

To Arbitrate or Not to Arbitrate . . .

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What does this mean and why do I care? In today's fast-paced, "do or die" business climate, many business decision makers are drawn to the seductive appeal of arbitration as a quicker and less expensive alternative to litigation. Depending on the deal, arbitration can offer a quick resolution or a dangerous trap for the unwary.

Imagine that you are the president of a software company that has just won a multi-million dollar contract with a large equipment manufacturer. Although anxious to ink the deal, you question your attorney's advice to add an arbitration clause to the contract asking, "what does this mean and why do I care?"

The seemingly mundane arbitration clause can tremendously alter the bargaining power of parties to a contract if a dispute later arises. Determining whether to include an arbitration clause – and what it should say – requires a thorough understanding of your business's role in the transaction. Before proceeding with an arbitration clause in any contract, the following questions should be considered:

What is the relative size of the parties? Typically, arbitration can provide a quicker, less expensive means to resolve a dispute than litigation. Drawn out litigation against a well-financed counterpart can take years to resolve and could squeeze a smaller company's

financial resources, not to mention the diversion of management time and effort spent in litigation strategy sessions and responding to discovery. Arbitration can level the playing field for dispute resolution, allowing a smaller company economical enforcement of its contractual rights.

Which side has the information? Arbitration typically provides for an information exchange prior to a hearing that is significantly less extensive than that available through the court process. Arbitration may not be suitable if, in order to build a winning case, your business would need access to the other party's information and witnesses. You can mitigate this effect by drafting an arbitration clause to require a more extensive exchange of information.

What is at stake? Although excellent arbitrators are available, they often compromise and sometimes make the wrong decision. Grounds for an appeal from an arbitrator's decision are very limited and courts generally deny appeals from such decisions. For this reason, businesses should carefully consider whether a transactional dispute could lead to a "you bet your life" claim. If the magnitude of a potential dispute is such that the outcome might substantially jeopardize your company's future, you may need the protections provided by litigation and its established appeal process.

Sometimes the answers to these questions lead to a clear-cut choice between arbitration and litigation. Sometimes they do not. Careful consideration of all the variables *before* signing a contract should be the first rule of thumb.