TRIALS

Sometimes It Pays to Opt for a Jury in Business Disputes

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Arbitration: We read about judicial preference for it every day. Mandatory arbitration clauses force numerous cases

formerly heard by juries out of the court system. Given the U.S. Supreme Court's expansive interpretation of the Federal Arbitration Act, that's not likely to change anytime soon. What does this mean for trial lawyers? While efficient arbitration proceedings tried before experienced arbitrators offer significant benefits, the inherent bias of arbitration in favor of the commercial status quo suggests thinking twice before opting out of jury trials for business disputes.

One benefit of arbitration is that the case may proceed to hearing and finality faster than court cases proceed to jury trial. The reluctance of arbitrators to grant summary judgment or other dispositive motions in an arbitration case may lead to a hearing schedule that's hard to stop. Settlement mechanics are less frequent and not compulsory in arbitrations, absent a contractual mediation obligation. A well-crafted or litigated arbitration process may reach hearing in nine months or less and can be tried in one-half or less the time it would take in court. Of course, trial lawyers relish any chance to try a case, whether in a jury trial or before an arbitrator.

What about the ramifications of arbitration in a business case? This question may be academic where there's an enforceable pre-dispute arbitration clause. In most situations, there's no choice but to arbitrate, though nothing forces arm's-length companies to agree to arbitrate in the first place, while commercial parties—post-dispute—frequently revise and tailor their contract arbitration procedures.

There are also times, even after a dispute arises in the absence of an arbitration clause, when the parties may agree to forgo court litigation and opt into arbitration. The clients may need certainty, they may need a quick and nonpublic result, or they may not have the resources for years of trial litigation and appeal. Having a sophisticated business case decided by a recognized legal expert—a well-respected retired judge—is a strong alternative. Anyone who has argued to a jury about complex electronic circuits or the intricacies of financial transactions knows the challenge of trying to make the case factually accurate and compelling but still understandable to laypersons. Why not have a smart, legal expert decide the dispute?

One reason to pause is the specter of inherent bias in arbitration to favor status quo commercial interests. The large dispute resolution organizations don't publish statistics of how often claimants win in business dispute arbitrations as opposed to awards for the respondent. But studies have concluded that employees who arbitrated their employment disputes prevailed in only about 21 percent of their cases, nearly one-half to one-third of their win rate in comparable employment jury trials. The studies also show that arbitration awards in employment cases are substantially lower—with median damages ranging from one-half to one-fifth those awarded by juries.

Having tried many cases—for both sides and before both juries and arbitrators—we believe there are unique challenges facing an arbitration claimant in a business dispute, especially when seeking substantial relief like tort or lost profits damages.

The arbitration process inevitably recognizes the commercial expectations of companies in contracting for lower-risk dispute resolution. This tilt may generally favor modest results and compromise—especially in close cases. Most arbitrators reasonably believe that companies select arbitration to avoid the perceived excesses of juries and see arbitration as a more conservative venue for deciding potential disputes. Realistically, sophisticated commercial contracting parties have sought in advance to limit exposure in the event of a business rupture to losses best measured by their contract. The Uniform Commercial Code is replete with such limitations. Arbitrators in contractual business disputes are thus less susceptible to emotive arguments designed to capture big dollars or to find intentional misconduct. Instead, they decide cases from the risk-averse perspective that the parties before them contracted for.

Arbitrators—and particularly retired judges—are also more inclined than a jury to base their award on a legal defense or some limited ruling such as contract integration clauses, statutes of limitations, or damages limitation provisions. Judges spend their careers as lawyers and then as judges focusing on and analyzing technical legal requirements and how to efficiently handle and dispose of cases. This mind-set does not disappear when they arbitrate cases. Arbitrators frequently use the parties' own industry-born pre-dispute contract terms to cabin a result. By comparison, jury consultants tell us that jurors prioritize and decide the "right and wrong" and perceived fairness of the dispute and then latch onto the facts and law supporting their view.

Arbitrators also protect finality. After they decide a dispute, arbitrators are inclined to write a narrow award that avoids strong opposing arguments or other bases by which to attack the award.

Arbitrations are a large and growing part of our practice. Sometimes they are mandatory in the contracts litigators are handed, and sometimes they are the only real choice for a small company or a small dispute. When you do arbitrate, consider the inherent role arbitration plays in holding parties commercially accountable. But given a choice on behalf of the plaintiff who feels that contract damages are too limiting for the harm it has incurred—and when the client can afford the time and resources of the court process—the arbitration tilt toward the status quo may suggest opting for a jury, even in complex business disputes. ▪