PROPER LEGAL DRAFTING OF ARBITRATION CLAUSES

a Qais Ali Mahafzah,  b Mohammad Taha Alflaieh

ABSTRACT

Objective: This article analyses the main and necessary features on drafting an arbitration clause properly. Thus, the article identifies and debates the major points that shall be considered in drafting arbitration clauses, namely, ambiguity of drafting, scope of arbitration, institutional or ad hoc arbitration, international or domestic arbitration, choosing the place and seat of arbitration, choosing arbitrators, language of arbitration, and reconciliation before entering into arbitration. This article does not contest that we shall have a uniform or standard template for arbitration clauses. Rather, it only provides guidance for drafting a proper and legal arbitration clause.

Theoretical framework: Arbitral disputes arise when there is a written arbitration clause that leads to arbitration instead of litigation. Such clauses shall be drafted properly and legally, where if such drafting is not proper and legal, the arbitration clause will not be applicable, and in consequence, it shall be considered null and void.

Method: The method used in this research is practical legal research including statutory and comparative approaches.

Results: The results of this study explain that the drafters of arbitration clauses shall be cautious and knowledgeable in their writing given the significance of the arbitration clause’s terms.

Conclusions: The conclusion of this study is that there is no universal arbitration clause that can be followed, but there are several critical provisions in an arbitration clause that can help parties to avoid spending time and money on the arbitration proceeding. Thus, arbitration clauses shall be drafted properly and carefully.

Keywords: international arbitration, arbitration clause, drafting arbitration clauses.

Received: 28/08/2023
Accepted: 27/11/2023
DOI: https://doi.org/10.55908/sdgs.v11i12.1948

a Ph.D. in Commercial Law, The University of Jordan, E-mail: q_mahafzah@ju.edu.jo,
Orcid: https://orcid.org/0000-0003-2994-7962
b Ph.D. in Criminal Law, Middle East University, E-mail: mohd@gedaralaw.com,
Orcid: https://orcid.org/0009-0002-1298-0002
REDAÇÃO LEGAL ADEQUADA DAS CLÁUSULAS DE ARBITRAGEM

RESUMO

Objetivo: Este artigo analisa as principais características e as características necessárias para a elaboração de uma cláusula de arbitragem de forma adequada. Assim, o artigo identifica e debate os principais pontos que devem ser considerados na elaboração de cláusulas de arbitragem, ou seja, ambiguidade de redação, âmbito de arbitragem, arbitragem institucional ou ad hoc, arbitragem internacional ou nacional, escolhendo o local e sede da arbitragem, escolhendo árbitros, língua de arbitragem, e reconciliação antes de entrar em arbitragem. Este artigo não contesta que teremos um modelo uniforme ou padrão para cláusulas de arbitragem. Pelo contrário, apenas fornece orientações para a elaboração de uma cláusula de arbitragem adequada e legal.

Estrutura teórica: As disputas arbitrais surgem quando há uma cláusula de arbitragem escrita que leva à arbitragem em vez de litígio. Tais cláusulas devem ser redigidas de forma adequada e legal, se tal redação não for adequada e legal, a cláusula de arbitragem não será aplicável e, consequentemente, deve ser considerada nula e sem efeito.

Método: O método usado nesta pesquisa é a pesquisa jurídica prática, incluindo abordagens estatutárias e comparativas.

Resultados: Os resultados deste estudo explicam que os redatores de cláusulas de arbitragem devem ser cautelosos e conhecedores em sua escrita dada a importância dos termos da cláusula de arbitragem.

Conclusões: A conclusão deste estudo é que não há nenhuma cláusula de arbitragem universal que pode ser seguida, mas há várias disposições críticas em uma cláusula de arbitragem que pode ajudar as partes a evitar gastar tempo e dinheiro no processo de arbitragem. Assim, as cláusulas de arbitragem devem ser redigidas de forma adequada e cuidadosa.

Palavras-chave: arbitragem internacional, cláusula de arbitragem, redação de cláusulas de arbitragem.

1 INTRODUCTION

An arbitration clause is an agreement between two parties or more where a dispute may arise between them regarding a particular legal relationship that shall be settled by arbitration, and this agreement can be based on their agreement in the contract itself, or later on the contract in a separate agreement, or by referring to a document that includes an arbitration agreement with the clarity of this referral.3

The clause is usually included in the original contract as being the source of the legal relationship, whether it is a civil, commercial or administrative contract. The parties to the contract, for example, may agree that the dispute arising from the interpretation of the contract or its implementation shall be decided by arbitration, and in consequence,

---

3 Ahmad Ibrahim Abdul-Tawab, Arbitration Agreement: Concept - Pillars and Conditions - Scope (in Arabic) (Egypt - Cairo: Dar Al-Nahda Al-Arabia for Publication and Distribution 2013) 63.
arbitration shall be applicable on any dispute may occur in the future concerning this interpretation or implementation, and is not focused on a particular dispute. However, the clause could be included in a subsequent agreement before any dispute arise or even after.4

The arbitration clause does not lapse with the passage of time, as it is of unlimited duration unless there is an agreement to the contrary between the parties.

The arbitration clause gives the parties the power to decide the dispute and defines the scope of that power. According to some scholars,5 the parties essentially design their own personal judicial system. As a result, the arbitration clause affects how the entire arbitration process will proceed, and in consequence, in order to be valid, enforceable, and effective, the arbitration clause needs to be carefully drafted.

Given that the serious impact of the arbitration clause, which is depriving the contracting parties of resorting to the state’s judiciary, such clause shall be drafted properly and legally, where if such drafting is not proper and legal, the arbitration clause will not be applicable, and in consequence, it shall be considered null and void.

It is important to bear in mind that this article aims to realise the importance of the wording of an arbitration clause for arbitration to function smoothly. When arbitration clauses contain defective wording, such wording are subject to unnecessary procedural incidents and debates.6 This article does not contest that we shall have a uniform or standard template for arbitration clauses. Rather, it only provides guidance for drafting a proper and legal arbitration clause.

2 THEORETICAL FRAMEWORK

Some scholars argue7 that it is typically safe to use standard arbitration clauses provided by arbitral institutions as a template, where those standard clauses contain clear

---

4 If the arbitration agreement focuses on a dispute that has already arisen and on what may arise from a dispute in the future, it is considered an arbitration agreement containing an agreement on arbitral procedures and an arbitration clause, where each of them have different legal consequences. Fat-hi Wali, Mediator in National and International Commercial Arbitration - Science and Practice (in Arabic) (Egypt - Cairo: Part I, Dar Al-Nahda Al-Arabia for Publication and Distribution 2021) 142.


and basic text of the arbitration clause that is to be adapted by the parties to the circumstances of their contract, if needed. However, such argument is not accurate since, as discussed below, some standard arbitration clauses are still debatable in their application.

Under the rules of various arbitration centers there are different models for arbitration clauses that are carried out under the supervision of those centers. Among those are the following:

**The UNCITRAL Arbitration Clause:**

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.

Note. Parties should 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 and country];
(d) The language to be used in the arbitral proceedings shall be . . . .

**The ICC (Paris) Arbitration 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.

**The Cairo Regional Center for International Commercial Arbitration (CRCICA) Arbitration Clause:**

Any dispute, controversy or claim arising out of or relating to this contract, its interpretation, execution, the termination or invalidity thereof, shall be settled by arbitration in accordance with the Rules of Arbitration of the Cairo Regional Centre for International Commercial Arbitration.

Note: Parties should consider adding:

a. The number of arbitrators shall be ... (one or three);
b. The place of arbitration shall be ... (town and country); and
c. The language to be used in the arbitral proceedings shall be...

Note: Parties may consider adding:
The time limit within which the arbitral tribunal shall make its final award shall be...\(^{10}\)

The above UNCITRAL and CRCICA Arbitration Clauses are more comprehensive in their drafting and application than the ICC (Paris) Arbitration Clause. The ICC (Paris) Arbitration Clause is a debatable one since it is drafted in general and indefinite; the clause does not cover the termination or invalidity of the contract. In other words, the ICC (Paris) Arbitration Clause may give the right to the disputed parties to file a lawsuit before the national courts whose subject matter is termination or invalidity of the contract since the issue of termination or invalidity of the contract is not considered arising from or related to the contract, where the arbitration clause shall explicitly state that it includes termination or invalidity of the contract.

This was confirmed by the decision of CRCICA in 2010,\(^{11}\) in terms of the lack of jurisdiction of the arbitral tribunal to adjudicate disputes arising from the invalidity of the contract if the scope of the arbitration clause is limited on disputes arising from the implementation or interpretation of the contract without disputes related to its validity. Likewise, what was confirmed by the Cairo Court of Appeal in 2003,\(^{12}\) that if the arbitration clause is limited to disputes arising from the interpretation or implementation of the contract, then this clause does not cover disputes based on non-contractual liability or those based on the invalidity, termination or rescission of the contract.

3 METHODOLOGY

In the Hashemite Kingdom of Jordan for example, although there are no decisions of the Jordanian Cassation Court directly and explicitly related to the lack of jurisdiction of the arbitral tribunal to adjudicate disputes arising from the invalidity of the contract if the scope of the arbitration clause is limited to disputes arising from the implementation or interpretation of the contract and without mentioning disputes related to its validity,


\(^{11}\) Arbitration Case No. 652 of 2009, in which the arbitral award was issued on 14/6/2010.

\(^{12}\) Cairo Appeal - Circuit 91 Commercial - Session 7/27/2003 in Case No. 12 of the year 120 BC.
still we can conclude that the Jordanian Cassation Court’s decisions, quite frankly, have tended towards a narrow interpretation of the scope of the arbitration clause. The Jordanian Cassation Court settled on a number of basic principles regarding arbitration that still exist to this day, and they are as follows:

1. **Considering Arbitration as an Exceptional Way to Resolve Disputes**: The Jordanian Cassation Court ruled by stating that: “The principle in resolving disputes is within the competence of courts of all kinds and that resorting to those courts is a right for every citizen ... and that resorting to arbitration is an exception to the general rule”,13 and the Cassation Court established its position based on the provisions of the Jordanian Constitution,14 as it decided that: “Article 102 of the Constitution entrusted the right to resort to judiciary to all persons under all articles in the regular courts in the Hashemite Kingdom of Jordan, and that the agreement between individuals or organizations referring their disputes to arbitration is an exception to this article...”.15 The Jordanian Cassation Court also confirmed that the court’s control on the arbitration clause is due to the fact that: “arbitration is an exceptional way to settle disputes that is originally within the jurisdiction of the courts exclusively”.16

2. **The Satisfaction of the Parties to the Arbitration Dispute shall be Verified**: The Jordanian Cassation Court ruled by stating that: “the referral to arbitration must be from the parties to the dispute, and an arbitration clause must be written to determine the disputes agreed to be settled by the arbitrators so that their judgment is focused on clear and specific disputes, since resorting to arbitration is an exceptional way to settle disputes that are originally within the jurisdiction of the courts exclusively.”17

3. **The Necessity of Adopting a Narrow Interpretation of the Scope of the Arbitration Clause**: The Jordanian Cassation Court requires that the dispute referred to arbitration be clearly defined. The Jordanian Cassation Court ruled by stating that: “The agreement between individuals or organizations referring their disputes to arbitration is an exception to this article, and this exception should not

---

15 The Jordanian Cassation Court under Case No. 350/90, Jordan Bar Association Magazine of 1990, 1941.
16 The Jordanian Cassation Court under Case No. 452/93, Jordan Bar Association Magazine of 1994, 1241.
17 ibid.
be expanded in interpretation and application with its clear limits”.\textsuperscript{18} Moreover, due to the exceptional nature of arbitration, arbitration, as the Jordanian Cassation Court ruled, is: “limited to what the will of the two parties intends to present to the arbitrator. Accordingly, the agreement of the two parties in the arbitration clause to refer any dispute between them to arbitration does not allow the arbitrator to dissolve or liquidate the company because the arbitration clause limits the jurisdiction of the arbitrator to examine disputes arising from the application of the provisions of the contract or related to it.”\textsuperscript{19}

Among the important applications of the narrow interpretation of the scope of the arbitration clause is what the Jordanian Cassation Court ruled by stating that: “It is understood from the provisions of Article 21 of the Franchise Agreement that the dispute between the two parties is referred to arbitration if it occurs regarding the interpretation or enforcement of any of the provisions of this agreement, and since the claim of the appellee is related to the recovery of a sales tax, so the Customs Court of First Instance will be the competent court to look into such claim”.\textsuperscript{20} It is clear from the former decision that the Jordanian Cassation Court did not consider expanding the scope of the arbitration clause. That is, the Cassation Court could have said that the enforcement of the Franchise Agreement entails the performance of the sales tax, and therefore the dispute over this tax is related to the implementation of the Agreement and that is within the scope of the arbitration clause. However, the Cassation Court refused that and considered that this matter falls within the jurisdiction of the Customs Court. What confirms the direction of the Jordanian Cassation Court towards a narrow interpretation of the scope of the arbitration clause is what it went to by stating that: “the arbitration clause, as it is settled, must be written, clear and explicit in accordance with the provisions of Article (10/a) of the Arbitration Law No. 31 of 2001”.\textsuperscript{21} It is noted here that Article (10/a) does not mention the phrase that the arbitration clause be "clear and explicit". In other words, the scope of the arbitration clause was interpreted by the Jordanian Cassation Court in a narrow and cautious way, without expansion.

As a result, it might be possible to rely on the above decisions regarding the invalidity of the agreement if the Arbitration clause does not clarify literally that it applies

\textsuperscript{18} Case No. 350/90 (n 12) 1941.
\textsuperscript{19} The Jordanian Cassation Court under Case No. 1774/94, Jordan Bar Association Magazine of 1997, 1154.
\textsuperscript{20} The Jordanian Cassation Court under Case No. 404/2004, on 08/08/2004, Adalah Electronic Publications.
\textsuperscript{21} The Jordanian Cassation Court under Case No. 3307/2004, on 07/03/2005, Adalah Electronic Publications.
to the invalidity of the agreement, and in consequence, the party adhering to such claim may resort to the competent court to invalidate the agreement since the invalidity of the agreement falls outside the jurisdiction of arbitration as long as the arbitration clause does not expressly provide for.

In this context, it should be noted that Welser and Molitoris\textsuperscript{22} argue that common law courts have made a distinction between narrowly and widely drafted arbitration clauses. Although widely drafted arbitration clauses may prevent the fragmentation of disputes between arbitration and litigation and avoid the arise of further complications when the underlying contract itself proves to be invalid, it is important to keep in mind that on an international level, courts frequently give arbitration clauses a broad interpretation.\textsuperscript{23} Widely drafted arbitration clauses cover not only all disputes that may arise out of the contract, but also those related to it, while narrowly drafted arbitration clauses limit disputes to straightforward contractual matters. This point of view received harsh criticism for being too codified, failing to accurately reflect the genuine intentions of the parties, and needlessly dividing processes that deal with the same facts only because they are founded on different legal grounds.

4 RESULTS AND DISCUSSION

Arbitration clauses may contain defect or defects liable to disrupt the smooth progress of arbitration; it may appear that the arbitration clause makes filing a dispute for arbitration optional; if the dispute involves three or more parties with divergent interests, the arbitration clause may specify that the tribunal must be composed of three arbitrators, which is a defective mechanism for appointing arbitrators; the arbitration clause may establish impractical requirements for the arbitration proceedings, such as unworkable deadlines.\textsuperscript{24} Subsequently, one may try to define what a perfect arbitration clause would look like. While it is difficult to generalize about what would make a perfect arbitration clause.


\textsuperscript{23} The general consensus in Germany and Switzerland is in favor of a broad interpretation of widely drafted arbitration clauses that results in the arbitral tribunal’s exclusive jurisdiction. Hence, it is commonly accepted that disputes resulting from the non-contractual obligations of the parties, inasmuch as they relate to the performance of the contract, are likewise covered by arbitration clauses dealing with future contractual disputes. Yet, it is uncertain whether the pro-arbitration tendency of German courts with regard to noncontractual obligations applies to conflicts arising out of separate contracts. ibid 19.

\textsuperscript{24} Gaillard and Savage (n 4) 261-262.
clause, it is not nearly as difficult to identify what should be considered in drafting an arbitration clause. The disputed parties too often do not focus on drafting the arbitration clause, where it is usually done by their legal counsels. Thus, the legal counsel who is in charge of drafting the arbitration clause should carefully consider the following points:

4.1 AMBIGUITY OF DRAFTING

The parties shall have their agreement on the arbitration clause clear without ambiguity in the meaning of the existence of recourse to arbitration, by using a firm and assertive formula that reveals the parties’ explicit intention to choose arbitration as a way to resolve disputes. A non-conclusive statement, such as an agreement that “any of the parties may submit the dispute to arbitration....” means that recourse to arbitration is not binding, or an agreement that “if the dispute is not resolved amicably, the parties agree that it will be referred to the arbitral tribunal” indicates a future agreement that may not happen. In addition, the statement of the arbitration clause might include equivocation. Craig, Park and Paulsson, in their book International Chamber of Commerce Arbitration, gave an example of an equivocal arbitration clause: “In case of dispute, the parties undertake to submit to arbitration, but in case of litigation the Tribunal de la Seine shall have exclusive jurisdiction”. Such clause is misleading and leads the parties to litigation instead of arbitration.

It was ruled that if the contract stipulates that any of the parties may resort to arbitration or to the state courts, and a party resorts to court, the arbitration clause may not be pleaded, as it is not obligated to resort to arbitration. Thus, it is in the interest of the parties to confirm their agreement on arbitration by stipulating not to resort to the state courts. That means that the drafter must produce an enforceable agreement to arbitrate; binding arbitration should be clearly and unequivocally stated.

In drafting the arbitration clause, it shall also state that the agreed-upon path is the only path that either party may take, and that neither of them is permitted to take another

25 The arbitration clause is occasionally the one that is least thought through and is frequently “copied and pasted” from one contract to another. Nigel Blackaby and others., Redfern and Hunter on International Arbitration (7th edn, Oxford University Press 2023) para. 2.04; Irene Welser, Pitfalls of Competence, in Austrian Arbitration Yearbook (Klaussegger and others edns. 2007) 8.
27 Townsend (n 5) 1.
29 The Jordanian Cassation Court under Case No. 586/2012, on 09/05/2012, Adalah Electronic Publications.
judicial or arbitral path. The reason for this is that in the ‘Al-Ahram Hill’ arbitration case, a case between the Arab Republic of Egypt and Southern Pacific Properties (S.P.P.) (Middle East) Limited - a Hong Kong corporation, the foreign party resorted to using ICC arbitration as it was the agreed route. When the arbitration ruling of the Court of Arbitration of the ICC in Paris issued in his favour was invalidated by the Paris Appeal Court and the French Court of Cassation, he resorted to arbitration at the International Centre for Settlement of Investment Disputes (ICSID). In a partial ruling regarding jurisdiction, the ICSID decided that there is nothing to prevent a party from conducting any other arbitration in order to reach its right, and this ruling considered that the Egyptian Investment Law, which includes a provision for the arbitration of the ICSID, provides legislative approval from the state, after which no condition or agreement is required arbitration because the treaty establishing the ICSID did not stipulate an agreement, but rather stipulated an “approval” to enter into arbitration.

4.2 SCOPE OF ARBITRATION

The drafter shall specify the scope of arbitration. This range can be expanded or narrowed. It may provide that arbitration includes disputes relating to the implementation of the original contract. Thus, arbitration is limited to a point of implementation. It does not include what is related to the conclusion of the original contract for example, and this issue falls under the jurisdiction of the courts. Thus, there is duplication in the consideration of the elements of the same case, which leads to conflicting judgments at times: The arbitral tribunal decides to obligate one of the parties to implement in kind or to pay monetary compensation, while the court decides to invalidate the original contract. Therefore, the best way of formulating the arbitration clause is the method of generalization and comprehensiveness. The arbitration clause may state that: “Any

30 For a detailed explanation of this case, see, Hafiza Al-Sayyed Al-Haddad, Contracts Concluded between Countries and Foreign Persons (in Arabic) (Egypt – Alexandria: University Thought House 2001) 305.
32 Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case No. ARB/84/3.
34 On the other hand, it should be noted that parties of the dispute shall also be aware of whether resorting to arbitration itself is permissible or not. For example, under Article (10/D) of Jordan Arbitration Law, any previous agreement of resorting to arbitration in labour disputes is not permissible, while under Indonesia Arbitration Law parties may resort to arbitration in labour disputes. Surya Perdana, “The Government as the Intermediate in the Settlement of Labor Disputes in Indonesia” (2023) 11(6) J. Law Sustain. Dev. 1, 7.
dispute or controversy arising out of or related to this contract shall be referred to arbitration.” Arbitration centres usually follow this way of drafting, where they set a model clause in this sense to be included in the contract. However, if the draft is an arbitration agreement, it must refer to the original contract in sufficient detail by mentioning its date, parties, subject, number, and other matters that cut the dispute over the intended original contract. Determining the scope of arbitration is a point in which the opinion of the disputed parties must be taken, and they have a choice between the two methods.

In consequence, although it is in the interest of the parties to mention that their recourse to arbitration is to settle the disputes that will arise between them “arising from or related to the contract” i.e. formulating the arbitration clause with generalization and comprehensiveness, however, and as discussed above, the parties shall define disputes in a detailed way by stating that disputes cover the interpretation of the contract, its implementation, or what is related to the invalidity, validity, or its termination, including all disputes that may arise from or related to the contract.

4.3 INSTITUTIONAL OR AD HOC ARBITRATION

To consider whether arbitration will, when necessary, conduct institutional arbitration or whether it will conduct ad hoc arbitration. This is the first step in determining the intention of the parties, and therefore their opinion must be considered. Their tendency may be to rely on a specific arbitration centre in which they trust and benefit from its services, so they choose institutional arbitration. In this case, the proper name of the centre chosen by the parties must be mentioned in the arbitration clause.\[^{35}\] It improves the scrutiny of placing the name of the centre. For example, many arbitration cases that were presented to the International Chamber of Commerce, the parties do not like to mention this Chamber. The Chamber was forced to interpret the mis-wording as referring to the International Chamber of Commerce in Paris. However, if it is said, for example, that arbitration takes place before the “International Chamber of Commerce in Geneva”, then it is interpreted that what is meant is the International Chamber of Commerce, whose headquarters is in Paris, provided that the seat or place of arbitration is in Geneva. This is often followed by other arbitration centres.\[^{36}\]


\[^{36}\] Jean Benglia, “Inaccurate reference to the ICC” (1996) 7(2) ICC Int'l Ct Arb Bull 11, 12.
It is not uncommon for an arbitration centre to host ad hoc arbitration cases, allowing its sessions to be held at its headquarters and placing its services at the disposal of the parties and arbitrators. However, the judgment will be a judgment in ad hoc arbitration and not in institutional arbitration.\(^{37}\)

In drafting the arbitration clause, it is indicated with the name of the arbitration centre that the rules of procedures in this centre apply to the dispute. However, the arbitration procedures regulations change from time to time. Therefore, it is better to mention the intended regulation: is it the regulation in force at the time of drafting the condition or agreement on arbitration, or is it the regulation that is in force at the time of submitting the case to the arbitration centre!\(^{38}\)

The parties may choose alternative procedural rules to regulate the arbitration procedures since the arbitration clause is a product of consent. Those guidelines will give the parties a framework for how to carry out the arbitration. Choosing an institution's guidelines is not the same as choosing that institution to handle the arbitration. For instance, the arbitration might be governed by the UNCITRAL Rules while also being an Ad Hoc arbitration.\(^{39}\)

It is important to know that converting an agreed institutional arbitration to an ad hoc arbitration leads to dangerous consequences in certain cases, as in the following example: A typical arbitration clause was brought before the International Chamber of Commerce in Case No. 3383\(^ {40}\) involving a contract between two parties. In order to continue with the case as ad hoc arbitration, the arbitrators persuaded the parties to abandon the International Chamber of Commerce. The parties agreed and drafted a new arbitration agreement, setting a three-month deadline for the arbitrators’ decision. As the arbitrators were unable to issue the decision during this time, the parties agreed to renew it three times. However, in the fourth renewal, the defendant claimed that he was unable to agree because doing so would violate the law in his country. As a result, the arbitral tribunal concluded its work without issuing a decision. The claimant then turned to the International Chamber of Commerce once more in accordance with the original arbitration clause, and the Chamber appointed a sole arbitrator. However, this arbitrator

---

39 Verdias (n 5) 254.
ruled that he lacked jurisdiction because the institutional arbitration clause had been abolished by the ad hoc arbitration clause and that the claimant was no longer permitted to use it absent a new agreement with the other party.

4.4 INTERNATIONAL OR DOMESTIC ARBITRATION

Indicate whether the agreed arbitration is international or domestic: This is because domestic arbitration needs to review the binding rules in the local procedural law to see if they serve the interests of the drafter's client or not. If the country in which the local arbitration will take place is foreign to the drafter, he shall refer to one of the law firms’ offices in that country in order to obtain advice on that matter.

The parties must take into account the potential locations for the enforcement of an award or award-based judgments. This is significant in an international contract. The New York Convention,41 for example, makes arbitration awards enforceable in many countries engaged in international trade, if both the country where the arbitration takes place and the country where the award is to be enforced are parties to the same convention. The idea is to give the underlying transaction enough thought so that the arbitration clause can be customized to the client's specific needs and to any conflicts that may be logically expected.

In order to assess if a country is a party to a convention on the enforcement of arbitral awards, the drafter shall take into account the country where the client is most likely need to enforce an eventual award, such as where the adversary's assets are situated. As a result, the arbitration shall be held in a country that is a party to the same convention.42

4.5 CHOOSING THE PLACE AND SEAT OF ARBITRATION

The locus arbitri, also known as the arbitration place, is the location where the arbitration will take place legally. This means that it is the location that does not have any legal effect on the arbitration case. Rather, it is just a geographical location chosen by the arbitrators or from the parties for easy access to it and meeting there, or for a specific purpose such as hearing witnesses or inspecting a site. However, the choice of this place

42 Townsend (n 5) 2-3.
does not entail anything related to the applicability of the basic guarantees of litigation to arbitration, and does not challenge the judgment before courts.

The lex arbitri, on the other hand, also known as the arbitration seat, indicates that many facets of the arbitral process and the judgment are governed by the law of the venue. Thus, several important aspects are influenced by the seat. It establishes whether procedural laws, including any appeal rights, the availability of interim remedies, and the degree to which local courts would assist, oversee, and/or obstruct the arbitration process, will be applicable to different procedural components of the arbitration. More significantly, the location where the award is presumed to have been rendered will be the arbitration's seat. The grounds for challenging an award in front of the local courts will thus be determined by the law of the seat.\(^{43}\)

Some institutions' rules permit the arbitrators to choose the situs based on the facts and circumstances of the parties' case if the parties are unable to agree,\(^{44}\) while other institutions' rules give the institution itself the authority to choose the situs.\(^{45}\) It should be emphasized that adopting a situs does not require all arbitral proceedings to take place there; instead, the arbitrators may choose to conduct certain proceedings at other locations as permitted by the arbitral rules.\(^{46}\)

If the arbitration case is affected by the law of the country in which the arbitration takes place, then this country shall be the seat of arbitration, and one of the manifestations of legal influence here is that arbitration respects the basic guarantees of litigation at the “seat” of arbitration, and that if this ruling is to be invalidated for any reason, this challenge to nullity is made before the courts of the country’s seat of arbitration.

In consequence, when the parties fail to designate a seat or failed to do so in a clear way, parties most likely may lose their right to choose the seat. Under the institutional arbitration, the arbitration rules may provide a default seat (e.g. Article 20.1 of the Dubai International Arbitration Centre Arbitration Rules 2022 (“DIAC Rules”)). The arbitration institution may choose the seat if the arbitration rules do not

---


\(^{44}\) AAA International Rules art. 13 (administrator may initially determine the place of arbitration, subject to the power of the arbitrators to determine the situs); UNCITRAL Rules art. 16.

\(^{45}\) ICC Rules art. 14 (ICC International Court of Arbitration shall fix the place of arbitration if not agreed by the parties); LCIA Rules art. 16.1 (seat shall be London unless and until the LCIA Court determines that another seat is more appropriate).

\(^{46}\) ICC Rules art. 14 (arbitrators may conduct hearings or deliberate at any location they deem appropriate); AAA International Rules art. 13 (arbitrators may hold conferences, hear witnesses or inspect property at any place they deem appropriate); LCIA Rules art. 16.1 (arbitrators may hold hearings and deliberations at any convenient location).
specify a default location. However, depending on whether the seat will be decided after the tribunal’s creation, this might take up to several months or longer. 47

The Hamm Court of Appeals in Germany, 48 for example, ruled that an arbitration clause was invalid because it was fatally vague: "[The parties] shall proceed to litigate before the Arbitration Court of the International Chamber of Commerce in Paris with the seat in Zurich." The court held that it was impossible to tell whether the parties intended to submit to the Zurich Chamber of Commerce or the International Chamber of Commerce in Paris, both of which have permanent arbitration tribunals.

As a result, a procedural law or substantive law provision should not be added if one already exists. Doing so might result in an unclear phrase, which ultimately could result in an arbitration clause that is voidable.

It should be noted that it might be agreed in the arbitration clause (or after) to give the arbitrators the authority to decide the dispute between the two parties without being bound by a specific law, so they judge according to their conscience and feel that it achieves justice. This is called the power of conciliation. This does not prevent the arbitrator from choosing a specific law that he applies, and in this case, he is obliged to provide sufficient justifications to support his choice. In other words, to demonstrate that he did not find more just than the rule of law that he applied and that his choice is due to the fact that it is a law that achieves justice in the best possible way.

4.6 CHOOSING ARBITRATORS

The drafting of the following clause ‘Any disputes arising out of this Agreement will be finally resolved by binding arbitration’ is most likely enforceable since it plainly requires the parties to arbitrate disputes, but at the same time, does not accomplish the intended purpose of an arbitration clause, which is to avoid court. The parties will have to appear in court to have an arbitrator or arbitrators chosen for them unless they can come to an agreement on the details of their arbitration. Hence, it is far better to include in the arbitration clause the minimum requirements needed to start arbitration without the involvement of a court:

47 Elliott (n 40).
1. To specify the number of arbitrators: the number of arbitrators may be determined by the rule of procedural law that applies to arbitration. For example, it is not permissible for the number to be even, as in Jordan Arbitration Law, or it is required that the number be an odd number, i.e. one, three, five...etc. The sole arbitrator shall be chosen according to the cases of low value of domestic disputes or due to the high confidence of the parties in that arbitrator. As for large cases and international disputes, the disputed parties often will want a panel of three.

2. Method of appointing arbitrators: In addition to detailing the number of arbitrators, a well drafted arbitration clause will also outline the procedures to be followed in appointing them. The common method of appointing arbitrators is for each of the parties to choose an arbitrator and for the two selected arbitrators to choose the third arbitrator who presides over the arbitral tribunal. Thus, if the arbitration clause does not specify the appointment procedure of the arbitrator(s), this will force the disputed parties to go to court seeking for such appointment, where such procedure will delay the starting of the arbitration. However, under the institutional arbitration, the parties may authorize the arbitration centre to choose the arbitrator or arbitrators. They may delegate to an international figure or a well-known international body, such as the Court of Arbitration in The Hague, which is stipulated in the rules of the UNCITRAL not as an appointing authority, but rather as an authority to appoint an arbitral authority. The person or body shall make the selection of the arbitrator or arbitrators in dispute. Rather, in ad hoc arbitration, one or both parties may resort to assigning the choice to a specific arbitration centre.

3. Determining the qualifications required of arbitrators: In determining the qualifications required of arbitrators, it should be noted that this issue does not always happen in arbitration cases, but only happens in certain cases, where the case requires a certain type of specialization, and usually this happens in

---


50 Of Course, delay may also arise by referring to court if one of the parties does not appoint an arbitrator to be appointed by him or the two arbitrators appointed by the parties are not able to agree on the third arbitrator. S Ravi Shankar, ‘How to Draft an Effective Arbitration Clause & Arbitration Agreement’ (2012) 9 https://www.lawsenate.com/publications/ebooks/drafting-arbitration-clause-and-agreement.pdf> accessed 28 July 2023.

51 UNCITRAL (n 6) Art. 6.
construction cases. Therefore, FIDIC documents are keen to mention the arbitrators’ qualifications clause in the parties’ agreement on arbitration form. However, such mentioning may result in an arbitration clause that is very challenging to implement if that clause is drafted by requiring exaggerated qualifications. Moreover, the arbitration clause may specify by name the individual whom the disputed parties want as their arbitrator. However, there may be a risk if the identified person becomes unavailable in the future.\textsuperscript{52} As a result, it is unwise to excessively detail the arbitration clause.\textsuperscript{53}

4.7 LANGUAGE OF ARBITRATION

The parties may choose a language for arbitration, which is often the same as the language of the contract, and they may leave that to the arbitrators. The parties may agree that each of them will use his own language and in this case, they will use translators if that language is unknown to the other party. Of course, it is very important that the parties agree on the language of arbitration because through this agreement they will avoid expensive, time-consuming translation of documents, and interpretation at hearings.

In international conflicts, however, the problem of language is a much more complicated operation than it is in domestic arbitration, where the parties are often from the same country and share the same language and culture.\textsuperscript{54} Before the arbitration process begins, the parties must consider language concerns in order to create a plan for language evaluation. The parties shall follow this strategy throughout the whole proceedings. In this regard, it is appropriate to choose arbitrators who speak the same language, or arbitrators who are bilingual, or at least one arbitrator who is proficient in the less common language that is relevant to the proceedings.\textsuperscript{55}

4.8 RECONCILIATION BEFORE ENTERING INTO ARBITRATION

There are some optional statements that could be considered and added on the arbitration clause. The drafter may inquire the parties whether they wish, before entering into arbitration, to make an attempt to reconcile between them. The benefits of reconciliation are well acknowledged, and it can avoid the time and cost of arbitration.

\textsuperscript{52} Verdi\textit{as} (n 5) 250.
\textsuperscript{53} Townsend (n 5) 3.
\textsuperscript{55} ibid, 150.
The disadvantage of reconciliation in arbitration, on the other hand, is that if the attempt to conciliate is not satisfied, then the case is considered prematurely filed, or if this attempt is not inevitable, then the text for it is in a reduced form than the inevitable formula. Moreover, certain arbitration clauses demand that negotiations between the parties take place in ‘good faith’ before mediation and/or arbitration. This is unnecessary since negotiations usually occur and it can be difficult to define what constitutes ‘good faith’.

5 CONCLUSION

The arbitration clause is crucial to the administration of the arbitration. Based on the universal principle of freedom of contract, the parties have the freedom to create the arbitration clause. As a result, freedom of contract lies at the very heart of how the law governs arbitration; the drafting of the arbitration clause constitute the governing law. Thus, the drafters shall be cautious and knowledgeable in their writing given the significance of the arbitration clause’s terms.

In fact, there is no universal arbitration clause that can solve every issue, but there are several critical provisions in an arbitration clause that can help parties to avoid spending time and money on the arbitration proceeding.

As identified by Bishop, arbitration clauses may be classified into three categories: basic clauses, general clauses and complex clauses. Basic clauses are those that solely contain the provisions that are necessary or particularly significant for a working arbitration agreement. General clauses, on the other hand, are the most prevalent type of arbitral provision used in significant transactions. They are more complex than basic clauses and contain the aforementioned clauses as well as a few helpful, low-risk, and popular optional clauses. While complex clauses are those that incorporate uncommon provisions in addition to the fundamentals, so complex clauses are ones that do both.

Because loosely drafted arbitration clauses are readily challenged in court by any of the disputed parties, who may not be interested in arbitrating the dispute, the arbitration clause should be drafted without any space for a second interpretation.

56 Yamshon (n 5) 3.
57 Bishop (n 35) 20.
58 Bishop (n 35) 24.
59 Bishop (n 35) 25.
As a result, parties should draft a more comprehensive arbitration provision if they wish to maintain more control over the arbitration proceeding. When drafting a detailed and well-drafted arbitration clause, the drafter shall be smart enough to draft a legal framework that supports the desired procedures, minimizes the need for disputes regarding the framework itself, complies with applicable laws, and avoids creating the kinds of ambiguities and uncertainties that could render the arbitration clause invalid. In consequence, when the arbitration clause is unquestionably valid and lays out a procedure that will go smoothly and efficiently, parties should have less incentive to use legal tactics and more incentive to settle their dispute without going to court. Nevertheless, the words ‘detailed’ and ‘well drafted’ are not necessarily synonymous. Thus, a detailed arbitration clause shall take into consideration the above guidance on drafting an arbitration clause.
REFERENCES


4. Cairo Appeal - Circuit 91 Commercial - Session 7/27/2003 in Case No. 12 of the year 120 BC.

5. CRCIACA, Arbitration Case No. 652 of 2009, in which the arbitral award was issued on 14/6/2010.


28. Jordanian Cassation Court under Case No. 586/2012, on 09/05/2012, Adalah Electronic Publications.


38. Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case No. ARB/84/3.


