

Drafting Effective Arbitration Clauses

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Why arbitration?

A contract is only as good as its dispute resolution clause. If the rights and obligations are unenforceable, the contract may be useless.

“Follow the Money.”

Is arbitration the best dispute resolution mechanism for your deal?

Should you consider negotiation and mediation first?

The most important consideration is whether the parties will obtain an enforceable award.

You need to consider:

- Where do the parties have their assets?
- Will the award be enforceable in that jurisdiction?

Drafting the Arbitration Clause

Arbitration is a creature of contract, thus the agreement needs to be in writing. The basic rule of drafting an international arbitration clause is to avoid ambiguity.

In fact, in many instances, the culprit of rendering the arbitration process inefficient, costly and cumbersome could be lessened by a properly drafted clause.

Essential Elements

1. Ad-hoc or institutional:

Arbitrations may be either administered or ad hoc. Administered arbitrations are conducted in accordance with the rules of an institution such as the AAA, CPR, ICC or LCIA. Ad hoc arbitrations are conducted by the parties themselves either

- pursuant to a specified set of rules, such as the UNCITRAL Rules, or rules crafted by the parties.
2. Institutions provide established sets of rules, support services (*e.g.*, scheduling, billing, payments of arbitrators, service of documents, arranging hearing rooms), and assistance in the appointment of arbitrators. Awards resulting from institutional arbitrations may be more readily enforceable as the enforcing court may take comfort in knowing that the award is the product of established procedures and, in some cases, the institution has reviewed and commented on the draft award.
 3. Ad hoc arbitration gives parties great flexibility and avoids the expense of an institution. If one of the parties is uncooperative, however, there is no institution to fall back on and the other party may be forced to resort to the courts. Parties must also deal directly with arbitrators over potentially sensitive matters such as rates and the payment of fees. The disadvantages of ad hoc arbitration are reduced if both parties are experienced and cooperative.
 4. Use model arbitration clause?
 5. Does the clause cover all potential disputes between the parties?
 - “claims,” “differences,” “disputes”
 - “arising out of,” “arising under”
 - “in connection with,” “in respect of”
 6. Parties (more than two)
 7. Arbitrators
 - how many
 - method of appointment
 - expertise
 8. What law governs the arbitration proceedings
 9. Seat of the arbitration

Although not a requirement, an arbitration clause ordinarily should specify the place or “seat” of the arbitration. The law of the seat governs important procedural aspects of the arbitration unless otherwise provided for in the contract, *e.g.*, the validity of the

arbitration agreement and its scope, issues relating to the appointment and removal of arbitrators, the authority of courts and arbitrators to award interim measures, the enforcement of discovery orders, and whether certain types of damages such as punitive damages are permissible. It is to the courts at the seat of the arbitration that actions may be brought to vacate an arbitral award.

In selecting the seat, consideration should be given to whether there is a modern arbitration law, and whether the local courts are supportive of arbitration, will not unduly interfere, are independent and are accustomed to sophisticated commercial disputes. In international arbitrations, parties should ensure that the seat is in a country that is a signatory to the New York Convention (ordinarily not a problem given that over 149 countries is signatories).

Practical considerations should also be factored in, such as flight connections, accommodations, the availability of facilities, support services, the location of witnesses and documents, and whether the seat is in a politically stable place.

1. Rules that govern the arbitration (ICC)
2. Are proceedings private and confidential?
3. Language of the proceedings
4. Choice of Substantive law (governing law of the contract)

Minor Pathology

What a difference a “May” makes:

“Any dispute arising out of or in any way relating to this Agreement may be referred to arbitration. Such arbitration shall take place in the USA and shall proceed in accordance with the Rules of Arbitration of the International Chamber of Commerce.”

Where is the ICC?

International Court of Arbitration is frequently seized with arbitration clauses that state ‘International Chamber of Commerce’ “in Zurich,” “in London,” “in Geneva,” “in New York.”

“Article 8(3) may be applied to cases falling in a first group of clauses, where there exists an agreement to arbitrate followed by diversified working such as:

- ‘ International Chamber of Commerce of Geneva;’
- ‘ International Chamber of Commerce, Geneva Office;’
- ‘ International Chamber of Commerce London;’
- ‘Chamber of Commerce of Paris;’
- ‘Arbitration at Zurich in accordance with ICC Rules;’
- ‘Arbitration by three arbitrators at the *Netherlands Arbitrage Instituut* in The Hague;’
- ‘Paris Chamber of Commerce;’
- ‘Arbitration before the Swiss ICC National Committee in Zurich;’
- ‘Arbitration Court of the Chamber of Commerce in Zurich;’
- ‘Arbitration of ICC, The Hague,’ and Delhi as place of arbitration;
- ‘International Court of Arbitration in Paris;’
- ‘Arbitration Court in Zurich, Switzerland;’
- ‘ International Commercial Arbitration Board in Geneva;’
- ‘Paris Chamber of Arbitration.’

In all these cases, the Court held that it was likely that the parties had adopted ICC arbitration and had chosen Paris, London, Zurich or Delhi as the place of arbitration, and that the decision on this question was therefore a matter to be submitted to the arbitral tribunal.”

In what language(s) is (are) the contract and translation?

- “The place of arbitration will be Barcelona if (Party X) is the Claimant and Paris if (Party Y) is the Claimant.”

Ad-hoc and institutional arbitration in the same clause, or not?

Reference to both arbitral and local court jurisdiction

“The errors in clauses referring incompletely, or which may be deemed to refer, to the ICC, could be grouped into various categories. For example, a first group could comprise clauses which, irrespective of any specific localization, refer to an arbitration institution – be in a commission, court or office – which they define by the addition of the adjective ‘international,’ so that this word then seems the determining factor. A second could comprise clauses which refer to a ‘Chamber of Commerce’ or ‘Court of Arbitration’ situated in Paris. In this second category, the place (Paris) together with the international nature of the dispute – such as the fact that the parties are of different nationalities – are key factors enabling the *prima facie* existence of an ICC arbitration agreement to be determined. Lastly, a third group would comprise clauses, which are less common, that refer to a Chamber of Commerce but with no indication of the word ‘international’ or its being in Paris.

-“All claims, disputes and other matters in question between the contractor and the company arising out of, or relating to, the contract documents or the breach thereof, shall at the sole discretion of the company, be decided either under applicable Saudi Arabia Law and procedure or by arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce. In the event the company chooses arbitration, the arbitrator(s) shall apply the substantive laws of the Commonwealth of Virginia USA. Arbitration shall be held in Paris, France. The language of arbitration proceedings shall be in English.”

Reference to two arbitral institutions in the same clause, or not?

- “Any controversy or claim arising out of or relating to this agreement or the breach hereof, shall be settled by arbitration in Seoul, Republic of Korea, before the Korean Commercial Arbitration Tribunal by a single arbitrator in accordance with the Rules of Arbitration of the International Chamber of Commerce.”

The non-existent institution

Greater Pathology

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