“Litigation vs. Arbitration”

Costs of arbitration have risen to the point where it can be more expensive than a trial, especially for plaintiffs.

BY ROBERT M. HELLER

Now that arbitration has matured, is it still the economical, efficient service its proponents claim it to be? The answer is decidedly mixed.

Think back only 10 years ago when arbitration was the exception rather than the rule to resolving disputes. Then, arbitration's quick results were a welcome relief from the up-to-five-year wait for a date in court.

However, arbitration may have lost some of its advantages over court proceedings simply because it has worked so well. Clients no longer have to wait years before they have their day in court. Because arbitration has relieved some of the overcrowding in civil courts, the wait has been pared to a year or so – still a long time, but nowhere near what it once was.

However, arbitration costs have risen to the point where arbitration can be more expensive than a trial, especially for plaintiffs. Arbitrators typically charge between $300 and $500 an hour. Add the cost of legal representation and even the quickest of arbitrations can easily put its costs proportionally out of balance when compared with the disputed damages. Since parties in the dispute often split the cost, individuals and small-business owners who would hire an attorney on a contingency fee basis if a case were to go to court can be financially strapped using arbitration

Another worry is arbitration's growing complexity, which can make it almost as lengthy as some court cases. Originally devised as a simple, quick dispute resolution method, many arbitration hearings are slowing down with the increasing number of procedural and other matters being imposed, particularly when discovery is allowed.

Arbitration opponents say the system is unfair, especially if the arbitration is mandatory. Mandatory arbitration takes away the rights of the parties to choose which form of dispute resolution to use.

For plaintiffs, the idea of presenting a case before a jury of their peers is often much more appealing than having an arbitrator decide the case. A jury typically is going to favor the "little guy" or underdog. Not surprisingly, many large companies insist on including mandatory arbitration clauses in their contracts. They would rather take their chances with a known arbitrator than with 12 unknown jurors.

This brings up the next potential drawback of arbitration. Large companies have the advantage of knowing which arbitrators would be more sympathetic to their side and

attempt to secure those arbitrators to hear their disputes. Individuals and small business owners who are not regularly involved in arbitrations do not have this knowledge. A great fear is that arbitrators who often are used by the same companies may have an unconscious bias in favor of those companies because they bring them regular work.

Arbitrators are given a great degree of flexibility, which may be seen as a positive. But that flexibility can have undesirable consequences. Arbitrators are not bound by legal precedent, and their decisions cannot generally be reviewed because of error of fact or law. Parties in arbitrations run the risk that the arbitrator will make a mistake yet they will be unable to take action to vacate the decision.

Code of Civil Procedure Section 1286.2 outlines the grounds for vacating an arbitration award. Only when the award is procured by corruption or fraud or the rights of the parties are substantially prejudiced by arbitrator misconduct can the arbitration be overturned. These grounds make overturning an arbitration very difficult.

For many, the finality of an arbitration decision is its beauty, but if an arbitrator errs, the losing side has little recourse. This disadvantage is most exposed when a nonlawyer is used to hear a dispute. By not using retired judges or experienced attorneys to arbitrate, the parties run the risk of a higher instance of legal errors that cannot be corrected.

Unlike a court trial, the winning respondent in arbitration cannot sue the losing claimant for malicious prosecution. When deciding this issue in *Brennan v. Tremco Inc.*, 2001 WL 370217 (Cal. Apr. 16, 2001), the California Supreme Court noted that it did not favor using tort remedies after a private arbitration decision and believed that parties choose arbitration because of their desire to resolve an entire dispute without protracted litigation. Once again, the legal rights of parties involved in arbitration are restricted in the interest of a presumably speedier resolution.

Another concern is the disappointing quality and quantity of available arbitrators. For example, a recent arbitration required the use of an arbitrator from a well-known arbitration company with real estate expertise in the Los Angeles area. The number of arbitrators from this company who met these criteria and who were available for the arbitration was limited. Because the arbitration clause stipulated this specific type of arbitrator from this particular company, the case had to move forward without the parties being able to select the best arbitrator for the dispute.

Arbitration does have its upside, however. Arbitration offers a degree of confidentiality that one can never get in a court of law. This advantage remains critical to those who want to keep their dispute outcomes private. Arbitration also provides the parties the luxury of selecting the arbitrator whom they feel is best qualified to hear their case. They don't have to cross their fingers and hope that a judge or jury is competent or will take the time to hear and review their case thoroughly.

For defense attorneys, the fear of a "runaway" jury that bases its decision on emotion, not fact, is to a great extent eliminated with arbitration. An impartial, experienced arbitrator presumably will not let emotion play a role in the decision-making process.

Other arbitration advantages include control over the location and time of the arbitration, the ability to use an arbitrator that has special knowledge about the industry in which the dispute occurs, and the relative speed of arbitration proceedings. Because arbitration is less formal than trial, arbitrators have an opportunity and often are willing to express their views about a case, giving attorneys a better sense of their standing in the proceedings.

None of the negative aspects of arbitration will stall its growing popularity. Expect arbitration to become a privatized court system, parallel to the public system, with its own defined, unique rules and ever-more complex set of procedures.

After all is said and done, we may find that arbitration only buys a bit faster resolution to our disputes, but at a cost. Will it be worth it? Even today, arbitration is not for every situation nor do arbitration clauses need to be included in every contract. The next several years will decide whether arbitration matures into the alternative form of dispute resolution it was heralded to be or whether it becomes bogged down in runaway costs and delays much like its court-system counterpart.

———

Robert M. Heller is a business litigation attorney in Los Angeles, California.

Originally published in Los Angeles Daily Journal, circa 1998