AHLA Dispute Resolution Service

Guide to Arbitration Clauses

NOTES

INTRODUCTION

This guide does not provide legal advice and is not a substitute for such advice. Federal and state laws regulating arbitration are subject to change, and courts vary in their interpretations of these laws. So, when drafting an arbitration clause, you need to be familiar with the law in your jurisdiction or obtain legal advice from a competent attorney.

STANDARD CLAUSES

Pre-Dispute Clause

To have disputes that might arise in the future arbitrated through the AHLA Dispute Resolution Service, insert this clause into a contract:

> *Any dispute arising out of or relating to this contract or the subject matter thereof, or any breach of this contract, including any dispute regarding the scope of this clause, will be resolved through arbitration administered by the American Health Lawyers Association Dispute Resolution Service and conducted pursuant to the AHLA Rules of Procedure for Arbitration. Judgment on the award may be entered and enforced in any court having jurisdiction.*

Post-Dispute Clause

To arbitrate a dispute that has already arisen through the AHLA Dispute Resolution Service, complete and sign this stand-alone contract:

> *The parties whose signatures appear below hereby agree to arbitrate the following dispute(s):*
>
> _____
>
> _____
>
> *through arbitration administered by the American Health Lawyers Association Dispute Resolution Service and conducted pursuant to the AHLA Rules of Procedure for Arbitration. The parties further agree that judgment on the award may be entered and enforced in any court having jurisdiction.*

Comprehensive Clause

To establish a broad corporate policy in favor of arbitration, insert the following clause into all commercial contracts:

> *Arbitration offers a faster, less expensive, and more efficient method of resolving disputes than resort to the court system. This company has therefore adopted arbitration as its preferred means of resolving disputes arising out of contractual arrangements to which it is a party. Accordingly, any dispute between the parties shall, upon the demand of either party, be resolved through arbitration administered by the American Health Lawyers Association Dispute Resolution Service in accordance with the AHLA Rules of Procedure for Arbitration.*

CUSTOM CLAUSES

An arbitration clause can be tailored in an infinite variety of ways. However, the range of issues that parties typically address is fairly limited. Key questions to consider are whether to:

- combine arbitration with another dispute resolution process (such as mediation);
- increase the number of arbitrators;
- amend the process for selecting the arbitrator or arbitrators;
- restrict access to information about the arbitration;
- allow or prohibit class actions;
- specify how much discovery will be allowed;
- set the hearing location;
- require the arbitrator to apply certain rules of evidence;
- choose which laws will govern the proceeding;
- limit the relief the arbitrator may award;
- allocate fees and expenses;
- establish how detailed the award must be; and
- create a process for appealing the award.

This guide provides tips and sample language for addressing each of these issues in an agreement to arbitrate.

COMBINING ARBITRATION WITH ANOTHER PROCESS

Creating a Pre-Requisite (Condition Precedent) to Arbitration

Parties can often avoid arbitration by settling their differences through dialogue. To ensure such dialogue occurs, parties can make negotiation or mediation a pre-requisite to filing a claim.

Drafting tip: Create objective milestones. For example, state that a party may file a claim for arbitration 30 days after inviting the other party to resolve outstanding issues through negotiation, or 60 days after requesting mediation. Do not set subjective standards such as "good faith" negotiation or a "serious" settlement offer because disagreements are likely to arise as to whether the standard has been met. To resolve such disagreements, a judge or arbitrator may require testimony and exhibits pertaining to settlement discussions that parties had hoped to keep confidential.

Sample language:

> *Prior to filing a claim for arbitration under this clause, a party must request mediation through the AHLA Dispute Resolution Service. No earlier than 60 days after notifying the opposing party that the request for mediation was submitted to AHLA, a party may initiate arbitration through the AHLA Dispute Resolution Service if, for any reason, the matter has not been fully resolved in mediation.*

Agreeing to Med-Arb or Arb-Med

Parties sometimes try to promote settlement by empowering a neutral to serve as both an arbitrator and a mediator. In med-arb (mediation followed by arbitration), the neutral assists the parties in trying to reach an agreement, and, if no agreement is reached, convenes an arbitration hearing and issues an award. In arb-med (arbitration followed by mediation), the neutral convenes an arbitration hearing, and, before rendering an award, assists the parties in trying to reach an agreement.

Drafting tips: A med-arb agreement must:

(a) state that information shared with the neutral in mediation may form the basis for an award in arbitration; and

(b) waive the parties' right to contest the award because ex parte communications took place in mediation caucuses.

An arb-med agreement must indicate whether the arbitrator is going to seal the award before mediation begins in order to foreclose the possibility that the award will be based on information shared in confidence in mediation. If the award is not sealed, the agreement must include clauses (a) and (b) above.

In addition, a med-arb or arb-med agreement must clearly delineate when the neutral transitions from one role to the other. The roles and responsibilities of an arbitrator are very different from those of a mediator. A neutral can serve in only one role at a time, and it must be clear at all times in what role the neutral is serving.

SELECTION OF ARBITRATION OR PANEL

Number of Arbitrators

The AHLA Rules of Procedure for Arbitration provide for the appointment of a single arbitrator unless the parties jointly request a panel of three.[1] Parties sometimes feel more comfortable having three decision-makers rather than just one, but a panel significantly increases the cost of arbitration and may slow down the process.

If parties agree to have claims resolved by three arbitrators but do not specify how the panel will be selected, the default process under AHLA Rule 3.5 will apply. Each party will select a single arbitrator from a list of five or ten candidates provided by the Administrator, and these two arbitrators will select a third from this same list of candidates. If these two arbitrators cannot agree on a third, the Administrator will appoint a third from the list of candidates. The third arbitrator—the one selected by the other two arbitrators—will serve as the lead arbitrator (chair).

Parties may prefer to select all three arbitrators selected jointly, i.e., by combining their rankings. Here is sample language:

> *Parties will rank the candidates provided by the AHLA Administrator sequentially in order of preference and return the ranking form to the Administrator. The most highly desired candidate should be ranked "1," the second choice should be ranked "2", etc. Parties may strike no more than one candidate. The Administrator will appoint the candidate with the lowest combined score as the chair, and the candidates with the second and third lowest scores as the remaining two arbitrators.*

Method of Selection

Under the AHLA Rules of Procedure for Arbitration, the Administrator furnishes the parties with a list of candidates to rank and appoints the candidate with the lowest combined score.[2] The score is the sum of the parties' rankings. If Party A ranks Mr. Smith as a "1" (most preferred candidate) and Party B ranks Mr. Smith as a "5" (5th choice), then Mr. Smith's score is 6 (1 + 5). Parties may prefer to identify qualified candidates on their own, or to narrow the list of candidates recommended by the Administrator in a different, mutually agreeable way.

1 See AHLA Rule 3.2 and Exhibit 1 to AHLA Rules.
2 See AHLA Rule 3.2.

Drafting tip: If an alternative method of selection requires cooperation, include a backup plan that takes effect if one party declines to participate or if the parties, despite good faith efforts, cannot reach an agreement.

Sample language:

> *Within 15 days after a claim for arbitration is filed, the parties will exchange lists of proposed arbitrators and reach agreement on which arbitrator(s) to appoint. If the parties fail to appoint the arbitrator(s) within 15 days, the AHLA Administrator will appoint a single arbitrator pursuant to the process set forth in Rule 3.2 of the AHLA Rules of Procedure for Arbitration.*

Qualifications

Under the AHLA Rules of Procedure for Arbitration, the Administrator selects candidates for ranking who most closely match the criteria identified by the parties as important. Parties occasionally want to go a step further and require that the arbitrator possess certain qualifications. For example, if the contract is for emergency medical services, the parties may require that the arbitrator have experience with the laws governing the provision of such services. To minimize travel costs, parties may require that the arbitrator reside in the metropolitan area or state where the hearing will take place.

Drafting tip: Be careful not to narrow the pool too far. If no arbitrators with the requisite qualifications are available, the agreement may be unworkable.

Sample language:

> *The arbitrator must have at least five years of full-time or part-time experience in employment law.*

ARBITRATION PROCESS

Confidentiality

The AHLA Rules of Procedure for Arbitration provide that arbitration hearings are private[3] and that AHLA will release a document related to an arbitration, including an award, only to comply with a court order or other legal process, or in response to a party's request.[4]

Parties may want to go a step further and bind each other to keep the arbitration process and the award confidential.

3 See AHLA Rule 6.3.
4 See AHLA Rule 8.2.

Drafting tip: Do not make the clause overly broad. Consider: (a) who needs to know about the arbitration in order to fulfill their responsibilities, such as investors, accountants, attorneys, and other advisors; (b) who has a right to know about the arbitration by virtue of their position; and (c) whether any public disclosures or government filings are required.

Sample language:

> *The parties agree to disclose the existence of this arbitration, information about what has taken place or may take place in this arbitration, the award, or information about the outcome of this arbitration, only as needed to: (a) present claims and defenses in arbitration; (b) pursue or oppose legal remedies in court pertaining to this arbitration, including enforcement of an award; (c) comply in good faith with applicable laws, rules, regulations, court orders, or other legal requirements; or (d) comply with the award. In all other respects, the parties agree to keep this arbitration strictly confidential.*
>
> *The parties reserve the right to enter into, or request from the arbitrator, a more detailed confidentiality agreement or protective order.*

Class actions

If there is any possibility of one side seeking class relief, the parties may want to specify whether class actions are permitted. If parties do not expressly provide for class status in arbitration, a court is likely to find that an arbitrator lacks the authority to order class relief.[5] This is an evolving area of law, and parties should consult with an attorney who is familiar with recent developments.

Discovery

Under the AHLA Rules of Procedure for Arbitration, the arbitrator determines how much discovery is necessary and whether to entertain motions.[6] To control these decisions, parties may specify how much discovery is permitted or how electronic discovery is to be conducted. Alternatively, they may prohibit all discovery.

A reasonable limit on discovery may effectively cap the amount of time and money devoted to resolving a dispute. It is important to bear in mind, however, that the appropriate amount of discovery may be quite difficult to predict in advance. Thus, depriving an arbitrator of discretion over the scope of discovery may create unintended consequences.

An arbitration clause could authorize wide ranging discovery-- as broad as that permitted in court--but the ensuing cost and delay generally eclipse any benefits. Arbitration is faster and less expensive than litigation only if the process remains more

5 See *Stolt-Nielsen v. AnimalFeeds*, 130 S. Ct. 1758 (2010).
6 See AHLA Rules 5.5 and 5.6.

streamlined. A key component of a streamlined process is a restriction on nearly unlimited discovery.

Drafting tip
If a limitation on discovery benefits one party at the expense of another, a court or arbitrator may decide that it is unconscionable or violates public policy and refuse to enforce it. This is particularly true if the beneficiary had significantly greater leverage in drafting the agreement to arbitrate.

Sample Language:

> *Each party is limited to no more than five depositions and ten interrogatories.*

Hearing Location
Because many health care organizations are tied a particular area, they can often predict well in advance where they would like a hearing to take place. Thus, parties may wish to add a clause along these lines:

> *The arbitration hearing will take place in [city], [state].*

Rules of Evidence
Arbitrators generally do not follow rules of evidence applicable in court proceedings.[7] Parties may designate that an entire set of rules, such as the Federal Rules of Evidence, apply, or they may require that only specific legal concepts apply such as limitations on hearsay evidence.

An informal hearing generally proceeds faster than a hearing under rigid rules of evidence, with fewer interruptions for objections and evidentiary rulings and fewer barriers to the introduction of evidence. Consider whether the possible benefits of formal rules outweigh the likely added costs and delay.

Sample language:

> *The arbitrator will admit into evidence only documents and testimony that would be admissible under the Federal Rules of Evidence.*

AWARD

Choice of Law
To avoid a potentially lengthy dispute over which state's laws should apply to a claim, parties often designate the governing law.

7 See AHLA Rule 6.6.

Sample language:

> *This agreement shall be governed and construed in accordance with the laws of the State of _____, without regard to choice or conflict of law provisions or rules.*

or

> *Any arbitration arising out of this contract shall be governed by and interpreted in accordance with the laws of the State of _____ and the Federal Arbitration Act, 9 U.S.C. §§ 1-16.*

Relief

Under the AHLA Rules of Procedure for Arbitration, an arbitrator can award any relief authorized by contract or applicable law.[8] Parties may agree to limit an arbitrator's discretion in a variety of ways including:

- Barring certain types of relief, such as punitive damages, consequential damages, or injunctive relief;
- Capping the total amount of the award, or the amount awarded per claim or per claimant;
- Agreeing on liquidated damages for breaches of specific contract provisions; or
- Adding interest to the amount awarded.

A clause authorizing an arbitrator to award interest should not attempt to modify any applicable statutory right to interest. Furthermore, it should specify the interest rate (e.g., 2% per year) and the time period during which interest accrues (e.g., from the date a wrongful act occurred until the date the award is paid).

Drafting tip: A court or arbitrator may reject a clause that attempts to limit the type or amount of relief authorized by statute, particularly if the clause disfavors a party with less bargaining power.

Sample language:

> *The arbitrator may award not award punitive damages to either party for any reason.*

Fees and Expenses

The AHLA Rules of Procedure for Arbitration incorporate the "American Rule": Each party pays its own attorney's fees, and the parties split the costs of the arbitration process evenly.[9] However, parties may want to deter each other from pursuing weak claims or defenses by making the loser pay costs.

8 See AHLA Rule 7.5.
9 See AHLA Rule 7.6.

Drafting tips:
A "loser pays" clause should provide for situations in which there is no clear winner, such as when the claimant prevails on some but not all claims, or is awarded some but not all of the relief sought. If the arbitrator is required to designate one party as having "prevailed" and award all fees and costs to this party, a partially successful party may feel cheated. A graduated approach may be fairer.

In addition, parties should take into account any applicable laws that award legal fees to the prevailing party.

Sample language:

> *The arbitrator shall, in good faith, approximate the extent to which each party prevailed and shall award the costs of the arbitration process and reasonable attorney's fees and expenses consistent with this approximation. A party that is determined to have fully prevailed on all its claims is entitled to all costs it incurred for the arbitration process and all reasonable attorney's fees and expenses.*

Rationale
The AHLA Rules of Procedure for Arbitration require an arbitrator to provide a concise statement of the reasons supporting his or her award.[10] Parties may decide a reasoned award is unnecessary and agree to have the arbitrator issue a short form award, or they may go in the opposite direction and require a decision supported by detailed findings of fact and conclusions of law.

A reasoned or detailed award may provide insights into how to address similar issues in the future, and it may provide a basis for an appeal. But imposing a writing requirement on the arbitrator adds to the time and cost of producing an award.

Sample language:

> *The arbitrator shall provide the findings of fact and conclusions of law which support the award.*

APPEALS

Finality is a primary attraction of arbitration. Unlike a trial court decision, an arbitrator's award is not subject to review by an appellate court for erroneous findings of fact or conclusions of law.[11] Only if the arbitration process is tainted by one of the severe flaws enumerated in the Federal Arbitration Act may a court vacate an award.[12] Thus, arbitration may be significantly quicker and less expensive than litigation.

10 See AHLA Rule 7.8.
11 See *Hall v. Matell*, 552 U.S. 576 (2008).
12 See 9 U.S.C. § 10.

The risk is that an arbitrator may misconstrue or ignore either the evidence or the governing law. Selecting a highly qualified arbitrator with a strong reputation is the surest way to minimize this risk. A fallback strategy is to include an appeals process in the agreement to arbitrate. Parties must weigh the possible benefits to be gained through review against the added cost and delay. The broader and more elaborate the process, the greater the strain on time and resources.

An appeal procedure should address the following topics:

Filing a Notice: Parties may set a deadline for filing an appeal with the AHLA Administrator, and for filing a response or cross appeal. They may specify how detailed the appeal, response, or cross appeal must be.

Stay of Court Proceedings: To avoid duplicate proceedings, parties may agree that once an appeal is filed, they will no longer pursue an action in court to vacate, modify, or enforce the award under the Federal Arbitration Act.

Appointment of Panel: Parties may agree to the selection process in AHLA Rule 3.5 or craft a different method for appointing appellate arbitrators.[13]

Scope of Review: If parties can appeal alleged errors of law, the agreement must require that the original award include conclusions of law. If the parties can appeal findings of fact, the agreement must require that the original award include findings of fact, that the hearing is transcribed or videotaped, and that a complete record is available for review.

Authority of Panel: The panel may have the authority to affirm or vacate the original award in whole or in part, and may have the authority to dismiss some or all of the claims or counterclaims covered in the original award. The panel may also be authorized to remand the claim to the original arbitrator for reconsideration of certain issues. The panel may be authorized to proceed even if one party refuses to participate in the appeals process.

Standard of Review: The panel may be required to apply the same standard of review as a first-level appellate court would apply in similar circumstances, or it may be required to apply a higher or lower standard of review.

Briefing and Argument: The parties may agree on a schedule for briefing and oral argument, or they may authorize the panel to set a schedule and determine whether oral argument is necessary.

Method of Voting: The panel may be authorized to reach decisions by a majority vote, or it may be required to reach a unanimous decision in order to overturn an award or part of an award.

13 Parties could appoint a single arbitrator, but appellate panels are the norm.

Award: The panel may be required to provide a concise statement of the reasons for its award. The award should be regarded as final.

Payment: The filing party may be fully responsible for a deposit to cover the costs and expenses of appeal, or the parties may agree to share this responsibility in some fashion. The parties may agree to share the costs and expenses of the appeals process, or they may authorize the panel to award costs and expenses to the prevailing party, or in any manner the panel regards as fair and just under the circumstances. The panel may be empowered to award attorneys' fees as it deems appropriate.

Confidentiality: The parties may extend a confidentiality agreement (see page 4 above) to the appeals process.

Drafting Tip: The right of appeal may be limited to awards above a dollar threshold. If negotiated at arms' length between two health care organizations, a threshold is unlikely to raise concerns. But if a threshold is imposed on an individual by an organization with greater leverage, it may be regarded as unconscionable or a violation of public policy.

Sample language:

> *Within 15 days after an award is issued in this matter, a party may file an appeal with the AHLA Administrator noting objections to the award. Within 15 days after such an appeal is filed, any other party may file a response or a cross appeal. Once an appeal is filed, no party will pursue an action in court to vacate, modify, or enforce the award under the Federal Arbitration Act until the appellate panel issues an award through the process set forth below.*
>
> *The Administrator will appoint an appellate panel of three arbitrators pursuant to the selection process set forth in AHLA Rule 3.5. The panel will set a briefing schedule and determine whether oral argument is necessary. It may proceed even if one or more parties refuse to participate in the appeals process.*
>
> *After reviewing the briefs and listening to oral argument, if any, the panel may affirm or vacate the original award in whole or in part. The panel will reach decisions by majority vote, applying the same standard of review as a first-level appellate court would apply in similar circumstances. The panel will provide a concise statement of the reasons for its award, which will be regarded as final. Unless all parties agree to an extension, the appellate panel will issue its award within 30 days after briefing and oral argument, if any, is concluded.*
>
> *Deposits to cover the cost of the appeals process will be provided in accordance with AHLA Rule 5.3. Fees and expenses will be apportioned in accordance with AHLA Rule 7.6(b).*

AHLA Dispute Resolution Service

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