

WANT TO BETTER CONTROL YOUR ARBITRATIONS?

10 STEPS TO WRITING A BETTER ARBITRATION AGREEMENT.

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Many of the complaints that I hear from litigators about arbitration could be resolved if the arbitration clause which forced the parties into litigation were written better. Arbitrations are, of course, a creature of contract.¹ Therefore, the parties' arbitration agreement² is often the beginning and end of the arbitrator's authority.³ The arbitrator is bound to give effect to the contractual rights and expectations of the parties "in accordance with the terms of the agreement."⁴ In fact, although the Federal Arbitration Act presumes that arbitration awards will be confirmed except upon a few narrow circumstances⁵ the arbitrator who acts beyond the scope of the authority found in the parties' arbitration clause risks having the award vacated.⁶ So, if you want the arbitrator to behave differently, write a better arbitration agreement. If you are not the person drafting the clause, consider persuading your client to allow you to alter the clause to better address your needs as a litigator. This approach may save the client from future difficulties. The following are ten items that you should consider when drafting your client's arbitration agreement.

1. SCOPE OF THE ARBITRATION

A well-drafted arbitration clause will define exactly which disputes are subject to mandatory arbitration. If the clause is too narrowly drafted, one party might try to litigate certain issues in Court, and others in the arbitration, reducing the value and effectiveness

of the agreement. Conversely, if the clause is too broad, some courts will presume that all issues should be resolved in the arbitration, and it will be very difficult for a party to convince a Court otherwise.

2. MEDIATION BEFORE ARBITRATION

Some agreements require mediation of the parties' differences prior to arbitration. These types of clauses may save the parties from looking weak by being the first to suggest mediation or settlement. On the other hand, mandatory mediation can sometimes increase costs and delay the inevitable. If mediation is desired, the agreement should determine the method for selecting the mediator and arbitrator, how the neutral's fee is to be paid (whether by one party or as a shared expense), and a deadline for how soon the mediation will be held after the demand. If no selection method is specified, but the parties have chosen a specific institution to administer the mediation/arbitration, the default selection rules of that institution will apply.

3. PAYMENT OF ARBITRATOR, ADMINISTRATIVE, AND ATTORNEY FEES

The parties should determine if each is responsible for one half of the arbitrator's fees and administrative



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costs or if the prevailing party is entitled to an award against the losing party for the cost of the arbitration. They should also agree whether each side will bear its own attorney fees, whether the prevailing party is entitled to an award of its actual or reasonable attorney fees, or whether the arbitrator is tasked with allocating all costs and fees between the parties.

4. NUMBER AND QUALIFICATION OF ARBITRATORS

Some practitioners argue that a three-arbitrator panel ensures a better result, as a majority of three respected neutrals must agree on any result, mitigating the chance of a ruling adverse to the evidence. As three-arbitrator panels can be very expensive, some drafters allow for a single arbitrator unless the claim is over a threshold amount where the extra expense may be more justifiable.

Regardless of the number of arbitrators required, the agreement should determine the method for selecting the arbitrators. If no method is specified, but the parties have chosen a specific institution to administer the arbitration, then the default selection rules of that institution will apply.⁷

Did you know that you can specify the qualifications of the arbitrator? If you

need someone with a minimum level of technical knowledge, specify that in the agreement and it will be required. If you desire someone who is a retired federal judge or has at least 20 years experience litigating in a particular area of law, you could require that as well. If the dispute is international in nature, consider adding a language requirement (“the arbitration will be conducted in the Spanish language”).

5. DURATION OF THE ARBITRATION

Give consideration to whether the types of arbitrations in which your client may be involved might benefit from limiting or expanding the duration of the arbitration. For instance, an agreement might provide that the arbitration award must be made within 90 days of the filing of the claim and that the arbitration must be completed in one calendar day, with each side limited to 4 hours of presentation time on a chess clock. In other circumstances, such a limitation might be wholly inappropriate.

6. VENUE & GOVERNING LAW

A well-crafted arbitration clause should determine where the arbitration will take place. In the absence of such a clause, if the parties cannot agree on a location, one will be determined by the arbitrator. Careful consideration should be given to what procedural and substantive law will apply to the arbitration. If you agree to arbitrate through a service such as AAA or JAMS, you may consider using its procedural rules and the substantive law of the forum state.

7. DISCOVERY AND MOTION PRACTICE

If the parties fail to designate the scope of allowable discovery in their arbitration agreement, the arbitrator may be guided by institutional procedural rules or personal ethos to limit discovery. Careful consideration should be given to the amount and type of discovery you want to allow in your arbitrations. Consider designating the types of document exchanges which must take place, the treatment of electronically stored information, the

number and location of depositions, and whether interrogatories and/or requests for production of documents or other discovery methods will be allowed. The parties should also consider whether motion practice should be allowed in the arbitration.

8. ARBITRATION SUBMITTED ON DOCUMENTS

In certain circumstances, the parties may deem it advantageous that matters be submitted to arbitration, but heard without live testimony or oral argument. Written submission arbitrations are considered by some to be a considerable advantage where one anticipates small-dollar value claims or where the desire is to obtain a speedy result.

9. LIMITATION AND TYPE OF AWARD

Parties may determine by contract whether the arbitrator has authority to award consequential or punitive damages, and may determine whether the arbitrator has authority to grant equitable or injunctive relief. The agreement should also determine the type of award (standard, reasoned, or with findings of fact and conclusions of law) the parties desire from the arbitrator.

A standard award designates the prevailing party and delineates the resulting award and allocating costs and fees as appropriate without explaining the reasoning of the award. A reasoned award contains a summary of the issues, questions, claims, and defenses, as well as the reasoning behind the arbitrator’s award. A reasoned award could require only one or two sentences, or it might require formal findings of fact and conclusions of law. The parties should specify whether they expect findings of fact and conclusions of law. Finally, although most arbitrations are not subject to appeal, the parties may agree to allow an appeal and designate the procedures for the same.

10. CONFIDENTIALITY

Although a recognized benefit of arbitration, confidentiality is not always guaranteed. Most arbitrations through a

recognized service will require adherence to rules requiring confidentiality. A private arbitration held outside one of these services may not always impose confidentiality on the parties. The parties should therefore specify whether they desire confidentiality.

CONCLUSION

Many of the fears clients and litigation attorneys have regarding arbitration can be obviated or mitigated if careful attention is paid when the contract is being drafted. Consider these ten steps the next time you are drafting a contract with an arbitration clause.

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¹ Federal Arbitration Act, 9 U.S.C. § 1 et seq. (hereinafter “FAA”) § 2 (agreements to arbitrate “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract”); *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 130 S. Ct. 2772, 2776, 177 L.Ed.2d 403 (2010); *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205, 1208 (9th Cir. 1998).

² Together with applicable arbitration rules and caselaw.

³ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, 1745-46, 179 L. Ed. 2d 742 (2011) (“In line with these principles, courts must place arbitration agreements on an equal footing with other contracts, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 126 S. Ct. 1204, 163 L.Ed.2d 1038 (2006), and enforce them according to their terms, *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989)”); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S. Ct. 3346, 3354, 87 L. Ed. 2d 444 (1985).

⁴ FAA § 4; see also *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 682, 130 S. Ct. 1758, 1774, 176 L. Ed. 2d 605 (2010).

⁵ FAA § 10.

⁶ “It is only when [an] arbitrator strays from interpretation and application of the agreement and effectively ‘dispense[s] his own brand of industrial justice’ that his decision may be unenforceable.” *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 671, 130 S. Ct. 1758, 1767, 176 L. Ed. 2d 605 (2010). FAA § 19(4)(a) allows an award to be vacated “where the arbitrators exceeded their powers.” See also Uniform Arbitration Act § 12(a)(3); Revised Uniform Arbitration Act § 20(a)(4). NRS 38.241(1)(d) dictates that a court shall vacate an arbitration award if the arbitrator exceeded his powers. *Health Plan of Nevada, Inc. v. Rainbow Med., LLC*, 120 Nev. 689, 697, 100 P.3d 172, 178 (2004).

⁷ Common administrators include, for example, the American Arbitration Association (“AAA”) (<https://www.adr.org/aaa>) or JAMS (<http://www.jamsadr.com/clauses/>). For arbitrations abroad, well known administrators include the London Court of International Arbitration (<http://www.lcia.org/>), the International Court of Arbitration (<http://www.iccwbo.org/about-icc/organization/dispute-resolution-services/icc-international-court-of-arbitration/>), and International Centre for Settlement of Investment Disputes (<https://icsid.worldbank.org/apps/ICSIDWEB/Pages/default.aspx>). Note that many of these administrators have sample agreement clauses for copying and pasting into your agreement, and regarding some or all of the topics covered in this article.

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