

Drafting International Arbitration Clauses - IBA Draft Guidelines Published

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Given that the arbitration clause is often relegated to the status of boiler-plate during contractual negotiations, it will come as no surprise that arbitration clauses may be inadequately drafted. While not every clause will be so deficient as to be 'pathological', many readers of this blog will have first-hand experience of dealing with the fall-out from an arbitration clause which has suffered from ambiguities in drafting or a lack of comprehensiveness of thought.

The 'IBA Guidelines for Drafting International Arbitration Clauses', recently published in draft form (at http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Default.aspx) will surely improve appreciation of the complexities surrounding this indispensable clause. The draft Guidelines are the IBA's latest addition in their growing, influential contribution to international arbitration, already comprising the 'Guidelines on Conflicts of Interest in International Arbitration', the 'Rules on the Taking of Evidence in International Arbitration' and 'Rules of Ethics for International Arbitrators'. The draft Guidelines are now open for comment from the wider international arbitration community.

The Guidelines comprise a series of rules or 'guidelines', followed by model clauses which put into practice the advice given in relation to each of the Guidelines. The

Guidelines are wide-reaching in scope and not only offer advice in relation to generic arbitration clauses, but also deal with more specific clauses and situations, including multi-tier dispute resolution clauses, arbitration clauses for multi-party contracts, and arbitration clauses in the multi-contract context.

One recurring theme is the need for certainty and to agree on as many elements in the arbitration clause as possible in advance, rather than waiting for a dispute to materialise when agreement between the parties on such matters may be less forthcoming. The greater degree of certainty embodied in a comprehensive arbitration clause allows the parties to consider the strategy to adopt in resolving disputes and, in theory at least, a more efficient means to obtaining a final and binding decision.

The guidelines consider the different choices made by international parties. Guideline #1 commences with the choice between institutional and ad hoc arbitration and concludes in favour of institutional arbitration. Guideline #2 emphasises the availability of UNCITRAL rules if ad hoc arbitration is chosen and the importance of choosing an arbitral institution as the appointing authority. Of course some institutions will administer arbitrations under UNCITRAL rules (eg the LCIA). There have even been some more unusual examples of one institution administering arbitrations under the rules of another institution (such as SIAC administering arbitration under ICC rules in Alstom v Insignia SGCA [2009] 24). In the event parties do opt for ad hoc arbitration, Guideline #2 provides a detailed recommended clause.

Guideline #3 also encourages parties not to limit the scope of the disputes which will be subject to arbitration. While in certain circumstances parties may have good reasons to exclude some disputes from the scope of the arbitration clause, even carefully drafted exclusions can lead to jurisdictional problems.

It is clear from the commentary to Guideline #4 that the task force has given careful consideration to the important distinction between the parties' choice of "seat", or juridical place of an arbitration and the choice of logistical venues for hearings.

The other Guidelines #5 to #8 comment on key considerations for parties drafting an arbitration clause, including the method of selection of arbitrators and choice of the rules of law governing the contract.

After the principal drafting issues, the Guidelines provide recommended clauses for

optional elements, such as:

- Provisional and conservatory measures (the authority of the arbitral tribunal and of the courts)
- Document production
- Confidentiality
- Allocation of costs and fees
- Qualifications required of arbitrators
- Time limits
- Finality

The Guidelines warn of the dangers in limiting these optional elements but recognise that corporate choice may lead to specific drafting requirements.

The Guidelines also consider arbitration clauses for multi-tier, multi-party and multi-contract dispute resolution. The authors of the Guidelines recognise that such clauses present specific drafting challenges and set out the issues to be considered and recommended clauses.

The draft Guidelines, developed by arbitration practitioners, will be complemented by the results of the empirical study being conducted by the Queen Mary University of London School of Arbitration of the factors that influence corporate choices in international arbitration, which is being sponsored by White & Case LLP. The study is currently in its data-gathering phase and can be accessed at <http://www.arbitrationonline.org/survey/>. The survey targets in-house counsel with substantial experience of arbitration (as a guide, about five years in-house experience - although this is not a strict requirement).

The study will provide invaluable insight into the corporate decision-making in this area, identifying issues that influence corporate choice in many of the factors raised by the draft Guidelines. The results of previous studies align with many of the Guidelines' recommendations, such as the conclusion in favour of institutional rather than ad hoc arbitration. Readers are encouraged to bring this survey to the attention of suitable in-house counsel.

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