

How to Draft a Good Arbitration Clause

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Outline of the Presentation

I. Two Preliminary Issues

A. What is Arbitration?

B. Why Resort to Arbitration?

II. Drafting the Clause: Do's and Dont's

A. Essential Elements

- i) Clear Commitment to Final and Binding Arbitration
- ii) Precise Definition of the Clause's Scope (*i.e.* the Types of Disputes to Which it Applies)

B. Useful Elements

- i) Seat of the Arbitration
- ii) Applicable Procedural Rules and the Choice Between *Ad Hoc* and Institutional Arbitration
- iii) Law (or Rules) Governing the Contract and the Possibility of Resorting to *Amiable Composition*
- iv) Number of Arbitrators

C. Other Elements

- i) Language of the Arbitration Proceedings
- ii) Mandatory Mediation/Conciliation Process
- iii) Professional Qualifications of Arbitrator(s)
- iv) Applicable Rules of Evidence
- v) Confidentiality
- vi) Accommodation for Multicontract/Multiparty Disputes

III. Conclusion and Question Period

Sample Clauses

1) AMAC Standard Clause

“Any dispute arising out of or in connection with this agreement shall be referred to arbitration in _____, in accordance with the AMAC Maritime Arbitration Rules. Where a dispute does not exceed CDN. 50 000,00 \$, the AMAC small claims procedure (Rule 31) shall apply.”

2) Canadian Commercial Arbitration Centre Standard Clause

“All disputes arising out of or in connection with the present contract, in particular concerning its formation, existence, validity, effects, interpretation, implementation, violation, resolution or annulment, shall be finally resolved by means of arbitration in accordance with the International Arbitration Rules of the Canadian Commercial Arbitration Centre.”

3) International Chamber of Commerce Standard Clause

“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.”

4) Problematic Clause: Uncertainties as to Whether Arbitration is Mandatory and Final

“Disputes arising out of or in connection with the present contract that the Parties are unable to resolve amicably may be referred to arbitration by the Claimant.”

5) Problematic Clauses: Uncertainties as to their Scope

a) *“Any dispute, difference or question arising between the parties hereto in relation to the construction, meaning or effect of any provision of this agreement shall be settled by arbitration under and in accordance with the Rules of Arbitration of the International Chamber of Commerce by three arbitrators. The place of arbitration shall be Zurich, Switzerland.”*

b) *“Any dispute arising hereunder shall be finally determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules.”*

6) Problematic Clause: Uncertainties Regarding the Arbitral Institution Chosen by the Parties

“All disputes arising out of or in connection with the present contract shall be finally settled by the ICC of Zurich.”

7) Problematic Clause: Uncertainties Regarding the Applicable Procedure

“In case such a dispute is not settled amicably by senior management within thirty (30) days of escalation to senior management, such dispute shall be resolved and determined by an arbitration board acting in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce (I.C.C.), whose decision shall be final and binding upon the parties.”

8) International Chamber of Commerce Standard ADR/Arbitration Clause

“In the event of any dispute arising out of or in connection with the present contract, the parties agree to submit the matter to settlement proceedings under the ICC ADR Rules.”

If the dispute has not been settled pursuant to the said Rules within 45 days following the filing of a Request for ADR or within such other period as the parties may agree in writing, such dispute 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 of Arbitration.”

9) Additional Language Incorporating the IBA Rules on the Taking of Evidence in International Commercial Arbitration

“In addition to the [institutional or ad hoc rules chosen by the parties], the parties agree that the arbitration shall be conducted according to the IBA Rules on the Taking of Evidence in International Commercial Arbitration.”

10) Additional Language Aimed at Limiting Difficulties in a Multicontract/Multiparty Context: Rule 30 of the AMAC Rules of Procedure

“30 (1). With the consent of the parties, the arbitral tribunal shall have the power to direct that there be joined into the reference any other party or parties who, by written consent, have indicated readiness to be so joined and the arbitration shall then proceed as though the arbitral tribunal had been appointed to deal with all associated disputes between the respective parties on a consolidated basis. The present rules shall apply mutatis mutandis to the party being so joined.

30 (2). Where two or more disputes arising out of the same transaction or series of transactions have been referred to the same arbitral tribunal, the tribunal shall have the power to direct that the disputes be heard concurrently. The present Rules shall apply mutatis mutandis to the hearing. [Added in 1991].

30 (3). Unless stipulated to the contrary in advance, the parties agree, by consenting to the Rules, that a request to a court for an order consolidating arbitrations or joining any

other person or persons to the reference shall constitute a request for an interim measure of protection. The court shall give all necessary directions as to procedure, as may be required. [Added in 1991].

) Confidentiality: Art. 4 of the Canadian Commercial Arbitration Centre International Arbitration Rules

“1. Unless otherwise agreed by the parties, the Centre, the arbitrators and the parties undertake to keep confidential and not to disclose or to use outside of the arbitral procedure any information not otherwise in the public domain which was obtained or generated by virtue of the arbitration, including the existence of the arbitration itself as well as the decisions and deliberations of the Tribunal.

2. The information referred to in paragraph 1 may be disclosed, in good faith, only insofar as it is strictly necessary to satisfy a legal requirement. A party who intends to proceed with such a disclosure shall give reasonable advance notice to all other parties involved.

3. The information referred to in paragraph 1 may also be disclosed in good faith in order to protect or to pursue a legal right, particularly in the context of legal proceedings seeking the enforcement or the annulment of an Award made by the Tribunal.

4. A party shall be responsible for the breach by its employees or its advisors of any duty of confidentiality owed under the Rules. A party who calls witnesses shall inform them of such duty and shall invite them to subscribe thereto.”

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