Making the Case for Arbitration[1]

By Philip Cutler

Is litigation "better" than arbitration? What does "better" mean, and who decides?

The debate over arbitration vs. litigation has been going on for years, and will likely continue…with no clear winner. Aaron Foldenhauer essentially invited this discussion in his July 29 article on CorpCounsel.com, "Big Risks and Disadvantages of Arbitration vs. Litigation" [www.corpcounsel.com, search by article title]. While my article responds to some of the criticisms of arbitration in that one, I hope that it is a thoughtful counterpoint. I speak from the standpoint of one who, for over 40 years, has counseled businesses and their owners, tried their cases in both court (jury and non-jury) and arbitration, and served as neutral arbitrator, either as sole arbitrator or as a member of chair of a multi-arbitrator panel, in hundreds of commercial cases.

ADR is commonly known as *alternative* dispute resolution. Many of us who litigate and arbitrate, and certainly those of us who serve as neutral arbitrators and mediators, prefer to define ADR as *appropriate* dispute resolution. For, as in all things, context is important – and often outcome-determinative. Whether in an intellectual property licensing agreement, a franchise agreement, a construction contract or even a "routine" business agreement, choosing the forum and the decision-maker to which the inevitable disputes are to be submitted are matters that deserve substantially more thought than they frequently receive.

I have seen hundreds of dispute resolution provisions in business contracts, most of which specify arbitration. While many are well-drafted and serve clients on both sides well, others are exceptionally poor. Too often the "arbitration clause" is not the subject of any meaningful negotiation or consideration; the transactional lawyer – or worse, the executive negotiating a contract – simply lifts the clause from another contract without so much as a thought about whether it is appropriate for the business arrangement at hand.

The Foldenhauer article also ignores a substantial advantage of arbitration over litigation in the courts: the ability to select an appropriate decision-maker--one with appropriate legal and business experience in the industry. The drafted

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arbitration clause should provide for the number of arbitrators and the qualifications they should possess, either specifically or by reference to governing rules and procedures. (If a provider-organization is to administer the case, it should be identified and counsel should understand it calculates fees, trains arbitrators, processes cases and handles evidence and discovery.) At the appointment stage it is incumbent upon counsel to vet candidates to ensure that the arbitrator or panel chosen to resolve the dispute is qualified not only to decide the case, but to ensure that the proceedings are managed fairly, efficiently and effectively – and that the parties are likely to perceive them in that light.

While Foldenhauer is certainly entitled to his opinion, his article cites no authority for many of his assertions. Nor does he mention, much less analyze, any of the substantial causes of the angst that he recounts. While a client or its lawyer may be "surprised" by an arbitrator's award, that surprise is entirely subjective and may just as well be due to an inaccurate assessment of the strength of the each side's case. One can hardly posit an arbitrator's (or trial judge's) wholesale acceptance of one side's legal theories or evidence as, *ipso facto*, a ground for complaint. That may very well be what the law and the totality of the evidence supported.

Moreover, any lawyer who has tried cases recognizes that judges commonly request that the parties provide the court with their proposed findings of fact and conclusions of law; sometimes the judge picks and chooses from among the parties' proposals, sometimes not. The court's touchstone is how the proposed findings and conclusions stack up with applicable law and the evidentiary record.

There are undeniably risks for clients who choose to arbitrate their business disputes, just as there are risks for them in jury and non-jury court cases. However, the Foldenhauer article fails to address many of the causes of a business's dissatisfaction with arbitration – and to recognize that the "risks" can be managed proactively by a business's lawyer (with the help of an experienced litigator) in drafting a dispute resolution clause appropriate for the dispute (either before or after it has arisen), and by thoughtfully vetting and then selecting the arbitrator or arbitrators chosen to resolve it.

Cost and delay go hand-in-hand. They are, as Foldenhauer says, of concern to clients – just as they are of concern to clients in court litigation. The more arbitration is like litigation, the greater the cost and the greater the delay. An in-depth examination of these concerns is beyond the scope of this article, but the concerns were of sufficient importance that the College of Commercial Arbitrators

convened a national summit of arbitrators, users of arbitration, in-house and trial counsel and arbitration providers (such as the American Arbitration Association and JAMS) in 2009. From that summit emerged the *College of Commercial Arbitrators Protocols for Expeditious, Cost-Effective Commercial Arbitration* [available at www.thecca.net]. As these protocols demonstrate, reining in costs and effectively managing arbitrations is the joint responsibility of ADR providers, arbitrators, users and counsel.

Similarly, in 2011 the American Arbitration Association polled 40 experienced arbitrators with wide experience in both business and law, and asked them for the ten things they would tell CEOs and CFOs in order to maximize the benefits of commercial arbitration. The result was *The Top 10 Ways to Make Arbitration Faster and More Cost-Effective* [available at www.adr.org]. Effective case management by the arbitrator should also be of concern to clients and their counsel. One need only look to the College of Commercial Arbitrators *Guide to Best Practices in Commercial Arbitration* (3rd Ed., 2013, Juris Publishing) for a comprehensive and indepth treatment of these issues.

The courts are, as the Foldenhauer's article points out, essentially "free" in the sense that the general public, not the parties, pay the judges' and court system's salaries and costs. But then, in the court system one doesn't get to choose the decision-maker, and select one with relevant substantive law or industry experience. There are many benefits to the use of arbitration (especially multi-arbitrator panels), but those benefits come with a cost. Wise counsel evaluates the trade-offs and advises her client accordingly.

Finally, the lack of general judicial review of arbitration awards is a given. However, the U.S. court system is unequipped to provide disputants with the speed and efficiency commonly available in arbitration. Moreover, many arbitration providers have appellate procedures akin to those available from the courts. And the Federal Arbitration Act (coupled with the "manifest disregard of the law" gloss still viable in many circuits) provides an opportunity to overturn some arbitration awards. Still, one of the benefits of arbitration is its finality. While court judgments and jury verdicts can be appealed, the "benefit" of an appeal has to be juxtaposed against not only its cost but also the statistical reality that only a small portion of cases are reversed on appeal.

The Foldenhauer article adds nothing to the merits of the debate over arbitration vs. litigation, and simply muddies the waters. Just as "bad facts make

bad law," horror stories of the kind Foldenhauer recounts should not indict the whole of a dispute resolution process that has worked well for centuries.

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