

# Checklist for Commercial Arbitration

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**T**his is a brief summary of commercial arbitration principles and procedure in general. There are specialized rules for various types of commercial arbitrations, and these rules may differ in certain respects from the general commercial arbitration rules referred to in this checklist. These specialized rules should be consulted when dealing with such cases. The following abbreviations are used in this checklist: CAR: Commercial Arbitration Rules of the American Arbitration Association (April 1982); UAA: Uniform Arbitration Act (adopted in whole or in part by 41 states plus Puerto Rico and the District of Columbia); and USC: United States Code.

## **Nature of arbitration as contrasted with judicial proceedings.**

- A. Particular arbitrator with expertise selected for specific dispute, instead of permanent tribunal for all disputes. (CAR §5).
- B. Substantive principles of law not necessarily followed. *Burchell v. Marsh*, 58 US (17 How) 344 (1854).
- C. Proceedings private and usually without recorded transcript. (CAR §23).
- D. Arbitrators not bound by rules of evidence. (CAR §§31, 32).
- E. Reasons need not be given in support of determination. (CAR §§42, 43).
- F. Award subject to limited appellate review. (9 USC 10; UAA §12); *Wilko v. Swan*, 346 US 427, 98 L Ed 168, 74 S Ct 182 (1953).
- G. Proceedings expeditious and relatively inexpensive. (CAR Administrative Fee Schedule, p. 17).

## **Areas of dispute adaptable to arbitration.**

- A. General commercial disputes:
  1. Contracts.
    - a. Interpretation.
    - b. Performance.
  2. Accounting.
  3. Intrabusiness disputes.
  4. Matters of trade custom and usage.
  5. Valuation issues.
  6. Small claims.
- B. Specialized commercial disputes:
  1. Construction.
  2. Homeowner's warranty.
  3. Textile.
  4. Seed and grain.
  5. International.
  6. No-fault.
  7. Real estate valuation.
  8. Uninsured motorist.

## **Methods of obtaining arbitration of disputes.**

- A. Future disputes.  
Contract provisions suggested by American Arbitration Association:

Any controversy or claim arising out of or relating to this contract, or any breach thereof, shall be settled in accordance with the Rules of the American Arbitration Association, and judgment upon the award may be entered in any Court having jurisdiction thereof.

- B. Existing disputes.  
Submission form suggested by American Arbitration Association:

We, the undersigned parties, hereby agree to submit to arbitration under . . . Arbitration Rules of the American Arbitration Association the following controversy: (describe dispute briefly and state amount involved).

We further agree that the above controversy be submitted to (one) (three) Arbitrators selected from the panels of Arbitrators of the American Arbitration Association.

We further agree that we will faithfully observe the agreement and the Rules and that we will abide by and perform any award and that a judgment of any Court having jurisdiction may be entered upon the award.

#### Prerequisites to arbitration.

- A. Arbitrable controversy.
1. Justiciable dispute or one subject to judicial action.
  2. Dispute the resolution of which would not contravene public policy. *Wilko v. Swan*, 346 US 427, 98 LEd 168, 74 S Ct 182 (1953).
- B. Formal writing.
1. Contract clause providing for arbitration of future disputes. (UAA §1; CAR §1), or
  2. Submission of a pending dispute. (UAA §1; CAR §9.)
- C. Arbitration procedure:
1. Locale. (CAR §11.)
  2. Method of selecting arbitrators (9 USC 5; UAA §3; CAR §§12–16) and of filling vacancies. (UAA §3; CAR §20.)
    - a. Arbitrator must disclose any information about circumstances likely to affect impartiality. (CAR §19.) *Commonwealth Coatings Corp. v. Continental Casualty Corp.*, 393 US 145, 21 L Ed2d 305, 89 S Ct 337 (1968), reh'g denied, 393 US 1112, 21 L Ed2d 812, 89 S Ct 848 (1969).
  3. Number of arbitrators. (9 USC 5; CAR §17.)
    - a. Generally one arbitrator unless otherwise agreed by parties. (Id.)
  4. Time, place of hearing. (UAA §5(a); CAR §21.)
    - a. Generally set by arbitrator. (Id.)
    - b. Pre-hearing conference may be available. (CAR §10.)
  5. Provision for costs and fees. (UAA §10; CAR §§43, 48–51.)

6. Provision as to whether judgment may be entered on award. (UAA §11.)

#### Initiation of arbitration proceedings.

- A. Without court order.
1. Demand for arbitration filed by one party to dispute, listing names of parties, contract involved, nature of claim, remedy sought. (CAR §7.)
  2. Submission agreement. (CAR §9; Form C-1.)
  3. Answering statement and/or counterclaim are like pleadings and ordinarily define and limit scope of arbitrable issues. (CAR §8.)
    - a. No new or different claims after filing period without consent of arbitrator. (Id.)
- B. By court order.
1. If either party refuses to arbitrate, the other party may apply for a court order compelling arbitration. (9 USC 4; UAA §2(a).)
  2. Under United States Arbitration Act, notice of application for court order must be served in accordance with Federal Rules of Civil Procedure. (9 USC 4.)
- C. Stay of action.
1. If one party brings judicial action of an arbitrable issue, other party may obtain a stay in court in which action is brought. (9 USC 3; UAA §2(c).)
  2. Failure of party to seek a stay may result in waiver of right to arbitrate. (9 USC 3, 4.)

#### Issues available to party opposing arbitration.

- A. Party opposing arbitration may raise:
1. Questions of fact.
    - a. No valid contract or submission for arbitration exists.
    - b. Other party has failed to comply with conditions precedent to arbitration.
    - c. No issue referable to arbitration exists.
  2. Questions of law.
    - a. Existence of bona fide controversy.
    - b. Waiver.
      - (1) By filing judicial action.
      - (2) By answering or counterclaiming to judicial action.
      - (3) Other conduct inconsistent with arbitration.
    - c. Illegal contract.
    - d. Contract impossible of performance.
    - e. Existence of subsequent written contract superseding, or releasing parties from requirements of, arbitration contract.



- B. If substantial issue of fact exists, court in which action to enforce right to arbitration is brought will proceed with trial on such issue. (9 USC 4; UAA §2(b).)
  - 1. Court hearing is similar to hearing on motion for summary judgment. (9 USC 4; UAA §2(b).)
  - 2. Party opposing arbitration may seek jury trial under United States Arbitration Act. (9 USC 4.)
- C. Ordinarily, participation in the selection of arbitrators or in any proceedings before them constitutes a waiver of the issue of validity of the arbitration submission or contract.
  - 1. Party seeking to raise issues opposing arbitration should avoid any participation in the arbitration proceedings.
  - 2. When party claims arbitrators were improperly selected, he should not continue with arbitration, in order to avoid a charge of waiver.

#### Arbitration hearing.

- A. Parties may be represented by attorneys. (UAA §6; CAR §21.)
- B. Hearings are ordinarily set promptly. (UAA §5(a); CAR §21.)
- C. Notice of hearing must be given to all parties.
- D. Arbitrators may be empowered to proceed in the absence of party that fails to appear. (UAA §5(a); CAR §30.)
- E. All parties having a direct interest in the case may attend. (UAA §5(b); CAR §25.)
- F. Arbitrators may adjourn hearing for good cause shown. (UAA §5(a); CAR §26.)
- G. Arbitrator has power to subpoena witnesses. (9 USC 7; UAA §7(a); CAR §31.)
- H. Rules of evidence do not control, although sometimes relevant as guides. (CAR §§31, 32.)
  - 1. Arbitrator empowered to vary hearing procedure. (CAR §29.)
    - I. Party bringing the arbitration generally opens and closes hearing. (Id.)
    - J. No stenographic record kept unless requested by one or more parties. (CAR §23.)
  - K. Refusal of arbitrator to hear material evidence may constitute ground for vacating award. (9 USC 10(c); UAA §12(a)(4).)
  - L. Party that proceeds with arbitration after knowledge that rules have not been complied with, and fails to state objection in writing, is deemed to have waived right to object. (CAR §38.)
- M. No ex parte communication by party with arbitrator. (CAR §40(a).)
- N. Parties may stipulate to vary procedure.

#### Arbitration award.

- A. Award must be rendered within specified time after close of hearings. (UAA §8(b); CAR §41.)
- B. Award must be in writing (9 USC 13(b); UAA §8(a); CAR §42), signed by a majority. (UAA §5(c); CAR §18.)
- C. Interest is assessable at discretion of arbitrator. (CAR §43.)
- D. Award may be confirmed by court, if either party so desires (9 USC 13; UAA §11), within one year after award. (9 USC 9.)
- E. Award may be vacated by court only:
  - 1. If procured by corruption, fraud, or undue means. (9 USC 10(a); UAA §12(a)(1).)
  - 2. Because of partiality or corruption of the arbitrator. (9 USC 10(b); UAA §12(a)(2).)
  - 3. Where the arbitrator:
    - a. Refused to hear pertinent or material evidence. (9 USC 10(c); UAA §12(a)(4).)
    - b. Refused to postpone hearing upon sufficient cause shown. (9 USC 10(c); UAA §12(a)(4).)
    - c. Was guilty of other misbehavior prejudicing the rights of parties. (9 USC 10(c); UAA §12(a)(4).)
    - d. Exceeded powers. (9 USC 10(d); UAA §12(a)(3).)
    - e. Imperfectly executed powers. (9 USC 10(d).)
- F. An award may be modified or corrected by a court:
  - 1. Where there was a miscalculation of figures or a mistake in description of person, thing, or property. (9 USC 11(a); UAA §13(a)(1).)
  - 2. Where arbitrator awarded upon a matter not submitted to arbitration. (9 USC 11(b); UAA §13(a)(2).)
  - 3. Where the award is imperfect in form. (9 USC 11(c); UAA §13(a)(3).)
- G. Arbitrator may be empowered to modify award for reasons set forth in (F), above, upon timely application by party. (UAA §9.)

#### Effect of arbitration judgment.

- A. Res judicata applies to every arbitration award confirmed by a court. *Rembrandt Industries v. Hodges International*, 38 NY2d 502, 381 NYS2d 451, 344 NE2d 383 (1970).
- B. An appeal from a confirmed award is limited to defects in the arbitration procedure as outlined above. (9 USC 10.)

#### Liability of arbitrators.

- A. Arbitrators immune from *civil* liability for damages

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arising out of their conduct as arbitrators. *Hill v. Aro*, 263 F Supp 324 (ND Ohio 1967). See also CAR §47(B).

#### Liability of administering agencies.

- A. Administering agencies generally immune from civil liability for damages arising out of their conduct in administration of arbitrations. *Corey v. New York Stock Exchange*, 493 F Supp 51 (WD Mich 1980). See also CAR §47(B).

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**Editor's Note:** Although new topics of controversy in dispute resolution arise almost daily, many old issues persist. In 1958, an editorial appeared in *The Arbitration Journal* entitled "Creeping Legalism in Arbitration." It pointed to the "growing superstructure of legal trappings" that was becoming increasingly evident in arbitration.

The use of the term *creeping legalism* caused Benjamin Aaron in 1959 to comment that "there will be time enough to determine whether [the particular practices or attitudes under attack] are creeping, toddling, or galloping" and that it would be better to focus on those practices and attitudes rather than to deal in verbal generalizations.

Sylvester Garrett echoed this sentiment in 1961 in a speech before the National Academy of Arbitrators ("Are Lawyers Necessarily An Evil In Grievance Arbitration?"), in which he concluded that "there is infinite variety among arbitrators and arbitration systems . . ." and that "it would seem well to withhold generalizations as to any presumed ideal approach to arbitration for all parties, for all purposes, and for all occasions."

After more than twenty years, concern over the issue continues, as the following article attests.

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