

### **ARBITRATION SHOULD NOT BE THE ONLY OPTION**

The benefits of a jury trial outweigh arbitration-binding clauses in commercial real estate contracts.

Steven Susser

Some real estate professionals reflexively add arbitration clauses to their commercial real estate contracts. The reasons for favoring arbitration range from fear of large jury verdicts to a belief that jurors are irrational. Professionals may feel more comfortable with a judge or an arbitration panel that knows more about the real estate industry than someone off the street.

Real estate professionals should not be so quick to lock in arbitration. There may be occasions when a judge or an arbitration panel is the best decision maker for commercial real estate disputes, but real estate professionals are often better off opting for a jury trial.

#### **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 wisdom in numbers. Consider the jar of jellybeans example. When a diverse group of people estimates the number of jellybeans in a jar, the group average is remarkably accurate. Some guesses may be closer than others, but, collectively, this group will come remarkably close to the right answer.

But a jury trial is not a jar of jellybeans, and the right answer is that which favors a certain side. But in the hands of a capable trial lawyer, a jury will arrive at the right results. The supposed irrationality of a jury is often the fault of trial counsel.

#### **Predisposition**

While jurors bring a host of biases to the deliberative process, they are less likely than judges or arbitrators to have a predisposition concerning the particular law, facts or clients at issue. If a case is being decided by a judge, that judge may have dealt with a similar real estate issue in the past and may have strong views one way or the other. Similarly, it is possible that an arbitrator or his firm has had some dealings with one the parties in the past. These prior dealings could cloud the decision process during arbitration. Judges and arbitrators are more likely than jurors to bring case-specific “baggage” to the proceedings.

#### **Cost**

Jury trials are usually less expensive than arbitration. Participants pay for arbitration, but not (directly) for jury trials. Most arbitration is conducted under the auspices of the American Arbitration Association (AAA), which will charge a fee depending on the amount of damages in dispute. Currently, the fees range from \$700 to \$65,000. In addition, parties 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 arbitrations involve three arbitrators, the legal fees can quickly

escalate. In contrast, the expenses for trial are funded by tax dollars, with the exception of relatively modest court fees. Speed

Another misconception is that arbitration costs more because of its benefits, such as speedier resolutions. Although there are expedited arbitration proceedings that end quickly, these are often simple affairs that would be expeditiously resolved in any forum. Complex commercial arbitration, however, takes a long time to resolve.

This should not be surprising. Arbitrators are being paid by the hour, and the AAA obtains fees from the use of its facilities. The more protracted the arbitration, the more money the arbitrators and AAA make. There is often no incentive to move quickly.

Another time consuming factor is the scheduling of arbitration hearing dates that work for three busy arbitrators and the parties involved. Unlike a court, the arbitrators will have difficulty forcing participants to attend an arbitration hearing when they have a conflict. In contrast, courts are often under pressure to reduce their caseload. Not only will they do whatever they can to move their cases along, but many jurisdictions have internal rules that limit the time that a case can be outstanding.

## **Compromise**

Arbitration is often about compromise. This is partially because, in arbitration, the panel — whether one or three arbitrators — will often feel beholden to both parties who have chosen and funded the panel. This encourages a compromised award, but parties do not want a compromise award in arbitration. If participants wanted a compromise award, they would have settled the case before the start of the arbitration hearing.

Once participants appear before an arbitration panel or a jury, they typically believe they can win everything or lose nothing. Jurors, on the other hand, 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. As long as parties have put their fate in the hands of a competent trial lawyer, they should feel confident that they can get the desired result.

## **Appeals**

The ability to appeal an arbitration award is very limited. Unless the award is ludicrous, the resolution will stand. In contrast, the grounds for appeal from a judicial decision or jury verdict are broader and more varied. Thus, participants will be much more likely to get a second review of your case at the appellate level if they go to trial. There is even the possibility of a third review by the pertinent supreme court. This tripartite process can take a lot of time.

## **Appropriate Response**

To be fair, there are times when arbitration is appropriate. 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 a party believes in its case and has a good trial lawyer, it should have faith in the

jury system. Parties may not always win, but they have stepped onto an even playing field and have been given every reasonable opportunity to present their case.

Perhaps most important, the sum total of intelligence in the jury room, when combined with the give-and-take of jury deliberations, is the best assurance of a favorable result to a case. Arbitration should not be ruled out as an option, but it should never be the only option. Real estate professionals need to think through the pros and cons before signing on to a contract with an arbitration clause or reflexively adding arbitration language to commercial real estate contracts.

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