

# Rethinking The Conventional Wisdom On Arbitration For Commercial Disputes

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What is so great about arbitration? Some business people reflexively add arbitration clauses to their commercial contracts. The purported reasons for favoring arbitration range from fear of large jury verdicts to a belief that jurors are irrational.

Far better, according to conventional wisdom, to trust one's fate to a judge or arbitration panel, where wise men and women will inevitably arrive at the "right" decision. I believe the conventional wisdom is wrong. Although there may be occasions when a judge or an arbitration panel is the best decision maker for your dispute, you are often better off opting for a jury trial. There are several reasons why.

## Wisdom in numbers

A judge or arbitrator may know more about the law, but he cannot rival the collective brainpower of six to 12 jurors. There is, indeed, wisdom in numbers.

Consider the jar of jellybeans. It has been established that when a diverse group of people estimate the number of jellybeans in a jar, the group average is remarkably accurate. Sure, some guesses may be closer than others, but, collectively, this diverse group will come remarkably close to the right answer.

Of course a jury trial is not a jar of jellybeans, and the right answer is that which favors your side. But in the hands of a capable trial lawyer, a jury will, indeed, arrive at the right results - that is, the result that gives you a victory. The supposed irrationality of a jury is often the fault of trial counsel.

## Predisposition

Yes, jurors bring to the deliberative process a host of biases that may affect their vote. But they are less likely than judges or arbitrators to have a predisposition concerning the particular law, facts or clients at issue.

If a judge is deciding your case, that judge may have dealt with a similar legal issue in the past and may have strong views one way or the other. That's helpful if his view happens to coincide with yours, but that will not always be the case.

Similarly, it is possible that your arbitrator or his firm has had some dealings with your adversary in the past. Indeed, it is possible that your arbitrator's firm hopes to obtain business from your adversary sometime in the future. The point is that judges and arbitrators are more likely than jurors to bring case-specific "baggage" to the proceedings.

## Cost

It may seem counter-intuitive, but jury trials are usually less expensive than arbitration. The reason is simple. You pay for arbitration and you do not pay (at least not directly) for jury trials.

Most arbitration is conducted under the auspices of the American Arbitration Association (AAA). The AAA will charge a fee depending on the amount of damages in dispute. Currently, the fees range from \$700 to \$65,000.

In addition to this fee, you will be responsible for at least one half of the arbitrator's legal fees. These fees can range from \$150 to \$500 (or more) per hour. As many arbitration hearings involve a panel of three arbitrators, the legal fees can quickly escalate. In contrast, the expenses for trial are funded by our tax dollars, with the exception of relatively modest court fees.

### **Speed**

I know what you are thinking: Arbitration may cost more, but it is a lot quicker than the court system. Again, this is a misconception.

Although there are expedited arbitration proceedings that do indeed end quickly, these are often simple affairs that would be expeditiously resolved in any forum. For the typical complex commercial arbitration, however, the reality is that it takes a long time.

This should not be surprising. Arbitrators are being paid by the hour. The AAA obtains fees from the use of its facilities. The longer you are in arbitration, the more money the arbitrators and AAA make.

There is often no incentive to move quickly and, indeed, there is an incentive to delay. Add to this the fact that you will need to schedule arbitration hearing dates that work for three busy arbitrators *and* the parties involved, and this becomes a recipe for weeks or months of delays.

Remember, unlike a court, the arbitrators will have difficulty forcing your adversary to attend an arbitration hearing when he has a conflict.

In contrast, courts are often under pressure to reduce their caseload. Not only do they usually have more cases than they can handle and, hence, will do whatever they can to move their cases along, many jurisdictions have internal rules that limit the time that a case can be outstanding. If a judge has too many "old" cases on his docket, he can expect an unpleasant call from the chief judge.

### **Compromise, compromise, compromise**

Arbitration is often about compromise.

This is partially because, in arbitration, the panel- whether one or three arbitrators - will often feel beholden to the parties who, after all, have chosen and funded the panel. This encourages a compromised award.

But you do not want a compromise award in arbitration. If you wanted a compromise award, you would have settled the case before the start of the arbitration hearing.

Once you get before an arbitration panel or a jury, you typically think you can win everything or lose nothing and are willing to "put your money where your mouth is." This is where the jury comes in. Jurors tend to see one side as right and the other side as wrong. They are more likely to reach a verdict that is a zero-sum game.

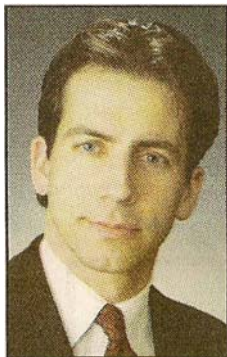
## **Appeals**

The ability to appeal an arbitration award is very limited. Unless the award is ludicrous, it will stand. In contrast, the grounds for appeal from a judicial decision or jury verdict are broader and more varied.

Thus, you will be much more likely to get further review of your case at the appellate level if you go to trial. Of course, appeals can take a lot of time. The appellate process can last two years and you avoid that delay with arbitration. Whether the delay is worth the extra pairs of eyes will undoubtedly depend on how you did at trial.

To be fair, there are times when arbitration is appropriate. Indeed, if the parties are close to settling but cannot because of minor barriers or emotional issues, an arbitrator or mediator can often bridge the gap. But if you believe in your case, you should have faith in the jury system. It is a sophisticated system that produces good results. You may not always win, but you will know you have stepped onto an even playing field and have been given every reasonable opportunity to present your case.

Perhaps most important, the sum total of intelligence in the jury room, when combined with the give-and-take of jury deliberations, is your best assurance of a favorable result to your case. Be sure to think through the pros and cons before signing on to a contract with an arbitration clause or reflexively adding arbitration language to your commercial contracts.



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