Arbitration's Advantages Make It A Superior Solution

By **David Singer** (December 13, 2021)

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The benefits of commercial arbitration are generally known and widely accepted. 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 federal court litigation throughout the U.S., and concluded that, 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.

Further, when an appeal was included, U.S. district and 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.[1]

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 generally take longer, with an even greater disparity between the length of time for a case to be concluded in state court as opposed to arbitration.[2]

In a recent guest article published in Law360, focusing on the mass filing of arbitrations in consumer and employment cases in which businesses require one-on-one arbitration, the author favorably highlights that "the median lawsuit in the U.S. District Court for the Eastern District of Virginia took about 12 months. Compare that — on a somewhat apples-to-oranges basis — to the average arbitration, which takes eight months."[3]

Although the Eastern District of Virginia is widely known as a "rocket docket" anomaly, even in that court, according to the author, it takes 50% longer to get to trial than the average arbitration.

Having lost the battle on that front, the author proposes a two-part metric to evaluate the benefits of arbitration: (1) whether the benefits attributable to arbitration are unparalleled, in that they are not also offered in litigation; and (2) whether the benefits attributable to arbitration are mutual, in that they are similarly shared and available to both claimants and respondents.

We welcome the comparison, and suggest that the metric is one that commercial arbitration passes with flying colors. Although some attorneys who represent plaintiffs in cases best handled in class actions may prefer litigation, that does not mean that "arbitration is a sham" and worthless, as the author asserts.

First, commercial arbitration generally is more efficient than court litigation. In litigation, the court may well adhere to the standard or default schedules for discovery, motions, pretrial orders and the like. However, in arbitration, the default is quite the opposite — i.e., more limited document discovery, few if any depositions, no interrogatories, few motions and less formal procedures.

Those are the facts, not hypotheticals. However, if commercial parties want to have their litigation experience, they have the right to arbitrate their cases as they would a court litigation, or not include an arbitration clause in their contracts. (Of course this may be different for contracts of adhesion in the consumer and employment context.)

Second, it is inaccurate to suggest that, if a benefit of arbitration redounds to one party in a particular case, such benefit is to be generalized to all cases. Damages awarded in an arbitration may not be dissimilar to that awarded in a litigation, and may redound to a claimant's benefit. Respondents may favor arbitration because they fear the randomness of jury verdicts.

Over a large population of potential litigants, predictability may be more important than whether the mean award is higher or lower in a particular forum. As to whether arbitration or litigation is more likely to have a case dismissed on motion: If fewer dispositive motions are granted in arbitration, that means that an arbitration is more likely to go to an evidentiary hearing than a litigation is to go to trial.

The fact that arbitration is a quicker and more efficient means for resolving disputes than court litigation is not even the primary 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 — in particular, civil jury trials — did not take place, evidentiary hearings in arbitration proceeded in large numbers, generally remotely using Zoom or other online platforms.

Parties to arbitration and arbitrators were able to test the technology in advance of the evidentiary hearing, choose the manner for circulating documents, present live witness testimony through direct examination and cross-examination, and complete the hearing without the hassle and expense of travel and lodging.

The satisfaction among practitioners and arbitrators with remote hearings has been high. It is anticipated that the use of remote hearings — including hybrid hearings — 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 a panel of three arbitrators. Parties and counsel can consider whether they want an arbitrator with subject matter expertise in the industry or area 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 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.

Party control permeates the entire arbitration process. Parties can agree on the extent of discovery that they 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. 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. The AAA commercial arbitration rules provide that an arbitrator may allow a dispositive motion only upon a showing that the motion is likely to succeed and dispose of or narrow the issues of the case.[4] Time-consuming and expensive motions that lack merit, and therefore have a limited chance of success, can thereby be avoided.

Parties can further agree on prehearing 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 prehearing submissions can be avoided.

Another benefit of commercial arbitration is the privacy that it affords. The evidentiary hearing is conducted in a private setting, such as the offices of an arbitration service provider or private law firm. Only the parties, arbitrators, witnesses and court reporter attend, unless otherwise agreed by the parties.

The arbitrator and service provider are sworn to maintain the strict confidentiality of the arbitration, and parties and counsel are free to agree upon their own confidentiality obligations. Accordingly, a business generally can maintain the confidentiality of its proprietary information, relationships and trade secrets, and an individual can protect the privacy of her/his personal information.

In the prior article, the author contorts the benefit of being able to choose an arbitrator who has subject matter expertise into a negative, claiming that such expertise can come at the price of impartiality. There is no cited or apparent factual basis for such conclusion.

Moreover, the requirement for disclosure of possible conflicts by arbitrators is much broader than it is for judges. It is far easier to disqualify an arbitrator following a disclosure than it is to disqualify a judge based on a real or perceived lack of impartiality.

The author's gripe against arbitration appears largely to stem from the practice of some employers requiring employees — or ostensible independent contractors who may in fact be employees — to sign arbitration agreements, and the fact that some of these agreements contain class action waivers.

Whether class action waivers should be incorporated into contracts is a separate question from whether arbitration has advantages over litigation for resolving commercial disputes, because class action waivers can be included in any type of dispute resolution contract — including contracts that provide for disputes to be resolved through litigation.

Moreover, class action arbitration does exist, and nothing precludes contracting parties from allowing class action arbitrations. Nor does the practice of so-called mandatory arbitration have an effect on the efficacy of arbitration. An employee who signs an arbitration agreement, whether the agreement is a condition of employment or a voluntary act by the employee, still gains the benefits of arbitration that are described herein.

Arbitration is flourishing because it is a better method for addressing and resolving disputes that arise from contractual relationships. That is a good thing.

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[1] AAA, Measuring the Costs of Delays in Dispute Resolution, http://go.adr.org/impactsofdelay.html.

[2] Roy Weinstein, Arbitration offers Efficiency and Economic Benefits Compared to Court Proceedings, New York Dispute Resolution Lawyer (Fall 2017).

[3] Arbitration's Supposed Benefits Don't Measure Up, Law360 (Sept. 30, 2021).

[4] AAA Commercial Arbitration Rules, Rule 33; JAMS Comprehensive Rules and Procedures, Rule 18.