Should I agree to an optional Arbitration clause in a contract?

Many contracts contain optional "arbitration" clauses. For example, the forms most commonly used in the sale of residential real estate in California contain an optional "arbitration" clause, with the clause becoming part of the contract if both the Buyer and Seller initial the clause. In other business and real estate contracts whether or not to include an "arbitration" clause is part of the contract negotiation.

There is a vast difference of opinion among attorneys regarding whether matters should be submitted to binding arbitration rather than litigated in court. In most (but not all) instances the arbitration process is faster and less expensive than litigating in court and the parties have more control in scheduling in arbitration than they do in court

Although the arbitration process is by no means inexpensive, it is often less expensive than litigation because there are less hearings to attend and less time is wasted waiting. Arbitration can often be completed in 6-12 months or less, whereas a lawsuit may take two or three years or even longer to be resolved. The time and cost savings with arbitration often make arbitration an attractive alternative to lawsuits.

However, there are also disadvantages to arbitration. The constitutional right to a jury is waived. Further, an arbitrator is not actually required to follow California law, procedure, or rules of evidence. For the most part an arbitrator can render a decision on whatever legal, evidentiary or factual basis he or she sees fit. While judges and juries can certainly make bad decisions, the court system allows a right of appeal whereby an appellate court can review the judge or jury decision and determine whether California law, procedure, and evidence rules were followed and can overturn the decision if they were not followed. In an arbitration, there is generally no right of appeal, and an arbitrator's decision, even if completely contrary to California law, cannot be set aside in most instances. Setting aside the decision of an arbitrator generally requires that you prove it was issued as a result of fraud, an undisclosed conflict of interest, or other intentional wrongdoing on the part of the arbitrator. Those cases are extremely rare, making it almost impossible to overturn an arbitrator's decision even if that decision is completely contrary to California law, procedure, or evidence rules.

Because of the potential "cons" of arbitration, the value of arbitration in potentially saving time and expense in appropriate circumstances must be weighed carefully against the waiver of rights to jury and appeal. I consider it to be essential that the arbitrator is familiar with the area of law that is the subject of the dispute and that he or she is competent, reasonable, and unbiased, so I am generally very reluctant to recommend arbitration of a dispute unless I know who the arbitrator will be. Agreeing to an arbitration clause in a contract and then having an arbitrator assigned or determined at a later date may save time and expense but can result in a decision that is fundamentally unfair and that leaves you with no meaningful remedy for that unfair result; and arbitration results are not predictable since arbitrators are not required to follow California law, procedure, or rules of evidence.