ARBITRATION WITHOUT HEARINGS

Usually, when we think of the way in which our courts function, we assume that the end of litigation should cases fail to settle, is a trial. It makes sense on the surface to assume that the end of arbitration which operates as a private, consensual alternative to the courts would be a hearing. Usually, an arbitral heading before one or more arbitrators results in an award which tells the parties who won, who lost, the amount of the award, and any other remedies that may be applicable, and the costs and interest payable by one party to another.

It is therefore counter- intuitive that not all arbitrations require a formal hearing. And in many situations provided that the parties agree, the final award made by an arbitrator can be delivered very quickly and inexpensively, without the arbitrator meeting anyone.

This can and does happen when the issues involved are very narrow and focused and can be dealt with in the form of written productions delivered by each party. Typically, disputes over valuation of property such as insurance losses or commercial rent increases at the time of lease renewal are appropriate subjects for no hearing arbitrations.

I arbitrated a ‘no hearing’ claim that involved valuation of a retailer’s loss of profit following a break-in at his high end leather goods shop. He discovered on opening his shop one morning that it had been broken into at night and that a large quantity of expensive men’s leather jackets had been stolen. He had a standard property and casualty insurance policy in effect at the time that provided coverage in the event of theft. The loss was about $80,000.00.

The shop keeper made a claim on his policy and documented the cost of the goods stolen and their usual selling price. He supported his claim by attaching accounting evidence that his chartered accountant helped him organize. He had operated the same business in the same location for over 20 years and also supported his claim with years of financial statements, tax returns and notices of assessment. At the end of the day,

with his accountant's assistance he was able to demonstrate his lost profit by calculating his customary selling price for each of the stolen jackets less the cost of that specific inventory.

The insurer declined to accept his claim and engaged the services of a chartered accountant who offered a different theory of value for the stolen goods. The valuation materials supplied were delivered by both sides and attached to the deliveries were confirming letters signed by the parties asking me to arbitrate the value of the loss solely by reference to the materials delivered. I was instructed that neither the parties nor any other witnesses would appear and that my decision was to be based on 'final offer selection'. If I accepted the claimant's position, I was to quantify his loss as calculated by his accountant. On the other hand, if I accepted the insurer's position, I was to quantify the loss based on the value suggested by its accountant.

The theory offered by the insurer's accountant disregarded the historic experience of the policy holder and ignored basic business practice such as examination of the cost of the stolen goods and their ordinary, retail selling price. All of this data was made readily available and the parties, needless to say, had each other's complete submissions.

It took approximately four days in all to read and analyze all of the extensive materials, and to deliver a twelve page award. If a Plaintiff started an action that was undefended, and Plaintiff's counsel set down the action for a damages assessment, the decision would never be made in four days.

Jack Zwicker
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