

Five Practical Things to Consider, If You Include an Arbitration Clause in Your Contract

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If you've decided you want to arbitrate disputes relating to your contract or business arrangement, here are five practical things you ought to consider covering in your arbitration agreement, things that most people don't think about until it's too late:

1. *Pick the right arbitration service.* Many business arbitrations nowadays are conducted by the American Arbitration Association. But yours doesn't have to be. You can choose to use the AAA, and that brings with it a number of advantages, including established rules and procedures and a wide selection of experienced potential arbitrators. But there are other organizations that do arbitrations, such as JAMS, formerly known as the Judicial Arbitration & Mediation Services. Or you and your counter-party may be able to agree up front on a private individual arbitrator. Consider the costs and the advantages and disadvantages of each approach in drafting your arbitration agreement.

2. *Specify the number of arbitrators.* Under the AAA Commercial Rules, if the arbitration agreement doesn't specify whether the dispute is to be heard by a single arbitrator or by a panel, "the dispute shall be heard and determined by one arbitrator, *unless the AAA, in its discretion*, directs that three arbitrators be appointed." To state the obvious, three arbitrators will cost a lot more than a single arbitrator. Having three arbitrators also introduces more challenges in scheduling and in arbitrator selection. You may prefer having a panel of three decide your case, rather than entrusting all decisions to a single arbitrator. But, especially where there is a limited amount in controversy, the parties should make that decision, rather than leaving it to "the AAA, in its discretion."

3. *Specify where and how the arbitration will be held.* If your company is headquartered in Dallas, but you have customers or business relationships with persons and entities across the country, you probably want to specify that the arbitration will be held in Dallas, in accordance with Texas law. As may seem obvious, not only will that reduce your arbitration costs, it may also help ensure more consistent results. Further, knowing they will have to travel to Texas to arbitrate may dissuade some of your opponents from pursuing the process. So, you should specify that in your agreement, rather than leaving the "locale" of the arbitration to the AAA or the arbitrator. But the nation's recent experience during the COVID-19 pandemic has added a wrinkle. The value of specifying a Dallas "locale" for your arbitration—to say nothing of the quality of the parties' presentations, including witness testimony—may be diminished if the arbitration is conducted "virtually," by Zoom or some other remote-communication platform. So, consider adding a requirement that at least the final hearing in the arbitration will be

conducted in person in the specified locale, and not remotely through some electronic platform, unless all parties agree otherwise when it comes time for that hearing.

4. *Be specific about attorneys' fees.* Under the “American rule” followed in most court cases in the United States, each side in a lawsuit pays its own attorneys’ fees, unless (i) there is a statute that provides for an award of fees, usually to the prevailing party, or (ii) the contract between the parties does so. The AAA Commercial Rules, however, arguably introduce a twist. Rule 47(a) says the “arbitrator may grant any remedy that the arbitrator deems just and equitable,” and Rule 47(d) specifically allows for “an award of attorneys’ fees if all parties have requested such an award.” At least on their face, these provisions don’t adhere to the American Rule requiring a statutory or contractual basis for a fees award. You should carefully consider how you want fees to be handled by an arbitrator, including perhaps specifying in your agreement that the parties agree fees may not be awarded by the arbitrator under AAA Rule 47 other than as authorized by statute.

5. *Don’t go international if you don’t need to.* The AAA’s international arm is the ICDR—the International Centre for Dispute Resolution. It offers capabilities suited to international arbitrations, such as multilingual staff. But its administrative costs are higher than standard AAA costs. Cases will be shifted to the ICDR if the parties are from different countries, if much of the contract is performed outside the United States, or for several other reasons. Often, however, even when the technical bases for involving the ICDR are triggered, the parties do not need the ICDR’s additional resources—for example, when one party is a U.S. company and the other is incorporated in Canada or Mexico but operates largely from a U.S. facility, and all dealings between the parties have been and will be in English. Consider specifying in your arbitration agreement that any arbitration will be administered by the AAA or JAMS, and not the ICDR, to try to avoid unnecessary fees. In the same vein, you might consider including an agreement that all arbitration fees and expenses will be split equally between the parties, at least pending the final award. Otherwise, you may find yourself saddled with a fee schedule (for example, the AAA employment dispute schedule) that provides for fees and expenses to be paid largely or entirely by the business.

