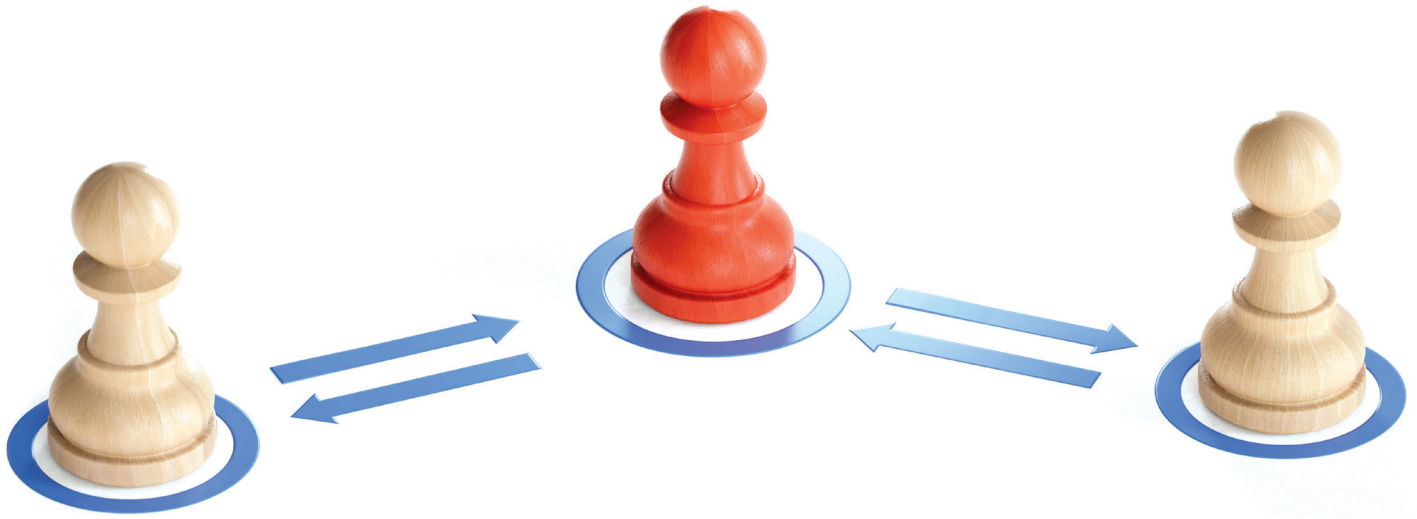




Arbitration: A True Litigation Alternative

By ROY L. DE BARBIERI and ROBERT HARRIS

Before the Federal Arbitration Act was adopted in 1925, courts often refused to enforce agreements requiring parties to arbitrate future disputes. Judges frequently viewed arbitration provisions as improper attempts to bypass judicial authority. Even if parties contractually had agreed to arbitrate, the agreement might be ignored once a dispute reached the courthouse. The FAA changed that. Arbitration agreements became enforceable. Parties who agreed in advance to resolve disputes privately could rely on courts to honor that decision. Institutions administering arbitrations shortly followed: the American Arbitration Association was founded in 1926.

Yet arbitration itself did not begin in 1925.

Long before arbitration legislation and institutions existed, businesspeople were resolving disputes outside the courts in a simpler way: they chose someone they trusted and asked that person to decide. No rules. No institution. No clause required. Just two parties, a disagreement, and a neutral they could agree on. As an example, two parties in the fish business had a dispute about whether a fisherman was obligated to sell his daily catch exclusively to a particular market customer. The issue mattered—but the real challenge was timing. Mackerel doesn't age well. So, the parties did something practical: they asked someone they both trusted to decide the issue on the spot. Time is sometimes everything and arbitration is simply this: choosing a decisionmaker you trust, on a timeline that makes sense for your business.

Fast forward to today. Most business arbitrations begin the same way: with a clause drafted months or years before the dispute, at

a time when the parties are focused on doing business together, not on conflict. What happens far less often is the reverse. Two businesses find themselves in an active dispute. The contract contains no arbitration clause. Litigation looms—or has already begun. And yet, despite the absence of any contractual obligation, the parties voluntarily agree to arbitrate. Or not. Why is that scenario so rare?

Several factors contribute to the rarity of arbitration agreements reached after a dispute has begun.

Not Everyone Likes Arbitration

Some lawyers worry about limited appellate review. Others are concerned about inconsistent outcomes or unfamiliar procedures. Many attorneys are simply more comfortable with the structure and predictability of court litigation. These concerns are understandable. Arbitration is not a perfect process, and it is not appropriate for every dispute. But skepticism alone does not explain why arbitration is almost never discussed once litigation becomes the presumptive path.

It Takes Two to Tango

Absent a pre-dispute agreement, arbitration after litigation commences requires mutual consent. One party's enthusiasm is meaningless without the other's. And if a party believes it has an advantage in court—procedural leverage, discovery pressure, delay—there is little incentive to give that up voluntarily. Though rational, it may sometimes be shortsighted.

The Dominant Reason: No One Asks

The most common reason post-dispute arbitration does not happen is simpler and more human: nobody suggests it. A dispute arises. Counsel are retained. Pleadings are drafted. Litigation begins. Arbitration never enters the conversation—not because it was considered and rejected, but because it was never considered at all. Once the litigation train leaves the station, stopping it requires someone to pause and ask a simple question: Is court really the best place to resolve this dispute?

Why Business Clients Should Consider Arbitration—Even Without a Clause

Many modern commercial disputes resemble the fisherman's problem more than lawyers realize. Capital is tied up. Operations are disrupted. Business relationships fray. Time becomes a significant cost. When lawyers and their clients pause to ask whether arbitration makes sense, several realizations may emerge:

Speed Often Matters Most

Business clients may talk about vindication, principle, or leverage. But what they often need most is resolution. Arbitration can compress timelines dramatically. Hearings are scheduled when the parties and arbitrator are available—not when the court's calendar allows. Discovery is streamlined. Motion practice is limited. Finality arrives in months, not years. For businesses operating in real time, that difference can be decisive and exceedingly valuable.

Expertise Is Not Random

In litigation, judges are assigned randomly. You might draw someone with deep familiarity with the relevant industry or issues. Or you might not. Arbitration allows the parties to choose a decision-maker with appropriate expertise. Less time is needed to educate the arbitrator about industry practices. More time is devoted to what actually matters.

Discovery Can Be Right-Sized

One of arbitration's often critiqued features—limited discovery—is often one of its greatest strengths. Litigation discovery can spiral out of control, consuming more time and money than the dispute warrants. Depositions multiply. Document requests grow broader. Motion practice follows. Arbitration discovery can be tailored to the needs of the case. When counsel articulate legitimate needs, discovery is usually permitted. What disappears is not fairness, but excess, leaving discovery that is sufficient, focused, and less expensive.

Privacy Has Real Value

State sponsored Court proceedings are public by default. Arbitration is not; journalists and the public cannot walk into an arbi-

tration hearing. For closely held companies, partnerships, family businesses, and organizations concerned about reputational risk, privacy can be extremely important. Financial information, internal disputes, and proprietary data can remain private within the arbitration process.

Finality Can Be a Feature, Not a Flaw

Limited appellate review is frequently cited as a drawback of arbitration. But in many commercial disputes the possibility of appeal is more theoretical than practical.

Appeals are expensive. They are slow, and they fail more often than not. As a tradeoff, arbitration offers a focused decision from a neutral with subject matter expertise that allows parties to move on. And if the stakes are high enough, the parties can effectively front-load an appeal by agreeing to have three arbitrators with relevant expertise decide the dispute. For parties who want closure—to put the dispute behind them—finality is a feature, not a drawback.

When Arbitration Makes Particular Sense

Post-dispute arbitration is not appropriate for every case. But certain circumstances make it particularly attractive:

- disputes involving time-sensitive business decisions
- cases benefiting from specialized industry expertise
- situations where confidentiality is important
- disputes where litigation costs may be excessive
- matters where the parties want a decision, not a war of attrition

When these factors align, arbitration deserves serious consideration—even after litigation has begun. All it takes is an attorney wise and confident enough to ask their adversary: "How do you feel about arbitration?"

A few practical points you shouldn't skip over:

- Decide whether you want a stay vs. dismissal—a stay is safer if you're worried about enforcement or the other side backing out
- Be careful with cost allocation—will the parties bear their own costs, or will the arbitrator be empowered to allocate costs based upon who prevails.
- Think about discovery limits—too restrictive can hurt you, too broad defeats the purpose.
- Consider adding a mediation step before arbitration if you think settlement is realistic.

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While those considering submitting a dispute to arbitration should craft their agreement with counsel based upon the applicable circumstances, here are a few thoughts as a starting point:

ARBITRATION AGREEMENT

This Arbitration Agreement ("Agreement") is entered into on [Date], by and between:

Defendant: [Your Full Name and Address]

Plaintiff: [Opposing Party Full Name and Address]

Collectively referred to as the "Parties."

1. PURPOSE

The Parties agree to resolve all disputes arising out of or related to the civil litigation currently pending in [Court Name, Case Number] (the "Dispute") through binding arbitration, in lieu of continued court proceedings.

2. SCOPE OF AGREEMENT

This Agreement applies to all claims, counterclaims, defenses, and issues of any kind arising out of or relating to the Dispute, whether based in contract, tort, statute, or equity.

3. STAY OR DISMISSAL OF COURT ACTION

The Parties agree to jointly file a stipulation to:

- Stay the pending court case pending arbitration; or
- Dismiss the case without prejudice, subject to reinstatement only for enforcement of the arbitration award.

(Select one.)

4. ADMINISTRATION

- The arbitration shall be administered under the auspices of [e.g., American Arbitration Association (AAA), JAMS, or other agreed service].

5. SELECTION OF ARBITRATOR

The arbitration shall be conducted before:

- A mutually agreed-upon neutral arbitrator; or
- An arbitrator selected through [e.g., American Arbitration Association (AAA), JAMS, or other agreed service].

If the Parties cannot agree within [14] days, the arbitrator shall be appointed by [designated organization or court].

6. ARBITRATION RULES AND PROCEDURE

The arbitration shall be conducted in accordance with:

- [AAA Commercial Arbitration Rules / JAMS Rules / other agreed rules]

Modifications:

- Discovery shall be limited to [e.g., document exchange, X depositions].
- Motions practice shall be allowed at the arbitrator's discretion.
- The arbitrator shall apply the substantive law of the State of Connecticut.

7. LOCATION AND FORMAT

The arbitration shall take place in:

- [City, Connecticut], unless otherwise agreed.

Proceedings may be conducted:

- In person, remotely, or in a hybrid format, as determined by the arbitrator.

8. CONFIDENTIALITY

All aspects of the arbitration, including submissions, testimony,

and the award, shall be confidential, except:

- As required by law; or
- As necessary to enforce or challenge the arbitration award.

9. COSTS AND FEES

- The arbitrator's fees and administrative costs shall be shared equally, unless otherwise awarded by the arbitrator.
- Each Party shall bear its own attorney's fees unless the arbitrator determines otherwise based on applicable law or agreement.

10. HEARING AND EVIDENCE

- The arbitrator shall allow each Party a fair opportunity to present evidence and arguments.
- The rules of evidence shall be applied flexibly.
- The arbitrator may consider written submissions in lieu of live testimony where appropriate.

11. ARBITRATION AWARD

- The arbitrator shall issue a written, reasoned decision within [30–60] days after the hearing concludes.
- The award shall be final and binding on the Parties.
- Judgment on the award may be entered in any court of competent jurisdiction.

12. LIMITED RIGHT TO APPEAL

The Parties agree that the arbitration award shall be final, with only limited judicial review as permitted under applicable law (e.g., fraud, arbitrator misconduct, or manifest disregard of the law).

13. SETTLEMENT AUTHORITY

Each Party represents that they have full authority to enter into this Agreement.

14. GOOD FAITH PARTICIPATION

The Parties agree to participate in the arbitration process in good faith and to make reasonable efforts to resolve the Dispute efficiently.

15. GOVERNING LAW

This Agreement shall be governed by and construed in accordance with the laws of the State of Connecticut.

16. ENTIRE AGREEMENT

This Agreement constitutes the entire understanding between the Parties regarding arbitration of the Dispute and supersedes any prior discussions or agreements.

17. AMENDMENTS

This Agreement may only be amended in writing signed by both Parties.

18. SIGNATURES

Defendant:

Signature: _____

Name: _____

Date: _____

Plaintiff:

Signature: _____

Name: _____

Date: _____