

CLIENT ALERT

Drafting Effective Arbitration Agreements – Lessons Learned and Pitfalls to Avoid

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AUTHORS

Duncan Speller | **Elliott Couper** | **Jack Davies**

Parties generally agree to refer their disputes to arbitration as a matter of contract (an “arbitration agreement”). The arbitration agreement is usually included in the contract to which it relates.¹ Because arbitration proceedings are creatures of contract, the parties have significant flexibility – via their arbitration agreement – to develop bespoke procedural rules that will apply to any dispute that arises between them. It is thus crucial that parties treat the arbitration agreement as an essential component of each contract and obtain appropriate legal advice when the contract is being drafted.

The arbitration clause is sometimes left to the last minute in a contract negotiation. This is inadvisable. Substantive contractual rights only have practical value where there is an effective dispute resolution provision for enforcing those rights. An effective and well-drafted arbitration agreement will ensure there is a mechanism through which contractual rights can be given effect and enforced.

In this alert we first discuss the use of model arbitration clauses, which typically provide the best starting point when drafting arbitration agreements. We then move to consider the essential elements that every well-drafted arbitration agreement should include, as well as further optional elements that may be advisable to include. Finally, we set out eight practical tips that parties can use to ensure they draft effective arbitration agreements.

¹ Parties can also enter into an agreement to refer disputes to arbitration after the dispute has already arisen (called a “submission agreement”).

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Use of a Model Arbitration Clause

Where parties are able to agree on an arbitral institution, it is typically preferable to use that institution's model arbitration clause as the starting point for negotiating and drafting the arbitration agreement. All of the well-established arbitral institutions have published model arbitration clauses, including, for example, the International Chamber of Commerce (**ICC**), the London Court of International Arbitration (**LCIA**) and the International Centre for Dispute Resolution (**ICDR**). The ICC's model arbitration clause is as follows:²

“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.”

Model clauses provide that the default provisions set out in the rules of the relevant arbitral institution will apply to any arbitration proceedings, thus avoiding the need for detailed express provision on these issues where the parties wish to adopt the default provision in the rules. Parties may, however, wish to depart from those default provisions and devise bespoke provisions that are tailored to their particular circumstances. For instance, under the ICC Arbitration Rules, where the parties have not agreed on the number of arbitrators, the default position is that a sole arbitrator shall be appointed by the ICC. In our experience, parties often prefer to have a three-person tribunal and to provide expressly for party involvement in the selection of the arbitrators, including the chair.

The Essential Elements of an Arbitration Agreement

Certain elements are essential and should be included in every arbitration agreement. These elements are critical to the legal and practical effectiveness of the arbitration agreement. An arbitration agreement should include the following elements:

1. **Intention to arbitrate:** An arbitration agreement should clearly and unambiguously specify the parties' intention to refer disputes to arbitration, e.g., *“All disputes shall be submitted to arbitration ...”*
2. **Scope:** An arbitration agreement should clearly and unambiguously define the scope of the disputes that must be submitted to arbitration, e.g., *“All disputes arising out of or in connection with the present contract ...”*
3. **Seat:** An arbitration agreement should specify the seat of the arbitration and will preferably do so using the word “seat,” e.g., *“The seat of arbitration shall be London, England.”*

² ICC, Arbitration Clause, available [here](#). The LCIA and ICDR model clauses are available at: LCIA, Recommended Clauses, available [here](#); and ICDR, Clauses, available [here](#).

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4. **Governing law:** An arbitration agreement should specify the law applicable to it, e.g., “*The law governing this arbitration agreement shall be that of England and Wales.*”
5. **Appointment of tribunal:** An arbitration agreement should specify the number of arbitrators on the tribunal and the applicable mechanism for their appointment, e.g., “*Any arbitration shall be settled by three arbitrators who are to be appointed in accordance with the ICC Rules, except that the two arbitrators appointed by the parties shall designate a third arbitrator who shall act as the presiding arbitrator.*”
6. **Language:** An arbitration agreement should specify the language that any arbitration should be conducted in, e.g., “*The language of the arbitration shall be English.*”
7. **Institution:** If the parties have agreed to an arbitral institution, it should be specified (using its correct name) in the arbitration agreement, e.g., “*All disputes shall be submitted to arbitration administered by the London Court of International Arbitration (LCIA) in accordance with the LCIA Rules.*”

In addition to the essential elements, an arbitration agreement may also include certain optional elements. For example, an arbitration agreement could provide for express confidentiality obligations, require parties to engage in alternative dispute resolution procedures before commencing arbitration, or specify the scope of any document production or discovery rights. Whether such optional elements should be included in an arbitration agreement will depend on considerations relevant to the particular commercial contract being negotiated, including the nature of the transaction, the counterparty and the types of disputes that may arise. It is typically advisable to seek specialist advice when considering what optional elements might be included in an arbitration agreement.

Practical Tips for Drafting Arbitration Agreements

Below we set out eight practical tips that parties can use to ensure they draft effective arbitration agreements and avoid potential problems that we have seen arise in practice.

(1) **Carefully Consider and Clearly Define any Carve-Outs**

Parties sometimes carve out (i.e., exclude) particular types of claims from being resolved by arbitration. For example, parties sometimes carve out patent disputes from intellectual property licensing agreements or state that certain technical, valuation or accounting issues shall be subject to expert determination. In some circumstances, such carve-outs may make sense. However, introducing carve-outs may create ambiguity in the scope of the arbitration agreement and lead to collateral disputes about, for example, whether a given dispute falls within or outside the arbitration agreement and whether that question should be determined by an arbitral tribunal or a national court.

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Oracle America Inc v. Myriad Group AG illustrates the potential risks of including carve-outs.³ There, the parties' arbitration agreement carved out intellectual property infringement disputes from being resolved by arbitration. A collateral dispute arose between the parties as to the proper forum for determining certain claims and whether an arbitral tribunal or a court should make that determination. Although the Court ultimately decided that such issues must be determined in arbitration, the collateral dispute resulted in significant delays to the progress of the arbitral proceedings (which were stayed for 18 months).

Any carve-outs to an arbitration agreement must be drafted using clear and express language that stipulates the category or categories of disputes that are excluded from being resolved by arbitration. There should be no ambiguity about the proper forum that a given dispute should be submitted to.

(2) Carefully Consider any Multi-Tier Arbitration Agreements

Parties may agree that, before commencing any arbitration, they must engage in certain alternative dispute resolution (ADR) procedures (i.e., as preconditions). For example, the parties may agree to negotiate in good faith for a specified period before commencing arbitration. Although ADR procedures can provide a mechanism to enable the parties to resolve disputes amicably and efficiently, when poorly drafted, such provisions can have significant downsides. These include the following:

- (i) Unless a settlement is reached, ADR procedures will not result in any binding judgment or award. ADR procedures may therefore simply delay resolution of a dispute and thereby increase costs.
- (ii) ADR procedures may give rise to collateral disputes about, for example, whether the ADR procedures have properly been complied with before commencing arbitration and whether an arbitral tribunal has jurisdiction over the relevant claims. Indeed, parties have previously sought to have awards set aside on these bases.⁴ It is particularly important to be clear in the arbitration agreement about whether or not the ADR process is intended to be a mandatory pre-condition to the commencement of arbitration.
- (iii) The responding party may seek to delay or frustrate progress of the ADR procedures by, for example, refusing to engage in any negotiations. Again, this can simply delay resolution of a dispute and thereby increase costs.

³ *Oracle America Inc v. Myriad Group AG* No. 11-17186 (9th Cir. 2013).

⁴ See, e.g., *Republic of Sierra Leone v. SL Mining Ltd* [2021] EWHC 286 (Comm).

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It is therefore important that multi-tier arbitration agreements are drafted clearly, with any obligations and associated timetables expressly spelled out. It should also be possible for a prospective claimant to fulfil any ADR requirements without the engagement of all contracting parties, including where they find their counterparties uncooperative.

(3) Expressly Specify the Law Governing the Arbitration Agreement

Under most national laws and institutional rules, an arbitration agreement constitutes a separate contract to the main contract that contains it. This means that the arbitration agreement can, in principle, be governed by a different law to that governing the main contract. It is therefore important that parties specify the law applicable to the arbitration agreement. This law will be relevant to issues such as the validity, scope, formation, termination, interpretation and waiver of the arbitration agreement.

If the law governing the arbitration agreement is not specified, a conflict-of-laws analysis will need to be applied to determine it. Specifying the law applicable to the arbitration agreement thus removes ambiguity and avoids disputes as to that question. Indeed, several cases have grappled with the issue of the applicable law in circumstances where the parties have not expressly stipulated it.

Kabab-Ji SAL (Lebanon) v. Kout Food Group (Kuwait) provides a recent example in which the English and French courts reached opposite conclusions.⁵ In *Kabab-Ji*, the tribunal determined that the arbitration agreement was governed by French law, under which a third party not privy to the main contract (Kout) was bound to the arbitration agreement. Kout sought unsuccessfully to annul the award in the French courts on the basis that English law applied to the arbitration agreement. In parallel, however, Kout was successful in resisting enforcement of the award in the English courts on the same basis. In contrast to the French court, the English court concluded that English law applied to the agreement to arbitrate and the third party was not bound by the arbitration agreement under English law. Had the parties simply specified the law applicable to the arbitration agreement, such litigation could have been avoided.

(4) Consider the Nuances of Different Arbitral Seats

The seat of an arbitration is sometimes thought of as simply the physical place of the arbitration but, in fact, the seat will have critical legal consequences. The seat will generally determine important issues such as: the applicable procedural law; which courts have supervisory jurisdiction over the arbitration; and the applicability of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (**New York Convention**).

It is important to select a seat in a country that has ratified the New York Convention and that has national legislation and a judiciary that are supportive of arbitration. Aside from these essential requirements, some seats will have jurisdiction-

⁵ *Kabab-Ji SAL (Lebanon) v. Kout Food Group (Kuwait)* [2021] UKSC 48. See our previous client alert on the case, available [here](#).

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specific nuances on which specialist advice should be sought. For illustrative purposes, some particular nuances of three jurisdictions are noted below:

- (i) **China:** China's 1994 Arbitration Law distinguishes between: (a) domestic arbitral awards; (b) foreign awards (awards made outside of China); and (c) foreign-related arbitral awards (awards made by Chinese-recognised arbitration institutions with foreign elements). The distinctions may have potentially significant consequences, as Chinese courts have greater powers to supervise domestic arbitrations and to set aside domestic awards than they do with respect to foreign awards and foreign-related awards.
- (ii) **Taiwan:** Taiwan is not a signatory to the New York Convention. This means that an award rendered in an arbitration seated in Taiwan cannot be enforced under the New York Convention in other contracting countries.
- (iii) **Russia:** Russia has retained a reputation as a jurisdiction that is not wholly supportive of international arbitration. For instance: (i) Russian courts have a reputation for interpreting public policy more broadly than other national courts in the context of proceedings to recognise and enforce an arbitral award; and (ii) Russia has passed a law that, in some circumstances, enables sanctioned parties to refer disputes to the Russian courts despite the parties having concluded an arbitration agreement.

(5) Consider Issues of Consolidation and Joinder

In situations involving multiple contracts and/or third parties, the same factual situation may give rise to several separate arbitrations in which a different tribunal is appointed in each. These kinds of separate yet parallel arbitrations produce potential risks in terms of conflicting decisions, duplication of work, and costs and delays.⁶ Parties may therefore seek to avoid such risks by: (i) combining one or more of the separate arbitrations into a single arbitration (“consolidation”); or (ii) adding one or more third parties to the arbitration (“joinder”). Institutional arbitration rules typically address both consolidation and joinder (see, e.g., ICC Rules, Articles 7 and 9–10). Parties may, however, wish to agree bespoke mechanisms for each, particularly if they wish to expand the circumstances where joinder or consolidation may be permissible.

Arbitration agreements must be carefully drafted when multiple contracts are involved or third parties are closely involved with the relevant contract. It is important for the arbitration agreement in each separate contract to be consistent and compatible (i.e., to provide for the same number of tribunal members, institutional rules, seat, etc.). In addition, the arbitration agreements should expressly allow consolidation and joinder, and clearly and unambiguously set out the requirements that must be met for each to take place. These provisions in the arbitration agreement will need to be tailored to the particular transaction at issue, taking into account the relevant contracts and parties involved. For example,

⁶ See, e.g., *W v. AW* [2021] HKCFI 1707.

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parties often wish to be able to join third parties to arbitration proceedings, but may be unprepared for the scenario in which that third party, after being joined, acts in an uncooperative manner and raises significant obstacles before an award can be issued.

In short, situations involving multiple contracts and third parties can raise complex issues and, in most cases, parties are well advised to seek specialist advice.

(6) Determine Whether Express Confidentiality Obligations Are Required

Although some jurisdictions (e.g., England and Wales) require that arbitration proceedings must be kept confidential (together with any testimony, documents and awards resulting from such proceedings), some do not. Even in countries which do impose a duty of confidentiality, the precise scope and content of that duty can vary. As a result, arbitral awards and facts related to the arbitration may sometimes be made public, including through enforcement procedures or a challenge to an award. Parties can reduce such risks by including express confidentiality obligations in their arbitration agreement. When doing so, parties should consider the intended scope of any confidentiality obligations, including whether they should cover all or some of the following: (a) the fact of the arbitration; (b) the information, documents and witness evidence disclosed during the arbitration; (c) the arbitration award; and (d) any settlement discussions.

(7) Consider the Appropriate Scope of Document Production

There is a significant divergence in practice between common law and civil law systems when it comes to document production (or “discovery”). In international arbitration, broad U.S. style discovery is unusual, but some document production is generally permitted. Most institutional rules provide arbitral tribunals with discretion to order a party to produce documents or other evidence. In this regard, many tribunals opt to be guided by the IBA Guidelines on the Taking of Evidence in International Arbitration (“the IBA Guidelines”).⁷ The IBA Guidelines are intended to strike a balance between common and civil law traditions. They do provide a mechanism for a party to produce documents in its possession, custody or control of its counterparty but the requesting party bears the burden of establishing that a specific and narrow category of document is reasonably believed to exist and is relevant to the dispute and material to its outcome.

It is possible for parties to agree on express document production obligations in their arbitration agreement. They may confirm, broaden or narrow the default scope of document production in the arbitration agreement. For instance, it could be agreed that each party may take a specified number of depositions (depositions are rare in international arbitration). Conversely, parties could agree that there will be no document production or to the application of the 2018 “Prague Rules” on the Efficient Conduct of Proceedings in International Arbitration which permit document production in narrower circumstances than the IBA Guidelines. Such provisions should be drafted clearly and should define with precision the

⁷ IBA Guidelines on the Taking of Evidence in International Arbitration, available [here](#).

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scope of any document production obligations. Parties should also carefully evaluate whether any bespoke document production provisions are suitable for all disputes that may arise under the contract rather than simply one specific type of dispute.

(8) Express Powers to award Interim Measures

It may be necessary for parties to seek interim measures to safeguard their substantive rights either before the commencement of arbitral proceedings or after proceedings have been filed. For example, a party may be irreparably prejudiced if its opponent, say, destroys material evidence or dissipates its assets, meaning that any resulting award will not be able to be efficaciously enforced. Parties should accordingly consider if it is advisable to provide for express powers to award interim measures in their arbitration agreement, in respect of either a court or the tribunal (or both).

The current versions of most institutional rules provide tribunals with wide powers to grant interim measures and many arbitration laws confer similar powers on arbitral tribunals and national courts.⁸ However, the powers of courts and tribunals can vary significantly from seat to seat. For example, section 39(1) of the Arbitration Act (UK) provides that the parties are “free to agree that the tribunal shall have power to order on a provisional basis any relief which it would have power to grant in a final award” but section 39(4) caveats that unless “the parties agree to confer such power on the tribunal, the tribunal has no such power.” An agreement to a set of arbitration rules that empowers the tribunal to grant interim relief (such as the ICC Rules or the LCIA Rules) will constitute an agreement under section 39(4). However, in an arbitration clause providing for *ad hoc* arbitration in England, the tribunal will have no power to grant provisional measures under section 39(1) unless conferred by agreement and thus parties should consider whether it is advisable to include express language in their agreement to arbitrate.

(9) Express Waivers of Sovereign Immunity

In many jurisdictions around the world, sovereign States (and their State entities) enjoy sovereign immunity.⁹ Sovereign immunity confers on States immunity from adjudication by national courts or arbitral tribunals (“immunity from suit”) and the execution of any judgment or award (“immunity from execution”). Sovereign immunity can accordingly present a significant obstacle to a party seeking to enforce its rights against a State or a State-controlled entity. As a result, when a party is contracting with a State (or State entity), it is important to obtain an express contractual waiver of sovereign immunity. Parties should ensure that the waiver is effective under the laws of jurisdictions where enforcement may be sought in relation to both immunity from suit and immunity from execution.

⁸ See e.g., ICC Rules 2021, article 28(1).

⁹ See, e.g., the State Immunity Act 1978.

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Conclusion

Parties should carefully consider the specific circumstances of the contract they are negotiating and tailor their arbitration agreement accordingly. Specialist advice may be required to ensure that the arbitration agreement is valid and enforceable, and meets the expectations of the party for the dispute resolution process.

Willkie's international arbitration group has extensive experience providing specialist advice efficiently and cost-effectively to commercial entities, individuals, States and State entities on the most appropriate elements to be included in a given arbitration agreement.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

Duncan Speller

+44 203 580 4711

dspeller@willkie.com

Elliott Couper

+44 203 580 4876

ecouper@willkie.com

Jack Davies

+44 203 580 4781

jdavies@willkie.com

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