

# Strategies and Best Practices for Drafting Arbitration Clauses

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# Arbitration Basics

- Arbitration is a matter of **contract** and consent. Disputes are subject to arbitration if, and only if, the parties agreed to arbitrate those disputes.
- Terms, conditions, procedures, etc. are determined via contract.
- Arbitration is known for its procedural flexibility, which allows parties to engage in an efficient, confidential and fair process leading to a final, binding and enforceable award.
- Arbitration is also a useful in multi-national transactions, providing a neutral forum for dispute resolution.

# **Do I Want an Arbitration Agreement?**

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# Unique Characteristics | Pros/Cons of Arbitration

- Confidentiality/Privacy
- Class Action Waivers
- Speed/Efficiency (time, expense, finality)
  - Streamlined Procedures and Simplified Discovery/Evidence Processes
  - Limited Opportunities to Build Case, Dig for Evidence
- Subject Matter Expertise

# Unique Characteristics | Pros/Cons of Arbitration

- One shot–limited motion practice, no appeal
- No precedent
- Unpredictability/unconventional outcomes
- More Discretion | More Room for Compromised/Split Outcomes

# Strategies

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# Confidentiality

- **Objective – Stay out of Court**
  - Scope of Arbitration Clause
  - Delegation/Gateway Clauses
    - Issues of arbitrability decided in arbitration (waiver, Unconscionability, etc.)
  - Confidentiality Provisions (discovery, documents)
  - Reasoned/Non-Reasoned Award

# Class Action Waivers

- Must be conspicuous
  - Bold, Caps, Plain English
  - A conspicuous notice at or near the start of the consumer terms and conditions should state that they include an arbitration clause and class action waiver that will impact any dispute resolution, and direct the consumer where to find that provision.
  - Explain waiver of Jury Trial clearly



# Class Action Waivers

- **Online Transactions** – hyperlinks to arbitration agreements and class action waivers must be conspicuous, in the line of sight
- Crucial if telemarketing (TCPA)

# Enforceable

I understand and agree to email marketing, the Terms & Conditions which includes mandatory arbitration and Privacy Policy.

**Continue »**

# Not Enforceable

The screenshot shows a website footer on a blue background. On the left, there is a logo placeholder (red box), the text "Your happiness, backed by our Gajillion Percent Promise." with a smiley face icon, and social media icons for Instagram, Facebook, Twitter, and YouTube. Below this is a "Learn more" link. On the right, there is a "We're here to help." section with a phone icon and "1-800- [red box]" and a chat icon with "Chat with us". Below this is a grid of links: "About us" (Our story, Community, Careers), "Help" (How to order, How to read your prescription, Returns & exchanges, Subscription info, Gajillion percent promise, Best-price guarantee, FAQs, Contact us), "My account" (Order status, Reorder, Upload prescription, My prescriptions, My subscriptions), and "Resources" (Eye Society Blog, Insurance, FSA / HSA, Offers & coupons). At the bottom left is "Copyright [red box] All Rights Reserved." and at the bottom center are "Privacy practices", "Terms and conditions" (circled in red), "Accessibility", and "Ad Choices". At the bottom right is a "Live chat" button.

# Class Action Waivers

- Beware Unconscionability
  - Avoid heavy-handed, one-sided agreements with consumers and employees
    - Venue
    - Costs
    - Fee-shifting
    - Confidentiality
- Avoid Class Actions in Arbitration
- Consider Possibility of Mass Arbitration

# Speed/Efficiency (time, expense, finality)

- Agreed-upon timeline (hearing and award)
- Provisions Limiting Discovery
  - Number of depositions, document requests, etc.
- No Dispositive Motions
- Single Arbitrator

# Subject Matter Expertise | Sample Provisions

The arbitrator shall be a certified public accountant.

The arbitration proceedings shall be conducted before a panel of three neutral arbitrators, all of whom shall be members of the bar of the state of [specify], actively engaged in the practice of law for at least 10 years.

The panel of three arbitrators shall consist of one contractor, one architect, and one construction attorney.

# Best Practices

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# Enforceability

- Need clear, unmistakable intent to arbitrate, with an agreement that the arbitration award can be entered in court as a final judgment
  - Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial [or other] Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.



# Enforceability

- Use model clauses
- If drafting/revising—use concise, simple, plain English
- Scope of arbitration clause (parties)
- Scope of arbitration clause (subject matter)
  - **Example:** “arising out of” or “arising under” the contract (potentially restricted to contract claims only) vs. “relating to” or “in connection with” the contract (broader formulation to expand scope, e.g., to tort and quasi-contract)

# Other Considerations

- Carve-outs
  - *E.g.*, Injunctive Relief
- Specific Rules
  - Patent, Construction, Employment, Large/Complex Cases, etc.
- Seat/Venue

# Other Considerations

- Governing Law
- Mediation Requirement?
- Arbitrability – Delegation clause
- Consolidation and joinder

# Unique/Creative Concepts

- Baseball Arbitration
  - **Example:** Each party shall submit to the arbitrator and exchange with each other in advance of the hearing their last, best offers. The arbitrator shall be limited to awarding only one or the other of the two figures submitted
  - Facilitates reasonable, conservative demands/offers
  - Good when parties have a long-term or ongoing relationship

# Unique/Creative Concepts

- Limited range of recovery (High/Low)
  - **Example:** Any award of the arbitrator in favor of [specify party] and against [specify party] shall be at least [specify a dollar amount] but shall not exceed [specify a dollar amount]. [Specify a party] expressly waives any claim in excess of [specify a dollar amount] and agrees that its recovery shall not exceed that amount. Any such award shall be in satisfaction of all claims by [specify a party] against [specify a party].

# **International Arbitration Agreements**

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# International Arbitration Issues

- Institution
- Seat
- Law Governing the Arbitration Agreement
- Multi-Tiered Dispute Resolution Agreements

# Institution

- Choose an Established International Institution
  - ICC, LCIA, SIAC, PCA
  - Reputable “regional” institutions: Stockholm, Hong Kong, Vienna
- Specify/Incorporate Governing Rules
  - Which version applies: time of agreement, or time of arbitration?
- Support Staff/Decisional Body
- Alternative: *Ad Hoc* Arbitration



# Seat

- Selecting the arbitral seat, or place, of the arbitration can be critical
- The seat establishes the legal place of the arbitration
  - Domestic law governing the arbitral proceedings and annulments/set aside applications
  - Could become the substantive law if not expressly stated
- The seat does not dictate the physical location of the proceedings/hearings
- Agreement should specify the seat as a city and nation, not just a nation
- Considerations for Seat Choice:
  - neutrality of nation vis-à-vis the parties' nationalities
  - should be a New York Convention state with a developed arbitration law and good courts

# Governing Law Clause

- Include a Separate Governing Law Clause in the Contract
  - Expressly identify the law governing the contract

AND

- Expressly identify the law governing the arbitration agreement

# Governing Law – Contract

- Considerations:
  - Established independent court system?
  - Established and accessible body of law?
  - Civil law or common law?
  - Neutral law vis-à-vis party nationality?

# Governing Law – Arbitration Agreement

- Failure to expressly identify the law governing the arbitration agreement can lead to unintended consequences, varying resolutions, and expensive litigation
  - Law of the seat
  - Law of the underlying contract
- Considerations for Governing Law:
  - Pro-arbitration?
  - Limited remedies (no anti-suit injunctions, no domestic interim relief)?
  - Result of fee non-payment?

# Multi-Tiered ADR

- Negotiation (sometimes of principals/officers), mediation, arbitration
  - Very common
  - Inserts questions of conditions precedent
  - Should be clear on stop/start points between tiers
- Arbitration-Litigation or Litigation-Arbitration
  - Likely valid, but invite attacks on validity, res judicata, and public policy
- Arbitration - Appellate arbitration
  - Allowed under some arbitration laws
  - Should confirm when choosing seat

# Other International Arbitration Issues

- Language of Arbitration
  - Impacts selection of arbitrators and counsel
  - In what language is the evidence (documentary and testimonial)?
  - In what language is the underlying contract (could be default rule)?
- Currency of Award
  - Can introduce issues of exchange rate and conversion timing
- Availability of Pre- and Post-Award Interest (or other relief)
  - Not all measures of relief are available in all jurisdictions

# Standard IA Clause: ICC

- **All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.**
  - All disputes
    - Broad, not limited to “claims”
  - Arising out of or in connection with
    - Broad, should extend to non-contract claims
  - Shall be finally settled
    - Express statement of mandatory, binding, arbitration
  - Under the [ICC Rules]
    - Incorporates the rules (but does not specify a version), and impliedly selects the institution
  - By one or more arbitrators appointed in accordance with the [ICC Rules]
    - Flexible to adapt to needs of the particular dispute

# Standard IA Clause: LCIA

- Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.

The number of arbitrators shall be [one/three].

The seat, or legal place, of arbitration shall be [City and/or Country].

The language to be used in the arbitral proceedings shall be [ ].

The governing law of the contract shall be the substantive law of [ ].

- Any dispute
  - Broad, not limited to “claims”
- Arising out of or in connection with
  - Broad, should extend to non-contract claims
- including any question regarding its existence, validity or termination
  - Expressly broad scope
- shall be referred to and finally resolved by arbitration
  - Express statement of mandatory, binding, arbitration
- under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause
  - Incorporates the rules (but does not specify a version), and impliedly selects the institution
- Provides express fill-ins for number of arbitrators, seat, language, and substantive law of the contract
  - A separate identification of governing law of the arbitration agreement is still preferred







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