



ARBITRATION AGREEMENT & GUIDE

Included:

Overview

Dos and Don'ts Checklist

Arbitration Agreement Instructions

Sample Arbitration Agreement

1. Overview

In the business world, disputes are inevitable. Small disagreements may be resolved between the parties, but larger ones may linger and grow, leading to hard feelings, delayed deals, and lost business. The court system was designed to determine these issues, allowing the parties to argue their cases before a judge or jury. Unfortunately, courthouse resolution has become an increasingly costly and inefficient venture, and even simple cases can cost hundreds of thousands of dollars and take years to conclude. One way to avoid this process is to submit the dispute to arbitration.

When parties want to arbitrate their issues, an arbitration agreement (sometimes called a “submission agreement”) can be drafted and submitted to the selected arbitrator. Arbitration will take the place of a trial, and the parties give up their right to go to court in exchange for a quick and cost-effective resolution. This package contains everything you’ll need to customize and complete your arbitration agreement. A written agreement minimizes confusion, misunderstanding, and error, and clearly sets forth the parties’ expectations and obligations. Once signed, each party can again focus on resolving the matter and returning to business as usual.

2. Dos & Don’ts Checklist

- Arbitration is way for two parties to resolve disputes outside of the courthouse. Together with mediation, it’s often referred to as a kind of alternative dispute resolution or ADR. The individuals entering into arbitration put their dispute before one or more people (arbitrators) who resolve it and enter a decision. In most cases, this decision is binding. In other words, it is the equivalent of a judge’s ruling and is not a mere suggestion.
- In most cases, arbitration is a voluntary process. In other words, both parties must agree to arbitrate their dispute – one party cannot be “forced” into it.
- An agreement to arbitrate a dispute that has already arisen is sometimes called a “submission agreement.” A submission agreement is needed when the parties don’t have an existing written contract or a clause in an existing contract that provides that arbitration will be used to settle disputes between them. The submission agreement is used to start the arbitration with the selected arbitrator.
- Most states have statutes governing arbitration, and there is a federal arbitration act that may also apply to your case. These laws vary from jurisdiction to jurisdiction, and may require that an agreement contain specific language to be enforceable. For example, the Vermont Arbitration Act requires that the parties sign an additional agreement with a specific acknowledgment of their consent to arbitration.
- There are some types of disputes that should not (and may not, in some states) be submitted to arbitration. For example, many states prohibit the submission of healthcare-related disputes to binding arbitration. Review your state’s laws for additional information about the types of disputes that may be subject to ADR in your area.

- Although you should feel free to adapt the enclosed document to suit your agreement, a submission agreement must, at a minimum:
 - Be in writing
 - Be signed by both parties
 - Explain the dispute
 - List the names and addresses of the parties
 - Specify the amount of money involved
 - Describe the proposed solution

- After completing and signing the agreement, the parties must submit the document to the arbitrator or arbitration firm that they've selected.

- Note that for disputed amounts less than \$10,000, there may be expedited proceedings that can be followed. The American Arbitration Association ("AAA") terms this "desk arbitration," and will not require hearings in such cases. The arbitrator will make the decision on the basis of the papers submitted.

- There are industry-specific clauses that may be inserted into the enclosed document to customize it to your individual dispute. For example, the AAA has special rules governing construction law claims and may fast-track cases with claims of less than \$75,000, or have different structures for cases with at least \$500,000 in controversy.

- Each party should be given ample time to review and sign the document, and to seek counsel if desired. This will reduce the likelihood, or at least the efficacy, of a claim that one party did not understand the agreement's terms or the effect of arbitration in general.

- Both parties should review the completed agreement carefully to ensure that **all relevant deal points** have been included. It is better to be over-inclusive than under-inclusive. Do not assume that certain expectations or terms are agreed to if they are not stated expressly in the document.

- Each party should be given at least one original, signed copy of the arbitration agreement.

- Depending on the nature of its terms, you may decide to have your arbitration agreement witnessed or notarized. This will limit later challenges to the validity of a party's signature.

- If the original agreement or the conditions of your arbitration are complicated, do not use the enclosed form. Contact an attorney to help you draft a document that will meet your specific needs.

3. Arbitration Agreement Instructions

The following provision-by-provision instructions will help you understand the terms of your agreement. You can use the sample included in this packet as a starting point when revising or drafting your own arbitration agreement.

The numbers and letters below (e.g. Section 1(a), Section 2(d), etc.) refer to the corresponding provisions in the agreement. Please review the entire document before beginning your step-by-step process.

- **Introduction of Parties.** Identifies the document as an arbitration agreement. Write in the date on which the agreement is signed. Identify the parties and, if applicable, what type of organization they are.
- **Recitals.** The “whereas” clauses, referred to as recitals, define the world of the agreement and offer key background information about the parties. Use the first blank to describe, in detail, the nature of your dispute with the other Party. Explain what issues you want to be decided through the arbitration (and any that you specifically do not want decided in this forum).

The Parties also have the ability to select the rules they want to govern their arbitration. There are a number of organizations that publish arbitration rules that their arbitrators will follow. There are two listed as examples in the recitals (those of the American Arbitration Association and the CPR Institute for Dispute Resolution), but you can feel free to insert the arbitration rules the Parties have selected to govern their case (e.g., JAMS Comprehensive Arbitration Rules and Procedures, USA&M Rules of Arbitration). If you will be using industry-specific rules (e.g., commercial rules; employment rules) of these organizations, write in the applicable description of those rules.

Note that this decision is not irreversible. If these rules prove unwieldy down the road, you and the other Party can change them by mutual agreement to suit your arrangement.

- **Section 1: Submittal to Arbitration.** The Parties’ agreement that they will resolve their dispute using arbitration and that the decision of the Arbitrator will be final. In other words, this is binding arbitration.
- **Section 2: Initiation of Arbitration.** Explains how to start the Arbitration itself. The actual process will vary depending on the Rules that you have selected to govern your Arbitration, but this paragraph provides some general guidelines. Enter the mailing (or online) address of the arbitration organization you have selected to administrate your proceeding.
- **Section 3: Arbitrator.** There are two options provided for you and the other Party, and you should choose the one that best suits your arrangement. This section will provide you with a procedure to select the arbitrators. The first allows you to create a three-person panel to hear your case. Each of the Parties will pick one arbitrator, and those two arbitrators will in turn pick the third. For more complicated cases, having three people available to discuss issues and decide the case may be useful.

The second alternative allows you and the other Party to select a specific Arbitrator to hear your case. This will be a less expensive option (as each arbitrator will charge for their time) and may be suited to smaller, more easily resolved disputes.

Depending on the selection you make, you should revise the remainder of the Agreement to refer to either an Arbitrator or Arbitrators.

- **Section 4: Hearing.** Allows the Arbitrator to set the date, time, and location of the hearing on the case (if any) after discussing with the Parties their availability. This is deliberately left general for the Parties to decide at a later date, rather than locking everyone into a date that may be unworkable. Enter the name of the city, state, and country in which the arbitration will take place – the specifics of the location will be left for a later date.
- **Section 5: Applicable Law and Rules.**
 - (a) Applicable Law. Provides that the law that will govern the Agreement and the arbitration itself will be those of the state chosen by the Parties. Enter the name of the selected state in the blanks provided.
 - (b) Arbitration Rules. States that the arbitration will be governed by the Rules named in the Recitals. Enter the name of the state in which the arbitration will be conducted in the blank space provided.
 - (c) Familiarity with Rules. Indicates that whichever rules the Parties chose (e.g., AAA, CPR, etc.), they have read and become familiar with them. This is a good idea since it will help you understand what is going on throughout your arbitration process.
- **(Optional) Section 6: Preliminary Relief.** In some cases, the Parties' rights will be harmed if they have to wait until a final decision is made. For example, if the dispute is about an action that will take place in the next few days, one Party may want to get a preliminary order that prevents that event from happening. In this section, the Parties are given the right to seek this relief either from the Arbitrator or from a local court. This is an optional provision and you are not required to include it in the document. If you choose to remove it, correct the section numbers and references in the Agreement.
- **Section 7: Discovery.** Discovery is the process through which each Party has the opportunity to investigate the other Party's information (e.g., asking to see files, interviewing their witnesses, etc.). In litigation, this is a lengthy and complicated process, and can drag on for years, costing the Parties many thousands of dollars in the process.

There are two options provided here for conduct of this discovery process, and you should select the one that best characterizes how you would like this process to go. In the first, general authority is given to the Arbitrator(s) to conduct the discovery as efficiently and equitably as it/they see fit. The second puts more exact, stringent limits on the conduct of discovery, providing a static time period within which discovery must be completed. If you choose this option, indicate how long you want this process to last.

- **Section 8: Conduct of Hearing.** A description of how the arbitration proceedings will work.
 - (a) Management of Proceedings. Gives the Arbitrator(s) the ability (and authority) to run the proceedings to make them efficient and as economical as possible.
 - (b) Powers. To help the Arbitrator(s) decide the case, it/they are given the powers specifically listed in this subsection (including powers to limit testimony or other procedures in the interest of efficiency and cost-effectiveness). Enter the name of the governing state in the blank space provided on the first line. If there are other abilities you want the Arbitrator(s) in your case to have, feel free to include those here.
 - (c) Oath Required. Provides that any testimony given in the arbitration will be given under oath.

- (d) Right to Counsel. As in a court setting, each Party to the arbitration is given the right to hire legal representation (but neither is required to do so).
- (e) Subpoenas. Allows the Parties to require that witnesses attend the proceedings or that documents be provided under subpoena. This subsection makes clear that this power – standard in courthouse proceedings – has been incorporated into the arbitration process.
- (f) Unavailable Witnesses. Permits the use of testimony of witnesses not testifying in person to the extent that it would be permitted in a courthouse in the governing jurisdiction.
- (g) Deadline. Indicates that if something is supposed to be completed by Day X (e.g., papers submitted or tasks performed), the Party has until 5:00 p.m. on Day X to complete it.
- (h) Copies. States that whenever one Party gives a document to the other Party, it must also give a copy to the Arbitrator(s).
- (i) No Record/Record of Proceedings. There are two options provided, and you should select the one that best suits your arrangement. In the first, the Parties agree that the proceedings will not be recorded (either on video or by stenographer taking notes). In the second, the Parties are permitted to record the proceedings if they pay for it. If a recording is made, they will need to provide a copy to the Arbitrator(s).

- **Section 9: Award.**

- (a) Form of Award. The “award” is any of a number of remedies that might be indicated by the Arbitrator, which range from payment of damages to entering their reasoning about the decision. In commercial cases, arbitrators usually will not write an opinion explaining the reasons for the award unless all of the parties request one. If both Parties want this opinion, with reasons explaining why the decision was made, select the first option.
- (b) Timing. There are two options provided, and both set specific limits on the amount of time the arbitration as a whole can take. Select the one that best suits your arrangement. This may vary depending on the complexity of your case and the extent of your dispute, and you should make sure you leave enough time to detail your case and have it decided.
- (c) Written Statement. Provides that the Arbitrator(s) will provide a “tentative” decision to the Parties before it becomes final. The Parties will have the opportunity to respond, and the Arbitrator(s) will enter the final decision in the following few days. If you want to extend this time, you can feel free to do so.
- (d) Damages. Punitive damages are damages paid not to repay one party for a loss that it experienced, but to deter the other party from taking the same actions again. In other words, it is a “punishment” of the defendant and not a compensation of the plaintiff. This subsection (d) lists two options, and you should select the one that best suits you.

The first prevents the Arbitrator(s) from deciding that punitive damages can be awarded in the case. Unless specifically required by the law, the Arbitrator(s) would only be able to order the losing Party to make payments to compensate for any losses.

The second allows the Arbitrator(s) to order punitive damages. The optional last clause allows the Parties to set a top limit on the total amount of such damages that can be awarded.

- (e) Costs/Fees. Although arbitration is considerably cheaper than litigation and other dispute resolution alternatives, there are still some costs involved in the process. This section allows you to divide those costs and fees between the Parties as you see fit. In the first option, there is a general idea that the Parties will split the costs and fees equally (or as decided by the Arbitrator(s)). In the second, the Parties agree that the losing Party (as determined by the Arbitrator(s)) will be responsible for both Parties' fees and costs.
- **(Optional) Section 10: Confidentiality.** This is an optional provision, and allows the Parties to restrict how information regarding their dispute will be used outside of the hearing. Note that arbitrators are already subject to confidentiality laws under the general rules of arbitration, but this section reiterates that responsibility.
 - **Section 11: Consideration.** "Consideration" is what each party gives in the contract. In many cases, this is money given by one party in exchange for goods or services provided by the other. In this Agreement, each Party is entering the Agreement in exchange for the other Party giving up their right to go to court over the Dispute.
 - **Section 12: Effect of Agreement on Third Parties.** A statement that nobody other than the Parties is intended to benefit from the Agreement. This may seem obvious, but there are some contexts in which the arbitrator's decision has been extended to companies that did not sign the agreement (e.g., if one group company signs, it may bind other members of its group). If a company "benefits" from an agreement, it may also be thought to be covered under it. This section makes sure that non-parties will not be bound by the agreement by receiving specific benefits from it.
 - **Section 13: Exclusion of Liability.** Prevents the Arbitrator from being held liable for its actions in the arbitration.
 - **Section 14: Successors and Assigns.** States that the Parties' rights and obligations will be passed on to heirs or, in the case of companies, successor organizations or organizations to which rights and obligations have been permissibly assigned.
 - **Section 15: No Implied Waiver.** Explains that if either Party allows the other to ignore or break an obligation under the agreement, it does not mean that Party waives any future rights to require the other to fulfill those (or any other) obligations.
 - **Section 16: Notice.** Lists the addresses to which all official or legal correspondence should be delivered. Write in a mailing address for both the Claimant and the Respondent.
 - **Section 17: Counterparts / Electronic Signatures.** The title of this provision sounds complicated, but it is simple to explain. It says that even if the Parties sign the agreement in different locations, or use electronic devices to transmit signatures (e.g., fax machines or computers), all of the separate pieces will be considered part of the same agreement. In a modern world where signing Parties are often not in the same city - much less the same room - this provision ensures that business can be transacted efficiently, without sacrificing the validity of the agreement as a whole.
 - **Section 18: Severability.** Protects the terms of the agreement as a whole, even if one part is later invalidated. For example, if a state law is passed prohibiting choice-of-law clauses, it will not undo the entire agreement. Instead, only the section dealing with choice of law would be invalidated, leaving the remainder of the contract enforceable.

- **Section 19: Headings.** Notes that the headings at the beginning of each section are meant to organize the document, and should not be considered operational parts of the agreement.
- **Section 20: Entire Agreement.** The Parties' agreement that the document they're signing is "the agreement" about the issues involved. Unfortunately, the inclusion of this provision will not prevent a Party from arguing that other enforceable promises exist, but it will provide you some protection from these claims.

DISCLAIMER

LegalZoom is not a law firm. The information contained in the packet is general legal information and should not be construed as legal advice to be applied to any specific factual situation. The use of the materials in this packet does not create or constitute an attorney-client relationship between the user of this form and LegalZoom, its employees or any other person associated with LegalZoom. Because the law differs in each legal jurisdiction and may be interpreted or applied differently depending on your location or situation, you should not rely upon the materials provided in this packet without first consulting an attorney with respect to your specific situation.

The materials in this packet are provided "As-Is," without warranty or condition of any kind whatsoever. LegalZoom does not warrant the materials' quality, accuracy, timeliness, completeness, merchantability or fitness for use or purpose. To the maximum extent provided by law, LegalZoom, its agents and officers shall not be liable for any damages whatsoever (including compensatory, special, direct, incidental, indirect, consequential, punitive or any other damages) arising out of the use or the inability to use the materials provided in this packet.

ARBITRATION AGREEMENT

This Arbitration Agreement (the "Agreement") is made on _____, 20__ (the "Effective Date") by and between by and between _____, a _____ [corporation] [limited liability company] [etc.] (the "Claimant"), and _____, a _____ [corporation] [limited liability company] [etc.] (the "Respondent") (each a "Party" and collectively the "Parties").

RECITALS

WHEREAS, the Claimant has a claim against the Respondent arising out of a dispute over:

_____ (the "Dispute"); and

WHEREAS, the Parties have determined that they refer to and finally resolve the Dispute through arbitration under the applicable rules (the "Rules") of the [American Arbitration Association ("AAA")][the CPR Institute for Dispute Resolution] rather than in court; and

WHEREAS, this Agreement is intended to serve as the Parties' submission of the Dispute to arbitration and sets forth the terms through which arbitration will be conducted.

NOW, THEREFORE, the Parties have entered into this agreement