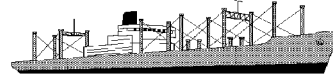




# Rollin' On



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## ARBITRATION, COURTS AND PONY PREDICTIONS

### *Arbitration:*

#### *Maybe yes, maybe no*

I am a big advocate of alternative dispute resolution, or ADR for short. It can keep the costs down, can be faster, and is usually more user friendly. So given the choice, I would opt to go down that road instead of the normal court procedure.

However, it doesn't always work that way. I'm involved in a situation where a large company uses a very onerous, one-sided contract that can work very harshly to the detriment of the other side, even in arbitration as the contract provides.

For example, the contract provides that no "discovery", meaning requesting documents or deposition of or from the other side, of the reason for termination is allowed. In this case, the contract was terminated without any reason given. But the contract provides that either side can have full discovery in regard to damages. We don't need discovery from the other side to know what our damages are, so this is very one-sided. And it gets worse.

The contract provides that the other side can reinstate my client in the event it loses at arbitration. Imagine that, you're shut down or doing something else or otherwise committed, and you're supposed to stop what you're doing and go back to work for the company that terminated you. You thus have won the battle but lost the war. But it gets worse.

The contract provides that the arbitrator has no power to deviate from the terms of the contract. That puts the arbitrator in a box since he/she will feel confined to the provisions of the

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contract. Keep in mind that the arbitrators are on a list from which they receive appointments from companies such as the one involved, and it is not in their best interests to disregard these contractual provisions. A court, on the other hand, can exercise its equitable powers and do what it considers appropriate, within the confines of the law. But it gets worse.

In this case, the contract provides that the party who files for arbitration must pay thousands of dollars in filing fees. So you've had your contract terminated, your method of earning a livelihood, you have no reason given for the termination, and now you have to start writing checks to pursue an arbitration that if you win, the other side can say, nevermind, you can come back to work now. Also, the contract provides that the arbitrator is not allowed to provide a reason for whatever the award may be. The arbitrator can only state who wins, and the amount of damages. It gets worse.

More than six months pass before you even have a hearing of any kind, in this case what is called a preliminary hearing during which the time is set for the arbitration hearing, and the events that are to occur before the hearing, such as the exchange of witness and exhibit lists and the submission of your trial brief. And you guessed it: The hearing is almost one year from the date of the illegal termination of the contract.

Arbitration is supposed to be fast, inexpensive and user-friendly. It is supposed to provide an alternative to the judicial system, which is often

bogged down and rigid. However, it can be abused. In this case, the client would have been much better off to go see the judge than to see the arbitrator who is largely powerless to provide any sort of proper damages or relief.

So be careful what you sign when someone promises arbitration.

### *Predicting Court Time:* *Like betting on the ponies.*

I had a hearing earlier this week. The time was scheduled for one hour, starting at 2:00 pm. We finished around 5:00 pm. There are factors that go into improper guesses. In this case, the other side (it's always the fault of the other side) took a long time to confer with each other, only to return to the court to advise that they could not agree to whatever the proposal was. The judge was very patient, too patient although in the end he got what he needed from the other side. After he got what he needed, he made a ruling, and he did not spend a lot of court time in reaching that conclusion.

Still, betting on how long a certain hearing will go is like betting on a horserace. You just never know; thus, if you have a choice, you get the early am or the first pm setting of the day. That way, if hearings back up, you'll be in front, not at the end.

A friend of mine once was entering a judge's chambers for a hearing, and on his way in, I asked how long he would take since my hearing was to follow. He told me only five minutes. Thirty minutes later, on his way out, I told him that his guess was way off, to which he replied that it only took him five minutes to do his part, and that the opponent took 25 minutes. Likely story, totally without corroboration.

That's all for now. Until next time, keep the cargo *rollin'!*

#### **The Obligatory Disclaimer**

This newsletter is for informational purposes, does not provide legal advice and does not create an attorney-client relationship.

#### **Short Bio**

Admitted to the state bars of Oregon, Alaska, Florida and Massachusetts. Practicing law for over 25 years and emphasizing transportation law, business law and related litigation.