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Drafting Effective Arbitration Clauses for VIAC Proceedings

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To resolve a commercial dispute through arbitration, the parties must mutually agree, typically expressed through an arbitration clause in their contract(s). This article guides drafting arbitration clauses that enable parties to initiate proceedings at the Vietnam International Arbitration Centre ("**VIAC**"), the country's leading arbitration institution, under its Rules on Arbitration ("**VIAC Rules**") and applicable Vietnamese law.

1. What is an arbitration clause?

An arbitration clause is a contractual provision that establishes arbitration as the method for resolving disputes between parties, rather than litigation in court. Under the Law on Commercial Arbitration 2010 ("**LCA 2010**")[1], conflicts are resolved through arbitration if both parties have expressly agreed to this mechanism, typically by including an arbitration clause in their contract.

2. Essential terms of the arbitration clause

Generally, parties are free to tailor the arbitration clause to their specific circumstances. When opting for institutional arbitration – where an arbitral institution, such as VIAC, administers the proceedings for a fee – the arbitration clause should conform to that institution's rules and recommended practices.

For example, if VIAC is chosen, the arbitration clause should align with the VIAC Rules and its model arbitration clause, which is available on the VIAC website. The standard VIAC model clause reads:[2]

> *"Any dispute arising out of or in relation to this contract shall be resolved by arbitration at the Vietnam International Arbitration Centre (VIAC) in accordance with its Rules of Arbitration.*
>
> *(a) The place of arbitration shall be [city and/or country];*
>
> *(b) The governing law of the contract [is/shall be] the substantive law of [*].*
>
> *(c) The language to be used in the arbitral proceedings shall be [*]."*

This model clause incorporates many of the key elements recommended by respected international organizations such as the International Bar Association ("**IBA**")[3], the International Centre for Dispute Resolution ("**ICDR**")[4], and the United Nations Commission on International Trade Law ("**UNCITRAL**")[5], which includes the following:

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[1] Article 5.1 of the LCA 2010.
[2] https://www.viac.vn/en/model-clause.html.
[3] IBA Guidelines for Drafting International Arbitration Clauses, https://www.ibanet.org/MediaHandler?id=D94438EB-2ED5-4CEA-9722-7A0C9281F2F2 ("**IBA Guide**").
[4] ICDR Guide to Drafting International Dispute Resolution Clauses, https://www.icdr.org/sites/default/files/document_repository/ICDR_Guide_Drafting_Clauses.pdf.
[5] UNCITRAL Arbitration Rules (2021), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/21-07996_expedited-arbitration-e-ebook.pdf.

2.1 Information about the arbitral institution

An effective arbitration clause must accurately identify the arbitral institution, including its official name and any relevant details, to avoid ambiguity. Ambiguous or incorrect references can confuse, challenge the institution's authority, and lead to procedural delays.

Under the LCA 2010, if the clause does not name the arbitral institution, the parties must agree on one when a dispute arises. If such an agreement cannot be reached, the institution will be chosen at the claimant's request.[6] This provision effectively gives the claimant the right to select the arbitral institution when the arbitration clause is unclear.

2.2 The place of arbitration

The place of arbitration, also known as the seat of arbitration, is the location where the arbitral proceedings are conducted and where the arbitral award is officially issued. Generally, the parties have the freedom to choose this location, whether within or outside Vietnam.

However, the choice of the arbitration venue carries significant legal implications. While it does not determine the substantive law governing the merits of the dispute, it may influence critical aspects of the arbitration. These include, but are not limited to, the law governing the arbitration proceedings, the supervisory powers of the local courts, and set-aside applications.

2.3 The governing law

The governing law refers to the substantive law applicable to the dispute – the legal framework that arbitrators will apply when assessing the case's merits and rendering a decision.

If both parties are Vietnamese individuals or organizations, and the subject matter of the contract is located in Vietnam, or if the contract was entirely established, performed, modified, or terminated in Vietnam, then Vietnamese law must govern the contract. In all other cases, the parties are generally free to choose the governing law.[7] If the parties fail to reach an agreement on this point, the arbitral tribunal will determine the most appropriate applicable law, taking into account the circumstances.[8]

To avoid uncertainty, contracting parties should specify the governing law(s) that will apply to their agreement. By doing so, they ensure a clear legal framework for interpreting and performing the contract, resolving disputes, and minimizing the risk that an unintended or unfavourable law will be applied during the arbitration.

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[6] Article 43.5 of the LCA 2010.
[7] Article 14.1 of the LCA 2010; Article 663.2 and 664 of the Civil Code 2015.
[8] Article 14.2 of the LCA 2010.

2.4 The language of arbitration

The language of arbitration refers to the language in which the arbitral proceedings will be conducted. When selecting the language, parties should consider not only the language of the contract and relevant documents but also the capacity of the arbitral institution and the arbitrators to operate effectively in that language.

At VIAC, most arbitrators are proficient only in Vietnamese and English. If the parties choose a different language, it may significantly limit the pool of qualified arbitrators available to hear the case.

Where one party is a foreign-invested enterprise operating in Vietnam, or a foreign individual or organization or other instances where there is a "foreign element" in the dispute, Vietnamese law permits the use of foreign languages in arbitration.[9] However, if the parties cannot agree on the language of arbitration, the arbitral tribunal will make the final decision.[10]

In addition to the elements discussed above, an effective arbitration clause should also include the following essential terms to ensure clarity and procedural efficiency:

2.5 Number of arbitrators

At present, VIAC allows arbitration proceedings to be conducted by either one (1) or three (3) arbitrators.[11] Unless the parties expressly agree otherwise, the default rule is that the tribunal will consist of three (3) arbitrators.[12] To avoid procedural disputes, the parties should specify in the arbitration clause the number of arbitrators who will preside over the case.

While a three-member tribunal generally leads to more prolonged and more costly proceedings compared to a sole arbitrator, it can offer greater procedural safeguards. This is particularly important in complex disputes, where having multiple arbitrators can help ensure a more balanced and reasoned outcome.

2.6 Selection of arbitrators

Parties should agree on which party or parties have the right to select the arbitrators, how many arbitrators each party may appoint, and who will serve as the presiding arbitrator. These decisions can significantly influence the outcome of the arbitration.

In VIAC arbitrations, if the parties do not reach an agreement on the selection process, the standard mechanism set out in the VIAC Rules will apply:[13]

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[9] Article 10.2 of LCA 2010; Article 23.2 of the VIAC Rules.
[10] Ibid.
[11] Article 11.1 of the VIAC Rules.
[12] Article 39.2 of the LCA 2010; Article 11.2 of the VIAC Rules.
[13] Article 40 of the LCA 2010; Article 12 and 13 of the VIAC Rules.

(a) **For a three-member arbitral tribunal**, the claimant and the respondent each appoint one arbitrator, either directly or by deferring to VIAC. If the claimant or respondent consists of multiple parties, those parties must either agree among themselves or defer to VIAC to select their respective arbitrators. The two appointed arbitrators then jointly select the third arbitrator, who will act as the presiding arbitrator and chair the tribunal.

(b) **For a sole arbitrator tribunal**, both the claimant and respondent must agree on the sole arbitrator. If they cannot agree, the appointment will be made by VIAC.

This selection process also applies if an arbitrator needs to be replaced during the proceedings, per the VIAC Rules.[14]

2.7 Expedited procedure

VIAC allows parties to opt for an expedited arbitration procedure, which typically involves a sole arbitrator, shortened time limits, and the possibility of conducting hearings without the parties' physical presence. To use this procedure, the parties must expressly agree to it in the arbitration clause.[15]

Parties may refer to the VIAC model clause for expedited procedures, available on VIAC's website, which reads:

> *"Any dispute arising out of or in relation to this contract shall be resolved by arbitration at the Vietnam International Arbitration Centre (VIAC) in accordance with its Rules of Arbitration. The parties agree that any arbitration commenced pursuant to this clause shall be conducted in accordance with the Expedited procedure set out in Article 37 of the VIAC Rules of Arbitration.*
>
> *(a) The place of arbitration shall be [city and/or country];*
>
> *(b) The governing law of the contract [is/shall be] the substantive law of [*].*
>
> *(c) The language to be used in the arbitral proceedings shall be [*]."*

3. Optional terms of the arbitration clause

One of the key advantages of arbitration is that parties have the freedom to tailor the arbitration clause to suit their specific needs, resulting in a dispute resolution process tailored to their unique circumstances. This section highlights several optional, but beneficial, terms that parties may consider including when finalizing the arbitration clause. Whilst not essential to initiating arbitration proceedings, these provisions are "nice-to-have."

[14] Article 42 of the LCA 2010; Article 17.3 of the VIAC Rules.
[15] Article 37 of the VIAC Rules.

3.1 Qualifications of the arbitrators

Parties may agree on specific qualifications that an arbitrator must meet to be eligible to resolve their dispute. These requirements can include, but are not limited to, nationality, professional licenses, expertise, or experience in a particular field, ensuring the dispute is handled by the most suitable individual. That said, tailoring the eligibility criteria should be exercised with caution. At the time a dispute arises, the parties are often better positioned to assess which qualifications are most relevant. Moreover, overly restrictive criteria may significantly narrow the pool of available arbitrators, limiting the parties' freedom to choose and potentially delaying the proceedings.

3.2 Confidentiality

Vietnamese law stipulates that, unless otherwise agreed by the parties, arbitral proceedings shall be conducted in private.[16] However, neither the law nor the VIAC Rules is entirely clear on whether parties or third parties are prohibited from disclosing the arbitral award after the dispute has been resolved, nor do they specify what measures the tribunal or parties may take in the event of a breach of confidentiality.

Currently, the VIAC arbitral tribunal may, at the request of a party, order interim measures such as *"Prohibition of any specific action by any party in dispute or order that any party in dispute take specific actions aimed at preventing conduct adverse to the arbitral proceedings."*.[17] While these provisions are helpful, they do not entirely deter a party from disclosing information about the arbitration, especially after the award has been issued.

Therefore, issues related to confidentiality – including the scope and duration of confidentiality, permitted disclosures, and legal consequences for breaches – should be expressly addressed in the arbitration clause.

Parties may consider referencing the IBA's model confidentiality clause, which reads:[18]

> *"The existence and content of the arbitral proceedings and any rulings or award shall be kept confidential by the parties and members of the arbitral tribunal except (i) to the extent that disclosure may be required of a party to fulfil a legal duty, protect or pursue a legal right, or enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority, (ii) with the consent of all parties, (iii) where needed for the preparation or presentation of a claim or defense in this arbitration, (iv) where such information is already in the public domain other than as a result of a breach of this clause, or (v) by order of the arbitral tribunal upon application of a party."*

[16] Article 4.4 and 55.1 of the LCA 2010; Article 38.2 of the VIAC Rules.
[17] Article 49.2.b of the LCA 2010; Article 21.1.b of the VIAC Rules.
[18] IBA Guide, page.25, para.64.

3.3 Allocation of costs

In VIAC arbitrations, unless the parties agree otherwise, the arbitral tribunal has full discretion to allocate arbitration costs.[19] These costs may include arbitrators' fees, administrative expenses, inspection and valuation fees, expert advice fees, and other relevant costs such as travel and accommodation.[20]

Because approaches to cost allocation vary widely, the tribunal's discretion can make it difficult for parties to predict how costs will ultimately be divided. To reduce uncertainty, parties are advised to include specific provisions on cost allocation in the arbitration clause.

There are various options available, but a commonly recommended approach is to allocate costs proportionally to each party's success in the arbitral award. Parties may refer to the IBA's model clause on such type of allocation, which reads as follows:[21]

> *"The arbitral tribunal may include in their award an allocation to any party of such costs and expenses, including lawyers' fees [and costs and expenses of management, in-house counsel, experts and witnesses], as the arbitral tribunal shall deem reasonable. In making such allocation, the arbitral tribunal shall consider the relative success of the parties on their claims and counterclaims and defenses."*

3.4 Multi-tier dispute resolution

In dispute resolution terms of the contracts, it is very common for the parties to require that, before initiating arbitration, they must first attempt negotiation, mediation, or other alternative dispute resolution methods. Such terms are generally referred to as multi-tier dispute resolution clauses.

When drafting multi-tier dispute resolution clauses, the parties should consider the following key factors:

(a) To prevent one party from using negotiation or mediation as a delay tactic to avoid arbitration, the clause should include:

  (i) A clearly defined and indisputable event that triggers the negotiation or mediation phase, such as a written request by a party, late payment for delivered goods, or non-performance of an obligation.

  (ii) A specific timeframe for the negotiation or mediation phase, and/or an event that ends this phase, after which either party is permitted to initiate arbitration.

[19] Article 34.2 of the LCA 2010; Article 36 of the VIAC Rules.
[20] Article 34.1 of the LCA 2010; Article 34 of the VIAC Rules.
[21] IBA Guide, page.26 and 27, para.71.

(b) The clause should explicitly state that arbitration may only commence after the negotiation or mediation phase is completed, thereby eliminating any ambiguity regarding whether arbitration and negotiation/mediation can proceed simultaneously. This clarity prevents one party from prematurely initiating arbitration without completing the prior dispute resolution steps.

(c) The clause should make arbitration mandatory after unsuccessful negotiation or mediation. Using permissive language, such as "the dispute MAY be resolved through arbitration," rather than "the dispute WILL be resolved through arbitration," risks allowing a party to bypass arbitration and instead bring the dispute to court.

It is essential to note that Vietnamese courts do not have a uniform opinion on whether an arbitral award can be set aside if a party breaches a multi-tier clause by initiating arbitration prematurely. Currently, the prevailing view is that full compliance with the multi-tier process is necessary for the arbitral award to be considered valid. Nevertheless, a Vietnamese court does have the discretion to decide otherwise.

3.5 Consolidation of claims

Under Article 6 of the VIAC Rules *"Claims arising out of or in connection with more than one contract may be made in a single Request for Arbitration to be resolved in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement."*

For added certainty, parties involved in multiple contracts may consider including a clause to this effect in their agreements, expressly providing that any disputes arising under two or more contracts may be resolved through a consolidated arbitration.

3.6 Finality of the arbitration

In Vietnam, arbitral awards are regarded as the final verdict on a dispute matter, and are not subject to appeal.[22] Awards may only be set aside on limited grounds such as lack of jurisdiction, procedural violations, forged evidence, conflicts of interest, or breaches of fundamental principles of Vietnamese law.[23] Therefore, it is generally unnecessary to include a specific clause on the finality of the award.

However, if the parties prefer to include such a provision for added certainty, they may consider referencing the IBA's model clause, which reads:[24]

> *"Any award of the arbitral tribunal shall be final and binding on the parties. The parties undertake to comply fully and promptly with any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made."*

[22] Article 4.5 of the LCA 2010.
[23] Article 68.2 of the LCA 2010; Article 32.5 of the VIAC Rules.
[24] IBA Guide, page.30, para.84.

3.7 Other optional terms

Other optional terms for the arbitration clause include, but are not limited to, notice requirements, document production, provisional and conservatory measures, proceedings in the absence of a party's participation, joinder, case management, and scheduling.

Well-crafted arbitration clauses in contracts are essential for ensuring that arbitrations are resolved quickly, efficiently, and in a manner intended by parties.

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