

# **"Arbitration -- The Expedient Alternative?"**

## **When Does Arbitration Really Make Sense?"**

Thomas Talerico

Bodman, Longley & Dahling LLP

# Is Arbitration Really the “Alternative?”

11/08/2002

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**“There was a time when litigation was the dominant method of dispute resolution, and administrative proceedings resolved ancillary cases, and mediation and arbitration were “alternative” methods. By the end of the Twentieth Century, litigation is the least used method used to resolve common legal problems. Administrative proceedings replaced many judicial cases. Judicial cases usually were resolved through settlement and mediation, and seldom were resolved by trial. Arbitration became the fastest growing method selected by parties to resolve their disputes.”**

*2000 William Mitchell Law Review* article, citing various authorities.

- “[T]here are estimates that upwards of 90% of international contracts contain arbitration clauses.” *Kansas Journal of Law and Public Policy*, Spring 2000, citing Berger, *International Economic Arbitration*.

**Court filings are down.**

**Case load filings at arbitration  
institutions have gone up.**

# Cornell/PERC Study

- More than 530 corporations Fortune 1000.
- ADR a more satisfactory process than litigation.
- 79% had used arbitration in the last 3 years.

## Other findings:

- ADR is now widely used to resolve complex business disputes.
- 90% say ADR is a critical cost-control technique.
- More than half said cost pressures directly affected decision.
- 80% considered ADR “a more satisfactory process”.
- 66% said ADR provides “satisfactory settlements”.
- 59% said ADR “preserves good relationships”.

# What is Arbitration?

- Creature of contract.
- Parties can choose procedures.
- Procedure is generally much less formal.
- Parties can pick the judge(s).
- Subject to limited judicial review.
  - ◆ Fraud, bias, or failure to admit evidence.

## **“Emphatic” federal policy in favor of arbitration.**

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*Southland v Keating; Mitsubishi Motors Corp v Solar Chrysler Plymouth, Inc.*

Arbitration clauses are now fully enforceable, with very limited exceptions.

Federal law preempts most state legislation.

## Five decisions in 2001 term.

- Very limited public policy challenges to award .
- Arbitration clause in a consumer agreement enforceable despite silence re fees and costs.
- Contracts of employment within FAA's reach.
- Agreement to arbitrate sufficient to waive Indian Tribe's sovereign immunity.
- Reviewing court's ability to reject factual findings limited.

“In deciding whether to arbitrate, you compare the marginal costs with the marginal benefit. If the marginal benefit of arbitration exceeds the marginal cost of arbitration, then you arbitrate. The more important question, the more interesting question is, what are the marginal costs and benefits of arbitration?”

*Kansas Journal of Law & Public Policy, Spring 2000*

## Potential costs and benefits:

- Different outcome.
- Different procedures, likely including less discovery and supposedly less cost.
- Privacy.
- Enforceability.
- Finality.

# Different outcome

- How much will this process cost?
  - ◆ Disposition.
  - ◆ Expenses.

## National Center for State Courts 1999 report:

- 945,615 civil dispositions.
- 105,781 trials (11.19%).
- 14,105 jury trials (1.56%).

## 1996 NCSC report :

- 1,028,574 civil dispositions.
- 7.14% by trial.
- 1.75% by jury trial.

## **Administrative Office of the U.S. Courts 9/30/01 Report :**

- 247,592 civil dispositions.
- 5,401 (2.2%) began trial.

## ABA Study re franchise systems:

- 420 disposed matters.
- 71% of lawsuits settled.
- Balance resolved by:
  - Motion (16%)
  - Bench trials (6%)
  - Arbitration (5%)
  - Jury trial (2%)

## Other findings:

- More cases settled in state than Federal court (76% versus 64%).
- More cases resolved by motion in Federal than state (25% versus 12%)
- 60% of arbitration cases tried to conclusion.

## Trial results:

- Franchisors won
  - ◆ 45% in state court.
  - ◆ 60% in Federal court.
  - ◆ more bench than jury trials (63 v 54%).
  - ◆ 18% in arbitrations.
- “Mixed” results more common in arbitrations.
  - ◆ Although “mixed” results also more common in jury trials.

# Other Findings:

Although franchisors lose more arbitrations,

Average awards dramatically lower than jury verdicts.

# Financial consequences

- Median settlement - \$66,000.
- Median arbitral award - \$74,500.
- Median bench award - \$67,500.
- Median jury verdict - \$421,973.

## Other costs.

- Attorneys fees and expenses.
- Lost time.
- Arbitrators' fees.
- Association fees.

## The Arbitrators.

- Expertise.
- 49% of Cornell/PERC respondents expressed a lack of confidence in the arbitrators, with 29% being concerned about qualifications.
- “Career arbitrators.”

# Number and Selection of Arbitrators.

- 1 v 3.
- Party Appointed.
- All neutral.
- Random.
- Selection from Panel.

# Discovery.

- Historically, limited.
- More common today.

# Witnesses.

- Affidavits.
- Direct testimony witness statements.

# Other procedural considerations

- Location.
- Language.
- Translation.
- Transcription.
- Motion Practice.
- Form of award.

# Privacy

- Do not assume confidentiality.
- May avoid adverse precedents.

# Enforceability.

- “Arbitration finesses the issue of sovereignty.”

# Finality.

- Awards are final even when “so incomprehensible that three years later the judges and parties are still trying to figure it out.” Posner, J., *IDS Life Insurance Co v Royal Alliance Associates, Inc.*

# Reversal rate estimates

- Cornell Law study:
    - ◆ 21% trial outcomes appealed.
    - ◆ 21% result in reversal.
    - ◆ Jury/bench appealed and reversed at same rate.
    - ◆ Defendant reversals 31.14%
    - ◆ Plaintiffs 13.18%
- ★ *Clairmont and Eisenberg*

The overall reversal rate in claims involving “general contract and fraud” resulted in a higher overall reversal rate. (e.g., defendants prevailing on appeal on fraud claims 41.38% of the time.)

## Length of proceedings until conclusion.

- Proceeding may start sooner.
- But last longer.

# Summary

- Arbitration seems to be increasingly common.
- Arbitration seems to narrow likely results.
- Arbitration can be at least as costly as litigation.
- Circumstances must be assessed individually.