

**A PRACTICAL GUIDE FOR DRAFTING
INTERNATIONAL ARBITRATION CLAUSES**^o

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INTERNATIONAL ARBITRATION CLAUSES

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A. Introduction

Since the foundation of international arbitration is its consensual nature, the parties to an international contract may – to a considerable extent – design the manner in which the arbitral proceedings are conducted. The first and most important opportunity for the parties to take control of their arbitration is in the drafting of their arbitration clause. As part of this exercise, the parties have substantial (although importantly, not unlimited) freedom in engineering the structure of their arbitration.

In drafting the clause, there are a few mandatory requirements that must be met, and a few provisions that must be included. These provisions should be clear and unequivocal. In addition to these provisions, however, a clause may be ornamented in virtually endless combinations with a cornucopia of provisions covering topics as important as the situs of the arbitration and as esoteric as class action arbitrations.

A word of caution is in order. There is no such thing as a single “model”, “miracle” or “all purpose” clause appropriate for all occasions.¹ Each clause should be carefully tailored to the exigencies of a given situation, taking into account the likely types of disputes, the needs of the parties’ relationship and the applicable laws. Because the arbitration clause is typically one of the last contractual provisions negotiated – after the parties have agreed on the essential terms – often the parties merely insert form clauses or allow the party with the greatest bargaining

strength to dictate the contents of the clause.² In the latter case, a negotiator must know which provisions are essential and which are not.³

Beyond merely including arbitration clauses in individual agreements, however, companies may wish to consider the desirability of establishing arbitration and alternative dispute resolution (ADR) programs. Most companies have numerous types of contracts – consumer contracts (often standard-form agreements with thousands of people), distribution agreements, franchise agreements, supplier contracts, sales agreements, commercial agreements of various sorts (sometimes with competitors), and unusual agreements such as those involving large projects and sales or purchases of substantial assets. Each of these agreements involve different considerations for dispute resolution clauses, and different arbitration clauses should be crafted for each. In addition, a multi-tiered ADR clause may be appropriate for major projects.

With these concepts in mind, the following discussion attempts a comprehensive analysis of the provisions that parties may include as the elements of an arbitration clause. This discussion also seeks to help the negotiator determine which provisions are necessary, and which may be omitted, in a particular agreement.

B. Factors Relevant to the Enforceability of an Arbitration Clause

1. Treaty Requirements

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the Inter-American Convention on International Commercial Arbitration (Panama Convention) list the requirements that must be met for an arbitral agreement to be

¹ Stephen Bond, How to Draft an Arbitration Clause (Revisited), 1 ICC Int'l Ct. Arb. Bull. 14 (Dec. 1990).

² Id.

³ Id.

enforceable by the authority of the treaties. Both Conventions include similar requirements for enforcing arbitral agreements. First, the arbitration agreement must be reduced to writing.⁴ A writing may consist of a separate arbitration agreement or an arbitral clause contained in a contract.⁵ Second, the writing must either be signed by the parties or be contained in an exchange of letters or telegrams.⁶

These simple requirements still exclude from enforceability both oral agreements, such as sales made by telephone, and contracts formed by conduct. The latter category encompasses deals in which one party sends a written document containing an arbitration clause, the other party neither signs the document nor responds in writing, but the parties perform the implicit agreement. Despite the existence of a writing and a performed agreement, courts have refused to enforce arbitration clauses in such cases.⁷

2. Capacity of the Parties

One of the few grounds in the New York and Panama Conventions for refusing to enforce an arbitration award exists when the parties to the arbitration agreement are under some incapacity (pursuant to the law applicable to them) or when the arbitration agreement is invalid

⁴ New York Convention art. II(1)&(2); Panama Convention art. 1.

⁵ New York Convention art. II(1) & (2).

⁶ New York Convention art. II(2); Panama Convention art. 1 (also includes telex communications in the list of non-signed documents that may contain an enforceable arbitration agreement). See DIETF, Ltd. v. RF, AG, decision of Obergericht [Court of Appeal], Basel-Land (Switzerland), 5 July 1994, 21 Y.B. Com. Arb. 685, 688 (1996) (telex acceptance of written confirmation of order, which explicitly referred to general conditions, which contained an arbitration clause, satisfied writing requirement).

⁷ E.g., Smal v. Goldroyce, [1994] 2 HRC 526 (Hong Kong). See Schiff Food Products, Inc. v. Naber Seed & Grain Corp. (Saskatchewan Court of Queen's Bench, Melfort 1 Oct. 1996).

under the governing law agreed by the parties or, in the absence of an agreement on the governing law, under the law of the country where the award is made.⁸

With this incentive in mind, sometimes a State (or a subdivision or agency of a State) will argue that it did not have the capacity to agree to arbitration. Swiss law provides that a State or an enterprise or organization controlled by it cannot rely on its own law to contest either its capacity to be a party to an arbitration or the arbitrability of a dispute covered by the arbitration agreement.⁹ Thus, if Swiss law governs, the capacity and arbitrability issues may be eliminated for a State party. Nevertheless, it is advisable at the outset to verify the capacity of a State entity to agree to arbitration.¹⁰ It may also be useful to include a representation that the State has the capacity to agree to arbitrate.

3. Authority of the Signators

A similar issue arises when a party claims the person signing the agreement was not properly authorized. In civil law countries, certain formalities, such as a power of attorney, are often required for authorization to sign an agreement. Some States, and perhaps even some private companies, may require two signatures of persons at specific levels before certain contracts may be considered binding.

In the case of All Union Foreign Trade Association Sojuzneftexport v. JOC Oil, Ltd.,¹¹ a Soviet organization entered into a contract for the sale of oil. The Chairman of the Soviet organization signed the contract, but Soviet law required the signatures of two persons properly

⁸ New York Convention art. V(1)(a); Panama Convention art. 5(1)(a).

⁹ Swiss Federal Private International Law Act art. 177(2).

¹⁰ Piero Bernardini, The Arbitration Clause of an International Contract, 9 J.Int'l Arb. 45, 47 (1992).

¹¹ 18 Y.B. Com. Arb. 92, 93, 99 (1993).

authorized by power of attorney from the Chairman. The arbitral institution held the contract invalid because of the mandatory nature of the two-signature requirement of Soviet law. The arbitrators also decided that the risk of the lack of authority of the Association's Chairman to sign the contract fell upon the private party, which was found to have a duty to satisfy itself as to the authority of the signator for the opposing party.

It is important for a party to investigate and satisfy itself of the authority of the signator to bind the opposing party. In some cases, it may be worthwhile to include a representation by a party that the officer signing is properly authorized.

4. Parties Bound By An Arbitration Clause

Generally, an arbitration clause binds only the persons or companies who sign the agreement.¹² This requirement reflects the fact that arbitration is consensual in nature, and is dependent upon the parties' agreement.

There are, however, exceptions to this rule. For example, when claims are brought by or against a corporation that is a signatory to an arbitration agreement, U.S. courts may require arbitration of claims by or against a non-signatory, affiliate company if the claims are "intimately intertwined" with, or are "inherently inseparable" from, the claims brought by or against the affiliate signatory, provided the non-signatory affiliate consents to arbitration.¹³ As some courts have said when a parent company was sued in tort as a means of circumventing an arbitration clause in a subsidiary's contract, "If the parent corporation was forced to try the case, the

¹² F.C. & S.C. v. F.D. & S.D., Partial Award of 17 March 1983 in ICC Case No. 4402, 9 Y.B. Com. Arb. 138, 140 (1984); Thomson-CSF, S.A. v. American Arbitration Ass'n, 64 F.3d 773, 780 (2d Cir. 1995). See also Pierre Lalive, Le droit suisse de l'arbitrage, in L'Arbitrage 279, 281; Roger Perrot, Le droit française de l'arbitrage, in L'Arbitrage 249, 250.

¹³ Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 757-58 (11th Cir. 1993), cert. denied, 115 S.Ct. 190 (1994); J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 320-21 (4th Cir. 1988); Carlin v. 3V, Inc., 928 S.W.2d 291, 294-97 (Tex. App. – Houston [14th Dist.] 1996, n.w.h.).

arbitration proceedings would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted.”¹⁴ Some courts have based these holdings on a theory of equitable estoppel.¹⁵ At least one celebrated French case has similarly held that a non-signatory parent company could voluntarily participate in an arbitration between the signatories to a contract, one of which was its subsidiary.¹⁶ This has come to be known as the “group of companies doctrine”.

Second, a non-signatory corporation that is held to be the alter ego of an affiliate company that signed an arbitration agreement may be required to participate in an arbitration proceeding involving claims against its alter ego.¹⁷ Third, an arbitral agreement may be held to include non-signatories when assent may fairly be implied by their conduct.¹⁸ Fourth, a successor in interest is bound to its predecessor’s arbitration agreement.¹⁹ Fifth, a principal is

¹⁴ J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 321 (4th Cir. 1988), quoting Sam Reisfeld & Son Import Co. v. S.A. Etero, 530 F.2d 679, 681 (5th Cir. 1976).

¹⁵ Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S., 9 F.3d 1060, 1064 (2d Cir. 1993); Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 757-58 (11th Cir. 1993); McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co., 741 F.2d 342, 344 (11th Cir. 1984).

¹⁶ Dow Chemical France v. ISOVER SAINT GOBAIN, Cour d’Appel de Paris, 21 October 1983, 110 Journal du droit international (Clunet) 899 (1983), 9 Y.B. Com. Arb. 131, 137 (1984). See also Map Tankers, Inc. v. MOBIL Tankers, Ltd., Partial Final Award No. 1510 of 28 November 1980, 7 Y.B. Com. Arb. 151, 153 (1982) (award of Society of Maritime Arbitrators).

¹⁷ Fisser v. International Bank, 282 F.2d 231, 234-35 (2d Cir. 1960); Builders Federal (Hong Kong) Ltd. v. Turner Constr., 655 F. Supp. 1400, 1406 (S.D.N.Y. 1987). Typically, however, the alter ego theory must be tested in court prior to the arbitration proceeding. See Hidrocarburos y Derivados, C.A. v. Lemos, 453 F. Supp. 160, 177 (S.D.N.Y. 1977); Fridl v. Cook, 908 S.W.2d 507, 514 (Tex. App. – El Paso 1995, writ dismissed w.o.j.).

¹⁸ Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S., 9 F.3d 1060, 1064 (2d Cir. 1993); In re Transrol Navegacao, S.A., 782 F. Supp. 848, 851-52 (S.D.N.Y. 1991).

¹⁹ See generally Juan Antonio Cremades, Problems That Arise From Changes Affecting One of the Signatories to the Arbitration Clause, 7 ICC Int’l Ct. Arb. Bull. 28, 29-30 (Dec. 1996).

subject to an arbitration clause in its agent's contract.²⁰ An agent who does not disclose the fact it is acting as an agent in contracting will, of course, be bound to the arbitration agreement,²¹ while an agent who discloses its agency will not.²² Sixth, third-party beneficiaries of a contract are bound to the arbitration clause because they cannot avoid the burdens of a contract while accepting the benefits.²³

On the other hand, some authorities have ruled that assignees of a contract are not required to arbitrate unless the assignee agrees to be bound to the arbitration clause.²⁴ Guarantors and sureties are generally bound to arbitrate only if the guaranty or performance bond either includes an arbitration clause or incorporates a contract containing an arbitration clause.²⁵

5. Unified Contractual Scheme

Some arbitral tribunals and courts have decided that an arbitration clause in one contract between the parties would also apply to other agreements between the same parties if the

²⁰ Wintershall, A.G. v. Government of Qatar, Partial Award of 5 February 1988 and Final Award of 31 May 1988, 28 I.L.M. 795 (1989) (Qatar General Petroleum Corporation, wholly-owned by the Government, was held to be the Government's agent because the Government appointed most of the Board of Directors, most of whom were Government officials, and thus, the Government was bound to arbitrate under its agent's arbitration clause). See Marc Blessing, The Law Applicable to the Arbitration Clause and to Arbitrability: Academic Solutions versus Practice and "Real Life" at 12, included in the First Working Group Papers of the ICCA Congress, May 3-6, 1998, in Paris (arbitral tribunal and Swiss Federal Supreme Court imputed arbitration clause of provincial organization of an Asian State to the national government) ("Blessing, The Law Applicable").

²¹ Yorkshire Int'l, Inc. v. Raytex Fabrics, Inc., 355 N.Y.S.2d 1, 2 (App. Div., Dept. 1, 1974).

²² In re Littlejohn & Co. and J. Berlage Co., 247 N.Y.S.2d 60, 61 (App. Div., Dept. 1), aff'd, 202 N.E.2d 566 (N.Y. 1964).

²³ Interpool, Ltd. v. Through Transport Mutual Ins. Ass'n., 635 F. Supp. 1503, 1504-05 (S.D. Fla. 1985).

²⁴ All-Union Foreign Trade Ass'n "Sojuznefteexport" v. JOC Oil, Ltd., Award in Case No. 109/1980 of 9 July 1984, 18 Y.B. Com. Arb. 92, 100 (1993); Lachmar v. Trunkline LNG Co., 753 F.2d 8, 9-10 (2d Cir. 1985). But see Cremades, supra note 19, at 29.

²⁵ See Compania Espanola de Petroleas, S.A. v. Nereus Shipping, S.A., 527 F.2d 966, 973 (2d Cir. 1975), cert. denied, 426 U.S. 936 (1976); Cianbro Corp. v. Empresa Nacional de Ingenieria y Tecnologia, S.A., 697 F. Supp. 15, 18-19 (D.Me. 1988).

agreements relate to the same project.²⁶ Some arbitrators refer to this as “a unified contractual scheme”.²⁷ Other cases have referred to agreements without an arbitral clause as “merely accessory” to a contract containing an arbitration agreement as a way of justifying the extension of the clause.²⁸ In one case argued by the author, a U.S. court ordered arbitration of all contractual and tort claims between the parties although only the letter of intent included an arbitration clause.²⁹

6. Separability Doctrine

Arbitration clauses have been attacked as void based on claims that the contract as a whole was induced by fraud, was rescinded or terminated by its own terms. Although there is some logical force to these claims, to validate such claims when the parties agreed in their contract to resolve all disputes by arbitration would frustrate the intent of the parties.

To deal with these claims, arbitral panels and courts promulgated the separability doctrine. The essence of this doctrine is that the arbitration clause is an independent agreement, separate from the remainder of the contract in which it is contained.³⁰ With this logic in mind, courts have held that the arbitration clause did not terminate with the contract containing it, could not be rescinded with a rescission notice for the contract as a whole and was not invalid for fraud

²⁶ Societe Quest-Africaine des Bétons Industriels (SOABI) v. Republic of Sengal, ICSID Case No. ARB/82/1, 17 Y.B. Com. Arb. 42, 52 (1992); G.I.E. Acadi v. Societe Thomson-Answare, Revue de l'Arbitrage 1988, 573 ss, cited in Blessing, The Law Applicable, *supra* note 20, at 15.

²⁷ Southern Pacific Pproperties, Ltd. v. Arab Republic of Egypt, Award in ICC Case No. 3493 of 16 February 1983, in Collection of ICC Arbitral Awards 1974-1985 at 124, 128 (Kluwer 1990); ICC Case No. 7929 of 8 February 1995, cited in Blessing, The Law Applicable, *supra* note 20, at 16.

²⁸ KCA Drilling v. Sonatrach, Award in ICC Case No. 5651 of 16 September 1988, cited in Blessing, The Law Applicable, *supra* note 20, at 16.

²⁹ Anderra Energy Corp. v. SAPET Development Corp., 22 Y.B. Com. Arb. 1077, 1080 (1997).

³⁰ Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402 (1967).

in the inducement of the contract, unless the arbitration clause itself was specifically induced by fraud.³¹

One of the implications of this doctrine is that the validity and effect of the arbitration clause may be subject to a different country's law than the contract itself.

7. Arbitrability of Disputes

One of the issues that occasionally arises is whether the type of dispute involved is “arbitrable” – that is, whether under a given nation's view of public order or public policy a particular species of controversy may properly be arbitrated, or whether it must be litigated in the nation's courts. Traditionally, certain kinds of claims such as antitrust or competition law issues,³² securities issues,³³ intellectual property disputes,³⁴ and personal status and employment issues³⁵ were considered not proper subjects for arbitration. That view has been eroding for the past quarter century.

In the past 25 years, both antitrust and competition law issues³⁶ and securities law questions³⁷ have been held by courts to be arbitrable. Although many nations will not allow

³¹ Id. at 406.

³² American Safety Equip. Corp. v. J.P. Maguire Co., 391 F.2d 821, 828 (2nd Cir. 1968).

³³ Wilko v. Swan, 346 U.S. 427, 438 (1953).

³⁴ Marc Blessing, Arbitrability of Intellectual Property Disputes, 12 Arb. Int'l 191, 201-02 (1996) (“Blessing, Arbitrability”).

³⁵ Bernardini, supra note 10, at 47.

³⁶ Mitsubishi Motors Corp. v. Soler Chrysler, 473 U.S. 614, 628-29 (1985); Attorney General of New Zealand v. Mobil Oil New Zealand, Ltd., [1989] 2 NZLR 64d. See also John Beechey, Arbitrability of Anti-trust/Competition Law Issues – Common Law, 12 Arb. Int'l 179, 188-89 (1996).

³⁷ Scherk v. Alberto-Culver Co., 417 U.S. 506, 515, reh'g denied, 419 U.S. 885 (1974). See also Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 480 (1989); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 238, reh'g denied, 483 U.S. 1056 (1987).

arbitral panels to invalidate patents,³⁸ some countries allow arbitration of all intellectual property issues.³⁹ The U.S. Supreme Court has also ruled that claims under the Age Discrimination in Employment Act are arbitrable when covered by an arbitration clause in an employment agreement.⁴⁰

It would be useful for parties to research the applicable law to determine whether any likely disputes that may arise under their agreement are considered non-arbitrable. With this knowledge, parties may better plan for the resolution of disputes.

8. Conditions Precedent to Arbitration

Occasionally, parties provide that a certain action or event will occur prior to the initiation of an arbitration proceeding. For example, in different arbitration clauses reviewed by the author, a meeting of senior executives to negotiate a settlement, the occurrence of mediation⁴¹ or a lack of jurisdiction of a specific court have been provided as conditions to the filing of

³⁸ Blessing, Arbitrability, supra note 34, at 201-02 (Australia, France, Germany, Great Britain, and The Netherlands).

³⁹ Id. at 200-01 (Switzerland, Canada and the United States); 35 U.S.C. § 294; Saturday Evening Post Co. v. Rumbleseat Press, Inc., 816 F.2d 1191, 1199 (7th Cir. 1987); Beckman Instruments, Inc. v. Technical Develop. Corp., 433 F.2d 55, 63 (7th Cir. 1970).

⁴⁰ Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 27 (1991).

⁴¹ See DeValk Lincoln Mercury, Inc. v. Ford Motor Co., 811 F.2d 326, 335 (7th Cir. 1987) (summary judgment granted in part because party did not comply with mediation clause, which required an appeal to the Policy Board within 15 days as a condition precedent to pursue any other remedy); White v. Kampner, 1992 Conn. Super. LEXIS 931 (Conn. Sup. Ct. Apr. 2, 1992).

arbitration.⁴² Exhaustion of other alternative dispute resolution (ADR) procedures may also be listed as conditions to the initiation of arbitration.⁴³

Three problems may occur in the drafting of such clauses. The first occurs when the parties provide for the occurrence of an event prior to arbitration but are unclear whether it is merely preferred that the action or event occur before the arbitration or whether it is actually intended as a condition to initiating a proceeding.⁴⁴ This lack of clarity may result in litigation, delay and extra expense.

Second, it is sometimes not clearly stated when the condition will be deemed satisfied and an arbitration may be commenced. If the condition involves settlement negotiations or mediation, it is generally helpful to state a time period so it is clear when the condition has been met.⁴⁵ If the condition is even more vague, such as the lack of jurisdiction of a court, it is important to delineate what is required to satisfy the condition.

⁴² One arbitration agreement reviewed by the author provided that all disputes be submitted to the federal district court for the Southern District of New York "to the extent such court has jurisdiction." The clause went on to say that all disputes for which the federal court does not have jurisdiction shall be decided by arbitration in accordance with the Rules of the ICC, with the arbitration to be filed "within a reasonable time after the dispute has arisen."

⁴³ See the discussion of ADR, § I(2), infra.

⁴⁴ In Belmont Contractors, Inc. v. Lyondell Petrochemical Co., 896 S.W.2d 352, 357 (Tex. App. – Houston [1st Dist.] 1995, no writ), the alternative dispute resolution clause read: "If the parties cannot agree within 10 days on a different method of resolving the matter, the matter shall be submitted by the parties to and be decided by binding arbitration." The court held that failure to agree to another method of resolving the dispute was a condition precedent to binding arbitration, and since the parties agreed to mediation, the arbitration provision was not binding on them even though the mediation failed to settle the dispute. See also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jana, 835 F. Supp. 406, 409-10 (N.D. Ill. 1993) (filing claim within six years after the event in question is a condition precedent to arbitration, not a procedural stipulation, under section 15 of the NASD Code of Arbitration Procedure); NL Indus., Inc. PaineWebber, Inc., 720 F. Supp. 293, 304 (S.D.N.Y. 1989) (timely filing of written protest was a condition precedent to arbitration).

⁴⁵ As a corollary, the parties should be careful about imposing deadlines after the expiration of which an arbitration proceeding may not be filed. In a case before a court in Geneva, the parties' clause provided that an arbitration proceeding could be filed within 30 days after the failure of negotiations. An arbitration proceeding was filed, but the opposing party claimed it was untimely. One party claimed the negotiations failed in January, while the claimant argued they failed in April. The arbitration was filed within 30 days

Third, if one party has control over the subject matter of the contract - project management, perishable goods or money, for example - commencing an arbitration proceeding or seeking interim relief in court expeditiously can be extremely important because of the pressure the opposing party can exert by delay. This problem can be solved by careful drafting, which allows the parties to initiate an arbitral proceeding before complying with the condition precedent if necessary to protect a party's economic interests.

9. Incorporation of Arbitration Clauses by Reference

Major projects may involve the negotiation and drafting of many different but interrelated agreements – in some cases dozens of separate contracts. If the parties desire to include the same arbitral clause in each agreement, rather than typing the same language into each and taking the risk of varying language, which could lead to different results, the parties may prefer to negotiate a single master or umbrella arbitration agreement. This master agreement can then be incorporated into each separate contract by reference. If this is done, each separate contract should contain language incorporating the master arbitral agreement. Even if the arbitral clause will be somewhat different in some of the project agreements, a master arbitration agreement can still be used, with any additions or deletions drafted into specific contracts.

It is not uncommon in some trades for the parties to conclude contracts by telexes or other similar means in which they agree to price, quantity and the general terms and conditions of an industry association standard-form document, which may include an arbitration clause. Courts have generally upheld the incorporation by reference of an arbitration clause in this manner, provided the contract is between experienced businessmen and they are (or should be) familiar

after the April date. The Geneva court held the negotiations failed in January; therefore, the arbitration was not timely filed, and arbitration failed.

with the document incorporated.⁴⁶ In France, for an incorporation by reference to be valid, the existence of the arbitration agreement must either be mentioned in the main contract or the contents of the incorporated document must be known to the parties.⁴⁷ It is generally preferable for the language incorporating the other document to refer specifically to the arbitration clause in order to show the parties were aware of it and intended arbitration.

If an arbitral clause from an unrelated agreement is to be incorporated by reference into a specific contract, the parties should be careful to insure that all aspects of the clause fit their agreement.⁴⁸

10. Unconscionable Arbitration Clauses

Recently, a few plaintiffs in U.S. courts have attacked the selection of the ICC Arbitration Rules in contracts on the ground that the ICC's administrative fees are excessive, and thus, the arbitration clause is unconscionable. An example of these attacks is demonstrated by the case of Brower v. Gateway 2000, Inc.⁴⁹ There, a computer manufacturer's Standard Terms and Conditions Agreement, which is included in the box with the computer, provided for arbitration of any disputes in accordance with the ICC Arbitration Rules. The Agreement also stated that by keeping the computer more than 30 days, the consumer accepted the Terms and Conditions. A New York court rejected the plaintiffs' claims in a domestic class action lawsuit that the

⁴⁶ Tradax Export, S.A. v. Amoco Iran Oil Co., 11 Y.B. Com. Arb. 532, 534-35 (1986) (Swiss Federal Supreme Court); Lawrence Craig, William Park & Jan Paulsson, International Chamber of Commerce Arbitration § 5.08 at 94 (2d ed. 1990).

⁴⁷ Bomar Oil v. Enterprise Tunisienne d'Activites Pétrolières, decision of the French Cour de Cassation, 11 October 1989, cited in Richard Kreindler, Practical Issues in Drafting International Arbitration Clauses, 63 Arbitration 47, 51 (1997).

⁴⁸ Progressive Casualty Ins. Co. v. Reaseguradora Nacional de Venezuela, 802 F. Supp. 1069, 1079 (S.D.N.Y. 1992), rev'd, 991 F.2d 42, 47 (2d Cir. 1993). See Brian Drewitt & Giles Wingate-Saul, Drafting Arbitration Clauses, 62 Arbitration 39, 44 (1996).

arbitration agreement was a material alteration of a preexisting oral agreement under Uniform Commercial Code (UCC) § 2-207 and that it was an unenforceable adhesion contract.

With respect to the unconscionability issue, however, the court noted that the ICC advance fee of \$4000 (for a claim of less than \$50,000) is more than the cost of most of the defendant's products. The court held the excessive cost of the ICC fees would effectively deter and bar consumers from arbitration, leaving them no forum for their disputes. The ICC fees were held unreasonable and the arbitration clause unconscionable and unenforceable under UCC § 2-302. The appellate court remanded the case for consideration of a substitute arbitrator.

C. General Considerations

1. Institutional Model Clauses

Each of the leading arbitral organizations provides a sample arbitration clause for inclusion in international contracts. For example, the International Chamber of Commerce (ICC) suggests the following clause:

All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.⁵⁰

This clause has been said to contain the three “key expressions” for an arbitral clause – “All disputes”. . . “in connection with”. . . “finally settled”.⁵¹ The term “all disputes” encompasses all types of controversies, without exception. The language, “in connection with”, creates a broad form clause that will cover non-contractual claims such as tort and fraud in the inducement,

⁴⁹ 1998 WL 481066 (N.Y.A.D. 1 Dept. – Aug. 13, 1998).

⁵⁰ ICC International Court of Arbitration Pamphlet.

⁵¹ Craig, Park & Paulsson, supra note 46, § 6.03 at 111.

while “finally settled” indicates the parties intend the arbitrator’s ruling to be final so a court will not try the case de novo.

The London Court of International Arbitration’s (LCIA) suggested clause states:

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.

- (i) The number of arbitrators shall be [one/three].
- (ii) The place of arbitration shall be [City and/or Country].
- (iii) The language to be used in the arbitral proceedings shall be [_____].
- (iv) The governing law of the contract shall be the substantive law of [_____].⁵²

The American Arbitration Association (AAA) suggests the following clause:

Any controversy or claim arising out of or relating to this contract shall be determined by arbitration in accordance with the International Arbitration Rules of the American Arbitration Association.⁵³

It should be noted that the clauses quoted are all broad-form clauses designed to encompass all disputes relating to the parties' contract.⁵⁴ While almost certainly enforceable, these clauses provide the bare minimum in an arbitration clause. For those who want more than the bare bones, the discussion in the following sections should provide ample material for drafting a more detailed arbitration clause.

⁵² LCIA Recommended Arbitration Clauses.

⁵³ AAA International Rules Introduction. The model clause also gives the parties the option of specifying the number of arbitrators, and the place and language of the arbitration.

⁵⁴ See J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 321 (4th Cir. 1988).

2. Different Versions of the Arbitration Rules

Since the major arbitral institutions have amended their arbitration rules from time to time, an issue may arise as to which version of the rules the parties intended to govern their arbitration – the version in effect at the time the parties signed their agreement or the version in effect when the arbitral proceeding was commenced. This can be an important issue because the recent amendments to the rules of the ICC (January 1, 1998), the AAA (April 1, 1997) and the LCIA (January 1, 1998) have been substantial.

The parties can decide this matter by providing in their clause either that the adopted rules “then in force” on the date of their agreement or the rules “as modified or amended from time to time” shall be applied.⁵⁵ In this respect, the parties may wish to adopt the rules in existence at the time of contracting because these are the rules they know, and future rule changes may have unpredictable effects. On the other hand, the parties may wish to take advantage of future rule amendments, assuming the institution will only adopt changes that will better the arbitral process.

While allowing the parties expressly to choose which version of the rules they prefer, some of the institutions include a default provision stating which version will be applied in the absence of an agreement. For example, the rules of the ICC, AAA and LCIA all provide that in the absence of an agreement to the contrary, the arbitration shall be conducted according to the rules in effect on the date of the commencement of the arbitral proceeding.⁵⁶

⁵⁵ Bond, *supra* note 1, at 17.

⁵⁶ ICC Rules art. 6(1) (effective Jan. 1, 1998); AAA International Rules art. 1(1) (eff. April 1, 1997); LCIA Rules Introductory Paragraph (eff. Jan. 1, 1998).

3. Derogation From Institutional Rules

In drafting a detailed arbitration clause, the parties should consider whether they can modify the institutional rules adopted. The AAA International Rules provide they are applicable "subject to whatever modifications the parties may adopt in writing."⁵⁷ This language indicates that any of the AAA Rules may be altered by the parties.

In contrast, a few of the ICC Rules also explicitly allow the parties to agree otherwise, but in some cases the ICC has refused to administer an arbitration because of alterations made by the parties' agreement to particular rules deemed by the ICC to be fundamental to its arbitral procedure.⁵⁸ For example, the ICC has refused to administer arbitrations in situations in which the parties provided for non-binding arbitration, in which the parties' agreement both called for an umpire procedure and adopted the ICC Rules, and in which the parties provided that the chairman of a tripartite panel could not alone decide the case in the absence of a majority, although the ICC Rules permit him to do so.⁵⁹ The ICC has also refused to set in motion arbitration proceedings when arbitral clauses provided that the ICC Court could not confirm arbitrators, handle challenges to arbitrators, replace arbitrators, determine arbitrators' fees, or scrutinize the draft award.⁶⁰ It has also been suggested that the ICC would probably refuse to

⁵⁷ AAA International Rules art. 1.1.

⁵⁸ Youssef Takla, Non-ICC Arbitration Clauses and Clauses Derogating from the ICC Rules, 7 ICC Int'l Ct. Arb. Bull. 7, 9 (Dec. 1996); Eric Schwartz, Comments on Choosing Between Broad Clauses and Detailed Blueprints at 11, included in the First Working Group papers of the ICCA Congress, May 3-6, 1998, in Paris.

⁵⁹ Schwartz, supra note 58, at 11-12.

⁶⁰ Takla, supra note 58, at 9.

administer an arbitration if the parties' agreement attempted to alter the ICC Rules regarding the Terms of Reference.⁶¹

If a party wishes to adopt the ICC Rules but to alter them, it should consider including a clause either providing that any alteration of the ICC Rules may be disregarded if the ICC will otherwise refuse to administer the arbitration or adopting back-up rules such as the UNCITRAL Rules for an *ad hoc* arbitration or another institution's rules such as those of the AAA.

4. Pathological Arbitration Clauses⁶²

Pathological arbitration clauses might be defined as those drafted in such a way that they may lead to disputes over the interpretation of the arbitration agreement, may result in the failure of the arbitral clause or may result in the unenforceability of an award.⁶³ Examples of such problems include (1) equivocation as to whether binding arbitration is intended,⁶⁴ (2) naming a specific person as arbitrator who is now deceased or who refuses to act,⁶⁵ (3) naming an

⁶¹ Schwartz, supra note 58, at 11.

⁶² Defective arbitration clauses were first denominated as "pathological" in 1974 by Frederick Eisemann, who served at that time as the Secretary General of the ICC International Court of Arbitration. Craig, Park & Paulsson, supra note 46, § 9.01 at 158.

⁶³ Id.

⁶⁴ In a French case, the dispute resolution clause was headed, "Choices of forum", and read: "In case of a dispute the parties undertake to submit to arbitration but in case of litigation the Tribunal de la Seine shall have exclusive jurisdiction." Decisions of 1 Feb. 1979, T.G.I. Paris, 1980 Rev. Arb. 97 (1980), and 16 Oct. 1979, 1980 Rev. Arb. 101 (1980), cited in William W. Park, Arbitration of International Contract Disputes, 39 Bus. Law. 1783, 1784 n.2 (1984).

Another defective clause provided, "In the event of any unresolved dispute, the matter will be referred to the International Chamber of Commerce," but it failed to say whether the dispute would be settled by arbitration. Alan Redfern & Martin Hunter, Law & Practice of International Commercial Arbitration at 178 (2nd Ed. 1991).

Finally, one clause read simply: "Arbitration – all disputes will be settled amicably." Drewitt & Wingate-Saul, supra note 48, at 43.

⁶⁵ See Marcus v. Meyerson, 170 N.Y.S.2d 924, 925-26 (1958) (court had no authority to name a substitute for a resigning arbitrator who was specifically named in the parties' contract); Swedish Arbitration Act of 1929

institution to administer the arbitration proceeding or to appoint the arbitrators if the institution never existed, is misnamed in the clause or refuses to act,⁶⁶ (4) providing unreasonably short deadlines for action by the arbitrators,⁶⁷ (5) providing too much specificity with respect to the arbitrators' qualifications,⁶⁸ or (6) providing for conflicting or unclear procedures.⁶⁹

§ 9: "If a person who is designated as arbitrator in an arbitration agreement dies, the agreement shall lapse unless otherwise agreed between the parties," cited in Craig, Park & Paulsson, supra note 46, § 9.03 at 160 n.5.

⁶⁶ The Hamm Court of Appeals in Germany decided an arbitration clause was fatally ambiguous and void in a case in which the clause read, "[The parties] shall proceed to litigate before the Arbitration Court of the International Chamber of Commerce in Paris with the seat in Zurich." The court ruled it could not determine if the parties intended to submit to the ICC in Paris or to the Zurich Chamber of Commerce, both of which maintained permanent arbitral tribunals. Hamm Court of Appeals (Nov. 15 1994), *Recht der Internationalen Wirtschaft (RIW)* Vol. 40, p. 681 (1995) = *Recht und Praxis der Schiedsgerichtsbarkeit (RPS)*, Supplement no. 14 (1995) to the *Betriebsberater*, p. 21, cited in Johann Hochbaum, Pathological Arbitration Clauses in German Courts – German Courts Interpret Arbitration Clauses: Wrong Designation of the Seat of an Arbitration Institution, 11 *Mealey's Int'l Arb. Rep. No. 1* at 20, 23 (Jan. 1996). In another clause that referred to the ICC of Zurich, the defendant contested the jurisdiction of the ICC, contending the clause referred to a proceeding under the Arbitration Rules of the Zurich Chamber of Commerce. Bond, supra note 1, at 15.

But see Jean Benglia, Inaccurate Reference to the ICC, 7 *ICC Int'l Ct. Arb. Bull.* 11, 12 (Dec. 1996); Societe Asland v. Societe European Energy Corp., *Rev. arb.* 1990, p. 521 (reference to "the official Chamber of Commerce in Paris, France" was held to mean the ICC), cited in Bond, supra note 1, at 15-16; Warnes, S.A. v. Harvic Int'l, Ltd., 92 *Civ. 5515 (RWS)*, 1993 U.S. Dist. LEXIS 8457 (S.D.N.Y.-June 21, 1993) (court enforced a clause calling for arbitration before the New York Commercial Arbitration Association, finding this was a non-existent institution, but ordering arbitration before AAA).

Naming a person by title to appoint the arbitrators can be risky. While the President of the International Court of Justice and the President of the Swiss Federal Tribunal have made appointments of arbitrators in the past, they have no obligation to do so and may not continue to make such appointments in the future. See Craig, Park & Paulsson, supra note 46, § 9.03 at 161. The ICC will make appointments of arbitrators for a fee, so it should be considered at least as a back-up appointing authority.

⁶⁷ "An overly strict time limit may have the unavoidable result that the arbitral tribunal's mandate expires before it is practically possible to conduct an international arbitration." Craig, Park & Paulsson, supra note 46, § 9.08 at 165. In one case, a time period of three months was specified for the arbitrators to issue an award from the date of the arbitration agreement, which period could be extended four times, but one party refused to extend the period, and the arbitrators ruled their mandate had expired. Belgian Enterprise v. Iranian Factory, 7 *Y.B. Com. Arb.* 119, 120-21, 124 (1983).

⁶⁸ "It would be tempting the devil to require that the arbitrator be an English-speaking Italian, with a French law degree and a familiarity with Mid-East construction contracts." Park, Arbitration of International Contract Disputes, supra note 64, at 1786. See also Bernardini, supra note 10, at 56.

⁶⁹ Benjamin Davis, Pathological Clauses: Frederic Eisemann's Still Vital Criteria, 7 *Arb. Int'l* 365, 387 (1991). One reported arbitral clause read: "Disputes hereunder shall be referred to arbitration, to be carried out by arbitrators named by the International Chamber of Commerce in Geneva in accordance with the

Sometimes, pathological clauses can be saved. In one case, a clause provided merely: “English law – arbitration, if any London according ICC Rules.” An English court held this was a valid arbitration clause and enforced it.⁷⁰ In another case, which was argued by the author, the clause read: “In case of discrepancies between the partners, it is agreed to request arbitration according to international laws of arbitration.”⁷¹ Because the nominal parties were all Peruvian and U.S. companies, a federal district court held the international law of arbitration to which reference was made was the Panama Convention, to which the U.S. and Peru were both parties.⁷² Since the Panama Convention contains a default provision mandating use of the Inter-American Commercial Arbitration Commission (IACAC) Arbitration Rules in the event the parties have not agreed to a set of rules, the court ordered the arbitration to be conducted under IACAC's Arbitration Rules.⁷³

arbitration procedure set forth in the Civil Code of Venezuela and in the Civil Code of France, with due regard for the law of the place of arbitration.” Craig, Park & Paulsson, *supra* note 46, § 9.04 at 163. This compromise on the procedural law is virtually guaranteed to lead to delays and costly disputes, and may well lead to the unenforceability of an award.

The author recently reviewed a draft clause in which two arbitrators and an umpire were to be appointed, but it implied the three were to decide the case together. In the typical umpire procedure, the parties each appoint an arbitrator, and these two try to decide the case. If they are unable to do so, they appoint an umpire who decides the case alone. *See* 1996 English Arbitration Act § 21. Mixing the umpire procedure with a three-member arbitral tribunal in which the “umpire” acts merely as the presiding arbitrator confuses the procedure and may lead to expensive litigation, an unworkable procedure or an unenforceable award. In a case in which the umpire procedure was specified along with the ICC Rules, the ICC refused to administer the arbitration. *Sumitomo Heavy Industries, Ltd. v. Oil & Natural Gas Commission*, [1994] 1 Lloyd's Rep. 45 (July 23, 1993).

⁷⁰ *Arab-African Energy Corp. v. Olieprodukten Nederland, B.V.*, (1983) 2 Lloyd's L. Rep. 419 (Q.B. Com. Ct.).

⁷¹ *Anderra Energy Corp. v. SAPET Development Corp.*, 22 Y.B. Com. Arb. 1077, 1078 (1997).

⁷² *See id.* at 1079, 1081.

⁷³ *Id.* at 1085.

5. High-Low or Baseball-Style Arbitration

An unusual form of arbitration, which may significantly affect the result, is so-called "baseball-style" arbitration, also sometimes referred to as high-low arbitration.⁷⁴ With this approach, the drafter provides that each party will propose a monetary figure for resolving any dispute over damages, and the arbitrator is required to choose one party's proposal as the award. Some clauses provide that the arbitrator shall select the proposal that is judged to be the "more equitable".

This technique limits the discretion of the arbitrator and prevents a compromise award. It also pressures the parties to make realistic proposals rather than seeking outrageous sums or offering unreasonably low amounts. When this technique is employed, its use is typically limited to damage claims.

6. On-Line Arbitration

Recently, WIPO created the Administrative Challenge Panel, which provides an on-line arbitration procedure for handling certain types of trademark disputes over the Internet. This project is currently limited to disputes over domain names, and does not encompass damage claims. WIPO also offers expedited arbitration on-line. Most of these cases are submitted on the documents without a hearing.

Similarly, AAA and the Cyberspace Law Institute have jointly initiated the Virtual Magistrate Project, which administers arbitrations between system operators and on-line users

⁷⁴ This name is applied because of its well-known use to resolve salary disputes between players and teams in Major League Baseball in the United States.

involving allegedly wrongful messages.⁷⁵ These arbitrations decide whether a message should be deleted or access to it restricted, but they do not rule on damage claims.⁷⁶

One group - the Global Arbitration and Mediation Association - reportedly is already offering international commercial arbitration on the Internet.⁷⁷ Other arbitral institutions are considering these new developments.

Because this technique is so recent, a drafter who wants certain categories of disputes handled on-line needs to authorize it in the arbitration agreement. The drafter can provide that all disputes be handled by on-line arbitration, that only certain types of disputes be handled on-line (such as trademark disputes not involving damage claims) or that damage claims of a certain limited extent (e.g., \$500,000 or less) be handled on-line. Of course, the parties may wish merely to authorize the filing of documents such as pleadings and briefs through the Internet.

If this technique is used, it is critical to designate the situs of the arbitration or the procedural law to apply since there is no single place of an on-line arbitration, and therefore, no clearly applicable procedural law.⁷⁸ It is also important for the parties to consider issues of confidentiality when using the Internet, even if a certain level of encryption is used. Finally, the parties should specify the procedure to be used with an Internet arbitration. For example, the parties may wish to provide that any hearings be held through chat rooms in which dialogue

⁷⁵ Gabrielle Kaufman-Kohler, Identifying and Applying the Law Governing the Arbitration Procedure – The Role of the Law of the Place of Arbitration at 19, included in the Second Working Group papers of the ICCA Congress, May 3-6, 1998, in Paris.

⁷⁶ Id.

⁷⁷ Jasna Arsic, International Commercial Arbitration on the Internet: Has the Future Come Too Early?, 14 J. Int'l Arb. 209 (Sept. 1997).

⁷⁸ Id. at 217-20.

occurs in real time through typed transcripts⁷⁹ or that oral hearings be held by video-conference, by conference call or by hearings with all parties or counsel present in person.

D. An Analytical Framework for Evaluating Arbitration Clauses

Negotiating and drafting arbitration clauses are inherently practical exercises, but evaluating their validity and effectiveness requires an analytical framework. One authority has listed four essential functions of an arbitration clause: (1) to produce mandatory consequences for the parties, (2) to exclude the intervention of State courts in the resolution of disputes (at least prior to the rendering of an award), (3) to empower the arbitrators to resolve the parties' disputes, and (4) to adopt a procedure for resolving the disputes.⁸⁰ These criteria provide the essential ingredients necessary for an arbitration clause to be effective, and clauses may usefully be examined against them to determine whether they are valid and will accomplish the intended goal.

Nevertheless, these general criteria represent only a starting point in analyzing an arbitral clause. As an additional analytical tool, arbitration clauses may be classified into a trinity of categories: (1) basic clauses, (2) general clauses and (3) complex clauses.⁸¹

Basic clauses may be defined as those that include only the basic provisions -- those that are essential or particularly important to a viable arbitration agreement. Basic clauses encompass institutional model clauses, but may have additional provisions as well. These provisions may include the following elements: (1) the adoption of arbitration as the method of resolving the

⁷⁹ Id. at 211-12.

⁸⁰ See Davis, supra note 69, at 366, translating and discussing the criteria first set out in F. Eisemann, *La clause d'arbitrage pathologique*, Commercial Arbitration Essays in Memoriam Eugenio Minoli, U.T. E.T. 1974.

⁸¹ See generally Redfern & Hunter, supra note 64, at 168-69 (describing simple, equivalent and detailed clauses).

parties' disputes, (2) an agreement that the award will be final and binding, (3) the scope of the clause, (4) the adoption of either institutional arbitration rules or *ad hoc* arbitration, (5) the number of arbitrators, (6) the method of selecting the arbitrators, (7) the place or situs of the arbitration, (8) the language of the arbitration, (9) authorization for a court to enter judgment on the award, (10) a notice provision, and (11) a governing law provision. Basic clauses are often used when routine commercial transactions are involved, when there is only a brief time period for negotiating or drafting the arbitration clause or when the parties are unable to agree to anything more. In the energy industry, examples of basic clauses may be found in oil sales, shipping, joint study and bidding, and oil lifting agreements.

General clauses represent perhaps the most common range of arbitral provisions for substantial transactions. They are more involved than basic clauses, including the provisions outlined above and certain optional provisions that are useful, relatively low risk and not uncommon. Beyond the basic provisions, the optional provisions sometimes inserted in a general clause include the following list: (1) ADR provisions such as conditions precedent requiring negotiation or mediation, (2) qualifications and conduct of the arbitrators, (3) interim measures, (4) costs and attorneys' fees, (5) interest, (6) the currency of the award, (7) an exclusion of punitive and consequential damages, and (8) a waiver of appeals. General clauses are typically used in larger commercial transactions such as projects, when a few provisions beyond the basic clause are necessary (but all potential provisions are not needed), when the parties are unwilling to risk including provisions that could either derogate from institutional rules or violate mandatory rules of the applicable law (and they do not have the time or resources to research the issue), or when an agreement cannot be reached on additional provisions.

Examples of general clauses may be found in the energy industry in joint operating, drilling, natural gas supply, and power plant construction agreements.

Complex clauses are those that are more involved still, including some unusual provisions in addition to the basics. These clauses must be carefully tailored to prevent inconsistencies and meticulously researched to prevent provisions that might invalidate the clause in a given jurisdiction. Some of these clauses are often unnecessary or even undesirable in many situations or to many parties, but in a given case, they may be particularly important. Beyond those included in basic and general clauses, the provisions that may be included in a complex clause consist of the following: (1) confidentiality, (2) discovery, (3) multi-party arbitration, (4) consolidation, (5) split clauses requiring litigation of some issues and arbitration of others, (6) summary disposition (written procedure), (7) expert determination, (8) arbitrability, (9) waivers of appeals or consent to appeals, (10) a requirement that the arbitrators submit a draft of a proposed award before it becomes final, and (11) authorization to adapt the contract or to fill gaps in it. Complex clauses may be used in major projects involving large amounts of money, in transactions with governments or state-owned companies, in transactions in which there is a significant risk of breach of contract by one party, or when the arbitral clause represents a particularly important segment of the contract because litigation or other dispute resolution methods are not viable alternatives – and may even be repugnant – at least to one of the parties. Complex clauses are sometimes inserted in major investment agreements with host governments.

In practice, of course, arbitration clauses do not fall neatly into such rigid categories. Each provision serves its own separate and unique need, and the various provisions may be combined in a variety of different ways in any given arbitral clause. Nevertheless, these

categories may prove a useful analytical tool for evaluating arbitration agreements against a party's needs.

Beyond noting the general criteria and classifying the categories of clauses, certain principles for drafting arbitration clauses can also be identified. These principles are aimed generally at preventing the failure of the clause.

The first principle requires avoidance of provisions that offend mandatory rules of the applicable substantive or procedural law. This includes at least the procedural law of the situs of the arbitration and the laws of the likely country of enforcement of the award. In one case, a court in France held an arbitral clause invalid because of the inclusion of a provision permitting a broader appeal of the award to the courts than was allowed by French law.⁸² Also, if an award must be enforced in the Middle East, the mere mention of interest may invalidate the clause.⁸³

The second principle is similar: alterations of arbitral rules fundamental to the operation of the administering institution should be avoided. Some ICC Rules – and virtually all of the AAA International Rules – may be modified by the parties' agreement. But the ICC has refused to administer arbitrations when the parties' agreement modified certain rules the ICC considers basic to the proper functioning of an ICC arbitration.⁸⁴

It is because of these types of problems that some commentators remark of arbitration clauses that "less may be more." This may be true if the applicable law and arbitration rules are

⁸² Societe de Diseno v. Societe Mendes, 1995 Rev. arb. 263 (Cour d'appel de Paris – Oct. 27, 1994), cited in Schwartz, supra note 58, at 9.

⁸³ Bond, supra note 1, at 14.

⁸⁴ See § C(3), supra.

unknown to the parties, but in skillful hands, a comprehensive clause can solve many problems, leading to a more cost effective and satisfactory resolution of disputes.

A third principle requires respect for the drafting rules designed to prevent pathological mistakes.⁸⁵ These rules may be summarized as follows: First, the intent to require binding arbitration should be clearly and unequivocally stated. Second, the drafter should verify the existence and proper name of the institution designated to administer the arbitration. Third, the parties should avoid naming a particular person as arbitrator in their agreement. Fourth, the parties should avoid too much specificity when imposing qualifications for the arbitrators. Fifth, the parties should insure that any institution named to act as appointing authority will agree to fulfill its mandate. Sixth, the parties should insure that the procedure adopted is clear, workable, and not confused or conflicting. Seventh, if deadlines are imposed for action by the institution or arbitrators, generally, either they should be made precatory or extensions should be permitted in the sole discretion of the institution, the arbitrators or a court. Making extensions dependent upon agreement of the parties once a dispute has arisen may be tempting fate. Eighth, if a condition precedent to arbitration is adopted, either a deadline for the occurrence of the condition or the means of satisfying it should be clearly stated.

Another drafting problem of lesser import that has arisen involves the use of the word “may” in describing the initiation of arbitration. Often arbitration clauses provide that either party “may” initiate arbitration, thus tempting the non-moving party to argue in court that arbitration was not intended to be mandatory. The law is reasonably settled, at least in the U.S., that the use of the word “may” in this sense means the parties are not required to initiate

⁸⁵ See § C(4), *supra*.

arbitration, but when one of the parties does, arbitration becomes mandatory for both parties.⁸⁶ Nevertheless, it is preferable to state that any disputes “shall” be resolved by “binding” arbitration.

E. Essential Clauses

1. Adoption of Arbitration as the Method to Resolve Disputes

The first requirement for an arbitration clause is that the parties’ agreement must expressly state they intend to resolve their disputes by arbitration. While this seems obvious, occasionally parties have said that controversies would be referred to an institution that administers arbitration proceedings, but without mentioning arbitration as the method for deciding their issues.⁸⁷ Institutions such as the ICC have other methods for determining disputes that do not include arbitration. These procedures encompass conciliation, expert determination and a pre-arbitral referee procedure. Thus, if the parties want their disputes decided by arbitration, they should say so explicitly.

2. Final And Binding⁸⁸

It is common for arbitration clauses to provide that any arbitration award rendered will be “final and binding”. In this context, “binding” means the parties intend that the award will

⁸⁶ Allis-Chalmers Corp. v. Lueck 471 U.S. 202, 204 n.1 (1985); Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 879 (4th Cir. 1996); American Italian Pasta Co. v. Austin Co., 914 F.2d 1103, 1104 (8th Cir. 1990); Held v. National R.R. Passenger Corp., 101 F.R.D. 420, 423-24 (D.D.C. 1984); Block 175 Corp. v. Fairmont Hotel Management, 648 F. Supp. 450, 452 (D.Colo. 1986). See also Republic Steel Corp. v. Maddox, 379 U.S. 650, 658 (1965).

⁸⁷ Redfern & Hunter, supra note 64, at 178.

⁸⁸ For a related issue, see the discussion of Waiver of Appeal at § G(3).

resolve the dispute and be enforceable by national courts against the losing party.⁸⁹ It will not result merely in an advisory opinion that the parties are free to disregard. A reference that any award will be “final” means the substance of the award will not be reviewed by the courts.⁹⁰

Even if the parties do not say explicitly that the award will be final and binding, they may accomplish the same result by adopting the ICC, AAA or LCIA Rules. The ICC and LCIA Rules provide that any award shall be “binding” on the parties, and by submitting to those rules, the parties waive their right to any form of recourse, to the extent such waiver may be validly made.⁹¹ The AAA International Rules provide that the award will be “final and binding” on the parties, and they will carry it out without delay.⁹² The AAA International Rules do not include language, however, that the parties waive their right to recourse against the award.

By including the terms, “final and binding”, or an equivalent phrase – “any disputes shall be finally settled by binding arbitration” – parties express their intent for courts to enforce the award without reviewing the evidentiary foundations of the award. This is an important provision, and especially so if institutional rules are not adopted.

3. Scope of Arbitration⁹³

At the outset, the parties should consider what types of disputes they want arbitrated. If they desire to restrict arbitration only to contract disputes, they should draft a narrow-form

⁸⁹ U.S. courts have held that the phrase “final and binding” means “that the issues joined and resolved in the arbitration may not be tried de novo in any court.” M&C Corp. v. Erwin Behr, GmbH & Co., 87 F.3d 844, 847 (6th Cir. 1996); Iran Aircraft Industries v. Avco Corp., 980 F.2d 141, 145 (2d Cir. 1992).

⁹⁰ Bond, supra note 1, at 20.

⁹¹ ICC Rules art. 28(6); LCIA Rules art. 26.9.

⁹² AAA International Rules art. 27(1).

⁹³ For a related issue, see the discussion of Split Clauses at § H(5), infra.

arbitration clause. In the United States, this may be accomplished by using the phrase, "all disputes arising under this agreement," to define the scope of the disputes encompassed within the arbitration clause.⁹⁴ This phrase may preclude arbitration of matters that are closely connected to the contract, but do not "arise out of" it.

If all potential disputes are intended to be encompassed, including tort claims, statutory claims, fraud-in-the-inducement claims, and any others that may arise from the relationship established by the parties' agreement, then a broad-form clause should be drafted. This is accomplished in the U.S. by the following wording: "all disputes arising out of, connected with, or relating in any way to this agreement." The U.S. Supreme Court has referred to this language as a "broad-form clause", and has held that a claim of fraud in the inducement of the contract as a whole falls within the broad sweep of this language.⁹⁵

In contrast, it is reported that in the United Kingdom, the phrases "under this contract", "in connection with" and "in relation to" have been limited in scope by some authorities, the terms "in respect of" and "with regard to" have been afforded a fairly-wide meaning and the words "arising out of" have been construed to have the widest meaning.⁹⁶

Because of this difference in interpreting these phrases, to create a broad clause, it may be useful to include all of these phrases in series or to state outright the clause is intended to be a broad-form clause that will encompass all possible claims between the parties. To insure the breadth of the clause, some parties include language stating the disputes covered include any

⁹⁴ Mediterranean Enterprises, Inc. v. Ssangyong Corp., 708 F.2d 1458, 1464-65 (9th Cir. 1983); In re Kinoshita & Co., 287 F.2d 951, 952 (2d Cir. 1961).

⁹⁵ Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 398 (1967).

⁹⁶ See Ethiopian Oilseeds & Pulses Export Corp. v. Rio Del Mar Foods, Inc., [1990] 1 Q.B. 86, 97 ("arising out of" should be given a wide interpretation); Ashville Investments, Ltd. v. Elmer Contractors, Ltd., [1989] Q.B. 488, 508; Drewitt & Wingate-Saul, supra note 48, at 41; Redfern & Hunter, supra note 64, at 152-53.

relating to “the contract, its negotiation, performance, non-performance, interpretation, termination, or the relationship between the parties established by the contract.”

Whatever approach the parties decide to take, they should be clear in their choice of language so as to avoid any ambiguity or misinterpretation.

4. *Ad Hoc* or Institutional Arbitration

One of the more fundamental issues for parties agreeing to arbitrate future disputes is to determine whether the arbitration will be conducted *ad hoc* or will be administered by an arbitral institution. The factors that parties may consider in making this decision are discussed below.

The advantage of *ad hoc* arbitration is that the parties avoid the administrative fees charged by arbitral institutions, which can be substantial in some cases. The disadvantages of *ad hoc* arbitration are that national courts are more likely to intervene when there is no administering institution and, in the absence of an administrator, the parties may have to apply to the courts to resolve procedural problems on which they cannot agree. *Ad hoc* arbitration also requires that the parties assume the administrative and planning responsibilities generally undertaken by arbitral institutions. Moreover, with *ad hoc* arbitration, there is no quality control review by an institution like the ICC. There is also evidence that *ad hoc* awards do not receive the same deference as institutional awards when they are presented to courts for enforcement.⁹⁷

The advantages of using an institution represent the flip side of *ad hoc* arbitration. The institution may handle most of the administrative functions, provide a method of handling most procedural problems and provide quality control for at least some functions such as the selection of arbitrators. Cost is the primary disadvantage of institutional arbitration. Institutions such as

⁹⁷ Park, Arbitration of International Contract Disputes, *supra* note 64, at 1785; Bond, *supra* note 1, at 16; Nicholas Ulmer, Drafting the International Arbitration Clause, 20 Int’l Law. 1335, 1337 (1986).

the ICC usually charge an administrative fee that is a percentage of the amount in controversy. In addition, there may be hidden costs such as first-class airfare for the arbitrators for long flights or the fee for a secretary to the arbitral tribunal (usually a junior counsel) to take care of administrative details and take notes. In return for the administrative fee, however, the ICC performs significant services for the parties, including a review of party-nominated arbitrators for independence, appointing qualified arbitrators when necessary and scrutinizing proposed awards to insure their enforceability.

If the parties decide on institutional arbitration, they must choose from a myriad of competing arbitral institutions. Among the better known are the ICC, the AAA, the LCIA, the International Centre for the Settlement of Investment Disputes (ICSID),⁹⁸ and the Stockholm Chamber of Commerce. Other international arbitral institutions include: the Inter-American Commercial Arbitration Commission (IACAC), the Commercial Arbitration and Mediation Center for the Americas (CAMCA), the Arbitration Court of the World Intellectual Property Organization (WIPO), the Singapore Centre for International Commercial Arbitration, the Hong Kong Centre for International Commercial Arbitration, the Cairo Centre for International Commercial Arbitration, and the British Columbia Centre for International Commercial Arbitration.

In lieu of the arbitration rules of an institution, the parties may adopt the UNCITRAL Arbitration Rules.⁹⁹ This is a set of arbitral rules drafted by the United Nations Commission on International Trade Law but not connected to any administering institution. Some institutions

⁹⁸ Unlike the other arbitral institutions, ICSID has jurisdictional requirements for its use. See § J, *infra*.

⁹⁹ G.A. Res. 31/98, 31 U.N. GAOR Supp. (No. 39) U.N. Doc. A/31/39 (1976).

such as the ICC, AAA and the LCIA have declared they will apply the UNCITRAL Rules if the parties agree to their use.¹⁰⁰

The parties may also adopt the UNCITRAL Rules for use in an *ad hoc* arbitration. If the parties choose an *ad hoc* arbitration, but do not adopt ready-made rules, they must frame their own rules sufficiently for conducting the proceeding. Otherwise, they fall back on the law of the country where the arbitral proceeding will be held.

F. Important Clauses

1. Number of Arbitrators

Most arbitration rules provide for the number of arbitrators and a method for selecting them if the parties do not specify the number or a mechanism for their appointment. Nevertheless, it is generally desirable that the parties express their preference. The custom in international arbitrations involving significant monetary amounts is to appoint a three-person panel, but when the amount in dispute does not justify three, a single arbitrator may be preferred.

2. Method of Selecting Arbitrators

The appointment of a three-person panel usually involves each party appointing one arbitrator, and these two then agreeing on a third arbitrator to be the chairman of the tribunal. If the parties simply adopt institutional rules, some provide that the institution will determine the number of arbitrators and will select the third arbitrator when three are deemed appropriate.¹⁰¹

¹⁰⁰ The UNCITRAL Rules, promulgated in 1976, have proven popular in practice, and formed the basis of the arbitration rules of the Iran-United States Claims Tribunal and IACAC. Because the decisions of the Iran-U.S. Claims Tribunal are published, there is a reported jurisprudence interpreting the UNCITRAL Rules. See Stewart Baker & Mark Davis, *The UNCITRAL Arbitration Rules in Practice: The Experience of the Iran-United States Claims Tribunal* (Kluwer 1992); Jacomijn J. van Hof, *Commentary on the UNCITRAL Arbitration Rules: The Application by the Iran-U.S. Claims Tribunal* (Kluwer 1991).

¹⁰¹ ICC Rules art 8(2) & 8(4).

In an *ad hoc* arbitration, it is important that the parties include a back-up provision for appointment by an independent authority if a party fails to appoint its arbitrator or if the party-appointed arbitrators cannot agree on the presiding arbitrator.¹⁰² They should also either provide for the replacement of arbitrators who die or resign or authorize the continuance of the proceedings with a truncated tribunal, or both.¹⁰³

Some arbitration clauses provide that the parties shall attempt within a stated period of time after the commencement of the arbitration to agree on a sole arbitrator, but if they are unable to do so within the period allowed, the result will be a panel of three arbitrators. This mechanism provides flexibility – the parties are not bound under any and all circumstances exclusively either to a sole arbitrator or to a panel of three. A similar approach may mandate that the arbitration will be conducted by a sole arbitrator if the amount in controversy, exclusive of interest and costs, is less than a threshold amount – say US \$1 million – but will be conducted by a panel of three arbitrators if the dispute involves the threshold amount or more.

Occasionally, the contract will provide for a named individual to act as arbitrator. This is generally not a wise procedure because the unavailability of the person named may render the arbitration agreement invalid or, even if not, it may cause problems regarding the appointment of a substitute.¹⁰⁴

¹⁰² Most institutional rules address these issues and include procedures for breaking such a stalemate. See ICC Rules art. 8(4); AAA International Rules art. 6(3); LCIA Rules art. 7.2; UNCITRAL Rules art. 7(2).

¹⁰³ A truncated tribunal is one that begins with three arbitrators but is able to continue its work with a lesser number, if necessary. See ICC Rules art. 12(5); WIPO Arbitration Rules art. 35; Stephen Schwebel, The Validity of an Arbitral Award Rendered by a Truncated Tribunal, 6 ICC Int'l Ct. Arb. Bull. 19, 20 (Nov. 1995).

¹⁰⁴ Marcus v. Meyerson, 170 N.Y.S.2d 924, 925-26 (1958).

Many arbitral rules either require or suggest that the institution appoint a sole or third arbitrator who is not a national of either parties' countries. Parties occasionally provide in their clause that no national of a party or of its parent company may serve as arbitrator, or more often, that the sole or third arbitrator may not be a national of the parties' countries.

3. Place

If the parties fail to agree to the place of the arbitration, some institutions' rules allow the arbitrators to decide the situs based on the circumstances of the parties and the case,¹⁰⁵ while other rules authorize the institution itself to select the situs.¹⁰⁶ U.S. courts will rarely overturn the parties' choice of arbitral forum when the agreement specifies one.¹⁰⁷ If the parties do not specify a venue, but have agreed to submit to particular arbitration rules that allow the arbitrators to decide the forum, it will be difficult for the parties to challenge the arbitrators' choice of venue.¹⁰⁸ It should be noted that choosing a situs does not mean that all arbitral proceedings have to take place there; the arbitrators generally have discretion under the arbitral rules to conduct some proceedings at other venues.¹⁰⁹

¹⁰⁵ AAA International Rules art. 13 (administrator may initially determine the place of arbitration, subject to the power of the arbitrators to determine the situs); UNCITRAL Rules art. 16.

¹⁰⁶ ICC Rules art. 14 (ICC International Court of Arbitration shall fix the place of arbitration if not agreed by the parties); LCIA Rules art. 16.1 (seat shall be London unless and until the LCIA Court determines that another seat is more appropriate).

¹⁰⁷ National Iranian Oil Co. v. Ashland Oil, Inc., 817 F.2d 326, 335 (5th Cir. 1987); Snyder v. Smith, 736 F.2d 409, 419-20 (7th Cir. 1984), cert. denied, 469 U.S. 1037 (1984).

¹⁰⁸ Stanicoff v. Hertz, 406 N.E.2d 1318, 1319 (Mass. App. 1980).

¹⁰⁹ ICC Rules art. 14 (arbitrators may conduct hearings or deliberate at any location they deem appropriate); AAA International Rules art. 13 (arbitrators may hold conferences, hear witnesses or inspect property at any place they deem appropriate); LCIA Rules art. 16.1 (arbitrators may hold hearings and deliberations at any convenient location).

In selecting the situs, perhaps the most important factor is the legal environment of the forum. Parties should consider the following factors related to the legal system of the venue.¹¹⁰

- (1) It is especially important to select a forum whose arbitral awards will be enforceable in other countries (e.g., a country that has ratified the New York or Panama Conventions recognizing arbitral awards).
- (2) The forum's law should recognize the agreement to arbitrate as valid. Article V(1)(a) of the New York Convention contemplates that the validity of an arbitration agreement may be determined by the law of the country where the award was made, so compliance with local laws is important.
- (3) Because the arbitral site is usually the country whose courts will hear an action to vacate an award, it is important to consider the scope of review of awards available in that country.¹¹¹
- (4) The national courts of the situs should not unnecessarily interfere in ongoing arbitral proceedings, thereby creating an incentive for dilatory tactics and expensive procedural disputes.
- (5) The forum's courts should, however, assist the proceedings when necessary (e.g., by compelling arbitration or by enforcing discovery orders made by the tribunal).¹¹²
- (6) The host country should allow non-nationals to appear as counsel in international arbitration proceedings. This is not always the case; for example, Japan and Singapore have at times required that the parties' representatives be lawyers admitted to practice, and reside, in the forum state.¹¹³ Other countries require that representatives be lawyers (e.g., Indonesia, Israel, Saudi Arabia and Spain),¹¹⁴ while others require representatives to present a power of attorney to the arbitral panel (e.g., Argentina, Greece, Austria).¹¹⁵

¹¹⁰ See Gary B. Born, *International Commercial Arbitration in the United States* at 73-75 (1994).

¹¹¹ See, e.g., *Southern Pacific Properties Ltd. v. Arab Republic of Egypt*, 2 Int'l Arb. Rep., No. 1, at 17 (Cass. Civ. Ire 1987) (French court's reversal of ICC arbitral award rendered in Paris).

¹¹² See, e.g., U.S. Arbitration Act, 9 U.S.C. §§ 4, 7.

¹¹³ David Rivkin, *Keeping Lawyers Out of International Arbitration*, 6 Int'l Lit. Q. 4-5 (March 1990).

¹¹⁴ *Id.* at 4.

¹¹⁵ *Id.* at 3.

- (7) The situs should not unduly restrict the choice of arbitrators. In Saudi Arabia, arbitrators must be Muslim and male.¹¹⁶ In Venezuela, arbitrators must be lawyers licensed to practice law in Venezuela if Venezuelan law applies.¹¹⁷ Certain other countries have also required that arbitrators be nationals of their country.¹¹⁸

The location of the arbitration may also determine the language of the arbitration if the parties have not specified the language. Even if the parties do specify a venue, some countries' laws require that their language be used. For example, arbitrations in some Arab countries must be conducted in those countries' languages.¹¹⁹

A location that is inconvenient for the parties or expensive for travel may affect the availability of witnesses or the cost of proceedings. The tax treatment of the award may also be a relevant consideration.¹²⁰

In some cases, the parties may provide for two different places for the arbitration, depending on which party initiates the proceeding. This has been referred to as a “home and home” provision.¹²¹

The most notable venues for international arbitration include London, Paris, Geneva, New York and Stockholm. For cases involving Asian parties, proceedings may be held in Singapore, Kuala Lumpur, Hong Kong or, with Chinese parties, Beijing. With Latin American parties, the more popular venues include Paris, Mexico City, New York, Miami, and Houston.

¹¹⁶ Bond, supra note 1, at 18.

¹¹⁷ James Rodner, Arbitration in Venezuela, in ICC International Court of Arbitration Bulletin: International Commercial Arbitration in Latin America – Special Supplement at 99 (1997).

¹¹⁸ Bernardini, supra note 10, at 54.

¹¹⁹ Id. at 58.

¹²⁰ Id. at 55.

¹²¹ Kreindler, supra note 47, at 53.

With the looming expansion of NAFTA, Buenos Aires and Santiago may soon grow in popularity.

4. Language

Absent agreement by the parties, most arbitral rules allow the arbitrators to decide the language, taking into account the language of the contract and other relevant circumstances.¹²² The AAA International Rules specify that the language of the document containing the arbitration agreement shall be used unless the arbitrators determine otherwise.¹²³ Similarly, the LCIA Rules provide that the initial language shall be that of the document containing the arbitration clause unless the parties agree otherwise,¹²⁴ but after the arbitral tribunal is formed, the arbitrators may decide the language to be used.¹²⁵

Generally, the parties should specify the language to be used in the proceedings if they can agree. If the language selected is not the native language of the client, counsel may wish to provide both for simultaneous interpretation and for sharing equally the cost of translating testimony and documents.¹²⁶

¹²² ICC Rules art. 16; UNCITRAL Rules art. 17.

¹²³ AAA International Rules art. 14.

¹²⁴ LCIA Rules art. 17.1.

¹²⁵ Id. art. 17.3.

¹²⁶ Kreindler, supra note 47, at 52; Bond, supra note 1, at 20.

5. Entry of Judgment

The Second Circuit Court of Appeals in the U.S. held, in the early 1970's, that in the absence of a clause that a court may enter judgment on an arbitral award, courts may not do so.¹²⁷ Later courts have softened the impact of Varley by holding that consent to entry of judgment may be implied by the conduct of the parties.¹²⁸ A reference that the award would be "final" was heavily relied upon in one case to authorize entry of judgment upon the award.¹²⁹

In the wake of Varley, the AAA Commercial Arbitration Rules were amended to provide that parties adopting such rules were deemed to have agreed that judgment may be entered on the award.¹³⁰ Nevertheless, if enforcement may be required in the U.S., it is important that parties include an entry-of-judgment provision in their arbitration clause.

G. Helpful Clauses

1. Qualifications and Conduct of the Arbitrators¹³¹

The Arbitration Rules of the AAA, the LCIA and UNCITRAL require that all arbitrators be impartial and independent.¹³² The ICC Rules only expressly require independence.¹³³ The

¹²⁷ Varley v. Tarrytown Ass., Inc., 477 F.2d 208, 210 (2d Cir. 1973). See also Splosna Plovba of Piran v. Agrelak Steamship Corp., 381 F. Supp. 1368, 1370-71 (S.D.N.Y. 1974).

¹²⁸ I/S Stavborg v. National Metal Converters, Inc., 500 F.2d 424, 426-27 (2d Cir. 1974).

¹²⁹ Id.

¹³⁰ AAA Commercial Arbitration Rules, art. 47(c) (eff. July 1, 1996).

¹³¹ For a detailed discussion of this issue, see Doak Bishop & Lucy Reed, Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration, 14 (Issue No. 4) *Arb. Int'l* 1 (1998).

¹³² AAA International Rules art. 7.1; LCIA Rules art. 5.2; UNCITRAL Rules art. 10(1).

¹³³ ICC Rules art. 7(1), but an arbitrator may be challenged for "lack of independence *or otherwise*." Id. art. 11(1) (emphasis added).

1996 English Arbitration Act only expressly requires impartiality.¹³⁴ The ICSID Rules require a statement from the arbitrator that he will judge fairly between the parties and will not accept instruction or compensation from them.¹³⁵

In light of these differing tests, a party may wish to insert a clause requiring that all arbitrators be impartial, which is the key test,¹³⁶ and may even wish to require all arbitrators to declare that they can and shall decide the case impartially. As added insurance, the arbitration clause may adopt the International Bar Association's Rules of Ethics for International Arbitrators, and require that all arbitrators comply with these rules of ethics.

Although covered to some extent in the IBA Rules, the parties may wish to insure the complete independence of the arbitrators by requiring that they not have any financial interest in the dispute or any financial dependence on the parties (directly or indirectly). This independence may also take the form of prohibiting the sole or presiding arbitrator (or all arbitrators) from being of the same nationality as any of the parties or their parent companies.

In addition, parties may in some cases desire to include a provision requiring certain expertise in the arbitrators. If this is included, it should be broadly drafted unless the arbitration clause is limited to certain types of well-defined disputes. Such a clause may require that all arbitrators be actively involved in the trade, be knowledgeable and experienced in a certain type of business or be knowledgeable of the law relating to that business. A provision that is too

¹³⁴ Arbitration Act 1996, Chapters 1(a) & 24(1)(a) (June 17, 1996).

¹³⁵ ICSID Rules of Procedure for Arbitration Proceedings Rule 6(2).

¹³⁶ See English Arbitration Act 1996, Chapters 1(a) and 24(1)(a) (June 17, 1996); Departmental Advisory Committee on Arbitration Law (Chairman, The Rt. Hon. Lord Justice Saville), Report on the Arbitration Bill ¶¶ 101-04 (February 1996).

specific as to the qualifications of the arbitrators may fail if arbitrators with those qualifications cannot be found.¹³⁷

2. Interim Measures

Federal courts in the U.S. have split over their authority to grant interim measures in the face of an arbitration clause. The U.S. Third and Fourth Circuit Courts of Appeals, and New York state courts, have held that U.S. courts may not grant interim measures because of the New York Convention's requirement that a court seized of a matter must refer the parties to arbitration.¹³⁸ Other courts have disagreed,¹³⁹ with some creating express exceptions for admiralty cases¹⁴⁰ and injunctions.¹⁴¹

This can be an important issue if immediate relief is necessary, for example, to prevent spoilage of perishable goods or to protect intellectual property during the pendency of a dispute.

Some arbitral rules and some countries' laws expressly allow the arbitrators to issue interim measures (in the nature, for example, of an injunction or an order to preserve property),¹⁴² while other countries' laws do not allow arbitrators to issue such orders.¹⁴³ Because

¹³⁷ Park, Arbitration of International Contract Disputes, *supra* note 64, at 1786.

¹³⁸ I.T.A.D. Assoc., Inc. v. Podar Bros., 636 F.2d 75, 77 (4th Cir. 1981); McCreary Tire & Rubber Co. v. CEAT SpA, 501 F.2d 1032, 1038 (3d Cir. 1974); Cooper v. Ateliers de la Motobecane, 442 N.E.2d 1239, 1242-43 (N.Y. 1982).

¹³⁹ E.g., Carolina Power & Light Co. v. Uranex, 451 F. Supp. 1044, 1051-52 (N.D. Cal. 1977).

¹⁴⁰ Andros Compania Maritima, S.A. v. Andre & Cie., S.A., 430 F. Supp. 88, 89-90 (S.D.N.Y. 1997).

¹⁴¹ Rogers, Burgun, Shahine & Deschler, Inc. v. Dongsan Constr. Co., 598 F. Supp. 754, 758-59 (S.D.N.Y. 1984).

¹⁴² ICC Rules art. 23; AAA International Rules art. 21; LCIA Rules art. 25; UNCITRAL Rules art. 26; UNCITRAL Model Law on International Commercial Arbitration art. 17.

¹⁴³ 1996 English Arbitration Act § 39(4) (arbitrators have no power to order provisional relief unless the parties confer such power on them).

of the differing rules and laws, the parties may wish to empower the arbitral tribunal with such authority, or deny it such power, in their arbitration clause.

Courts outside the country where the arbitration is to take place will sometimes refuse to decide issues of interim measures, leaving such questions either to the arbitral panel or to the courts of the arbitral venue.¹⁴⁴

One method of dealing with this issue – at least in part – is to adopt the ICC's Pre-Arbitral Referee Procedure, which requires a written agreement.¹⁴⁵ In accordance with these rules, the Chairman of the ICC International Court of Arbitration will appoint a referee in the shortest time possible after the time period for filing the answer, which is required within eight days from receipt of the request.¹⁴⁶ The referee is empowered to issue certain provisional orders such as orders for conservatory measures, restoration, payments, signing or delivery of documents, and preserving or establishing evidence.¹⁴⁷ The referee's order does not pre-judge the case or bind a later authority, but it is binding on the parties until changed by the arbitral tribunal or a court.¹⁴⁸ The order is not enforceable as an arbitral award, but non-compliance may be sanctioned by the arbitral tribunal.¹⁴⁹

¹⁴⁴ See Channel Tunnel Group, Ltd. v. Balfour Beatty Construction, Ltd., [H.L. 1993] A.C. 334, [1993] 1 All E.R. 664, [1993] 1 Lloyd's Rep. 291, XIX Y.B. Com. Arb. 736, 745 (1994) (English courts may not grant interim injunction in respect of a foreign arbitration, but may grant pre-arbitration injunction); David Wagoner, Interim Relief in International Arbitration, 62 *Arbitration* 131, 134 (1996). But see Trade Fortune, Inc. v. Amalgamated Mill Supplies, Ltd., (1994) 89 BCLR (2d) 132; Interbulk (Hong Kong), Ltd. v. Safe Rich Industries, Ltd., (1992) 2 HKLR 185.

¹⁴⁵ ICC Pre-Arbitral Referee Procedure Rules art. 3.1.

¹⁴⁶ Id. arts. 3.4 & 4.2.

¹⁴⁷ Id. art. 2.1.

¹⁴⁸ Id. art. 6.3.

¹⁴⁹ Martin Hunter, Jan Paulsson, Nigel Rawding, & Alan Redfern, *The Freshfields Guide to Arbitration & ADR: Clauses in International Contracts* at 50 (Kluwer 1993) ("Freshfields Guide").

3. Waiver of Appeal/Exclusion Agreement

This topic is related to the issue of the final and binding nature of an award, which is discussed above.¹⁵⁰ The provisions of the ICC and LCIA Rules deeming a waiver of any form of recourse against an award,¹⁵¹ and an arbitration clause provision waiving the right to appeal the award, constitute an "exclusion agreement,"¹⁵² which excludes review of an arbitral award on the merits by a national court. In England, the incorporation of an institution's arbitral rules, which provide for the waiver of recourse from an arbitral award, is sufficient to prevent judicial review of the award,¹⁵³ while in other countries such as Switzerland an exclusion agreement must be express.¹⁵⁴ The reason for this difference may be found in the fact that English courts have broad powers to review an arbitral award for errors of English law, when that law is applicable,¹⁵⁵ while in Switzerland and other countries, review of an award is limited to the few defenses provided in the New York Convention.¹⁵⁶ Thus, the scope of the review conducted in Switzerland is much more limited than that available in England.

¹⁵⁰ See § E(2), *supra*.

¹⁵¹ ICC Rules art. 28(6); LCIA Rules at. 26.9. See AB Gotaverken v. General National Maritime Transport Co., 6 Y.B. Com. Arb. 237, 240-41 (1981) (Swedish Supreme Court held ICC award binding and enforceable under ICC Rules art. 24 despite challenge to the award in French courts).

¹⁵² Bernardini, *supra* note 10, at 59.

¹⁵³ Arab-African Energy Corp. v. Olieprodukten Nederland, N.V., [1983] 2 Lloyd's L. R. 419 (Q.B. Com. Ct.); Marine Contractors, Inc. v. Shell Petroleum Dev. Co. of Nigeria, Ltd., [1984] 2 Lloyd's Rep. 27.

¹⁵⁴ See Swiss Federal Private International Law Act art. 192(1). See also Clear Star, Ltd. v. Centrala Morska Importowo-Eksportowa "Centromor" and Centromor, S.A., cited in Bernardini, *supra* note 10, at 59.

¹⁵⁵ 1996 English Arbitration Act § 69.

¹⁵⁶ Swiss Federal Private International Law Act art. 190.

In the United States, courts have held the parties may agree to eliminate all court review of arbitral awards,¹⁵⁷ but the intention to do so must clearly appear.¹⁵⁸ The Second Circuit has held that U.S. courts may review international awards under the limited defenses provided by the New York Convention despite a provision that an award shall be “final and binding”.¹⁵⁹ The Sixth Circuit has agreed, holding that U.S. courts may review awards under the New York Convention defenses despite a clause that both provided that disputes would be “finally settled” by arbitration and adopted the ICC Rules with the language deeming a waiver of the right to appeal.¹⁶⁰ Thus, the U.S. position appears to be that the inclusion of “final and binding” language and the adoption of arbitral rules deeming a waiver of the right to appeal are not sufficient to preclude court review of an award under the limited, but fundamental, defenses provided by the New York Convention. To waive the right to review under these defenses, the arbitral clause must clearly and expressly provide for such a waiver.

The difference in these models indicates that a waiver of the right to appeal an award may mean one of two things: (1) the parties may not appeal to the courts on the merits (*i.e.*, they may not argue that the arbitrators misunderstood the facts or misapplied the law), or (2) the parties may not apply to the courts to vacate the award on any basis, including the defenses listed in the New York and Panama Conventions.¹⁶¹ Since the law differs from country to country as to

¹⁵⁷ Gramling v. Food Machinery & Chem. Corp., 151 F. Supp. 853, 855-56 (W.D.S.C. 1957) (award was agreed to be final and binding “without any right of appeal from the award”).

¹⁵⁸ Aerojet-General Corp. v. American Arbitration Ass'n, 478 F.2d 248, 251 (9th Cir. 1973).

¹⁵⁹ Iran Aircraft Indus. v. Avco Corp., 980 F.2d 141, 145 (2d Cir. 1992).

¹⁶⁰ M&C Corp. v. Erwin Behr, GmbH & Co., 87 F.3d 844, 847 (6th Cir. 1996).

¹⁶¹ See Food Services of America, Inc. v. Pan-Pacific Specialities, Ltd., (1997) 32 BCLR (3d) 225.

which of these situations is included in a waiver, if the parties wish to waive the right to appeal, they should be specific in describing which of these situations they intend by their waiver.

H. Unusual Clauses

1. Confidentiality

Although confidentiality is often cited as one of the primary advantages of arbitration,¹⁶² most of the best known institutions' arbitration rules do not require the *parties* to maintain the confidentiality of the arbitral proceedings, the award or any documents exchanged in, or created for, the arbitration proceeding.¹⁶³ The arbitration rules of some institutions do impose such a confidentiality requirement upon the administrator and arbitrators.¹⁶⁴ With the notable exception of England, whose courts have imposed an implied obligation of confidentiality,¹⁶⁵ most countries' laws impose no confidentiality requirements upon the parties to an arbitration.¹⁶⁶

The information that parties may desire to maintain as confidential may be categorized as follows:

- (1) the existence of the arbitral proceeding;

¹⁶² Jan Paulsson & Nigel Rawding, The Trouble with Confidentiality, 5 ICC Int'l Ct. Arb. Bull. 48 (1994).

¹⁶³ See AMCO Asia Corp. v. Indonesia, ICSID ARB/81/1 (award dated 1 February 1994). But see LCIA Rules art. 30.1; WIPO Rules arts. 73-75; Center for Public Resources (CPR) Non-Administered Arbitration Rules, Rule 16.

¹⁶⁴ See, e.g., AAA International Rules art. 34; WIPO Arbitration Rules art. 76.

¹⁶⁵ See, e.g., Insurance Co. & Lloyd's Syndicate, 10(1) Mealey's Int'l Arb. R. 9 (Jan. 1995) (U.K. Queen's Bench Div. (Commercial Court) October 27, 1994); Hassneh Ins. Co. v. Steuart, [1993] 2 Lloyd's Rep. 243 (Q.B.); Dolling-Baker v. Merrott [1990] 1 W.L.R. 1205, [1991] 2 All ER 890 (U.K. Court of Appeal (Civil Div.) March 21, 1990).

¹⁶⁶ See, e.g., Esso Australia Resources Ltd. v. Plowman, FMC. No. 95/014 (High Ct. Austr. 1995); Commonwealth of Australia v. Cockatoo Dockyard PTY, Ltd., No. CA 40713 of 1994, No. CL 55049 of 1994, 10(7) Mealey's Int'l Arb. R. 3 (July 1995) (Court of Appeal of Supreme Court of New South Wales, June 27, 1995); U.S. v. Panhandle Eastern Corp., 118 F.R.D. 346, 349-50 (D. Del. 1988); Galleon Syndicate Corp. v. Pan Atlantic Group, Inc., 6 Mealey's Lit. R.: Reinsurance 73, 74 (N.Y. App. Div., Dept. 1) (Feb. 13, 1996).

- (2) contemporaneous or historical documents produced or exchanged by the parties;
- (3) documents prepared for the arbitration (e.g., briefs and pleadings); and
- (4) the arbitral award.

Therefore, if the parties desire that their proceedings, documents and award be maintained as confidential, they should provide for it in their arbitration clause. If a confidentiality obligation is provided in the clause, it should include an exception for situations in which it is necessary to go to court either to compel arbitration or to enforce the award. Other exceptions should be provided for disclosure when required by law or when required to enforce other rights or defend other proceedings in situations in which the fact of the award is a necessary element of the claim or defense.¹⁶⁷

2. Discovery

Litigation in U.S. federal and state courts is characterized by broad, pre-trial discovery obtained through document production, interrogatories and depositions (usually oral, but occasionally conducted in writing). In England, document discovery is permitted, but not depositions.

Parties may choose arbitration in part to avoid these procedures, which are often perceived as time consuming and expensive. Parties from civil law countries, who are often accustomed to little or no discovery, are likely to hold this perception. There are obvious cost advantages to limiting discovery, but if parties want to insure they will have access to relevant evidence, they should provide for it in their clause.

¹⁶⁷ Insurance Co. & Lloyd's Syndicate, 10(1) Mealey's Int'l Arb. R. 9 (Jan 1995), U.K. Queen's Bench Div. (Commercial Court) Oct. 27, 1994.

The International Bar Association has adopted Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration. These rules do not automatically apply to an arbitration proceeding; they must be adopted by either the parties or the arbitrators. When applicable, they provide for limited production of documents, falling into two categories: (1) documents to be relied upon by the parties at the arbitral hearing, and (2) documents that can be identified with specificity and that are exchanged with third parties (*e.g.*, correspondence).

It is not common for arbitration clauses in international agreements to address whether discovery will be allowed (and if so, in what form), or how evidence will be received by the tribunal. Nonetheless, contracts occasionally address these issues, and parties may desire to provide in the arbitration clause that the tribunal will allow discovery, and may even dictate the discovery that will be permitted and the procedures to be used.

The types of discovery that may be specified in the arbitral clause include the following:

- (1) documents and information contractually required to be provided;
- (2) audits of books and records;
- (3) documents to be relied upon by the parties in the arbitral proceeding;
- (4) documents exchanged with third parties;
- (5) documents in the care, custody or control of the parties;
- (6) sworn oral depositions or depositions by written questions;
- (7) written interrogatories;
- (8) inspection of premises; and
- (9) interviews of employees.

In international litigation and arbitration, documents must generally be requested with specificity,¹⁶⁸ but if document discovery is desired in the U.S. mode, the parties should provide that documents may be requested by broad category.

Some clauses explicitly restrict discovery by providing it shall be limited and handled expeditiously, and shall not include discovery procedures available in litigation before courts. In at least one clause drafted by the author, however, a state-owned oil company agreed to a broad discovery clause that included all of the types of discovery listed above. The discovery provision was limited though to environmental issues.¹⁶⁹

Parties may also effectively provide for discovery by including contractual provisions mandating that one party periodically provide the other with certain information or by providing a right to audit. Provisions such as these are often found in joint operating agreements in the energy industry.

3. Multi-Party Arbitration

In situations in which there are more than two parties to an arbitration, and yet the parties want the ability to appoint their own arbitrator, it may be desirable to include a clause addressing this situation. It is possible for an arbitration clause to fail if it provides that each party may appoint its own arbitrator and these two will select the third, but there are more than two parties to the dispute. It is more likely, however, that the arbitration will have to be split into separate

¹⁶⁸ James Carter, Obtaining Foreign Discovery and Evidence for Use in Litigation in the United States: Existing Rules and Procedures, 13 Int'l Law. 5, 15-16 (1979).

¹⁶⁹ The parties' agreement provided for liability for environmental problems caused by the private party's activity on certain property, while allowing the state-owned company to make other use of the same property. The broad discovery clause represented a compromise on the private party's request for indemnity from the state-owned company for its use of the property.

arbitrations with only two parties to each. Until recently, none of the primary institutions' arbitration rules addressed this problem, and few countries' procedural laws deal with it.

In the case of Siemens AG and BKMI Industrienlagen GmbH v. Dutco Construction Co.,¹⁷⁰ a claimant filed a single ICC arbitration against two respondents claiming separate breaches by each of a consortium agreement for constructing a cement plant in the Middle East. The arbitral clause provided for three arbitrators to be selected in accordance with the ICC Rules. The ICC required the two respondents jointly to appoint a single arbitrator, and they did so under protest, reserving their rights. After an award was rendered, respondents sought to set it aside. The French Supreme Court ultimately held the principle of equality of the parties in designating arbitrators is a matter of public policy that cannot be waived before a dispute arises. Thus, each respondent had the right to designate its own arbitrator.

Responding to this situation, the ICC, AAA, and LCIA recently adopted rules that allow the institutions to appoint all arbitrators when there are more than two parties to an arbitration and either all claimants or all respondents cannot agree on the joint appointment of an arbitrator for their side.¹⁷¹

The options for solving this problem in the arbitration clause may be categorized as follows:

- (1) If there are three parties, each appoints its own arbitrator, and these three decide among themselves who will be the presiding arbitrator. Note that there is no true neutral or non-party appointed arbitrator with this procedure, and some arbitral rules allow the chairman to decide the dispute if the arbitrators cannot form a majority.¹⁷²

¹⁷⁰ No. 89-28 708 Y and No. 89-18 726 Y combined, decision of the Cour de Cassation (French Supreme Court) 1st Civil Chamber, 7 January 1992.

¹⁷¹ ICC Rules art. 10(2); AAA International Rules art. 6(5); LCIA Rules art. 8.1.

¹⁷² ICC Rules art. 25(1); LCIA Rules art. 26.3.

- (2) Either the parties agree to group themselves together into two or three groups for the purpose of jointly appointing an arbitrator or the appointing authority is authorized to group them together. The parties so grouped together then jointly appoint an arbitrator. This procedure may be used when parent and subsidiary companies are parties or when certain parties have a common interest and a common position in the dispute.
- (3) The appointing authority selects all arbitrators or the strike-list method is used, in which the institution submits a list of potential arbitrators to the parties and allows them to strike those they do not want and rank the remaining candidates.

Whichever option is chosen will depend on the likely number of parties, whether they can be grouped together, and how important it is to the parties that they be able to appoint their own arbitrators.

4. Consolidation of Arbitral Proceedings

When there are multiple arbitration proceedings filed or possible, with common questions of law or fact and the possibility of conflicting awards, it may be advisable to consolidate the arbitration proceedings.¹⁷³ This situation may occur with "chain" or "string" contracts in which a middleman buys from one party and sells to another.

If the parties have not signed the same arbitration clause, however, consolidating the proceedings may be problematic. The U.S. Federal Arbitration Act authorizes courts to enforce arbitration "in accordance with the terms of the agreement."¹⁷⁴ Some U.S. courts have interpreted this provision narrowly, prohibiting consolidation if the parties' agreement does not

¹⁷³ Hoover Group, Inc. v. Probola & Assocs., 710 F. Supp. 679, 681 (N.D. Ohio 1989) ("The two arbitrations present common questions of law and fact, and a danger of conflicting findings and awards"); Sociedad Anonima de Navegacion Petrolera v. Cia de Petroleaos de Chile, S.A., 634 F. Supp. 805, 809 (S.D.N.Y. 1986).

¹⁷⁴ 9 U.S.C. § 4.

provide for it.¹⁷⁵ The opposite view has also been taken, however, based primarily on Rules 42(a) (consolidation of actions) and 81(a)(3) (applicability of Federal Rules of Procedure to arbitration proceedings) of the Federal Rules of Civil Procedure.¹⁷⁶

Even when consolidation is possible, the details of consolidating two existing arbitral proceedings may present substantial difficulties. The simplest possibility is to consolidate the arbitrations before one of the existing panels, often the first-filed proceeding, and dismiss the other panel. If there is an overlap of arbitrators, it may be possible to consolidate with five arbitrators.

U.S. courts have refused to consolidate when arbitration agreements provided for different arbitral institutions or rules on the basis that "[w]hen the contracting parties have agreed upon an arbitral forum, to impose another upon either of them without consent would be to rewrite their agreement."¹⁷⁷ One U.S. court solved this problem by ordering two separate arbitral panels operating under different institutional rules to hold a joint evidentiary hearing with one of the panels issuing its award first.¹⁷⁸

¹⁷⁵ Government of the United Kingdom v. Boeing Co., 998 F.2d 68, 70 (2d Cir. 1993) (two separate arbitration agreements and no consolidation clause); Weyerhaeuser Co. v. Western Seas Shipping Co., 743 F.2d 635, 637 (9th Cir. 1984); Coastal Shipping, Ltd. v. Southern Petroleum Tankers Ltd., 812 F. Supp. 396, 402 (S.D.N.Y. 1993); PaineWebber, Inc. v. Fowler, 791 F. Supp. 821, 826 (D. Kan. 1992).

¹⁷⁶ Maxum Foundations, Inc. v. Salus Corp., 817 F.2d 1086, 1088 (4th Cir. 1987) (implied consent to consolidate found in identical arbitration clauses); Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A., 527 F.2d 966, 975 (2d Cir. 1975) (single arbitration agreement, three parties, no consolidation clause, five arbitrators ordered).

¹⁷⁷ Stewart Tenants Corp. v. Diesel Const. Co., 229 N.Y.S.2d 204, 206 (1963).

¹⁷⁸ Jamaica Commodity Trading Co. v. Connell Rice & Sugar Co., No. 87 Civ. 6369, 1991 U.S. Dist. LEXIS 8976 (S.D.N.Y. - July 2, 1991).

One factor to consider in deciding whether to include a consolidation clause is the possibility of a class action claim in the United States.¹⁷⁹ Class actions are proper only when there are numerous claimants with common questions of law or fact, such as a dispute over an identical provision in a standard-form contract that involves hundreds of claimants, often consumers.¹⁸⁰ Typical commercial transactions tailored to a few parties will not give rise to class actions.

U.S. courts have held that consumers whose contracts contained arbitration clauses were required to arbitrate even though they filed their lawsuit as a class action.¹⁸¹ In at least one case, to prevent a class action in an arbitration proceeding, the clause read: “each claim or controversy will be arbitrated by the Franchisee on an individual basis and will not be consolidated in any arbitration action with the claim of any other franchisee.”¹⁸² Language in some cases may imply that a consolidation clause is sufficient authorization to certify a class action in an arbitration proceeding.¹⁸³ Companies with numerous standard-form agreements should be careful not to implicitly authorize a class action arbitration by including a consolidation provision.

¹⁷⁹ See § H(11), *infra*.

¹⁸⁰ See Fed. R. Civ. P. 23.

¹⁸¹ Howard v. Klynveld Peat Marwick Goerdeler, 977 F. Supp. 654, 665 n.7 (S.D.N.Y. 1997); Doctor’s Associates, Inc. v. Hollingsworth, Bus. Franchise Guide (CCH) ¶ 11,069 at 28,909-10 (D. Conn. – Nov. 25, 1996).

¹⁸² Doctor’s Associates, Inc. v. Hollingsworth, Bus. Franchise Guide (CCH) ¶ 11,069 at 28,906 (D.Conn. – Nov. 25, 1996).

¹⁸³ Randolph v. Green Tree Financial Corp., 991 F. Supp. 1410, 1424 (M.D. Ala. 1997).

5. Split Clauses

Another species of scope clauses¹⁸⁴ include those provisions authorizing arbitration of certain disputes and litigation of others, which may be denominated as “split clauses.”¹⁸⁵ In these provisions, the parties may draft a broad-form clause but then carve out certain types of disputes such as intellectual property claims that they do not want to be arbitrable, or they may craft a clause tailored to include only narrowly-specified types of disputes. A variation of this provides for litigation of a certain category of disputes, but empowers one party to elect to have those disputes resolved by arbitration.¹⁸⁶ If this variation is chosen, the process for making the election should be specified.¹⁸⁷ Another variation is to provide that one party’s claims must be arbitrated, while the other party may litigate its claims.¹⁸⁸

A third variation is referred to in England as Scott v. Avery clauses.¹⁸⁹ These provide either that no litigation shall be filed on the issues subject to litigation until an award has been issued on the arbitrable issues, making the completion of arbitration of some issues a condition precedent to litigation of others, or that the respondent’s sole obligation will be to pay the pecuniary sum awarded in arbitration.¹⁹⁰ These provisions are sometimes found in insurance

¹⁸⁴ See § E(3), supra.

¹⁸⁵ Freshfields Guide, supra note 149, at 47.

¹⁸⁶ Id. at 48.

¹⁸⁷ Id.

¹⁸⁸ Barker v. Golf U.S.A., Inc., ___ F.3d ___ (8th Cir. 1998) (clause providing that any disputes shall be resolved by arbitration “except for monies owed to Golf USA” did not fail for lack of mutuality of obligation because mutuality is not required for arbitration clauses as long as the contract as a whole is supported by consideration).

¹⁸⁹ (1856) HL Cas 811 [1843-60] All ER Rep. 1.

¹⁹⁰ Drewitt & Wingate-Saul, supra note 48, at 42.

contracts in which courts may be authorized to decide liability issues, while arbitrators are empowered to rule on the damage claims.¹⁹¹

6. Summary Disposition (Written Procedure)

The author has recently seen several domestic arbitration clauses in the U.S. that authorized (but did not compel) the arbitrators in their discretion to decide the case on “summary judgment”. Summary judgment is a U.S. judicial procedure that permits judges, in appropriate circumstances, to decide a case based on the documents and sworn written testimony in the form of affidavits. With this procedure, a summary judgment may be granted for one party when the undisputed facts and the law indicate there are no disputed issues. But if the sworn testimony from the parties contradicts one another on a crucial point, summary judgment is not appropriate, and oral testimony must be taken.

Use of summary disposition appears to be growing in domestic arbitration in the U.S. Internationally, arbitrators may be authorized by the parties to decide the case on the documents, as supplemented by any written testimony if the arbitrators believe they do not need additional information. If the arbitrators believe they need oral evidence, however, for example, when the written testimony is contradictory on key issues and credibility must be assessed, summary disposition may be considered inappropriate.

International arbitrators may have the inherent authority to decide the case on summary disposition with a written procedure,¹⁹² but with the new ICC Rules mandating an oral procedure

¹⁹¹ Id.

¹⁹² See Dalmia Dairy Indus., Ltd. v. National Bank of Pakistan, [1978] 2 Lloyd’s Rep. 223, 269-70 (arbitrator’s decision to rule on the basis of the documents without hearing testimony upheld); Richard Medalie, The Libyan Producers’ Agreement Arbitration: Developing Innovative Procedures in a Complex Multiparty Arbitration, 7 J. Int’l Arb. 7, 21 (June 1990) (arbitrators considered summary judgment motion).

if one of the parties requests,¹⁹³ and the UNCITRAL Draft Notes on Organizing Arbitral Proceedings stating that oral hearings are a fundamental right that must be respected,¹⁹⁴ if the parties desire the availability of summary disposition, it may be useful to authorize this procedure specifically.

7. Arbitrability

In many national laws and arbitral rules, arbitrators are given the authority to decide their own jurisdiction.¹⁹⁵ This is referred to as "competence-competence" or "Kompetenz-Kompetenz" (jurisdiction concerning jurisdiction). In First Options of Chicago, Inc. v. Kaplan,¹⁹⁶ the U.S. Supreme Court held that the question of whether a particular dispute is arbitrable is to be decided by the courts unless the parties agreed that the arbitrators will decide the arbitrability question.

In light of First Options, if the parties want the arbitrators to decide the arbitrability issue for an arbitration in the U.S., they must empower the arbitrators in their agreement. But empowering the arbitrators to decide arbitrability can mean one of three things: (1) the arbitrators may look at their jurisdiction without waiting for a court to do so (French model), (2) the arbitrators may decide their own jurisdiction in the first instance without court intervention until after an award is rendered, at which time a court may review jurisdiction (English model) or (3) the arbitrators may decide their own jurisdiction in a binding manner with no court review

¹⁹³ ICC Rules art. 20(2). Of course, an oral procedure does not necessarily mean that oral testimony will be allowed.

¹⁹⁴ UNCITRAL Draft Notes on Organizing Arbitral Proceedings ¶ 75.

¹⁹⁵ See UNCITRAL Model Law on International Commercial Arbitration art. 16(1).

¹⁹⁶ 514 U.S. 938, 115 S.Ct. 1920, 1923-24 (1995).

(German model).¹⁹⁷ Any authorization for the arbitrators to decide their own jurisdiction should specify which of these models is intended by the parties.

8. Consent to Appeal

The corollary to waivers of appeal¹⁹⁸ may be found in contract provisions broadening judicial review by specifically authorizing an appeal of arbitral awards for errors of law or findings of fact not based on substantial evidence. Provisions broadening judicial review have been upheld by federal courts in the United States,¹⁹⁹ although one court has noted that the parties' agreement may not broaden the courts' jurisdiction to review an arbitral award.²⁰⁰ A French court has gone even further and held not only that an arbitration clause cannot permit an appeal of an arbitrators' findings of fact and law under French law, but that an arbitration clause containing such a provision for increased judicial scrutiny was void and unenforceable.²⁰¹

If a party wishes to agree to arbitration using the ICC or LCIA Rules, but desires to maintain its right to seek vacatur under the New York Convention's defenses, then it should specifically delete, to that extent, the institutional rule that waives the right to seek recourse.²⁰² This will prevent any inconsistency or confusion.

¹⁹⁷ William Park, The Arbitrability Dicta in *First Options v. Kaplan*: What Sort of Kompetenz-Kompetenz Has Crossed The Atlantic?, 12 Arb. Int'l 137, 149-50 (1996).

¹⁹⁸ See § G(3), *supra*.

¹⁹⁹ LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 888 (9th Cir. 1997); Gateway Technologies, Inc. v. MCI Telecommunications, Inc., 64 F.3d 993 (5th Cir. 1995).

²⁰⁰ Chicago Typographical Union v. Chicago Sun-Times, 935 F.2d 1501, 1505 (7th Cir. 1991).

²⁰¹ Societe de Diseno v. Societe Mendes, 1995 Rev. arb. 263 (Cour d'appel de Paris - Oct. 27, 1994), cited in Schwartz, *supra* note 58, at 9.

²⁰² It is unlikely the ICC will refuse to administer an arbitration because of a party's desire to maintain its right to seek a vacatur under the New York Convention defenses.

9. Adaptation of Contracts and Gap Filling

The adaptation of contracts and gap filling represent two different situations, both of which are distinct from the typical powers of an arbitrator.²⁰³ Unless either agreed by the parties or permitted by applicable law, at least in some countries arbitrators may not possess the power to adapt contracts (often long-term agreements) to changed circumstances or to fill gaps that exist in a contract by adding a new term.²⁰⁴ To the extent they do so, it is likely to be justified as an exercise in finding and applying the intent of the parties.²⁰⁵

Emphasizing this distinction, the ICC at one time adopted Rules for Adaptation of Contracts. Parties could provide in their contract that any gaps be filled, or the agreement adapted to changed circumstances, by the procedure provided in the ICC Rules for Adaptation of Contracts. Those rules were distinct from the ICC Arbitration Rules; the procedure provided by those rules was not an arbitral proceeding, and any resulting decision was not an arbitral award and could not be enforced under the auspices of the New York Convention. Several years ago, however, the ICC abrogated its Rules for Adaption of Contracts because of non-use.

Parties may address this issue by expressly conveying or denying this power to the arbitrators or by ignoring it, in which event the arbitral panel may assume either that it has this power or that it does not. It may be useful for parties to determine whether the arbitrators possess this power under the applicable law, including the law of the place of arbitration and the law of the likely country of enforcement.

²⁰³ Redfern & Hunter, supra note 64, at 181-82; Bernardini, supra note 10, at 56.

²⁰⁴ Id. at 182-83.

²⁰⁵ Id. at 183.

10. Draft of Proposed Award

In some situations, the parties may wish to have the right to comment on, and correct any errors in, the arbitrators' award before it becomes final. If this is desired, the parties may provide that the arbitrators will submit to the parties an unsigned draft of their award and give the parties a specified time period (*e.g.*, ten days) to provide written comments on any alleged errors of fact, law, computation, or otherwise.²⁰⁶ Thereafter, the arbitrators will render their signed award, perhaps again within a specified time period. If a time period is specified as a deadline, it should be sufficient to allow the arbitrators to consider the comments and make any necessary changes to the award.

11. Class Actions

Some claimants have filed class action lawsuits, despite the existence of an arbitration clause in their contracts. Upon being referred to arbitration, they requested that U.S. courts certify them as representatives of a class of persons similarly situated in the arbitration proceeding, thus allowing them to recover in a representative capacity all damages suffered by the entire class.

U.S. courts have held, however, that they lack authority to certify a class action in an arbitration proceeding, unless the arbitration agreement authorizes class certification.²⁰⁷ Most companies will never want to include a class action authorization provision in an agreement, but if they do, they should expressly provide for it.

²⁰⁶ Since the ICC Court of International Arbitration has the right (and duty) under the ICC Rules to scrutinize awards before they are issued, a provision such as this might cause the ICC to refuse to administer the arbitration.

²⁰⁷ Champ v. Siegel Trading Co., 55 F.3d 269, 276-77 (7th Cir. 1995); Randolph v. Green Tree Financial Corp., 991 F. Supp. 1410, 1424 (M.D. Ala. 1997).

I. Related Clauses (Sometimes Included in the Arbitration Clause)

1. Notice

Under the New York and Panama Conventions, one of the few defenses to the enforcement of an award is the failure to receive proper notice of the appointment of an arbitrator or notice of the arbitration proceedings, or when a party is unable to present his case, perhaps because of a failure to receive notice of the hearing.²⁰⁸ It can prove very helpful in the event of an arbitration proceeding to include in the contract a notice provision, which specifies the name or title of the person to be given notice in the event of a dispute and the address to which the notice is to be sent. If the notice provision is not included within the arbitration clause, it may be helpful for the arbitration clause to state that any notices to be given involving arbitration may be provided to the person at the address specified in the notice provision of the contract.

A notice provision may prevent disputes over service issues (request for arbitration) and due process concerns (notice of the hearing). The issue of notice may arise when an award is given by default after a party fails to appear for the arbitration hearing.²⁰⁹ The government of Iran often raised the lack of proper notice as a defense to claims brought against it after the 1979 revolution.²¹⁰

2. Alternative Dispute Resolution (ADR) Procedures

Increasingly, parties are including provisions requiring the exhaustion of ADR procedures, including settlement negotiations or mediation, before arbitration proceedings may

²⁰⁸ New York Convention art. V(1)(b); Panama Convention art. 5(1)(b).

²⁰⁹ Maritime Int'l Nominees Establishment v. Republic of Guinea, 693 F.2d 1094, 1095, 1099 (D.C. Cir. 1983).

²¹⁰ Ulmer, supra note 97, at 1345.

be instituted. In fact, the terms “med-arb” (mediator acts as an arbitrator) and “co-med-arb” (one person acts as mediator and a different person acts as arbitrator) has come into common usage to describe a two-tiered procedure requiring mediation followed by arbitration.²¹¹ Some commentators have suggested “arb-med” or “arb-con”, in which the arbitrator may attempt settlement during the arbitration proceedings by acting as mediator or conciliator.²¹² Some provisions require a three-tier dispute resolution procedure: a meeting of senior executives to negotiate (occasionally calling for formal presentations by counsel to senior executives of the parties), and if the negotiations are unsuccessful within a certain time period, then the party may initiate mediation. If the mediation is unsuccessful within a defined time framework, then an arbitration proceeding may be filed.

So the parties do not get trapped in an endless series of negotiations or mediations, with one party claiming they have not concluded, it is important to set a deadline for each. Thus, if negotiation or mediation is a condition precedent to filing an arbitration proceeding, a time limit for satisfying the condition will allow the parties to move forward.

Some large construction projects have adopted complex, multi-tiered ADR procedures for resolving disputes, often with binding arbitration as the procedure of last resort. For example, the Channel Tunnel project created a two-tiered procedure in which all disputes would be referred first to a panel of three independent experts who would render a written decision within

²¹¹ David Elliott, Med/arb: Fraught with Danger or Ripe with Opportunity, 62 *Arbitration* 175, 181-82 (1996).

²¹² Alan Shilston, Arb-Med? Arb-Con is Preferable, 63 *Arbitration* 241, 242 (1997).

90 days, and if either party were dissatisfied with the experts' decision, then it could initiate an arbitration proceeding.²¹³

The Hong Kong Airport Core Programme promulgated a four-tiered ADR procedure:²¹⁴

- (1) an independent engineer's decision,
- (2) mediation,
- (3) adjudication through a formal evidentiary proceeding with a written decision within 42 days, and
- (4) arbitration.

Still other construction projects have included decisions from an authorized representative and a three-member Dispute Review Board as steps through which claims must proceed before an arbitration may be initiated.²¹⁵ In construction projects in Hong Kong, a Dispute Resolution Adviser may be appointed to identify potential disputes at an early stage, advise on the means of resolving the disputes and assist in their resolution.²¹⁶ Although decisions rendered in the pre-arbitral steps might ultimately be reversed by the arbitrators, many of these programs require the parties to comply with the preliminary rulings unless – and until – a different decision is issued.

These various ADR procedures may, of course, be combined in different ways as part of a dispute resolution clause. Whatever procedures are desired, however, it should be remembered that in designing the procedure there is virtue in simplicity.

²¹³ Anthony Connerty, The Role of ADR in the Resolution of International Disputes, 12 Arb. Int'l 47, 49 (1997).

²¹⁴ Id. at 54.

²¹⁵ Id. at 52-53.

²¹⁶ Henry Tsin, Dispute Resolution Adviser System in Hong Kong – Design & Development, 63 Arbitration 67, 68 (1997).

3. Governing Law

(a) Substantive Law and Conflicts Rules

It is generally desirable to specify in the contract the substantive law to govern the parties' disputes. A party may wish to omit such a clause, however, when the opposing party is insistent on a national law that is clearly unacceptable to the first party. This may occur when a host government insists on its own law in an investment contract. As a practical matter, of course, the private party may have to accede to the host government's insistence, but it may prefer no governing law clause if it has a choice.

A governing law clause may be viewed as selecting: (1) the conflicts rules to be followed to determine the substantive law, (2) the substantive law itself, (3) the procedural law, or (4) the law to determine the validity and effect of the arbitral clause ("*lex arbitri*").²¹⁷ Although a specification of the governing law without excluding the conflicts rules may be held merely to select a country's conflicts rules, the modern tendency is to find that it actually designates the substantive law to be applied.²¹⁸ Nevertheless, it is preferable to exclude the conflicts rules or to make it explicit that the chosen law is the substantive law of the country.²¹⁹

²¹⁷ Union of India v. McDonnell Douglas, (1993) 2 L.R. 48; Mozambique Buyer v. Netherlands Seller, Preliminary Award in ICC Case No. 5505 of 1987, in Collection of ICC Arbitral Awards 1986-1990 at 142, 146 (Kluwer 1994).

²¹⁸ EC Convention on the Law Applicable to Contractual Obligations (Rome Convention of 1980) art. 15; UNCITRAL Model Law on International Commercial Arbitration art. 28(1).

²¹⁹ Park, Arbitration of International Contract Disputes, *supra* note 64, at 1787.

(b) Procedural Law

Generally, parties do not specify in an arbitral clause the procedural law to be applied to the arbitration proceeding.²²⁰ In the absence of a choice, arbitrators typically apply the procedural law of the place of the arbitration.²²¹

Occasionally, parties may agree to a situs with an unusual procedural law. In that case, the parties may compromise by specifying a different procedural law.²²² But parties must be careful in doing so. Even if a procedural law other than that of the place of the arbitration is designated by the parties, the arbitrators will likely apply the mandatory rules of law of the place of the arbitration,²²³ which may result in conflicts with the designated procedural law, litigation over the resulting issues and enforceability problems. It is also possible, when a different procedural law is specified, that the countries of the situs and of the procedural law may both assert jurisdiction over the case.²²⁴

Applying a different country's procedural law than that of the situs may also lead to complications over the place where proceedings to vacate the award may be instituted. For

²²⁰ Ulmer, supra note 97, at 1342-43.

²²¹ India Company v. Pakistani Bank, Award in ICC Case No. 1512 of 1971, in Collection of ICC Arbitral Awards 1974-1985 at 3 (Kluwer 1990); Italian Claimant v. Belgian Respondent, Award in ICC Case No. 2272 of 1975, in Collection of ICC Arbitral Awards 1974-1985 at 11-12 (Kluwer 1990).

²²² In one case, a clause read: "Disputes hereunder shall be referred to arbitration, to be carried out by arbitrators named by the International Chamber of Commerce in Geneva in accordance with the arbitration procedure set forth in the Civil Code of Venezuela and in the Civil Code of France, with due regard for the law of the place of arbitration." Craig, Park & Paulsson, supra note 46, § 9.04 at 163. In that clause, the procedural law to be followed was unclear, confused and potentially conflicting, which could lead to challenges to the award. Id.

²²³ Klaus Lionnet, Should the Procedural Law Applicable to International Arbitration be Denationalised or Unified? – the Answer of the UNCITRAL Model Law, 8 J. Int'l Arb. 5, 7-8 (Sept. 1991).

²²⁴ See Union of India v. McDonnell Douglas, (1993) 2 L.R. 48; National Thermal Power Corp. v. Singer Corp., (1992) 3 S.C.C. 551 (India), 18 Y.B. Com. Arb. 403, 413 (1993).

example, may an action to vacate the award be brought in the country whose procedural law is applied (even though it was not the situs of the arbitration) or in the country of the situs (even though its procedural law does not apply) or both?²²⁵

The options for the drafter in handling the procedural law may be listed as follows:²²⁶

- (1) ignore the issue, which is the most common approach, in which case the arbitrators will decide which procedural law to apply;
- (2) designate the procedural law of the place of the arbitration;
- (3) specify the procedural law of a country other than that of the situs;
- (4) adopt a procedural law other than that of a country, such as the UNCITRAL Model Law on International Commercial Arbitration; or
- (5) exclude a procedural law and create the procedural rules in the arbitration clause itself.

If options 3, 4 or 5 are adopted, the parties may wish to specify explicitly that any mandatory procedural rules of the situs will apply and take precedence, thereby avoiding any arguable conflict.

(c) *Lex Arbitri*

Because the arbitration agreement stands as independent of, and separate from, the contract as a whole, its validity and effect may be subject to a law other than that of the contract as a whole.²²⁷ Generally, arbitration clauses do not include an explicit choice of the *lex arbitri*, perhaps because the parties assume the law of the contract will apply to this issue as well.²²⁸ But

²²⁵ See International Standard Elec. Corp. v. Bidas Sociedad Anonima Petrolera Industrial y Comercial, 745 F. Supp. 172, 176-78 (S.D.N.Y. 1990).

²²⁶ See Craig, Park & Paulsson, supra note 46, § 8.02 at 133-34.

²²⁷ Id. § 8.03 at 134.

²²⁸ Id.

it is well established that parties may select a law to govern the validity and effect of the arbitration clause that is different from either the law of the situs or the law governing the main contract.²²⁹

In the absence of a choice by the parties, arbitrators generally attempt to apply a *lex arbitri* that will validate the arbitration agreement. In doing so, arbitrators have reached differing results, at times applying the law specified in the governing law provision of the contract,²³⁰ the law of the situs²³¹ or the law of the place of contract performance and award enforcement.²³²

(d) Denationalized Law

Rather than selecting the law of a particular country, parties may sometimes prefer to designate denationalized law such as the *lex mercatoria*,²³³ international law or general principles of the law of civilized nations.²³⁴ A variant of this practice is to provide that the governing law will be the principles of a specified national law that are common to (or are not

²²⁹ Id. at 135.

²³⁰ Italian Principal v. Belgium Distributor, Final Award in ICC Case No. 6379 of 1990, in Collection of ICC Arbitral Awards 1991-1995 at 134, 137 (Kluwer 1997).

²³¹ Liechtenstein Claimant v. Austrian Defendant, ICC Award No. 5832 of 1988, in Collection of ICC Arbitral Awards 1986-1990 at 533, 534 (Kluwer 1994).

²³² German Claimant v. Greek Respondent, Award in ICC Case No. 953 of 1956, in Collection of ICC Arbitral Awards 1974-1985 at 17 (Kluwer 1990).

²³³ The existence of *lex mercatoria* – the law of merchants – as a subset of international law distinct from national law has been a subject of some controversy. See, e.g., Georges Delaume, Comparative Analysis as a Basis of Law in State Contracts: The Myth of the Lex Mercatoria, 63 Tul. L. Rev. 575, 576-77 (1989); Keith Highet, The Enigma of the Lex Mercatoria, 63 Tulane L. Rev. 613, 628 (1989). But see French Enterprise v. Yugoslav Subcontractor, Award in ICC Case No. 3540 of October 3, 1980, in Collection of ICC Arbitral Awards, 1974-1985 at 105, 106, 109-10 (Kluwer 1990) (applying *lex mercatoria*).

²³⁴ Some commentators have sought to define the contents of both the *lex mercatoria* and general principles of law. See Lord Justice Mustill, The New Lex Mercatoria: The First Twenty-five Years, in Liber Amicorum for the Rt. Hon. Lord Wilberforce at 149 (1987); Comment, General Principles of Law in International Commercial Arbitration, 101 Harv. L. Rev. 1816 (1988).

inconsistent with) either international law or general principles of the law of civilized nations.²³⁵ If this procedure is adopted, the provision should also specify the law to be applied if there are no common principles.²³⁶ This type of clause provides a safeguard against the application of unusual provisions of a host country's law.

Denationalized governing law clauses have been upheld by national courts.²³⁷ Both the ICC Rules and the AAA International Rules allow the arbitrators, in the absence of a choice of law by the parties, to apply such *rules of law* as they deem appropriate.²³⁸ The term "rules of law" is used, instead of the word "law", specifically to authorize arbitrators to apply denationalized law, rather than being restricted to applying only national law.²³⁹

(f) Placement of the Governing Law Provision

It has been suggested that the placement of the governing law provision in the contract – inside or outside the arbitration clause – may be significant in construing the provision.²⁴⁰ Since the procedural law and the *lex arbitri* may be different than the substantive law, placement of the governing law provision inside the arbitration clause might be interpreted as a choice of either

²³⁵ Libyan American Oil Co. v. Libya, 6 Y.B. Com. Arb. 89, 92 (1981); British Petroleum (Libya) Ltd. v. Libya, 5 Y.B. Com. Arb. 143, 149 (1980); Texaco Overseas Petroleum Co. v. Libya, 4 Y.B. Com. Arb. 177, 181 (1979).

²³⁶ Texaco Overseas Petroleum Co. v. Libya, 4 Y.B. Com. Arb. 177, 181 (1979).

²³⁷ See, e.g., Norsolor v. Pabalk Ticaret, Supreme Court of Austria, decision of 18 November 1982, cited in Park, Arbitration of International Contract Disputes, *supra* note 64, at 1787 n.7.

²³⁸ ICC Rules art. 17(1); AAA International Rules art. 28(1).

²³⁹ Marc Blessing, Choice of Substantive Law in International Arbitration, 14 J. Int'l Arb. 39, 56-57 (June 1997).

²⁴⁰ Yves Derains, The ICC Arbitral Process Part VIII: Choice of the Law Applicable to the Contract and International Arbitration, 6 ICC Int'l Ct. Arb. Bull. 10, 11 (May 1995).

the procedural law or the *lex arbitri*, and not of the substantive law. Thus, one commentator has suggested the governing law provision should be placed outside the arbitral clause, as a separate clause of the contract.²⁴¹

In one case, the contract provided in a separate clause that Syrian law applied, but the arbitration clause included a sentence that the arbitrators “shall judge according to general principles of law and justice.” The arbitrators rejected the argument that this sentence applied only to the procedural law or to the *lex arbitri*, deciding this was not the common intention of the parties.²⁴² Instead, the panel harmonized this sentence with the governing law clause, applying Syrian law, but holding that the sentence in the arbitration clause limited Syrian law, protecting the private party both from future modifications of Syrian law and from exorbitant provisions of the law that could work only to its disadvantage.²⁴³

(f) Drafting Considerations

It is beyond cavil that the specific language employed in drafting the governing law clause may be significant. For example, providing that “all disputes shall be *governed* by the law of _____” is not necessarily the same as a clause that provides “this agreement shall be *interpreted* in accordance with the law of _____”. At least two cases have restricted the latter clause by holding that the law selected applied only to issues of interpretation of the contract, while other issues would be resolved by law not specified in the contract.²⁴⁴ At least one other

²⁴¹ Id.

²⁴² Italian Enterprise v. Syrian Enterprise, Award in ICC Case No. 3380 of November 29, 1980, in Collection of ICC Arbitral Awards 1974-1985 at 96, 98 (Kluwer 1990).

²⁴³ Id. at 99.

²⁴⁴ Mobil Oil Iran v. Iran, 16 Iran-U.S. C.T.R. 3, 24 (14 July 1987); Ultimate Buyer v. Intermediary Buyer/Seller v. Primary Seller, Final Award in ICC Cases 7385 and 7402 of 1992, in Collection of ICC Arbitral Awards 1991-1995 at 209, 213 (Kluwer 1997).

case has noted that the term “principles of law”, as used in a governing law clause, does not rule out the application of principles of international law.²⁴⁵ Thus, the precise language used can determine whether the law selected applies to most issues in dispute, or only to certain restricted issues.²⁴⁶

4. Equitable Principles

Rather than deciding a case strictly on the basis of applicable law, under some circumstances, an arbitral panel may rule based on equitable principles. Generally, the arbitrators must be authorized to do so.²⁴⁷ This is usually accomplished by empowering the arbitrators either to act as *amiable compositeurs* or to decide the case *ex aequo et bono*.

Some authorities imply there is no real difference between the authority to act as *amiable compositeur* and to decide the case *ex aequo et bono*.²⁴⁸ But some commentators have suggested the difference is that an *amiable compositeur* does not have to apply the law strictly, but must still comply with mandatory rules of law, while arbitrators with the authority to act *ex aequo et bono* need not apply even mandatory legal principles, subject only to international public policy.²⁴⁹

²⁴⁵ Texaco Overseas Petroleum Co. v. Libya, 4 Y.B. Com. Arb. 177, 182 (1979).

²⁴⁶ As one commentator has noted, the governing law clause does not apply to all possible issues in the case; for example, it does not apply to issues of capacity of a party, a signator’s authority to sign a document or the insolvency of a company. Derains, supra note 239, at 16.

²⁴⁷ ICC Rules art. 17(3); AAA International Rules art. 28(3); LCIA Rules art. 22.4; UNCITRAL Rules art. 28(3).

²⁴⁸ See Karyn Weinberg, Equity in International Arbitration: How Fair is “Fair”? A Study of *Lex Mercatoria* and *Amiable Composition*, 12 B.U. Int’l L.J. 227, 231 n.26 (1994); Redfern & Hunter, supra note 64, at 38.

²⁴⁹ Christine Lecuyer-Thieffry & Patrick Thieffry, Negotiating Settlement of Disputes Provisions in International Business Contracts: Recent Developments in Arbitration and Other Processes, 45 Bus. Law. 577, 592-93 n.75 (1990) (discussing Swiss law).

A different view claims that *ex aequo et bono* means arbitrators have the authority to decide the case on equitable principles, with the discretion to mitigate the consequences of a strict application of the law.²⁵⁰ According to the same author, there are two primary limits on decisions taken under this authority: (1) mandatory provisions of law must still be applied, and (2) the authority to mitigate the law applies only to substantive law, not procedural law, which must be applied.²⁵¹ By contrast, *amiable compositeurs* are authorized by the parties to act as their agent to settle the dispute.²⁵² This authority represents a joint mandate to settle, allowing the arbitrators to compromise the parties' dispute. From this perspective, the concept of *amiable compositeur* is even broader than that of *ex aequo et bono*.²⁵³

Some contracts with governments have used their own language to permit arbitrators to decide disputes on equitable grounds: "This Agreement shall be construed according to the principles of good faith and good will,"²⁵⁴ and the arbitrators shall "judge according to general principles of law and justice."²⁵⁵

Given the confusion, parties are well advised to avoid these expressions and to specify precisely what authority they are conveying on the arbitrators. The possibilities may be categorized as follows:

²⁵⁰ Mauro Rubino-Sammartano, *Amiable Compositeur (Joint Mandate to Settle) and Ex Bono et Aequo (Discretionary Authority to Mitigate Strict Law): Apparent Synonyms Revisited*, 9 J. Int'l. Arb. 5, 9-10 (March 1992).

²⁵¹ *Id.* at 13.

²⁵² *Id.* at 14-15.

²⁵³ *Id.* at 16.

²⁵⁴ *Sapphire International Petroleum v. National Iranian Oil Co.*, 35 International Legal Reports 136 (1957).

²⁵⁵ *Italian Enterprise v. Syrian Enterprise*, Award in ICC Case No. 3380 of Nov. 29, 1980, in Collection of ICC Arbitral Awards 1974-1985 at 96, 99 (Kluwer 1990).

- (1) The arbitrators may decide the case based on principles of equity and good faith.
- (2) The arbitrators may decide the case based on principles of equity, but mandatory rules of law must be applied.
- (3) The arbitrators may decide the case based on principles of equity, and applicable law (including mandatory rules of law) need not be applied.
- (4) The arbitrators are authorized as the parties' agent to settle the parties' disputes, with the authority to impose a settlement equitable to the parties.

5. Waiver of Sovereign Immunity

The U.S. Foreign Sovereign Immunities Act (FSIA) provides that foreign governments and their agencies and instrumentalities are not immune from the jurisdiction of U.S. courts if they have explicitly or implicitly waived their sovereign immunity.²⁵⁶ The Act provides for an implicit waiver if the sovereign has agreed to arbitrate disputes capable of settlement by arbitration under U.S. law and the arbitration takes place (or is intended to take place) in the United States.²⁵⁷ Despite this statute, U.S. courts construe the implied waiver provisions of the FSIA narrowly.²⁵⁸ Therefore, it is generally desirable when dealing with a foreign sovereign to include an explicit waiver of sovereign immunity in the contract, using language as broad and all-encompassing as possible.

At a minimum, the clause should include a waiver of sovereign immunity from service of process, jurisdiction of courts (at least to the extent necessary to compel arbitration or enforce awards) and post-judgment execution or attachment of assets. A waiver of immunity from pre-judgment attachment of assets, injunctive relief, the appointment of a receiver, the filing of a *lis*

²⁵⁶ 28 U.S.C. § 1605(a)(1).

²⁵⁷ *Id.* § 1605(a)(6). See Maritime Int'l Nominees v. Republic of Guinea, 505 F. Supp. 141, 143 (D.D.C. 1981).

pendens, or other interim measures, may also be desirable,²⁵⁹ but difficult to negotiate. It is also helpful to include an acknowledgement that the transaction is commercial in nature since the FSIA only applies to commercial activities.²⁶⁰ Of course, the waiver should be irrevocable.

On the other side, a government may desire to limit its waiver to the subject matter of the arbitration, including the validity and interpretation of the arbitration clause, the arbitral procedure and the setting aside of the award.²⁶¹

6. Expert Determination

In lieu of arbitration for all controversies, parties may desire to provide for an expert determination for certain types of disputes that require particular expertise. Historically, an expert determination typically involved a valuation, such as a certifier in construction contracts determining the amount of an interim payment to be made to a contractor.²⁶² Today, expert determinations may be used for a variety of decisions, for example, for valuations, technical decisions and situations in which there is a possibility of a deadlock among companies to a consortium agreement over management issues.²⁶³ In such situations, it may be necessary to obtain a quick determination by an expert in the subject matter.

The ICC has established a Centre for Expertise, which has promulgated rules for conducting an expert determination. The ICC Centre for Expertise may be designated by the

²⁵⁸ Shapiro v. Republic of Bolivia, 930 F.2d 1013, 1016 (2d Cir. 1991).

²⁵⁹ Tatiana de Maekelt, Sovereign Immunity and Its Waiver, in *International Contracts* at 263-64 (Matthew Bender 1981).

²⁶⁰ 28 U.S.C. § 1605(a)(2).

²⁶¹ de Maekelt, supra note 258, at 237.

²⁶² Doug Jones, Is Expert Determination a 'Final and Binding' Alternative?, 63 *Arbitration* 213, 213-14 (1997).

parties in their agreement to administer an expert determination, in which case the Centre will locate and appoint an expert with the appropriate qualifications for the dispute, unless the parties agree on the identity of the expert.²⁶⁴

Under the ICC Rules for Expertise, the expert may make findings, recommend measures for the performance of the contract or for safeguarding the subject matter and supervising the performance of contractual obligations.²⁶⁵ The expert determination is not binding on the parties.²⁶⁶ The parties may, however, provide in their contract that the expert determination will be binding on them, but it will be binding only as a contractual undertaking.²⁶⁷ An expert determination is not an arbitral award and is not enforceable under the New York or Panama Conventions. To enforce the determination, a party must sue on it, but one commentator has observed that courts will generally enforce it.²⁶⁸

The parties should be careful not to mix the concepts of arbitration and expert determination for the same category of disputes because the two involve different procedures and are enforced differently, and a confusion of the two may lead an arbitral institution to treat them either as an arbitration or as an expert determination when the parties intended the opposite result. It may also lead to litigation over the institution's interpretation or the enforceability of a resulting award or determination.

²⁶³ See id. at 214.

²⁶⁴ ICC Rules for Expertise art. 5(2).

²⁶⁵ Id. art. 8(1)

²⁶⁶ Id. art. 8(3).

²⁶⁷ Id.; Jones, supra note 261, at 221.

²⁶⁸ Jone, supra note 261, at 221.

The parties should also take care in imposing deadlines. Strict time limits that are too brief may lead to the expiration of the expert's authority before a report can be rendered.²⁶⁹

7. Punitive & Consequential Damage Exclusion

Despite some state laws in the United States (e.g., New York) prohibiting arbitrators from awarding punitive damages,²⁷⁰ the U.S. Supreme Court has held that arbitral tribunals in the U.S. may award punitive damages unless they are forbidden to do so by the parties' agreement.²⁷¹ In the aftermath of this ruling, the AAA International Rules were amended to include a section providing the parties are deemed by adopting the rules to have waived the right to punitive damages except when a statute requires that compensatory damages be increased in a specified manner.²⁷²

Historically, international arbitral panels have refused to award punitive damages.²⁷³ A few arbitral panels of the Society of Maritime Arbitrators have recently awarded punitive damages, however, in the limited situation of a wrongful conversion of a cargo.²⁷⁴ The author has also recently seen clauses prohibiting an award of punitive damages, except when one party has been found to engage in delaying actions or dilatory tactics. Such a clause must be taken to mean that punitive damages are authorized when the legal basis for punitive damages are proved

²⁶⁹ It is recommended that any deadline provide no less than 60 days for the expert to issue a determination from the date of his appointment.

²⁷⁰ Garrity v. Lyle Stuart, Inc., 40 N.Y.2d 354, 386 N.Y.S.2d 831, 353 N.E.2d 793 (1976).

²⁷¹ Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 58, 60-61 (1995).

²⁷² AAA International Rules art. 28(5).

²⁷³ John Gotanda, Supplemental Damages in Private International Law § 6.4 at 226 (Kluwer 1998).

²⁷⁴ Id. at 228-29.

and delaying tactics are present since delaying tactics alone cannot constitute a sufficient basis for an award of punitive damages.

Because of the Mastrobuono case, parties may wish to include a provision expressly prohibiting an award of punitive damages. This may be particularly appropriate when U.S. parties are involved or when U.S. law governs the contract. Similarly, parties may wish to prohibit the arbitrators from awarding consequential or incidental damages.

8. Costs and Attorneys' Fees

It is often useful to provide how costs and attorneys' fees are to be apportioned. The rules of the major institutions authorize arbitrators to award costs against one of the parties or to allocate the costs between the parties.²⁷⁵ The rules generally define the costs to include: (1) the arbitrators' fees, (2) the arbitrators' expenses, (3) administrative fees, (4) fees of experts appointed by the tribunal, (5) expenses of experts appointed by the tribunal; and (6) reasonable legal fees of a party.²⁷⁶ In addition, the ICC Rules allow "other costs" to be taxed against a party.²⁷⁷ The AAA International Rules also allow an award of costs connected with an application for interim relief.²⁷⁸ The LCIA Rules do not define the costs, providing merely that "all or part of the legal or other costs" incurred by one party may be allocated to the other, unless

²⁷⁵ ICC Rules art. 31(3); AAA International Rules art. 31; LCIA Rules art. 28.2.

²⁷⁶ ICC Rules art. 31(1); AAA International Rules art. 31.

²⁷⁷ ICC Rules art. 31(1).

²⁷⁸ AAA International Rules art. 31.

otherwise agreed.²⁷⁹ The rationale for allocating costs is also spelled out in the LCIA Rules: “costs should reflect the parties’ relative success and failure in the award or arbitration.”²⁸⁰

In the United States, arbitrators are often reluctant to award attorneys' fees because under the American Rule, courts may not grant attorneys' fees absent statutory or contract authority.²⁸¹ In England and on much of the European Continent, national laws allow an award of attorneys' fees to the prevailing party on the theory that costs follow the event.²⁸² Therefore, European arbitrators are more accustomed to granting attorneys' fees.

If the parties desire the arbitrators to have the authority either to award, or not to award, costs and attorneys' fees, they may wish to grant or deny that power to the arbitrators explicitly. Generally, arbitral tribunals will enforce an arbitral clause authorizing an award of costs and attorneys' fees.²⁸³

9. Interest

It is a generally-accepted legal principle that interest may be awarded in conjunction with a damage award.²⁸⁴ In the U.S., there is virtually a presumption in favor of awarding pre-

²⁷⁹ LCIA Rules art. 28.3.

²⁸⁰ Id. art. 28.4.

²⁸¹ Gotanda, supra note 272, § 5.4(2).

²⁸² Id. § 5.4(1)(a)&(b) at 147-49.

²⁸³ Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v. Government of the State of R'as Al Khaimah, 14 Y.B. Com. Arb. 111, 121-22 (1989) (panel enforced a provision that all costs including solicitors' fees will be borne by the defaulting party).

²⁸⁴ Gotanda, supra note 272, § 2.1 at 12. Both the Principles of International Commercial Contracts, drafted by the International Institute for the Unification of Private Law (UNIDROIT Principles), and the U.N. Convention on Contracts for the International Sale of Goods, authorize an award of interest. Id. § 2.4 at 40-43.

judgment interest on arbitral awards.²⁸⁵ Some countries, however – particularly in the Middle East – prohibit an award of interest.²⁸⁶ One commentator has even opined that the mere mention of interest may result in the invalidation of the arbitration award or even the arbitration clause in some Middle Eastern countries, like Saudi Arabia.²⁸⁷

There are three issues that arise with respect to an award of interest: (1) whether interest may be awarded, (2) the date from which interest accrues and (3) the rate of interest to be awarded.²⁸⁸

Although some tribunals have awarded interest on the basis of general principles of law²⁸⁹ or principles of reasonableness and fairness,²⁹⁰ if the parties want an award to bear interest, they should expressly authorize it in their agreement,²⁹¹ especially since some tribunals have refused to award interest.²⁹² Arbitrators generally enforce clauses authorizing an award of interest.²⁹³ Interest may be an important part of any award, particularly if there is a significant delay between the event giving rise to the claim and the arbitration award.²⁹⁴

²⁸⁵ In re Waterside Ocean Navigation Co., 737 F.2d 150, 153-54 (2d Cir. 1984).

²⁸⁶ Gotanda, supra note 272, § 2.3(6) at 34.

²⁸⁷ Bond, supra note 1, at 14. But see Gotanda, supra note 271, § 2.3(6) at 36 n.118 (“In Saudi Arabia . . . banks charge ‘commission’ or ‘administrative’ costs for what some argue amounts to interest.”).

²⁸⁸ Gotanda, supra note 272, § 2.1 at 12.

²⁸⁹ See id. § 2.5(1)(c) at 50.

²⁹⁰ Id. § 2.5(1)(d) at 51.

²⁹¹ Ulmer, supra note 97 at 1347.

²⁹² Gotanda, supra note 272, § 2.5(2) at 53.

²⁹³ Id. § 2.5(1)(a) at 45.

²⁹⁴ Id. § 2.1 at 11, citing KCA Drilling, Ltd. v. Sonatrach, ICC Case No. 5651 (awarding \$23 million in damages and \$26 million in interest).

The parties may also wish to specify the date from which interest accrues. The agreement may provide that a contract breach will occur if a party does not comply with its obligations by a certain date, in which event interest will run from that date.²⁹⁵ If no such date is specified, many countries' laws provide that interest will accrue from the date of a demand for performance.²⁹⁶

With respect to the rate of interest, parties may leave it to the arbitrators' discretion, specify it at a set rate, such as the maximum legal rate provided by the law of a given jurisdiction, or base it on a benchmark like the London Inter-Bank Offering Rate (LIBOR) or the prime rate of a named bank.²⁹⁷ The parties may also provide that only simple interest may be awarded or they may authorize compound interest. Generally, tribunals award simple interest, but a few have rendered awards including compound interest.²⁹⁸

Finally, parties should know that if they do not address the question of interest, the arbitrators may struggle because of the lack of consensus as to whether the authority to award interest is a matter of substantive or procedural law.²⁹⁹ Some nations consider the question of interest to be a matter of substantive law, while others consider it procedural, and still others deem the authority to award interest as substantive, but the date of accrual and the rate to be procedural.³⁰⁰ The parties may avoid disputes over these questions by resolving them in their agreement.

²⁹⁵ Gotanda, supra note 272, § 2.1 at 12.

²⁹⁶ Id.

²⁹⁷ Ulmer, supra note 97, at 1347.

²⁹⁸ Gotanda, supra note 272, § 2.5(1)(d) at 53.

²⁹⁹ Id. § 2.5(1)(b) at 48.

³⁰⁰ Id.

10. Currency of the Award

When damages may be specified in different currencies, there are three issues that may arise: (1) the currency in which the award should be stated, (2) the date for converting from the currency in which damages are calculated into the currency in which the award is rendered (in situations in which such a conversion is necessary) and (3) the exchange rate that should be used for the conversion, when necessary.³⁰¹

The dates that may be selected for conversion include: (1) the date of the breach of the contract, (2) the date of issuance of the award or (3) the date on which the award is ordered to be paid.³⁰² The most common dates are the breach date and the award date.³⁰³

With respect to the exchange rate, there are also three possibilities that have been used by arbitral tribunals: (1) the official rate, (2) the market rate and (3) the published rate.³⁰⁴ The published rates used include those found in the New York Times, the Wall Street Journal and the International Financial Statistics of the International Monetary Fund.³⁰⁵

Instead of leaving the decision entirely to the arbitrators, the parties may decide these issues in the contract. In fact, an award may be easier to enforce if the arbitrators are required to state it in a single, specified currency.³⁰⁶ U.S. dollars are especially popular for this purpose because the exchange rate is easily ascertainable, institutions like the ICC calculate costs in this

³⁰¹ Id., § 4.1 at 95, & § 4.4 at 127.

³⁰² Id. § 4.1 at 94.

³⁰³ Id. § 4.4 at 127.

³⁰⁴ Id. § 4.4(3) at 140.

³⁰⁵ Id. at 140-41.

currency and many parties' assets are denominated in U.S. dollars, thus reducing the risks of currency fluctuations.³⁰⁷

J. Special Drafting Considerations for ICSID Arbitration

One advantage of ICSID arbitration lies in the ICSID Convention,³⁰⁸ which supports the ICSID Arbitration Rules. Under the Convention, a government party is required to recognize an ICSID award "as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."³⁰⁹ An ICSID award may only be appealed by means of the procedure provided in the ICSID Convention.³¹⁰

Unlike any other arbitral institutions, ICSID imposes jurisdictional requirements that must be met in order to arbitrate before ICSID. Thus, counsel must take special care in drafting an ICSID arbitral clause. The jurisdictional requirements for ICSID may be summarized as follows:

1. The arbitration must involve an *investment* dispute.
2. One of the parties to the dispute must be a State which is a party to the ICSID Convention ("Contracting State") or a constituent subdivision or agency of a Contracting State. For a State's subdivision or agency, the State must *designate* the subdivision or agency to ICSID as an entity authorized to arbitrate under the auspices of ICSID.

³⁰⁶ Ulmer, *supra* note 97, at 1345-46. See ACLI, Ltd. (A.C. Israel/Woodhouse Co., Ltd.) v. Cominco, Ltd., (1985) 61 BCLR 177, 62 BCLR Xli (note) (arbitrator may make award in the currency referred to in the contract).

³⁰⁷ Id. at 1346.

³⁰⁸ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, done Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 475 U.N.T.S. 195 (ICSID Convention).

³⁰⁹ ICSID Convention art. 54(1). See Societe L.T.D. Benvenuti et Bonfant v. Government of the People's Republic of the Congo, 26 June 1981 (Cour d'Appel de Paris, 1st chambre supp.), 7 Y.B. Com. Arb. 159, 160-61 (1982).

³¹⁰ ICSID Convention art. 52.

3. The other party must be a private party that is a national of another Contracting State. Nationality is determined as of the date of consent to ICSID arbitration, which may occur when a contract containing an ICSID arbitration clause is signed. If the private party is a company locally incorporated in the host country, it may still qualify as a national of another Contracting State for jurisdictional purposes of ICSID if the parties agree, explicitly or implicitly, to treat it as a national of another Contracting State and if it is, in fact, foreign controlled.³¹¹
4. The Contracting State involved in the dispute must *consent* in writing to ICSID jurisdiction. Consent may be given in the parties' contract, in a nation's internal law,³¹² in a bilateral investment treaty,³¹³ or in a multilateral treaty, such as the North American Free Trade Agreement (NAFTA).

In drafting the ICSID arbitration clause, counsel should take these jurisdictional requirements into account, and make sure the parties comply in the agreement, or otherwise, with each.

Because of the jurisdictional requirements of ICSID, it is wise to provide in the arbitration clause for a back-up institution to administer the arbitration in the event ICSID jurisdiction fails.

K. Conclusion

The preceding discussion is intended to provide parties, counsel and negotiators with a practical, up-to-date list of the provisions that may be included in an arbitration clause contained in an international commercial contract. While this list attempts to be virtually exhaustive,

³¹¹ Amco Asia Corp. v. Indonesia, ICSID ARB/81/1 (award dated 1 February 1994) (agreement to treat the locally-incorporated private company as a national of another Contracting State can be derived from the context of the arbitration agreement); Societe Quest-Africaine des Bétons Industriels v. Republic of Senegal, ICSID ARB/82/1, Award of 1 August 1984, 17 Y.B. Com. Arb. 42, 48 (1992) (sufficient for ICSID jurisdiction that ultimate controlling company, although not the immediate parent, was a national of a Contracting State); Vacuum Salt Products, Ltd. v. Republic of Ghana, ICSID ARB/92/1 (award dated 16 February 1994) (for investment in Ghana, company owned 20% by Greek and remainder by Ghanians was not foreign controlled as a matter of fact for purposes of ICSID jurisdiction, and therefore, ICSID did not have jurisdiction even though parties agreed to treat it as foreign controlled).

³¹² Southern Pacific Properties, Ltd. v. Arab Republic of Egypt, ICSID ARB/84/3 (award dated May 20, 1992) (ICSID jurisdiction founded on the Egyptian foreign investment law of 1974).

³¹³ Asian Agricultural Products, Ltd. v. Republic of Sri Lanka, ICSID ARB/87/3 (award of June 21, 1990) (ICSID jurisdiction founded on the 1980 U.S.-Sri Lankan Treaty for the Promotion and Protection of Investments).

counsel will sometimes find it necessary to develop new provisions significant to an unusual situation. Also included in the preceding discussions are the various factors essential to the proper drafting of each provision.

It is hoped that negotiators will find this guide useful in determining which provisions must be included in an arbitration clause and which may be negotiated. Counsel may also find this paper helpful in evaluating the enforceability of the company's arbitration clauses.

Attached to this paper are a Checklist for Drafting Arbitration Clauses, a Comparative Chart of International Arbitral Rules, a Comparative Chart of Arbitration Laws of Selected International Sites, and an inventory of arbitral provisions organized into Basic, General and Complex Arbitration Clauses.