# Negotiating Your Arbitration Agreement To Control The Expense And Parameters Of Arbitrations

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Lawyers who arbitrate commercial disputes are hearing a crescendo of complaints from their clients about the arbitration process. General counsel who had expected privately administered arbitrations to be faster and more economical than disputes litigated in courts have frequently been disappointed to find that the trend in commercial arbitration is to mimic the scope of litigation, with more discovery, more witnesses, and, ultimately, longer evidentiary hearings. Companies in arbitration also may be unpleasantly surprised by other aspects of the process that they did not anticipate, such as the consolidation of disputes over different transactions into a single arbitration, being forced to arbitrate in a distant or otherwise inconvenient venue, and their inability to maintain the confidentiality of the process.

Obviously, no dispute resolution mechanism is perfect. As long as there are disputes arising from commercial transactions, companies and the lawyers who represent them will attempt to tilt battlefields to their advantage. Nevertheless, one inherent virtue of arbitration is that companies can exert control over the scope and parameters of the process before a dispute ever occurs.

Arbitration, after all, is a "creature of contract," (*United Steelworkers of America v. American Manufacturing Co.*, 80 S. Ct. 1343, 1347 (1960) (Brennan, J., concurring)), and the Federal Arbitration Act "lets parties tailor some, even many features of arbitration by contract, including the way arbitrators are chosen, what their qualifications should be, which issues are arbitrable, along with procedure and choice of substantive law." (*Hall Street Associates v. Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008).) In practice, however, companies neglect to negotiate the terms of arbitration agreements and, thus, miss opportunities to control the parameters of future disputes that might arise.

**Limiting the scope of discovery.**

Parties in arbitration increasingly bemoan the trend in arbitration toward more burdensome discovery. More and longer depositions mean higher attorney fees and more company personnel tied up in depositions and deposition preparation, and generally lead to longer and more expensive arbitration hearings. In some arbitrations, the increase in discovery may be justified by the complexity of the issues and/or the sums in dispute. The salient point here is that the parties to a transaction can exercise some control over the scope of any arbitration that might later take place by negotiating limits on discovery in their arbitration agreement.

For example, the arbitration agreement can include limits on the number of depositions that each party may take and the duration of each deposition. Moreover, such limits can be tied to the magnitude of the dispute; thus, the arbitration agreement can set a specific limit on the number of depositions in any dispute under, e.g., one million dollars, but contain no such limits for larger disputes that justify greater discovery expense. In general, it is much easier to negotiate these sorts of limits at the outset of the transaction – when the arbitration agreement is being drafted and no dispute yet exists – than after a dispute arises and one party perceives a need for, or strategic advantage in seeking, a large number of depositions.

**Regulating the consolidation of disputes over different transactions.**

Most arbitration agreements do not explicitly instruct whether disputes arising out of distinct transactions may be consolidated or how a request for consolidation should be addressed, which may result in disputes over those very issues. It was long assumed by many that where a given contract contained an agreement to arbitrate any disputes, the scope of such arbitration would be limited to disputes arising out of that contract. However, recent court decisions have undercut that assumption.

For example, in *Employers Insurance Co. of Wausau v. Century Indemnity Co.*, 443 F.3d 573 (7th Cir. 2006), the Seventh Circuit Court of Appeals rejected a company's attempt to obtain a declaratory judgment that it was entitled to two separate arbitrations to resolve disputes arising out of two different contracts. The Court of Appeals held that the "question of whether an arbitration agreement forbids consolidated arbitration is a procedural one, which the arbitrator should resolve." (*Id.* at 577.) Key to the court's decision was the undisputed fact that the two "Agreements' arbitration clauses are silent as to whether consolidated arbitration is permissible." (*Id.* at 576.) Noting that there was no question as to whether each of the disputes was arbitrable, the court reasoned that the "only question is the kind of arbitration proceeding their Agreements allow. This comes down to a matter of contract interpretation, which the arbitrator is well qualified to address." (*Id.* at 578.)

Controversies over consolidation can thus be avoided – or, least, greatly reduced – at the contract-drafting stage. Companies entering into contracts that contain agreements to arbitrate should consider drafting specific language that expressly prohibits or permits consolidation with other disputes between the parties, depending on what the parties want and are willing to negotiate.

**Ensuring the confidentiality of arbitration.**

Confidentiality is often considered to be one of the principal advantages of private arbitration. By resolving disputes away from public courthouses, companies can avoid negative publicity and can attempt to avoid being bound by public judgments. However, no company should assume that an arbitration will be confidential unless the arbitration agreement so specifies. Although some industries have a custom of confidential arbitration, an arbitrator may be loathe to impose confidentiality where the parties' arbitration agreement does not expressly require it and the opposing party objects to keeping the proceedings confidential. Accordingly, if maintaining the confidentiality of potential disputes is of value to a company, it should negotiate the inclusion of a confidentiality provision in its arbitration agreements.

In contemplating and negotiating such provisions, companies should consider the need to articulate exceptions to confidentiality, such as to provide information to outside auditors and/or government regulators. Companies should also be aware that, if and when a party seeks to have an arbitration award confirmed, vacated, or modified in court, the court may refuse to seal the record of an arbitration even where the parties agreed to keep that record confidential. *See, e.g., Global Reinsurance Corp. v. Argonaut Insurance Co.*, 2008 U.S. Dist. LEXIS 32419 (S.D.N.Y. April 18, 2008).

**Choosing the arbitration venue.**

Perhaps the most frequently overlooked term in arbitration agreements is the venue provision. Companies routinely agree to arbitrate disputes in locations that are more convenient for their trading partners, thus adding to their arbitration costs and ceding leverage to their future opponents in the event of arbitrable disputes. Indeed, arbitration agreements frequently provide that any arbitration will take place in the city in which a specified party is located, which can lead to the other party incurring significantly greater expense. If the parties cannot agree on a mutually convenient location, one way to avoid building a hometown advantage for one party into the arbitration agreement is to leave the venue to the discretion of the arbitrator(s).

**Conclusion**

Commercial arbitration is a "creature of contract," and the parties to commercial transactions may negotiate the terms of their contracts to control the scope and parameters of future arbitrations. By doing so, companies may limit the expense of dispute resolution, as well as ensure the procedures that arbitrators will follow to adjudicate disputes. Accordingly, the time to think through the ramifications of the specific terms in any arbitration agreement is when that agreement is negotiated, which is typically before any dispute arises.

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