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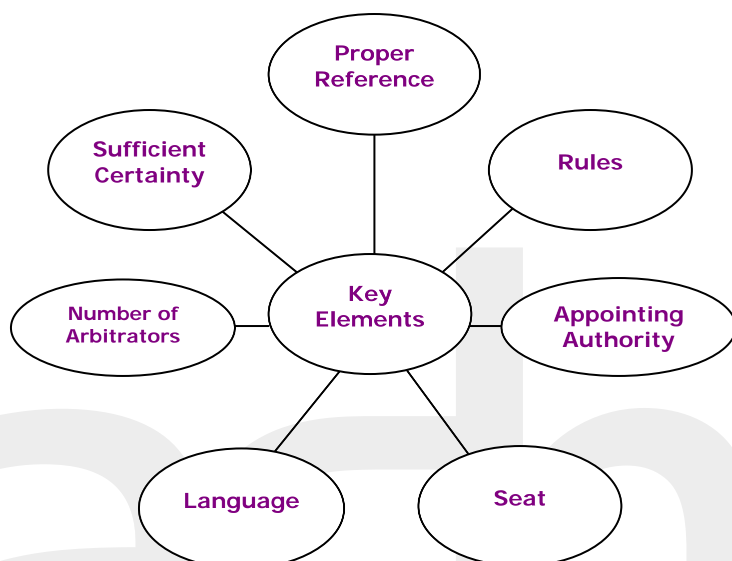
International arbitration briefing

Anatomy of an arbitration Part II: Key elements of an arbitration clause

In the second instalment of our series providing practical insights into the arbitration process, we examine the key elements of an arbitration clause and the importance of drafting the clause so that it is effective. It should be of particular interest to those unfamiliar with the principles behind providing for arbitration as a dispute resolution procedure in commercial agreements.

Arbitration is founded upon the principle that two or more parties have consented to their disputes being resolved by arbitration rather than national courts. It is a creature of contract and requires agreement between the parties. That agreement is commonly found in an arbitration clause (included in a contract prior to a dispute arising) or a submission agreement (entered into once a dispute has already arisen). In this article, we focus on the key elements of the former.

Key elements of an arbitration clause



Proper reference to arbitration

The purpose of the arbitration clause is to refer disputes arising under the contract to arbitration. The parties must identify which disputes they want to finally resolve by arbitration and ensure that the drafting of the clause achieves that.

Parties will often want a "one-stop" dispute resolution procedure for all disputes arising in relation to a contract. The arbitration clause should therefore be broadly drafted to cover all disputes arising out of or in connection with the contract in question, whether those disputes are contractual or non-contractual in nature.

Rules of arbitration

One of the benefits of arbitration over litigation is the ability of the parties to define the procedure by which the arbitration will be conducted. The level of flexibility accorded to the parties depends on whether they opt to resolve their disputes through institutional or ad hoc arbitration.

If institutional arbitration is chosen, it is usual for the selected institution's rules to govern the conduct of the arbitration. If ad hoc arbitration is chosen, the parties may choose to draft their own rules or, as is more common, to use other rules, such as the UNCITRAL Rules.

Appointing authority

In an institutional arbitration, the selected institution will be the appointing authority. Unless agreed otherwise, the appointment of the arbitrators will be governed by that institution's rules. However, in an ad hoc arbitration it is important to specify a mechanism for appointment of the arbitrators in default of appointment by the parties. This is usually done by nominating a third party appointing authority. Most of the arbitral institutions offer an appointing service, even if their arbitral rules are not being used.

Seat of arbitration

The seat or place of the arbitration is one of the most important matters to specify when drafting an arbitration clause. It is the law of the seat that governs how the arbitral proceedings are to be conducted. So, for example, if the seat was specified to be London the English Arbitration Act 1996 would apply to the arbitration.

The choice of seat can also affect: whether the national courts will intervene in the arbitration; whether the subject matter of the dispute is capable of being resolved by arbitration; the ease by which an arbitral award can be challenged or appealed; and the enforceability of an arbitral award in other jurisdictions. The parties should ensure that the chosen seat has ratified the New York Convention to maximise the chances of an award being enforced in other jurisdictions.

Language

The language of the arbitration will be the language of the written and oral submissions and of any hearings. The language chosen will usually be the language of the contract underlying the dispute. If the language is not specified in the arbitration clause, the arbitral tribunal will determine it.

Number of arbitrators

Usually an arbitration is heard by one or three arbitrators. An even number of arbitrators should always be avoided. Although cheaper, choosing a sole arbitrator can be more risky as the award depends on the opinion of only one person. In complex disputes, parties often feel more comfortable knowing that their chosen arbitrator is part of a three person tribunal.

Ensure the arbitration clause is sufficiently certain

National courts will generally try to uphold arbitration provisions. However, the arbitration clause should always be clearly drafted to avoid any argument as to its application once the parties' relationship has broken down.

Other points to consider

The parties may also wish to make express provision in the arbitration clause for the governing law of the arbitration agreement (sensible if the law governing the contract does not coincide with the seat, e.g. English law but French seat). Under the law of most developed arbitration jurisdictions, an arbitration agreement is considered separate to the main contract in which it is located and so may be governed by a different law. Provision should also be made for the exclusion of rights of appeal, confidentiality, and interim measures.

Invest in the drafting of the arbitration clause to avoid future difficulties

Parties should carefully consider what they want from the arbitral process and ensure that the drafting of the arbitration clause reflects those wishes. An ambiguous arbitration clause is open to attack once a dispute arises and the effectiveness of such a clause will likely be contested, adding a further layer of expense and delay.

For further information and specimen clauses, please refer to our International Arbitration Clause Quickguide.

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