

(Outline)

**DIFFICULTIES IN DRAFTING AN ARBITRATION CLAUSE IN CREDIT
SYNDICATE OR CREDIT REESTRUCTURING AGREEMENTS**

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Arbitration as method of settling financial disputes is not generally favored for use in creditor-borrower disputes in international restructuring and syndicated loan agreements.

Commercial lenders desire to ensure the certainty of predictable judicial interpretation of restructuring or syndicated loan agreement provisions, in somewhat neutral forums, such as New York or London.

But the question is: what happened if those forums could not be designated as jurisdiction? Here let me foresee two scenarios:

- Lender – borrower disputes, such as with regard to events of defaults, and
- Intercreditor disputes between banks and syndicate members.

In the context of Lender – borrower disputes specifically in case of seeking on a Summary judgment to attach property of the borrower.

If the syndicated loans and restructurings are documented with promissory notes or similar negotiable instruments, there could be some problems.

Promissory notes, for example, are strictly regulated in many legal systems, especially in civil law systems, which means that the issuer or holder in due

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course, cannot contract out of this regulation and therefore an arbitration clause cannot be included in these documents.

Traditionally, it has been considered in civil law systems that the strict regulation of this type of negotiable instruments necessary so that the issuer, holder and all parties related to the instrument know with certainty which rules are applicable.

The same happened with the recognition of those promissory notes of 50 or 100 pages that hardly the Mexican courts understand it.

In my opinion, the inclusion of an arbitration clause in a Promissory Note governed by Mexican Law jeopardizes the possibility of obtaining Summary Judgment on the note and corresponding attachment of the debtor's property.

However, there may be a solution to this limitation, namely the inclusion of an arbitration clause in a promissory note.

Mexican conflict rules allow application of the laws of the State which the parties choose and, in this case, those that the drawer of the promissory note authorized to be included in the arbitration clause of this instrument (Art. 13, para. V of the Federal Civil Code)

As regards the seat of the arbitration designated in the arbitration clause, it turns out to be very important in this specific case. If the seat of the arbitration is located outside Mexico, it will, in accordance with Mexican law, be considered an international arbitration (Art. 1415 of the Commercial Code) and the corresponding finding will be recognized and enforced in Mexico through the New York Convention to which Mexico is party and the provisions of which are contained in the Commercial Code (Arts. 1461 et sec.)

In this manner, the restriction existing in legal systems which considers that the promissory note must be controlled by strict law can be circumvented and an arbitration clause managed to be included therein.

In the context of intercreditor disputes, between agent bank and syndicate members, arbitration clause may be a much practical approach to resolving such disputes than resorting to expensive, time consuming litigation, but always in very precise issues.

Also, this approach stressed the confidentiality of arbitration in resolving these disputes which benefits the whole transaction.

Finally, these are arbitration clauses made for multiparty disputes and modern arbitration rules cover these type of disputes that by the way, are resolved by arbitrators choose by all parties involved.