



EFFECTIVE DISPUTE RESOLUTION:

When to Litigate vs. Arbitrate

Presented by:
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Agenda

- Framework: Litigation vs. Arbitration vs. Mediation
- Clause Enforceability: Employment & Consumer
- CAA vs. FAA – Key Differences
- Class-Action Waiver Landscape
- Recent Case Spotlights
- International Arbitration Basics
- Early-Resolution & Drafting Tips
- GC Checklist

Selecting the Forum – Decision Flow

- **Key Business Drivers: speed, cost, precedent, privacy, predictability**
 - Match forum to dominant business risk
- **Arbitration for confidentiality/expertise**
 - Faster docket; appeal strictly limited
- **Litigation for precedent: discovery + broad remedies**
 - Public ruling shapes policy; discovery uncovers facts
- **Mediation as potential low-cost on-ramp (or later option)**
 - Early neutral can value claims & may preserve relationships
 - Timing may not be right early on. May need more info to value/assess
 - Often used in litigation and arbitration, and at different junctures

Pros & Cons – Head-to-Head

- **Litigation:** + precedent, discovery | – time, cost, publicity
 - Best when injunction or authoritative precedent needed
- **Arbitration:** + speed, privacy | – limited appeal, upfront admin costs
 - Ideal for tech/IP disputes needing expert neutrals
 - Maintaining relationships
- **Mediation:** + flexible, relationship-preserving | – non-binding
 - Usually used in tandem with litigation and arbitration
 - Can be pursued at any time, assuming there is agreement

Employment Clauses – Armendariz Compliance

- Neutral arbitrator (no repeat-player bias)
- Adequate discovery (enough to vindicate claim)
- Statutory remedies available (FEHA damages, fees)
- Written, reasoned award (judicially reviewable)
- Employer pays arbitration costs beyond court fee
- No one-way obligations (mutuality requirement)

Fail one prong and the clause is presumptively unconscionable under Armendariz v. Foundation Health, 24 Cal.4th 83 (2000).

Consumer / Commercial Clauses – Key Standards

- AT&T Mobility v. Concepcion 563 U.S. 333 (2011)
 - FAA pre-empts Discover Bank rule; mass-arb era begins
- McGill v. Citibank 2 Cal.5th 945 (2017)
 - Public-injunctive relief claims stay in court; waiver unenforceable
- AmEx v. Italian Colors 570 U.S. 228 (2013)
 - Economic impracticability not basis to void class waiver

California vs. Federal Arbitration Acts – Key Contrasts

	CAA (Cal. Code Civ. Proc. §1280 et seq.)	FAA (9 U.S.C. §1 et seq.)
Scope	Governs arbitrations seated in CA; can apply by contract even where FAA would also reach.	Applies to contracts “involving interstate commerce.” Pre-empting conflicting state law.
Compel / Stay	Court may refuse to compel if parallel litigation with third parties risks “conflicting rulings” (§1281.2(c)).	No similar discretion; Section 4 mandates stay/compel.
Fee-Payment Deadline	Failure to pay provider fees within 30 days → material breach & waiver (§§1281.97-.99). Basis for Sanders ruling.	No statutory deadline; provider rules govern.
Arbitrator Disclosures	Broad, mandatory disclosures (bias, repeat appointments, business ties) (§1281.9; Ethics Standards 7-12).	No parallel federal statute; rely on provider rules & due-process challenge.
Vacatur Grounds	Adds nondisclosure & refusal-to-postpone as separate bases (§1286.2). Parties may contract for expanded merits review (Cable Connection).	Four narrow FAA grounds (corruption, partiality, misconduct, excess of powers); cannot contract for “appellate” merits review.
Appeals	Orders (granting/denying) are immediately appealable (§1294).	Section 16 provides similar appeal right but only for denials of arbitration; grants are interlocutory-only.

Drafting & Enforcement – Practical Tips

- Clear delegation clause (clarify who decides gateway issues)
- Specify cost allocation, discovery limits, appeal rights
- Select rules, seat, and language explicitly
- Carve-outs for IP / injunctive relief
- Mass-arbitration savings clause
- Fee-shift & cost-advance provisions

Recent Arbitration Case Spotlights

<i>Case</i>	<i>Holding</i>	<i>Key Facts / Analysis</i>
Coinbase, Inc. v. Suski , 602 U.S. ____ (2024)	Courts—not arbitrators—decide which of multiple conflicting contracts governs if parties didn’t clearly delegate that issue.	Coinbase sweepstakes T&C clashed with User Agreement. SCOTUS (9-0) affirmed 9th Cir.; FAA “severability” didn’t override contract-formation principles.
Heckman v. Live Nation Ent. , 93 F.4th 670 (9th Cir. 2024)	Mass-arbitration protocol was unconscionable; motion to compel denied.	Ticketmaster terms forced consumers into new ADR provider with confusing batch rules that favored defendant. Court stressed “fundamental fairness” requirement.
Sanders v. Superior Ct./Edward Jones (Cal. Ct. App. 2025)	Untimely payment of arbitration fees (≥30 days) waived right to arbitrate under §1281.98; case proceeds in court.	Employer paid \$54k five days late; court applied CAA automatic-waiver rule—FAA did not pre-empt.
Viking River Cruises, Inc. v. Moriana , 596 U.S. 639 (2022)	FAA pre-empts CA rule barring division of PAGA claims; individual PAGA claims must be arbitrated.	Reinforced delegation & class-waiver power; set up subsequent CA appellate split (e.g., Adolph v. Uber , 14 Cal.5th 1104 (2023)).

International Arbitration – Quick Tour

Factor	International Arb.	Cross-Border Litigation
Enforceability	Awards enforceable in 172 countries under 1958 New York Convention. (newyorkconvention.org)	Foreign judgments often require cumbersome recognition / comity proceedings.
Neutral Forum & Language	Parties choose seat, rules, language; arbitrators often tri-national panel.	Parties may be forced into one side's home court & procedural law.
Confidentiality	Generally private; evidence rules flexible.	Filings presumptively public; discovery broad (esp. U.S.).
Speed & Cost	Faster than many national courts but costlier upfront (tribunal fees).	Court fees lower; duration longer; appeals add further delay.

If your supply chain or JV counterpart is abroad, arbitration's enforcement edge under the New York Convention often outweighs higher initial costs.

Why Singapore Has Surged in Popularity (Top-4 in 2025 Queen Mary Univ. of London Survey)

Factor	Practical Impact for In-House Counsel
Pro-Arbitration Legal Framework	International Arbitration Act adopts UNCITRAL Model Law; courts follow a “minimal-intervention” doctrine.
Judicial Reputation & Track Record	Singapore High Court & Court of Appeal enforce awards promptly; statistics show < 5 % set-aside rate over the last decade.
SIAC Efficiency & Costs	Fast-track procedure can deliver final awards in 6 months; fee caps are ~20–30 % lower than comparable ICC cases.
Maxwell Chambers & Infrastructure	Purpose-built hearing facilities; 24/7 tech support; time-zone sweet spot between Europe & the Americas.
English-Language Proceedings	Seamless for common-law contracts; large pool of bilingual Chinese-English practitioners for cross-border deals.
Regional Hub & Geopolitical Neutrality	Preferred seat for South-East Asia, India, and Belt-and-Road disputes—avoids Hong Kong / mainland China sensitivities.

When to Recommend Singapore

- JV or supply-chain disputes spanning ASEAN, India, or China.
- Parties desire common-law procedure, but neutral Asian venue.
- Need for expedited rules (SIAC) or Emergency Arbitrator relief.

Comparison to Other Popular Seats

- London → Still a top selection. Established courts. However, premium cost, EU enforcement gap post-Brexit.
- Hong Kong → Similar Model Law base; recent political situations prompt concerns.
- Dubai (DIFC) → Growing in MENA region; civil-law influences.

Drafting Tips for a Singapore Seat Clause

“Any dispute shall be referred to and finally resolved by arbitration administered by SIAC under the SIAC Rules. The seat of arbitration shall be Singapore. The language shall be English.”

- Include governing law separately (e.g., New York or English law) if substantive law neutrality is important.

Negotiation Ladder – Escalate by Design

- Step 1: Business leads negotiate (10 days)
- Step 2: Senior executives meet (20 days)
- Step 3: Mediation with neutral (30-45 days)
- Clear time-lines keep pressure on settlement
- Consider burden and enforcement.
- *Conditions precedent to proceeding with litigation or arbitration? May depend on wording*

GC Take-Away Checklist

1. Does the clause meet Armendariz or Consumer standards?
2. Have we addressed mass-arbitration fee exposure?
3. Are carve-outs aligned with our IP / injunction needs?
4. Is the seat / governing law optimal for enforcement?
5. Are escalation steps & timelines built in? Are they likely to be met? If not, any condition precedent concerns?

Questions & Discussion

- Are there any disputes that should never go to arbitration?
- Open floor – live Q&A

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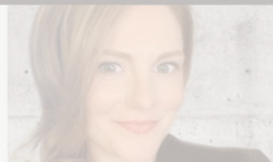
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Thank you!



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