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The Arbitration Agreement: Tips for Drafting an Effective Arbitration Clause

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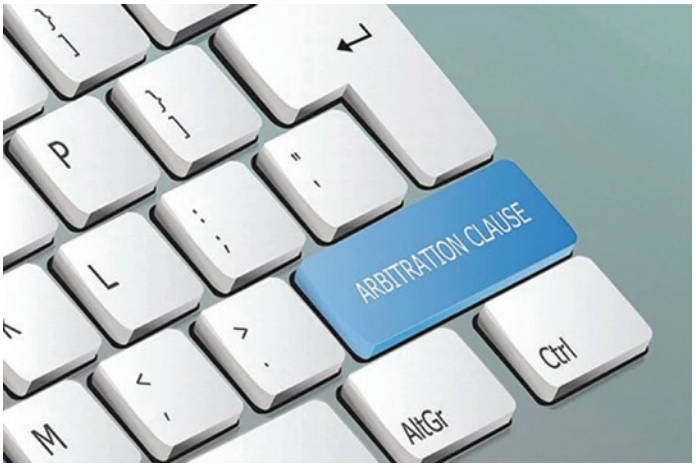
An agreement to arbitrate can empower the parties and afford them a good deal of control over the dispute resolution process. A well-constructed arbitration clause can provide certainty by outlining the process prior to a dispute. Once a dispute arises, it is far more unlikely the parties will reach an agreement as to how an arbitration should proceed. All too often, however, an agreement to arbitrate is one of the last clauses in a contract on which the drafter focuses. While the focus is typically—and appropriately—on the business terms of the agreement, careful consideration should still be given to an arbitration clause to ensure the client's goals in submitting to arbitration are met. Below are areas to consider when drafting an arbitration clause.

Scope. Be particular when identifying the scope of the arbitration agreement. Using terms such as "in connection with" the contract or "under the terms of" the contract have different meanings. Decide whether the parties want a broad arbitration clause that will include any disputes that relate to the agreement or prefer a more tailored agreement that only submits certain disputes to arbitration. If, for example, there is a particular aspect of a transaction that may come into dispute that would best be decided by an expert in that field, then carving out such a dispute may indeed be the prudent course. Just be clear about what is to be arbitrated and what is not. If a standard clause works, use it. But don't be afraid to modify the arbitration clause to suit your client's needs—just be thoughtful and cautious when doing so.



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Pre-arbitration requirements. Mediation can be a cost-effective tool to resolve disputes at the earliest stages. If you are so inclined, include a provision requiring mediation prior to any arbitration. Carefully consider how to incorporate such a requirement though. First, be very clear on whether this is a requirement prior to commencing arbitration or if mediation may—or even must—be explored concurrently. You want to avoid a situation where jurisdiction is challenged because a party fails to meet a mediation requirement. On the other hand, you also don't want to end up in a position where a difficult adversary can use the mediation requirements to avoid the onset of arbitration. Be clear on what counts as good-faith participation in the mediation and, ideally, provide time limits within

which the parties must perform their mediation obligations.

Forum and rules. When drafting an arbitration clause, it is important to carefully consider which arbitration forum to choose. The rules, locations, and arbitrators will differ by organization. This is an opportunity to choose a forum that is convenient and provides rules in line with how you envision the arbitration process. Factors to consider include the fee structure, the background and experience of the arbitrators, the location options for a hearing, the procedural rules, including with respect to the scope of discovery, and how much discretion will be available to the arbitrator. When selecting an arbitration body, consider the possibility that such choice may not exist in the future. The last few years have demonstrated that anything is possible and selecting a second choice can eliminate any delay or potential barrier to the arbitration process.

Arbitrator and panel selection. Parties to a contract often include standard arbitration provisions in an effort to avoid the time and costs of litigating their dispute in court. But when doing so, it is important to think through the specifics of the arbitration agreement you are drafting. If, for example, one of your goals is to keep costs down, you may want to rethink appointing a panel of three arbitrators. If you think an arbitrator that specializes in a specific industry will best understand the underlying contract and transaction, then be specific on the process for selecting the arbitrator or arbitrators and what their credentials must be. Just be careful not to be overly specific and create a situation where no eligible arbitrator can be designated. Also, if you choose to identify a particular individual or individuals, pick back-up options or identify a back-up process for selection if the designated arbitrators are not available. A potential arbitrator identified in the agreement may have retired or died since the time the agreement was drafted. Or he or she may simply be unavailable for too long a period and the parties prefer to expedite the process. It is better to think ahead about these possibilities and have a plan in place.

Confidentiality. Parties often select arbitration because it is a more private forum, as opposed to publicly-filed litigation. Moreover, arbitration affords the parties the flexibility to decide how much information regarding their dispute may actually be disclosed. Therefore, if confidentiality regarding the dispute is best for your client's business or for the particular contract and matter at hand, designate the arbitration as confidential in your agreement.

Finality of the award. One of the benefits of arbitration is that when it ends, it ends. Or at least it should. Nevertheless, all too often a party will challenge the arbitrator's award in court despite the very limited grounds for doing so. If, however, you have been bitten one too many times by an arbitrator that simply "got it wrong"—whether by mistake of law or fact—consider including the right to appeal or even to move to reconsider. A motion for reconsideration will give the arbitrator a chance to right his or her wrong. Whether an arbitrator is willing to do so will depend on the facts and the individual. But, ultimately, convincing a court to do so on such grounds will more often than not be a wasteful exercise.

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The purpose of an arbitration clause is to resolve disputes and not create them. Drafting an ambiguous or inadequate arbitration clause can lead to greater delay and expense, when saving time and money are two of the main factors parties typically have in mind in selecting arbitration. The arbitration clause should address the specific needs of the parties. Take the time before the agreement is finalized to think through these issues. Drafting an effective arbitration agreement is the first—and a key—step on the path to a productive arbitration.

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