

Tips on drafting arbitration clauses

Many contracts include arbitration clauses. All too often, during the drafting process, the arbitration clause receives less attention than other terms of the agreement. But an arbitration clause is too important to be treated as “boilerplate.” If a dispute arises, it plays a critical part in determining how the parties’ rights and obligations are determined.

Contracting parties and their lawyers should give careful consideration to the terms of the arbitration clause in any draft agreement. There is no “one-size-fits-all” arbitration provision. Different agreements, parties and circumstances call for different terms. That said, there are certain issues that should be considered when drafting any arbitration clause, as follows.

1 Scope of agreement to arbitrate: Specify the type of disputes that will be subject to mandatory arbitration and any exceptions—for example, “any disputes arising under or relating to this Agreement, other than claims under [specified articles], shall be referred to and resolved through final and binding arbitration.” Common exceptions include disputes relating to intellectual property rights and confidentiality covenants, and requests for injunctive relief prior to the appointment of the arbitrator or panel.

Because agreements to arbitrate generally do not extend to related parties of the signatories, consider whether there are other parties that should sign the agreement solely to ensure that they are proper parties to any arbitration (see story on p. 10 on this topic.)

2 Prerequisites to arbitration: Do the parties want non-binding mediation and/or negotiation of the dispute as a prerequisite to arbitration? If so, specify those requirements. Also provide a time period after which those steps will be deemed



STUART SVONKIN

to be completed to avoid any dispute over whether the prerequisites have been met.

3 Procedural law: Specify the law that governs procedural issues in the arbitration (the “*lex arbitri*”). Note that this is different from the question of what law governs the interpretation of the agreement (the agreement’s choice of law clause).

4 Administered versus ad hoc arbitration: Is the arbitration going to be administered by an institution (for example, the International Chamber of Commerce’s Court of International Arbitration (ICC), the London Court of International Arbitration (LCIA) or ADR Chambers) or is it going to be administered by the parties and the arbitrator (an “*ad hoc* arbitration”)? Consider the cost implications of having a proceeding administered.

5 Means for commencing arbitration: Make clear how a party is to refer a dispute to arbitration. This can be done, for example, by service of a notice of arbitration. Specify what must be included in such a notice.

6 Appointment of arbitrators: The arbitration clause should state how many arbitrators are to be used (the most common alternatives are a single arbitrator or a panel of three) and whether an arbitrator must have particular qualifications. Unless the clause adopts institutional rules that provide for a particular appointment process, it should specify how the arbitrator or members of the panel are to be selected.

The clause should make clear what happens if the parties are unable to agree on this—for example, in a single arbitrator case, that the arbitrator is to be appointed by agreement of the parties or, failing agreement, by a court of competent jurisdiction on application by any party. In the case of a panel, a common approach is for each party or side to appoint one arbitrator, and the two party appointees to choose the third arbitrator, who serves as chair of the panel. If a panel will be used, the clause should state that decisions of the panel may be made by a majority.

7 Seat of arbitration: The seat of the arbitration (the place where it will be conducted) should be specified, as it may inform which procedural law governs the arbitration and how awards may be enforced.

8 Language of arbitration: Specify the language in which the proceeding will be conducted, especially where the parties operate in different languages.

9 Confidentiality: If the confidentiality of the proceeding is important to the parties, the nature and scope of the confidentiality obligation should be addressed (see story on this topic on p. 9).

10 Remedies: Unless applicable institutional rules address the issue, the clause should state the remedies that the arbitrator or panel is authorized to award, as well as any remedies that the arbitrator or panel is not authorized to award. Injunctive relief, equitable remedies, and punitive and aggravated damages can be expressly included or excluded. The currency in which a monetary award is to be rendered should also be specified.

11 Form and timing of award: If the parties want the arbitrator or panel to render written reasons and/or to issue an award within a particular time period, that should be specified.

12 Costs: If the parties want the arbitrator or panel to have the power to make costs awards, they should make that clear. Consider specifying whether costs awards include the arbitrator/panel’s fees and/or other costs of the hearing, and whether costs can be awarded on an issue-by-issue basis.

13 Interest: Unless the underlying commercial agreement makes clear what rate of interest applies to any award made by the arbitrator or panel, address that issue in the arbitration clause.

14 Enforcement of award: Include language providing that any arbitral award can be enforced by having judgment entered on the award by any court of competent jurisdiction.

15 Appeal or review of award: Do the parties want an arbitral award to be final and binding? Do they want to allow for any appeal? If so, on what grounds—on questions of law, fact, mixed fact and law? Consider whether the procedural law governing the arbitration contains provisions regarding appeal or review and whether the parties wish to alter or “contract around” those default provisions. ■

Stuart Svonkin is a partner in the Litigation and Dispute Resolution group at Torys LLP in Toronto. He regularly advises clients on arbitration and other ADR-related issues and frequently represents clients in international and domestic arbitration proceedings, mediations and other ADR processes.

Arbitration centres’ rules vary

Confidentiality

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mercial arbitration context, parties often select rules of procedure that govern their arbitration. These rules are distinguished from rules of civil procedure.

Arbitration rules issued by various arbitration chambers may incorporate confidentiality obligations. When parties opt for these rules, they effectively incorporate and agree to the listed confidentiality obligations. This is an effective way to incorporate obligations of confidentiality. What it takes, however, is knowledge of the various rules. Different arbitration centres have different rules and these rules, in turn, set down varying confidentiality obligations. Some extend these obligations only to the parties, some extend to both parties and arbitrators and still others extend these duties to anyone involved in the process (which includes administering bodies and even witnesses). Choosing the right rules is critical.

Here are a few non-confidential thoughts Canadian lawyers should keep in mind, given that this topic is in a nascent state in our country:

- If confidentiality is needed, draft a clause—relying on implicit obligations will lead to headaches;
- Be sure to investigate the applicable law and statutes (provincial) relating to confidentiality obligations and mandatory disclosures to which your client is bound;
- You can make your life a bit easier by selecting rules that incorporate obligations—but be sure to read their scope to see on whom the obligations rest and to what extent. ■

Anthony Daims teaches international commercial arbitration, international sales law and contracts in the common law section of the University of Ottawa’s faculty of law and is a member of the faculty’s international law group.

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AD+REM
ALTERNATIVE DISPUTE RESOLUTION SERVICES INC.

phone 902.422.6729
email gus@gusrichardson.com
www.gusrichardson.com

