

## **Drafting Effective Arbitration Clauses for Hospitality Contracts**

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Arbitration can provide an efficient and confidential means of resolving disputes while preserving business relationships between parties. However, poorly drafted arbitration clauses can lead to costly delays, unintended consequences, and unnecessary court intervention that undermines the benefits of the arbitration process. To ensure arbitration meets the parties' expectations, it is crucial to carefully draft customized arbitration clauses rather than relying on one-size-fits-all provisions.

During the negotiation and transaction process, whether in hotel management agreements, franchise agreements, or lending agreements, business lawyers have to think about the potential for a dispute to arise. What are the consequences to the client of a deal gone wrong? Time, money, relationship, goodwill, reputation. When considering how to resolve the dispute, the default for most attorneys is court. Another tool in the toolbox that most practitioners should consider and talk to their clients about is including a dispute resolution clause in the contract. ADR is not just for pre-dispute agreements. After the dispute arises, parties can and should consider creating a dispute resolution agreement incorporating some of the same tips and best practices.

### **Considerations When Drafting**

When drafting an arbitration clause, parties should consider several factors:

- Nature of the agreement
- Locations of the parties
- Types of disputes likely to arise and which party may breach
- Potential amount of controversy
- Whether a tiered dispute resolution process with mediation is desired
- Need for emergency relief or specific remedies
- Need for enforcement

With these factors in mind, the clause can be tailored to address arbitration rules, arbitrator selection, remedies including emergency relief, governing law, confidentiality, fees and costs allocation, locale, discovery, and the type of award.

### **Best Practice Tips**

Some best practice tips for effective arbitration clause drafting include:

**Procedures:** Specify the use of an arbitration provider's rules. Within the provider's rules, for example, the AAA's, procedures can vary. Lawyers drafting an ADR clause should consider this when tailoring the clause to include a specific subset of procedural rules. AAA's Commercial Rules, for example, have expedited procedures for matters with less than \$100,000 in dispute and large complex procedures for matters with a minimum of \$1 million in dispute. Attorneys can always change the procedure post-dispute, but it can be difficult to do so. Something to consider: Identifying a special set of procedures may box the parties in an untenable arbitration procedure that is not fit for the dispute.

**Locale:** Identify the city and state where the evidentiary hearing should be held. This should not be vague, nor should it be absent from the contract. Although arbitrations can proceed virtually or hybrid, identifying a local is a key component of an ADR clause.

**Tiered Process:** If using a multi-step process, set deadlines, use an established mediation rule set, and grant arbitrator authority over disputes involving conditions precedent. While major disputes, like hotel mismanagement, may be better served by engaging in arbitration at the outset, minor disputes can be resolved quickly, effectively, and with little cost by engaging in mediation or an informal negotiation process. The key takeaway is to ensure that the process is laid out, with realistic deadlines and that it identifies a roadmap out of one process and into the next one.

**Arbitrators:** When considering including a specific number of arbitrators, remember that three is not always better than one. Three arbitrators cost five (5) times as much as a single arbitrator. The AAA, for example, includes in the Commercial Rules a threshold for the appointment of a single or three arbitrators. Lawyers may consider setting a higher threshold for a three-arbitrator panel than the rules provide for.

If including a selection method, again, consider defaulting to the chosen ADR provider's selection process to avoid delays, ambiguity, and unnecessary challenges. No coin tossing! If it is decided that more than one arbitrator will decide the dispute, set reasonable time frames for the selection process to be completed and provide a fallback if the designated process fails.

Parties may consider including particular expertise that the arbitrator(s) must have, for example, “at least 10 years experience in the hospitality industry”. This can ensure that the arbitrator is knowledgeable in the subject matter of the dispute. Tip: do not be too creative here to the point where your choices become very limited.

**Costs:** Use clear language on how arbitration fees and costs will be allocated between parties. Are you granting the arbitrator(s) authority to reallocate? What do the rules say about this? Consider these questions when deciding what to include in the ADR clause.

*Rely on the arbitration provider's standard clause language to ensure enforceability and avoid ambiguity.*

### **Resources**

The American Arbitration Association (AAA) provides numerous resources to assist parties in drafting effective arbitration clauses, including:

- AAA ClauseBuilder© online tool for drafting clauses [www.clausebuilder.org](http://www.clausebuilder.org)
- Arbitration rules, guides, and educational resources on [www.adr.org](http://www.adr.org)

Properly drafted arbitration clauses ensure an efficient process aligned with the parties' interests. While arbitration provides confidentiality and a method to preserve relationships, a poorly drafted clause can lead to the opposite - an unnecessarily complicated, costly, and public situation that undermines arbitration's advantages. Taking the time to thoughtfully customize the arbitration clause is crucial for achieving the intended benefits of the arbitration process.