

# Annotated Model Arbitration Clause for International Contracts

A checklist of issues to consider in drafting an arbitration clause, with suggested text and commentaries

Including the Debevoise & Plimpton LLP  
Protocol to Promote Efficiency in International Arbitration

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## **ANNOTATED MODEL ARBITRATION CLAUSE FOR INTERNATIONAL CONTRACTS**

A well-drafted arbitration clause will not only facilitate a more efficient arbitration, but by providing an effective dispute resolution mechanism, it may deter breaches of the agreement and thus reduce the likelihood of litigation. Indeed, a good arbitration clause is often the most important provision in a contract when it comes to avoiding costly and time-consuming disputes. A clause need not be complex to be effective, but it is prudent to spend time thinking strategically about the client's likely posture in any dispute and how that posture should translate into an arbitration clause that maximizes the prospect of successful, efficient dispute resolution.

It follows that no single arbitration clause is suitable for all contracts. The drafting of an arbitration clause for international contracts should be informed by careful consideration of the nature of the contract, the parties to the contract, the types of disputes that might be expected to arise under the contract, and the jurisdictions likely to be involved in any dispute. Drafting an appropriate clause also requires an understanding of the circumstances that may call for special provisions, such as provisions addressing interim relief, confidentiality, and other important issues. This document provides a framework for building a clause that is suitable to the transaction under consideration. It also provides model language to address some of the common drafting issues that arise in complex agreements.

The model clause consists of two paragraphs set out on page 7 that, in one variation or another, should generally be included in every agreement. The basic model clause is annotated in the pages that follow with commentary, which details the decisions that should be made with respect to its provisions. Optional clauses, which may or may not be appropriate for a given agreement, follow the annotations for the model clause, and are also accompanied by commentary. Included as an appendix to this booklet is Debevoise's *Protocol To Promote Efficiency in*

*International Arbitration*, which provides useful guidance for devising procedures that can make arbitrations quicker and less costly.

The model clause, while offering a number of specific options, does not exhaust all the possible provisions that may need to be considered or may be desirable in particular contracts. This model clause should therefore serve as the beginning, not the end, of the process of drafting an arbitration clause.

The topics addressed may conveniently be organized in the form of the following checklist of issues to consider in drafting an arbitration clause:

<b><u>Model Clause</u></b>		
<input type="checkbox"/>	<b><u>Number of Arbitrators:</u></b> Should there be one or three arbitrators?	See page 8
<input type="checkbox"/>	<b><u>Governing Rules:</u></b> What arbitration rules should be selected to govern the procedure of the arbitration? Should institutional or <i>ad hoc</i> arbitration be chosen?	See pages 9, 53-60
<input type="checkbox"/>	<b><u>Selection of Arbitrators:</u></b> What method should be used to select the arbitrator(s)? What institution should be selected as a default appointing authority?	See page 11
<input type="checkbox"/>	<b><u>Seat:</u></b> What site should be selected as the seat of the arbitration?	See pages 13, 61-79
<input type="checkbox"/>	<b><u>Language:</u></b> In what language shall the arbitration proceedings be conducted?	See page 14
<input type="checkbox"/>	<b><u>Finality of the Award:</u></b> Must the parties indicate their intent to be bound by the award?	See page 15
<input type="checkbox"/>	<b><u>Judgment on the Award:</u></b> Should the parties include language to facilitate enforcement of the award?	See page 15

## Optional Clauses

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- |                          |   |             |
|--------------------------|---|-------------|
| <input type="checkbox"/> | <b><u>Multiparty Disputes:</u></b> Are there more than two parties to the transaction, so that special provisions on arbitrator selection in multiparty disputes, joinder, intervention and consolidation should be included? | See page 16 |
|--------------------------|---|-------------|
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- |                          |  |             |
|--------------------------|--|-------------|
| <input type="checkbox"/> | <b><u>Mandatory Negotiation, Conciliation or Mediation:</u></b> Should the parties be required to try to negotiate or mediate a resolution to the dispute before the arbitration can go forward? | See page 24 |
|--------------------------|--|-------------|
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|--------------------------|--|-------------|
| <input type="checkbox"/> | <b><u>Split Clauses:</u></b> Should the parties maintain the option to choose the appropriate dispute resolution mechanism after the dispute has arisen? | See page 26 |
|--------------------------|--|-------------|
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|--------------------------|---|-------------|
| <input type="checkbox"/> | <b><u>Interim Relief:</u></b> Should special provisions addressing interim relief or specific relief be included? | See page 28 |
|--------------------------|---|-------------|
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- |                          |  |             |
|--------------------------|--|-------------|
| <input type="checkbox"/> | <b><u>Emergency Arbitrators:</u></b> Would it be prudent to provide for a pre-arbitration emergency relief procedure before an arbitrator rather than a court? | See page 29 |
|--------------------------|--|-------------|
- 
- |                          |   |                     |
|--------------------------|---|---------------------|
| <input type="checkbox"/> | <b><u>Interim Adjudication:</u></b> Would it be desirable, as in some construction contracts, to provide for a mechanism for interim adjudication of disputes as well as for arbitration? | See pages 31, 80-82 |
|--------------------------|---|---------------------|
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|--------------------------|---|-------------|
| <input type="checkbox"/> | <b><u>Nationality and Qualifications of Arbitrators:</u></b> Should the arbitration clause provide for the nationality of the arbitrator(s)? Should the parties require that arbitrators meet certain criteria? | See page 32 |
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## Optional Clauses

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|--------------------------|---|-------------|
| <input type="checkbox"/> | <b>Jurisdiction to Determine Jurisdiction:</b> If the selected rules do not already so provide, should the clause state that the arbitrators have jurisdiction to determine their own jurisdiction?   | See page 34 |
| <input type="checkbox"/> | <b>Production of Evidence:</b> Should specific forms of obtaining evidence be provided for or excluded? Should a provision noting the parties' right to examine tribunal-appointed experts or excluding the tribunal's right to appoint experts be added? | See page 35 |
| <input type="checkbox"/> | <b>Confidentiality:</b> Should the clause expressly mandate confidentiality of the arbitration proceedings?   | See page 41 |
| <input type="checkbox"/> | <b>Arbitrators' Freedom Not to Apply the Law:</b> Should the arbitrators be given the authority to decide the case based on what they find to be equitable rather than according to the law?  | See page 43 |
| <input type="checkbox"/> | <b>Costs:</b> Should a clause requiring the parties to share the costs of the arbitration be added?   | See page 44 |
| <input type="checkbox"/> | <b>Exemplary Damages:</b> Should any authority of the arbitrators under local law to award punitive or exemplary damages be excluded?   | See page 45 |
| <input type="checkbox"/> | <b>Interest:</b> Should the parties include a clause specifying the rate at which interest shall accrue?  | See page 46 |
| <input type="checkbox"/> | <b>Currency of Award:</b> Should the currency in which the award will be rendered be specified?   | See page 47 |
| <input type="checkbox"/> | <b>Right to Appeal:</b> Should the parties include a clause reserving the right to appeal the arbitration?  | See page 47 |

## Optional Clauses

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|--------------------------|--|-------------|
| <input type="checkbox"/> | <b>Waiver of Sovereign Immunity:</b> Is a State or a State-owned entity a party to the transaction, so that special provisions on sovereign immunity should be included? | See page 48 |
| <input type="checkbox"/> | <b>Service of Process:</b> Should the parties provide an agent for service of process and waive process objections in aid of enforcement of the award?                   | See page 49 |
| <input type="checkbox"/> | <b>Classwide Arbitration:</b> Is it necessary to exclude classwide arbitration?  | See page 50 |
| <input type="checkbox"/> | <b>Baseball Arbitration:</b> Would a “baseball” or “last offer” arbitration be useful in this context?   | See page 50 |



## MODEL ARBITRATION CLAUSE

### Arbitration

a. Any dispute, controversy, or claim arising out of, relating to, or in connection with this contract, including with respect to the formation, applicability, breach, termination, validity or enforceability thereof,<sup>1</sup> shall be finally settled by arbitration. The arbitration shall be conducted by [*one or three*] arbitrators,<sup>2</sup> in accordance with [*identify rules*] in effect at the time of the arbitration,<sup>3</sup> except as they may be modified herein or by mutual agreement of the parties.<sup>4</sup> The seat of the arbitration shall be [*city, country*],<sup>5</sup> and it shall be conducted in the [*specify*] language.<sup>6</sup>

b. The arbitration award shall be final and binding on the parties. The parties undertake to carry out any award without delay and waive their right to any form of recourse based on grounds other than those contained in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 insofar as such waiver can validly be made.<sup>7</sup> Judgment upon the award may be entered by any court having jurisdiction thereof or having jurisdiction over the relevant party or its assets.<sup>8</sup>

### Annotated Commentary to Model Arbitration Clause

1. Broad/narrow. In most instances, parties should submit *all* disputes to arbitration. It is possible, however, to agree to arbitrate only specific types or categories of disputes. If the latter course is chosen, the scope of the reference to arbitration should be carefully and precisely delineated in the arbitration clause. Even with careful drafting, however, there is a significant risk that when a dispute arises one party will claim that the dispute does not fall within the scope of the arbitration clause. Such a preliminary dispute will delay and make more

expensive eventual resolution of the primary dispute. For that reason, it is preferable to use a broad clause as the model text proposes.

In some instances, arbitration agreements include “split” clauses, which provide for arbitration, but grant one party the choice of going to court instead. Such clauses should generally be drafted with the utmost caution, given that they can be ineffective in certain jurisdictions. For further information on split clauses, see point 3 below in the Optional Clauses section.

2. Number of arbitrators. The decision to select one or more arbitrators depends on the nature of the contract, the amount that may be in dispute and the complexity of the potential controversies. Having one arbitrator is less expensive and often more expeditious, and is preferred for smaller disputes or if issues do not need the analysis of three arbitrators. A three-person tribunal can often better analyze complex factual and legal issues, and therefore may increase the likelihood of a fair, well-reasoned result. Moreover, a three-arbitrator panel provides the parties with more control over the nature of the tribunal, since the parties will generally each select one party-appointed arbitrator.

Although parties are generally allowed to select any number of arbitrators, it is rarely advisable to select an even number of arbitrators. Further, some jurisdictions, including **France** (in domestic arbitrations), **the Netherlands**, **Italy**, and **Egypt**, prohibit the selection of an even number of arbitrators (*See, e.g.*, French New Code of Civil Procedure, Art. 1453; Netherlands Code of Civil Procedure, Article 1026(1); Italian Code of Civil Procedure, Article 809; Egyptian Arbitration Law, Article 15(2)).

In the absence of agreement between parties, the administering institution’s rules will govern the number of arbitrators. For example, the International Arbitration Rules of the American Arbitration Association’s International Center for Dispute Resolution (“AAA International Rules”) (Article 5), Rules of Arbitration of the International Chamber of Commerce, effective on January 1, 2012

(“ICC Rules”) (Article 12(2)), the Rules of the London Court of International Arbitration (“LCIA Rules”) (Article 5.4) and the Singapore International Arbitration Center (“SIAC”) Rules (Rule 6.1) provide for a default of one arbitrator (although the respective institutions can appoint three if they determine that the dispute warrants it), while the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”) (Article 37 (2)(b)) and UNCITRAL Arbitration Rules (“UNCITRAL Rules”) (Article 7) provide for a default of three. The Hong Kong International Arbitration Centre (“HKIAC”) Rules (Article 6) provide that, if the parties have not agreed on the number of arbitrators, the HKIAC Council shall determine whether a particular case will be heard by one or three arbitrators.

3. Rules. As a general proposition, the arbitration clause should be coordinated with and reflect the arbitration rules that are chosen to govern the arbitration. One of the first choices facing parties is whether to opt for institutional versus *ad hoc* arbitration. Institutional arbitration involves an arbitral institution providing administrative assistance with running an arbitration (such as facilitating communications, arranging for hearings, paying arbitrators) in exchange for a fee, while *ad hoc* arbitration requires the parties themselves to attend to such administrative details. Although some disputes may be conducive to the selection of *ad hoc* rules—for instance in cases in which the parties are experienced in international arbitration—the relatively low administrative fee charged by an institution often provides good value. Institutions generally supply efficient administrative services, assist in ensuring that arbitrators do their job and may even help arbitrators produce error-free awards.

The AAA International Rules, the ICC Rules and the LCIA Rules are generally preferred for institutional arbitrations. In addition, other regional centers operate on a global basis, and their rules can be selected for disputes anywhere. The preferred rules among such centers are the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (“SCC Rules”), the SIAC Rules, and the HKIAC Rules. For

*ad hoc* arbitrations, the Rules of the CPR International Institute for Conflict Prevention & Resolution (“CPR Rules”) and the UNCITRAL Rules are preferred. For disputes arising out of commercial transactions involving intellectual property, it may be appropriate under certain circumstances to use the World Intellectual Property Organization Arbitration Rules (“WIPO Rules”). For disputes involving a sovereign State, the parties may agree to arbitration before the International Centre for Settlement of Investment Disputes (“ICSID”). There are potentially significant differences among these rules (including on substantive issues such as waiver of certain types of damages), so careful attention needs to be paid when selecting the applicable rules.

Because the major arbitration institutions amend their rules from time to time, it is generally desirable to select the version of the rules in effect at the time of the arbitration (except as they may be modified by mutual agreement of the parties), so that the parties may take advantage of future rule amendments or revisions. Most rules provide that, in the absence of agreement to the contrary, the choice of a particular set of rules refers to the rules in effect on the date of commencement of the arbitration. *See* AAA International Rules, Article 1; ICC Rules, Article 6(1); LCIA Rules, Preamble; CPR Rules, Rule 1.1; UNCITRAL Rules, Article 1; WIPO Rules, Article 2. Where the parties wish to adopt the rules in existence at the time of contracting, they should do so expressly in the arbitration clause.

In selecting an arbitration institution or *ad hoc* rules to govern the arbitration, counsel should consider whether it is more likely that it will be the claimant or the respondent in any arbitration. For example, arbitrator fees often comprise the biggest share of administrative expenses, and certain rules provide for fee arrangements that may result in higher fees and require more up front costs to be borne by the claimant. Also, if there is some possibility that the other party will refuse to participate in the arbitration, it is important to select one of the arbitration institutions or *ad hoc* rules cited above, as each has rules permitting the arbitration to proceed in the absence of a party. (*See, e.g.*, AAA International Rules, Article 23; ICC Rules, Article 6(8); LCIA

Rules, Article 15.8; CPR Rules, Rule 16; UNCITRAL Rules, Article 30; ICSID Rules, Rule 42; WIPO Rules, Article 56). These rules make it easier to commence arbitration in circumstances in which the other party declines to participate. Other arbitrations also may in certain circumstances proceed notwithstanding the respondent's refusal to appear. If the arbitration clause or the applicable rules do not allow the arbitration to proceed in the absence of a party, lengthy and costly court proceedings to compel arbitration may be necessary.

Suggested language for selecting sets of rules, as well as some considerations as to when to pick each one, are set forth in Appendix 1. If other rules are being considered for a particular transaction, it is important to obtain the advice of experienced international arbitration counsel.

4. Method of Selecting Arbitrators. The rules chosen should be consulted to see if the rules themselves provide for a satisfactory procedure. Common to most forms of arbitration, the "appointing authority" is typically responsible for confirming arbitrators nominated by the parties and appointing arbitrators when the parties fail to nominate them or delegate authority for appointing arbitrators to an institution.

In administered arbitrations, relevant rules usually provide that the chosen institution will act as appointing authority. *See, e.g.*, AAA International Rules, Article 6 (International Centre for Dispute Resolution, a division of the AAA); ICC Rules, Articles 12-15 (ICC International Court of Arbitration); LCIA Rules, Articles 6-8 (LCIA Court); ICSID Rules, Rule 4 (Chairman of the Administrative Council); SCC Rules, Article 9, 13 (SCC Board of Directors); SIAC Rules, Rule 6 (Chairman of Centre); HKIAC Rules, Articles 7 and 8 (HKIAC Council).

In UNCITRAL or other *ad hoc* arbitrations, the arbitration clause should provide for an appointing authority. The ICC International Court of Arbitration, AAA and LCIA are most often used as appointing authorities and are highly recommended.

In most cases, the default method selected by the rules is satisfactory, and additional text on the subject in the clause is unnecessary. For other cases, the following variants should be considered.

**One arbitrator:**

**Variant 1: Agreement by Parties and Default Appointment by Arbitration Institution**

“The parties agree to seek to reach agreement on the identity of the sole arbitrator within [30 days] after the initiation of arbitration. If the parties do not reach agreement on the sole arbitrator, then the appointment of the sole arbitrator shall be made by [name of institution].”

**Variant 2: Respondent Chooses From Pre-selected List**

“The parties agree that the sole arbitrator shall be one of the persons listed on Schedule [x] hereto. Within [30 days] after receiving the request for arbitration, the respondent shall select one of those persons, and such person shall serve as arbitrator. In the event such person is unable to serve, the respondent shall, within [10 days] after receipt from that person of notice of such inability, select another person from the list in Schedule [x] hereto, and such person shall serve as arbitrator. If necessary, this process shall continue until the arbitrator is so designated. In the event that none of the arbitrators listed on Schedule [x] hereto is able to serve, the sole arbitrator shall be appointed by [name of institution].”

**Three arbitrators:**

**“The claimant shall nominate an arbitrator in its request for arbitration. The respondent shall nominate an arbitrator within [30 days] of the receipt of the request for arbitration. The two arbitrators shall nominate a third arbitrator within [30 days] after the nomination of the second arbitrator. The third arbitrator shall act as chair of the tribunal. If any of the three arbitrators is not nominated within the time prescribed above, then the [name of the institution] shall appoint that arbitrator.”**

For the appointment of arbitrators in multiparty proceedings, see point 1 in the Optional Clauses section below.

5. Seat of the arbitration. The “seat” of an arbitration is the jurisdiction in which the arbitration is legally based. Each jurisdiction has laws governing the conduct of the arbitrations seated there. Mandatory procedural rules, if any, of the legal seat of the arbitration cannot be overcome by agreement of the parties or by rulings of the arbitrators. National courts in the country of the seat have the ability to review and potentially to vacate or set aside awards, and awards set aside by courts at the seat of the arbitration may not be enforceable elsewhere. Before drafting an arbitration clause and selecting the seat of an arbitration, counsel should therefore carefully review the arbitration law of the proposed seat of arbitration and the history of court interference with arbitrations in that seat to ensure that that law will not hinder arbitration of disputes that may arise under the contract. It is also important that the arbitration clause be consistent with the arbitration law of the seat of the arbitration.

For reasons of convenience, the parties may agree that the hearings be held in a place other than the seat of the arbitration. Such a provision, whether in the clause or agreed upon at the time of arbitration, if properly drafted, does not change the legal seat of the arbitration.

An arbitration clause, or a provision for the seat of the arbitration, does not serve the same function as a choice of law clause. The arbitration law of the seat may provide some background procedural rules

regulating the arbitration. In contrast, a choice of law clause establishes the substantive law governing the contract itself. Thus, it is of utmost importance to include, in addition to the arbitration clause, a provision providing for the law governing the contract.

Because of the diverse legal schemes applicable to international arbitrations that exist in jurisdictions around the world, the recommended language for the model clause varies depending on the seat. For instance, in jurisdictions with federal structures, it is advisable to include language clarifying whether state or federal arbitration law, or both, may apply. Also, the arbitration law of some jurisdictions may include provisions that may be undesirable, such as expanded judicial review, but the parties may be able to opt out of such provisions in certain jurisdictions by including appropriate language in their arbitration agreement.

Examples of language that should be included in an arbitration clause for selected seats of arbitration are provided in Appendix 2.

6. Language. If the parties are from countries with different languages, it is important to provide for the language of the arbitration. In the absence of such a provision, arbitrators will typically select the language of the contract as the language of the arbitration, but this is not always the case.

If the parties are from countries with a common language, it is not necessary to include a provision regarding language, but it may nevertheless be advisable. Parties should keep in mind that the selection of more than one language can add to the cost and length of proceedings, and it is advisable to select one language in most cases.

If a party wishes to make clear that it may submit documents, and that witnesses may testify, in their original language with appropriate translation, the following language may be added:

**“provided that either party may submit testimony or documentary evidence in any language if it furnishes, upon**



**the request of the other party, a translation into [*specify language*] of any such testimony or documentary evidence.”**

7. Finality of the Award. Although most rules provide that arbitral awards are final and binding on the parties, it is generally preferable to include this language as a safeguard. The language relating to the parties' compliance with awards without delay and waiver as to any form of recourse is included to bolster the finality of the award, but it is important to note that the effectiveness and conditions of such waiver depend on the applicable law. Notably, the award can still be subject to vacatur or setting aside under the law of the seat of arbitration or to denial of enforcement on the grounds identified in Article V of the New York Convention, which provides that a court may refuse to enforce an arbitral award only on limited grounds that largely focus on considerations of basic fairness. Generally speaking, United States, United Kingdom, and French courts have construed these defenses narrowly to hold that they represent the exclusive means for challenging a foreign award.

8. Judgment on the Award. This language is necessary to simplify the exercise of jurisdiction in any enforcement action in the United States under the Federal Arbitration Act (“the FAA”). Enforcement jurisdiction should generally be a simple matter in those countries that have ratified the New York Convention (145 countries as of March 7, 2011). Unfortunately, the applicable law in some countries, including the United States, can lead to disputes over jurisdiction and venue for the enforcement of awards. It is therefore highly recommended that this language, which can avoid extensive collateral litigation at a later date, be included in any standard arbitration clause.

## **OPTIONAL PROVISIONS AND COMMENTARY**

In addition to the issues addressed in the commentary above, a number of other matters should be considered when drafting an arbitration clause for an international contract.

### **1. Multiparty contracts.**

If there are more than two parties to a contract, the arbitration clause may need to be adapted substantially to account for the rights of three or more parties.

#### **a. Selection of Arbitrators**

If there are more than two contracting parties to an arbitration clause, individual selection of the arbitrators by each party becomes impractical. Most institutional rules provide that the institution selects the arbitrators in multiparty disputes if either the multiple claimants acting jointly or the multiple respondents acting jointly fail to nominate their respective arbitrators for confirmation or if all the parties are unable to agree on a method of appointing arbitrators. (*See, e.g.*, ICC Rules, Article 12(8); AAA International Rules, Article 6(5); LCIA Rules, Article 8; CPR Rules, Rule 5.4; UNCITRAL Rules, Article 10). The following clause may be used where the default rules are insufficiently precise or are otherwise undesirable:

**“(a) If all parties to this arbitration agree that the alignment of parties as claimants and respondents in the request for arbitration is correct, or if no party objects to such alignment within [15 days] after receipt of the request for arbitration, then each side shall nominate one arbitrator within [30 days] after receipt of the request for arbitration. The two arbitrators shall nominate the third arbitrator within [30 days] after the nomination of the later-appointed of these two arbitrators. The third arbitrator shall act as**

chair of the tribunal. If any of the three arbitrators is not nominated within the time prescribed above, then [*name of the institution*] shall appoint that arbitrator.”

“(b) If any one of the parties to this arbitration objects in writing to the alignment of parties in the request for arbitration within [*15 days*] after receipt of the request, and if the parties do not agree within [*15 days*] thereafter on an alignment of the parties into two sides each of which shall appoint an arbitrator, then [*name of institution*] shall appoint all three arbitrators.”

In the alternative, the clause may provide for the immediate selection of all three arbitrators by the institution:

“If there are more than two parties to an arbitration, there shall be three arbitrators, who shall be appointed by [*name of the institution*].”

#### **b. Joinder, Intervention**

The drafter of the clause should carefully consider whether it is in the interest of the client potentially to join other parties to the arbitration proceedings or to be joined into proceedings between other contractual parties. There may be situations in which a party has only a discrete role in a transaction and may not want to be subjected to lengthy multiparty arbitration proceedings. Moreover, a party may not want its relationships with a contractual partner to be revealed to the other parties, or may wish to keep secret information of a confidential nature, such as know-how, marketing, pricing, and profit margins.

The simplest way to provide for joinder is to select the ICC Rules or the UNCITRAL Rules, both of which have recently been revised to provide a framework for multiparty jurisdiction. The UNCITRAL Rules, as revised in 2010, allow third parties to be joined in some circumstances, but only if the party to be joined is also a party to the arbitration agreement that governs the existing arbitration. Under the UNCITRAL Rules, the arbitral tribunal *may* allow joinder, unless it finds that allowing

joinder would prejudice any of the new or existing parties. (*See* UNCITRAL Rules, Article 17(5)).

The ICC Rules, as effective January 1, 2012, are both broader and narrower than the UNCITRAL Rules. Under the ICC Rules, joinder is not permitted after any arbitrator has been appointed, except with the consent of all parties, including the party to be joined. (ICC Rules, Article 7(1)). This avoids the risk, which exists under other rules, that the joined party may challenge the award on the ground that it was unfairly denied an opportunity to participate in the selection of arbitrators, albeit at the cost of reduced flexibility. The ICC Court makes the initial decision whether to allow joinder, based on whether it is *prima facie* satisfied that the requirements for joinder have been met.

Unlike the UNCITRAL Rules, the ICC Rules may permit joinder in certain circumstances even where the claims of the parties are the subject of multiple arbitration agreements. Joinder will be permitted in such circumstances, so long as (i) all of the arbitration agreements call for the application of the ICC Rules; and (ii) the ICC Court is *prima facie* satisfied that the agreements may be “compatible” and that the parties may have agreed that their disputes can be determined together in a single arbitration. (*See* ICC Rules, Article 6(4), 9). Arbitration agreements are not compatible, for instance, where they specify different seats of arbitration or different numbers of arbitrators. If all parties are not signatories to all of the relevant agreements, the ICC Court will evaluate the nature of the relationships and may prohibit joinder if the contracts deal with different legal relationships, even if they are part of the same economic transaction. For example, the ICC Court has indicated that it will not allow joinder in disputes involving an owner-contractor-subcontractor relationship without the agreement of all parties, whether provided at the time of the arbitration or agreed upon in the arbitration clause itself.

Thus, if parties wish to ensure the availability of joinder in an agreement involving a number of related contracts among different parties, it is advisable to coordinate the drafting of all of the contracts to provide for joinder. This may be done either (i) by inserting identical provisions

into each contract and cross-referencing each other, or (ii) by drafting an umbrella arbitration agreement that is agreed by all parties to the multi-contract transaction. In either case, it is recommended that the arbitration clause specifically list each of the agreements that are to be subject to joinder and intervention.

Unlike the ICC and UNCITRAL Rules, the LCIA and SIAC Rules provide for joinder only with the consent of the party to be joined, and therefore may be less effective than the language proposed above or the ICC and UNCITRAL Rules. The LCIA Rules allow for joinder only where the party to be joined has consented in writing. (*See* LCIA Rules, Article 22.1(h).) This provision permits one party to the arbitration, usually the respondent, to add to the proceeding a party that may or may not have been a signatory to the contract underlying the dispute, so long as that additional party agrees – even if the other party to the arbitration does not agree. Similarly, Rule 24.1(b) of the SIAC Rules provides for joinder “upon the application of a party,” again without the consent of the other party to the arbitration as long as the additional party consents in writing, but “provided that such person is a party to the arbitration agreement[.]”

None of the Rules discussed above provides for intervention at the request of a third party; a new party can be joined only at the initiative of one of the existing parties. If the parties wish to allow for intervention, or if they want to provide for joinder under rules other than the ICC or UNCITRAL Rules, they should include in their agreement language that expressly so provides for joinder and intervention and should also ensure that all parties who might participate in a dispute agree to the joinder and intervention provision, even if they are not all parties to the same contract. The following language may be used:

**“Any contracting party serving a request for arbitration or other document in the arbitration containing a claim, including a notice pursuant to this provision (the “Notice”), shall send a copy of the Notice to every other contracting party. Any contracting party named as a respondent to a**

claim first set forth in the Notice may join any other contracting party as a party to the arbitration to afford that party an opportunity to defend against the claim or to assert against that party a claim that is substantially related to the claim set forth in the Notice. Any contracting party that is not already a party to the arbitration may intervene as a party to the arbitration to defend against a claim first set forth in the Notice or to assert against any other contracting party a claim that is substantially related to the claim set forth in the Notice.”

“Such joinder or intervention shall be made within [30 days] from the receipt of the relevant Notice by a written notice specifying the joinder or intervention and setting forth the new claim or defense asserted. If any party so requests within [30 days] after receipt of the notice of joinder or intervention, the tribunal shall decide whether the joinder or intervention is admissible under the terms of this clause and whether and to what extent any related arbitration proceedings between contracting parties shall be discontinued in the interest of efficiency. The tribunal’s decision shall be binding.”

“For the avoidance of doubt, the term “claim” as used in this clause includes any claim, counter-claim, cross-claim, or claim by or against a joined or intervening party.”

“Any joined or intervening party shall be bound by any award rendered by the arbitration tribunal even if such party chooses not to participate in the arbitration proceedings.”

Except where the ICC Rules are chosen, it is advisable where joinder is a possibility to use the alternative method of selecting arbitrators in the multiparty contracts described above, which provides for the selection of all three arbitrators by the administering institution. If all arbitrators are appointed by the administering institution, a joined party cannot later complain that it was treated unfairly in the selection of arbitrators.

### c. Consolidation

In the alternative, a multiparty arbitration clause may provide for the consolidation of parallel arbitration proceedings. As a matter of general principle, unless the parties to the arbitrations that are sought to be consolidated have so agreed, there is no power in the arbitrators and, except as noted below, in courts, to consolidate a number of related arbitrations into a single arbitration. Accordingly, if there is a real possibility of a need for consolidation and a series of contracts are involved, the drafting of all of the related contracts should be coordinated to provide for consolidation.

Terms of consolidation should be tailored to the particular situation presented. However, if the contract drafter believes that it would be advantageous to provide for the possibility of consolidation, the following language may be considered for insertion into each related agreement or into an umbrella arbitration agreement signed by all parties:

**“In order to facilitate the comprehensive resolution of related disputes, and upon request of any party to the arbitration proceeding, the arbitration tribunal may consolidate the arbitration proceeding with any other arbitration proceeding relating to this agreement or to [related agreements]. The arbitration tribunal shall not consolidate such arbitrations unless it determines that (i) there are issues of fact or law common to the two proceedings so that a consolidated proceeding would be more efficient than separate proceedings, and (ii) no party would be prejudiced as a result of such consolidation through undue delay or otherwise. In the event of different rulings on this question by the arbitration tribunal constituted hereunder and the tribunal(s) constituted under the [the related agreement(s)], the ruling of the [name one panel] shall control.”**

An alternative is to permit consolidation only if all parties to all of the disputes consent, although such a clause would make consolidation significantly less likely. Notably, the ICC Rules permit the ICC Court to order consolidation at the request of any party to any dispute, even in the absence of consent from all other parties, where the claims arise under the same arbitration agreement, or where the arbitrations are between the same parties, arise in connection with the same legal relationship, and the ICC Court finds that the arbitration agreements are compatible. (ICC Rules, Article 10.). The ICC Court’s decision to consolidate arbitrations is final; the tribunal has no authority to sever the proceedings.

Three methods for selecting the arbitrators in a consolidated proceeding are preferable: *First*, if one contract is primary (*e.g.*, in a construction situation, the contract between the owner and the general contractor), provide that the arbitration tribunal shall be the one constituted under that primary contract:

**“In the case of a consolidated proceeding, the arbitrators in the consolidated proceeding shall be the members of the arbitration tribunal that was first-filed pursuant to [*name of primary agreement*].”**

*Second*, provide that the arbitration tribunal in the first-filed arbitration pursuant to any of a series of related contracts shall be the tribunal for the consolidated arbitration. If the ICC Rules are chosen, this method will apply unless the parties agree otherwise:

**“In the case of a consolidated proceeding, the arbitrators in the consolidated proceeding shall be the arbitration tribunal that was appointed for the first-filed of the consolidated proceedings pursuant to any one of this agreement or [*name related agreements*].”**

And *third*, if the arbitration is institutional, provide that the institution appoint all of the arbitrators:



**“In the case of a consolidated proceeding, the arbitrators in the consolidated proceeding shall be appointed by the [name of the institution] on the request of one of the disputing parties.”**

Some arbitral and court decisions could be interpreted to call into question the first two methods for selecting the arbitrators in a consolidated proceeding (e.g., *Siemens, BKMI v. Dutco Construction Company*), although their application is doubtful, since the parties will have explicitly agreed to this appointment mechanism.

The arbitration law of **The Netherlands** (Article 1046 of the Netherlands Code of Civil Procedure) permits consolidation of arbitration proceedings in certain circumstances even without the consent of the parties. Therefore, that law should be consulted and the jurisdiction avoided (or exclusionary language drafted) if placing the arbitration there would subject the proceeding to unwanted mandatory consolidation. If mandatory consolidation is desired, the parties may consider choosing the jurisdiction as seat.

In a number of jurisdictions in the **United States**, such as California, state law permits consolidation without the consent of all the parties to an arbitration agreement. See also Section 10 of the Revised Uniform Arbitration Act, which has been enacted by a number of States. It is not clear whether, absent use of the clause recommended in Appendix 2, the provisions of the FAA would preempt these State laws.

The particular forms of consolidation and joinder clauses proposed in this and the preceding subsection are not necessarily interchangeable. *First*, the joinder clause provides for notice of claims to be provided to all parties to the agreements at issue, while the consolidation clause does not. The consolidation clause will, therefore, be most useful to a party that already has knowledge of the claims and potential claims. It will be desirable, for example, if the contractual relationship among the parties to the contracts at issue is linear (such as that between an owner and a contractor, and a contractor and subcontractor) and the client is situated in the middle of the contractual chain – and therefore likely to be aware

of claims involving the other parties. The joinder provision may be preferable in cases in which the client's position is situated at an end of a linear contractual relationship or in pool-like relationships such as consortia, where one of the parties may not necessarily be aware of claims between other parties that implicate its interests. *Second*, the joinder provision requires tribunal intervention only if a party objects to the joinder or intervention, while the consolidation provision requires tribunal approval in every case, which could impose additional costs. *Finally*, although this is true for each of the proposed optional clauses, it is important to review the applicable arbitration rules to ensure compatibility with these provisions.

## **2. Mandatory Negotiation, Conciliation, or Mediation.**

Parties sometimes want to require that arbitration be preceded by efforts to negotiate a mutually satisfactory result or by conciliation or mediation. These are often called “tiered” dispute resolution clauses. Negotiation, conciliation and mediation may provide a less costly means of resolving a dispute than arbitration, and may also be more effective in preserving a continuing relationship among the parties than more adversarial processes. Including such a provision in the contract makes it more likely that the parties will make use of one of these procedures, because it may be difficult for either party to suggest resort to one of these procedures in the midst of a dispute because of the concern that to do so may signal a weakness in its position. Mandatory negotiation is more likely to be successful if the agreement involves an ongoing project or a relationship between the parties. To further increase the likelihood of success, it may be advisable to specify that a senior executive from each party should participate in such negotiations.

Clauses imposing a negotiation, mediation or conciliation requirement should be used with care, however, because they are subject to abuse by a party wishing to delay arbitration. If such a provision is included, it is important to include the language below (starting with “notwithstanding”) to make clear that either party may commence

arbitration at any time or after a brief, specified time period for negotiation, conciliation, or mediation, so that there is no argument that a party failed to meet a condition precedent to the arbitration. It is also wise to specify that any disputes about compliance with such an obligation are themselves arbitrable, again so that a delaying party does not attempt to litigate the question in court:

**“In the event of any dispute, controversy, or claim arising out of, relating to, or in connection with this contract, or the breach, termination, or validity thereof, a party wishing to commence arbitration shall first serve notice on the proposed respondent(s) that a dispute has arisen and demand that [*negotiation, conciliation, or mediation*] commence.”**

*[Specify procedure of negotiation, conciliation, or mediation.]*

**“Notwithstanding anything else contained herein, any party to such [*negotiation, conciliation, or mediation*] shall have the right to commence arbitration at any time after the expiration of [*30 days*] after service of such demand for [*negotiation, conciliation, or mediation*] under this subsection. Any disputes concerning the propriety of the commencement of the arbitration shall be finally settled by arbitration pursuant to this section.”**

Many arbitral institutions have published mediation or conciliation rules and procedures that complement their arbitration rules. Where this is so, it will generally be advisable to adopt the same institution’s procedures for mediation. Where this is not possible (e.g., where the arbitration provision calls for UNCITRAL Rules), the mediation procedures promulgated by the AAA, ICC, LCIA and CPR are preferred.

### 3. Split Clauses.

“Split” or “hybrid” clauses allow one or both parties the right to elect litigation or arbitration once the dispute has arisen. These clauses have the advantage of allowing the most appropriate dispute resolution mechanism to be selected once the nature of the dispute and the location of assets against which enforcement action may be taken are actually known. However, careful consideration needs to be given to the inclusion of such clauses since: *first*, in some jurisdictions they are not considered to be a proper reference to arbitration and are, therefore, invalid; and, *second*, in many jurisdictions their validity has not yet been tested. Therefore, even if split clauses are valid in the seat of arbitration, advice should also be sought on their validity in any jurisdiction of potential enforcement of an award.

Split clauses can be sole option (*i.e.*, one party has the right of election) or mutual option (*i.e.*, both parties have the right of election). However, mutual option clauses can be very complex and have the potential to result in parallel proceedings if a forum race is triggered with one party electing to arbitrate and the other electing to litigate.

In **England**, split clauses are valid. An example of a sole option clause, where a party is given the option to elect litigation, is the following:

**“Notwithstanding Clause [*the initial arbitration clause*], [Party B] hereby agrees that [Party A], at its sole option and for its benefit, may choose to submit any such dispute, controversy or claim to the courts of England, to the jurisdiction of which for the purposes of such dispute [Party B] irrevocably submits[, or to such other court or courts which have jurisdiction to determine such dispute or claim].**

**If arbitration has been commenced by [Party B] at the time that [Party A] chooses to submit the matter to a court of competent jurisdiction, then it is agreed that such arbitration is to be discontinued, save where [Party A] has consented to such commencement or has waived such right**

by filing an answering submission in the arbitration so as to render it inequitable to cause those proceedings to be stopped.

For the avoidance of doubt, the right of [Party A] to exercise the option pursuant to Clause [•] arises each time there is a dispute covered by Clause [•] and shall not be affected by any previous election made by [Party A] under that Clause.”

Split clauses are enforceable in **Australia**, **New Zealand** and **Hong Kong** (*William Co. v Chu Kong Agency Co. Limited* [1993] 2 HKC 377; *P&O Nedlloyd Limited, P&O Nedlloyd (HK) Limited v Wab Hing Seafreight (China) Co. Limited* [1999] HKCU 1412). Further, while there has been no case law on the issue, there is some basis to suppose that courts in **Singapore** and **Malaysia** would follow the English law approach to enforcement of such clauses. In **China**, courts often set aside or refuse to enforce an award involving an arbitration agreement with a split clause. A 2006 decision from the Supreme People’s Court clarified that while these clauses are disfavored, it is now incumbent on the respondent to object to the split clause before the first arbitration hearing is held; otherwise, the respondent will be deemed to have accepted arbitration. The decision also clarified that a court must reject an application for setting aside if a party failed to challenge the validity of the arbitration clause in arbitration proceedings, but applies to have the award set aside once the award is rendered.

In the **United States**, split clauses are generally enforced, although it should be noted that sole option split clauses may be problematic, as some courts have found that one-sided arbitration clauses may be unconscionable and thus unenforceable. (*See e.g., Bragg v Linden Research, Inc*, 487 F Supp 2d 593, 605-11 (ED Pa 2007) (California law); *Ticknor v Choice Hotels Intl, Inc*, 265 F 3d 931, 939-40 (9th Cir 2001) (Montana law); and *Deutsch v Long Island Carpet Cleaning Co.*, 158 NYS 2d 876 (NY 1956)).

#### **4. Interim Relief.**

Some arbitration laws deal specifically with the question of interim relief, and, as always, the relief afforded by the applicable arbitration laws should be reviewed before inserting specific language. As a matter of theory, there is wide acceptance that the arbitration tribunal may award injunctive relief between the parties to the arbitration. (*See* AAA International Rules, Articles 21, 27(7); ICC Rules, Article 28; LCIA Rules, Article 25; CPR Rules, Rule 13.1; UNCITRAL Rules, Article 26; ICSID Rules, Rule 39; WIPO Rules, Article 46.) However, because it takes some time to constitute an arbitration tribunal, and because the arbitration tribunal itself cannot enforce injunctive relief on its own, the availability of interim relief from the tribunal may, as a practical matter, be limited.

The rules of most arbitration institutions provide that, before the arbitration tribunal is formed, resort to a court for interim relief to maintain the status quo pending completion of the arbitration (*e.g.*, if intellectual property or trade secret rights may be infringed) is not incompatible with, or a waiver of, the right to arbitrate under those rules. (*See* AAA International Rules, Article 21(3); ICC Rules, Article 28(2); LCIA Rules, Article 25.3; CPR Rules, Rule 13.2; WIPO Rules, Article 46; UNCITRAL Rules, Article 26(9).)

However, if one is using other rules that do not say so or that require the parties expressly to stipulate their agreement to request any judicial authority to order provisional measures (*see* ICSID Rules, Rule 39(5)), the drafter should provide:

**“A request by a party to a court of competent jurisdiction for interim measures necessary to preserve the party’s rights, including pre-arbitration attachments or injunctions, shall not be deemed incompatible with, or a waiver of, this agreement to arbitrate.”**

If the parties wish to specify that they retain the right to seek provisional relief from the courts only until such time as the arbitrators are able to order provisional relief, the following clause may be added:

**“Either party has the right to apply to any court of competent jurisdiction for interim relief necessary to preserve the party’s rights, including pre-arbitration attachments or injunctions, until the arbitrators are appointed. After appointment of the arbitrators, the arbitrators shall have exclusive jurisdiction to consider applications for interim relief.”**

If the drafter believes that interim or injunctive relief may be sought in the arbitration and the applicable arbitration law and rules do not clearly make such relief available without the parties’ consent, the following language may be added:

**“In addition to the authority conferred on the arbitration tribunal by the rules specified above, the arbitration tribunal shall have the authority to make orders for interim relief necessary to preserve the party’s rights, including pre-arbitration attachments or injunctions. The parties agree that any ruling by the arbitration tribunal on interim measures shall be deemed to be a final award with respect to the subject matter of the ruling and shall be fully enforceable as such.”**

## **5. Emergency Arbitrators.**

If the parties prefer to seek interim relief from an arbitrator rather than a court, they may consider adopting the AAA International Arbitration Rules, the ICC Rules, the CPR Rules, the SCC Rules, or the SIAC Rules, which have adopted provisions for the appointment of an emergency arbitrator solely to hear and decide applications for interim relief prior to the appointment of an arbitral tribunal. (*See* AAA International

Rules, Article 37; ICC Article 28; CPR Rule 14; SCC Rules, Appendix 2; SIAC Rule 26.2.)

Generally, these rules provide that a party with an urgent need for interim relief can apply to the institution for the appointment of an emergency arbitrator, and that the institution will make such an appointment within 24 hours of that application. Notice must be provided to the other party, and *ex parte* applications are not permitted. The emergency arbitrator sets the procedures for a prompt hearing, and he or she must issue a decision within a short time period (i.e., 5 days under the SCC Rules; 15 days under the ICC Rules), which may be extended in exceptional circumstances. The institutions' rules vary as to whether the decision of the emergency arbitrator is made in the form of an order or an award that can be enforced in court (although the time necessary to do so may limit the utility of interim relief where enforcement is necessary). The AAA Rules give that choice to the arbitrator; the ICC Rules provide that it shall be an order, not an award, so that it is not subject to scrutiny by the ICC Court. An order is not necessarily judicially enforceable in all states, but in states that have adopted the 2006 version of the UNCITRAL Model Law, the emergency arbitrator's decision is enforceable. All the rules, however, provide that the decision is binding on the parties. The powers of the emergency arbitrator expire once the arbitral tribunal is appointed, and the emergency arbitrator generally may not serve as a member of the arbitral tribunal. The emergency arbitrator's decision is generally not binding on a subsequently-appointed arbitral tribunal.

For certain institutions, such as the ICC, CPR, SIAC, and SCC, the parties' selection of the general arbitration rules gives rise to automatic access to the special provisions governing the appointment of an emergency arbitrator, although parties may be able to opt out of such provisions. (*See* ICC Rules, Article 29(6).) However, some rules specifically require parties to opt-in. For example, under the AAA International Rules, the emergency arbitrator provisions are automatically available only to arbitration agreements entered into on or after May 1, 2006; otherwise, parties must opt-in.



## **6. Interim Adjudication.**

In construction contracts, it is common to have provisions for adjudication of certain types of disputes that may arise while construction is ongoing. These provisions aim to facilitate a quicker type of resolution than is possible in arbitration and to allow the construction to proceed where the existence of the dispute could otherwise operate to suspend the construction work.

The most common of such provisions refers disputes regarding technical and operational matters arising during construction to an independent expert or experts for resolution within a predetermined timeframe. Normally, these provisions require final adjudication of such disputes by the expert, although it is possible to provide for review of the expert determination in arbitration if the determination has not become moot by the passage of time:

**“If a dispute arises as to [*specified disputes*], such dispute may be referred by either party for determination by an Expert agreed between and appointed by the Parties. If the Parties are unable to agree within [5] days of the referral, the Expert shall be appointed by [*name of institution*]. The Expert shall have no authority to resolve or determine any Dispute except for those listed in this paragraph.**

**The determination of the Expert shall be [*final and*] binding on the Parties [*unless and until an Arbitration Award issued pursuant to this Agreement modifies or annuls the determination*].”**

Two words of caution should be sounded about these interim adjudication procedures. *First*, it is important that a clear differentiation be made between the types of disputes that may be referred to the interim adjudication procedure and the types of disputes referable to arbitration. Otherwise, significant delay to the eventual resolution of the dispute – potentially including litigation – may result from a preliminary disagreement as to the proper means of resolution. *Second*, as with

clauses that require that arbitration be preceded by efforts to negotiate a mutually satisfactory result or by conciliation or mediation, care must be taken to preclude the possibility that a party will argue that the interim adjudication procedure is a condition precedent to arbitration where that result was not intended.

In large, complex construction projects and in construction matters likely to give rise to disputes among multiple parties, a more sophisticated form of interim adjudication clause may provide for setting up and maintaining Dispute Review Boards (“DRBs”) or Dispute Adjudication Boards (“DABs”) to serve this function. DABs and DRBs are costly, but may be beneficial for complex, high-value projects, especially those that are expected to last for several years and where the number of disagreements is likely to justify the cost. Each of the AAA, ICC and International Federation of Consulting Engineers, among others, provides procedures for the appointment and operation of DRBs and DABs. Generally speaking, DRBs issue “recommendations” that become binding only if there is no objection within a specified time, while DABs issue decisions that are immediately binding. Most procedures provide that both recommendations and decisions may be subsequently reviewed in an arbitration. General considerations and suggested language for selecting a set of rules are set forth in Appendix 3.

## **7. Nationality of the Sole Arbitrator or Chairman of the Tribunal, Qualifications of the Arbitrator(s), and Independence and Impartiality of Arbitrators.**

The rules selected often contain provisions relevant to questions of nationality and independence. (*See* AAA International Rules, Article 6(4); ICC Rules, Article 13(5); LCIA Rules, Article 6; UNCITRAL Rules, Article 6(4); ICSID Rules, Rules 1 and 3; WIPO Rules, Articles 20 and 22.) Even when they do, they may not make it mandatory that a sole arbitrator or chair appointed by the appointing authority be of a nationality other than that of any of the parties (UNCITRAL Rules,

Article 6(4); AAA International Rules, Article 6.4), or may not specify that a party's nationality shall be deemed to include that of its parent company (compare LCIA Rules, Article 6, with ICC Rules, Article 9(5)). Thus, depending on the rules adopted, consideration should be given to providing that the sole arbitrator or the chairman of the tribunal be a citizen of a country other than those of the parties and, if appropriate, their parents or controlling interests.

Although providing for the nationality of a sole arbitrator in this way is based on legitimate concerns that an arbitrator might be biased in favor of a party of the arbitrator's own nationality, the issue of whether such requirements may violate applicable national anti-discrimination laws has been hotly contested. In the **United Kingdom**, for example, the Supreme Court in 2011 reversed a controversial 2010 decision from the English Court of Appeal that had resulted in parties amending arbitration agreements so as to remove nationality requirements for arbitrators. *Nuridin Jivraj v Sadruddin Hashwani* [2011] UKSC 40. In holding that arbitrator qualification requirements, including nationality criterion, are fully enforceable under English law, the Supreme Court's decision confirmed the widely-held view in the arbitration community that such provisions should not run afoul of national law.

Parties that nonetheless wish to take measures to preserve the validity of an arbitration clause, in the unlikely event that another Court were to void such a requirement on anti-discrimination grounds, may provide that such provision is severable by using the following language:

**“The [*sole arbitrator/chair of the tribunal*] shall not be a citizen of either \_\_\_\_\_ or \_\_\_\_\_, to the extent the law permits.”**

If potential disputes may involve complex business, legal, or technical issues, parties may require that arbitrators possess specific qualifications. However, there are risks associated with adopting this approach, including (1) unduly narrowing the pool of potential candidates (overly stringent requirements may mean that there are only a handful of potential arbitrators, which may make it difficult or impossible to

constitute a tribunal); (2) presupposing characteristics that may not be appropriate for every potential dispute; and (3) providing an avenue for a party seeking to delay or frustrate proceedings (*i.e.*, the party may argue that one or more of the arbitrators does not meet the specified criteria). Administering institutions usually maintain rosters of highly qualified legal and business experts in a wide range of industries, thus obviating the need for such a provision in most cases. In those cases where parties nevertheless wish to specify criteria for arbitrators, the following language may be used:

**“Each arbitrator shall [list qualifications (e.g., “be an attorney experienced in oil and gas contracts,” “have a degree in civil engineering,” “be fluent in both English and Spanish”)]. An arbitrator shall be deemed to have met these qualifications unless any party objects within 20 days.”**

The final sentence of this language is important to prevent a losing party from later challenging an award on the ground that an arbitrator did not have the necessary qualifications so that the tribunal was not properly constituted.

It is generally accepted that arbitrators in international arbitrations should be independent and impartial, and the leading international rules so provide. (See AAA International Rules, Article 7; ICC Rules, Articles 11, 13(2); LCIA Rules, Article 5.2; CPR Rules, Rule 7.1; ICSID Convention, Article 14(1); WIPO Rules, Article 22; UNCITRAL Rules, Article 6(4)). This standard applies to an arbitrator nominated by a party as well as to an arbitrator appointed by an institution. If the chosen rules do not so provide, it is desirable to include a provision in the arbitration clause stating:

**“The arbitrator[*s*] shall be impartial and independent.”**

## **8. Jurisdiction to Determine Jurisdiction.**

It is generally accepted that arbitration tribunals have the authority to determine their own jurisdiction (“Kompetenz-Kompetenz”). The rules

selected often provide that the arbitration tribunal may rule on its own jurisdiction. (See ICC Rules, Articles 6(3), (9); LCIA Rules, Article 23; AAA International Rules, Article 15; CPR Rules, Rule 8; UNCITRAL Rules, Article 23; WIPO Rules, Article 36.) When the rules selected do not explicitly so provide, or if the parties wish to leave no doubt regarding their intention to invest the tribunal with this authority (and thus minimize the possibility of protracted litigation in courts over this threshold issue), the parties should include a clause expressly delegating to the arbitrator authority to resolve all threshold issues:

**“The Arbitral Tribunal shall determine the scope of its own jurisdiction.”**

The tribunal’s jurisdiction is generally subject to final review by the court at the seat of arbitration or a court considering a request for enforcement. However, some courts in the **United States** have interpreted Kompetenz-Kompetenz clauses as providing the arbitration tribunal with exclusive and final authority to rule on jurisdiction and have declined to review jurisdictional decisions made subject to such a clause. To avoid any doubts, the parties may consider including language along the following lines:

**“The arbitral tribunal’s authority to determine its own jurisdiction pursuant to [Rule [x]] does not affect a competent court’s authority to determine the tribunal’s jurisdiction on an action to vacate, modify, confirm, recognize or enforce the arbitration award.”**

## **9. Production of Evidence in Arbitration.**

The rules of some arbitration institutions provide tribunals with the authority to order the production of evidence (See AAA International Rules, Article 19; LCIA Rules, Article 22(1)(c) – (e); CPR Rules, Rule 11-12; UNCITRAL Rules, Article 27; ICC Rules, Article 25(5); ICSID Rules, Rule 34(2) – (4)). Some arbitration laws also provide arbitral tribunals with this authority, unless the parties agree otherwise.

*See, e.g.*, Hong Kong Arbitration Ordinance Section 56. Because the rules and laws are typically general and do not describe the mechanisms for the taking of evidence, it is a good idea for parties to consider whether they want to spell out in the arbitration clause particular rules governing evidentiary matters, such as the exchange of documents, the use of experts or the manner in which the hearing is to be conducted.

The IBA Rules on the Taking of Evidence in International Arbitration (the “IBA Rules”) were updated in 2010 and present internationally recognized standards involving these issues, which most parties will find acceptable. If parties conclude that they wish the IBA Rules to govern the proceeding, they should make a provision to this effect in the arbitration clause:

**“The procedures for the taking of evidence shall be governed by the IBA Rules on the Taking of Evidence in International Arbitration.”**

Alternatively, the parties may wish to include certain provisions of the IBA Rules and not others. If so, clauses specifically incorporating the desired provisions can be incorporated in the arbitration agreement, as in the next two sections.

#### **a. Requests for Documents**

Usually, the rules chosen will contain provisions with respect to requests for and the production of documents or provide that such requests and production shall be made in accordance with the rulings of the arbitration tribunal. (See AAA International Rules, Article 19(3); LCIA Rules, Article 22.1(e); CPR Rules, Rule 11; UNCITRAL Rules, Article 27(3); ICC Rules, Article 25(5); ICSID Rules, Rule 34(2)(a)).

In certain circumstances (*e.g.*, if the other party will have possession of most of the documents relevant to the dispute), it may be advantageous to provide specifically for more expansive disclosure of documents than is available under the applicable rules:

**“In addition to the authority conferred on the arbitration tribunal by the rules specified above, the arbitration tribunal**

**shall have the authority to order such production of documents as may reasonably be requested by either party or by the tribunal itself.”**

In other circumstances, the parties may wish to preclude any exchange of documents, in order to provide for a more streamlined and less costly proceeding:

**“The parties agree that they shall have no right to seek production of documents or any other discovery in the arbitration proceeding, except that the parties shall exchange the documents that they intend to use in evidence at the hearing.”**

The IBA Rules contain provisions that address the production of documents and valid objections to a production request (Articles 3 and 9). These provisions provide a good balance between the narrow civil law and the broader common law approach to document production. Inclusion of these provisions in an arbitration clause gives the parties to an international arbitration sufficient advance knowledge of the procedure that will be followed, of conditions that must be fulfilled before the arbitration tribunal will issue an order for the production of documents, and of valid objections to production requests that are available to protect the legitimate interests of the party from whom documents are requested:

**“The procedure for the exchange of documents shall be governed by Article 3 and Article 9 of the IBA Rules on the Taking of Evidence in International Arbitration.”**

Depositions (the taking of oral witness testimony before the hearing) are rarely permitted or appropriate in international arbitration. In the unusual event that the drafter believes that pre-hearing depositions may be necessary to prove a party’s case, the following language could be added:

**“In addition, either party may request a reasonable number of pre-hearing discovery depositions of party witnesses.”**

Usually, however, none of these provisions should be necessary, and it is reasonable to rely upon the arbitration tribunal to afford such discovery and document production as it deems appropriate.

Any clause providing for the taking of evidence cannot be inconsistent with the law of the seat of the arbitration. Moreover, no arbitration clause can convey to the arbitrators authority over third persons unless that law so allows. The laws of many countries, including **England**, the **United States** and **Hong Kong**, permit courts in limited circumstances to assist arbitrators in obtaining third-party evidence.

For instance, any party (including third parties) may be able to compel discovery from entities located in the United States under 28 U.S.C. § 1782, which allows a U.S. District Court to compel production of evidence from a person found within its jurisdiction “for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation.” 28 U.S.C. § 1782(a). Some U.S. courts have interpreted the provision expansively to include discovery in support of private arbitration proceedings. If the drafter considers it advisable to preclude the possibility of discovery under Section 1782, which may substantially increase the cost and burden of an arbitration when there are U.S. entities, the following language may be added:

**“The parties agree that they shall have no right to seek production of documents or any other discovery for purposes of the arbitration proceeding under 28 U.S.C. § 1782.”**

#### **b. Expert Testimony**

The appointment of experts by the arbitration tribunal itself is common in civil law countries, and most arbitration rules make specific provision for the arbitration tribunal to appoint its own expert or experts. (*See* AAA International Rules, Article 22; ICC Rules, Article 25(4); LCIA Rules, Article 21; CPR Rules, Rule 12.3; UNCITRAL Rules, Article 29; ICSID Rules, Rule 34(2)(a); WIPO Rules, Article 55.)



Depending upon the rules used, there may be some question as to the parties' right to examine such expert's report to the tribunal and to question such expert on his or her report. Most tribunals would allow cross-examination. If the selected rules do not provide for tribunal-appointed experts or make clear the parties' right to examine such experts, the following clause should be considered:

**“The arbitration tribunal may, at its option, appoint one or more experts to advise it with respect to any issue in the arbitration. If any expert is so appointed, the parties hereto shall have the right to examine such expert's report to the tribunal and to question such expert at an oral hearing.”**

The parties may also decide to exclude the tribunal's right to appoint experts:

**“The arbitration tribunal shall not have the authority to appoint experts, and Article [x] of the [*selected rules*] shall not apply.”**

The IBA Rules contain provisions on party-appointed experts (Article 5) and tribunal-appointed experts (Article 6). The drafters may choose to include those rules in the arbitration agreement:

**“Article[s] 5 [and 6] of the IBA Rules on the Taking of Evidence in International Commercial Arbitration shall apply to expert testimony.”**

### **c. Disclosure of Electronic Documents and Information**

Technology has changed the way information is stored and communicated, with the effect of making large caches of electronic information potentially subject to discovery obligations. A few arbitration institutions and the IBA have adopted guidelines that provide for the management of electronic documents and information, primarily in an effort to mitigate the financial and efficiency burdens imposed. (See AAA/ICDR Guidelines for Information Disclosure and Exchange in International Arbitration Proceedings (“AAA Guidelines”), Article (4); CPR Protocol on Disclosure of Documents and Presentation

of Witnesses in Commercial Arbitration (“CPR Protocol”), Article 5(d), Schedule 2; IBA Rules, Article 3.)

The IBA has opted to include electronic documents within the scope of its general disclosure framework, which gives tribunals broad latitude to order the production of relevant evidence, while at the same time encouraging tribunals to conduct the arbitration in an efficient manner. The AAA Guidelines provide more detailed guidance than the IBA Rules and call on arbitrators to work towards economic efficiency in electronic disclosure. The AAA Guidelines also grant arbitrators the power to order testing or other means of narrowing electronic document requests. The CPR Protocol takes an even more detailed approach by providing parties with four Modes, each of which provides for a different amount of electronic disclosure. The narrowest, Mode A, provides for disclosure, in non-native format, only of those documents presented in support of each parties’ case. The broadest, Mode D, contemplates full disclosure of electronic evidence, subject only to limitations of reasonableness, duplication, and undue burden. Modes B and C constrain the scope of disclosure by limiting to different degrees the number of custodians, the chronological scope, and whether non-primary sources (such as back-up tapes) must be accessed.

Given the increasing reliance on technology in the creation and storing of documents, parties should consider what role electronic disclosure is likely to play in any disputes between them. If parties desire a greater degree of control over electronic disclosure than that provided for by the IBA Rules, they may wish to consider incorporating one of the Modes in the CPR Protocol using the following language:

**“The parties agree that disclosure of electronic information shall be implemented by the Tribunal consistent with Mode [ ] in Schedule 2 of the CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration.”**

Parties can also specify in detail the type of production of electronic documents that would be available in any arbitration. For example:

**“The parties agree that disclosure of electronic information shall be in reasonably usable form and shall include only such information: maintained by no more than [specify number] of designated custodians; created between the date of the signing of the agreement that is the subject of the dispute and the date of the filing of the request for arbitration; and stored in primary storage facilities with reasonably accessible active data (that is, no information is required to be disclosed from back up servers or back up tapes, cell phones, PDAs, or voicemails).”**

## **10. Confidentiality.**

The majority of institutional rules contain a specific provision dealing with confidentiality, although these vary considerably in detail and scope and often provide less confidentiality than parties may expect. More comprehensive provisions on confidentiality of the proceedings can be found in the LCIA and CPR Rules (*see* LCIA Rules, Article 30; and CPR Rules, Rule 18). The AAA International Rules, on the other hand, limit the confidentiality obligations to the tribunal and the institution, not the parties (AAA International Rules, Article 34). The ICC Rules, as revised effective in 2012, permit the tribunal, upon request of any party, to make orders concerning the confidentiality of the arbitration (ICC Rules, Article 22(3)).

The approaches of national laws and courts are equally varied, with some courts holding that arbitrations are presumptively not confidential, and others establishing a strict duty of confidentiality on the parties, which may in appropriate circumstances be waived by the court.

If the parties desire to preserve the confidentiality of the arbitration, it is recommended to include an express provision to that effect. It should, therefore, be considered whether the party will need to disclose the existence of the arbitration or the award to enforce its rights, such as in enforcement proceedings or in an insurance context, or to satisfy its

obligations under law. The following clause preserves confidentiality while providing for certain limited exceptions:

**“The parties, any arbitrator, and their agents or representatives, shall keep confidential and not disclose to any non-party the existence of the arbitration, non-public materials and information provided in the arbitration by another party, and orders or awards made in the arbitration (together, the “Confidential Information”). If a party or an arbitrator wishes to involve in the arbitration a non-party – including a fact or expert witness, stenographer, translator or any other person – the party or arbitrator shall make reasonable efforts to secure the non-party’s advance agreement to preserve the confidentiality of the Confidential Information. Notwithstanding the foregoing, a party may disclose Confidential Information to the extent necessary to: (1) prosecute or defend the arbitration or proceedings related to it (including enforcement or annulment proceedings), or to pursue a legal right; (2) respond to a compulsory order or request for information of a governmental or regulatory body; (3) make disclosure required by law or by the rules of a securities exchange; (4) seek legal, accounting or other professional services, or satisfy information requests of potential acquirers, investors or lenders, provided that in each case of any disclosure allowed under the foregoing circumstances (1) through (4), where possible, the producing party takes reasonable measures to ensure that the recipient preserves the confidentiality of the information provided. The arbitral tribunal may permit further disclosure of Confidential Information where there is a demonstrated need to disclose that outweighs any party’s legitimate interest in preserving confidentiality. This confidentiality provision survives termination of the contract and of any arbitration brought pursuant to the contract. This confidentiality provision may be enforced by an arbitral tribunal or any court of competent**

**jurisdiction, and an application to a court to enforce this provision shall not waive or in any way derogate from the agreement to arbitrate.”**

Notably, this clause does not cover a party’s own “historical” documents and documents and information in the public domain. The clause includes a number of exceptions to the confidentiality obligation to permit disclosure in certain circumstances. However, such disclosure is permitted only to the extent necessary to fulfill one of the specifically enumerated circumstances requiring that disclosure. For instance, if there is a requirement to disclose the existence of the arbitration, this will not of itself justify the disclosure of any other Confidential Information. The exceptions should be specifically tailored to the particular circumstances, as the securities exchange exception would only be relevant to listed companies. This clause also provides for the right of the parties to disclose Confidential Information in order to pursue legal rights unrelated to the arbitration, and confers on the tribunal the power to permit further disclosure. The parties should consider carefully whether to permit disclosure in those circumstances, and if so whether such disclosure should be further subject to more precisely defined or limited conditions.

## **11. Freedom Not to Apply Law.**

The parties may also authorize the tribunal to decide as *amiables compositeurs* or *ex aequo et bono*, meaning that the tribunal may award any remedy or relief which it deems just and equitable, including the possibility of reforming the contract, without reference necessarily to the law governing the contract. Such a provision should be employed only rarely, because it can result in a decision that is not based on the terms of the contract and the applicable law.

Although most arbitration laws allow the parties to agree that the tribunal can reach a decision on this basis, few court decisions in any jurisdiction provide guidance as to the scope of the arbitrator’s authority under such a provision. However, the authority to render a decision on

this basis does not necessarily vest an arbitrator with unfettered discretion: a 2008 decision of the highest court of the Canadian province of Quebec held that an arbitrator acting as *amiable compositeur* exceeded his authority by modifying the parties' agreement. Certain laws, moreover, may be regarded as mandatory for reasons of public policy.

In certain industries, notably in the context of reinsurance agreements, there is a practice and custom of authorizing arbitrators not to apply strict rules of law. The custom and practice of particular industries may sufficiently guide or constrain the arbitrators as to make this option a reasonable choice for contracts in those industries. It may be preferable, however, to specify the relevant custom and practice as the governing law for such contracts, rather than relying on the inherently ambiguous *ex aequo et bono* standard.

## **12. Costs.**

There are three main approaches to awarding costs: (1) the losing party bears all or a substantial proportion of the prevailing party's costs; (2) each party bears its own costs (often referred to as the "American Rule"); or (3) costs are awarded in proportion to the relative success of each claim. In this context, "costs" typically include not only institutional and arbitrator expenses, but also attorneys' and experts' fees. In some situations, indemnity provisions that are separate and apart from the arbitration clause may have the effect of imposing the obligation to pay costs on one party or the other. If parties do not specify cost allocation in the contract, arbitration rules typically afford arbitrators wide discretion in allocating costs and fees between the parties. The emerging trend has been for arbitral tribunals and national courts to adopt approach (1) described above.

Although the rules of administering institutions almost always provide for an award of costs – although the language of the rules varies and should be checked – parties may choose explicitly to grant arbitrators this authority, or deviate from the rules and include a clause providing that the losing party shall bear the costs of the prevailing party or that

each party shall bear its own costs. In those instances, one of the following variants may be included:

Variant 1: Arbitrators Are Granted Discretion to Apportion Fees and Expenses

**“The arbitrators shall have the power to make an award allocating the costs and expenses of the arbitration between the parties, including reasonable legal fees and other costs of legal representation.”**

Variant 2: Losing Party Pays Prevailing Party’s Costs

**“The arbitrators shall award to the prevailing party its costs and expenses, including its reasonable legal fees and other costs of legal representation, as determined by the arbitrators.”**

Variant 3: Each Party Bears its Own Costs

**“All costs and expenses of the arbitrators [and the arbitral institution] shall be borne by the parties equally; each party shall bear its own arbitration costs and expenses, including its legal fees and other costs of legal representation.”**

### **13. Waiver of Punitive, Exemplary, or Similar Damages.**

In 1995, the United States Supreme Court held that arbitrators have the authority to award punitive damages unless the parties expressly agree otherwise. A choice of law clause selecting a law that does not permit arbitrators to award punitive damages – such as New York law – may not be sufficient to preclude an award of punitive damages. Parties that

want to preclude the arbitrators from awarding punitive damages are advised to do so expressly:

**“The parties hereto expressly waive and forgo any right to punitive, exemplary or similar damages as a result of any controversy or claim arising out of, relating to, or in connection with this agreement, or the breach, termination, or validity thereof.”**

It may be preferable to place this provision in the miscellaneous provisions of the contract, rather than in the arbitration clause, in order to preclude any argument that punitive damages are outside the scope of the arbitrators’ authority but are otherwise available in a court proceeding instituted for that sole purpose. Drafters should note, however, that there is uncertainty in some jurisdictions as to whether such a pre-dispute waiver of punitive damages is enforceable.

The AAA International Rules uniquely contain a provision waiving the right to punitive damages in any arbitration pursuant to those rules, unless the parties provide otherwise in their contract. (Article 28 (5)).

#### **14. Interest.**

The parties may also consider including a clause that determines the interest to be awarded. Such clauses are particularly useful where the parties wish to avoid the statutory interest rate established by the law applicable to the contract. The parties may choose a fixed rate or a rate based on a publicly available reference rate (such as LIBOR or Euribor). The interest period (*e.g.*, one week deposits, one month deposits, etc.) should be indicated as well.

In addition, many jurisdictions do not allow for the compounding of interest, and some jurisdictions allow the compounding of interest only if the parties specifically so agree. If the parties desire that interest be compounded, it is therefore recommended to include a provision that expressly provides so:



**“Notwithstanding Section [*applicable law*], pre-award and post-award interest shall be awarded at [*specify rate and interest period*]. Interest shall be compounded [*monthly*].”**

#### **15. Currency of the Award.**

It may sometimes be in the interest of the parties to specify the currency in which the award should be paid. This can be done simply by providing that:

**“Any award shall be payable in [*specify currency*].”**

#### **16. Appeal.**

One of the major advantages of international arbitration is that an award is final and binding and may not be annulled except on the basis of a number of strictly limited grounds. *See generally* Appendix 2 (discussing relevant law of various jurisdictions).

In the very exceptional circumstance that a party nevertheless wishes that a full appeal of the arbitration award to a second arbitration tribunal should be available, it is possible to draft such a clause. Such clauses are complex and should be drafted with caution. One variant is to provide for such an appeal only if the award exceeds a certain value.

In addition, specific types of recourse to courts beyond the usual limited grounds for review may be possible. For example, in some jurisdictions, such as Hong Kong, parties may agree to appeal to courts on questions of law arising out of awards under certain circumstances. *See* HK Ar. Ord., Schedule 2, Section 5. However, clauses providing for remedies such as this should be thoroughly vetted with counsel knowledgeable in the applicable law, and otherwise approached with caution, as local law exceptions and idiosyncrasies abound. For example, the U.S. Supreme Court has held that parties may not by contract expand the grounds for federal court review of arbitration awards beyond those set forth in the Federal Arbitration Act (*Hall Street*, 552 U.S. 576 (2008)).

## **17. Sovereign Immunity, Waiver as to Enforcement.**

Claims of sovereign immunity may be asserted not only by a government and its agencies, but also by a company or organization controlled by the State. While arbitration clauses generally effect a waiver of immunity with respect to an arbitration tribunal's jurisdiction, they do not necessarily do so with respect to enforcement by a national court of an award or execution against the foreign entity's assets. For the private party, therefore, it is of particular importance to consider the inclusion of an explicit waiver of immunity respecting judicial enforcement.

Such a waiver of execution may be expressed as follows:

**“To the fullest extent permitted by law, the [*State party or enterprise*] hereby irrevocably waives any claim to sovereign or any other immunity in regard to any proceedings to enforce an arbitration award rendered by a tribunal constituted pursuant to this Agreement, including without limitation, immunity from suit, immunity from service of process, immunity from jurisdiction of any court, and immunity of its property and revenues from execution or from attachment or sequestration before or after judgment.”**

Waivers of sovereign immunity are often construed more narrowly than the breadth of their words would suggest. For example, under **United States** law, a general waiver of immunity does not permit prejudgment attachment unless the waiver contains specific language to that effect. In addition, regardless of waiver, the law of the enforcing jurisdiction may not permit execution or attachment against certain state assets. A State party may wish to draft the waiver clause expressly to exclude certain classes of assets that it may regard as essential to its sovereign operations, such as assets used for diplomatic or military purposes and assets held by its central bank.

## **18. Service of Process.**

For actions to enforce an arbitration award, service of process may become a tricky issue. For example, if a party wins an arbitral award against an Argentine corporation and attempts to attach assets of that corporation in the United States, unless jurisdiction of the assets can be obtained *in rem*, the party seeking to enforce the award would have to serve through the complex mechanism of the Inter-American Convention on Letters Rogatory, and service of process could take a year or more. Similar conventions exist to address service of process in other countries; regardless of the applicable treaty, service of process of a court proceeding to enforce an arbitral award could prove costly and time-consuming.

Therefore, an arbitration clause may include a designated agent for service of process by first-class mail or courier, with an express waiver of any objection based on service of process. Such a clause may be expressed as follows:

**“[Party] hereby irrevocably appoints, with respect to itself and to its assets, [Process Agent] for service of all pleadings, process, requests for discovery and/or other papers in connection with any proceedings, wherever brought, for the recognition and enforcement of any award resulting from an arbitration brought pursuant to this Section, or any judgment, of any jurisdiction, resulting therefrom. Service of process in accordance with this paragraph may be made by delivering a copy of such process to [Process Agent] at [address] by hand delivery, first-class mail, or courier, and [Party] irrevocably authorizes [Process Agent] to accept such service on its behalf. [Party] hereby waives any objection to service of process by service on [Process Agent] in accordance with this paragraph. Nothing in this paragraph shall be deemed to limit the right to serve legal process in any other manner permitted by law.”**

## **19. Classwide Arbitration.**

Classwide arbitration is rare in the context of international business contracts, but if such a provision is desirable, it must be carefully tailored. In the United States, classwide arbitration is permissible if the agreement of the parties so provides. Two recent decisions of the Supreme Court of the United States have rejected the position of certain courts (primarily California state courts) that a right to classwide arbitration could be inferred from silence. In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, the Supreme Court held that imposing class arbitrations on parties who have not agreed to authorize class arbitration is inconsistent with the FAA, and that a right to classwide arbitration could be inferred from silence. 130 S.Ct. 1758 (2010). In *AT&T Mobility LLC v. Concepcion*, the Supreme Court held that state laws holding arbitration provisions unenforceable if they excluded the possibility of classwide arbitration were preempted by the FAA. 131 S.Ct. 1740 (2011).

In light of *Stolt-Nielsen* and *Concepcion*, if classwide arbitration is desired, it would be prudent to include a clause that specifically permits class arbitration. Some institutions, such as the AAA, have published supplementary rules for use in classwide arbitration that can be incorporated by reference into an arbitration agreement. Conversely, if it is desirable to exclude the possibility of classwide arbitration, *Concepcion* provides reason to believe that such a provision will be given effect.

## **20. Baseball Arbitrations.**

### **a. Baseball Arbitration**

In very specific circumstances, the parties may agree to a “baseball arbitration,” also known as “last offer arbitration.” Under such a clause, each party submits to the arbitrator a single proposed amount to be awarded and presents support for that amount in a summation-style argument. The arbitrator is then bound to select one of the amounts as

the more appropriate, without being able to diverge from them. The amount selected by the arbitrator becomes a binding arbitration award.

A baseball arbitration clause may be desirable where the dispute between the parties involves only the amount owed and not liability itself. It may also be used for a damages phase of a bifurcated arbitration, after liability has already been determined.

The following language may be used:

**“The parties agree that the arbitration shall be a ‘baseball arbitration.’ Each party shall submit to the arbitrator and exchange with each other in advance of the hearing a single figure representing the amount it believes should be awarded. The arbitrator shall be limited to awarding only one of the two figures submitted.”**

Because baseball arbitration forces the parties to submit figures that are reasonable, in the hope that the arbitrator will choose that figure, the exchange of those figures often facilitates settlement.

#### **b. Night Baseball Arbitration**

An additional variant on baseball arbitration is known as “night baseball” arbitration. Under the rules of night baseball arbitration, the parties exchange their own determinations of the value of the case, but the figures are not revealed to the arbitrator. The arbitrator will assign a value to the case, and the parties agree to accept the high or low figure closest to the arbitrator’s value.

The following language may be used:

**“The parties agree that the arbitration shall be a ‘night baseball arbitration.’ Each party shall exchange with each other in advance of the hearing a single figure representing the amount it believes should be awarded, but these figures shall not be provided to the arbitrator. The award shall be the figure closest to the value determined by the arbitrator.”**

The advantage of this variant is that the arbitrator must do more than simply determine the prevailing party. Thus, the arbitrator is likely to be engaged to a greater degree with the details of the positions of the parties. On the other hand, for this same reason, the proceeding may not be as streamlined as under a “baseball arbitration.” Like baseball arbitration, night baseball arbitration gives both parties the incentive to present reasonable figures in order to increase the likelihood that their figure will be closer to the value assigned to the case by the arbitrator.

## **APPENDIX 1**

### **SELECTION OF RULES**

#### **Institutional Rules**

##### American Arbitration Association

##### **“the International Arbitration Rules of the American Arbitration Association”**

The AAA International Rules are based in large part on the 1976 UNCITRAL Rules for *ad hoc* arbitration, but they provide for some administrative involvement in areas where an administrator may be necessary, such as the appointment of or challenge to arbitrators. These rules were revised, effective April 1, 1997, by a task force headed by Debevoise & Plimpton partner David W. Rivkin and last amended in 2010.

The International Centre for Dispute Resolution (“ICDR”) is the international division of the AAA and is charged with the exclusive administration of all of the AAA’s international matters. It serves as an appointing authority under the AAA International Rules. The ICDR offers two administrative fee options for parties filing claims or counterclaims: the Standard Fee Schedule with a two payment schedule: and Flexible Fee Schedule with a three payment schedule that offers lower initial filing fees, but potentially higher total administrative fees for cases that proceed to a hearing. The arbitrators’ fees are usually based on an hourly or daily rate. The rules may be used anywhere in the world.

The ICDR recently modified the Fee Schedule, and as of June 2010, the AAA will retain a portion of the administrative filing fee if a party files a demand for arbitration that is incomplete or otherwise does not meet the filing requirements, and if the deficiency cannot be corrected in a reasonable period of time.

The text of the AAA International Rules can be found at <http://www.adr.org/sp.asp?id=33994>.

## **International Chamber of Commerce**

### **“the Rules of Arbitration of the International Chamber of Commerce”**

The ICC Rules are the most familiar to many parties. They provide for substantially more administrative involvement at various stages of the proceeding, including scrutiny of draft awards. Uniquely, the ICC Rules also require the preparation of Terms of Reference, in which the nature of the claims and defenses and, unless the tribunal decides otherwise, the issues to be resolved are set forth. The ICC requires an advance on costs, based on the amount in controversy, which is meant to cover all of the costs of the arbitration and must be paid at an early stage of the arbitration (before the Terms of Reference become operative). If the respondent does not pay its share of this advance, the claimant must either pay the respondent’s share or enter into a bank guarantee in order for the case to proceed. The arbitrators’ fees are also based on the amount in controversy. Depending on the size of the claim, these fee arrangements may result in higher fees and more up front costs being borne by the claimant than with other institutions. They may be used anywhere in the world.

In September 2011, the ICC issued new rules, which go into effect on January 1, 2012. Among other things, the new rules seek to improve the time and cost efficiency of ICC arbitration by streamlining procedures, including by requiring tribunals to convene a case management conference at the start of every case (Article 24). The new rules also include a framework for conducting arbitrations involving more than two parties or multiple arbitration agreements (Articles 7-10), before a single tribunal where appropriate, as well as provisions for an emergency arbitrator empowered to order interim or conservatory measures “that cannot await the constitution of an arbitral tribunal” (Article 29).



The text of the ICC Rules can be found at <http://www.iccwbo.org/court/arbitration/id4199/index.html>.

### **London Court of International Arbitration**

#### **“the Rules of the London Court of International Arbitration”**

The LCIA Rules also provide administered arbitration, but with minimum involvement by the administrator. The LCIA generally acts through its President, who makes appointments of arbitrators and appoints panels to determine challenges. The LCIA’s schedule of costs provides administrative fees based on tasks performed and arbitrators’ fees based on a capped daily or hourly rate rather than on the amount in controversy. This fee schedule may result in lower costs. The LCIA Rules, effective January 1, 1998, may be used anywhere in the world.

The text of the LCIA Arbitration Rules can be found at [http://www.lcia.org/Dispute\\_Resolution\\_Services/LCIA\\_Arbitration\\_Rules.aspx](http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx).

### **International Centre for Settlement of Investment Disputes**

#### **“the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States and the rules of the International Centre for Settlement of Investment Disputes (ICSID) or, in the event that the Convention is not available, in accordance with the ICSID Additional Facility Rules”**

ICSID was established by the Washington Convention (formally known as the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States). ICSID differs from other arbitral institutions in a number of ways. Most importantly, an award rendered pursuant to the Washington Convention and the ICSID Arbitration Rules is immediately enforceable in any State that is a Contracting Party to the Washington Convention, as if it were a judgment of a court of that State. Moreover, an ICSID award is not subject to review or challenge in any national court. Such an award may be reviewed only by

an international arbitral panel in accordance with the annulment mechanism provided for in the Washington Convention.

The Washington Convention applies to only a relatively narrow category of legal disputes: those arising directly from an investment and between a Contracting State – or a constituent subdivision or agency designated by a Contracting State – and a national (or company) of another Contracting State. Because of these jurisdictional limitations, it may be advisable to stipulate in an ICSID arbitration clause that: **“the transaction to which this agreement relates is an investment”**; and **“the investor is a national of [*Contracting State other than respondent State*]”** or, if the investor is a company organized under the laws of the respondent State but controlled by foreign nationals, **“it is agreed that, although the investor is a national of [*the respondent State*], it is controlled by nationals of [*Contracting State other than respondent State*] and shall be treated as a national of that State for the purposes of the Convention.”**

ICSID also administers arbitrations not falling within the Washington Convention under its Additional Facility Rules. These rules apply to arbitrations between a State and a national of another State if at least one of the two States is a Contracting State to the ICSID Convention. Unlike Washington Convention arbitrations, those under the Additional Facility Rules are subject to national court review. The optional clause proposed above selects the Additional Facility Rules in the alternative to ensure an arbitral forum in the event that a technical objection to Washington Convention jurisdiction is upheld. The alternative provision for Additional Facility jurisdiction may also serve to discourage such objections in the first place, because a successful objection would be of limited value to a respondent State.

Like the other institutions discussed in this appendix, the Secretary-General of ICSID may also serve as the appointing authority for arbitrators in certain *ad hoc* arbitration proceedings, most commonly in arbitrations under the UNCITRAL Rules.

Because Washington Convention awards are not subject to national court review, the seat of arbitration has less legal significance. ICSID tribunals hold hearings at the seat of ICSID in Washington D.C. or at such other place as may have been agreed by the parties. ICSID has to date entered into special arrangements for hearings to be held at the Permanent Court of Arbitration at The Hague, the Regional Arbitration Centres of the Asian-African Legal Consultative Committee at Cairo, at Kuala Lumpur and at Lagos, the Australian Centre for International Commercial Arbitration at Melbourne, the Australian Commercial Disputes Centre at Sydney, the Singapore International Arbitration Centre, Maxwell Chambers in Singapore, the German Institution of Arbitration and the Gulf Cooperation Council Commercial Arbitration Centre at Bahrain.

The text of the ICSID Convention, regulations and rules, as amended and effective April 10, 2006, can be found at <http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp>. The text of the ICSID Additional Facility Rules, also amended and effective April 10, 2006, can be found at <http://icsid.worldbank.org/ICSID/ICSID/AdditionalFacilityRules.jsp>.

### **World Intellectual Property Organization**

#### **“the Rules of the WIPO Arbitration and Mediation Center”**

The WIPO Arbitration and Mediation Center, based in Geneva, Switzerland, is part of the World Intellectual Property Organization. The Center provides dispute resolution services designed primarily for disputes arising out of commercial transactions or relationships involving intellectual property. The Arbitration Rules were originally promulgated in October 1994. A revised version came into effect on October 1, 2002. The rules may be used anywhere in the world.

The text of the WIPO Arbitration Rules can be found at <http://arbiter.wipo.int/arbitration/rules/index.html>.

## **Other Regional Rules and/or Institutions**

In specific circumstances, other rules, such as the Swiss Rules of International Arbitration, or the rules of relatively established regional institutions, like the Hong Kong International Arbitration Centre, the Singapore International Arbitration Center, the Netherlands Arbitration Institute, the Vienna Chamber of Commerce, the Arbitration Institute of the Stockholm Chamber of Commerce, and the German Institute of Arbitration, may be used.

Careful consideration of the specifics of a transaction is recommended if the parties consider choosing arbitration under the Rules of the China International Economic and Trade Arbitration Commission (“CIETAC”) or the Japan Commercial Arbitration Association (“JAA”). If all parties to the arbitration agreement are Chinese (even if a Chinese party is foreign-owned) and Chinese law governs the agreement, the parties must select CIETAC or another Chinese arbitration institution. Under Chinese law, only “foreign-related” disputes can be arbitrated outside of China, and foreign ownership of a Chinese entity may not be sufficient to make a dispute “foreign-related.” The JAA has been less widely used than some other Asian arbitration institutions (i.e., in Hong Kong and Singapore) and its track record for effective administration of international arbitrations is less established.

## ***Ad Hoc* Rules**

### **CPR International Institute for Conflict Prevention & Resolution**

#### **“the Rules of the CPR International Institute for Conflict Prevention & Resolution for Non-Administered Arbitration of International Disputes”**

The CPR Rules were drafted by a distinguished committee of international practitioners. The rules, originally released in 1989 and most recently revised in 2007, are clearly drafted and provide an effective framework for *ad hoc* arbitration. The CPR becomes involved only if necessary in the appointment of, and determination of challenges to, arbitrators. The rules, however, provide for more discovery than non-American parties may find acceptable. *See* CPR Rule 11. Fees charged by the CPR for performing these services are likely to be minimal. The CPR Rules may be used anywhere in the world.

The text of the CPR Rules can be found at <http://www.cpradr.org/ClausesRules/2007InternationalArbitrationRules/tabid/291/Default.aspx>.

### **UNCITRAL**

#### **“the UNCITRAL Arbitration Rules”**

If these rules are selected, it is also necessary to add to the end of paragraph (a) the following sentence: **“The appointing authority shall be [ICC, AAA, LCIA, or WIPO].”**

The UNCITRAL Rules were originally adopted in 1976 and were substantially updated and revised in 2010. They are the most commonly used rules for *ad hoc* arbitration. They are generally recognized and therefore may be preferred by certain parties. Each institution has its

own schedule of fees for acting as the appointing authority under the UNCITRAL Rules, which may be used anywhere in the world.

The 2010 revision of the UNCITRAL Rules, mandated by the United Nations Commission on International Trade Law, reflects four years of effort by a UNCITRAL working group consisting of members from governments and international organizations, which was aimed at enhancing the efficiency of arbitration under the Rules.

The 2010 UNCITRAL Rules include revised procedures for the replacement of an arbitrator, the requirement for reasonableness of costs and a review mechanism for arbitration costs, as well as additional provisions dealing with, among others, multiparty arbitration and joinder, liability, and interim measures. The Rules also make express references to the use of modern technologies.

The text of the UNCITRAL Arbitration Rules can be found at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/pre-arb-rules-revised.pdf>.

## **APPENDIX 2**

### **CHOICE OF ARBITRATION SEATS**

#### **General Considerations**

- A. New York Convention. The seat chosen must be within a State Party to the New York Convention, so as to ensure enforceability pursuant to that Convention.
- B. Mandatory Procedural Rules. The law of the forum State should permit maximum party autonomy in determining the procedure of the arbitration. Some countries impose time limits on the period in which the arbitration must be conducted. Depending on the matter in dispute, such time limits could be an advantage or disadvantage.
- C. Judicial Intervention. The law of the forum State should provide minimum opportunity for judicial intervention in the arbitration, particularly with respect to the merits of the dispute, either during the conduct of the arbitration or by way of review of the award.
- D. Restrictions on Counsel and Arbitrators. The law of the forum State should not impose restrictions, such as nationality requirements, on the parties' freedom to choose (a) arbitrators, and (b) counsel. The immigration and bar regime for the country should also not raise any barriers to participation by foreigners as counsel or as arbitrator.
- E. Logistical Considerations. The forum should:
  - 1. be geographically convenient;
  - 2. have adequate facilities; and
  - 3. have available an adequate pool of local practitioners.

It is *not* essential that an administering body be located in the forum. The principal administering bodies, including the ICC, AAA and LCIA, routinely administer arbitrations outside their home cities. In addition, there are effective rules, such as those of the CPR International Institute for Conflict Prevention and Resolution and UNCITRAL, designed specifically for non-administered arbitration.

### **Seats Generally Recommended**

#### A. New York.

1. The United States is a party to the New York and Panama Conventions.
2. Both the Federal Arbitration Act, Title 9 of the United States Code, and the New York Arbitration Law, Article 75 of the Civil Practice Law and Rules, are progressive arbitration statutes that recognize party autonomy, discourage judicial intervention, and place no nationality restrictions on arbitrators or counsel.
3. The American Arbitration Association is headquartered in New York.
4. New York has good facilities and an experienced international bar.
5. The following language should be included in the arbitration clause in order to avoid any uncertainty over the possible application of state law:

**“Notwithstanding [the choice of law clause], the arbitration and this agreement to arbitrate shall be governed by Title 9 (Arbitration) of the United States Code.”**



B. Paris.

1. France is a party to the New York Convention.
2. In January, 2011, France adopted a new law on arbitration (see Decree No. 2011-48 of Jan. 13, 2011, effective May 1, 2011), reforming the law governing international arbitration with the express purpose of making France even more arbitration-friendly. The new law amends the French Code of Civil Procedure mainly to consolidate and codify well-established French case law relating to international arbitration. For example, the Code now makes explicit the generally-accepted principle governing the severability of the arbitration agreement, according to which the arbitration clause remains unaffected even if the underlying contract is found void. The Code continues to permit the parties free rein in establishing the procedures applicable to an international arbitration and subjects awards to an action for annulment only on narrow grounds, such as the improper exercise of jurisdiction by the arbitrators, an award in excess of the arbitrators' authority, or a violation of international public policy.
3. A notable innovation in the Code now permits parties to agree to waive their right to challenge an award by seeking annulment. Such waiver does not affect the parties' right to appeal an enforcement order (*l'ordonnance d'exequatur*), which can never be waived. As a result, when enforcement of the award is sought in France, the benefits of such a waiver are limited, since proceedings for setting aside an award and for appealing an enforcement order are based on identical grounds.
4. Applications to set aside arbitral awards in France go directly to the court of appeal at the seat of the arbitration. As most international arbitrations in France are seated in Paris, the Cour d'appel de Paris hears most such applications, and is

experienced with them. Other arbitration-related matters, however, go to courts of first instance.

5. The Code has revised the timeframes for seeking relief after notification of an award. Proceedings to set aside an award must be commenced within one month following notification, while proceedings to appeal an enforcement order must be commenced within one month following notification of the award endorsed with the enforcement order. This period is extended by two months for persons living abroad.
6. The International Chamber of Commerce, with its International Court of Arbitration, is located in Paris.
7. Paris has good facilities and an experienced international bar.

C. London.

1. The United Kingdom is a party to the New York Convention.
2. The lengthy Arbitration Act 1996 completely rewrote English arbitration law. The provisions of the Act are too numerous to summarize here, but two features are worth noting. *First*, the Act allows a party to seek judicial determinations of questions of English law, either during the proceeding or on appeal from the award, which may cause delay. Parties may exclude such right of appeal by inserting the following language:

**“The parties expressly agree that leave to appeal under section 69(1) or an application for the determination of a preliminary point of law under section 45 of the Arbitration Act 1996 may not be sought with respect to any question of law arising out of an award or in the course of the proceedings.”**

Although an express reference to section 69 is not essential, the exclusion of rights of appeal must be clear. Provisions in the arbitration agreement that the award shall be “final, conclusive and binding,” for example, have been held by English courts not to be sufficient to exclude this right of appeal. Notably, the English courts have held that an ICC arbitration clause acts as an exclusion clause, since the ICC Rules state that the parties “have waived their right to any form of recourse insofar as such waiver can validly be made.” The LCIA Rules contain a similar provision, and therefore reference to them should also be seen as agreement to an exclusion clause. The 2010 revision of the UNCITRAL Rules contains a broad model waiver statement in its Annex, which should also be effective. Reference to the AAA International Rules will probably not be considered a waiver because they do not include such a provision.

*Second*, in an attempt to reduce a problem often faced by non-English parties in English arbitrations, the Act also makes clear that arbitration procedure can vary from court procedure.

The Act also allows parties to deviate from a number of its other provisions. It may be worth reviewing these provisions of the Act to determine whether any other such exceptions should be made.

3. Applications concerning arbitration-related matters may only be brought within a limited range of courts in England (as provided in the Practice Direction to Part 62 of the Civil Procedure Rules). Generally speaking, these are: the Commercial Court (general), the Technology and Construction Court (construction and engineering disputes), the Business List of regional mercantile courts (e.g., Manchester, Leeds, Bristol and Birmingham); and the Central London County Court business list (the only county court that can accept arbitration applications). In practice, the two

main avenues for arbitration-related matters in England are the Commercial and Technology and Construction Courts in London, which together handle the vast majority of applications.

4. The London Court of International Arbitration (LCIA) is headquartered in London.
5. London has good facilities and an experienced international bar.

D. Geneva or Zurich.

1. Switzerland is a party to the New York Convention.
2. The Swiss International Arbitration Law, chapter 12 of the Statute on Private International Law, became effective on January 1, 1989. If the seat of the arbitration is in Switzerland, but none of the parties has its domicile, its habitual residence, or a business establishment in Switzerland, they may prospectively waive the right to seek to set aside an award on some or all of the enumerated grounds. This could be accomplished by the following language:

**“The parties expressly waive and exclude, pursuant to Article 192 of Chapter 12 of the Swiss Private International Law Act, the right to bring any setting aside proceeding pursuant to Article 190 of Chapter 12 of the Act.”**

Any such exclusion agreement should make explicit reference to this provision of the Swiss Private International Law Act; reference to the ICC, LCIA or other rules alone would not be sufficient. However, it is generally not desirable to include such language, because the scope of setting aside proceedings under Article 190 is limited, and a party may regret excluding even such basic grounds for overturning an award as that the tribunal exceeded its jurisdiction.

3. Applications to set aside arbitral awards made in Switzerland must be brought before the Swiss Federal Tribunal, the country's highest court. No further appeal or recourse is available. As a matter of practice, all setting aside applications are assigned to the First Civil Court of the Swiss Federal Tribunal. While this is a generalist civil court, this group of judges has developed considerable experience and expertise in deciding arbitration-related cases. Other court applications relating to arbitration, however, are generally heard by the Cantonal court of first instance at the place of arbitration in Switzerland. The practice on the assignment of arbitration matters within the Cantonal courts of first instance varies considerably from one canton to another.
4. The Swiss Chambers' Court of Arbitration and Mediation is based in Basel and is experienced in conducting international arbitration.
5. Geneva and Zurich have good facilities and an experienced international bar.

## **Other Seats**

### A. Dublin

1. Ireland is a party to the New York Convention.
2. Ireland has just passed a new Arbitration Act (2010), which is a virtually pure form of the UNCITRAL Model Law. It provides for a dedicated arbitration judge in the High Court, and there is no appeal from the High Court on arbitration matters.
3. Ireland has a high-quality, independent judicial system and a high-quality bar. The necessary facilities in the form of conference space, hotels, and restaurants in Dublin are ample and convenient.
4. Dublin should be considered a low-cost alternative to London, with many of the same advantages, but at lower cost. It might serve as an alternative to London in a situation in which one party wants London but the other party, for whatever reason, resists London itself.

### B. Stockholm

1. Sweden is a party to the New York Convention.
  2. The Swedish Arbitration Act came into force in 1999 and is based on the UNCITRAL Model Law. The Act's innovations include the establishment of rules to determine the law applicable to the agreement to arbitrate, afford the respondent the right to have the dispute resolved if the claimant withdraws its claim, and allow foreign (i.e. non-Swedish) parties to waive in advance the ability to set aside the arbitral award.
  3. The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) is experienced in conducting international arbitrations.
- C. Contracts Involving Pacific Rim Countries.
1. Hong Kong
    - a. In November 2010, Hong Kong enacted a new Arbitration Ordinance, which went into force on June 1, 2011. The new Ordinance is based on the UNCITRAL Model Law, with the goal of promoting Hong Kong as a potential seat for international arbitration. Hong Kong has applied a version of the UNCITRAL Model Law to international arbitrations since 1990, and so has substantial experience with international arbitration. The new Ordinance more closely follows the Model Law, including provisions for interim measures and confidentiality. Significantly, the new Ordinance also eliminates the distinction between domestic and international arbitration that existed under the earlier law.
    - b. Hong Kong remains subject to the New York Convention by virtue of ratification by the People's Republic of China ("PRC"). On December 31, 2009, the PRC's Supreme People's Court published a notice confirming that *ad hoc* and international arbitration

awards made in Hong Kong are enforceable in mainland PRC, so long as they involve disputes that are considered “foreign-related” under Chinese law, as described above.

- c. Hong Kong has expressly provided in its Arbitration Ordinance that restrictions as to who can serve as counsel do not apply to arbitration proceedings.
- d. The Hong Kong International Arbitration Centre (“HKIAC”) is experienced in conducting international arbitration. Its Administered Arbitration Rules were amended effective September 2008.
- e. Hong Kong is the recommended seat of arbitration for any contract involving the PRC, so long as the contract is sufficiently “foreign-related” to permit the choice of a non-Chinese institution and seat.
- f. Notably, awards rendered in Hong Kong are not enforceable in India—something to keep in mind under relevant circumstances.

## 2. Singapore

- a. Singapore is a party to the New York Convention.
- b. Singapore has adopted the UNCITRAL Model Law for international arbitrations with slight modification in its International Arbitration Act (“IAA”). Recent amendments to the IAA incorporated some of the 2006 revisions to the model law. The revised IAA empowered Singapore courts to make interim orders in aid of foreign arbitrations whether or not it relates to a matter that is justiciable before a Singapore court, reversing the effect of a previous Supreme Court of Appeal decision, and eased enforceability by simplifying the authentication process of Singapore arbitration awards.



- c. Foreign counsel may conduct arbitrations under the amended Singapore Legal Profession Act even when the substantive governing law is Singapore law. *See* Legal Profession Act, c. 161, § 35(1) (Sing.). The decision in *Turner Pte. Ltd. v. Builders Federal Ltd.* persists only insofar as it limits appearances before the local courts to Singapore qualified counsel.
  - d. Recent case precedent strongly favors arbitration. A recent court of appeals case stated that Singapore has developed an “unequivocal judicial policy of facilitating and promoting arbitration.”
  - e. The Singapore International Arbitration Centre (“SIAC”) is located there, which has good facilities. The recently amended SIAC Arbitration Rules include provision for an expedited procedure for cases: (i) with a value of US\$5 million or less; (ii) when the parties agree; or (iii) in cases of exceptional urgency. The revision has also introduced a rule which empowers a tribunal to apply the law which it determines appropriate in cases where parties failed to designate the law applicable to the substance of their dispute. The Singapore government also opened the new home of SIAC, Maxwell Chambers, in July 2009. Maxwell Chambers also houses the Permanent Court of Arbitration, the ICC, and the ICDR, among others.
3. Honolulu
- a. Honolulu provides the advantage of a U.S. site, subject to U.S. law. Hawaii’s International Arbitration, Mediation and Conciliation Act is conducive to arbitration. However, few international cases have been held there.
  - b. Because of its location and culture, Asian parties may consider it a sufficiently “neutral” site.

4. Kuala Lumpur

- a. Malaysia is a party to the New York Convention.
- b. The Arbitration Act 2005, which came into force on 15 March 2006, largely adopted the UNCITRAL Model Law. The law gives parties greater flexibility to select the procedures governing the appointment of arbitrators and the proceedings, and allows the arbitral tribunal to determine its own jurisdiction, including on the validity of the arbitration clause. It also provides that the awards of arbitral tribunals are final and binding, with several grounds for setting aside the award. The Court of Appeal recently ruled that the Act has no application to arbitrations with seats outside of Malaysia.

The Act specifies several instances where the courts are given a right to intervene in certain matters including staying proceedings, granting interim measures of protection, and assistance in taking of evidence. The Act replaced conflicting case law in this regard, though how courts will apply the Act is still unclear.

- c. The Kuala Lumpur Regional Centre for Arbitration (KLCRA) has adopted the UNCITRAL Rules and is located there. International arbitration in Malaysia, while still relatively new, appears to be making great strides towards improvement.

5. Sydney, Melbourne or Auckland

- a. Both Australia and New Zealand are parties to the New York convention.
- b. Both countries have adopted the UNCITRAL Model Law.
- c. Both countries have an experienced bar.

- d. Within Australia’s federal structure, international arbitration matters are in the jurisdiction of state supreme courts. In 2009, Australia’s Parliament gave the Federal Court concurrent jurisdiction over international arbitration. In addition, in January 2010, the Supreme Court of Victoria made an appointment of an “Arbitration Coordinating Judge” for each registry, creating an arbitration list that centralizes arbitration matters. The list is managed by a judge with international arbitration experience who, along with several other commercial judges, will hear all arbitration-specific cases.
  - e. The principal drawback of these cities is their distance from the major Asian cities, which adds to expense and inconvenience. The relatively small time differences somewhat diminish the burden.
- D. Contracts Involving Latin America. The most frequently accepted seats involving American or European and Latin American parties are New York and Paris. In a U.S.-Latin American contract, if New York is not accepted, one may suggest:
- 1. Miami
    - a. Florida adopted the UNCITRAL Model Law in July 2010 (replacing the Florida International Arbitration Act). Its Model Law and the Federal Arbitration Act would apply.
    - b. A rule adopted by the Supreme Court of Florida that became effective January 1, 2006, removed restrictions on non-Florida lawyers participating in an international arbitration in Florida.
    - c. The AAA’s International Center for Dispute Resolution (“ICDR”) has its south-eastern regional office in Miami.

- d. Because of Miami's location and culture, Latin American parties may consider it a sufficiently "neutral" site.
2. Mexico City
    - a. Mexico is a party to the New York and Panama Conventions.
    - b. Mexico has adopted the UNCITRAL Model Law.
    - c. In a pro-arbitration ruling in 2006, Mexico's Supreme Court affirmed the applicability of the principle *kompetenz-kompetenz*, holding that arbitral tribunals have jurisdiction to intervene, hear and decide on the validity of both the arbitration agreement and the underlying contract. However, parties seeking to annul an arbitration agreement as void or inoperative can seek judicial review.
    - d. In 2009, the law governing arbitration procedure and the recognition and execution of arbitral awards was made expressly applicable to federal government contracts. (*See* Law for Public Works and Services, No. 2748-IV.)
  3. São Paulo and Rio de Janeiro
    - a. Brazil is a party to the New York and Panama Conventions.
    - b. In 1996, Brazil has adopted the UNCITRAL Model Law. (*See* Law 9,307 The Brazilian Arbitration Act of 23 September 1996.) However, the law does contain some differences from the UNCITRAL Model Law that should be explored before Brazil is selected as the seat of arbitration.
    - c. Within the last decade, Brazilian courts have grown accepting and supportive of arbitration with strong precedents opposing court intervention into arbitration proceedings. Although a lower São Paulo court recently

interfered with a sitting tribunal on issues of evidence, that decision appears to be exceptional. Brazilian courts have also recognized the validity of arbitration clauses in government contracts.

- d. The ICC, ICDR and LCIA manage cases with seats in Brazil. There are also a number of Brazilian arbitration organizations with growing popularity, the most prominent being the Brazil-Canada Chamber of Commerce. The main drawback of the rules promulgated by this Chamber in international arbitrations, particularly those involving a Brazilian party, is that there appears to exist a heavy presumption that the parties select arbitrators from a pre-determined panel that is comprised of largely Brazilian attorneys. These rules also contemplate a highly abbreviated briefing and award schedule.
  - e. Brazil now has a sophisticated arbitration bar and São Paulo and Rio have been increasingly chosen as the seat of arbitrations.
4. Santiago
- a. Chile is a party to the New York and Panama Conventions.
  - b. In 2004, Chile adopted the UNCITRAL Model Law to govern international commercial arbitration taking place in Chile. (*See* Law No. 19,971, the “International Arbitration Law.”)
  - c. Case precedent has supported limited court intervention in arbitral proceedings.
5. Other venues
- a. While the following venues are not as popular as the cities mentioned above, they remain possibilities:

Bermuda (which is very common in insurance/reinsurance disputes), Toronto, Montreal or Vancouver.

- b. Bermuda and Canada are parties to the New York Convention and have adopted the UNCITRAL Model Law.

6. Caution: While some Latin American countries have made great strides in becoming more hospitable to international commercial arbitration, other countries such as Bolivia, Ecuador, and Venezuela have become more hostile. Historically, most Latin American countries have had strict procedural requirements that hindered arbitration. It is unclear to what extent recent favorable legislative improvements will, as a practical matter, loosen those restrictions.

E. Contracts Involving the Gulf States. Picking a Gulf state as the seat of an international commercial arbitration is not recommended given that many of the Gulf state courts historically have been hostile to arbitration. However, there are several countries that have recently made pro-arbitration reforms and would be preferred should it be necessary to select a Gulf state as the seat of an arbitration. In recent years, moreover, several new arbitral institutions have been formed that have adopted provisions and principles from other well-established sets of rules.

1. Dubai

- a. In 2006, the United Arab Emirates (“UAE”) became a party to the New York Convention.
- b. A potentially good seat for arbitration in the Gulf States is the Dubai International Financial Centre (“DIFC”), a geographic zone in the center of Dubai’s financial district where UAE federal and commercial laws do not apply.

- i. The DIFC arbitration law, introduced in 2008, governs arbitrations with their seat in the DIFC, and permits parties to choose DIFC as a seat of arbitration regardless of whether the contract has any connection with Dubai or the DIFC. The DIFC arbitration law is modeled on the UNCITRAL Model Law and is overseen by the independent DIFC court.
  - ii. Arbitral awards made in the DIFC and confirmed by the DIFC court should be directly enforceable in Dubai and internationally, although it is early to know how effective this process will be.
  - iii. In 2008, the LCIA formed an arbitration center with the DIFC, the DIFC LCIA Arbitration Centre, and adopted rules of arbitration modeled on the LCIA rules.
- c. Outside of the DIFC, arbitration in Dubai is not recommended, as the UAE's anachronistic arbitration law has hampered progress. *See* Federal Law No. (11) of 1992, Civil Procedures Law. The arbitration law sets mandatory rules that cannot be modified by contract and provides the framework for court intervention in arbitration proceedings. For instance, it requires that an arbitration award be ratified by UAE courts, which have been hostile to the awards of arbitral tribunals, before it can be enforced.
  - d. The UAE is expected to adopt a modified version of the UNCITRAL Model Law, which may improve the prospects of arbitration in Dubai.
  - e. Arbitration has historically been treated with suspicion in the UAE. But with the growth of Dubai's financial sector and with the support of the independent DIFC, arbitration is slowly becoming a more legitimate dispute resolution alternative, particularly in the real estate and construction sectors.

## 2. Bahrain

- a. As of the publication of this model clause in October 2011, political turmoil in Bahrain makes it an unacceptable seat for arbitrations. Prior to current events, however, Bahrain had adopted the UNCITRAL Model Law (in 2004) and become party to the New York Convention (in 1988), and was working towards becoming a leader in arbitration among the Gulf states.
- b. Since 1995, Bahrain has hosted the Gulf Cooperation Council Commercial Arbitration Centre (“GCAC”). There are reciprocal arrangements in place between the Gulf Cooperation Council (GCC) states that provide for enforcement of arbitral awards issued within other member states. As of April, 2011, the GCC states consist of the United Arab Emirates, Bahrain, Saudi Arabia, Oman, Qatar and Kuwait.
- c. In 2009, Bahrain introduced Legislative Decree No. 30 which reformed the state’s arbitration laws. The law established a new and independent chamber, the Bahrain Chamber of Dispute Resolution (“BCDR”), in association with and modeled on the AAA. The new law statutorily mandates international parties with disputes over BHD 500,000 to arbitrate with the BCDR and requires a Bahraini arbitrator (or two in the event of a three-person tribunal). Alternately, the BCDR will have jurisdiction if the parties so provide. The parties may agree on the law governing the dispute.
- d. The BCDR Rules closely follow those of the ICDR. Awards of a BCDR tribunal are final and binding with very limited grounds for appeal.
- e. It is too early to tell how the new law and rules will be applied in practice, or to judge the degree of court intervention.



3. Caution: The reforms described above are recent and it will take some time to see their impact on international commercial arbitration in the Gulf. Note that some Gulf states (including Iraq and Libya) are not parties to the New York Convention and are not members of the GCC.

## **APPENDIX 3**

### **DISPUTE BOARDS**

#### **General Considerations & Proposed Language**

In general, contracts that provide for a Dispute Review Board or a Dispute Adjudication Board (“DRB/DAB”) should not provide for mandatory negotiation or mediation before the DRB/DAB provisions can be invoked. The principal advantage of a DRB/DAB is its ability to reach a quick, binding resolution; even limited periods of mandatory negotiation or mediation before a dispute may be submitted to the DRB/DAB can be counterproductive.

Contracts that provide for a DRB/DAB should assign all disputes to the DRB/DAB. This minimizes the likelihood of a protracted dispute over whether an issue is to be referred to the DRB/DAB or the arbitrator, which could significantly delay resolution. Conversely, if the parties identify narrow areas of potential dispute that they do not want to be decided by the DRB/DAB, those should be defined explicitly in the contract.

The following sets of rules and procedures may be adopted by reference:

- American Arbitration Association (“AAA”) Dispute Resolution Board Specifications, Operating Procedures, and Hearing Rules and Procedures. The AAA procedures provide for a Dispute Resolution Board, the decisions of which (referred to as “Recommendation”) are not binding, but are admissible in a later proceeding unless the parties otherwise agree. If the parties want to use AAA procedures but to have the Board render a binding decision, it will be necessary to specify that in the contract. The AAA procedures set forth detailed timelines for pre-hearing submissions and for the Board’s decision, including requiring that a Recommendation will be issued within 14 days of the hearing, which will ordinarily be held at the next site visit after the parties’ initial submissions.

- International Chamber of Commerce (“ICC”) Dispute Board Rules. The ICC rules provide three options: a Dispute Review Board that issues “Recommendations” that become binding only if no party objects within 30 days; a Dispute Adjudication Board that issues binding “Decisions”; and a Combined Dispute Board that may do either, depending on the circumstances. The parties may provide for review of Decisions by the ICC before the DAB issues them. ICC Rules provide timelines for initial submissions, and also require that a Decision or Recommendation be issued within 90 days of referral of the dispute, or 120 days if the agreement provides for ICC review.

Both sets of Rules require that a Decision or Recommendation state the reasons for the decision. It is important to note that the AAA Rules allow for counsel to attend Board hearings, but unlike the ICC Rules, they expressly do not permit counsel to participate unless the Board finds that counsel would be helpful in resolving a particular dispute.

**Suggested language:**

**“The Parties hereby agree to establish a Dispute Adjudication Board (“DAB”) [or a Dispute Review Board (“DRB”)] in accordance with the [select rules] (“Rules”), except as they may be modified herein or by mutual agreement of the Parties. During the pendency of the Project that is the subject of this Agreement, any Disputes shall be referred to the [DRB/DAB] for determination.**

**The [DRB/DAB] will consist of three members, two to be nominated by each Party, with the third selected by the two nominated members in consultation with representatives of the Parties within [30 days] after execution of this Agreement by the Parties. The third member shall serve as the Chair. [Party A] hereby nominates [*name and/or title*] and [Party B] nominates [*name and/or title*] to serve as members of the [DRB/DAB]. [If the [DRB/DAB] requires a hearing to resolve a Dispute, the full board shall be**

convened to hear the matter if amount in controversy exceeds five hundred thousand dollars (\$500,000.00); otherwise, the Chair will hear the matter alone.]

The decision of the [DRB/DAB] shall be binding on the Parties during the pendency of the [*specify project*] and unless and until an Arbitration Award issued pursuant to Article [ ] of this Agreement modifies or annuls such decision. An arbitration seeking review of a [DRB/DAB] determination may be commenced only after completion of the [*project*] that is the subject of this Agreement. An arbitration to compel a Party to comply with a determination of the [DRB/DAB] may be commenced at any time.

Any costs associated with the [DRB/DAB] shall be split equally between the Parties, except in the event of a proceeding to compel a Party to comply with a determination of the [DRB/DAB], in which case in the event the decision is enforced by the arbitration, the Party resisting compliance shall bear all costs associated with the related proceeding, including but not limited to reasonable attorneys' fees.”

**APPENDIX 4**

# Debevoise & Plimpton LLP

## Protocol to Promote Efficiency in International Arbitration

International arbitration can provide significant advantages for parties to cross-border disputes, such as a neutral forum, input into selecting the decision-maker and nearly worldwide enforceability of awards. With seemingly greater frequency, however, parties to international arbitrations express concerns about increased length and cost of the arbitration process. These concerns have caused some parties to question the value of international arbitration as an efficient dispute resolution mechanism.

To respond to these concerns, the international arbitration practitioners at Debevoise & Plimpton LLP have developed this Protocol To Promote Efficiency in International Arbitration. This Protocol identifies specific procedures that generally make an arbitration more efficient. Through this Protocol, we express our commitment to explore with our clients how such procedures may be applied in each case. In each arbitration, parties, counsel and arbitrators should take maximum advantage of the flexibility inherent in international arbitration and should use only the procedures that are warranted for that particular case. The procedures set out here are therefore not meant to be inflexible rules. However, through their consideration, we believe that we can improve the arbitration process and thereby enable our clients to enjoy the advantages of international arbitration.

### Formation of the Tribunal:

1. Before appointing arbitrators, we will ask them to confirm their availability for hearings on an efficient and reasonably expeditious schedule.
2. We will ask arbitrators for a commitment that the award will be issued within three months of the merits hearing or post-hearing briefs, if any.
3. We will work with our opposing counsel to appoint a sole arbitrator for smaller disputes or where issues do not need the analysis of three arbitrators.

## Debevoise & Plimpton LLP Protocol to Promote Efficiency in International Arbitration

### **Establishing the Case and the Procedure:**

4. We will encourage consolidation and joinder of parties and disputes to avoid multiple proceedings when possible.
5. When possible, we will include a detailed statement of claim with the request for arbitration, so that briefing can proceed promptly once the procedural calendar is established.
6. We will propose and encourage the arbitral tribunal to adopt procedures that are appropriate for the particular case and that are designed to lead to an efficient resolution. We will use our experience in crafting such procedures, and we will not simply adopt procedures that follow the format of prior cases.
7. We will request the arbitral tribunal to hold an early procedural conference, usually in-person, to establish procedures for the case. Although in-person meetings may cost more because of travel time and expense, they often ultimately save costs by allowing a more complete discussion of the procedural issues that may arise. We will seek to set the merits hearing date, as well as all other procedural deadlines, in this first procedural conference.
8. We will request our clients and opposing clients to attend any procedural meetings and hearings with the arbitral tribunal, so that they can have meaningful input on the procedures being adopted and consider what is best for the parties at that time.
9. When appropriate to the needs of the case, we will consider a fast track schedule with fixed deadlines.
10. We will explore whether bifurcation or a determination of preliminary issues may lead to a quicker and more efficient resolution.

### **Evidence:**

11. We will limit and focus requests for the production of documents. We believe that the standards set forth in the IBA Rules of Evidence generally provide an appropriate balance of interests.
12. We will work with opposing counsel to determine the most cost-effective means of dealing with electronic documents.

## Debevoise & Plimpton LLP Protocol to Promote Efficiency in International Arbitration

13. We will, when possible, make filings electronically and encourage paperless arbitrations. When cost-effective, we will use hyperlinks between documentary exhibits and their references in memoranda.
14. We will use written witness statements as direct testimony to focus the evidence and hearings.
15. We will avoid having multiple witnesses testify about the same facts.
16. We will encourage meetings of experts, either before or after their reports are drafted, to identify points of agreement and to narrow points of disagreement before the hearing.
17. We will generally brief legal issues and consider presenting experts on issues of law only when the tribunal and counsel are not qualified to act under that law.
18. We will divide the presentation of exhibits between core exhibits and supplementary exhibits that provide necessary support for the claim or defense but are unlikely to be referenced at a hearing.

### **The Hearing:**

19. We will consider the use of videoconferencing for testimony of witnesses who are located far from the hearing venue and whose testimony is expected to be less than two hours.
20. We will consider the use of a chess-clock process (fixed time limits) for hearings.
21. We will not automatically request post-hearing briefs, but we will consider in each case whether they would be helpful in promoting the efficient resolution of the issues. When post-hearing briefs are appropriate, we will ask the arbitral tribunal to identify the issues on which it may benefit from further exposition, and then seek to limit the briefing to such issues.
22. We will also consider alternative briefing formats, such as the use of detailed outlines rather than narrative briefs, to focus the issues and to make the briefs more useful to the tribunal.

**Settlement Consideration:**

23. We will investigate routes to settlement, including by suggesting mediation, when appropriate, either at the outset of the case or after an exchange of submissions has further clarified the issues.
24. Where applicable rules or law permit, we will consider making a “without prejudice except as to costs” settlement offer at an early stage. This will not only protect our client’s costs position, but it may lead the opposing party to consider potential outcomes more seriously.
25. When appropriate, we will ask arbitrators to provide preliminary views that could facilitate settlement.



# Debevoise & Plimpton

919 Third Avenue  
New York, NY 10022  
1 212 909 6000  
555 13th Street, N.W.  
Washington, D.C. 20004  
+1 202 383 8000

65 Gresham Street  
London  
EC2V 7NQ  
+44 20 7786 9000

4, place de l'Opéra  
75002 Paris  
+33 1 40 73 12 12

Taubenstrasse 7-9  
60313 Frankfurt am Main  
+49 69 2097 5000

Catherine Amirfar  
Donald Francis Donovan  
Tony Dymond  
Mark W. Friedman  
Lord (Peter) Goldsmith, QC, PC  
Antoine F. Kirry  
Wendy J. Miles, QC  
Dmitri V. Nikiforov  
Ina C. Popova

Frederick T. Davis  
Aimee-Jane Lee  
Carl Micarelli  
Philip Rohlik

Business Center Mokhovaya  
Ulitsa Vozdvizhenka, 4/7  
Stroyeniye 2  
Moscow, 125009  
+7 495 956 3858

21/F AIA Central  
1 Connaught Road Central  
Hong Kong  
+852 2160 9800

22/F Jin Mao Tower  
88 Century Boulevard  
Pudong New District  
Shanghai 200121  
+86 21 5047 1800

[www.debevoise.com](http://www.debevoise.com)

Dietmar W. Prager  
Natalie L. Reid  
David W. Rivkin  
Thomas Schürle  
Karolos Seeger  
William H. Taft V  
Patrick Taylor  
Christopher K. Tahbaz