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THE PROS AND CONS OF ARBITRATION AGREEMENTS

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ARBITRATION CLAUSES OR AGREEMENTS have become standard issue in business settings these days, big and small alike. They appear to find their way into almost anything capable of being considered a legally binding agreement, from the back of a parking space pass to the most complex of written contracts. As such, almost everyone who reads this article has probably at some point in their dealings, had some exposure to an agreement requiring that he or she submit a dispute to the process of binding arbitration for resolution. Many of these agreements are part of non-negotiable contracts such as the parking space pass example referenced above. However, sometimes individuals specifically seek to include an arbitration provision in the context of their business agreements for the perceived benefit of efficiency and economy in resolving foreseeable disputes. Despite this perception, arbitration agreements carry with them certain risks and costs, as well as benefits. The realities of arbitration should be understood by the party considering arbitration before agreeing to have their dispute resolved in this manner.

The process of arbitration is one whereby the parties to a dispute seek to have that dispute determined by a privately selected decision maker, an arbitrator. Instead of a trial, the parties present their evidence to the arbitrator during the arbitration hearing. Generally, the arbitrator serves as both judge and jury during the process and his or her ruling on the matter will govern both the legal and factual issues to be decided in the particular case. In most cases, the arbitrator's ruling will not be disturbed by the courts in California and is just as enforceable as a judgment after a court or jury trial.

The potential or perceived benefits of having your dispute resolved by way of a binding arbitration typically relate to the time and cost factors associated with the process. As most people understand, going through the court system for resolution of a dispute can be a very costly and time consuming endeavor. By and large, the process of arbitration is more streamlined and cost effective than typical litigation. The hearings can take place sooner than if one were to proceed through the court system for a trial on the merits. Since the formal rules of evidence and procedure are often relaxed in an arbitration setting, the

hearings are generally shorter and less costly than a typical trial. Further, many believe that sophisticated legal or factual issues are better determined by an arbitrator who has some experience or background in the subject area of the dispute. This can result in a better, more qualified, fact finder determining the outcome of your dispute. Additionally, the process of arbitration is a private method of dispute resolution and thus, there is greater privacy for the parties than normal judicial proceedings.

Despite its benefits, arbitration can be a less desirable forum to have a dispute or claim heard and determined. For one, from a plaintiff's standpoint, the claim may carry less value if it is determined by way of arbitration as opposed to a jury trial. Further, unless expressly provided for by the parties' agreement, there is usually no entitlement to conduct discovery in arbitration proceedings. Additionally, arbitrators are more likely than judges to provide "half justice." That is, splitting the claim in half and satisfying neither party. Also, the proceedings in arbitration can at times be more protracted and costly than a trial. This is especially true if the parties have agreed to participate in formal discovery. There is also the possibility that an arbitrator will avoid relying on legal principles in issuing his or her award and instead, issue the award based upon fairness or the equities of the situation. Since an arbitration award is typically not subject to review by the courts, this can make the process a more risky endeavor for all involved.

Notwithstanding the above, the process of arbitration can be a very useful form of dispute resolution. Knowing what provisions to include and account for in your agreement are essential to ensuring that the pros outweigh the cons in using this form of alternative dispute resolution. With the assistance of competent legal counsel, you will be able to negotiate a meaningful arbitration provision as part of your contract that takes into account your specific needs or goals. **GT**

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