FIRST THINGS FIRST: DESIGN THE ARBITRATION PROCESS YOU WANT

By Richard Chernick, Esq.

The principles for drafting a pre-dispute arbitration clause are straightforward. They do require an understanding of the legal relationship, which will be the subject of the clause, some sense of the nature of disputes that are likely to arise and a basic understanding of arbitration process.

Following are the top 10 rules:

1. Identify the scope of arbitration with precision. The gold standard is "all disputes arising out of or relating to this Agreement . . ." This is a "broad form" clause that is invariably interpreted by courts to encompass related tort and statutory claims. Anything less may limit the arbitrators' power to determining only contractual disputes.
2. Decide whether determining arbitrability shall be delegated to the arbitrators or left with the court. Typical delegation language: "any controversy, claim or dispute 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 . . ." Courts will enforce such delegations.
3. State who will administer the arbitration. "The arbitration shall be administered by JAMS pursuant to its Comprehensive Arbitration Rules and Procedures." If neither an institution nor institutional rules are mentioned, the arbitration will be non-administered (ad hoc).
4. Choose rules to govern the arbitration in the case of a non-administered clause: "The arbitration shall be governed by the UNCITRAL Rules."
5. Decide between a sole arbitrator and a tripartite panel and specify the method of selection of the arbitrator(s), mindful of the default process contained in the designated rules in the event of a failure to agree: "Each party shall select an arbitrator (who shall serve as a neutral arbitrator as that term is used in the Revised Code of Ethics for Arbitrators in Commercial Disputes); the party-appointed arbitrators shall jointly select the presiding arbitrator."
6. Specify the governing (substantive) law: "shall be determined by arbitration in Los Angeles, California, in accordance with the laws of the State of California for agreements made in and to be performed in California."
7. Address the scope of discovery unless the (default) rules are acceptable to the parties.
8. Choose a venue for the arbitration: "shall be determined by arbitration in Los Angeles, California . . ."
9. Decide on fee and cost allocation; if none, the rules will determine the extent to which cost shifting is permitted: "The arbitrators shall, in the Award, allocate all of the costs of the arbitration, including the fees of the arbitrator and the reasonable attorneys' fees of the prevailing party, against the party who did not prevail."
10. Specify the form of award and that it shall be subject to confirmation by a court: "The Award shall be in writing and shall specify the factual and legal bases for the Award. Judgment on the Award may be entered in any court having jurisdiction."

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The complete clause might look like this:

Any controversy, claim or dispute 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 Los Angeles, California, in accordance with the laws of the State of California for agreements made in and to be performed in California. The arbitration shall be administered by JAMS pursuant to its Comprehensive Arbitration Rules and Procedures ("Rules"). Each party shall select an arbitrator (who shall serve as a neutral arbitrator as that term is used in the Revised Code of Ethics for Arbitrators in Commercial Disputes (2004)). The party-appointed arbitrators shall jointly select the Presiding Arbitrator. The Award shall be in writing and shall specify the factual and legal bases for the Award. The arbitrators shall, in the Award, allocate all of the costs of the arbitration, including the fees of the arbitrator and the reasonable attorneys' fees of the prevailing party, against the party who did not prevail. Judgment on the Award may be entered in any court having jurisdiction.

Of course, there are many additional possible provisions, such as:

- A non-binding step prior to arbitration (e.g., mediation)
- The power of the arbitrators to grant provisional relief
- Limitations on the remedial power of the arbitrators (e.g., no punitive damages)
- Special timing requirements for the arbitration (e.g., "the hearing shall commence not later than 90 days after the formation of the Panel, shall not exceed 10 consecutive business days and the award shall be issued within 30 days of the conclusion of the hearing")
- Specific formats for the award such as final offer ("baseball") arbitration or bracketed ("high-low") arbitration
- Internal appeals (such as the JAMS Optional Appeal Procedure)
- Enhanced review of the award by a court where that is permitted (*see Cable Connection, Inc. v. DIRECTV, Inc.*, 44 Cal. 4th 1334 (2008))

Clarity and simplicity are most likely to result in an enforceable agreement and a process that will not engender disputes about contractual intent; the clause can always be refined after the dispute arises and the parties have more information about the nature of the dispute.

By keeping these rules in mind, parties can design the process they deserve. ■

Richard Chernick, Esq. *is an arbitrator and mediator. He is Vice President and Managing Director of the JAMS arbitration practice. He is a former chair of the ABA Dispute Resolution Section. He can be reached at rchernick@jamsadr.com.*