

# The Arbitration Alternative

By Lawrence R. Mills

There seems to be growing concern among lawyers that the court system does not deliver the “just, speedy, and inexpensive determination” of disputes envisioned by the drafters of the civil rules. Why not consider stipulating with opposing counsel to submit some of your civil cases to binding arbitration? I have seen firsthand the considerable benefits that often can be achieved by choosing arbitration as an alternative forum for resolution of civil disputes.

All too frequently, litigators limit their arbitration cases to “demand cases,” that is cases in which a pre-existing contract contains an arbitration clause requiring the dispute to be arbitrated. But virtually any case can be taken to binding arbitration, whether or not a pre-existing contract provision exists, if the parties agree to make it a “submission case,” by stipulating, after the dispute has arisen, to arbitration.

Why choose arbitration? Arbitration can result in a faster resolution. Most arbitrations can get to a hearing and final award in six months or less, except in cases where the parties want it to take longer. Moreover, in arbitration you can get a firm hearing date instead of a theoretical possibility as in some courts where trial dates are not firm and civil cases are routinely “bumped” to allow criminal cases to go forward. Another significant advantage of arbitration is confidentiality. In arbitration, the parties can resolve their disputes without public scrutiny and ensure the confidentiality of the evidence, the hearing, and the result.

Another key advantage of arbitration is that you can choose the decisionmaker. If you have a dispute involving complex or technical issues, you may want to submit your case to an experienced arbitrator in preference to entrusting the decision to an overworked and randomly-assigned judge or to a lay jury. Also, in arbitration, the parties can agree on the prehearing procedures to be followed and keep them as simple or as full-blown as they wish.

Of course, arbitration has its own disadvantages and may not be an appropriate choice in every case. The parties must pay an arbitrator instead of using a “free” judge. There is no appeal in arbitration, which can be either a plus or minus depending on the parties’ interest in a prompt and final resolution, but which certainly argues in favor of careful selection of the arbitrator. Also, in arbitration it is less common for the arbitrator to decide a case on summary judgment than would be true in court. Nevertheless, the advantages of arbitration make it an appealing alternative in many cases.

How do you convince your client, and the other side, to agree to arbitration? Many lawyers assume that, once a dispute has arisen and no pre-existing contract provision compels arbitration, the likelihood of negotiating an agreement to submit the case to arbitration is low. In my experience, however, it often happens that both sides may conclude there are compelling reasons – although they may not be the same reasons - to submit the dispute to arbitration rather than take it to court.

Plaintiffs are most interested in obtaining the quickest possible resolution of the claim, a firm hearing date, and a forum that involves reduced likelihood of fatal summary judgment motions. Defendants may be most interested in eliminating the risk of an irrational, runaway jury verdict and in litigating the case in a confidential forum, out of the public eye. Both sides may share a common interest in having the dispute determined by a fair and knowledgeable decisionmaker within a reasonable period of time and without the risk of interminable appeals.

Ultimately, each party will agree to arbitrate, rather than go to court, only if that party perceives the benefits of arbitration as outweighing those of going to court. The result of this analysis will vary from case-to-case, but the question "Should we consider submitting this case to arbitration?" should be on your checklist of issues to consider with the client and opposing counsel at the beginning of most civil litigation matters.

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