Validity of Arbitration Clause

**Decision Tree Table for Validity of Arbitration Clause**

| **Step** | **Question** | **Code** | **Answer** | **Sub-Code** | **Action** |
| --- | --- | --- | --- | --- | --- |
| 1 | Is there a clearly defined arbitration clause or agreement included in the contract? | A1 | No | A1.1 | End process. Arbitration cannot proceed without a clause. |
|  |  |  | Yes | A1.2 | Proceed to Step 2. |
| 2 | Does the contract require the parties to pursue an amicable settlement process (e.g., mediation)? | A2 | No | A2.1 | Proceed to Step 3. |
|  |  |  | Yes | A2.2 | Answer sub-question: Are the parties examining the settlement process? |
|  | Sub-question: Are the parties examining the amicable settlement process? | A2.2.1 | No | A2.2.1.1 | Examine the settlement process and resolve the issue. |
|  |  |  | Yes | A2.2.1.2 | Proceed to Step 3. |
| 3 | Is the arbitration process to be conducted under the rules of a specific arbitral institution? | A3 | No | A3.1 | Identify it as Ad-hoc Arbitration. Proceed to Step 4. |
|  |  |  | Yes | A3.2 | Choose the institution and proceed to Step 4. |
| 4 | Does the arbitration clause explicitly cover disputes arising from or related to the contract? | A4 | No | A4.1 | End process. Arbitration cannot proceed without such coverage. |
|  |  |  | Yes | A4.2 | Proceed to Step 5. |
| 5 | Does the arbitration clause designate a specific geographical location (seat)? | A5 | No | A5.1 | Review **Note 1** for resolving this omission and proceed. |
|  |  |  | Yes | A5.2 | Proceed to Step 6. |
| 6 | Does the arbitration clause identify the substantive law governing the contract? | A6 | No | A6.1 | Review **Note 2** to address this issue and proceed. |
|  |  |  | Yes | A6.2 | Proceed to Step 7. |
| 7 | Does the arbitration clause specify the number of arbitrators for the tribunal? | A7 | No | A7.1 | Review **Note 3** to address this omission and proceed. |
|  |  |  | Yes | A7.2 | Proceed to Step 8. |
| 8 | Does the arbitration clause specify the language of arbitration proceedings? | A8 | No | A8.1 | Review **Note 4** to resolve this issue and proceed. |
|  |  |  | Yes | A8.2 | Proceed to Step 9. |
| 9 | Does the arbitration clause designate an appointing authority for arbitrators? | A9 | No | A9.1 | Review **Note 5** to address this omission and proceed. |
|  |  |  | Yes | A9.2 | Arbitration clause is valid. |
| 10 | **If no valid arbitration clause exists**, do the contracting parties share the same nationality? | A10 | No | A10.1 | Proceed to the next question. |
|  |  |  | Yes | A10.2 | End process. Arbitration is not applicable under this clause. |
|  | Sub-question: Is there an investment agreement (e.g., BIT) between the countries? | A10.1.1 | No | A10.1.1.1 | End process. |
|  |  |  | Yes | A10.1.1.2 | Review **Note 6** to address the situation. |

**Notes**

1. **Note 1:** Guidelines for addressing the absence of a seat of arbitration.
2. **Note 2:** Steps to determine substantive governing law.
3. **Note 3:** Resolution methods for unspecified tribunal composition.
4. **Note 4:** Addressing absence of specified arbitration language.
5. **Note 5:** Procedures for appointing an authority in the absence of designation.
6. **Note 6:** Leveraging investment agreements (e.g., BITs) in the absence of an arbitration clause.

**Key Features of the Table**

1. **Step-by-Step Flow:** Each question leads to a clear action or next step.
2. **Sub-Questions:** Nested sub-questions handle conditional scenarios (e.g., amicable settlement process).
3. **Action-Oriented:** Each decision point leads to a specific action (e.g., proceed, end, review notes).
4. **Code System:** Codes (e.g., A1, A2.1) are used for easy reference and tracking.
5. **Notes Integration:** Notes are referenced at relevant points to provide additional guidance for resolving omissions or issues.

**Notes:**

**1- Note no. 1**

**If the arbitration clause does not designate a specific geographical location or seat of arbitration, several steps can be taken to address this omission:**

1. Mutual Agreement by the Parties:

The parties can mutually agree on a location or seat of arbitration after the dispute arises. This is often the simplest solution if the parties are cooperative and willing to negotiate this aspect.

1. Default Rules of the Arbitral Institution:

If the arbitration is institutional (e.g., conducted under the rules of the ICC, LCIA, or CIArb), the default rules of the chosen institution may provide guidance. Many arbitral institutions have default provisions for selecting a seat if the arbitration agreement does not specify one. The institution itself may designate a seat based on factors like neutrality, convenience, or the law governing the contract.

1. Application to the Court or Appointing Authority:

If the arbitration is ad hoc (not governed by any institutional rules), the parties can apply to a competent court or an appointing authority specified in the arbitration agreement for a determination of the seat. The court or appointing authority may choose a seat that is deemed neutral and appropriate for the arbitration.

1. Consideration of Legal and Practical Factors:

If no agreement can be reached and no institutional rules or appointing authority apply, the parties may need to consider factors such as:

* + Neutrality: A jurisdiction that is neutral to both parties.
  + Legal Framework: A jurisdiction with a well-established legal framework for arbitration and a judiciary that supports arbitration.
  + Convenience: Location in terms of logistics for the parties, witnesses, and arbitrators.
  + Enforcement: Jurisdictions where the final award can be easily enforced under the New York Convention.

1. Proceeding Without a Formal Seat:

In rare cases, arbitration may proceed without a formally designated seat, operating according to principles of international law or equity. However, this can lead to complications regarding the legal framework applicable to the arbitration and the enforceability of the award.

1. Arbitral Tribunal's Decision:

The arbitral tribunal itself may have the power to determine the seat of arbitration if empowered by the arbitration agreement or applicable rules. The tribunal would consider factors such as neutrality, fairness, and convenience for all parties involved.

**In conclusion, while it's preferable to specify a seat in the arbitration clause, there are mechanisms to address the absence of such a specification, ensuring that the arbitration process can still proceed effectively and fairly.**

**2-Note no.2**

If the arbitration clause does not identify the substantive law that governs the contract and any disputes that may arise under it, the following steps can be taken to resolve this issue:

**1. Mutual Agreement by the Parties**

* **Negotiation:** The parties can negotiate and agree on the applicable substantive law after the dispute arises. This is often the preferred approach if both parties are cooperative and willing to reach a consensus.
* **Amendment:** The parties may amend the arbitration agreement or contract to include the chosen substantive law.

**2. Application of Conflict of Laws Principles**

* **Tribunal's Determination:** If the parties cannot agree on the substantive law, the arbitral tribunal will usually determine the applicable law based on conflict of laws principles. This involves considering factors such as:
  + The law of the jurisdiction with the closest connection to the contract.
  + The place where the contract was executed or performed.
  + The nationality or domicile of the parties.
  + The place of the seat of arbitration, if specified.
* **Renvoi:** In some legal systems, the tribunal may use the "renvoi" doctrine, referring to the conflict of laws rules of the potentially applicable jurisdictions to identify the substantive law.

**3. Application of International Principles**

* **Lex Mercatoria:** The tribunal may apply general principles of international commercial law (known as "lex mercatoria") or trade usages that are commonly accepted in the relevant industry.
* **UNIDROIT Principles:** The tribunal may refer to internationally recognized principles, such as the UNIDROIT Principles of International Commercial Contracts, to fill gaps in the contract or to determine the applicable law in the absence of a choice.

**4. Default Rules of the Arbitral Institution**

* **Institutional Rules:** If the arbitration is conducted under the rules of an arbitral institution, those rules may provide guidance on how to determine the applicable substantive law in the absence of a choice by the parties. For example, the rules may empower the tribunal to apply the law it considers appropriate given the circumstances.

**5. Application of the Law of the Seat of Arbitration**

* **Seat of Arbitration:** If the arbitration agreement specifies a seat of arbitration but not the substantive law, the tribunal might apply the law of the seat as the governing law for the contract and disputes. This approach is often taken when there is a strong connection between the seat and the contract.

**6. Application of the Law Most Favorable to the Validity of the Contract**

* **Validation Principle:** The tribunal may apply the law that would uphold the validity of the contract, especially in situations where the contract might be invalid or unenforceable under certain legal systems.

**7. Equitable and Just Solutions**

* **Equity and Justice:** In cases where no clear governing law can be identified, the tribunal may decide the dispute based on principles of equity and justice, ensuring a fair and reasonable outcome for both parties.

**Conclusion**

While it is always preferable to specify the governing law in the arbitration clause or contract, there are mechanisms in place to address the absence of such a specification. The arbitral tribunal will typically take a pragmatic approach, considering the specific circumstances of the case, the parties' intentions, and the relevant legal principles to determine the applicable substantive law.

**3- Note no.3**

If the arbitration clause does not specify the number of arbitrators that will constitute the arbitral tribunal, the following steps can be taken to resolve this issue:

**1. Mutual Agreement by the Parties**

* **Negotiation:** The parties can negotiate and mutually agree on the number of arbitrators after a dispute arises. This is often the simplest and most straightforward solution if the parties are willing to cooperate.
* **Amendment:** The parties may amend the arbitration agreement to include the agreed-upon number of arbitrators.

**2. Default Rules of the Arbitral Institution**

* **Institutional Rules:** If the arbitration is conducted under the rules of an arbitral institution (such as the ICC, LCIA, CIArb, etc.), the institution's default rules will typically specify the number of arbitrators when the arbitration agreement is silent on this point. For example, many institutions default to a sole arbitrator unless the parties agree otherwise or the complexity of the case requires a three-member tribunal.
* **Request to the Institution:** Either party can request the arbitral institution to appoint the number of arbitrators deemed appropriate based on the nature and complexity of the dispute.

**3. Applicable Arbitration Legislation**

* **National Arbitration Laws:** If the arbitration is ad hoc (not governed by any institutional rules), the relevant national arbitration law may provide a default rule regarding the number of arbitrators. Many arbitration laws, such as the UNCITRAL Model Law on International Commercial Arbitration, default to a sole arbitrator unless the parties decide otherwise.
* **Court Intervention:** In some jurisdictions, if the parties cannot agree on the number of arbitrators, they may apply to a competent court to decide on the appropriate number of arbitrators based on the specific circumstances of the dispute.

**4. Appointment by an Appointing Authority**

* **Appointing Authority Designation:** If the arbitration agreement or the parties designate an appointing authority (such as a chamber of commerce or other institution), the appointing authority can decide on the number of arbitrators.
* **Appointment Process:** The appointing authority may consider the nature and complexity of the dispute, the amount in controversy, and other relevant factors in deciding whether to appoint a sole arbitrator or a panel of three arbitrators.

**5. Consideration of Practical Factors**

* **Nature of the Dispute:** The parties and tribunal can consider factors such as:
  + **Complexity:** More complex disputes may warrant a panel of three arbitrators to ensure a comprehensive review.
  + **Costs:** A sole arbitrator is often more cost-effective and faster than a panel of three arbitrators.
  + **Amount in Controversy:** Disputes involving smaller sums may be more suited to a sole arbitrator to minimize costs.

**Conclusion**

While it is ideal for the arbitration clause to specify the number of arbitrators, mechanisms are in place to address this omission. The parties' mutual agreement, default rules of the arbitral institution, national arbitration laws, and the role of appointing authorities provide flexibility to ensure that the arbitration process can proceed efficiently and fairly, even in the absence of a specific provision regarding the number of arbitrators.

**4- Note no.4**

If the arbitration clause does not specify the language in which the arbitration proceedings will be conducted, the following steps can be taken to address this omission:

**1. Mutual Agreement by the Parties**

* **Negotiation:** The parties can negotiate and mutually agree on the language of the arbitration after a dispute arises. This is often the most straightforward solution if the parties are willing to cooperate.
* **Amendment:** The parties may amend the arbitration agreement to specify the agreed-upon language.

**2. Default Rules of the Arbitral Institution**

* **Institutional Rules:** If the arbitration is conducted under the rules of an arbitral institution (such as the ICC, LCIA, CIArb, etc.), the institution’s rules may provide guidance on determining the language of the arbitration. Some institutional rules may give the arbitral tribunal the authority to decide the language in the absence of a party agreement.
* **Request to the Institution:** Either party can request the arbitral institution to determine the language based on the circumstances of the case.

**3. Decision by the Arbitral Tribunal**

* **Tribunal's Discretion:** In the absence of an agreement or specific institutional rules, the arbitral tribunal has the discretion to determine the language of the arbitration. The tribunal will consider several factors, including:
  + **Contract Language:** The language in which the contract was drafted or primarily communicated can serve as a strong indicator of the parties' intentions.
  + **Parties' Languages:** The native languages of the parties and their representatives may influence the decision to ensure fairness and efficiency.
  + **Language of Documentation:** The language of the key documents and evidence to be presented in the arbitration could also play a role in determining the appropriate language.
  + **Neutrality and Efficiency:** The tribunal may select a neutral language that is not the native language of either party if it promotes fairness and efficiency in the proceedings.

**4. National Arbitration Laws**

* **Local Legislation:** If the arbitration is ad hoc and not subject to any institutional rules, the relevant national arbitration laws may provide some guidance or default rules regarding the language of arbitration, although this is less common.

**5. Practical Considerations**

* **Costs and Convenience:** The choice of language can significantly impact the cost and convenience of the arbitration, especially concerning translation and interpretation services. Parties and tribunals typically prefer a language that minimizes these costs while ensuring that both parties can fully participate and understand the proceedings.
* **Bilingual or Multilingual Proceedings:** In some cases, the tribunal may decide to conduct the arbitration bilingually or with multiple languages if it is practical and serves the interests of both parties, though this can increase costs and complexity.

**Conclusion**

While it is ideal for the arbitration clause to specify the language of the proceedings, there are mechanisms to address the absence of such a provision. Through mutual agreement, the rules of the arbitral institution, the discretion of the arbitral tribunal, or guidance from national laws, the parties can ensure that the arbitration proceeds in a language that is fair, efficient, and conducive to resolving the dispute.

**5- note no.5**

If the arbitration clause or the rules governing the arbitration do not designate an appointing authority to select or replace arbitrators when the parties cannot agree on appointments, the following steps can be taken to resolve this issue:

**1. Mutual Agreement by the Parties**

* **Negotiation:** The parties can mutually agree to appoint an arbitrator or to designate an appointing authority after a dispute arises. This could involve direct negotiation or engaging in mediation to reach an agreement.
* **Amendment:** The parties can amend the arbitration agreement to include a specific appointing authority or mechanism for appointing arbitrators.

**2. Default Rules of the Arbitral Institution**

* **Institutional Rules:** If the arbitration is conducted under the rules of an arbitral institution (such as the ICC, LCIA, CIArb, etc.), those rules typically provide default mechanisms for the appointment of arbitrators when the parties cannot agree.
  + **Institutional Intervention:** The institution itself often acts as the appointing authority. For example, the ICC Court or the LCIA Court will appoint arbitrators if the parties fail to agree within a specified time.
* **Procedure for Appointment:** The institution’s rules will outline the steps to be followed, which might include submitting a request for the institution to appoint an arbitrator.

**3. Application to a Court or National Arbitration Body**

* **Court Application:** If the arbitration is ad hoc (not governed by any institutional rules) and the parties have not designated an appointing authority, either party may apply to a competent court to appoint an arbitrator.
* **National Arbitration Laws:** Many jurisdictions have national arbitration laws that provide a procedure for appointing arbitrators when the parties cannot agree. For example, the UNCITRAL Model Law on International Commercial Arbitration allows courts to appoint arbitrators in the absence of an agreement.
* **Arbitration Bodies:** Some countries have national arbitration bodies or chambers of commerce that can act as appointing authorities.

**4. Consideration of a Neutral Third Party**

* **Neutral Third Party:** The parties can agree to appoint a neutral third party, such as a bar association, trade organization, or another neutral entity, to act as the appointing authority. This is often chosen for its impartiality and independence.
* **Procedure Agreement:** The parties may agree on a procedure for selecting this neutral third party or give them specific instructions regarding the criteria for appointing arbitrators.

**5. Appointment by Co-Arbitrators**

* **Two-Party Appointment:** If the arbitration tribunal is to consist of three arbitrators and each party has appointed one arbitrator, those two arbitrators can jointly appoint the third arbitrator, often referred to as the presiding or chairperson.
* **Failure to Agree:** If the two appointed arbitrators cannot agree on the third arbitrator, the parties or the appointed arbitrators can apply to a court, institution, or designated authority to make the appointment.

**6. Default to Single Arbitrator**

* **Single Arbitrator:** In some cases, if the parties cannot agree on multiple arbitrators and no appointing authority is designated, it may be practical to proceed with a sole arbitrator appointed by a court or institution.

**Conclusion**

While it is preferable to specify an appointing authority in the arbitration clause or rules, there are various mechanisms to ensure that the arbitration process can still proceed smoothly in the absence of such a designation. The parties can negotiate, default to institutional rules, seek court intervention, or appoint a neutral third party to act as the appointing authority. National arbitration laws often provide a clear framework for handling the appointment of arbitrators when parties cannot reach an agreement, ensuring that arbitration remains a viable option for dispute resolution.

**6- Note no.6**

If there is no arbitration clause in the contract between the parties but there is an investment agreement (such as a Bilateral Investment Treaty or BIT) between the two countries of the contracting parties, the following steps can be taken to address the situation:

**1. Review the Investment Agreement (BIT)**

* **Check for Arbitration Provisions:** Investment agreements like BITs typically contain provisions on dispute resolution mechanisms, including investor-state arbitration. These provisions can provide for arbitration even if the underlying contract lacks an arbitration clause.
* **Scope of Coverage:** Determine whether the dispute falls within the scope of the investment agreement. BITs generally cover disputes related to investments made by investors from one contracting state in the territory of the other contracting state.
* **Applicable Rules and Institutions:** Investment agreements often specify the rules under which arbitration can be initiated, such as ICSID (International Centre for Settlement of Investment Disputes), UNCITRAL (United Nations Commission on International Trade Law), or other institutional rules.

**2. Initiate Arbitration Under the Investment Agreement**

* **Invoke the Arbitration Clause in the BIT:** If the BIT provides for arbitration, an investor can invoke this clause to commence arbitration proceedings against the host state. This is a common practice in investor-state disputes.
* **Follow the Procedures Outlined:** Ensure compliance with any procedural requirements outlined in the BIT, such as mandatory negotiation periods, notification requirements, or cooling-off periods before commencing arbitration.

**3. Determine the Forum for Arbitration**

* **Choose the Arbitration Forum:** The investment agreement may provide a choice of forums for arbitration, such as ICSID, UNCITRAL, or other institutions. The investor can choose the forum specified in the treaty.
* **Adhere to the Rules of the Chosen Forum:** Once a forum is chosen, the investor must adhere to the rules and procedures of that forum. For example, ICSID has its own rules and procedures for filing a request for arbitration, while UNCITRAL arbitration is conducted under its own set of rules.

**4. Consider Alternative Dispute Resolution (ADR) Mechanisms**

* **Negotiation and Mediation:** Before commencing arbitration, it might be beneficial to explore negotiation or mediation as a means to resolve the dispute amicably. Some investment agreements require parties to attempt amicable settlement before proceeding to arbitration.
* **Conciliation:** Some BITs or investment agreements may provide for conciliation as a preliminary step before arbitration, which involves a neutral third party facilitating a settlement between the disputing parties.

**5. Seek Legal Advice and Representation**

* **Legal Expertise:** Engaging legal counsel experienced in international investment law and arbitration is crucial. They can help navigate the complexities of the investment agreement, choose the appropriate forum, and ensure that all procedural and substantive requirements are met.
* **Prepare for Arbitration:** Legal counsel can assist in preparing the necessary documentation, such as a Notice of Arbitration or Request for Arbitration, and represent the investor throughout the arbitration process.

**6. Analyze the Benefits and Risks of Arbitration**

* **Evaluate the Suitability of Arbitration:** Consider whether arbitration under the investment agreement is the best course of action. Arbitration can be costly and time-consuming, and it is important to assess the likelihood of success, the potential for enforcement of the award, and the overall strategy.
* **Assess the Host State’s Track Record:** Consider the host state’s history of complying with arbitration awards and any known biases or procedural challenges that might arise.

**Conclusion**

If there is no arbitration clause in the contract but there is an investment agreement between the two countries of the contracting parties, the investment agreement may provide an alternative basis for arbitration. Reviewing the provisions of the investment agreement and following the stipulated procedures can allow for the resolution of disputes through arbitration, even in the absence of a direct contractual arbitration clause. Engaging experienced legal counsel is crucial to navigate this process effectively.

**Starting Point:**

**Node 1:**

**Question:** Is there a clearly defined arbitration clause or agreement included in the contract?

* + **Yes:** Proceed to **Node 2**
  + **No:** **End**

**Node 2:**

* **Question:** Does the contract require the parties to pursue an amicable settlement process (negotiation/mediation) before initiating arbitration?
  + **Yes:** Proceed to **Node 3**
  + **No:** Proceed to **Node 4**

**Node 3:**

* **Sub-question:** Are the parties examining the amicable settlement process before moving forward with arbitration?
  + **Yes:** Proceed to **Node 4**
  + **No:** **Action:** Examine the amicable settlement process

**Node 4:**

* **Question:** Is the arbitration process to be conducted under the rules of a specific arbitral institution?
  + **Yes:** Proceed to **Node 5**
  + **No:** **Action:** It is an Ad-hoc Arbitration

**Node 5:**

* **Question:** Does the arbitration clause explicitly state that it covers disputes arising from or related to the construction contract?
  + **Yes:** Proceed to **Node 6**
  + **No:** **End**

**Node 6:**

* **Question:** Does the arbitration clause designate a specific geographical location or seat of arbitration?
  + **Yes:** Proceed to **Node 7**
  + **No:** **Action:** Review Notes No. 1

**Node 7:**

* **Question:** Does the arbitration clause identify the substantive law that governs the contract and any disputes?
  + **Yes:** Proceed to **Node 8**
  + **No:** **Action:** Review Notes No. 2

**Node 8:**

* **Question:** Does the arbitration clause specify the number of arbitrators that will constitute the arbitral tribunal?
  + **Yes:** Proceed to **Node 9**
  + **No:** **Action:** Review Notes No. 3

**Node 9:**

* **Question:** Does the arbitration clause specify the language in which the arbitration proceedings will be conducted?
  + **Yes:** Proceed to **Node 10**
  + **No:** **Action:** Review Notes No. 4

**Node 10:**

* **Question:** Does the arbitration clause or rules designate an appointing authority to select or replace arbitrators if the parties cannot agree?
  + **Yes:** Proceed to **Node 11**
  + **No:** **Action:** Review Notes No. 5

**Node 11:**

* **Question:** Is there no valid arbitration clause or agreement in the contract?
  + **Yes:** Proceed to **Node 12**
  + **No:** **End**

**Node 12:**

* **Question:** Do the contracting parties share the same nationality?
  + **Yes:** **End**
  + **No:** Proceed to **Node 13**

**Node 13:**

* **Question:** If No: Is there an investment agreement between the two countries?
  + **Yes:** **Action:** Review Notes No. 6
  + **No:** **End**