

**41st Annual Page Keeton Civil Litigation
Conference
Austin, TX
November 3, 2017**

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The Creative Use of Arbitration

KING & SPALDING

Agreement to Arbitrate

- Arbitration is based on consent
- Arbitration is usually based on a contractual arbitral clause
- In major projects, arbitration may be based on a Master Arbitration Agreement applying to multiple contracts
- Post-dispute arbitration agreements (e.g., during litigation)
- Arbitration with governments may be based on treaty provisions

Benefits of Customizing the Arbitral Procedure

- Control over the case
- The ability to tailor the procedure to the needs and circumstances of the parties and the case
- Time and cost savings
- Increased predictability and clarity
- Ability to take advantage of the tribunal's expertise

Drawbacks of Customizing the Arbitral Procedure

- Unintended consequences of poorly drafted clauses :
 - Frustrate the arbitral process (cost and time savings) if courts must intervene
 - Threaten the finality and enforceability of awards
 - Create fairness issues (e.g., tipping the scales)
 - Impair the benefits of the tribunal's discretion

Examples of Arbitration Provisions

- ***Discovery and evidentiary rules***

- The arbitrator shall require exchange by the parties of documents relevant to the issues, with due regard for eliminating expense and expediting the arbitration. The arbitrator may order the deposition of witnesses, limited to a maximum of 3 depositions per party, and a maximum of 4 hours duration

- ***Awards of costs and fees***

- If the arbitrator determines that a party has prevailed, then the arbitrator shall award that party its reasonable attorney's fees and legal costs

David Allgeyer, *Sample Arbitration Clauses with Comments*, Association of Corporate Counsel (www.acc.com/_cs_upload/vl/membersonly/SampleFormPolicy/409703_1.pdf)

- ***Deadlines for Arbitration Award***

- The tribunal shall issue its award within 60 days after completion of the merits hearing or the filing of any post-hearing briefs

Limitations on Parties' Autonomy Pathological Clauses

- “**Pathological**” **arbitration clauses** are those drafted in such a way that they may lead to disputes over the interpretation of the arbitration agreement, may result in the failure of the arbitral clause or may result in the unenforceability of an award

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First appeared as part of the conference materials for the
41st Annual Page Keeton Civil Litigation Conference session
"Arbitration: What You Can and Can't Do"