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Appointment of Sole Arbitrator: Can a Modified Asymmetrical Arbitration Clause Avoid Court Appointment?

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An asymmetrical arbitration clause is one where only one party can choose the method of resolving disputes between the parties. A slightly varied form of such a clause is usually contained in statutory arbitrations, which involve lop-sided arbitration clauses where only one party has the right to appoint the arbitrator. At first brush, these clauses appear to be patently unfair, but the same have been held to be enforceable in various jurisdictions. Considering their enforceability has been recognized, one may use the same to further efficiency and speed of the entire arbitral process, especially in the context where a mutually agreed sole arbitrator must be appointed. If one were to modify these clauses further to account for disagreement between the parties, one could limit, if not eliminate, the need to approach courts for such appointments.

Often times, an arbitration clause requiring the appointment of a mutually agreed sole arbitrator contains nothing more than the phrase "mutually appointed by both parties," leaving several questions, including the appropriate time period for appointment, unanswered. Additionally, such language does not provide a contractual solution to a deadlock with respect to the choice of the sole arbitrator. The only remedy in ad-hoc arbitrations, in such cases, is seeking an appointment of arbitrator through the court at the seat of the arbitration under Article 11 (4) of the UNCITRAL Model Law, 1985 **("Model Law")**.

In jurisdictions where court procedure is slow and tedious, an application to the court for appointment of an arbitrator can last years before being finally decided. Therefore, more elaborated language for the arbitration clause could be a possible contractual solution. The below sample clause provides such a solution:

> "*The arbitral tribunal will comprise of a single arbitrator to be appointed by mutual consent of the Parties within 7 (seven) days of the request of the notice to start arbitration proceedings. If either party does not respond to the request for mutual appointment of arbitrator within the aforesaid 7 (seven) days, the party issuing such a request may nominate such an arbitrator, subject to such nomination not being in contravention of IBA Guidelines on Conflict of Interest.*"

The incorporation of such a clause may appear to be asymmetrical, granting one party the right to nominate the sole arbitrator, but in practice, the same adequately caters to the interest of both the

parties for several reasons explained below.

1. Fair and Equal Treatment

The first and foremost objection ordinarily raised with respect to asymmetrical arbitration clauses is that they are violative of the fundamental principle of fair and equal treatment of parties in arbitration. This argument is often misplaced and misapplied. The principle of fair and equal treatment is enshrined in Article 18 of the Model Law, which refers to treatment with equality, and each party being given a full opportunity of presenting its case before the arbitral tribunal. Therefore, the said Article only comes into play once the arbitral tribunal has been formed and concerns only the manner in which the tribunal is expected to conduct the arbitral proceedings.

Asymmetrical arbitration clauses and the clause referred to above fall within a stage prior to the appointment of the sole arbitrator. While asymmetrical arbitration clauses grant one party the right to choose to go to court or have the dispute resolved through arbitration, the modified clause above ensures equal and fair treatment with respect to choice of the method of dispute resolution, *i.e.*, through arbitration, and also grants an equal opportunity to either party to exercise their right to accept or reject the name of the sole arbitrator suggested by the party invoking arbitration.

The above sample clause also leaves enough flexibility for parties to reach an agreement with respect to the appointment of the sole arbitrator, should the party continue to communicate with each other and negotiate in good faith. At the same time, it creates a deterrent against delay tactics by forcing a party to seek a court appointment of the sole arbitrator at the cost of additional delay and expense.

Any concern over equality and fair treatment is adequately addressed by giving both parties the equal rights to participate in the appointment of the sole arbitrator, and should one party choose not to exercise that right, the same would amount to waiver under contract law principles. Alternatively, if one of the parties intends to play foul by deliberately mishandling the service of notice of arbitration, the same would bring the risk of challenge to the final award by the other party.

2. Independence and Impartiality

Another reason why the aforesaid sample clause is more suitable as it unequivocally accepts the international standards for independence and impartiality of the sole arbitrator and hence any concern over one-party appointing a non-neutral or biased arbitrator is suitably addressed. If the party appointing the sole arbitrator fails to ensure compliance with the standards, the opposite party will get more reasons to challenge the appointment of the sole arbitrator.

3. Neutrality

Tied to the standard of independence and impartiality, the above sample clause strengthens the neutrality of the sole arbitrator. Any arbitrator appointed under such a clause would be more

conscious of the possibility of his or her appointment being challenged and hence would have a greater incentive to fully disclose even the remotest conflict of interest, which would further bolster the integrity and efficacy of the entire arbitral process. Furthermore, such an appointment would be in consonance with the intention of the parties to have speedy and effective dispute resolution with minimal court intervention and without sacrificing or compromising adjudication of their dispute by a neutral person.

4. Breach of the Arbitration Agreement

One potential objection with the above sample clause may be that it would unnecessarily place one of the parties in a position where they would be forced to breach the arbitration agreement (and hence may be liable for damages if granted by the tribunal later) when one party does not fulfill its obligation to respond within seven days of the receipt of the arbitration notice. However, even this objection may not hold water as the fundamental basis of arbitration is consent and when two commercial parties intend to have speedy dispute resolution along with the freedom to determine the arbitrators, procedure, etc. of the arbitral tribunal, there is little ground to argue that this flexibility cannot be extended to the formation of the arbitral tribunal.

Conclusion

Therefore, as per the foregoing, there are more reasons in favor of incorporating the more elaborated sample arbitration clause mentioned above as opposed to the potential objections against its incorporation. If more and more parties were to adopt such clauses, they could drastically reduce court intervention and deter guerrilla tactics of delay and abuse of the process by the parties. The only set of circumstances in which the parties would be forced to go to courts with respect to the nomination of the sole arbitrator by the mutual agreement would be the challenge the appointment of the arbitrator under Article 13 (3) or 14 (1) of the Model Law.

Thus, the acceptability of asymmetrical clauses may actually be a silver lining permitting a spin-off or variation which may ultimately create situation where court-appointed sole arbitrators would become an exception rather than the norm, especially in countries with slow court procedures, where delay tactics in appointment of sole arbitrator is often the first resort when one of the party is the government or a public sector undertaking. While there is little or no basis to reasonably predict how the courts in each country would react to such a clause, it cannot reasonably be denied that such a clause would only further arbitral efficacy and reduce court intervention to a bare minimum, ultimately strengthening the goal of speedy dispute resolution.

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