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Arbitration Agreements

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Arbitration Agreements

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WHY

WHO

WHERE

WHAT

WHEN

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Arbitration Agreements Defined

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- Arbitration Act 1996 – Section 6(1)
  - *"An agreement to submit to arbitration present or future disputes (whether they are contractual or not)"*
- Arbitration Act 1996 – Section 5
  - Arbitration agreements must be in writing to be effective and enforceable in England and Wales
- New York Convention 1958 – Article II(1)
  - *"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"*

Why arbitrate?

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Common Reasons to Arbitrate
- Party Autonomy / Control
- Neutral Venues
- Worldwide Systems of Enforcement
- Confidentiality

See also *2021 International Arbitration Survey: Adapting arbitration to a changing world | White & Case LLP (whitecase.com)*

Confidentiality

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- Implied duty of confidentiality in England and Wales
  - *Ali Shipping Corporation v Shipyard Trogir* [1997] EWCA Civ 3054
- Other Jurisdictions -
  - Australia - *Esso Australia Resources v Plowman* (1995) 183 CLR 10 - confidentiality is not an essential element of arbitration
  - United States - *U.S. v. Panhandle et al.* (1988) 118 F.R.D. 346 – no overarching principle of confidentiality in arbitration
  - Sweden - *Bulbank v. A.I. Trade Finance (2000) T1881-99* - no international consensus on duty of confidentiality in arbitration

Confidentiality

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* DO NOT TAKE IT FOR GRANTED! *

- Expressly covered in the Arbitration Agreement

  or

- Under Institutional Rules
  - LCIA – Article 30
  - SIAC – Article 39
  - HKIAC – Article 45

- NOTE - ICC and UNCITRAL Rules – Arbitral proceedings are not automatically confidential.

Valid Agreements to Arbitrate

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- New York Convention 1958 – Article II(3)
  - Parties must arbitrate unless the agreement is *"null and void, inoperative or incapable of being performed"*
- *AdActive Inc v Ingrouille* [2021] EWCA Civ 313
  - Pro arbitration stance taken by English Courts
- Arbitration Act 1996 – Section 9
  - *(1) A party to an arbitration agreement against whom legal proceedings are brought … in respect of a matter which under the agreement is to be referred to arbitration may… apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.*
  - *(4) On an application under this section the court* ***shall*** *grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed*.

Where – The Agreement Itself

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- Arbitration Act 1996 – Section 6(2)
  - The reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement.
- Incorporation by Reference
  - *Modern Building (Wales) Ltd v Limmer & Trinidad Co Ltd* [1975] 2 Lloyd's Rep. 318 (Court of Appeal) – General words of incorporation suffice
  - BUT - *Lisnave Estaleiros Navais SA v Chemikalien Seetransport GmbH* [2013] EWHC 338 (Comm) – no incorporation - formal contract included no reference to the general conditions which contained the arbitration agreement
- Two Contract Cases
  - *Barrier Limited v Redhall Marine Limited* [2016] EWHC 381 - general words of incorporation insufficient to incorporate an arbitration clause contained within a contract with a third party. However…

Doctrine of Severability

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- Arbitration Act 1996 – Section 7
  - *Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.*
- *Fiona Trust & Holding Corporation v Privalov* [2008] 1 Lloyd's Rep 254
  - *"…invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a "distinct agreement" and can be void or voidable only on grounds which relate directly to the arbitration agreement"* – Per Lord Hoffman (paragraph 17)

What – the key elements of the arbitration agreement

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- The law of the seat
- Law of the arbitration agreement
- Scope of the Agreement
- Institutional or ad hoc arbitration
- Language of the arbitration
- The “who” – arbitrator selection

The law of the seat

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- Legal “home” of the arbitration
- Not the same as the physical location of any hearings (although hearings often take place in the same location as the seat)
- Determines which state’s procedural laws will govern the arbitration
- Determines the:
  - Role of national courts in supporting and supervising the arbitration
  - Availability of interim measures (e.g. freezing injunctions)
  - Grounds on which an arbitral award can be challenged

Seat selection

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Parties should consider:

- The legal infrastructure in a seat
- The quality of the judiciary
- Whether the jurisdiction is a signatory to the New York Convention
- Whether the seat has good facilities (if the seat will also be the physical location of the hearing)
- Whether the seat is safe and accessible to parties and their legal advisors

Law of the arbitration agreement (1)

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- Can be different to the law of the underlying contract (due to the doctrine for separability)
- Will determine any questions as the validity, scope and interpretation of the arbitration agreement
- The parties choice of law of governing law for an arbitration agreement can be either express or implied

Law of the arbitration agreement (2)

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- Will usually either coincide with the law of the underlying contract or the law of the seat.
- UK Supreme Court recently set out 9 principles which govern determination of the law applicable to an arbitration agreement – see *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38 (**NB**: the Rome I Regulation does not apply to arbitration agreements).
- However, other jurisdictions have tended to find that the law of the seat is the most appropriate law governing the arbitration agreement.
- To avoid uncertainty, it is best practice to expressly state the law of the arbitration agreement.

Scope of the arbitration agreement

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- In most cases, the scope of the arbitration agreement should be as broad as possible.
- Any carve-outs (e.g. for specific disputes to be finally resolved by expert determination) should be carefully and precisely delineated.

ICC Standard Arbitration Clause:

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.

LCIA Standard Arbitration Clause:

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.

Institutional or ad hoc arbitration (1)

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- Institutional arbitration:
  - Administered by a specialised arbitral institution
  - Conducted under the arbitral institution's own set of arbitration rules
  - Popular institutions:
    - International Chamber of Commerce (ICC– based in Paris)
    - London Court of International Arbitration (LCIA)
    - Singapore International Arbitration Centre (SIAC)
    - Arbitration Institute of the Stockholm Chamber of Commerce (SCC)
    - Hong Kong International Arbitration Centre (HKIAC)

Institutional or ad hoc arbitration (2)

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- Ad hoc arbitration:
  - Simply put, ad hoc arbitration is an arbitration which is not an institutional arbitration
  - Parties can chose their own rules and procedures (subject to the laws of the seat)
- Parties can agree to incorporate or modify existing rules of arbitration procedure, such as the United Nations Commission on International Trade Law Rules (UNCITRAL Rules)

Institutional arbitration

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- Advantages of institutional arbitration
  - Pre-established set of rules and procedures can save time and money
  - Institution can provide administrative and specialised assistance
  - Depending on which institution is selected, the award may be scrutinised by the institutions court
- Disadvantages
  - Adds to expense
  - Bureaucracy

Ad hoc arbitration

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- Advantages of ad hoc arbitration
  - No administration fees
  - Maximum flexibility and adaptability
- Disadvantage of ad hoc arbitration
  - Risk that parties will not cooperate to agree arbitral procedures (leading to delays and additional costs)
  - Lack of institutional support makes it easier for parties to frustrate the process (increasing the risk of having to turn to local courts)
  - Will not always be cheaper or more cost effective than institutional arbitrations

Language of the arbitration

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- Specifying the language of the arbitration can be particularly important on international projects where the parties speak different languages
- Consider the language of the underlying contract and/or the majority of documents

The “who” – arbitrator selection

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- Arbitration agreements should:
  - Specify the number of arbitrators (usually one or three)
  - The appointment mechanism (whether by agreement of the parties, or selection by an appointing authority)
  - Any required qualifications – although this may require careful drafting, so that the requirements are not too prescriptive or overly broad.

Other considerations

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- Multi-tiered arbitration clauses
- Rules on evidence
- Joinder
- Consolidation

Conclusions

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- Think carefully about whether arbitration is right for you
- Pay close attention to your drafting, because you will be held to your arbitration agreement
- Resist the temptation to be overly prescriptive
- Consider taking specialist legal advice

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Questions? Thank you.

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