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International Commercial Arbitration Clause

This excerpt of a Standard Clause on our website can be used when drafting an arbitration clause for many types of international commercial agreements. This Standard Clause has integrated notes with important explanations and drafting tips. For the complete, online version of this resource, visit practicallaw.com.

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An arbitration clause must include:

- The disputes the clause covers, commonly referred to as the scope of the arbitration agreement.
- An unambiguous statement that all of the disputes covered under the arbitration agreement are to be resolved only through arbitration.
- An unequivocal endorsement of arbitration to resolve the defined disputes in a binding and final manner.

Without all of these elements, an arbitration clause may be unenforceable.

In addition, an arbitration clause should indicate:

- The number of arbitrators and the method for their appointment.
- The place of arbitration or arbitral seat.
- The language of the arbitration, if the parties do not share the same language.

Although the absence of these elements may not render the clause unenforceable, it may delay the commencement or continuation of an arbitration while the parties argue over the appointment of arbitrators, the arbitral seat or the language of the arbitration.

Beyond these elements, arbitration allows the parties to select other features when designing their dispute resolution process to best suit their needs.



Search [Drafting International Arbitration Agreements](#) for more on issues that counsel should consider when finalizing an arbitration agreement.

SELECTED PROVISIONS AND DRAFTING NOTES

1.1 Arbitration.

(a) Any dispute, controversy or claim arising out of or relating to this Agreement or the breach, termination or validity thereof ("**Dispute**"), shall be submitted to mandatory, final and binding arbitration before [PREFERRED ARBITRAL INSTITUTION], in accordance with [RULES OF PREFERRED ARBITRAL INSTITUTION] in effect at the time of filing of the demand for arbitration, with the arbitration administered by [PREFERRED ARBITRAL INSTITUTION], subject to the provisions of this Section 1.1, pursuant to the United States Federal Arbitration Act, 9 U.S.C., Section 1, *et seq.*

DRAFTING NOTE

SCOPE AND SELECTION OF THE INSTITUTION

Mandatory and Exclusive Nature of Arbitration

The arbitration clause must specify that arbitration is the exclusive dispute resolution mechanism between the parties. It is imperative that the clause use the word "shall," instead of the word "may." For example, "[a]ny dispute . . . shall be determined by arbitration."

Occasionally, however, one of the parties may want to reserve the option to choose between arbitration and litigation. Clauses

that include this option are referred to as sole option or asymmetrical arbitration clauses.

Scope

The arbitration clause should clearly delineate the disputes that fall within its scope. The scope of the clause should be as broad as possible, allowing all potential disputes between the parties relating to the agreement to be resolved only through arbitration. Otherwise, a party may argue that a particular claim lies outside of the arbitration agreement and should be brought in court, thereby making parallel

proceedings possible. (See *IBA: Guidelines for Drafting Arbitration Clauses* (IBA Drafting Guidelines).)

To cover all potential claims relating to the agreement, including not only contractual, but also potential tort and statutory claims, the language in Section 1.1(a) may be used, which is commonly referred to as a broad arbitration clause.

AD HOC VERSUS ADMINISTERED ARBITRATION

Arbitration administered by an arbitral institution is often preferable to ad hoc arbitration because it usually results in a more predictable procedural process. The benefits of administered arbitration include that the arbitral institution:

- Offers administrative services, such as:
 - confirming the appointment of arbitrators nominated by the parties; and
 - appointing arbitrators when the parties cannot agree.
- Fixes and collects arbitrators' fees.
- Considers challenges to the appointment of an arbitrator.

With an institution standing behind the arbitration, one party may avoid difficulties if the other party fails to comply with the arbitration agreement.

Ad hoc Arbitration

In an ad hoc arbitration, there is no arbitral institution in charge of administering the proceeding from beginning to end. Therefore, the parties need not pay administrative fees. However, in large commercial disputes, administrative fees are relatively lower than attorneys' and experts' fees and therefore should not determine whether the parties agree to administered arbitration.

Administered Arbitration

If the parties opt for institutional or administered arbitration, the arbitration agreement should make clear that the

parties are choosing an institution to act as the administrator, thereby preventing a party from later arguing that the arbitration should be non-administered. Traditionally, courts have interpreted an arbitration clause stating that an arbitration will be held "in accordance with" an arbitral institution's rules to mean by inference that the designated institution will administer the arbitration (see *York Research Corp. v. Landgarten*, 927 F.2d 119, 121-23 (2d Cir. 1991); *St. Lawrence Explosives Corp. v. Worthy Bros. Pipeline Corp.*, 111 F.3d 124 (table), 1997 WL 187332, at *1 (2d Cir. 1997); *Life Receivables Trust v. Goshawk Syndicate 102 at Lloyd's*, 888 N.Y.S.2d 458, 459 (1st Dep't 2009), *aff'd*, 14 N.Y.3d 850, *cert. den'd* 131 S. Ct. 463 (2010)).

However, the First Department of the New York Supreme Court Appellate Division held that an arbitration clause including the phrase "a decision of the matter so submitted shall be rendered promptly in accordance with the commercial rules of the American Arbitration Association (AAA) . . ." was only "a choice of law clause" and did not reflect an agreement that the arbitration be administered by the AAA (*Nachmani v. By Design, LLC*, 901 N.Y.S.2d 838, 839 (1st Dep't 2010)). The *Nachmani* decision therefore counsels in favor of an arbitration clause expressly stating that the arbitral institution chosen by the parties will administer the arbitration.

The clause should also specify that the arbitral rules of the chosen institution will govern the arbitration, even though many institutional rules require arbitrations administered by that institution to proceed under that institution's rules. Certain institutions have more than one set of rules, however, and counsel should expressly select the appropriate body of rules.



Search [Standard Arbitration Clauses for the AAA, ICDR, ICC and UNCITRAL](#) and [Standard Recommended Arbitration Clauses](#) for sample arbitration clauses recommended by several arbitral institutions.

(ii) The language of the arbitration shall be [LANGUAGE]. The place of arbitration shall be [[CITY], [COUNTRY]].

DRAFTING NOTE

THE PLACE OF ARBITRATION

The place or seat of the arbitration should be a venue that recognizes arbitration as a valid dispute resolution mechanism and is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the New York Convention) (21 U.S.T. 2517, 330 U.N.T.S. 3) (enabling legislation codified at 9 U.S.C. § 201). There are currently more than 140 parties to the New York Convention.

The New York Convention has two main functions:

- First, it provides that “[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration” (*New York Convention, Art. II(1)*).
- Second, “[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon” save for limited circumstances where recognition and enforcement may be refused (*New York Convention, Arts. III and V*).

The chosen place of arbitration should be known to support, and not unduly interfere

with, arbitration. For example, the parties should ensure that the courts at the place of arbitration allow for judicial injunctive relief in aid of arbitration to provide for the enforcement of the arbitration agreement or otherwise award interim relief.

Unless the parties agree otherwise, the law of the seat is also the governing arbitration law, also known as the procedural law. The governing law of the underlying agreement, usually set out in a section of the agreement separate from the arbitration clause, is generally understood as the substantive law of the agreement governing the rights and obligations of the parties, but not the procedural law of the arbitration. The parties should ensure that the choice of law clause does not also contain forum selection language that contradicts the arbitration agreement, thereby jeopardizing its enforcement. Additionally, an agreement should not contain two or more conflicting arbitration clauses.

The law of the seat also establishes the nationality of the award. The parties or the tribunal may choose to conduct hearings in another location, but this will not change the designated seat for legal purposes.

Usually a party seeking to set aside an award should do so in the seat (that is, the place where the award was issued).

(iii) [. . .]

(iv) By agreeing to arbitration, the Parties do not intend to deprive any court of its jurisdiction to issue a pre-arbitral injunction, pre-arbitral attachment, or other order in aid of arbitration proceedings and the enforcement of any award. Without prejudice to such provisional remedies as may be available under the jurisdiction of a court, the Tribunal shall have full authority to grant provisional remedies and to direct the Parties to request that any court modify or vacate any temporary or preliminary relief issued by such court, and to award damages for the failure of any Party to respect the arbitral tribunal’s orders to that effect. In any such judicial action: (a) each of the Parties irrevocably and unconditionally consents to the [exclusive] jurisdiction and venue of the federal or state courts located in [[CITY], [COUNTRY]] (the “[COUNTRY] Courts”) for the purpose of any pre-arbitral injunction, pre-arbitral attachment, or other order in aid of arbitration proceedings, and to the non-exclusive jurisdiction of such courts for the enforcement

of any judgment on any award; (b) each of the Parties irrevocably waives, to the fullest extent they may effectively do so, any objection, including any objection to the laying of venue or based on the grounds of *forum non conveniens* or any right of objection to jurisdiction on account of its place of incorporation or domicile, which it may now or hereafter have to the bringing of any such action or proceeding in any [COUNTRY] Courts; and (c) each of the Parties irrevocably consents to service of process by first-class certified mail, return receipt requested, postage prepaid.

DRAFTING NOTE

JUDICIAL INJUNCTIVE RELIEF IN AID OF ARBITRATION

Authority to Grant Injunctive Relief

The rules of most arbitral institutions vest in the arbitral tribunal the power to issue injunctive relief. Nevertheless, the parties should make clear in their arbitration clause that the arbitral tribunal has this authority. The parties also should consider adding a provision allowing a party to seek injunctive relief in the courts to aid in arbitration proceedings.

Injunctive Relief Before Constitution of a Tribunal

Ensuring that a party may avail itself of judicial relief in aid of arbitration is important because it may wish to seek this type of relief before the constitution of the tribunal. For example, Company A commences arbitration against Company B according to their arbitration agreement. Before the constitution of the tribunal, Company B attempts to dilute its assets and divert them beyond the reach of Company A, the tribunal and the courts in the place of arbitration. To prevent Company B from doing this, Company A may need to seek court intervention.

For this reason, arbitration clauses often include a provision allowing a party to seek injunctive relief in aid of arbitration. Insofar as judicial relief in the place of arbitration is concerned, this provision may be unnecessary because the applicable statute or case law may provide for judicial assistance in aid of arbitration. Nonetheless, it is useful to clarify the parties' intent to be bound by interim judicial relief and, as appropriate, permit judicial action in aid of arbitration in a place other than the seat of the arbitration.

Emergency Arbitrator

Several arbitral institutions have rules providing for an emergency arbitrator to be appointed specifically to address requests for interim relief pending the constitution of the tribunal. These emergency procedures are welcome, but they may not effectively address the needs of a party facing a recalcitrant opponent who refuses to recognize the legitimacy of the arbitration process. In such cases, judicial relief may be more effective.

The proposed language of the first two sentences in the sample subclause makes clear that the designated courts and the arbitral tribunal both have the power to issue injunctive relief in aid of arbitration.

Designating an Exclusive Judicial Forum That May Grant Injunctive Relief in Aid of Arbitration

The advantages of designating an exclusive jurisdiction for the granting of injunctive relief, which is normally the jurisdiction where the arbitration is seated, are that:

- The parties know in advance where any court proceedings may be brought.
- It reduces the risk of a party seeking to undermine the arbitration by bringing judicial proceedings in a foreign state (for example, its state of residence, where the party may perceive it will receive a more favorable decision or delay the arbitration).

The disadvantage is that a party limits its ability to seek judicial injunctive relief to a single forum, which may reduce the effectiveness of the relief if the chosen forum is not the place of residence of the party against whom the relief is sought. Therefore, where a party seeks relief requiring enforcement in another jurisdiction (for example, where it needs to enjoin the

opposing party from selling assets located in a jurisdiction other than the selected forum), that type of relief may be foreclosed by the exclusive forum selection clause.

Even if the parties choose an exclusive forum in which to seek judicial injunctive relief, they should not provide that any venue has exclusive jurisdiction over actions brought to

enforce a judgment on any award. A party must be free to enforce an award anywhere the opposing party may have assets.



Search [Interim, Provisional and Conservatory Measures in International Arbitration](#) for more on the range of interim measures available in the context of international arbitration.

(v) – (vi) [. . .]

(vii) [If a claim or Dispute arises under this Agreement, any Party [shall/may] request for the [TITLES OF COMPANY OFFICERS] to meet within [NUMBER] days at a mutually agreed time and place to discuss and negotiate the Dispute. The meeting may be held via telephone conference.

If the claim or Dispute has not been resolved by negotiation within [NUMBER] days after the scheduled meeting provided for above, then the [TITLES OF COMPANY OFFICERS] [shall/may] refer the matter to the [TITLES OF SENIOR COMPANY OFFICERS] of each Party who shall have authority to settle the Dispute (the **“Senior Representatives”**). The Senior Representatives will meet within [NUMBER] days after the end of the [NUMBER]-day period referred to above at a mutually agreeable time and place. The meeting may be held via telephone conference. In the event that the Senior Representatives are unable to resolve the claim or Dispute by negotiation within [NUMBER] days after their scheduled meeting, then any Party shall have the right to submit the Dispute to arbitration in accordance with the following arbitration clause. A party may submit the dispute to arbitration if any party fails to respond to a request to meet.]

DRAFTING NOTE

SETTLEMENT NEGOTIATIONS AS A PRECONDITION TO ARBITRATION

The parties may wish to provide for the option of negotiations before commencement of an arbitration. Counsel may consider the optional language above for pre-arbitration negotiations, which may be mandatory or permissive.

The arbitration clause should clearly state whether pre-arbitration negotiations are

mandatory. If they are, the clause should set out clear time limits and either party should be entitled to commence an arbitration when they expire. This is necessary to avoid delays and disputes about whether:

- The parties have complied with a negotiation provision.
- A party may commence arbitration, and if so, when.

(See *IBA Drafting Guidelines, para. 87.*)

(viii) – (xi) [. . .]



For more on drafting clauses concerning the procedure for appointing arbitrators, providing for interim and provisional relief, and the payment of costs, among others, see the complete, online version of this resource. Search [International Commercial Arbitration Clause](#).