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Effective Arbitration Techniques in International Business

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Association of Corporate Counsel
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Panel

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I. What is an Arbitration Agreement?

Treaty Requirement:

An agreement in writing to submit a dispute to arbitration is essential (Article II of the New York Convention).

Evidence of consent:

In an international commercial arbitration, the arbitration agreement provides evidence that the parties have consented to resolve disputes by arbitration. This consent is essential. Without it, there can be no valid arbitration.

A. Separability of Arbitration Agreement

An arbitration agreement is separate from the contract in which it is contained. This has important consequences:

- survives termination of main contract
- validity independent of main contract
- governing law may not be the same as the law applicable to the main contract

A. Separability of Arbitration Agreement

- **ICC Rules – Article 6(4)**: *“Unless otherwise agreed, the Arbitral Tribunal shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is non-existent provided that the Arbitral Tribunal upholds the validity of the arbitration agreement. The Arbitral Tribunal shall continue to have jurisdiction to determine the respective rights of the parties and to adjudicate their claims and pleas even though the contract itself may be non-existent or null and void.”*
- Divergent jurisprudence on separability, e.g. France and England.

B. Objectives of an Arbitration Agreement

- (a) exclude local courts
- (b) identify appointing authority
- (c) confer jurisdiction on arbitrators
- (d) identify arbitrators' jurisdiction *ratione personae*
and *ratione materiae*

C. Effect of Valid Arbitration Clause

(a) Exclusion of local courts

- (i) common law: jurisdiction of local courts may be “stayed”
- (ii) civil law: local courts have no jurisdiction in the presence of an arbitration agreement

(b) Constitution of Arbitral Tribunal

even in the absence of co-operation by both parties, one party alone can effect the appointment of an Arbitral Tribunal

D. “Pathological” Clauses

- failure to achieve objectives
- may or may not be incurable
- may lead to expensive litigation unrelated to the merits
- Article II(3) of the New York Convention:

“The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed”.

- Enforcement of award

E. Essential Ingredients

- (a) identification of parties (“the parties”)
- (b) identification of legal relationship (“this agreement”)
- (c) identification of disputes (“all disputes”)
- (d) mandatory referral of disputes to arbitration:
 - exclude optional language
 - “shall, “not” may”
- (e) identification of arbitration rules
 - ad hoc
 - institutional

E. Essential Ingredients (cont'd)

- (f) identification of appointing authority
 - number of arbitrators
 - nationality of arbitrators
- (g) identification of place of arbitration
- (h) identification of language of arbitration
 - translation of documents
 - interpretation during hearing
 - cost of fully bilingual translated proceedings
 - bilingual un-translated proceedings

E. Essential Ingredients (cont'd)

- (i) identification of applicable law:
 - law applicable to the arbitration agreement
 - law applicable to the contract
 - alternatives to national laws:
 - UNIDROIT
 - CISG
 - general principles
 - equity clauses

F. Additional Options

- **Pre-conditions to arbitration**
 - expert determination
 - mediation
 - notice of dispute
 - engineer's decision
 - executive meeting
- **Qualifications of arbitrators**
 - in a system of law
 - in an area of technical expertise

F. Additional Options

- Interim measures
- Waiver of rights to appeal (e.g. England)
- Confidentiality
- Discovery
- Adaptation of contract

G. Multi-parties and/or groups of contracts

- consolidation of proceedings
- joinder of parties
- groups of contracts

H. Model Arbitration 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 said Rules”.*

SCC: *“Any dispute in connection with this agreement shall be finally settled by arbitration in accordance with the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce”.*

H. Model Arbitration Clauses (Cont'd)

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.*

Note – Parties may wish to consider adding:

- (a) the appointing authority shall be... [name of institution or person];*
- (b) the number of arbitrators shall be... [one or three];*
- (c) the place of arbitration shall be... [town or country];*
- (d) the language(s) to be used in the arbitral proceedings shall be... [specify].”*

II. Cultural Influences

- local rules of procedure and evidence do not apply
- written proceedings
- arbitrators may take a more active role
- mediation by arbitrators
- civil law notions may appear “academic” to common law lawyers
- broader range of legal norms potentially applicable

III. Comparative Benefits

- A. Neutrality
- B. International enforceability
- C. Confidentiality
- D. Flexibility
- E. Expertise
- F. Disadvantages of Arbitration

A. Neutrality:

In an international transaction, neither party wishes potential disputes to be decided by the domestic courts of the other party. Arbitration offers a neutral forum. In almost all jurisdictions today, arbitration agreements are binding and court proceedings brought contrary to an arbitration clause can be stayed.

B. Enforceability:

Arbitral awards are final and binding. Under the 1958 New York Convention, an arbitration award made in the territory of a Member State must be recognised and enforced in the same manner as a court judgment in another Member State. The Convention restricts the review powers of a local court to limited grounds (essentially procedural). There is, most often, no opportunity for appeal on the merits.

C. Confidentiality:

Arbitration proceedings are held in private. When the parties have on-going commercial relations that might be damaged if their dispute were public or where commercially sensitive information is involved (for example trade secrets), arbitration may assist to protect confidentiality.

D. Flexibility:

The procedure in an international arbitration, including rules of evidence, is most often independent from the law of the place of the arbitration or the law governing the contract. This allows the parties (or the arbitrators where the parties fail to agree) to “tailor” proceedings that are economical or otherwise appropriate to the circumstances of their dispute.

E. Expertise:

International arbitrators are experienced in handling complex cross-border disputes. In highly technical matters, an arbitrator may be selected because of particular expertise in order to minimise the need for additional expert evidence.

F. Disadvantages of Arbitration:

- Interim measures
- Limited powers the arbitral tribunal may exercise
- Inability to consolidate multi-party disputes without consent
- Where Arbitrator is technical expert, he/she may not have the legal expertise necessary for difficult points of law.



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