

BACK INTO THE ABYSS: THE PITFALLS OF ARBITRATION (Part II)

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In Part I, I highlighted some of the pitfalls of arbitration, which included arbitrators not being required to follow the law, that just about anyone can be an arbitrator, and the lack of recourse to the parties. As you've probably learned, I'm not a big fan of arbitration. And it's not because I litigate for a living. I've been involved in arbitrations that were just as contentious as any case in litigation. Rather, my concern is whether you understand how your rights are affected when you're required to arbitrate.

If there's a recurring theme here, it's this: There are very few "checks and balances" in arbitration and those that do exist are governed almost entirely by the arbitration clause in the contract you signed (which was probably quite minimal). In fact, as a general matter, the concept of "due process"—a fundamental right guaranteed under the Constitution—doesn't apply in arbitration. Is it hard to see why it can be faster than litigation? Get rid of those annoying fundamental rights and things tend to move much more quickly. So know what you're giving up. Here are a few more things to consider:

"You like me, you really like me!" It's a fact: Judges can be so . . . judgmental. They're called upon to make tough decisions and to decide very contentious and emotional disputes. In Massachusetts, where judges are appointed (and not elected), they still have job security regardless of how they decide cases. Their job is not to be liked, but to follow the law even if it compels them to make unpopular decisions. As there will almost always be a winner and loser, judges realize that at some point, somebody is going to be unhappy no matter what. They are, however, public employees who get paid by the government.

Contrast this with arbitrators. They get paid directly from the parties. Ultimately, arbitrators want to be liked by at least one party. In fact, they need to be liked. Why? Because they don't want to bite the hand that feeds them. After all, for an arbitrator to get paid somebody needs to first choose her to arbitrate the case. Or at the very minimum, not be eliminated from consideration at the outset. With judges, the hand that feeds them belongs to the government not to any of the parties. As a result, judges have no vested interest in seeing anyone happy if the law so dictates.

If one side loses, what are the odds of this arbitrator being chosen again, especially if the party arbitrates frequently? Pretty slim. On the other hand, if an arbitrator is always favorable to one side, who do you think they'll choose? And do you think they'll actually tell you about their experiences before certain arbitrators? You're in the dark; they're not. In fact, it's common to see the same arbitrators again and again in a particular industry. Indeed, many companies tend to know who all of them are beforehand, well before any disputes arise. Contrast this to court where the parties have no say over who the judge will be. And you can at least research how a judge thinks by reviewing her decisions in other cases.

"You take the arms, I'll take the legs." Perhaps it's because arbitrators get paid by the parties that this leads to the next problem with arbitration. Remember the biblical story of how King Solomon resolved the dispute of two mothers fighting over a baby? He proposed splitting the baby in two, so each side got a half. While this solution was intended to be ridiculous there, it's not so crazy in arbitration.

In the minds of many, arbitrators suffer from a compromise mindset by "splitting the difference" so as not to upset either side too much. While some studies have disputed this perception, it's still widely held and perception is a powerful thing. Few people, however, have the same perception with courts. Indeed, courts rarely have a problem giving one side or the other all to which it's legally entitled whether it upsets the other side or not.

It All Comes In. Courts also follow the rules of evidence. These are designed to ensure that questionable evidence, or evidence lacking certain characteristics, not be allowed in or to unduly influence the legal process. These rules can be cumbersome and technical at times, but they set certain standards. Arbitration has no such rules and the arbitrator can let in whatever evidence she wants. It doesn't matter whether that same evidence would have been excluded in court.

So is this good or bad? It depends. While you may be able to get evidence in that would never have been admissible in court, the other side can also. And while I appreciate having cumbersome admissibility burdens removed, there are times I'm grateful that these standards are in place protect the integrity of the process. In one case I had, there was a large e-mail trail between the parties. Sight unseen, the arbitrator (on the phone) indicated that it was "all coming in." It didn't matter whether the e-mails were filled with all types of inadmissible content, they were coming in and that was that. Judges don't have the unrestricted ability to do this, but arbitrators can do as they wish.

"Ethics? We don't need no stinkin' ethics!" So if arbitrators can do as they wish, are there any checks on their behavior? They don't have to comply with any mandatory rules and are regulated in very few states. Are they bound by ethical rules? Yes and no. "Yes" meaning that there are ethical principles for arbitrators, but as to whether they're actually bound by them? Not really. Let me explain:

Contrary to all of those lawyer jokes, law is a very regulated profession. We have an ethical code that must be followed. Liberal use of the words "shall" and "shall not" are found throughout, and the code is authoritative and binding. If lawyers don't follow them, there are disciplinary consequences. Judges are also subject to strict rules. In Massachusetts (as in other states), the Code of Judicial Conduct has several mandatory sections. For example, Canon 2 provides that a "*judge shall respect and comply with the law.*" Canon 3 requires that a "*judge shall perform the duties of judicial office impartially and diligently.*" Like lawyers, judges can be disciplined. Compare this to an arbitrator's ethical duties.

The American Arbitration Association ("AAA"), the largest arbitration provider and a private entity, has an ethical code for commercial arbitrators. Sort of. A comparison of this code yields some interesting differences. For example, Canon I states: "*An arbitrator should uphold the integrity and fairness of the arbitration process.*" Canon II states: "*An arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality.*" Canon IV: "*An arbitrator should conduct the proceedings fairly and diligently.*" Notice anything?

The word "shall" is absent. In its place, the word "should" is used consistently. In fact, just about any place where a judge is required to do something, an arbitrator should do something. Is this a big difference? It's huge. What people should do and what they're required to do are two totally different things. If you're required to do something and you don't, there are usually consequences (which help make people do what they're supposed to). If you should do something but don't, there usually aren't any.

But also consider the very purpose of this code compared to the judicial one. The Preamble in the Code of Judicial Conduct reads: "*The Code of Judicial Conduct is intended to establish standards for ethical conduct of judges.*" Simple and to the point. Contrast this with the Preamble in the arbitrator's code: "*[T]his Code sets forth generally accepted standards of ethical conduct for the guidance of arbitrators and parties in commercial disputes, in the hope of contributing to the maintenance of high standards and continued confidence in the process of arbitration.*"

A lawyer billing by the word must have drafted this. If you parse through this verbiage, you'll notice this code doesn't specifically do anything. It only provides "generally accepted standards" of behavior. It doesn't establish a thing. And these standards are for "guidance" and "in the hope of contributing" to "confidence" in the arbitration process. "In the hope of contributing?" How weak can you get? Most notably, however, is that this so-called code is intended to protect the arbitration process and not regulate the person in charge of the process. Why regulate when you can merely suggest? It's easier that way. Regulation implies recourse, which—as noted in Part I—is typically absent from arbitration. When consequences exist, the ethical language is simple and to the point. When they don't, you get what the AAA drafts.

What's the worst that can happen to an arbitrator who fails to comply with this code? Not a whole lot. Perhaps the AAA would no longer allow her to serve as an arbitrator. Perhaps the parties will no longer use her to arbitrate disputes. But so what? The party on the losing end of an arbitrator's failure to adhere to these principles would typically be out of luck. What's done is done.

Just One of the Herd. "Think." This was IBM's mantra for years. Don't just sign whatever is put in front of you. And don't fall for the other side's insistence that this is the "standard" arbitration provision. As any experienced lawyer will tell you, it's the standard provisions that can kill you. As I wrote in Part I, there are a few instances when arbitration is preferable to litigation, but you must first really think through what's at stake. Oftentimes, this comes down to money: Is there a great deal at stake? If so, and should things go wrong, litigation—as painful as it sounds—may be the best way to get the justice you seek.



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