

Practitioner's perspective

Arbitration clauses: do's and don'ts

Be specific when drafting an arbitration clause, says Chan Leng Sun, SC, at Baker & McKenzie

Drafting a valid arbitration clause is not rocket science. Many arbitral institutions offer sample model clauses – short but effective clauses incorporating their rules – on their websites. However, problems arise when those negotiating the contract get adventurous.

This brief guide sets out five do's and five don'ts for drafting arbitration clauses, assuming it is your chosen method for dispute resolution.

Do's: (a) Do commit to arbitration: As everything springs from the parties' agreement, your arbitration clause must commit parties to arbitration in imperative language. It can stipulate: "Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be determined by arbitration ..."

(b) Specify the place of the arbitration: The arbitration law of the jurisdiction specified will govern the arbitration, and will also be deemed as the place where the award is made. In countries with federal systems, it is preferable that the city is specified. The place or juridical seat of the arbitration will remain unchanged even when the physical venue of an arbitral meeting or hearing is shifted to another place.

(c) Specify the governing law of the contract: The substantive law governing the rights and obligations of the parties is independent of the seat and the arbitration law and not to be confused with it. The governing law of the contract should be stipulated, whether as part of the arbitration clause or in a separate provision.

(d) Pick an arbitration institution: Where it is not stipulated that the arbitration shall be in accordance with an institution's rules (such as ICC Rules, SIAC Rules or ICDR Rules), the arbitration is ad hoc. In such arbitrations, the essential default rules are provided by the arbitration law of the seat of arbitration, supplemented by such procedure as the tribunal might direct. In international arbitrations, parties typically pick

an arbitral institution, but the rules of an institution do not have the status of law. They are the contractually agreed procedural rules of the arbitration.

(e) Specify the language of the arbitration: Anglophiles often assume that any arbitration in an English-worded contract will be conducted in English. That is not a safe assumption to make in cross-border transactions involving companies or countries that operate in different languages. It is prudent to expressly state that the language of the arbitration shall be English. One could choose another language, but this may limit the choice of arbitrators and counsel. It may also require the arbitration records to be translated when enforcing the award.

Don'ts: (a) Do not cut and paste without checking for consistency. Arbitration clauses are sometimes inserted into a boilerplate contract without checking if the contract contains other dispute resolution clauses. If the contract contains both a court jurisdiction clause and an arbitration clause, there will be uncertainty over whether a dispute should proceed to litigation or to arbitration.

(b) Do not stipulate a governing law that is different from the law of the seat of arbitration. Some clauses provide for arbitration in one place while adding that the arbitration law of another place shall apply. For instance, "arbitration in London in accordance with the Indian Arbitration and Conciliation Act, 1996". Such clauses create conflict between the stipulated statute and the local arbitration law. There is no need to mention the law of the arbitration at all in the clause. The arbitration law of the seat will apply automatically.

(c) Do not mix and match arbitration rules and arbitration institutions. Over-creative clauses that go down this route often result in long battles between the parties as to their initial intentions and whether an award arrived at is even enforceable.

(d) Do not be overly prescriptive on the qualifications of the arbitrator. If

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it is important that the arbitrators are versed in the subject of the contract, be precise on the qualifications required. If not, potential arbitrators may be challenged on whether they are "experienced in IT" or "experts in the sugar trade". At the same time, do not over-prescribe. If your clause requires the arbitrator to be fluent in Finnish, have a postgraduate degree in computer science and be an expert on international trade, you may have difficulty finding someone who fits that description and is qualified to conduct arbitration.

(e) Describe the arbitral institution correctly. Clauses sometimes name a non-existent arbitral institution or an institution that might be a trade federation that does not administer arbitrations. Get the name of the arbitral institution right.

A sample arbitration clause can read as follows: "Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be determined by arbitration in [city] in accordance with [the intended institutional rules] in force at the commencement of the arbitration. The number of arbitrators shall be [...] The language of arbitration shall be English. This contract is governed by [...] law."

As this is a brief guide, I will end with the biggest "do" of all. Seek professional advice when drafting a clause that is relevant to your situation.

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