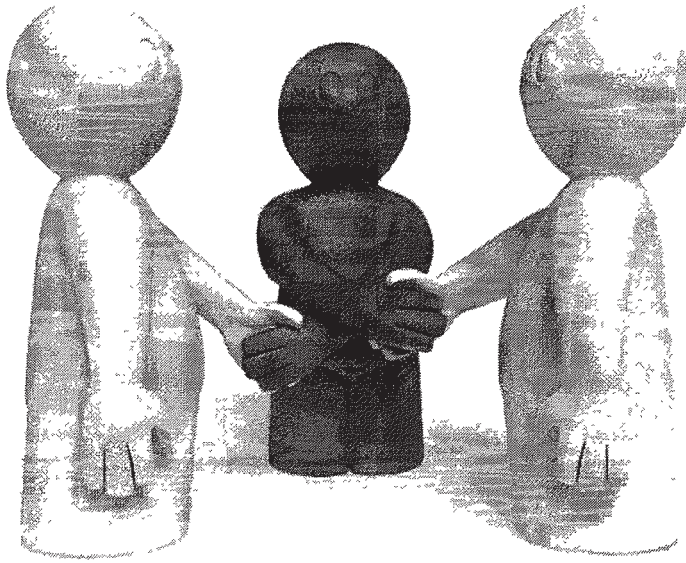




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Why Arbitrate? The Benefits and Savings

By Edna Sussman

Choice – the opportunity to tailor procedures to business goals and priorities – is the fundamental advantage of arbitration over litigation.¹

Much has been written in recent years about whether arbitration has become so much like litigation that arbitration's most commonly cited benefits – saving time and money – no longer pertain. One author, writing in a recent issue of the *New York State Bar Association Journal*, suggested that the cost of the arbitrators' fees makes litigation the less expensive alternative for resolving commercial disputes.² Response to this and other criticisms requires a review of the many benefits of arbitration, a look at the empirical data on the speed and cost of arbitration, and a summary of the mechanisms available to the parties and their counsel to control costs and increase efficiency.³

Why Arbitrate? Benefits

The many benefits of arbitration have led to the extensive use of arbitration as the process of choice for dispute resolution in commercial disputes. These include:

Faster and Cheaper – As is discussed at greater length below, arbitration is the *parties'* process. The parties can craft and implement a streamlined procedure that can sig-

nificantly reduce costs and provide for a much speedier resolution than can be found in court.

Flexible Process – As arbitration is a creature of contract, the parties can design the process to accommodate their respective needs. Hearings may be set at the parties' convenience and the less formal and less adversarial setting minimizes the stress on what are often continuing business relationships.

Subject Matter Expertise – Arbitration permits the parties to choose adjudicators with the expertise necessary to decide complex issues that often require such industry-specific expertise.

Finality – Judicial review of awards is restricted to very limited issues. The finality of awards is particularly important in business transactions. In many instances, with the cost of capital and the paralysis that indecision can bring to businesses, the most important consideration in a commercial dispute is that it be quickly and definitively decided.

Confidentiality – Arbitral hearings, as opposed to court trials, are generally private, and confidentiality can be agreed to by the parties. Most arbitral institutions have specific rules regarding the confidentiality of proceedings and awards. This is an important feature for many cor-

porations, particularly when dealing with disputes over intellectual property and trade secrets.

International Arena

Certain additional features of arbitration in the international context are of particular importance:

Cross-Border Expertise – Arbitration permits the parties to choose adjudicators with the necessary expertise to decide the dispute. Such special expertise can include an understanding of more than one legal tradition – such as common law, civil law or sharia law – an understanding and ability to harmonize cross-border cultural differences and fluency in more than one language.

Neutrality – In the international context, arbitration provides a neutral forum for dispute resolution and enables the parties to select decision makers of neutral nationalities who are detached from the parties or their respective home state governments and courts, in a setting in which bias is avoided and the rule of law is observed.

Enforceability – In the international context, a critical feature is the existence and effective operation of the New York Convention to which over 140 nations are parties. The Convention enables the enforceability of international arbitration agreements and awards across borders. It significantly limits the grounds for refusal to enforce an arbitration agreement or award, making it possible to enforce an award even in a jurisdiction that might otherwise find ways to favor its domestic party. In contrast, judgments of national courts are much more difficult and often impossible to enforce abroad.

Thus, even apart from the lower cost and greater speed, many parties choose arbitration for dispute resolution for one or more of these other benefits.

Is Arbitration Really Faster?

The availability of a process that is quicker than a court proceeding has long been a principal reason for the selection of arbitration for dispute resolution in business transactions. The statistics support the long-held belief that arbitration is a mechanism for achieving speedier dispute resolution. The American Arbitration Association (AAA) reports that for its business-to-business cases in which awards were rendered in 2008, the median length of time from the filing of the demand to the award was 238 days or 7.9 months.⁴ The AAA's international arm, the International Centre for Dispute Resolution (ICDR), reports that for its cases in which awards were rendered in 2008, the median length of time from the filing of the demand to the award was exactly 365 days or 12 months.⁵ The International Institute for Conflict Prevention and Resolution (CPR) reports that for its domestic and international cases combined in which an award was rendered in 2008, the median length of time from the filing of the demand to the award was 347 days or 11.5 months.⁶

By contrast, as reported for 2008, the median length of time for civil cases resolved through trial in the U.S. District Court for the Southern District of New York was 30.7 months for jury cases and 27.0 months for non-jury cases, a number in line with most other federal district courts.⁷ The median length of time from filing in lower court to disposition in the Second Circuit for cases that were appealed was 43.1 months.⁸ The Bureau of Justice Statistics reports that for state court contract cases in the 75 largest U.S. counties, the average length of time from case filing to trial in jury cases was 25.3 months and for bench trials 18.4 months.⁹

Thus as compared with both U.S. federal and state court systems, arbitration affords a significant time saving for the vast majority of cases. Indeed the average case appears to reach resolution three to five times faster in arbitration. And it must be noted that many international court systems are considerably slower than those in the United States.

Counsel expenses and fees are the most significant cost of litigation. Inevitably, a longer process requires the expenditure of additional lawyer time as it creates opportunities for additional discovery and motion practice. The abbreviated schedule in most arbitrations usually results in significant cost savings.

Is Arbitration Really Cheaper?

The reduced cost available in arbitration has historically been viewed as a principal reason to favor arbitration over litigation. It is true that access to the courts is essentially free while arbitration has some costs associated with it – i.e., the cost of the administering institution if one is selected and the cost of the arbitrator(s) – but these must be viewed in light of the total cost of the proceeding, including counsel fees and the other costs of preparing a case. While there appear to be no definitive statistical studies comparing the costs of arbitration with litigation in commercial cases, through informal comparisons and anecdotal evidence arbitration appears to be generally cheaper.¹⁰ Certainly it is a process that can be streamlined by the parties.

Only a small part of the total cost of arbitration goes for the fees and expenses of the arbitrators and the tribunal, the “additional” cost of arbitration. The International Chamber of Commerce reported that 82% of the costs incurred were what the parties spent to present their case, including lawyer fees and expenses, expenses related to witnesses and expert evidence, and other case preparation costs.¹¹ Thus, arbitrator and institutional charges were only 18% of the cost of the arbitration. And it should be noted that the costs for case preparation and presentation are much more easily controlled in arbitration than in litigation.

In litigation one is subject to the Federal Rules of Civil Procedure or parallel state court rules that allow for

broad discovery, including both document discovery and depositions. Typically, discovery is a very costly part of trial preparation, and it can be burdensome to the parties as well. Document discovery is generally more limited in arbitration; depositions are either dispensed with altogether or are severely limited in number. Extensive motion practice is commonplace in court but is much less common and, in fact, usually discouraged in arbitration.

arbitration process, counsel can consider contractually limiting document discovery, barring or limiting depositions, providing for fast-track procedures (such as limiting the length of time from appointment of the arbitrators to hearing and from the hearing to award), providing for "baseball arbitration," limiting the matter to one arbitrator at least for smaller disputes, excluding judicial review where that is permissible, and taking care to draft an arbitra-

If the parties jointly seek to extend or complicate the arbitration, they may obstruct the arbitrator's ability to achieve efficiency goals.

Court cases require more counsel time for preparation and trial than is the case with arbitration. For example, trial-related matters not pertinent to arbitration include evidentiary issues, voir dire and jury charges instructions, and proposed findings of fact and law. Appeals from trial court decisions are commonly filed, a process generally unavailable and, in any case, very unusual in arbitration.¹² All of these additional costs must be factored into any consideration of the costs of arbitration. This suggests that arbitration can be, and generally is, much less expensive even with a paid adjudicator.

What Can Parties Do to Make Arbitration Faster and Cheaper?

While a good arbitrator will manage the arbitration to expedite the proceeding and minimize costs, the parties and their counsel can have a determinative role and in all cases they play a significant part in establishing the timing and costs for the matter. Arbitrators can "jaw-bone," set schedules, emphasize efficiency and cost saving, and work with the parties to streamline the process, but they are required to follow the terms of the arbitration agreement. If, for example, the arbitration agreement establishes extensive litigation-like protocols, the arbitrator must follow them. If the parties jointly seek to extend or complicate the arbitration, they may obstruct the arbitrator's ability to achieve efficiency goals.

There are many steps counsel and parties can take to assure time and cost savings; much is in their hands. Efficiency and cost are not always the parties' principal goals in arbitration, however. But if speed and cost saving are objectives sought by the parties, attention should be devoted to carefully addressing the many choices available, including the following:

Contract Provisions – Counsel are increasingly coming to recognize the importance of tailoring the dispute resolution clause to the specific needs of the situation and are no longer simply inserting the "standard clause" at midnight. In order to assure a speedy and less costly

tration clause that will not provide grounds for a court challenge as to its application. The selection of appropriate governing rules can make all the difference and can set up the time limits and other procedures desired. In selecting the arbitral institutional rules that will govern, they should be reviewed to make an informed choice. Unless the parties want a lengthy proceeding, counsel should not provide for the application of the Federal Rules of Civil Procedure or the Federal Rules of Evidence. Of course it takes two to tango, and this contractual approach to limiting dispute resolution timing and costs only works if agreed to by all parties.¹³

Choice of Institution – Examine the rules of the provider institution selected, if the matter will not be *ad hoc*, in deciding which is most suitable. The rules of the institutions vary. Some have rules that promote more expeditious and less costly resolution.

Choice of Counsel – Retain counsel who understand the interest in efficiency and cost savings and who are experienced in arbitration. Selecting counsel who are accustomed to litigation and see all cases as best tried with a "leave no stone unturned" attitude can lead to the conversion of the arbitration into a litigation-like process, especially if all parties subscribe to that view.

Choice of Arbitrator(s) – Select an arbitrator who (1) is experienced in case management and has the ability to conduct the pre-hearing procedures efficiently; (2) is available to deal promptly with pre-hearing issues, hear the case in the near term, and deliver awards without undue delay after the hearing; and (3) has the ability to move hearings along.

Choices on Discovery – Do not seek extensive document discovery; eliminate depositions altogether or limit them to one or two per party. If one party opposes broad discovery, it is much easier for the arbitrator to set tight limitations, as he or she is not faced with "the parties' process" and right to choose. Provide that a single arbitrator be authorized to rule on discovery issues.

CONTINUED ON PAGE 24

CONTINUED FROM PAGE 22

Choices on Pre-Hearing Issues – Don't make motions other than those as to such threshold issues as the jurisdiction of the tribunal or the statute of limitations. Work cooperatively with opposing counsel to minimize the matters that must be brought to the arbitrator for resolution.

Choices on Scheduling – Pick as early a date for the hearing as is realistic and consistent with the level of preparation the case merits based on client goals – and stick to it. Rescheduling a hearing can often cause a lengthy delay as it can be difficult to find dates on which all participants are available.

Choices for the Hearing – The conduct of the hearing can be expedited by (1) presenting direct testimony by affidavit; (2) limiting the time available for the hearing and, if appropriate, using the "chess clock method" to assure equal time; (3) using telephone and video conferencing technology; (4) choosing a hearing location that minimizes expenses to the parties; (5) conferencing or "hot tubbing" the experts; (6) using a single expert to advise the arbitrators rather than having the parties offer competing experts; and (7) limiting post-hearing submissions.

What Else Is Being Done to Make Arbitration Faster and Cheaper?

Current criticisms of arbitration – that it is neither speedy nor cost-effective – largely stem from two issues: the submission to arbitration of sophisticated business cases of significant monetary value and the advent of globalization with the resulting increase in complex cross-border disputes. Counsel and parties have in recent years chosen to handle some of these matters in a manner that has led to their falling within time frames and cost structures more akin to litigation than arbitration. These cases have led some to question the efficacy of arbitration.

The arbitral institutions have been responsive to the criticism and are devoting significant attention to fostering speedier and cheaper arbitration proceedings by promulgating rules, guidelines and protocols¹⁴ intended to help parties select a more efficient process, and to provide a concrete, rule-based protocol for the arbitrator to resist burdensome party requests. Educational programs for arbitrators now often emphasize the ways in which the arbitrator can facilitate an efficient hearing. To meet the criticism head on, the College of Commercial Arbitrators is holding a national summit in October 2009 for all constituencies to come together to discuss and vote on a series of concrete, practical protocols.

In short, the institutions and the arbitrators are stepping up to the challenge of preserving the time- and cost-saving advantages of arbitration. However, it takes parallel motivation and action by parties and counsel to achieve the goal.

Conclusion

Any system of dispute resolution, whether arbitration or litigation, will have its outliers, the cases that run amok, and it is easy to point to those to support a negative view. However, any realistic analysis must look to the functioning of the overall system and the unique ability the parties have to craft a process that meets their needs. If cost and time savings are important to the parties, arbitration provides a mechanism for achieving those goals. Litigation may have many other virtues but it simply does not offer the parties the opportunity to tailor the process to meet those objectives. ■

1. Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the "New Litigation,"* 7 De Paul Bus. & Comm. L.J. 3 (forthcoming 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1372291.

2. Ronald J. Offenkrantz, *Arbitrating Commercial Issues: Do You Really Know the Out-of-Pocket Costs?* N.Y. St. B.J. (Jul./Aug. 2009), p. 30.

3. This article focuses on commercial disputes. Consumer and employment arbitration which has been controversial in recent years and has been the subject of numerous studies and articles is beyond its scope.

4. E-mail from American Arbitration Association on file with author.

5. E-mail from the International Centre for Dispute Resolution on file with author.

6. E-mail from the International Institute for Conflict Prevention and Resolution on file with author.

7. *Judicial Business of the United States Courts 2008* Table C-10, available at <http://www.uscourts.gov/judbus2008/contents.cfm>.

8. *Id.* at Table B-4A.

9. *Civil Justice Survey of State Courts*, Bureau of Justice Statistics 2005, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cbjtsc05.pdf>.

10. Susan Zuckerman, *Comparing Cost in Arbitration and Litigation*, 62 Disp. Res. J. 42 (2007). An anecdotal study in which three construction litigators and arbitrators concluded that litigation was 27% more expensive than arbitration even assuming that several depositions were taken in the arbitration and excluding the costs of appeals in a court proceeding.

11. International Chamber of Commerce Commission on Arbitration, *Techniques for Controlling Time and Costs for Arbitration*, available at http://www.iccwbo.org/uploadedFiles/TimeCost_E.pdf.

12. See, e.g., *Hall St. Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008). Some institutions provide for an appellate process with a panel of arbitrators but parties have not commonly availed themselves of this option. For example, CPR established rules for an appellate process with a panel of three arbitrators in 1999, but the process has never been used by any party.

13. For a discussion of the many issues a careful drafter should consider in drafting the dispute resolution clause, see Stipanowich, *supra* note 1; John Townsend, *Drafting Arbitration Clauses: Avoiding the 7 Deadly Sins*, 58 Disp. Resol. J. 28 (2003).

14. See, e.g., AAA Commercial Arbitration Rules. Expedited Procedures; ICDR Guidelines for Information Exchanges in International Arbitration; JAMS Streamlined Arbitration Rules and Procedures; CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration, ICC Commission on Arbitration, *supra* note 11; IBA Rules on the Taking of Evidence in International Commercial Arbitration.