an arbitration provision can narrow the scope of discovery to "documents directly related to the claims and defenses," allocate the potentially enormous cost of e-discovery, or restrict the number and length of depositions. It can even be drafted to ensure your dispute is resolved quickly by detailing when the various stages of arbitration must be completed by; for instance, mandating that discovery be completed 90 days from initiation of the arbitration and that a final award be reached within 180 days. The scope of an appeal can also be negotiated and agreed to, thus providing the right to challenge an arbitrator's ruling that is inconsistent with applicable law.

However, as noted above, arbitration has its disadvantages. Depending on the number of arbitrators, their hourly rates, and the time required (based part on the complexity of the dispute), arbitration can be cost-prohibitive – especially for disputes involving relatively small

continued on page A-19

Ronald S. Hodges
Ronald S. Hodges is a partner of Shulman Hodges & Bastian LLP. Mr. Hodges is also the director of the litigation department and can be reached at rhodges@shbllp.com.

Kiara W. Gebhart
Kiara W. Gebhart is an associate of Shulman Hodges & Bastian LLP. She is a member of the firm's litigation department and can be reached at kgebhart@shbllp.com.



Mattson Resources:

Staffing solutions for a multiple of industries

Mattson Resources has established themselves as a premier source for growing businesses in the region

Mattson Resources has quickly grown into one of the most prominent staffing, recruiting and payroll firms in Orange County. Mattson Resources has grown by 150% in the last three years. While many staffing companies have pared down their staff, Mattson Resources continues to expand into target markets set for expansion in Orange County. Specialty divisions in IT and Engineering are geared for support in the software, green energy and medical device industries. Accounting and Finance support all types of business from clerks to CFOs. Mattson's Administrative division boasts 17+ years average experience within its core recruiter group. The Administrative group places positions from clerks to high-level marketing, purchasing, and customer service managers. Their skilled industrial division has 40+ years experience in all facets of manufacturing, with specialties in plastics, medical devices, pharmaceutical and general labor.

Mattson is also a Certified Woman Business Enterprise. The company is led by Linda Elder, a 30-year staffing industry veteran. "Our vision for the inception of Mattson Resources was to bring the needs of Orange County's diverse economy together with exceptional recruiting talent to fill the service voids provided with other providers." Having worked with over 1,800 Orange County companies in the last three years and placing 3,500 candidates, Mattson Resources has met their goal of establishing themselves as a premier source for growing businesses in the region.

Mattson Resources has an exclusive rewards program that provides their clients a multitude of gift options, much like frequent flyers miles for credit cards. This is a totally unique program in the staffing industry. They also provide quarterly legal seminars to their client companies with some of the most prominent attorneys in Southern California.

Mattson Resources Orange County offices are conveniently located in the Metro Point Towers at Metro Point Center in Costa Mesa. For more information, please call (714) 881-1850.

TO ARBITRATE OR NOT? IT'S TIME TO RECONSIDER

continued from page A-18

dollar amounts. With the implementation of fast track procedures, submission of relatively small disputes to the court's fast-track programs could result in a quicker and less costly resolution. After all, you will not have to pay for every moment the judge works on your case. Moreover, binding arbitration through the use of retired judges carries with it an increasing concern regarding bias of judicial officers who may be motivated by hopes of repeat business from customers obtaining favorable results.

Traditional litigation also provides more certainty the Court will apply the applicable rules of evidence and procedure and will follow the law. Arbitrations are less formal and not similarly constrained by the typical procedural and evidentiary rules. Moreover, should the arbitrator's decision be flawed or otherwise unacceptable to you, arbitration generally provides very little or no right to appeal.

Of course, the best option for you will depend greatly on the particular needs of your business. No one solution or arbitration provision fits all. However, an appropriately drafted ADR provision can protect your business in the event a dispute arises, and if the trend continues, you can rest assured one eventually will.