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Factors in Choosing Between Arbitration and Litigation

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In drafting contracts, one provision that must be considered for inclusion is the way disputes are resolved. Some parties, especially those in the construction or financial industries, have a preference for using arbitration to resolve disputes, while others prefer the traditional route of resolving disputes in a courtroom. There are potential advantages and disadvantages for each. When deciding whether to include an arbitration clause in your agreement versus providing for litigation in a courtroom to apply, a few major factors stand out.

1. Public versus Private. Arbitration is a private process where documents and other filings are not made public. This allows the parties to resolve their disputes without the press, competitors, or others monitoring the situation, and most arbitration decisions are kept confidential. In most states, nearly every filing in a court proceeding is made public the moment it is filed and decisions or verdicts are made public. While the parties can ask to seal documents or otherwise protect them from public disclosure, most judges prefer that filings remain open to the public barring some business or other compelling justification (e.g., protection of trade secrets).
2. Formal versus Informal. Litigation is a formal process conducted in a public courtroom. It has certain rules that apply to every case. Arbitration is less formal, the rules are looser, and the parties have more say in the procedures. An arbitration hearing can be held anywhere that the parties agree.
3. Speed of Process. Arbitration typically provides a quicker resolution than a courtroom proceeding. The parties are generally provided flexibility to set their own timetable, rather than trying to fit into a court's busy docket.
4. Cost. Because of the compressed timing with arbitration, one would think the costs would also be more reasonable. The author's experience shows that the total costs of arbitration and litigation run about the same since the parties conduct the same work albeit in a compressed schedule in arbitration. The filing fees are much higher in arbitration and the parties have to pay the arbitrators for their time (tax dollars pay for judge's salaries), so many times it amounts to a wash.
5. Selection of Decision-Maker. In arbitration, the parties have flexibility to choose and select either an arbitrator or a group of arbitrators to decide their dispute. The arbitrator can be a lawyer, but does not need to be a lawyer, and can be anyone that the parties agree to use. The arbitrator resolves any pre-hearing disputes and makes the ultimate decision in the case. In litigation, a trial judge will decide pre-trial disputes and either the judge or a jury will ultimately decide the case. In most states, the parties have no say in which judge gets assigned to their case and juries are randomly chosen.

6. Expertise. Arbitrators are normally selected from a pool of professionals with experience in the very industry in which you are working (e.g., construction lawyers serve as arbitrators to resolve construction disputes). In most states, judges normally see and hear cases of a general nature, as opposed to cases only in one industry. If you believe industry-specific knowledge is important to understand the issues and documents in your case, and to analyze specific liability and damage claims, then arbitration may be your way to go.
7. Appeal Rights. An arbitrator's decision is normally final and binding. In many jurisdictions, it is extremely hard to appeal a decision of an arbitrator, even if that decision is contrary to the law or the arbitrator makes a mistake. In litigation, a judge's decision is always subject to an appeal where a reviewing court may correct any error made.

The above factors are just some of the items to consider. Before making this decision, discuss your situation with your counsel where all of the factors and your unique situation can be explored.

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