7 Golden Rules to “Bullet Proof” your Arbitration Agreement

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Having to arbitrate a case is – in itself – a difficult task that can cost a lawyer (and thus also the client) a lot of effort, time and money. Having to add an entire discussion about the arbitration agreement to the dispute only complicates things. No doubt that there is longstanding *jurisprudence* on how to interpret and enforce arbitration agreements. And the truth is that whatever problem you may encounter, either case law or scholar’s opinion will have a solution for it. But that is not what this article is about. This article is not about finding a solution to a problem you might encounter. This article is about what you can do to avoid (or at least mitigate) those problems in the first place.

As a lawyer, you should be eager (or at least I am) to discuss the substance of the case instead of having to dedicate time and resources fighting about “who has jurisdiction”, “is the clause valid”, “can the party go to arbitration”, and so on.

One of the best ways to make sure that your dispute will be as limited as possible to the *merits* of the case, is to invest in a good arbitration agreement.

To assist in that task, here there are 7 golden rules to “bullet proof” your arbitration agreement.

1. Make clear which dispute resolution method you are choosing

It might seem obvious, which is probably why people in charge of negotiating contracts end up not paying attention to it. Those who work in the sector know

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that it is not rare for there to be a dispute concerning the parties' choice for method of dispute resolution. Such type of dispute can arise, for instance, when the parties – even though choosing to go to arbitration – leave in their contract certain terms that might contradict the parties' derogation from state court jurisdiction. That was the case in *Mindstar v Samsung*, decided by the Ontario Court in 1992. It concerned a contract that contained a reference to arbitration as well as to a clause granting Mindstar the "right to sue". Mindstar interpreted its own "right to sue" as the right to claim compensation in court and brought a claim against Samsung before the Ontario Court. Samsung, then, requested the stay of the proceedings claiming that the reference to "right to sue" would not overturn the parties' choice for arbitration.[2] In that case, the decision was in favour of Samsung (and arbitration) and the court proceedings were stayed. That, however, is not always the outcome. In a different case decided by the Supreme People's Court in China[3] the court examined a very contradictory arbitration clause which read:

"Arbitration: All disputes shall be settled in a friendly way, if not, then the Hong Kong law will be used for final settlement of dispute. The decision made by Hong Kong Court will be final and binding for both parties. The fees and all costs of the arbitration will be born by losing party."

Here, the case also concerned a party's request to stay court proceedings in face of the existence of an arbitration agreement. However, unlike the previous case, the highest court in China refused to stay the proceedings on the basis that the arbitration clause was ambiguous and could not be specifically enforced. That to say that there is no assurance of the outcome when facing this type of situation. Nonetheless, a good way to stay clear out of such type of discussion is to make sure to unambiguously indicate one – and one only –method of dispute resolution in the contract.

2. Pay close attention when inserting "attempts to negotiate"

Another issue that can certainly cause problems in your arbitration agreement is the careless insertion of "*attempts to negotiate*" or the need to "*try to find an amicable solution*" before going to arbitration.

When parties are negotiating a contract, it does make sense that they wish at least for a chance being given to solve a dispute amicably before seeing themselves being brought into an arbitration. The problem here lies on the fact that – if the perimeter of this attempt to negotiate is not clear enough – once the parties begin to fight, there is just too much room for alleging that said pre-condition for arbitration is not fulfilled. It is true that certain courts have recognized that "*… surely a party may not be allowed to prolong resolution of a dispute by insisting on a term of the agreement that, reasonably construed, can only lead to further delay …*".[4] What is not so sure is that if you are facing the same problem, an adjudicator would decide in that same manner.

So, if you are planning to insert such type of condition in your agreement, make sure to provide in clear terms what the

[2] In this case, the Court of Ontario decided in favour of Samsung and stayed the proceedings. The court concluded that the right to sue did not qualify the duty to arbitrate and that even disputes concerning the clause creating the right to sue were subject to arbitration. The court found this "*consistent with the requirement that the arbitrator will, in the first instance, determine its own jurisdiction, and the scope of its authority*". ('CLOUT Case 32, Mind Star Toys Inc. v. Samsung Co. Ltd., Ontario Court of Justice, General Division, 30 April 1992', in Albert Jan Van den Berg (ed), Yearbook Commercial Arbitration 1994 - Volume XIX, Yearbook Commercial Arbitration, Volume 19 (© Kluwer Law International; ICCA & Kluwer Law International 1994) pp. 265 – 265).

[3] Case decided by the Supreme People's Court on 5 August 1996, mentioned in Neil Kaplan, 'A Case by Case Examination of Whether National Courts Apply Different Standards When Assisting Arbitral Proceedings and Enforcing Awards in International Cases as Contrasting with Domestic Disputes. Is There a Worldwide Trend towards Supporting an International Arbitration Culture?', in Albert Jan Van den Berg (ed), International Dispute Resolution: Towards an International Arbitration Culture, ICCA Congress Series, Volume 8 (© Kluwer Law International; ICCA & Kluwer Law International 1998) pp. 187 – 218.

[4] Cumberland & York Distrib. v. Coors Brewing Co., 2002 WL 193323, at *4 (D. Me.) (citing Southland Corp. v. Keating, 465 U.S. 1 (U.S. S.Ct. 1984)).

parties are required to do (*e.g.* send notices, engage in mediation, etc.) as well as a reasonable (and ideally not to long) timeline to comply with such conditions (*e.g.* parties are allowed to begin arbitration after x days of negotiation).
Something which may also help is to expressly provide for the consequences of breaching such provisions. For instance, whether a party's failure to send a notice in x days can prevent them from starting an arbitration.

3. Use model clauses (but be ready to adapt them if necessary)
Something which also certainly helps is relying on model clauses provided by arbitration institutions instead of drafting a clause from scratch.
The International Chamber of Commerce, for example, provides not one but several model clauses which can be used in accordance with the parties' needs and interests.[5] Same thing can be said about many other major institutions: LCIA,[6] AAA,[7] CIETAC,[8] HKIAC,[9] SCC,[10] CAM.[11]
Using a model clause not only helps avoiding ambiguous or contradicting drafts, but also guarantees that you will have checked the box for every mandatory item that an arbitration agreement needs to contain. Seat, applicable rules, number of arbitrators, etc. That, however, is not all. The negotiator of the contract should also be prepared to adapt the text of the clause if necessary. For instance, and of course depending on the possibilities given by the applicable rules to the proceedings, due consideration should be given to the eventual need to adjust the numbers of arbitrators, to include a choice for expedited procedures, to limit or broaden the scope of the arbitration agreement, to expressly derogate from any specific provisions, and so on.

4. Be careful with providing for time limits in your dispute resolution clause
Adding time limits to your dispute resolution clause can be both a blessing and a curse. On the one hand, it might be useful to include certain deadlines within the text of your clause. That is the case with cooling-off periods during which parties are required to try to amicably settle the dispute before bringing the issue to arbitration (subject to point 2. *supra*). Some other time limits, on the other hand, may cause more problems than they solve. For instance, providing for time period within which a party will have to prepare their submissions is not advisable. Afterall, those issues are often covered by the set of applicable rules to the dispute. Also, leaving those specific time limits open gives room for the parties to later adapt them to the specific circumstances of the dispute. It would make no sense to have to comply with a long period for preparation of a submission when the case is a simple discussion of law. Likewise, to have to abide by a short period of preparation when dealing with a highly complex case is likely to prejudice the parties. Another time limit that should be avoided is establishing a deadline for the resolution of the dispute (for example saying that "*… the dispute shall be finally resolved within X months …*"). Even though it may be tempting to try to guarantee that any problems will be solved quicky, the truth is that such provisions hardly ever work in any party's

[5] Standard ICC Arbitration Clauses and their variations are available at: https://iccwbo.org/dispute-resolution-services/arbitration/arbitration-clause/ (accessed on 23 June 2021)
[6] LCIA Recommended Clauses are available at: https://www.lcia.org/Dispute_Resolution_Services/LCIA_Recommended_Clauses.aspx (accessed on 23 June 2021)
[7] AAA Model Clauses are available at: https://www.intracen.org/Model-Clause-The-American-Arbitration-Association/ (accessed on 23 June 2021)
[8] CIETAC Model Clause is available at: https://www.cietac-eu.org/model-clause/ (accessed on 23 June 2021)
[9] HKIAC Model Clauses are available at: https://www.hkiac.org/arbitration/model-clauses (accessed on 23 June 2021)
[10] SCC Model Clauses and their variations are available at: https://sccinstitute.com/our-services/model-clauses/ (accessed on 23 June 2021)
[11] CAM Arbitration Model Clauses and their variations are available at: http://www.camera-arbitrale.it/en/Arbitration/Clauses/Models+clauses.php?id=222 (accessed on 23 June 2021)

favour. The parties should have adequate time to present their case and, even more importantly, the Arbitral Tribunal should have time to decide the case without feeling pressured to rush things because bound by a short deadline. For what is worth, not mentioning a deadline is not necessarily a prejudice since most arbitration laws, as well as arbitration rules, do include provision for efficiency and expeditiousness of arbitral proceedings.[12] On the other hand, providing for a deadline only adds the risks of having the arbitral tribunal not being able to comply with it. Consequences of such a breach can be very damaging to the parties' interests as they include annulment of the award, loss of jurisdiction of the arbitrators, need for replacement of arbitrators and so on.[13]

5. Indicate the law applicable to the dispute resolution clause

One of the basic principles of arbitration is the severability of the arbitration agreement. A principle that essentially entails that the arbitration agreement can be considered a separate agreement from the underlying contract in which it is inserted. That guarantees, for instance, that even in cases when the underlying contract is null, the parties' consent to derogate from state jurisdiction remains in place. Other consequences derive from the severability of the arbitration agreement, among which the possibility to have the arbitration agreement governed by a law different than the one governing the underlying contract. An idea that is commonly known in the arbitration field. And still, parties often neglect to indicate in their contract which is the law that governs the arbitration agreement.

If the applicable law to the underlying contract is the same of the seat of arbitration, then you should *probably* be fine. I say *probably* because an unsatisfied party might want to discuss the matter before entering the merits of the dispute and, in the absence of an express provision, parties will likely spend time and money in that discussion. In any case, the main problem arises when the seat of the arbitration is in one place and the law applicable to the contract refers to the law of another place. It is true that there is consistent case law on the matter, but that does not necessarily make things easy. When in face of such circumstances, arbitral tribunals are likely to apply the so-called Sulamerica Test,[14] which is a test developed within an English Case but commonly applied in arbitration. It essentially provides that the law applicable to arbitration shall be, in the first place, the law expressly chosen by the parties. In the absence of such express choice, consideration is due to an implicit choice of the parties (which one might argue to be comprised either in the choice for seat or in the choice for law applicable to the contract). In the absence also of an implicit choice, the tribunal shall consider as applicable the law with the closest and most real connection to the case (which also does not give much of a direct answer to the problem). To cut the story short and avoid the problem: make sure to expressly mention the law applicable to your arbitration agreement in your contract.

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[12] For instance, article 24.5 of the 2021 ICC Rules provides that "*the arbitral tribunal shall establish the procedural timetable that it intends to follow for the efficient conduct of the arbitration.*" Likewise, article 14 of the 2020 LCIA Rules provides that the arbitrator has "*a duty to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute*."

[13] In some cases, courts have allowed a leeway after not complying with the contractual time limit saying that "[I]*t was not unusual for the Arbitration Awards to be made or rendered in periods of time exceeding that appearing in the Agreement.*" (Local 355, etc. v. Fontainebleau Hotel Corp., 423 F. Supp. 83 (S.D. Fla. 1976), para. 7). In other cases, however, courts were much stricter and decided that *"once the time period had expired, the arbitrator lacked the jurisdiction to pass the award, rendering his unilateral extension of time ineffective*" (P v. S, L, Cour de cassation de Belgique, C.08.0028.F, 5 Mar. 2009).

[14] The test established in *Sulamerica CIA Nacional de Seguros SA and others v Enesa Engenharia SA and others* [2012] EWCA Civ 638. Latest confirmation of the use of such reasoning can be seen in Sulamerica case *Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb" & Ors* [2020] UKSC 38 (Enka).

6. Think about connected contracts and their dispute resolution clause

Another issue to consider when drafting your dispute resolution clause is to coordinate it with any connected contracts. Think, for instance, about a complex commercial operation involving multiple parties. Each single operation is embedded in a different contract with different parties. A contract of supply, a contract of construction, a contract of guarantee. A main client, a contractor, a subcontractor, a guarantor. There is simply no way to guarantee that if and when a dispute arises, that dispute will not exceed the subjective scope of each contract. Instead, it is likely that the dispute will involve multiple parties and/or multiple contracts.

Starting from the assumptions that it is never simple nor easy to deal with multiparty and multi-contract arbitrations, something that would most definitely help is to have the same kind of dispute resolution in all contracts involving the commercial operation. For clauses to be compatible, they should have – at least – the same seat, same institution, same applicable rules, same number of arbitrators. Further, and depending on the rules chosen, having compatible arbitration agreements can also facilitate the request for joinder of a third party as well as consolidation of proceedings. Bottom line is, considering connected contracts when drafting your dispute resolution clause can save you much trouble.

7. Dedicate your time and attention to the dispute resolution clause

One last tip in relation to the drafting of your dispute resolution clause, which should now be apparent: dedicate time to it. It is understandable that no one would want to think about disputes when negotiating a contract, that it might not seem like a good idea to enter issues that could lead to the parties' disagreements before the contract is even in place. However, when things are still on the table for discussion is also the moment when parties are most likely to make concessions. A good lawyer knows not to lose that opportunity. The dispute resolution clause is an important part of a contract and dedicating time and attention to its drafting can save the client's time and money, as well as save the lawyer a big headache of having to litigate the dispute resolution method before being able to litigate the dispute. **Prevention is better than cure.**

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