

Challenges in Drafting a Dispute Resolution Clause

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Many parties give little thought to the dispute resolution clauses in their contracts. Often, they operate on certain assumptions – for example, that arbitration is preferable to litigation in national courts because arbitrators are neutral, that the process is cheaper or quicker than judicial procedures, and that an arbitration will progress along a fairly well-defined path according to a somewhat predictable timetable. Based on those assumptions, dispute resolution clauses often get short shrift – even in agreements that cover the parties’ most important business dealings.

Recent decisions from the US Supreme Court are a reminder that standard dispute resolution provides little more than a rough framework, and that arbitration can veer in different directions depending on the nature and location of the parties, the subject matter and the evidence. This flexibility to address a wide variety of circumstances may be an advantage, but it comes at the expense of clarity and completeness. Time and effort devoted to a discussion of how a potential dispute will be resolved and incorporation of that understanding in a contract, will be worth the investment. This chapter discusses two recent US Supreme Court decisions that highlight the importance of clear and comprehensive dispute resolution clauses, especially when the stakes are likely to be high. It will then offer a few clauses that have been useful in a variety of contexts.

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