Spring 1999

The Case Against Arbitration

David E. Boelzner
William & Mary Law School, deboelzner@wm.edu

The Case Against Arbitration

Fall-Winter 2002

Spring-Summer 2002

Fall-Winter 2001

Spring-Summer 2001

Fall-Winter 2000

Spring-Summer 2000

Fall-Winter 1999

Spring-Summer 1999

It has been conventional wisdom for a number of years that arbitration is a less expensive way to resolve disputes than traditional courtroom litigation. The standard forms of agreement promulgated by the American Institute of Architects and the American Consulting Engineers' Council contain arbitration clauses, and even when these standard forms are not used, construction contracts often provide for arbitration. The assumption is that arbitration is both quicker and cheaper than traditional litigation.

I must -- as we say in the legal business -- respectfully dissent. Arbitration probably is most often quicker, but it is not always cheaper and, in my view, the trade off between the quality of result and the cost savings, if any, is usually not worth it, except for small claims.

First, let me be clear what we are talking about.

When I say arbitration, I am referring to a formal binding hearing process in which a hired decision-maker, or panel of them, receives documentary and testimonial evidence, judges the facts, applies the law, and renders an award. I am not talking about mediation, which is a neutral evaluation of claims and defenses with the aim of a resolution through compromise. Mediation can be a valuable tool if the parties are reasonably desirous of settling or if one or more parties has an unrealistic perception of the claim.

Arbitration, however, is basically Litigation Light, and like some of the "light" products for dietary consumption, arbitration too often does not live up to its touting. The primary benefit advanced in support of arbitration is also its chief drawback: it is not litigation.

Litigation in the courts can be expensive and burdensome, in terms of the time and resources expended by the parties. This is so for a variety of reasons, but the principal culprit is court procedures that preserve and protect rights. Discovery rules provide for orderly (if slow) exchange of crucial information about each side's case. Evidentiary rules exist to prevent the fact finder (usually a jury of people untrained in the logic of legal proof) from deciding the case on an improper basis. And appellate procedures are available to guard against errors by the trial judge in applying the law. All these protections have the effect of slowing the process and making it more cumbersome, just as the ascent of a cliff face may be slowed by the precaution of ropes and pitons.

When you agree in your contract to arbitration, you are signing away most of these protections.

Discovery is theoretically available in arbitration, though in practice it may be limited. Arbitrators can issue subpoenas but cannot enforce them; a court must be resorted to if a third party proves recalcitrant. Arbitrators typically allow much more "evidence" to come in for consideration than a judge would, including much that is irrelevant. (Judges generally are less strict about evidentiary limits when they are judging the facts than when a jury is, but arbitrators are often even much more liberal.) Although the majority of arbitrators are lawyers, even the lawyers may not be seasoned trial lawyers and few will have the experience of a judge assessing evidence neutrally. Perhaps most important, an arbitrator's decision is virtually unreviewable except for egregious matters like fraud, collusion, etc.

Many awards are unaccompanied by any account of the reasoning behind them, so there is no record upon which any appeal could be based even if an appeal route were available.

These deficiencies are, of course, the very reasons arbitrations can be accomplished more quickly.

When the niceties of procedure need not be observed, matters may proceed more expeditiously. A faster progress to conclusion generally saves money, but how much, and at what expense?

In an arbitration of any size or consequence, the parties will almost invariably be represented by counsel, and attorney's fees are the largest component of the cost of dispute resolution in most cases, whether the resolution occurs in court or through arbitration. Because of the looser and less restrictive approach to the taking of evidence, arbitration hearings can end up consuming more time than a bench trial (a trial to the judge, without a sitting jury). Arbitration does not offer the procedural mechanisms of the motion to dismiss or the motion for summary judgment, which can resolve cases on undisputed facts as a matter of law without having to go to trial ; arbitrations go to full hearing unless the parties settle. In addition, the administrative costs of an arbitration overseen by AAA, for example, are not inconsequential: the filing fee alone can be several thousand dollars, depending on the amount at issue in the case, and in a significant matter you will generally have three arbitrators each billing at anywhere from $800.00 to $2,500.00 per day. By comparison, the federal court filing fee is $150.00 no matter how much money is at issue (state courts are often less), and the judges are provided by the government free of charge.

And what of the quality of decision making?

Certainly there are good and bad arbitrators, just as there are good and bad judges. There is no question that a sensible, intelligent, evenhanded arbitrator can render a salutary and cost-effective service. Unfortunately, there is very little way to control who will decide a particular case. AAA selects arbitrators much the way courts select jurors; the parties are permitted to strike peremptorily a certain number of names from the list and rank the remaining names, and the association selects the arbitrator or panel. The parties have no control over the initial slate of names, which is usually determined by locale and whether the case requires special expertise. Special expertise can also turn out to be a two-edged sword. I have found that when an arbitrator is an architect, for example, he may bring his own inescapable bias to bear on a design issue and ignore the facts and presentations by both sides.

To be sure, you usually cannot select the judge who will hear your case either. But sometimes the range of possibilities can be limited by choosing where the case is filed, and, at the very least, whichever judge gets the assignment will likely be a known quantity to local counsel, who can advise about the judge's preferences, quirks, etc. Often this is not true of selected arbitrators, particularly if you find yourself going to arbitration in a distant city.

While most arbitrators as well as most judges genuinely seek to do justice, I believe judges are more likely to decide a case on its merits, separated from prejudice, sympathy, personal orientation, bias, and other extraneous considerations. This is partly because judges are trained and acquire through experience the ability to segregate, and ignore to a large degree, their personal beliefs and store of knowledge when evaluating the facts of the particular case before them. The second and very important reason is that judges have someone looking over their shoulder, policing the way they render their decisions. Appellate review not only provides an avenue for repairing a ill-conceived decision, but it also constrains trial judges in their initial consideration. Trial judges do not like to be reversed; they naturally seek a course that leaves them immune from criticism upon appellate review.

Arbitrators have no such constraints upon them.

They are supposed to derive their authority from the contract, consider the facts, evaluate them fairly, and apply the law correctly to those facts. But there is nothing that really compels them to do so other than their own sense of duty and responsibility. While in many, perhaps most, cases that is sufficient, it doesn't give me the sense of comfort I derive from the system of judicial review. Without that review, arbitration decisions tend to be, well, arbitrary.

In short, when you agree to arbitration you give up a great deal and I am not sure you gain that much. For small claims, under, say, $25,000 to $50,000, the quicker resolution through arbitration may be just the ticket. Because the stakes are not as high, it is not as devastating if you lose because of poor decision making. But where there is considerable money or significant principle riding on the decision,

you will be legally much better off, and financially not all that much worse off, in retaining your right to a court adjudication. The docket load in applicable jurisdictions may affect the decision; if you are likely to end up litigating in the Southern District of New York, for example, where cases wait a matter of years to come to trial, it may well be more cost effective to arbitrate larger claims. In the Eastern District of Virginia, by comparison, the so called "rocket docket," cases routinely proceed to trial within a few months of filing, a swiftness of resolution that is hard to improve on even through arbitration. Most courts will respect choice-of-forum clauses in contracts, however, so a speedier jurisdiction can sometimes be chosen.

Remember, the parties can always voluntarily agree to arbitrate after the fact, just as they can agree to a mediation.

Many courts nowadays impose a mandatory mediation session before cases are allowed to proceed to trial, and trial judges can be powerful instruments in aid of settlement efforts. Relatively few court cases actually proceed through trial. I see very little benefit in agreeing by contract, in advance, to give up your day in court. When confronted with form contracts or other proposals that would impose an arbitration requirement, my advice is to consider long and hard before agreeing to such a provision and, if you do agree, modify the language so that it applies only to the sorts of disputes where you can tolerate a capricious result without recourse.

About the author: David E. Boelzner, Esq. practices law as a member of a firm with offices in several cities in the U.S.

The CSRF newsletter is published for SPECTEXT® subscribers and others involved in design and construction. To obtain your copy of *Creating a Common Language*®, please contact the CSRF Support Center by telephone at 1-877- SPECTXT or 410-838-7525 or you may e-mail us at supportcenter@csrf.org

Home | About | Board | Research | WebFormat™ | Contact Us | Newsletters
Publications | News Releases | Related Sites | Search