

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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