

## To Litigate or to Arbitrate: That Is the Question!

May 31, 2024 | [Gabriela Chambi](#) and [Julia K. Whitelock](#)

You've been sued by a consumer. Now what?

First things first: What are your business's priorities regarding how and where the dispute is resolved? Should the dispute be resolved by a court, or could it be resolved through arbitration? Is this a matter your business may want to try and settle early? Does your business have a contract with the consumer? Does your contract have an arbitration provision? How can this dispute be resolved efficiently? These are some initial questions your business may consider when facing a lawsuit.

In most cases, it helps to look at your contracts with the consumer to answer some of these questions. Many contracts contain arbitration provisions that, in most cases, will steer any case strategy toward resolving the matter through arbitration. However, knowing what to expect in litigation and arbitration can help answer these initial questions and inform decisions when your business thinks about risk management for this and any potential future disputes. It's always good to understand the risks related to cost, length of time to resolution, and publicity when evaluating or re-evaluating any strategy.

So, back to the basics. What are some of the general differences between litigation and consumer arbitration? This side-by-side comparison should help illustrate those differences.


	LITIGATION	CONSUMER ARBITRATION
<b>Forum and Decisionmaker</b>	Filed in state or federal court; judge or jury will determine the outcome of the case.	An alternative way to resolve legal disputes outside the court system. Disputes are filed with an arbitration company, such as JAMS or AAA; generally, arbitrators are practicing attorneys or retired judges.
<b>Public vs. Private</b>	Any judgment against the company is public. The court docket is public, which means anyone can view it and see that there is a case filed against your business. All filings are also public and may disclose all sorts of information about your business. There are “protective orders” that can protect confidential information. <b>(Note: This consideration is important with regard to protecting trade secrets and sensitive information and reducing the likelihood of reputational risk and copycat cases, among other risk management issues.)</b>	Consumer arbitration is private and confidential. Individuals cannot look up the docket or case information, which is not available to the public. Thus, individuals not associated with the arbitration cannot see what documents are being filed and what information is being disclosed. There are “protective orders” to protect confidential information; however, arbitrators cannot enforce the protective orders once the matter is resolved. <b>(Note: Many properly drafted arbitration provisions contain class action waivers, which means the dispute cannot be litigated on behalf of a group of people. Instead, the dispute can be resolved with the consumer making the claim. Note, however, that courts may not allow parties to contract out of collective or class actions involving certain types of claims, e.g., class-wide injunctive relief under California’s Unfair Competition Law. With arbitrations being private, your business may be protected from other individuals learning about the case and initiating copycat cases or coordinated mass arbitrations.)</b>
<b>Time and Costs</b>	Depending on the claims asserted, discovery and motions practice can be lengthy and costly.  This could mean large document collections and hiring vendors for document productions and could include depositions of your employees or leadership. These efforts take time and manpower away from your business.	Consumer arbitration is meant to be a bit more informal, shorter, and more efficient, with limited discovery, to help mitigate costs. For example, consumer arbitration limits the opportunity for third-party discovery. Consumer arbitration allows parties to issue subpoenas for testimony or document production at the merits hearing, but any enforcement of those subpoenas requires a petition to a court. <b>(Note: Under the consumer arbitration rules of most arbitration fora, the business entity being sued covers the costs related to the arbitration, with the exception of a small filing fee that must be paid by the consumer.)</b>

<p><b>Considerations Post-Judgment</b></p>	<p>Ability to appeal court orders and/or judgments is available in litigation; however, the costs and the amount of time the case could drag on are factors that must be considered.</p>	<p>Arbitrators issue awards, which the parties' arbitration agreement may agree are binding. Appeals of final arbitration awards are significantly limited by the Federal Arbitration Act or state statutes. An arbitration award must be confirmed by a court to be reduced to a judgment that can be enforced.</p>
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Now that the major differences between litigation and arbitration are laid out, where does settlement fit in? Litigation and arbitration both allow and encourage settlement discussions and agreements between the parties. With either of these two processes, settlement can be discussed at almost any point in time. However, if costs are a consideration, then settlement discussions at the initial stage may be most beneficial to mitigate exposure and legal costs down the road.

With this broad background in mind, how can understanding the differences between litigation and consumer arbitration inform your risk management and decision-making in potential future disputes? Some considerations could include:

- the parties and non-parties. Consumer complaints may contain allegations against a co-defendant or that implicate a third party, such as the dealership from which you buy retail installment sales contracts or even a vendor you work with. So, your company should ask:
  - Do I want to preserve the business relationship with the vendor or third party?
  - Could litigation affect that relationship?
  - How could settlement affect that relationship?
  - If arbitration is the road your business wants to take, is that vendor or third party subject to arbitration as well?
- the type of claim or dispute.
  - Does the dispute involve issues or relief that are best resolved in arbitration?
  - Is the claim one that could have implications across the industry such that your business wants to make a "statement" through the court system?
  - Is this dispute something you may want to handle on your own, or do you want to engage counsel or outside counsel?
- the implications of a judgment or arbitral award.
  - Is the dispute one that may require certain business practice and policy changes from your business? If so, is that something your business wants to be public?
- the use of your arbitration clause.
  - In some cases, the parties may elect to waive arbitration and proceed in court.

Any business, whether small or large, can benefit from an overview of how legal disputes can be handled. If your company is not familiar with litigation or consumer arbitration, it is never too early to learn about the costs associated with each, the time it can take to get matters resolved, and the potential exposure your business could face. You never know when you may be hit with your first lawsuit. If your company is all too familiar with dispute resolution, then it may be a good idea to take another look at the differences between litigation and consumer arbitration to consider the overall costs to your business, the time involved, and the legal repercussions. 

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7037 Ridge Road, Suite 300, Hanover, Maryland 21076  
410.684.3200

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