

ALTERNATIVE DISPUTE RESOLUTION

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In a previous newsletter, I discussed the effectiveness of mediation as a method of resolving a dispute. I now want to take a look at arbitration as a vehicle through which to bring finality to a dispute.

Under New York law, arbitration is final and binding except in certain circumstances which are more specifically outlined in New York Civil Practice Law and Rules Section 7511. For purposes of this article, however, I want to focus on the pros and cons of arbitration as a form of alternative dispute resolution.

First, it is important to note that unless parties to a dispute mutually agree to arbitrate their dispute, arbitration must be contractually agreed to. Unlike proceeding through the New York State court system, arbitration proceedings can usually be commenced and concluded in a significantly shorter period of time. Furthermore, the amount of attorneys' incurred in an arbitration proceeding, in many cases, are less than they would be in the more traditional court proceeding. Keep in mind, however, legal fees can be awarded to the prevailing party in an arbitration proceeding just as in State Court under certain circumstances.

In addition to the expedited basis on which an arbitration proceeding can be conducted, the applicable rules of evidence are also more relaxed than they are in a State court proceeding. Simply stated, there are no written rules of evidence in an arbitration proceeding and whether certain evidence is admitted is left to the discretion of the arbitrator(s). One can certainly argue that the relaxed evidentiary rules can cut both ways.

Perhaps the biggest risk associated with arbitration is its finality. As mentioned above, there are limited circumstances under New York in which arbitration award can be "appealed". Unless one of those rare circumstances exist, the losing party in an arbitration proceeding has no avenue of redress. In State Court, however, a losing party has the right, provided the appeal is not frivolous, to appeal an adverse decision to the Appellate Division and then to the New York State Court of Appeals in very limited circumstances. One can certainly make the argument that litigating in New York State courts provides more opportunities to have "justice served" than an arbitration proceeding does.

The decision whether to include an arbitration clause in a contract should be made at the outset of the negotiation process. In some industries, arbitration and mediation provisions are almost boilerplate. Before agreeing to an arbitration provision or asking that one be included in a contract, it is important to consider the nature of the contract, the issues that could possibly be in dispute at some point in the future, the amount of time that could be

expended resolving the dispute in the absence of an arbitration proceeding and the amount of legal fees that could be incurred.

We would be happy to discuss the arbitration process and other avenues of dispute resolution with you.