

Arbitrator, Judge, or Jury; Pick Your Poison

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As a general rule businesses hate litigation. Why? Litigation results seem uncertain to the point of randomness. It need not be that way. You can never squeeze all of the uncertainty out of litigation, but if you understand who will be making the decision, litigation becomes more predictable. Think of it this way; if you ask an umpire to call balls and strikes; they should do well because they've been trained for that. Don't ask that umpire to rule on off sides in a soccer game; they may not be better than the average passerby.

In litigation you have three basic choices of decision maker, judge, jury or arbitrator. Each has its own strength and weakness.

Juries can always find the liar. In a credibility dispute, juries rule. It's hard to successfully lie to even the worst jury. All of the most common disputes boil down to credibility, who had the green light; how long had the spilled oil been on the floor; etc. It's something about the psychology of the group. It's why we still use juries 500 years after they were invented. Technical disputes (the contract called for material meeting one testing organization's spec, the material delivered was tested to a rival organizations spec; are they equivalent?) are much harder for juries. Even the best jury struggles with technical issues. With a technical dispute no one is lying, they just disagree. Results from juries can be random on technical issues since factors, such as which witnesses the jury likes, will get undeserved weight.

Judges are great with legal issues. They have the training and, more importantly the experience, to do a good job with legal decisions. Legal disputes occur when the litigants agree on what happen, but not what that means under the law. This is surprisingly common in business disputes that play out in a series of letters, contracts and e-mails that everyone admits were exchanged. On factual issues, judges are juries of one. Without eleven comrades, judges are unpredictable juries. Judges may be better with technical issues if they have the time and inclination to learn the technical area. If not, they are no better than a jury.

Arbitrators can have whatever technical expertise you require. Likewise, complex or unusual legal issues, which a busy judge might not be able to devote time to, will fare better in front of an arbitrator experienced in that area of law. Single arbitrators, like judges, are juries of one. Three arbitrator panels can have some jury dynamics but they are not the same as a jury.

Bottom line? If you have the chance to designate either beforehand (like in a contract) or later by agreement, and if you understand what you will be fighting over, you may be able to get a better result by choosing the best type of decision maker for your particular dispute.

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