

Drafting Arbitration Clauses

By Sarah Reynolds and Natalie Tuseth

Because arbitration is a creature of contract, parties must agree to it as a form of dispute resolution. Most arbitral institutions provide standard arbitration clauses that parties can adopt and modify for their circumstances. For example, the standard International Chamber of Commerce arbitration clause reads as follows:

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.

In many cases, a standard institutional clause will be sufficient, but parties should consider whether it makes sense to include additional terms based on their circumstances. In drafting arbitration clauses, it is important to use precise and unambiguous language making it clear that arbitration is a mandatory, rather than an optional, path for dispute resolution. Courts will not enforce an arbitration clause that says parties “may” arbitrate, as opposed to “shall” arbitrate.

With respect to scope, parties can choose to arbitrate specific types of claims or “any and all claims arising from a contract,” which broadly sweeps in even non-contractual claims. It is important that parties are clear about their intended scope. Parties sometimes exclude specific matters from the arbitration agreement, e.g., claims for injunctive relief.

Parties can also designate in the clauses the number of arbitrators that will decide a dispute (typically one or three). Occasionally, parties will leave that question open in a clause so that they can decide when a particular dispute arises. The advantage with that approach is that parties can better calibrate the number of arbitrators to the value and complexity of the dispute. The disadvantage is that such “agreements to agree” often result in litigation if parties reach an impasse. As a middle ground, some parties choose to include a dollar amount scale (e.g., one arbitrator if the dispute is valued by claimant as \$1 million or less; 3 arbitrators if the dispute is valued above that threshold). Parties may also outline their arbitrator selection process such as

each party will select one arbitrator of a panel of three, or each party presenting a list of arbitrators to the designated arbitral institution.

Parties should also clearly identify the substantive law, or the law of the contract, in their clause. Parties should carefully consider the law that will apply to the merits of the dispute. Different jurisdictions interpret legal concepts differently (e.g., Japan generally does not allow for the concept of an efficient breach as the U.S. does).

Similarly, parties can select the applicable procedural law in the clause. Most arbitral institutions have a set of procedural rules that parties can apply, even if they are not availing themselves of the institution's services otherwise. Because some arbitral institution's procedural rules cannot be waived, parties should consider their preferences when selecting procedural law. Parties can also leave it to the discretion of the arbitrator to determine what procedural rules will apply.

Parties should also identify the "seat" of the arbitration. Important legal consequences flow from this choice. Challenges related to the award will be raised in the domestic courts of the seat. Some jurisdictions are more inclined toward judicial interference with arbitral awards than others. Parties should take care to select an arbitration-supportive jurisdiction as the seat. The law of the seat—*lex arbitri*—will also step in if there is a gap in applicable procedural rules. While the seat of the arbitration is generally the same as the venue (i.e., the place where the evidentiary hearing will take place), it does not have to be if there is a more convenient location.

Parties are encouraged to select a language in their arbitration clause. Failure to do so can result in the default rules of the seat dictating the language or requirements that submissions and hearings be conducted in multiple languages—a cost-increasing endeavor.

Parties should also consider whether it makes sense to specify arbitrator credentials that would be relevant to parties' dispute (e.g., admission in a jurisdiction, industry experience, language skills, etc.).

Further modifications may make sense, including excluding awards of punitive damages, directing how costs should be allocated upon final award, whether parties can seek interim injunctive relief in a domestic court, etc. As a general rule, thoughtful consideration of an arbitration clause during negotiations will help ensure fewer delays and roadblocks in the dispute resolution process on the back end.

Additional sources:

- Nastasja Suhadolnik & Cara North, *Guide to drafting arbitration clauses*, Corrs Chambers Westgarth (October 2024), <https://www.corrs.com.au/site-uploads/images/Arbitration-Guide-2024.pdf>.
- Anne Veronique Schlaepfer, *Drafting Arbitration Clauses in M&A Agreements*, Global Arbitration Review (May 14, 2024).
<https://globalarbitrationreview.com/guide/the-guide-ma-arbitration/5th-edition/article/drafting-arbitration-clauses-in-ma-agreements>.