



Guide for Drafting Arbitration Clauses

An Introduction for Transactional Lawyers

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Importance of Drafting Arbitration Clauses Correctly

- Arbitration is a creature of consent – it can only take place if the disputing parties expressly agree to resolve their disputes via arbitration
- Any ambiguity or uncertainty can lead to significant delays, increased costs, and in a worst case scenario, the absence of jurisdiction
- The time to "figure it out" is not when a dispute arises, but when a commercial agreement is being drafted



Mandatory Clauses: Introduction

- There are certain clauses that you **must** have in order for an arbitration clause to be effective:
 - First, you need a clause that **expressly states** that the parties agree that disputes will be resolved by arbitration;
 - Second, you need a clause that identifies what **arbitration rules** will be applicable to the arbitration;
 - Third, you need a clause that identifies the **legal seat** of the arbitration;
 - Fourth, you need a clause identifying the **number of arbitrators** who will hear the arbitration; and
 - Finally, you need a clause identifying the **language** in which the arbitration will take place.



Mandatory Clauses: Clauses Subjecting Disputes to Arbitration (I)

- **Guideline 1:** This clause should be drafted as broadly as possible and provide that all disputes under the commercial agreement shall be resolved by arbitration.
- **Guideline 2:** The clause should be drafted to cover not only all disputes "arising out of the contract", but also all disputes "in connection with or relating to" the contract.
- **Guideline 3:** The clause should expressly cover disputes relating to the existence, validity, or termination of an agreement.
- **Recommended Clause:** *All disputes arising out of or in connection with this agreement, including any question regarding its existence, validity, or termination, shall be finally and conclusively resolved by arbitration.*



Mandatory Clauses: Clause Subjecting Disputes to Arbitration (II)

- The parties may want to carve out certain disputes from an arbitration clause
 - *Example:* the parties may wish to refer discrete pricing or technical disputes to an expert, rather than an arbitration tribunal.
 - **Be careful!** It is often difficult to cleanly segregate different kinds of disputes under a single contract, and these types of clauses often give rise to jurisdictional issues.
 - If the parties insist on them, the disputes that are not subject to arbitration should be clearly identified and expressly carved out, with all other disputes subject to arbitration.
- **Recommended Clause:** *Except for matters that are specifically excluded from arbitration hereunder, all disputes arising out of or in connection with this agreement, including any question regarding its existence, validity, or termination, shall be finally resolved by arbitration.*



Mandatory Clauses: Clause Setting Out Arbitration Rules (I)

- The parties must designate a set of arbitration rules that will apply to an arbitration
- These set out the procedural framework for the arbitration. For example:
 - How can an arbitration be commenced?
 - How are arbitrators to be appointed?
 - How are arbitrators to be challenged or disqualified?
 - What to do if an arbitrator is disqualified?
 - The procedures to be followed during the arbitration.
- Absent a reference to a set of arbitration rules, it will be unclear to the parties how any of the foregoing are to take place, which will inevitably lead to delays and increased costs



Mandatory Clauses: Clause Setting Out Arbitration Rules (II)

- There many different sets of rules, which can be broken down into two categories
- **Institutional arbitrations** are administered by an arbitral institution (*e.g.*, ICC, LCIA, ICDR, AAA, etc.) for a fee
 - They do not play a role in the merits of a dispute, but ensure that an arbitration runs smoothly and that procedural irregularities are avoided
- ***Ad hoc* arbitrations** are not administered by any institution, and the burden of running the arbitration falls on the parties and the arbitrators they appoint
 - They are less expensive than institutional arbitrations, however the parties lose all the support that an arbitration institution provides, and run a greater risk of procedural irregularities occurring



Mandatory Clauses: Clause Setting Out Arbitration Rules (III)

- Institutional arbitrations are recommended for disputes that are relatively complex or involve large dollar amounts
- *Ad hoc* arbitrations are generally recommended for disputes that are relatively straightforward or involve lesser dollar amounts
- **Recommended clause:** Always use language suggested by the relevant arbitration rules, but most will read as follows:

All disputes arising out of or in connection with this agreement, including any question regarding its existence, validity, or termination, shall be finally and conclusively resolved by arbitration under the [Name of the Rules].



Mandatory Clauses: Clause Setting Legal Seat of Arbitration

- The seat or place of arbitration is the "juridical or legal home" of the arbitration
- The law of the seat governs certain procedural aspects of the arbitration:
 - Courts at the seat are generally the only courts empowered to provide judicial assistance;
 - Courts at the seat are the only courts able to set aside an arbitral award; and
 - The legal seat can also affect the enforceability of an award.
- Parties should consider setting the legal seat of the arbitration in:
 - A New York Convention State so that enforceability will not be an issue;
 - A jurisdiction whose laws are supportive of arbitration; and
 - A jurisdiction whose courts are arbitration friendly.
- **Recommended Clause:** *The place or legal seat of arbitration shall be [City/Country].*



Mandatory Clauses: Clause Setting Number of Arbitrators

- Typically, either one arbitrator or three, but in any case, an odd number.
- Benefits of going with one arbitrator:
 - Less expensive, as only paying for one arbitrator; and
 - Quicker proceedings.
- Benefits of going with three arbitrators:
 - Better equipped to deal with complex issues of fact and law;
 - Reduces the risk of irrational or unfair results; and
 - Gives the parties more control over process.
- Generally, the more expensive and complicated a dispute, the more the parties should err on the side of appointing three arbitrators
- **Recommended Clause:** *There shall be [one or three] arbitrator[s].*



Mandatory Clauses: Clause Setting Language of Arbitration

- Where the parties or related parties come from different countries, the language of the arbitration should always be specified.
- Even if the parties are all from the same jurisdiction, in the future a party might sell its interest in the commercial agreement to a third-party from another country.
- Multi-language arbitrations are possible, but they always cause delays and increased costs
- **Recommended Clause:** *The language of the arbitration shall be [Language].*



Mandatory Clause: Model Clause

All disputes arising out of or in connection with this agreement, including any question regarding its existence, validity, or termination, shall be finally and conclusively resolved by arbitration under the Rules of Arbitration of the International Chamber of Commerce.

- (a) The legal seat of the arbitration shall be Calgary, Alberta, Canada.*
- (b) The number of arbitrators shall be three.*
- (c) The language to be used in the arbitral proceedings shall be English.*



Optional Clauses: Introduction

- The previously discussed mandatory clauses are just the bare minimum provisions that need to exist in an arbitration clause in order for an arbitration to be possible.
- However, every set of arbitration rules in existence differ from one another, and all contain different gaps in their procedure.
- Therefore, there are an additional number of provisions that the parties would be well-advised to insert into their arbitration clauses, depending on which arbitration rules they select, and the commercial agreement being negotiated
- **Always seek expert advice from an arbitration specialist when considering these optional clauses.**



Optional Clauses: Provisional and Conservatory Measures (I)

- Provisional and conservatory measures are key tools in a traditional court's toolbox
 - *Example:* Injunctions, freezing orders, security for costs, preservation of assets, etc.
- An arbitration tribunal cannot provide provisional or conservatory measures unless this authority is expressly granted by the parties.
 - Otherwise parties need to go to the courts for interlocutory measures, which could result in overlapping proceedings and inconsistent rulings
 - Most arbitration rules grant this authority by default – but, some do not.
- Another issue is a party's ability to seek provisional and conservatory measures before an arbitration tribunal is constituted.
 - The arbitration clause should expressly grant the parties the ability to seek provisional or conservatory measures from a court prior to the tribunal's constitution.



Optional Clauses: Provisional and Conservatory Measures (II)

Recommended Clause: *The arbitral tribunal appointed under this arbitration clause shall be authorized to issue provisional or conservatory measures. However, each party retains the right to apply to any court of competent jurisdiction for provisional and/or conservatory relief:*

(i) prior to the constitution of the arbitral tribunal, or

(ii) in the absence of the jurisdiction of the arbitral tribunal to rule on provisional or conservatory measures in [the legal seat of the arbitration].

The parties agree that seeking and obtaining such provisional or conservatory measures shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.



Optional Clauses: Discovery and Evidence

- Most arbitration rules grant tribunals broad discretion on discovery and evidence.
 - In recent years, however, discovery in arbitration has gotten out of control as disputes have become more and more complex
 - Parties should include provisions in their arbitration clauses that sets out the rules of discovery and evidence the tribunal ought to apply in the arbitration.
- The simplest and most effective way to do this is by adopting the *IBA Rules on the Taking of Evidence in International Arbitration*.
- **Recommended Clause:** *In addition to the authority conferred upon the arbitral tribunal by the [Applicable Arbitration Rules], the arbitral tribunal shall have the authority to order production of documents in accordance with the IBA Rules on the Taking of Evidence in International Arbitration.*



Optional Clauses: Confidentiality (I)

- Parties to an arbitration frequently assume that the arbitration proceedings are confidential.
 - While many arbitration rules require that the proceedings be confidential, a number of them do not.
 - Further, in many jurisdictions, parties are under no duty to keep the existence or content of the arbitration proceedings confidential.
- Therefore, if the parties want the proceedings to be confidential, they should address this issue in the arbitration clause, subject to reasonable limitations.



Optional Clauses: Confidentiality (II)

Recommended Clause: *The existence and content of the arbitral proceedings, including any ruling or award, the identity of witnesses, documents and information produced by one party to another, and materials prepared for the purpose of the arbitration, shall be kept confidential by the parties and the arbitral tribunal and shall not be used for any purpose other than in connection with the arbitration. The Parties shall also take reasonable efforts to ensure that their officers, employees, witnesses, representatives, and consultants comply with the obligation of confidentiality herein. Notwithstanding all the foregoing, the Parties shall have the right to disclose the foregoing information: (i) to the extent that disclosure may be required of a party to fulfill a legal duty, protect or pursue a legal right, or enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority, (ii) with the consent of all parties, (iii) where needed for the preparation or presentation of a claim or defense in this arbitration, (iv) where such information is already in the public domain other than as a result of a breach of this clause, (v) where such information is already in the possession of a party prior to its disclosure by another party, or (vi) by order of the arbitral tribunal upon application of a party.*



Optional Clauses: Allocation of Costs and Fees (I)

- Many sets of arbitration rules set out how the costs of the arbitration, each party's legal fees, and each party's expert fees are to be allocated at the conclusion of the arbitration:
 - Some expressly say that the losing party will bear all of the costs of the arbitration and all of the other party's legal and expert fees;
 - Some are more circumspect leaving it to the discretion of the tribunal; and
 - Some say nothing at all.
- To avoid any uncertainty, the parties should consider addressing the issue of costs and fees directly in their arbitration clauses.



Optional Clauses: Allocation of Costs and Fees (II)

- **Recommended Clause Granting the Tribunal Discretion:** *The arbitral tribunal may include in its award an allocation to any party of such costs and expenses, including lawyers' fees as the arbitral tribunal shall deem reasonable.*
- **Recommended Clause Providing Costs and Fees to the Winner:** *The arbitral tribunal may include in its award costs and expenses, including lawyers' fees, to the prevailing party, as determined by the arbitral tribunal in its discretion.*
- **Recommended Clause Allocating Costs and Fees in Proportion to Success:** *The arbitral tribunal may include in its award an allocation to any party of such costs and expenses, including lawyers' fees, as the arbitral tribunal shall deem reasonable. In making such allocation, the arbitral tribunal shall consider the relative success of the parties on their claims and counterclaims and defenses.*
- **Recommended Clause if No Allocation of Costs and Fees is Desired:** *All costs and expenses of the arbitral tribunal shall be borne equally by the parties. Each party shall bear all of its own costs and expenses (including of its own counsel, experts and witnesses) involved in preparing and presenting its case.*



Optional Clause: Finality of Arbitration

- In most jurisdictions, arbitral awards are final, binding, and not subject to any appeal and only very limited grounds of review.
- However, in some jurisdictions, appeals from arbitrations are permissible
 - *Example:* In Alberta, under the *Arbitration Act*, domestic arbitrations may be appealed as a matter of right, unless such appeals are expressly excluded by the parties in their arbitration clause
- **Recommended Clause:** *Any award of the arbitral tribunal shall be final, non-appealable, and binding on the parties. The parties expressly waive any right of appeal to any court or judicial authority to the fullest extent permitted by law, other than as may be necessary to enforce or confirm any arbitration award.*



Optional Clauses: Multi-Party Clauses (I)

- If your commercial agreement involves more than two parties, arbitration clauses can get very complicated.
 - How are arbitrators appointed if there are more than two parties?
 - If only two parties go to arbitration, is the result final and binding on the non-disputing parties?
 - Should the non-disputing parties have access to a full record of the proceedings?
 - Should the non-disputing party be able to intervene in the arbitration if it becomes apparent its rights and obligations will be affected?
 - Should the disputing parties be able to compel a non-disputing party to join an arbitration where necessary to resolve a dispute?



Optional Clauses: Multi-Party Clauses (II)

- Arbitration clauses in a multi-party context are extremely complicated, and **specialized advice should always be obtained in these circumstances**
- **Guideline 1:** The clause should address the consequences of the multiplicity of parties for the appointment of arbitrators
 - Where there is one arbitrator, the parties should require that all the disputing parties agree on the arbitrator, absent which an "appointing authority" should be designated to appoint
 - Where there are three arbitrators, the parties on each "side" of a dispute should appoint one arbitrator each, with the third appointed by the two party-appointed arbitrators. Failing agreement, an "appointing authority" should be designated to appoint.



Optional Clauses: Multi-Party Clauses (III)

- **Guideline 2:** The clause should expressly allow for intervention and joinder
 - The absence of intervention and joinder provisions can lead to overlapping proceedings, conflicting decisions, and associated delays, costs, and uncertainties
 - The arbitration clause should require that whenever an arbitration is commenced, notice should be issued to all contracting parties, whether they are disputing parties or not, and a clear time period should be provided after the notice is issued for each contracting party to "intervene" or "opt-in" to the arbitration and for each contracting party to compel another contracting party to join the arbitration
 - Following the expiration of this time period, all contracting parties are bound by the result of the arbitration, whether they are disputing parties or not



Optional Clauses: Multi-Party Clauses (IV)

- **Guideline 3:** The clause should expressly allow for consolidation of arbitrations involving the same facts or law
 - The absence of consolidation provisions can lead to overlapping proceedings and conflicting decisions
 - The arbitration clause should require that whenever two or more arbitrations are commenced within a certain timeframe with respect to the same facts or law, they should automatically be consolidated into a single proceeding
 - Where two or more arbitrations are commenced a significant time apart, the parties should be required to make submissions to the earliest constituted tribunal, which will have the discretion to allow consolidation or not
 - It is important to state that where two or more arbitrations are governed by different sets of legislation – e.g., international arbitration vs. domestic arbitration – that shall not be "consolidated" but "heard concurrently before the same tribunal"



Optional Clauses: Multi-Contract Clauses (I)

- Where a single transaction involves several related contracts, arbitration clauses can get extremely complicated
 - Assume there are three contracts in a transaction: Contracts 'A', 'B', and 'C'
 - Parties '1' and '2' are parties to Contract 'A'; Parties '2' and '3' are parties to Contract 'B'; and Parties '4' and '5' are parties to Contract 'C'
 - What happens if a dispute arises that involves all of Contracts 'A', 'B', and 'C'?
 - A tribunal constituted under Contract 'A' can only exercise jurisdiction over Parties '1' and '2' – it cannot exercise jurisdiction over the parties to Contract 'B' and 'C'
 - This can lead to overlapping, parallel proceedings over the same facts and law, that could lead to manifestly inconsistent results



Optional Clauses: Multi-Contract Clauses (II)

- Arbitration clauses in a multi-contract contexts are extremely complicated, and **specialized advice should always be obtained in these circumstances**
- **Guideline 1:** A straightforward solution is to establish a standalone dispute resolution protocol that is signed by all the parties to the various interrelated contracts and that is incorporated by reference into every contract.
 - *Example:* An "Umbrella Arbitration Agreement" that applies to all contracts and parties in a transaction, and that all parties sign
 - The parties then expressly agree that a tribunal constituted under the Umbrella Arbitration Agreement can exercise jurisdiction with respect to any of the contracts, and any of the parties



Optional Clauses: Multi-Contract Clauses (III)

- **Guideline 2:** If it is not feasible to conclude a standalone dispute resolution protocol, the parties should consider including in every agreement in the transaction a clause that submits each party to the jurisdiction of tribunals constituted under any of the interrelated agreements, in order for joinder and intervention to be possible
 - Every agreement in the transaction should have identical or at least complementary arbitration clauses in order for this to work
 - *Arbitrations cannot be consolidated where they apply different arbitration rules, a different number of arbitrators, a different language, or a different seat*
 - Every agreement in the transaction should expressly acknowledge that joinder and intervention is possible, and that a tribunal constituted under any of the agreements can exercise jurisdiction over the parties to the other agreements



Optional Clauses: Multi-Contract Clauses (IV)

- **Guideline 3:** If it is not feasible to conclude a standalone dispute resolution protocol, the parties should also consider including in every agreement in the transaction a clause that allows for the parties to consolidate any arbitrations commenced in relation to the same subject matter under any of the interrelated agreements.
 - Again, every agreement in the transaction should have identical or at least complementary arbitration clauses
 - *Arbitrations cannot be consolidated where they apply different arbitration rules, a different number of arbitrators, a different language, or a different seat*
 - Every agreement in the transaction should expressly acknowledge that consolidation is possible, and that a tribunal constituted under any of the agreements can exercise jurisdiction over the parties to the other agreements



Optional Clauses: Multi-Tiered Dispute Resolution Clauses (I)

- It is not uncommon for agreements to provide for negotiation, mediation, or some other form of alternative dispute resolution as a preliminary step before arbitration.
- Generally speaking, these types of clauses should be avoided as they can create unnecessary conditions precedent to the commencement of an arbitration
 - There is nothing to prevent the parties from negotiating or mediating prior to or even during arbitration if they so choose
- However, if the parties insist on a multi-tiered dispute resolution clause, they must be very carefully drafted, as poorly drafted clauses can be used to gain a delay or other tactical advantage by a party
- In extreme circumstances, poorly drafted clauses can even be used to prevent an arbitration from ever being commenced



Optional Clauses: Multi-Tiered Dispute Resolution Clauses (II)

- Arbitration clauses in a multi-tiered dispute resolution clauses have many pitfalls, and **specialized advice should always be obtained in these circumstance**
- **Guideline 1:** The clause should specify a short period of time for negotiation or mediation, triggered by a defined and indisputable event, after which either party can resort to arbitration without anything more
 - The negotiation or mediation period should be triggered by a written request to negotiate
 - The parties should then be given a short and specific period of time to negotiate, after which either party can commence an arbitration
 - The clause should specify that even if no negotiation or mediation actually occurs, the parties can proceed to arbitration after the specified time elapses



Optional Clauses: Multi-Tiered Dispute Resolution Clauses (III)

- **Guideline 2:** The clause should never require that the parties negotiate or mediate in "good faith" before an arbitration can be commenced.
 - This creates a dangerous condition precedent to arbitration
 - Requiring that the parties negotiate in "good faith" allows a party to potentially interminably delay an arbitration from being commenced by arguing that the other party didn't negotiate in good faith
- **Guideline 3:** The clause should expressly state that the triggering event for negotiation or mediation suspends or tolls prescription or limitation periods.
 - If the negotiation or mediation period would prevent a party from commencing an arbitration prior to the expiration of a limitation period, it could cause a party to be time-barred from making a claim



Optional Clauses: Time Limits

- Parties sometimes try to save costs and time by stipulating that an award must be made within a fixed period of time from the commencement of arbitration.
- But the parties must be careful not to *require* that an arbitration be completed within a certain period of time, as this can result in an unenforceable award
- A time limit clause should set out the time within which the parties wish to see the arbitration concluded, but allow the tribunal to extend those time limits to avoid the risk of an unenforceable award
- **Recommended Clause:** *The parties shall request that the arbitral tribunal render the award within [X] months of the constitution of the arbitral tribunal, unless the arbitral tribunal determines, in a reasoned decision, that the interest of justice or the complexity of the case requires that such time limit be extended.*



Optional Clause: Continuing Performance

- Parties often stop performing their obligations under an agreement once an arbitration is commenced by another party as a pressure tactic.
- In order to avoid this, parties frequently insert a clause in which they agree to perform their obligations under an agreement during the pendency of an arbitration.
- **Recommended Clause:** *The parties agree that performance under this agreement shall continue during the resolution of a dispute by arbitration under this clause.*



Optional Clause: Currency of Awards

- Often, transactions involve multiple currencies.
- In order to minimize the risk of currency fluctuations, parties may wish to agree that all awards be rendered in a certain currency.
- **Recommended Clause:** *Awards shall be made and payable in U.S.dollars.*



Importance of Getting Expert Advice

- Every set of arbitration rules is different, uses different terminology, and contains different gaps that an arbitration clause must fill.
- Additionally, in contexts where there are multiple parties, multiple contracts, or multi-tiered dispute resolution procedures, arbitration clauses need to be lengthy and detailed to avoid divesting a tribunal of jurisdiction.
- It is imperative that in these circumstances that you seek advice from an arbitration specialist to review the arbitration clause you are contemplating.