Should You Enforce a Non-compete Agreement Through Arbitration or Litigation? An Examination of the Not-So-Obvious Answer to This Recurring Question

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When a non-compete agreement contains an arbitration clause, this raises the issue of whether the non-compete should be enforced through arbitration or litigation. This is an obvious threshold question with an answer that is not so clear. This blog post explores the pros and cons of enforcing non-compete agreements through arbitration, as opposed to litigation in state or federal courts. This is mainly explored from the perspective of the party seeking to enforce the non-compete agreement (and thus most likely to have a say over the forum), but much of this can be read the opposite way to the extent that a party finds itself on the other side of this question.

But first, is arbitration permissive or the exclusive remedy? If the operative agreement reveals that arbitration is an option but not the exclusive forum for enforcement, then whether to select arbitration should be examined carefully and strategically to make an informed decision. If arbitration is the exclusive remedy, then this blog is still an important read, but mainly from the perspective of knowing what you are signing up for by arbitrating, as opposed to litigating, a non-compete agreement. If you don't like what you read, then it might be best to reexamine the non-compete carefully to determine if the arbitration clause is valid and enforceable.

Why is non-compete arbitration different from typical commercial arbitration? As litigators in this area know, in a non-compete enforcement action often times preliminary injunctive relief is sought. In these types of disputes, the possibility of receiving a temporary restraining order or preliminary injunction is just as important, if not more important, to a party seeking to enforce a non-compete agreement. Also, in a non-compete enforcement action, there will be instances when the dispute presents itself in the form of a well-resourced business pursuing relief from an individual. Because of this recurring procedural posture in non-compete enforcement actions, this makes arbitration different than when arbitration is pursued between two companies fighting largely over money damages, for example when two larger entities pursue claims for monetary damages.

The pros of arbitrating non-compete agreements.

- **Speed.** Both the AAA and JAMS have specific procedures to deal with a request for a preliminary injunction. These can include assigning an emergency arbitrator within 24 hours of filing the arbitration. That emergency arbitrator is selected by the AAA/JAMS precisely because they have the

capacity to hear the request on an expedited basis. That emergency arbitrator will often attempt to immediately hold a scheduling call to talk about the timeline of an expedited hearing on a motion for preliminary injunction. This happens in courts sometimes as well, however, an assigned judge may be in the middle of a trial, or may be dealing with an important criminal matter that understandably takes priority over a civil docket. Accordingly, on average, an emergency arbitrator assigned for the purpose of handling a request speedily is less likely to have such a scheduling delay, and the request for preliminary injunction is more likely to be handled extremely promptly.

- **Remote proceedings.** Unless you are in a major legal market, the emergency arbitrator is unlikely to be present in your city. In the age of legal practice by video-conferencing, an emergency arbitrator is likely to proceed with scheduling and hearings using remote means, which in theory should mean less delay and less expense. In our experience over the past few months, emergency arbitrators are willing, and parties consent, to remote proceedings.
- **Skilled and dedicated arbitrators.** Although it obviously depends on who is appointed, many of the emergency arbitrators available for appointment are very dedicated, intelligent, and able. Often they are very focused on their purpose of providing immediate injunctive relief, and they are very well-equipped to get there promptly.

The cons of arbitrating non-compete agreements.

- **Cost.** Arbitrators are paid by the hour. This can add up quickly, so clients need to go into arbitration with eyes wide open about the reality that they will be paying not only their attorney, but also the arbitrator. In a case that will be heard by a three arbitrator panel, this observation is triply important.
- **Prepayment of cost.** The arbitration organization usually requires pre-payment of an arbitrator's fee through a retainer prior to holding any hearings. So a client must know upfront that to walk in the door/log on the zoom for an emergency hearing, they will be required to put up cash.
- **No "standing before the court" moment.** For a party seeking to enforce a non-compete agreement, there is often much satisfaction in the moment when the other party is "hauled into court." With arbitration, and especially with emergency arbitration, this psychological watershed moment could potentially come across as less monumental. An arbitration is likely to happen in a conference room rather than a court room, and so if going to court is important for a client, this needs to be evaluated as a drawback to arbitration.
- **No automatic court reporter/record.** If you want a court reporter to be present to prepare a transcript of the proceedings, that is usually up to the parties to pay for and arrange on their own.
- **Deadlock over fees.** Many arbitration agreements provide for the parties to split the costs and arbitrator fees 50/50. But what happens when one party believes that the agreement is unenforceable, or otherwise just refuses to pay? The arbitration organization will usually force the complainant to front the entirety of the cost and allow the arbitrator to later address the issue as part of the dispute. If the complainant is unwilling or unable to front the entire cost for arbitration, then the arbitration will be stayed or dismissed.
- **Registration and enforcement of an injunction.** Arbitrators are private citizens that are given authority by mutual consent of the parties. That is to say, arbitrators fill the same role as a judge, but they only have power because the parties agree that they have power. What happens if one of the parties suddenly, perhaps after losing at arbitration, decides that they will not respect the decision? The avenue at that point is to go to court to seek enforcement of the injunction received at arbitration. In a non-compete enforcement action where customers and accounts sometimes hang in the balance and time is of the essence, this dynamic can prove to be a substantial drawback to arbitration. If an opposing party decides to defy an arbitrator's award, this can result in significant delay to enforcing a non-compete, and must be a contingency considered as a drawback.
- **Collateral attack.** Following from the immediately preceding bullet point, when the enforcing party eventually does bring the injunction to a court to seek enforcement, a delaying opponent may decide

to attempt a full-blown collateral attack on the entire arbitration process. While that should likely not be successful, it could be, and regardless, it would cost more time and expense to sort through.

- **The non-compliant enjoined party.** Once a judge finally does bless the process and outcome obtained at arbitration, if the enjoined party later does not comply with the injunction, the enforcing party is then in the position of filing a motion for contempt of court, or filing an enforcement action for breach of contract. This is also generally true for following up on non-compliance after a court proceeding, but given the aforementioned realities about time often being of the essence in non-compete enforcement actions, the fact that it could take several more additional steps to get finality should be mentioned.

Factors that cut both ways.

- **Discovery.** There is less formality around discovery conducted through arbitration as opposed to litigation. In a dispute where both sides generally know what is going on, this can present substantial cost savings. But in a situation where discovery would prove essential, the lack of formal discovery may end up being a drawback presented with arbitration.
- **Closed/confidential proceedings.** Usually arbitration is a private, closed, and confidential process. For businesses that like this anonymity, or when confidential information is at the heart of the dispute, this can be a substantial draw to arbitration. However, if part of the impetus for enforcing a non-compete agreement is to "send a message" to those not technically involved in the dispute at hand (ie, other employees with their own non-competes, competitors, third-parties that could become liable for breach of the non-compete being disputed, etc.) then the anonymity may actually work against a client's goals.
- **Finality.** Typically, an outcome at arbitration is not appealable, so there is less risk of a dispute hanging around in the appellate courts for years. However, if you are the losing party, then this likely means that you are stuck with the outcome.
- **Arbitrator Selection/Bias.** The emergency arbitrator is often assigned at random with a short but not overly substantive time for objection. The permanent arbitrator assigned to the case often comes to the case through mutual agreement or an organized selection process. However, sometimes arbitrators are less familiar to practitioners than judges are, so there is a greater chance of getting a wild-card arbitrator, or one that handles things unconventionally. There are rules to follow in arbitration, but they leave quite a bit up to the arbitrator's discretion, so depending on how that works out, if could become a pro or a con. It is probably best thought of as a risk to assume.
- **Rules of Evidence.** The rules are more likely to be relaxed, or at times completely disregarded in arbitration. Depending on a given client's position and their evidence, this could help or hurt.

Conclusions. There is no one size fits all approach to enforcing non-compete agreements. Deciding on the forum in which to enforce the agreement is often one of the first strategic considerations taken up, but as should be clear after reading this article, there is no "always" and "never" associated with this decision. After discussing these issues with our clients, and grounded in a firm understanding of what their goals are, we can arrive at a decision that is best calculated to reach their desired outcomes.