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Drafting the perfect arbitration clause

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A reference to the “perfect arbitration clause” is always likely to be a little controversial. It suggests that somewhere there lies a precedent for a perfect clause, waiting to be discovered in some cave like the Dead Sea scrolls, or the tablets handed down by God on Mount Sinai. Sadly, no such precedent exists. In the same way that all commercial contracts differ, so too will the optimal arbitration clause for any particular situation. In the immortal words of Arthur Ashe “success is a journey, not a destination”, and that is true of drafting arbitration clauses as much as anything else. With that in mind, let’s try and recount the main steps which normally need to be taken on that particular journey.

1. Is arbitration appropriate?

This is not the place for a discussion of the [merits of arbitration against its disadvantages](#). Entire articles are written [on that subject](#), and this article presupposes that particular decision has already been made. Nor is this the place to advocate mediation as an alternative. However, when considering arbitration always remember that there are certain jurisdictions which prohibit the use of arbitration clauses in certain circumstances, particularly in employment and consumer contracts. It is also worth noting that certain matters are, by their nature, not readily suitable for arbitration, and fall outside of key international treaties in relation to cross border arbitration. In particular Article V of the [New York Convention](#) contains a broad exclusion to enforceability where “[t]he subject matter of the difference is not capable of settlement by arbitration under the law of that country”.

Every lawyer knows from the time they first drank their mother’s milk that a good arbitration clause is expressed to be imperative (“must” or “shall”) and not equivocal. The recent softening of this requirement in the English courts has not diminished the need for prudence with respect to other jurisdictions. However, sometimes for good reasons or bad, the parties may want to include an asymmetric clause, ie that Party A may either commence arbitration against Party B in London or sue them in the courts of Bermuda at their option, but Party B can only ever commence arbitration against Party A in London and has no recourse to the courts. Some jurisdictions accept the validity of such asymmetric clauses (such as the UK); some jurisdictions reject them (such as France, presumably because such

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clauses are thought to lack the necessary *liberté, égalité* and/or *fraternité*).

2. Arbitration or expert determination

It is worth considering whether all issues which might arise between the parties should necessarily be resolved at an arbitration hearing, or whether in some cases a discrete issue might be resolved by an expert determination. Expert determinations are similar to arbitration in that they bind the parties to a particular finding of fact, but distinct from arbitration in that they usually resolve a single issue and don't make a final determination of claims. A common but effective use of experts relates to valuations in the sale of a business or assets. An expert determination will not necessarily resolve all the issues, but often times it will. Many commercial agreements will include both expert determinations (for certain specific issues) and arbitration clauses (for resolution of claims). But always remember that an expert determination on its own will not normally oust the jurisdiction of the courts in the same manner as an effective arbitration clause, and the courts of various jurisdictions will often consider themselves free to review an expert determination in a way which they would not do for an arbitration award.

3. Institutional arbitration or *ad hoc*

The next material issue that tends to be considered is whether the parties should arbitrate under the auspices of a particular institution (and if so, which one) or whether any arbitration should be done on an *ad hoc* basis. Again, the arguments are well rehearsed – institutional arbitration tends to be more formalised, slower and more expensive. *Ad hoc* arbitration tends to be cheaper, more flexible and better placed to fill unusual situations, but often suffers from lack of a “grown up” supervising the process, particularly in the early stages. Also, as a generalisation, my experience has tended to be that people who are more comfortable with arbitration as a concept tend to be more likely to use *ad hoc* arbitration, and those who are less familiar prefer the comfort of an institutional framework. The two options are not of course entirely mutually exclusive – one can have an *ad hoc* arbitration, usually a particular institution's procedures, or (in most cases) utilise an institution for the conduct of the arbitration but extract certain aspects of the process (such as appointment of the tribunal) to be done on an *ad hoc* basis.

4. Size of the tribunal

Normally an arbitration clause must make a straight decision between a sole arbitrator, or a panel of three (one appointed by each party plus an umpire). Only on very rare occasions will the parties use any other form of tribunal. A sole arbitrator is usually quicker, cheaper and more efficient. But it exposes the parties to a single point of view, and may make the appointment process more contentious. Conversely, a larger panel may be more balanced, but it means juggling the time commitments of three arbitrators to get hearing dates; and, of course, all three arbitrators will also need to be paid.

5. Composition of tribunal – lawyers or experts

Because of the quasi-judicial nature of arbitration proceedings, arbitrators are often lawyers or otherwise legally trained. But one of the great benefits of arbitration is the ability to specify that the arbitrators (or the umpire) must have different qualifications which provide the necessary technical expertise on the relevant subject matter. For institutional arbitration, arbitrators are often (although not universally) selected from panels. For *ad hoc* arbitration the parties should give consideration to any relevant qualifications that one or more members of the panel may be required to have as a condition of appointment. These qualifications need

not necessarily be professional – for example fluency in more than one language may also be advantageous in specific international commercial disputes.

6. Choice of law issues

Every commercial lawyer also knows that no good commercial contract should ever fail to contain an express governing law clause. That governing law will determine the merits of any claim, but not necessarily the procedure of the claims process; that procedure will be determined by the law of the relevant forum. Where possible, it is normally advisable for the governing law of the agreement to be the same as the law of the forum for dispute resolution. However, in special cases the parties may wish to provide, for example, that an agreement is governed by the laws of England, but that any disputes shall be resolved by arbitration in the British Virgin Islands. What far too few lawyers (much less their clients) appreciate is the significance of the laws which apply to the arbitration in cases where the forum and choice of governing law is not the same. In most conflict of laws systems, the procedural rules are determined by the “seat” of the arbitration. So in the previous examples, an unprepared lawyer may assume that the restrictions on applying to set aside awards found in the UK’s Arbitration Act 1996 apply by virtue of the governing law, but they would discover that the more liberal regime in the BVI’s Arbitration Act 2013 actually applies.

What even fewer lawyers appreciate is the difference between the law of the place of the arbitration, and the official “seat” of the arbitration. The “seat” is best thought of as the domicile of the arbitration award, and while normally parties should strive to ensure it will always be the same as the place of arbitration, this is not necessarily so. In particular, in *Hiscox v Outhwaite* [1992] 1 AC 562, the English House of Lords held that under the old Arbitration Act 1979 English law, the seat is treated as the place where the award is signed, rather than the place where the substantive hearing took place; that rule continues to apply in common law jurisdictions whose law is based upon the 1979 Act. In most conflict of laws systems it is the seat that will determine procedural matters and the power of courts to intervene in the arbitration process – not the place where the hearings take place. Care should be taken not to create a mismatch by accident. Equally, parties should be cognisant of the ability of having an arbitration whose official seat is in one jurisdiction but where the hearing is conducted in another (or is conducted electronically across multiple jurisdictions).

7. Appeals and applications to set aside

Depending upon the seat of the arbitration, the parties may be able to restrict or enable the ability to appeal, challenge or set aside the award of an arbitrator. Or alternatively, that question can be expressed in the reverse - if the parties wish to ensure that they have (or do not have) the ability to subsequently challenge an award they feel to be erroneous, they need to ensure that they choose a seat for the arbitration which will enable them to do so. The [UNCITRAL Model Law](#) provides (at Article 13) that the parties are free to agree if an award is open to challenge, but if they do not express agreement on this point then an award is open to challenge within 15 days of becoming aware of the basis for challenge. The BVI’s Arbitration Act 2013 states that an award may only be challenged for serious irregularity, or appealed on a point of law, if the parties expressly agree to do so. Under English law the position is reversed – the parties are entitled to appeal on a point of law or to set aside on the basis of irregularity unless they have agreed to exclude that right. In either jurisdiction the parties have the freedom to choose, but the default position if they make no choice is different in each case.

8. Interim relief

The parties may also wish to consider whether the availability to seek interim relief in relation to any dispute is desirable. It has become vogue in recent times in certain jurisdictions (Singapore being a notable example) to confer upon arbitrators the power to grant injunctive or interim relief. There is some healthy scepticism about the value of this – injunctive relief from the court carries with it the sanction of state in the form of contempt of court for violating such an order. Breach of an interim order by an arbitrator carries with it the risk that the arbitrator will be cross, and therefore more likely to rule against the party in breach, but not a great deal more than that – and certainly nothing which might compel a third party to act or refrain from acting in a particular way.

Accordingly, if the parties contemplate a serious likelihood of interim relief being required, then the better course is normally to carve out an ability to apply to a court or courts for such interim relief, but to do so in a manner which explicitly preserves the requirement to arbitrate in relation to the determination of the merits of the underlying claim.

9. Language

A good arbitration clause will specify the language in which the arbitration should be conducted to avoid disputes upon the issue. In many cases there may be a likelihood of the underlying evidence being in one or more foreign languages. If the arbitrators lack the requisite language skills, a process for agreeing translations may be a consideration.

10. Procedure

If the parties agree on institutional arbitration, then the arbitration rules of that institution will normally be applied (although the parties should certainly consider if they want to modify any of those procedures by agreement in advance). If the parties choose *ad hoc* arbitration they may want to adopt a standardised form of arbitration rules such as the [UNCITRAL Model Rules](#) or the [London Common Law and Commercial Bar Association Arbitration Rules](#) (modified or otherwise). Only in rare cases will the parties set out in detail the actual procedural rules application in the arbitration clause itself.

But in the era of social media and smartphones, there are a generation of entrepreneurs who might reasonably view an oral hearing in a fixed location as “*so yesterday*”. Arbitration hearings can be conducted by telephone or video conference (although it is certainly not an ideal process if cross examination is required). But even beyond that, documents only arbitrations which are emailed to an agreed arbitrator are beginning to find more traction, and there are several web based online arbitration facilities which are aimed at smaller value claims. And who knows what the future may hold – arbitration apps for the iPhone?

Summary

There are a lot of things to think about when trying to draft your perfect clause. But lawyers and their clients should try and moderate their stress levels when drafting arbitration clauses. In this field as in much of life, the great should not become the enemy of the good. Far better that parties utilise simple but effective arbitration clauses than that they fail to reach agreement while striving for the “perfect clause”. Like most quests for perfection, it works better as an aspiration than a requirement.

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