

Arbitration, Court or Jury Trial?

By Guy O. Kornblum

The selection of the means for resolving your client's claim and dispute if it cannot be resolved takes some thought. Not every case needs to be tried to a jury. Sometimes submitting it to voluntary arbitration or waiving a jury and having a court trial may be preferable. In making this decision, and advising a client, there needs to be considerable thought given to this topic. One point is critical: Your client needs to understand the choices and understand your recommendation and advice and why you have posed them.

There are a number of articles on this topic. So, is the topic exhausted? Not in my view. While the articles are there,¹ and they discuss the topic, there are some realistic considerations which may not be discussed or emphasized in

determining the right forum for your client's case. Most recognize that arbitration can be faster, less expensive and less public for resolving disputes, but it is not subject to the same rules of evidence and discovery as a court case. This can result in concerns regarding fairness and transparency.

Do You Have a Choice as to the Forum?

First is the question of whether you have of a choice of the forum for resolving your client's matter. I have seen situations, usually in contracts, in which arbitration is required or is an alternative that "may" be selected. I have also seen situations in which an agreement provides for resolution by a court trial only, so a jury trial is waived. In that circumstance, there must be a clear understanding from a "clear, plain, and conspicuous" provision so a court trial is the only forum for resolution.²

The first item for review is what forum choices you have for resolution of your client's matter? Even if a jury trial is available, it may not be right for your client's case.

What Are the Considerations for Deciding How to Proceed?

Even if the option is open for a jury trial, that does not mean that it is the best choice for your client. So, what are the considerations for determining if a jury trial is the preferred alternative to resolution?

Here are some factors to consider:

- Is time important? That is, will opting for a jury trial result in a delay in obtaining compensation for your client? The delay may be extended given appellate rights that may further extend the opportunity for collection. Arbitration certainly is likely to be quicker with a degree of finality (with limited or no appellate rights).
- What is your client's jury appeal? How will your client appear in front of a jury? Will your client make a good impression? Is the client sympathetic? Will the client be viewed in a positive way, or are there aspects that may turn off a jury?

Jury trials are not for everyone or every case, so discussing the options for resolution with your client should be on your agenda.

- How will your client handle a jury trial? Is your client able to handle the process? Will nerves or testifying cause the client to be unable to emotionally handle the stresses and strains of attending a jury trial and testifying? Arbitration and even a court trial provide a less intimidating and more relaxed process which may make your client and witnesses more comfortable. So, if emotions are a factor, a less public forum may be preferred.
- Are the issues in the case so complicated they will be difficult to present to



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a jury? Is there a better chance that an arbitrator or judge will better understand the complexities? If so, a court trial or arbitration may be the preferred forum for resolving the dispute.

- More to that point, arbitration allows the parties to choose someone who understands the subject matter and who has experience with the issues involved. Emotion is less of a factor so the issues have more prominence with a more sophisticated trier of fact who can focus on them.
- Arbitration usually results in a more efficient process at a lower cost (even if the arbitrator is paid) with relaxed rules of evidence allowing testimony remotely or by an expedited process, streamlined hearings, flexibility in scheduling, and other efficient and cost saving alternatives which can offset the arbitrator's cost.
- Finally, if there are relationships to be preserved, arbitration presents a less confrontive and more diplomatic manner of resolving any dispute.

Why Not a Court Trial?

Another alternative is to bypass a jury and opt for a court trial. In my view, this is an alternative to arbitration if you are willing to take the chance on the selection of a judge ruling rather than the opportunity to

choose the presiding officer which arbitration presents. In short matters this may be the most efficient and cost-saving approach as arbitration requires planning and the expense of paying a presiding officer.

In business cases, or even admitted liability cases with damages only an issue, with perhaps only a few days needed to present your case, a court trial is an op-

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tion. It can be efficient and less costly as the parties can agree on more streamlined methods of presenting their case. And like an arbitration the "rules" may be relaxed, and the court can hear the "whole story." One advantage is that all rights of appeal are preserved with a court trial if there are issues that deserve appellate court attention.

A court trial may be a reasonable alternative if costs are a factor which can be substantial if an arbitrator is paid for a case that takes a longer time to process to conclusion.

Will Your Adversary Be a Barrier to Forum Selection?

Obviously, your adversary could be an impediment to your selecting a forum other than a court or jury trial if there is no mandatory provision for arbitration. Perhaps a candid approach to the other side will reveal what your alternatives might be and if the parties can agree on a forum for resolution. It is worth a try to have this conversation if circumstances permit.

A Final Thought

To summarize, options may be available for resolution of your client's dispute. Jury trials are not for everyone or every case, so discussing the options for resolution with your client should be on your agenda. This gives your client the opportunity to consider the best process for resolving the dispute. ■

- 1 Just Google "arbitration v. jury trial" and you will find them. A good case to read about arbitration generally and issues relating to agreements to arbitrate, waiver of rights to a jury trial and related issues is *Pinnacle Museum Tower Association v. Pinnacle Market Development US LLC* (2012) 55 Cal.4th 223.
- 2 Regarding jury waivers, see the recent case of *Tricoast Builders, Inc. v. Fonnegra* (2024) 15 Cal.5th 766.