

IBA GUIDELINES

I. Introduction

1. The purpose of these Guidelines is to provide a succinct and accessible approach to the drafting of international arbitration clauses. Poorly drafted arbitration clauses may be unenforceable and often cause unnecessary cost and delay. By considering these Guidelines, contract drafters should be able to ensure that their arbitration clauses are effective and adapted to their needs.

2. The Guidelines are divided into five sections (in addition to this introduction). The first section offers basic guidelines on what to do and not to do. The second section addresses optional elements that should be considered when drafting arbitration clauses. The third section addresses multi-tier dispute resolution clauses providing for negotiation, mediation and arbitration. The fourth section discusses the drafting of arbitration clauses for multiparty contracts, and the fifth section considers the drafting of arbitration clauses in situations involving multiple, but related contracts.

II. Basic Drafting Guidelines

Guideline 1: The parties should decide between institutional and ad hoc arbitration.

Comments:

3. The first choice facing parties drafting an arbitration clause is whether to opt for institutional or ad hoc arbitration.

4. In institutional (or administered) arbitration, an arbitral institution provides assistance in running the arbitral proceedings in exchange for a fee. The institution can assist with practical matters such as organizing hearings and handling communications with and payments to the arbitrators. The institution can also provide services such as appointing an arbitrator if a party defaults, deciding a challenge against an arbitrator and scrutinizing the award. The institution does not decide the merits of the parties' dispute, however. This is left entirely to the arbitrators.

5. Institutional arbitration may be beneficial for parties with little experience in international arbitration. The institution may contribute significant procedural 'know how' that helps the arbitration run effectively, and may even be able to assist when the parties have failed to anticipate something when drafting their arbitration clause. The services provided by an arbitral institution are often worth the relatively low administrative fee charged.

6. If parties choose administered arbitration, they should seek a reputable institution, usually one with an established track record of administering international cases. The major arbitral institutions can administer arbitrations around the world, and the arbitral proceedings do not need to take place in the city where the institution is headquartered.

7. In ad hoc (or non-administered) arbitration, the burden of running the arbitral proceedings falls entirely on the parties and, once they have been appointed, the arbitrators. As explained below (Guideline 2), the parties can facilitate their task by selecting a set of arbitration rules designed for use in ad hoc arbitration. Although no arbitral institution is involved in running the arbitral proceedings, as explained below (Guideline 6), there still is a need to designate a neutral third party (known as an 'appointing authority') to select arbitrators and deal with possible vacancies if the parties cannot agree.

Guideline 2: The parties should select a set of arbitration rules and use the model clause recommended for these arbitration rules as a starting point.

Comments:

8. The second choice facing parties drafting an arbitration clause is selection of a set of arbitration rules. The selected arbitration rules will provide the procedural framework for the arbitral proceedings. If the parties do not incorporate an established set of rules, many procedural issues that may arise during arbitral proceedings should be addressed in the arbitration clause itself, an effort that is rarely desirable and should be undertaken with specialized advice.

9. When the parties have opted for institutional arbitration, the choice of arbitration rules should always coincide with that of the arbitral institution. When the parties have opted for ad hoc arbitration, the parties can select arbitration rules developed for non-administered arbitration, eg, the Arbitration Rules developed by the United Nations Commission on International Trade Law ('UNCITRAL'). Even if they do so, the parties should designate an arbitral institution (or another neutral entity) as the appointing authority for selection of the arbitrators (see paragraphs 31-32 below).

10. Once a set of arbitration rules is selected, the parties should use the model clause recommended by the institution or entity that authored the rules as a starting point for drafting their arbitration clause. The parties can add to the model clause, but should rarely subtract from it. By doing so, the parties will ensure that all the elements required to make an arbitration agreement valid, enforceable and effective are present. They will ensure that arbitration is unambiguously established as the exclusive dispute resolution method under their contract and that the correct names of the arbitral institution and rules are used (thus avoiding confusion or dilatory tactics when a dispute arises). The parties should assure that language added to a model clause is consistent with the selected arbitration rules.

Recommended Clause:

11. For an institutional arbitration clause, the website of the chosen institution should be accessed in order to use the model clause proposed by the institution as a basis for drafting the arbitration clause. Some institutions have also developed clauses that are specific to certain industries (eg, shipping).

12. For an ad hoc arbitration designating a set of rules, the website of the entity that issues such rules should be accessed in order to use the entity's model clause as a basis for drafting the arbitration clause.

13. In those instances where contracting parties agree to ad hoc arbitration without designating a set of rules, the following clause can be used for two-party contracts:

All disputes arising out of or in connection with this agreement, including any question regarding its existence, validity or termination, shall be finally resolved by arbitration.

The place of arbitration shall be [city, country].

The language of the arbitration shall be [...].

The arbitration shall be commenced by a request for arbitration by the claimant, delivered to the respondent. The request for arbitration shall set out the nature of the claim(s) and the relief requested.

The arbitral tribunal shall consist of three arbitrators, one selected by the claimant in the request for arbitration, the second selected by the respondent within [30] days of receipt of the request for arbitration, and the third, who shall act as presiding arbitrator, selected by the two parties within [30] days of the selection of the second arbitrator. If any arbitrators are not selected within these time periods, [the designated appointing authority] shall, upon the request of any party, make the selection(s).

If a vacancy arises, the vacancy shall be filled by the method by which that arbitrator was originally appointed, provided, however, that, if a vacancy arises during or after the hearing on the merits, the remaining two arbitrators may proceed with the arbitration and render an award.

The arbitrators shall be independent and impartial. Any challenge of an arbitrator shall be decided by [the designated appointing authority].

The procedure to be followed during the arbitration shall be agreed by the parties or, failing such agreement, determined by the arbitral tribunal after consultation with the parties.

The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, validity or effectiveness of the arbitration agreement.

The arbitral tribunal may make such ruling in a preliminary decision on jurisdiction or in an award on the merits, as it considers appropriate in the circumstances.

Default by any party shall not prevent the arbitral tribunal from proceeding to render an award.

The arbitral tribunal may make its decisions by a majority. In the event that no majority is possible, the presiding arbitrator may make the decision(s) as if acting as a sole arbitrator.

If the arbitrator appointed by a party fails or refuses to participate, the two other arbitrators may proceed with the arbitration and render an award if they determine that the failure or refusal to participate was unjustified.

Any award of the arbitral tribunal shall be final and binding on the parties. The parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made. Enforcement of any award may be sought in any court of competent jurisdiction.

Guideline 3: Absent special circumstances, the parties should not attempt to limit the scope of disputes subject to arbitration and should define this scope broadly.

Comments:

14. The scope of an arbitration clause refers to the type and ambit of disputes that are subject to arbitration. Absent particular circumstances compelling otherwise, the scope of an arbitration clause should be defined broadly to cover not only all disputes 'arising out of' the contract, but also all disputes 'in connection with' (or 'relating to') the contract. Less inclusive language invites arguments about whether a given dispute is subject to arbitration.

15. In certain circumstances, the parties may have good reasons to exclude some disputes from the scope of the arbitration clause. For example, it may be appropriate to refer pricing and technical disputes under certain contracts to expert determination rather than to arbitration. As another example, licensors may justifiably wish to retain the option to seek orders of specific performance and other injunctive relief directly from the courts in case of infringement of their intellectual property rights or to submit decisions on the ownership or validity of these rights to courts.

16. The parties should bear in mind that, even when drafted carefully, exclusions may not avoid preliminary arguments over whether a given dispute is subject to arbitration. A claim may raise some issues that fall within the scope of the arbitration clause and others that do not. To use one of the above examples, a dispute over the ownership or validity of intellectual property rights under a licensing agreement may also involve issues of non-payment, breach and so forth, which could give rise to intractable jurisdictional problems in situations where certain disputes have been excluded from arbitration.

Recommended Clauses:

17. The parties will ensure that the scope of their arbitration clause is broad by using the model clause associated with the selected arbitration rules.

18. If the parties do not use a model clause, the following clause should be used:

All disputes arising out of or in connection with this agreement, including any question regarding its existence, validity or termination, shall be finally resolved by arbitration under [selected arbitration rules].

19. Exceptionally, if there are special circumstances and the parties wish to limit the scope of disputes subject to arbitration, the following clause can be used: Except for matters that are specifically excluded from arbitration hereunder, all disputes arising out of or in connection with this agreement, including any question regarding its existence, validity or termination, shall be finally resolved by arbitration under [selected arbitration rules].

The following matters are specifically excluded from arbitration hereunder: [...].

Guideline 4: The parties should select the place of arbitration. This selection should be based on both practical and juridical considerations.

Comments:

20. The selection of the place (or 'seat') of arbitration involves obvious practical considerations: neutrality, availability of hearing facilities, proximity to the witnesses and evidence, the parties' familiarity with the language and culture, willingness of qualified arbitrators to participate in proceedings in that place. The place of arbitration may also influence the profile of the arbitrators, especially if not appointed by the parties. Convenience should not be the decisive factor, however, as under most rules the tribunal is free to meet and hold hearings in places other than the designated place of arbitration.

21. The place of arbitration is the juridical home of the arbitration. Close attention must be paid to the legal regime of the chosen place of arbitration because this choice has important legal consequences under most national arbitration legislations as well as under some arbitration rules. While the place of arbitration does not determine the law governing the contract and the merits (see paragraphs 42-46 below), it does determine the law (arbitration law or *lex arbitri*) that governs certain procedural aspects of the arbitration, eg, the powers of arbitrators and the judicial oversight of the arbitral process. Moreover, the courts at the place of arbitration can be called upon to provide assistance (eg, by appointing or replacing arbitrators, by ordering provisional and conservatory measures, or by assisting with the taking of evidence), and may also interfere with the conduct of the arbitration (eg, by ordering a stay of the arbitral proceedings). Further, these courts have jurisdiction to hear challenges against the award at the end of the arbitration; awards set aside at the place of arbitration may not be enforceable elsewhere. Even if the award is not set aside, the place of arbitration may affect the enforceability of the award under applicable international treaties.

22. As a general rule, the parties should set the place of arbitration in a jurisdiction (i) that is a party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the New York Convention), (ii) whose law is supportive of arbitration and permits arbitration of the subject matter of the contract, and (iii) whose courts have a track record of issuing unbiased decisions that are supportive of the arbitral process.

23. An arbitration clause that fails to specify the place of arbitration will be effective, though undesirable. The arbitral institution, if there is one, or the arbitrators, will choose for the parties if they cannot agree on a place of arbitration after a dispute has arisen. (In ad hoc arbitration, however, if difficulties arise with the appointment of the arbitrators and no place of arbitration is selected, the parties may be unable to proceed with the arbitration unless courts in some country are willing to assist.) The parties should not leave such a critical decision to others.

24. The parties should specify in their arbitration clause the 'place of arbitration', rather than the place of the 'hearing'. By designating only the place of the hearing, the parties leave it uncertain whether they have designated the 'place of arbitration' for the purposes of applicable laws and treaties. Moreover, by designating the place of the hearing in the arbitration clause, the parties deprive the arbitrators of desired flexibility to hold hearings in other places, as may be convenient.

Recommended Clause:

25. The place of arbitration shall be [city, country]

Guideline 5: The parties should specify the number of arbitrators.

Comments:

26. The parties should specify the number of arbitrators (ordinarily one or three and, in any case, an odd number). The number of arbitrators has an impact on the overall cost, the duration and, on occasion, the quality of the arbitral proceedings. Proceedings before a three-member tribunal will almost inevitably be lengthier and more expensive than those before a sole arbitrator. A three-member tribunal may be better equipped, however, to address complex issues of fact and law, and may reduce the risk of irrational or unfair results. The parties may also desire the increased control of the process afforded by each having the opportunity to select an arbitrator.

27. If the parties do not specify the number of arbitrators (and cannot agree on this once a dispute has arisen), the arbitral institution, if there is one, will make the decision for them, generally on the basis of the amount in dispute and the perceived complexity of the case. In ad hoc arbitration, the selected arbitration rules, if any, will ordinarily specify whether one or three arbitrators are to be appointed absent contrary agreement. Where the parties have not selected such a set of arbitration rules, it is especially important to specify the number of arbitrators in the clause itself.

28. Parties may remain deliberately silent as to the number of arbitrators, reasoning that the choice between a one- or three-member tribunal will be better made if and when a dispute arises. While the opportunity to decide this question after a dispute arises is an advantage, the corresponding disadvantage is that the proceedings may be delayed if the parties disagree on the number of arbitrators, particularly in the ad hoc context. On balance, it is recommended to specify the number of arbitrators in advance in the arbitration clause itself.

Recommended Clause:

29. There shall be [one or three] arbitrator[s].

Guideline 6: The parties should specify the method of selection and replacement of arbitrators and, when ad hoc arbitration is chosen, should select an appointing authority.

Comments:

30. Both institutional and ad hoc arbitration rules provide default mechanisms for selecting and replacing arbitrators. When they have incorporated such set of rules, the parties may be content to rely on the default mechanism set forth in the rules. The parties may also agree on an alternative method. For example, many arbitration rules provide for the chairperson of a three-member tribunal to be selected by the two co-arbitrators or by the institution. Parties often prefer to attempt to select the chairperson themselves in the first instance. If the parties decide to depart from the default mechanism, they should use language consistent with the terminology of the applicable arbitration rules. For example, under certain institutional rules, the parties 'nominate' arbitrators, and only the institution is empowered to 'appoint' them. When the parties

have not incorporated a set of arbitration rules, it is crucial that they spell out the method for selecting and replacing arbitrators in the arbitration clause itself.

31. The need to designate an appointing authority in the context of ad hoc arbitration constitutes a significant difference between drafting an institutional arbitration clause and drafting an ad hoc arbitration clause. In institutional arbitration, the institution is available to select or replace arbitrators when the parties fail to do so. There is no such institution in ad hoc arbitration. It is, therefore, critical that the parties designate an 'appointing authority' in the ad hoc context, to select or replace arbitrators in the event the parties fail to do so. Absent such a choice, the courts at the place of arbitration may be willing to make the necessary appointments and replacement. (Under the UNCITRAL Rules, the Secretary General of the Permanent Court of Arbitration designates the appointing authority if the parties have failed to do so in their arbitration clause.)

32. The appointing authority may be an arbitral institution, a court, a trade or professional association, or another neutral entity. The parties should select an office or title (eg, the president of an arbitral institution, the chief judge of a court, or the chair of a trade or professional association) rather than an individual (as such individual may be unable to act when called upon to do so). The parties should also make sure that the selected authority will agree to perform its duties if and when called upon to do so.

33. Significant time may be wasted at the outset of the proceedings if no time limits are specified for the appointment of the arbitrators. Such time limits are ordinarily set in arbitration rules. Parties that have agreed to incorporate such rules thus need not concern themselves with this issue, unless they wish to depart from the appointment mechanism set forth in the rules. When the parties have not agreed to incorporate a set of arbitration rules, it is important to set such time limits in the arbitration clause itself.

34. When a tribunal is comprised of three arbitrators, it sometimes occurs that one arbitrator resigns, refuses to cooperate or otherwise fails to participate in the proceedings at a late and critical juncture (eg, during the deliberations). In those circumstances, replacement may not be an option as it would overly delay and disrupt the proceedings. Absent specific authorization, however, the remaining two arbitrators may not be able to render a valid and enforceable award. Most (but not all) arbitration rules therefore permit the other two arbitrators in such a situation to continue the proceedings as a 'truncated' tribunal and to issue an award. When the parties do not select a set of arbitration rules (or where the selected arbitration rules do not address the issue), the parties can authorize in the arbitration clause a 'truncated' tribunal to proceed to render an award.

Recommended Clauses:

35. When institutional arbitration is chosen, and the institutional rules do not provide for all arbitrator selections and replacements to be made by the parties in the first instance, and the parties wish to make their own selections, the following clause can be used:

There shall be three arbitrators, one selected by the initiating party in the request for arbitration, the second selected by the other party within [30] days of receipt of the request for arbitration, and the third, who shall act as [chairperson or presiding arbitrator], selected by the two parties within [30] days of the selection of the second arbitrator. If any arbitrators are not selected within these time periods, the [institution] shall make the

selection(s). If replacement of an arbitrator becomes necessary, replacement shall be done by the same method(s) as above.

36. When non-administered arbitration is chosen, the parties can provide for a method of selection and replacement of arbitrators by choosing a set of ad hoc arbitration rules, eg, the UNCITRAL Arbitration Rules.

37. The clause proposed above for ad hoc arbitration without a set of arbitration rules (see paragraph 13 above) sets forth a comprehensive mechanism to select and replace the members of a three-member tribunal and includes provisions permitting a truncated tribunal to proceed to render an award without the participation of an obstructive or defaulting arbitrator.

38. In similar circumstances, but where the parties wish to submit their dispute to a sole arbitrator, the parties can amend the clause proposed in paragraph 13 above and use the following language:

There shall be one arbitrator, selected jointly by the parties. If the arbitrator is not selected within [30] days of the receipt of the request for arbitration, the [designated appointing authority] shall make the selection.

Guideline 7: The parties should specify the language of arbitration.

Comments:

39. Arbitration clauses in contracts between parties whose languages differ, or whose shared language differs from that of the place of arbitration, should ordinarily specify the language of arbitration. In making this choice, the parties should consider not only the language of the contract and of the related documentation, but also the likely effect of their choice on the pool of qualified arbitrators and counsel. Absent a choice in the arbitration clause, it is for the arbitrators to determine the language of arbitration. It is likely that the arbitrators will choose the language of the contract or, if different, of the correspondence exchanged by the parties. Leaving this decision to the arbitrators could cause unnecessary cost and delay.

40. Contract drafters are often tempted to provide for more than one language of arbitration. The parties should carefully consider whether to do so. Multi-lingual arbitration, while workable (there are numerous examples of proceedings conducted in both English and Spanish, for example), may present challenges depending on the languages chosen. There may be difficulties in finding arbitrators who are able to conduct arbitration proceedings in two languages, and the required translation and interpretation may add to the costs and delays of the proceedings. A solution may be to specify one language of arbitration, but to provide that documents may be submitted in another language (without translation).

Recommended Clause:

41. The language of the arbitration shall be [...].

Guideline 8: The parties should ordinarily specify the rules of law governing the contract and any subsequent disputes.

Comments:

42. In international transactions, it is important for the parties to select in their contract the rules of law that govern the contract and any subsequent disputes (the 'substantive law').

43. The choice of substantive law should be set forth in a clause separate from the arbitration clause or should be addressed together with arbitration in a clause which makes clear that the clause serves a dual purpose, eg, captioning the clause 'Governing Law and Arbitration [or Dispute Resolution].' This is so because issues can arise under the substantive law during the performance of the contract independent of any arbitral dispute.

44. By choosing the substantive law, the parties do not choose the procedural or arbitration law. Such law, absent a contrary agreement, is ordinarily that of the place of arbitration (see paragraph 21 above). Although the parties can agree otherwise, it is rarely advisable to do so.

45. Sometimes parties do not choose a national legal system as the substantive law. Instead, they choose *lex mercatoria* or other a-national rules of law. In other cases, they empower the arbitral tribunal to determine the dispute on the basis of what is fair and reasonable (*ex aequo et bono*). Care should be taken before selecting these options. While appropriate in certain situations (eg, when the parties cannot agree on a national law), they may create difficulties by virtue of the relative uncertainty as to their content or impact on the outcome. As it is difficult to ascertain in advance the rules that will ultimately be applied by the arbitrators when the parties select these alternatives to national laws, resolving disputes may become more complex, uncertain and costly.

Recommended Clause:

46. The following clause can be used to select the substantive law:

This agreement is governed by, and all disputes arising under or in connection with this agreement shall be resolved in accordance with, [selected law or rules of law].

III. Drafting Guidelines for Optional Elements

47. Arbitration being a matter of agreement, contracting parties have the opportunity in their arbitration clause to tailor the process to their specific needs. There are numerous options that contracting parties can consider. This section sets out and comments upon the few that the parties should consider during the negotiation of an arbitration clause. By setting out these options, these Guidelines do not thereby suggest that these optional elements need to be included in an arbitration clause.

Option 1: The authority of the arbitral tribunal and of the courts with respect to provisional and conservatory measures.

Comments:

48. It is rarely necessary to provide in the arbitration clause that the arbitral tribunal or the courts or both have the authority to order provisional and conservatory measures pending decision on the merits. The arbitral tribunal and the courts ordinarily have the authority to do so, subject to various conditions, even where the arbitration clause is silent in this respect. The authority of

the arbitral tribunal rests with the arbitration rules and the relevant arbitration law. That of the courts rests with the relevant arbitration law.

49. When the governing arbitration law restricts the availability of provisional or conservatory relief, however, or when the availability of provisional and conservatory relief is of special concern (eg, because trade secrets or other confidential information are involved), the parties may want to make the authority of the arbitral tribunal and the courts explicit in the arbitration clause.

50. When the availability of provisional and conservatory relief is of special concern, the parties may also want to modify restrictive aspects of the applicable arbitration rules. For example, certain institutional rules restrict the right of the parties to apply to the courts for provisional and conservatory relief once the arbitral tribunal is appointed. Under other arbitration rules, the arbitral tribunal is authorized to order provisional and conservatory measures with respect to 'the subject matter of the dispute', which leaves uncertain whether the arbitral tribunal can order measures to preserve the position of the parties (eg, injunction, security for costs) or the integrity of the arbitral process (eg, freezing orders, anti-suit injunctions).

Recommended Clauses:

51. The following clause can be used to make explicit the authority of the arbitral tribunal with respect to provisional and conservatory relief:

Except as otherwise specifically limited in this agreement, the arbitral tribunal shall have the power to grant any remedy or relief that it deems appropriate, whether provisional or final, including but not limited to conservatory relief and injunctive relief, and any such measures ordered by the arbitral tribunal shall, to the extent permitted by applicable law, be deemed to be a final award on the subject matter of the measures and shall be enforceable as such.

52. The following clause can be added to the above clause, or used independently, to specify that resort to courts for provisional and conservatory measures is not precluded by the arbitration agreement:

Each party retains the right to apply to any court of competent jurisdiction for provisional and/or conservatory relief, including prearbitral attachments or injunctions, and any such request shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

53. The following clause can be added to the clause recommended at paragraph 51 above, or used independently, to limit the parties' right to resort to the courts for provisional and conservatory relief after the arbitral tribunal is constituted:

Each party has the right to apply to any court of competent jurisdiction for provisional and/or conservatory relief, including pre-arbitral attachments or injunctions, and any such request shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate, provided however that, after the arbitral tribunal is constituted, the arbitral tribunal shall have sole jurisdiction to consider applications for provisional and/or conservatory relief, and any such measures ordered by the arbitral tribunal may be specifically enforced by any court of competent jurisdiction.

54. If, in exceptional circumstances, the parties consider that ex parte provisional relief by the arbitral tribunal may be needed, they should so specify and amend the clause recommended at paragraph 51 above by adding '(including ex parte)' after the word 'provisional'. Even with such addition, however, ex parte remedies ordered by the arbitral tribunal may not be enforceable under the relevant arbitration law.

Option 2: Document production.

Comments:

55. While the extent document production and information exchange in international arbitration varies from case to case and from arbitrator to arbitrator, parties are usually required to produce identified documents (including internal documents) that are shown to be relevant and material to the dispute. Other features particular to 'discovery' in some jurisdictions, such as depositions and interrogatories, are ordinarily absent. The IBA has developed a set of rules, the IBA Rules on the Taking of Evidence in International Arbitration (the 'IBA Rules'), designed to reflect this standard practice. These rules, which address production of both paper documents and electronically-stored information, are often used by international arbitral tribunals, expressly or not, as guidance.

56. The parties have three primary options regarding information or document production. They can say nothing about it and be content to rely on the default provisions of the governing arbitration law, which ordinarily leaves the question to the discretion of the arbitrators. They can adopt the IBA Rules. They can devise their own standards (bearing in mind that extensive document production is likely to have a major impact on the length and cost of the proceedings).

57. A difficulty that may arise in the context of document production in international arbitration is the issue of which rules should govern whether certain documents are exempt from production due to privilege. When, in the rare instance, contracting parties can foresee at the contract drafting stage that issues of privilege may arise and be of consequence, the parties may want to specify in their arbitration clause the principles that will govern all such questions. Article 9 of the IBA Rules provides guidance in this respect.

Recommended Clauses:

58. The following clause can be used to incorporate the IBA Rules either as a mandatory standard or, alternatively, for guidance purpose only:

[In addition to the authority conferred upon the arbitral tribunal by the [arbitration rules]], the arbitral tribunal shall have the authority to order production of documents [in accordance with] [taking guidance from] the IBA Rules on the Taking of Evidence in International Arbitration [as current on the date of this agreement/the commencement of the arbitration].

59. The following clause can be used if the parties wish to specify the principles that will govern issues of privilege with respect to document disclosure:

All contentions that a document or communication is privileged and, as such, exempt from production in the arbitration, shall be resolved by the arbitral tribunal in accordance with Article 9 of the IBA Rules on the Taking of Evidence in International Arbitration.

Option 3: Confidentiality issues.

Comments:

60. Parties frequently assume that arbitration proceedings are confidential. While arbitration is private, in many jurisdictions parties are under no duty to keep the existence or content of the arbitration proceedings confidential. Few national laws or arbitration rules impose confidentiality obligations on the parties. Where a general duty is recognized, it is often subject to exceptions.

61. Parties concerned about confidentiality should, therefore, address this issue in their arbitration clause. In doing so, the parties should avoid absolute requirements because disclosure may be required by law, to protect or pursue a legal right or to enforce or challenge an award in subsequent judicial proceedings. The parties should also anticipate that the preparation of their claims, defenses and counterclaims may require disclosure of confidential information to non-parties (witnesses and experts).

62. Conversely, given the common assumption that arbitration proceedings are confidential, where the parties do not wish to be bound by any confidentiality duties, the parties should expressly say so in their arbitration clause.

Recommended Clauses:

63. Some arbitration rules set forth confidentiality obligations, and the parties will accordingly impose such obligations upon themselves if they agree to arbitrate under these rules.

64. The following clause imposes confidentiality obligations upon the parties:

The existence and content of the arbitral proceedings and any rulings or award shall be kept confidential by the parties and members of the arbitral tribunal except (i) to the extent that disclosure may be required of a party to fulfil a legal duty, protect or pursue a legal right, or enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority, (ii) with the consent of all parties, (iii) where needed for the preparation or presentation of a claim or defense in this arbitration, (iv) where such information is already in the public domain other than as a result of a breach of this clause, or (v) by order of the arbitral tribunal upon application of a party.

65. The following clause may be used where the parties do not wish to be bound by any confidentiality obligation:

The parties shall be under no confidentiality obligation with respect to arbitration hereunder except as may be imposed by mandatory provisions of law.

Option 4: Allocation of costs and fees.

Comments:

66. Costs (eg, arbitrators' fees and expenses and, if applicable, institutional fees) and lawyers' fees can be substantial in international arbitration. It is rarely possible to predict how the arbitral tribunal will allocate these costs and fees, if at all, at the end of the proceedings. Domestic approaches diverge widely (from no allocation at all to full recovery by the prevailing party), and

arbitrators have wide discretion in this respect.

67. Given these uncertainties, the parties may wish to address the issue of costs and fees in their arbitration clause (bearing in mind that such provisions may not be enforceable in certain jurisdictions). The parties have several options. They may merely confirm that the arbitrators can allocate costs and fees as they see fit. They may provide that the arbitrators make no allocation of costs and fees. They may try to ensure that costs and fees are allocated to the 'winner' or the 'prevailing party' on the merits, or that the arbitrators are to allocate costs and fees in proportion to success or failure. The parties should avoid absolute language ('shall') in drafting such a clause, as the identification of the 'winner' or the 'prevailing party' may be difficult and the clause may needlessly constrain the arbitrators in their allocation of costs and fees.

68. The parties may also wish to consider whether to allow compensation for the time spent by management, in-house counsel, experts and witnesses, as this issue is often uncertain in international arbitration.

Recommended Clauses:

69. The following clause can be used to ensure that the arbitrators have discretion to allocate both costs and fees (or to reaffirm such discretion if the designated arbitration rules include a provision to this effect):

The arbitral tribunal may include in its award an allocation to any party of such costs and expenses, including lawyers' fees [and costs and expenses of management, in-house counsel, experts and witnesses], as the arbitral tribunal shall deem reasonable.

70. The following clause provides for allocation of costs and fees to the 'prevailing' party:

The arbitral tribunal may award its costs and expenses, including lawyers' fees, to the prevailing party, if any and as determined by the arbitral tribunal in its discretion.

71. The following clause provides for allocation of costs and fees in proportion to success:

The arbitral tribunal may include in their award an allocation to any party of such costs and expenses, including lawyers' fees [and costs and expenses of management, in-house counsel, experts and witnesses], as the arbitral tribunal shall deem reasonable. In making such allocation, the arbitral tribunal shall consider the relative success of the parties on their claims and counterclaims and defenses.

72. The following clause can be used to ensure that the arbitrators do not allocate costs and fees:

All costs and expenses of the arbitral tribunal [and of the arbitral institution] shall be borne by the parties equally. Each party shall bear all costs and expenses (including of its own counsel, experts and witnesses) involved in preparing and presenting its case.

Option 5: Qualifications required of arbitrators.

Comments:

73. An advantage of arbitration, as compared to national court proceedings, is that the parties select the arbitrators and can, therefore, choose individuals with expertise or knowledge relevant to their dispute.

74. It is usually not advisable, however, to specify in the arbitration clause the qualifications required of arbitrators. The parties are ordinarily in a better position at the time of a dispute to know whether expertise is required, and if so, which, and each remains free at that time to appoint an arbitrator with the desired qualifications. Specifying qualification requirements in the arbitration clause may also drastically reduce the pool of available arbitrators. Further, a party intent on delaying the proceedings may challenge arbitrators on the basis of the qualification requirements.

75. If the parties nonetheless wish to specify such qualifications in the arbitration clause, they should avoid overly specific requirements, as the arbitration agreement may be unenforceable if, when a dispute arises, the parties are unable to identify suitable candidates who both meet the qualification requirements and are available to act as arbitrators.

76. Parties sometimes specify that the sole arbitrator or, in the case of a three-member panel, the presiding arbitrator shall not share a common nationality with any of the parties. In institutional arbitration, such qualification requirement is often superfluous, as arbitral institutions ordinarily apply such practice in making appointments. In ad hoc arbitration, however, the parties may want so to specify in their arbitration clause.

Recommended Clauses:

77. The qualifications of arbitrators can be specified by adding the following to the arbitration clause:

[Each arbitrator][The presiding arbitrator] shall be [a lawyer/an accountant].

Or

[Each arbitrator][The presiding arbitrator] shall have experience in [specific industry].

Or

[The arbitrators][The presiding arbitrator] shall not be of the same nationality as any of the parties.

Option 6: Time limits.

Comments:

78. Parties sometimes try to save costs and time by providing in the arbitration clause that the award be made within a fixed period from the commencement of arbitration (a process known as 'fast-tracking'). Fast-tracking can save costs, but parties can rarely know at the time of

drafting the arbitration clause whether every dispute liable to arise under the contract will be appropriate for resolution within the prescribed period. An award that is not rendered within the prescribed period may be unenforceable or may attract unnecessary challenges.

79. If, despite these considerations, the parties wish to set time limits in the arbitration clause, the tribunal should be allowed to extend these time limits to avoid the risk of an unenforceable award.

Recommended Clauses:

80. The following clause can be used to set time limits:

The award shall be rendered within [...] months of the appointment of [the sole arbitrator] [the chairperson], unless the arbitral tribunal determines, in a reasoned decision, that the interest of justice or the complexity of the case requires that such limit be extended.

Option 7: Finality of arbitration.

Comments:

81. An advantage of arbitration is that arbitral awards are final and not subject to appeal. In most jurisdictions, awards can be challenged only for lack of jurisdiction, serious procedural defects or unfairness, and cannot be reviewed on the merits. Most arbitration rules reinforce the finality of arbitration by providing that awards are final and that the parties waive any recourse against them.

82. When the arbitration clause does not incorporate a set of arbitration rules, or where the incorporated rules do not contain finality and waiver of recourse language, it is prudent to specify in the arbitration clause that awards are final and not subject to recourse. Even where the parties incorporate arbitration rules that contain such language, it may still be advisable to repeat this language in the arbitration clause if the parties anticipate that the award may need to be enforced or otherwise scrutinized in jurisdictions that view arbitration with suspicion. When adding a waiver of recourse to the arbitration clause, the parties should review the law of the seat of arbitration to determine the scope of what is being waived, and the language required under the *lex arbitri*.

83. Parties are sometimes tempted to expand the scope of judicial review by, for example, allowing review of the merits. It is rarely advisable, and often not open to the parties, to do so. If the parties nonetheless wish to expand the scope of judicial review, specialized advice should be sought and the law at the place of arbitration should be reviewed carefully.

Recommended Clauses:

84. When the parties wish to emphasize the finality of arbitration and to waive any recourse against the award, the following language can be added to the arbitration clause, subject to any requirement imposed by the *lex arbitri*:

Any award of the arbitral tribunal shall be final and binding on the parties. The parties undertake to comply fully and promptly with any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can

validly be made.

85. When, in the exceptional case, the parties wish to expand the scope of judicial review and allow appeals on the merits, the parties should seek advice as to their power to do so in the relevant jurisdiction. Where enforceable, the following sentence can be considered:

The parties shall have the right to seek judicial review of the tribunal's award in the courts of [selected jurisdiction] in accordance with the standard of appellate review applicable to decisions of courts of first instance in such jurisdiction(s).

IV. Drafting Guidelines for Multi-Tier Dispute

Resolution Clauses

86. It is common for dispute resolution clauses in international contracts to provide for negotiation, mediation or some other form of alternative dispute resolution as preliminary steps before arbitration. Construction contracts, for example, sometimes require disputes to be submitted to a standing dispute board before they can be referred to arbitration. These clauses, known as multi-tier clauses, present specific drafting challenges.

Multi-Tier Guideline 1: The clause should specify a period of time for negotiation or mediation, triggered by a defined and undisputable event (ie, a written request), after which either party can resort to arbitration.

Comments:

87. A multi-tier clause that requires negotiation or mediation before arbitration may be deemed to create a condition precedent to arbitration. To minimize the risk that a party will use negotiation or mediation in order to gain delay or other tactical advantage, the clause should specify a time period beyond which the dispute can be submitted to arbitration, and this time period should generally be short. In specifying such time period, the parties should be aware that commencing negotiation or mediation may not be sufficient to suspend the prescription or limitation periods.

88. The period of time for negotiation or mediation should be triggered by a defined and indisputable event, such as a written request to negotiate or mediate under the clause or the appointment of a mediator. It is not advisable to define the triggering event by reference to a written notice of the dispute because a mere written exchange about the dispute might then be sufficient to trigger the deadline.

Recommended Clauses:

89. See the clauses recommended below at paragraphs 94-96.

Multi-Tier Guideline 2: The clause should avoid the trap of rendering arbitration permissive, not mandatory.

Comments:

90. Parties drafting multi-tier dispute resolution clauses often inadvertently leave ambiguous their intent to arbitrate disputes that cannot be resolved by negotiation or mediation. This

happens when the parties provide that disputes not resolved by negotiation or mediation 'may' be submitted to arbitration.

Recommended Clauses:

91. See the clauses recommended below at paragraphs 94-96.

Multi-Tier Guideline 3: The clause should define the disputes to be submitted to negotiation or mediation and to arbitration in identical terms.

Comments:

92. Multi-tier dispute resolution clauses sometimes do not define in identical terms the disputes that are subject to negotiation or mediation as a first step and those subject to arbitration. Such ambiguities may suggest that some disputes can be submitted to arbitration immediately without going through negotiation or mediation as a first step.

93. The broad reference to 'disputes' in the clauses recommended below should cover counterclaims. Such counterclaims would thus need to go through the several steps and could not be raised for the first time in the arbitration. If the parties wish to preserve the right to raise counterclaims for the first time in the arbitration, they should so specify in their arbitration clause.

Recommended Clauses:

94. The following clause provides for mandatory negotiation as a first step:

The parties shall endeavor to resolve amicably by negotiation all disputes arising out of or in connection with this agreement, including any question regarding its existence, validity or termination. Any such dispute which remains unresolved [30] days after either party requests in writing negotiation under this clause or within such other period as the parties may agree in writing, shall be finally settled under the [designated set of arbitration rules] by [one or three] arbitrator[s] appointed in accordance with the said Rules. The place of arbitration shall be [city, country]. The language of arbitration shall be [...].

[All communications during the negotiation are confidential and shall be treated as made in the course of compromise and settlement negotiations for purposes of applicable rules of evidence and any additional confidentiality and professional secrecy protections provided by applicable law.]

95. The following clause provides for mandatory mediation as a first step:

The parties shall endeavor to resolve amicably by mediation under the [designated set of mediation rules] all disputes arising out of or in connection with this agreement, including any question regarding its existence, validity or termination. Any such dispute not settled pursuant to the said Rules within [45] days after appointment of the mediator or within such other period as the parties may agree in writing, shall be finally settled under the [designated set of arbitration rules] by [one or three] arbitrator[s] appointed in accordance with the said Rules. The place of arbitration shall be [city, country]. The language of

arbitration shall be [...].

[All communications during the mediation are confidential and shall be treated as made in the course of compromise and settlement negotiations for purposes of applicable rules of evidence and any additional confidentiality and professional secrecy protections provided by applicable law.]

96. The following clause provides for both mandatory negotiation and mediation sequentially before arbitration:

All disputes arising out of or in connection with this agreement, including any question regarding its existence, validity or termination ('Dispute'), shall be resolved in accordance with the procedures specified below, which shall be the sole and exclusive procedures for the resolution of any such Dispute.

(A) Negotiation

The parties shall endeavor to resolve any Dispute amicably by negotiation between executives who have authority to settle the Dispute [and who are at a higher level of management than the persons with direct responsibility for administration or performance of this agreement].

(B) Mediation

Any Dispute not resolved by negotiation in accordance with paragraph (A) within [30] days after either party requested in writing negotiation under paragraph (A), or within such other period as the parties may agree in writing, shall be settled amicably by mediation under the [designated set of mediation rules].

(C) Arbitration

Any Dispute not resolved by mediation in accordance with paragraph (B) within [45] days after appointment of the mediator, or within such other period as the parties may agree in writing, shall be finally settled under the [designated set of arbitration rules] by [one or three] arbitrator[s] appointed in accordance with the said Rules. The place of arbitration shall be [...]. The language of arbitration shall be [...].

[All communications during the negotiation and mediation pursuant to paragraphs (A) and (B) are confidential and shall be treated as made in the course of compromise and settlement negotiations for purposes of applicable rules of evidence and any additional confidentiality and professional secrecy protections provided by applicable law.]

V. Drafting Guidelines for Multiparty Arbitration

Clauses

97. International contracts often involve more than two parties. Parties drafting arbitration clauses for these contracts may fail to realize the specific drafting difficulties that result from the multiplicity of parties. In particular, one cannot always rely on the model clauses of arbitral

institutions, as these are ordinarily drafted with two parties in mind and may need to be adapted to be workable in a multiparty context. Specialized advice should generally be sought to draft such clauses.

Multiparty Guideline 1: The clause should address the consequences of the multiplicity of parties for the appointment of the arbitral tribunal.

Comments:

98. In a multiparty context, it is often not workable to provide that 'each party' appoints an arbitrator. There is an easy solution if the parties are content to provide for a sole arbitrator: in such case, the parties can provide that the sole arbitrator is to be appointed jointly by the parties or, absent agreement, by the institution or appointing authority. Where there are to be three arbitrators, a solution is to provide that the three arbitrators be appointed jointly by the parties or, absent agreement on all, by the institution or appointing authority.

99. Alternatively, the arbitration clause can require that the parties on each 'side' make joint appointments. This option is available when it can be anticipated at the drafting stage that certain contracting parties will have aligned interests. The overriding requirement is, however, that all parties be treated equally in the appointment process. This means in practice that, when two or more parties on one side fail to agree on an arbitrator, the institution or appointing authority will appoint all arbitrators, as the parties on one side would otherwise have had the opportunity to pick their arbitrator while the others not. This is the solution that has been adopted in some institutional arbitration rules.

Recommended Clauses:

100. The clause recommended below at paragraph 105 specifies a mechanism for appointing arbitrators in a multiparty context.

Multiparty Guideline 2: The clause should address the procedural complexities (intervention, joinder) arising from the multiplicity of parties.

Comments:

101. Procedural complexities may abound in the multiparty context. One is that of intervention: a contracting party that is not party to an arbitration commenced under the clause may wish to intervene in the proceedings. Another is that of joinder: a contracting party that is named as respondent may wish to join another contracting party that has not been named as respondent in the proceedings.

102. An arbitration clause would be workable even if it failed to address these complexities. Such clause would, however, leave open the possibility of overlapping proceedings, conflicting decisions and associated delays, costs and uncertainties.

103. There is no easy way to address these complexities. A multiparty arbitration clause should be carefully drafted with regard to the particular circumstances, and specialized advice should usually be sought. As a general rule, the clause should provide that notice of any proceedings commenced under the clause be given to each contracting party regardless of whether that contracting party is named as respondent. There should be a clear time period after that notice

for each contracting party to intervene or join other contracting parties in the proceedings, and no arbitrator should be appointed before the expiry of that time period.

104. Alternatively, the parties can opt to arbitrate under institutional rules that provide for intervention and joinder, bearing in mind that these rules may give wide discretion to the institution in this respect.

Recommended Clauses:

105. The following provision provides for intervention and joinder of other parties to the same agreement:

All disputes arising out of or in connection with this agreement, including any question regarding its existence, validity or termination, shall be finally resolved by arbitration under [selected arbitration rules], except as they may be modified herein or by mutual agreement of the parties.

The place of arbitration shall be [city, country].

The language of arbitration shall be [...]. There shall be three arbitrators, selected as follows.

In the event that the request for arbitration names only one claimant and one respondent, and no party has exercised its right to joinder or intervention in accordance with the paragraphs below, the claimant and the respondent shall each appoint one arbitrator within [15] days after the expiry of the period during which parties can exercise their right to joinder or intervention. If either party fails to appoint an arbitrator as provided, then, upon the application of any party, that arbitrator shall be appointed by [the designated arbitral institution]. The two arbitrators shall appoint the third arbitrator, who shall act as presiding arbitrator. If the two arbitrators fail to appoint the presiding arbitrator within [45] days of the appointment of the second arbitrator, the presiding arbitrator shall be appointed by [the designated arbitral institution/appointing authority].

In the event that more than two parties are named in the request for arbitration or at least one contracting party exercises its right to joinder or intervention in accordance with the paragraphs below, the claimant(s) shall jointly appoint one arbitrator and the respondent(s) shall jointly appoint the other arbitrator, both within [15] days after the expiry of the period during which parties can exercise their right to joinder or intervention. If the parties fail to appoint an arbitrator as provided above, [the designated arbitral institution/appointing authority] shall, upon the request of any party, appoint all three arbitrators and designate one of them to act as presiding arbitrator. If the claimant(s) and the respondent(s) appoint the arbitrators as provided above, the two arbitrators shall appoint the third arbitrator, who shall act as presiding arbitrator. If the two arbitrators fail to appoint the third arbitrator within [45] days of the appointment of the second arbitrator, the presiding arbitrator shall be appointed by [the designated arbitral institution/appointing authority].

Any party to this agreement may, either separately or together with any other party to this agreement, initiate arbitration proceedings pursuant to this clause by sending a request for arbitration to all other parties to this agreement [and to the designated arbitral institution, if any].

Any party to this agreement may intervene in any arbitration proceedings hereunder by submitting a written notice of claim, counterclaim or cross-claim against any party to this agreement, provided that such notice is also sent to all other parties to this agreement [and to the designated arbitral institution, if any] within [30] days from the receipt by such intervening party of the relevant request for arbitration or notice of claim, counterclaim or cross-claim.

Any party to this agreement named as respondent in a request for arbitration, or a notice of claim, counterclaim or cross-claim, may join any other party to this agreement in any arbitration proceedings hereunder by submitting a written notice of claim, counterclaim or cross-claim against that party, provided that such notice is also sent to all other parties to this agreement [and to the designated arbitral institution, if any] within [30] days from the receipt by such respondent of the relevant request for arbitration or notice of claim, counterclaim or cross-claim.

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

VI. Drafting Guidelines for Multi-Contract Arbitration

Clauses

106. It is common for a single international transaction to involve several related contracts. Drafting arbitration clauses in a multi-contract setting presents specific challenges.

Multi-Contract Guideline 1: The arbitration clauses in the related contracts should be compatible.

Comments:

107. The parties should avoid specifying different dispute resolution mechanisms in their related contracts (eg, arbitration under different sets of rules or in different places), lest they run the risk of fragmenting future disputes. An arbitral tribunal appointed under the first contract may not have jurisdiction to consider a dispute that raises questions about the second contract, thus inviting parallel proceedings.

108. Assuming the parties want consistent decisions and wish to avoid parallel proceedings, a straightforward solution is to establish a stand-alone dispute resolution protocol, which is signed by all the parties and then incorporated by reference in all related contracts. If it is impractical to conclude such a protocol, the parties should ensure that the arbitration clauses in the related contract are identical or complementary. It is especially important that the arbitration clauses specify the same set of rules, place of arbitration and number of arbitrators. To avoid difficulties when proceedings are consolidated, the same substantive law and language of arbitration should also be specified. The parties should also make clear that a tribunal appointed under one contract has jurisdiction to consider and decide issues related to the other related contracts.

Recommended Clause:

109. If the parties do not wish to, or cannot, establish a stand-alone dispute resolution protocol, the following provision should be added to the arbitration clause in each related contract:

The parties agree that an arbitral tribunal appointed hereunder or under [the related agreement(s)] may exercise jurisdiction with respect to both this agreement and [the related agreement(s)].

Multi-Contract Guideline 2: The parties should consider whether to provide for consolidation of arbitral proceedings commenced under the related contracts.

Comments:

110. A procedural complexity that arises in a multi-contract setting is that of consolidation. Different arbitrations may be commenced under related contracts at different times. It may, or may not, be in the parties' interest to have these arbitrations dealt with in a single consolidated arbitration. In some situations, the parties may reason that one single consolidated arbitration would be more efficient and cost-effective. In other circumstances, the parties may have reasons to keep the arbitrations separated.

111. If the parties wish to permit consolidation of related arbitrations, they should say so in the arbitration clause. Courts in some jurisdiction have discretion to order consolidation of related arbitration proceedings, but ordinarily will not do so absent parties' agreement. Where the courts at the place of arbitration have no such power, or where the parties do not wish to rely on judicial discretion, the parties should also spell out in the clause the procedure for consolidating related proceedings. The applicable arbitration rules, if any, and the law of the place of arbitration should be reviewed carefully, as they may constrain the parties' ability to consolidate arbitral proceedings. Conversely, in some jurisdictions, the parties may want to exclude the possibility of consolidation (or class arbitration).

112. Specialized advice is required when the related contracts also involve more than two parties. Drafting consolidation provisions in a multiparty context is especially intricate. An obvious difficulty is that each party must be treated equally with respect to the appointment of the arbitrators. A workable, but less than ideal, solution is to provide for all appointments to be made by the institution or appointing authority. The parties should also be aware that a consolidation clause may, in some jurisdictions, be read as consent to class-action arbitration.

Recommended Clauses:

113. The following provision provides for consolidation of related arbitrations between the same two parties:

The parties consent to the consolidation of arbitrations commenced hereunder and/ or under [the related agreements] as follows. If two or more arbitrations are commenced hereunder and/or [the related agreements], any party named as claimant or respondent in any of these arbitrations may petition any arbitral tribunal appointed in these arbitrations for an order that the several arbitrations be consolidated in a single arbitration before that arbitral tribunal (a 'Consolidation Order'). In deciding whether to make such a Consolidation Order, that arbitral tribunal shall consider whether the several

arbitrations raise common issues of law or facts and whether to consolidate the several arbitrations would serve the interests of justice and efficiency.

If before a Consolidation Order is made by an arbitral tribunal with respect to another arbitration, arbitrators have already been appointed in that other arbitration, their appointment terminates upon the making of such Consolidation Order and they are deemed to be *functus officio*. Such termination is without prejudice to: (i) the validity of any acts done or orders made by them prior to the termination, (ii) their entitlement to be paid their proper fees and disbursements, (iii) the date when any claim or defense was raised for the purpose of applying any limitation bar or any like rule or provision, (iv) evidence adduced and admissible before termination, which evidence shall be admissible in arbitral proceedings after the Consolidation Order, and (v) the parties' entitlement to legal and other costs incurred before termination.

In the event of two or more conflicting Consolidation Orders, the Consolidation Order that was made first in time shall prevail.