

## **BENEFITS OF ARBITRATION FOR COMMERCIAL DISPUTES**

**by Edna Sussman and John Wilkinson**

The Arbitration Committee of the ABA Section of Dispute Resolution is preparing a brochure for broad dissemination to educate users on the benefits of arbitration for commercial disputes. You will find below the text of the current draft of the brochure. We welcome your comments, edits and additions. Please contact us at [esussman@sussmanadr.com](mailto:esussman@sussmanadr.com) and [JohnHWilkinson@msn.com](mailto:JohnHWilkinson@msn.com) or [submit your comments online](#). You can help us make it better, so please do take the time to review this draft.

## **BENEFITS OF ARBITRATION FOR COMMERCIAL DISPUTES**

Arbitration has been part of the dispute resolution landscape for centuries: (i) some commentators date arbitration back to the time of the Phoenician merchants; (ii) Alexander the Great's father, Phillip the Second, used arbitration as a means for resolving border disputes; (iii) George Washington had an arbitration clause in his will; and (iv) the English used arbitration for commercial disputes as early as 1224.

Arbitration is preferred by many as a way to resolve commercial disputes. It has significant advantages over litigation in court, such as party control of the process, typically lower cost and shorter time to resolution, flexibility, privacy, awards which are fair, final and enforceable, decision makers who are selected by the parties on the basis of desired characteristics and experience, and broad user satisfaction. Thus, for example, did you know that:

### **Party Control**

- Because arbitration is a creature of contract, parties can by agreement design the process to accommodate their respective needs and can continue to do so as the proceeding moves forward. For example, the nature and scope of discovery (including whether to allow depositions), the conduct of the hearing (including testimony by live video), the length of time for the entire process, as well as pre-screening the arbitrators for disclosure issues and availability can all be determined by the parties, both at the contractual stage and after the arbitration has commenced.

### **Length of Time**

- According to statistics of the American Arbitration Association ("AAA") for the year 2008, the median length of time from the filing of an arbitration demand to the final award in domestic, commercial cases was just **7.9** months.

- By contrast, in 2010, the median length of time from filing through trial of civil cases in the U.S. District Court for the Southern District of New York was **33.2** months.<sup>1</sup>
- The median length of time in 2010 from filing of a civil case in lower court to disposition of appeal by the Second Circuit Court of Appeals was **40.8** months.<sup>2</sup>

### **Expense**

- Attorneys' fees and expenses are by far the most significant cost of litigation, and they increase in direct proportion to the time to resolution of the case. Attorneys' fees and expenses are minimized in arbitration because arbitrations are generally concluded in far less time than cases in court.
- Although it is true that there are no arbitrator or institutional charges in court cases, the International Chamber of Commerce reports that those charges represent only 18% of the cost of arbitration.<sup>3</sup> This 18% (and substantially more) can be recouped quickly because of the increased speed and efficiency of arbitration and the ability to tailor the arbitration to the specific needs of the parties.
- Court cases generally require more counsel time and, thus, more expense for preparation and trial than is needed in arbitration. For example, trial-related matters which consume time and money in court but which are usually not part of arbitration include extensive evidentiary issues, *voir dire*, jury charges, broad motion practice, proposed findings of fact, endless authentication of documents, qualification of experts, cumulative witnesses and, finally, appeals, which are far more limited in arbitration than in court.

### **Flexible Process**

- In arbitration, parties can schedule hearings and deadlines to meet their objectives and convenience. The flexibility of arbitration and the opportunities it allows parties to save time and money are apparent in common arbitration practices such as: choosing a location for the hearing that will minimize costs; taking witnesses out of order or interrupting a witness to accommodate individual needs; continuing a hearing after normal business hours (e.g., during the night or over a weekend) in order to complete a witness or finish the hearing; taking testimony of distant witnesses by video conference or by telephone; ordering testimony so that all experts on a topic testify directly after one another or even all at the same time (a procedure known as "hot tubbing"); and using written witness statements for some or all of the witnesses in lieu of time-consuming, oral direct testimony.
- When negotiating their underlying commercial contract, parties often utilize the flexibility of arbitration to include provisions in the arbitration clause which will enhance the efficient conduct of any arbitration that might arise thereafter. Most commonly, such clauses set time limitations for concluding the entire arbitration, as well as limitations on interim phases such as discovery and commencement of the hearing. A primary benefit of this common approach is it is far easier for the parties to agree on such matters when they

negotiate their commercial contract than when a dispute has actually arisen and the parties are in an adversarial relationship.

- The flexibility of arbitration fosters a relatively informal atmosphere. Together with the privacy of the arbitration proceeding, this serves to reduce the stress on the witnesses and on what are often continuing business relationships between the parties.

#### **Confidentiality**

- Arbitral hearings are held in private settings and are attended only by those designated by the parties and their counsel. This is in contrast to trial proceedings held at the court house, which are open to the public. In addition, maintaining the confidentiality of the arbitration proceeding can be agreed to by the parties, unlike in court, where requests to seal the record are seldom granted. Most arbitral institutions have specific rules regarding the confidentiality of proceedings and awards.
- Confidentiality is an important feature for many corporations, particularly when dealing with disputes involving intellectual property and trade secrets or when there are concerns about publicity or damage to reputation or position in the marketplace.

#### **Arbitrator Selection**

- A great benefit of arbitration is that the parties can select their arbitrators, both under the party appointed system and the list system, and thereby choose arbitrators with qualifications tailored to the needs of the arbitration in question. These desired qualifications can include attributes such as subject matter expertise; reputation for competence; temperament; number of years of experience; number of arbitrations chaired; availability; and commitment and ability to conduct an efficient, cost-effective arbitration.
- The ability of parties to select arbitrators with desired expertise and competence contrasts with most court cases where judges are assigned randomly without regard to whether they possess qualifications particularly suited to the dispute in question.
- An additional benefit is the parties' ability to provide for a panel of three arbitrators to hear complex and/or high-dollar disputes.

#### **Discovery and Related Matters**

- In court litigation in the United States, the governing Federal Rules of Civil Procedure or parallel state court rules often allow for broad, burdensome and expensive discovery, including lengthy depositions and the extensive production of electronic data.
- Unless specifically agreed otherwise by the parties, discovery and related procedures are considerably more limited in arbitration than in litigation. See, e.g., the New York State Bar Association's *Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic Commercial Arbitrations and International Arbitrations*.<sup>4</sup> These Guidelines,

among others, contain significant suggested limits on processes including document discovery, e-discovery, depositions, discovery motions and dispositive motions. Guidelines like these are binding when adopted by the parties. But even if they are not adopted, arbitrators often rely on these Guidelines as a framework for the efficient conduct of the pre-hearing phase of arbitration.

- Arbitrators, in contrast to harried federal and state court judges, are actively involved in the management of the case and can promptly conduct a telephonic or in person supervised session to assure expeditious proceedings.

### **Finality**

- In many cases it is important that commercial disputes be resolved quickly and finally because drawn-out indecision significantly increases costs and may cause business paralysis. Arbitration provides finality and does so quickly and economically because lengthy, expensive appeals like those encountered in court are not available under the Federal Arbitration Act (“FAA”) and state arbitration statutes. These statutes severely limit a court’s ability to vacate arbitration awards except on narrow grounds such as corruption, fraud and evident partiality, which are difficult to prove and rarely succeed.
- In some cases, parties to a large dispute may want a more comprehensive appeal than is permitted under the FAA and state arbitration statutes. They can accomplish this (without sacrificing the efficiency of arbitration) by providing for an appeal to a second arbitrator or panel of arbitrators on traditional legal grounds. An appeal within the arbitration framework can be conducted quickly and cost effectively, without significantly delaying the final resolution of the case.

### **International Commercial Disputes**

- Arbitration permits the parties to choose adjudicators with the necessary special expertise to decide a cross-border dispute, which is not possible with the luck of the draw in court. This special expertise can include knowledge of more than one legal tradition (e.g., common law and civil law), experience, understanding and ability in harmonizing cross-border cultural differences between parties and fluency in more than one language.
- In the international context, arbitration provides what in some cases may be the only possible neutral forum for dispute resolution and enables the parties to select decision makers of neutral nationalities or of recognized neutrality who are detached from the parties and their respective home state governments and courts. Thus arbitration allows the parties to avoid concerns that may arise with respect to some judicial systems, and it assures an adjudicative setting in which bias is avoided and the rule of law is observed. Arbitration also avoids delays in court which, in some jurisdictions, can exceed five or even ten years.
- In the international context, a critical feature of arbitration is the existence and effective operation of the New York Convention to which over 140 nations are parties. The

Convention enables the enforcement of international arbitration agreements and awards across borders. In contrast, judgments of national courts are more difficult and often impossible to enforce in other countries.

### **Arbitration Does Not Face the Budgetary Cutbacks Being Imposed on the Courts**

- Arbitration is not affected by the current massive cutbacks in judicial budgets in states across the United States or by the increase in the criminal docket in the federal courts, all of which are increasing the already significant delays in the time to get to trial in civil cases in state and federal courts.<sup>5</sup>

### **Studies Prove that Arbitration is in Many Ways a Better Process**

- **Satisfaction** - Studies have shown that a majority of users believe arbitration is better, cheaper and faster than litigation.<sup>6</sup>
- **Fairness** - Studies have shown that arbitration is perceived to be “a more just process” with 80 per cent of attorneys and 83 percent of business people reporting that arbitration is a fair and just process.<sup>7</sup>
- **International** - Studies have shown that 86% of corporate counsel are satisfied with international arbitration.<sup>8</sup>
- **Expertise**- Studies have shown that the majority of parties find arbitrators to be more likely to understand the subject of the arbitration than judges.<sup>9</sup>
- **Predictability** - Studies have shown that counsel make fewer errors in predicting case results in arbitration versus not only jury trials but also cases tried to a judge, demonstrating that outcomes in arbitration are more predictable than in litigation.<sup>10</sup>
- **Arbitrators Do Not Split the Baby** – Studies have repeatedly and conclusively shown that arbitrators do not split the baby. For example, a 2007 study showed that in only 7% of the cases were damages awarded in the midrange of 41-60% of the amount claimed, results almost identical to a similar study conducted six years earlier.<sup>11</sup>
- **Lack of bias** - Studies have concluded that three arbitrators are less likely to be influenced by unconscious biases than is a single judge in a bench trial.<sup>12</sup>
- **Compliance with awards** - Studies have shown that the rate of voluntary compliance with arbitral awards is over 90%.<sup>13</sup>

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<sup>1</sup> *Judicial Business of the U.S. Courts, U.S. District Courts—Median Time Intervals From Filing to Disposition of Civil Cases Terminated*, by District and Method of Disposition, at

<http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/appendices/C05Sep10.pdf>

<sup>2</sup> *Judicial Business of the U.S. Courts, Table B-4A.U.S. Courts of Appeals—Median Time Intervals in Months for Merit Terminations of Appeals Arising From the U.S. District Courts*, by Circuit at

<http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/appendices/B04ASep10.pdf>

<sup>3</sup> International Chamber of Commerce Commission on Arbitration, *Techniques for Controlling Time and Costs for Arbitration*, available at [http://www.iccwbo.org/uploadedFiles/TimeCost\\_E.pdf](http://www.iccwbo.org/uploadedFiles/TimeCost_E.pdf).

<sup>4</sup> *Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic Commercial Arbitrations and International Arbitrations*, available at <http://www.nysba.org/ArbitrationGuidelinesBooklet>.

<sup>5</sup> National Center for State Courts, statistics and information on state court budget cuts available at [www.NCSC.org](http://www.NCSC.org); Wall Street Journal, *Budget Woes Squeeze Federal Courts in NYC*, DECEMBER 27, 2011; Wall Street Journal, *Criminal Case Glut Impedes Civil Suits*, November 10, 2011.

<sup>6</sup> Rand Institute for Civil Justice, *Business to Business Arbitration in the United States, Perceptions of Corporate Counsel* ("Rand"), p. 1, 30 (2011).

<sup>7</sup> Id.

<sup>8</sup> PriceWaterhouseCoopers, *International Arbitration, Corporate Attitudes and Practices*, ("PWC"), p. 8 (2008).

<sup>9</sup> Rand, *supra* note vi at p. 32

<sup>10</sup> Randall Kiser, *Beyond Right and Wrong*, p. 63 (publ. Springer) 2010.

<sup>11</sup> American Arbitration Association, *Splitting the Baby: a New AAA Study*, available at <http://www.adr.org/sp.asp?id=32004>

<sup>12</sup> Chris Guthrie *Misjudging*, 7 Nev. L.J. 420, 451-453 (2007).

<sup>13</sup> PWC *supra* note viii at p. 8.