

Alternative dispute resolution (ADR)

Everyone's best interest

Over the past twelve to eighteen months, Markel Cambridge Alliance has been asked more frequently what we think about having an arbitration clause in client contracts. It is our response that it is always in everyone's best interest.



Speaking from an insurance professional's point of view, it is good to have options to solving legal disputes. It is even better to have options that are fair, efficient and not costly drains on resources. Traditional legal remedies used to solve disputes drain resources; they are expensive and consume large amounts of time. Money may or may not be an issue to you, but time typically is. Time is the one resource we have been trying to manipulate from the beginning of existence. We want more. We want to be more efficient users of time. A drawn out legal matter is not efficient and not in your best interest.

Alternative dispute resolution (ADR) consists of two main categories – arbitration and mediation. Both have their advantages and disadvantages. Only you can decide which is best for you. If you Google "Advantages to ADR" or "Disadvantages to ADR" you'll have plenty of reading, but please choose your sources of information wisely. A good place to start is the American Arbitration Association www.adr.org.

Certain large legal matters are best left to traditional legal solutions where a jury of your peers is beneficial. But for medium to small matters ADRs are ideal. The arbitration panel selection process is fair and it makes sense. One side chooses a panelist, the other side chooses a panelist, and the two panelists choose the third panelist. So choosing the arbitrator is choosing the judge and jury in one body. Not to diminish the value of juries, but for sophisticated discussions on financial matters, it is more efficient to have three educated and experienced arbitrators deciding the facts of a securities matter and/or a fiduciary's duty case. More time can be focused on what happened or what didn't happen, rather than drudging through the details of "what is a fiduciary" and "are the standards the same as for a registered rep?"

A handful of regulators are taking offense to the ADR clauses. From what we've seen, the issue stems from mandatory versus optional. Statements from different regulators state a mandatory arbitration clause may not be in the clients' best interest. We have our opinions, but we've learned not to fight city hall. If the clause is optional, then it appears acceptable. The following is an example of a before-and-after arbitration clause Markel recently reviewed while analyzing a risk.

Example of before-and-after arbitration clauses

Original clause before auditing

Arbitration: Subject to the conditions and exceptions noted below in the event of any controversy, dispute, or claim arising from or relating to this Agreement, both parties agree to submit the dispute to arbitration pursuant to the Commercial Rules of the American Arbitration Association. The prevailing party shall be entitled to reasonable attorneys' fees, cost, and expenses. The Client understands that this Agreement to arbitrate does not constitute a waiver of its right to seek redress in court where a waiver would be void under applicable federal or state securities laws.

Revised arbitration clause after the auditor's comments

Arbitration: Subject to the conditions and exceptions noted below in the event of any controversy, dispute, or claim arising from or relating to this Agreement, arbitration is recommended as being in the best interests of both parties due to the significantly lower costs involved. The arbitration is suggested pursuant to the Commercial Rules of the American Arbitration Association. The prevailing party shall be entitled to reasonable attorneys' fees, cost, and expenses. The Client understands that this Agreement to arbitrate does not constitute a waiver of its right to seek redress in court where a waiver would be void under applicable federal or state securities laws.

In life and in our chosen professions we are always making decisions and using some sort of cost-benefit analysis. A bad case is a bad case no matter where it is heard, and likewise for a good case ... the question is how much extra money and extra time do you want to spend for the same outcome?