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Arbitrating Hotel Management Agreement Disputes: Beware Of "Arbigation"


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Any discussion of the benefits of arbitration over litigation generally parrots the "well known" benefits. That is, arbitration is generally viewed, by both lay persons and even by most attorneys, as a more economical and efficient method of resolving disputes than traditional litigation. Attorneys and parties are often surprised when arbitration includes complex and burdensome discovery, motion practice, and expensive hearings. As explained below, the line between arbitration and litigation has, at least in some instances, disappeared.

A. The Traditional Benefits Of Arbitration

The general perception of arbitration as a cheaper and faster method of resolving disputes is the result of certain generally-held understandings about arbitration. One common perception and, indeed, mantra of arbitration associations, is that arbitration involves little, if any, of the formal and burdensome discovery processes that are part and parcel of litigation. Thus, most people assume that, in an arbitration, there will be no requirement to produce documents in response to voluminous document requests, to participate in depositions, or to involve third-parties in discovery. It is also generally believed that arbitration is faster than litigation because arbitration avoids the delays associated with overcrowded court dockets. Finally, because of the strict limitations on judicial review of arbitrations, arbitration is considered to be a way to achieve a more final result than litigation, which often involves the potential for multiple appeals. As a result of the perceived expedited nature of the arbitration process, its informality, its finality, and the lack of full blown litigation-style discovery, it also is generally believed that attorneys' fees associated with arbitration will be drastically lower than those in litigation. Private arbitration associations, such as the American Arbitration Association ("AAA") reinforce the general perception of the benefits of arbitration over litigation, touting arbitration, and other methods of dispute resolution, as more expeditious and less costly than traditional litigation.

Based on the general perception of the foregoing purported benefits of arbitration, many attorneys and business people blindly trumpet arbitration as the preferred method of dispute resolution. And, not surprisingly, many hotel management agreements contain boilerplate arbitration clauses. However, while the benefits of arbitration are surely recognized in many matters that are submitted to arbitration, in some instances, the well-known benefits of arbitration simply do not exist.

B. "Arbigation: The Blurring Of The Lines Between Arbitration And Litigation

People with recent arbitration experience will likely tell you that, despite the conventional wisdom, arbitration is not what it is touted to be and often resembles a full fledged litigation. In fact, as a result of the gradual blurring of the lines between arbitration and litigation, some have started to refer to the process as "arbigation".

For example, despite the common perception that litigation-style discovery is foreign to the arbitration process, the decision to allow discovery is generally left to the discretion of the arbitrators. In addition, your adversary may argue that expansive discovery processes are critical to its prosecution and/or defense of its claims. As a result, it is no longer unusual for an arbitration to include one or more of the traditional devices allowed in litigation. In a complex case, your arbitration could include expansive, and burdensome, discovery.

Therefore, you should not be surprised if, despite the fact that you chose to arbitrate, you find yourself being required to produce large volumes of documents (including, of course, undertaking the extremely burdensome task of searching for, and producing, emails), participating in depositions, and even having to explain to third-parties that they must participate in the discovery process. The amount of discovery allowed could be identical to that permitted in litigation. The fact that arbitration is looking more like litigation has not been lost on practitioners, as demonstrated by numerous recent articles in which attorneys are now questioning the advantages of arbitration.

Another common incident of arbitration that surprises parties to arbitrations is the receipt of a sometimes significant invoice from an arbitration association to cover administrative fees, and attorneys' fees for the hourly rates of up to three arbitrators. A party that chose arbitration because of its economical benefits will surely be unpleasantly surprised to learn that he or she will be charged administrative fees that do not exist in litigation, and attorneys' fees for the hourly rates of up to three arbitrators (that obviously are not charged by judges in federal or state court litigations).

Finally, it should be noted that while many arbitration associations trumpet the benefits of obtaining arbitrators with specialized knowledge, none of the major arbitration associations have specialized arbitration panels with individuals who have expertise in the hospitality industry.

C. Whether Your Arbitration Will Be An Arbigation Depends In Large Part On Your Arbitration Clause

As explained above, despite including an arbitration clause in your hotel management agreement, you may be unpleasantly surprised to find yourself in a lengthy, burdensome and costly proceeding. However, there are steps that you can take to help ensure that you experience an arbitration, and not an arbigation.

In order to avoid ending up in an "arbigation," you must carefully consider the type of arbitration that you may need and, as equally important, the types of arbitration you want to avoid. Therefore, it is crucial that you draft and insert an appropriate arbitration clause specific to your agreement. Merely relying on a boiler plate arbitration provision could lead to a lengthy and expensive arbitration process.

However, it is important to note that arbitration continues to be a confidential procedure. Therefore, if the dispute is a sensitive topic for either the hotel owner or manager arbitration remains the best option.

If you do decide to choose arbitration as your preferred method of dispute resolution with your hotel owner or manager, it is critically important that you draft an arbitration provision that sets forth the manner in which your potential arbitration will proceed, including, but not limited to, provisions detailing the scope and types of discovery that will occur if a dispute arises. For example, perhaps you will agree that each side will be allowed one (and only one) deposition. However, depending on whether you are an owner or manager, you may want the opportunity for more expansive document discovery. In addition, you will also want to consider whether your dispute should and will be decided by a single arbitrator, or a panel of three arbitrators. Finally, you should consider whether to insist upon the ability to choose a hospitality industry expert as your arbitrator.

Arbitration can be a more economical and swifter method of resolving disputes than traditional litigation. However, given the discretion that is given to the arbitrator(s) who is ultimately selected, a party to a dispute cannot know in advance whether or not that party will experience some or all of the benefits of arbitration. While there is no way to ensure, in advance of the selection of your arbitrator(s), what type of arbitration will proceed, a carefully tailored arbitration clause is a necessary start.

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