

CONSIDERATIONS FOR CONTRACTUAL ARBITRATION PROVISIONS

Arbitration is a common form of alternative dispute resolution (ADR) used frequently and effectively in business settings. In arbitration, the parties have flexibility to choose decision-makers, jurisdiction, and many procedural rules, but they limit themselves in terms of discovery and some courtroom protections.

While most courts will enforce arbitration clauses in contracts, such clauses should be sufficiently clear and precise. When considering arbitration and contractual arbitration provisions:

1. Treat arbitration clauses as key business terms.

The arbitration clause contains the details of how you will settle any dispute that arises. Review it as carefully as you would any other business term, like delivery or payment details.

2. Use the contractual negotiation process to design a mutually-agreeable arbitration clause.

During contract negotiation, most business parties are cooperating well together and are pursuing a shared interest in creating a contract that benefits them both. This atmosphere lends itself well to creating an arbitration clause that will meet the parties' respective needs if a dispute arises later.

3. Attend to the details.

Although negotiation is a good time to address arbitration decisions, remember that cooperation between the parties in negotiating their contract is not necessarily a sign that this cooperation will continue. Any details regarding arbitration not agreed upon at the outset of the deal may be more difficult to negotiate after the arbitration provision is part of a signed agreement and the parties face a dispute and feel less inclined to cooperate.

4. Focus on the type of arbitration that is appropriate for the transaction.

The type of arbitration that is most familiar to you may not be the best choice for every transaction or situation. Consider your business goals each time the question of arbitration is

discussed. For instance, will the circumstances of a future dispute lend itself well to binding arbitration, or does non-binding arbitration provide more or better “bargaining power” to discuss a settlement of the dispute?

If you have any question, please contact Grant Killoran at grant.killoran@wilaw.com or 414-276-5000.