



# Is Arbitration Worth It? The Pros and Cons of Arbitrating Franchise Disputes

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# Introduction

## Arbitration vs. Litigation

- Arbitration Pros

- Ability to modify the process
- Streamlined often faster
- Cost (usually lower)
- Ability to choose venue
- Finality

- Arbitration Cons

- Finality
- Increasing cost
- Arbitrability disputes
- Limited discovery (could also be a pro)

# Past the Gatekeeper: Getting to Arbitration



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# Legal support for arbitration

- Federal Arbitration Act (“FAA”)
- Role of state law
  - Governs the validity of the conflict
  - Cannot discriminate against arbitration
  - Can set procedural standards not conflicting with the FAA

# Who decides if a dispute will be arbitrated?

- Agreement
  - Franchise agreement, Franchise Application, Settlement Agreements, etc.
- Arbitrability
  - ✓ Pro tip: don't overlook dispute resolution clauses in other agreements related to the franchise relationship aside from the franchise agreement

# Challenging an arbitration clause

- Contractual challenges
    - Unconscionability
    - Fraud
    - Waiver
    - Estoppel
  - Scope of the arbitration agreement
- ✓ Pro tip: if you choose arbitration commit to it

# Enforcing an arbitration clause

- Compelling arbitration
- Staying litigation  
*Smith v. Spizzirri*, 601 U.S. 472, 477 (2024)
- Filing for arbitration



# Forum and venue considerations

- Forum - Choosing an arbitration association
  - AAA
  - JAMS
  - CPR
  - Other
- Venue
  - Specify in the agreement, but give flexibility
  - Virtual
  - State law impact



# You've arrived at arbitration. Now what?



# Arbitration pro: it's cheaper. But is it?

- It's not cheaper when it comes to the costs of administration
  - But when done correctly, arbitration should ultimately save the parties money on legal fees and other costs
- ✓ Pro tip: generally speaking, you get what you pay for



# Arbitration pro: choose your judge and jury

- Single arbitrator or panel?
- Choosing the arbitrator(s)
  - By agreement of the parties
  - The “rank-and-strike” approach
  - Subject matter or industry expertise
- ✓ Pro tip: selecting your arbitrator may be the most important phase of the arbitration; treat it as such

# Emergency injunctive procedures

- Traditional: arbitration agreement carve-outs allowing parties to pursue temporary injunctive relief in court
- New AAA and JAMS procedures for obtaining interim injunctive relief
- Court might be unavoidable nevertheless

# Arbitration pro: you decide

- The preliminary hearing: your chance to define the scope, set the ground rules, determine logistics and costs
    - Mediation?
    - Discovery?
    - Experts?
    - Hearing parameters?
    - Form of Award?
- ✓ Pro tip: engage with opposing counsel

# Arbitration con: a less formal process can lead to unfair results

- Absent agreement otherwise – significantly less discovery (more opportunity to “hide the ball”)
- Rarely successful dispositive motions
- Once under way, the process incentivizes a hearing
- Relaxed rules put great power in the arbitrator’s hand

# The Arbitration Hearing



# Last hurdle – the most detrimental aspect of arbitration

- Pay to play
  - Not only administrative fees of the arbitration agency, but also
  - Fees of the arbitrator
- Nonpayment by one side





# Relaxed rules, procedures, and rules of evidence

- AAA and JAMS – except for privilege issues – optional
  - Pro or con?
- 9 U.S.C. s 10 – vacating award not hearing pertinent and material evidence

# Conduct and duration of proceedings

- Longer or shorter than going to court
- Flexibility
- Remote vs. in-person
- Chess clock

# Confidentiality

- Not open to the public
- Not secretive
- Protective orders/arbitration clauses
- Confirmation
- FDD disclosure obligations

# Record of proceedings

- Typically, no court reporter
- Pros and Cons of a court reporter

# All good things must end



# The conclusion of arbitration

- Closing arguments
- Attorney's fees and costs
- Closing the Hearing
- Form of Award
  - How much detail is desirable
- Split the baby
  - Myth or Reality
- Nonbinding arbitration

# Post-arbitration: enforcement and challenges

- Modifications or Corrections ≠ Reconsideration by the Arbitrator
- Federal or state court?
- Personal service required
- Modification or correction redux
  - 9 U.S.C. 11 and 9 U.S.C 12
- Inherent delays
- No substantive appellate rights unless called for in the arbitration clause
- Manifest disregard of the law
- Bias, fraud or exceeded scope
- Once confirmed;
  - same effect as a decision on the merits by a court

Questions?



# Thank You

## Speakers:

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