

## **Dispute Resolution: Court Proceedings Vs. Arbitration**

*By J. Frank McKenna*

*Dispute resolution can be costly both in time and money. The popular saying, "Justice delayed is justice denied," has an element of truth to it. One of the common methods of dispute resolution aimed at a prompt result is arbitration. This article will provide a brief overview of the court process compared to arbitration as a means to resolve disputes, and the advantages and disadvantages of each.*

### **What is Arbitration?**

Arbitration is a popular form of alternative dispute resolution using knowledgeable individuals to serve as arbitrators to resolve disputes. The pros and cons of arbitration should be considered long before any actual disputes arise.

During the negotiation and drafting of an agreement or contract, consider whether it would be advantageous to include an "arbitration clause" in the contract. Usually such clauses provide that any claim or dispute "arising out of or relating to" the contract shall be settled by arbitration.

The arbitration clause may include specific provisions regarding the location of the arbitration, the number of arbitrators to be appointed, fees, and the rules that will govern the arbitration proceedings. Without an arbitration clause in an agreement or contract, one party cannot compel another party to arbitrate its disputes. Conversely, when an arbitration clause does exist, a party can insist that the clause be enforced.

### **The Fact-Finder**

In the court process, either a judge (in a bench trial) or a jury will act as the fact-finder in the trial of the disputed matter. The parties typically have little control over who the judge presiding over the case will be. Usually, the judge's approach to the case will be to follow the law and make a decision based on legal precedent.

In a jury trial, the parties have very limited control over the jury selection process. More often than not, the jury will consist of lay persons of varied backgrounds with little or no knowledge of the issues in question or the law to be applied. Therefore, much of the time during the trial is spent educating the jurors so that they have a basic understanding of industry practices, or whatever is the subject of the dispute. Then, they receive instruction from the judge on how to apply the law to the facts as they understand them.

Although the jury system works well in many instances, in complex cases, there is a risk of a verdict that defies reason because of misinterpretation of the facts and incorrect application of the law. The "human element" also comes into play in a jury trial, more so than in an arbitration or bench trial. There is always the possibility that a juror will cast a sympathy vote for a party viewed as an underdog regardless of whether the facts or law support such an award.

The fact-finder in an arbitration is the arbitration panel that consists of arbitrators who are either neutral or party-appointed.

Organizations such as the American Arbitration Association ("AAA") maintain a roster of qualified individuals to act as arbitrators. Most have the education and experience to qualify them as experts in their field.

Little time, if any, will be required to educate the arbitrators on industry practices and procedures relevant to the matters at issue. The arbitrators will resolve the dispute in accordance with their understanding of the facts of the case and the customs and practices in the industry. Strict application of the law should factor into the arbitrators' decision but may not, particularly not as much as in a court.

Arbitration cases are usually heard by either one arbitrator, or a panel of three. Obviously, with one arbitrator, there will be less expenditure of time and money. It is possible to incur significantly more time and money on a three-arbitrator case. The argument can be made, though, that a panel of three arbitrators can provide a better balance of expertise and judgment.

The process of selecting and appointing the arbitrators depends upon the rules of the governing agency and the agreement of the parties.

### **The Rules**

The rules in a court proceeding are determined based on jurisdiction. There are federal rules for federal court cases and state rules for state court cases. Also, most jurisdictions have local rules. All of these rules provide for everything from the timing, format and content of the initial complaint in the case to the procedures to be followed after trial.

In addition to the express rules in court cases, many judges have their own practices and procedures which may impact the management of a case.

In an arbitration, the parties can choose to adopt the federal or state court rules, or create a hybrid set of rules tailored specifically to their case.

The AAA has standard rules for arbitration as well as special rules for construction cases, commercial cases, labor management cases and other areas. AAA usually categorizes cases into three groups: (1) Fast Track or Expedited Procedure (for claims of less than \$50,000); (2) Regular Track (for claims between \$50,000 to \$1 million); and, (3) Large, Complex Case Track (for claims of at least \$1 million). In all cases, AAA rules govern the appointment of arbitrators, the date, place, and time of the hearing, the form and time of the award, and applicable filing fees, as well as other administrative matters.

### **Time**

In a court case, the pleading phase (the initial filings setting forth the positions of the parties) can take months. The discovery process - the gathering and investigation of facts through the exchange of information, documents and depositions - can take years. Then, once a case is ready for trial, scheduling the trial becomes dependent upon the volume of cases on the court's docket and the trial judge's calendar. Often it is difficult to get a date certain for trial and the courts are reluctant to take into consideration or simply cannot accommodate a time convenient to the parties. Once a trial commences, particularly in the case of a jury trial, it will usually continue without interruption through its conclusion.

Many courts have rules to implement Alternative Dispute Resolution (ADR). Depending on the locale, the local rules may require court supervised mediation, arbitration, non-trials or other ADR procedures designed to expedite resolution of the dispute. These court-supervised rules almost always provide that the decision is not final and binding but is subject to appeal and de novo trial rights.

Typically, arbitrations move at a quicker pace, as the rules are designed to move cases along to a resolution.

Under AAA rules, most fast track cases have a 60-day time standard for case completion. Usually the

arbitrators will work with the parties to schedule a convenient time for the hearing. However, cases with more than one arbitrator can be difficult to schedule, as it becomes increasingly difficult to coordinate and accommodate the schedules of the arbitrators and the parties. For this reason, sometimes in large complex cases, the hearing days may be scheduled in segments of a few days at a time with breaks in between. Although this may allow the parties additional preparation time, it can also result in a loss of continuity and focus on the case.

### **Cost**

Often the greatest expense in court cases is discovery. The costs incurred in connection with reproducing documents, taking depositions and gathering other evidence can be high. However, these costs may be justified if they result in the elimination of certain issues, better trial preparation and strategy and the discovery of information crucial to proving your case.

With arbitration, the rules the parties adopt may or may not allow for lengthy discovery. The amount and extent of discovery permitted in arbitration will depend on the amount in controversy, the discretion of the arbitrators and the position of the parties. Limited discovery will control the cost, but the lack of full disclosure of all relevant facts can lead to inefficiencies during the hearing, resulting in surprises and delays. This requires control by the arbitrators before and during the hearing.

Unlike a judge or jury proceeding, the parties to an arbitration pay a fee for the services of the arbitrators and pay for their expenses. In cases where a hearing is broken into segments over a period of time, these costs can be a considerable amount. There is also a fee for the agency administering the arbitration.

### **The Trial and Hearing**

The trial of a court case is typically a very formal proceeding which takes place in a courtroom. There is a strict set of rules enforced which govern the conduct of all participants. Satisfying the rules of evidence and procedure can often be a tedious process, taking an enormous amount of the court's time, and in the process, boring the jury. For example, the introduction of evidence in a trial requires laying the proper foundation, prohibits the admission of evidence that cannot be authenticated and prohibits hearsay evidence, both oral and documentary.

The arbitration is usually less formal. The hearing can take place in a conference room and is usually confined to only those participating or having a direct interest in the proceedings. Because the arbitrators are usually very knowledgeable about the subject matter, they sometimes tend to have little need for foundational lines of questioning and direct the parties to quickly get to the crux of the issues.

However, arbitrators are more inclined to allow all evidence introduced into the case. The arbitrators, over objections, usually consider the questionable evidence, along with and in light of the objections relating to its relevance and admissibility. This may happen for a number of reasons.

Arbitration is a less formal procedure, and not all arbitrators have training regarding rules of evidence. Also, the arbitration process generally encourages arbitrators to accept proffered evidence and then consider the objection when deciding on the weight to give it. So, in the interest of moving the case along, they allow the evidence into the record with the caveat that it will be considered along with the related objections. It is not at all uncommon for arbitrators to question the witnesses themselves if the examination by the attorneys has not clarified all of their questions.

### **The Decision**

In a bench trial, a judge will usually render a decision within a few weeks of the close of the case, depending on its complexities. A jury deciding a case will deliberate immediately after the close of the case and until it reaches a unanimous decision. However, in both cases, the decision can be appealed

to a higher court by either party. On large commercial contracts, where millions of dollars can be at stake, the right of appeal is an important factor that should carry significant weight when deciding whether or not to include an arbitration clause in the contract.

In arbitration, where there are multiple arbitrators, the decision must be by a majority. The AAA rules provide guidelines stating the time period in which an award will be issued. For example, in large, complex cases, arbitrators must make an award within thirty days from the date of closing the hearing, unless the parties agree otherwise. Usually, there is voluntary compliance with the award; however, judgment on the award can be entered in a court having appropriate jurisdiction if necessary. The arbitration clause or arbitration agreement between the parties usually provides that the award is final and binding.

### **Conclusion**

The decision whether to include an arbitration clause in a contract should depend on the ultimate objective of the parties to the contract.

If the objective is prompt resolution with some degree of informality, arbitration is the best approach. If the objective is strict application of the law and a right of appeal, the dispute should be resolved in a court of law.

Cost is a factor in the decision, and arbitration is usually, but not always, less expensive.

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