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Court Versus Arbitration: The Positives and Negatives

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There is no one-size-fits-all preferred type of proceeding. Every case is unique and presents its own concerns.

With courts backed up in their civil dockets, due to the year-long pandemic-related delays, parties (and counsel) may wish to consider resolving their dispute in an arbitral forum rather than in court. In order to make that decision, it might be helpful to explore the pros and cons of each. As a retired federal judge with a total of 27 years of judicial experience, and now an arbitrator for the past five years, I have had a close-up view of both processes. I hope my insider views will be useful to lawyers and clients alike in choosing the appropriate forum in which to resolve their disputes.

I begin on the positive note of cataloging what I view as the advantages of each. The first advantage of arbitration is the ability of parties to design their own process. There are many issues the parties can decide—assuming they can agree. These might include whether to have a single arbitrator or a panel of three arbitrators; whether there should be an opportunity to appeal to an arbitration appellate panel—now being offered by most of the major providers; how much discovery should be allowed (often very limited) and whether one member of the panel can be designated to decide all discovery disputes. They can also determine the form of an award. Do

they need a lengthy and thorough reasoned award, a summary reasoned award or just an up or down judgment?

The second advantage that is often discussed is the ability of the parties to select the arbitrator(s). In practice this means that the parties can select someone with subject matter expertise. They might also decide to select a former judge whose judicial opinions are public and can be reviewed, or someone they merely have confidence in given her standing in the legal community. It also allows the parties to take into account the need for diversity in the selection of a panel of decision-makers.

A third advantage is that arbitration is a confidential process that is often very important to the parties. While it is true that the award may become public if a motion is made to a court to enforce or vacate the award, the court may agree to seal that portion of the record if there is a strong case for continued confidentiality. Final awards are also often easier to enforce in foreign courts when the affected state is a signatory to the New York Convention in which the state has agreed to recognize arbitral awards.

There are three additional advantages to arbitration worth a brief mention. The first is that the parties and their counsel can count on a date certain for the arbitration hearing. Once a date is set, it is not moved unless the parties jointly request an adjournment for good cause—such as ongoing settlement discussions. The second is that the parties are guaranteed a prompt decision—often within 30 days of the close of the hearing. Finally, in arbitration the parties are usually guaranteed the personal attention of the decision maker throughout the proceedings. As explained below, this is not always true in court where busy judges often rely on law clerks and law secretaries for some of the work in civil cases.

There are, however, certain advantages of court proceedings that cannot be found in arbitration. First, there is the issue of cost. Other than filing fees, there are no further court fees. But many lawyers find that court cases are very expensive because of lengthy time to disposition and essentially unlimited discovery and motion practice. A second advantage, at least for those who legitimately need it, is the broad discovery permitted by most court rules. A third advantage is the automatic right of appeal. Finally, courts generally strictly construe the rules of procedure (i.e., Federal Rules of Civil Procedure) and the rules of evidence. It bears mention that courts can provide jury trials if that is a preference and can also handle class actions and multidistrict litigation.

Disadvantages of each process are now easy to list because they are essentially the flip side of the advantages just described. Disadvantages of arbitration include the costs of the proceedings, i.e., arbitrator costs and forum costs; limited discovery; no appeal; no jury trial; and the difficulty of researching past decisions of arbitrators as opposed to judges. The disadvantages of court proceedings include the random selection of the judge; a public forum lacking in confidentiality; the use of law clerks; backlogged dockets often prioritizing criminal cases; and the length of time to disposition.

Before closing, I have just a few miscellaneous thoughts to add to the above catalogue. One further—but recent—advantage of arbitration over court proceedings is the flexibility of venue. Now that remote hearings have become well accepted, the seat of the arbitration is less important than ever before. The arbitrators can reside anywhere and yet easily participate in a remote hearing. It is my guess that court proceedings will return to the courtroom after it is safe to do so. Settlement efforts are often built into arbitration agreements as a pre-condition to arbitration. This removes the onus of suggesting mediation—something that often worries parties in litigation. Finally, and no small point, the convenience of a time and date certain for witnesses and experts, who may be spread throughout the country if not the world, is no small benefit that arbitration offers.

In conclusion, there is no one-size-fits-all preferred type of proceeding. Every case is unique and presents its own concerns. The point of this article is to highlight the benefits and lack thereof of both arbitration and court proceedings and provide a checklist of considerations to guide the choice of parties and their counsel in selecting the forum/process best suited to resolving their dispute.

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