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The Usage of Legal English in Drafting International Arbitration Agreement

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The Usage of Legal English in Drafting International Arbitration Agreement

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I. Introduction of Arbitration Agreement

A. What is an Arbitration Agreement?

When parties agree to arbitrate their disputes, they relinquish their right to have such disagreements resolved by a national court. Instead, they agree to settle their disagreements privately, outside of the judicial system. As a result, the arbitration agreement involves a substantial waiver of an essential right to have the dispute handled in court, as well as the creation of new rights. The New York Convention of 1958 governs arbitration under international law. The Convention's purpose is to ensure that foreign arbitration judgements are enforced internationally.[1] The United Nations Commission on International Trade Law (UNCITRAL) has developed a legal model to help nations in modernizing arbitration procedures, notably in international commercial arbitration.[2] The UNCITRAL Model Law governs all aspects of the arbitral process, from the arbitration agreement to the composition and jurisdiction of the arbitral tribunal, as well as the level of court intervention, and all the way to the recognition and execution of the arbitral decision. It reflects international consensus on important components of international arbitration practice, which has been adopted by States from all regions and the world's many legal and economic systems.[3]

The following is the definition of an arbitration agreement as stipulated in the UNCITRAL Model Law:

> "*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*

[1] Greenwood, Lucy. *A New York Convention Prime*r. Dispute Resolution Magazine : 2019. rhttps://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2019/summer-2019-new-york-convention/summer-2019-ny-convention-primer/ > accessed 5 February 2022 (13.15)

[2] UNCITRAL. *Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006*. Texts and Status https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration > [3] *Ibid.*

agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement." [3]

The definition of an arbitration agreement is not as coherently defined in Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution ("**Indonesian Arbitration Law**") as in the UNCITRAL Model Law, but it can be concluded that an arbitration agreement is a written agreement between disputing parties that later becomes a requirement before dispute resolution. Article 2 of Indonesian Arbitration Law stipulated that *"This Act shall regulate the resolution of disputes or differences of opinion between parties having a particular legal relationship who have entered into an arbitration agreement which explicitly states that all disputes or differences of opinion arising or which may arise from such legal relationship will be resolved by arbitration or through alternative dispute resolution".* [4]

B. The Difficulty of Understanding Legal English in Arbitration Agreement

By way of agreeing to an arbitration agreement, parties may choose the rules that will govern the procedure, the seat of the arbitration, the language of the arbitration, the law governing the arbitration, and frequently, the decision-makers, who the parties may choose because of their particular expertise in the subject matter of the parties' dispute. The arbitration agreement between the parties delegate arbitrators the authority to resolve the dispute and defined the scope of that authority. Parties may opt to construe *"their own dispute resolution forum/process",* however the substantive law still follows the substantive law of the contract.

Due to the nature of international arbitration, parties, arbitrators, and any other third parties in the arbitral procedures are commonly from different countries and speak various languages.

[3] Article 7 of UNCITRAL Model Law on International Commercial Arbitration 1985 With amendments as adopted in 2006 (UNCITRAL Model Law)

[4] Article 2 of Law Number 30 of 1999 Concerning Arbitration and Alternative Dispute Resolution

Nonetheless, procedural language is sometimes seen as a secondary issue. The disputing parties may also specify specific criteria for arbitrators, such as experience or competence in a certain sector or the ability to speak a specific language. Despite the arbitration clause, parties of a contract and even legal practitioners occasionally struggled to understand the legalese or legal english in arbitration agreements. Legal English is the sort of English used in legal writing and by professionals in the legal industry and those who are not used to reading words in legal english will find it difficult to comprehend. Thus, learning legal English will make it easier for law students, practitioners, and parties of the contract to understand the contents of legal documents such as arbitration agreements.

II. Drafting an Arbitration Agreement

a. The Necessity of an Effective Arbitration Agreement

The arbitration agreement serves an important purpose in that it establishes a framework for the parties' own private dispute settlement system outside of national courts. The agreement should be carefully prepared to ensure the system's effective operation. A properly-drafted arbitration provision has a major influence on how well the parties resolve their disagreement. A "pathological clause" can emerge from this. [5] It may be so inadequate that the arbitration agreement is rendered invalid. At the absolute least, the defect may provide a foundation for lengthy disagreements over the interpretation of the provision and how the arbitration would be conducted.

There are several types of defects that might create a clause pathological. For instance, the clause might be unclear, inconsistent, or include incorrect information. The clause might use the

[5] W. Laurence Craig, William W. Park, & Jan Paulsson. 2000. *International Chamber of Commerce Arbitration*, p. 127, n. 1

incorrect name for an arbitral institution or its procedures, resulting in the choosing of a nonexistent body. Clauses may allow for the selection of a certain arbitrator, who may have deceased by the time the arbitration begins. Parties may specify in one provision that disputes will be handled through arbitration and in another section in the same contract that a certain court will have exclusive jurisdiction over any dispute. Even though not pathological, the clause may still not offer an efficient or useful procedure to the parties.

i. Essential Components

Arbitration is a contractual creation. In order to be valid, it must meet a number of conditions, just like any other sort of contract.[6] There can be no arbitration or award if there is no genuine arbitration agreement. In other words, the cornerstone of any arbitration process is a valid arbitration agreement.[7] There is a fair amount of conventional wisdom that a short and simple arbitration clause is sufficient and that an elaborate or complex clause is unnecessary.[8] Furthermore, the numerous works on pathological clauses, which show that even basic clauses may go wrong, serve as a cautionary note for drafters of increasingly complicated clauses.[9] Many arbitrations will be sufficed by the modest model provision provided by the arbitral institution chosen by the parties to handle the arbitration. Furthermore, such a clause has existed for a long time and is straightforward and familiar to both the parties and the administrators of the arbitral institution.

Arbitration is classified into two types: institutional arbitration and ad hoc arbitration. Institutional arbitrations, on the other hand, are performed in accordance with institutional

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[6] Gaillard, E. and Savage, J., *Fouchard, Gaillard, Goldman On International Commercial Arbitration*, 1999, p. 241.

[7] Jesús Saracho Aguirre. *Validity of the Arbitration Agreement.* 2021. https://jusmundi.com/en/document/wiki/en-validity-of-the-arbitration-agreement-ground-to-refuse-recognition-andenforcement-of-non-icsid-awards > accessed 6 February 2022 (13.23)

[8] Julian D. M. Lew, Loukas A. Mistelis, Stefan M. Kroll. 2003. *Comparative International Commercial Arbitration*, 166 § 8–5.

[9] W. Laurence Craig, William W. Park, & Jan Paulsson, *supra* note 1, 127–135.

arbitration norms and governed by an arbitral institution in charge of numerous matters such as arbitrator appointments, arbitrators' fees, and administrative support.[10] Ad hoc arbitrations are held without the use of institutional arbitration rules or the supervision of an arbitral institution.[11] Institutions, on the other hand, may provide administrative or logistical support to ad hoc tribunals.

If, on the other hand, the parties choose for ad hoc arbitration, they may need to provide more information in their arbitration clause. If there is no administering institution and the parties are unable to reach an agreement on how to continue, they may be forced to go to court. If they cannot agree on the appointment of an arbitrator, for example, a court may be requested to do so. In many It is necessary that the arbitration agreement to be in writing, whether it is for ad hoc or institutional arbitration. The New York Convention requires a writing for enforcement purposes, [12] as do many arbitration rules, such as the UNCITRAL Model Law, which has been established as the law of many nations.

Parties that select an institution to handle their arbitration should include the institution's model arbitration provision in their contract. The UNCITRAL Arbitration Rules recommends a fairly standard sample clause : [13]

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force. Parties may wish to consider adding:

[10] Sicard-Mirabal, J. and Derains, Y., *Introduction to Investor-State Arbitration*, Wolters Kluwer, 2018, p. 3. Born, G.B., *International Arbitration: Law and Practice*, Wolters Kluwer, 2015, p. 26.

[11] Oetiker, Ch., *Chapter 4: Ad Hoc Arbitration in Switzerland*, in Arroyo, M. (ed.), Arbitration in Switzerland: The Practitioner's Guide, Wolters Kluwer, 2018, p. 895.
Girsberger, D. and Voser, N., International Arbitration: Comparative and Swiss Perspectives, Shulthess Verlag, 2016, 15.

[12] Article II (2) of New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958

[13] UNCITRAL Arbitration Rules, https://uncitral.un.org/sites/uncitral.un.org/files/mediadocuments/uncitral/en/arb-rules.pdf > accessed 5 February 2022 (11.20) [15]*) State the institution or jurisdiction*.

a. The appointing authority shall be ... (name of institution or person);[15]

b. The number of arbitrators shall be ... (one or three); [14]
c. The place of arbitration shall be ... (town or country);[15]
d. The language(s) to be used in the arbitral proceedings shall be ... [18]

- **Choice of Arbitrators**

Filling in the blanks in the model clause above will necessitate some significant considerations on the behalf of the parties. A party should evaluate how difficult the transaction is, how probable a disagreement will emerge, and the anticipated value of the possible dispute when deciding whether to have one or three arbitrators. Because there would be no need for members of a tribunal to discuss and dispute over various matters, scheduling hearings should be easier, expenses should be lower, and the procedures and award should go forward more swiftly with one arbitrator. On the other hand, in complicated, high-value conflicts, parties typically prefer three arbitrators; when large sums of money are at risk, most parties feel better at ease with three arbitrators. When it comes to processing all of the essential information and arriving at a reasonable resolution, three people are usually stronger than one.

- **Seat of Arbitration**

Choosing the seat of the arbitration is vital since the arbitration law of the arbitral areas of work will commonly be the law that governs the arbitration. Parties desire a friendly arbitration system, that is, one that does not interfere unnecessarily with the arbitral procedure. If a judicial intervention is required or arises during or after the arbitration, the procedures will be affected by the local law governing

[14] *State an odd number. Either state one, or state three.*
[15] *Parties should specify the seat of arbitration of their choice. If the parties wish to select an alternative seat to Singapore, please replace "[Singapore]" with the city and country of choice (e.g., "[City, Country]")* [18] *State a language for the arbitration proceeding*

arbitration. Parties will also select a nation that is not each party's place of business in order to be in a neutral place

- **Language of Arbitration**

  Unless the parties have explicitly agreed on a language, the tribunal may make a different decision. Hence, a client who had to bear the unexpected costs of translating papers and witness evidence because the lawyers had failed to specify the language in the arbitration provision, would be dissatisfied.

- **Substantive Law**

  Its inclusion inside the arbitration clause should preclude one side from claiming that the substantive law governing the contract is not always the substantive law governing the arbitration agreement. However, regardless of where they place it, the parties should clearly identify the substantive law they have agreed upon in order to prevent needless arguments during the arbitration.

ii. **Examples of Invalid International Arbitration Clause**

1. Unclear Intention to Arbitrate

When creating an arbitration agreement, careful wording and language are required to avoid interpretation concerns that may arise as a result of the decision to commence arbitration.

In a contract for sale and purchase of coal, two parties agreed to the following clause:

"*...Should no such amicable settlement be reached, the dispute* ***may,*** *as agreed by the Parties, be submitted for arbitration by a tribunal of three arbitrators (each party shall*

appoint one arbitrator and the third arbitrator shall be appointed by the two arbitrators selected by the Parties) at the Singapore International Arbitration Centre in accordance with its Rules of Arbitration. Arbitration shall be in English. The decision of these arbitrators shall be final."

The inclusion of the word "may" creates uncertainty about whether the issue will be addressed through arbitration or not. In order for the Arbitration Clause to be enforceable, it must be clear that the parties mutually agreed to Arbitration as an alternate forum. As an example of the consequences above, It will render such a contract or agreement unenforceable. Eventually, the parties lose the ability to settle disputes through arbitration. As a result, significant financial costs and lengthy litigation in state court are incurred.

2. Unclear Seat of Arbitration

Misinterpretation of the meaning of the designation of the arbitral institution and the seat of the arbitration may result into ambiguous terms about the location of the arbitration.

In a sale of goods contract, a buyer and a seller agreed to the following clause:

"*...Any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved* ***by arbitration in Singapore****, before a single arbitrator agreed upon by both the buyer and seller or if not so agreed, appointed in accordance with the English Arbitration Act 1996 as amended from time to time. The language of the arbitration shall be English****. The seat of the arbitration shall be England*** *and the arbitration awards shall be final without appeal to the court...*"

The place of arbitration is another decision of major importance. It constitutes the seat of the arbitration and the law of that place governs the arbitral proceedings, [16] there are cases

in different jurisdictions in which a court or arbitral tribunal has taken the law of the seat of the arbitration to be the appropriate law to govern the parties' arbitration agreement. [17]

3. Incorrect Arbitral Institution Rules

If the disputing parties choose institutional arbitration, the arbitration will be conducted in accordance with standards of the chosen institution. Different forums, however, may use different choice-of-law rules and reach different conclusions about the law applicable to the international arbitration agreement.[18]

In a license agreement, two parties agreed to the following clause:

"*Any and all such disputes shall be finally resolved by arbitration before the **Singapore International Arbitration Centre** in accordance with **the Rules of Arbitration of the International Chamber of Commerce** then in effect and the proceedings shall take place in Singapore and the official language shall be English.*"

[16] Blackaby, Nigel. *Redfern and Hunter on International Arbitration*. Oxford ; New York :Oxford University Press, 2009, p.53
[17] Blackaby, Nigel *Op.cit* ,p.95
[18] Born, Gary. International Commercial Arbitration, Second Edition. 2014. Kluwer Law International, p.474

iii. Most Common Used Words in International Arbitration

Legalese	Plain English
Affidavit	Sworn Document
Annulment of an award	Revocation of Arbitration Decision
Proceedings	Arbitration Procedure
Jurisdiction	Authority
Pathological arbitration clause	Contradicting Arbitration Clause
Notice of Arbitration	Request to arbitrate
Statement of Claim	Fact that Support the Claim
Seat of Arbitration	Place to Arbitrate
Chairman/Presiding Arbitrator	Head of the Judging Panel (Arbitrators)
Validity of Arbitration Agreement	Parties consent to arbitrate

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