

The Silent Killer: Why "Validity" Matters in Your ADR Clause

By Joánri Duursema, CCMAP

In any contract lifecycle, disputes are inevitable. Alternative Dispute Resolution (ADR) clauses, promising cost-efficiency, confidentiality, and a solution outside the traditional courtroom, are often tucked away in the latter part of the contract or General Terms as a boilerplate clause meant to provide a framework for resolving those disagreements.

But what happens when the foundation the ADR clause rests on - the contract's validity - is called into question? This is where the often-overlooked word "validity," or the phrase "and validity thereof," becomes critically important.

Imagine a scenario where a disagreement arises, and one party claims the entire contract is invalid due to issues with its formation, perhaps alleging misrepresentation, or lack of capacity by a signatory etc. If the ADR clause doesn't explicitly address disputes concerning the *validity* of the contract itself, you could find yourself in a precarious situation as arbitrator.

Here's why this seemingly small detail can have a significant impact:

The Four Walls of the Contract: Contractual dispute resolution, especially arbitration, operates within the confines of the contract that created it. The arbitrator's appointment, authority to adjudicate the dispute, have their award be enforceable within that contract, by that same token, is also typically derived from the contract between the parties.

If the contract creating that process is then found to have been invalid, the basis for arbitration becomes equally invalid.

Note that this will only be applicable where the contract is found to have never been valid - not where the contract was initially valid and then became, or is found to have become, invalid thereafter.

The Arbitration Paradox: Consider the irony: a party arguing that the contract is invalid might also be required to participate in an arbitration process outlined within that very contract. Without a clear provision addressing validity, courts may struggle with how to proceed. Does the arbitrator have the power to decide on the validity of the contract itself? Or does that question need to be resolved in court first, potentially undermining the efficiency goals of ADR?

The Risk of Parallel Proceedings: The absence of "validity" in the ADR clause can also lead to a messy situation where one party initiates arbitration while the other party files a court action challenging the contract's validity. This can result in costly and time-consuming parallel proceedings as the court will need to consider its own jurisdiction as well before hearing the case, defeating the purpose of having an ADR clause in the first place.

So what now?

Protect the dispute resolution mechanism

1. Write it in at the start

Ensure certainty and clarity by including the phrase "and validity thereof" in your ADR clause acts as a safeguard.

By clarifying this seemingly minor detail while drafting you can save significant time, money, and headaches down the road, ensuring that your chosen path to dispute resolution remains effective and reliable.

2. Amend the contract prior to arbitration to include it.

You may be engaged and on review of the contract and an overview of the matters in dispute, it becomes clear that those matters include something that can invalidate the contract, propose that the parties amend the ADR clause to include necessary language to ensure the clause will survive to enable adjudication.

Conclusion

Ultimately, putting the words "and validity thereof" in your ADR clause isn't just legal jargon – it's a practical step that makes good sense. By clearly stating that your chosen way to resolve disagreements also covers any arguments about whether the contract itself is valid, you can steer clear of confusing legal battles and the risk of ending up in both arbitration and court at the same time. This small addition makes sure your agreed-upon method for solving problems can actually do its job properly and efficiently, protecting the time and money you hoped to save in the first place.

Sample Clause:

Dispute Resolution: Any dispute, disagreement, or claim arising out of or relating to this Agreement, including the breach, termination, or **validity thereof**, shall be resolved by [Insert chosen ADR method, e.g., arbitration] in accordance with [Insert relevant rules, e.g., the rules of the International Chamber of Commerce]. The place of [ADR method] shall be [Insert location].

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