

ARTICLES

Should a Judge, Jury, or Arbitrator Decide Your Complex Commercial Case?

This important decision will set the tone for the balance of the case, and equal consideration should be given to each available alternative.

By Bryan Gottfredson and Michael Harris – April 20, 2020

In many complex commercial cases, the determination of who will decide the fate of a party has already been established by preexisting contractual provisions. Perhaps the drafters of the complex agreements at issue have already dictated that a jury trial will be waived or that the parties must proceed to resolve their disputes via a specific and thoughtful arbitration procedure. However, in many instances, who will resolve many, if not all, of the disputed issues between the parties is left to the parties and their counsel to determine after the dispute has arisen and very early in the litigation. This important decision must be made promptly, but only after consideration of all the prevailing factors.

Demanding a Jury Trial

The decision to demand a jury trial in federal court must be made early in the process after initiating the lawsuit. The Federal Rules of Civil Procedure provide that a party may demand a jury trial “no later than 14 days after the last pleading directed to the issue is served.” *See* Fed. R. Civ. P. 38(b)(1). “[T]he last pleading directed to’ an issue is not the pleading that raises the issue, it is the pleading that contests the issue. Normally, that pleading is an answer, or, with respect to a counterclaim, a reply.” *McCarthy v. Bronson*, 906 F.2d 835, 840 (2d Cir. 1990) (internal citations omitted), *aff’d*, 500 U.S. 136 (1991). The demand must be in writing, but it may be combined with a separate pleading. *See* Fed. R. Civ. P. 38(b)(1). After a proper demand is made, those issues for which a jury trial have been demanded will be tried by a jury absent a subsequent stipulation to a bench trial or a finding that there is no right to a jury trial for those issues. *See* Fed. R. Civ. P. 39(a).

The timing of the demand requires parties to consider at the outset of litigation whether or not they wish to request a jury. However, attorneys should be aware that amended pleadings at a later date to include additional claims may provide the other side with another opportunity to request a jury trial for the newly added claims. *See, e.g., Fredieu v. Rowan Cos., Inc.*, 738 F.2d 651, 653 (5th Cir. 1984) (“An amended or supplemental pleading that raises new issues enables a party to request a jury trial for those issues in the manner established by Rule 38(b).”). The following factors should be considered when deciding whether to proceed with a bench or jury trial in a case involving business and contractual issues.

The Benefits of a Bench Trial

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It is rare that a federal judge assigned to a complex commercial litigation matter will be reviewing for the first time the applicable law that will be applied in your case. However, consideration must be given to who the likely assigned judge may be. In small jurisdictions, it is easier to predict which judge will preside over your lawsuit, while in larger jurisdictions, the case may be assigned to any of a number of judges. Therefore, it is possible to assess the odds of drawing a judge who has had years of business litigation experience prior to joining the bench or significant exposure to similar cases on the bench (or both).

In addition, state courts across the country are more frequently establishing commercial or business courts that should not be overlooked when determining venue. In Arizona, for example, one division of the Superior Court, known as the Commercial Court, is composed of judges who are former business litigators and extremely well versed in the law likely to be at the center of most commercial litigation matters. The benefit of having judges who have already spent years in the trenches with similar versions of fact patterns that are about to be litigated cannot be overstated. If state court rules allow these judges the flexibility to tailor discovery, trial, and procedural issues to the needs of the case, the process for a thoughtful litigant can be significantly streamlined and have a direct impact on the result.

Whether in state or federal court, bench trials are frequently favored for technical or otherwise complicated arguments that are predicated on a close reading of the contractual language at issue. On the whole, judges—as opposed to jurors, who may lack training in business concepts or contract interpretation—are typically adept at understanding and recognizing the technical aspects of complex commercial disputes. Jurors, on the other hand, may not appreciate the painstaking effort trial lawyers make to explain technical nuances that can more easily be compartmentalized by a non-lawyer as “legal jargon.”

Lastly, bench trials can afford litigants a quicker and more cost-effective means to reach the finish line of their dispute. Motions in limine, voir dire, and jury instructions can be largely eliminated. The avoidance of jury selection alone will likely save a day (if not more) of trial. During the trial itself, most judges permit, if not encourage, a more casual proceeding without a jury present. All of the foregoing can reduce the time required to prepare for trial, the time spent in trial, and the fees associated with a trial—key factors in weighing the options before embarking on what could be a lengthy litigation.

Considerations for a Jury Trial

Where a strong emotional or equitable component exists at the heart of the dispute, a jury trial should be considered. This is not exclusive to tort claims; commercial cases often contain sensitive or emotional issues that add distinct nuances to the parties’ respective positions. Savvy attorneys who know how to convey their client’s energy and emotional toll may be able to impart these feelings to a sympathetic jury. If certain claims or defenses are rooted in equity but may fall short on purely technical grounds, the choice of a jury might be better. More emphasis should be placed on the relatable facts, the likability of witnesses, and the presentation style of the lawyer when determining that a jury is the more optimal trier of fact. Despite the parties’ and lawyers’ interest in the commercial dispute that they have spent years evaluating, the more

layered and document-intensive a case is, the more difficult it will be to captivate the average juror, especially over a multi-week period of time that many complex cases require.

Another factor to consider at the beginning of the case is that a judge may have lived with your case for over a year (perhaps more) before deciding the ultimate issues, whereas jurors will hear everything for the first time at the commencement of trial. The ability to present the “story” to a new set of eyes and ears that will have a fresh take on the parties and facts may be beneficial after lengthy discovery battles and contentious motion practice. While the rules of evidence and appointment of experienced judges are designed to prevent preconceived notions and feelings about parties that develop along the way, a thoughtful analysis of whether your client will benefit from a new set of fact finders at trial should be considered. Jurors too will not come in free of their own preconceived ideologies, but they will be asked to check them at the door and will not have lengthy exposure to a party or that party’s counsel before they have to make final rulings. This allows counsel an opportunity to reframe the dispute to cast a favorable light on his or her client’s position during the trial.

A Third Alternative: Arbitration

Before filing a lawsuit, while a party and his or her counsel contemplate whether their chances are better with a judge or jury, they should also contemplate at least one other alternative—private arbitration. Arbitration is an often-overlooked alternative to state or federal court. Even if the contracts at the heart of the dispute do not contain arbitration provisions, the parties can still choose to have their grievances decided via private arbitration. In a complex business dispute, the chances are high that neither party will be blindsided by the filing of a lawsuit. In most instances, by the time a party is ready to seek judicial intervention, it has already exhausted its efforts through letters that have not persuaded the other side to capitulate. Because the lawsuit is not a surprise to anyone, there is little harm in exploring, or at least considering, arbitration before deciding on whether your client’s particular situation would fare better in a certain court or before a judge or jury. A party exploring this alternative with co-counsel prior to commencing a lawsuit need not perceive it as a sign of weakness. Rather, it may convey a show of strength that the party is ready, willing, and able to proceed as quickly as possible to the finish line.

The modern arguments for and against arbitration are the subjects of numerous articles and advocacy pieces and can be digested elsewhere. However, there are some benefits that should not be overlooked, especially if there is a chance that your adversary may agree to arbitrate and (of equal importance) agree on the format of the arbitration. The modern complex business dispute is typically bogged down by massive amounts of documentation the lawyers are forced to sift through before finding the few pieces of material and relevant information that can be used and accepted as evidence in a proceeding. Document-intensive discovery often causes cases to drag out much longer than originally anticipated, and the answer to the oft-asked question by many litigants—“When will my case go to trial?”—is moved further and further down the road. By agreeing on the format of the arbitration, the parties can potentially have more flexibility in planning their discovery, limiting it, and arriving at an arbitration date much sooner than they would otherwise get to trial, potentially resulting in substantial savings. The parties’ counsel can select an arbitrator they are comfortable with to make the ultimate ruling in the case. When both

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sides personally choose an arbitrator or arbitration panel to decide the merits of the dispute, there is little room to legitimately blame the “system” for an unfavorable outcome. Other procedural and practical issues can be agreed upon ahead of time, such as confidentiality, number of depositions, and motion practice. In short, even if counsel decide on fundamental rules to apply, such as the American Arbitration Association Rules (the regular or complex rules or a combination of them), these can be custom-tailored as agreed upon by the parties.

Finally, if the parties decide to arbitrate instead of litigate in court, they will greatly advance their objectives if they cooperatively draft a comprehensive submission agreement to the arbitrator or administrative body overseeing the arbitration. By self-selecting the arbitrator and the rules of the road governing the proceeding, they can have a direct impact on advancing the best interests of their clients.

Conclusion

Once the decision has been made to litigate a business dispute, a threshold issue from the onset is determining which trier of fact suits your client’s specific situation. This important decision will set the tone for the balance of the case, and equal consideration should be given to each available alternative to provide your client the best possible chance for the optimal result.

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