ARBITRATION INSIGHTS: AUSTRALIA

DRAFTING ARBITRATION CLAUSES

The second briefing in our Arbitration Insights series provides a simple guide to drafting arbitration clauses. Arbitration clauses are often the last clauses to be negotiated once all the other terms are agreed. Drafted at sunset, negotiators are both tired and pleased that the substantive terms are agreed and ultimately would prefer to take in the view, than continue negotiations.

The problem is that the arbitration tribunal's jurisdiction is determined by the scope of the arbitration clause and if the arbitration clause is not properly drafted, significant and costly issues will arise if a dispute develops later.

The solution, if you are in a hurry, is to copy the model arbitration clauses from one of the arbitration institutions and both ACICA and the Resolution Institute have useful model clauses on their websites. Another option is to adopt the model clause from the recently launched Victorian Commercial Arbitration Scheme.

If you have more time, one of the advantages of arbitration is that the parties can define how they want their dispute to be run. If you want to draft your own clause, we set out below a checklist of the issues which the arbitration clause should include and then some drafting tips.

The Arbitration Clause Checklist

An arbitration clause should include the following information:

- the range of the disputes to be referred to arbitration
- the "seat" of the arbitration and governing law
- the arbitration procedural rules
- the number and qualification (if any) of the arbitrators
- the language of the proceedings

Drafting Tips

The Scope of the Disputes

Firstly and perhaps most importantly, it is important to consider what disputes are to be referred to arbitration. Australian courts apply the usual contractual rules of interpretation to arbitration clauses, which means that if the intention is to refer the widest possible range of disputes to arbitration, then the clause needs to be written using wide words.

Our suggestion is to define the disputes to be referred to arbitration as follows:

"Any dispute, difference, controversy or claim arising out of, relating to or in connection with [this Contract] including any question or issue regarding its existence, validity or termination shall be resolved by arbitration."

Of course, it is quite possible that the parties may want certain issues to be determined in arbitration and other issues determined by another dispute resolution procedure. This is acceptable and enforceable, although great care is needed to ensure that the dispute resolution is drafted in a way to give effect to the parties' intentions. If in doubt, the prudent approach would be to adopt wider words.

The Seat of the Arbitration and Governing Law

The phrase the "seat" of an arbitration (like most jargon) causes unnecessary confusion. The seat of the arbitration determines the jurisdiction which applies to the arbitration process and therefore which courts will have oversight over the arbitration and support the arbitral process. Choosing the right "seat" is therefore fundamentally important. It is vital to ensure that the arbitration law and the courts in that jurisdiction support arbitration in law and in practice. However given that the arbitration law in each Australian state and territory is "uniform" and every state and territory has strong independent judges, then any Australian jurisdiction can be chosen.

The seat of the arbitration is different from the physical place of the arbitration. An arbitration with a seat in Victoria can still physically take place anywhere.

It is common for the seat of the arbitration to be different from the governing law of the contract. To prevent the difficulties in interpretation highlighted in the UK Supreme Court decision in *Enka Insaat v OOO Insurance Company Chubb [2020] UKSA 38*, it is advisable to expressly state the law governing the arbitration agreement.

Procedural Rules

The next question is whether to draft the arbitration clause to include a specific institution or specific rules.

Institutional or ad hoc arbitration

Institutional arbitration is an arbitration carried out with the assistance of an arbitral institution. Again there is a wide choice available and there is no obligation in Australia to use an Australian arbitration institution.

The services chosen can be as simple as a point of contact for the parties and assistance with the appointment of the arbitral tribunal or as complex as vetting the draft award before it is issued, such as the service that the ICC provides.

Of course, the more comprehensive the service, the greater the arbitration administration fee.

However it is not necessary in Australia, to use an arbitration institution at all. If the parties are able to appoint an arbitrator (and if they are not the courts will help them), then the parties and the tribunal can decide the procedure. An arbitration which is conducted without the support of an arbitration institution is called an "ad hoc" arbitration. Ad hoc arbitrations are common in the international shipping industry. They are effective and also much cheaper than institutional arbitrations.

Arbitration Rules

It is best practice to state the applicable arbitration rules in the arbitration clause. If the parties adopt institutional arbitration, then it is common for that institution's rules to apply. This is though not always the case and it is possible to provide for institutional arbitration but state that another set of rules will apply.

It is also possible for the parties to set their own rules including limiting disclosure, limiting expert evidence or limiting the recovery of costs.

Number and qualifications of the arbitrators

Arbitration tribunals are typically constituted by one or three arbitrators. A tribunal consisting of three arbitrators will have the advantage of limiting unfair results or incorrect decisions, which is important in situations where appeals are limited. On the other hand, an arbitration conducted by a sole arbitrator is likely to be quicker and cheaper.

Where it is necessary for the arbitrator to have specific expertise, then it would be better to state

that clearly in the arbitration clause. However parties should be careful when specifying required qualifications, not to unduly limit the pool of available arbitrators.

Language

Finally, if the contract involves international parties, consideration should be given as to the language of the arbitration.

Concluding Remarks

One of the distinct advantages of arbitration over the court process is that arbitration law allows parties to choose their own procedure. Where the contract negotiators do not have time to do this, then adopting one of the model clauses of an arbitration institution is a good solution.

However we recommend to parties that they take some time to consider how they want their dispute to be administered. Arbitration offers endless choices, including rules on consolidation with other disputes, limiting discovery, setting rules on expert evidence and on cost recovery. Indeed the arbitration clause may form part of a multi-tiered dispute resolution clause and we will write more on that topic in our next briefing.

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