LINDQUIST & VENNUM PLLP

ACC Association of Corporate Counsel

Sample Arbitration Clauses with Comments

BRIEF DESCRIPTION

Arbitrations are creatures of contract. Thus, the parties can shape an arbitration proceeding to a great extent in their arbitration agreements. I have arbitrated dozens of cases as a sole arbitrator or as an arbitration panel chair or panel member. My experience from that is that well-drafted arbitration clauses can greatly improve the process help save everyone money and poorly drafted ones can complicate the process and cost everyone extra money. In some cases, inconsistent clauses can even threaten the viability of the result of the arbitration. Fortunately, by thinking ahead about the likely disputes that the parties could encounter and be required to arbitrate, you can help to shape the arbitration a way that will ensure an efficient and fair process and result.

BODY OF DOCUMENT

When considering drafting an arbitration clause, there are a number of basic questions to ask:

1. Should I arbitrate or litigate? That decision will turn in part on a number of factors. First, is the importance of the dispute to your company? If the matter could be of great importance, you might prefer to have a full legal process including appeal. You will also want to consider whether any dispute in which your company is likely to be involved will require extensive discovery, which often is not allowed in arbitration. In many cases, that is not a problem, so arbitration would be an advantage because discovery is much less likely to get out of hand in arbitration. You will also want to consider whether any likely disputes are more suitable for decision by a lawyer or other expert familiar with the technical or legal issues involved as opposed to a court or jury that probably will not be as familiar with such matters. Arbitration will generally get your company a faster decision.

2. Where should the arbitration take place? Of course, you will prefer your "backyard," as will the company on the other side of the deal. Often, though, you can find a neutral place or convince the other side your location works for everyone.

3. Should we have an administered arbitration? Having a third-party administrator will involve payment of a fee and costs, but often is the best option. Administrators such as the American Arbitration Association, CPR or JAMS have access to extensive information about qualified arbitrators in the area of your dispute and make the process of arbitrator selection much easier. Such administrators also typically help deal with issue of arbitrator disclosures to ensure impartial arbitrators. If you do not have an administered arbitration, you will need to specify carefully the rules that apply. You need to be careful if you just adopt an organization's rules but not its jurisdiction, though, since the rules contemplate that the administrating organization will do the administrating.

4. Should we have a single arbitrator or a whole panel? Panels tend to bring more collective wisdom to bear on the issues, but tend to be about three times more expensive than a single arbitrator. You will need to consider the size and importance of any likely disputes when drafting your arbitration clause.

5. How much discovery should we allow? The parties are able to either expand the usual scope of discovery or contract it in their arbitration agreement. If you want to be sure you receive documentary discovery, it makes sense to put that right in the agreement. If you think you will want some depositions, you should say so. Consider limiting them in number and duration. In many cases, it may be more important to limit the amount of discovery so the cost of the arbitration doesn't overwhelm the amount in controversy.

6. Should we put specific time limits on the date of the hearing, the time for award and the like? It is not uncommon for parties to specify that a hearing will take place sixty days from filing, that awards will be entered in ten days and the like. For small disputes this may work out, but be careful. If the dates are not realistic, you will find yourself having to demand that your witnesses drop whatever they are doing to get ready for a quick arbitration deadline. Generally, a good arbitrator will keep the proceedings on track without making the timing oppressive.

7. Should we require confidentiality of the arbitration? Arbitrators are bound to keep the arbitration confidential. The parties, however, are not unless they agree. Thus, a confidentiality agreement in the agreement to arbitrate will preserve confidentiality, a significant benefit of the arbitration process for those companies that prefer not to have their business disputes made public.

8. Should we provide for awards of attorneys' fees and the expense of the arbitration? This will depend a great deal on the likely nature of any dispute. Arbitrators are bound to uphold any contractual requirements of fee and cost shifting, so be sure that is what you want before you draft that in the agreement.

9. Do we want to have just a numerical award or do we want findings and conclusions or a reasoned award? Under some arbitration rules, the default award is simply a numerical award, e.g. "We find for the Claimant and against the Respondent in the amount of $X." If you want something more detailed, which many parties do, you can be sure you receive it by requiring it in the arbitration agreement. Most parties find findings and conclusions to be overkill, and opt for a reasoned decision, which gives the basic reasons for the decision and not all the detailed factual findings. While arbitration awards are difficult to overturn as the grounds for review are very limited, there is virtually no chance of overturning an award that has no reasoning associated with it. Of course, you must pay the arbitrator or panel their normal hourly rates to write a more elaborate decision, which increases the cost. Some parties feel that the extra rigor that writing the reasons out brings to the decision-making process is worth the extra expense.

With the above considerations in mind, here are some sample clauses. Most suggest AAA as the administrator. If you prefer a different administrator, they typically have sample clause to start with on their website. AAA has a very useful publication entitled "Drafting Dispute Resolution Clause: a Practical Guide." It is available at http://www.adr.org/si.asp?id=4125 or you can search the AAA site www.adr.org.

Clause for simple arbitration:

- 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 Arbitration Rules [including the Optional Rules for Emergency Measures of Protection]. The arbitration hearing shall take place in _____, _____ before a single arbitrator. Judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

Clause for more complex arbitration:

- Any controversy or claim arising from or relating to this contract or the breach thereof shall be settled by arbitration administered by the American Arbitration Association under its applicable Procedures for Large, Complex Commercial Disputes, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. The arbitration shall take place before a panel of three arbitrators in _____, _____.

Additions:

Injunctive relief. If you think it likely that you may need injunctive relief and would rather have that available in court, delete the reference to including the Optional Rules for Emergency Measures of Protection and insert the following:

- Notwithstanding the foregoing, either party may immediately bring a proceeding seeking preliminary injunctive relief in a court having jurisdiction thereof which shall remain in effect until a final award is made in the arbitration.

Expertise. If you think it would be beneficial to have an arbitrator or arbitrators with specific expertise, you can require that in a clause of this sort:

- The arbitrator shall be a certified public accountant.
- The arbitrator shall be a lawyer having at least ten years of experience in patent law.
- The arbitration panel shall consist of a lawyer having at least ten years of experience dealing with complex contracts, an accountant having experience in calculating lost profits, and a panel chair experienced in conducting complex arbitrations

Form of decision. As noted above, if you want to assure receiving a fuller decision in your case, you can be sure you will receive it by requiring it:

- The arbitrator(s) shall issue a reasoned decision.
- The arbitrator(s) shall issue findings of facts and conclusions of law.

If you want to be sure you don't pay for a fuller decision, you may want to specify that, too.

- The arbitrator(s) shall provide a standard form of Award.

Discovery. If you want to make sure that you have a certain form of discovery, you can specify that. You will want to be careful, however, that you don't provide for so much discovery that you sacrifice low cost and efficiency, two of the premier virtues of arbitration.

- The arbitrator shall require exchange by the parties of documents relevant to the issues raised by any claim, defense or counterclaim or on which the producing party may rely in support of or in opposition to any claim, defense or counterclaim, with due regard for eliminating undue burden and expense and the expedited and lower cost nature of arbitration. At the request of a party, the arbitrator may at his or her discretion order the deposition of witnesses. Depositions shall be limited to a maximum of three depositions

per party, each of a maximum of four hours duration, unless the arbitrator otherwise determines.

There are many other matters you could address in the discovery section. One might be a limit to electronic discovery, which can become very expensive. CPR has issued a very useful protocol on the disclosure of documents in arbitration. You can review it at: www.cpradr.org/Portals/0/CPR%20Protocol%20for%20distribution.pdf. (or search "CPR protocol disclosure of documents" in Google.)

The following are some sample clauses that have a similar approach, going from the least extensive to the most extensive:

- The arbitrator(s) shall only require the parties to disclose documents that they intend to rely on in presentation of their case at the hearing.

- The arbitrator(s) shall require the parties to disclose active electronic information maintained by only [specified number] custodians, from primary storage facilities (excluding backup facilities and tapes).

- The arbitrator(s) shall require disclosure of non-privileged materials, including electronic information, relevant to any parties' claim or defense, subject to limitations imposed by the arbitrator based on reasonable expense, duplication and undue burden.

Statutes of limitation. Some jurisdictions have cases holding that statues of limitations don't apply to claims in arbitration. You may want to make sure that they do apply with a clause like this:

- No demand for arbitration may be made after the date when the institution of legal or equitable proceedings based on such claim or dispute would be barred by the applicable statute of limitation.

Prohibition against punitive damages. You can limit the arbitrator's authority to award punitive damages by doing so in a clause like this:

- The arbitrator is not authorized to award punitive or other damages not measured by the prevailing party's actual damages

Awards of costs and fees. You can require such an award, forbid it, or leave it to the discretion of the arbitrator(s).

- If the arbitrator determines that a party has generally prevailed in the arbitration proceeding, then the arbitrator shall award to that party its reasonable out-of-pocket expenses related to the arbitration, including filing fees, arbitrator compensation, attorney's fees and legal costs.

- Each party shall bear its own costs, fees and expenses of arbitration.

- If the arbitrator determines that a party has generally prevailed in the arbitration proceeding, then the arbitrator may award to that party its reasonable out-of-pocket expenses related to the arbitration, including filing fees, arbitrator compensation, attorney's fees and legal costs.

Confidentiality. As noted above, arbitrators typically must keep the proceedings confidential, but the parties are not required to absent an agreement to do so. The following clause seeks to preserve confidentiality, while still allowing necessary reports and steps taken to enforce the Award. :

- The arbitration proceedings and arbitration award shall be maintained by the parties as strictly confidential, except as is otherwise required by court order or as is necessary to confirm, vacate or enforce the award and for disclosure in confidence to the parties' respective attorneys, tax advisors and senior management and to family members of a party who is an individual.

A fairly detailed sample clause. The clause below addresses most of the issues noted above in some way. It assumes a substantial dispute, but one for which you do not want to use a full panel with the relevant cost. It also assumes your dispute will require some discovery of the other side to fully support your position, but not the full-blown, expensive discovery we you normally see in court proceedings. Depending on your circumstance, you will likely want to address them differently and in more or less detail, but this should give you a relatively detailed starting point for drafting. Some arbitration practitioners and arbitrators would counsel you to use more general clauses and rely on the skill and experience of the arbitrator(s) to shape the process. Others prefer taking more control of the process by anticipating most common issues that arise and providing a fair amount of guidance to the arbitrator(s) in managing the process.

- Arbitration. (a) Any controversy or claim arising out of this Agreement or any alleged breach of this Agreement shall be resolved by means of binding arbitration before a single arbitrator in accordance with the then existing Commercial Arbitration Rules of the American Arbitration Association, including the Optional Rules for Emergency Measures of Protection. The arbitrator shall be a practicing attorney or retired judge with at least fifteen years total working experience as such. The arbitration shall be held in _____, ____ or any other place agreed upon at the time by the parties. No demand for arbitration may be made after the date when the institution of legal or equitable proceedings based on such claim or dispute would be barred by the applicable statute of limitation. The arbitrator is not authorized to award punitive or other damages not measured by the prevailing party's actual damages. An award of damages shall include pre-award interest at the rate of _____ percent from the time of the act or acts giving rise to the award.

  (b) A party may apply to the arbitrator seeking injunctive relief until an arbitration award is rendered or the dispute is otherwise resolved. A party also may, without waiving any other remedy, seek from any court having jurisdiction any interim or provisional relief that is necessary to protect the rights or property of that party pending the arbitrator's appointment or decision on the merits of the dispute. If the arbitrator determines that a party has generally prevailed in the arbitration proceeding, then the arbitrator shall award to that party its reasonable out-of-pocket expenses related to the arbitration, including filing fees, arbitrator compensation, attorney's fees and legal costs.

  (c) The arbitrator shall issue a reasoned award. Judgment upon the arbitrator's award may be entered in any court having jurisdiction. The arbitration proceedings and arbitrator's award shall be maintained by the parties as strictly confidential, except as is otherwise required by court order or as is necessary to confirm, vacate or enforce the award and for disclosure in confidence to the parties' respective attorneys, tax advisors and senior management and to family members of a party who is an individual.

(d) The arbitrator shall require exchange by the parties of (i) the name and, if known, address and telephone number of each person likely to have knowledge of relevant information, identifying the subjects of the information, and (ii) non-privileged documents, including those in electronic form, that are relevant to the issues raised by any claim, defense or counterclaim or on which the producing party may rely in support of or in opposition to any claim, defense or counterclaim. The arbitrator shall limit such production based on considerations of unreasonable expense, duplication and undue burden.

These exchanges shall occur no later than a specified date within 60 days following the appointment of the arbitrator. At the request of a party, the arbitrator may at his or her discretion order the deposition of witnesses. Depositions shall be limited to a maximum of three depositions per party, each of a maximum of four hours duration, unless the arbitrator otherwise determines. The arbitrator may allow such other discovery as he or she determines is reasonably necessary for a fair determination of the dispute. Any dispute or objections regarding discovery or the relevance of evidence shall be determined by the arbitrator. All discovery shall be completed within 120 days following the appointment of the arbitrator, unless the arbitrator otherwise determines.

ABOUT THE AUTHOR

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