PositivelyNeutral

Arbitration and Mediation for Attorneys and Their Business Clients

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The Fisherman's Way: Resolving Business Disputes Before They Spoil

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 statute changed that. Arbitration agreements became enforceable. Parties who agreed in advance to resolve disputes privately could rely on courts to honor that decision.

Yet arbitration itself did not begin in 1925.

Long before legislatures and arbitration 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.

I was introduced to that idea in law school—not through a statute, but through a story.

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.

That story stuck with me because it captures arbitration at its most intuitive. Strip away the doctrine and the procedure, and arbitration is simply this: choosing a decisionmaker you trust, on a timeline that makes sense for your business. Whether in the fish market or somewhere else, when the formal legal system can’t deliver a timely answer, practical people find a better way.

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. When a dispute later erupts, arbitration happens because the contract requires it.

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. None of them is irrational. But together they create a powerful default toward litigation.

1. 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.

2. It Takes Two to Tango

Arbitration by agreement requires mutual consent. One party's enthusiasm is meaningless without the other's. And once a party believes it has an advantage in court—procedural leverage, discovery pressure, delay—there is little incentive to give that up voluntarily. That is rational. It may also sometimes be shortsighted.

3. The Dominant Reason: No One Asks

Perhaps 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.

Court dockets are crowded. A case filed today may not reach trial for two or three years—or longer.

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.

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

Court proceedings are public by default. Arbitration is not; journalists and the public cannot walk into an arbitration 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 rarely succeed.

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.

How Post-Dispute Arbitration Happens

When parties agree to arbitrate after a dispute arises, the process unfolds in one of two ways.

Organizations such as the American Arbitration Association can provide procedural rules and case management. The structure can be reassuring for parties who want established procedures guiding the process.

Alternatively, the parties—like the fishmongers from days of old—may simply agree on an arbitrator and design the process themselves. This approach can be more streamlined, though it requires cooperation and clarity about how the arbitration will proceed.

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?”

Rob Harris is a full-time arbitrator and mediator of commercial and employment disputes, often involving business entities and their owners, senior employees, investors and service providers. He is a member of the National Academy of Distinguished Neutrals, and he is a longstanding panelist for the American Arbitration Association, including participation on its Commercial, Employment, Construction and Consumer panels, and its specialty panels for Large Complex Cases, Mergers and Acquisitions and Joint Ventures.

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