

# Arbitration vs. Litigation: Which is Better for a SaaS or Digital Health Contract?

I was recently asked by a client whether arbitration or litigation in a SaaS contract was better. The issue had been raised by an attorney on the other side of the SaaS contract negotiation, who had not only tried to persuade my client to revise the specific clause in that case, but had also provided my client the unsolicited advice that “he should prefer litigation over arbitration” in all cases.

My client, who had elected to include an arbitration clause in his standard SaaS contract terms, was unsure what to do and how to respond, and so he reached out to me for guidance.

While the debate over whether arbitration or litigation is better for a particular organization is not a dilemma specific to the SaaS industry, it is one that clients often raise with me in frustration, hoping that I can advise them that one option is definitively “better” than the other. The answer, like many things in the law, is not so black and white, and it should not be decided without considering the pros and cons of each option.

What happens when a SaaS or digital health contract includes an arbitration clause?

First of all, let’s assume you have no arbitration clause in your contract and a dispute arises, then the only contractually available forum to hear the dispute will be a courtroom. If your company does not have an in-house legal department with litigators on staff, then you will need to hire a litigation support to handle the litigation process, either from the plaintiff side or the defense side. You will incur costs every time a motion is filed or defended, and you

will incur costs for discovery, depositions, mediation, and the trial preparation, all until the case is either settled or a judgment is reached. This process could take years to go through.

On the other hand, let's assume you have an arbitration clause in your contract and a dispute arises, then the contractually available forum to hear the dispute will be a courtroom. However, your opponent may not want to arbitrate the case, and so your opponent may file in court first, in which case you will have to file to compel the case to arbitration. Alternatively, your opponent may be unwilling to participate in the arbitration, so you may have to file a motion to compel your opponent participate in the arbitration. Once you win any motion in court, you will then have to initiate the arbitration with the private organization that will handle the arbitration, which will generally be AAA or JAMS in the US, but there are other organizations that handle commercial arbitration internationally. This will require you to pay the filing fees, which are often far higher than is required to initiate a case in a court. Once the case is initiated an arbitrator will be appointed to hear the case, and the parties will decide on the format for the case, and the case will proceed outside of court within the private dispute resolution process of the organization selected.

What are the advantages of arbitration in a SaaS or digital health contract?

What are the advantages? Well, arbitration is intended to be a commercial process rather than a legal process, so it is much less formal. It also can be faster, as there is no judicial backlog to slow down the process. There are fewer rules governing the process, so it often viewed as less predictable. But fewer rules also means that the process is more easily managed by business-people who are not litigators. The goal of arbitration is generally to get to a rendered decision as quickly as possible, which may be

advantageous.

How is arbitration different than the standard court path to dispute resolution?

In contrast, the court option is very formal. It can be slow, which may be a negative in some situations and a positive in other situations. And it is governed by rules and precedent, which will require knowledge and familiarity with both to proceed through. Most litigated cases settled, so the goal of litigation may not be to get to a judgment. Instead, the goal may actually be to get to a settlement.

Is arbitration cheaper than going to court to resolve the dispute?

Is one option necessarily cheaper than the other? Arbitration is generally perceived in the business world to be cheaper, due to the faster process and the relaxed rules, but because the process is a private commercial process, the fees for the administration of the case can be higher in some situations and it is still possible to incur legal fees during the process. In contrast, discovery, depositions, and motion hearings can drive up the cost of a litigation process, both in terms of legal hours billed but also in terms of other costs.

Is an arbitration award a faster path to enforcement?

It is important to recognize that getting an arbitration award may not actually be better than a mediated settlement to the party owed an award, since a voluntary settlement may be easier to enforce than a decision. On the other hand, the process is private and stays completely confidential and outside of court records, which may be preferred by both parties, and the informality may be less stressful on both sides of the dispute.

How to Decide between Dispute Resolution via Arbitration or

## Litigation When Drafting?

In the end, the choice between arbitration vs. litigation is one of personal or commercial preference. You have to expect that a commercial litigator who spends his career in the courtroom is going to prefer to stay as far away from arbitration as possible. In contrast, transactional lawyers are generally going to prefer to stay as far away from litigation as possible.

I generally recommend to clients that they should contemplate the type of dispute that would arise from a particular set of contract terms before deciding how they prefer to resolve that dispute. For example, if a dispute arises, would an informal private solution to resolving the dispute be better than the formality of litigation? Will the other side have significantly more resources to apply towards the dispute? Would the other side benefit from delaying the resolution of the dispute and causing you to invest significant resources in the process? What will be the anticipated filing fees for each side in the dispute?

All in all, arbitration vs. litigation is not a decision that should be made without some careful consideration of the underlying issues and the consequences of each decision. There are valid reasons why parties gravitate to one option or the other. It is up to your business to decide what should be your organization's preferred standard with respect to a particular type of contract, and whether or not you will be willing to concede your position upon request by a particular client. You may realize that your preferred position is going to be the same in every case, or alternatively, that your position may require review on a scenario-by-scenario basis.

If you have questions regarding whether to accept or reject arbitration in a dispute resolution clause in a contract, please schedule a consultation today to discuss at <https://calendly.com/prinzlawoffice>.