

## Top 5 Pitfalls to Avoid in Arbitration Agreements

Once you decide to arbitrate rather than litigate, the next crucial step is ensuring the arbitration agreement is well-drafted. While arbitration offers businesses a private, efficient, and flexible method for resolving disputes, poorly constructed agreements can lead to procedural roadblocks, costly disputes, and unintended outcomes. Working with experienced arbitration counsel can help you avoid common mistakes that may undermine the effectiveness of your agreement. Below are five key pitfalls to avoid when drafting an arbitration agreement:

### 1. Ambiguity in the Scope of Arbitration

One of the most common mistakes in arbitration agreements, and a source of arbitration-related disputes, arises from vague language regarding which claims will be resolved through arbitration. If the language is too vague, parties may find themselves in court debating whether a particular dispute falls within the scope of arbitration.

To minimize confusion and potential litigation concerning the scope of arbitration, clearly outline the types of claims and disputes subject to arbitration.

Arbitration provisions should explicitly address:

- Whether the scope of arbitration includes only contractual disputes or extends to tort, statutory, and regulatory claims.
- Whether claims by or against affiliates, subsidiaries, or employees are covered.
- Whether future disputes arising out of ongoing business dealings are covered.
- Any exclusions, such as claims related to intellectual property infringement or injunctive relief.

A well-defined scope ensures that all parties understand their obligations and reduces the risk of jurisdictional challenges and resolution delays. Overly vague language makes determining whether a specific point is within the intended scope challenging.

## 2. Failure to specify the Seat of Arbitration and Governing Law

The seat of arbitration, the legal jurisdiction/system that governs arbitration proceedings, can impact the procedural rules, how arbitrators are appointed, how the hearing is conducted, and other important aspects of the arbitration. Many agreements fail to explicitly designate a seat, which can lead to uncertainty, litigation on that issue, and unintended consequences.

To mitigate risk, parties to an arbitration agreement may:

- Choose a seat of arbitration in a jurisdiction with a strong legal framework supporting arbitration (e.g., New York, London, Singapore).
- Clearly state which law governs the arbitration agreement itself, as this can influence the validity and interpretation of the clause.
- Specify the jurisdictions where an award may need to be recognized or enforced.

An arbitration agreement without a defined seat and governing law can lead to costly jurisdictional disputes and enforcement challenges.

## 3. Poorly Drafted Provisions Governing Rules and Procedure

Arbitration agreements should outline clear rules to ensure an efficient and predictable dispute resolution process. Common drafting errors include:

- Failure to specify the arbitration institution (e.g., ICC, AAA, LCIA) to administer the arbitration.
- Failure to specify the rules that will govern the arbitration.
- Unclear text regarding arbitrator selection, the timeline for proceedings, , and hearing procedures.
- The lack of provisions addressing interim relief is often critical in time-sensitive disputes.

A well-structured provision addressing the rules and procedural framework helps streamline the arbitration process and reduces the risk of procedural challenges that could drive up costs and delay resolution.

## 4. Lack of Confidentiality Protections

Many parties assume arbitration is inherently confidential, but this is not always true. Unlike court proceedings, arbitration confidentiality is not guaranteed by law and must be negotiated. Without a confidentiality clause, parties may find their arbitration proceedings and sensitive business information become public.

To ensure sensitive information remains protected:

- Explicitly include a confidentiality clause covering all relevant aspects of the arbitration, including filings, evidence, and awards.
- Specify who is bound by confidentiality obligations (e.g., parties, arbitrators, witnesses, and experts).
- Consider additional protective measures, such as requiring redacted versions of awards if disclosed in enforcement proceedings.

By proactively addressing confidentiality, parties can safeguard proprietary information and trade secrets better.

## 5. Impractical or Unworkable Terms

Arbitration is valued for its flexibility, but poorly designed terms can undermine its efficiency. Failure to address service of process, arbitrator and forum fees, and overly rigid deadlines may result in avoidable litigation, prevent access and use of relevant evidence, while excessively complex procedures can result in excessive motion practice and litigation.

To ensure an effective arbitration process:

- Align procedural rules with the complexity and scope of the anticipated disputes.
- If the choice is institutional arbitration, ensure the selected institution's rules fit the parties' needs.
- If ad hoc arbitration is preferred, establish clear procedures, including timelines, document exchanges, and hearing formats.

Careful consideration of terms of the arbitration agreement facilitate a streamlined and effective alternative to litigation. A well-balanced procedural framework preserves arbitration's efficiency while ensuring fairness for both parties.

Drafting a strong arbitration agreement requires foresight and attention to detail. By clearly defining the scope of arbitration, choosing the right seat and governing law, structuring procedural provisions effectively, addressing confidentiality, and avoiding impractical and unworkable terms, parties can avoid costly disputes and maximize the benefits of arbitration. Collaborating with experienced arbitration counsel is essential in crafting an enforceable agreement aligned with the parties' expectations. Addressing these common pitfalls proactively can mean the difference between a streamlined arbitration process and a protracted legal battle.