

Dispute resolution clauses: drafting principles and concepts



A well-drafted dispute resolution clause is essential and provides parties seeking to resolve a dispute with certainty as to process and procedure. This is even more prevalent in an international setting where the parties are based in different jurisdictions.

We outline below the key issues to consider when drafting jurisdiction clauses and arbitration agreements and provide some model clause examples from the most established courts and arbitral institutions around the world.

Jurisdiction clauses

WHAT IS IT?

A jurisdiction clause is a clause setting out the parties' agreement to submit any disputes arising out of or in connection with an agreement to a particular national court.

There are three main types of jurisdiction clause:

- **Exclusive jurisdiction clause:** The parties agree to submit to the exclusive jurisdiction of a particular court. This means that the parties know exactly where the dispute will be brought and what national procedural rules will apply in the event that a dispute arises.
- **Non-exclusive jurisdiction clause:** Here the parties generally agree that a dispute may be resolved in the jurisdiction stated in the clause (e.g. the Courts of England & Wales), but without prejudice to the right of one or other of the parties to refer the dispute to the courts of another jurisdiction. The advantage of this is that it achieves flexibility if, on reflection, there is a more appropriate jurisdiction in which to resolve the dispute.
- **Unilateral or "one-sided" jurisdiction clause:** Often appearing in finance agreements, such a clause allows one party (the borrower) to initiate proceedings in one particular court, whilst the other party (the lender) may (under the most common form of wording) choose to bring proceedings in "any court of competent jurisdiction" and, commonly in practice, where the borrower's assets are located. Whilst offering obvious flexibility, advice should be taken as to the enforceability of such clauses (particularly in civil law jurisdictions) because if found to be void, the lender faces uncertainty over where they could sue and be sued.

WHY IS IT IMPORTANT?

- The procedural rules governing rights of audience, interim measures (e.g. freezing or "attachment" orders), disclosure, appeals, recovery of costs, court fees and security vary from jurisdiction to jurisdiction.
- The efficiency of the court process and procedure can vary hugely. Accordingly, what may take days in one court may take much longer in another.
- If a jurisdiction clause is not properly drafted, found to be void or not included in the agreement, the parties will incur additional time and cost in determining the court with jurisdiction to hear the dispute (which may be determined by reference to private international law).

- A well drafted jurisdiction clause will avoid a party being sued in a jurisdiction which may be unfamiliar, unpredictable, inconvenient and expensive.

KEY ISSUES TO CONSIDER WHEN DRAFTING A JURISDICTION CLAUSE

General factors:

- **Location:** Consideration should be given as to which court is most cost effective, practical and convenient for the potential dispute. For example, where are any witnesses located and what language do the parties speak?
- **Consistency:** As a rule of thumb, it is sensible to ensure that governing law and the jurisdiction clause refer to the same place (e.g. the laws of the DIFC governing the agreement with the DIFC Courts having jurisdiction over any dispute).
- **Incorporation:** The jurisdiction clause should be expressly incorporated into the main agreement. Likewise, ensuring that the relevant clause is consistent with any other ancillary contractual documentation is essential to mitigate any risks associated with a "battle of the forms".
- **Convenience:** Are you the party suing or the party likely to be sued? If you are the party most likely to sue, you should ensure that any dispute is heard in a jurisdiction which has an efficient judicial system, a good range of interim/final remedies (e.g. freezing injunctions and disclosure orders) and a well-trodden enforcement framework.
- **Enforcement:** "Cash is King" so the real value in a judgment depends on its enforceability. Accordingly, consideration should be given to the ease by which a judgment obtained in one jurisdiction can be enforced in another (for example, where the defendant's assets are located) and this will often depend on whether a reciprocal enforcement treaty exists between the relevant jurisdictions. In circumstances where international or multi-jurisdictional enforcement is likely to be required, the parties should consider referring the dispute to arbitration where they can avail of the benefits of the New York Convention (see further below).

Unilateral jurisdiction clauses:

- The legal position regarding unilateral jurisdiction clauses is well settled in England & Wales (and therefore most likely, the DIFC). However, some civil law jurisdictions (such as France) consider such clauses to be unfair and contrary to concept of 'conditions potestatives' which render "one-sided" contractual provisions ineffective.
- Accordingly, parties should think carefully about incorporating unilateral jurisdiction clauses into their agreements (particularly in the Middle East) and should seek advice on the enforceability of such clauses, both in the jurisdiction to whose governing law their agreement is subjected and also in the jurisdiction(s) in which the counterparties' assets are located (should enforcement be necessary).

MODEL JURISDICTION CLAUSES

Below, we provide some examples of standard form (model) jurisdiction clauses. The words in square brackets can be altered according to the agreement of the parties. While these may serve as a useful starting point, parties should seek legal advice to ensure that their chosen clause is suited to their needs and consistent with any other provisions in the agreement(s).

Exclusive / non-exclusive jurisdiction

"Each party to this agreement irrevocably agrees that the courts of [INSERT] shall have [non-]exclusive jurisdiction to hear, settle and/or determine any dispute, controversy or claim (including any non-contractual dispute, controversy or claim) arising out of or in connection with this agreement, including any question regarding its existence, validity, formation or termination. For these purposes, each party irrevocably submits to the jurisdiction of the [INSERT] courts."

Exclusive jurisdiction (after a dispute arises/over existing disputes)

"A dispute having arisen between the parties concerning [DEFINE DISPUTE], the parties hereby agree that the dispute shall be subject to the exclusive jurisdiction of the [INSERT JURISDICTION] courts."

Unilateral jurisdiction

"For the benefit of [Party A], the parties irrevocably agree that the courts of [INSERT] shall have exclusive jurisdiction to hear, settle and/or determine any dispute, controversy or claim (including any non-contractual dispute, controversy or claim) arising out of or in connection with this agreement, including any question regarding its existence, validity, formation or termination. For these purposes, each party irrevocably submits to the jurisdiction of the [INSERT] courts.

However, nothing in this clause limits the right of [Party A] to bring proceedings, including third party proceedings, against [Party B] in any other court of competent jurisdiction, and the bringing or continuing of proceedings in any one or more jurisdictions shall not preclude the bringing of proceedings in any other jurisdiction, whether concurrently or not, if and to the extent permitted by applicable law."

Arbitration agreements

WHAT IS ARBITRATION?

Arbitration is procedure in which a dispute is submitted (by agreement between the parties) to a tribunal (usually consisting of one or three arbitrators who are selected by the parties) which makes a binding decision on the dispute. In choosing arbitration, the parties opt for a private form of dispute resolution procedure instead of submitting to the jurisdiction of a national court.

ADVANTAGES OF ARBITRATION

- **Confidentiality:** Arbitration proceedings are conducted privately. Some arbitration legislation recognises the duty of confidentiality which prohibits disclosure of documents to third parties. Arbitration awards are confidential to the parties under most arbitration rules and do not give rise to binding precedent.
- **Flexibility:** Parties are free to agree on procedural matters: such as: seat of arbitration; and various aspects etc. Arbitration rules are flexible and less complex than national civil court procedure, making them accessible to parties based in different jurisdictions.
- **Neutrality:** Due to the perception of a "home turf" advantage, parties are cautious about referring disputes to either party's national court and prefer a neutral forum (i.e. where international rules are applied by a multi-national tribunal in a mutually acceptable venue).
- **Cost:** The costs of arbitration are paid for by the parties. This includes the tribunal's fees, administrative fees for hearing facilities and legal costs. The costs are typically split equally between the parties. Procedural efficiencies are possible if the parties agree on various procedural matters which also results in a costs-saving. Cost recovery is generally higher in arbitration for a successful claimant compared to court litigation.
- **Enforcement:** Arbitration awards are widely enforceable under the 1958 New York Convention on the Recognition and Enforcement of Awards, to which more than 160 states are party. This Convention limits the grounds for refusing enforcement of an arbitration agreement (restricting a national court from favouring one party over another).

SOME FACTORS TO CONSIDER WHEN DRAFTING A JURISDICTION CLAUSE

- **Choice of rules:** Each arbitral institution has its own set of rules that supplement the terms included in an arbitration clause. These rules will typically govern how the Tribunal is appointed, confidentiality and the provisions for interim and emergency relief. Leading arbitral institutions include the ICC, LCIA, DIAC, DIFC-LCIA, SIAC etc. Ad hoc arbitrations are where the parties and the Tribunal administer the arbitration themselves (i.e. without the support of an institution or centre). However, the parties can select stand-alone arbitration rules such as the UNCITRAL rules to apply to ad hoc arbitrations.

- **Number of arbitrators:** This will depend on the nature, value and complexity of the dispute. The number of arbitrators in most cases is one or three. A sole arbitrator may be agreed jointly by both parties, or he/she may be appointed by a third party (e.g. the relevant institution) if the parties cannot agree. Alternatively, if there are to be three arbitrators, each party nominates an arbitrator and the third (neutral) arbitrator and chairperson will be appointed by the relevant institution.
- **Seat of arbitration:** The seat or "legal place" of the arbitration gives the award its "nationality" and determines the legal framework within which the arbitration takes place. This should not be confused with the physical location where hearings take place (although these can, in some circumstances, be the same e.g. the DIFC). Rather when choosing the "seat" the parties are selecting the procedural law that applies to the arbitration. For example, by selecting the DIFC as the seat, the parties invoke the application of the DIFC Arbitration Law. The seat is of critical importance to the enforceability of the resulting award.
- **Language:** The parties should specify the working language of the arbitration. Care should therefore be given to selecting arbitrators who are fluent (to a legal standard) in the chosen language.
- **Governing law:** If not addressed elsewhere in the agreement, the dispute resolution clause should also specify the substantive law that shall apply to the rights and obligations of the parties arising under the agreement. The substantive law of the agreement can be any law and does not need to bear a relation to the seat of the arbitration. For example, it is common for parties to submit to the jurisdiction of the DIFC-LCIA with the arbitration being seated in the DIFC but subject to English law.
- **Other optional elements:** Depending on the nature of the dispute and the specific needs, the parties may also decide to:
 - agree on mandatory pre-arbitration settlement negotiations and/or mediation;
 - waive the right to challenge an arbitral award;
 - insert a confidentiality clause since the process can differ depending on the arbitral institution and the seat of the arbitration;
 - stipulate the process for constituting the tribunal (e.g. time limits for appointment); and/or
 - consider the need for interim relief during the arbitration proceedings, which will be determined by the courts of the seat of the arbitration.

MODEL ARBITRATION AGREEMENT

A list of the most common arbitral institutions with the various model clauses is appended to this note (**Appendix 1 and 2**). However, for ease of reference, we set out below (by reference to the DIFC-LCIA model agreement) an example of an arbitration agreement which should prima facie be accepted by a Tribunal.

"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 Arbitration Rules of the DIFC- LCIA Arbitration Centre, which Rules are deemed to be incorporated by reference into this clause.

The number of arbitrators shall be three.

The seat, or legal place, of arbitration shall be the DIFC.

The language to be used in the arbitration shall be English.

The governing law of the contract shall be the substantive law of the DIFC"

About us

Stephenson Harwood's Middle East dispute resolution team is able to advise and represent you at any stage of the court/arbitration proceedings, from drafting a valid, enforceable and effective dispute resolution clause to representing you in court/arbitration proceedings, to enforcement of an arbitration award or a court judgment in courts around the world. Should you have any specific questions that you would like advice on or are considering legal representation in connection with litigation, please do not hesitate to get in contact with one of our team members below.

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Appendix 1: Model clauses and key features

Arbitral institutions typically provide model arbitration clauses, which can be incorporated into the dispute resolution provisions of contracts. The following table sets out the key features of each of the draft clauses provided by the listed arbitral institutions.

A tick signifies that the institution's model clause covers the relevant feature, and no tick indicates that the model clause does not provide for that relevant feature. 'Default' means that unless the parties have agreed otherwise, the institution provides for default wording on that particular characteristic.

Arbitration institution	Seat	Rules	No. of arbitrators	Language	Applicable law	Other options
International Chamber of Commerce ("ICC")	✓	✓	✓	✓	✓	Expedited arbitration/ tiered clause
Singapore International Arbitration Centre ("SIAC")	✓	✓	✓	✓	✓	Expedited arbitration/ med-arb/ad hoc
Hong Kong International Arbitration Centre ("HKAIC")	✓	✓	✓	✓	✓	Ad hoc
London Court of International Arbitration ("LCIA")	✓	✓	✓	✓	✓	Submission agreement/ med-arb
DIFC- LCIA	✓	✓	✓	✓	✓	Submission agreement/ med-arb
China International Economic and Trade Arbitration Commission ("CIETAC")		✓				

Arbitration institution	Seat	Rules	No. of arbitrators	Language	Applicable law	Other options
Dubai International Arbitration Centre ("DIAC")	✓	✓	✓	✓		Submission agreement
International Centre for Settlement of Investment Disputes ("ICSID")	Default	✓	✓	✓	✓	
Permanent Court of Arbitration ("PCA")	✓	✓	✓	✓		Conciliation/ ad hoc
Uncitral rules	✓	✓	✓	✓		Appointing authority

Appendix 2: Example clauses

Below, we include some model clauses provided by the listed arbitral institutions on their respective websites as at the date of this article. It is strongly recommended that parties check the relevant arbitral institution's website in the event that the relevant model clause has been amended/updated. Parties may decide to adapt the model clauses according to the particular circumstances and in light of the chosen applicable governing law.

Arbitral institution	Standard model clauses
ICC (click here to view)	"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."
SIAC (click here to view)	"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 administered by the Singapore International Arbitration Centre ("SIAC") 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 seat of the arbitration shall be [INSERT]. The Tribunal shall consist of [INSERT NUMBER] arbitrator(s). The language of the arbitration shall be [INSERT]."
HKAIC (click here to view)	"Any dispute, controversy, difference or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted. The law of this arbitration clause shall be [INSERT]. The seat of arbitration shall be [INSERT]. The number of arbitrators shall be [INSERT NUMBER]. The arbitration proceedings shall be conducted in [INSERT]."
LCIA (click here to view)	Future disputes: "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. The number of arbitrators shall be [one/three]. The seat, or legal place, of arbitration shall be [City and/or Country]. The language to be used in the arbitral proceedings shall be []. The governing law of the contract shall be the substantive law of []." Existing disputes: "A dispute having arisen between the parties concerning [], the parties hereby agree that the dispute shall be referred to and finally resolved by arbitration under the LCIA Rules. The number of arbitrators shall be [one/three]."

Arbitral institution	Standard model clauses
	<p>The seat, or legal place, of arbitration shall be [City and/or Country].</p> <p>The language to be used in the arbitral proceedings shall be [].</p> <p>The governing law of the contract [is/shall be] the substantive law of []."</p>
<p>DIFC- LCIA (click here to view)</p>	<p>"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 Arbitration Rules of the DIFC – LCIA Arbitration Centre, which Rules are deemed to be incorporated by reference into this clause.</p> <p>The number of arbitrators shall be [INSERT NUMBER].</p> <p>The seat, or legal place, of arbitration shall be [INSERT CITY AND/OR COUNTRY].</p> <p>The language to be used in the arbitration shall be [INSERT].</p> <p>The governing law of the contract shall be the substantive law of [INSERT]."</p>
<p>CIETAC (click here to view)</p>	<p>MODEL ARBITRATION CLAUSE (1)</p> <p>"Any dispute arising from or in connection with this Contract shall be submitted to China International Economic and Trade Arbitration Commission (CIETAC) for arbitration which shall be conducted in accordance with the CIETAC's arbitration rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties."</p> <p>MODEL ARBITRATION CLAUSE (2)</p> <p>"Any dispute arising from or in connection with this Contract shall be submitted to China International Economic and Trade Arbitration Commission (CIETAC)_____Sub-Commission (Arbitration Center) for arbitration which shall be conducted in accordance with the CIETAC's arbitration rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties."</p>
<p>DIAC (click here to view)</p>	<p>"Any dispute arising out of the formation, performance, interpretation, nullification, termination or invalidation of this contract or arising therefrom or related thereto in any manner whatsoever, shall be settled by arbitration in accordance with the provisions set forth under the DIAC Arbitration Rules ("the Rules"), by one or more arbitrators appointed in compliance with the Rules."</p>
<p>ICSID (click here to view)</p>	<p>Clause 1 – Consent in respect of future disputes</p> <p>"The [Government]/[name of constituent subdivision or agency] of name of Contracting State (hereinafter the "Host State") and name of investor (hereinafter the "Investor") hereby consent to submit to the International Centre for Settlement of Investment Disputes (hereinafter the "Centre") any dispute arising out of or relating to this agreement for settlement by [conciliation]/[arbitration]/[conciliation followed, if the dispute remains unresolved within time limit of the communication of the report of the Conciliation Commission to the parties, by arbitration] pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter the "Convention")."</p> <p>Clause 2 – Consent in respect of existing disputes</p> <p>"The [Government]/[name of constituent subdivision or agency] of name of Contracting State (hereinafter the "Host State") and name of investor (hereinafter the "Investor") hereby consent to submit to the International Centre for Settlement of Investment Disputes (hereinafter the "Centre") for settlement by [conciliation]/[arbitration]/[conciliation followed, if the dispute remains unresolved within <u>time limit</u> of the communication of the report of the Conciliation Commission to</p>

Arbitral institution	Standard model clauses
	the parties, by arbitration] pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, the following dispute arising out of the investment described below:..."
PCA (click here to view)	"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 PCA Arbitration Rules 2012."
Uncitral rules (click here to view)	<p>"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.</p> <p>NB: Parties should consider adding:</p> <ul style="list-style-type: none"> (a) The appointing authority shall be [NAME OF INSTITUTION OR PERSON]; (b) The number of arbitrators shall be [ONE OR THREE]; (c) The place of arbitration shall be [TOWN AND COUNTRY]; and (d) The language to be used in the arbitral proceedings shall be..."