





Arbitration Tips-N-Tools (TNT): Round 6

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In this round of Arbitration Tips-N-Tools, Professor Amy Schmitz asks some of the leading arbitration practitioners about drafting Arbitration Clauses, especially in a digital world and faced with the complexities of the Covid-19 pandemic.

Round 6: What are your 3 top tips and/or tools with respect to drafting Arbitration Clauses – especially in the digital era and complexities of Covid?

Responses:

A) Julie Hopkins –

- The fundamentals of drafting a good arbitration clause remain the same. This [presentation](#) I found online a few years ago for YCAP (Young Canadian Arbitration Practitioners) by Vasilis Pappas, arbitration counsel based out of Vancouver, is a useful resource.
- Consider adopting institutional arbitration rules that explicitly provide for the discretion to order virtual hearings. Examples include – the [AAA Commercial Arbitration Rules](#), [LCIA Arbitration Rules](#), the [new ICC Rules](#) effective January 1, 2021. A Canadian example is the new Vancouver International Arbitration Centre's [Domestic Arbitration Rules](#).
- Make it clear in the arbitration clause that an agreement as to physical hearing location does not override the discretion given to arbitrators in any agreed Rules to conduct a virtual hearing.

B) Rachel J. Goedken –

- Review and when appropriate, revise to expressly permit virtual arbitration hearings.

C) Linda A. Michler –

In addition to a clause determining the way arbitrators/ADR organization will be picked, consider addressing the following (and not only in the age of Covid-19):

- Information Security – must be reasonable. Reasonableness is based on the sensitivity of the information, burden and costs, the value of the case, and efficiency.
- Considerations: asset management, access controls, encryption, communication security, physical environmental security, operational security, incident management (some depend on whether virtual or in-person or a mixture of virtual and in-person).
- Parties should agree on the measures, and agree early, preferably before the first case management conference. If they cannot agree, the tribunal has the authority to decide.

Stay tuned for more Arbitration TNT by Prof. Amy Schmitz coming your way next week.....

Julie Hopkins

Julie was counsel with Borden Ladner Gervais LLP and practised commercial litigation, arbitration and administrative law for more than 25 years. She advised and represented clients on complex and technical matters concerning oil and gas, insurance, labour and employment, estates and trusts, corporate, and constitutional law. As a result, she...

Amy Schmitz

Professor Amy Schmitz joined the University of Missouri School of Law and the Center for Dispute Resolution as the Elwood L. Thomas Missouri Endowed Professor of Law in 2016. Previously she was a Professor at the University of Colorado School of Law for over 16 years. Prior to teaching, Professor...

Rachel Goedken

As Director of the Werner Institute at Creighton Law School, Professor Goedken focuses on nonlitigation dispute resolution – arbitration, mediation, and negotiation. Before joining the faculty, Professor Goedken earned her BS in Psychology and MS in Industrial Relations, then worked in labor relations and human resources for several years before...

Linda Michler

Linda A. Michler is an arbitrator and mediator and may be reached at 412.854.4315/ 412. 480.1731 or on-line at www.nadn.org/linda-michler She is licensed in PA, NY and NC and is a member of the National Academy of Distinguished Neutrals and is on the roster of the American Health Law Association's Dispute...

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