



ALP NG & Co.
Model Arbitration Clause

Introduction

An arbitration agreement [AA] is the foundation stone of commercial arbitration. This is because the AA records the consent of the parties to submit a dispute to arbitration and as a general rule, there can be no arbitration between parties who have not first agreed to resolve their dispute(s) through arbitration. Thus, unlike national courts which derive their jurisdiction from the Constitution and/or the statute creating the courts or from parties' jurisdiction agreement, the jurisdiction of arbitration tribunals derives solely from the agreement of the parties to submit their existing or future disputes to arbitration.

Article II (1) of the New York Convention 1958 [NYC] refers to an agreement to arbitrate as including,

“an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen between them in respect of a defined legal relationship, whether contractual or not”

while Article 7(1) of the UNCITRAL Model Law defines AA in the following words,

“an agreement by the parties to submit all or certain disputes which have arisen, or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.”

Most national arbitration legislations have adopted definitions of AA that significantly borrow from the NYC and Model Law. For instance, the English Arbitration Act 1996 in section 6(1) refers to “an agreement to submit to arbitration present or future disputes (whether they are contractual or not)” while Section 2 of the United States' Federal Arbitration Act refers to “a written provision... to settle by arbitration a controversy thereafter arising out of [a] contract or transaction, or ... an agreement to submit to arbitration an existing controversy.” The Nigerian Arbitration and Conciliation Act 1988 [ACA] does not contain a definition of AA but the Act, in section 1, prescribes the forms which an AA may take.

From the above, it is obvious that the existence of a valid AA is a precondition for the commencement and validity of arbitration proceedings, and in the absence of a valid AA, a dispute cannot be validly submitted to an arbitral tribunal for resolution.

Two types of AA can arise under Article 7(1) of the UNCITRAL Model Law - a Submission Agreement and an Arbitration Clause. A Submission Agreement deals with an existing dispute, not otherwise subject to arbitration, but which parties subsequently agree to submit to arbitration. An Arbitration Clause, on the other hand, is a clause that refers any future dispute (arising from the contract) to arbitration. Although it is possible to have a free-standing AA, more often than not, AAs are contained as clauses in a main contract.

Experience has shown that despite its importance, parties hardly devote adequate time to the negotiation of AAs in their contracts and this sometimes has far reaching consequences especially when the Arbitration Clause ultimately proves pathological. To assist legal departments, fellow counsel, and the general public, the ALP Dispute Resolution team has put together the following Model Arbitration Clauses:

Short Form Model Arbitration Clause - Institutional Arbitration

Any dispute, claim or disagreement (hereinafter “Dispute”) arising out of, in connection with, or in relation to this agreement, including any question regarding its existence, validity, breach, or termination or the legal relationships established by this agreement, shall be referred to and finally settled by arbitration under the Rules of the [...] ¹, which Rules are deemed to be incorporated by reference into this clause. The arbitral tribunal shall comprise [...] ² arbitrator(s) who shall be appointed in writing on the agreement of the Parties. ³ The seat of Arbitration shall be [...] ⁴. The Arbitration proceedings shall take place in [...] ⁵ and/or shall take place through any medium mutually agreed by the parties. The proceedings shall be conducted in English Language. The arbitration agreement shall be governed by [...] ⁶.

Short Form Model Arbitration Clause - Ad-Hoc Arbitration

Any dispute, claim or disagreement (hereinafter “Dispute”) arising out of, in connection with, or in relation to this agreement, including any question regarding its existence, validity, breach, or termination or the legal relationships established by this agreement, shall be referred to and finally settled by arbitration in accordance with the provisions of the [...] ⁷, and Rules made pursuant thereto. The arbitral tribunal shall be composed of [...] ⁸ arbitrator(s) who shall be appointed in writing on the agreement of the Parties. ⁹ The seat of Arbitration shall be [...] ¹⁰. The Arbitration proceedings shall take place in [...] ¹¹ and/or shall take place through any medium mutually agreed by the parties. The proceedings shall be conducted in English Language. The arbitration agreement shall be governed by [...] ¹².

Institutional Arbitration - Multi-tiered

- 1.1 The Dispute Resolution Procedure set out in this Clause shall apply to any dispute, claim or disagreement (hereinafter “Dispute”) arising out of, in connection with, or in relation to this agreement.
- 1.2 The Parties undertake to resolve any Dispute by means of good faith negotiation by the Parties and the Parties shall do everything possible within the confines of the law to amicably resolve the Dispute. Any resolution reached by the Parties in that regard shall be reduced to writing and shall be binding on the Parties.
- 1.3 Where the Parties fail, or are otherwise unable, to amicably resolve their Dispute within [...] ¹³ days from the date that either Party sends a Notification of Dispute to the other Party (which given period may be extended by mutual consent of the Parties) such Dispute shall be referred to and shall be finally settled by arbitration under the Rules of the [...] ¹⁴, which Rules are deemed to be incorporated by reference into this clause.

¹ For example, the Rules of the Lagos Court of Arbitration/Chartered Institute of Arbitrators (UK) Nigerian Branch/Nigerian Institute of Chartered Arbitrators/Regional Centre for International Arbitration/Lagos Multidoor Courthouse, etc.

² This is usually 1 or 3 depending on the nature of the contract and amount involved.

³ By reason of the incorporation of the applicable arbitral institution’s Rules, in the event of a default by either Party to appoint an arbitrator, or the failure of two party-appointed arbitrators to appoint the third arbitration, the default appointing procedure under the arbitral institution’s Rules will kick in.

⁴ For example: Nigeria.

⁵ For example: Lagos, Nigeria.

⁶ For example: the Laws of the Federal Republic of Nigeria.

⁷ The Arbitration and Conciliation Act 1988 or the Arbitration Law of Lagos State.

⁸ 1 or 3 arbitrator(s).

⁹ Parties are strongly encouraged to select an arbitral institution to merely act as the default appointing authority to avoid any recourse to the courts for the purpose of making such appointments.

¹⁰ For example: Nigeria.

¹¹ For example: FCT Abuja, Nigeria.

¹² For example: the Laws of the Federal Republic of Nigeria.

¹³ For example: 14 days.

¹⁴ For example: the Rules of the Lagos Court of Arbitration/Chartered Institute of Arbitrators (UK) Nigerian Branch/Nigerian Institute of Chartered Arbitrators/Regional Centre for International Arbitration/Lagos Multidoor Courthouse, etc.

1.4 The arbitral tribunal shall be composed of [...] ¹⁵ arbitrator(s) who shall be appointed in writing on the agreement of the Parties.

Either Party shall be at liberty to propose any person for appointment as a sole arbitrator. Where either Party objects to the choice of an arbitrator proposed by the other Party or the Parties are otherwise unable to agree on the choice of the sole arbitrator within [...] ¹⁶ days after receipt of the notice of arbitration, either Party may request [...] ¹⁷, to make such appointment.

Or

Each party shall be entitled to appoint one arbitrator and the two party-appointed arbitrators shall appoint a third arbitrator, who shall be the chairman of the arbitral tribunal. If either party fails to appoint an arbitrator within [...] ¹⁸ days of the receipt of notice of the appointment of an arbitrator by the other party, [...] ¹⁹ shall, at the request of the party not in default, appoint an arbitrator on behalf of the defaulting party.

Where the two party-appointed arbitrators fail to agree upon a third arbitrator within [...] ²⁰ days of the appointment of the second arbitrator, the third arbitrator shall, at the request of either party, be appointed by [...] ²¹. The third arbitrator shall be the chairman of the arbitral tribunal.

1.5 The seat of Arbitration shall be [...] ²².

1.6 The Arbitration proceedings shall take place in [...] ²³ and/or shall take place through any medium mutually agreed by the parties. The proceedings shall be conducted in English Language.

1.7 The arbitration agreement shall be governed by [...] ²⁴.

Ad-Hoc Arbitration - Multi-tiered

1.1 The Dispute Resolution Procedure set out in this Clause shall apply to any dispute, claim or disagreement (hereinafter “Dispute”) arising out of, in connection with, or in relation to this agreement.

1.2 The Parties undertake to resolve any Dispute by means of good faith negotiation by the Parties and the Parties shall do everything possible within the confines of the law to amicably resolve the Dispute. Any resolution reached by the Parties in that regard shall be reduced to writing and shall be binding on the Parties.

¹⁵ 1 or 3 arbitrator(s).

¹⁶ For example: 21 days.

¹⁷ For example: the President/Chairman, for the time being, of the Lagos Court of Arbitration/Chartered Institute of Arbitrators/Chartered Institute of Arbitrators (UK) Nigerian Branch/Nigerian Institute of Chartered Arbitrators/Regional Centre for International Arbitration/Lagos Multidoor Courthouse, etc.

¹⁸ For example: 21 days.

¹⁹ For example: the President/Chairman, for the time being, of the Lagos Court of Arbitration/Chartered Institute of Arbitrators/Chartered Institute of Arbitrators (UK) Nigerian Branch/Nigerian Institute of Chartered Arbitrators/Regional Centre for International Arbitration/Lagos Multidoor Courthouse, etc.

²⁰ For example: 21 days.

²¹ For example: the President/Chairman, for the time being, of the Lagos Court of Arbitration/Chartered Institute of Arbitrators/Chartered Institute of Arbitrators (UK) Nigerian Branch/Nigerian Institute of Chartered Arbitrators/Regional Centre for International Arbitration/Lagos Multidoor Courthouse, etc.

²² For example: Nigeria.

²³ For example: Enugu, Nigeria.

²⁴ For example: the Laws of the Federal Republic of Nigeria.

- 1.3 Where the Parties fail, or are otherwise unable, to amicably resolve their Dispute within [...]²⁵ days from the date that either Party sends a Notification of Dispute to the other Party (which given period may be extended by mutual consent of the Parties) such Dispute shall be referred to and finally settled by arbitration in accordance with the provisions of the [...]²⁶, and Rules made pursuant thereto.
- 1.4 The arbitral tribunal shall comprise [...]²⁷ arbitrator(s) who shall be appointed in writing on the agreement of the Parties.
- 1.5 Either Party shall be at liberty to propose any person for appointment as a sole arbitrator. Where either Party objects to the choice of an arbitrator proposed by the other Party or the Parties are otherwise unable to agree on the choice of the sole arbitrator within [...]²⁸ days after respondent's receipt of the notice of arbitration, either Party may request [...]²⁹ to make such appointment.

Or

Each party shall be entitled to appoint one arbitrator and the two party-appointed arbitrators shall appoint a third arbitrator, who shall be the chairman of the tribunal. If either party fails to appoint an arbitrator within [...]30 days of the receipt of notice of the appointment of an arbitrator by the other party, [...]³¹ shall, at the request of the party not in default, appoint an arbitrator on behalf of the defaulting party.

Where the two party-appointed arbitrators fail to agree upon a third arbitrator within [...]³² days of the appointment of the second arbitrator, the third arbitrator shall, at the request of either party, be appointed by [...]. The third arbitrator shall be the chairman of the tribunal.

- 2.1 The seat of Arbitration shall be [...]³³.
- 2.2 The Arbitration proceedings shall take place in [...]³⁴ and/or shall take place through any medium mutually agreed by the parties. The proceedings shall be conducted in English Language.
- 2.3 The arbitration agreement shall be governed by the [...]³⁵.

²⁵ For example: 30 days.

²⁶ The Arbitration and Conciliation Act 1988 or the Arbitration Law of Lagos State.

²⁷ 1 or 3 arbitrator(s)

²⁸ For example: 60 days.

²⁹ For example: the President/Chairman, for the time being, of the Lagos Court of Arbitration/Chartered Institute of Arbitrators/Chartered Institute of Arbitrators (UK) Nigerian Branch/Nigerian Institute of Chartered Arbitrators/Regional Centre for International Arbitration/Lagos Multidoor Courthouse, etc.

³⁰ For example: 60 days

³¹ For example: the President/Chairman, for the time being, of the Lagos Court of Arbitration/Chartered Institute of Arbitrators/Chartered Institute of Arbitrators (UK) Nigerian Branch/Nigerian Institute of Chartered Arbitrators/Regional Centre for International Arbitration/Lagos Multidoor Courthouse, etc.

³² For example: 60 days.

³³ For example: the President/Chairman, for the time being, of the Lagos Court of Arbitration/Chartered Institute of Arbitrators/Chartered Institute of Arbitrators (UK) Nigerian Branch/Nigerian Institute of Chartered Arbitrators/Regional Centre for International Arbitration/Lagos Multidoor Courthouse, etc.

³⁴ For example: Ibadan, Nigeria.

³⁵ For example: the Laws of the Federal Republic of Nigeria.

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Olasupo leads the commercial litigation and dispute resolution practice group. He is often referred to as a 'seasoned arbitrator and strategic litigator' with thirty years of experience acting for sovereign, sub-national and private international parties in international commercial & investment arbitration/ litigation and other advisory capacities. He has significant deep experience in investor-state arbitration and the leading African counsel in ICSID experience, investment-related disputes.



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