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Expert Analysis

The AAA Standard Arbitration Clause: Room for Improvement

Given that mainstream contract drafting is dysfunctional,[1] it shouldn't come as a surprise that what is touted as model contract language usually exhibits significant shortcomings.

A handy example of that is the standard arbitration clause recommended by the American Arbitration Association, as stated in the introduction to the AAA commercial arbitration rules:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Standard English

Clarity is best served by articulating deal terms in standard English—the English of educated native English speakers—albeit a limited and stylized version of it. (The notion that legalese is more precise was debunked decades ago.)[2] With that in mind, here are some ways I'd tidy up the AAA standard arbitration clause:

• The couplet "controversy or claim" smacks of redundancy.[3] Why not just say "disputes"? That's the word used in the first rule stated in the AAA commercial arbitration rules, rule M-1, which refers to "mediation or conciliation of existing or future disputes."

• It's standard for a contract to refer to itself as "this agreement," not "this contract."[4] No confusion could result from that, even if you do without the capital "A" that most drafters needlessly inflict on *agreement* in "this agreement."[5]

• The reference to "or the breach thereof" is redundant.

• The reference to the AAA commercial arbitration rules constitutes not a reference to a title of a work but to a category of document. After all, other sets of commercial arbitration rules exist—the standard clause acknowledges as much by referring to "*its* Commercial Arbitration Rules."

By **Kenneth A. Adams**

Furthermore, the AAA commercial arbitration rules don't refer to themselves as such—their title is "Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes)." Consistent with the approach to capitalization recommended in "The Chicago Manual of Style," a reference to a category of document doesn't merit initial capitals.[6]

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• It would be preferable to give the reader a breather by addressing judgment on the award in a separate sentence.

• The *(s)* in "arbitrator(s)"is clumsy.[7] Using "one or more arbitrators" would represent an improvement, but it would be more succinct to refer instead to the arbitration itself.

• The "thereof" in "jurisdiction thereof" is unnecessary and ponderous.

Categories of Language

But the AAA standard clause also raises more complex issues.

For purposes of business contracts, it's best to use *shall* only to impose a duty on the subject of the sentence, as in *Acme shall purchase the Shares*. The test for this use of *shall* is whether you could replace *shall* with "has a duty to" and have the provision still make sense.[8]

Use of *shall* in the AAA standard clause—"Any controversy or claim…shall be settled"—fails this test. That should come as no surprise, as in mainstream drafting *shall* is drastically overused.[9] That overuse not only makes contract prose awkward and confusing, it also helps render drafters oblivious to nuances in expressing who should be doing what in a given provision, and why. Capturing those nuances requires recognizing that any given contract provision falls within one of a number of categories of contract language, each of which should be distinguished by its verb use.[10]

The AAA standard clause demonstrates what can be missed through overreliance on *shall*. It uses the passive voice, with *the parties* as the missing *by*-agent.[11] You could instead use the active voice—*The parties shall settle*—but there's a bigger issue lurking here, in that it doesn't make sense to impose on the parties an obligation to arbitrate all disputes. Some disputes are more serious than others, and presumably a contract party would seek arbitration for only the most serious, as opposed to mediation, informal negotiations, or simply shrugging off a grievance.

The best way to reflect that would be to use language of discretion, so as to allow a party to demand arbitration, but only as the exclusive means of initiating adversarial proceeds. (It would be inappropriate to specify that arbitration is the exclusive means of *resolving* any dispute through adversarial proceedings, as courts have a role to play with respect to interim measures and enforcing or appealing arbitration awards.)

You could instead retain language of obligation by saying that if a party initiates adversarial proceedings, it "shall" do so by demanding arbitration. But rather than imposing a duty, which presumes the possibility of breach, it would seem simpler to state that arbitration is the only option available.

In addition to language of discretion, it would be a good idea to include language of performance, using *hereby consents*. It's standard for forum-selection provisions in contracts to consider the perspective of both the party bringing a claim and the party subject to a claim—you describe the discretion afforded any party bringing a claim and have the parties consent to any claim being so brought. Applying that approach to arbitration provisions would serve to make them clearer and more comprehensive.

Claims Covered

Let's now consider the phrase *arising out of or relating to*. It features prominently not only in arbitration provisions but also in governing-law provisions. What causes drafters to add *or relating to* to *arising out of*?

One concern relates to the range of potential claims that could be raised in a dispute. Acme might want to bring a claim based on the contract, for example a claim for breach of a contract

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obligation or breach of warranty. Or it might want to bring a tort claim (for example, a claim for misrepresentation), a claim challenging a patent, or a claim authorized by statute.

Contracts offer predictability in business transactions. It follows that drafters are inclined to arrange matters so that a contract's provisions cover all possible disputes, not just those grounded in contract. (Whether that's in fact a good idea would depend on the context.) And it's not surprising that drafters should avail themselves of *arising out of or relating to*, as *arising out of* would seem to express a narrower meaning than does *relating to*. Think in terms of how one arises out of one's parents but is related to a broader group of people.

But is *arising out of or relating to* the best way to articulate this intended meaning? In a passage relating to drafting arbitration provisions, a treatise deftly summarizes the conventional wisdom regarding *arising out of or relating to*:

> It is essential that an arbitration clause cover precisely the subject matter that the parties intend to be submitted to arbitration. In most contracts that provide for arbitration, the parties intend that all disputes arising out of or relating to the contract be subject to arbitration, and in the United States the phrase "arising out or relating to" has become the model for broad arbitration clauses. Also effective is the phrase "in connection with." By using a more limited description—e.g., one which covers only disputes "arising out of" the contract, and not those "relating to" the contract—the parties create the risk that a court will conclude that the parties did not intend the clause to be broad and, in particular, intended to exclude tort claims, which may be considered to "relate to" the contract but not to "arise out of" the contract.[12]

Alternative Approach

But consider the disconnect between the first sentence of the quoted paragraph and what follows: it would indeed be a good idea to state precisely what kind of claims are to be submitted to arbitration, but instead of precision, *arising out of or relating to* merely offers two degrees of vagueness.

In this regard, it's no accident that the quoted paragraph uses the phrase "subject matter." The clearest way to bring all claims—contract-based and other—within the scope of an arbitration provision would be to allude not only to the contract but also to the activities that the parties will be engaging in as part of the transaction contemplated by the contract. From the standpoint of the reasonable reader, the all-encompassing scope of such a provision would render redundant *or relating to* as a means of covering claims other than those based in contract.

You could express this meaning simply by using *arising out of the subject matter of this agreement*, but to do so might be to invite an argument as to what constitutes the subject matter of the agreement. A more precise alternative would be to state what the subject matter of the contract consists of. For example, if you're dealing with a manufacturing and supply agreement, for purposes of any arbitration provision you could say "any dispute arising out of this agreement, the Supplier's manufacture of any quantity of the Product under this agreement, or sale of any quantity of the Product by the Supplier to the Buyer under this agreement."

Whether you refer to the subject matter generally or specifically, this approach represents an improvement over *arising out of and relating to*. Instead of referring to an unduly narrow point of reference—the contract—and relying on a vague standard—*relating to*—to reach beyond it, you refer to the activities under the contract.

Plenty of courts have attributed significance to *arising out of or relating to* in the context of arbitration provisions.[13] But if courts have had occasion to opine as to the meaning of *arising out of or relating to*, that's because it's unnecessarily vague. The notion of relying on such "tested" contract language is a poor second-best to using contract language that leaves less room for dispute.[14]

Why not simply leave the standard clause as is? Because the alternative version articulates more accurately than the original what the parties are actually agreeing to, and it does so in clearer prose.

Instead of following the proposed alternative approach, you could refer explicitly to claims that are covered—for example, by saying *including any tort claims*. But there's no guarantee that the transactional lawyer drafting a given contract would have a firm grasp of not only the deal terms but also the kinds of claims that the client might want to bring in the event of some future dispute. But if you know that a particular kind of extra-contractual claim would be relevant for purposes of a given contract, supplementing the proposed alternative language by referring to that kind of extra-contractual claim might provide some belt-and-suspenders comfort.

Activities Covered

A drafter might use *arising out of or relating to* with a view to capturing not just the subject matter of the contract but also other, unspecified activities. But if you can't express what those activities might be, attempting to bring them within the scope of an arbitration provision would seem a matter of guesswork.

And a court might balk at the idea, on the grounds that those activities are too remote. For example, in *Jones v. Halliburton Co.*, No. 08-20380 (5th Cir. Sept. 15, 2009), the U.S. Court of Appeals for the Fifth Circuit held that claims brought by a Halliburton employee arising out of a sexual assault that occurred in worker housing were not "related to" the plaintiff's employment contract and refused to compel arbitration.

Revised Clause

Here's the net effect of the changes discussed above:

> As the exclusive means of initiating adversarial proceedings to resolve any dispute arising out of this agreement [*general language*: or the subject matter of this agreement] [*example of precise language*: , the Supplier's manufacture of any quantity of the Product under this agreement, or sale of any quantity of the Product by the Supplier to the Buyer under this agreement], a party may demand that any such dispute be resolved by arbitration administered by the American Arbitration Association in accordance with its commercial arbitration rules, and each party hereby consents to any such dispute being so resolved. Judgment on any award rendered in any such arbitration may be entered in any court having jurisdiction.

The AAA's model clause has, in the words of the AAA's "Drafting Dispute Resolutions: A Practical Guide," "consistently received judicial support." Even if that's the case, that isn't an impediment to improving it. No rational judge would see in the alternative version any source of confusion.

Why not simply leave the standard clause as is? Because the alternative version articulates more accurately than the original what the parties are actually agreeing to, and it does so in clearer prose. And a rational contract process requires consistent contract language: for anyone drafting a contract consistent with "A Manual of Style for Contract Drafting," the AAA model clause in its current form would strike a discordant note.

As for the prospects of any of the changes proposed in this article making their way into the AAA standard clause, the AAA is apparently considering revising its commercial arbitration rules. It recently invited suggestions; the deadline was Sept. 1, 2009. But when it comes to contract language, one shouldn't expect too much in the way of innovation from large legal organizations, as they're prone to both the sluggishness of many large organizations and the legal profession's resistance to change. And they usually do their drafting by committee—an approach conducive to stasis.

But you don't need the AAA's seal of approval to use my revised version of their standard arbitration clause. If for purposes of a given contract you think, like I do, that it more clearly reflects the intent of the parties, go ahead and use it, and let the AAA play catch-up.

1. See Kenneth A. Adams, "Dysfunctional Drafting," Nat'l L.J., Sept. 8, 2008.
2. See Kenneth A. Adams, A Manual of Style for Contract Drafting xxvi (2d ed. 2008).
3. See id. at ¶16.11.
4. See id. at ¶1.7.
5. See id. at ¶1.84.
6. See id. at ¶16.45.
7. See id. at ¶16.50.
8. See id. at ¶2.25.
9. See id. at ¶2.32.
10. See id. at ¶2.2.
11. See id. at ¶2.67.
12. See Commercial Contracts: Strategies for Drafting and Negotiating §5.04[D][1] (Morton Moskin ed. 2008) (citations omitted).
13. See *Pennzoil Exploration & Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1067 (5th Cir. 1998).
14. See Adams, supra note 2, at xxvii.