PositivelyNeutral

Arbitration and Mediation for Attorneys and Their Business Clients

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What Do Business-To-Business Arbitration And A Well-Tailored Suit Have In Common?

Scenario #1: You are a transactional attorney representing a business client in a substantial transactional matter. It's time to address the dispute resolution tribunal—court or arbitration. The draft agreement provided by the counterparty provides for arbitration. As you review the agreement with your client, she suggests that you should push back on the counterparty's arbitration preference. However, the contract negotiation already has been stressful, and you are dubious that your client's suggestion is a good one.

Scenario #2: You are a business litigator and your client advises you that a dispute between his company and his contract counterparty soon will involve claims flying back and forth. He emails you with the operative agreement and it provides for arbitration. You cringe, because you anticipate that he will be upset to hear that he cannot proceed in court.

In recent years, arbitration has received a lot of media attention, mostly in the context of consumer and employment disputes. Lost in the discussion, however, are the advantages that arbitration continues to provide over litigation in a B2B context.

When newspaper-reading B2B clients balk at arbitration, knowledgeable attorneys educate them about often unknown or unappreciated virtues of B2B arbitration. Let’s review some of them.

The "But What About the Judge?" Syndrome
A common misconception is that litigation provides a more reliable decision-maker. In litigation, the case will be decided by an exalted, robed judge in an elegant courtroom, whereas arbitrators are “wanna be” judges lacking in credentials and gravitas.

Robes notwithstanding, arbitration provides parties with a far greater opportunity to ensure that their matter will be decided by someone best suited to the task. Especially in recent years, organizations like the American Arbitration Association (AAA) have vetted and curated their rosters to ensure that arbitrators are exceedingly well-credentialed.

More importantly, no matter their pedigree, judges may have limited familiarity with the subject matter of the dispute. Whereas parties in litigation typically have no control over the judge assigned to their case, arbitration allows businesses to select decision-makers with specific expertise relevant to their industry and dispute.

For example, AAA maintains rosters of arbitrators who are specifically qualified by areas of need. Need someone who understands the intricacies of M&A disputes? There's a panel for that. Worried about complex intellectual property issues? There's a panel for that too. Have a dispute where the claimed damages are in the tens of millions of dollars? Consider the AAA’s large, complex case panel.

With this array of options, parties can ensure that their dispute is resolved by a professional who understands the nuances of the issues at hand, providing a level of expertise that litigation cannot guarantee.

And here's the kicker - if you really can't let go of that judicial security blanket, the AAA enables parties to select from a panel of former judges.

The "Appeals Safety Net" Anxiety

"But what if the arbitrator gets it wrong?" Attorneys know that, except in very limited circumstances, an arbitrator's decision will not be reversed by a court. But let's put this in perspective. What percentage of litigated cases are appealed? And of those, how many appeals succeed?

Still, for high-stakes cases, there's an arbitration solution: the three-arbitrator panel. The AAA permits the parties by agreement to utilize a three-arbitrator panel. Even in the absence of agreement, the AAA nonetheless can exercise discretion to appoint a three-arbitrator panel if deemed appropriate.

Think of this as a front end appeal process. With three sets of arbitrator eyes listening to the evidence, considering the applicable contract and interpreting the law, the likelihood of error is remote, obviating concerns about the absence of appeal rights.

When considered as an alternative for high-stakes arbitrations, the additional cost of a three-person panel is justifiable and can be measured against the costs (and likelihood of success) on a judicial challenge to a single arbitrator's award.

And, spoiler alert, for those wanting suspenders in addition to their belt, AAA offers appellate arbitration, which parties can provide for in their arbitration agreement.

The Discovery Security Blanket

One of the biggest concerns attorneys hear about arbitration is the perceived limitation on discovery. This concern often stems from a fundamental misunderstanding about arbitration flexibility.

Contrary to rumor, arbitration allows parties to shape the discovery process to fit their specific needs. Arbitration permits parties to agree on the scope and method of discovery, ensuring that they have access to necessary information without the burdens often associated with litigation. Rarely do arbitrators impose material limitations on discovery when the parties collectively present a discovery plan for approval.

In the absence of an agreement, arbitrators will issue a discovery order establishing the extent and type of discovery that the parties may pursue. The arbitrators' issuance of a "front end" order should be compared with litigation discovery. Federal and state procedural rules on their face may be more open-ended than the discovery order issued by an arbitrator at the commencement of the matter. However, in litigation, parties routinely object to the scope of discovery requested under those open-ended rules, with judges often limiting the requested discovery in expensive and time-consuming motion practice.

At the end of the day, the scope of discovery available to the parties in arbitration and litigation is not materially different.

Furthermore, arbitrators are more accessible than judges when disputes arise during discovery. Instead of waiting weeks or months for a court hearing on a discovery motion, parties can often resolve disputes in a matter of days through a conference call with the arbitrator. This responsiveness ensures that arbitration remains efficient and focused on the resolution of substantive issues rather than procedural battles.

Confidentiality and Protection of Business Interests
For companies handling sensitive financial, technological, or strategic information, arbitration provides a significant advantage: confidentiality. Unlike court proceedings, which are generally public, arbitration allows disputes to be resolved in a private setting. This protects proprietary information, trade secrets, and reputational interests, preventing competitors or the media from gaining access to potentially damaging disclosures.

The Bottom Line: A Business-Driven Approach to Dispute Resolution
The goal of arbitration is not to mimic litigation—that's why courthouses were invented. Rather, arbitration seeks to create a dispute resolution process that serves clients' actual needs, not their perceived ones. Think of arbitration as a blank canvas rather than a pre-painted picture. You can design it to address the concerns that actually matter to your client while letting go of the ones that don't.

When clients raise the perceived shortcomings of arbitration, attorneys should remind them that business-to-business disputes are different than the arbitration

matters discussed in the newspapers, and educate them about the ability to customize arbitration to serve their business's specific needs. By shifting the narrative from skepticism to opportunity, attorneys can help their clients see that arbitration often delivers faster, more cost-effective, and more specialized dispute resolution than traditional litigation.

Next time a client expresses hesitation about arbitration, start by asking what they truly need in a dispute resolution process. With a well-crafted arbitration agreement, businesses can achieve better outcomes while avoiding the inefficiencies and unpredictability of litigation. By taking a proactive approach, attorneys can position arbitration not as a compromise, but as a strategic advantage in high-stakes commercial disputes.

Rob Harris is a full-time arbitrator and mediator of commercial and employment disputes, often involving business entities and their owners, senior employees, investors and service providers. He is a longstanding panelist for the American Arbitration Association, including participation on its Commercial, Employment, Construction and Consumer panels, and its specialty panels for Large Complex Cases, Mergers and Acquisitions and Joint Ventures.