Pros and Cons of Arbitration

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Arbitration is a method for resolving legal disputes without going to court. Where parties are similarly situated, they may specify by agreement whether disputes will be arbitrated and, if so, how the arbitration will be conducted. At other times, one party may require that disputes will be arbitrated as a condition to doing business. Lawyers are frequently asked which is better: arbitration or litigation? The answer, of course, is "It depends." This edition of the *Capital* newsletter is devoted to arbitration, addressing some of the issues that most frequently arise and starting with a very brief summary of factors to be considered.

Cost

Perhaps the most the common reason for choosing arbitration is the belief that it will cost less than litigation. This may or may not be true. For a large employer that requires its employees to arbitrate disputes, mandatory arbitration likely would result in cost savings for the employer. But what about two parties to a commercial contract that requires arbitration? Attorneys' fees and the costs of discovery can be – but are not always – substantially lower in arbitration. What if the parties disagree on whether their dispute is subject to mandatory arbitration, as is often the case? The cost of litigating this initial question may eat up any savings that might otherwise have resulted from arbitration. Ultimately, if the parties can reach agreement on the questions of whether and how to arbitrate, arbitration can be less expensive than going to court. But absent such agreement, cost savings may not materialize.

For tips on keeping arbitration costs down and avoiding a dispute about whether to arbitrate, see the articles "Five Practical Things to Consider If You Include an Arbitration Clause in Your Contract" and "Enforcing Your Arbitration Agreement: Where and How."

Control

The general perception is that arbitration gives the parties greater control over the proceedings than they would have in court. Parties to arbitration may be able to select an arbitrator in whom both sides have confidence, whereas litigants do not get to select their judge. However, the arbitration parties are not always able to select the arbitrator or to mutually agree on an arbitrator. Sometimes the parties will not even be able to control how many arbitrators will hear their dispute, which can obviously affect the cost of arbitration. Moreover, once the arbitrator is selected, the arbitrator may have more discretion in fashioning the outcome than a judge has in a court case.

Additionally, whereas trial results can usually be challenged on appeal, a party may not be able to appeal an unfavorable arbitration result. For more on this subject, see "Can I Appeal a 'Rogue' Arbitration Award?" in this issue.

Privacy and Transparency

Weighing heavily in favor of arbitration for some is the privacy it affords to the parties involved. Unlike court records and trial proceedings, which are usually accessible by the public, arbitration is private, and the parties are typically under an obligation of confidentiality. For parties who put a premium on privacy, the confidential nature of arbitration can be enough to outweigh any advantages that a trial may have.

Formality

Arbitration proceedings can be relatively informal compared with a trial. The rules of evidence and procedure, which often make trials and trial preparation long and complicated, do not apply, and the setting is typically less formal. Arbitrations may proceed without, or with greatly reduced, formal discovery or depositions, which can lead to faster and less expensive resolution. The flip side of the informality is that the rules of evidence and procedure that apply to a trial have been worked out carefully over many years to try to ensure fairness to all parties. Without them, one or both sides may feel they did not get a fair hearing. An experienced and competent arbitrator can go a long way toward making the process fair to all parties.

Time

Many consider time as a critical advantage of arbitration, especially when compared with litigation, as arbitrators are often able to hear cases and render their decisions much more quickly than the courts. However, this may not necessarily be true. To cite an extreme example, in a partnership dispute where the partnership agreement required mandatory arbitration by a three-member arbitration panel, the panel did not render a decision for almost three years after the arbitration hearing. The parties might very well have saved themselves time and money if they had litigated.

As discussed here and as further shown in this issue of the *Capital* newsletter, the realities of arbitration can be very different from common perceptions and deciding whether to arbitrate can be a complicated decision.