Draft an Arbitration Clause both Tailored and Clear

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Arbitration clauses benefit from simplicity. The best arbitration clauses also inform. Rarely are they inventive or creative. This is true for Chinese arbitration, or any other. Arbitration clauses should be tailored to your contract's purpose and your firm's needs. Above all, construct your arbitration clause with an eye towards clarity, and not towards partisan advantage.

Arbitration clauses should include six essentials.

One; specify the applicable laws.

Two; select an institution or rules.

Three; explain the number of arbitrators and their qualifications.

Four; explain the manner of selection of arbitrators.

Five; consider whether summary procedure will apply.

Six; allocate costs.

The Checklist:

1. Specify the law. This includes the governing law (substantive), the seat (procedural law), and the law of the arbitration contract. These may all be different. Select the same jurisdiction for all three, at least if simplicity and clarity are the goals.

1a. The governing law. Select the substantive law. The law may be that of a state, such as Texas, or a nation, such as China. The CISG will sometimes apply when selecting certain jurisdictions. Therefore, cross-border parties must specifically opt out of the CISG, or it applies. For example, Western Australian law applies the CISG to govern disputes between two different parties from two different signatory nations.

The other principle pitfall for selection of substantive law may derive from an unclear choice-of-law, rather than choosing a 'disadvantageous' law. It may be practically infeasible to game the substantive law for a future dispute. However, the failure to make a clear choice of governing law may well summon a host of uncertainties.

1b. The seat. Select the procedural law. The law of the seat will determine the national regime which will shape the proceedings and frame the award. In arbitration, party representatives ordinarily need not hold direct qualification or licensure under the substantive law[1]. It is critical for parties to identify the seat. Some jurisdictions permit an arbitration clause to identify an applicable procedural law separate from the seat's. But be sure that a clear upside justifies the risk of divergence.

1c. The law of the clause itself. Select the substantive law for the arbitration agreement. The agreement to arbitrate itself is severable from the underlying contract. It simply has to be, otherwise parties could destroy the dispute resolution arrangements through breach or termination of contract. In most cases, the seat should match the law which governs the arbitration agreement. Identifying the law of the arbitration contract may prove extremely helpful, even if only to avert further dispute. Nonetheless, some model institutional clauses do leave aside this important factor.

2. Select an institution or rules. The place of hearing may differ from the seat of the arbitration. The hearing may be somewhere else besides the institution's facilities. We discussed the advantages of Chinese institutions previously, but an offshore institution may nonetheless suit some particular China-related cases. China-seated agreements should nominate an institution. Nevertheless, even non-institutional 'ad hoc' arbitrations require that parties select a set of rules.

3. Explain the number of arbitrators and their qualifications. Limit restrictions on qualifications to a bare minimum. A sole arbitrator will save money. One arbitrator suits most commercial sales agreements. A three-member Tribunal may be necessary

[1] One notable exception to this is California. (See http://kluwerarbitrationblog.com/2017/07/25/california-next-major-international-arbitration-seat/). However, California Senate Bill 766 would remedy this. (See https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB766). Avoid selecting California as the seat of arbitration, at least for now.

for complex transactions. Cross-cultural concerns could also weight selection of a three-member panel. Often, Chinese parties favor three.

4. Explain the manner of selection of arbitrators. A traditional model envisions party appointment of two arbitrators, and those two arbitrators selecting a third. A reform model denies parties the power to appoint because it views the practice as a moral hazard[2]. Some institutions reserve the power to appoint the presiding or sole arbitrator. Institutional fiat at least promises greater efficiency. After all, party agreement can be difficult to arrange once a dispute has arisen. In any case, do not leave this critical detail to the institution's defaults. Think carefully about how arbitrators may be selected. The forethought and effort of a sequenced list of prearranged and named arbitrators might serve your arbitration clause best.

5. Consider summary procedure. Explicate whether expedited or summary procedure will even be available. As above, avoid institutional defaults. Answer affirmatively whether summary procedure may reduce the arbitration panel to a sole arbitrator. Parties should explicitly consent to the reduction of a three-member tribunal to a sole arbitrator. Other than these two considerations, avoid changing triggers for summary procedure from the institutional rules.

6. Costs allocation. Will the loser pay? Will the parties bear their own costs? Or will the Tribunal have wide latitude to apportion costs? Costs include legal fees, institutional fees, the Tribunal's fees, and perhaps expert fees. Without guidance, arbitration proceeds on the assumption that the loser must pay, but the Tribunal determines what it would mean to lose. After all, a minority of awards grant claimants maximum relief on every claim. This holds true for China domestic arbitration, as well as the international standard. Understand the kind of fee arrangement the legal team you would hire might charge. It makes little sense to draft a cost-shifting approach, but then bargain hard with your legal team, even as the other side hires a top-flight international firm. Institutions tend to default to maximum Tribunal discretion, which could mean the manner of allocation of costs may remain a mystery

[2] A minority view professes that the practice of unilateral appointments (or nominations) of arbitrators is a moral hazard which should be removed. (See:http://kluwerarbitrationblog.com/2017/07/03/call-remove-unilateral-appointments-seven-years/).

until the award. Clarify this aspect of your case from the start instead of guessing later.

A comprehensive and clear arbitration clause can make a difference. You make consult the checklist above to assure that the essentials have been expressed. A serious claim, or a meritorious defense, finds expression even in the initial preparation and drafting.

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