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FACTORS TO CONSIDER BEFORE YOU AGREE TO SUBMIT YOUR COMPANY TO ARBITRATION

Arbitration is a procedure used in the resolution of legal disputes outside of the traditional court system. In arbitration, the parties agree to submit their disputes to one or more persons, known as "arbitrators" or an "arbitration panel." An arbitrator is someone, usually a former judge or a lawyer with significant experience in an area of law related to the dispute, who hears and decides motions, rules on evidentiary matters, and ultimately decides the disputed case. The arbitrator's decision, known as the arbitration "award," is generally binding on the parties.

Before you agree to subject your business to arbitration in a commercial agreement, you should carefully consider the nature of any future dispute that may arise over that agreement and whether arbitration of any such dispute will be beneficial. Whether you anticipate that your company will be the plaintiff or the defendant may greatly impact your decision.

The following are some of the factors to consider when deciding whether to agree to arbitration:

- **Input into the selection of the decision maker**. In an arbitration proceeding, the parties typically have input into the choice of the arbitrator. The parties can agree on an arbitrator, or choose an arbitration company to select an arbitrator. A party does not have this luxury with respect to choosing a judge, who is randomly assigned to preside over a lawsuit. In addition, the parties to an arbitration are not subject to the same geographic limitations that exist with a judge. The parties can agree to select an arbitrator from anywhere in the world.
- **A firm date for the hearing**. Parties can generally better control the date of the arbitration hearing than the date of a traditional court proceeding. An arbitrator will likely provide more flexibility scheduling the hearing than a judge will provide.
- **Less formality.** Arbitration proceedings are not generally subject to all of the same rules of evidence or pretrial procedures found in a traditional court case.
- **Lack of full discovery**. Since arbitration is less formal than the traditional court case, the ability to conduct full discovery, especially third-party discovery, is potentially more difficult in an arbitration. In addition, non-parties are not subject to the arbitration agreement and, therefore, may have a greater ability to resist discovery efforts.

- **More costly filing fees**. The fees associated with initiating an arbitration proceeding are typically far more costly than the filing fees associated with a court case. In addition, arbitrators typically charge an hourly rate for the time spent working on the arbitration, including review of documents, attendance at hearings, and preparing decisions. In a court case, the judge presides over your case with no costs beyond the initial filing fee.
- **Takes less time**. The typical arbitration proceeding is resolved faster than the typical court case. Although there are exceptions to this, arbitration does not suffer from the same back-log of cases found in the traditional court system.
- **No jury**. Arbitration requires that the parties waive their right to a jury trial. The parties present their evidence and witnesses to the arbitrator, who decides the dispute.
- **Greater finality**. In arbitration, there generally is only a very limited right to appeal. As a result, most arbitrations will end with the arbitrator's decision and the parties are generally stuck with the decision, whether good or bad.
- **Greater ability to keep the dispute private**. Unlike a lawsuit filed with the court, parties to an arbitration have the ability to keep the proceedings, and the result, confidential. A court proceeding is almost always public.

If you have any questions regarding this article, please contact Greg Lyons at O'Neil Cannon at 414-276-5000.