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Arbitration: An investment in the future

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Most parties to a contract may not appreciate the importance of a properly drafted arbitration clause until they find themselves in a dispute. International arbitration has become a principal method of resolving disputes between states, individuals, and corporations in almost every aspect of international trade, commerce, and investment. This popularity stems from the often flexible and efficient nature of arbitration. However, parties to a contract may lose some, if not all, of this flexibility and efficiency if the arbitration clause is not properly tailored to the contours of the contract and to party needs.

There are two basic types of arbitration agreements: the arbitration clause and the submission agreement. An arbitration clause looks to the future; it usually appears in the principal contract and is an agreement to submit future disputes to arbitration. A submission agreement, on the other hand, looks to the past and is an agreement to submit existing disputes to arbitration. Whatever the form, all arbitration agreements must be in writing and signed by both parties to be recognised as valid under Thailand's Arbitration Act B.E. 2545, which closely follows the Model Law of the United Nations Commission on International Trade Law (UNCITRAL).

In this article, we highlight important elements that should be considered for inclusion in most arbitration clauses.

A valid arbitration agreement: Care should be taken to ensure that the arbitration agreement is valid. It must be made clear that the parties intend that any and all disputes between them shall be finally resolved by arbitration. An example of an arbitration clause that has been held invalid is: "In case of dispute, the parties undertake to submit to arbitration but in case of litigation the [court] shall have exclusive jurisdiction" (Craig, Park, and Paulsson, International Chamber of Commerce Arbitration, 3rd Ed., 2000, 128, 127-135). Such unclear language can give rise to a costly and time-consuming scenario in which a party takes action in a civil court to resolve a dispute and the defendant seeks to stay the proceedings on the basis of the existence of the arbitration clause. To avoid such an outcome, parties should negotiate for clear and concise language (e.g., "the parties to this contract, XYZ Inc. and ABC Inc., agree to submit any dispute arising therefrom to final and binding arbitration").

The number of arbitrators: Although in other jurisdictions, parties may choose to have an even number of arbitrators, under Thailand's Arbitration Act the number of arbitrators must be odd. In general, three arbitrators at most will be sufficient.

Establishment of the arbitral tribunal: There are many different methods of appointing an arbitral tribunal. Often, each party to a dispute will appoint one arbitrator and these arbitrators will mutually appoint an "umpire" or "referee." some other common approaches are:

- by agreement of the parties;

- by an arbitral institution;

- through a list system;

- by a professional institution or trade association; or

- by a national court.

Whatever the procedure, it should be clearly stated in the arbitration agreement.

Ad-hoc or institutional arbitration: Whether to choose ad-hoc arbitration (which is conducted pursuant to rules agreed to by the parties) or institutional arbitration (which is administered by an arbitral institution under its own rules of arbitration) is one of the most important decisions that has to be made in drafting an arbitration clause. One advantage of an ad-hoc arbitration is that it may be shaped to meet the wishes of the parties and the facts of the particular dispute. However, ad-hoc arbitration depends for its full effectiveness on the unlikely cooperation between the parties and their lawyers. On the other hand, institutional arbitration provides a set of rules that has been previously used and works well in practice. The downside of this approach is that, depending on the issues in dispute and particularised facts, it can be much more costly than ad-hoc arbitration.

Seat of arbitration: The choice of place or seat of arbitration frequently constitutes the law that governs the arbitral proceedings. It is advisable to consider practical matters, such as distance, availability of adequate hearing rooms, and back-up services, when considering the seat of arbitration.

Governing law: If the parties agree to a governing law that is different from that of the primary contract, it must be stated in the arbitral clause. Often, if the arbitration clause does not mention a governing law, the governing law is, de facto, that of the primary contract. It should be noted that under Thailand's Arbitration Act, the parties to a contract may agree on the governing law. Where there is no agreement, Thai law applies.

Language of arbitration: The language of the contract is, de facto, that of the arbitration although, in the circumstances, the arbitral tribunal usually has discretion to allow other languages to be used. To limit the expense and hassle of multiple languages, a single language should be specified in the arbitration agreement.

We believe the foregoing provides a sound introduction to those elements of arbitration agreements that are of most critical importance. While this may provide a helpful overview, parties should nonetheless seek the advice of legal counsel before finalising and executing such agreements.

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