Arbitration 201: Drafting the arbitration clause for the arbitration you want

By Erika Birg

The parties are close to completing their negotiations on every point in the deal, but there is one aspect left: dispute resolution. It is admittedly difficult when putting together an agreement to look ahead to how it may fall apart in the future, but that is an important component to protecting your rights and interests. Negotiate it now or regret it later.

Do you want arbitration at all? In most commercial disputes, it is favored for its confidential nature, and the timeliness of a resolution saves real money. For example, for commercial disputes, the current average time from initiation to award at the American Arbitration Association ("AAA") is 7.3 months. Compare that with the time to resolution for most court cases, and arbitration has a clear advantage.

You may decide that arbitration is proper for some types of claims, but not for others. In that case, you can carve out specific claims from arbitration, but you need to do so very carefully. In addition to identifying which claims you want in court and which you want in arbitration, identify who will decide the meaning of the carve-out—the court or the arbitrator? This can be particularly important if the contract being drafted involves the possibility of a class action; there is a diversity of opinion based on a variety of factual scenarios as to enforceability of multiple-plaintiff claims being carved out from arbitration clauses. If multiple-plaintiff cases are to be avoided, consider who would decide the enforceability and interpretation of the carve-out and where the arbitration will be brought (this is generally permissible forum-shopping in advance of any claim arising in a commercial context, but you should check for the current status on class-wide claims involving consumers in your chosen jurisdiction, given the ever-evolving state of the law).

If you expect to seek injunctive relief, there are methods for seeking such relief in arbitration. To ensure a mechanism to enforce, however, it is wise to initially go to court for the preliminary injunctive relief, until an award is issued and you can return to court for confirmation. Arbitrators lack the enforcement mechanisms of courts, including contempt. If that is a procedure you want to employ, say so in clear and unmistakable language. Otherwise, you could be receiving a motion to compel arbitration and perhaps not receiving the requested court relief.

Do you need a specific type of arbitrator? Someone with real estate experience, an electrical engineering background, or an accountant to work through post-closing matters? To the extent you can identify the type of person you are looking for to decide the dispute now, add it now so you do not have to fight about it later. Also, choosing the right administrator will assist in determining who will be available to you to resolve the dispute.

How many arbitrators do you want? This is often a cost question, but many believe that a three-arbitrator panel is more likely to come to the right result because of the balancing

influences. Just be sure to factor in the cost of paying three people to decide your dispute. Also, scheduling the arbitration hearing becomes exponentially more complicated because you now have to work around more schedules.

Where do you want your arbitration hearing to take place? Considerations for deciding locale are: (1) location of the parties; (2) location of good arbitrators for your dispute; (3) location of the witnesses; (4) neutrality of location; and (5) cost. Among these factors, the parties will decide what is the most pressing for them. Sometimes neutrality of the location outranks the cost, but the location of the witnesses must be considered because arbitrators may be able to subpoena documents across state lines (subject to some disputes). In general, however, you cannot subpoena witnesses beyond state lines. Accordingly, if the project involves non-parties that may be essential, you may wish to designate the location of the project as the location of the arbitration to make sure you have access to crucial witnesses. Alternatively, leaving the location silent allows the administrative agency to decide whether the claim is brought in the proper jurisdiction. Most rules allow the administrator to change the locale chosen by the Claimant under certain circumstances. And, in some states, mechanisms for enforcement, modification or vacatur for an award vary, so it is also helpful to understand what will be involved after the award is rendered.

Do you allow for discovery and if so, what mechanisms? Arbitration administrators have different rules on discovery, but the parties can make their own rules as well. In some instances, where confidentiality is the driving reason for arbitration, parties choose to incorporate the Federal Rules of Civil Procedure and Federal Rules of Evidence into their clause. That eliminates many of the benefits of efficiency and economy that arbitration is meant to provide, but may serve the ultimate goal of having a more in-depth examination of the issues than might be expected in arbitration, where depositions can be rare and interrogatories unheard of.

Once you have the major points, here are a few more to consider: (1) Do you want a prevailing party to be ensured of payment of attorneys' fees and costs of arbitration? (2) Do you want to limit or expand the arbitrator's authority to award punitive damages or other types of relief? (3) Do you want to take advantage of any appeal procedures available from the arbitration administrator? and (4) What type of award do you want – standard, reasoned, findings of fact/conclusions of law? All of these can be addressed in the arbitration clause so that these are not left to future disagreements between the parties.

Arbitration can be had only by agreement. If you are going to agree to arbitration, then make it meaningful by addressing these issues in advance.

Erika C. Birg

Erika C. Birg is a partner in Nelson Mullins Riley & Scarborough’s Atlanta office. She focuses her practice on helping companies protect their businesses before, during, and after litigation and has significant experience in resolving business-to-business disputes through litigation, alternative dispute resolution, and state and federal appeals involving business torts, contract disputes, trade secrets, computer fraud and non-compete matters. She is a member of the The American Arbitration Association's National Roster of Arbitrators for Commercial Disputes.

Reprinted with permission from the March 24, 2016 edition of Inside Counsel© 2016 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited, contact 877-257-3382 or reprints@alm.com.