InsideCounsel.com
BUSINESS INSIGHTS FOR LAW DEPARTMENT LEADERS
DECEMBER 2, 2014


Arbitration vs. jury trials: Does it make a difference?

Five key factors to guide you in choosing between arbitration and a jury trial

BY STACEY P. SLAUGHTER, DENISE RAHNE

Many factors inform a company's decision whether to choose to make their case to a jury or an arbitrator when a dispute arises in the United States. Confidentiality for business reputation reasons is a ubiquitous rational for favoring arbitration. When drafting agreements, however, or in those instances when facing the option of agreeing to submit a dispute to arbitration, some other key factors should guide you.

1. Is there a real choice?

If possible, the best time to determine whether arbitration is right for potential disputes is during the formative stages of the contractual or organizational legal relationship. Necessarily anticipatory, this requires something just short of a crystal ball, albeit a crystal ball that can be informed by factors such as those discussed in items two through five below. If consideration of such factors argues for arbitration, then you should make the decisive choice while you can. Then, craft and negotiate an arbitration clause that captures the desired breadth, understanding that future efforts to limit the breadth of agreements to arbitrate can be challenging in light of strong public policy encouraging arbitration.

There are, of course, those instances where a dispute arises, no agreement to arbitrate applies, and both parties are willing to consider voluntary arbitration. Importantly, if you face a dispute where an agreement to arbitrate arguably exists, the same public policy encouraging arbitration has implications when a dispute arises. In such situations, your most important decision is whether to spend resources fighting what is very often a losing battle. In many situations involving any agreement to arbitrate, the decision whether or not to proceed with arbitration involves a somewhat interesting legal exercise but no real question about the outcome.

2. Is pace an issue?

Arbitration is often a stripped down, streamlined path to getting your matter before a decision making. Usually it involves less discovery — see number three below — and a less formal approach to the rules surrounding the entire process. Plus, unlike judges who have little control over the state of their dockets, most arbitrators manage the rate at which they take cases and can typically keep to an aggressive and established time schedule set by the parties. Consequently, in almost every situation — the most obvious exception being some venues with established "rocket dockets" — arbitration will be the hare and a jury trial the turtle. So if you want a more predictably speedy resolution, then your situation lends itself more to arbitration. If you can afford to wait out your opponent or a slower pace is beneficial, then that is less the case.

3. Is discovery an issue?

While the path leading to a traditional jury trial may be guided by some discovery limits, those in the game know that discovery is costly and easily becomes one of the most unpredictable aspects of both the litigation time table and the budget. Typically, parties to a traditional court case may obtain any material that is reasonably calculated to lead to the discovery of admissible evidence. If your case requires extensive discovery to assess and inform strategy, then it may be worth the time and expenditure. If not, all other things being equal, arbitration may be a better and more economical alternative. In arbitration, one recent study shows that 91 percent of arbitrators surveyed "always" or "usually" limit discovery by working with the attorneys in the case, and 94 percent of arbitrators surveyed "always" or "usually" encouraged the parties involved to limit the scope of discovery.

4. Is your narrative jury friendly?

Whether in arbitration or before a jury, the ability to prevail in a dispute is only as good as the skill of your trial lawyer and the evidence in your case. Your evidence, or narrative, must persuade the jury or arbitrator on three levels: ethos, logos, and pathos. Ethos is an appeal to ethics. Pathos is an appeal to emotion. And logos is an appeal to logic. While juries and arbitrators will both attend to ethics, the process can differ somewhat on the other two levels. Arbitration, particularly commercial arbitration, typically promises a decision maker who possesses a degree of business acumen — and one who might tend more toward logic. Jury trials, on the other hand, are marked by their expectation of fundamental fairness born of the notion that the decision maker represents a cross section of the populace. This necessarily means that emotion may play a larger role in the outcome. If you compare your strongest litigation narrative to these human levels, it can inform your choice.

5. Legal precedent and appealability

It should come as no surprise that arbitrators try to follow the rules. Recently, Professor Thomas Stipanowich of Pepperdine University School of Law conducted a survey of 134 highly experienced arbitrators, the majority of whom had arbitrated more than 100 disputes in their careers. Contrary to popular belief, 87 percent of subjects reported that they always tried to follow applicable law in rendering an award. Another 70 percent confirmed that they "readily" rule on dispositive motions. This desire to attend to the rules likely has an iterative relationship with the likelihood of appeal. Under the U.S. Federal Arbitration Act, for example, a court can vacate or modify an arbitration award if the arbitrator's findings or fact are not supported by the record or conclusions of law are erroneous. Short of that, you should look closely at the ground for appeal in your jurisdiction or under the rules of the private provider when considering whether or not to arbitrate

About the Authors

Stacey P. Slaughter
Stacey Slaughter is a partner at Robins, Kaplan, Miller & Ciresi L.L.P. She represents businesses and institutional investors that face significant financial markets disputes and complex business problems. spslaughter@rkmc.com.

Denise Rahne
Denise Rahne is a trial attorney at Robins, Kaplan, Miller & Ciresi L.L.P. She represents fiduciaries, businesses, and institutional investors that face significant financial markets disputes and complex business problems, including regulatory compliance, fiduciary litigation, contractual disputes, and antitrust issues. dsrahne@rkmc.com.