

## ARBITRATING BUSINESS DISPUTES

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Litigators love going to court. It's always exciting to stand up before a judge -- whether an elected official or a federal judge actually appointed by the President. And litigators are pretty good at using all of the complicated rules and procedures to our clients' advantage.

But sometimes businesspeople don't feel the courts give their case the attention it deserves. The courts are, after all, charged with handling all kinds of cases involving all kinds of parties, from murder and mayhem to medical malpractice. And judges control the proceedings according to their own schedules.

Arbitration can be an effective means for companies to utilize to resolve commercial disputes and to avoid some of the complications and shortcomings of litigation. Its key advantages are that it is a private, confidential process that can be tailored to handle a particular controversy. The parties, rather than the courts, have virtually complete control over the process.

That control must be exercised with a view to the kind of dispute your company will likely be in and what side it will be on. It is before any dispute arises -- in the drafting of the arbitration provision contained in the contract that embodies the business relationship -- that smart businesspeople and their counsel can tailor a useful process. I suggest that five key areas of the arbitration process be specifically addressed in the arbitration clause: (1) the identity of the arbitrators; (2) the place of the arbitration; (3) the governing law; (4) the administration of the proceedings; and (5) the remedies available. Addressing these issues up front eliminates the need to litigate over them later.

**Arbitrator(s).** You can specify one or three arbitrators, either by name or by particular qualifications. The parties can provide that panels of three arbitrators hear disputes over a

certain dollar amount. You can specify that the arbitration panel be comprised of lawyers (or non-lawyers) with a certain number of years in, for instance, the construction or utilities industries.

**Place of Arbitration.** Specifying the place where the arbitration proceeding will be held eliminates the need to battle later over this much-litigated issue. A city roughly in-between the principal locales of the businesses involved could be selected. Or, to deter less meritorious claims, you can require that a party bring any arbitration demand on the other party's home turf.

**Governing Law.** The arbitration clause should specify the law to govern the merits of the dispute. The state where the contract is to be principally performed makes good sense. The parties should also specify in their agreement the arbitration law that will govern, such as the Federal Arbitration Act, to avoid the need to debate this later.

**Administration.** Businesses must decide whether it is worthwhile to specify an administrator for the arbitration proceeding, such as the American Arbitration Association or the Center for Public Resources. While not without problems and sometimes not inexpensive, the administrator can serve the important function of serving as a buffer between potentially hostile parties, and may be able to rein in an arbitrator too enamored with his own powers.

**Remedies.** The parties can, and should, put some limits on the arbitrators' powers, particularly with respect to the remedies available. The power to award punitive damages is often curtailed. Consequential damages can be excluded. You should carve out injunctive relief from the list of available remedies since courts are better equipped to issue restraining orders and injunctions and their orders are punishable by a finding of contempt.

Arbitration can be very useful to resolve business disputes where the parties can agree on the basic rules and procedures to govern the resolution of any dispute that arises between them. The key is for the parties to exercise their ability to control the proceedings. This control should be exercised before there is any dispute, since it might be much harder to come to terms after a controversy has arisen.