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Arbitration: Is It The Right Choice For You?

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Many business people today automatically instruct their attorneys to include arbitration clauses in their contracts. They believe they will get a better, faster and cheaper resolution of their disputes than they will in court. But is this true? The truthful answer is: Not necessarily. By considering the some of the advantages and disadvantages of arbitration, a person negotiating a contract can make an informed decision whether an arbitration clause would be in his or her best interest.

Advantages

1. **It may be quicker.** An arbitration proceeding *can* be resolved more quickly than a court proceeding in many cases. The reason is that arbitration proceedings usually dispense with most of the discovery (written interrogatories and depositions) that occur in a normal court case. If getting the matter resolved quickly is likely to be more important to you than getting the discovery you may need to prove or defend your case, arbitration is the better route to take.
2. **It may be less costly.** This advantage is present only if the parties dispense with most discovery in arbitration. As discussed below under disadvantages, the filing fees and arbitrator's fees will be far higher than what you would pay in court. The savings will come from reduced attorneys' fees because your lawyer is not conducting the type of discovery that

usually occurs in a lawsuit. Again, if the speed of resolving the dispute is likely to be more important than obtaining discovery that you may need, arbitration is the way to go.

3. **There are no juries.** All disputes in arbitration are resolved by a single arbitrator or a panel of three arbitrators, not jurors. Most arbitration panels are composed of lawyers or experienced business people. If you are reluctant to have your case resolved by a jury, choosing arbitration will guarantee that you won't have a jury. You should be aware, however, that a "waiver of jury trial" clause in a contract is usually enforceable. If you include such a clause in your contract you can have your dispute resolved by a judge in a non-jury trial.

4. **Arbitration proceedings are more private.** Papers filed in court are public records and are open to full public view, including the media. In fact, most federal courts now have electronic filing of papers which enables anyone, including the media, to engage in virtual discovery of what cases and papers have been filed. State courts in Florida will soon have electronic filing as well. Arbitration proceedings are not open to similar public or media scrutiny. If privacy is important to you (such as, for example, in a family owned business in which a shareholder's agreement is being negotiated) arbitration may have a definite advantage.

5. **The decision is usually final.** There are extremely limited appeal rights from an arbitration award. Basically, an arbitrating party can appeal only if there is fraud or corruption in the arbitration process. Therefore, the dispute resolution will not be delayed by appeals.

Disadvantages

There are also disadvantages of arbitrating a dispute rather than having it resolved by judge or jury. Some of these disadvantages are the flip side of the advantages.

1. **Fees are high.** Most clients involved in arbitration for the first time are quite surprised how high the filing fees and arbitrator fees are. For example, the initial fees (filing fee

and case service fees) in a case filed with the American Arbitration Association (“AAA”) involving a dispute over \$500,000 are \$8,500. Additionally, each party must pay an equal share of the arbitrators fees. For a case that is only somewhat complex those fees could easily exceed \$30,000 per party. Even if the dispute is only over \$10,000, the initial fees payable to AAA are \$1250, not including the arbitrators’ fees. By comparison, the filing fee in federal court is \$350 regardless of the amount, and in state court it is \$250 for any suit filed in circuit court (over \$15,000). You pay no fees for the judges. They are paid by the government.

2. **There is less discovery.** This is often cited as an advantage of arbitration rather than a disadvantage. However, sometimes the only way to adequately prepare your claim or your defense is to take the depositions of key witnesses as well as the parties. That may not be possible in an arbitration proceeding, although the panel of arbitrators will usually allow for at least one deposition per side. If you are entering into an agreement in which the other side will have most of the knowledge of facts and documents, arbitration may not be a good idea for you.

3. **There are limited appeal rights.** One reason that arbitration proceedings are often faster than court proceedings is that there are almost no appeal rights. Even if the arbitrators misunderstood the facts or were wrong in their interpretation of the law, the only basis for appeal is to show there was corruption or fraud in the arbitration process. That is highly unusual and extremely difficult to prove. Speed in resolving disputes is important, but if you would like some remedy if the arbitrators are wrong on the law, or totally misunderstood the facts, you are better off in court.

4. **The rules of evidence do not apply.** In both federal and state courts there are rules of evidence that the parties must follow. If the judge makes an error by improperly admitting evidence or refusing evidence that should have been admitted, there are appeal rights

to correct the mistake. In arbitration proceedings the arbitrators do not have to comply with the rules of evidence, so evidence that would not be admissible in court may come in. The rules of evidence have been developed in common law countries over the centuries, and exist for a reason: they help insure that appropriate and reliable evidence comes in and that inappropriate and unreliable evidence is kept out. The use of the rules of evidence should lead to more predictable and more just results.

5. **There are no juries.** Yes, this is listed as one of the advantages of arbitration, but it may also be a disadvantage. There is a reason our forefathers included the right to a jury trial in the Constitution. Over the centuries, in most types of cases a jury of one's peers has proven to be a reliable method of discerning the truth and reaching a just result. Some cases are better suited for juries than other cases. If the agreement you are negotiating deals with issues you believe a jury would not understand, you may prefer arbitration if a dispute arises. Alternatively, you may prefer to be in court and have a non-jury trial provided by a jury waiver clause in the contract.

Alternatives

There are alternatives that you may want to include in the contracts that you negotiate. First, consider a requirement for mediation before suit is filed, with exceptions for any major events where seeking an injunction or other prompt relief may be required. Most courts today require mediation before a case goes to trial anyway, and you will save considerable money if you are successful in a pre-filing mediation. Judges and arbitrators will often waive the requirement for a further mediation conference if the parties have already participated in a pre-filing mediation.

As a second alternative for business disputes you could include a clause that says “The exclusive jurisdiction and venue for any dispute arising under or related to this contract shall be the Business Court Subdivision of the Civil Division of the Ninth Judicial Circuit Court of Florida under the Business Court Procedures then in effect. If the dispute is ineligible to be tried in Business Court, then the exclusive jurisdiction and venue shall be in a court of competent jurisdiction in Orange County, Florida.” An alternative clause (after stating disputes will be resolved in Business Court) could read “If the dispute is ineligible to be tried in Business Court, then the dispute shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules then in effect, and a judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.” The Business Court in Orange County has judges experienced in business disputes and the law applicable to such disputes. The procedures in that court are designed to facilitate a relatively prompt decision while applying existing law and the rules of evidence. And the parties retain their right to an appeal of an adverse judgment.

Conclusion

The decision as to what forum to use to resolve any disputes that arise under a contract is one that the contracting parties should carefully consider. Despite having some advantages, arbitration is not necessarily the right choice. You should consider the advantages and disadvantages of arbitration, and the advantages of the Business Court before deciding what forum and rules to include in your contract.