

Perspectives on Choice of Law, Enforcement, Investment Treaties and Arbitration Clauses

Lucy Reed

Key points

1. The parties' relationship will be greatly affected by the law governing questions as to the contract's validity and meaning. The parties should give real consideration to the applicable law, remembering that: (a) attempts to avoid choosing a law are futile; (b) the principles governing contractual doctrine vary considerably among different jurisdictions (even within the common law world); and (c) a prudent party will think about the evidential record during the negotiation phase.
2. When selecting the applicable law, particular attention should be given to the rules governing contractual interpretation (ie whether textual or purposive and the extent to which extrinsic evidence is admissible) and the treatment of penalties, hardship, and agreements to agree.
3. When negotiating an arbitration clause, key aspects that call for particular consideration include:
 - (a) the expression of unequivocal agreement to binding arbitration;
 - (b) the scope of disputes that the parties agree to arbitrate;
 - (c) the number, method of selection and qualification of arbitrators;
 - (d) the legal seat of the arbitration, which may be different from its physical location, and which may certainly be different from the law applicable to the contract;
 - (e) the language of the arbitration;
 - (f) the application of a set of standard arbitral rules, or whether bespoke provisions are required;
 - (g) the nomination of an institution to administer the arbitration, unless the parties wish the tribunal they appoint to administer it on an ad hoc basis; and
 - (h) the finality of any award.

This is a preview. Not all pages are shown.