ARBITRATION PROS AND CONS

We are frequently asked by our clients about the pros and cons of arbitration. While there are many benefits to arbitration, it may not be right for every company. Decisions about arbitration need to be made in advance and incorporated into your key contracts. To help you consider whether arbitration is right for your business, here are some claims made about arbitration, along with some helpful guidance based on our experience.

CLAIM: ARBITRATION LEADS TO A FASTER RESOLUTION

Trial courts typically do not schedule a trial any sooner than 12 months from the date as case is filed, and with recent cuts to court funding, the time to trial is more often closer to 18 months. By comparison, the amount of time it takes to get a case to arbitration depends on a number of variables.

In many cases, it takes some time for the parties to even agree on the arbitrator. The arbitrator will then consult with counsel to determine when they might want to schedule the arbitration. In many instances, this decision may be put off for several months (this is also common in trial courts) to allow the parties to better determine how long each side will need to properly present its case. Unlike trial courts, however, which are under pressure to bring cases to trial as quickly as possible, this pressure is absent in the arbitration system, and litigators often prefer to prolong the time it takes to get to arbitration so that they are not scrambling to prepare the case. Because arbitrators are not evaluated based on how long it takes to get a matter to arbitration, and because arbitration is seen as a more cooperative system, arbitrators are much more likely to grant continuances requested by the parties or their counsel.

The net effect is that it is not inconceivable that arbitrations may actually take *longer* to get underway. Of course, there are times when a case is ready to go sooner and an arbitration may take place before it could have gone to trial in the court system.

CLAIM: ARBITRATION IS CHEAPER THAN THE COURT SYSTEM

Whether arbitration is cheaper than a court trial will depend on the type of case, the litigants involved and the arbitrator chosen by the parties. Here are some starting points to consider:

First, unlike the court system, the parties are paying for the arbitrator's time. It is not uncommon for an arbitrator to charge anywhere from $400 - $600 an hour, and this charge applies anytime the arbitrator is working on the case prior to the arbitration: in conferences with the attorneys, reviewing pleadings and documents, handling discovery issues, and dealing with motions filed by the parites. During the arbitration itself, an arbitrator may charge $3,000 - $4,000 for every day of the arbitration. An arbitration typically last five to ten business days, but a complex case may go on much longer.

Second, there are the filing fees to consider. Some arbitration services charge anywhere from $5,000 to $10,000 just to file the complaint. Others are more reasonable, so care should be taken to consider the arbitration service identified in the arbitration clause.

Third, you should be aware that many arbitration clauses require *three* arbitrators, which will increase costs significantly. These clauses should be avoided if at all possible.

Of course, there are some factors that might limit costs. If the arbitration commences sooner than the matter could have gone to trial, attorneys may have less time to prepare the case, which might keep costs down. Some arbitration clauses or procedural rules limit discovery to save money for both parties. In addition, certain motions which are routinely filed in court are less likely to be filed in arbitration, so the parties save time and attorneys' fees on motions that often do not result in any measurable advantage to either side had they been filed in court. Finally, the fact that many arbitrators encourage parties to work out issues informally, rather than through the requirement of formal motion proceedings, can also be a factor in limiting some costs.

The net result is that arbitrations can be less costly than litigation if the time to arbitration is shorter and if motions and pleadings challenges are limited or discouraged altogether.

CLAIM: ARBITRATION IS MORE FLEXIBLE THAN COURT TRIALS

Flexibility is one of the key advantages of arbitration. The arbitrator is not bound by the time limits imposed by most courtroom schedules. Unlike courtroom judges that have to hear law and motion matters in the morning (which delays the start of trial until around 9:30 or 10:00), allow for one and a half hour breaks for lunch, and end each day at 4:30, arbitrations can accommodate the parties' and the witnesses' schedules, and can even be scheduled later into the evening and on weekend days. Because the schedule is set by the arbitrator and the parties, greater flexibility can be expected.

CLAIM: ARBITRATION RELIES ON SIMPLIFIED PROCEDURE

Arbitrators are not bound by the rules of evidence in the same way as superior court judges. This is also true with respect to rules about written discovery, depositions, motions and the conduct of the arbitration. Unless the arbitration agreement calls out specific rules that must be followed, the parties are able to determine the rules applicable to their case along with the arbitrator. Dispositive motions may not be allowed, which can either be a disadvantage or a cost-saver, depending on a party's position in the case. While most attorneys prefer to stick with the rules that they know, the relatively informal rules of arbitration allows more flexibility than would otherwise be allowed in cases tried before a judge or jury.

CLAIM: ARBITRATION RESULTS IN A FINAL DETERMINATION

This feature of arbitration can be a plus or a minus depending on the outcome of the arbitration. While most parties prefer a final determination which avoids the costs of appeal, there are times when a decision could have been appealed but for the fact that arbitrations are rarely appealable. Even if an arbitrator's award is unfair, illogical or appears to be "just plain wrong," the outcome cannot be appealed except in the most narrow of circumstances. Of course, because appeals add additional cost and are often used as a post-verdict settlement tactic, arbitration has an advantage in cases where the outcome was properly reached.

CLAIM: ARBITRATION FAVORS COMPANIES OVER INDIVIDUALS

Almost every arbitrator would challenge the notion that there is any bias inherent in the arbitration system. But many familiar with the system believe it more often favors companies over individuals.

First, the absence of the jury in arbitration favors companies. Juries instinctively feel empathy for individuals and distrust larger corporations. Removing the jury from the equation, and utilizing a seasoned arbitrator who has "seen it all," avoids a jury tempted to award damages based on emotion. Of course, court trials where the parties have inserted a contractual waiver of the right to a jury trial could also have the same advantage.

Second, companies are repeat customers in arbitration, while individuals are rarely going to be involved in another arbitration. Arbitrators know their selection depends on their reputation. An arbitrator that develops a reputation for handing out large awards will not be selected by the companies that repeatedly use the arbitration system. Knowing this, arbitrators face a subtle pressure to avoid awards that might dissuade others from selecting them in the future. While many arbitrators deny this pressure exists, there is a reason that corporations are increasingly insisting on arbitration clauses in every one of their agreements.

Finally, it is important to consider the most likely position in which arbitration will become necessary. For example, the additional fees and costs of arbitration can be a deterrent to individual plaintiffs and attorneys working on a contingency fee. By contrast, if your most likely dispute will be a collection matter involving your invoices, you may feel that the threat of a court trial is more likely to result in payment, while mitigating the bias against corporations by incorporating into your agreements a waiver of the right to a jury. There are many other factors that may be relevant to your specific circumstances, so we encourage you to discuss them with us to determine what is best for your business.