



The Flaws of Arbitration

Today's subject is arbitration and why you should avoid it. Blasphemy you say? Read on to find out why court litigation before a judge sitting without a jury may be preferable. Recently, I found myself before an appellate court trying to vacate an arbitration award. When the appellate panel

realized that my arbitration appeal was the only thing separating them from their next meal, they dismissed me with the rubric of the finality of arbitration awards. Justice? Perhaps not.

Although we had selected a qualified arbitrator who had conducted a fair hearing, and made favorable findings, we were powerless to do anything about the arbitrator rewriting the contract with findings directly contrary to its express terms. I felt like the lawyer in a recent federal court of appeals case where the court upheld an arbitration award based upon the arbitrator's reliance on terms that were not even

in the contract. Does arbitration really deserve the favored status it receives? Let's explore some arbitration myths.

Myth No. 1: It's cheap and streamlined. Wrong. Arbitration of complex commercial disputes is neither—especially if the parties have committed to a three-person panel. The arbitration model “you pick one, I'll pick one and then those two will pick the third one” seems silly. The end result is a nightmarish 10- to 20-day trial broken up into three days here, four days there, and so on.

Even with a single arbitrator, the process is expensive and lengthy, with complex matters requiring discovery and pretrial activity nearly as broad as in court litigation.

Myth No. 2: It's final and unappealable. Wrong again. An arbitration award can be challenged where fraud, corruption, undue means, misbehavior or misconduct on the arbitrator's part can be clearly demonstrated. These are very narrow grounds for appeal and are almost never successful—as my appellate panel let me know. However, this does not keep arbitration award-losers from filing petitions to vacate awards and then appeals from those petitions (when denied)—regardless of the true merits—costing excessive time and six figure dollars.

Myth No. 3: It's more conservative. Generally, but there is a downside. Arbitration does eliminate the risk of runaway jury verdicts. However, arbitrators are notorious for Solomonic “splitting the baby” results, a very unattractive feature. If your case is strong, why should you be awarded only half a loaf? If your case is weak, you should settle, not arbitrate.

The better alternative is the bench trial. Imagine a scenario where you can: choose where your claim can be brought, as long as there is some connection to the parties or to their business, and impose your own statute of limitations; receive gratis a highly skilled, experienced jurist with a strong self-interest in moving the claim briskly to resolution; have the right to appeal the jurist's written decision.

I give you the judge sitting nonjury, the product of a contractual jury waiver clause. While the risk of a bad judge cannot be completely eliminated, it can be minimized.

One important footnote is that Georgia and California courts have ruled that contractual jury trial waivers are unenforceable. Despite this, the lower court in California and a California Supreme Court justice wrote that a nonjury trial before a single judge is a good alternative. The way around this, for now, is to avoid California and Georgia.

Arbitration has a place and serves a purpose. But risk managers should alert their counsel and contract negotiators about pitfalls of mandatory arbitration provisions. There may be a better way to skin that cat.

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