

High Tech Counsel Corner

Arbitration—Another Form of Dispute Resolution

Rational generally businesses try to limit the costs and risks of litigation. Arbitration is a procedure whereby parties agree to resolve certain disputes before an arbitrator who will render a decision that is binding and enforceable. Arbitration is by no means a panacea and it has its upsides and downsides.

The advantages of arbitration include (a) speed in getting a decision, (b) creating some certainty through the contractual provision as to the location of the arbitration, (c) more limited costs in discovery, and (d) avoiding the difficulties of explaining the nuances of a business dispute to a jury. Thus, arbitration often can be resolved in six months as compared to a court litigation, which often can take over a year in New Hampshire courts and substantially longer in the courts of some other states. The discovery process usually is limited in arbitration in that the parties will not be allowed to take depositions or ask written questions in the form of interrogatories unless both parties agree to such expanded discovery. The parties can agree in the initial contract on the location of the arbitration, whether one or more than one arbitrator will decide the case and can even agree on the appropriate qualifications for the arbitrator.

However, the same characteristics that may seem to be advantages can be downsides under some circumstances. There may be times when a party is under a severe disadvantage by not being able to obtain discovery in the form of depositions or more extensive written discovery than permitted under the applicable arbitration rules. Further, while arbitration avoids some costs of discovery, the parties must pay the costs of the arbitrator and the organization (such as the American Arbitration Association) before whom the arbitration is being held. And while juries are feared by some litigants, such fears may be misplaced and some litigants may conclude that they would like their day in court—before twelve New Hampshire jurors.

If the parties decide on including an arbitration clause in a contract, they should try to anticipate some basic issues such as (a) will the arbitrator have the authority to order more discovery than strictly permitted and will the arbitrator have the discretion to require one party to pay fees and costs, (b) what disputes must be arbitrated, and (c) where will the arbitration be held.

The bottom line is that arbitration is an alternative to be considered and used at times—but it is not always the best solution for all parties.



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