



CONSTRUCTION
LAW
INSTITUTE

THE ART OF DRAFTING ARBITRATION CLAUSES

Uganda Law Society CLE Training on "Commercial
Contracts: What you need to know".

By:
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About the Presenter

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ARBITRATION AGREEMENT -A DEFINITION

A valid Arbitration Agreement/Clause

(1) An “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 agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. (UNCITRAL)

THE ARBITRATION AGREEMENT

- An “Arbitration agreement” is an agreement by the parties to go to arbitration in the case of all, or certain disputes, in order to finally resolve the dispute.
- The dispute may arise between them in contract or otherwise.
- An arbitration agreement may be a clause in a contract or in the form of a separate agreement.
- An valid arbitration agreement must clearly chose arbitration over litigation.
- Most institutions have template clause.



Example 1

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.

Example 2

- **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 under the London Court of International Arbitration (**LCIA**) Rules, 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 London
- **The venue** shall be London
- **The language** to be used in the arbitral proceedings shall be English
- **The governing law of the contract** shall be the substantive law of England

A Med-Arb Clause

“Any dispute difference or controversy arising out of or in connection with this contract shall first be referred to mediation at the Indian Institute of Arbitration & Mediation (IIAM) and in accordance with its then current Mediation Rules and as per the Arbitration & Conciliation Act, 1996.

If the mediation is abandoned by the mediator or is otherwise concluded without the dispute or difference being resolved, then such dispute difference or controversy shall be referred to and determined by arbitration as per the Arbitration & Conciliation Act, 1996* by IIAM in accordance with its Arbitration Rules”.



SIAC Med-Arb 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 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 [Singapore].*

The Tribunal shall consist of _____** arbitrator(s).

The language of the arbitration shall be _____.

The **parties further agree that following the commencement of arbitration, they will attempt in good faith to resolve the Dispute through mediation at the Singapore International Mediation Centre (“SIMC”)**, in accordance with the SIAC-SIMC Arb-Med-Arb Protocol for the time being in force. Any settlement reached in the course of the mediation shall be referred to the arbitral tribunal appointed by SIAC and may be made a consent award on agreed terms.

THE AGREEMENT MUST BE IN 'WRITING' BEFORE, OR AFTER THE DISPUTE STARTS- - Section 3 ACA

An arbitration agreement may be in the form of an **arbitration clause in a contract or in the form of a separate agreement.**

An arbitration agreement shall be **in writing.**

An arbitration agreement is in writing if it is contained in—

- a document **signed by the parties;** or
- an **exchange of letters, a telex, a telegram or other means of telecommunication which provides a record of the agreement.**

The reference in a contract to a document containing an **arbitration clause shall constitute an arbitration agreement** if the contract is in **writing** and the reference is such as to make that arbitration clause part of the contract.



CONFIRM
Arbitration Agreement

ELEMENTS OF AN ARBITRATION AGREEMENT

1. The 5 layers of law

The 5 layers of law

Law governing the arbitration agreement

The Seat of the arbitration

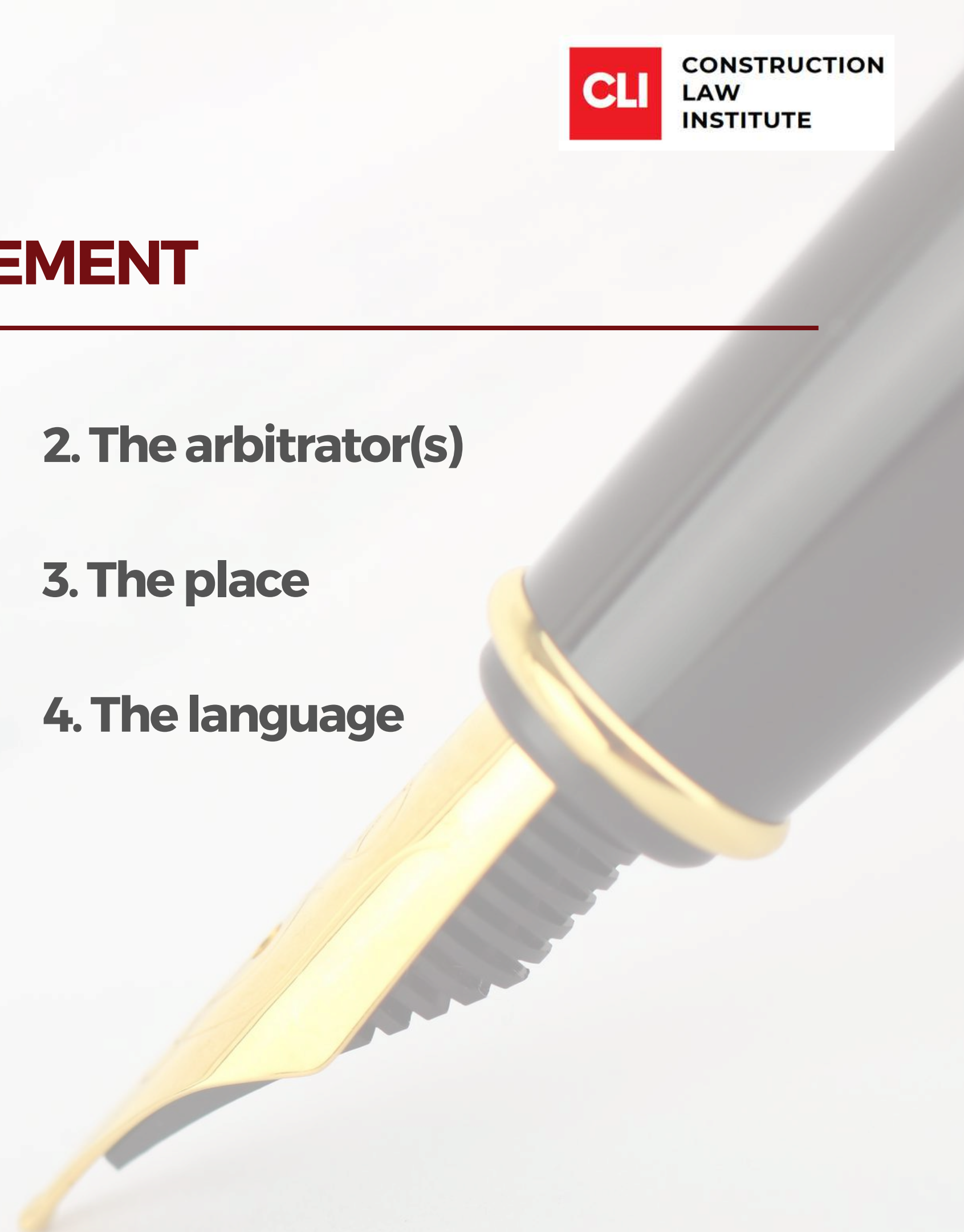
Procedural rules governing the arbitration

The law governing enforcement

2. The arbitrator(s)

3. The place

4. The language



THE LAW OF THE CONTRACT

Usually specified in the contract.

If not, it may be implied that the laws of the country where the contract was performed will apply.



THE SEAT/LEGAL JURISDICTION OF THE ARBITRATION

The “**seat**” of the **arbitration**, is the legal jurisdiction to which the **arbitration** is tied. The seat will determine the procedure or rules which govern the **arbitration**, including;

Arbitrability, time limits for commencement, **interim measures, some procedures, powers of the arbitrators, confidentiality, form and validity** of the award, **finality** of the award including appeal rights, **enforcement**



ISSUES REGARDING THE SEAT

- **Do not confuse the seat or legal place** of the arbitration with the **location** of the arbitration
- E.G. The Court of Arbitration for Sports, (CAS), sits in whatever country the Olympic games is situated, but the seat is always Switzerland and the rules are those of CAS.
- The five most preferred and widely used seats are **London, Paris, Hong Kong, Singapore** and **Geneva**.
- Based on **reputation** of the seat, **neutrality of the local legal system**, national arbitration law, track record for **enforcing agreements** to arbitrate and arbitral awards, availability of quality **arbitrators**, cultural **familiarity**, **efficiency of local court** proceedings, **location of a party's people**, **availability of specialised lawyers** at the **seat**, **cost**, **location** and **quality of hearing facilities**, location of the arbitral institution, language, transport connections

THE RULES OF PROCEDURE

- Can be written by the parties
- Adopted from one of the institutions
- Taken from the rules of arbitration organisations such as the AAA, and IBA.



OTHER REQUIREMENTS

The place of arbitration

-Anywhere in the world

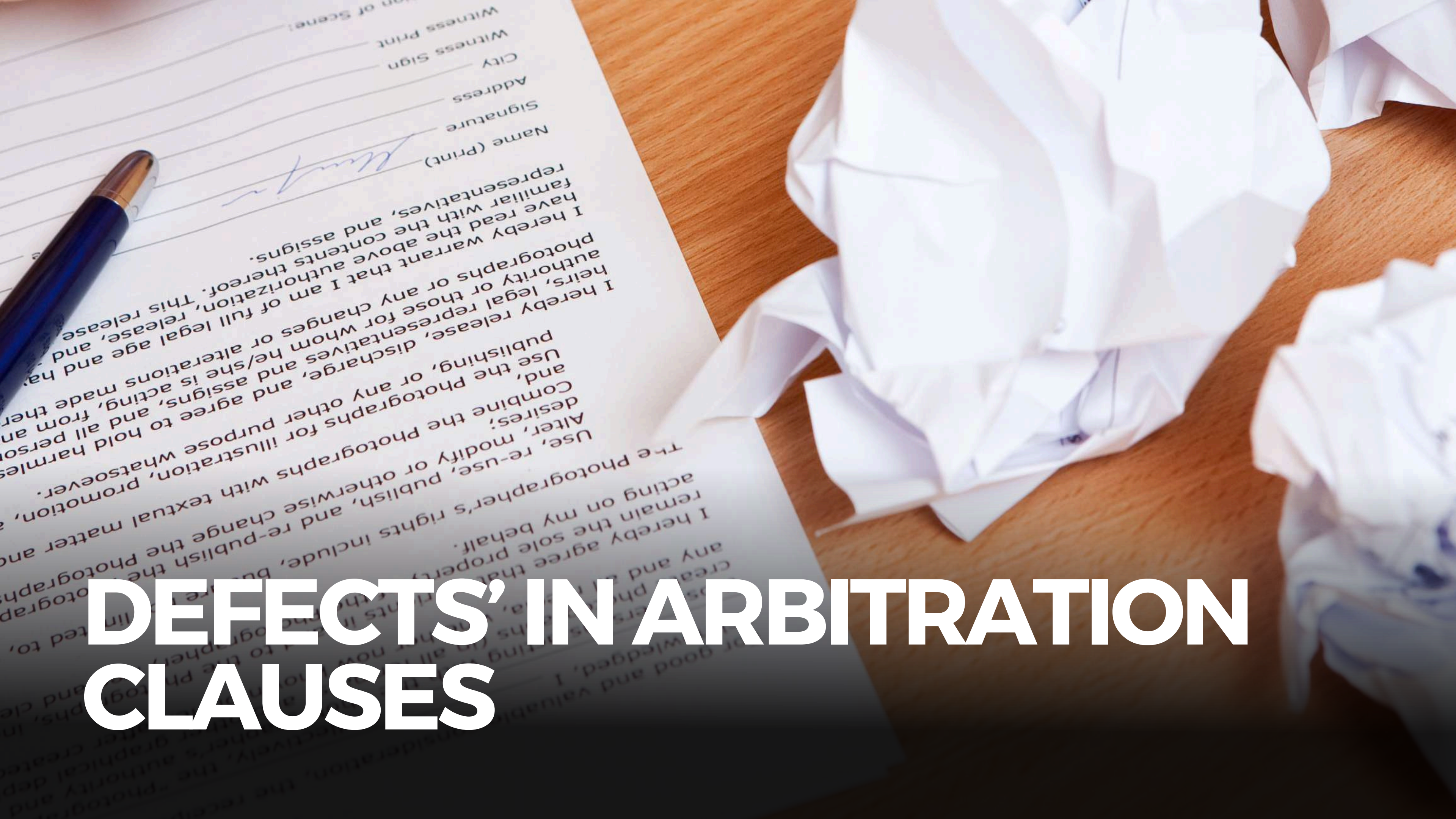
The number of arbitrators

-Dependent on the nature of the dispute and recourses.

The language of the arbitration

-That which is most convenient





DEFECTS' IN ARBITRATION CLAUSES



DEFECTS' IN ARBITRATION CLAUSES

KVC Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd [2017] SGHC 32.

- 'The Seller and the Buyer agree that all disputes arising out of or in connection with this agreement that cannot be settled by discussion and mutual agreement shall be referred to and finally resolved by arbitration as per Indian Contract Rules'.
- Second contract referred to the 'Singapore Contract Rules'.
- One of the contracting parties was from Singapore
- **The Singapore High Court found that a bare arbitration clause which merely provides for submission of dispute to arbitration without specifying the place of the arbitration, the number of arbitrators or the method for establishing the arbitral tribunal remains a valid and binding arbitration agreement if the parties have evinced a clear intention to settle any dispute by arbitration.**

What is the relevant law from the decision in KVC Rice Intertrade Co Ltd?

- Under Section 8(2) of Singapore's International Arbitration Act ('IAA') (Cap. 143A), the President of the SIAC Court of Arbitration is designated as the statutory appointing authority.
- Article 11(3) of the Model Law provides that where the parties had not agreed on the mechanism for appointment of arbitrator(s), the default appointing authority (i.e. the Singapore International Arbitration Centre ("SIAC") President) in this case will appoint the arbitrator(s).

The reasoning in KVC Rice Intertrade Co Ltd

- Where there was no other way to prevent injustice to a would-be claimant, the Court is prepared to step in to appoint an arbitrator for the parties. This is provided the dispute has some connection with Singapore, which was satisfied in this case as the defendant was a Singapore company.
- The President of the SIAC Court of Arbitration is designated as the statutory appointing authority under Section 8(2) of Singapore's International Arbitration Act ('IAA') (Cap. 143A), and was therefore able to appoint an arbitrator in the case
- Even if the President of the SIAC Court declines to appoint the arbitrators for whatever reason, the Singapore court retains "residual jurisdiction" to ensure that the arbitration under both arbitration clauses proceed notwithstanding any deadlock between the parties on the appointment of arbitrators.

What is a Tiered Dispute Resolution Clause?

What is a Tiered Dispute Resolution Clause?

- A tiered dispute resolution clause involves a series of steps in the overall dispute resolution process, each designed to handle the dispute if it has not been resolved by the previous step.
- These vary from the single step clause which provides for mediation and then arbitration, to a multi-step clause which provides for a series of direct negotiations followed by mediation if the negotiations fail and then arbitration.
- If drafted properly, the structure can be very effective but if not, can be used tactically to delay matters. To avoid this the drafting should ensure that it is clear when one stage ends and another begins.
- The common approach is to provide for a structured time scale for when the various steps are to take place and to make it clear when the time period for each stage ends.

Drafting the Tiered Clause

- The detailed clause will minimise procedural disagreement and may enhance the possibility of a court treating it as enforceable.
- If litigation is commenced in breach of an obligation to mediate/pursue ADR the court may order a stay of proceedings pending mediation.
- In arbitration the situation is different because the arbitration tribunal derives its jurisdiction from the parties' agreement to arbitrate.
- If the tiered clause provides that the parties have first to go to ADR the effect could be to deprive the tribunal of jurisdiction until the ADR process has been exhausted.
- When drafting the ADR clause it is up to the parties to decide whether they wish to specify a particular ADR procedure or whether they prefer to agree on one as and when a dispute arises.
- Tiered clauses should provide a mechanism for a final, binding and enforceable resolution of the dispute, typically arbitration but not both arbitration and litigation.

Drafting Rules

- The golden rule with any dispute resolution clause is clarity in drafting.
- A clear process;
- Certainty when the process is triggered;
- Incorporate a time frame (beginning and end);
- Ensure that the decision makers are easily identifiable;
- Make it clear whether the mediation is to take place before or during arbitration.
- State that the arbitral award shall be final and binding.

Sample Tiered Clause

- “If any dispute arises out of or in connection with this agreement or its formation, directors or other senior representatives of the parties with authority to settle the dispute will, within 30 days of a written request from one party to the other, meet in a good faith effort to resolve the dispute.
- If the dispute is not wholly resolved at that meeting, the parties will attempt to settle it by mediation in accordance with the ICAMEK Mediation Rules. Unless otherwise agreed between the parties within 15 days of notice of the dispute, the mediator will be nominated by ICAMEK. To initiate the mediation a party must give notice in writing ("ADR notice") to the other party(ies) to the dispute requesting mediation. A copy of the request should be sent to ICAMEK. Unless otherwise agreed, the mediation will start not later than 30 days after the date of the ADR notice.
- No party may commence any arbitration in relation to any dispute arising out of this agreement until it has attempted to settle the dispute by mediation and either the mediation has terminated or the other party has failed to participate in the mediation.
- If the dispute is not settled by mediation within 60 days of commencement of the mediation or within such further period as the parties may agree in writing, the dispute shall be referred to and finally resolved by Arbitration. ICAMEK shall be the appointing body and administer the arbitration. ICAMEK shall apply the ICAMEK rules in force at the time arbitration is initiated. In any arbitration commenced pursuant to this clause the number of arbitrators shall be 3 and the seat or legal place of arbitration shall be Kampala, Uganda.”

Pathological Arbitration Clauses



Pathological Arbitration Clauses.

- The term “**pathological clauses**”, coined by Frédéric Eisemann, is widely used to describe arbitration clauses with apparent defect(s) liable to disrupt the smooth progress of the arbitration. Such clauses may be a source of conflict for the whole duration of the dispute – from jurisdictional battles to challenges at the enforcement stage.
- However, not all “defects” render an arbitration clause devoid of any effect. Some of these imperfections may be resolved through the tool of interpretation.

Sloppy multi-tiered clause (Lack of clarity as to when stages begin/end, whether stages are optional or not):

“Disputes shall be submitted to arbitration according to the Rules of Conciliation and Arbitration of the ICC...; disputes which may be resolved by conciliation shall be submitted first to conciliation”.

(Pathological Arbitration clauses Pathological Arbitration clauses, Marie , Marie - H élèneMalevilleMaleville, IBLJ, n °1, 2000, p.69) 2000, p.69)

“The parties shall mediate so long as one party believes settlement through mediation is possible, after which the parties shall submit the dispute to binding arbitration”.

Singapore is also well-known for the willingness of its courts to uphold arbitration agreements. As the Singapore Court of Appeal explained in the case of *Insignia v Alstom*:

“... where the parties have evinced a clear intention to settle any dispute by arbitration, the court should give effect to such intention, even if certain aspects of the agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars... so long as the arbitration can be carried out without prejudice to the rights of either party and so long as giving effect to such intention does not result in an arbitration that is not within the contemplation of either party”.

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