Arbitration's 'Value Proposition,' Timely and Less Expensive Dispute Resolution

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George Krueger, Krueger ADR

In the early 1980s Americans confronted a relatively new consumer good: bottled water. The challenge faced by the sellers of bottled water was to convince consumers to pay for an otherwise free commodity i.e., to create an irresistible "value proposition." Consumers of dispute resolution services face a similar choice today.

Consider a typical scenario: Your company is about to sign a significant contract. It may be with a critical vendor, it could be an important agreement with a consultant or even a "buy/sell" agreement respecting the company you started years ago. Whatever the nature of the contract, you will have to consider the possibility that, in the future, you will have a dispute with your counter-party. You should address this possibility by considering the forum in which the dispute will be heard. There are a number of seemingly "boilerplate" provisions which you may want to consider, including whether "all disputes" must be submitted to arbitration for a final, non-appealable decision. Absent such a provision, any dispute will be decided by a court.

The choice is a stark one. Parties can either go to court to resolve their disputes in a public forum for free or they can submit their claims to a dispute resolution service, such as the American Arbitration Association (AAA), for a confidential determination in an agreed upon location. Filing with the AAA requires payment of both administrative costs and arbitrator fees. In large cases, these fees and cost can total tens of thousands of dollars. Like sellers of bottled water in the 1980s, providers of arbitration services need to show a "value proposition" supporting the use of a fee-based arbitration system where a similar fee is not associated with the court.

Although essentially free, courts impose a significant, but hidden, cost: delay. The most recent statistics published by the Administrative Office of the United States Courts (AO) show that the median time from filing a civil case in federal court to trial is 26.9 months and that fully 22.9 percent of all civil cases pending in federal court

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are now more than 3 years old. These figures only include the time it takes to resolve the case at the trial court level and exclude the time-consuming appellate process, which can easily add an additional year of delay. While figures vary from court to court, and by judge, the AO's most recent figures suggest an additional "aging" of federal court cases is now underway. The AO reports a 3.5-percent increase in the total number of cases filed in federal court since 2017, and a 17.9-percent reduction in the number of cases terminated during this same period. Based on these figures, it is likely that the median time for disposition will increase over time.

Since "time is money," the 26.9 months it takes for the median case to go to trial suggests increased costs. This takes many forms. Delay necessarily postpones resolution of what may be a critical issue confronting a business, handcuffing the company until final resolution of the case. Moreover, while the federal rules now expressly allow only that discovery which is "proportionate" to the case, parties seeking additional discovery argue about the interpretation of this term, knowing that the default rule is to permit ten depositions of seven hours per side. Such discovery is costly. In addition, delay itself results in significant additional out-of-pocket costs. Even during "slow" periods of a case, careful and zealous lawyers continuously reevaluate the parties' respective positions, investigate new "leads," monitor applicable legal developments and test their legal theories. Last, the judicial process can play havoc with the schedule of witnesses, corporate decision makers and counsel, since scheduling orders and trial dates are subject to change as busy judges juggle their heavy civil caseload and "bump" civil cases for criminal cases, as is required.

Arbitration offers a fundamentally different experience, particularly for commercial disputes administered by the AAA involving claims of $500,000 or more. In such cases, arbitrators (whether sitting individually or as a panel) typically have relatively few matters and can more easily accommodate the parties' scheduling needs. Moreover, while AAA discovery is limited, critical documents are disclosed early in the process, much like in court. The AAA rules requires production of documents "relevant and material to the outcome of the disputed areas." See AAA Rules L- 3 and R-22(b). Such documents in complex commercial cases typically provide a helpful road map to explain what decisions were made, why, and by whom.

Perhaps the most critical difference between federal court and the AAA relates to depositions. Rather than allow 10 depositions per side as of right, the AAA Rules discourage depositions and permit them only in "exceptional cases" at the "discretion of the arbitrator" and upon a showing of "good cause," see AAA Rule L-3(f). As further stated in the rule, the arbitrator's discretion in determining whether to allow any depositions should be exercised "consistent with the expedited nature of arbitration." To avoid doubt, the AAA cautions arbitrators and parties that "care must be taken to avoid importing procedures from court systems [which are] not appropriate to the conduct of arbitrations." This rule is intended to provide a "simpler, less expensive and more expeditious" resolution than courts typically deliver, see AAA Rule L-1(b). Last, judicial review of an arbitrator's award is infrequent and rarely successful, as the basis to attack an arbitration award is severely limited by statute. All of this is intended to result in a more timely and cost-efficient resolution than is offered by the courts.

It seems to be working. According to a 2017 study, it takes on average 12 months longer to get to trial in federal court than it takes to have a case resolved through an arbitration administered by the AAA. The average difference in time to disposition is an even greater 21 months when appellate time is considered. As noted, because delay breeds fees and costs, companies can save significant sums by resolving their disputes in arbitration before the AAA rather than in court. That is the "value proposition" of arbitration.

While courts are "free" and arbitration is not, arbitration will frequently result—on a net basis—in a less expensive, timely resolution of the dispute based on a full exchange of documents and a limited number of depositions (if any, as determined by the arbitrator in close consultation with the parties). Businesses that seek a forum in which to resolve their disputes need to consider whether the benefits of a "free" court system are simply too expensive when compared to a fee-based arbitration system.

George J. Krueger, *of Krueger ADR, has almost four decades of experience as a commercial litigator. His practice is now focused on arbitration and mediation, typically in complex commercial disputes. Information about his practice can be found at* ***www.kruegeradr.com (http://www.kruegeradr.com)****. He can be contacted at* ***kruegeradr@gmail.com (mailto:kruegeradr@gmail.com)****.*

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