

# HOW TO DRAFT AN EFFECTIVE ARBITRATION CLAUSE AND ARBITRATION AGREEMENT



OLSWANG

## **Drafting An Effective Arbitration Clause and Arbitration Agreement**

These are some of the points you should consider when drafting an arbitration clause and/or arbitration agreement:

### *1. Decide between administered or ad hoc arbitration?*

An *administered* arbitration is one which is conducted with the assistance of an arbitral institution, e.g. the Singapore International Arbitration Centre ("SIAC"), or the International Chamber of Commerce ("ICC"). The arbitral institution usually sets the arbitrators' fees (this may be scaled according to the total amounts in dispute), facilitates the exchange and dissemination of pleadings, enforces procedural deadlines and reviews the arbitral award. An *ad hoc* arbitration is one which is administered by the arbitral Tribunal itself. The additional cost incurred by appointing an administering institution is usually recovered in the savings resulting from the efficient administration of the arbitration.

### *2. Method of Selection and Number of Arbitrators*

Parties usually specify in the arbitration clause or arbitration agreement that there should be either one or three arbitrators (specifying an even number will only risk deadlock). If parties fail to specify the number of arbitrators, then the applicable arbitration law will usually determine the number of arbitrators and the default appointing authority. The institutional rules (if agreed between the parties) may also provide for a default appointing authority (for example, the institution's Chairman) if the parties cannot agree on the appointment of the sole or third arbitrator.

The advantages of appointing a sole arbitrator are costs and speed. However, a sole arbitrator may not have the legal and/or technical expertise to address all the issues in dispute.

A three man Tribunal is most common in international arbitrations, particularly if the amounts in dispute are significant or the issues are diverse or complex. A three-man Tribunal allows the parties to appoint arbitrators of various legal and technical skills to hear the dispute. There is also a lower risk that a three-man Tribunal will arrive at a wrong decision. However, the cost of three arbitrators can be high and should be weighed against the amounts in dispute.

### *3. Arbitration Rules*

The parties should determine the arbitration rules which, in addition to the arbitration law of the seat of the arbitration, will govern the arbitration procedure. Parties that choose to have their arbitrations administered will usually adopt the arbitration rules of that institution. Some of the more common arbitration rules used by parties include the SIAC Rules, the ICC Rules and the UNCITRAL Rules.

#### 4. *Language of the Arbitration*

Parties should specify the language of the arbitration, particularly if the parties and their respective witnesses speak different languages, or if the law of the country governing the arbitration specifies that in the absence of any agreement between the parties, the arbitration should be conducted in the national language of that country. Failure to specify the language of the arbitration may ultimately result in parties having to incur expensive and unnecessary costs for translating documents and witness evidence.

#### 5. *Place of the arbitration*

The place or "seat" of the arbitration determines the arbitration law governing the arbitration procedure. Parties should select a neutral place and also one where the local courts will enforce the arbitration agreement and support the arbitral process. For example, Singapore is a popular choice for parties doing business in Asia because Singapore is neutral and has a well established legal system that observes the rule of law. Singapore courts also offer a high level of support for arbitration.

### **Sample Arbitration Clauses**

Most international arbitral institutions recommend sample dispute resolution clauses which refer the dispute to arbitration. For example, parties who wish to refer their disputes to SIAC or the ICC for arbitration should include the relevant arbitration clauses set out at **Appendix 1**.

### **Sample Arbitration Agreement**

Where a dispute has already arisen and parties wish to resolve the dispute through arbitration, parties may consider using the sample arbitration agreement at **Appendix 2**.

### **Legal Advice**

No part of this Guidance Note should be taken as legal advice. You should seek legal advice when adopting the sample arbitration agreement or clause so that they can be tailored to your particular scenario.

### **Further Information**

If you would like to receive more information about drafting an effective arbitration clause and arbitration agreement, please contact **Jonathan Choo**, Partner and Head of Arbitration & Dispute Resolution at Olswang Asia LLP:

+65 6720 8278, or email [jonathan.choo@olswang.com](mailto:jonathan.choo@olswang.com).

**APPENDIX 1**  
**SAMPLE ARBITRATION CLAUSES**

For parties who wish to refer their disputes to SIAC arbitration

"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 in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") for the time being in force, which rules are deemed to be incorporated by reference in this clause.

The Tribunal shall consist of \_\_\_\_\_ ***[State an odd number, either state one or three]*** arbitrator(s) to be appointed by ***[e.g. the Chairman of the SIAC]***.

The language of the arbitration shall be \_\_\_\_\_ "

For parties who wish to refer their disputes to ICC arbitration

"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."

**APPENDIX 2  
SAMPLE ARBITRATION AGREEMENT**

This Agreement is made on **[Date]**

**BETWEEN**

**[Name and address of Party A]** ("Claimant") and all its predecessors, successors, and/or assigns (including without limitation any administrator, receiver, trustee, liquidator (provisional or otherwise) or equivalent appointees if relevant under insolvency law;

**AND**

**[Name and address of Party B]** ("Respondent") and all its predecessors, successors, and/or assigns (including without limitation any administrator, receiver, trustee, liquidator (provisional or otherwise) or equivalent appointees if relevant under insolvency law

(Collectively, the "Parties" and each, a "Party")

**WHEREAS**

**[State brief facts of the dispute.]**

The Parties wish to resolve the Dispute by arbitration.

**IT IS AGREED as follows:**

**Procedural Rules of the Arbitration**

1. The Arbitration will be conducted in accordance with **[state which Rules, for example, the Singapore International Arbitration Centre Rules ("the SIAC Rules")]** for the time being in force, save insofar as such rules are varied by the terms of this agreement.

**Governing Law of the Arbitration**

2. The governing law of the Arbitration will be **[state which Governing Law, for example, the Singapore International Arbitration Act (Cap 143A)]** as amended from time to time.

### **The Appointment of the Tribunal**

3. The Tribunal shall comprise three arbitrators. Each party shall appoint one arbitrator. The two party appointed arbitrators will then appoint the Chairman. If the arbitrators cannot agree the appointment of the Chairman then the Chairman shall be appointed by ***[state name of appointing authority, for example, the Chairman of the Singapore International Arbitration Centre.]***
4. In the event of the death or resignation of any arbitrator during the course of the proceedings, unless the parties agree otherwise, a replacement arbitrator shall be appointed by ***[state name of appointing authority, for example, the Chairman of the Singapore International Arbitration Centre.]***

### **The Seat of the Arbitration**

5. The seat of the arbitration shall be ***[state name of the country].***

### **The Language of the Arbitration**

6. The language of the arbitration shall be ***[state preferred language of arbitration].***

### **Confidentiality**

7. Save as specifically provided in this Agreement, no information concerning this Agreement or the Arbitration may be unilaterally disclosed by any Party to a third party unless required to do so under any applicable law or by any competent governmental or statutory authority or pursuant to the rules or regulations of any relevant regulatory, administrative or supervisory body (including, without limitation, any relevant stock exchange or securities regulator).

Signed by ***[Name of Party A]***

on this ***[Date]***

Signed by ***[Name of Party B]***

on this ***[Date]***