

Considerations for Contractual Arbitration Provisions

Arbitration is a common form of alternative dispute resolution (ADR) used frequently and effectively in business settings. In arbitration, the parties have flexibility to choose decision-makers, jurisdiction, and many procedural rules, but they limit themselves in terms of discovery and some courtroom protections.

While most courts will enforce arbitration clauses in contracts, such clauses should be sufficiently clear and precise. When considering arbitration and contractual arbitration provisions:

1. Treat arbitration clauses as key business terms.

The arbitration clause contains the details of how you will settle any dispute that arises. Review it as carefully as you would any other business term, like delivery or payment details.

2. Use the contractual negotiation process to design a mutually-agreeable arbitration clause.

During contract negotiation, most business parties are cooperating well together and are pursuing a shared interest in creating a contract that benefits them both. This atmosphere lends itself well to creating an arbitration clause that will meet the parties' respective needs if a dispute arises later.

3. Attend to the details.

Although negotiation is a good time to address arbitration decisions, remember that cooperation between the parties in negotiating their contract is not necessarily a sign that this corporation will continue. Any details regarding arbitration not agreed upon at the outset of the deal may be more difficult to negotiate after the arbitration provision is part of a signed agreement and the parties face a dispute and feel less inclined to cooperate.

4. Focus on the type of arbitration that is appropriate for the transaction.

The type of arbitration that is most familiar to you may not be the best choice for every transaction or situation. Consider your business goals each time the question of arbitration is discussed. For instance, will the circumstances of a future dispute lend itself well to binding arbitration, or does non-binding arbitration provide more or better "bargaining power" to discuss a settlement of the dispute?

If you have any question, please contact **Grant Killoran** at grant.killoran@wilaw.com or 414-276-5000.

Creating Arbitration Clauses in Contracts: Where and How

Arbitration clauses in commercial and employment contracts are increasingly popular as a means to try to settle business disputes without going through a court trial. Arbitration clauses should be clear regarding how the arbitration is to be carried out.

In addition to detailing who will hear the dispute (the arbitrator), an arbitration clause should designate a place or venue for the arbitration. This is particularly important if there is a chance the dispute will be between a private party and a foreign government. If so, the private party may wish to have any arbitration take place in a neutral country.

An arbitration clause also should make clear how the arbitration will be carried out. For example, what issues will be decided in the arbitration – and what issues, if any, should be excluded from the arbitration? There may be certain issues that are not suited to arbitration, or that cannot be arbitrated in a particular jurisdiction. In addition, arbitration clauses can specify whether the arbitration is intended to be binding or non-binding, as well as the governing law to be applied.

A “good faith negotiation” or mediation clause can be useful to allow the parties to attempt to settle their dispute before the arbitration begins, either by direct negotiation or with a third party mediator.

Also, consider language to address certain procedural issues, such as: the scope and nature of discovery and the discovery process and the arbitration hearing procedures, including rules of evidence, exhibits, court reporters, and the record (if any) of the proceeding. Arbitration clauses also can include information on the scope of allowable remedies, including whether injunctive relief is allowed or the parties can agree to limitations or exclusions of remedies.

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Contractual Arbitration Clauses: Arbitrator Selection and Qualifications

An increasing number of contracts contain arbitration clauses. But not all arbitration clauses

are equally clear, precise, and specific—or equally enforceable.

Like other contract clauses, an arbitration clause may be invalidated under general principles of contract law. The U.S. Supreme Court has ruled that an arbitration clause may be invalid if it is indefinite, fraudulent or unconscionable, or was agreed upon under duress. As a result, commercial arbitration clauses should be clear and specific.

Before agreeing to an arbitration clause, consider how you would want any future arbitration to proceed, and the circumstances under which arbitration would be required.

For instance, consider whether you would like to use the services of a specific alternative dispute resolution provider, such as the American Arbitration Association. If you are considering such a provider, you might wish to examine its sample arbitration clauses and compare them to your own.

Next, consider the process established to select the arbitrator or arbitrators. Do you want to present your dispute to a single arbitrator or to an arbitration panel? For example, some arbitration clauses specify a panel of three arbitrators: each party picks one arbitrator, and then those two arbitrators choose the third arbitrator.

In addition to considering *how* the arbitrator will be chosen, you also should consider *who* will be qualified to serve as an arbitrator. For example, do you want the arbitrator to have relevant experience in a particular subject area (like architecture, engineering, software, publishing, or employment) or a particular qualification (like a CPA or a JD)? By considering these sort of issues prior to entering into an arbitration agreement, you can reduce the risk of future conflicts and add a degree of certainty to the arbitration process.

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Trends in Arbitration in the United States

Businesses in the United States have used arbitration clauses in contracts for many years. The purpose of these clauses is to encourage (or require) that contract disputes be settled in arbitration rather than by litigation and trial. Consumer and employment contracts frequently include arbitration clauses.

As Internet-based businesses have exploded over the past fifteen years, so have the number and types of business contracts containing arbitration clauses. Businesses frequently include mandatory arbitration provisions in their online “terms and conditions” for use of their sites,

products or services. Businesses engaging in international transactions, whether online or offline, also may include arbitration provisions in their agreements to limit litigation in countries throughout the world.

While business contracts have changed to reflect changes in alternative dispute resolution, litigation, and the business environment, the arbitration process in the United States also has changed to reflect a more technologically-interconnected world in which arbitration, not litigation, is being used to resolve many types of business disputes.

As a result, arbitration proceedings now often include many of the rules for the handling of electronically stored information (ESI) that U.S. courts already have enacted. Due to its “electronic” nature, ESI can present challenges involving discovery, security, and authentication that traditional paper-based recordkeeping does not.

Courts have addressed these challenges by creating specific rules addressing ESI issues, as well as by adapting existing rules for paper-based documentation to try to accommodate ESI. Since arbitration proceedings frequently handle disputes involving businesses that create, store, and use large quantities of electronic information, many arbitrators have adopted similar rules. But the rules governing ESI usually differ between litigation and arbitration and one potential advantage of arbitration therefore is the possibility of a limited discovery process. Arbitration often can reduce the amount of “big data” a party must parse in order to find what is relevant to the proceeding at hand.

Arbitration remains the second most popular form of alternative dispute resolution in the United States, after mediation. The formal and binding nature of most arbitration – along with the fact that parties can choose arbitrators with specialized technical knowledge helpful to understand the details of the dispute – makes arbitration an appealing alternative to litigation (and trial), particularly when international jurisdictions may be in play.

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A Deeper Dive into the Arbitration Process and a Look at the Advantages and Disadvantages of Arbitration

During arbitration, evidence and testimony are presented at a formal arbitration hearing. Discovery may occur before then, but its scope usually is limited by the parties’ agreement or the arbitrator rules. After the arbitration hearing, the arbitrator issues a decision, known as an “award.”

Arbitration may be binding or non-binding. Most arbitrations held in the U.S. today are binding arbitrations. In a “binding” arbitration, the arbitrator’s decision is final, binding, and enforceable in court, similar to a court judgment. Both Wisconsin state and federal courts will enforce binding arbitration decisions. A “non-binding” arbitration does not have these elements of a binding arbitration, but can be helpful for evaluating a case or creating a basis for settlement negotiations between the parties.

The utility of arbitration (and other forms of alternative dispute resolution) in a particular dispute depends on various factors, including the nature of the dispute, the contract at issue and the state and federal laws in question, as well as the potential financial and time-related costs of litigation.

So why do parties choose arbitration? They do so because the arbitration process offers certain advantages. For instance, arbitration allows the parties to choose the place, time, rules, law, and people who will make the decision on the dispute. This flexibility, in turn, can make it easier for the parties to present technical facts since they can often choose a person or panel with expertise to understand a complex situation. The arbitration process also is typically shorter and faster than litigation and a trial due to limited, private discovery and streamlined procedural rules. Finally, most arbitration decisions are final and binding, with no appeals.

As with every dispute resolution process, however, arbitration also has certain disadvantages. Arbitration does not offer the right to a judge or a jury. Discovery is limited not only by the “ground rules” of the selected arbitration forum, but also by the limited power arbitrators have to force non-parties to submit to discovery or to issue subpoenas. Third parties cannot be added to arbitration without their consent, making complex multi-party disputes more difficult to resolve. Court rules of evidence and procedure do not apply. Since complex arbitration can be costly, parties with limited financial resources may be at a disadvantage in arbitration, and may not have the leverage litigation can provide to share or shift costs.

Arbitrators have wide discretion in their decision-making and have no obligation to explain their reasoning to the parties. Appeals from arbitration awards are rare. Typically, an arbitration award can be overturned only as a result of corruption, fraud, partiality, or prejudicial misconduct by the arbitrator.

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What Is Arbitration?

Arbitration is a common form of alternative dispute resolution (ADR) in which parties agree to resolve a dispute by submitting it to one or more neutral decision-makers, or arbitrators, for decision. Arbitration consists of a formal hearing, similar to a trial, where the parties are represented by legal counsel and present evidence and testimony. The parties usually have the option to choose the decision-makers.

In Wisconsin, arbitration is governed by the Wisconsin Arbitration Act, which is found in Chapter 788 of the Wisconsin Statutes. Among other things, the Wisconsin Arbitration Act states that an arbitration clause in a contract is valid, irrevocable and enforceable unless certain grounds exist to invalidate the contract. However, a few disputes, including certain disputes over employment contracts, petroleum storage tank remediation and state employment relation matters, are exempt from this rule.

In a dispute governed by a contract containing an arbitration agreement, the Wisconsin Arbitration Act requires Wisconsin courts to send the parties to arbitration, instead of trial, pursuant to the terms of their contract. If a party seeking arbitration has failed to live up to its obligations under the contract containing the arbitration agreement, however, the court may choose whether or not to stay litigation so that the arbitration may proceed.

The Federal Arbitration Act contains a similar rule that “a written provision in any ... contract” that indicates an intent to settle contract-related disputes by arbitration “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”

In addition, federal courts may refer civil actions and bankruptcy adversary proceedings to arbitration if the parties consent. Both federal districts in Wisconsin have rules governing arbitration and other forms of ADR. Federal constitutional claims, some civil rights claims and claims involving damages over \$150,000 cannot be sent to arbitration from federal court, however.

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Understanding Mediation as an Alternative to Litigation

The most common form of alternative dispute resolution (ADR) is mediation. During a mediation, a neutral third party (often a retired judge or experienced attorney) works with

the parties to try to reach a settlement of their dispute. The mediator does so by focusing on the disputed issues and exploring possible options for settlement. Mediation generally is considered “informal,” unlike litigation or arbitration. It is a non-binding, private process, in which the mediator acts as a neutral intermediary or “deal broker.”

Unlike arbitration or trial, the mediator has no power to require the parties to settle their dispute, insist on a particular result or issue a decision. The parties must come to any agreement themselves. If a settlement cannot be reached, the parties are free to try another form of ADR or go to trial.

Mediation offers a number of advantages. Most mediations take no more than a day or two to complete. Since the mediation process moves quickly and requires significantly less preparation than does litigation or arbitration, mediation generally is cost-effective.

A settlement reached at mediation is final and binding. Unlike a court judgment, the details of a mediated settlement can be kept private, allowing the parties to resolve their dispute while keeping the details of that resolution out of the public eye.

The advantages of mediation, however, do conceal certain weaknesses. Since mediation is non-binding, a mediation that ends with no agreement can feel like “wasted time.” And unless both parties are motivated to settle the dispute and demonstrate a willingness to work together to reach a compromise, mediation is unlikely to succeed.

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What Does It Mean to Litigate a Civil Case?

Alternative dispute resolution (ADR) is so named because it provides an “alternative” to litigating a civil dispute before a court in a bench or jury trial. The most popular forms of ADR are mediation and arbitration, although other options exist.

Litigation is when a lawsuit is filed in a court of law. A lawsuit typically involves a dispute over a particular state of affairs: a contract breach, an injury suffered in an accident, or some other dispute situation.

Litigation offers certain advantages. Access to the decision-maker, whether judge or jury, is free of charge, except for minimal filing fees. Discovery is part of the litigation process, and can be wide-ranging, allowing the parties to gather a great deal of information. Third parties can be added to a law suit, if appropriate. The rules of evidence and procedure are well-

defined. The final decision can be enforced by the court. If a party loses, that party has the right to appeal. And, litigation does not prevent the parties from attempting ADR or negotiating a settlement before, during or even after trial.

Despite these benefits, litigation also has certain disadvantages. The large case load faced by judges, as well as the demands of discovery and procedural issues, can make litigation both slow and expensive. The broad discovery allowed in litigation and the inherently public nature of litigation can expose damaging or embarrassing details, creating brand or reputation management concerns. Highly technical or complex disputes can be difficult to present to a judge or jury in an efficient and accessible manner, as judges and juries may lack the specialized knowledge needed to fully grasp the issues involved in the dispute. Litigation decisions can be appealed, adding additional expense and extending the duration of the dispute.

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Understanding Alternative Dispute Resolution in Wisconsin: An Overview

Alternative dispute resolution (ADR) offers a way for parties to resolve business disputes without going through a civil trial. ADR may take place before or after a lawsuit is filed. Many contracts, including construction, securities and Internet terms-of-service contracts, increasingly require ADR before or instead of trial. Generally speaking, courts have found these provisions enforceable.

The phrase “alternative dispute resolution” is an umbrella term covering several different types of proceedings. Direct negotiation, mediation and arbitration are the most popular forms of ADR. Although the rules differ for each, all three are intended to try to resolve a civil legal dispute without going to trial.

In Wisconsin, courts can order parties to participate in ADR. Wisconsin Statute Section 802.12(2) empowers Wisconsin Circuit Court judges to require ADR prior to trial. The parties generally are free to choose the type of ADR they wish to utilize and the ADR service provider, although the judge may make these decisions for the parties if they cannot agree.

Wisconsin judges cannot, however, require that the parties participate in the more expensive types of ADR, including non-binding arbitration, summary jury trials, or multiple facilitated ADR processes (such as both mediation and arbitration), without the parties consent.

Also, while a Wisconsin judge can require the parties to participate in ADR, he or she cannot require them to settle their dispute. In *Gary v. Eggert*, the Wisconsin Supreme Court held that while Section 801.12 allows a judge to require some form of ADR before trial in appropriate cases, it does not allow the judge to require that the parties resolve the dispute, abandon one or more legal positions or settle out of court. The right to trial must remain available to the parties even if they are sent to ADR prior to trial.

Federal courts, including those in Wisconsin, also can order parties to participate in ADR. 28 U.S.C. 651(b) allows federal district court judges to authorize the use of ADR in civil actions and bankruptcy adversary proceedings. In the United State District Court for the Eastern District of Wisconsin, **Local Rule 16(d)** governs ADR considerations. In the United State District Court for the Western District **Local Rule 3 (LR 16.6CJ)** governs ADR.

If you have any questions, please contact attorney **Grant C. Killoran** at grant.killoran@wilaw.com or 414-276-5000.

O'Neil, Cannon, Hollman, DeJong & Laing S.C. Hosts CLE Seminar for Small Firm and Solo Practitioners

On October 8, 2014, O'Neil, Cannon, Hollman, DeJong & Laing S.C. hosted a Continuing Legal Education seminar focusing on legal issues of interest to Wisconsin small firm and solo practice attorneys. Approximately 70 attorneys attended the event. The firm's Managing Shareholder, Jim DeJong, presided over the event.

Chad Baruch of Dallas, Texas was the keynote speaker for the seminar. Attorney Baruch spoke on effective legal writing. He also spoke on constitutional law issues and moderated a panel discussion on corporate drafting issues. Bob Gagan, President of the State Bar of Wisconsin, also participated in the seminar. Attorney Gagan discussed the resources available from the State Bar of Wisconsin to assist small firm and solo practice attorneys.

A number of O'Neil, Cannon, Hollman, DeJong & Laing S.C. attorneys spoke at the event, including:

- Randy Nash and Greg Mager discussed State Bar of Wisconsin projects with State Bar President, Bob Gagan.
- Dean Laing presented on several litigation issues, including the impact of social media research in litigation and emerging deposition and expert witness practice issues.

- Pete Faust, Doug Dehler, Joe Maier, and Joe Newbold participated in a panel discussion with Chad Baruch on corporate document drafting issues.
- Joseph Gumina presented on recent developments in labor and employment law.
- Grant Killoran presented on legal and practical issues related to the handling of electronically stored information.
- Seth Dizard, Melissa Blair, and Tim Van de Kamp participated in a panel discussion on recent developments in creditors' rights, bankruptcy and receivership law.

If you would like any additional information regarding the seminar, including copies of the seminar materials, please contact Grant Killoran via e-mail at grant.killoran@wilaw.com or by telephone at 414.276.5000.
