

International Arbitration Webinar Series

Common Pitfalls in Drafting and Negotiating Dispute Resolution Clauses and How to Avoid Them

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OUTLINE

- The Components of an Arbitration Clause
- Dangers and Common Mistakes
- The Role of Model Institutional Clauses

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INTRODUCTION (1)

- Where and by whom a dispute is decided can be critical
- The perennial problem – insufficient attention to the disputes clause
 - Insufficient attention to the matters provided (e.g. seat)
 - Insufficient care in drafting
 - Failure to take advice from local lawyers at the seat/forum

INTRODUCTION (2)

- Dispute resolution provision is a product of the parties'
 - Interests
 - Negotiations
 - Drafting ability
- Jurisdiction/Forum Selection Clauses vs Arbitration Agreements
- Other forms of dispute resolution (e.g. expert determination, DRB)

“The cardinal rule of drafting an international arbitration agreement is to avoid the type of ambiguity and equivocation that will later delight a party wishing to drag its feet” (William W Park, 1997)

Essential Elements of an Arbitration Clause (1)

- Agreement to arbitrate
- Type of arbitration
 - Institutional/Administered
 - Choice of institution – e.g. consider rules, practices and charges
 - Ad hoc
 - Consider adoption of existing procedural rules (e.g. UNCITRAL)
 - Consider making an institution an “appointing authority”

Essential Elements (2)

- Scope of Agreement to Arbitrate
 - Generally wise to draft broadly
 - Carve outs to be approached with caution
- Method of appointment of arbitrators
- Number of arbitrators (one or three)

Essential Elements (3)

- Place/seat of the arbitration
 - Practical convenience
 - Neutrality
 - Legal factors
 - Scope for court interference
 - Scope for annulment/setting aside of the award
 - Is the claim arbitrable?
 - Ease of enforcement (is the country of the seat party to the NY Convention?)

Essential Elements (4)

- Language
- Governing law of the contract (separate provision preferably)
- Always consider:
 - Formalities (e.g. incorporation by reference)
 - Capacity to enter into the arbitration agreement
 - Validity (e.g. any non-arbitrability issues?)

Optional Elements of an Arbitration Clause (1)

- Qualifications/characteristics of the tribunal
- Procedure
 - Specification of procedure - e.g. documents only
- no final hearing
 - Disclosure/evidence – e.g. application of IBA Rules
 - ‘Fast track’ arbitration – be realistic and specify consequences if time limits not met

Optional Elements (2)

- Remedial Powers
 - Provisional/interim relief
 - Costs
 - Interest
 - Award currency

Optional Elements (3)

- Limits on rights of appeal/challenge
- Confidentiality

DANGERS AND COMMON MISTAKES: Examples of Pathological Clauses (1)

- Absence of agreement to arbitrate/equivocation as to whether binding arbitration is intended:
 - *“Any dispute of whatever nature arising out of or in any way relating to the Agreement or to its construction or fulfilments may be referred to arbitration. Such arbitration shall take place in USA and shall proceed in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce”*
(Cravat Coal Export Company, Inc. v Taiwan Power Company, USDC Eastern District of Kentucky, Civil Action n°90-11, March 5, 1990)
 - *“The present contract is governed by the laws of Luxembourg. Possible disputes will in all cases be submitted to the Committee for Conciliation of the International Chamber of Commerce in Paris (France)”*
(Meissner v 1.Planet S.A., District Tribunal of Luxembourg, n°186/66, April 29, 1988)

Examples of Pathological Clauses (2)

- Sloppy multi tiered clause (Lack of clarity as to when stages begin/end, whether stages are optional or not):
 - *“Disputes shall be submitted to arbitration according to the Rules of Conciliation and Arbitration of the ICC... ; disputes which may be resolved by conciliation shall be submitted first to conciliation”.*
(Pathological Arbitration clauses, Marie-Hélène Maleville, *IBLJ*, n°1, 2000, p.69)
 - *“The parties shall mediate so long as one party believes settlement through mediation is possible, after which the parties shall submit the dispute to binding arbitration”.*

Examples of Pathological Clauses (3)

- *“Prior to any judicial proceeding, [parties] shall submit [their disputes] to an arbitral tribunal of three members, of which each party appoints the arbitrator of its choice within a eight-days period from the request made by the most diligent party. In the event arbitrators do not agree about the choice of a third arbitrator, the latter shall be appointed by the President of the Commercial Tribunal of Versailles.*

If any conciliation is possible on the enforcement of this contract, only the Commercial Tribunal of Versailles shall be competent”

(Société Sagua La Sablière et autre v SARL Optimal Conseil, Court of Appeal of Paris, November 20, 2003)

Examples of Pathological Clauses (4)

- Providing too much specificity with respect to the arbitrators' qualifications:
 - *"Parties shall appoint a Chinese speaking Arbitrator with a French law degree and a familiarity with Mid-East construction contracts"*
- Naming a specific person as arbitrator who is now deceased or refuses to act

Examples of Pathological Clauses (5)

- Naming a specific person as arbitrator who is always the same appointed:
 - The arbitration clause included in **Bouygues' contracts** constitutes an excellent example. Article 30.1 of the Specific Conditions provides: *“All disputes resulting from the interpretation, validity, performance and especially but not only from subcontractor’s rights of payment and termination of the contract (...) shall be submitted to an arbitration proceeding, according to the provisions of this article and articles 1442 and following of the New Code of Civil Procedure.*
The sole Arbitrator as Arbitral Tribunal is appointed in the Particular Conditions”
And the said **Particular Conditions** provide: *“According to article 30 of the Specific Conditions, claimant to arbitration shall submit the dispute, to one of the Arbitrators hereunder appointed:*
Mr A. or Mr B. or Mr C. or Mr D.”

Examples of Pathological Clauses (6)

- Drafting an incomplete clause which makes access to justice difficult:
 - *"If, during the term of this agreement or subsequently, a doubt, conflict or dispute between the Parties results from the interpretation or performance of this Agreement or of any subject in relation to this Agreement, or concerning the rights and obligations of the Parties arising from this Agreement, or in the event that no settlement is reached on an alternative method of dispute resolution, this doubt, conflict or dispute shall be settled by arbitration. Each Party shall appoint an Arbitrator. If these Arbitrators do not settle the dispute by a mutual agreement, or if they do not agree about the choice of a Third Arbitrator, the President of the International Chamber of Commerce of Paris will be required to appoint this Third Arbitrator. The decision of the arbitral Tribunal thereby established shall be final and binding on the Parties"*
(Israel v Société NIOC, Civ. 1st, February 1, 2005)

Examples of Pathological Clauses (7)

- Inadvertent limits on scope of clause:
 - “All disputes arising out of the performance of the contract, and during the term of this contract, shall be submitted to an arbitral tribunal”
(Commercial Ch. of the French Cour de cassation, March 13, 1978, in *Rev. arb.* 1988, p.124)
 - “All disputes shall be settled by arbitration according to the Rules of Conciliation and Arbitration of the ICC, and for disputes which may be resolved by conciliation, the parties would proceed first with such conciliation”
(ICC Award n°2138, 1974, *Rev. arb.* 1988, p.125)

Examples of Pathological Clauses (8)

- Naming an institution to administer the arbitration or to appoint arbitrators, where the arbitration does not exist, is mis-named or refuses to act:
 - *“All disputes or disagreement arising out of the present agreement which cannot be resolved amicably, will be submitted for arbitration before the Chamber of Commerce of Bucharest or the Arbitration Commission of the ICC of Paris”*
(Lebanese CC, April 27, 1987, *Rev. arb.* 1988, p.723)
 - *“If the Seller should bring an action against the Buyer, the parties will refer to the jurisdiction of the tribunal at the Chamber of Commerce in the city of the Buyer. If it does not exist, or there exist several, the parties will refer to the jurisdiction of the Court of Arbitration of the ICC in Paris and take for the decision on the disputes the Rules of this Chamber of Commerce”*
(Pathological Clauses: Frédéric Eisemann’s Still Vital Criteria, Benjamin G. Davis, 7 *Arb. Int’l* (1991))

Examples of Pathological Clauses (9)

- Providing unreasonably short deadlines for actions by the tribunal:
 - *“The award shall be issued in a period of time of three months from the date of the arbitration agreement. This period can be extended four times if both parties agree to”*

- Providing for conflicting or unclear procedures:
 - *“Disputes hereunder shall be referred to arbitration, to be carried out by arbitrators named by the International Chamber of Commerce in Geneva in accordance with the arbitration procedure set forth in the Civil Code of Venezuela and in the Civil Code of France, with due regard for the law of the place of arbitration”*
(Pathological Clauses: Frédéric Eisemann’s Still Vital Criteria, Benjamin G. Davis, 7 *Arb. Int’l* 365, 387 (1991))

Examples of Pathological Clauses (10)

- Ineffective incorporation by reference (ties in with next item): it depends of the seat of arbitration

Outline

Multi-parties

Multi-contracts

Capacity of parties to arbitrate

Arbitrability

Med-arb

Over prescription

Ad hoc and institutional arbitration

Review of institutional clauses

I Multi-party

Party A
Party B
Party C

II Multi-contract

Party A
Party B

Party A
Party B

Party A
Party B

III Multi-party and multi-contract

Party A
Party B
Party C

Party A
Party B
Party C

Party A
Party B
Party D

Party A
Party C

Party A
Party B

Multi-party contract

“Multi party” - single contract with more than two parties.

Problems that may arise:

- Appointment of arbitrator or panel where there are more than two parties, in particular, attaining equal treatment of the parties
- Often the contracts will contain generic arbitration clauses
- Tailored clauses may:
 - provide for joint appointment by two or more parties
 - leave the appointment of a panel of arbitrators representing each of the parties to an appointing authority (but may not have clear rules)
 - provide for weighted appointment rights
 - Joinder where a party is later added
 - Consolidation where separate disputes are heard together

Critical issue: lack of due process → challenge or refusal to enforce award

Multi-contract situations

“Multi-contract” - a situation where there are a number of contracts, possibly with different parties. Key aim is to ensure all parties to various contracts sign up to consistent dispute resolution (DR) procedure including mechanisms for consolidation/joinder to avoid multiple proceedings and inconsistent awards.

- Situations in which multi-contract issues might arise:
 - construction contracts
 - insurance and reinsurance
 - project finance
 - investment, joint venture and shareholder agreements
 - sale of goods or services
- Often the contracts will contain generic and conflicting arbitration clauses
- Diverse and substantially different contracts may not be suitable for a common DR procedure

Multi-contract situations: drafting considerations

“Multi-contract” drafting considerations:

- The arbitration clauses in the related contracts should be harmonised:
 - to avoid different dispute resolution mechanisms in related contracts (risk of fragmenting future disputes) because an arbitral tribunal under the first contract may not have jurisdiction to consider issues arising from the second contract
 - to avoid parallel proceedings
 - with identical or complementary provisions or one protocol
 - To allow consolidation/joinder/intervention + specify that an arbitrator/tribunal appointed under one contract has jurisdiction to consider and decide issues related to the other contracts (note priority: 1st filed, 1st ordered, head contract or as agreed)

Multi-party and multi-contract considerations

Multi-party

align governing law & law of the place (or seat) of arbitration

check law of the seat

select appropriate rules

amend/add to rules if required to cover:

- appointment of arbitrator(s)
- joinder/intervention
- consolidation
- time limit
- costs

Multi-contract

align governing law of the contracts & law of the seat
common DR regime

check law of the seat

select appropriate rules

amend/add to rules if required to cover:

- appointment of arbitrator(s)
- joinder/intervention
- consolidation
- time limit
- costs

Multi-party and multi-contract arbitration clauses: advantages and challenges

Advantages:

- more efficient for related disputes between multiple parties and/or contracts to be heard together, in the same forum and with the same applicable laws
- multi-party/contract arbitration reduces the risk of conflicting decisions on issues of law and/or fact, thus preserving both finality and certainty

Challenges:

- parties can only arbitrate if they agree to do so, either by an express agreement to arbitrate in the contract or by agreeing to arbitrate as and when any dispute arises (joining unrelated third parties)
- few jurisdictions make provision in their arbitration laws for the joinder and/or consolidation of disputes in arbitration (domestic arbitration, Hong Kong)
- multi-party/contract arbitration may be ordered by an arbitral institution (or a tribunal appointed under an institution's rules) where the parties agree that institutional rules will apply (LCIA Rules), but invariably require consent
- requires co-operation, as difficulties still likely to arise

Capacity of parties to arbitrate

Generally co-extensive with principal agreement

Capacity of individuals, companies, state or state entities

Assignment, novation, subrogation, liquidation and succession

Restrictions on ability to submit disputes to arbitration (type of dispute, sanction of courts)

Waiver of sovereign immunity (objections to jurisdiction or execution)

Subject matter not arbitrable

Crime and fraud

Intellectual property

Competition and anti-trust

Marriage: divorce

Relations between parents and children

Actions in rem against vessels

Matters reserved for resolution by state agencies and tribunals (such as taxation, development control, immigration, nationality and social welfare entitlements)

“Med-arb”

Definition: any ADR procedure combining mediation and arbitration in sequence

Advantages

Improved overall efficiency

Combines the benefits of both mediation and arbitration

May narrow the scope of disputes for subsequent arbitration

Disadvantages

- Inhibit the sharing of information and compromise, open communication with the mediator, essential to successful mediation
- Mediator may not conduct the mediation with sufficient vigor or focus
- Doubts as to fairness and impartiality in subsequent arbitration if mediator sees confidential or privileged information during the mediation

Dangers of being overly prescriptive

may produce a pathological clause or create increased scope for one party to challenge the ultimate award for procedural unfairness or lack of jurisdiction.

may not actually be complete or clear!

may be too rigid & cripple the arbitration process before it starts, and/or create uncertainty:

- procedural timing
- qualifications or experience of arbitrator(s)
- application of laws
- “Opt-in”, appeal of merits

Ad hoc v. institutional

Ad hoc arbitration:

- parties choose the arbitrator(s) themselves, without reference to an arbitral institution (but if the parties cannot agree on the choice of arbitrator(s), it is common for the decision to be referred to an appointing authority)
- no supervision or support from any institution in relation to the conduct of the proceedings
- no review of the award by an arbitral institution
- potentially lower costs

Institutional arbitration:

- arbitration conducted by an institution such as:
 - China International Economic and Trade Arbitration Commission (CIETAC)
 - Hong Kong International Arbitration Centre (HKIAC)
 - International Chamber of Commerce (ICC)

Ad hoc arbitration in China

Ad hoc arbitration in China is not allowed. Arbitration Law requires that all arbitrations in China be administered by an arbitration institution. Article 16 and Article 18 apply here.

- Article 16 of the Arbitration Law, requires the written arbitration agreement to designate an arbitration commission.
 - Under Article 16(3):

An arbitration agreement shall include the arbitration clauses provided in the contract and any other written form of agreement concluded before or after the disputes providing for submission to arbitration.

The following contents shall be included in an arbitration agreement:

 1. the expression of the parties' wish to submit to arbitration;
 2. the matters to be arbitrated; and
 3. the Arbitration Commission selected by the parties.
- Article 18 provides that unless the parties can reach agreement on the arbitration commission, the arbitration agreement is void, ad hoc arbitration cannot be used in China.
 - Under Article 18:

If the arbitration matters or the arbitration commission are not agreed upon by the parties in the arbitration agreement, or, if the relevant provisions are not clear, the parties may supplement the agreement. If the parties fail to agree upon the supplementary agreement, the arbitration agreement shall be invalid.

Ad hoc arbitration outside China with Chinese party

An award from an ad hoc arbitration conducted outside China is enforceable against a Chinese party in China.

- China acceded to the New York Convention 1958 (NYC) and *ad hoc* arbitrations obtained in foreign countries are enforceable in China under the NYC.
- The Supreme People's Court recently confirmed that awards resulting from *ad hoc* arbitrations conducted in Hong Kong were enforceable in China: 30 December 2009, Supreme People's Court issued *Notice of Relevant Issues on the Enforcement of Hong Kong Arbitral Awards in the Mainland*

HKIAC rules and enforcement in China

- HKIAC adopted new Administered Arbitration rules on 1 September 2008.
- HKIAC awards are enforceable in China under the Supreme People's Court letter to the Secretary for Justice dated 25 October 2007 and the Supreme People's Court Notice (Fa [2009] No. 415) issued 30 December 2009.

ICC awards and enforcement in China

ICC awards are enforceable in China under the NYC. Even if it is an ICC award with the place of arbitration in China, Chinese courts will treat it as a “non-domestic award” and enforce it under the NYC.

- ICC award 14006/MS/JB/JEM, Ningbo Intermediate Court:
 - Facts: Claimant commenced ICC arbitration against Chinese company for breach of a sale and purchase contract. Contract provided disputes should be submitted to ICC arbitration in Beijing. ICC appointed a Singaporean arbitrator to adjudicate the case in Beijing.
 - Ruling: the Court viewed the ICC award as an award “not considered as [a] domestic award...” under Article I of the New York Convention.

Review of institutional clauses

When considering an institutional arbitration clause:

- decide whether an ad hoc clause is preferable
- check it is properly set out & referenced
- whether additional provisions are required:
 - such as the date/version of the rules applicable
 - seat and place of arbitration
 - specific choice of language
 - exact number of arbitrators
 - consolidation/joinder/intervention (with extended jurisdiction and costs powers)

Questions?

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