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Using Arbitration Agreements to Resolve Business Disputes Efficiently

LITIGATING DISPUTES IN court can be costly and disruptive for any business, regardless of whether you are an international corporation or a one-person service company. One disgruntled customer or former employee who decides to bring you to court can be a drain on both your profits and your time. With some advance planning, however, you may be able to resolve difficult claims more quickly and less expensively.

Arbitration is one way to potentially reduce the time and expense required to resolve legal disputes. In arbitration, claims are resolved by private, neutral professionals rather than by the courts. This is an increasingly common method of resolving business disputes, consumer complaints and employment issues.

Arbitration offers multiple advantages over litigation that many businesses believe outweigh a few downsides. Through arbitration, you can:

- resolve a claim in a shorter period of time;
- reduce the cost of litigation;
- limit discovery and depositions;
- allow for private resolution of disputes;
- add scheduling flexibility to the process.

Arbitration does have some disadvantages:

- it is typically binding;
- the parties are responsible for the arbitrator's fees.

On the whole, however, arbitration has proven to be an effective tool for efficiently resolving disputes. Compared to litigation, arbitration is quicker, less expensive, less intrusive and more flexible for all parties.

ARBITRATION AGREEMENTS

One party cannot simply decide to arbitrate a claim; both parties must agree to submit their dispute to an arbitrator. Arbitration generally requires some form of written agreement in which the parties agree to submit all claims to arbitration.

This is frequently accomplished by inserting an arbitration clause into a contract between the parties. The clause can be included in your standard form purchase agreement, service contract, employment agreement or any other form of contract. The American Arbitration Association (AAA) has proposed sample language for a basic arbitration clause: (See Sidebar for example of language.)

A well-drafted arbitration agreement may give your business a welcome advantage in arbitration proceedings. For the maximum benefit, any arbitration agreement should be specifically tailored to the needs of your business. Terms can be included to make the process more favorable to you by predetermining certain aspects of the arbitration, such as:

- applicable arbitration rules;
- governing state law;
- location for arbitration hearings;
- allocation of arbitration costs.

Different businesses have different needs. An arbitration clause written for a residential pool service contract may not include the best terms to use in a distributor's standard purchase agreement. For this reason, an arbitration agreement should be drafted with the relevant business relationship in mind. Among the things to consider are:

- whether arbitration is required for any dispute or only certain types;
- criteria for selecting or disqualifying an arbitrator;
- the basis of the award for damages to be made by an arbitrator;
- the arbitrator's power to issue temporary orders or to compel disclosure of certain information;
- whether punitive damages can be awarded.

As a general rule, a single arbitrator is typically used to resolve a dispute. Another option, however, is a

LANGUAGE FOR ARBITRATION CLAUSE

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial [or other] Arbitration Rules [including the Optional Rules for Emergency Measures of Protection], and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

An arbitration agreement also may incorporate language to enhance confidentiality, award attorneys' fees to the prevailing party or require the appointment of a three-arbitrator panel. AAA proposes the following options:

Except as may be required by law, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties.

The prevailing party shall be entitled to an award of reasonable attorney fees.

three-arbitrator panel that allows for resolution by three experts, though this would triple the amount of arbitrator fees. If a panel is desirable, AAA recommends specific language to be included in an arbitration agreement (See Sidebar for multiple arbitrators.)

THE ARBITRATION PROCESS

The procedures for arbitration are generally more flexible than court litigation. The length of the arbitration process is typically measured in months rather than years, depending on the complexity of the dispute.

The rules governing an arbitration may vary based on the administrator (such as AAA or the National Arbitration Forum) and the type of claim asserted (*e.g.*, consumer, commercial, employment). Though the rules of various arbitration organizations may differ, they typically follow the same general pattern.

Arbitration is initiated when a party (the claimant) serves an arbitration demand. This demand states the basis for the claim, including the facts supporting the claim and the relief sought (usually the amount of money). The other party (the respondent) may then answer the demand within a set period of time.

Arbitrators are selected with the assistance of a claim administrator. The administrator will typically provide a list of potential arbitrators with relevant experience in the subject matter of the claim. If the parties cannot agree on an arbitrator, the administrator may make the final decision. Usually, one arbitrator is appointed to decide a claim, though a panel of arbitrators is an option.

Once the arbitrator is appointed, he or she will confer with the parties to set a schedule for exchange of witness lists and documents (usually less than in litigation) and then to schedule an arbitration hearing. In setting the schedule, the arbitrator generally tries to accommodate the parties and minimize any disruption of their professional or personal lives.

LANGUAGE TO INCLUDE MULTIPLE ARBITRATORS

Within 15 days after the commencement of arbitration, each party shall select one person to act as arbitrator and the two selected shall select a third arbitrator within 10 days of their appointment. If the arbitrators selected by the parties are unable or fail to agree upon the third arbitrator, the third arbitrator shall be selected by the American Arbitration Association.

Laws governing arbitration vary by state. Consult an attorney to ensure that your arbitration agreement complies with any requirements for your jurisdiction.

At the arbitration hearing, the parties present their evidence and arguments to the arbitrator. The hearing is less formal than a trial, but is similar in that relevant documents, witness testimony and legal arguments may be presented by each side.

After the hearing, the arbitrator has a set amount of time to issue a written decision. If the arbitration agreement or other contractual provisions allow, the arbitrator may also consider having the losing party pay the winner's arbitration expenses.

Win or lose, the odds are that arbitration will be quicker, less expensive and less disruptive of your business than conventional litigation. Given the relative advantages of arbitration over litigation, consider whether your business might benefit from taking proactive steps to allow for arbitration of any future disputes that might arise. ❙

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