

6th Annual Arbitration and Investment Summit 2018

Caribbean, Latin America & Other Emerging Markets



WORKSHOP ON DRAFTING ARBITRATION CLAUSES

What is an Arbitration Clause?

- The arbitration clause or agreement is the foundation of almost every arbitration.
- It is evidence of the consent of the parties to submit their dispute to arbitration.
- Separate contract, independent & distinct from main contract.

Effective Arbitration Clauses

- When is an arbitration clause effective?

Frédéric Eisemann: when it

- (1) produces mandatory consequences for the parties;
- (2) excludes the intervention of state courts in the settlement of the disputes;
- (3) gives powers to the arbitrators to resolve the disputes likely to arise between the parties;
- (4) puts in place of a procedure that allows the rapid and efficient resolution of the dispute, and leads to an enforceable award.

Effective Drafting of an Arbitration Clause

- Essential elements of effectiveness
 - Intention to arbitrate
 - Make clear that you want to go to arbitration
 - Scope of the agreement
 - Use wide wording
 - Clear reference to
 - Institution, in case of institutional arbitration
 - or
 - Seat, in case of ad hoc arbitration

Effective Drafting of an Arbitration Clause

- Other consideration when drafting arbitration agreements:
 - Number of arbitrators
 - How arbitrators are appointed
 - Arbitration rules
 - Language of the arbitration
 - Applicable law (seat /place of arbitration)
 - Consolidation
 - Confidentiality

Multi-tiered Arbitration

- Written notice of dispute
 - Cooling-off period
 - Negotiation
 - Mediation period
 - Arbitration

Typical Defects

- Ambiguous language
- Seat
- Law
- Scope
- Conflicting dispute resolution provisions
- Incorrect reference to institution

Seat / Place of Arbitration

- This can influence which law governs the arbitration.
- This has a bearing on the issue which courts can exercise supervisory and supportive powers in relation to the arbitration.
- The place of arbitration determines the nationality of the award which is relevant for the ultimate enforcement of the award.
- The seat of the arbitration must be distinguished from the place where the actual hearings take place.

Example of Standard Clauses

- **ICC**

“All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.”

- Parties can exclude Emergency Arbitrator and can provide law governing the contract, the number of arbitrators, and the place and language of arbitration. Alternatively these issues can be left for determination through the ICC Arbitration system, either by the Court or arbitral tribunal.

Example of Standard Clauses

- **LCIA**

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.

The number of arbitrators shall be [*one / three*].

The seat, or legal place, of arbitration shall be [*city and / or Country*].

The language to be used in the arbitral proceedings shall be [].

The governing law of the contract shall be the substantive law of []

Examples of defective or pathological clauses

- *Paul Smith v H&S Int'l Holdings (High Court 1991)*

“Clause 13: If any dispute arise between the parties the dispute shall be adjudicated under the rules of Arbitration of the ICC

Clause 14: The Courts of England shall have exclusive jurisdiction over this agreement to which jurisdiction the parties hereby submit”

Examples of defective or pathological clauses

- *Lucky Goldstar v Nag Moo Kee Engineering*
(High Court of Hong Kong 1993)

“ Any dispute or difference arising out of this contract shall be arbitrated in the 3rd Country, under the rule of the 3rd Country and in accordance with the rules of procedure of the International Commercial Arbitration Association”

Examples of defective or pathological clauses

- *HKL Group Co Ltd v Rizq International Holdings Pte Ltd*

“Any dispute shall be settled by amicable negotiation between two Parties. In case both Parties fail to reach amicable agreement, all disputes out of in connection with the contract shall be settled by the Arbitration Committee at Singapore under the rules of the International Chamber of Commerce of which awards shall be final and binding both parties. Arbitration fee and other related charge shall be borne by the losing Party unless otherwise agreed.”

Examples of defective or pathological clauses

- *Christian Kruppa v Alessandro Benedetti & Anr* [2014] EWHC 1887 (Comm)

“In the event of any dispute between the parties pursuant to this Agreement, the parties will endeavour to first resolve the matter through Swiss arbitration. Should a resolution not be forthcoming the courts of England shall have non-exclusive jurisdiction”.

Summary

In every arbitration agreement, be it a submission or an arbitration clause we have to examine:

- Formal validity – existence of the clause
- Substantive validity – ability to generate legal consequences
- In either case it is essential to determine the relevant applicable law.