# The Benefits of Arbitration for Business-to-Business Disputes - *PSWH*

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The cost of resolving contractual business-to-business disputes, including any judgments owed, fees for lawyers, experts, and vendors, and opportunity costs can be considerable. We are often asked by our clients whether arbitration is a good alternative to litigating a dispute in court. Based on our experience as counsel in both litigation and arbitration, and Justice Stein's position as an arbitrator in a significant number of disputes, we believe arbitration can be a less expensive, faster alternative *if* conducted correctly.

When determining whether arbitration should be utilized, it is important to review the pros and cons of arbitrating business-to-business disputes. Naturally this review needs to include parameters for drafting arbitration clauses and conducting arbitrations. We do not address consumer or employment arbitration, which have particular issues that should be considered in detail. Of course, the best decision about how to resolve a dispute depends on the specific facts and circumstances, and businesses should always consult a lawyer to understand their legal rights and obligations.

**Arbitration Basics**

Arbitration is a voluntary form of binding dispute resolution before one or three arbitrators, who are appointed by the parties. With limited exceptions, a party that has not expressly agreed to arbitrate cannot be compelled to resolve disputes before an arbitrator. Ordinarily, parties agree to arbitration in a contractual clause before a dispute has arisen. It is also possible, however, to agree to arbitrate after the dispute starts. Either way, an agreement between the parties to arbitrate that applies to the type of dispute between them must be enforced under federal and New Jersey law. Unless an arbitration agreement was the product of fraud or duress, or based on some

other reason that contracts generally cannot be enforced, courts will order parties that have agreed to arbitrate a dispute to do so.

Arbitration is also binding. The result of the process—called an arbitration award—will determine the parties' legal rights and responsibilities. That makes arbitration more like litigation than mediation. Federal and New Jersey law require courts to enforce arbitration awards like judgments except in certain narrow circumstances relating to the process, but not the substance or merits, of the arbitration. Unless the arbitrator made a grave procedural error, the losing party will be required to comply with the arbitration award and pay any amounts required by the award.

**Benefits of Arbitration**

With those basic concepts in mind, the potential advantages to arbitrating instead of litigating include speed and flexibility, finality, and confidentiality. When the dispute is international in scope, arbitration has the added benefits of enforceability and neutrality. We briefly explain those benefits below. Businesses should weigh these benefits against the main drawback of arbitration—the inability to appeal to correct perceived errors by the arbitrators.

***Speed and Flexibility***

Parties to an arbitration can—and should—participate in designing the process. In court, the parties are required to follow procedural rules that apply to every case. Those rules might not be right for all types of disputes and can create the potential for inefficiencies like unnecessary delay. Although most arbitration clauses incorporate a set of rules, those rules are guidelines that can be varied by the parties and thus are flexible. Parties should keep in mind that a case requiring complex procedures like extensive factual discovery might not be right for arbitration.

***Finality***

Arbitration awards are final in that they are legally binding and are not subject to appeal. The winning party does not need to await appeals before the case is truly over. Although the lack of appeals is a benefit in that it speeds up the process, it also means that there is no higher court to correct arbitrators' errors of factfinding or law. A case that involves difficult legal issues, which might benefit from appellate review, might not be right for arbitration.

***Confidentiality***

With some limited protections for trade secrets and other sensitive information, documents in litigation are publicly filed and court appearances are open to the public. Parties to an arbitration can agree that the process and results are confidential. The dispute and the arbitration award, however, will often become public if one side goes to court to enforce or challenge the award.

***Enforceability & Neutrality (for International Disputes)***

Arbitration has additional benefits when the dispute is international in scope. Treaties to which the United States is a party—most notably what is called the New York Convention—make international arbitration agreements and awards in commercial contracts enforceable throughout the world. The United States is not currently a party to any treaty that makes court judgments in commercial cases similarly enforceable. It is often easier to enforce an arbitral award against a foreign party than a court judgment. Arbitration also affords parties from different countries a "neutral" forum to resolve disputes.

**Dos and Don'ts**

To preserve the above benefits, here are some dos and don'ts for negotiating arbitration clauses and conducting arbitration proceedings.

**Do:**

- specify in the arbitration clause where the arbitration will occur, called the place or legal situs of the arbitration, which will provide the law that governs the conduct of the arbitration and the courts with sole power to vacate an award (on the limited procedural grounds noted above);
- specify in the arbitration clause whether one or three arbitrators will decide disputes, but the clause can also provide that one arbitrator will be appointed unless the parties agree otherwise or unless the amount in dispute is greater than a certain sum;
- specify in the arbitration clause the rules to apply to the arbitration, such as the rules of the American Arbitration Association (AAA), its international wing, the International Centre for Dispute Resolution (ICDR); JAMS; or the International Chamber of Commerce (ICC);
- work cooperatively with the opposing side to set reasonable deadlines and procedures with an eye toward reducing costs and getting more quickly to the heart of the dispute;
- consider time-saving steps like written witness statements instead of direct testimony and avoiding pre-hearing motions like motions to dismiss the claims; and
- know your arbitrator—a retired appellate judge is going to be focused on the law, but someone whom you've chosen for industry expertise could be more knowledgeable about common industry practice.

**Don't:**

- require the use of court procedural and evidentiary rules, which will limit flexibility in the arbitration;
- include overly specific requirements for an arbitrator's experience in the arbitration clause (e.g., mandating an arbitrator with 10 years of experience as the CEO of a Fortune 100 pharmaceutical company), which will make

finding qualified arbitrators more difficult;

- impose time restraints that the arbitrator cannot vary, such as a deadline for holding a hearing or for issuing the award; and
- file frivolous challenges to arbitration awards based on the view that the arbitrator made the wrong decision.

**Conclusion**

In sum, business-to-business arbitration can provide the benefits of speed and flexibility, finality, confidentiality, and (for international disputes) enforceability and neutrality. But businesses should seek to cooperate in a process meant to get more quickly to the heart of the issues, not replicate court proceedings like burdensome and extensive discovery that will increase costs and slow down the case. To do so would simply produce private litigation and substantially reduce the benefits of arbitration without the right to appeal.