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corpcounsel.com | April 1, 2019

Tailoring Arbitrations: One Size Does Not Fit All

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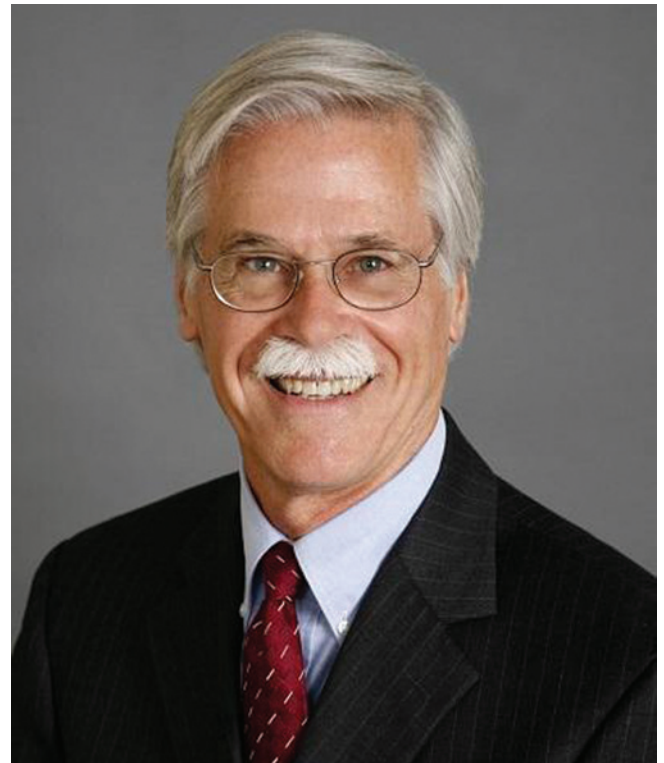
You've just persuaded your client to include an arbitration clause in future transactional contracts. Now what? Go to the form books? Borrow from some old contracts you've collected over the years? Start from scratch?

It's important to remember that an arbitration can take many different forms. Your goal should be to devise a process that best suits your client's needs in terms of speed, cost, confidentiality, etc. Interestingly, neither the Federal Arbitration Act (FAA) nor the California Arbitration Act (CAA) defines "arbitration." Perhaps the most succinct definition is found in *Cheng-Canindin v. Renaissance Hotel Associates* (1996) 50 Cal.App.4th 676, 687-688: "... we conclude that, although arbitration can take many procedural forms, a dispute resolution procedure is not an arbitration unless there is a third party decision maker, a final and binding decision, and a mechanism to assure a minimum level of impartiality with respect to the rendering of that decision." That definition, however, leaves a lot of leeway.

George Washington's handwritten will called for arbitration in the

event of a contest: "... all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; two to be chosen by the disputants—each having the choice of one—and the third by those two. Which three men thus chosen, shall, unfettered by Law, or legal constructions, declare their sense of the Testators intention; and such decision is, to all intents and purposes to be as binding on the Parties as if it had been given in the Supreme Court of the United States."

Washington touched upon several features you should consider when designing an arbitration clause, such as the number and qualifications of arbitrators, whether some shall be "party" arbitrators, and whether they will be required to follow the law or



may instead be "unfettered by Law, or legal constructions."

Here are 10 matters, among many others,[1] to consider when designing arbitration clauses:

1. Number and Type of Arbitrators: How many arbitrators do you want, and what are their qualifications? Three heads may be better than one, but this will likely cost three times as much. If you decide upon having three arbitrators, should

they all be neutral, or should any be “party arbitrators”? In the interest of economy, do you want all three or just one (such as the chair) to hear pre-hearing disputes, such as discovery battles?

2. Scope of the Arbitration Clause: Which disputes will go to arbitration? You should be clear as to which disputes go to arbitration and which go to court (if any).

3. Arbitrator’s Authority to Decide Jurisdiction: If a disagreement arises over whether a particular dispute is covered by the arbitration clause, who decides that issue? A court or the arbitrator? If you want the arbitrator(s) to decide this, you should include a delegation clause, which will clarify that the arbitrator has jurisdiction over any scope determinations.

4. Venue: Where will the arbitration be held? Within reason, your client can include language as to where the arbitration should take place.

5. Discovery: How much discovery will be permitted? The FAA does not provide for discovery, and the CAA does not automatically provide for discovery. In California, the parties may make full Code of Civil Procedure (CCP) discovery available via the provisions of CCP §§ 1283.05 and 1283.1. However, as discovery can become one of the costliest items in arbitration, does your client want to limit it, as opposed to allowing “scorched earth” discovery? If it is limited, you should clearly specify what is allowed.

6. Speed: How quickly should the arbitration proceed, including the time allotted for the arbitrator(s) to render an award?

7. Confidentiality: Will the arbitration be confidential? Contrary to popular understanding, arbitrations are not automatically confidential (they are confidential for the arbitrator, but not the parties). A confidentiality provision should be included to maximize confidentiality.

8. Rules of Evidence: Will the arbitrators be required to follow the rules of evidence? If so, which ones? Again, neither the FAA nor the CAA says that the rules of evidence will be applied. Further, the rules of most arbitration provider organizations say that the rules of evidence need not be strictly followed. If you want strict adherence to the rules of evidence, the arbitration clause should say so.

9. Adherence to the Law: Must the arbitrator(s) follow the law in arriving at a decision? Or may he or she act, as in Washington’s will, “unfettered by Law or legal constructions”? If your client wants strict adherence to the law, it’s important for the agreement to say so and designate what law is to be applied.

10. Reviewability of Award: How reviewable do you want the award to be? Both federal and California law provide limited grounds for challenging an arbitration award. Mistakes of law are generally not grounds to vacate an award. If your client wants greater review by the

courts, you should clearly specify that. Of course, this review may increase the overall time and cost of the process by encouraging the “losing” party to make an “on the merits” appeal to the courts.

If this drafting exercise is more than you or your client wants to deal with, you may want to designate an arbitration provider and specify one of its sets of rules. However, even if you go this route, you can tailor the rules to meet your client’s needs. Arbitration is a matter of contract, and whatever process the parties agree upon will rarely be second-guessed by the courts.

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[1] For an in-depth discussion, see Chapter 8, “Drafting ADR Agreements,” of *California Practice Guide: Alternative Dispute Resolution* by Knight, Chernick, Flynn and Quinn (The Rutter Group, 2018).

