Litigation or Arbitration: What You Should Know About Modern Dispute Resolution Clauses

- Dispute Resolution Clauses: What are they?

Often referred to as the 'Midnight Clause'[1] or 'Boilerplate Clause'[2], dispute resolution clauses should be considered as integral and given profound attention during contract negotiations. This is necessary because the absence or presence (if improperly drafted) of a dispute resolution clause may prove consequential for either party in the management of disputes arising from the contract.

Thus, depending on the preferred dispute resolution procedure, the following basic items are worth considering for the purpose of a dispute resolution clause:

1. **Jurisdiction Clause:**

   Also known as forum selection clause, jurisdiction clause is particularly relevant where parties are desirous of resolving potential disputes in a cross-border transaction in through the state apparatus i.e. courts [3].

   The choice of the national court that would exercise jurisdiction over the dispute can be tailored to the parties' preference. For instance, jurisdiction may be conferred on the national court of either or both parties or alternatively in a neutral jurisdiction[4].

   There are three possible outcomes in a jurisdictional clause:

   - First, both parties may submit to the exclusive jurisdiction of one or more courts thereby restricting the parties from instituting an action in a national court not agreed by both parties;
   - Both parties may submit to the non-exclusive jurisdiction of a particular court, in which case, either parties may Institute an action in a court of his choice.

- Finally, parties may integrate both options that one of the parties will be restricted to a particular national court while the other will be afforded the freedom to commence an action in any national court of his choice[5].

The above principles could also be applied in determining the jurisdiction that will bind an arbitration process.

2. Choice of Arbitration Rules:

Where parties elect to arbitrate, they should include the procedural rules that will govern the conduct of the arbitration proceeding. This is usually informed by parties' adoption of either an institutional framework or ad-hoc procedure. One of the perceived advantages of the former is that it relieves parties of administrative burdens commonly associated with an ad-hoc procedure. For instance, the usual practice is that arbitral institutions will afford parties a pool of qualified arbitrators from which they could appoint their preferred arbitrator(s). Furthermore, renowned arbitral institutions offer standard rules which have evolved in application over time[6].

Before parties can take benefit under institutional rules, parties must indicate their interest, in the arbitration clause, by specifying the name and the applicable rules of the arbitral institution of choice. If parties are in default of this requirement, ad-hoc procedure will take effect.

3. The Seat of Arbitration:

Simply put, the seat of arbitration is the jurisdiction whose national arbitration law will govern the arbitral process. The choice of an arbitral seat should be given considered thought, as it "affects questions of arbitrability, procedure, court intervention and enforcement"[7]. The seat of arbitration should however be distinguished from the 'venue' of arbitration proceeding. The parties may agree to a separate location different from the

'seat' for the physical conduct of the arbitration proceeding. Regardless, the arbitral law of the seat will govern the arbitration proceeding. For instance, an arbitration agreement may have Nigeria as its seat while the hearing of the arbitration proceeding will hold in London. In this case, the Nigeria's arbitral law will govern the arbitral process.

4. Selection of Arbitrators:

In the exercise of their autonomy, parties to an arbitration agreement are at liberty to include the procedure for the appointment of arbitrators that would seat on the dispute emanating from their contract. Generally, the procedure will stipulate the qualification and nationality of the arbitrator(s), number of arbitrators (usually odd), and in some cases the appointing authority (this could be the head of an arbitral institution or the court).

5. Choice of Law:

Typically, dispute resolution clauses include provision that will state the law that would govern **substantive matters of the contract**. Invariably, the governing law will form the basis upon which the terms the contract will be construed and interpreted for the determination of the rights and obligations of parties to the contract.

The governing law provision is not the same as the law of the seat of arbitration nor national court to which parties wishes to submit their disputes. Thus, it is not uncommon for parties to select a particular country as the seat of arbitration (or national court) while adopting another country's law as the governing law.

6. Choice of Language:

Where parties to an arbitration agreement operate in different languages, it is customary to specify the language that would be used in the proceeding[8].It is also usual practice to include the requirement of an interpreter to serve the need of any party that does not speak the chosen language of the arbitration[9].

Dispute resolution clauses are important due to the far-reaching impacts on parties involved in contractual relationship. Also, dispute resolution clauses should be devoid of equivocality to avoid disputes as its interpretation which may prolong the resolution of the actual commercial dispute.

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[1] i.e, the last clause to be considered in the grand scheme of the contract negotiation

[2] a generic term for standard contractual clauses

[3] Gbenga Bamodu, 'Jurisdiction and Applicable Law in Transnational Dispute Resolution before the Nigerian Court' [1995] *The International Lawyer* 29(3) p562.

[4] Ashurst," Jurisdiction Clauses" *Ashurst* (12 February 2020) <https;//www.ashurst.com/en/news-and-insights/legal-updates/jurisdiction-clauses/> assessed 18/4/2020

[5] Ibid.

[6] see for instance, the WIPO Arbitration Rules 2020 and the ICC Rules of Arbitration 2017

[7] American Arbitration Association," Drafting Dispute Resolution Clauses: A Practical Guide" *American Arbitration Association* (2013) <http://www.adr.org/sites/default/files/document_repository/Drafting%20Dispute%20%Resolution%20Clauses%20A%20Practical%20Guidde.pdf> assessed 18/4/2020

[8] ibid

[9] ibid