

Arbitration Checklist:

'Five Golden Rules'



From our experience, we have put together five 'golden rules' for arbitration clause drafting. In any given deal, there may obviously be particular issues or complexities, but the following will be of wide application.

RULE 1. KEEP IT SIMPLE

- A properly-drafted arbitration agreement (generally a clause in the underlying contract) is vital. An arbitration agreement does not need to be complicated or elaborate. The precedent clauses published by the various arbitral institutions are typically concise and often no, or only minor, amendments are required. We set one out at the end of this note.

RULE 2. MAKE SURE THAT YOU HAVE THE BASICS COVERED

- In your agreement and its arbitration clause you should cover the following
 - **The 'seat' or 'legal place' of the arbitration.** The choice of seat defines what procedural law will apply to your arbitration. It is a critical choice – see Rule 3 ('Choose a safe 'seat' for your arbitration').
 - **The arbitration rules to be applied.** Parties frequently opt for internationally-recognised arbitration rules produced by a well-known arbitral institution - see Rule 4 below ('Choose between *ad hoc* and institutional arbitration').
 - **The language of the arbitration.** The parties should specify the language to be used in the arbitration proceedings.
 - **Number of arbitrators.** You should specify in the agreement how many arbitrators are to be appointed – it is usually one or three. Where you have chosen arbitration rules, they will almost certainly set out a default mechanism for appointment. However, parties often agree on their own mechanism in the contract.
 - **The governing law for the agreement.** Do not forget to state the governing law for the contract. This is often not in the arbitration clause itself but in a separate clause. If you stipulate that a contract will be governed by US law then, whatever the seat of the arbitration, that is the law that will be applied to the *merits* of any dispute.

RULE 3: CHOOSE A SAFE 'SEAT' FOR YOUR ARBITRATION

- As noted above, the choice of 'legal place' or 'seat' for your arbitration is key. Tell your contract negotiators to inform you *immediately* if anybody tries to change the seat you have proposed.
 - A common misconception is that the seat determines where you will have any hearing. It does not. If your seat is Paris, you may choose to have your hearing in

Paris. However, in reality you could choose to have hearings in any location. The seat is critically important for other reasons, including:

- The seat determines the *procedural law* underpinning the arbitration. In effect it decides which country's arbitration statute or equivalent (and related laws) will apply to your arbitration. Arbitration statutes typically set out the powers of the tribunal and the local courts in respect of the arbitration. In arbitration-friendly jurisdictions the courts will not be allowed to *interfere* in arbitral proceedings. However, they will be able to *support* (e.g. by ordering interim relief where the tribunal is unable to do so). By contrast, some jurisdictions may have legislation which enables local courts potentially to intervene in proceedings and even claim jurisdiction themselves. These are best avoided.
- The seat may impact on the eventual enforcement of any arbitral award. Many signatories to the New York Convention (there are currently 148) will only enforce awards made in other Convention countries. Therefore, make sure that the seat is a signatory to the New York Convention.
- **So, remember:** choose a 'safe seat' in an arbitration-friendly jurisdiction. There is a good selection which includes New York, London, Paris, Stockholm, Geneva, the DIFC in Dubai, Singapore and Hong Kong.

RULE 4: CHOOSE BETWEEN AD HOC AND ADMINISTERED ARBITRATION

- One of the fundamental choices will be between 'ad hoc' or 'institutional arbitration'. In an 'ad hoc' international arbitration, the administration of the arbitration will fall to the arbitrator (who may appoint a 'secretary' to help in this regard). In an institutional arbitration, an arbitral organisation (such as the AAA in the US, the LCIA in England or the ICC in Paris) will – for a fee – provide administrative back-up in the form of a secretariat for the arbitration.
- These institutions are truly international and can be used in disputes worldwide. For instance, 75% of the cases referred to the LCIA involve no English parties and the LCIA rules can be chosen for disputes with a seat outside of England. Equally, you could decide on a seat in England and pick, for example, the AAA commercial rules or the ICDR international rules (the international division of the AAA).

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Remember:

- In practice, both ad hoc and institutional arbitration can work equally efficiently. Delays are often down to the parties rather than the 'type' of arbitration.
- Whatever you decide, stipulate the rules chosen in the arbitration clause. For ad hoc international arbitrations, parties often choose the internationally-recognised UNCITRAL rules.

RULE 5: GETTING COMPLEX? SEEK EXPERT ASSISTANCE

- Arbitration clauses can be simple, but there are all types of situations where things could become more complicated, e.g.:
 - There are multiple parties/related contracts and one party is asking for 'joinder' and/or consolidation provisions.
 - A party wants a 'sole option clause', i.e., a provision that it alone can choose whether to go to arbitration or to a local court if a dispute arises.
 - You are contracting with a state party and are concerned that they may rely on 'state immunity' if there were a dispute.

- The good news is that these are matters that can be dealt with, although they fall outside the scope of this introductory note. We would be happy to discuss these or any further matters with you.

Conclusion

- As noted at the outset, arbitration clauses do not need to be elaborate. What follows is an example of a basic clause without 'whistles and bells', that you would find in many contracts the world over:

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

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

The seat of the arbitration shall be [London, England].

The language to be used in the arbitration proceedings shall be [English]."

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