Arbitration vs. Litigation – Some Points to Consider

Whether you're signing a real estate contract or an employment agreement, entering into a joint venture or just considering an agreement setting forth the terms of how you and another company will deal with one another, its become more and more likely that you'll be asked to agree to resolve any future disputes through arbitration, as opposed to litigation. In fact, "Arbitration Clauses" are now relatively commonplace in business agreements. Unfortunately, however, a familiarity with the ups and downs of arbitration is much less common than the agreement to arbitrate. So when deciding whether to sign that agreement, here are a few of the things you should consider.

Privacy: Absent a Judge sealing the court record, most matters arising in judicial proceedings are public knowledge. By comparison, arbitration is generally confidential, at least with regard to the arbitrators talking to others. However, while the arbitrators may be bound by ethical rules, that is not necessarily the case with the parties. Instead, the parties are generally bound to hold the proceedings confidential only if confidentiality is made a rule of the arbitration.

Time and Money: Certainly one of the key concerns associated with litigation is the time and money that can be involved. To understand where that time and money is spent, you can view the judicial process as broken down into four phases: (a) Pleadings (the filed documents that set forth the parties' claims); (b) Motions (legal issues that the parties present to the judge for resolution); (c) Discovery (that part of the case where you are gathering evidence and information from the other side and witnesses); and (d) Trial (where you try the issues to a judge or jury). Arbitration, however, often involves limited pleadings, little or no motion practice, and limited discovery. Accordingly, time and money are saved. However, this can be a catch-22. For example: (a) you may be presented at the arbitration with testimony from witnesses who you have not yet been questioned under oath; (b) you may not be able to address all of the legal issues ahead of time; and (c) strategic advantages that one attorney may be able to gain over another through familiarity with motion practice and/or procedural rules may be lost.

Expertise: Judges and jurors are certainly not experts on every topic. Accordingly, there is an education process involved in trying a case before a judge or jury. With arbitration, however, arbitrators are often picked because of expertise with the issues at hand or an understanding of the industry within which the parties work.

Judicial Review: One of the great benefits of our legal system is the right to appeal the decision of a judge or jury that you believe is incorrect. In arbitration, however, judicial review is extremely limited, and in arbitrations conducted under the guise of the Florida arbitration code (which would be most commercial arbitrations in Florida), there are very few grounds that justify a court's vacating (or setting aside) an arbitration award.

Mistakes of fact or law made by the arbitrator are not one of those grounds. What that means is courts are generally powerless to correct those types of errors and awards are typically upheld even if legally incorrect.

Whether to choose arbitration is a business decision impacted by numerous factors; however, knowing some of what you'll get and some of what you'll give up can help you make the best decision possible.

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