SUMMARY

Arbitration has a negative reputation among some people because it often is mandated to resolve disputes between consumers and businesses or between employees and employers. But in the proper circumstances, arbitration can be a good choice.

This article explores the advantages and disadvantages of arbitration compared to litigation, not from the perspective of a particular party but based on the goals of fair and efficient procedure, correct results, and minimizing adverse collateral consequences of the dispute resolution process.

The article also proposes criteria that should govern the choice between arbitration and litigation.

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Arbitration: The Pros, the Cons, and the Best Fit

Lawyers should become familiar with the benefits and drawbacks of arbitration before advising clients whether to choose this alternative dispute resolution mechanism or traditional litigation.

Congress intended the 1925 Federal Arbitration Act (FAA)[1] "to replace judicial indisposition to arbitration" with a national policy favoring it.[2] Statutes in numerous states, including Wisconsin, echo the FAA language embodying that policy.[3] These statutes have accomplished their objective. In the words of a recent Seventh Circuit opinion, it "would be difficult to overstate the strength" of the U.S. Supreme Court's support for arbitration.[4] Similarly, the Wisconsin Supreme Court has recognized the state's "policy of encouraging arbitration as an alternative to litigation."[5]

In light of pandemic-fueled growth of court backlogs,[6] which may be a recurring phenomenon with cyclical COVID-19 surges, it is logical to expect that disputants will more readily consider arbitration as an alternative to litigation.[7] This article explores the advantages and disadvantages of arbitration compared to litigation, not from the perspective of a particular party but based on the goals of fair and efficient procedure, correct results, and minimizing adverse collateral consequences of the dispute resolution process. The article then proposes criteria that should govern the choice between those dispute resolution modes.

Arbitration Overview

The linchpin of arbitration is the agreement to arbitrate; a party can be required to submit to arbitration only those disputes it has agreed to submit.[8] An arbitration agreement can either precede or follow the inception of the dispute. In the latter situation, each party can decide whether to arbitrate by considering the pros and cons with reference to a specific existing dispute.

Pre-dispute arbitration agreements, however, are more common. A pre-dispute agreement to arbitrate usually is part of a more comprehensive agreement governing the parties' transaction or relationship, and that agreement is often one of adhesion in which the terms are unnegotiated, especially in the context of consumer transactions. Even if the parties negotiate some aspects of their comprehensive agreement, the arbitration clause typically receives scant attention. In these pre-dispute scenarios, the drafter decides whether anticipated disputes will be arbitrated and can tailor the arbitration to the probable characteristics of such disputes.

Consumer arbitration entails special issues such as the use of mandatory arbitration clauses in adhesion contracts to preclude class actions[9] and the countermove of mass arbitration filings by lawyers who represent consumers. These controversial issues, which can also arise in employment and even between businesses (and at the intersection of those contexts) when the underlying transaction or relationship is the product of grossly unequal bargaining power,[10] are beyond the scope of this article.

Advantages of Arbitration

Arbitration has several advantages, some of which are discussed below.

More ability to choose and specify qualifications of decision-maker. A party to litigation has only limited and blunt tools with which to influence selection of the judge and jurors.[11] As a result, the degree to which the judge or jurors who end up on the case have expertise in its subject matter is left mainly to chance.

Arbitrator selection tools are much sharper and more varied. Arbitrator rosters are specialized by subject matter, or arbitrators

otherwise limit or focus their practice according to their areas of expertise (commercial, employment, construction, and numerous others). Thus, if the parties use an arbitration service provider such as the American Arbitration Association (AAA) or the Judicial Arbitration and Mediation Service (JAMS) for case administration, as most parties do, description of the dispute in the arbitration demand or joint submission to arbitration ensures that the case administrator will provide arbitrator candidates with expertise in the relevant subject matter.

Once arbitrator candidates are identified, the parties have greater participation and influence in the selection process than in litigation.[12] In large cases, enhanced selection methods such as interviews of arbitrator candidates or submission of written questions to them are available. In addition, the parties can agree in an arbitration agreement or clause, or separately, to 1) a particular arbitrator, 2) a method of arbitrator selection (which can be custom designed), or 3) arbitrator qualifications (for example, "at least five years as a federal judge" or "at least three years as a construction site supervisor").

Confidentiality. Keeping a dispute out of public access or records is often important to protect trade secrets and confidential business information, as well as to protect business reputation. Individual parties also value confidentiality to protect reputation and avoid embarrassment. Litigation is as public as it gets. Courtrooms are almost always open to the public, including the news media. In addition, information filed in court is presumptively public.[13] Courts approach with skepticism motions and even agreements to file documents under seal.[14]

In contrast, arbitration is not a public proceeding. Arbitrators are ethically bound to maintain the confidentiality of all matters relating to the proceedings and their decisions.[15] An arbitration agreement or clause can extend these confidentiality obligations to the parties and all other participants in the arbitration. Moreover, the agreement can extend the scope of confidentiality not only to the results and information submitted in the arbitration but also to the existence of the arbitration proceeding.

More flexible rules and procedures. Procedural rules in arbitration are more flexible than their litigation counterparts. For example, the AAA's commercial rules include four sets of rules that presumptively apply depending on the magnitude of the claims in a particular case: procedures for resolving cases on the basis of documents only (when no claim exceeds $25,000, excluding interest, attorney fees, and costs), expedited procedures (no claim exceeds $100,000 with those exclusions), regular procedures (each claim is less than $1 million with those exclusions), and large complex-case procedures.[16] Notwithstanding these presumptions, any of these tracks or elements of them can be used in any case by agreement or, subject to a party's right to an oral hearing regardless of claim size,[17] as the arbitrator determines.[18] (Reference to "the arbitrator" or "an arbitrator" includes reference to a three-arbitrator tribunal if the arbitration agreement or clause, or an applicable rule, so provides.)

Apart from the rules themselves, arbitrators are generally more flexible than judges about procedure. To a large extent, this reflects the distinction that judges serve the public, while arbitrators serve only the parties. Because of this inherent flexibility, as well as the mix-and-match nature of the rules themselves, an arbitration agreement or clause can mold a procedural regimen to the nature of a dispute that has arisen or is likely to arise, and when resolving procedural disagreements in an existing dispute, the arbitrator has a measure of discretion to do the same.

Less expensive if process used properly. Arbitration proponents frequently tout the process as less expensive than litigation. To achieve that goal, however, arbitration must first offset costs not presented by litigation: higher filing fees and case administration fees if a service provider is used and, of greater significance in large cases, compensation of the arbitrator. Arbitrator compensation is not invariably a fearsome cost factor. In AAA commercial expedited-track cases and consumer cases, for example, the arbitrator works for a modest flat fee rather than an hourly fee. Regardless of how the arbitrator is paid, however, well-managed arbitration can be less expensive than litigation.[19]

The most glaring disadvantage of arbitration is that judicial review of an award is much more limited than judicial review of a trial or circuit court decision.

One cost-saving measure is to eliminate, minimize, or at least control discovery. Some claims depend on broad and sustained discovery because evidence is otherwise unavailable to a party, perhaps because of concealment — for example, claims alleging fraud or misuse of trade secrets. But in many cases, evidence is known or obtainable by more efficient means, and formal discovery quickly reaches a point at which its time and cost burdens outweigh any continuing benefit.

Arbitration embodies a presumption against traditional discovery. Typical "discovery" under the AAA commercial

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rules for cases on the expedited or regular track is limited to exchange of hearing exhibits, witness lists, and expert witness reports. When the parties disagree about discovery or its scope, an arbitrator is likely to limit discovery more than a judge would. Consequently, discovery under arbitration agreements or clauses, or under separate agreements negotiated by the parties during arbitration, also tends to be more limited than it would be in litigation. In addition, the arbitration agreement or clause itself can proactively limit discovery.

Another cost-saving measure is to eliminate, minimize, or control motion practice. Arbitrators are trained to exercise extreme caution in granting dispositive motions and therefore are less receptive to them than judges. In addition, AAA Commercial Rule R-34 requires that a party obtain the arbitrator's permission to file a dispositive motion by demonstrating, via a letter to which the opposing party may respond, a likelihood that the motion will dispose of or narrow the issues. As a result, dispositive motions are less common in arbitration than in litigation. Most non-dispositive motions in arbitration are handled informally — for example, via a conference call with the arbitrator — and much more expeditiously than in litigation.

A third cost-saving measure is that the final hearing is likely to occur sooner than would a trial in litigation. A Murphy's law for lawyers is that the longer a case is pending, the more things will happen that cost money. A 2017 study by Micronomics, an economic research and consulting firm, found that on average federal district court cases take more than 12 months longer to get to trial than arbitrated cases take to get to final hearing.[20] Indeed, an arbitration agreement or clause can require that the final hearing occur or the award (the arbitral ruling on the merits) issue within a specified time after initiation of the proceeding, which can be an effective time-saving provision as long as the specified time period is realistic.

Finally, arbitration can reduce costs if the final hearing takes less time than would be spent in trial. As an initial matter, eliminating the prospect of a jury trial avoids a potentially enormous extra investment of time and other resources. Moreover, the rules that apply to final hearings, like procedural rules in arbitration generally, are more flexible than their litigation counterparts. For example, written statements under oath can substitute for direct examination of witnesses, avoiding what many view as time-wasting "dog and pony shows." Another example is that the rules of evidence — most notably, the hearsay rule — do not apply in arbitration,[21] so there are fewer objections. Arbitration hearings also tend to move more quickly than trials because arbitrators, who lack the diverse responsibilities the court system imposes on judges, are less susceptible than judges to interruptions during evidentiary hearings.

More expeditious decisions. With isolated exceptions[22] and otherwise within exceptionally broad limits,[23] judges can delay releasing decisions. Not so with arbitrators. Under AAA rules, the award must be issued within 30 days after conclusion of the final hearing in commercial cases on the regular and large complex-case tracks, and within 14 days in commercial cases on the expedited track and in consumer cases.[24] With extremely limited exceptions, such as the arbitrator's death, these deadlines are immutable. They are the defining characteristic of arbitration.

As for decisions other than an award (that is, on motions), a case administrator is more likely to influence an arbitrator to decide expeditiously than a court clerk to so influence a judge. This follows from the dynamics of those relationships and the differences in stature of arbitrators and judges. Because the AAA and other service providers supervise arbitrators on their rosters much more closely than a judge is supervised and can remove a poorly performing arbitrator much more readily than a judge can be removed, most arbitrators do not risk attention-grabbing delay in their non-final decisions. In any event, an arbitration agreement or clause can set a time limit for those decisions.

A necessary caveat is that merely because arbitration *can* proceed faster and with less expense than litigation does not mean that it *will*. The case must be amenable to the time- and

expense-saving opportunities that arbitration presents; the arbitration agreement must be thoughtfully drafted; and the parties, arbitrator, and case administrator must all be committed to follow both the letter and the spirit of the arbitration agreement and the governing rules. If these stars align, arbitration offers ample tools to reduce the time and expense litigation would entail.[25]

Disadvantages of Arbitration

Much narrower scope of judicial review. Because any party to arbitration must contemplate the possibility of losing, the most glaring disadvantage of arbitration is that judicial review of an award is much more limited than judicial review of a trial or circuit court decision. The scope of judicial review of arbitration awards has been described as "among the narrowest known in the law."[26] Section 10 of the FAA[27] authorizes a court to vacate or modify an arbitral award on grounds of its procurement by corruption, fraud, or undue means; evident partiality or corruption of arbitrators; other arbitrator "misbehavior" that prejudices a party's rights; or arbitrators exceeding their powers under the arbitration agreement. In *Hall Street Associates v. Mattel Inc.*,[28] the U.S. Supreme Court held that these grounds are exclusive and therefore manifest disregard of law is not, in and of itself, a ground for vacating or modifying an award under the FAA. Thus, an award can be upheld under the FAA even if the arbitrator got the facts or the law, or both, wrong – even *very* wrong. This is disquieting, especially because the FAA has been held to represent "the broadest permissible exercise of Congress' Commerce Clause power"[29] and its influence therefore dominates over that of correlative state arbitration statutes, at least in commercial disputes.

An arbitration agreement or clause can provide for an appeal process within the arbitral forum. For instance, the AAA offers optional appellate arbitration rules, under which a party can appeal an award based on material and prejudicial errors of law or clearly erroneous determinations of fact.[30] The appeal is heard by a panel of three appellate arbitrators (unless the parties agree to use one arbitrator),[31] and the process otherwise resembles that of an intermediate appellate court.[32] The extent to which such an arbitral appellate remedy ameliorates the disadvantage of extremely narrow judicial review of an award depends on a party's comfort level with the general concept of arbitration as an alternative dispute resolution mechanism.

Lack of public scrutiny. This is the flip side of the advantage conferred by confidentiality. In litigation, the fact that a court is largely a public forum that anyone, including the news media, can monitor tends to deter corruption and other forms of misbehavior. A dispute resolution system such as arbitration that operates completely in private lacks those guardrails.

The arbitrator's issuance of a "standard" award – that is, one that announces only the result and omits any supporting reasoning or explanation – exacerbates this disadvantage. A standard award leaves the parties unable to gauge whether the arbitrator understood the issues. Additionally, a standard award encourages a reviewing court to speculate about the reasoning in support of an award and thereby might facilitate the "hands off" approach that courts, especially federal courts, are prone to apply to review of an award.[33] Parties to arbitration should uniformly request, and the arbitrator should issue, a reasoned award,[34] notwithstanding the increase in cost (if the arbitrator is compensated hourly) that such an award entails.

Regardless of the form of award, a dispute involving an issue of significant public interest benefits from resolution in a forum under public scrutiny, with the opportunity for participation of governmental or private *amici curiae*. Because an arbitration award is not precedential, arbitration is not well-suited to *amicus* participation.

Arbitration cannot "make law." In some cases, one or more of the parties

Arbitration: The Pros, the Cons, and the Criteria for Choosing a Resolution Model

Arbitration can be a reasonable alternative to litigation, but it isn't appropriate for every case and every party. Here is a summary of the pros and cons of arbitration and the criteria that should govern the choice between arbitration and litigation.

Benefits of Arbitration

- More ability to choose and specify qualifications of decision-maker.
- Confidentiality.
- More flexible rules and procedures.
- Less expensive if process used properly.
- More expeditious decisions.

Drawbacks of Arbitration

- Much narrower scope of judicial review.
- Lack of public scrutiny.
- Arbitration cannot "make law."
- Less likelihood of successful dispositive motion.
- More expensive if process misused.

Criteria Favoring Arbitration

- No wish to resolve a significant controlling legal issue of first impression ("make law").
- No direct and significant public interest component.
- A wish to avoid public scrutiny or a public record of the dispute.
- Disposition by dispositive motion unlikely.
- No need or wish for a full-court press on discovery. **WL**

believe the dispute has importance beyond the interests of the parties themselves. Such a case is pursued not only to resolve the dispute between the parties but also, and perhaps more significantly, to resolve a controlling issue of law that will apply to similar disputes — that is, to "make law." The trial court decision in such a case is but a prelude to appellate proceedings that will culminate in a rule of law binding on lower courts and entitled to deference under the doctrine of *stare decisis*.

Because arbitration is a not a public proceeding, typically the award is not publicized, and it does not bind the decision-maker in any other arbitration or litigation. In other words, arbitration cannot make law.

Less likelihood of successful dispositive motion. As already discussed, reduction of motion practice is one way to make arbitration more cost effective than litigation. In the context of a dispositive motion, the assumption underlying that premise is that the motion is unlikely to dispense with the need for further proceedings such as an evidentiary hearing. In a case presenting no disputed issue of material fact, however, a dispositive motion may promote efficiency if the resources devoted to that motion are less than those the case would otherwise require from that point forward. Thus, in a case amenable to a dispositive motion or cross-motions, the procedural hurdle to dispositive motions and the fact that arbitrators are less receptive than judges to such motions might be a disadvantage.

As mentioned, the parties can agree to resolve a case based solely on documentary submissions. This is functionally equivalent to dispositive cross-motions if the parties also agree, or the arbitrator determines, that no genuine dispute of material fact exists. If such a dispute exists, however, the parties and arbitrator are left with the inherent difficulty of resolving it on the basis only of documents. Moreover, the document-only procedure requires the parties' agreement; the arbitrator cannot impose it. Thus, the document-only procedure does not completely erase the disadvantage of arbitrators' reluctance to allow and grant dispositive motions.

More expensive if process misused. An arbitrator typically can determine, by a few minutes into the first preliminary hearing, whether the parties are likely to realize the potential cost savings of arbitration. Reflexive insistence on or acquiescence in the traditional litigation model — including full-blown discovery, the full range of motion practice, an expansive prehearing order to accommodate that activity, and formal trial procedures — is a mortal blow to efficient use of arbitration. The traditional litigation model entails traditional litigation costs, plus the

expenses, such as arbitrator compensation, unique to arbitration.

A well-drafted arbitration agreement or clause can counteract litigation-bred habits. In the absence of such forethought, and if the parties disagree on procedural issues, the arbitrator has some discretion to resolve those disputes so as to promote the efficiency of the proceeding. If counsel for the parties agree to treat arbitration as nothing more than an alternative forum for implementation of the traditional litigation model, however, the arbitrator can only suggest, not command, that they think about other options.

Criteria Favoring Arbitration

The following criteria make an existing or anticipated dispute amenable to arbitration:

- No wish to resolve a significant controlling legal issue of first impression ("make law");
- No direct and significant public interest component;
- A wish to avoid public scrutiny or a public record of the dispute;
- Disposition by dispositive motion unlikely;
- No need or wish for a full-court press on discovery.

Conclusion

Arbitration is a robust dispute resolution mechanism but is not appropriate for every dispute. A party with a choice between litigation and arbitration should analyze an existing or expected dispute according to the foregoing criteria. A party that chooses arbitration can maximize its benefits by thoughtful drafting of the arbitration agreement or clause to fashion a procedural regimen that best fits the dispute. **WL**

ENDNOTES

[1]9 U.S.C. §§ 1-402.

[2]*Hall St. Assocs. L.L.C. v. Mattel Inc.*, 552 U.S. 576, 581 (2008) (citing *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)); FAA § 2, 9 U.S.C. § 2.

[3]Compare FAA section 2 with Wis. Stat. section 788.01.

[4]*Continental Cas. Co. v. Certain Underwriters at Lloyds of London*, 10 F.4th 814, 816 (7th Cir. 2021).

[5]*First Weber Grp. Inc. v. Synergy Real Est. Grp. LLC,* 2015 WI 34, ¶ 24, 261 Wis. 2d 496, 860 N.W.2d 498 (quoting *Kemp v. Fisher*, 80 Wis. 2d 94, 100, 277 N.W.2d 859 (1979)).

[6]*See* Thomson Reuters Inst., *The Impacts of the Covid-19 Pandemic on State and Local Courts Study 2021: a Look at Remote Hearings, Legal Technology, Case Backlogs, and Access to Justice* 4, https://tinyurl.com/bdh8sm96 (last visited Dec. 13, 2022); Griff Witte & Mark Berman, *Long After the Courts Shut Down for Covid, the Pain of Delayed Justice Lingers*, Wash. Post (Dec. 19, 2021), https://www.washingtonpost.com/national/covid-court-backlog-justice-delayed/2021/12/18/212c16bc-5948-11ec-a219-9b4ae96d-a3b7_story.html (behind paywall for some readers) (last visited Dec. 13, 2022).

[7]*See* Am. Arbitration Ass'n, *The Arbitration Solution to COVID-19-Stalled Court Litigation*, https://adr.org/litigation-to-arbitration?utm_source=website-adr&utm_medium=mosaic&utm_campaign=website-litigation-to-arbitration (last visited Dec. 13, 2022).

[8]*United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960).

[9]*See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (holding that FAA preempted California's judicial rule regarding unconscionability of class arbitration waivers in consumer contracts).

[10]*See, e.g.*, *Billie v. Coverall North Am. Inc.*, 444 F. Supp. 3d 332 (D. Conn. 2020) (granting motion to stay and compel arbitration in putative class action brought by janitorial workers against purported employer, in which workers alleged that defendant misclassified them as independent contractors).

[11]*See* 28 U.S.C. §§ 1331-1332 (common bases for federal district court jurisdiction); 28 U.S.C. § 1441 (federal removal jurisdiction); Wis. Stat. § 757.19; SCR 60.04(1)(a); 28 U.S.C. § 144 (recusal of a judge for cause); Wis. Stat. §§ 801.58-801.59 (substitution of judge without cause); Wis. Stat. § 805.08(1), (3); Fed. R. Civ. P. 47(b)-(c) (challenges to jurors with and without cause).

[12]See, for example, the following commercial arbitration rules of the American Arbitration Association: R-13 (Appointment from National Roster), R-14 (Direct Appointment by a Party), and R-15 (Appointment of Chairperson by Party-Appointed Arbitrators or Parties). The rules can be viewed here: https://adr.org/sites/default/files/Commercial%20Rules.pdf (last visited Dec. 13, 2022). (Unless otherwise indicated, all other references in these endnotes to rules are to the American Arbitration Association's rules.)

[13]*See, e.g.*, U.S. District Court for the Eastern District of Wisconsin, General Local Rule 79(d), www.wied.uscourts.gov/local-rules-and-guidance-0 (last visited Dec. 13, 2022); U.S. District Court for the Western District of Wisconsin, Administrative Order No. 337, www.wiwd.uscourts.gov/administrative-orders (last visited Dec. 13, 2022).

[14]*See, e.g., Boettcher v. Metropolitan Life Ins. Co.*, No. 08-C-439, 2009 WL 484231 (E.D. Wis Feb. 25, 2009) (unpublished).

[15]*See, e.g.*, American Arbitration Association Code of Ethics for Arbitrators in Commercial Disputes, Canon VI.B.

[16]*See* Commercial Arbitration Rules R-1 to R-60, E-1 to E-10, L-1 to L-3.

[17]*See id.*, Rule E-6.

[18]*See id.*, Rule R-33(b).

[19]*See* Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. Mich. J. L. Reform 813 (2008).

[20]Am. Arb. Ass'n, *Measuring the Costs of Delays in Dispute Resolution*, https://go.adr.org/impactsofdelay.html?_ga=2.58255913.280552962.1654380949-761301773.1633724954 (last visited Dec. 13, 2022).

[21]Commercial Arbitration Rule R-35(a).

[22]*See, e.g.*, Wis. Stat. § 805.16(3) (motion after verdict not decided on the record within 90 days after rendition of verdict is considered denied).

[23]*See, e.g.*, SCR 70.36; *Disciplinary Proc. Against Dreyfus*, 182 Wis. 2d 121, 513 N.W.2d 604 (1984).

[24]Commercial Arbitration Rules R-47, E-9; Consumer Rule R-42.

[25]*See* David L. Evans & India Johnson, *The Top Ten Ways to Make Arbitration Faster and More Cost Effective*, Am. Arb. Ass'n, https://tinyurl.com/b8bkuc7b (last visited Dec. 13, 2022).

[26]*First State Ins. Co. v. National Cas. Co.*, 781 F.3d 7, 8 (1st Cir. 2015) (internal citation omitted).

[27]9 U.S.C. § 10.

[28]*Hall St. Assocs.*, 552 U.S. at 584. *But see Baldwin-Woodville Area Sch. Dist. v. West Cent. Educ. Ass'n-Baldwin Woodville Unit*, 2009 WI 51, ¶ 21, 317 Wis. 2d 691, 766 N.W.2d 591 (identifying manifest disregard of the law as ground to vacate award under Wis. Stat. section 788.10).

[29]*Citizens Bank v. Alafabco Inc.*, 539 U.S. 52, 56 (2003) (internal citation omitted).

[30]Optional Appellate Arbitration Rule A-10.

[31]*Id.*, Rule A-5(c).

[32]*See id.*, Rules A-16 (Record on Appeal), A-17 (Appeal Briefs), A-15 (Oral Argument).

[33]For a recent example, see *Continental Casualty Co.*, 10 F.4th at 821-23.

[34]*See* Commercial Arbitration Rule R-48(b). **WL**