Pathological Arbitration Clauses: How to Keep Poor Drafting From Derailing Dispute Resolution

A practical guide to spotting common errors in arbitration agreements—and cutting procedural risk, cost, and uncertainty.

Why the arbitration clause matters

Arbitration is now a go-to tool for resolving complex commercial disputes, especially in cross-border deals. Companies choose it for flexible proceedings, specialized arbitrators, confidentiality, and the ability to enforce awards across multiple jurisdictions.

But those benefits hinge on one basic point: the arbitration agreement has to be drafted well. A sloppy clause can turn a mechanism built for efficiency and certainty into just another source of dispute.

In practice, so-called pathological arbitration clauses routinely trigger jurisdictional objections, delays in getting the proceedings started, higher costs, and even problems enforcing the award. This article flags the common drafting errors in arbitration agreements and lays out best practices to head them off at the contract stage.

What is a pathological arbitration clause?

A pathological arbitration clause is one that reflects the parties' intent to arbitrate but contains ambiguities, contradictions, omissions, or terms that are hard to implement—any of which can undermine the proceedings. The problem usually surfaces once a dispute is already on the table and the parties need to trigger the dispute-resolution mechanism.

In Panama, Law No. 131 of December 31, 2013—which governs domestic and international commercial arbitration—recognizes principles such as the autonomy (separability) of the arbitration agreement and the tribunal's authority to rule on its own jurisdiction. Even so, a pathological clause can open the door to challenges over the scope, validity, or application of the agreement.

Common errors that may affect the effectiveness of the arbitration

1. Imprecise designation of the arbitral institution

One of the most common errors is a generic reference to an arbitral institution or center without nailing down its name, applicable rules, or administering role. Trouble also arises when the clause uses outdated names, cites institutions that no longer exist, or points to centers that don't fit the type of dispute the contract contemplates.

When the institution isn't clearly identified, the fight can shift from the merits of the dispute to a threshold battle over where and how the arbitration should proceed.

2. Contradictory language

Some contracts pair an arbitration reference with an exclusive-jurisdiction clause favoring state courts, or use formulas like "arbitration before the courts of justice." These contradictions cloud the parties' true intent and can spark parallel proceedings.

3. Omission of the seat of arbitration

Don't confuse the seat of arbitration with the physical venue of the hearings. The seat sets the procedural legal framework, determines which courts can hear a setting-aside action, and, in some cases, affects enforcement of the award. If the parties don't agree on it, the institution or the tribunal will pick one—potentially on criteria that don't match the deal's commercial expectations.

4. Lack of clarity regarding the number and method of appointment of arbitrators

The clause should state whether the tribunal will be a sole arbitrator or a panel of three, plus how arbitrators are appointed and replaced. Getting this right lets the parties match the process to the amount, complexity, and sensitivity of the dispute—and avoids side fights at the outset.

5. Omission of the law applicable to the merits

The law governing the contract may differ from the law of the seat. If the parties don't spell it out, the tribunal has to determine it through conflict-of-laws rules—adding uncertainty to how rights and obligations are read, especially in cross-border contracts.

6. Ambiguous scope of the arbitration agreement

Broad formulas are usually helpful, but they need to be precise enough to capture every dispute tied to the contract. Loose drafting lets a party argue that a given claim falls outside the arbitration agreement.

7. Language not agreed upon

When the parties come from different jurisdictions, the language of the arbitration drives costs, translation timelines, document admissibility, and the pool of available arbitrators. Locking it down—and even setting practical rules for documents in another language—cuts procedural friction.

8. Poorly designed multi-tiered clauses

Multi-tiered (escalation) clauses work well when they set clear deadlines, objective triggers, and specific consequences. Without those, they invite fights over exactly when a party can validly start arbitration.

Practical impact for the parties

A pathological arbitration clause can carry a real business cost:

- Major delays: jurisdictional fights can push back the start or progress of the arbitration, especially when the parties first have to litigate the validity, scope, or administration of the agreement.
- Added costs: legal fees from procedural motions, parallel interim measures, and potential setting-aside actions.
- Risk of the award being set aside: if the tribunal takes jurisdiction on shaky grounds, the award can be vacated.
- Enforcement headaches: an award with defects in the arbitration agreement can be turned away by the courts where you try to enforce it.
- Lost strategic edge: arbitration stops being a fast, confidential tool and turns into drawn-out litigation that strains the business relationship.

Best practices when drafting the arbitration agreement

When negotiating commercial, financing, construction, technology, energy, infrastructure, or M&A contracts, make it a habit to pressure-test at least the following:

- Arbitral institution: name it precisely by its official name and state that the arbitration will be administered under its rules.
- Seat of arbitration: spell it out (for example, Panama City, Republic of Panama) and, where relevant, keep it separate from the venue where hearings take place.
- Number and appointment of arbitrators: state whether the tribunal is a sole arbitrator or a panel of three, plus how they're appointed and replaced.
- Language of the proceedings: set it expressly, especially in international contracts where the parties work in different languages.
- Law applicable to the merits: name the substantive law governing the contract and keep it distinct from the law of the seat.
- Scope of the agreement: draft it broadly and expressly so it captures every dispute tied to the contract.
- Confidentiality: agree on it expressly when the applicable rules don't impose it by default.
- Multi-tiered clauses: if you use them, build in objective deadlines, triggers, and defined consequences for each stage.

Panama as a seat of arbitration

Panama offers a favorable legal framework for commercial arbitration, backed by international treaties that support the recognition and enforcement of awards. As a regional business hub, it's a strong choice of seat for contracts with cross-border components. In picking the seat, weigh where the assets are, the nature of the dispute, the applicable rules, and access to interim measures or emergency mechanisms.

Conclusion

A well-drafted arbitration clause won't eliminate the risk of a dispute, but it does keep an avoidable procedural fight from making things worse. Nail down the institution, seat, governing law, tribunal, language, and scope, and arbitration can do its job: resolve the matter in an orderly, efficient, and enforceable way.
Bottom line: treat the arbitration clause not as boilerplate, but as a strategic risk-management call. The cost of careful drafting is marginal next to the damage a pathological clause can do once a dispute hits.

Alcogal's litigation and arbitration team advises local and international clients on drafting, negotiating, and defending arbitration agreements, and represents them in domestic and international arbitrations under a range of institutional rules. An early review aligns the clause with the specific risks of the deal and with each client's dispute-resolution strategy.

Frequently asked questions about pathological arbitration clauses

What is a pathological arbitration clause?

It's an arbitration agreement that reflects the parties' intent to arbitrate but contains ambiguities, contradictions, or omissions that make it hard to implement. Errors like failing to name the arbitral institution, the seat, or the governing law can trigger jurisdictional objections, delays, higher costs, and even a set-aside of the award.

What are the most common errors when drafting an arbitration clause?

The usual suspects: naming the arbitral institution imprecisely; using contradictory language (for example, mixing arbitration with the jurisdiction of state courts); leaving out the seat; not defining the number and appointment of arbitrators; omitting the governing law; drawing the scope too vaguely; failing to set the language of the proceedings; and poorly designed multi-tiered clauses.

What elements should a well-drafted arbitration clause include?

It should clearly name the arbitral institution and its rules; spell out the seat; state the number of arbitrators and how they're appointed; set the language of the proceedings; establish the governing law; draw the scope broadly and expressly; address confidentiality where needed; and, for any multi-tiered clause, set objective deadlines, triggers, and consequences.

Why choose Panama as a seat of arbitration?

Panama offers a favorable legal framework for commercial arbitration—Law No. 131 of 2013—plus international treaties that make awards easier to recognize and enforce. As a regional business hub, it's a strong fit for cross-border contracts. When choosing the seat, weigh where the assets are, the nature of the dispute, the applicable rules, and access to interim measures or emergency mechanisms.

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