It's Never Too Late to Arbitrate

The Case for Mid-Suit Arbitration Agreements

By Richard H. Silberberg and Dai Wai Chin Feman

The benefits of incorporating arbitration provisions in commercial contracts are well-established.[1] Often overlooked, however, are the advantages of agreeing to arbitrate disputes *after* the inception of a lawsuit filed in court.

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Even for parties that initially resisted arbitration—either by declining to include an arbitration provision in an underlying contract, or opposing the arbitrability of a dispute—certain features of the judicial process may change the equation in an ongoing lawsuit such that proceeding in court is no longer appealing, practicable, or advantageous for either party. Enter the mid-suit agreement to arbitrate.

Arbitration is a creature of contract. Parties to an existing lawsuit are, therefore, free to negotiate arbitration arrangements that are tailored to the issues at hand. Arbitration agreements in commercial contracts often consist of boilerplate provisions drafted to be as general as possible, and it is rare that such agreements anticipate important aspects of procedure that are relevant to the adjudication of a potential dispute. Mid-suit arbitration agreements, however, can be precisely customized to the realities, idiosyncrasies, and procedural postures of specific disputes that have already arisen. Indeed, parties can craft bespoke arbitration agreements that leverage the "best of both worlds" from both judicial and alternative dispute resolution processes.

Mid-suit arbitration agreements are not mutually desirable in every case. However, parties would be well-advised to consider the possibility of moving to arbitration at various junctures in the litigation lifecycle. An agreed submission of the dispute to arbitration at any stage of the litigation will obviate any challenge to arbitrability. This article discusses various stages of litigation at which arbitration may be an attractive pivot for parties, and why.

After the Denial of a Motion to Dismiss

The denial of a motion to dismiss is the first sensible point to consider mid-suit arbitration. Defendants often resist arbitration because they believe they have a strong argument that the plaintiff's case should be dismissed at an early stage of the case as a matter of law, and that an arbitrator may be less willing than a judge to grant a dispositive motion until the claimant has had a reasonable opportunity to present its case. Once a motion to dismiss is denied, however, the prospect of an early exit from the litigation has vanished.

With the initial defensive advantage of traditional litigation having been mooted by the denial of the motion to dismiss, parties can and should consider arbitrating the remainder of their dispute. The parties have wide latitude to negotiate an arbitration agreement covering all aspects of the dispute remaining to be adjudicated. They can take full advantage of arbitration's well-known benefits of party control, speed, cost, flexibility, confidentiality, and finality. Since the initial pleadings and motion practice have served their purpose of focusing the parties' attention upon the important issues in the case, the parties are in a good position at that stage to develop a refined agreement addressing the precise issues to be determined and the manner in which such issues should be presented to the factfinder, all while obviating any possibility of a dispute over arbitrability. Parties can also dispense with ancillary costs associated with a court action, such as the retention of local counsel.

The freedom to contract underlying the arbitration process can be used to bridge gaps between parties' respective preferences. The ability to modify rules in administered arbitrations should be fully leveraged to that end.[2] For example, one party may be averse to arbitration because it prefers that a judge preside over the dispute. The parties could address this concern by agreeing that the tribunal be composed of former state or federal judges. The parties could even stipulate that the former judges have particular expertise in the genre of dispute at issue, a feature that the court system may lack.

Discovery is another area in which parties may avail themselves of the opportunity to blend the most favorable aspects of litigation and arbitration. For example, the taking of depositions may prove to be a point of contention between the parties. While depositions are commonplace in litigation, they are less so in arbitration. Beyond setting parameters governing the number and length of depositions, parties may agree to conduct corporate representative depositions, which are rarely provided by arbitration clauses and cannot be ensured in the absence of an agreement between the parties to conduct them. Parties may even customize the scope of those depositions beyond the means available under federal or state procedural rules by limiting the number of enumerated topics of the corporate representative's testimony. Further,

by stipulation, they may agree to conduct depositions of specific non-parties under their control. In a similar vein, parties can take advantage of other traditional discovery devices, such as interrogatories or requests for admission, while imposing strict limits that are aligned with arbitration's goals of efficiency and expedition. Similar parameters could be applied to e-discovery through limitations imposed upon document requests, custodians, search terms, and privilege logs.

Mid-Discovery

Exposure to the burdens and complexities of discovery in court actions may also make arbitration a logical mid-discovery alternative to litigation. While there are clearly circumstances in which one party seeks to benefit from the broad scope of traditional discovery as a fishing or pressure tactic, that is not always the case. Indeed, mid-discovery litigation fatigue can be mutual as parties are faced with terabytes of data, dozens of depositions, frustrating meet-and-confer sessions, and serial motions to compel. Clients may not appreciate the full cost, extent, and intrusiveness of lawsuit discovery until they have experienced it first-hand. Furthermore, parties often find that courts rarely have the patience or capacity to thoroughly and expeditiously adjudicate discovery disputes, even those that potentially could impact the outcome of the case. By contrast, arbitrators are generally in a position to rule on discovery disputes during the course of a party-initiated telephone conference or following an exchange of correspondence, without the need for filing wasteful motions to compel. Challenges to privilege designations or redactions of confidential documents can also be quickly resolved by a special master designated for that purpose.

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The sensitive nature of document production may also be a factor in the litigation vs. arbitration calculus during the mid-discovery stage. Discovery frequently proves embarrassing for both parties. In business disputes, the public disclosure of sensitive or personal information is often a byproduct of litigation rather than the goal. In such circumstances, both parties, upon re-evaluation in the context of ongoing discovery, may prefer the private nature of an arbitration proceeding over a court action, particularly given the penchant of judges to favor public access to court records even if both parties wish to preserve confidentiality.

Another feature of arbitration that should be examined during discovery is the likelihood that arbitrators will screen post-discovery dispositive motions before agreeing to entertain them. Discovery often reveals to both parties that issues of fact are undeniably present. In arbitration, that realization is likely to prevent the filing of post-discovery dispositive motions. But, in court, the filing of post-discovery summary judgment motions (even dueling summary judgment motions) is more commonplace, either as a Hail Mary, a cost-pressure tactic, or to preview issues for the court.

As an illustration, AAA Commercial Rule R-33 provides that an arbitrator may entertain a dispositive motion if the movant establishes that the motion is likely to result in the disposition of the case or in a narrowing of the issues. That is a reasonably high bar that litigants in court actions are not necessarily required to meet prior to filing summary judgment motions.

In addition to being costly, post-discovery motion practice can delay the trial of a court action for months, sometimes years. Thus, in situations where both parties have realistic views of their chances on summary judgment, they may mutually agree to proceed straight to an arbitral evidentiary hearing in lieu of costly, likely pointless, and time-consuming motion practice in court.

Pre-Trial

After years of costly discovery and motion practice, litigation fatigue is at its highest in the pre-trial phase. Unfortunately for parties, judicial requirements and the uncertainty of trial scheduling drive significant additional costs and expenses that can cause litigation budgets to balloon. Arbitration is therefore a logical consideration at this inflection point. For parties that have resisted arbitration to preserve the procedural accoutrements of traditional litigation, little incentive may remain to stay in court.

For example, many judges require onerous, highly detailed pre-trial submissions, including proposed *voir dire* questions, requests to charge, motions *in limine*, jury instructions, verdict forms, and, in some cases, joint pre-trial orders that can resemble a blueprint for the entire trial. The parties have limited ability to agree upon which—if any—of a judge's preferences are necessary, appropriate, or productive in the context of a given dispute.

Moreover, trial scheduling is unpredictable and fraught with delays. Congested dockets routinely result in long periods of inactivity, followed by a notice that parties should be available for trial on as little as 24 or 48 hour notice. The "hurry up and wait" aspect of trial scheduling can add unnecessary cost and inconvenience as parties' counsel repeatedly gear up for trial.

By choosing to arbitrate, parties can conveniently agree to hold the evidentiary hearing at a time when both sides' witnesses and counsel are available, rather than subject themselves to the anxiety, pressure, and uncertainty of trial-ready calendars. Parties can also avail themselves of the added benefit of choosing the location of the

hearing and gaining the advantages of physical space and technological capability for witness preparation, breakout rooms, video testimony, and translation booths that are unavailable in many, if not most, courts.

Jury trials are also likely to be lengthier than evidentiary hearings before experienced arbitrators. Delays associated with jury selection, objections to the admission of testimony, motions to strike testimony, conflicts in judicial schedules requiring breaks in the taking of testimony, the necessity of explaining legal concepts to laypersons, and other factors all contribute to prolonging the ultimate taking of the evidence (and increasing attorneys' fees).

In advance of jury trials, parties may also feel pressure to retain jury consultants and conduct mock trials. While such services may offer helpful perspective on trial strategy, they often result in six-figure expenditures that would not be necessary in an arbitration hearing before a sophisticated tribunal. These costs, combined with the inherent uncertainty of jury verdicts (hence the need for a consultant), may eclipse any perceived advantage associated with a jury trial. And, the uncertainty inherent in a jury trial can outweigh whatever goodwill a party believes it has developed with a judge over the course of the litigation.

Even without the delays and additional costs occasioned by jury trials, verdicts in bench trials may take months to issue, and may be followed by additional rounds of motion practice. The timing of issuance of arbitration awards, on the other hand, is generally limited by the rules promulgated by the administrative provider, and can be further controlled by the parties in their arbitration agreement.

Confidentiality should also be a prominent consideration at the pre-trial stage. Highly confidential or embarrassing facts are often disclosed in discovery, and trial testimony on these points may be inevitable. In circumstances where both sides have an incentive to avoid public disclosure, the confidentiality of an arbitration is a logical solution.

Finally, a note on finality. Finality is widely regarded as a benefit of arbitration. But the lack of an appellate mechanism may give pause to certain parties about leaving the court arena. A potential compromise is the incorporation in the mid-suit arbitration agreement of appellate procedures available in certain arbitration forums, including the AAA and JAMS.[3]

Conclusion

The benefits of arbitration are not restricted to parties that have entered into pre-dispute arbitration agreements. Such benefits are available after a lawsuit has been commenced, and even if a case is on the eve of trial. Yet, mid-suit arbitration agreements remain underutilized. While parties may prefer certain features of traditional litigation over arbitration, such preferences are rarely insurmountable, and most, if not all, can be accommodated by the arbitral process.

Strategic considerations will ultimately prevail in determining whether to make the mid-suit transition from traditional litigation to arbitration. Parties that perceive themselves as "winning" will be more inclined to remain in court. Other parties may be hesitant to raise the prospect of arbitration to avoid appearing weak. Nevertheless, parties to a litigated matter would be well-advised to periodically evaluate whether the potential advantages of the arbitral process warrant transitioning from court to arbitration. In doing so, they will likely find a sliding scale of incentives that tilts increasingly toward arbitration.

As cases proceed procedurally in court, parties gradually exhaust the benefits of traditional litigation that may have caused resistance to invoking arbitration at the outset. And, as the outlook for early victory in a lawsuit fades, parties may be more willing to arbitrate if the confidentiality of the proceedings and the outcome is assured.

Finally, as they now do with mediation, court administrators should consider implementing requirements that parties periodically discuss the possibility of arbitration as an alternative to litigation. Such requirements would educate parties and, possibly, provide them with a mechanism that would satisfy their paramount goals while ultimately reducing court congestion.

Endnotes

1. *See, e.g.*, Edna Sussman & John Wilkinson, Benefits of Arbitration for Commercial Disputes, Arbitration Committee of the ABA Section of Dispute Resolution, *available at* https://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/March_2012_Sussman_Wilkinson_March_5.authcheckdam.pdf.
2. *See, e.g.*, AAA Commercial Arbitration Rule R-1; JAMS Comprehensive Arbitration Rule 2.
3. *See* AAA Optional Appellate Arbitration Rules; JAMS Optional Arbitration Appeal Procedure.

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