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Tips to avoid a pathological arbitration clause: Part 2

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(For Part 1, please see the January 2010 edition of Asian-Counsel)

5. Designation of arbitrators

Some agreements may provide the names of individual arbitrators to be appointed when there is a dispute, but this type of nomination should be avoided. Where the named persons are not available, the arbitration agreement may not be recognised as valid or parties may have difficulties agreeing on a substitute. If concerned about preserving neutrality of arbitrators, parties can provide in the arbitration clause that the arbitrator should not have the same nationality as either party to the agreement.

When appointing the arbitrator, it is useful for the parties to know whether the arbitrator is from a civil or common law jurisdiction. It is also important to ensure that he/she has the necessary experience and is best suited to hear the dispute in question. The designation of an arbitrator has to be taken seriously as it may have a substantial impact on the award.

6. Law, equity and language

Parties should include a clause such as, "The law governing the contract shall be…". Parties can also specify that the arbitrators act as *amiable compositeurs*, meaning that they have the authority to decide in equity. This sentence can then be added: "The arbitrators shall not be bound by rules of law, and may exercise the power of an *amiable compositeur* or decide the case *ex aequo ad bono*".

It must also be remembered that the language of the contract does not imply that the same language will be used in the arbitration unless it is specifically stated.

7. Enforceable award

Parties must also ensure that the award granted by the tribunal will be enforceable. An express waiver of appeal may be used for countries which have a statutory right of appeal in arbitration.

It is common for an arbitration clause to provide that any award rendered will be "final and binding". In this context, "binding" means the parties intend the award will resolve the dispute and be enforceable by national courts against the losing party. Any reference stating that any award will be "final" will mean that the courts will not review the substance of such award.

8. Place of arbitration

The parties should specify the place of arbitration with the name of the city chosen by them as follows: "The place of arbitration shall be ...". The place of arbitration will determine the extent to which state courts may or may not interfere with the arbitration process and the recourses available. Possible locations include New York, Washington DC, Paris, Geneva and Singapore.

It should be noted that choosing a location does not mean that all arbitral proceedings have to take place there. The location for arbitration may also determine the language of the arbitration if the parties have not specified the language. A location that is inconvenient for the parties or expensive in respect of travel may affect the availability of witnesses or the cost of proceedings.

9. Language of arbitration

In case the language of the arbitration is not specified in the arbitration clause, the arbitrators will take into account the language of the contract and other relevant circumstances.

10. Multipartite arbitration

An arbitration clause may fail when each party is allowed to appoint its own arbitrator when there are more than two parties to the dispute. Usually in an arbitration involving only two parties, the two arbitrators appointed will select a third arbitrator to preside as chairman. If there is multipartite arbitration, parties should agree that all respondents and all claimants should conjointly appoint the panel of arbitrators, whether one or three.

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