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ARBITRATION

This is Part Two of a four-part series by Williams & Connolly's Nick Boyle and Richard Olderman on how arbitration clauses, if properly drafted, may save companies huge amounts of time and money if disputes were to arise (137 CARE, 7/18/16).

Securing the Benefits of Arbitration: Thoughtful Drafting of Arbitration Clauses

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PART TWO

In our first installment, we discussed some basic points: the dangers of boilerplate arbitration provisions; the rules that apply in an arbitration; and drafting the standard arbitration clause as well as "step-clauses." Our theme of saving time and money in arbitrations continues with drafting an overall case schedule; providing for the choice of arbitrators; designating the hearing location; assuring confidentiality; and allowing for provisional relief.

2. Overall Case Schedule.

Absent strict time limits, an arbitration can, and often does, drag on for years. The arbitral institutions offer alternative expedited procedures, when specifically invoked by the parties in the agreement. *See, e.g.*, JAMS Rule 16.1. These rules, to an extent, provide timetables and limit discovery. The parties should consider whether they want these expedited provisions to apply.

If not, establishing deadlines in the arbitration agreement itself will streamline the proceedings and avoid the perils of an arbitration without limits. The timetable might provide, for example, a defined period for arbitrator selection; for completion of discovery (e.g., within a specified number of days of the arbitration demand); that the hearing is to commence a specified number of days after the demand; and that, at the hearing, each side is to be given a certain number of days for direct and cross-examination. (An alternative limitation, that the parties will have an equal amount of time for direct and cross-examination, can be unfair, for example when one side has more witnesses than the other). The schedule might also specify a time period for completion of the arbitration (AAA suggests "within nine months of the filing of the notice of intention to arbitrate (demand)"); and establishes when the award is

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to be rendered (for example, within a specified number of days after the close of the hearing, or service of the post-hearing briefs).

AAA suggests this clause to address the duration of the arbitration proceeding:

> The award shall be made within nine months of the filing of the notice of intention to arbitrate (demand), and the arbitrator(s) shall agree to comply with this schedule before accepting appointment. However, this time limit may be extended by agreement of the parties or by the arbitrator(s) if necessary.

Id. at 29.

A more comprehensive provision, suggested by JAMS, provides as follows:

> The following time limits are to apply to any arbitration arising out of or related to this Agreement:
>
> (1) Discovery is to be completed within ___ days of the service of the arbitration demand; (2) The evidentiary hearing on the merits (''Hearing'') is to commence within ___ days of the service of the arbitration demand; (3) At the Hearing, each side is to be allotted ___ days for presentation of direct evidence and for cross-examination; (4) A brief, reasoned award is to be rendered within 45 days of the close of the Hearing or within 45 days of service of post-hearing briefs if the arbitrator(s) direct the service of such briefs.
>
> The arbitrator(s) must agree to the foregoing deadlines before accepting appointment.
>
> Failure to meet any of the foregoing deadlines will not render the award invalid, unenforceable or subject to being vacated. The arbitrator(s), however, may impose appropriate sanctions and draw appropriate adverse inferences against the party primarily responsible for the failure to meet any such deadlines.

JAMS Clause Workbook 8 (eff. Apr. 1, 2015).

The College of Commercial Arbitrators (CCA) has encouraged time limits: ''There is no reason why time limits cannot be placed on completing a commercial arbitration, and many thoughtful observers believe that such limits are the single most effective device available for reining in arbitration cost and delay.'' CCA, *supra*, at 27, comments; *see id*. (observing that Parkinson's rule (work expands to fill the time available for its completion) ''is especially true in commercial arbitration where the stakes are often high, those doing the work are typically conscientious 'Type A' lawyers, and all actors, both counsel and arbitrators are being paid by the hour.''). Once the time limits are established they should be followed, absent extraordinary circumstances.

3. Choosing the Arbitrators.

Selecting the arbitrator or arbitrators is the most important step in the arbitration process. *See id*. at 32, comments. (''[T]he selection of an appropriate arbitrator or arbitration tribunal is nearly always the single most important choice confronting parties in arbitration; a misstep in the choice of arbitrator(s) may undermine many other good choices.'') (footnote omitted). The choice is critical for at least two reasons: ''They will likely provide the only review of the case's merits, and arbitrators will have primary control over the process itself.'' Jay Folberg et al., *Resolving Disputes: Theory, Practice & Law*, 470-73 (2008).

The qualities you are seeking in an arbitrator, or the particular arbitrator himself or herself, can be specified in the agreement. Alternatively, if JAMS, AAA or CPR is administering the arbitration, these associations provide the parties with a list of proposed arbitrators generally familiar with the subject area at issue. However the arbitrators are chosen, certain considerations are paramount.

Perhaps most importantly, the arbitrator must have a manageable caseload, one that will not delay the scheduling of your arbitration. Other factors to consider include the arbitrator's legal, technical or commercial background; his or her experience, reputation, and commitment to economies and efficiencies; and (where relevant) his or her fluency in certain languages. You may be looking for a retired judge from a particular court, a lawyer with certain experience and expertise or an accountant or patent engineer. *See* Jay E. Grenig, *Alternative Dispute Resolution* § 7:40 (2005 & Supp. 2016) (listing these factors to consider: arbitrator experience, education, skill in conducting hearings, prior rulings in similar cases, availability, timeliness of awards and fee schedule). A sample clause addressing arbitrator qualifications, suggested by the AAA, is the following:

> The arbitrators will be selected from a panel of persons having experience with and knowledge of electronic computers and the computer business, and at least one of the arbitrators selected will be an attorney.

See AAA, *Drafting Dispute Resolution Clauses: A Practical Guide*, 24 (2013).

Or, in the alternative:

> The panel of three arbitrators shall consist of one contractor, one architect, and one construction attorney.

AAA, *supra*, at 24. The clause should also address the procedure for selecting the arbitrators. The AAA suggests this short provision for a single arbitrator: ''In the event that arbitration is necessary, [name of specific arbitrator] shall act as the arbitrator.'' *Id*. at 23. The AAA correctly notes, however, that ''the potential unavailability of the named individual in the future may pose a risk.'' *Id*.

The AAA also provides two alternative provisions for selecting three arbitrators in a timely manner:

> The arbitrator selected by the claimant and the arbitrator selected by respondent shall, within 10 days of their appointment, select a third neutral arbitrator. In the event that they are unable to do so, the parties or their attorneys may request the American Arbitration Association to appoint the third neutral arbitrator.

Or:

> Within 14 days after the commencement of arbitration, each party shall select one person to act as arbitrator and the two selected shall select a third arbitrator within 10 days of their appointment. [The party-selected arbitrators will serve in a non-neutral capacity]. If the arbitrators selected by the parties are unable or fail to agree upon the third arbitrator, the third arbitrator shall be selected by the American Arbitration Association.

Id. The typical arbitration demand is made in accordance with the terms of the agreement, which often calls for a demand letter by a party, and the designation of the petitioning party's chosen arbitrator. If the agreement has set a specific time for the other party to designate an arbitrator, it is at this point that the period to designate commences running.

There are instances where a party to the agreement, upon receipt of a demand letter, refuses to arbitrate, and the demanding party brings suit in federal court for

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damages, or for an injunction and declaratory relief, or to compel arbitration. Taking these possibilities into account, the drafters of the arbitration clause may wish to have the clock start running upon service of the response to the arbitration demand.

4. Location of the Hearing, Place of Legal Residence, Language and Law of the Arbitration.

Arbitrations have hearing locations as well as the place of legal residence (also known as where venue is located or, in international arbitrations, the ''arbitral seat''). The legal residence is the domicile of the arbitration, a legal construct. It signals, *inter alia*, the location of courts vested with jurisdiction to enforce arbitration orders or, in certain circumstances, appoint arbitrators. While the legal residence is often the physical location where the hearings take place, the parties may designate the seat they wish, regardless of the location of the actual arbitration hearing.

When thinking about the hearing location, the parties should consider the convenience of the location to witnesses, local counsel, hotels, transportation, court reporters, meeting facilities, etc. and the availability of arbitrators in the relevant area. In international cases, the parties should also consider conventions governing the recognition and enforcement of arbitral awards. Under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed or acceded to by over 150 countries, international arbitral awards must be recognized, absent certain defenses (e.g., the lack of a full and fair hearing, arbitrators' lack of jurisdiction). Additionally, the language of the arbitration should be specified. AAA recommended clauses on these topics include the following:

> The place of arbitration shall be [city], [state], or [country].
>
> The languages of the arbitration shall be [specify].

AAA, *supra*, at 24-25.

Finally, the parties commonly specify the law that will govern the contract and/or the arbitration proceedings. Be aware that such provisions are not the same as specifying a location for the arbitration.

The following are provisions suggested by AAA:

> This Agreement shall be governed by and interpreted in accordance with the laws of the state of [specify]. The parties acknowledge that this Agreement evidences a transaction involving interstate commerce. The United States Arbitration Act shall govern the interpretation, enforcement, and proceedings pursuant to the arbitration clause in this agreement.

Or, in the alternative:

> Disputes under this clause shall be resolved by arbitration in accordance with Title 9 of the US Code (United States Arbitration Act) and the Commercial Arbitration Rules of the American Arbitration Association.

Id.

5. Confidentiality.

Mediations are confidential, but nothing in the AAA Rules requires confidentiality in arbitrations. The AAA's rules for large and complex cases, for example, only state that the arbitrator ''shall maintain the privacy of the hearings unless the law provides to the contrary.'' AAA Rule 25. On the other hand, JAMS Rule 26 provides that ''JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of an Award, or unless otherwise required by law or judicial decision.'' Absent specific provisions in the rules, or in the law of a particular jurisdiction, the parties themselves have no obligation to keep either the existence of the arbitration or the content of the arbitration confidential, unless bound to do so by the agreement. Accordingly, parties who want the arbitration to be kept confidential should state this in the arbitration clause. Such a clause might read as follows:

> Except as may be required by law, or any applicable insurance policy, neither a party nor an arbitrator may disclose the existence, content or results of any arbitration hereunder without the prior written consent of both parties.

JAMS suggests the following clause:

> The parties shall maintain the confidential nature of the arbitration proceeding and the Award, including the Hearing, except as may be necessary to prepare for or conduct the arbitration hearing on the merits, or except as may be necessary in connection with a court application for a preliminary remedy, a judicial challenge to an Award or its enforcement, or unless otherwise required by law or judicial decision.

JAMS, *supra*, at 4. If the parties do not wish to have a confidentiality obligation, they may specify as follows:

> The parties shall be under no confidentiality obligation with respect to arbitration hereunder except as may be imposed by mandatory provisions of law.

6. Interim or Provisional Relief.

If the parties reasonably foresee a need for interim or provisional relief, and the arbitral rules are silent on the matter, the parties can insert into an agreement a clause governing such relief:

> Either party may apply to the arbitrator seeking injunctive relief until the arbitration award is rendered or the controversy is otherwise resolved. Either party also may, without waiving any remedy under this agreement, seek from any court having jurisdiction any interim or provisional relief that is necessary to protect the rights or property of that party, pending the establishment of the arbitral tribunal (or pending the arbitral tribunal's determination of the merits of the controversy).

AAA, *supra*, at 26.

The rules of some arbitral institutions address the need for emergency measures. AAA Rule 38(c), accordingly, provides that within one business day of receipt of notice ''the AAA shall appoint a single emergency arbitrator designated to rule on emergency applications.'' The rules for appointment of an emergency arbitrator generally apply when the panel of arbitrators has not yet been seated.