Customized Arbitration

Resolving Your Business Disputes Effectively

By James W. Riley, Jr.

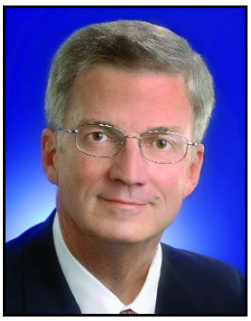
Many people have learned in recent years about the potential benefits of arbitration. Ensuring that the advantages are realized, however, often requires a contract provision that establishes the arbitration process you desire.

Commercial arbitration is a dispute resolution process set forth in a contract between businesses. (This article is not intended to address arbitration of labor, securities or consumer disputes). The advantages of privacy, expediency, economy, informality and flexibility can be ensured with a carefully written contractual arbitration provision because great deference is given by the courts, and by the arbitral tribunal, to the agreement of the parties.

All too often, the contractual arbitration provision resembles the following: Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Such an arbitration provision, while effective in requiring arbitration to resolve disputes under the contract, will not ensure the advantages of arbitration are realized. To secure those advantages, carefully consider and incorporate them into the contractual arbitration provision. Some factors to evaluate are:

1) **Privacy:** Maintaining the confidentiality of the existence and details of the dispute, of financial and other proprietary information, and of the outcome is important. Any limitations on public or other disclosure of such information should be expressly stated, along with the consequences of violations.
2) **Time to complete process:** The time period in which the parties intend the arbitration process to be completed should be stated. The tribunal must know the parties' intentions in order to balance the competing goals of having a proper presentation of the parties' positions and applicable evidence, as well as achieving efficiency and economy. The arbitrator must avoid improperly refusing to postpone a hearing or to hear appropriate evidence, or a court could vacate the arbitration award. That result would undermine the arbitration process and eliminate the expedient dispute resolution the parties intended.
3) **Parties' selection of decision makers:** Unlike litigation, arbitration allows the parties to select the decision-maker after they evaluate the experience, expertise and perspective of the arbitrator(s). Parties can elect to use one arbitrator or three. Using one arbitrator decreases the cost of arbitration and simplifies scheduling issues. Problems associated with using three arbitrators are that an agreement may not be reached and the award is a compromise, a result some parties denounce.
4) **Administered or ad hoc arbitration:** Various agencies exist that provide administrative services for arbitration. Four prominent ones are the American Arbitration Association (www.adr.org), JAMS (www.jamsadr.com), the National Arbitration Forum (www.arb-forum.com) and the Center for Public Resources (www.cpradr.com). An alternative to "administered" arbitration is "ad hoc," or independent arbitration, in which the parties deal directly with the arbitrator(s), without the involvement of an administrative agency.



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5) **Procedural rules for the arbitration process:** To allow the arbitration to occur in an organized and predictable manner, the arbitration provision typically incorporates rules for the arbitration process that have been promulgated by one of various administrative agencies. Their rules can be adopted for use by the ad hoc arbitrator(s), even if no administrative agency is to be involved.
6) **Location:** Obvious economy results if the parties' attorneys and the arbitrator come from the same locale as the majority of witnesses testifying at the hearing.
7) **Hearing:** The arbitration hearing can usually be scheduled more quickly than a trial in court. Moreover, the hearing is less formal than a trial and can be tailored to the disputed issues. The parties should specify what rules of evidence apply. Even if they do not specify, the arbitrator should use basic evidentiary principles to insure that only relevant and reliable evidence is admitted. Then the award will be based on reliable evidence and the hearing is not unduly extended when improper evidence is admitted.
8) **Discovery:** A costly element of litigation in America is discovery. Discovery short of that in conventional litigation is essential for efficiency and economy. The limited discovery allowed in the arbitration proceeding should therefore be stated in the arbitration provision.
9) **Arbitrator's authority:** The arbitrator's authority and any limitations on the authority to award preliminary (injunctive) relief, interest, punitive damages, attorney fees and costs of the arbitration must be stated. Otherwise, the arbitrator will fairly assume that the parties have authorized the arbitral tribunal to take whatever actions are necessary to resolve the dispute.
10) **Arbitral Award:** The parties may require that negotiation or mediation precede the arbitration process. The parties may want a reasoned award, which includes the factual and legal basis for the award, to ensure that the tribunal thoroughly analyzes the issues presented. The tribunal's award should be issued soon after the hearing. The parties may be very specific in directing the type of award the arbitrator will make, such as an award within high and low limits or an award of the proposal of one party or the other (commonly known as "baseball" arbitration). The parties can dictate the structure

of the arbitration award to provide the dispute resolution they require.

11) **Appeal rights:** Federal law, which applies to all interstate commerce, provides for review of an arbitration award in situations involving bias, corruption or manifest disregard of the law. These limited appeal circumstances provide the parties with essential protection from such misconduct by the arbitral tribunal. The parties may also provide for arbitral review under the rules of one administrative agency, JAMS.

12) **Enforcement:** The parties should consider and address enforcement, both of the agreement to arbitrate, as well as the ultimate award of the tribunal. The arbitration process, which is voluntary and contractual by definition, can be frustrated if one party simply refuses to participate in the process to select the tribunal, pay the costs of the arbitration, etc. An essential provision in an arbitration clause is an immediate and effective remedy for such obstructive behavior by a party.

13) **Governing law:** The Federal Arbitration Act will apply to most agreements because it applies to interstate commerce. In addition, most states have an arbitration statute, commonly the Uniform Arbitration Act, or Revised Uniform Arbitration Act, which will be applicable to the arbitration agreement. The parties should specify any particular law they intend to apply to the arbitration provision and proceeding.

Commercial arbitration can be an efficient, economical and confidential method of resolving business disputes, provided that time and effort is devoted to establishing the proper arbitration process in the parties' agreement. It is essential to establish that process before the dispute arises, because once the parties have agreed to disagree, reaching agreement on the details of the arbitration process is unlikely.

The potential benefits from an effective arbitration provision justify the effort and expense of its preparation. Furthermore, the drafting party has the advantage of laying the framework to which the other party must react. Customize the commercial arbitration process for the advantages you want and take control of the dispute resolution process.

INFORMATION LINK

Author: James W. Riley, Jr. is the president of the Indiana State Bar Association, a business litigator and arbitrator, and is on the Commercial Arbitration Panel of the National Arbitration Forum. He can be contacted at (317) 636-8000 or go to www.rbelaw.com.