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AFRICAN INSIGHTS

HOW TO DRAFT EFFECTIVE ARBITRATION CLAUSES

Our previous edition of African Insights considered the reasons why arbitration is emerging as the preferred method of dispute resolution in Sub-Saharan Africa. This publication focuses on the issues to consider when drafting and negotiating arbitration clauses.

THE SEAT

The arbitration clause should state the seat of the arbitration. This is the legal "home" of the arbitration and it is primarily the courts of the seat that are likely to determine any issues arising out of the arbitration. It is important, therefore, to choose a seat that is supportive of, and familiar with, the arbitral process.

In some cases, this may mean choosing one of the well-known centres of international arbitration, such as London, New York, Geneva or Paris. If an African seat is preferred, local advice should be sought but a good starting point is to consider whether the relevant country's arbitration law is based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (the Model Law). This is the position in Tunisia, Egypt, Kenya, Uganda, Rwanda, Nigeria, Zambia, Zimbabwe, Madagascar and Mauritius. Ghana's Alternative Dispute Resolution Act of 2010, which draws on principles reflected in the Model Law and features of the English Arbitration Act 1996, is also generally regarded as providing a modern and effective framework for arbitration.

The arbitration itself need not actually take place in the seat and so it will usually be possible to hold hearings in a neutral venue or in the place, for example, where documentary evidence and witnesses are located and the relevant events took place.

The choice of seat is also important when considering the ease with which an award can be enforced. It will usually be preferable to seat the arbitration in a country where the enforcing party can take advantage of the procedures and protections afforded by the New York Convention or the Uniform Arbitration Act, which applies in member states of the Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA) (see here for more information about the New York Convention and OHADA).

ARBITRAL RULES

Parties to an arbitration are free to agree on their own bespoke set of procedural rules but it is more usual for them to incorporate into their arbitration clause the standard rules of an arbitral institution. The arbitral institution will also provide support and administrative assistance.

The arbitration need not be held in the place where the arbitration institution is based. For this reason, the London Court of International Arbitration (LCIA) and the International Chamber of Commerce (ICC) remain popular choices throughout the world. However, there are a number of African arbitration institutions which are growing in size and reputation. These include the LCIA-MIAC Arbitration Centre in Mauritius and the Cairo Regional Centre for International Commercial Arbitration.

NUMBER OF ARBITRATORS

The arbitration clause should specify the number of arbitrators to be appointed. Most arbitrations have one or three arbitrators. High value arbitrations commonly have three arbitrators because this reduces the risk of an unpredictable outcome. However, this adds to the expense, and can create delay because of the need to fit the arbitration into the diaries of three different (and often busy) people.

QUALIFICATIONS OF ARBITRATORS

Arbitration agreements sometimes require arbitrators to have specific qualifications. This can cause problems, however, if a dispute arises about an issue, which the parties did not foresee at the time of entering into the arbitration agreement, and which is not within the specified area of expertise. For example, it may be counterproductive to provide for the arbitrators to be qualified accountants if a dispute arises about a complex legal issue. If the arbitration clause provides for the arbitrators to have specific or unusual qualifications, it may be difficult to find arbitrators with the requisite qualifications who are willing and able to act. Therefore, the appointment of a suitably qualified tribunal is normally best left to an appointing authority (usually the arbitral institution which is supervising the arbitration) once the nature of the dispute has become clear. It is rarely a good idea to identify a named arbitrator because problems can arise if that arbitrator is unavailable or refuses to act.

LANGUAGE

The arbitration clause should specify the language in which hearings will be held.

CONFIDENTIALITY

Most arbitral rules provide for confidentiality. However, this should be checked. If there are no such provisions, or they are inadequate, a bespoke confidentiality agreement should be included.

GOVERNING LAW

A jurisdiction or arbitration clause should not be confused with a governing law clause. The former dictates the forum in which a dispute will be determined; the latter decides the law which will be applied to the contract. The most important consideration when selecting the governing law of a contract is that it will give effect to the parties' rights and obligations in a commercial and predictable way. For this reason, English governing law clauses are often used even where neither the parties nor the subject matter of the contract have any connection with England.

Where a transaction includes the grant of security, particularly if the assets being secured are immoveable property, a major consideration is the need for any security to be created and valid under the law of the place where the secured asset is located.

Where the governing law of the contract is different from the law of the seat, it is a good idea to specify which law will apply to the arbitration clause (which will be treated as a separate agreement within the main agreement). Usually, it will make more sense for the law that governs the arbitration clause to be that of the seat.

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