

## ECONOMICAL LITIGATION AGREEMENTS:

# The Best of Both Worlds

By Steven Andersen

In principle, arbitration bypasses much of the time and cost of business litigation, yet still affords a fair and judicious dispute resolution. Usually it works, but sometimes the arbitrator simply makes the wrong decision and the aggrieved party is left with little recourse. One of the things that makes arbitration fast and cheap, after all, is its finality.

"Generally, arbitrators do a good job. I'm very supportive of arbitration, but we've all seen a small number of cases that are just outside the ballpark," says Richard L. Seabolt, co-head of the Commercial, Securities and Antitrust division of the Trial Practice Group at Duane Morris LLP. "In those cases, that finality becomes a bad thing."

In some cases, parties actually challenge arbitration awards in court, or include appellate provisions in arbitration contracts. But even if such efforts eventually succeed in redressing errors of law, the irony is bitter: A contract expressly intended to avoid litigation results in litigation.

"These cases show the pent-up demand that sophisticated clients have to try to sculpt alternative dispute resolution in a way that fits their needs," Seabolt says. "That's what makes the ELA concept Dan came up with so exciting."

### On Appeal

ELA—Economic Litigation Agreements—are the brainchild of Daniel B. Winslow, a Duane Morris partner and former Massachusetts trial judge. While on the bench, Winslow made streamlining

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business litigation a personal priority, and first broached the ELA concept in a paper he wrote for a think tank. But he found the court system had little motivation to take the initiative in providing prompt and affordable justice.

"The civil justice system is a monopoly. It has a lot of strengths of a monopoly and a lot of weaknesses of a monopoly," he says. "When I came back into private practice, I started to rethink the ELA concept. I realized that because so much commercial litigation is contract-based, the power of the contract is tremendous."

Think of ELA as civil litigation prenuptial agreements that use arbitration to manage the discovery process. A judge still makes decisions on threshold motions, dispositive motions and at trial, but the most costly and time-consuming aspect of litigation—discovery—is closely prescribed.

The intent is to provide the best of both worlds: the speed and affordability of arbitration and the ability to appeal in litigation.

"Any trial lawyer worth his or her salt can cost the opposing party a million dollars in e-discovery," Winslow says. "The beauty of this is we're not sacrificing a civil justice system that in the main gets us to the right results, but takes us too darn long and costs us too much to get there."

### Work in Progress

Winslow is in the late stages of vetting the ELA concept before introducing it on a pilot basis. (Several companies are already committed to testing the process in practice.) He's working with the International Institute for Conflict Prevention & Resolution (aka the CPR Institute), an industry-sponsored ADR organization, to develop a model ELA. A draft committee will collaborate on honing the ELA process, which Winslow expects to be ready for companies to incorporate into contracts by the end of the year.

ELA will allow companies to tailor the dispute resolution process to the scale of the controversy. For a smaller and more routine contract, less discovery is allowed. Instead of running to a judge for every minor problem—conflicts over interrogatories, for example—a discovery arbitrator makes the call. In each challenge, by contractual agreement, the loser pays.

The discovery arbitrator is really the linchpin of the ELA process. It will take time to train arbitrators in this new discipline, but Winslow hopes it will be quick to catch on.

"This is cutting-edge stuff," Winslow says. "We've found that general counsel who hear about this clamor for it. Clearly, there is a real need out there. Just last week we had an associate general counsel from Microsoft say he'd like to participate in the drafting process. We see some of the biggest companies in America recognizing the need to improve civil justice administration in a way that the courts either can't or won't."

Interest is particularly high in the technology sector, where time is of the essence. Some nanotechnology has a market value of just 30 to 60 days. A civil litigation process that can take two or three years is not even an option.

Winslow says ELA initially will be used only as an alternative to business-to-business litigation, but he can see other applications.

"It might even have value in business-to-consumer contract disputes," he says. "If a home builder provides a warranty for a \$300,000 home, and it costs \$400,000 between the two parties to litigate the warranty disputes, do you have a sensible process?"

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### Big Upside

"ELA could be a real win-win, but it's one of those things that has to be carefully written so that you don't end up litigating over what the agreement meant," says [Sharon L. Caffrey](#), a Duane Morris partner and co-head of the Products Liability and Toxic Torts division of the firm's Trial Practice Group. "It would obviously change a lot of litigation, especially for businesses. I could see that down the road it could be a model for tort reform, particularly in multidistrict litigation."


Any time a company has cases in multiple jurisdictions arising from the same product, the appeal of a reduced discovery guideline is self-evident. In fact, to some extent, courts already limit the amount of repetitive discovery in mass tort cases. But a standardized process for business litigation would benefit all parties.

"If it takes off at the corporate-to-corporate litigation level, I think it would be great for companies," Caffrey says. "At times companies must make decisions, not necessarily based on the strength or weakness of their position in the litigation

or whether they think that they can prevail, but on the costs of litigating. That's really unfortunate, particularly for smaller companies that might end up being named in additional law suits if they settle too easily. Companies should be in a position to think about what's best for them, and what's best—if they are publicly traded—for their shareholders, rather than to make decisions based primarily on the costs of discovery."

If it proves effective, the ELA process may even help salvage the otherwise viable relationships that are so easily destroyed in protracted litigation, or left tainted by an inequitable arbitrated resolution.

"At the end of the day, it may free companies up to do more business with each other," Caffrey says. "Maybe even a company with whom the business has had a tense relationship in the past."

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