ARBITRATION: THE GOOD, THE BAD AND THE UGLY

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Arbitration makes a lot of sense. Disputes are resolved fast. Attorneys' fees are minimal. And it is private, so dirty laundry is not aired in a public forum.

The Good

The best thing about arbitration is that it has the capacity to resolve disputes quickly. However, there are several bottlenecks. One is an arbitration clause that requires mediation first. Mediation before litigation is usually a good thing, except it usually takes one to three months to set up, and if one of the parties does not want to mediate, the process is less likely to succeed and time has been wasted. That said, the Nevada Supreme Court has decided that an arbitration clause requiring mediation first is enforceable. Some arbitration clauses specify that the state or federal rules of discovery apply. That requirement can add six months to a year or more before the parties get to an arbitration hearing. Finally, even if the parties have chosen arbitration for its speed, complex cases can take four to 10 months or more to reach an arbitration hearing. Arguably, this outcome is better than two to five years for litigation. Arbitration usually resolves disputes much more quickly than does litigation—but "quick" can depend on perspective and, for some, quick is still very slow.

The Bad

The bad part of the arbitration process is that sometimes the playing field is not level. People think they will get a fair shot from a neutral, independent person. However, some arbitration clauses force people to choose arbitrators from specific arbitration companies. Many such companies, like Advanced Resolution Management, American Arbitration Association and JAMS are reputable and have arbitrators who are independent. With companies like these, a participant is more likely to get a neutral decision maker. However, some arbitration companies are set up by certain industries for the sole purpose of providing arbitrators for cases arising within those industries. This arrangement has the potential to generate biased arbitrators, since deciding against the relevant industry may keep an arbitrator from getting assigned more cases.

The Ugly

Depending on your perspective, the worst thing about arbitration may be that the arbitrator has almost ultimate power. The arbitrator's decision, even if totally wrong, is upheld by courts in the vast majority of cases. The grounds for overturning an arbitrator's award are very, very narrow and not easily met. The winning party will likely be thrilled and vindicated; the losing party will likely be mad and upset. If the parties want the issue concluded quickly, and both sides chose a neutral arbitrator, then the arbitrator's decision is final. The party that lost the arbitration can appeal to a court, but because arbitrators' decisions are often rubber-stamped, the losing party may think an arbitrator's decision was too arbitrary. This is the ugly side of arbitration—there is no effective review method in place through which to determine whether or not an arbitrator followed the law. Grounds to overturn an award are fraud, impartiality, corruption or refusal to consider material evidence. Arbitration statutes usually allow one of the parties to file a motion to confirm or object to an award. A motion is quick—usually only taking a few weeks. If arbitration statutes added another component—the review of an award based upon whether or not the arbitrator followed the law—a court decision would at least give the losing party a shot at a meaningful review of an award while still keeping the process simple and fast. NL

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