Drafting the Arbitration Provision in Commercial Contracts, Part 2
The Nuts and Bolts That Make a Provision Work

By: Hon. John P. DiBlasi, J.S.C. (Rtd.) &
Jacqueline I. Silvey, Esq., NAM General Counsel

When parties enter into a commercial contract that contains an arbitration provision, they are usually in the honeymoon stage of the business relationship. An agreement which specifies arbitration as the sole form of dispute resolution is much like a prenuptial agreement. In the event that a 'divorce' occurs, the provision which supplies the greatest detail ensures a lesser likelihood of a delay of the resolution process, especially at a time when acrimony between the parties is likely.

Arbitrators have a unique perspective of what happens when commercial agreements are not drafted with sufficient specificity to assure that the ADR process moves forward in an expeditious manner to resolve disputes arising out of the agreement. When things go wrong, neutrals are charged with managing the nuts and bolts of the dispute resolution process and assisting counsel in expeditiously moving the proceeding forward. The best practice is to be proactive. While no one can envision all of the contingencies arising out of disputes that may emerge from complex commercial agreements prior to the arbitration, a clear framework regarding the procedures to be followed is essential.

Most arbitration provisions should contain a 'time is of the essence' requirement. Unless the preliminary procedures are sufficiently delineated, the process of getting to the arbitration itself can be significantly delayed. At the outset, there should be, at a minimum, a catch-all provision prescribing the time within which the arbitration process should be completed. The practical problem is creating sufficient procedural rules to be followed to ensure that this, and other aspects of the arbitration provision, can be realistically accomplished. The alternative of moving for enforcement in the courts defeats the entire purpose of avoiding litigation. The question that will challenge counsel is how much is enough and how much is too much? The general suggestion would be that the greater the detail, the better. Counsel drafting the agreement should attempt to envision issues arising out of a party engaging in dilatory conduct designed to delay, if not defeat, the arbitration process, and what remedies are available to compel the delaying party to proceed with the arbitration.

Many commercial agreements contain a provision that the process is to be governed by the Federal Arbitration Act, Title 9, U.S. Code, Section 1-14 (FAA). This is particularly important as the FAA has been interpreted as a substantive law governing all contracts arising out of Interstate Commerce. However, at the same time, counsel must be mindful of the fact that this does not automatically vest jurisdiction in the federal courts for the purposes of enforcing the arbitration agreement. In order to establish federal jurisdiction, the controversy must meet the requirements of Title 28, USC Part IV. In essence, the claim must involve a federal question, diversity or admiralty. If there is no such basis under Title 28, the rights granted under the FAA must be enforced in a state court. Counsel, planning to rely on the use of the federal courts to enforce and safeguard the rights and responsibilities of the parties pursuant to the arbitration agreement, must be sure that the agreement meets the jurisdictional requirements, supra.

In addition to the above, a provision as to the State Laws which will govern any dispute that arises under the contract, as well as consent to jurisdiction to a Federal and State court, should be agreed to. The arbitration clause should also contain a provision that state laws will apply to the extent they are not consistent with the FAA. Consideration must be given as to which state laws and court would best serve the parties to the agreement. This may involve a question of logistics. Another consideration may be which state court would most expeditiously handle such a request and, depending upon the complexity of the matter, the expertise of the bench.

One of the great advantages of selecting an ADR provider in the contract is that the parties may prospectively avoid many of the issues that may otherwise arise out of an arbitration agreement that lacks sufficient specificity as to all terms. In the absence of specific contract language, the ADR provider's rules most often set forth not only the procedural mechanism and the time frame for the arbitration proceeding, but also governing law and/or evidentiary rules if the contract is silent as to those matters.

It is critically important that the parties review the rules of the selected ADR firm prior to referencing them in the arbitration clause. Consideration must be given as to whether they are sufficient to address the particular issues that may arise from the commercial agreement. For instance, it is important that the provider's rules prescribe remedies that are available to ensure the enforcement of rights under the arbitration agreement in the event one party fails to proceed. It may be wise to again specifically incorporate the enforcement provisions of the FAA and/or appropriate state law. Further, there is nothing to stop the parties from supplementing the provider's rules with additional terms at the time of the making of the original agreement. It is best to be proactive and guard against the possibility of a recalcitrant party.

Having addressed these initial points, the next items to be considered include the type of arbitration process and the selection of the arbitrator(s). This will be the subject of the next article in the series.

Hon. John P. DiBlasi is a retired Justice of the Supreme Court, Westchester County, Commercial Division. He is a member of NAM's (National Arbitration and Mediation) Hearing Officer Panel and is available to arbitrate and mediate cases throughout the United States. For the third straight year, Judge DiBlasi was voted the #1 mediator in the United States in the 2016 National Law Journal Annual Reader Rankings Survey. He was also named a National Law Journal 2016 Alternative Dispute Resolution Champion, as part of a select group of only 48 nationwide. Judge DiBlasi was voted one of the Top 10 mediators in the 2016 New York Law Journal Annual Reader Rankings Survey for the seventh year in a row. Additionally, he has been designated a Super Lawyer for the fourth consecutive year (2016, 2015, 2014 & 2013) and he holds an AV Preeminent Peer Rating from Martindale-Hubbell in both Alternative Dispute Resolution and Litigation – a distinction given only to those who possess the highest ethical standards and professional ability.

Jacqueline I. Silvey, Esq. is General Counsel at NAM (National Arbitration and Mediation). She is involved in various operations of the company, including oversight and implementation of commercial and employment dispute resolution initiatives. Ms. Silvey is former in-house counsel to one of the largest property and casualty insurers in the United States.

For any questions or comments, please contact Ms. Silvey via email at jsilvey@namadr.com or direct dial telephone at 516-941-3228.