Top 10 Mistakes: Drafting Arbitration Agreements

By Amy Lieberman

Drafting arbitration agreement can be a complex process. Here are the most common mistakes made in the process of drafting arbitration agreements and solutions to avoiding them.

1. Failing to Include a Mediation Provision. Arbitration agreements that only call for arbitration without mediation are a thing of the past. Virtually, every dispute – except for those where a judicial pronouncement is needed – is able to be mediated. Make it easy by including a mediation provision. In fact, avoid the label "arbitration agreement." Instead, use the label, "dispute resolution agreement."

2. Drafting an Incomplete Mediation Provision. A mediation provision should make it easy on the parties, by specifying the *how, who, when, where and fees:*

- *How* – How to initiate mediation (i.e., submit a written request to the other party).
- *Who* – Who should be considered for selection as a mediator? Specify an entity with a roster of qualified neutrals, an attorney or ex-judge with relevant substantive expertise, or a process for exchanging a list of names.
- *When* – When should mediation occur? (i.e., "Within 60 days of request to initiate mediation or arbitration").
- *Where* – Where should mediation be held? (This is important if in different states)
- *Fees* – Employer should pay if there is an employer-plan; otherwise, specify parties split fees 50/50. (*Note*: An arbitration provision that calls for the parties to split *arbitration* fees does not go far enough. Make it clear for mediation as well.)

3. Describing Mediation as "Non-Binding." While mediation is a voluntary process once the parties appear, any agreement reached by the parties is legally binding. Stating that the process is "non-binding" leads to the potential problem of parties not giving mediation preparation the appropriate attention.

4. Drafting a "Med-Arb" Provision. A provision that states that a mediator will be empowered to serve as arbitrator in the event no resolution is reached is problematic. A mediator learns information that he would not otherwise learn in arbitration, such as what a party would be willing to do, or acknowledgements of weaknesses, which could influence his ultimate decision and neutrality. The better process is to select an independent arbitrator, if mediation is unsuccessful.

5. Failing to Provide For Injunctive Relief in Court. In commercial cases, it may be important to be able to race to the courthouse to obtain a TRO or preliminary injunction to quickly shut down illegal competition or solicitation that can cause irreparable harm. If this is the case, be sure to expressly carve out this exception from mandatory arbitration.

6. Mandating a Three-Arbitrator Panel. Many arbitrators will tell you that when there are panels of three, the two-party-selected neutrals end up acting as advocates. This defeats the purpose of selecting "neutrals." It also can triple the cost of arbitration and delay the process due to scheduling conflicts. If you feel compelled to go with a three-arbitrator panel, specify that the chair will handle all discovery disputes and minor scheduling issues.

7. Drafting an Incomplete Arbitration Provision. The same suggestion applies to drafting this provision, as with a mediation provision: be sure to specify the *how, who, when, where and fees:*

- *How* – How can a party initiate arbitration? (i.e., Demand sent to parties; to the AAA or other tribunal).
- *Who* – Roster or process for selection of arbitrator (see above).
- *When* – When arbitration must be initiated (i.e., 180 days of perceived breach; one year from harm; or within applicable statute of limitations).
- *Where* – Where will the arbitration be held? (This is important if in different states)
- *Fees* – Employer should pay, if there is an employer-plan; otherwise, specify parties split fees 50/50.

8. Failing to Define Scope of Arbitrator's Authority / Jurisdiction . Preliminary matters regarding "arbitrability" of a claim must be decided by someone. Is a class action waiver enforceable? Specify who is empowered to make decisions relating to arbitrability, jurisdiction and enforceability of arbitration clauses – the arbitrator or a court. Otherwise, you may end up litigating this issue. Is the arbitrator able to award punitive damages? If not, be sure to specify.

9. Failing to Define Scope of Discovery. Parties are at liberty to provide for discovery and for limitations on discovery. Failure to specify can lead to arbitration essentially being the same as litigation and parties lose the benefit of efficiency, which is one of the hallmarks of arbitration.

10. Failing to Provide for Dispositive Motions. Drafting, responding to and arguing motions for summary judgment add up to increased cost and months of delay, which also causes parties to lose the benefit of efficiency. Avoid this problem by specifying that motions will not be filed.

A final note of caution: Plaintiff's counsel often will file a lawsuit without being aware of an arbitration agreement. Before filing, check with your client and opposing counsel. Additionally, defense counsel should think twice before immediately moving to compel arbitration. If opposed, attorney's fees add up. Simply contact plaintiff's counsel, send them a copy of the agreement and request that they dismiss, or at least stay, the litigation.

If a motion to compel is opposed and you wish to seek attorney's fees for prevailing, do so from the court. If you delay until arbitration, you may be deemed to have waived the right to seek recovery.

Amy L. Lieberman is a full-time professional mediator of employment and business conflict. She has repeatedly been listed in the Best Lawyers in America, Southwest Super Lawyers, and Ari zona's Finest Lawyers in alternative dispute resolution, and is the author of the book, "Mediation Success: Get it Out, Get it Over, Get Back to Business." Visit her website at www.insightmediation.com or call Amy at (480) 246-3366.