المـــركـز الـسـعـــودي للتحكـيم التجـــاري
Saudi Center for Commercial Arbitration

Guide to Drafting ADR Clauses

Contents:

Introduction

A dispute resolution clause is an agreement, separate or within a contract, which sets out the mechanism for the resolution of disputes between the contractual parties. The scope of that agreement is determined in the drafting of the clause. The inclusion of Alternative Dispute Resolution ("ADR") clauses in commercial contracts is a common practice. Arbitration, mediation and other alternatives to litigation are most frequently accessed by reference to a "future disputes" clause in a commercial contract.

The ADR process provides parties with alternative means of resolving their disputes without resorting to litigation which saves time and cost. Unlike in litigation, the process is private and parties themselves are able to decide the rules and procedures for resolving their dispute and to select a mutually acceptable neutral third party to facilitate their resolution.

However, the benefits of an ADR provision will be lost if the parties fail to give proper attention to the terms of an ADR clause and do not fully understand its implications when they include the clause in their contract. It might be too late to address any misunderstandings or fill in the gaps in an inadequate ADR mechanism after a controversy arises. When including an ADR clause in a contract, it is essential to ensure that the clause is drafted with clarity, precision and meets the intended purpose. A poorly drafted ADR clause may result in delay, expenses and inconvenience which are the very opposite of the desired result.

Another important aspect of an ADR clause which is often overlooked by parties is that the result of an ADR procedure may be final and binding on the parties, i.e. the parties may be prevented from challenging the determination in a court if they are not happy with the outcome.

Too often, dispute resolution clause of the contract is considered among the "midnight clauses", left until the final hour, after the more substantive provisions have been negotiated at length. Best practice is to consider the matter of problem solving and dispute resolution early in the negotiation, so providing a positive environment for further negotiation and avoiding the undue pressure of a closing deadline. In any case, each and every commercial relationship is unique. Contracting parties are well advised to seek appropriate guidance when drafting such clauses.

Checklist for Decision Making

The following checklist of principal matters should be considered before drafting ADR Clause:

Capacity and Authority

The capacity and/or authority of the parties and signatories to the ADR agreement should be checked. The ADR agreement should be signed by the parties themselves or authorized person with a special and valid power of attorney. A copy of the power of attorney should be attached to the agreement. The power of attorney should precise explicitly that parties' representatives are authorized to sign ADR or arbitration clauses. If the ADR clause is signed by a legal entity, the signature must be executed by its authorized representative after obtaining the required approvals. Signatory capacity is particularly important where a state or para-statal authority is party to the contract.

In case ADR clause is signed by conservator or guardian acting on behalf of one of the parties, the legal document establishing conservatorship or guardianship must be copied and attached to the agreement. If additional authorization is needed from a court or other entity to allow the guardian or conservator to execute the ADR agreement, the concerned party should fulfil this requirement to avoid nullity of the agreement.

Mandatory Requirements

The governing law of the arbitration agreement and/or the law of the seat of arbitration and/or the law of the place of enforcement might impose mandatory requirements on the parties as to the form and/or contents of the arbitration agreement. These requirements should be observed carefully.

Scope of ADR Clause and Arbitrability

The parties should decide what disputes they wish to be referred to ADR process. Generally, clauses are drafted very broadly so as to capture all disputes which might arise between the parties. However, sometimes parties wish certain categories of disputes to be resolved by other means. This requires careful drafting, including provision for the resolution of disputes regarding the category into which a dispute falls. It should also be noted that, as a matter of public policy, some disputes might not be arbitrable under the applicable law.

Single or Multi-Step Clause

A decision needs to be made whether the clause will contain a single process or a multi-step process. The choice is whether to provide only for arbitration or mediation, or to combine different ADR processes, for example to provide for direct negotiations, followed by mediation if the negotiations fail, and/or followed by arbitration in case of non-settlement.

Concurrent or Successive Procedures

Parties should consider whether they want to attempt mediation before any adversarial process begins, whether arbitration or litigation. The opportunity of mediation settlement may be higher before a hostile step of commencing court proceedings or arbitration. A party might be concerned to preserve their rights to seek provisional relief from court or arbitral tribunal without waiting for mediation outcomes. A concurrent clause will also allow for mediation to take place after the parties have more information, and so perhaps provide a better opportunity for settlement.

Identifying Procedural Rules

The parties should consider whether to amend the procedural rules adopted by the SCCA.

The following "Model" dispute resolution clauses, accompanied by short commentary, are intended to assist contracting parties in drafting (ADR) clauses. Parties with questions regarding drafting a Saudi center for Commercial Arbitration Clause are welcome to email SCCA at info@sadr.org for assistance.

Model SCCA Short Form Arbitration Clause

The short form arbitration clause below will guide the parties through all the major aspects of arbitration. Incorporating by reference a modern set of arbitral procedures which meet the expectations of the parties in arbitration proceedings, the short form clause serves as an excellent starting point for the drafter. Incorporation of the short form clause provides for the following critical aspects of the arbitral process:

- Notice of arbitration requirement and calculation of periods of time;
- Response to the Notice of Arbitration and initiation of a Counterclaim;
- Joinder;
- Amendment and supplement of claim;
- Composition of the arbitral tribunal;
- Arbitrator conflict of interest disclosure and challenge procedure,
- Interim and/or Emergency Relief;
- Case management and scheduling;
- Place of Arbitration;
- Jurisdiction;
- Applicable law;
- Powers of the Tribunal;
- Conduct of the Arbitration, hearing and taking of evidence;

- Proceedings in the Absence of a Party's Participation;
- Costs;
- Form and effect of the Award.

The SCCA offers the following short form standard arbitration clause:

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration administered by the Saudi Center for Commercial Arbitration (The "SCCA") in accordance with its Arbitration Rules."

The parties should consider adding:

- The number of arbitrators shall be (one or three);
- The place of arbitration shall be [city, province, state, country];
- The language(s) of the arbitration.

Post-Dispute Arbitration Agreement "Submission Agreement"

If the parties wish to submit their existing dispute, whether contractual or not, to arbitration, they may enter into the following submission agreement:

"The parties hereby submit the following dispute to arbitration administered by the Saudi Center for Commercial Arbitration (the "SCCA") in accordance with its Arbitration Rules.

The following issues shall be subject to arbitration: ……."

Parties should precise in their agreement a description of the dispute and determine clearly the scope of arbitrable matters. Failing to do so, would make the agreement nil and void.

The submission agreement may also provide for the number of arbitrators, the place and language of arbitration.

Multi-Step Clauses

It is increasingly common for parties who agree to include an arbitration clause in a contract to establish an obligation to negotiate or mediate before initiating arbitration proceedings. These obligations are referred to as "escalation clauses," "multi-tier clauses," or "multi-step alternative dispute resolution clauses". These clauses have a "filtering" effect, by providing an opportunity for the situation to be resolved outside arbitration, thereby avoiding the financial costs and delays involved in the arbitration process. Failing this, the clause may also serve to provide parties with an opportunity to prepare their defense better if a negotiated solution or mediation settlement cannot be reached. Such clauses are particularly appropriate where the parties have a long-standing and on-going commercial relationship, and where there may be factors to consider other than the narrow scope of a particular dispute.

While those factors are missing in a commercial relationship arising out of a single transaction, it is the rare case that would not benefit from settlement discussions.

A legitimate concern about the use of "step clauses" is the potential for a party to unnecessarily delay the process and a possible adverse decision.

However, this problem can be addressed by providing time limits on each step. These limits are, at best, an educated guess regarding appropriate timing for negotiations or a mediation to be completed by the disputing parties. Alternatively, the clause might be drafted to allow each party to demand arbitration without recourse to the previous step(s), or by permitting mediation and arbitration to proceed concurrently. Otherwise, parties should be prepared to go through each required dispute resolution process.

For the benefit of parties drafting commercial contracts who wish to include an express obligation to seek resolution of disputes by negotiation and/or mediation prior to arbitration or concurrent with it, SCCA offers the following model "step" clauses.

Negotiation-Arbitration Clause

Negotiation clauses play an important role in the dispute resolution process. They should be considered procedural arbitration requirements that must be met before the parties can seek a decision on the merits.

However, failure to comply with the clause should not bar access to arbitration. The arbitral tribunal should determine the effects of non-compliance where there is a negotiation requirement. Generally, the case might be dismissed, although the arbitral tribunal may choose to simply suspend the proceedings until the requirement has been met.

Enforcement of the negotiation clause is possible when the terms of performance are well defined, but not when the clause is reduced to generic or imprecise statements. In any event, these clauses serve an important role in "filtering" or "weeding out" conflicts that may arise.

SCCA offers the following Negotiation – Arbitration step clause:

"In the event of any controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, the parties hereto shall consult and negotiate with each other and attempt to reach a satisfactory solution. If they do not reach settlement within a period of 45 days, then, upon notice by any party to the other(s), any unresolved controversy or claim shall be settled by arbitration administered by the Saudi Centre for Commercial Arbitration in accordance with the provisions of its Arbitration Rules."

The parties should consider adding:

- The number of arbitrators shall be (one or three);
- The place of arbitration shall be [city, province, state, country];
- The language(s) of the arbitration.

The model negotiation-arbitration clause above provides a single

negotiation "step". Parties sometimes provide multiple steps, by way of an "issue escalation" clause, in an attempt to encourage the surfacing and resolution of problems quickly during an ongoing project. Again, parties in those circumstances should be careful to provide time frames for moving the negotiation to the next level to avoid delay.

Mediation-Arbitration Clause

Use of the Mediation process is growing globally. In mediation, parties are free to negotiate business solutions even beyond issues of law or contract. Increasingly, parties perceive that mediation is more effective if an unresolved dispute is to be followed, and resolved, by arbitration. Since the requirement to mediate may be seen as a condition precedent to arbitration, a deadline should be established allowing parties to move from mediation to arbitration if necessary to avoid delay.

Another approach to the combination of mediation and arbitration is the Med-Arb hybrid process. In this process, parties appoint a professional neutral to act first as mediator and, if matters are still unresolved, take on the role of an arbitrator to decide the remaining issues. The benefits are generally to do with saving time and money by expediting the shift to arbitration process and to do so without having to agree upon or appoint a second neutral to be the arbitrator. A potential disadvantage with Med-Arb is that the roles of Mediator (Facilitative problem solver and open-minded deal broker) and Arbitrator (a finder of fact, who, based on witness testimony and evidence submitted, renders a formal, determinative, final and binding arbitral award) differ substantially and maybe be difficult in the best of circumstances. For these reasons, although Med-Arb is a possible solution if time and money are the dominant concerns, there is utility in having one professional mediator and then, if the matter remains unresolved retaining a new, independent professional arbitrator to settle the dispute.

The SCCA Model "Step-Clause" for mediation-arbitration is as follows:

"Any dispute, controversy or claim arising out of or relating to this contract, or a breach, termination or invalidity thereof, the parties hereto agree first to try to settle it by mediation, administered by the Saudi Center for Commercial Arbitration (The "SCCA") in accordance with its Mediation Rules. If settlement is not reached within 45 days after service of a written request for mediation, any unresolved dispute, controversy or claim arising out of or relating to this contract shall be settled by arbitration administered by the SCCA in accordance with its Arbitration Rules."

The parties should consider adding:

- The number of arbitrators shall be (one or three);
- The place of arbitration shall be [city, province, state, country];
- The language(s) of the arbitration.

It should be noted that parties can agree to mediate at any time, even in the absence of a future disputes clause providing for mediation. However, disputing parties frequently find that mediation is particularly effective when conducted against the deadline of a pending arbitration procedure.

Negotiation-Mediation-Arbitration Clause

Parties to commercial contracts, most particularly those involving strategic commercial relationships, will sometimes provide for both negotiation and mediation as precursors to arbitration. The intent is that the parties should try to solve the problem themselves first, and, if that proves difficult, utilize the services of a third party mediator, before resorting to a third party decision-maker/arbitrator.

Once again, time limits or an opt-out provision should be considered to avoid delay tactics.

The SCCA Model "Multi Step-Clause" for Negotiation-Mediation-Arbitration is as follows:

"In the event of any controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, the parties hereto shall consult and negotiate with each other and attempt to reach a satisfactory solution. If they do not reach settlement within a period of 45 days, then either party may, by notice to the other party, demand mediation under the Saudi Center for Commercial Arbitration Mediation Rules. If settlement is not reached within 45 days after service of a written request for mediation, any unresolved dispute, controversy or claim arising out of or relating to this contract shall be settled by arbitration administered by the SCCA in accordance with its Arbitration Rules."

The parties should consider adding:

- The number of arbitrators shall be (one or three);
- The place of arbitration shall be [city, province, state, country];
- The language(s) of the arbitration.

Model Concurrent Arbitration-Mediation Clause

Some parties prefer not to obligate themselves to mediate as a condition precedent to the filing of arbitration. However, failing to provide for mediation in the dispute resolution clause may result in a lost opportunity to make clear the parties' preference for a negotiated settlement. With those concerns in mind, the SCCA has developed a model "Concurrent Arbitration-Mediation" Clause. The Clause obligates the parties to mediate, but does so after the initiation of arbitration, when the parties are presumably more informed regarding both the matters in dispute and their respective needs and interests while avoiding delay.
The SCCA Model Concurrent Arbitration-Mediation Clause is as follows:

"Any controversy or claim arising out of or related to this contract, or the breach, termination or invalidity thereof, shall be resolved by arbitration administered by the Saudi Center for Commercial Arbitration in accordance with its Arbitration Rules. Once the notice of arbitration is filed, the parties agree to attempt to settle their dispute by mediation administered by the Saudi Center for Commercial Arbitration under its Mediation Rules. Mediation will proceed concurrently with arbitration and shall not be a condition precedent to any stage of the arbitration process."

The parties should consider adding:

- The number of arbitrators and/or shall be (one or three);
- The place of arbitration and/or mediation shall be [city, province, state, country];
- The language(s) of the arbitration and/or mediation.

Model Arbitration-Mediation-Arbitration Clause

Under the Arb-Med-Arb process, parties who have commenced arbitration are to refer their dispute to mediation. If the mediation is successful, parties can then record their settlement agreement before the arbitral tribunal as an enforceable consent award. In the Arb-Med-Arb process, a party may commence arbitration by filing a Notice of Arbitration under the auspices of the SCCA. After the Tribunal is constituted, it will stay the arbitral proceedings and the dispute will be referred to mediation under SCCA Rules. if the dispute is settled, parties can request the Tribunal to record their settlement in the form of a consent award. If the dispute is not settled within a period of time to be agreed upon, the arbitral proceedings will resume.

Arb-Med-Arb process combines the advantage of mediation and arbitration. It encourages parties to exert their best efforts to resolve disputes by mediation before resorting to arbitration proceedings. They also can record their settlement agreement as a consent award by the Tribunal. In this process, arbitrator(s) and mediator(s) are separately and independently appointed under the relevant SCCA Rules to avoid potential conflict of interests.

The SCCA Model Arbitration-Mediation-Arbitration Clause is as follows:

“Any controversy or claim arising out of or related to this contract, or the breach, termination or invalidity thereof, shall be resolved by arbitration administered by the Saudi Center for Commercial Arbitration in accordance with its Arbitration Rules. The parties further agree that following the commencement of arbitration and the constitution of the tribunal, they will attempt to settle their dispute by mediation administered by the Saudi Center for Commercial Arbitration under its Mediation Rules. The tribunal will order to stay the arbitration proceedings pending mediation. Any settlement reached in the course of the mediation shall be referred to the arbitral tribunal appointed by SCCA and may be made a consent award on agreed terms. If settlement is not reached within 4 weeks, arbitration proceedings will resume”

The parties should consider adding:

- The number of arbitrators and/or mediators shall be (one or three);
- The place of arbitration and/ or mediation shall be [city, province, state, country];
- The language(s) of the arbitration and/or mediation.

Mediation Clauses

Parties can adopt mediation as a stand-alone dispute settlement procedure. In the event that mediation does not result in settlement, the parties can agree to utilize other dispute resolution procedures or default to courts for the resolution of their dispute. Parties' may agree to mediate their future dispute and provide for mediation in their contract, or to mediate an existing dispute.

Pre-Dispute Mediation Clause

The following pre-dispute mediation clause may be included in contracts:

"Any dispute, controversy or claim arising out of or relating to this contract, or a breach, termination or invalidity thereof, the parties hereto agree first to try to settle it by mediation, administered by the Saudi Center for Commercial Arbitration (the "SCCA") in accordance with its Mediation Rules, before resorting to arbitration, litigation, or some other dispute resolution procedure."

The clause may also provide for the qualifications of the mediator(s), the place and language of mediation, and any other item of concern to the parties.

Post-dispute Mediation Clause

If the parties want to use a mediator to resolve an existing dispute, they may enter into the following submission agreement:

"The parties hereby submit the following dispute to mediation administered by the Saudi Center for Commercial Arbitration (the "SCCA") in accordance with its Mediation Rules."

The clause may also provide for the qualifications of the mediator(s), the place and language of mediation, and any other item of concern to the parties.

Appointment of Arbitral Tribunal Party-Appointed Arbitrator Clause

For parties and their counsel, the appointment of the arbitral tribunal is arguably the single most critical issue in arbitration. Unless parties provide otherwise, the SCCA uses a list selection process for arbitrator appointments. The other notable method for arbitrator selection is the party-appointed selection process. The SCCA will follow whatever method of appointment is provided by the parties' agreement. The SCCA Arbitration Rules require that all arbitrators, regardless of method of appointment, shall be impartial and independent. If there are more than two parties to the arbitration, the SCCA may appoint all arbitrators unless the parties have agreed otherwise as per SCCA arbitration Rules.

There is no need to mention any arbitrator selection method in the arbitration clause if the parties wish to use the SCCA's strike and rank list selection method as provided for in arbitration Rules. One perceived advantage of the list selection method is that it eliminates the need for any ex-parte contact between parties and arbitrators. The SCCA

begins the list selection process by consulting with the parties regarding arbitrator qualifications. After consultation, the SCCA sends an identical list of names along with their corresponding Curriculum Vitae to the parties with an invitation to strike unacceptable arbitrators, rank the remaining arbitrators in order of preference and return the list to the SCCA. The SCCA appoints the presiding arbitrator or tribunal from the closest mutual preference of the parties.

As an alternative to the list-selection process, parties can agree to use the party-appointed method of appointment. The perceived advantage of the party-appointed method is that with direct appointment of an arbitrator each party may have increased confidence in the tribunal. Parties who wish to use the party-appointed method should consider adding the following language to their arbitration clause:

"Within [30] days after the commencement of arbitration, each party shall appoint a person to serve as an arbitrator. The parties shall then appoint the presiding arbitrator (or, the two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal) within [20] days after selection of the party appointees. If any arbitrators are not selected within these time periods, the Saudi Center for Commercial Arbitration shall, at the written request of any party, complete the appointments that have not been made."
Parties are free to agree to the nationality of the arbitrators. The parties may also agree to a particular level of expertise, for example:

"The parties have agreed that any proposed arbitrator must be experienced in the field of _____ The SCCA as the appointing authority will finally determine what level of experience is deemed to be in compliance with the level of expertise requested by the parties."

This provision allows the parties to request a level of expertise with the addendum that allows the SCCA to complete the appointment process so that the parties' wishes to have an arbitrator with a level of expertise in a particular field is not later used by a recalcitrant party to delay the appointment of the arbitrators and the arbitration process.

The parties may also require the arbitrators to possess certain language skills or perhaps provide for a tripartite panel where one arbitrator is an attorney, the second an engineer or architect and the third a contractor.

However, parties should be cautious about requiring too-stringent level of expertise or background, as this may make it impossible to find the appropriate arbitrators. Perhaps better to express it as a preference or provide that SCCA or the parties shall use their best efforts.

Limitations on Time Frames and Information Exchange

The parties may agree to amend the SCCA Rules to suit their particular needs, except for those Rules which are considered a fundamental characteristic of SCCA arbitration (such as equality between parties, odd number of arbitrators and supremacy of the rules of Sharia). Examples of what specific procedures parties may wish to modify in the Rules are limitation of time and limitation or expansion of information exchange.

The following clause limits the time frame in arbitration:

"The award shall be rendered within [9] months of the commencement

of the arbitration, unless such time limit is extended by the tribunal."

The parties should be cautious of the dangers inherent in setting artificial deadlines. Time frames can be challenging but should be realistic. If time frames can't be met, the ability to enforce the award may be compromised. The alternative clause set forth below addresses the consequences of a "late" arbitration.

"It is the intent of the Parties that, barring extraordinary circumstances, arbitration proceedings will be concluded within [120] days from the date the arbitrator(s) are appointed. In particularly difficult circumstances the parties may apply to SCCA for an extension of time limit in the interests of justice. Failure to adhere to this time limit shall not constitute a basis for challenging the award."

The parties may limit information exchange by using the following clause:

"Consistent with the expedited nature of arbitration, pre-hearing information exchange shall be limited to the reasonable production of relevant, non-privileged documents explicitly referred to by a party for the purpose of supporting relevant facts presented in its case, carried out expeditiously."

Parties may also agree on the following limitation to hearing and exchange of information rules:

"The parties hereby agree to forego any in-person hearings and the arbitration shall take place based on the submission of documents only."

The parties should always exercise caution when restricting arbitration procedures and arbitral tribunal authority. Doing so may prevent arbitrators from, managing the process according to the immediate needs of the parties.

Confidentiality Clause

The type of contract may also call for additional language. So, for example, parties to an exclusive information contract or sensitive technology contract may wish to consider a confidentiality provision in their agreement. Parties to contracts frequently mistake privacy, which is a standard feature of commercial arbitration, for confidentiality. Absent party agreement, under the SCCA Arbitration Rules confidentiality will extend only to the arbitrator and the SCCA. Parties should also be aware of the limits of party agreement to confidentiality as regards non-signatories to the agreement such as witnesses and experts, and the requirements of law otherwise.

The SCCA Model Confidentiality Clause is as follows:

"Except as may be necessary in connection with a judicial challenge to an Award or its enforcement or unless otherwise required by law or judicial decision, neither a party nor its representatives may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of (all/both) parties."

Other Drafting Considerations

Contracting parties might also consider adding language to address specific procedural or remedial concerns. So, for example, notwithstanding the availability of emergency and interim relief under SCCA Arbitration Rules, parties may wish to underscore their expectation that such relief will be available by providing language to that effect in the dispute resolution clause. Parties may also add some specification on the substantive applicable law which might be the law of the contract. However, parties wishing to designate a different applicable law in the arbitration clause should take into account that such governing laws should not be contrary to Sharia.

Parties may add the following clause:

"The parties agree that the law of _____ shall be the governing law, except to the extent that such law is in conflict with the Sharia"

Model Clause for SCCA Acting as Appointing Authority Under the UNCITRAL Arbitration Rules

Certain parties may feel more comfortable in contracting for application of the UNCITRAL Arbitration Rules. The SCCA offers the following model Clause where parties seek to have SCCA act as the appointing authority under UNCITRAL procedures:

"Any dispute, controversy, or claim arising out of or relating to this contract, or the breach, termination, or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules in effect on the date of this contract. The appointing authority shall be the Saudi Center for Commercial Arbitration."

The parties should consider adding:

- The number of arbitrators shall be (one or three);
- The place of arbitration shall be [city, province, state, country];
- The language(s) of the arbitration.

Conclusion

It must be emphasized that a poorly drafted dispute resolution clause may affect the validity, effectiveness and progress of ADR process. In conclusion a "pathological" dispute resolution clause, is worse than no clause at all.

For further information regarding dispute resolution clauses, email the SCCA at info@sadr.org, or visit SCCA website: www.sadr.org

SCCA

المـــركـز الـسـعـــودي للتحكـيم التجـــاري

Saudi Center for Commercial Arbitration

SADR.org

+966 920003625