FT INNOVATIVE LAWYERS ASIA-PACIFIC 2023 WINNER

Pinsent Masons

Drafting Arbitration Agreements (Part 1)

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Pinsent Masons

29 May 2025

A purpose-led professional services business with law at the core

Target Outcomes

- Understand that a carefully drafted, relevant Arbitration Agreement can save a lot of time, cost and disruption during the contract term
- Identify the main points to consider when drafting an Arbitration Agreement at contract stage
- Enable informed decisions to be made about how to draft international Arbitration Agreements
- Draft Arbitration Agreements that are valid and binding

Agenda

- Why Arbitration?
- Defining an Arbitration Agreement
- Basic Principles of Arbitration Agreements
- Common Elements of Arbitration Agreements
- Conclusion & Q&A

Why Arbitration?

"*International commercial arbitration is a means by which international business disputes can be definitively resolved, pursuant to the parties' agreement, by independent, non-governmental decision-makers, selected by or for the parties, applying neutral adjudicative procedures that provide the parties an opportunity to be heard.*"

G. Born, § 1.02 International Commercial Arbitration (3rd Edition, 2021)

Why Arbitration? The Advantages

Flexibility: Arbitration is based on party agreement and can be flexible as to procedure, language, presiding arbitrators, etc

Confidentiality: Arbitral awards are not published and hearings are not open to the public

Impartiality: Wide range of competent arbitrators available with different qualifications (including foreign nationals)

Enforceability: Arbitral awards are generally enforceable worldwide (pursuant to New York Convention – 168 member states)

Why Arbitration? Advantages to Litigation

- Privacy of proceedings
- Usually confidential and unpublished
- Control over procedures
- International Enforceability
- Quicker and more economical

A Word of Warning

There is no such thing as a ‘model’ or ‘all purpose’ clause appropriate for all occasions

Each clause needs to be considered carefully, and tailored to the specific situation

To do this, you must know what is essential, and what is desirable in the particular deal

This requires understanding and managing the interaction of multiple legal systems, multiple sets of documents and arbitration options

A well-rounded understanding of arbitration practice and procedure is therefore essential before you ever pick up the pen to draft an arbitration agreement

Defining an Arbitration Agreement

UNCITRAL Model Law - Option 1

(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing.

UNCITRAL Model Law – Option 2

"Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

Defining an Arbitration Agreement

New York Convention

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

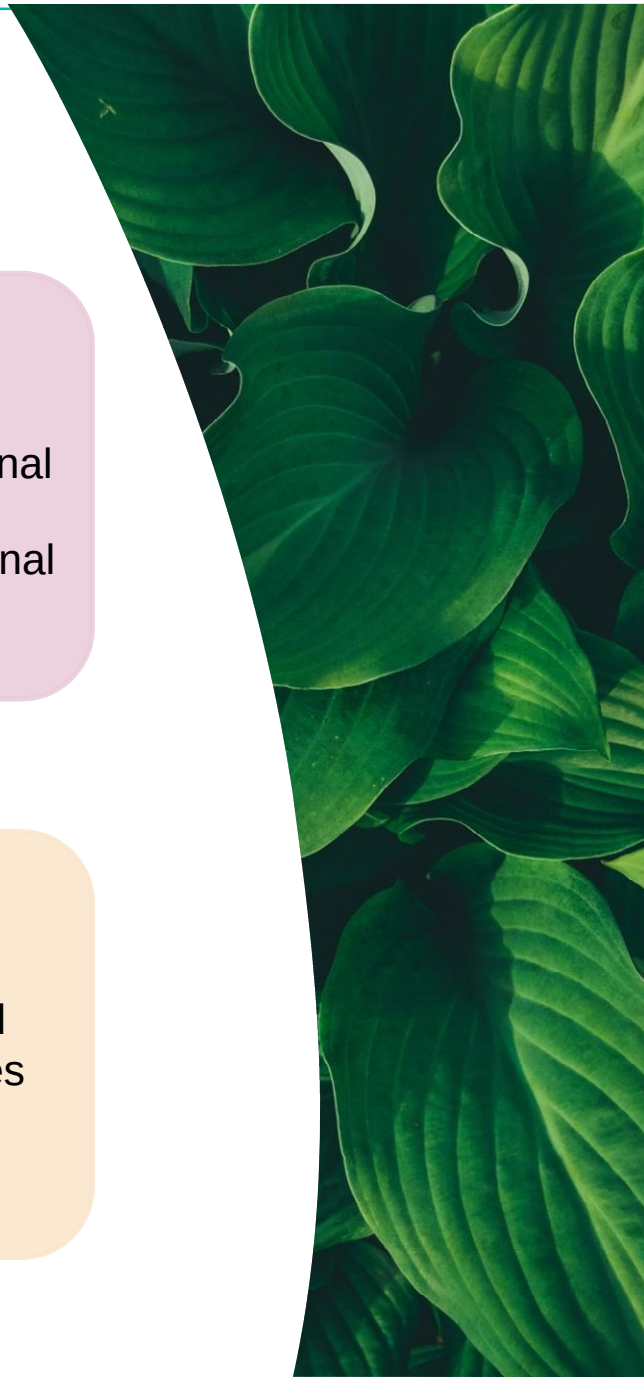
2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

Defining an Arbitration Agreement

Grounds for Non-Enforcement under the New York Convention

1. The parties to the agreement referred to in article II were, under the law applicable to them, **under some incapacity**, or the said **agreement is not valid under the law to which the parties have subjected it** or, failing any indication thereon, under the law of the country where the award was made (Art V(1)(a))
2. The award **deals with a difference not contemplated by or not falling within the terms of the submission to arbitration** … (Art V(1) (c))
3. **The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties**, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place (Art V(1) (d))
4. The subject matter of the difference is not capable of settlement by arbitration under the law of [the enforcing] country (Art V(2)(a))

Basic Principles of Arbitration Agreements



Submission to arbitration

- identify that disputes are resolved in arbitration not elsewhere
- referral must usually be mandatory/final and binding on all parties
- may be effective if arbitration is optional for one party but binding on others

Writing

- Arbitration agreement is documented
- Does not need to be signed by parties

Basic Principles of Arbitration Agreements

Consent

- *"**consent** of the parties remains the essential basis of a **voluntary system** of international commercial arbitration"* (Redfern & Hunter)
- Capacity & authority to enter into arbitration agreements
- Consent may be intended to extend beyond the direct signatories (i.e. subsidiaries or affiliates)
- Consent may extend beyond the individual contract to a scheme of contracts

Separability

- Arbitration agreement is separate from the rest of the contract
- Deals with situations where the contract as a whole was induced by fraud, rescinded or terminated by its own terms and parties say this includes the arbitration agreement
- Arbitration clause only affected where it is specifically tainted by the wrong-doing

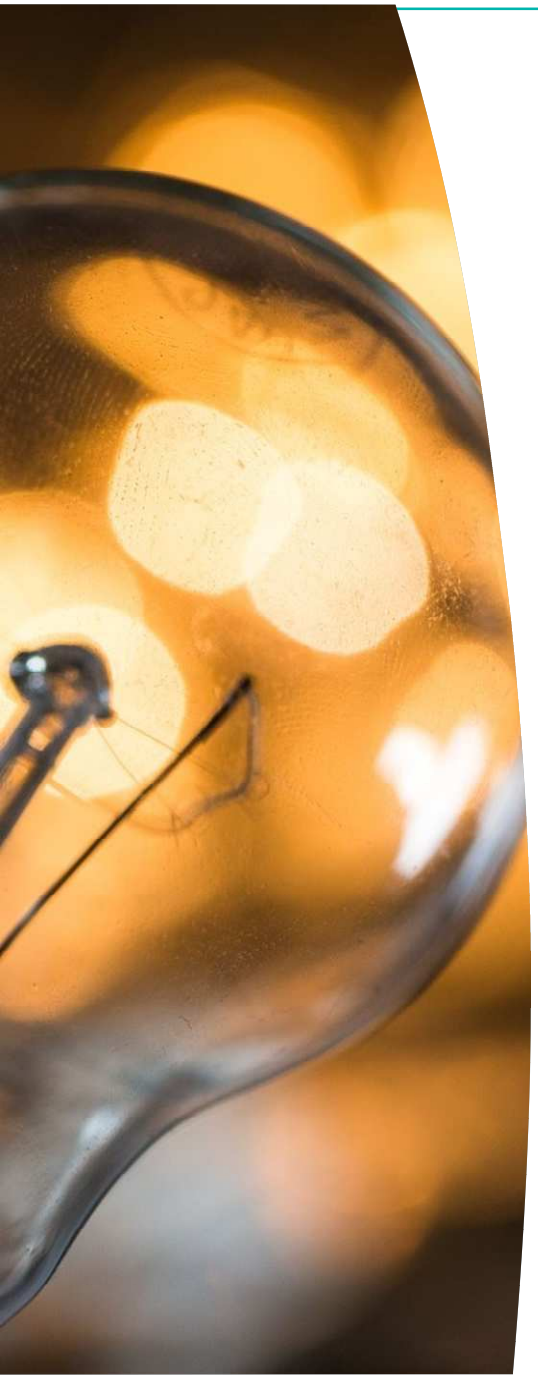
Basic Principles of Arbitration Agreements

Arbitrability

- The idea that certain kinds of claims are not fit to be resolved in arbitration
- Traditional view – competition, IP, securities regulatory, employment, trust disputes not suitable for arbitration
- Still closed – matrimonial, family, criminal, testamentary still mostly not arbitrated
- Starting to erode – parties need to consider the position in relevant jurisdictions

Statutory control

- Arbitration agreements may be blocked or subject to conditions by law
- Consumer protection legislation may affect arbitration agreements
- Arbitration agreements may be considered to be unconscionable or unfair clauses



End Result – A Basic Arbitration Agreement

Narrow scope clause

"Any dispute **arising under** this contract shall be referred to and finally resolved by arbitration."

Broader scope clause

"Any dispute **arising out** of or **in connection with** this contract shall be referred to and finally resolved by arbitration."

Even Broader Scope clause

"Any dispute, controversy, difference or claim arising out of or relating to this contract, **including the existence, validity, interpretation, performance, breach or termination thereof** or **any dispute regarding non- contractual obligations arising out of or relating to it** shall be referred to and finally resolved by arbitration"

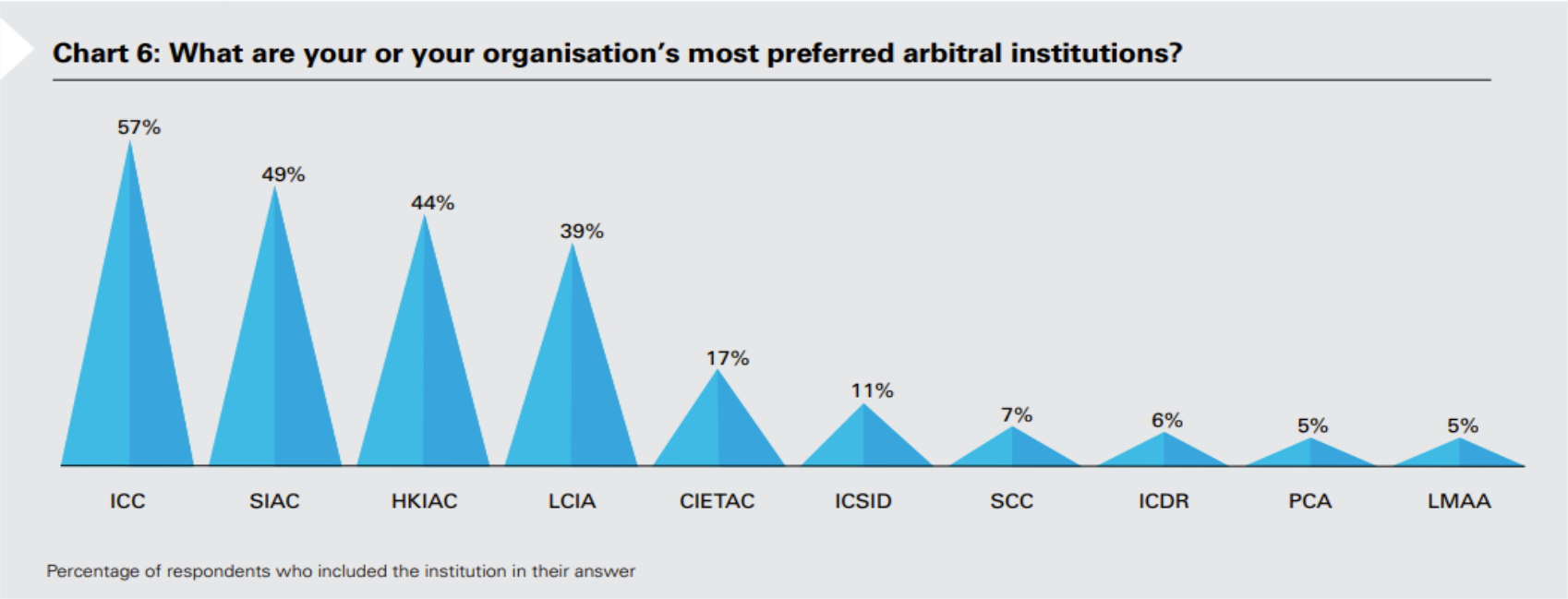
Common Elements of Arbitration Clauses

- Arbitral Institutions
- The Seat or Place of the Arbitration
- Number of Arbitrators
- Consolidation and Joinder
- Assignment and Novation
- Other Considerations

Arbitral Institutions - Institutional v Ad Hoc

- **Administered Arbitration** – An arbitration supervised by an institution. Institutions and their rules:
  - regulate starting the arbitration and appointment of the tribunal;
  - provide a set of procedural rules
  - take on some degree of administrative control and management of the proceedings
- **Ad hoc arbitration** – parties decide on and control the process until the tribunal is appointed, and tribunal controls thereafter
- Identifying an institution and adoption of its arbitration rules usually go together
- Still possible to have ad hoc arbitration with agreed procedural rules e.g. UNCITRAL Rules

Arbitral Institutions – Preferred Institutions



Source: QMUL Arbitration Survey 2021

CRCICA

VIAC Vienna International Arbitral Centre

DIS German Arbitration Institute

DIAC Dubai International Arbitration Centre

American Arbitration Association®

LCA Lagos Court of Arbitration International Centre for Arbitration and ADR

Arbitral Institutions – Selecting Institutions

- **Permanency** – make sure it has a good chance of being in existence when a dispute arises (c.f. abolition of the DIFC-LCIA)

- **Up-to-date Rules** – are their institutional rules up-to-date, efficient, reduce cost and delay, and suitable for the arbitration desirable to the parties. Major differences may include:
  - Existence of emergency arbitration / urgent relief
  - Available panels of arbitrators
  - Fees payable to the institution and fixing of tribunal fees
  - Provisions in relation to Terms of Reference procedures
  - Level of scrutiny of award

- **Qualified staff** – does the institution have qualified staff who can provide relevant back office services in relation to administration of the arbitration, and facilitate the tribunal in its work

Arbitral Institutions – Selecting Institutions

Reputation – what is the general reputation of the institution on the market and how is that reputation changing?

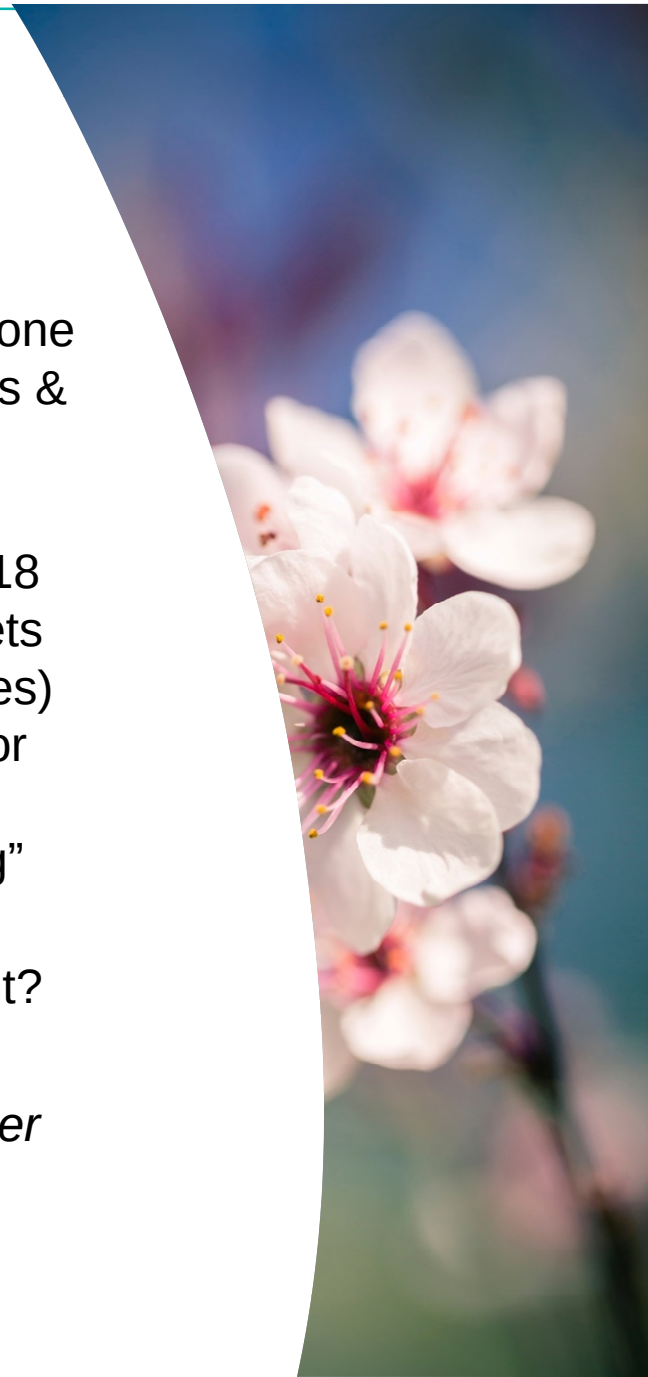
Previous experience – what is the previous experience of the institution?

Charges – how does the institution charge, and how does the value of the claim affect the charges?

Ancillary Services – can the institute assist with other aspects of the process like holding deposits, providing a hearing venue etc

Values – Institutions increasingly support the importance of ESG considerations or diversity considerations in tribunals etc

Arbitral Institutions – Selecting Institutional Rules



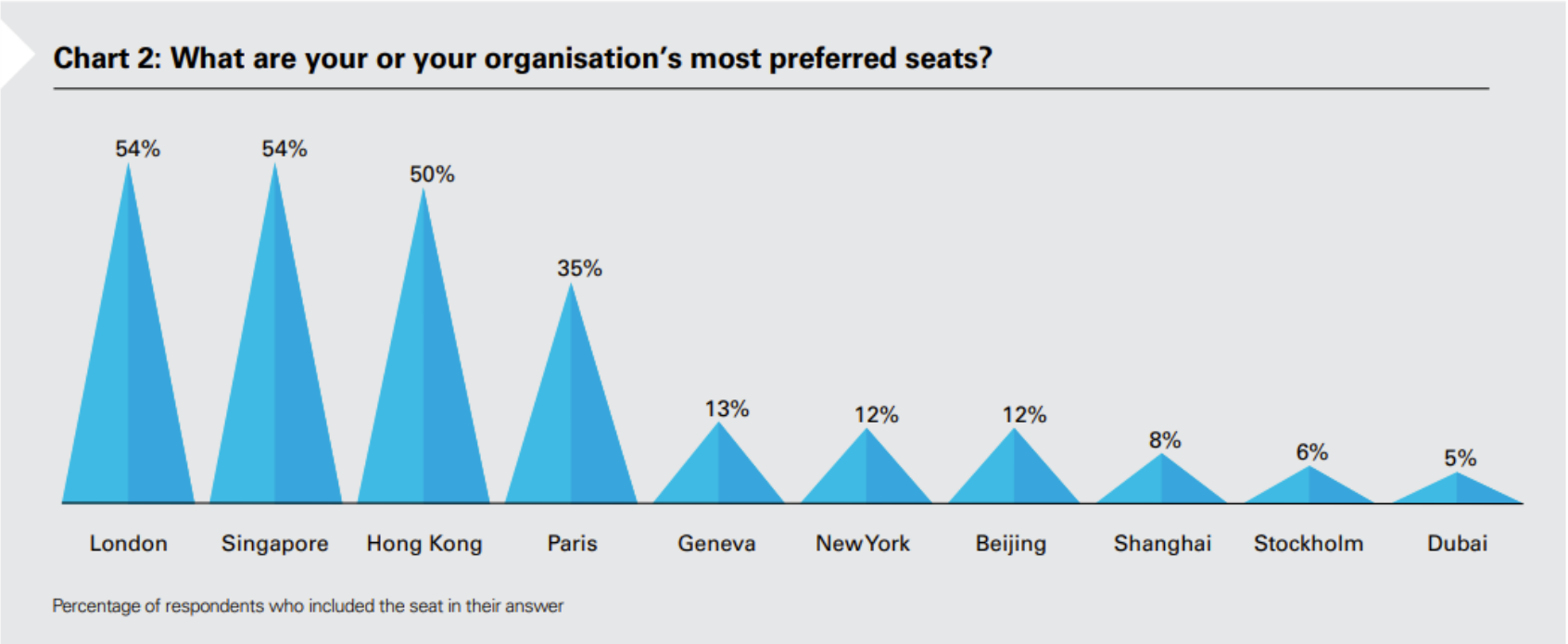
- **Different Rules –** many institutions have more than one set of rules (e.g. HKIAC Administred Arbitration Rules & HKIAC Domestic Arbitration Rules)
- **Different versions of Rules** – many rules have different arbitration rules editions (e.g. ICC Rules 2018 and ICC Rules 2021) and provide many other rule sets (e.g. ICC Mediation Rules or ICC Dispute Board Rules) – do you want "the rules now in force", "as modified or amended from time to time" or "rules in effect on the date of the commencement of the arbitral proceeding"
- **Amendments** - do the parties want to make any bespoke changes to the rules and if so to what extent?

Sample: "*arbitration administered by the [institution] under the [rules] in force when [event]*"

The Seat – What is it

- The legal ‘place’ of arbitration. The Seat determines:
  - The applicable procedural law of the arbitration
  - The national court that may assist or supervise the parties and the tribunal during the arbitration
  - The national court that has exclusive jurisdiction to determine any challenge or appeal in respect of the arbitral award
  - The nationality of the award (or country of origin) for the purposes of recognition and enforcement.
- Physical ‘venue’ of arbitration may be different

The Seat – Preferred Seats



Source: QMUL Arbitration Survey 2021

- The top 5 seats enjoy a 'dominant' position as they have been long recognized as 'safe seats'
- Seats are often tied to their dominant institution e.g. Singapore & SIAC / Hong Kong & HKIAC / Paris & ICC
- Rising regional seats – New York, Beijing, Dubai, Cairo, Nairobi

The Seat – selection considerations

- Whether the award will be enforceable in other countries where the other side has assets (e.g. a party to New York Convention)
- Whether the law of the seat will recognize the arbitration agreement as valid
- What is the scope of review by the courts at the seat of the arbitration award
- Whether the national courts will hinder the arbitration process (i.e. not a pro-arbitration jurisdiction or excessive delay / cost)
- Whether the national courts will support the arbitration process (e.g. stays to arbitration, appointment of arbitrators, interim remedies etc)
- Whether parties have choice of counsel in the arbitration including freedom to choose their own representatives vs using local lawyers
- Whether parties have choice of arbitrator including freedom to choose international arbitrators who are foreign nationals

The Seat – selection considerations

- Is the jurisdiction politically stable and economically attractive?
- Is the local legal system perceived as neutral and impartial?
- Is the local arbitration law modern and uptodate? Are they updated on a regular basis?
- Is third party funding permissible in the jurisdiction?
- Do the local courts have a track record of enforcing arbitration agreements and arbitration awards?
- Are the arbitration courts able to deal with matters remotely?
- Does the seat take an expansive view of what kinds of disputes are arbitrable?

The Seat – Mandatory Rules

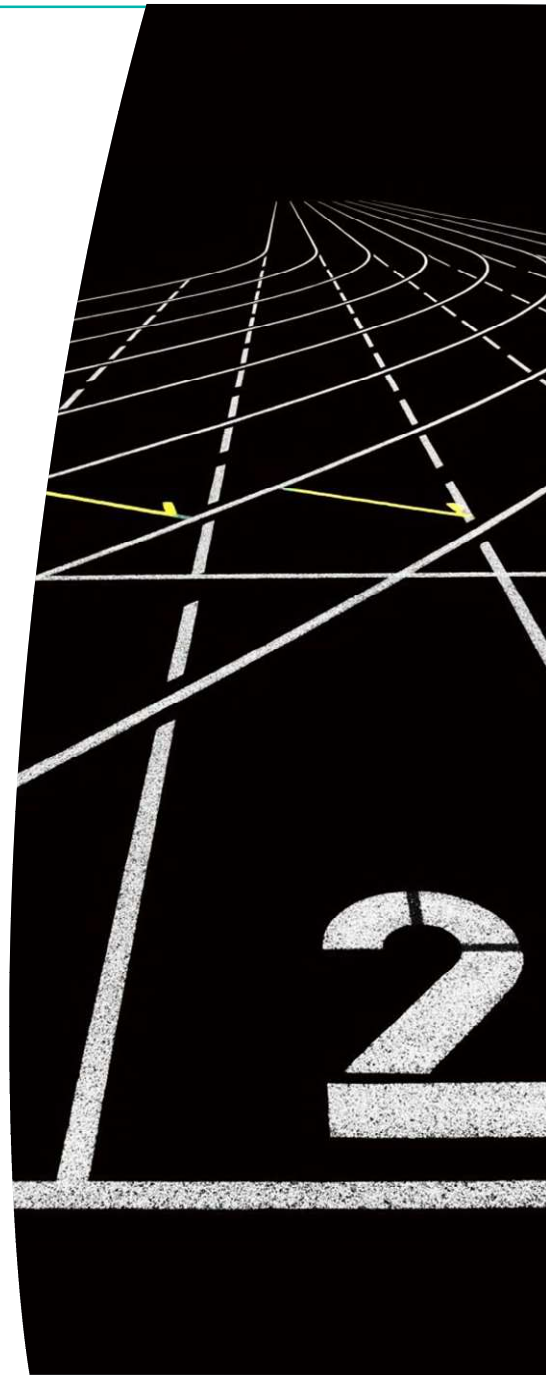
- Mandatory rules – rules which cannot be contracted out of
- Non-mandatory rules – rules which can be changed by the parties
- Arbitration agreement may be overwritten in part by mandatory rules of the law of the seat
- Examples:
  - contracting out of the general duty to act fairly and impartially between the parties
  - the right to have the courts review awards on jurisdiction or set aside awards

Sample language: "*The seat of arbitration shall be … [***]*"

Number of Arbitrators

- Typically 1 or 3 arbitrators based on value of contract and potential disputes. May need to consider:
  - size and complexity of the dispute
  - propensity to give more ‘correct’ decisions / error correction
  - diversity of experience / perspectives
  - party ‘buy in’ to the process due to picking ‘their’ arbitrator
  - cost of a 3 person tribunal vs 1 person tribunal
- Provisions may be made in the arbitration law / rules
- Bespoke provisions:
  - State for claims under certain value only one arbitrator otherwise three
  - Specify a time for a decision to be made
  - Specify what will happen if a decision cannot be made

Sample language: “*The number of arbitrators shall be ... (one or three).*”



Selecting Arbitrators

- 1 arbitrator – typically party agreement on nomination
- 3 arbitrators – typically each side nominates one and the two arbitrators / institution nominates a presiding arbitrator
- Further approaches:
  - Naming arbitrators in the contract
  - Identifying qualifications for arbitrators in the contract (e.g. relevant commercial experience)
  - Identifying restrictions on arbitrators (e.g. nationality of the parties)
  - Rule specific requirements like identifying the ‘appointing authority’ (UNCITRAL Rules Art 8) and institutional appointment process
  - Rules dealing with one parties’ failure to engage with nomination process
- Restrictions on the parties’ autonomy under arbitral rules (e.g. tribunal to be confirmed by institution – ICC Rules Art 13 or institutional lists)
- Need to consider process for challenging arbitrators, resignation or other replacement of arbitrators or continuation of proceedings

Governing Law of the Arbitration Agreement

The governing law determines the validity, interpretation, and enforceability of the arbitration agreement.

Different jurisdictions apply different choice-of-law rules (e.g., law of the seat vs. law of the main contract) when identifying the law governing the agreement

Failure to specify the governing law can lead to satellite litigation (e.g. *Enka v Chubb* (UKSC), where parties spent years disputing which law applied)

Align the clause with the seat of arbitration and institutional rules to ensure procedural coherence

Sample clause: "*This arbitration clause shall be governed by the law of [***]*"

Language of the Arbitration

- Arbitration can generally be conducted in any language or in multiple languages
- Choices of institution / rules can have impacts (e.g. HKIAC rules allow pre-commencement communication in English or Chinese if no language selected)
- Parties may prefer the language to be:
  - Language of the parties' nationality
  - Language of the contract or seat
  - Multi-language arbitrations
- Has implications on the choice of arbitrator and counsel and costs of translating documents

Sample: "*The arbitration proceedings shall be conducted in [***]*"

Multi-Contract Arbitrations

- Risk of concurrent arbitration proceedings with inconsistent decisions / findings.
- Avoid this by having language in arbitration agreements that allow:
  - Consolidation – joining of separate but related arbitrations
  - Joinder – adding a party to an existing arbitration
- In general clauses may need to be compatible across e.g. institution, rules, seat, process etc
- Arbitration rules now generally have detailed joinder and consolidation provisions to manage risks (e.g. composition of the tribunal) that arise

Sample: "*any arbitration arising out of this agreement may include by consolidation or joinder or by any other manner, any other person or persons whom or whom a party to the arbitration generally believes to be substantially involved in a common question of law or fact providing that such person has consented to joinder or consolidation or is party to a compatible arbitration agreement*"

Optional Extras

- Multi-tier dispute resolution clauses: requirement to engage in other forms of ADR before arbitration
- Confidentiality: express obligation to keep the arbitration and all materials generated confidential if needed
- Summary procedure: provides the Tribunal with the power to issue quick awards where there is no reasonably arguable defence
- Rights of appeal: should this right be excluded or limited, and if so to what extent? Should there be express consents to appeal where this is allowed under the applicable law?
- Draft of proposed award: do the parties want the right to review and comment on the draft of any award before it is given and correct any errors?
- Notice provisions: if not included in the contract, are these to be included in the arbitration clause?
- Waiver of sovereign immunity or immunity from execution: may be required if dealing with a state or state-owned entity

Optional Extras

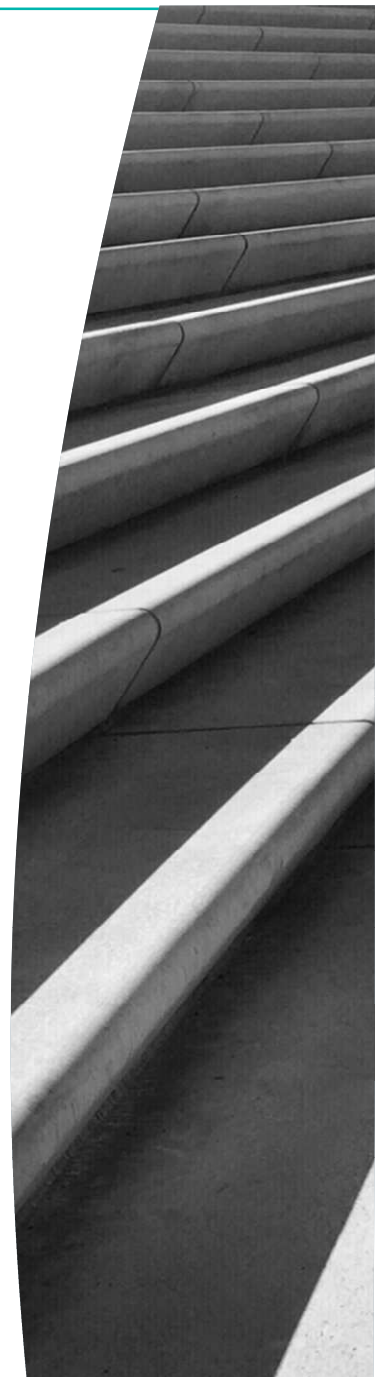
- Split clauses – allowing one or both parties to be able to pick the suitable dispute resolution mechanism after the dispute has arisen
- Interim relief – does specific provision need to be made in relation to the tribunal granting interim relief
- Emergency relief – does specific provision need to be made in relation to relief before the arbitration substantially commences if parties do not want to go to the court system
- Arbitrator freedom to not apply law – should the tribunal be able to decide the dispute on the basis of what is equitable or by reference to transnational law (e.g. lex mercatoria)
- Exemplary damages – do the parties need to carve out the tribunal's power to order exemplary or punitive damages under the local law
- Remedies – do the tribunal need to be specifically empowered to grant certain remedies (e.g. specific performance)

Common Options – Multi Tier Clauses

- Parties follow a sequence of dispute resolution steps—typically negotiation, mediation then arbitration

- Why Multi-Tier?
  - Encourage early resolution and preserve commercial relationships
  - Reduce costs and time associated with formal proceedings
  - Provide procedural clarity and escalation pathways

- Possible tiers that can be used:
  - Adjudication (Contractual DABs or statutory)
  - Expert Determination
  - Early neutral evaluation
  - Mini trials



Common Options – Multi Tier Clauses

Key Drafting Tips:

- Use **mandatory language**: “shall” instead of “may”
- **Define each step clearly**: who, how, and when
- **Set timeframes**: e.g., 30 days for negotiation
- **Specify consequences**: what happens if a step is skipped
- **Ensure procedural certainty**: avoid vague terms like “amicable resolution” or “best efforts”

Jurisdictional Insights:

- **UK**: Enforceable if mandatory, clear, and objectively ascertainable (e.g., Cable & Wireless v IBM)
- **Singapore**: Favors enforceability if steps are specific and reflect party autonomy
- **Hong Kong**: Courts uphold clauses with defined processes and timeframes (e.g., HZ Capital)

Necessary Options - Entry into Judgment

- Some language to deal with the enforcement of the award

- Language can be necessary to simplify the exercise of jurisdiction in any enforcement action in the United States under the Federal Arbitration Act

Sample: "*Judgment upon the award may be entered by any court having jurisdiction thereof or having jurisdiction over the relevant party or its assets*"

Interim Relief

- There is wide acceptance that the court may award injunctive relief between the parties to the arbitration as:
  - It takes some time to constitute an arbitration tribunal,
  - The tribunal itself cannot enforce injunctive relief on its own
- Parties may therefore seek interim relief from court
- Most rules provide that resort to court for interim relief pending completion of the arbitration is not incompatible with, or a waiver of, the right to arbitrate under those rules

Sample: "*A request by a party to a court of competent jurisdiction for interim measures shall not be deemed to be incompatible with, or a waiver of, this agreement to arbitrate.*"

Model Clause - ICC

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 Clause - LCIA

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.

The number of arbitrators shall be [one/three].

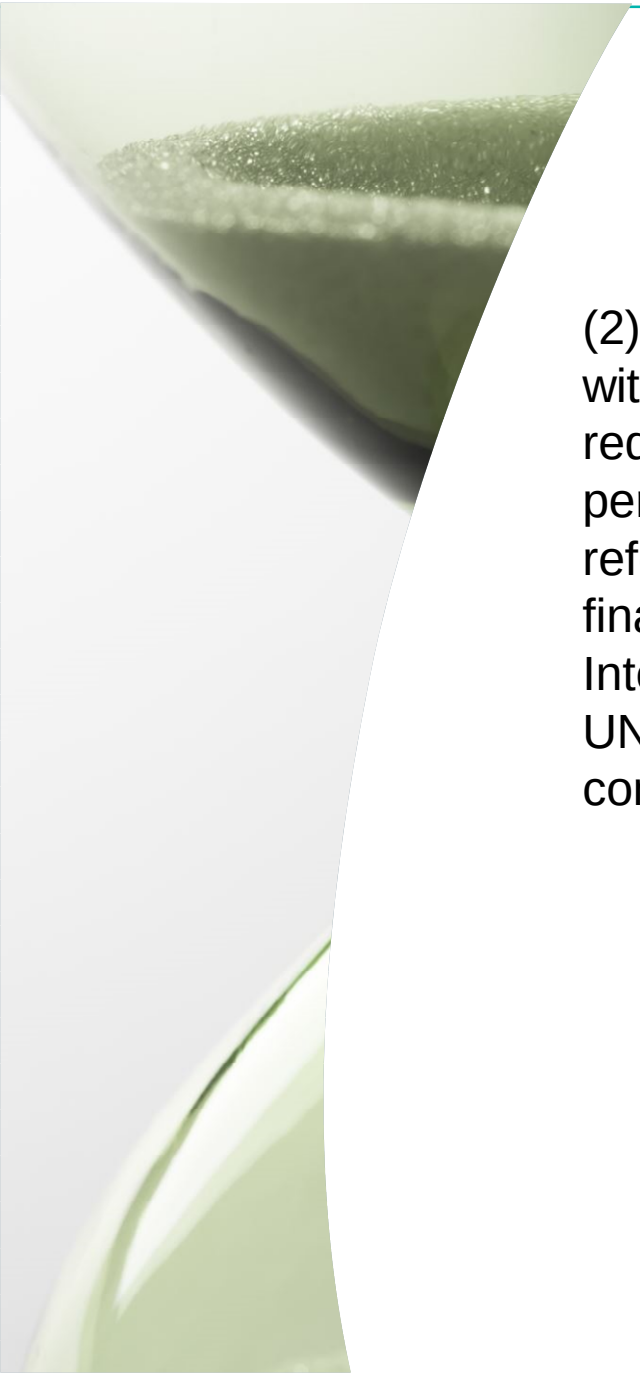
The seat, or legal place, of arbitration shall be [City and/or Country].

The language to be used in the arbitral proceedings shall be [ ].

The governing law of the contract shall be the substantive law of [ ].

Sample Clause – Multi Tier

(1) Dispute Resolution. The Parties agree that if any controversy, dispute or claim arises between the Parties out of or in relation to this Agreement, or the breach, interpretation or validity thereof, the Parties shall attempt in good faith promptly to resolve such [dispute] by negotiation. Either Party may, by written notice to the other, have such dispute referred to the Chief Executive Officers of the Parties for resolution. The Chief Executive Officers (or their authorized representatives) shall meet at a mutually acceptable time and place within ten (10) Business Days of the date of such request in writing, and thereafter as often as they reasonably deem necessary, to attempt to resolve the dispute through negotiation.



Sample Clause – Multi Tier

(2) Arbitration. If any dispute cannot be resolved amicably within sixty (60) Business days of the date of a Party's request in writing for such negotiation, or such other time period as may be agreed, then such dispute shall be referred by either Party for settlement exclusively and finally by arbitration in Hong Kong at the Hong Kong International Arbitration Centre … in accordance with the UNCITRAL Arbitration Rules in force at the time of commencement of the arbitration …

Key Takeaways

- A well-crafted arbitration agreement can save significant time, cost, and disruption during the contract
- A well crafted arbitration agreement is valid, binding and makes provision for the key elements that matter to the parties
- There must be a clear and unequivocal desire to resolve disputes through arbitration
- Parties need to make well-informed decisions on the key elements of the arbitration clause by understanding arbitration law and practice
- Poor drafting risks clauses being ‘pathological’ leading to difficulties in interpretation and application, and cost / delay to the parties

Q&A

Thank You

FT INNOVATIVE LAWYERS ASIA-PACIFIC 2023 WINNER

Pinsent Masons

Drafting Arbitration Agreements (Part 2)

Thomas King

Pinsent Masons

29 May 2025

A purpose-led professional services business with law at the core

Target Outcomes

- Identify defective arbitration clauses and the common issues that cause defects
- Understand the approach taken by courts in various jurisdictions to dealing with defective clauses
- Practice drafting an arbitration clause and identify suggested amendments
- Understand the best practice adopted in Africa

Agenda

- Primer on Pathological Clauses
- Sample Pathological Clauses
- Fixing Pathological Clauses – Practical Exercise
- Drafting exercise – Sunrise Power Scenario
- Conclusion & Q&A

Pathological Clauses – A Primer

- “pathological clauses” - arbitration clauses with apparent defect(s) liable to disrupt the smooth progress of the arbitration

- Imperfections may be resolved by interpretation and depend on the interpretation rules of the law governing the arbitration agreement

- Interpretation of a clause:
  - Depends on courts in each jurisdiction
  - Can turn on the policy of each jurisdiction towards arbitration
  - Cannot rewrite the clause or the parties’ bargain

Pathological Clauses – A Primer
Pro Arbitration Approach

Singapore Court of Appeal in *Insigma v Alstom:*

"… where the parties have evinced a clear intention to settle any dispute by arbitration, the court should give effect to such intention, even if certain aspects of the agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars… so long as the arbitration can be carried out without prejudice to the rights of either party and so long as giving effect to such intention does not result in an arbitration that is not within the contemplation of either party".

Pathological Clauses – A Primer

Pro-Court Approach

Lipton Teas Infusions Tanzania Limited vs C. H. B. S LTD [2025] TZHCComD 79 (25 April 2025)

"Where the Court is not in a jurisdiction that is pro-arbitration, normally it interprets the arbitration clauses narrowly based on the principle that an arbitration clause should be interpreted narrowly and therefore the ambiguity is resolved against the parties' intention to refer the dispute to arbitration. The jurisdiction of the Arbitrator stems from the Arbitration Agreement. Their intention to submit to arbitration must unequivocally arise from the agreement. The agreement must have originated from the parties' free will. Therefore, if one of them has acted induced by error or as a consequence of fraud, coercion or undue influence, there has been no real consent and the agreement to arbitrate is not valid. The Court, therefore, assumes jurisdiction and takes cognizance of the dispute and proceeds with the trial."

Note: Tanzania is a pro-arbitration jurisdiction

Pathological Clauses – A Quick Primer

Pro-Court Approach

IDS Industry Service and Plant Construction South Africa (Pty) Ltd v Industrius D.O.O.

- "In the exercise of the court's discretion to stay, the court a quo held that South African courts should exhibit a 'pro-enforcement bias' with regard to the enforcement of foreign arbitral awards. I agree. The 'pro-enforcement bias' is a strong factor in the exercise of a court's discretion and should weigh in favour of enforcement of arbitral awards and against delaying it."

Tee Que Trading Services (Pty) Ltd v Oracle Corporation South Africa (Pty) Ltd and Another (case no 065/2021) [2022] ZASCA 68 (17 May

- "*The Model Law (which South Africa adopted through the **International Arbitration Act of 2017**) reflects the international approach to international commercial arbitration agreements that, unless an arbitration agreement is null and void, inoperable or incapable of being performed, courts are obliged to stay action proceedings pending referral to arbitration*."

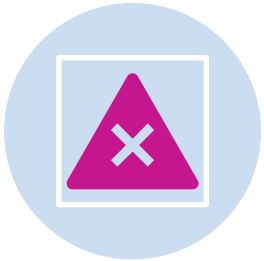
Metallurgical and Commercial Consultants (*Pty*) *Ltd v Metal Sales Co* (*Pty*) *Ltd*:

- "*Such an onus is not easily discharged. There are certain advantages, such as finality, which a claimant in an arbitration enjoys over one who has to pursue his rights in the Courts; and one who has contracted to allow his opponent those advantages will not readily be absolved from his undertaking . . . the discretion of the Court to refuse arbitration under a submission was to be exercised judicially, and only when a 'very strong case' for its exercise had been made out*."

Pathological Clauses – Examples

(1) BE VAGUE ABOUT WHETHER THE DISPUTE IS GOING TO ARBITRATION OR THE COURTS

(2) LEAVE IT UNCLEAR WHETHER THE ARBITRATION IS FINAL OR BINDING



(3) NAME A SPECIFIC ARBITRATOR IN THE CLAUSE WHO IS THEN UNABLE OR UNWILLING TO ACT

(4) SPECIFY AN APPOINTING AUTHORITY WHO DOES NOT WANT THE JOB

(5) REQUIRE QUALIFICATIONS FOR ARBITRATORS THAT ARE IMPOSSIBLE TO MEET

(6) PROVIDE UNREASONABLY SHORT DEADLINES FOR ACTIONS BY THE ARBITRATORS

Pathological Clauses – Examples

(7) Set out conflicting or unclear procedures, seats, or applicable laws

(8) Modify the rules so much that the institution refuses to administer the arbitration

(9) Require an institution to administer another institution's rules

(10) Specify an institution or rules that don't exist

(11) Specify an institution that doesn't want to administer arbitrations

(12) Include mandatory pre-arbitration steps that are impossible to comply with

Pathological Clauses – Examples

Korean Supreme Court Decision

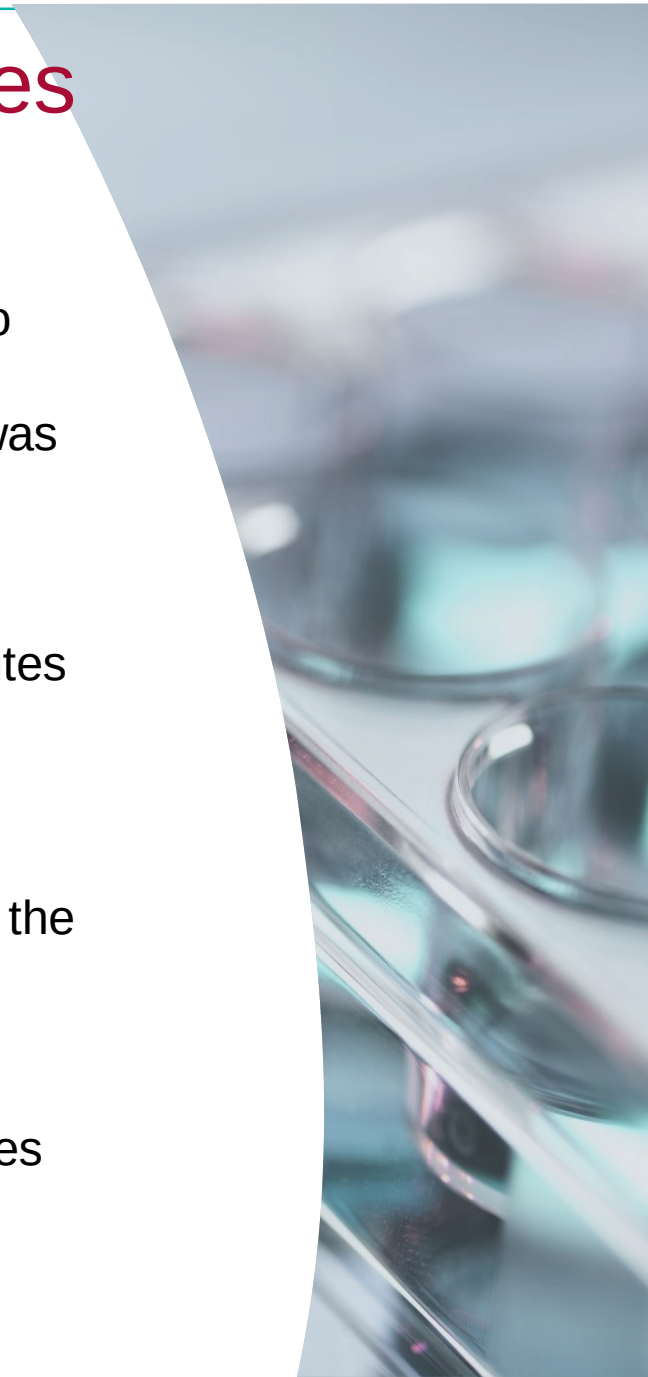
Arbitration Clause

"*All disputes, controversies, claims, or differences arising out of or in relation to this agreement, or a breath* (sic) *hereof, shall be finally settled by Korean law or in accordance with the Commercial Arbitration Committee of International Commercial Law*"

Is this a valid arbitration agreement?

Pathological Clauses – Examples

Korean Supreme Court Decision



First Instance

- No arbitration agreement - fails to identify an intent to refer disputes to arbitration
- Reference to Korean law and use of ‘or’ meant this was about having options to resolve through litigation or arbitration
- The institution specified does not exist
- No language excluding litigation from resolving disputes
- At best this might be an optional arbitration clause

Supreme Court Decision

- Weight put on “shall be finally settled” in language of the clause as a matter of interpretation
- Doesn’t matter if aspects like institution etc are ambiguous, contradictory or wrong
- Weight is on manifestation of intent to resolve disputes through arbitration

Pathological Clauses – Examples

Chinese Court Decision

Arbitration Agreement

"*All disputes arising from the execution of or in connection with the present contract shall be settled through friendly consultation between both parties. In case no agreement can be reached, the dispute shall be submitted to Singapore International Economic and Trade Arbitration Commission in USA law apply. The disagreement should be settled on the basis of the underlying contract and applied law. The decision of arbitration court will be binding and final for both parties*". (Emphasis added)

Is this a valid arbitration agreement?

Pathological Clauses – Examples

Chinese Court Decision

The Challenge

1. Institution does not exist and no seat specified. Chinese courts ordinarily strike down such clauses
2. If clause is governed by Chinese law, then Chinese law prohibits *ad hoc* arbitration

Court Decision

1. Correct that no institution has been identified
2. However, clear intention to arbitrate and it can be inferred that it would be under the Singaporean legal system
3. Seat should therefore be Singapore, and arbitration is governed by Singaporean law
4. Proper construction of the clause is a matter for the Singaporean courts

Pathological Clauses

Some Clauses to Fix

- *"All disputes arising in connection with the present agreement shall be submitted in the first instance to arbitration. The arbitrator shall be a well-known Chamber of Commerce (like the ICC) designated by mutual agreement between the parties."*

- *"Any and all disputes arising under the agreements contemplated hereunder …will be referred to mutually agreed mechanisms or procedures of international arbitration, such as the rules of the London Arbitration Association".*

- *"In case of dispute (contestation) the parties undertake to submit to arbitration but in case of litigation the Tribunal de la Seine shall have exclusive jurisdiction".*

Arbitration Drafting Exercise

Sunrise Power Scenario

Sunrise Power Ltd is a joint venture of a European solar plant operator, a Chinese construction company and a Kenyan investment fund. Sunrise has entered into a 25 year power purchase agreement with the Kenyan and Tanzanian governments to develop a 500MW integrated solar and battery storage facility which has interconnections to both the Kenyan and Tanzanian power grids.

Sunrise is gravely concerned about the risks posed by (a) changes to local content requirements during the project (b) delays caused by import permits and changes in tariff levels and (c) potential changes to the approach to PPAs in Kenya / Tanzania during the project.

You have been asked to draft a suitable arbitration agreement for the PPA

Arbitration Drafting Exercise

Sunrise Power Scenario

Some points to consider:

- Scope of referral to arbitration
- Seat, venue & institution
- Number and qualifications of Arbitrators
- Governing law
- Language
- Multi-tier dispute resolution
- Other optional extras

Arbitration Drafting Exercise

Sunrise Power Scenario

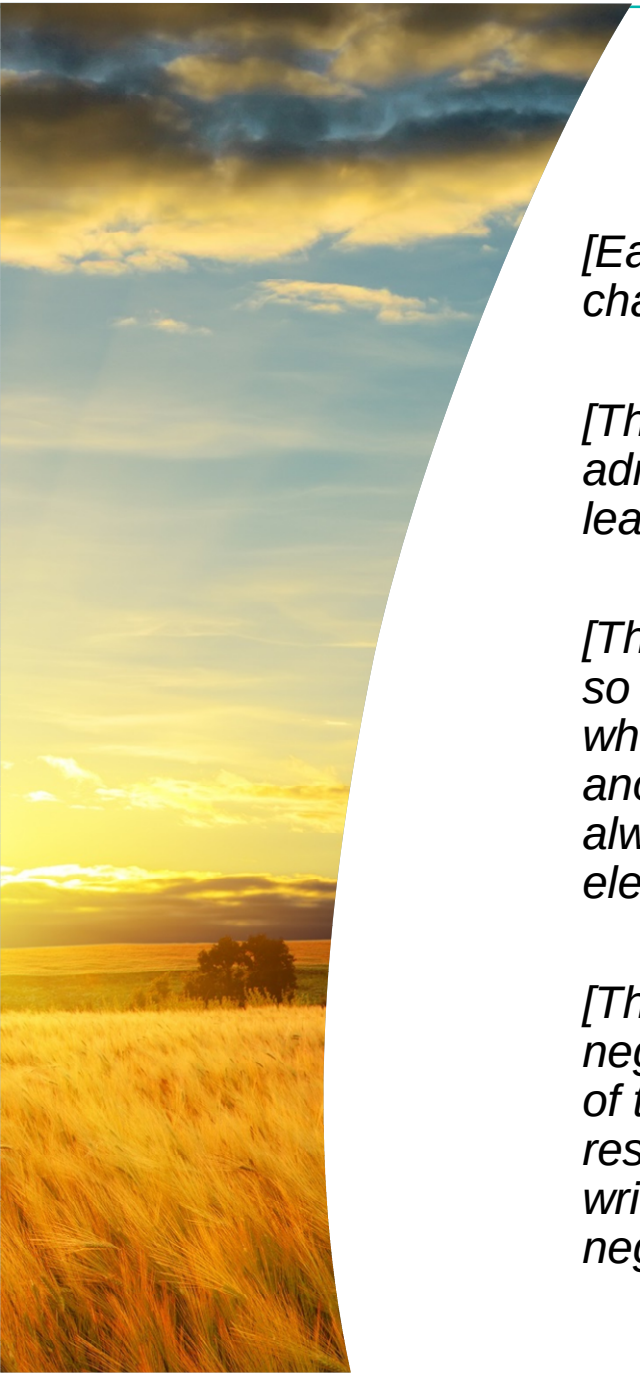
"Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Arbitration Rules 2020, which Rules are deemed to be incorporated by reference into this clause.

The number of arbitrators shall be three.

The seat of the arbitration shall be London.

The language to be used in the arbitral proceedings shall be English

The law governing the arbitration agreement shall be that of England and Wales."



Arbitration Drafting Exercise

Sunrise Power Scenario

[Each Party shall nominate one arbitrator, with the third (and chairperson) being nominated by the LCIA Court.]

[The chairperson shall be a practising senior counsel admitted to the Law Society of England and Wales with at least 25 years experience.]

[The LCIA Court shall nominate the arbitrators and in doing so shall take into account the nature of the dispute and whether the dispute is primarily legal, financial, technical or of another type which requires particular experience, provided always that one arbitrator (not the chair) shall be a qualified electrical engineer.]

[The parties shall first try to resolve the dispute by negotiation. The referring party shall notify the other in writing of the dispute and the parties shall meet and to attempt to resolve the dispute within 7 (seven) days from date of the written notice. If the dispute has not been resolved by such negotiation, the dispute shall be referred to …]

Key Takeaways

- Clear drafting is needed in respect of all elements to ensure that a clause is valid and operable
- Defective drafting can result in pathological clauses which can take time and cost to cure
- Courts in pro-arbitration jurisdictions will generally strive to uphold arbitration agreements
- When adapting existing arbitration clauses or drafting new arbitration clauses it is essential to ensure that all elements work together
- The end goal is to deliver an effective and efficient arbitration that is suited to the parties and their contract

Q&A

Thank You

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