ALTERNATIVE DISPUTE RESOLUTION

BLAW 5175: Business, Law and Ethics in Modern Society

University of Connecticut

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I. Where is arbitration on the spectrum of dispute resolution?

A. Negotiation: direct discussions between two parties to resolve an issue.

B. Mediation: a third party assists in the negotiation of a voluntary settlement. Sometimes there is an obligation to negotiate, but there is never an obligation to settle.

1. There are various types of mediation:

a) Facilitative (getting the parties to talk). This is the most common.

b) Evaluative (evaluating the claim and various bargaining positions; requires technical expertise).

c) Transformative (changes the landscape and gets the parties to thinks differently).

d) Sometimes the mediator does a little bit of each.

C. Mini-trial: one (or more) neutrals views a short presentation and issues a recommendation.

D. Arbitration: a third party settles the dispute between the parties. Once the parties have accepted

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arbitration, they do not have to agree with the arbitrator's award (which is binding upon them).

E. Judicial process: the government resolves the dispute between the parties.

II. There is a distinction between commercial matters (the subject of this outline) and other kinds of matters.

A. The parties are generally free to reach any agreement they desire (party autonomy) and the parties have roughly equal bargaining power.

1. However, there must be an agreement. The procedure cannot be secret to one party, *see Kenneth Votre v. Patricia Masiano-Votre*, FA-12-4017418-S (May 4, 2015)

B. The agreement between the parties will generally be enforced as written (*pacta sunt servanda*).

C. Don't write something so restrictive that it is the same (or worse) than court.

III. Why is there a preference for arbitration in commercial matters?

A. Traditionally courts would not enforce agreements to arbitrate because it was felt the courts could not (or should not) surrender their jurisdiction to decide disputes to the parties. This was substantially overruled by the Federal Arbitration Act (1925) and Uniform Arbitration Act (1955, amended in 2000). This was done against the backdrop of labor unrest where the courts were not delivering impartial justice.

B. The parties can structure the dispute resolution process to fit their dispute. The process is "scalable."

C. The parties can pick a decision maker who knows something about the subject of the dispute. For example, the parties may want to pick someone with an engineering background to decide an engineering

dispute.

D. The dispute resolution process can be quicker if managed correctly.

E. The dispute resolution process can be cheaper if managed correctly.

F. The decision maker may be insulated from political concerns, especially in states where judges are elected and your subject matter may be controversial.

G. Sometimes having special provisions for particular industries makes sense (for instance, baseball arbitration requires the arbitrator to pick only one of the parties' last, best offers). One side clearly wins and one side clearly loses, but it encourages the parties to make a reasonable last offer.

H. There are additional issues in international cases:

i. The United States is not a party to any international agreement to enforce judgments (either bilateral or multilateral).

1. However, the United States has signed the Hague Convention of Choice of Courts Agreements (which comes into force on October 1, 2015, but not for the United States and Ukraine who have not ratified their signatures). The parties to this convention as of September 12, 2017 are:

a. Austria
b. Belgium
c. Bulgaria
d. Croatia
e. Cyprus
f. Czech Republic
g. Estonia
h. European Union
i. Finland
j. France
k. Germany
l. Greece
m. Hungary
n. Ireland

o. Italy
p. Latvia
q. Lithuania
r. Luxembourg
s. Malta
t. Mexico
u. Netherlands
v. Poland
w. Portugal
x. Romania
y. Singapore
z. Slovakia
aa. Slovenia
bb. Spain
cc. Sweden
dd. United Kingdom

ii. Parties are concerned nationals will be treated better than foreigners.

iii. In investor-state arbitrations, private parties are concerned about litigating in a foreign party's courts. A sovereign will not willingly submit itself to the courts of another country.

1. *See* the UNCITRAL Rules on Transparency in Treaty based Investor-State arbitration (effective April 1, 2014). Applies to new arbitration agreements only, unless the parties otherwise agree to retrospective application to the transparency rules. (http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html)

IV. How do you want to pick the arbitrators? Recognize people tend to have a way they like to do it…and are not likely to lightly agree to another method.

See, for example, George Bernard Shaw's Caesar and Cleopatra (1898) "Pardon him, Theodotus; … he is a barbarian, and thinks that the customs of his tribe and island are the laws of nature."

A. Do you want one arbitrator or three (or some other odd number)?

1. Some people like a single arbitrator who is an expert in the subject matter.

2. Some people want a procedural expert to chair (possibly a lawyer) and two substantive experts.

3. What happens if you have more than two parties, such as a three-way supply contract (buyer, seller, and financier)?

B. Who is going to pick the arbitrator?

1. Some people require agreement between all parties, which raises the issue of what happens in a deadlock situation.

2. Some people will accept a list method, with a backup institutional appointment in case the parties don't agree.

3. Some people want to have direct party appointment of the two wing arbitrators, which changes the dynamics completely. In such cases the chair is effectively the one who makes the decision.

C. What qualities do you want in an arbitrator? Assuming you want a good arbitrator who will produce an enforceable award, you probably want:

1. An arbitrator who is independent of the parties.

2. An arbitrator who respects the process, giving parties their say without letting them run amuck.

D. The American Arbitration Association and the American Bar Association have jointly developed a set of ethical rules (https://www.adr.org/aaa/ShowProperty?nodeId=%2FUCM%2FADRSTG_003867&revision=latestreleased).

1. The appointing parties may each communicate *ex-parte* with the arbitrator they appointed (as long as they disclose this intention when the arbitration commences).

E. Arbitrators must make disclosures so the parties can determine whether or not they will properly discharge their duties (disclose whether or not they have conflicts of interest).

F. International Bar Association has a set of disqualifications, which they break down into

1. Red (disqualifying, but some can be waived)
2. Orange (think about it)
3. Green (not disqualifying)

V. What are the grounds for vacating an award? *See* Revised Uniform Arbitration Act §23.

A. The award was procured by corruption, fraud, or other undue means.

B. There was evident partiality by an arbitrator appointed as a neutral arbitrator. A proper disclosure is required to determine if an arbitrator is "partial." Once there is a disclosure of an issue and there is no objection, it is deemed waived.

C. There was corruption by an arbitrator. Bribing the arbitrator is not a good idea.

D. There was misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding.

E. An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing so as to prejudice substantially the rights of a party to the arbitration proceeding. Most arbitrators freely grant continuances fairly freely and allow in all evidence "for whatever it is worth."

F. An arbitrator exceeded the arbitrator's powers.

G. There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection not later than the beginning of the arbitration hearing.

H. The arbitration was conducted without proper notice of the initiation of an arbitration as required so as to prejudice substantially the rights of a party to the arbitration proceeding.

I. Making an error of fact or law does not allow the award to be vacated (although some arbitrations rules contain their own special appeal procedure as part of the overall arbitration process).

VI. Initially, the first goal of any arbitration should be an enforceable award that resolves the dispute between the parties. If that isn't your goal, then this outline won't help you.

A. Location of the Tribunal: This usually controls the law of the tribunal and affects the enforcement of the arbitral award. Things you must consider:

1. Will you be defending or prosecuting?

2. Where are the defendant's assets?

3. Does the local law impose any special procedural requirements?

4. Does the local law restrict the choice of arbitrator? For instance, are foreigners prohibited from being arbitrators?

5. What is the procedure to confirm an arbitral award?

B. Does the arbitration seat have an international agreement to enforce arbitration awards with the country where the arbitral award will be enforced?

1. 1958 New York Convention On The Recognition Of The Recognition And Enforcement Of Foreign Arbitral Awards. (www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf)

a) There are 157 state parties to this convention as of Monday, September 25, 2017.

2. 1975 Panama Convention on International Commercial Arbitration (http://www.oas.org/juridico/english/treaties/b-35.html).

   a) There are 19 state parties to this convention as of Monday, September 25, 2017.

3. Is there an applicable bilateral investment treaty (called a BIT), Friendship Commerce & Navigation (called a FCN) treaty or a free trade treaty?

VII. What basics must arbitration clauses contain?

A. There must be an agreement to arbitrate.

B. Existing Disputes - a person may agree to arbitrate an existing dispute. This is commonly called a submission agreement. These types of agreements are very rare although they can be tailored to the particular situation at hand.

C. Future Disputes - this is the most common type of arbitration clause. It is usually part of the applicable contract between the parties.

D. Arbitration clauses will be liberally construed, Middletown v. Police Local No. 1361, 187 Conn. 228 (1982).

E. There are standard arbitration clauses. Generally, it is a good idea to use the standard arbitration clause of the applicable administering agency unless you have a good reason not to. Courts tend to view any deviation from the standard clause as being intended to accomplish a specific (perhaps undisclosed) objective. Some general clauses are:

   1. American Arbitration Association

      a) Standard arbitration clause:

         Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by

arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

2. UNCITRAL recommended arbitration clause:

Any dispute, controversy or claim arising out of or relating to this agreement, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.

the appointing authority shall be [name of institution or person];

the number of arbitrators shall be [one or three];

the place of arbitration shall be [location]; and

the language to be used in the arbitration proceedings shall be [language].

VIII. What specifics must be contained in the arbitration agreement to be binding?

A. There must be consent to arbitration. This means the parties have indicated their intention to be bound by the decision of a third party. "Non-binding arbitration" is an oxymoron.

There will be no arbitration if the parties have not contracted for it, A. Dubreuil & Sons, Inc. v. Lisbon, 215 Conn. 604 (1990), Connecticut General Statutes §52-408, Connecticut General Statutes §50a-107 and 9 U.S.C. §2.

B. The consent must be in writing, Morganti v. Boehringer, 20 Conn. App. 67 (1989), Connecticut General Statutes §52-408, Connecticut General Statutes §50a-107 and 9 U.S.C. §2. Writing includes emails and faxes.

C. The writing must be signed, except under Connecticut General Statutes §50a-107(2). Electronic signatures are generally enforceable.

D. The scope of the dispute being arbitrated must be specified, Gary Excavating v. North Haven, 164 Conn. 119 (1972).

Contrary to many arbitration rules, the courts have jurisdiction to determine the jurisdiction of the arbitral tribunal, Welch Group, Inc. v. Creative Drywall, Inc., 215 Conn. 464, 467 (1990); Flynn v. Newington, 2 Conn. App. 230 (1984), and M&L Building Corporation v. CNF Industries, Inc., 7 Conn. L. Rptr. 31 (1992). This is contrary to Connecticut General Statutes §50a-116(1). The parties may be able to change this if Connecticut adopts the Revised Uniform Arbitration Act.

E. An agreement to arbitrate may also be found in:

1. An exchange of letters, emails, faxes or telegrams. Does anyone still use telegrams?

2. Articles of incorporation between members of an association or corporation (such as a trade association).

3. Bylaws between members of an association or corporation (such as a trade association).

4. Please note this is not covered by the black letter of the Revised Uniform Arbitration Act, but the comments claim the RUAA consider these acceptable agreements.

5. The UNCITRAL Model Law on International Commercial Arbitration does not explicitly discuss this issue.

F. All other elements can be filled in by local law, although this is not usually preferable. General contract rules are applied to arbitration agreements.

IX. You may wish to consider the following additional elements

in your arbitration clause:

A. Institutional v. ad hoc arbitration.

1. Having a professional case manager can be helpful to keep the process moving. They have likely seen whatever problem you have before…and might know what to do about it!

2. Courts are not accustomed to enforcing agreements to arbitrate when a dispute arises during the course of the case.

3. Most arbitral institutions have their own panel of arbitrators who have met the institution's standards for being on the panel.

B. The arbitral tribunal

1. How is it appointed?

2. Number of arbitrators (usually an odd number)?

a) Single arbitrator default under Connecticut General Statutes §52-411(b)

b) Three arbitrator default under Connecticut General Statutes §50a-110(2).

(1) Picking three arbitrators increases your costs by five times (as a general matter).

(2) You might want different qualifications for the chair and the "wings".

(a) The chair might be a lawyer from the place of arbitration who is used to keeping things moving.

(b) The wings might be substantive experts.

(c) Some people like to directly appoint the "wings".

(3) Some parties feel strongly about having

a party appointed arbitrator. I am not very enthusiastic about that.

c) Single arbitrator default under 9 U.S.C. §5. Three arbitrator default under Connecticut General Statutes §50a-110(2).

d) The rules you pick most likely provide for a default for things you don't specify (such as the number and qualifications of arbitrators).

3. Qualifications of arbitrators?

a) Special education (usually subject matter)

b) Special experience (usually procedural)

c) Some basis for giving the parties trust and confidence in the arbitrator's skill.

d) If you have 3 arbitrators, consider having the chair being a lawyer of the jurisdiction when the panel sits, with the other two arbitrators being substantive experts.

e) It is generally difficult to determine how good an arbitrator is until he is on your case (and then it is too late). Most law firms like to use "brand name" arbitrators if they can.

4. How are vacancies filled? Absent agreement to the contrary, the courts have the power to fill vacancies, Connecticut General Statutes §52-411, Connecticut General Statutes §50a-111(5) and 9 U.S.C. §5. An arbitral institution also has the power to fill vacancies under most rules.

5. May the proceedings continue if an arbitrator refuses to participate? A reluctant arbitrator may slow things up in Connecticut, Connecticut General Statutes §52-414(a), Connecticut General Statutes §50a-114(1). Often the applicable rules address this issue.

C. Place of arbitration. This governs the default law

applicable to the arbitral tribunal.[2] For arbitration awards which will be enforced elsewhere, it is very important to check if arbitration awards from the tribunal's seat will be enforced in the target forum (and if there are any restrictions on their enforcement).[3]

D. Language of the arbitration proceedings. If it is not specified, it may end up the language of the arbitration agreement or the arbitrators' mother tongue.

E. The law applicable to the merits of the dispute.

F. Rules of procedure the arbitral tribunal must follow. The rules should be designed to facilitate the rapid and inexpensive resolution of the dispute at hand.

1. Should the arbitration be done on documents only?

2. Will the parties be allowed to testify in person?

3. Will the parties be allowed to testify by affidavit?

4. Will institution of arbitration proceedings require special things, such as the signature of the president?

5. There is a tendency to turn arbitration into litigation, usually by having court-like discovery.

G. Pre-conditions to instituting arbitration, such as mediation. Perhaps you will require the company president to sign the arbitration demand…

H. Whether or not the arbitrator has the power of an amiable compositeur (almost never done).

[2] In Connecticut, this is the Federal Arbitration Act, 9 U.S.C. §101, Connecticut General Statutes §52-408 et seq., and/or the UNCITRAL Model Law on International Commercial Arbitration, Connecticut General Statutes §50a-101 et seq.

[3] The United States is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the 1975 Inter-American Convention on International Commercial Arbitration. This is important if the award must be enforced internationally.

1. There is some doubt some United States jurisdictions will enforce such awards.

2. The parties should be very wary about appointing such an arbitrator unless:

   a) They know the arbitrator ***VERY*** well and

   b) They implicitly trust the arbitrator's personal judgment to "do the right thing."

I. Whether or not provisional relief or interim measures of protection may be granted.

1. Is a bond required?

2. Are attachments allowed?

3. Are only conservatory measures allowed?

4. When is it necessary to go to a court, either to get the interim measures of protection or to enforce them?

5. The updated UNCITRAL arbitration rules have detailed provisions regarding interim measures of protection.

6. The updated UNCITRAL Model Law on International Commercial arbitration.

J. May arbitrations be consolidated?

1. When between the same parties?

2. When between differing parties, but relating to the same dispute?

3. Which arbitral tribunal survives?

K. Waiver of sovereign immunity. This likely has to cover both the proceedings and enforcement of any decision (the two are separate and distinct).

L. Attorneys' fees clauses as an in terrorem device. In

different countries, "costs" can automatically include attorneys' fees.

X. Pathological Arbitration Clauses: The arbitration clause does not work.

A. Do the parties mean to arbitrate?

1. Example - In the case of dispute, the parties undertake to submit to arbitration but in the case of litigation, the Connecticut Superior Court shall have exclusive jurisdiction.[4]

2. Example - All disputes arising out of this contract will be submitted in first instance to an arbitral tribunal of the American Arbitration Association. If the decision is not acceptable to either party, an ordinary court of law, to be designated by the claimant, shall be competent.[5]

3. Example - In the event of any unresolved dispute, the matter shall be referred to the American Arbitration Association.[6]

B. Choosing the wrong or non-existent arbitral institution. Verify the arbitral institution you select in the clause exists and handles cases of this type.

a) Example - The appointing authority shall be the American Arbitration Association in Bloomfield, Connecticut.[7]

b) Example - Any arbitration shall be administered by the arbitration rules of the Connecticut Bar Association's Alternate

[4] Do the parties go to arbitration or litigation? It is unclear.

[5] There is no indication of an intention to be bound by the decision of the arbitral panel.

[6] It is uncertain whether this dispute is being submitted to arbitration or to mediation.

[7] There is no office of the American Arbitration Association in Bloomfield, Connecticut.

Dispute Resolution Committee.[8]

c) Example - Any arbitration shall take place in accordance with the rules of the New England Arbitration Association.[9]

C. Beware of drafting compromises which make the arbitration difficult.

1. Example - the arbitration shall be conducted in accordance with the rules of the United States Arbitration and Mediation Association of Connecticut, Inc. and shall be administered by the American Arbitration Association.[10]

2. Example - In case of any dispute concerning the merchandise, the parties agree to have recourse to the procedure of conciliation foreseen in the Rules of Conciliation and Arbitration of the International Chamber of Commerce.[11]

3. Disputes other than those cited above will be finally settled according to the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with these Rules.[12]

D. Who names the arbitrators?

1. Example - In the event that a dispute is submitted to arbitration in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, the arbitration will be submitted to three arbitrators appointed in accordance with the said Rules and will take place

[8] This committee does not have any arbitration rules and does not supervise arbitrations.

[9] Needless to say, there is no New England Arbitration Association.

[10] A similar clause created great difficulties for the American Arbitration Association when it was tried.

[11] The parties have agreed to conciliation. Did they also agree to arbitration?

[12] The parties will disagree about which clause is applicable to this particular dispute. Does the dispute involve merchandise or not? Was there ever a valid business reason for using more than one dispute resolution mechanism?

> in Swiss Romande: the arbitrators will be nominated by the Swiss Court of Geneva and Lausanne.[13]

XI. How did it work in this "hypothetical" case?

Please note this "hypothetical" case is based on an actual case which can be obtained from public sources (such as PACER filings). But we aren't going to give you the case name…

A. The arbitration clause read:

> Arbitration: In the event of a dispute among the parties related to this Agreement the same shall be referred to arbitration by a single arbitrator nominated and agreed to by the Parties. Upon the failure of the Company and Recipient to agree upon a single arbitrator, in accordance with the Rules of the American Arbitration Association, each of them shall select one (1) arbitrator and the two (2) arbitrators so chosen shall then select a single arbitrator. Except as the Parties otherwise agree upon a request made by both Parties, the arbitration hearing shall be held in the home city of the Party not requesting arbitration and a court of competent jurisdiction sitting in that city may enter judgment on the award and issue execution thereon. All costs of arbitration shall be shared equally by the Parties, and the prevailing Party shall be entitled to recover its attorney's fees and other costs and expenses in connection therewith.

B. The United States District Court ordered arbitration on June 27, 2005.

C. The parties agreed to mutually appoint the arbitrator. What should be considered necessary attributes for this arbitrator?

[13] So who appoints the arbitrators in case of a conflict? Do the parties have to apply to the first court before they apply to the second court? How long does any applying party have to wait for a response from the first court before applying to the second court?

1. Does the relationship with opposing counsel matter?

2. Does the identity of the parties matter?

3. Is there a desirable subject matter competence?

4. Do you want a procedurally active arbitrator? Or not?

D. Should the arbitrator be interviewed? Are there any limits to that? *See* the attached guideline from the Chartered Institute of Arbitrators. Be careful the interview does not create a bias!

E. Should you tell the arbitrator why he is being considered?

F. One of the biggest concerns for an arbitrator is denying a continuance request because that is a ground for vacating an award. Rather than simply grant every request for a continuance, the arbitrator can explain in writing why he acted the way he did.

G. It is very difficult to get an arbitrator's track record. Large law firms keep their own databases on arbitrators.

H. Does it matter what the arbitrator's order is called? Should it matter?

1. Order.

2. Partial award.

3. Award.

XII. It is entirely different skill set to manage an arbitration than it is to manage a lawsuit. Picking the wrong lawyer or the wrong arbitrator makes all the difference in the world.

XIII. Counsel ethics in international cases.

A. Lawyers are licensed by one or more countries (or

states within a country). Each home jurisdiction has its own particular ethical requirements as part of its licensing scheme. These requirements can actually be contradictory. For example:

1. May lawyers speak to witnesses in before a hearing?

2. May lawyers prepare a witness before a hearing?

3. May lawyer pay for a witnesses expenses as an accommodation?

4. May a lawyer pay an expediting fee? Does it matter to whom and for how much?

5. Does a lawyer have a duty of loyalty to a client?

6. Does a lawyer have a duty of candor to the arbitral tribunal? What if the lawyer comes from a legal system that doesn't allow discovery? Will the lawyer be candid in disclosing documents? Will the lawyer tell the tribunal if his client is not candid in disclosing documents?

B. Some jurisdictions impose their own ethical rules on lawyers who conduct business within their jurisdiction…even though the foreign lawyers are not admitted to the local jurisdiction.

C. There is no licensing requirement imposed by an arbitral tribunal. Therefore, there are no ethical requirements when appearing in from of an arbitral tribunal.

D. Sometimes a jurisdiction requires party representatives in an arbitration to be lawyers. What happens if:

1. It is a labor arbitration? In such circumstances party representatives (especially union representatives) are traditionally not lawyers.

2. The unauthorized practice of law may be a crime. Is the arbitrator aiding and abetting a felony by knowingly allowing the unauthorized practice of law?

3. Does it matter if the lawyer is admitted in another jurisdiction?

E. Does the subject matter of the arbitration matter?