Beware the standard dispute clause!

Drafters of contracts who blindly put a standard dispute resolution clause into an agreement run serious risks for the parties to the contract. For example, a standard clause may refer transnational disputes to arbitration in South Africa in accordance with South African law when the parties' interests might be better served by referring them to a court in England in accordance with English law or vice versa.

The parties may also find that the standard clause requires them to use an enormously expensive dispute resolution agency and a complex arbitration procedure when they could administer the arbitration themselves in accordance with a simple and expedited procedure.

They may even find themselves having a thoroughly inappropriate and underqualified dispute resolver imposed on them at a great expense when a more suitably qualified person is available for much less. The only way to avoid these risks is to eschew relying mechanically on standard dispute resolution clauses. Instead drafters need to design clauses that are tailor-made for the particular kind of contract and the context in which disputes will have to be resolved under the contract.

The kinds of considerations that need to be taken into account in doing this are the following:

What kind of issues are most likely to cause dispute?

The answer to this question helps determine what kind of disputes need to be covered by the clause and who is most likely to raise the disputes.

For example, if the only disputes are likely to be legal disputes about the interpretation of the contract, then the appropriate dispute resolution system may differ from one in which the predominant disputes are likely to be differences of opinion about the adequacy of work performed in an ongoing service contract.

What process or processes should be used?

It is generally preferable when designing a dispute system to give first priority to consensus-seeking processes such as negotiation and mediation before resorting to adjudicative processes like arbitration or litigation in the courts.

Apart from the well-known processes of negotiation and mediation there is a wide variety of other consensus seeking processes that might be appropriate in the particular circumstances. Similarly, in addition to arbitration and litigation there are a large number of adjudicative processes that might be more appropriate for certain disputes in the particular circumstances than the well-known ones. There are also many hybrid processes that are appropriate in certain situations.

For example, if the kind of issues that are likely to cause dispute will result in small monetary claims only, then an expedited and informal mediation/arbitration process may be preferable to formal arbitration on its own. Likewise, if there is a wide variety of potential disputes rather than a range of different processes it might have to be included for the different categories of dispute.

Apart from ensuring that the right process or combination of processes has been chosen one needs to be sensitive to the fact that a process that might be appropriate in one jurisdiction might not be appropriate in another. For example, the waiting time for a court date in England is at present only a few months, whereas in South Africa it is a number of years. This may persuade a party who would prefer to use litigation for a particular kind of dispute in England to choose arbitration for those disputes in South Africa.

Who is most likely to raise disputes under the contract?

The answer to this question will help determine which substantive law would be most beneficial to a client and where it would be most convenient for the client to conduct dispute resolution processes.

Where should dispute resolution take place?

The answer to this question can have important cost implications for the parties.

For example, if a South African party had to arbitrate in England against an English party in accordance

with South African substantive law it would probably have to have both a South African and an English team of lawyers and pay for the South African lawyers to travel to England for the process.

What substantive law should apply?

The answer to the questions about the kinds of disputes that are most likely to arise and who will raise them, helps answer the question as to which substantive law should apply, and what criteria the adjudicator should apply in determining a dispute.

For example, if the majority of the disputes are likely to be disputes about contract interpretation between South African parties, then it may be preferable for South African law to apply and for arbitration to be the chosen process with the arbitrator being required to decide the matter as though he were a judge of the High Court. On the other hand, if most disputes are likely to be about the fairness of a person's decisions, then it might be preferable for the arbitrator to apply principles of equity.

What procedural law should apply?

In most jurisdictions there is a statute that regulates arbitration and in an increasing number of jurisdictions there is also a statute that regulates mediation. In most jurisdictions, including South Africa, the arbitration legislation is empowering legislation which provides that, unless the parties agree otherwise, the provisions of the statute will apply. It is generally not advisable to totally exclude the application of the empowering statute because it often facilitates important issues like enforcement. It is, however, important to consider which provisions should be excluded or varied, and what residual provisions will apply if the issue is not dealt with in the contract.

Many countries have adopted the United Nations Commission on International Trade Law (UNCITRAL) model law on arbitration and have enacted legislation to bring both their international arbitration and national arbitration law in-line with this international model law. The South African Law Commission has recommended that South Africa does this and has drafted appropriate legislation for the purpose but the Government has decided not to do so. Accordingly, the fact that our law is not in-line with international best practice often causes foreign parties to be wary about arbitrating in South Africa. They prefer to arbitrate in their home jurisdiction which has adopted the UNCITRAL model law.

Although there are significant advantages to adopting the UNCITRAL model law, the fact that South Africa has not done so is not a good reason in law not to conduct both international and national arbitration in South Africa. Our present Arbitration Act and the common law of arbitration provides parties with the basic rights and protection they need.

South Africa has also not adopted the UNCITRAL model law on conciliation and, unlike in the area of arbitration, it has no statute that regulates commercial mediation. Drafters therefore have to be particularly careful to consider how to ensure that an appro–priate mediation procedure will be followed best if mediation is prescribed.

Can arbitration awards be enforced?

South Africa is a signatory in the New York Convention and has enacted legislation that enables parties to enforce foreign arbitration awards. This is not the case in all jurisdictions so consideration needs to be given to whether the country in which an award has to be enforced is a signatory to the New York Convention and whether they have enacted appropriate domestic enforcement legislation.

What procedural rules should be followed in each process?

The appropriate procedural rules to be incorporated in a dispute resolution clause will be dictated by the kind of processes that are chosen to deal with disputes.

In many cases it is difficult to cover all eventualities in a dispute resolution clause, and so it is often advisable to provide for the parties to agree on the appropriate procedure once a dispute has arisen and, if they are unable to agree for the dispute resolver to be given the power to determine the procedure. Alternatively, they could agree that unless agreed otherwise at the time of dispute, a particular procedure will apply. This gives them the flexibility to choose an appropriate procedure for each dispute.

There are many dispute-resolving institutions each with their own set of recommended procedures. A drafter needs to choose procedures that are appropriate or leave it to the parties, and by default the dispute resolver, to choose an appropriate procedure as disputes arise.

What qualifications should dispute resolvers have?

It is important to consider what qualifications dispute resolvers under the contract should have. Processes like arbitration and mediation are specialised processes and require specialised skill and qualifications. One cannot assume, for example, that because a senior advocate has great advocacy skills, he will be able to effectively perform the role of a mediator.

Drafters should therefore either specify the particular qualifications required of the dispute resolver or provide that they will agree on this at the time that the dispute arises depending on its nature. The clause should provide that if they cannot agree then an appropriate expert must appoint a suitably qualified dispute resolver for the dispute in question.

Drafters need to be careful about abdicating the parties' choice of dispute resolver to a person without at least stipulating certain minimum qualifications for the dispute resolver. They must also be careful to separate the issue of choice of a dispute resolver by a dispute-resolving agency from whether or not that agency will administer the dispute resolution process.

Who should appoint the dispute resolvers?

In order to promote quality and legitimacy of the process, a maximum degree of choice needs to be given to the parties in the choice of a dispute resolver. Subject to certain basic qualifications mentioned above, the parties should be left to choose a dispute resolver and generally, only if they are unable to do so, should one be imposed on them by a third party. Even when this occurs it is advisable for the parties to be given maximum choice by, for example, being given the chance to indicate their preference from a recommended list.

Who should administer the dispute resolution process?

It is not always necessary to use the services of a dispute resolving agency to administer a dispute resolution process and the costs of doing so can, in some circumstances, be enormous and unnecessary. For example, some agencies like the International Chamber of Commerce and The Arbitration Association of South Africa charge parties a percentage of the value of the claim whereas, other agencies like the Association of Arbitrators and Tokiso Dispute Resolution only charge a fixed administration fee and a daily rate of the dispute resolver.

There are sometimes good reasons, notwithstanding the expense, to use an agency like the International Chamber of Commerce to administer a dispute resolution process. The Chamber provides a 'Rolls Royce' service and access to highly qualified and experienced arbitrators. It also vets awards by a panel of experts before they are delivered and this service gives international parties comfort that disputes involving large sums of money will be properly dealt with wherever in the world they might occur. There can be little reason to incur similar expense in relation to an intra-national dispute when a similar service is either not provided or not required.

Should there be an appeal, ratification or review process?

There might be circumstances when the ramifications of an award warrants an appeal, ratification or review process by somebody but this should be the exception and not the rule. Some of the attractions of arbitration are its finality, simplicity, speed and cost. Appeal, ratification and review processes tend to undermine these features. In any event, if an appeal is required, this should expressly be catered for in the dispute resolution clause.

What time limits should apply?

Drafters need to be conscious that a party may take advantage of a dispute resolution clause that does not have fixed time periods for the exhaustion of processes.

For example, it may be sensible to provide that, if for any reason mediation is not held or concluded within a fixed time, a party can go to arbitration. The absence of mediation might be better than to have a party delay finality by drawing out the mediation process.

Conclusion

Modern business requires solutions that make business sense and standard dispute resolution clauses often do not provide such solutions. The only way to ensure that a dispute resolution clause does so is to pay careful attention to specific dispute system design in each and every contract.

John Brand *BA LLB (Wits)* is a director at Bowman Gilfillan Inc in Sandton.