Arnall Golden Gregory LLP

Attorneys at Law

Should You Arbitrate or Litigate in the United States?

How to Make the Decision and Control the Process.

Litigating disputes in the United States court system comes with significant expense and risk. But if your response has been simply to insert a generic arbitration provision into your company's contracts, STOP! You are probably missing important opportunities to leverage your company's strengths with its contracting partners and to guide the dispute-resolution process to your advantage. Before you negotiate or sign your next contract, ask yourself these two important questions: (1) If a dispute arises, would we be better off litigating or arbitrating?; and (2) if arbitration is the better option, what specific terms should we include in a contractual arbitration provision to maximize our advantages should a dispute arise? The answers to these questions could save you months of headaches and your company millions of dollars.

Below is a quick guide on how to strategically answer these important questions.

1 Would my company be better off litigating or arbitrating the kinds of disputes that could arise out of the contract we are considering?

Whether to include a mandatory arbitration provision in a contract may be the single most important decision you make to ensure that future disputes are resolved in a way that best serves your company's business interests. And it's a decision that has to be made when the contract is being negotiated, not after it's signed. To make the right decision, you need to ask yourself: If a dispute arises, what is it likely to involve? Some factors may favor arbitration, others may not. The nature of the agreement and the business relationship should guide you in making this important decision.

Some factors to consider:

- **Exposure.** All of the terrible things you've heard about lawsuits and juries in the United States? Well, some of them are true! So what should you do? Think ahead to what kinds of disputes might arise between your company and your contracting partner. If the dispute whet to trial, would a jury be likely to award a large verdict against you? If so, requiring arbitration is probably a good idea. But if you are more likely to be the one receiving the outsized award, considering forcing litigation.
- **Cost.** Arbitration is usually less expensive than litigation. If the other party does not have the financial resources to sustain prolonged litigation, but you do, consider not including an arbitration provision and using the threat of costly litigation to leverage a favorable resolution.
- **Speed.** Arbitration generally takes less time than litigation. Decide if a quick resolution of a likely dispute would be to your advantage or disadvantage and let that influence your decision.
- **Finality.** Unlike litigation, arbitration decisions usually cannot be appealed. This is another "speed" factor to consider.
- **Privacy.** An arbitration provision can require confidentiality. If that's important to you, require arbitration. If publicity would damage your opponent, consider not including an arbitration provision in your contract.
- **Limited discovery**. Discovery is usually much more limited in arbitration. Determining which party could better handle the costs and hassles of broad discovery should help you decide whether to require arbitration.
- **Remedies.** Arbitration provisions can limit available remedies and waive others. Afraid of punitive damages? You can prohibit them in your arbitration agreement. Are you more likely to be the one seeking punitive damages? Then force the other side to litigate. You can also place other restrictions and caps on damages in arbitration, and you can require or prohibit awards of attorneys' fees to the winning party. There is a lot of room for strategic creativity here.
- **Emotion appeal.** Unlike jurors in litigation, arbitrators are usually trained attorneys. If one side is likely to have a more emotionally appealing case, and the other a more legally compelling position, the one with the emotional case would prefer litigation. Which are you likely to be?
- **Language barrier.** Arbitration is often the better choice if some of your important witnesses would have to testify in

a language other than English.

- **Informality.** Evidentiary rules are often relaxed in arbitration. If you're likely to need hearsay evidence to support your position in a dispute, opt for arbitration.

2 If we decide to include an arbitration provision in our contract, what terms should it contain to maximize our advantages?

Never blindly copy an arbitration provision from an old contract and paste it into the one you are negotiating. Arbitration is not a one-size-fits-all proposition. Every business relationship is unique, and terms that work to your advantage in one situation may hurt you in another. Instead, to draft an effective arbitration provision, you must evaluate its key elements on an item-by-item basis.

Some provisions to consider:

- **Mandatory mediation.** Requiring mediation before a party may pursue arbitration could lead to a quick, less-costly resolution.
- **The forum.** Decide where you want any arbitration to be held (e.g., which country, state, city, etc.?), then lock that into the contract.
- **The law:** If a particular country's or state's laws will be more advantageous to you in a likely dispute, require that all disputes be resolved under those laws.
- **The rules.** Consult an attorney to learn which alternative dispute organization's rules would serve you best and then designate them in the contract as the governing Rules.
- **The panel of arbitrators.** Determine how many arbitrators you want and what specialized knowledge or experience they should have. Sometimes three is better than one; other times it's not. And if your case will require complex, technical proofs, you may want a trained accountant, engineer, or other professional making the decision.
- **Confidentiality.** If it's important to you, require it. If you think you may want to use the documents or testimony or the final award in future disputes with this or other parties, do not include a confidentiality provision. Some Rules default to confidentiality, so if you don't want it, you may need to make that explicit in your agreement.
- **Discovery.** Think ahead and figure out whether you would prefer broad or narrow discovery in a future dispute. For example, you can agree to limit: the number, duration, and location of depositions; the number of interrogatories and documents requests; the scope of documents to be produced; how to handle electronically stored information; and even how many weeks or months discovery can last. Determine what would work best for you, then make that an explicit term in your arbitration provision.
- **The award.** Decide whether you want to limit the scope or type of damages available. Decide too whether you want the arbitrators to make written findings of fact and conclusions of law, or simply to pick a winner and state the amount of the award. Those parameters can be established in the contract.

Don't make the mistake of treating arbitration decisions as an afterthought. If you are willing to put in a little time before you negotiate and sign a contract, and to avail yourself of the contract-specific guidance that a trained arbitration attorney can offer, your company will have an enormous advantage if a dispute ever arises. If you have questions regarding these or other arbitration- or litigation-related topics and how they may affect your business, please contact:

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About Henry Chalmers
Mr. Chalmers co-chairs Arnall Golden Gregory's Litigation Group and has two decades of experience representing clients in litigation and arbitration. He also is a certified Arbitrator with the American Arbitration Association (AAA), through which he presides over disputes throughout the United States. Mr. Chalmers has written and lectured extensively on the arbitration and litigation process. He also regularly works with clients to evaluate whether to include arbitration provisions in contracts and how to draft the provisions to best promote his clients' interests.

About Arnall Golden Gregory
Arnall Golden Gregory LLP is a law firm with offices in Atlanta and Washington D.C. that serves the business needs of growing public and private companies. Its areas of focus include real estate, healthcare, corporate, litigation, arbitration, international, employment, life sciences, global logistics, privacy and intellectual property law. With the help of Arnall Golden Gregory's experienced attorneys, clients across a broad range of industries and around the globe turn legal challenges into business opportunities.