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PERSPECTIVE

Is arbitration truly cost-effective?

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Arbitration – when conducted in accordance with rules and ethical standards – truly represents the best of both worlds. It offers a less costly and more expeditious forum for litigants to present their claims to a neutral decision maker. Instead of waiting years for their cases to be heard, claimants resolve their matters in months with less paperwork and via an abbreviated process. The final decision means just that: no endless appeals and associated costs.

It should, therefore, be a cost-effective process for resolving disputes. But cost effectiveness lies in the eyes of the beholder. If one side consistently prevails, the process is clearly cost-effective for them. If arbitrators knock out decisions quickly and move on to new proceedings without missing a beat, it is cost-effective for them. If judges move cases off their calendars and focus on fewer dockets, it is cost-effective in their eyes.

For many in the plaintiffs' bar, however, arbitration is the antithesis of cost-effectiveness, the bete noir of the legal process. Arbitrators, they say, are biased, the process unfair, and outcomes arbitrary, unsupported by law, and impossible to reverse. Arbitrators' schedules are booked months in advance, their fees positively jaw-dropping. The process is anything but cost-effective.

Yes, there are challenges. But arbitration is valuable, and protocols are in place to prevent the downsides about which many complain.

Speed

Arbitration generally leads to quicker results than the judicial system. Unlike trials, whose dates are subject to backlogged court calendars, arbitrations can be scheduled based on the availability of the parties and the arbitrator. With fewer filings, fewer hearings, less discovery, not as many motions and fewer rules governing evidence, the process is short and sweet. A typical arbitration can be completed within a single day. Once the arbitrator issues a decision, the process is generally done.

Arbitration is faster than the courts. The average span between a civil complaint and verdict in state court has been estimated to be about two years. Add an additional one to two years for appeal, and claimants could spend a good portion of their lives resolving a dispute. California arbitrations from 2012 to 2017 had an average length ranging from 14 to 19 months from filing, far faster than backlogged courtrooms.

Arbitrators conduct preliminary hearings early in the process to establish a procedure to help maximize efficiency and economy while also providing parties with a fair opportunity to present their cases. This includes determining threshold or dispositive issues that can be decided without considering the entire case. Indeed, arbitrators are directed "to avoid importing procedures from court systems, as such procedures may not be appropriate to the conduct of arbitrations as an alternative form of dispute resolution that is designed to be simpler, less expensive and more expeditious."

Arbitrators are given broad authority to streamline the discovery process and manage any necessary exchange of information among parties with a view to achieving an efficient and economical resolution of the dispute while promoting equal treatment and safeguarding each party's opportunity to fairly present its claims and defenses.

Arbitrators are generally retired judges and seasoned litigators who can streamline the process based on their experience overseeing or litigating thousands of cases. They can quickly identify dispositive issues and move the case forward, avoiding the costly back-and-forth of traditional litigation.

Their schedules are generally more open than their counterparts in the judiciary. Parties and attorneys need not contend with packed court calendars; cases can be scheduled and resolved quickly, in a fraction of the time it would take in court.

Cost

Arbitration is usually less costly than litigation. Because cases heard by an arbitrator tend to be resolved more quickly than those heard by a jury, parties pay far less in attorneys' fees and avoid other costs associated with preparing for trial, such as document filing, discovery, and expert witness fees.

For employers who mandate arbitration for workplace disputes, the cost picture can be positively rosy. Even though employers bear the costs of arbitration – $10,000 per day or more for some neutrals – this is still small potatoes com-

pared to unpredictable, sympathetic jury verdicts. Even when the party paying the bills is unsuccessful in arbitration, the alternative is doubly costly.

Some arbitrations can be significantly more expensive than court proceedings – it can be cheaper to litigate securities actions, and top-shelf arbitrators in high demand can command fees as high as $25,000 per day – but these are exceptions to the rule. Most disputes will fall into more common practice areas and plenty of well-qualified arbitrators hire out at $800-$1200 an hour.

When arbitrations are non-binding and parties can take the matter back to court, they still benefit. They will have seen evidence and arguments from the other side and have the arbitrator's non-binding decision, which provides insight into the strength and weaknesses of each party's case, ultimately resulting in shortened litigation.

Process

Arbitration is basically "Litigation Lite": a way to reach a fair decision via a less cumbersome process. It calls for limited discovery, motion practice, and appellate review. It does away with countless filings and lengthy court processes. Evidence is easier to admit, and most matters can be handled through a phone call to the arbitrator.

Rules of evidence, however, are supposed to ensure that both sides receive a fair and just outcome. When restrictions are optional or ignored, prejudicial information could find its way in, and spurious facts and assertions could be difficult to disregard. But experienced judicial officers are trained to consider evidence for limited purposes. Even jurors are trusted to follow limiting instructions; trusting a judge to do so is a much better bet.

Abbreviated discovery and witness testimony could, some contend, make it difficult to present a complete case and receive an informed decision. However, one ground for vacating an arbitration award is that the rights of a party "were substantially prejudiced … by the refusal of the arbitrator to hear evidence material to the controversy." Because of this, arbitrators are usually careful to admit more evidence rather than less.

Arbitration has the added benefit of finality, except in non-binding arbitrations. With limited exceptions, "an arbitrator's decision is not generally reviewable for errors of fact or law, whether or not such error appears on the face of the award and causes substantial injustice to the parties." Under the Federal Arbitration Act, parties can challenge an arbitration ruling only if it was procured by fraud, the arbitrator was biased, the arbitrator refused to hear relevant evidence, or the arbitrator exceeded the power set forth in the arbitration agreement.

Fairness

Because arbitrators are usually retired judges or veteran attorneys, they should be less prone to identify with one side or the other, less likely to be swayed by emotional factors, and ostensibly more capable than a jury of rendering a reasonable monetary award. The parties in an arbitration usually choose the arbitrator together. Under the AAA rules for consumer arbitrations, parties are given a list of 10 arbitrators to choose from. If they cannot agree on an arbitrator, they strike names they object to and rank the remaining names in order of preference. In expedited arbitrations, where no disclosed claim or counterclaim exceeds $75,000, the parties are given an identical list of five arbitrators to choose from. If they cannot agree, they each strike two names, and AAA will select from the remaining names. Civil litigants are randomly assigned to a judge or department and are permitted only one "peremptory strike." An appeal, randomly assigned to a panel of judges or justices, adds a layer of unpredictability.

In arbitration, parties usually choose who will be the decision maker, increasing the chances their choice will be seen as impartial and unbiased. Most private arbitrators are eminently qualified to understand and evaluate evidence and to deliver reasoned legal decisions free from the passions and prejudices that often sway jury awards. Importantly, arbitrators must comply with extensive rules of disclosure, more onerous than those imposed on judges. Parties are waiving their right to a jury trial, and arbitrators are given free reign to decide the facts and the law, generally without the threat of an appeal. This is a significant responsibility.

First, arbitrators must disclose "all matters that might cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial …" California's rules require arbitrators to disclose categories of information including personal interests and relationships, work history and future employment as an arbitrator or mediator, professional relationships with parties and their representatives, financial interests, membership in organizations that practice discrimination, history of professional discipline, and knowledge of a disputed fact or relationship with a material witness. These disclosures encompass those requiring recusal by a sitting judge found in the Code of Civil Procedure section 170.1.

The disclosure rules are meant to dispel any reservations a party or attorney may have about the "repeat player effect," which imputes bias in favor of a party who regularly uses arbitration and could provide business for the arbitrator. An arbitrator's disclosures should suss out such biases. Arbitrators must disclose the names of parties in prior or pending cases, and, where applicable, the attorney representing a party in the current arbitration who is involved in the pending case, was involved in the prior case, or whose associate is involved in the pending or prior case. They must also disclose the result of prior cases arbitrated to conclusion, including the date of the arbitration award, identification of the prevailing party, the amount of monetary damages awarded, if any, and the parties' attorneys. That should be enough information to determine if an arbitrator is leaning to one side.

Cost-effectiveness

Arbitration will almost always be a more affordable and expeditious form of dispute resolution, compared to traditional litigation. Arbitrators can distill a dispute to its essential elements and resolve it in a matter of days or weeks, as opposed to the years it could take to get to the same point through summary judgment or trial.

Arbitrators can shape the process and their decisions by creatively responding to the circumstances before them, being bold in their decision-making, and calling cases as they see them, without concern about future workflow. They can maintain arbitration as a cost-effective alternative to litigation.

Ultimately, arbitration can only be cost-effective if it is fair. Parties who agree to have their disputes heard by an arbitrator should have confidence in the individual making the decisions and understand how the process will take shape. When selecting an arbitrator, they should choose someone based on his or her skills and knowledge, not how he or she may have ruled in prior cases.

Arbitrators must therefore be held to the highest standards regarding disclosure of potential biases and conflicts. California's Ethics Standards for Neutral Arbitrators in Contractual Arbitration says that "[f]or arbitration to be effective there must be broad public confidence in the integrity and fairness of the process."

Arbitration may not be perfect, but it can provide significant value to litigants and the judicial system overall, taking burden from the trial courts and resolving cases quickly and efficiently. If it does so while ensuring parties have a fair opportunity to present their cases, arbitration will always be a cost-effective alternative to litigation.

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