

LITIGATION vs. ARBITRATION

**BACK TO SCHOOL SYMPOSIUM
CLE – ACC Houston
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**Presented by:
David Tupper**

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ARBITRATION

- Arbitration is a private method of dispute resolution in which the parties select the individual or individuals who will finally decide the matters in issue following a process agreed upon by the parties, with no or a minimum of court intervention.

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ARBITRATION

- Domestic arbitrations involve parties from the same country.
 - Domestic law applies to the process, and the enforcement of any final decision.
- International arbitrations involve parties from different countries.
 - Which law applies to the process, and the enforcement of any final decision?

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LITIGATION

- Litigation is a term encompassing the use of court processes to resolve a dispute, according to the rules in place in that jurisdiction.

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BACKGROUND

- Many initially believed arbitration would eliminate problems inherent in litigation.
- However, there has in recent years been a more balanced view of the relative strengths and weaknesses of litigation and arbitration.
- Like almost all legal questions, the answer to the question as to which is better now seems to be “that depends”.

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THE ADVANTAGES OF ARBITRATION

The generally asserted benefits of arbitration are:

- Can select the arbitrator – lawyer or expert, depending on the nature of the case, legal or technical.
- Judges do not always have technical competence.
- Arbitrators are generally expected to spend more time on a case than judges usually can. This is valuable in complex matters and may result in better decisions.

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THE ADVANTAGES OF ARBITRATION

- Arbitrators often, and in principle have more flexible schedules than judges and can make themselves available in the evenings or during holidays.
- Can have greater control over the process and schedule.
- There may be a more business-like approach to resolution and it may be less conflict/less adversarial.
- Rules can be tailored to fit the case.

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THE ADVANTAGES OF ARBITRATION

- Limits on document discovery or the number of witnesses discovered resulting in efficiency.
- Confidentiality/public precedent is not created.
- May diminish bias in favour of small litigants in big litigant vs. small litigant dispute. An arbitrator may have more independence than many judges may have.
- Generally, there is flexibility with respect to laws of evidence. Time and expense in meeting rigid evidentiary rules is diminished.

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THE ADVANTAGES OF ARBITRATION

- Can be less costly.
- Can be speedier.
- In the United States, there is less exposure to juries and punitive damages.
- There are generally fewer rights of appeal. Appeals are generally limited to narrow jurisdictional or bias issues.

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ADDITIONAL BENEFITS OF ARBITRATION IN INTERNATIONAL CASES

- Choice of law.
- Choice of seat of arbitration
 - Eliminate “home court advantage”.

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ADDITIONAL BENEFITS OF ARBITRATION IN INTERNATIONAL CASES

- There are a number of recognized international arbitration processes and institutions:
 - United Nations Commission on International Trade Law (“UNCITRAL”) “Model Law” – 1985
 - Widely adopted basic principles of international arbitrations.
 - New York Convention of 1958 – also widely adopted.
 - International Arbitration Institutions
 - LCIA, ICDR (AAA), regional institutions.
 - Enforcement of rights cross-border
 - Procedures for enforcement of interim orders injunction.

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ADDITIONAL BENEFITS OF ARBITRATION IN INTERNATIONAL CASES

- Impartiality and independence mechanisms.
- Provision of lists (e.g., UNCITRAL): veto, ranking of preferences.
- Parties can attempt to constitute the tribunal by consent; authority appoints by default (ICSID).
- Nomination subject to approval by authority (ICC).

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DISADVANTAGES OF ARBITRATION

- There may be no right of appeal even if the arbitrator makes a mistake of fact or law, depending upon the arbitration clause or the arbitration legislation.
- The arbitration process may not be fast and it may not be inexpensive. Where there is a panel of arbitrators and quasi-litigation rules, it may actually be more expensive.

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DISADVANTAGES OF ARBITRATION

- The limitations on discovery that often arise may disadvantage one party or another.
- In the United States, the absence of a jury may be a disadvantage to certain litigants.
- The flexibility in the rules of evidence may not be appropriate on the facts of the case.

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DISADVANTAGES OF ARBITRATION

- Sometimes, the public nature of litigation causes an increased desire to settle because of the fear of public loss, or the issues becoming public.
- Rulings of arbitrators may not be tied to conventional legal principles and rules of law or evidence, but rather be based on more amorphous concepts of justice and equity. This may diminish the predictability of the result.

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DISADVANTAGES OF ARBITRATION

- Generally, non-signatories to an arbitration agreement cannot be compelled to arbitrate. In multi-party disputes, or disputes where other parties contributed to a loss, this can be significant disadvantage.
- An arbitrator's desire to obtain future retainers may result in compromise or "splitting the baby" awards.

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DISADVANTAGES OF ARBITRATION

- The absence of appeal rights in significant cases can cause inappropriate risk averse behavior.
- The uncertainty with respect to procedure means that process disputes become very important to the outcome. A case may be lost by an early ruling of an arbitrator which is not appealable.

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DISADVANTAGES OF ARBITRATION

- Some litigation is not best conducted in a speedy way. However, an arbitrator may drive a schedule that is not realistic and thereby increase the costs of the dispute.

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HOW TO DECIDE?

- How important is confidentiality?
 - Very important: Arbitrate
 - Not important: Litigate
- Can you anticipate the type of dispute that is likely to arise?
 - Yes: The choice to arbitrate or litigate will probably turn on whether you will need full discovery from the other side; selecting arbitration risks truncated discovery, unless specified otherwise.
 - No: Litigate – everyone knows the rules

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HOW TO DECIDE?

- Are you litigating with the government?
 - No clear answer but criteria for consideration include:
 - Will the government seek immunity from disclosure of documents key to proving your case? Immunity considerations may be diminished within the confines of a confidential arbitration (arbitrate).

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HOW TO DECIDE?

- Will it be easier for the government to settle if the process is confidential? (arbitrate)
- Will success in your case create an awkward precedent for government? (litigate)
- Are you a “sympathetic” litigant? (litigate)
- Can the government capriciously eliminate your claim or remedy by statute? (litigate)

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HOW TO DECIDE?

- Is your dispute international?
 - Yes: Arbitrate to control risks of foreign law (Sharia?), home bias
 - No: See above
- Is your case simple (e.g., Price setting, index replacement)?
 - Yes: Arbitrate
 - No: See above

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