OUTSIDE PERSPECTIVES

A Dissenting View On Arbitration

Many lawyers say corporations fare better in arbitration. They say arbitration is faster and cheaper than litigation. They say arbitration reduces "runaway verdicts." Some even whisper (outside the presence of judges, of course) that arbitrators are smarter than judges.

But is any of this really true?

I am neither brave nor foolhardy enough to say whether the average judge is smarter than the average arbitrator. I do note, however, that most lawyers seem to delight in telling stories of the horrors inflicted on them by both judges and arbitrators. I also note that the wisdom of a judge or arbitrator often appears to be proportional to how favorable a ruling is handed down.

Leaving intelligence aside, there is one critical difference between judges and arbitrators: arbitrators are chosen. For this reason, there is always "jockeying" when it comes time to choose an arbitrator. While the great majority of arbitrators undoubtedly take their oath of neutrality seriously, lawyers have long recognized that the appearance of partiality is almost as bad as partiality itself. If nothing else, the process of selecting an arbitrator often leaves a bad taste in a party's mouth, and many a party has second-guessed its decision to agree to a particular arbitrator after receiving an unfavorable verdict.

AARON KRAUSS

Does arbitration reduce runaway verdicts? Probably. I suggest, however, that a company that expects to be involved in many disputes should be more concerned with the average verdict than with the risk of an excessive verdict in an individual case. While I have never seen anyone actually cite 1 Kings 4:16-27 to an arbitrator, every lawyer I have ever met takes it as an article of faith that arbitrators have been "splitting babies" ever since the seminal case of *In re King Solomon*. The reduction in runaway verdicts therefore comes at a cost. In addition to increased risk of a compromise verdict, most lawyers would agree it is nearly impossible to convince an arbitrator to dismiss a case prior to a hearing. While these same lawyers are quick to complain that a judge failed to grant a dispositive motion that (at least in the lawyer's mind) was a clear winner, the ABA's statistics show that a large portion of civil cases are currently decided on motions. Given that other protections, such as "high/low" settlement agreements and appellate review, are available to reduce the risk of runaway verdicts, one must wonder if arbitration's ability to reduce runaway verdicts is worth the costs.

Is arbitration faster and cheaper than litigation? Probably not. Leaving aside the arbitrator's hourly fee, the cost of renting a room and any administrative fees imposed by the ADR provider, a demand for arbitration is often met with a court challenge to the enforceability of the arbitration clause. Notwithstanding the favored status of arbitration, *see, e.g.*, 9 U.S.C. § 2, some courts are reluctant to enforce pre-dispute agreements to arbitrate, especially in the consumer context. *See, e.g., Laster v. T-Mobile USA, Inc.*, 407 F. Supp.2d 1181, 1187-92 (S.D. Cal. 2005). These challenges add both cost and delay.

The bulk of most lawsuits' costs come from discovery. Although arbitrators can refuse to allow any discovery, *see Incorporated Village of Lynchburg v. Douglas N. Higgins, Inc.*, 822 F.2d 1088, 1090-91 (6th Cir. 1987), they rarely, if ever, do so. On the contrary, arbitrators almost always permit at least some discovery. As a practical matter, many lawyers have come to believe that the scope of discovery in a major arbitration is comparable to that in litigation. An arbitrator's ability to compel discovery, however, is much more restricted than a court's. *See Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004). While there are "workarounds" to these

limitations, such as convening the arbitration prior to the hearing in order to take what would otherwise be considered discovery, see *Hay Group*, 360 F.3d at 413, these workarounds are expensive.

When it comes to the actual hearing, an arbitration has at least two costs in addition to the arbitrator's fees. First, arbitration hearings are often longer than court hearings. While lawyers always complain when a judge uses Rule 403 to shorten their presentation of evidence the judge believes is cumulative, lawyers typically rejoice when a judge uses Rule 403 against their adversary. Arbitrators, in contrast, have little incentive to force the parties to curtail their presentations. The end result is often a longer hearing than would have been permitted in court. The second cost arises when this longer presentation of evidence causes the hearing to take more than the allotted time. If the arbitrator has to recess the hearing in order to hear another previously scheduled case, and then resume the hearing weeks or even months later, the parties will incur the expense of "ramping up" for a second time.

There is one last cost to arbitration - the lack of an effective appeal. The high standard for overturning an arbitrator's award rarely stops a party who has lost a significant verdict from appealing. Although they must, therefore, incur the costs associated with an appeal, the high standard for overturning an arbitrator's award may leave the losing party with a feeling that justice was not done. For example, in *Brentwood Medical Associates v. United Mine Workers of America*, 396 F.3d 237 (3d Cir. 2005), an arbitrator purported to rest his decision on language he quoted from a collective bargaining agreement. This quoted language did not, however, actually appear in the contract. Despite this "glaring" mistake, the arbitrator's decision was upheld, since the court was able to find other grounds that the arbitrator could have used to reach his decision. See *Brentwood*, 396 F.3d at 239 and 243.

At the end of the day, there are costs to arbitration beyond just having to pay the arbitrator. Incurring these monetary and nonmonetary costs may well be justified in particular cases. Arbitration is not, however, a panacea, and a party who reflexively tries to shift every dispute into arbitration is likely to be disappointed.

Aaron Krauss is a member of Cozen O'Connor's Commercial Litigation Practice Group, practicing out of the firm's Philadelphia office.

The views expressed in this article are those of the author, and are not necessarily those of his firm or his clients.