



Arbitration Clause Building Blocksⁱ

<u>Question</u>	<u>Options and Cautions</u>	<u>Building Block</u>
<p>1) Do you want to arbitrate all disputes that arise within the business relationship or do you want to arbitrate only disputes that arise under the specific contract in which you have included an arbitration clause?</p>	<p>a) Arbitrate disputes relating to the entire business relationship. b) Arbitrate disputes arising under the specific contract.</p>	<p>1) a) The parties hereto agree that all disputes, disagreements or differences between them relating to their business relationship with each other, including any dispute, disagreement or difference relating to the validity, enforceability or applicability of this agreement to arbitrate, shall be submitted to final and binding arbitration. The arbitration shall be commenced by one (or more) party (or parties) delivering to the other party (or parties) a Notice to Arbitrate which shall set out a brief description of the dispute, disagreement or difference to be arbitrated and a summary of the relief claimed.</p> <p>1) b) Any dispute, disagreement or difference arising under or relating to this agreement, including any dispute, disagreement or difference respecting the validity, existence or applicability of this agreement</p>

		(and/or the validity, existence or applicability of this agreement to arbitrate) shall be submitted to final and binding arbitration. The arbitration shall be commenced by one (or more) party (or parties) delivering to the other party (or parties) a Notice to Arbitrate which shall set out a brief description of the dispute, disagreement or difference to be arbitrated and a summary of the relief claimed.
2) Under what law is the arbitration to be conducted?	Note: It is recommended that the arbitration be conducted under the law of the jurisdiction in which the city, selected by the parties as the place (“seat”) seat of the arbitration, is located. Note: it is not necessary to select a particular arbitration statute but, if such a selection is made, care should be taken to select the correct statute where there is more than one.	2) The arbitration shall be conducted under the arbitration laws of _____.
3) What is the place and language in which the arbitration is to be conducted?	Note: The city designated as the place in which the arbitration is to be conducted is often referred to as the “seat” of the arbitration. It is very important that the seat of an arbitration be in a jurisdiction with modern arbitration law, an independent judiciary and a well functioning court system. The courts of that jurisdiction will have the ability to significantly assist (or hinder) the arbitration and will determine whether or not the award should be set aside after	3) The arbitration shall be conducted in [name city, state or province and country] in [name language].

	<p>it is rendered. The legal culture of the jurisdiction may also influence the way in which the arbitration is conducted. The choice of language, where that is in doubt, may have significant bearing on the cost of the arbitration if a significant number of documents are in a different language.</p>	
<p>4) How many arbitrators will there be and how will they be selected?</p>	<p>Which of the following options do you wish to follow:</p> <p>a) Single arbitrator appointed by the parties.</p> <p>b) Each “side” appoints one arbitrator and the two arbitrators appoint a Chair, in the event that the parties cannot agree on a Chair within a specified period of time.</p> <p>Note: Even if the second option is preferred, the parties have the option of later agreeing to a single arbitrator if that is more appropriate for the dispute. However, agreement may be difficult to achieve.</p>	<p>4) a) The arbitration shall be conducted by a single arbitrator who shall be agreed upon by all parties to the arbitration.</p> <p>4) b) Unless the parties agree that the dispute which has arisen should be arbitrated by a single arbitrator on whom they have agreed within [specify number] days of delivery of a Notice to Arbitrate, the party or parties that delivered the Notice to Arbitrate shall appoint a single arbitrator and the other party or parties shall appoint a single arbitrator. If the parties to the arbitration are unable to agree on an arbitrator to act as Chair of the tribunal within [specify number] days, the Chair of the tribunal shall be appointed by the two arbitrators appointed by the parties.</p>
<p>5) Do you wish to specify additional qualifications for members of the tribunal?</p>	<p>Note: It is generally better to trust the judgment of the parties or the Appointing Authority, in the specific circumstances of a given dispute, to select arbitrators that are properly qualified to adjudicate the dispute.</p>	<p>5) Individuals shall not be eligible to serve as arbitrators unless they are [insert a, b or c].</p>

	<p>Having too many, or too few restrictive, qualifications for arbitrators may result in complications and difficulties in finding appropriately qualified individuals. Specific qualifications may also give rise to additional disputes regarding the eligibility of individual arbitrators, especially if one of the parties is seeking to be uncooperative in the arbitration. However, some common and acceptable examples are set out below:</p> <p>a) qualified lawyers with at least 15 years experience in the practice of law or as a judge. b) fellows of the Chartered Institute of Arbitrators. c) members of the roster of arbitrators of the ICDR or the CPR Institute for the Prevention and Resolution of Disputes.</p> <p>Note: all arbitral institutions do not have “rosters”.</p>	
<p>6) Do you want an arbitral institution to administer your arbitration?</p>	<p>a) Yes. b) No. Note: If you choose an arbitral institution to administer your arbitration, it is generally advisable to adopt the arbitration rules of the institution you select to provide a framework for the conduct of the arbitration. If you decide not to have an arbitration institution involved, it will be advisable to designate an appointing authority (see below) or to</p>	<p>6) a) The arbitration shall be administered by [name arbitral institution] and shall be conducted pursuant to its rules relating to international commercial arbitration. 6) b) The arbitration shall be conducted pursuant to the [UNCITRAL Arbitration Rules or CPR Institute for Dispute Prevention and Resolution Rules] for non-administered arbitration.</p>

	<p>provide some rules for the constitution of the tribunal and the commencement of the arbitration within the arbitration clause itself. A few good choices are the, ADRI National Rules of Arbitration, the UNCITRAL Arbitration Rules or CPR Institute for Dispute Prevention and Resolution Rules for Non-administered Arbitration.</p>	
<p>7) Do you wish to designate an appointing authority?</p>	<p>Note: If the arbitration is not administered by an arbitral institution, it is highly recommended that an appointing authority be designated to make the necessary appointments in the event that one or more parties does not cooperate in the appointment process or in the event that the consensual appointment process does not work for some other reason (e.g there is more than one respondent and the respondents are unable to agree on an arbitrator to serve as their appointee).</p> <p>Arbitration institutions make ideal appointing authorities because they are administratively set up to perform this function. However, it must be borne in mind that the role of arbitration institutions as appointing authorities and their role in administering an arbitration are two different functions which require separate consideration and analysis.</p>	<p>7) a) The Appointing Authority shall be [name arbitral institution or other body that is designated to serve as the Appointing Authority].</p>

	<p>If a designating authority other than an established arbitration institution is used, the parties should ensure that it will be able and willing to serve as an appointing authority when called upon to do so, and that it is correctly described in the arbitration clause.</p>	
<p>8) Do you wish to make any specific provisions regarding the procedure to be followed in the arbitration?</p>	<p>a) No, the arbitrators will determine the procedure. b) Yes, the IBA Rules on the Taking of Evidence in International Arbitration. c) Yes. Specify own rules.</p> <p>Note: No guidance is provided herein with respect to option c above since the procedures will have to be drafted by lawyers for the specific case. This usually works best when an arbitration agreement is drafted with respect to a specific dispute which has already arisen or expected to arise. Pre-dispute agreements with specific detailed rules regarding the conduct of the arbitration often give rise to unproductive disputes about interpretation and applicability once a particular dispute arises.</p>	<p>8) a) The arbitration rules and procedures shall be as agreed between the parties. In the event that the parties fail to reach agreement as to the rules and procedures to be followed in the arbitration within [specify number] days of the appointment of the [arbitrator or tribunal], any party may apply to the [arbitrator or tribunal] for a determination of the rules and procedures to be applied in the arbitration. b) The arbitration shall be conducted in accordance with the IBA Rules on the Taking of Evidence in International Arbitration.</p>
<p>9) Do you wish to make any specific provision with respect to pre-hearing disclosure?</p>	<p>a) No. Leave it to the absolute discretion of the tribunal without any presumptions for or against any form of pre-hearing disclosure. [Note most international arbitrators consider that, pre-hearing disclosure is limited to documentary disclosure of the kind specifically contemplated</p>	<p>Include a provision, as appropriate, based on selection from the options described.</p>

	<p>by the IBA Rules of Evidence, unless the parties specifically agree to the contrary. Even where the parties agree to broader disclosure, some international arbitrators resist allowing such disclosure]</p> <p>b) Disclosure should be limited to knowing in advance of the final hearing the information upon which the other side will rely at the hearing. A party should not be entitled to obtain information which it does not already have, in order to make out its own case. [Note: some international parties and arbitrators consider that a party is not entitled to disclosure from the other side with respect to any issue on which the onus of proof is on the party seeking disclosure.]</p> <p>c) A party should be entitled to obtain relevant documentary evidence which will assist it in making out its own case and which may assist the tribunal in determining the facts upon which it should render its decision.</p> <p>d) A party should be entitled to any obtain from the other side relevant information (whether or not in documentary form) in the possession of the other side that may assist it in proving its case and which may assist the</p>	
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	tribunal in determining the facts upon which it should render its decision.	
10) Do you wish to add a specific provision regarding confidentiality?	Simple confidentiality provisions can lead to complex disputes regarding the extent of the obligation and possible exceptions. Complex confidentiality provisions can be difficult to negotiate, especially before the nature of the dispute is known.	
11) Other possible provisions.	<ul style="list-style-type: none"> a) The statute or rules governing the arbitration will typically contain provisions as to costs and interest but these are often varied by the parties. b) Where the governing statute or rules provide options regarding the possibility of appeals to the court on the merits, these options should be reviewed and choices made. It is suggested that parties consider what their objectives were in selecting arbitration rather than court litigation and then consider whether or how an appeal to the courts affects the achievement of those objectives. c) Parties sometimes limit the jurisdiction of the tribunal with respect to certain types of relief, e.g. punitive damages. 	

	<p>d) Recent amendments to international arbitration rules tend to allow for the possibility that a party can apply to the tribunal for urgent relief without giving notice to the other side (i.e. <i>ex parte</i>). In the future it is expected that more arbitration rules and statutes will incorporate this concept. If the parties wish to exclude this possibility, this should be expressly stated.</p>	
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ⁱ The contents hereof are to be treated as general observations and information about arbitration clauses, not as specific advice to be relied upon. Specific legal advice should be sought from a qualified practitioner in international arbitration before applying any of the above suggestions to a specific contract or dispute. These building blocks were created by the author as a contribution to the work of the NAFTA 2022 Committee Task Force on Forms of Arbitration Agreements, and have been subsequently expanded. The editorial contributions of members of that task force are gratefully acknowledged. The conclusions and opinions are those of the author alone.