



## To Arbitrate Or Not To Arbitrate – That Is The Question

Arbitration – the private means of resolving a dispute – is a well-accepted and often encouraged alternative to the court system. Whether arbitration is the right choice for your business contract, however, is a more nuanced question.

“Although not right for every situation, arbitration can be a cost-effective, relatively quick means of resolving business disputes. ”

As a starting point, all contracts should contain language regarding the resolution of disputes, including which state and/or country’s law will apply, where disputes will be resolved (a particularly important issue when parties are located in different states or countries) and whether arbitration or the court system will be used. It is this last choice that is the focus of this article.

Arbitration has considerable advantages – relative speed, limited discovery, privacy, and timing that is on the parties’ (and not the court’s) schedule. But those same benefits have their disadvantages –

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**Mark Smith** moderated a Boston Bar Association panel entitled ‘Cutting Edge Issues in Criminal Law’. Mark is the Vice President of the BBA.



**Jessica Conklin**  
co-founded the Boston Associates’ Networking Group to bring together associates from Boston-

area small- and medium-sized law firms to network, collaborate and learn more about practicing law as an associate.

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lack of judicial review of a decision, no right to a jury, the inability to do full discovery, and the costs of an arbitrator (although these costs may be less than the costs associated with litigation in the courts).

So which is better for you? That depends on the purpose of the agreement, the strength of your bargaining position, what you think a dispute might involve, and a general consideration of the advantages and disadvantages of arbitration in your situation. In any event, the decision as to whether to include an arbitration provision should not be made lightly.

Too often, an arbitration provision is seen as “boilerplate” or a mere add-on to an agreement. This can be a costly mistake. If the decision is made to include an arbitration clause, then it should be carefully crafted to meet your specific needs and concerns. In drafting an arbitration clause (or reviewing one that you are asked to sign), you or your attorney will want to consider at least the following:

- What issues will be arbitrated?
- Who will conduct the arbitration?
- How many arbitrators will be used?
- What rules will govern the arbitration?
- Where will the arbitration be held?
- What right to or limitations on discovery (the process of obtaining information from the other side) will there be?
- What limitations, if any, will be placed on the arbitrator?
- Whether the arbitrator can award attorneys’ fees and/or multiple damages?

Although not right for every situation, arbitration can be a cost-effective, relatively quick means of resolving business disputes. Whether to include such a provision in your business contract requires a thoughtful analysis of your particular situation.

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