ALTERNATIVE DISPUTE RESOLUTION

BLAW 5175: Business, Law and Ethics in Modern Society

University of Connecticut - MBA Program

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1. Why do you care?

    a. Well, if you do it right, arbitration can be:

        i. Faster.

        ii. Cheaper.

        iii. Confidential.

        iv. More final than litigation.

        v. Procedurally more flexible.

        vi. The arbitrators can build up a subject matter expertise.

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b. Arbitration is often used for large classes of disputes that need to be addressed but are large enough that individual adjudication is just not possible (sometimes in conjunction with the Bankruptcy Code because the potential claims are so numerous and large that it makes the company insolvent). For example:

    i. Asbestos claims (such as the WR Grace asbestos claims and the Owens Corning asbestos claims).

    ii. Life insurance claims (such as the Prudential Life claims when it went public).

    iii. Opioid claims.

c. Clients with regular (repetitive) small litigation often want it to keep the process controllable, such as:

    i. Franchise terminations.

    ii. Dealer disputes.

    iii. Some types of unusual financial transactions, such as factoring.

    iv. Ancillary divorce matters (not child custody, in particular).

2. Where is arbitration on the spectrum of dispute resolution? You need to know what it is before you can draft an effective clause.

    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.

        i. There are various types of mediation:

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

2. Evaluative (evaluating the claim and various bargaining positions; requires technical expertise). Giving an evaluation usually stops the mediation.

3. Transformative (changes the landscape and gets the parties to think differently).

4. Sometimes the mediator does a little bit of each.

c. **Mini-trial**: one (or more) neutral views a short presentation and issues a recommendation. A recommendation is non-binding.

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

3. 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 arbitration agreement they desire (party autonomy) and the parties have roughly equal bargaining power.

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

ii. If the parties have very disparate bargaining power, the arbitration agreement may be subject to a contract of adhesion analysis.

b. The arbitration agreement between the parties will generally be enforced as written (*pacta sunt servanda*). Commercial parties generally expect their written agreement will be followed by the courts.

c. Don’t write something so restrictive that it is the same as (or worse than!) the court.

    i. Do your really need to incorporate the Practice Book (the Connecticut court rules) by reference?

    ii. Do you really need to incorporate the rules of evidence by reference?

    iii. Do you really need to specify a hard deadline for the delivery of an arbitral award? What happens if it is missed?

    iv. Do you really need an arbitrator who is a JD-CPA with a doctorate in medieval philosophy who speaks Basque fluently? You may not be able to find one.

4. 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 (there was a perception management controlled the local judges).

    b. The parties can structure the dispute resolution process to fit their dispute. The process is “scalable.”

        i. There will be a lot of procedural protections for a big dispute (which makes the dispute resolution process slower and more expensive).

        ii. There will be very few procedural protections for a small dispute (which makes the dispute resolution process faster and less expensive).

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. Most people do not manage it well. Therefore, you will likely want your arbitrator to have at least some experience.

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

f. 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.

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

   ii. However, the United States has signed the Hague Convention of Choice of Courts Agreements (which came into force on October 1, 2015, but not for the United States, People's Republic of China and Ukraine who have not yet ratified their signatures).

5. Most people have a firm conviction that their preconception is the only rational way to proceed. Arbitration is very flexible … probably a lot more flexible than the parties' preconventions.

6. First big question: Do you want to have an administered or an *ad hoc* arbitration? It depends.

   a. Do you have a stable of trained arbitrators to pick from? If not, pick an arbitral institution. They have a stable of trained arbitrators (and probably do arbitrator training).

b. Have you ever administered an arbitration before? If not, pick an arbitral institution. They have done this before and it is different than arbitration.

c. Do you know enough about the law of arbitrations that you are comfortable drafting an arbitration clause? If not, pick an arbitral institution. The law which governs the contract is not necessarily the law that governs the arbitration. Unless otherwise specified, the governing law for the arbitration is the law of the arbitral seat (excluding the conflict of law rules).

i. Some laws regulate how the panel can arbitrate, such as Connecticut General Statutes §42-158m, which provides:

"Any provision in a construction contract for the performance of work on a construction site located in this state that purports to require that any dispute arising under the construction contract be mediated, arbitrated or otherwise adjudicated in or under the laws of a state other than Connecticut shall be void and of no effect, regardless of whether the construction contract was executed in this state."

The question is whether or not this is preempted by the Federal Arbitration Act.

ii. There are standard "off the shelf" arbitration clauses from arbitral institutions that offer a good place to start:

1. American Arbitration Association[2]

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

[2] This is the "standard" arbitral body within the United States. However, you may want to think about their due process protocol if you are doing consumer disputes.

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[3] 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].

3. American Dispute Resolution Center:

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 Dispute Resolution Center, Inc., and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. The arbitration shall be conducted in the English language in Hartford County, Connecticut. The seat of the arbitration shall be deemed to be Connecticut and the arbitration shall be governed by Connecticut

[3] Every major arbitral institution will administer the UNCITRAL arbitration rules. They all have their own minor implementing rules.

law. The arbitrator(s) shall have exclusive jurisdiction to determine his jurisdiction. Unless the parties otherwise agree, there will be (i) no discovery and (ii) no mediation.

4. International Chamber of Commerce:[4]

All disputes arising in connection with this Agreement shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one (1) or more arbitrators, appointed in accordance with the said rules. The parties to this Agreement shall have recourse, if necessary, to the International Centre for Technical Expertise of the International Chamber of Commerce in accordance with the International Chamber of Commerce's Rules for Technical Expertise. The seat of the arbitration shall be deemed to be Connecticut and the arbitration shall be governed by Connecticut law.

iii. How comfortable are you going to court to fill in the gaps if there is no arbitral institution? If not, use an arbitral institution.

7. The next big question is whether the dispute exists now (a *compromis*) or the clause governs future disputes (arbitration clause).

   a. Most arbitration clauses govern future disputes.

      i. The European Union disfavors *compromis* for consumers.

   b. Very few "off the shelf" arbitration clauses govern existing disputes.

[4] They tend to set the arbitrator fees by the amount of dispute, regardless of the amount of time the arbitrators spend working on the matter.

8. The arbitration clause should generally be scalable.

    a. It makes send to pay more to resolve larger disputes.

    b. It doesn't make a lot of sense to pay a lot to resolve tiny disputes.

    c. Most arbitral institutions have their own rules. They will administer arbitrations under:

        i. Their rules; and

        ii. The UNCITRAL rules.

    d. Arbitral institutions will almost never administer arbitrations under another arbitral intuition's rules. For example, the American Arbitration Association will not generally administer an arbitration under the International Chamber of Commerce's rules.

    e. By and large, you will generally not understand the implications of an arbitral institution's rules unless you have a lot of experience with them.

    f. The kind of things you can control range from:

        i. Whether or not "small claims" sized disputes should go to small claims courts. The small claims amount varies between states. Connecticut's limit remains at $5,000. It ranges from $2,500 in Kentucky to $25,000 in Tennessee.

        ii. Whether or not the arbitration should proceed without an oral hearing (a "documents only" arbitration). The consumer protocol of the American Arbitration Association always gives the consumer the right to request a hearing, no matter what the arbitral clause says.

        iii. The number of arbitrators. The administrative expense of a three person arbitral panel are FIVE times the administrative expenses of a single arbitrator.

        iv. The time period to do things. When the time periods are shortened, it is generally called an "expedited" arbitration.

v. Many arbitration rules give an absolute right to mediation, even if the amount of the case does not justify it. You can "opt out" explicitly if you want to.

vi. Will telephonic or video conferenced arbitrations be allowed? This is common in the age of the COVID-19 pandemic. Zoom hearings are getting more commonplace. Hearings assisted by technology have been common in large classes of disputes (such as telephone hearings in the Prudential life insurance disputes) and Zoom hearing in the asbestos disputes.

9. What are the standard elements of an arbitration clause?

a. There must be an agreement to arbitrate. This means the parties have indicated their intention to be bound by the decision of a third party. "Non-binding arbitration" is an oxymoron (but sometime people say it anyway).

i. 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 (repealed for agreements effective October 1, 2018), Connecticut General Statutes §52-407dd (effective for agreements effective October 1, 2018), Connecticut General Statutes §50a-107 and 9 U.S.C. §2.

ii. The consent must be in writing, *Morganti v. Boehringer*, 20 Conn. App. 67 (1989), Connecticut General Statutes §52-408 (repealed for arbitration agreements effective October 1, 2018), Connecticut General Statutes §52-407ff (effective for agreements effective October 1, 2018), Connecticut General Statutes §50a-107 and 9 U.S.C. §2. Writing includes emails and faxes.

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

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

   i. 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 change this default because Connecticut adopted the Revised Uniform Arbitration Act (effective for arbitration clauses effective after October 1, 2018).

c. The procedure cannot be secret to one party, *see Kenneth Votre v. Patricia Masiano-Votre*, FA-12-4017418-S (May 4, 2015). If there is no agreement to arbitrate, there will be no arbitration.

d. 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. Be careful you don't pick such specialized criteria that you end up with a null set of potential arbitrators.

e. The dispute resolution process can be quicker if managed correctly. Most people do not manage it well. Therefore, you will likely want your arbitrator to have at least some experience. With a three person panel, an attorney with trial experience is often picked as the chair.

   i. Will the parties each appoint their own arbitrator? This is very common in labor contracts.

   ii. Will the parties be selected using a list procedure (only possible if the arbitration is supervised by an arbitral institution).

f. 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.

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

h. Pre-conditions to instituting arbitration, such as mediation. Perhaps you will require the company president to sign the arbitration demand… It will ensure the president knows about the claim!

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

    i. There is some doubt some United States jurisdictions will enforce *amiable compositeur* awards.

        1. There is some concern such a choice might not be respected because it functionally prevents challenging an award for manifest disregard of the law and parties are not generally allowed to contractually change the standard for reviewing awards.

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

        1. They know the arbitrator VERY well, and;

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

    Having a replacement arbitrator would be a disaster under such circumstances.

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

    i. Is a bond required?

    ii. Are attachments allowed?

    iii. Are only conservatory measures allowed?

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

v. Explicitly allowed in the Revised Uniform Arbitron Act, Connecticut General Statutes §52-407hh (for agreements effective after October 1, 2018).

1. RUAA §8(a) allows the court to grant "provisional remedies" (not a defined term) before the arbitrator is appointed.

2. RUAA §8(b) allows either the court or the arbitrator to act once the arbitrator is appointed.

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

vii. The updated UNCITRAL Model Law on International Commercial arbitration has a lot of provisions on this topic.

k. May arbitrations be consolidated? Conversely, should consolidation be prohibited?

i. When between the same parties?

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

iii. Which arbitral tribunal survives?

iv. Revised Uniform Arbitration Act Connecticut General Statutes §52-407jj explicitly allows consolidation to be ordered by a court (for agreements effective October 1, 2018).

v. No consolidation will be allowed if the arbitration clause prohibits it.

10. More "exotic" types of clauses that people are increasingly considering:

a. **Med-Arb**: where a mediation is conducted first, then followed by an arbitration conducted by the same neutral.

i. **Advantage:** The neutral will know a lot more about the case because they will be spending more time with the parties.

ii. **Disadvantage:** There is a risk the neutral will learn something in an *ex-parte* mediation session that will affect the arbitration award that was unknown to the other party.

b. **Arb-Med**: Where an arbitration is conducted first (and the arbitration award is put in the arbitrator's vest pocket), followed by a mediation by the same neutral.

i. **Advantage:** The binding decision was done first, before there was ex-parte contact with the neutral.

ii. **Disadvantage:** It will take more time. There is some question about what happens if the mediated settlement is breached. Will the arbitration award be revived? What happens if the dispute is considered non-arbitral? Will that affect the mediated settlement?

11. Should there be any preconditions to invoking the arbitration clause?

a. Is there a mandatory negotiation period?

b. Is there mandatory mediation? For how long?

12. What kind of award do you want?

a. A basic award. This just says who wins (and how much if damages are awarded). There is no explanation.

b. A reasoned award (which takes more time and therefore increases the arbitrator cost). According to *Leeward Const. Co., Ltd. v. Am.*

Univ. of Antigua-College of Medicine, 826 F.3d 634, 640 (2d Cir. 2016), this means "something more than a line or two of unexplained conclusions, but something less than full findings of fact and conclusions of law on each issue raised before the panel."

c. Findings of facts and conclusions of law (usually more thorough than even a reasoned award).

d. The specific arbitration rules may have something to say in this regard, such as the AAA Commercial Arbitration Rule 46(b).

13. There are additional issues in international cases:

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

i. The United States has not signed the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. Only Ukraine and Uruguay have signed it and neither party has ratified its signature.

b. The United States has signed the Hague Convention of Choice of Courts Agreements (which came into force on October 1, 2015, but not for the United States, People's Republic of China and Ukraine; none of whom have yet ratified their signatures).

c. Parties are concerned nationals will be treated better than foreigners in international cases heard by domestic courts.

d. 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. That is why this kind of arbitration exists (and has a lot of peculiarities). The current hot topic is whether or not such disputes should be exclusively heard by standing bodies.

e. Where will the arbitral award be enforced? You should ensure the seat's arbitral awards will be enforced where the defendant's assets are located when you draft the arbitration clause.

   i. 1958 New York Convention on the Recognition and Enforcement Of Foreign Arbitral Awards. (www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf)

      1. There are 165 state parties to this convention as of Monday, September 21, 2020.

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

      1. There are 19 state parties to this convention as of Tuesday, July 28, 2020.

f. 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. The law of the seat of the arbitration may require an official state language be used.

g. You may want to consult the American Law Institute's Restatement on International Commercial Arbitration, which is expected to be published soon.

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

   a. Do the parties mean to arbitrate?

      i. 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.[5]

      ii. Example - All disputes arising out of this

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

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.[6]

iii. Example - In the event of any unresolved dispute, the matter shall be referred to the American Arbitration Association.[7]

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.

1. Example - The appointing authority shall be the American Arbitration Association in Bloomfield, Connecticut.[8]

2. Example - Any arbitration shall be administered by the arbitration rules of the Connecticut Bar Association's Alternate Dispute Resolution Committee.[9]

3. Example - Any arbitration shall take place in accordance with the rules of the New England Arbitration Association.[10]

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

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

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

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

[9] This committee does not have any arbitration rules and does not supervise arbitrations. It is no longer a committee and but is a section.

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

i. 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.[11] Arbitral institutions usually will administer only their arbitral rules (although almost all will administer arbitrations under the UNCITRAL arbitration rules).

ii. 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.[12]

iii. 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.[13]

d. Who names the arbitrators?

i. 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 in Swiss Romande: the arbitrators will be nominated by the Swiss Court of Geneva and Lausanne.[14]

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

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

[13] 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?

[14] 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?