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A Business Client's Guide to Arbitration Agreements

Many business people may have heard that arbitration agreements can be useful tools to resolve business, employment and other kinds of disputes in an economical, fair way. And that's correct, to a point. But what do clients need to think about *before* letting their lawyers begin drafting?

Arbitration Agreements Are Increasingly Upheld and Enforced by Courts

Although courts in some states (notably, my state of California) continue to demonstrate some reluctance to enforce arbitration agreements, the U.S. Supreme Court (SCOTUS) has given arbitration agreements the green light time and again. Most recently, in *Epic Systems Corp. v. Lewis* (2018) U.S, 138 S.Ct. 1612, the SCOTUS upheld arbitration agreements between an employer and its employees that limited the parties to "one-on-one" arbitration of their disputes, and which precluded collective or class actions from being prosecuted by the employees who signed the agreements. *Epic Systems* does not promote the proposition that just about *anything* in an arbitration agreement will be enforced – a provision that the arbitrator must be a member of the family that founded the business, or a provision that limits an aggrieved party's ability to present evidence, for example, would probably not be upheld in any court. The main takeaway is that the parties have a lot of latitude to shape or limit their arbitration rights. This is your chance to make a difference. But how to best do this?

William F. Murphy

William F. Murphy is a founding partner of Dillingham & Murphy, LLP, where his litigation and counseling practice focuses on employment and commercial disputes. He also represents senior executives in negotiating employment and severance agreements and represents both employers and employees in trade secret/ intellectual property disputes.

Dillingham & Murphy, LLP
601 Montgomery Street
Suite 1900
San Francisco, California 94111

415.277.2716 Phone

wfm@dillinghammurphy.com
dillinghammurphy.com

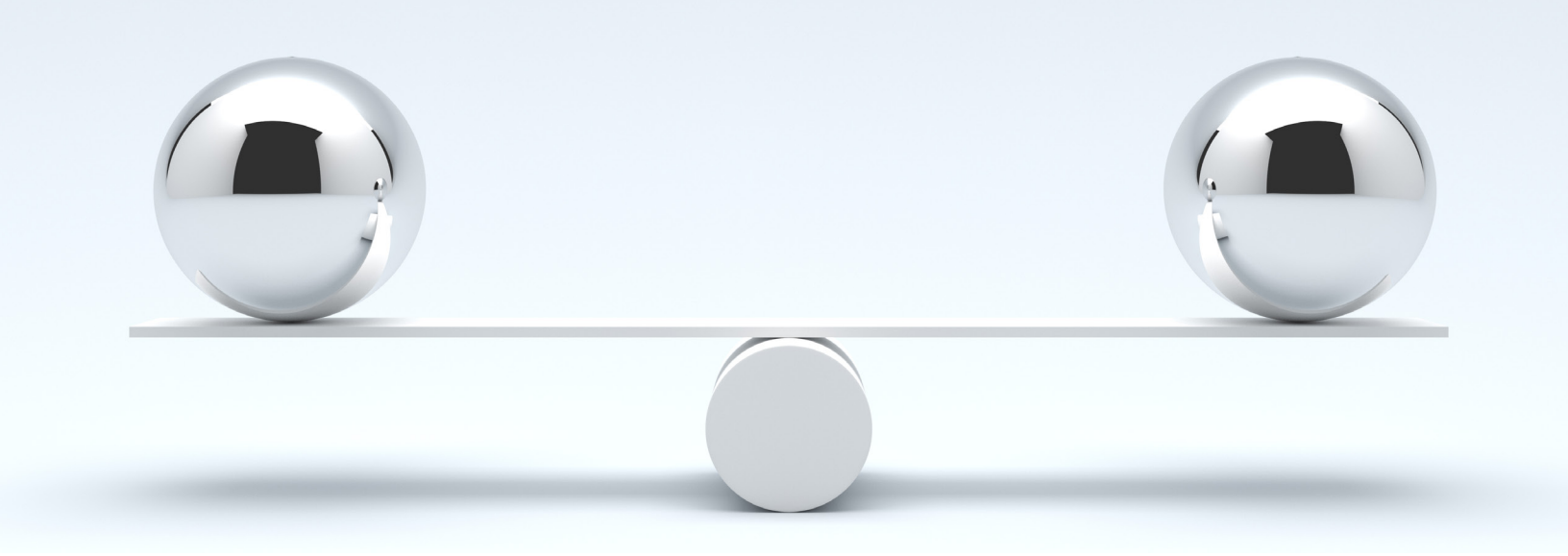
Arbitration – Pros and Cons

Pros

Court litigation is expensive. Arbitration is often thought to be less expensive. Courts themselves are slow. Arbitrators can set any pace the parties agree upon. Courts are often unfamiliar with the industry and the nature of the disputes that consistently arise in your industry. By contrast, litigants can select their arbitrator, perhaps finding one who knows the industry and is familiar with the issues that come up in the industry. Courts may be biased against you or your business, and recusal (the process of asking or demanding that the judge assigned to your case be removed from hearing the case due to possible bias) may not always be available. Juries can be emotional or arbitrary, but arbitrators (usually experienced lawyers or other subject matter experts) are thought to be more rational. Arbitrations are also more private matters, whereas courts are open to the public and the press. Arbitration agreements are often a good idea for smaller, family-owned businesses where disputes may arise, but you want them resolved quickly in a private setting on a confidential basis. Less expensive, faster, arguing before an industry expert who is fair and rational, without a high risk of adverse publicity – what's not to like?

Cons

Arbitration may be *too* quick and efficient, especially if your business seems to have the weaker of the two arguments. And increasingly, even arbitration can be as or more expensive than court litigation, as the best arbitrators often charge astronomical hourly rates or are members of arbitration tribunals that charge high rates (e.g., JAMS, a private alternative dispute resolution provider, and the American Arbitration Association). There is no meaningful appeal or review of an arbitrator's decision: if you get a bad decision that seems to misunderstand the arguments you have advanced, you're not going to persuade a court to overturn that arbitration award, at least on that basis. Finally, introducing arbitration as a means for resolving disputes may have unintended consequences. For example, if you agree with your non-unionized workforce that all disputes are to be resolved by arbitration, does that mean a disgruntled employee who gets the office with no view can force you to



arbitrate his or her office assignment? Be careful what you ask for – you may get it.

Questions to Consider Before You Hire a Lawyer

You should ask yourself several questions before hiring a lawyer to write up an arbitration agreement. Having answers to these questions beforehand provides a real opportunity to control how the dispute resolution process plays out.

1. Who will be the arbitrator?

If you want an arbitrator with subject matter expertise or familiarity with your industry, you can write that into the deal. You can pick an arbitrator now, even before a dispute arises, and write him or her into the agreement as the arbitrator, or you can rely on the rules of the various arbitration tribunals which specify how arbitrators are to be chosen if the parties haven't or can't agree on one. It's important to ask yourself who you would want to judge you and your business in the event a dispute arises, and make sure that person (or that kind of person) is specified in the agreement. Of course, an enforceable arbitration agreement requires a truly neutral arbitrator, so an agreement specifying someone likely biased by ties of blood or money would probably not be enforced.

2. What should be the law the arbitrator applies to resolve disputes?

If you are a Minnesota-based company doing business with a Japan-based company, you and your lawyer may feel more comfortable if Minnesota law – rather than Japanese law – applies.

Similarly, what arbitration tribunal's rules, if any, should apply? The American Arbitration Association, JAMS and ADR Services, to name just three, each have their own distinct rules for commercial disputes, employment disputes and other kinds of disputes. Most of these rules can be found online, so you can investigate and compare. Many states also have legislation setting forth rules and procedures for arbitrated disputes in the absence of agreement between the parties.

3. What sorts of disputes should be subject to arbitration, and what disputes should be excluded?

Disputes about whether a product delivered to a customer meets the customer's specifications may be a good thing to arbitrate. Disputes about whether the price you want to charge for that product is fair is probably something you keep from an arbitrator. We've also already mentioned possibly limiting employer-employee arbitrations to claims that really matter – say, terminations – but not allowing arbitration of other claims (e.g., office assignment). You should also consider what authority you want your arbitrator to have to order or refuse to order discovery, to award fees and costs, and to grant non-monetary or coercive relief (like issue injunctions).

4. Where should the arbitration take place?

The Minnesota seller and the Japanese buyer may have very different views on this question, but many companies on both sides might meet each other halfway and agree to arbitrate in, say, Los Angeles or Honolulu. Again, if you don't make this choice, the arbitration forum, a court or even the arbitrator may make this decision for you. Most have rules guiding the decision about where to hold an arbitration when the parties have not agreed and cannot agree.

5. When should the arbitration occur?

Unlike a court litigant who must march to the court's tempo, in arbitration you are free to set reasonable deadlines for the completion of discovery and the commencement of the actual arbitration.

6. Plaintiff or defendant?

Another important question to ask is whether you are more likely to be a plaintiff or a defendant in an arbitration proceeding. When contracting with employees, it's probably more likely that an employee will commence an action against the employer than it is that the employer will be commencing any action against the employee. If that is the case, perhaps that will guide what you want to do in other parts of the agreement, such as whether or not to provide that the prevailing party in any dispute is entitled to attorney's fees in addition to damages.

Conclusion

Arbitration agreements can be a useful tool for resolving business disputes, but it's important for businesspeople to ask and answer the right questions before inking the deal. P