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Arbitrations 101: Improving Your Chances for Dispute Resolution Success



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Pros & Cons of Arbitration v. Litigation

Costs

- **Pro:** Usually limited discovery, no depositions, lax rules of evidence, no third-parties, etc. which in turn reduce the costs of taking the matter through resolution.
- **Con:** Have to pay administrative fee to arbitral forum and the hourly rate of the arbitrator. Net savings for legal spend can be negated if arbitrator prolongs a case that most courts would resolve early via dispositive motion.

Time

- **Pro:** Arbitrator schedules proceedings based on parties' schedules and the average arbitration takes less time to conclude than litigation.
- **Con:** Less time to narrow the issues in dispute either informally or through legal rulings that typically occur in court. Depending on whether you are a plaintiff or defendant and the strength of your position, you may want the additional time litigating in court will provide.



Decision Maker

- **Pro:** Parties are involved in selection of arbitration and allows parties to select a person who may have expertise or familiarity with the issue in dispute, as well as other attributes.
- **Con:** The arbitrator is paid by the hour so he/she has no incentive to bring the arbitration to an early resolution if the claims lack merit or are without factual support. Arbitrator may not have the same experience as a trial judge and the background information available on an arbitrator may be more limited than a judge. A rogue/loose cannon arbitrator more of a risk due to no right of appeal.

Rules of Procedure

- **Pro:** Limited established rules of procedure, which allows the parties and the arbitrator to decide pre-trial matters such as dispositive motions, expert disclosures and discovery.
- **Con:** Uncertainty as to the rules of procedure and may not be satisfied with no dispositive motions, limited (or no) discovery and minimal expert disclosure.

Privacy

- **Pro:** Except for class arbitrations, arbitrations are private and confidential.
- **Con:** Because arbitration is a way for parties to resolve their disputes in private and outside of the courts, arbitration awards cannot be enforced without filing a lawsuit to enforce the award. For the most part, court proceedings are public, which can be embarrassing depending on the subject matter of the dispute.

Rules of Evidence

- **Pro:** Formal rules of evidence typically do not apply in arbitration so the time and costs associated with presenting a case in arbitration tends to be less than in court.
- **Con:** Greater possibility of arbitrator allowing and considering unreliable testimony or documents or testimony on issues on which the witness has no first-hand knowledge. Damages likely will not need to be proven with reasonable certainty. In court, there are established rules of evidence that the court must follow and that ensures reliability of evidence.

Subpoena Power

- **Pro:** Most state laws grant an arbitrator to subpoena witnesses to appear for hearings. The inability to issue discovery subpoenas keep the costs of arbitration low and limits the involvement of third parties.
- **Con:** Much more limited subpoena power than the court. Generally, the arbitrator does not have the power to issue discovery subpoenas nor does the arbitrator have extra-territorial subpoena power.

Appeal/Judicial Review

- **Pro:** Arbitration awards are final with no meaningful judicial review.
- **Con:** There is no meaningful judicial review so if arbitrator misapplies/misinterprets the law or bases decision on evidence that should not have been considered, the parties are likely stuck with the ruling. If a court misapplies the law or admits evidence that should be have been excluded, a party typically has, at least, one automatic right of appeal.

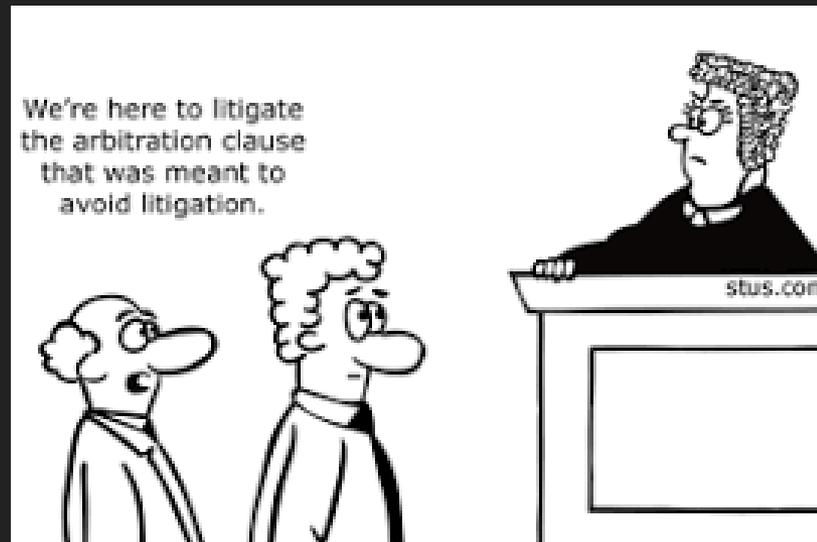


Third Parties

- **Pro:** Because arbitration is by agreement, a party cannot join a third-party that similarly has not agreed to resolve the dispute by arbitration. Thus, arbitration is typically bi-lateral which allows a more streamline approach and faster resolution.
- **Con:** Courts allow parties to bring into the litigation responsible third parties which allows all issues in dispute to be resolved through a single proceeding.

In Business 2 Consumer Agreements, Arbitration Clauses Can Avoid Class Actions

- Arbitration provisions can be combined with class action waivers to eliminate consumer class action risks
- Strong series of Supreme Court decisions during last 15 years requiring both state and federal courts to honor these provisions based on the Federal Arbitration Act (FAA)
- For companies providing consumer services, this benefit of arbitration can be huge



Drafting the Best Arbitration Provision for Your Company's Needs

Enforceability Considerations

- B2B – very little concerns regarding enforceability of agreement absent fraud, duress, or lack of capacity
- B2C – need to be concerned about procedural and substantive unconscionability
- E2E – employee cannot be placed in worse position than would be in court

Breadth of Provisions

- Encompass all disputes v. certain select types of disputes (i.e. only breach of contract claims)
- Exclude equitable disputes such as injunctions, restraining orders, declaratory judgments
- Limit arbitrable disputes to matters where the amount in controversy is above the jurisdictional threshold for small claims
- Grant or limit the arbitrator's power to award punitive damages

Pre-Arbitration Thresholds

- Mandatory formal mediation
- Mandatory notice of dispute and good faith efforts to informally resolve dispute within a given time period
- Consider if these add value or just add delay and expense



Specifying Specific Procedures/Rules Beyond the Rules of the Arbitration Body

- Applicability of federal rules of evidence to arbitration proceeding
- Specify the nature of discovery available in arbitration, subject to modification by agreement of the parties
- Provide whether arbitrator or court determines issues of arbitrability, such as whether dispute is within scope of agreement to arbitration

Selecting the Arbitration Body (AAA, JAMS, ICC, LCIA, CPR, Other?)

- For B2B, AAA is most commonly used for domestic arbitrations. JAMS also is commonly used.
- For international B2B contracts between a US and foreign company, non-American companies may prefer non-American arbitration providers, e.g., ICC/International Court of Arbitration, CPR, LCIA, etc.
- AAA does have an international arm – ICDR (International Centre for Dispute Resolution).
- Pros and Cons of different international arbitration providers



Sole Arbitrator v. Panel

- Typically one arbitrator is sufficient unless highly complex issues that might necessitate a background in several areas of expertise (i.e. construction arbitrations may require architect, engineer, contractor, and/or lawyer)
- Panel of arbitrators will be more expensive
- More efficient if only one arbitrator
- Panel decision is more likely to be a compromised ruling based on different views of the arbitrator – less chance for outlier outcomes

Selecting the Arbitrator(s)

- Do your due diligence
- Extremely important to research potential choices
- Don't just rely on CV; try to actually speak with attorneys who have used them
- Good mediator is not necessarily a good arbitrator – different roles
- Try to learn how busy they are – sometimes you can get their upcoming calendar – busy is better, but not swamped

Questions?



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Firm Overview

Miles & Stockbridge is a leading law firm with offices in the mid-Atlantic region, including offices in Baltimore and Washington, D.C. Its lawyers help global, national, local and emerging business clients preserve and create value by helping them solve their most challenging problems.

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