

Is Arbitration Right for Your Legal Needs? Key Considerations Before Choosing Arbitration Over Litigation

Arbitration is often viewed as a faster, more cost-effective alternative to litigation, but is it the right choice for every dispute? Should you include an arbitration clause in every contract?

While it can offer privacy, flexibility, and efficiency, arbitration also comes with trade-offs that can impact the outcome of your case. Understanding the key differences between arbitration and litigation is crucial to making an informed decision that aligns with your business and legal objectives.

Key Factors to Consider: Arbitration vs. Litigation

Before deciding whether arbitration is the best path forward, consider how each process differs regarding confidentiality, speed, flexibility, enforceability, appealability, costs, industry bias, and discovery limitations. Each factor plays a significant role in determining whether arbitration or litigation best serves your interests and the outcome of your dispute.

- **Confidentiality:** Arbitration proceedings are typically private, making it attractive for businesses that want to keep disputes out of the public eye. However, arbitration confidentiality is not guaranteed by law and must be negotiated. On the other hand, litigation generally becomes a matter of public record.
- **Speed:** Arbitration can resolve disputes faster than litigation, avoiding lengthy court dockets and procedural delays. However, complex arbitrations may still take years to conclude.
- **Flexibility:** Arbitration offers greater control over the process, allowing parties to select arbitrators with subject matter expertise and establish procedural rules. Litigation follows strict court-imposed procedures.
- **Enforceability:** Arbitration awards are often easier to enforce internationally, mainly because the New York Convention, an international treaty ratified by over 170 countries, streamlines enforcement across borders. With litigation, a win in one country may not be enforceable in another.
- **Appealability:** Unlike litigation, arbitration decisions are final, with limited grounds for appeal, which can be a disadvantage if the ruling is unfavorable.

- **Cost:** Both litigation and arbitration can be expensive. Some costs in arbitration can be contained. For instance, because of the limits imposed on the discovery process in most arbitration, discovery costs are usually more manageable than discovery in the civil litigation context. But court fees are very low compared to arbitrator fees (think, hourly rates!) and hearing costs. And while the limited availability of appeals can help streamline the arbitration process, if your opponent fails to pay a final award you may find yourself back in court to confirm the award and take enforcement action. Both will add to the costs of arbitration.
- **Industry Bias:** Some industries favor arbitration, and repeat-player advantages may create the perception of bias in favor of certain parties, especially if arbitrators regularly work with specific companies or industries. We often see this in the employment context.
- **Discovery Limitations:** Unlike litigation, which allows for extensive document requests and depositions, arbitration typically limits discovery, which can be a disadvantage if gathering extensive evidence is necessary.

When Does Arbitration Make Sense?

Arbitration is often the preferred choice in specific scenarios where its advantages outweigh potential drawbacks:

- **International Contracts:** Arbitration is widely used in cross-border agreements, offering a neutral forum and easier enforceability.
- **Confidentiality Requirements:** Industries handling sensitive information, such as finance, technology, and pharmaceuticals, often prefer arbitration to protect trade secrets and business strategies.
- **Industry-Specific Expertise:** Arbitration allows parties to select arbitrators with relevant subject matter expertise, making it particularly useful in fields like construction, energy, and intellectual property.
- **Ongoing Business Relationships:** Arbitration tends to be less adversarial than litigation, making it beneficial if the parties want to continue doing business together after resolving a dispute.

When Litigation Might Be the Better Choice

Despite its advantages, arbitration is not always the best option. Litigation may be preferable in cases where:

- **Legal Precedent Matters:** A public court ruling may be desired if a party seeks to establish legal precedent or influence industry standards.
- **Extensive Discovery Is Needed:** Litigation provides broader discovery tools in cases requiring substantial evidence gathering, depositions, or witness testimony.

- **Power Imbalances Exist:** Litigation may provide stronger protections and procedural fairness if a significant power imbalance exists between parties (such as in a consumer dispute with a large corporation).
- **Appeal Rights Are Essential:** Unlike arbitration, where appeal options are limited, court decisions can typically be appealed, allowing for challenges to a ruling.

Industries That Frequently Prefer Arbitration

Certain industries have a strong preference for arbitration due to its efficiency and enforceability:

- **Construction:** Disputes often involve complex technical issues that benefit from arbitrators with industry-specific knowledge.
- **Financial Services:** Many financial institutions include arbitration clauses in contracts to resolve disputes confidentially.
- **Technology & Intellectual Property:** Arbitration provides a private forum to protect proprietary information.
- **Energy & Natural Resources:** Many international agreements in this sector include arbitration clauses for enforceability across jurisdictions.

The Importance of Jurisdiction

The choice between arbitration and litigation also depends on the seat of arbitration, which can impact procedural rules, how arbitrators are appointed, or how the hearing is conducted. The ability to choose a seat of jurisdiction with a strong legal framework makes arbitration a more attractive option for international businesses. In contrast, litigation may be preferable in regions with well-established legal frameworks that ensure fair and consistent rulings.

Final Thoughts

Whether arbitration or litigation is chosen, experienced legal counsel is essential. An attorney well-versed in both dispute resolution methods can help navigate procedural complexities, draft enforceable arbitration clauses, and advocate effectively in either setting. This ensures that the dispute resolution strategy aligns with your broader legal and business goals.