



by Robert Goff

## Where does it say I waived my right to a trial?

### **Many commercial contracts include arbitration clauses.**

Most of the time, no one considers the impact of an arbitration clause until it is time to file a lawsuit. However, it is then too late to avoid its negative effects.

Arbitration is a method of resolving a legal dispute without submitting the case to the court. Instead of submitting the case to a judge and a jury, the parties submit the case to one or more attorneys for a decision. Instead of a trial before a judge and jury, the parties conduct a hearing before the decision makers (arbitrators).

In lawsuits resolved in the courts, the rules are set by the courts. In arbitration proceedings, the rules will be set forth in the contract.

Usually, the contract will incorporate the rules of some national arbitration association, such as the American Arbitration Association.

Like most national arbitration associations, AAA's rules can be found on its website ([adr.org](http://adr.org)). The rules are flexible, providing a great amount of discretion to the arbitrator(s).

Besides the waiver of a trial by jury, another difference between arbitration and cases handled by the courts is the lack of an appeal process. In most states, as long as there is no fraud by the arbitrator, it is nearly impossible to have an arbitrator's decision set aside even if the arbitrator misinterpreted the law.

Sometimes arbitration is preferable to handling a case in the courts. It may result in a quicker decision. It may result in less cost. For a highly technical case, the parties can agree upon an arbitrator with the needed technical expertise. However, arbitration may also increase the complexity of the case as well as the cost. For instance, the parties to the case will have to pay the arbitrator(s) for their time and effort.

Thus, it is important before entering into a contract to review it to determine if it includes an arbitration clause and whether arbitration would be appropriate in your circumstance. Even if arbitration seems to be a good fit for the transaction governed by the contract, there may still be some pitfalls in the arbitration section of the contract that need to be identified.

The proposed location of the arbitration proceeding should be identified. Obviously, a Kentucky company entering into a contract with a Florida company will want to carefully weigh the impact of a clause requiring arbitration in Miami.

First, if there is a dispute, critical personnel from the Kentucky company will likely have to travel to Miami for resolution of the case. While they may personally enjoy the trip it will likely result in lower productivity. Second, believe it or not, Miami lawyers are more expensive than lawyers in west Kentucky. Arbitration in Florida may result in additional legal fees. This will put the Kentucky company at a disadvantage in negotiating a settlement of the case and trying the case before the decision makers.

Sometimes, an arbitration clause will prejudice the party initiating the case by requiring that party to place a large money deposit with the decision makers before starting the case. For instance, a contract may require a \$100,000 deposit from the party complaining that it was treated unfairly.

This will likely have two effects. First, it may make it extremely difficult for a small business to initiate a case even if it has good reason to complain. Second, if the deposit is more than the damages sought, it may make the complaining party question whether it is even worth filing a claim.

Sometimes, you really aren't in a position to demand changes to the language of a proposed contract. However, if your bargaining position allows you to demand changes please consider the arbitration clause carefully before signing.

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Printed in Four Rivers Business Journal (Paducah Sun), July 2011