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In Defense of Arbitration

Over the past couple of years, most practitioners and certainly all ADR professionals have read numerous articles concerning what is wrong with arbitration and how arbitrators and counsel can fix these ills. ADR conferences have routinely addressed escalating costs and time inefficiencies, which are perceived to be contrary to the essential features of the arbitration process, and proposed various mechanisms for arbitrators and counsel to employ in order to address these problems. After researching the history and evolution of arbitration, as well as reflecting on my own experiences, both as an advocate and an arbitrator for the past 12 years, I have noticed the many ways and contexts in which arbitration functions quite well and for many seemingly satisfied users.

When there are concerns regarding arbitration, they are not exclusively about costs or inefficiencies; rather, they are more often directed at consumer arbitrations, which this article will not address. In commercial arbitrations, criticisms of the process are sometimes a result of misapplications. This is often caused by the increasing use to resolve large, complex, commercial disputes without considering necessary modifications for an effective process. The arbitration process, however, when viewed from a macro-perspective, is a time-honored and continuing success story.

When compared to litigation, arbitration's benefits are typically perceived as: privacy; flexibility; control over the process — including the quality and qualifications of arbitrators and scheduling; less formality and the potential use of legal or equitable norms and tailor-made remedies; the reduced time and cost in obtaining decisions; and of course finality. The perceived limitations or drawbacks, in many cases, are really just the flip-side considerations of these benefits. For example, people often mention the lack of an appeal as a drawback, which is really just the opposite of finality.

Overarching these lists of benefits and drawbacks, and one consideration evidenced by them, is arbitration's primary attribute — flexibility. It is within the parties' ability to mold or design a process to fit their needs, which can begin as early as the contract negotiating and drafting stage, before any disputes even arise. Only a process as flexible as arbitration — which has its historical roots in resolving repetitive, smaller disputes, occurring in the context of ongoing business or social relationships quickly, cheaply and with finality — could be adapted to produce resolution of today's complex commercial disputes.

It is precisely this flexibility that gives parties, counsel and managerial arbitrators the chance to mitigate the types of cost and inefficiency concerns being expressed recently. New discovery protocols, expedited motion and hearing procedures, and the institution of written direct testimony or use of panel testimony, are but a few of the adaptations used to make the arbitration process a better fit for commercial disputes.

Two manifestations of this remarkable flexibility spring to mind. Consider first the long-standard practice of determining baseball players' salaries via an arbitration process, which has acquired its own common name: "baseball arbitration." In baseball arbitration, each side provides a proposed number (presuming a monetary dispute) and the arbitrator is empowered to pick the number she thinks is most appropriate. This simple twist to traditional arbitration has produced significantly moderated numeric proposals from each side, because to propose a high number would be unwise and run the risk of leading the arbitrator to pick the other side's number. There are two beneficial effects in this process: 1) because both sides see one another's number, settlement is often quickly possible, and 2) even where settlement doesn't happen, the moderated difference in the two proposals allows a brief, relatively bloodless hearing with the goal of creating as few hard feelings as possible.

Consider another, more recently formalized process called "early neutral evaluation" or advisory arbitration — a dispute resolution tool being implemented with increasing frequency. There is a process many California lawyers know as "nonbinding arbitration," where smaller cases are ordered by state courts to nonbinding hearings before volunteer arbitrators, which most lawyers have found relatively ineffective. However, experience has shown that with a simple tweak, namely the considered selection of a neutral evaluator with subject-matter expertise, the nonbinding opinion of that neutral has a very powerful and positive effect on settlement of the dispute. The arbitration process again evolved to meet a need.

A final, often underappreciated advantage of arbitration, which costs nothing and oftentimes means a great deal to parties, is privacy. Most companies and individuals doing business together will agree on the importance of keeping their disputes, and the resolution thereof, as private as possible. For most people, participating in a dispute can be a very negative and emotional experience, and not something to be aired in public. Business partners in a dispute do not want competitors or other unwanted listeners in the room as they air their differences. Disputes between co-workers or members of social communities are best handled privately and with discretion.

Here arbitration meets all such needs.

None of this is to suggest that attention does not need to be paid to controlling runaway costs in those commercial disputes. However, even here, many attorneys and their clients are not as concerned as the hype would suggest. Many would agree there are justifiable concerns and that there is room for improvement regarding the conduct of commercial arbitrations. But particularly in high-stakes cases, attorneys are not as concerned with cost or time — so long as both are within reason and not capriciously inflated. Counsel view complete discovery as necessary and view a full hearing as essential, whether they are arbitrating or litigating. In fact, they expect these to be comparable and commensurate to the case. While most everyone is interested in both the predictability of time and costs and staying within their budgeted allotments of each, the preference and focus remains on the quality of the arbitrator, the hearing and the award.

In fact, in the types of very high-stakes cases increasingly brought to arbitration, the only thing counsel and their clients really want is an award they can decipher with legal reasoning and explain to their clients, issued by an experienced arbitrator or tripartite panel they can respect and trust. Of course, there is a viable debate as to the need for more than a single neutral, particularly in light of costs. However, in a large, bet-the-company-stakes case, the prevailing view is that a tri-partite panel is less likely to "get it wrong." Certainly, a single qualified neutral can render an appropriate award. But for parties skeptical about placing too much power or responsibility in one person's authority, one can argue a panel of three arbitrators will increase the likelihood an award will be accepted by both sides and less likely to be challenged.

Indeed, in such cases, even arbitration's hallmark of finality has been called into question, as more parties and counsel consider whether a right of appeal makes sense in big cases. The potential for getting stuck with what one considers a legally or factually incorrect award in the tens or hundreds of millions of dollars causes parties to rationally consider whether to again tweak the process to provide for a right of appeal, whether in court or privately.

So while we can and should continue to focus on ways to make commercial arbitrations more economical, we don't necessarily need to "throw the baby out with the bath water." Let's not forget that in many contexts, arbitration functions quite well, and with a little forethought and some planning can be efficient and effective in any number of disputes.

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