Arbitration Clauses: Why, When, & How?

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Who Am I?

- Arbitrator & mediator, affiliated with JAMS
- 25 years full-time experience in arbitration practice
- Particular industry expertise in technology, telecom, internet, entertainment, life sciences, other IP, and joint venture disputes
- Significant investment as well as commercial experience
- Based currently in Los Angeles but previously in Tokyo (2 yrs), Hong Kong (2 yrs), Shanghai (4 yrs), and New Zealand (4 yrs)
- Maintain offices in NY, London, and San Francisco as well as Los Angeles
- Former partner in & chairman/CEO of Coudert Brothers
- Former U.S. Ambassador to New Zealand & the Ind. State of Samoa
- Members of bars of California, New York, & Washington, DC; licensed as a solicitor in England & Wales
- Chartered Arbitrator; Fellow of the College of Commercial Arbitrators

DISPUTE RESOLUTION OPTIONS

Potential Mechanisms

- Walk-away
- Negotiation
- Mediation
- Arbitration
- Hybrids
- Litigation
- Self Help

Choice Depends on Your Objectives

- To insure (or avoid) a particular venue?
- To preserve a cordial, mutually beneficial business relationship?
- To exert maximum pressure on other side?
- To obtain a speedy, binding result?
- To maximize predictability of outcome?
- To preserve flexibility?
- To set (or avoid) precedent?
- To minimize or avoid public scrutiny?

Arbitration - Pros

- Private form of dispute resolution
- Available and structured by agreement of the parties
- Neutral decision-makers
  - Not part of any national government system
  - Often chosen by the parties
- Results are final and binding
  - Limited bases for appeal or challenge
- Confidential
- Commercial awards are widely enforceable under state law & the New York Convention

Arbitration - Cons

- May not be well suited to every case and circumstance
- Litigation may be preferable for some disputes, including:
  - Where multiple parties
  - Where summary judgment is desirable
  - Where binding precedent is important
  - Where preserving appeal is desirable
  - Where enforcement will be sought in same jurisdiction as the proceedings
- Parties pay the costs of arbitration (incl. the arbitrators' fees)

New York Convention

- United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958
- ~ 160 contracting States, including most major economies
- A contracting State agrees to:
  - Recognize and enforce arbitration agreements
  - Recognize and enforce arbitral awards
  - Not impose substantially more onerous conditions or higher costs on foreign awards than domestic awards
- Many contracting States have opted to only apply the Convention on a reciprocal basis, *i.e.*, only to awards rendered in another contracting State
- Establishes very limited grounds for refusing to enforce an award

Commercial vs. Investment

- Commercial arbitration
  - Arises from an arbitration agreement in a contract
  - State law governs the dispute
  - Usually between two corporate entities
  - Can involve a State entity
- Investment arbitration
  - Arises from an investment treaty, a State's national investment law, or an investment agreement
  - International law governs the dispute
  - A State is a party
  - Has proliferated w/ Bilateral Investment Treaties (BITs)
    - » currently more than 3,000 BITs worldwide
- Not always a bright-line difference

THE ARBITRATION CLAUSE

Consent as the Cornerstone

- Arbitration is a creature of contract
  - All parties must agree, whether before or after a dispute arises
  - Usually in the form of an arbitration clause in the parties' written contract(s)
  - Can be in the form of a submission agreement after a dispute has arisen
- Recently, there has been a chipping away at the paramount importance of consent, with expanded joinder and consolidation rules

Usual Components

- Exclusion of jurisdiction of national courts
- Types of disputes to be submitted to arbitration (if not all)
- Administering institution (if any)
- Procedural rules
- Governing law (sometimes found elsewhere in contract)
- Number of arbitrators and appointment method
- Seat (vs. location) of arbitration
- Language of arbitration

Additional Components?

- The “usual” components are not mandatory
- The parties may add or subtract terms as they wish
- Examples:
  - Scope of discovery
  - Pre-conditions to arbitration
  - Exclusion or provision of certain remedies
  - Confidentiality
- Beware of unintended consequences
  - Being clever or over-inclusive can backfire

How Specific Should The Clause Be?

- If specific:
  - May be more difficult to negotiate at time of contracting
  - Reduces likelihood of disagreement between the parties over terms and procedures once a dispute arises
  - Could limit flexibility after dispute arises
  - Increased risk of creating a “pathological” agreement
- If broad:
  - Maximizes flexibility once a dispute arises
  - Risks provoking disagreements and tactical jockeying among the parties once a dispute arises
  - Could create paralysis or delays if parties cannot agree on key terms or procedures once a dispute arises

JAMS Standard Domestic Clause

"Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in [insert the desired place of arbitration] before [one/three] arbitrator(s). The arbitration shall be administered by JAMS pursuant to its Comprehensive Arbitration Rules and Procedures [and in accordance with the Expedited Procedures in those Rules] [or pursuant to JAMS' Streamlined Arbitration Rules and Procedures]. Judgment on the Award may be entered in any court having jurisdiction. This clause shall not preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction."

JAMS Standard International Clause

"Any dispute, controversy or claim arising out of or relating to this contract, including the formation, interpretation, breach or termination thereof, including whether the claims asserted are arbitrable, will be referred to and finally determined by arbitration in accordance with the JAMS International Arbitration Rules. The tribunal will consist of [three arbitrators][a sole arbitrator]. The seat of the arbitration will be [location]. The language to be used in the arbitral proceedings will be [language]. Judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof."

Institutional vs. Ad Hoc Arbitration

- Key first decision to make
  - *Ad hoc*: arbitrators and parties determine and manage *everything*
  - Institutional: for a fee, a third-party entity will manage the arbitration for you
- Functions handled by the institution include:
  - Providing an established, comprehensive set of procedural rules
  - Oversight of administration of the case, scheduling, and the final award
  - Resolving challenges to or problems with the arbitrator(s)
- Major arbitral institutions include:
  - JAMS
  - International Chamber of Commerce
  - AAA / International Center for Dispute Resolution
  - London Court of International Arbitration
  - International Centre for Settlement of Investment Disputes (ICSID)
  - Hong Kong International Arbitration Centre
  - Singapore International Arbitration Centre

Pros & Cons

- Institutional arbitrations may involve increased costs, but the established procedures and administrative support can be *very* useful
- *Ad hoc* arbitration may be more flexible and sometimes more cost-effective, but it can produce gridlock, delay, and inefficiencies if a party is uncooperative, inexperienced, or unduly aggressive
- Bottom line: An institution with excellent case mgmt. culture (*e.g.*, JAMS) is usually your best friend

Choice of Law

- Always select the national law that will govern the *substantive resolution* of the dispute
  - If the parties don't select, the arbitrator will decide what law or combination of laws to apply
- Often treated as a separate provision elsewhere in the contract
- Is a fundamental decision that is often insufficiently considered
  - The law you select can often determine if you win or lose an arbitration
  - Not all bodies of law are created equally, nor are equally favorable to you
  - Before choosing, always consider (a) the subject matter of the contract, (b) the kind of disputes that might arise, and (c) how a particular body of substantive law deals with such subject matter and disputes
  - Don't simply trade off this decision lightly during negotiations
- Usually worth consulting local counsel during contract drafting

Seat of Arbitration

- Juridical and physical "place" of arbitration, most often identified as a particular city
- Absent a contrary agreement by the parties, the seat determines what *procedural* law governs the arbitration
  - √ governing substantive law vs. procedural law
  - √ procedural law vs. arbitration rules
- The courts and arbitration law of the seat of arbitration will govern certain procedural and jurisdictional issues that arise during the arbitration
  - Always important to select a seat that is "friendly" to arbitration
- The actual arbitration hearings need not be held at the seat
  - The parties or arbitrator(s) can determine location of the hearings
  - Hearings can also be held by tele- or video-conference

Number of Arbitrators

- One
  - Usually appointed by the arbitral institution per its rules
  - Sometimes left to joint decision of the parties after a dispute arises, but that can cause challenges
  - Lower cost and usually more efficient in terms of scheduling
- Three
  - Usually framed to permit each party to select one arbitrator, with the third (presiding) arbitrator selected either by agreement of the party-appointed arbitrators or the arbitral institution
  - All three arbitrators are required to be neutral and independent
  - But … having 3 arbitrators so selected may help a party insure that its case is given a full and fair hearing
  - May provide advantages in particularly large and complex cases, in part because of potential diversity of viewpoints, professional backgrounds, and skill sets on the tribunal
  - More expensive
  - Can pose scheduling difficulties

Step Clauses

- "Med-arb": melding arbitration with mediation or expert determination, often as a pre-condition to initiating arbitration
- Cooling-off periods: requiring a party to wait a certain period of time after a dispute arises before bringing a claim
- Negotiation periods: requiring parties to engage in good-faith negotiations for a certain period of time after a dispute arises before a claim can be brought
- Designed to build "de-escalation" into the process to afford parties opportunities to attempt to resolve a dispute before formal proceedings commence
- Must be framed carefully to avoid gridlock or other unintended consequences

Cost

- Overall cost
  - Can rival or exceed litigation in some cases if not managed carefully
  - Less expensive than litigation in many cases because of constrained discovery and parties' influence on structure and schedule
- Major cost risk points
  - Substantive written submissions
    - » Witness statements
    - » Expert reports
  - Hearings
    - » Schedule slippage or fracturing (*i.e.*, multiple hearings)
    - » Location
  - Litigation-minded counsel or counterparty
  - Enforcement of award, if contentious

Management

- Engage counsel with meaningful arbitration experience, particularly if it's an international case
  - Understands process, risk points, and cost pressure points
- Select arbitrator(s) with reputation for efficiency and strong case management skills
- Use the Prelim. Conference to narrow issues, avoid discovery creep, limit written submissions, and set schedule
- Avoid pointless "motions practice" that just annoys arbitrator(s)
  - Summary judgment
  - Discovery battles
  - Motions in limine
- Conduct ongoing settlement analyses throughout proceedings

Confidentiality

- The agreement of the parties controls
  - No general, enforceable norm of confidentiality
- Arbitral tribunal does *not* retain ongoing jurisdiction to enforce its orders or the award
- Consider issues of confidentiality carefully
  - Public relations value/harm of outcome of arbitration becoming public
  - Legal value/harm of testimony and other evidence presented in the arbitration being used in other arbitral or court proceedings
  - Express use of arbitral proceedings to collect evidence for use in other contexts
  - Expectations of your witnesses
  - Special case re trade secrets, technology, & other IP

Contact

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