

International Arbitration

Submission Agreements – How to Join the Pandemic Arbitration Party Even If You Weren't Invited



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*The pandemic is a great time to revisit and highlight the utility of **submission agreements**—agreements that allow parties without pre-existing arbitration clauses to choose to submit a particular dispute to arbitration.*

Arbitration is often seen as having three principal advantages over traditional litigation: it is cheaper, faster, and confidential. However, during the COVID-19 pandemic, another, less often-cited advantage of arbitration has come to the forefront: its flexible, party-driven nature. That flexibility is allowing many parties to adapt to the current set of circumstances and initiate or move forward their disputes even in these challenging times.

While traditional litigation revolves around the physical location of a courthouse, arbitral institutions have long overseen disputes from a distance, encouraging telephonic case conferences and electronic submission of documents. In recent years, arbitral institutions have shown a willingness to go further, permitting remote testimony and in some cases administering entire hearings remotely. Accordingly, with the onset of the COVID-19 crisis, arbitral institutions were well-placed to pivot nimbly to completely remote dispute resolution.

In the last few months, the major institutions have quickly established and shared best practices and protocols related to virtual hearings (see, e.g., [The International Institute for Conflict Prevention and Resolution \(CPR\) Annotated Model Procedural Order for Remote Video Arbitration Proceedings](#) and [AAA-ICDR Model Order and Procedures for a Virtual Hearing via Videoconference](#)) and cyber and data security in arbitration (see, e.g., KCAB International's [Seoul Protocol on Video Conferencing in International Arbitration](#) and [AAA-ICDR Best Practices Guide for Maintaining Cybersecurity and Privacy](#)).

Importantly, the advantages offered by arbitral institutions during this pandemic are not limited only to those who have arbitration clauses in their existing agreements. Even if your contract contemplates litigation, it's not too late to take advantage of arbitration's comparative strengths at this unusual time—through the use of a submission agreement.

The Basics of Submission Agreements

Unlike a standard arbitration clause—which makes arbitration the dispute resolution mechanism for all or some subset of potential *future* disputes arising from a particular contract—a submission or post-dispute arbitration agreement is entered into by parties to an *existing* dispute. In the submission agreement, the parties agree to submit only a specific dispute to arbitration. They can do so at the time the dispute arises, while the parties are engaged in negotiations for a resolution, or even if the dispute is already being actively litigated in court. Given that a submission agreement is defined by the dispute at issue, it typically includes a fairly precise statement or outline of the dispute being submitted to arbitration.

Negotiating and drafting a submission agreement raises many of the same considerations as drafting a broader arbitration clause—for example, whether the arbitration should be administered by an institution or conducted ad hoc, which arbitration rules should apply, what the seat and language of the arbitration should be, and how one or more arbitrators should be selected. In the post-dispute context, in which the parties have the benefit of understanding the issues and amounts in dispute, the parties may be better able to tailor the process to suit their parties' common aims or interests. In reality, the fact that the parties are necessarily in an adversarial posture may make it *more* challenging to reach agreement than in the normal context, when the arbitration clause is only one clause among many in a complex negotiation. Fortunately, there are standard submission clauses that avoid the need for extensive negotiations. For example, the AAA provides the following [standard language](#): “We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Commercial [or other] Arbitration Rules the following controversy: [describe briefly]. We further agree that a judgment of any court having jurisdiction may be entered upon the award.”

Specific Drafting Considerations for Submission Agreements

Although each dispute is unique, below are some general considerations that a party to a submission agreement may be advised to think through.

The party should consider how the submission agreement aligns or conflicts with the original agreement and ensure that it has achieved the desired relationship between the two agreements.

- Make sure that the submission agreement is clear on which disputes will be submitted to arbitration. If there is no intent to change the general dispute resolution provisions in the original agreement, the submission agreement should be written narrowly so that there is no confusion on that point.
- If the original agreement had a forum selection clause, clarify in the submission agreement whether that clause also applies to enforcement of any award arising out of the submission.
- To the extent that the submission agreement can be read as amending the original agreement beyond the treatment of one dispute, consider what steps need to be taken to comply with any modification or amendment requirements in the original agreement.

The party should consider what, if any, additional terms could be set in the submission agreement to tailor the proceedings to the specific dispute.

- Can the dispute be narrowed to a threshold factual or legal issue? Or a question regarding the calculation of damages? Where a central disagreement is the only impediment to a negotiated outcome, it can be more efficient and cost-effective to limit the arbitration to that central dispute.
- Is it possible to agree on more particularized rules, e.g., expedited procedures?
- Do the parties agree on the qualifications an arbitrator must have?

The party should consider what, if any, key procedural aspects of the proceedings it may be sensible to lock down in the submission agreement—in advance of the selection of a tribunal.

- Can the parties agree to dispense with document disclosure? Or with oral testimony altogether?
- Do the parties have a shared interest in an expeditious resolution, such that they can agree on the timing in which the dispute must be decided?
- Note, however, it is generally advisable to maintain some flexibility for the parties and the tribunal and to resist the temptation to set too many procedural arrangements in a submission agreement as this can generate a host of issues. Perhaps most critically, if a procedural requirement is set in the submission agreement and it is not, or cannot be, complied with for some reason, enforceability issues could arise.

Depending on the nature of the dispute, it may make sense to consider who the parties to the arbitration should be and the relative roles of those parties.

- For instance, if both parties to a contract agree there is a question as to how a force majeure provision should be interpreted, the submission agreement could provide for joint submission to arbitration and neither party would be designated as claimant nor respondent, contrary to the standard arrangement where one party files as claimant (and may have the burden of proof or other obligations corresponding to that status).
- Are there any third parties or subcontractors whom it would be beneficial to include in the interest of dispute resolution efficiency for all involved if that party were willing to enter into a submission agreement?

While far from a solution to every COVID-era legal dispute, submission agreements offer another option to resolve disputes in an unusual legal environment.

Conscious of the human, operational and financial strain that coronavirus is placing on businesses and organizations worldwide, Jenner & Block has assembled a multi-disciplinary Task Force to support clients as they navigate the legal and strategic challenges of the COVID-19 / Coronavirus situation.

For additional information and materials, please visit our COVID-19 / Coronavirus Resource Center.

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