

Drafting Arbitration Clauses

Arif Hyder Ali
Rose Marie Wong

Founding Principal | Independent Arbitrator
AHALI Dispute Resolution LLC



Importance of Arbitration Clause

- **Arbitration = Creature of Contract**
⇒ no agreement to arbitrate, no arbitration
- **Default mechanisms**

General Considerations

- **Arbitrate or not?**
 - **Party autonomy**
 - **Level playing field**
 - **Time and cost**
- **Draft clear arbitration clause**
- **Tailor your arbitration clause**
- **Related agreements**

Approach: An Integrated Process

- **Integrate drafting of arbitration clause into drafting of contract**
 - **Reach out to IDR lawyer early**
 - **Provide IDR lawyer with entire contract and other relevant information**
 - **Don't simply copy & paste arbitration clause from another contract**

Contents of Arbitration Clause

- I. Basic Requirements**
- II. Additional Elements**
- III. Procedural Aspects**
- IV. Special Issues**

I. Basic Requirements

- A. Final and binding agreement to arbitrate**
- B. Definition of scope of arbitrability**
- C. Set of rules / administering institution (if any)**
- D. Appointing authority (if any)**
- E. Agreement that judgment may be entered on award (applies to U.S. domestic arbitration)**

I. Basic Requirements

A. Final and binding agreement to arbitrate

- **arbitration as method of dispute resolution**

Bad example: *“In case of dispute, the parties undertake to submit to arbitration, but in case of litigation the Tribunal de Harry Potter shall have exclusive jurisdiction.”*

- **agreement binding and final**

Bad example: *“Any dispute of whatever nature arising out of or in any way relating to the Agreement or to its construction or fulfillment may be referred to arbitration.”*

I. Basic Requirements

- A. Final and binding agreement to arbitrate**
- B. Definition of scope of arbitrability**
- C. Set of rules / administering institution (if any)**
- D. Appointing authority (if any)**
- E. Agreement that judgment may be entered on award (applies only to domestic arbitration)**

I. Basic Requirements

B. Definition of scope of arbitrability

- **Define clearly what should be covered**
 - **breach of contract**
 - **other claims arising out of / related to contract**
 - **determination of arbitrability**
- **Be careful with carve-outs**
- **Limit arbitrators' authority where appropriate**
 - **Example: punitive damages, equitable relief, sanctions**

I. Basic Requirements

- A. Final and binding agreement to arbitrate**
- B. Definition of scope of arbitrability**
- C. Set of rules / administering institution (if any)**
- D. Appointing authority (if any)**
- E. Agreement that judgment may be entered on award (applies only to domestic arbitration)**

I. Basic Requirements

C. Set of rules / administering institution (if any)

- ***Ad hoc* or Administered Arbitration?**
 - UNCITRAL, CPR v. ICC, SIAC, LCIA, ICDR
- **If administered: Which institution?**
 - **Global institutions**
 - comparison of rules/comparison of fee structure
 - **Regional arbitration centers, industry organizations**
- **Which rules?**
 - **Ad hoc? UNCITRAL?**
 - **Subset of Institutional Rules**

I. Basic Requirements

- A. Final and binding agreement to arbitrate**
- B. Definition of scope of arbitrability**
- C. Set of rules / administering institution (if any)**
- D. Appointing authority (if any)**
- E. Agreement that judgment may be entered on award (applies only to domestic arbitration)**

Sample 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.”
- **ICDR**: “Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules.”
- **UNCITRAL**: “Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the **UNCITRAL** Arbitration Rules as at present in force.”

II. Additional Elements

A. Place of arbitration

B. Applicable law (Substantive/Procedural)

C. Language of the arbitration

D. Number of arbitrators

E. Qualifications of arbitrators

F. Method of arbitrator selection

G. Confidentiality

H. Interim relief

Additional Elements

A. Place of Arbitration

- **NY Convention applies?**
- **Need / availability of local counsel?**
- **Willingness of arbitrators, witnesses, and counsel to travel there?**
- **Logistical support available (conference rooms, stenographers, etc.)?**
- **Local judiciary supportive of arbitration (motions to compel; anti-suit injunctions) – or not (motions to vacate award)?**

Additional Elements

B. Applicable Law

- **Substantive Law**
 - Think of international conventions (e.g., CISG)
 - Think of conflicts of laws
 - Check contract for choice of law clause
 - Law applicable to the arbitration agreement
- **Procedural Law**
 - Carefully consider arbitration rules / local laws
 - Seat of arbitration may impact procedure

Additional Elements

C. Language of the Arbitration

- **Pick one language, not two or more**
- **Language limits pool of arbitrators and counsel**
- **Allow submission of documents / witness statements in original language where appropriate**
 - **Translations are costly and slow down the process**
 - **Witnesses should testify in their native language**
- **Default rule: language follows document containing arbitration clause**
 - **Careful with Term Sheets, MoUs, etc. that may become the final document**

Additional Elements

D. Number of Arbitrators

- **Pick one or three**
- **Possibly contingent on size of matter**
 - **Example: Appendix VI of the 2021 ICC Rules provides for Expedited Procedures before sole arbitrator if the amount in dispute does not exceed USD 3 million (for arbitration agreement concluded on or after 1 January 2021) – but parties may opt out; they may also agree to use Expedited Procedures in larger cases**

Additional Elements

E. Qualifications of Arbitrators

- **Use objective criteria (if any)**
 - **Examples:** 10 years admitted as lawyer in NY; retired federal judge; former officer of Lloyd's; MBA, CPA, from U.S. accredited school, etc.
- **Don't make it potentially impossible**
 - **Bad examples:** “*Mr. Smith*”, “*Chief Justice of the Supreme Court*”
 - **Bad example:** “*No U.S. national, admitted and resident in Orange County, 15 years experience in subject matter, and fluent in Mandarin.*”
- **Be clear**
 - **Bad example:** “*The parties agree that at least one-half plus one of the appointed arbitrators shall not be Spanish or Argentine or, not being [of either such nationality], shall not be lawyers practicing in said countries.*”
(*Consalvi*)
 - **Bad example:** “*The arbitrators ... shall be experts in the subject matter.*”
(*Infored*)

Additional Elements

F. Method of Arbitrator Selection

- **Your opportunity to ensure case is heard by proper arbitrator (one of the biggest advantages of arbitration)**
 - **Make sure you have free choice**
- **Usual procedure for three member panel:**
 - **Each party picks one (independent!) arbitrator**
 - **Chair picked by party appointed arbitrators or by arbitral institution**
- **Don't have unrealistic expectations**
 - **Bad example: “*Both parties will name their respective arbitrators within 3 days of the commencement of the arbitration, and the two so named shall name the chair within 5 days of the selection of the second arbitrator.*”**
 - **Review rules for default mechanism (including timing)**

Practical Tip:

Selection of Arbitrators

- 1. Availability**
- 2. Independence and Impartiality**
- 3. Experience in International Arbitration**
 - Particularly important for Chair
- 4. Name Recognition, Stature**
- 5. Legal background (common / civil law)**
- 6. Language skills**
- 7. Experience in subject matter**

Additional Elements

G. Confidentiality

- **Privacy vs. Confidentiality**
 - Privacy refers to the fact that arbitration proceedings are generally not open to the public
 - Confidentiality refers to the obligation to keep information disclosed during the arbitration private.
 - While arbitration is typically private, confidentiality is not always guaranteed and depends on the specific agreement, applicable law, and rules chosen by the parties.
- **Not absolute: enforcement proceedings; reporting obligations; etc.**

Additional Elements

H. Interim Relief

- **Provide for emergency relief before arbitrators are appointed**
- **Check applicable rules for default procedure**
 - **Art. 7 ICDR International Rules (2021) (“Emergency Measures of Protection”)**
 - **ICC: “Emergency Arbitrator”**

III. Procedural Aspects

- **Service**
(incl. enforcement / vacatur proceedings)
- **Discovery / disclosures**
(IBA, ICDR Guidelines?)
- **Use of experts**

III. Procedural Aspects (cont'd)

- **Oaths**
- **Costs**
- **Reasoned / unreasoned award**
- **Deadline for award**
 - **Don't be unrealistic; provide for potential extension**

IV. Special Issues

- **Equity** (“*ex aequo et bono*”; “*amiable compositeur*”)
- **Escalator / step-up clauses**
 - **Example: negotiation → mediation → arbitration**
 - **Be very specific when and how next step is reached !**
- **Multiple parties**
- **Claims against parents, affiliates, etc.**

IV. Special Issues (cont'd)

- **Shareholders' Agreements**
- **Dispute Resolution Boards**
- **Class arbitrations**
- **Appellate procedures**
 - **No judicial review (see *Hall Street*) – but arbitral?**
 - **Appellate procedures under foreign law (e.g., English Arbitration Act)?**

Contact

Arif Hyder Ali

arif.ali@ahalidisputes.com

**(+1) 202 538 9133
(Washington, D.C.)**

**(+44) (0) 204 577 2522
(London)**

