Could your arbitration clauses be putting your client at a disadvantage when contracts are contested? In the first of a monthly column exploring international arbitration in Latin America, Doak Bishop, Craig Miles and Roberto Aguirre Luzi, of King & Spalding, discuss how to draft an enforceable arbitration clause and which provisions to include.

The international arbitration process often begins before a dispute ever arises – with the parties’ decision to include an arbitration clause in their contract. This is the first strategic decision made by the parties in resolving their dispute, and perhaps the most important. Thus, the parties should seize the opportunity to take control of their arbitration clauses when drafting an agreement.

Parties include arbitration clauses in their contracts with the aim of solving future disputes in a timely and cost-effective manner. A carelessly drafted arbitration agreement, however, may become a pathological clause (i.e., one that is not enforceable or is ambiguous, giving rise to expensive and time-consuming court challenges). In drafting the arbitration clause, certain mandatory requirements must be included. Beyond these provisions, however, are a multitude of additional, optional provisions that may be included at the discretion of the parties.

A word of caution: there is no such thing as a single ‘model’ or ‘all-purpose’ arbitration clause that is ideal for all contracts. Rather, each arbitration clause must be carefully tailored to the specific circumstances of the contract and the requirements of the parties, taking into account the likely types of disputes that may arise, the needs of the parties, and the applicable laws. Unfortunately, because the arbitration clause is often one of the last contractual provisions negotiated, it is often simply inserted at the last minute with the parties merely using form clauses. Failing to include essential provisions or failing to tailor the arbitration clause to the exigencies of the specific contract can result in inefficiency, unnecessary conflict and increased expense once a dispute arises. But when in doubt, a simple clause like the model institutional clauses may be the best decision.

Enforceability of arbitration clauses
The main objective of a drafter should be to draw up an enforceable arbitration clause. The New York and Panama Conventions both list the requirements for an arbitral agreement in order to be enforceable. Both conventions include similar requirements for enforcing arbitration agreements.

First, the arbitration agreement must be in writing; oral agreements are not enforceable. A written arbitration agreement may consist of a separate arbitration agreement or an arbitral clause contained in a contract.

Second, the parties to the arbitration clause must have the capacity to agree to arbitrate. One of the few grounds in the New York and Panama Conventions for vacating an award are when the parties are under some incapacity (pursuant to the law applicable to them), or when the arbitration agreement is invalid under the governing law to which the parties agreed (or, in the absence of an agreement on the governing law, under the law of the country where the award is made).

Third, the type of disputes concerned must be arbitrable. Under a given nation’s view of public order or public policy, a particular species of controversy may be properly arbitrated, but there may be others that are not arbitrable (e.g., labour law).

Fourth, although it is not part of the conventions’ requirements, parties sometimes provide that a certain action or event must occur before arbitration. For example, mediation, negotiations or the lack of jurisdiction of a specific court could be conditions precedent to the filing of an arbitration. A common problem with these conditions is when it is unclear whether the provision is merely preferable before the arbitration or whether it is required to initiate a proceeding.

Institutional sample clauses
Each of the leading arbitral organisations provides a sample arbitration clause for inclusion in international contracts. For example, the International Chamber of Commerce (ICC) suggests the following clause:

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.

This clause contains the three key aspects of an arbitral clause:

- the phrase ‘all disputes’ encompasses all types of controversies, without exception;
- the phrase ‘in connection with’ generally creates a broad-form clause that will cover non-contractual claims such as tort and fraud in the inducement; and
- the phrase ‘finally settled’ indicates that the parties intend the arbitrators’ ruling to be final and binding.

But note that this clause leaves certain strategic decisions for the institution or arbitrators to decide once the arbitration is initiated: the venue, the number of arbitrators, the language of the proceeding, and the law to govern the parties’ obligations. If the parties wish to control the outcome of these decisions, they should provide for them in the arbitral clause. Therefore, while almost certainly enforceable, institutional sample clauses provide the bare minimum in an arbitration clause.

Types of arbitration clauses
Arbitration clauses can be classified into three categories: basic, general and complex clauses.

Basic clauses are those that include only the most basic provisions – those that are essential to a viable arbitration agreement. Most institutional model clauses are basic clauses.

General clauses are perhaps the most common type of arbitral provisions for substantial transactions. They include certain optional provisions beyond those in a basic clause, designed to solve particular problems (e.g., providing for the venue, language, governing law, mediation stages, etc). General clauses are typically used when some, but not all, potential provisions are needed, or when the parties are unwilling to risk deviating from institutional rules or violating mandatory rules of the applicable law and they do not have the time or resources to research the issue. Examples of these clauses may be found in the energy industry in joint operating, drilling, natural gas supply and power plant construction agreements.

Complex clauses include some more unusual provisions in addition those which are generally accepted. These clauses must be carefully tailored.
to prevent inconsistencies and meticulously researched to prevent provisions that might invalidate the clause in a given jurisdiction. Beyond those included in general clauses, provisions that may be included in a complex clause include: (i) confidentiality, (ii) discovery, (iii) multi-party arbitration, (iv) consolidation, (v) split clauses requiring litigation of some issues and arbitration of others, (vi) expert determination, (vii) arbitrability, (viii) waivers of appeals or consent to appeals, and (ix) authorisation to adapt the contract or fill gaps, among others.

**Principles for drafting arbitration clauses**

Regardless of the type of arbitration clause, certain drafting principles will help prevent the failure of the clause. First, parties should avoid provisions that offend applicable substantive or procedural law, particularly any mandatory law. This includes the procedural law of the seat of the arbitration and the laws of the likely countries of the award’s enforcement. For example, French courts have invalidated arbitration clauses that permitted a broader appeal of the award to the courts than was allowed by French law.

The second principle is similar: drafters should avoid altering arbitral rules fundamental to the operation of the administering institution. Some ICC rules — and virtually all of the American Arbitration Association (AAA) international rules — may be modified by the parties’ agreement. But the ICC has refused to administer arbitrations when the parties’ agreement modifies certain rules that the ICC considers fundamental to the proper functioning of its arbitrations.

A third principle is to include all essential provisions and avoid provisions that could result in a pathological clause. For example:

- the clause should expressly state that the arbitration is final and binding;
- the clause should state the correct name of the institution designated to administer the arbitration;
- the parties should generally avoid naming a particular person as arbitrator in their agreement;
- the parties should not be too specific when imposing qualifications for the arbitrators;
- the parties should ensure that any authority named to act as appointing authority will agree to fulfill its mandate;
- the parties should ensure that the procedure adopted is clear, workable and not confused or conflicting; and
- if a condition precedent to arbitration is adopted, either a deadline for the occurrence of the condition or the means of satisfying it should be clearly stated.

Fourth, when in doubt, a cautious drafter should pick a basic clause from a well-known institution. Why? Because small changes to a good clause can sometimes turn it into a pathological clause.

Some years ago, a model clause was used by a client in a different contract. The client had made a couple of what it considered small changes to it, but it made the clause unworkable. The lesson is that in experienced hands, advanced clauses can solve problems, but if you are not expert in them, be cautious and stick with the tried-and-true formule of institutional model clauses.

**Strategic provisions**

Drafters should be aware that certain strategic decisions are often being made at the drafting stage, long before a dispute arises, which can substantially impact a future arbitration. Among the most important for international contracts are the following:

The ICC has refused to administer arbitrations when the parties’ agreement modifies certain rules that the ICC considers fundamental

**Arbitral institutions**

These differ not only in terms of cost, but also on relevant strategic issues such as multi-party arbitration, confidentiality, arbitrator and witness interviews, and privileged information. A cautious drafter should know the prominent procedural differences among the institutional rules. In another column, we will explore the differences between the main arbitration rules, and the pros and cons of selecting ad hoc arbitration instead of institutional rules like ICC or AAA.

**Place of arbitration**

Selecting the right place of arbitration is a very important strategic issue. The venue should be sited in a New York or Panama Convention country in order to obtain the advantage of enforceability as a matter of treaty rights. It should also be in a country in which the courts will support and not obstruct the arbitral process. The courts of the place of arbitration control any decisions are often being made at the drafting stage, long before a dispute arises, which can substantially impact a future arbitration. Among the most important for international contracts are the following:

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