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TRENDS IN ARBITRATION IN THE UNITED STATES

Businesses in the United States have used arbitration clauses in contracts for many years. The purpose of these clauses is to encourage (or require) that contract disputes be settled in arbitration rather than by litigation and trial. Consumer and employment contracts frequently include arbitration clauses.

As Internet-based businesses have exploded over the past fifteen years, so have the number and types of business contracts containing arbitration clauses. Businesses frequently include mandatory arbitration provisions in their online "terms and conditions" for use of their sites, products or services. Businesses engaging in international transactions, whether online or offline, also may include arbitration provisions in their agreements to limit litigation in countries throughout the world.

While business contracts have changed to reflect changes in alternative dispute resolution, litigation, and the business environment, the arbitration process in the United States also has changed to reflect a more technologically-interconnected world in which arbitration, not litigation, is being used to resolve many types of business disputes.

As a result, arbitration proceedings now often include many of the rules for the handling of electronically stored information (ESI) that U.S. courts already have enacted. Due to its "electronic" nature, ESI can present challenges involving discovery, security, and authentication that traditional paper-based recordkeeping does not.

Courts have addressed these challenges by creating specific rules addressing ESI issues, as well as by adapting existing rules for paper-based documentation to try to accommodate ESI. Since arbitration proceedings frequently handle disputes involving businesses that create, store, and use large quantities of electronic information, many arbitrators have adopted similar rules. But the rules governing ESI usually differ between litigation and arbitration and one potential advantage of arbitration therefore is the possibility of a limited discovery process. Arbitration often can reduce the amount of "big data" a party must parse in order to find what is relevant to the proceeding at hand.

Arbitration remains the second most popular form of alternative dispute resolution in the United States, after mediation. The formal and binding nature of most arbitration – along with

the fact that parties can choose arbitrators with specialized technical knowledge helpful to understand the details of the dispute – makes arbitration an appealing alternative to litigation (and trial), particularly when international jurisdictions may be in play.

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