

## **Arbitration Clauses vs. Mediation**

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By Lee Jay Berman

Should you sign an arbitration clause? Who ever knows what to do? What are the risks? The Constitution of the United States guarantees you certain inalienable rights, among which is (aside from the pursuit of happiness) the right to a speedy trial by a jury of your peers.

Most people do not realize that by initialing the arbitration clause in a contract they are waiving their Constitutional rights to a trial. This is why laws were passed requiring these clauses to be in a minimum 10 point bold type and all capital letters in any contract. Have you noticed that? This law is to protect the consumer who should never sign away rights guaranteed them under the Constitution without due notice.

The next question is why must we protect the consumer. From what are we protecting him or her? Do you know that an arbitration award or decision can be binding if the contract requiring arbitration says it is. This means it cannot be overturned. Not for any reason. No matter what. Even if the arbitrator later admits that an error was made in the law.

Who are these arbitrators? Aren't they all former judges or at least attorneys? The answer is no. Arbitrators need not be attorneys. Most non-attorney arbitrators come from a long career in the industry in which they arbitrate. For example, a securities arbitrator may come from a thirty-five year career in trading stocks and bonds. Of even greater concern is the former judge who steps down after twenty-five years on the bench and begins to arbitrate complex business cases. Some of these judges were Public Defenders or District Attorneys before becoming criminal judges and have less knowledge about business practices and law than most lay persons. How would you like a judge who has been on the criminal bench his whole career deciding on your wrongful termination or real estate dispute? (For more on arbitration and its risks, see attorney Ric Kinnan's article in this issue of BUSINESS Santa Monica.)

I do not mean to paint only one side of the picture. Most arbitrators are very competent. I only want to make business people everywhere aware of the risks involved in arbitration, and the importance of thoroughly investigating their arbitrator before selecting them. Like anything else, do not simply select a company you have heard of and assume that the individual you get will be competent. We all want better, cheaper, faster justice, but at what price?

Perhaps a better alternative is Mediation. By now, if you have been reading this column, you know the difference. While an Arbitrator makes a decision on who is right and wrong, and decides the amount of the award, a Mediator helps the parties to work together to find a mutually agreeable solution. In other words, the people involved in the dispute get to put their stamp of approval on the final, binding agreement in a Mediation. If this sounds more reasonable, all you have to do is put a Mediation clause in front of the arbitration clause in your contracts and you will have an opportunity to work things out with the other person before everyone starts suing. You waive no rights. In the one in ten chance that the mediation is unsuccessful in resolving the

conflict, you still retain your other remedies, whether that means arbitration or trial. For a sample of this language, call our offices right now and we will fax or mail it to you!

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