New York Law Journal

Commercial Arbitration Is Alive and Well in New York

Commercial arbitration is flourishing in New York because parties voluntarily agree that arbitration is the preferred method for addressing and resolving disputes that may arise from their contractual relationships. For a wide range of reasons, the freedom of contracting parties to make that choice is a good thing.

By **David C. Singer** | December 23, 2020

Image removed.

One hundred years after adoption of what is now Article 75 of the New York CPLR and, soon thereafter, passage of the Federal Arbitration Act, the benefits of arbitrating commercial disputes are generally known and widely accepted in the business community.

Arbitration disputes on average are concluded far more quickly and efficiently than court litigation. A study reported by the American Arbitration Association compared the average duration of arbitrations conducted under AAA auspices with U.S. federal court litigations throughout the United States and concluded: (1) on average, U.S. district court cases took more than 12 months longer to get to trial than arbitration cases took to get to an evidentiary hearing (24.2 months versus 11.6 months); (2) when an appeal was included, U.S. district/circuit court cases on average took more than 21 months longer than arbitration to conclude (33.6 months versus 11.6 months), almost three times longer. Roy Weinstein, Cullen Edes and Nels Pearsall, *Efficiency and Economic Benefits of Dispute Resolution through Arbitration Compared with U.S. District Court Proceedings*, Micronomics Economic Research and Consulting (March 2017); American Arbitration

Association, *Measuring the Costs of Delays in Dispute Resolution (http://go.adr.org/impactsofdelay.html)* (Sept. 27, 2017). In a study limited to New York federal courts, the median time from filing a complaint to the beginning of trial was 30.9 months, in contrast to 12.5 months from filing an arbitration demand to issuance of a final award, a difference of 18.4 months. Cases in New York state courts undoubtedly take longer, with an even greater disparity between the length of time for a case to be concluded in New York state trial court versus arbitration. Roy Weinstein, *Arbitration Offers Efficiency and Economic Benefits Compared to Court Proceedings*, New York Dispute Resolution Lawyer (Fall 2017). In part this difference may be the result of over-crowded court calendars, exacerbated by the current COVID-19 environment.

The shorter time to conclusion has a corollary benefit: reduced cost. Notably, other aspects of commercial arbitration also tend to make an arbitration more efficient than a similar court proceeding. Discovery may be limited; motion practice may be more closely managed; and the case may be organized more tightly than a litigation in some court systems.

That arbitration may be a faster, more efficient, and less expensive means for resolving disputes than court litigation is not the only benefit of commercial arbitration. The ability of parties to control the arbitration process, tailoring each arbitration to meet their specific needs and preferences, provides a variety of additional benefits.

To appreciate the flexibility of the arbitration process, one need not look farther than the current pandemic. While courts were closed and civil trials were unable to take place, particularly civil jury trials, evidentiary hearings in arbitration were going forward in large numbers, generally remotely using Zoom or other online platforms. Parties to arbitration and arbitrators were able to test the technology and choose the manner for circulating documents in advance of the evidentiary hearing, present live witness testimony through direct and cross-examination, and complete the hearing without the hassle and expense of travel and lodging. Practitioners and arbitrators have reported a high level of satisfaction regarding remote hearings. It is anticipated that the use of remote hearings—including hybrid hearings (part remote-part in-person)—will remain an important part of arbitration even after the pandemic is behind us.

A crucial benefit of party control in commercial arbitration is the ability to participate in the selection of the decision maker—either a sole arbitrator or panel of three arbitrators. Parties and counsel can consider whether they want an arbitrator with subject matter expertise in the industry or areas of law raised in the case, the nature and extent of an arbitrator's prior work and other experience, whether the arbitrator is a former judge, and the availability of the arbitrator to hear the case within a desired time frame. Recommendations and input from trusted colleagues who have had direct experience with a particular arbitrator can be invaluable. This, of course, is quite different from the random assignment of judges in court litigation.

Indeed, party control permeates the entire arbitration process, both in their pre-dispute arbitration clause or during the proceedings once commenced. Parties can agree upon the extent of discovery that they ideally want to conduct—they can agree that there shall be no depositions, a limited number of depositions, a limited number of hours for each side to conduct depositions as they see fit, or unlimited depositions. Aside from document production, written discovery such as interrogatories and notices to admit generally are not used. When the parties request them, these can be managed to reduce the effort required by court rules and formal discovery motions. Since discovery is commonly the single greatest source of expense and delay in court litigation, streamlining the discovery process in commercial arbitration can save substantial time, attorney fees and related costs.

Parties also can agree on an approach to dispositive motions, including whether leave of the arbitrator must be sought and granted before a motion can be made. This way, time consuming and expensive motions that lack merit and have little chance of success can be avoided. In contrast to motions in court, motions in

arbitration should be decided quickly and without the length and detail—unless the subject requires—of court opinions.

Parties can further agree on pre-hearing submissions, including whether briefs and other submissions to the arbitrator in advance of the evidentiary hearing are warranted in a particular case. Meaningful savings and efficiencies are achieved when elaborate submissions can be avoided. Once the evidentiary hearing is concluded and the arbitration is closed, the arbitrator must render the award in a short time period—typically 30 days—usually dictated by the parties or the arbitral forum they have chosen.

Another benefit of commercial arbitration is the privacy that it affords. Generally, the evidentiary hearing is conducted in a private setting, such as the offices of an arbitration service provider or private law firm, with only the parties, arbitrators, witnesses, and court reporter in attendance, unless otherwise agreed by the parties. The arbitrator and service provider are sworn to maintain the strict confidentiality of the arbitration. The parties can agree upon the scope of their own confidentiality obligations, and confirm their agreement in a document that can be signed by the arbitrator and enforced as a contract or arbitral order. Accordingly, a business generally can maintain the confidentiality of its confidential information, relationships and trade secrets, and an individual can protect the privacy of her/his personal information, at least up to the time that court proceedings may be required to enforce the award.

So, why are complaints sometimes expressed regarding commercial arbitration?

One complaint is that arbitrators may be less willing than judges to grant dispositive motions. In fact, major arbitration service providers expressly permit arbitrators to rule on and grant dispositive motions. See, e.g., AAA Commercial Arbitration Rules, Rule 33; JAMS Comprehensive Rules and Procedures, Rule 18. Again, this concern may be addressed in the selection of an arbitrator who is willing to grant dispositive motions where justified. It was recently argued in an article published in the Law Journal: “And although no one can seriously question the integrity of arbitrators, there nonetheless remains a profit motive that could play a part in an arbitrator’s decision-making when faced with an early motion to dismiss a contract claim.” John J. Zefutie and Ugo Colella, *Don’t Arbitrate Contract Disputes (https://www.law.com/newyorklawjournal/2020/08/07/dont-arbitrate-contract-disputes/)*, New York Law Journal (Aug. 7, 2020). This is like arguing that a judge may be inclined to grant an early motion simply out of a desire to reduce the size of her/his docket. In fact, arbitrators take motion practice seriously and weigh the possible benefit of granting a dispositive motion against their obligations to provide parties with a full and fair opportunity to present their case and be heard.

Another complaint is that there is no right of appeal or judicial review in arbitration, except under very limited circumstances. Actually, the finality of an arbitration award is generally recognized as one of the benefits of arbitration. Upon the issuance of an arbitration award, the case in concluded. Unless there are statutory grounds for contesting the award, such as fraud, bias or where the arbitrator may have exceeded her/his powers, parties accept the arbitral award and move on with their lives and businesses. In contrast, final determinations in court litigation commonly are followed by motions for reargument or reconsideration and/or one or more appeals.

A primary concern that has been raised regarding the right to an appeal is that an arbitrator may “go off the rails” and issue an award that is totally without basis, leaving the wronged party with virtually no meaningful recourse. Any such concern can be addressed in the arbitrator selection process—if you select a highly qualified and experienced arbitrator who is well regarded in the community, that problem should not arise.

The article referenced above continues: “Because arbitration stresses fairness and compromise, a party arbitrating a breach of contract action runs the risk of obtaining a final ruling that imposes contract terms, obligations, or damages that the party never anticipated when entering into the contract.” Id. While arbitrators attempt to achieve a result that is fair, awards are not based on compromise. Just as judicial decisions, they are based on the facts presented and the law to be applied. According to a 2018 study of

AAA-ICDR business-to-business commercial awards, AAA-ICDR arbitrators made decisions clearly in favor of one party in over 94.5% of the cases. Only 5.5% of awards fell in the midrange category. Ryan Boyle and Susan D. Lewin, *ADR Does Not Mean Splitting the Baby*, Corporate Counsel Business Journal (March-April 2019).

Further, it should be noted that some arbitration service providers have adopted rules that provide for the right to appeal from an arbitration award, within the arbitration process. See, e.g., AAA Optional Appellate Arbitration Rules (2013); JAMS Arbitration Appeal Procedure (2003). While the appeal option is not commonly used, it is available to the parties.

Commercial arbitration is flourishing in New York because parties voluntarily agree that arbitration is the preferred method for addressing and resolving disputes that may arise from their contractual relationships. For a wide range of reasons, the freedom of contracting parties to make that choice is a good thing.

David C. Singer *of SingerADR Neutral Services is an independent arbitrator, mediator ombudsman and investigator, and a fellow of The College of Commercial Arbitrators.*
