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Arbitration: Why some general counsel have mixed feelings

By [Steve Mroczkowski](#)

In a recent article appearing on law.com entitled "Arbitration's Fall from Grace," Lou Whiteman commented on the waning popularity of arbitration in the eyes of some corporate counsel in the United States. The article did not denounce arbitration as a valid alternative to litigation, but it did address some common complaints that have risen out of the not-so-ideal experiences some companies have encountered using this process. I have condensed the article into the following few paragraphs in order to provide a clear representation of the main points Whiteman raises.

"Our company ended up investing more than a year's worth of time and substantial legal fees simply to enforce in court our right not to have to go to court." These are the skeptical words of Interland Inc. general counsel Jonathan B. Wilson. Wilson is referring to a drawn out court battle over the terms of Interland Inc.'s customer agreement which states that contractual disputes between customers and the company were to be settled through arbitration. This was challenged when a customer sued Interland in federal court claiming breach of contract. Interland promptly motioned for dismissal, citing the terms of its customer agreement. A jury eventually found for Interland, but the process was by no means inexpensive, costing the company both time and money. Following the federal court ruling, the customer and Interland settled the claim in arbitration-just as Interland's customer agreement stated.

While Wilson's case is an extreme one, he is not the only one who does not see arbitration in the idealistic light that was prevalent in the early 1990s. There are others claiming that arbitration is more expensive than litigation, offers no discovery or appellate rights, and contains no option for summary judgment. This, critics say, is enough to try to avoid the process or, to not challenge an opposing party's claims once in arbitration because the court battle that could ensue is not worth the extra cost. Some critics also complain that arbitrators tend to split their decisions, leaving a company wanting for much more after the process is complete. These decisions, some general counsel explain, fall well short of favorable judgments awarded in an adversarial court forum.

Supporters of arbitration do not try to deny stories like Wilson's, but they ask that opponents of arbitration remain reasonable when critiquing the process. It would be unwise to write off arbitration completely, merely because there are some instances of dissatisfaction. It would be unrealistic to say that a corporate dispute litigated in court always provides two satisfied parties when all is said and done. And, says attorney John F. Wymer III of King and Spalding LLC, corporations are partially to blame for the efficiency troubles they encounter through arbitration. Some companies have not invested the time and expertise necessary for an effective ADR program. Without investigating how arbitration could specifically benefit (or not benefit) their company, they merely set up a program because arbitration was lauded in the legal community as a new, efficient alternative to litigation. According to Wymer, "Businesses that have refined

arbitration and made it more focused and more fair to their employees or other parties are better off." In other words, a little more diligence in the initial setup stages of arbitration programs could have potentially saved some companies the extra costs they are now incurring.

As arbitration is criticized, mediation, a less popular and less known dispute resolution method, is gaining support. In certain respects, mediation addresses the claimed weaknesses of arbitration. Because of its less structured atmosphere, mediation tends to be less adversarial, less expensive, and quicker than arbitration. While mediation, like arbitration, lacks discovery rights and may not be as easily enforceable as a court opinion, the fact that a mediator does not decide the case helps disputing parties to recognize that the power resides in their hands. It is in the best interests of both parties to work together toward an expeditious and utility-maximizing decision. That is, the power to determine the criteria for settlement rests with the parties and thus, it is up to them to determine who wins, who loses, or if both will win.

Though it is not as smooth a road as some envisioned, arbitration still remains a very popular alternative to litigation. In order for a successful arbitration program, say supporters, resources must be devoted to researching the specific clauses and regulations that govern the process, and the advice of those familiar with arbitration, as opposed to those whose expertise is in trial work, needs to be consulted. Joseph D. Wargo, partner with Wargo & French in Atlanta and arbitration specialist, comments on this patient, thorough approach to instituting an arbitration program: "The truth is that arbitration is not a panacea, and it is not for every company. But I do think that the factors that made arbitration favorable to certain companies do remain, and companies should continue to take a look at whether it works for them."

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