Arbitration: How to Maximize Its Pros and Minimize Its Cons

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First Things First – What Arbitration Is *Not*

Alternative Dispute Resolution (ADR) is an umbrella term that includes various ways to resolve disputes without going to court.

Arbitration is one way, but it's distinct from mediation.

Mediation is:

- **Informal** – A glorified meeting, led by a mediator, with no official process. If you don't like how it's going, you can just get up and leave!
- **Nonbinding** – Unless the parties reach a deal, there's no binding outcome.
- **Inadmissible** – Almost anything you say at the mediation cannot be held against you in an arbitration or in court later.

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What Arbitration Is

Unlike mediation, an arbitration is an actual trial, but one that's usually held in a conference room instead of a court room.

Arbitration is:

- **Fairly formal** – The format is very flexible and can be adjusted to match the dispute at hand, but it looks like a trial and results in an arbitral "award."
- **Likely a one-shot deal** – Your appellate or other options are quite limited.
- **More confidential** – Arbitrations are generally confidential, unlike a trial.

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Primary Types of Domestic Arbitration

- Commercial
- Consumer
- Construction
- Employment
- Reinsurance
- Securities/Financial Industry Regulatory Authority (FINRA)

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Major Arbitration Associations and Organizations

- American Arbitration Association (AAA)
- Judicial Arbitration & Mediation Services (JAMS)
- American Bar Association (ABA) Dispute Resolution Section
- Association for Conflict Resolution (ACR)
- Association for International Arbitration (AIA)
- CPR Institute for Dispute Resolution
- Financial Industry Regulatory Authority (FINRA)
- International Chamber of Commerce (ICC) Commission on Arbitration

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Arbitration Process in a Nutshell

Starts with filing a demand for arbitration (like a complaint).

Assuming there's no fight over arbitration, the parties then choose one or more arbitrators (depending on their agreement).

Arbitrator(s) hold a conference call to agree on a schedule and procedural path for the arbitration.

Documents are exchanged, but depositions may or may not occur.

Pre-hearing briefs are submitted.

Hearing is held and award is issued.

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Arbitration Pros

The main “pros” of arbitration are that it’s:

- Fast – You can define how long the process lasts, even limiting it to 45-60 days.
  - Compared with years for litigation in court.
- Malleable – You can define the scope of the arbitral process in your contracts (e.g., limit discovery) or during the arbitration itself.

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Arbitration Pros

Other “pros” of arbitration are that it:

- Can be cheaper – Although you pay an arbitrator, the process can be cheaper, because it’s quicker and malleable.
- Is final – Award can be enforced in court when you’re done.

Arbitration Pros (cont.)

Another “pro” of arbitration is that it’s presumptively confidential (at least until you seek to enforce the award in court).

This could help if your dispute involves:

- Trade secrets
- Employment disputes (whether relating to clients, comp, etc.)
- Commercially sensitive information (e.g., dispute over business strategy)
- Likely media attention

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Arbitration Pros (cont.)

Another “pro” of arbitration is that it’s well suited to highly technical subject matters. For example:

- You get to choose your arbitrator(s), at least in part.
- You can seek arbitrators with expertise in your industry.
- You can seek arbitrators who’ve handled disputes just like yours.
- This can help further streamline the process.

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Arbitration Cons
(aka Jurors Aren't Always the Enemy)

The main "con" of arbitration is that it's "One and Done":

- Like everyone else, arbitrators sometimes make mistakes.
- But your ability to overturn an arbitral award is ***extremely*** limited.
- Getting the law or facts wrong generally ***isn't*** enough.

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Arbitration Cons (cont.)

Why?

- Most arbitral awards are reviewed under an extremely deferential standard set by the Federal Arbitration Act or state law.
- Generally, courts can overturn an arbitral award only for:
  - Fraud as part of the process;
  - The arbitrator exceeding her authority under the contract;
  - Maybe, depending on the jurisdiction, “manifest disregard of the law.”

Arbitration Cons (cont.)

Some examples to flesh this out:

- Arbitrator misread a key contractual provision → Not enough to overturn an award.
- Arbitrator misread the law → Not enough. Arbitrator has to have ***acknowledged*** the correct law and affirmatively decided not to follow it for it to qualify as "manifest disregard."
- Arbitrator awarded lost profits → Only a basis for overturning the award if the contract forbids the arbitrator from awarding lost profits, such that the arbitrator exceeded her authority.

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Arbitration Cons (cont.) → Limited Appellate Review

- No MTD
- No MSJ
- No Appellate Review

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Arbitration Cons (cont.) →

Arbitrators Gone Bad

Arbitration Cons (cont.) – Limited Motion Practice

Other “cons” of arbitration:

- Limited motion practice is available – May not be able to get all or part of a case dismissed as in court.
- Much more likely to go to trial without guaranteed motion practice – So process may not be as cheap as you’d hoped.

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Arbitration Cons (cont.) – Limited Motion Practice

Some examples to flesh this out:

- No Automatic Motions to Dismiss: In court, you have a right to move to dismiss part or all of a case on grounds such as the statute of limitations. In arbitration, you do not have an automatic right and must seek permission from the arbitrator to do so.
- No Right to Move for Summary Judgment: In court, if discovery comes out your way and a trial doesn't make sense, you have a right to move for summary judgment to that effect. Not so in arbitration.

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Arbitration Cons (cont.)

Other “cons” of arbitration:

- Minimal discovery rules unless contractually defined – Arbitral rules are very basic, so you may have to fight for discovery absent agreement.
- No evidence rules at trial – If a particular piece of evidence is especially problematic, you’re unlikely to get it excluded.

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AdLaw Specific Considerations – Online Ts & Cs

A special consideration in the false advertising realm:

- If consumer class actions are a frequent concern for your business, consider whether including arbitration clauses in your online Ts & Cs makes sense.
- The case law is still developing, but the largest appellate courts – the Second Circuit in NY, Ninth Circuit in CA, among others – will enforce arbitration clauses included in online Ts & Cs, depending on how the website is structured

AdLaw Specific Considerations – Online Ts & Cs (cont.)

Website format drives legal enforceability:

- Not Enforceable:
  - "Browsewrap" agreements where the website says you accept its terms merely by browsing the site.
- Always Enforceable:
  - "Scrollwrap" agreements where user must scroll through the Ts & Cs before clicking a mandatory "I agree."

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AdLaw Specific Considerations – Online Ts & Cs (cont.)

- Likely Enforceable:
  - Clickwrap agreements – where user clicks "I agree" after being shown Ts & Cs, but does not have to scroll through them – are usually enforced.
- Potentially Enforceable:
  - Sign-in wrap agreements – Above the "Submit" or "Place Order" button, it says "By clicking [Submit or Place Order], I agree to the Ts & Cs."
    - No requirement to review the Ts & Cs and confirm assent first.
    - Enforceable if (1) the website provides reasonably conspicuous notice of the terms to which the consumer will be bound (usually through a clearly indicated hyperlink); and (2) the consumer clicks a button or checks a box or otherwise manifests assent.

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AdLaw Specific Consideration – Class Actions

Why is arbitration important in the AdLaw context?

- Many states limit class action waivers under various circumstances.
- But existing Supreme Court precedent under the Federal Arbitration Act means states may not be able to prohibit class action waivers ***if part of an arbitration clause***.

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AdLaw Specific Consideration – Class Actions (cont.)

Why is arbitration important in the AdLaw context?

- This is why including an arbitration clause requiring individual (non-class) treatment of the consumer's claim may be beneficial to your business.
  - **BUT**: Google "mass arbitration" before doing this to understand the downside risks
    - Potentially thousands of individual arbitrations, AI-driven in some instances
    - Logistical and administrative costs, including arbitral costs

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Should I add an arbitration clause?

It depends. Ask yourself:

- How important is it to keep these disputes confidential?
- How important is it to have an appellate right?
- Note: Optional appeals now available at JAMS/AAA.

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Should I add an arbitration clause?

- Will getting rid of class actions help or hurt on net?
- Can I structure the arbitral process in a way that will maximize the pros and minimize the cons?
- Speaking with counsel can assist in walking through these kinds of considerations and finding the right fit for your business and the disputes it's most likely to face.

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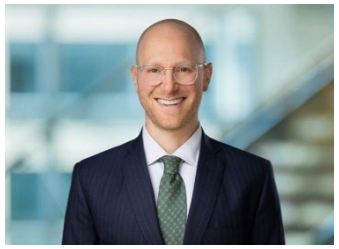
Biographies



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Brian Koosed is a seasoned litigator who represents corporations, financial institutions, and high-net-worth individuals in all aspects of commercial litigation and arbitration, at both the trial and appellate levels. Brian has experience with commercial disputes in the retail, manufacturing, hospitality, banking, and financial services sectors, particularly in alleged wrongful termination of contracts and other "business divorces." Brian regularly represents clients in connection with pre-closing and post-closing disputes arising out of complex M&A transactions, disputes between joint venture members or other business partners, early or wrongful termination claims (including relating to potential "break-up fees"), and adversary proceedings in Chapter 11 bankruptcies.

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John Worden is a trial lawyer. John is admitted in California and Nevada but has tried dozens of cases throughout the nation. He is a fellow of the American College of Trial Lawyers (ACTL), the American Board of Trial Advocates (ABOTA), and the Federation of Defense & Corporate Counsel (FDCC). John is the long-time chair of the San Francisco Bar Association's (BASF) ADR/Arbitration Section and a former board member of both BASF and BASF's Justice and Diversity Center.

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