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# **DRAFTING ARBITRATION CLAUSES**

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prepared for the  
**ABA-NYSBA International Practice Boot Camp 2014**

New York City – April 1, 2014

This booklet may constitute attorney advertising and is provided for informational purposes only. The sample clauses used therein are suggestions only and do not constitute legal advice. Specifically, this guide does not address all potential situations and does not cover all provisions that may be advisable in a particular contract. Specialized counsel should be consulted.

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## **Introduction**

This booklet seeks to provide guidance for the drafting of arbitration clauses. Section I describes the basic elements that should always be considered when drafting an arbitration clause. Section II addresses additional elements that are generally recommended to be included. Section III deals with further elements that are optional, not necessary. Section IV addresses special issues.

Throughout, sample clauses are provided from which a party may pick and choose to tailor an arbitration clause suitable for the situation at hand. There is no magic language, and no “one size fits all” solution. Depending on whether the party is most likely the breaching or the non-breaching party, it may seek different wording in the arbitration clause. Much will also depend on the relative bargaining power, in which case the person negotiating the clause should know which provisions are absolutely necessary — and which are not.

### **I. Basic Arbitration Clause**

In order to be valid, enforceable, and effective, an arbitration clause needs to achieve at least three things: (i) designate arbitration as a mandatory means of dispute resolution, (ii) define the scope of covered disputes, and (iii) select the governing rules.

#### **A. Mandatory Arbitration**

- Designate arbitration as the exclusive and mandatory means of dispute resolution.
- Use appropriate language: “shall”, not “may.”
- Remove conflicting forum selection clauses (often stemming from prior versions of the agreement) that may reside within the agreement (exception: carve-out clauses providing for certain disputes to be heard by courts).

#### **B. Scope**

- Leave no doubt whether a certain claim is covered.
- The parties may elect to arbitrate all disputes (including related tort claims, statutory claims, fraud and fraud in the inducement claims, etc.) or to limit the clause to claims directly arising out of the agreement.
- Arbitral tribunals have the authority to determine their own jurisdiction where there is “clear and unmistakable” evidence that the parties intended to grant such authority. Most international arbitration rules empower the arbitrators accordingly, but clarifying language cannot hurt.
- The parties may want to carve out certain claims (for example, the parties may refer certain pricing and technical disputes to expert determination rather than to arbitration).<sup>1</sup>

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<sup>1</sup> Such a clause can be found in Section IV.D.

- Sample clauses:
  - Broad Scope:

*“Any dispute, controversy, or claim relating to, connected with, or arising out of this Agreement, including any question regarding its existence, validity, or termination, as well as any challenge to the tribunal’s jurisdiction...”*
  - Narrow Scope:

*“All disputes arising under this Agreement...”* [precludes arbitration of matters that, while related to the agreement, do not arise out of it]

*“Any dispute, controversy, or claim relating to, connected with, or arising out of this Agreement, including any question regarding its existence, validity, or termination, but with the exception of claims arising under Article \_\_\_ of this Agreement...”* [precludes specific claims, even if they arise out of the agreement]

*“Except for those matters which are specifically excluded from arbitration hereunder as set forth below (‘Exempted Matters’), any dispute, controversy, or claim connected with, relating to, or arising out of this Agreement ... The following Exempted Matters shall be specifically excluded from arbitration: “ [May be combined with forum selection clause, e.g. *“The courts of [Country X / State Y] shall have exclusive jurisdiction over all Exempted Matters.”* or *“With respect to any matter not subject to arbitration under this Agreement, each party hereby irrevocably (i) submits to the non-exclusive jurisdiction of the courts of [Country X / State Y], (ii) waives any objection it may have at any time to the laying of venue of any such proceedings brought in such courts, (iii) waives any claim as to forum non conveniens, and (iv) waives the right to object with respect to such proceedings that any such court does not have jurisdiction over such party.”*”]*

**C. Rules**

- The parties have the choice between having their arbitration administered by an arbitral institution (institutional arbitration) and doing so themselves (*ad hoc* arbitration). There is also a “hybrid” version, where the arbitration itself is not administered, but the parties designate an arbitral institution as appointing authority for the arbitral tribunal in the event that the parties fail to agree upon a tribunal. Once in place, the tribunal then makes other necessary procedural and administrative decisions.
- Unless the parties are very experienced and “arbitration-savvy,” administered arbitration is the safer choice: The institution not only provides a tested set of rules, but also offers other support services (such as handling all communications with the arbitrators, including payment issues) and may step in if there are any problems between the parties, arbitrators, or counsel relating to the arbitral process itself (such as obstruction or delay).

Institutional rules usually also permit the arbitration to proceed if one party refuses to participate.

- If the parties have opted for institutional arbitration, the choice of the arbitral institution automatically determines which rules apply. Various arbitral institutions offer their services to administer arbitrations.

Global institutions include:

- International Chamber of Commerce (ICC),
- International Centre for Dispute Resolution (ICDR) of the American Arbitration Association (AAA), and
- London Court of International Arbitration (LCIA).

There are also many regional centers around the world.<sup>2</sup> Well-known examples include:

- Arbitration Institute of the Stockholm Chamber of Commerce (SCC),
- Câmara Americana de Comércio para o Brasil-São Paulo (AmCham Brazil-São Paulo),
- Cairo Regional Centre for International Commercial Arbitration (CRCICA),
- Centro de Arbitragem da Câmara de Comércio Brasil-Canadá (CAM-CCBC),
- China International Economic and Trade Arbitration Commission (CIETAC),
- Dubai International Arbitration Centre (DIAC),
- German Institution of Arbitration (DIS),
- Hong Kong International Arbitration Centre (HKIAC),
- Inter-American Commercial Arbitration Commission (IACAC),
- Singapore International Arbitration Centre (SIAC), and
- Swiss Chambers' Court of Arbitration and Mediation (SCCAM).

Other centers provide infrastructure, but do not administer proceedings, such as the New York International Arbitration Center (NYIAC).

- Which institution (and thus set of rules) is preferable has to be decided on a case by case basis by comparing the rules (*e.g.*, the availability of interim relief) and the fee structure (*e.g.*, the amount to be paid upfront to commence an arbitration) under the most likely factual scenario. For instance, if a party is likely to be the breaching party and thus the respondent in the arbitration, that party may prefer a set of rules requiring a higher initial fee and not providing for “emergency relief” from the tribunal.
- Some institutions have industry-specific subsets of rules.
- When the parties have opted for *ad hoc* arbitration, the parties may want to select arbitration rules developed for non-administered arbitration, *e.g.*, the Arbitration Rules

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<sup>2</sup> Newly established smaller regional centers should be selected only after careful consideration. Their rules and administrative capabilities may not have been fully tested, their roster of arbitrators may not provide the necessary choice, and if they disappear before the dispute arises, the arbitration clause may become a nullity.

developed by the United Nations Commission on International Trade Law (UNCITRAL). The International Institute for Conflict Prevention and Resolution (CPR) has published “Rules for Non-Administered Arbitration of International Disputes” and also serves as an appointing authority.

- Whether the parties prefer institutional arbitration, *ad hoc* arbitration, or the “hybrid” version, the applicable rules should be clearly designated, as they provide the procedural framework for the arbitration. If the parties do not incorporate a set of rules, all procedural issues that may arise during the arbitration should be addressed in the arbitration clause itself.

#### **D. Model Clauses**

- All arbitration institutions have their own model clauses, which may serve as a starting point. The model clauses contain all the elements required to make an arbitration agreement valid, enforceable, and effective.
- As set forth below in Sections II - IV of this guide, the parties may want to add to the model clauses. But arbitration clauses need to be drafted carefully in order to avoid clauses that do not work in the circumstances presented (often referred to as “pathological” clauses).
- Sample clauses:
  - ICC: “*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.*”
  - ICDR: “*Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules.*”
  - LCIA: “*Any dispute arising out of or in connection with this Agreement, 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.*”
  - CPR: “*Any dispute arising out of, or relating to, this Agreement, including the breach, termination or validity thereof, shall be finally resolved by arbitration in accordance with the International Institute for Conflict Prevention and Resolution Rules for Non-Administered Arbitration of International Disputes, by [a sole arbitrator] [three arbitrators, of whom each party shall appoint one] [three arbitrators, none of whom shall be appointed by either party].*”

## II. Recommended Additions

### A. Place of Arbitration

- The place (or “seat”) of arbitration has important legal consequences:
  - It determines the law governing the *procedural* aspects of the arbitration (*lex arbitri*);
  - Local courts may be called upon to provide assistance (*e.g.*, by appointing or replacing arbitrators, or by ordering provisional and conservatory measures);
  - Local courts may interfere with the conduct of the arbitration (*e.g.*, by ordering a stay of the arbitral proceedings); and
  - Local courts have jurisdiction to hear challenges against the award at the end of the arbitration.
  - Note: In international arbitrations seated in the United States, the Federal Arbitration Act (FAA) should apply. If it is not certain whether or not the transaction/dispute will qualify as international, and the parties want to ensure that the FAA will apply, they may wish to add the following language: “This Agreement and any arbitration conducted pursuant to its terms shall be governed by the Federal Arbitration Act (9 U.S.C. §§ 1-307)”.
- Parties may take into consideration the following factors:
  - Is the jurisdiction a party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) or the 1975 Inter-American Convention on International Commercial Arbitration (“Panama Convention”)?
  - Need/availability of local counsel? Does local law allow non-nationals to appear as counsel in international arbitration? Any restrictions as to choice of arbitrators?
  - Ease and willingness of parties, arbitrators, witnesses, and counsel to travel there (*e.g.*, required visas/immunizations, available flights, adequate hotels, etc.)?
  - Logistical support available (conference rooms, stenographers, etc.)?
  - Local law/judiciary supportive of arbitration (motions to compel, anti-suit injunctions) – or not (motions to vacate award)?
  - Tax treatment of the award?
- Note that under most rules, the tribunal is free to meet and hold hearings in places other than the one designated as the place of arbitration.
- Sample clause: “The place of arbitration shall be [city, country].”<sup>3</sup>

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<sup>3</sup> Parties may agree that the place of arbitration depends on which side commences the arbitration (arbitration to be held in the respondent’s country, so-called “home and home” provision). Such clauses should be used only after

**B. Applicable Law**

- Choose one substantive national legal system (which may, but does not have to, coincide with the seat of the arbitration).<sup>4</sup>
- Certain issues may be governed by a different law than the rest of the agreement. For instance, local law may apply to real estate-related issues (such as transfer of title, enforcement of mortgages, etc.).
- Be careful with “a-national” rules of law, such as *lex mercatoria* or “generally accepted principles of international law.” The content of such rules is often vague, unclear or uncertain, which may lead to additional disputes as to what these rules actually say or mean, before they can be applied to the facts of the case. Lengthy and expensive legal expert testimony is often required in such cases.
- Think of international conventions (e.g., the 1980 UN Convention of the International Sale of Goods [CISG]).<sup>5</sup> Should they apply or not? If not, expressly carve them out.
- Think of conflict of laws provisions and exclude them where appropriate.
- Think of the impact the applicable law has on the merits of the case (e.g., higher or lower standard of liability, statute of limitations, etc.) and on the procedure (e.g., pool of qualified counsel and arbitrators, language in which most of the case law and treatises will be, etc.).
- Check the remainder of the agreement for a choice of law clause. If there is any, make it consistent with the choice of law clause in the arbitration clause or simply collapse both clauses into one (e.g., by striking one of them).
- Time limits are often important. Where a party is most likely to be the breaching party, a short contractual limitations period should be established (to the extent allowed by the applicable law). Conversely, the party that is most likely the non-breaching side may want to set forth that the commencement of the arbitration tolls the statute of limitation. In any event, the arbitrators should have the authority to decide any disputes regarding this issue.<sup>6</sup>
- Sample clauses:

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Careful consideration, since they may put a party in a position where it has to make a choice between commencing arbitration in an unfamiliar and unfavorable forum or to abandon its right to relief.

<sup>4</sup> The seat of the arbitration does not determine the substantive law governing the dispute. The applicable law should thus be selected separately and expressly.

<sup>5</sup> Instead of summarily derogating the CISG, a party should analyze whether its application may actually benefit it.

<sup>6</sup> Some jurisdictions treat this as a procedural, rather than a substantive issue. Local counsel should be consulted as to whether the parties may toll time limits by agreement.



*“This Agreement is governed by, and all disputes arising under, relating to, or in connection with this Agreement shall be resolved in accordance with, the laws of [selected jurisdiction] [to the exclusion of its conflict of laws rules].”*

*“Any claim under this Agreement shall be time-barred unless the claiming party commences arbitration with respect to such claim within [one year] after the basis for such claim [has arisen][became known or should have become known to the claiming party.]”*

*“Any applicable statutes of limitations and defenses based upon the passage of time shall be tolled upon the filing of the request for [negotiation or mediation or] arbitration, as provided in this Agreement, and until [30 days] after the designated mediator or one of the parties has declared an impasse with no request for arbitration having been made, or where a request for arbitration has been made, until 60 days after the issuance of the final award.”*

**C. Language of the Arbitration**

- Pick one (and only one) official language for the arbitration.
- Consider any limitations the language of the arbitration may have on the pool of available arbitrators and counsel.
- Allow submission of documents or witness statements in original language where appropriate:
  - Translations are costly and slow down the process.
  - Witnesses should testify in their native language.
- Remember that as a default rule, the language often follows the document containing the arbitration clause. Be careful with term sheets, memoranda of understanding, etc. that may contain the final arbitration agreement between the parties.
- Sample clause:

*“The language of the arbitration shall be English. [Portuguese-language documents may be submitted without translation.]”*

**D. Number of Arbitrators**

- Pick one or three.
  - To allow more flexibility, sometimes the parties agree that they shall attempt, within a stated period of time after commencing the arbitration, to agree on a sole arbitrator, but if they fail to reach an agreement within such timeframe, the default mechanism will be a panel of three arbitrators.

- Keep in mind that the number of arbitrators has an impact on the overall cost, duration, and quality of the arbitral proceedings:
  - Arbitration before three-person tribunals is usually lengthier and more expensive than before a sole arbitrator.
  - A three-person tribunal may be better equipped to address complex issues of fact and law, reducing the risk of irrational or unfair results.
  - A three-person tribunal allows each party to select one arbitrator (who in addition may be selecting the chair), thus having an increased control of the process and reducing the risk of the other side unduly influencing the arbitrator.
- The choice between one or three may be made contingent on the size of the matter:
  - For example, R-1(b) of the AAA Commercial Rules provides for Expedited Procedures before a sole arbitrator “in any case in which no disclosed claim or counterclaim exceeds \$75,000” (but the parties may agree to use these procedures in larger cases as well).
- Note that all arbitrators, even those appointed by the parties, are strictly neutral, impartial and independent.
- Sample clause: “*There shall be [one or three] arbitrator[s].*”

#### **E. Method of Arbitrator Selection**

- The selection of the arbitrators is crucial, as the arbitration is only as good as the arbitrators. Parties often consider it to be one of the biggest advantages of arbitration that they can freely choose who decides their case, as opposed to a randomly-assigned judge in a court case.
- Usual procedure for a three-member panel:
  - Each party picks one arbitrator.
  - The chair is picked by the party-appointed arbitrators or the arbitral institution.<sup>7</sup>
- While it is advisable to set deadlines, the parties should not have unrealistic expectations. The party-appointed arbitrators should have at least 20-30 days to select the chair.
- The applicable arbitration rules should be reviewed for the default mechanism (including timing). If the parties decide to depart from the default mechanism, they should use language consistent with the terminology of the applicable arbitration rules: Under certain institutional rules, the parties “nominate” arbitrators, and only the institution is empowered to “appoint” them.

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<sup>7</sup> This differs from the English “umpire” procedure, where each party appoints one arbitrator, and the two so-appointed arbitrators attempt to agree on a decision. If they fail to do so, they appoint an umpire, who then decides by himself/herself.

- Sample clause (in case institutional rules provide for all arbitrator selections to be made by the institution, but the parties wish to modify that procedure):

*“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 party-appointed arbitrators within [30] days of the selection of the second arbitrator. Any arbitrator(s) not selected within these time periods shall be selected by the [institution].”*

**F. Judgment on the Award**

- U.S. courts enforce awards resulting from arbitrations not falling under the New York or Panama Conventions only if the parties expressly provided the court with the authority to do so. Some other jurisdictions have similar rules.
- While technically not necessary for international cases falling under the New York or Panama Conventions, it does not hurt to include the language in order to clarify the issue.
- Sample clause:  
*“Judgment on the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof or having jurisdiction over the relevant party or its assets.”*

**III. Optional Additions (Examples)**

**A. Service**

- In case the parties have carved out certain claims to be decided by courts, the parties may want to address the issue of valid service. This may also be relevant for purposes of commencing enforcement or vacatur proceedings.
- Sample clause:  
*“[Party A] irrevocably designates, appoints, and empowers [Agent B], with offices on the date hereof at [Address in City C], as its agent with respect to any action or proceeding in [Country D] to receive, on its behalf, and in respect of its property, service of any and all legal process, summons, notices, and documents which may be served in any such action or proceeding, and agrees that the failure of the agent to notify [Party A] of any such service of process does not impair or affect the validity of service. [Party A] further irrevocably consents to the service of process out of any of the courts listed in [Article X] by the mailing of copies by registered or certified mail, postage prepaid, to [Party A] at its address set forth in [Article Y], such service to become effective 30 days after such mailing. If for any reason [Agent B] shall cease to be available to act as agent, [Party A] agrees to designate a new agent in [City C] on the same terms and for the same purposes.”*

**B. Qualifications and Nationality of Arbitrators**

- Usually, the parties are in a better position at the time when the dispute arises to know whether specific expertise is required from the arbitrator and make the appropriate nomination, rather than doing so in advance in the arbitration clause. Also, the other party may delay the proceedings by challenging arbitrators on the basis of the qualification requirements, or, even worse, attack the award alleging that the arbitrators lacked jurisdiction because they did not have the necessary qualifications.
- If the parties nevertheless wish to specify qualifications in the arbitration clause, they should use objective criteria.
  - Examples: National of country X (or not from country Y); fluent in language Z; 10 years admitted as a lawyer; retired judge; former officer of Lloyd's; MBA, CPA, from U.S. accredited school, etc.
- The presiding arbitrator should be a lawyer, given that he/she is supposed to draft the award.
- Avoid personal designations (individuals may not be alive, become unavailable, or be conflicted at the time of the dispute) or potentially impossible qualifications:
  - Bad examples: "Mr. Smith", "Chief Justice of the Supreme Court."
  - Bad example: "No U.S. national, but admitted and resident in Orange County, 15 years experience in subject matter, and fluent in Mandarin." [Is there such a person? What if not?]
- Be clear and specific, not vague or cryptic, as this may lead to disputes:
  - Bad example: "The arbitrators ... shall be experts in the subject matter." [What does that mean? What makes someone an expert?]
- It is generally accepted that all arbitrators in international arbitration, including those appointed by the parties, shall be impartial and independent. While this usually goes without saying, in some cases, the parties may want to highlight this in the clause.
- Sample clauses:
  - "[Each arbitrator][The presiding arbitrator] shall have a degree [from a U.S. or UK accredited university] [in pyrometallurgical engineering]."*
  - "[The presiding arbitrator] shall be fluent in (written and spoken) English and Portuguese, and be a lawyer in good standing admitted in jurisdiction X for at least 10 years prior to the filing of the request for arbitration."*
  - "The [sole arbitrator/presiding arbitrator] shall not be a citizen of either [Country X] or [Country Y]."*

*“The presiding arbitrator shall be a practicing attorney admitted in [jurisdiction X] specializing in construction law.”*

*“The arbitrator(s) shall be impartial and independent.”*

### C. Document Disclosure

- As a general practice, document disclosure in internal arbitration is much more limited compared to U.S. style discovery. Most arbitration rules give the tribunal discretion as to the taking of evidence, including document disclosure. If the parties want to avoid surprises, they should spell out in the arbitration clause what type of disclosure, if any, they want. Depending on the factual situation, a party may want to exclude discovery altogether, freely allow it, or find some middle ground in between.
- U.S. parties should keep in mind that foreign opponents may make an application pursuant to 28 U.S.C. § 1782. While the U.S. Supreme Court has not yet clarified whether that provision applies to international arbitration, some courts in the United States have held that it does. In order to limit any risk, U.S. parties may want to prevent this “discovery through the backdoor” in the arbitration clause (to the extent disclosure is not desired).
- Sample clauses:
  - No discovery at all

#### Option 1

*“The parties agree that they shall have no right to seek production of documents or any other discovery in the arbitration proceedings. In addition, no party to this Agreement is permitted to make any application pursuant to 28 U.S.C. § 1782.”*

#### Option 2

*“The parties agree that there shall be no disclosure of documents other than the disclosure, prior to the hearing, of documents that each side will present in support of its case. Electronic disclosure by each party shall be limited to copies of electronic information to be presented in support of that party’s case, in print-out or another reasonably usable form. No party to this Agreement is permitted to make any application pursuant to 28 U.S.C. § 1782.”*

- Narrow discovery

#### Option 1

*“The parties shall be entitled to reasonable production of relevant, non-privileged documents, carried out expeditiously. If the parties are unable to agree upon same, the arbitral tribunal shall have the power, upon application of any party, to make all appropriate orders for production of documents by any party. There shall be no discovery depositions. [or: At the request of any party, the arbitral tribunal shall have the*

*discretion to order the examination by deposition of any witness to the extent the arbitral tribunal deems such examination appropriate [or necessary]. Depositions shall be limited to a maximum of [number] per party]. No party to this Agreement is permitted to make any application pursuant to 28 U.S.C. § 1782.”*

Option 2

*“The parties shall confer jointly with the arbitral panel at the earliest convenient date to determine the discovery that shall take place. Each party shall have the right to take no more than [number] depositions of potential witnesses not to exceed an aggregate total of [number] hours of deposition time for a party, and shall have the right to serve no more than [number] sets of interrogatories, none of which shall include more than [number] interrogatories. Additional discovery shall be in the discretion of the arbitrator. All discovery shall be completed within [number] months after the selection of the arbitrators, unless this period of time is extended by the tribunal for good cause. No party to this Agreement is permitted to make any application pursuant to 28 U.S.C. § 1782.”*

Option 3

*“The parties agree that they will disclose, prior to the hearing, the documents that each side will present in support of its case, as well as documents essential to a matter of import in the proceeding for which a party has demonstrated a substantial need. Disclosure of electronic information shall include (1) disclosure, in reasonably usable form, by each party of electronic information maintained by no more than [specify number] designated custodians; (2) provision only of information created between the date of the signing of the agreement that is the subject of the dispute and the date of the filing of the request for arbitration; (3) disclosure of information from primary storage facilities only; no information is required to be disclosed from back-up servers or back-up tapes; no disclosure of information from cell phones, PDAs, voicemails, etc.; and (4) no disclosure of information other than reasonably accessible active data. The parties agree to meet and confer, prior to an initial scheduling conference with the tribunal, concerning the specific modalities and timetable for electronic information disclosure. No party to this Agreement is permitted to make any application pursuant to 28 U.S.C. § 1782.”*

Option 4

*“The IBA Rules on the Taking of Evidence in International Commercial Arbitration (as amended) (the ‘IBA Rules’) shall apply together with [the designated arbitration rules]. Where there is inconsistency, the IBA Rules shall prevail, but solely as regards the taking of evidence. No party to this Agreement is permitted to make any application pursuant to 28 U.S.C. § 1782.”*

Option 5

*The parties may include a section in the “substantive part” of the main agreement establishing a contractual obligation of one party to provide the other party with certain*

*specifically defined documents or categories of documents regarding the project. The arbitral clause can make reference to that provision establishing that there will be no further discovery or document exchange between the parties under any other circumstances (including 28 U.S.C. § 1782).*

- Broader discovery

Option 1

*“In addition to the authority conferred on the arbitral tribunal by the above arbitration rules, the arbitral tribunal shall have the authority to order such production of documents [and such depositions of party witnesses] as may be reasonably requested by either party or by the arbitral tribunal itself. No party to this Agreement is permitted to make any application pursuant to 28 U.S.C. § 1782.”*

Option 2

*“The parties agree that they will disclose, prior to the hearing, the documents that each side will present in support of its case, documents essential to a matter of import in the proceeding for which a party has demonstrated a substantial need, and documents relating to issues in the case that are in the possession of persons who are noticed as witnesses by the party requested to provide disclosure. Disclosure of electronic information shall include (1) disclosure, in reasonably usable form, by each party of electronic information maintained by no more than [specify number] designated custodians; (2) provision only of information created [specify amount of time] prior to the date of the signing of the agreement that is the subject of the dispute and the date of the filing of the request for arbitration; (3) disclosure of information from primary storage facilities only; no information is required to be disclosed from back-up servers or back-up tapes; no disclosure of information from cell phones, PDAs, voicemails, etc.; and (4) no disclosure of information other than reasonably accessible active data. Upon a showing of special need and relevance by the requesting party, electronic disclosure shall include deleted, fragmented or other information difficult to obtain other than through forensic means. The parties agree to meet and confer, prior to an initial scheduling conference with the tribunal, concerning the specific modalities and timetable for electronic information disclosure. No party to this Agreement is permitted to make any application pursuant to 28 U.S.C. § 1782.”*

- Full discovery

Option 1

*“The parties shall allow and participate in discovery in accordance with the United States Federal Rules of Civil Procedure. Unresolved discovery disputes shall be submitted to the arbitrator(s).”*

Option 2

*“The parties agree that there shall be pre-hearing disclosure of documents, including electronic information, regarding non-privileged matters that are relevant to any party’s*

*claim or defense, subject to limitations of reasonableness, duplication, and undue burden. The parties agree to meet and confer, prior to an initial scheduling conference with the tribunal, concerning the specific modalities and timetable for electronic information disclosure.”*

**D. Confidentiality**

- Parties often assume that arbitration proceedings are confidential—which is not necessarily the case. While arbitration is private (i.e., no third party or the general public is allowed in the hearing room or has access to the files), the parties (unlike the arbitrators and the arbitral organizations) have, absent specific provisions in the applicable arbitration rules or legal provisions in certain jurisdictions, no general obligation to keep the existence or content of the arbitration confidential.
- Parties who wish to keep the arbitration confidential should say so in the arbitration clause. Confidentiality should encompass the following issues:
  - Existence of the arbitration itself;
  - Any documents prepared or created for the arbitration (including pleadings and other submissions to the tribunal);
  - Any evidence submitted by the parties (except for documents that are publicly available); and
  - Any correspondence from the arbitral organization or the tribunal (including procedural orders, interim and final awards, etc.).
- Similarly, parties who want to make sure that they are allowed to publish certain information may want to clarify so as well.
- Note that confidentiality, even if agreed to in the arbitration clause, may not be absolute, given that disclosure may be required by law (public companies may have reporting obligations, which in other countries may be different from U.S. standards), to pursue a legal right, or to enforce or challenge an award in a public court proceeding. Preparation of submissions in the arbitration itself may also require disclosure of confidential information to non-parties, such as fact witnesses and experts.
- Sample clauses:
  - Parties wishing to impose confidentiality obligation:

*“The existence and content of the arbitral proceedings and any rulings or award shall be kept confidential except (i) to the extent that disclosure may be required of a party to fulfill 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, or (ii) with the written consent of all parties. Notwithstanding anything to the contrary, either party may disclose matters relating to the*



*arbitration or the arbitral proceedings where necessary for the preparation or presentation of a claim or defense in such arbitration.”*

- Parties not wishing 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.”*

**E. Interim Relief**

- Depending on the circumstances, the availability of provisional and conservatory relief may be of importance for a party (e.g., to obtain an injunction, security for costs, a freezing order, an anti-suit injunction, etc.).
- The rules of certain arbitral institutions have built-in rules for emergency relief (e.g., Art. 37 of the ICDR Rules or Art. 29 of the ICC Rules), others do not. Some rules restrict the parties’ right to seek interim relief from the courts once the arbitral tribunal is in place; other rules limit it to the subject matter of the dispute.
- Sample clauses:
  - Explicit authority of the arbitral tribunal:  
*“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 conservatory relief and injunctive relief, and any such measures ordered by the arbitral tribunal may, 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.”*
  - Add-on or stand-alone clause to clarify that interim relief from courts is not precluded:  
*“Either party retains the right, consistent with this Agreement, 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.”*
  - Add-on or stand-alone clause to limit the parties’ right to resort to the courts once the arbitral tribunal is constituted:  
*“Either party has the right, consistent with this Agreement, to apply to any court of competent jurisdiction for provisional and/or conservatory relief, including pre-arbitral attachments or preliminary injunctions, 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.”*

**F. Damages And Interest**

- Some arbitration rules exclude punitive, exemplary, or similar damages; some do not. The side that is most likely the breaching party may want to exclude any such damages from being available. Similarly, such a party may want to limit the types or categories of consequential damages and exclude them from recovery.
- The parties may also want to determine the applicable interest rate if they wish to avoid the application of a statutory interest rate (which, *e.g.*, under New York state law is 9% p.a.). Fixed rates or rates pegged to a reference rate such as LIBOR etc. are advisable. To avoid any doubts, the clause should indicate whether and how interest should be compounded.
- Sample clauses
  - Waiver of punitive, exemplary, or similar damages:

*“The parties expressly waive and forego any right to punitive, exemplary, or similar damages as result of any dispute, controversy, or claim relating to, connected with, or arising out of this Agreement, or the breach, existence, validity, or termination thereof.”*
  - Limitation of damages (example benefitting owner-employer as breaching party):

*“The arbitrator(s) shall have no authority to directly or indirectly award any form of consequential damages, as such damages have been waived by the parties to this Agreement. Such prohibited damages include lost profits; any form of overhead not directly incurred at the project site, such as home office overhead; wage or salary increases; ripple or delay damages; loss of productivity; increased cost of funds for the project; extended capital costs; lost opportunity to work on other projects; inflation costs of labor, material, or equipment; non-availability of labor, material or equipment due to delays; increased costs of bonding due to delay; or any other indirect losses arising from the conduct of the parties to this Agreement.”*
  - Limitation of damages (example benefitting contractor as breaching party):

*“The arbitrator(s) shall not be empowered to award any damages as lost rent or revenue; rental payments for temporary offices; increased costs of administration or supervision; costs or delays suffered by others unable to commence work or services as previously scheduled, for which a party to this contract may be liable; increased costs of borrowing funds devoted to the project; delays in selling all or part of the project upon completion; termination of agreements to lease or buy all or part of the project, whether or not suffered before completion of services or work; forfeited bonds, deposits, or other monetary costs or penalties due to delay of the project; lost tax credits or deductions due to delay of the project; lost tax credits or deductions due to delay; impairment of security; or any other indirect loss arising from the conduct of the parties to this Agreement.”*

- Interest:  
*“Interest shall be awarded at [rate and period] and be compounded [monthly].”*

**G. Costs and Fees**

- Arbitration is often as costly as litigation. Costs (e.g., arbitrators’ fees and expenses, institutional fees) and attorney’s fees can be substantial. National laws diverge widely (from no allocation at all to full recovery by the prevailing party), and most rules give arbitrators wide discretion. The parties may achieve more certainty by dealing with costs and fees in the arbitration clause.
- The parties may wish to identify which categories of costs should be recoverable and which are not. In that context, they may want to consider whether compensation for the time spent by management and in-house counsel is recoverable.
- Some jurisdictions have strong public policy considerations that may render a clause unenforceable. For instance, an agreement that costs be split 50:50 may not be recognized in a jurisdiction that follows the “loser pays” rule. Similarly, success fees may not be recognized.
- Sample clauses:
  - Arbitrators have discretion to allocate both costs and fees:  
*“The arbitral tribunal may include in its award an allocation to any party of such costs and expenses, including attorneys’ fees [and costs and expenses of management, in-house counsel, experts, and witnesses], as the arbitral tribunal shall deem reasonable.”*
  - Allocation of costs and fees to the prevailing party:  
*“The arbitral tribunal may award its costs and expenses, including attorneys’ fees, to the prevailing party, if any, and as determined by the arbitral tribunal in its discretion.”*
  - 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 attorneys’ 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, counterclaims, and defenses.”*
  - Parties split costs equally:  
*“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.”*

## H. Deadline for Final Award

- Fixing a time limit within which the final award has to be rendered may save time and thus costs (so-called “fast-tracking”).
- The parties should build in flexibility and allow the tribunal to extend the time limits if necessary:
  - The time limits should be realistic and take into consideration necessary briefing and expert testimony.
  - Some disputes are not suitable for fast-tracking, and it is hard to predict at the time of drafting the arbitration clause whether fast-tracking will be appropriate.
  - An award not rendered within the prescribed period may be unenforceable or attract unnecessary challenges.

- Sample clause:

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

## I. Review by Courts

- In certain jurisdictions, certain issues at stake in the arbitration may be presented to the courts. For instance, the English Arbitration Act allows the courts to get involved for certain determinations, unless the parties agree otherwise.
- One of the stated advantages of arbitration is that there are no appeals. The review by the courts is usually limited to very few grounds which are similar or identical to the grounds listed in the New York Convention (and may not be expanded by agreement, as the U.S. Supreme Court held). As an exception, the English Arbitration Act allows the parties to appeal to a court on a question of law. The parties may exclude the possibility in the arbitration clause. Conversely, some jurisdictions – e.g., the Swiss Federal Statute on Private International Law (PIL) – allow the parties to completely waive any recourse to the courts, even on limited grounds. Such waivers should be used only after careful consideration.
- Given that arbitration is a creature of contract, the parties are free to submit the award to a second arbitral panel if they so choose. Some arbitral organizations (e.g., the CPR) provide rules for such appellate procedures, which should be used with caution and may be limited to cases exceeding a certain amount at stake.

- Model clauses:

*“The parties expressly agree that an application for the determination of a preliminary point of law under Section 45 or leave to appeal under Section 69 of the English*

*Arbitration Act of 1996 may not be sought with respect to any question of law in the course of arbitration pursuant to this Agreement or arising out of an award stemming from such arbitration.”*

*“An appeal may be taken under the CPR Arbitration Appeal Procedure from any final award of an arbitral panel in any arbitration arising out of or related to this Agreement that is conducted in accordance with the requirements of such Appeal Procedure. Unless otherwise agreed by the parties and the appeal tribunal, the appeal shall be conducted at the place of the original arbitration.”*

#### **J. Waiver of Sovereignty**

- Parties to a contract may include governments, governmental agencies, or government-owned or -controlled entities — all of which may assert sovereign immunity.
- While the arbitration clause in such a contract may be interpreted as a waiver of immunity with respect to the arbitral tribunal’s jurisdiction, such waivers are interpreted very narrowly and may not automatically include waivers with respect to the recognition of an award, the execution of a recognized award against sovereign assets, or pre-award attachments. Explicit language should be used for these issues.

- Sample clause:

*“To the fullest extent permitted by law, [State entity] hereby irrevocably waives any claim of sovereignty or any other immunity regarding any proceedings commenced pursuant to this Agreement, including, without limitation, any proceedings to recognize and/or enforce an award rendered by the arbitrator(s). Specifically, this waiver includes immunity from suit, immunity from service of process, immunity from jurisdiction of any court, and immunity of property and revenues from execution and/or attachment or sequestration before or after an award or judgment.”*

#### **IV. Special Issues**

##### **A. Negotiation and/or Mediation As Prerequisites for Arbitration**

- Mandatory negotiation or mediation may help to avoid costly arbitration and save the business relationship, in particular if that process involves executives not involved in the contract performance. On the other hand, parties can always negotiate, even if not contractually required to do so. Depending on the circumstances, the respective positions of the parties may be so firm that the negotiation or mediation process becomes a mere formality and only adds time and cost before the arbitration can begin. “Step-Up” or “escalator” clauses usually work between parties that have a certain size and a similar organizational structure.
- A negotiation or mediation period should be triggered by a specific and undisputable event (*e.g.*, a written request to negotiate or mediate under the clause, or the appointment of a mediator). Otherwise there might be a dispute as to whether or not the next step is

reached, or the losing party may even attempt to attack the award alleging that the arbitrators had no power.

- The negotiation or mediation period should be defined and rather short, *e.g.* 30 days.
- If the dispute is not resolved within the timeframe set forth in the clause, the next step is reached automatically. Avoid ambiguous clauses by using mandatory language (use “shall” instead of “may”).
- Sample clauses:
  - Mandatory negotiation as a first step:

*“The parties shall endeavor to resolve amicably by negotiation all disputes arising out of, relating to, 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] (the “Rules”) by [one or three] arbitrator[s] appointed in accordance with the Rules. The place of arbitration shall be [city, country]. The language of arbitration shall be [...].”*
  - Mandatory mediation as a first step:

*“Any controversy or claim arising out of or relating to this Agreement, or breach thereof, shall be settled by mediation under the Construction Industry Mediation Procedures of the American Arbitration Association. If a party fails to respond to a written request for mediation within 30 days after service or fails to participate in any scheduled mediation conference, that party shall be deemed to have waived its right to mediate the issues in dispute. If the mediation does not result in settlement of the dispute within 30 days after the initial mediation conference, or if a party has waived its right to mediate any issues in dispute, then any unresolved controversy or claim arising out of or relating to this Agreement, or breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.” [AAA Model Step Mediation-Arbitration Clause]*

or

*“The parties shall endeavor to resolve by mediation under the [designated set of mediation rules] (the “Mediation Rules”) all disputes arising out of, relating to, or in connection with this Agreement, including any question regarding its existence, validity, or termination. Any such dispute not settled pursuant to the Mediation 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] (the “Arbitration Rules”) by [one or three] arbitrator[s] appointed in accordance with the Arbitration 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 compromise and settlement negotiations for purposes of applicable rules of evidence and any additional confidentiality and professional secrecy protections provided by applicable law.]*

- Both mandatory negotiation and mediation before arbitration:

*“All disputes arising out of, relating to, or in connection with this Agreement, including any question regarding its existence, validity, or termination (a “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 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 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] (the “Arbitration Rules”) by [one or three] arbitrator[s] appointed in accordance with the Arbitration 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 compromise and settlement negotiations for purposes of applicable rules of evidence and any additional confidentiality and professional secrecy protections provided by applicable law.]”*

**B. Multiple Parties**

- Arbitration clauses are usually drafted with only two parties in mind: one claimant and one respondent. But international contracts frequently involve more than two players (for instance, parents or affiliates of the contracting parties). While some rules specifically provide for multi-party arbitration, others do not. Since the multiplicity of parties may make the “classic” clauses unworkable, adjustments may be warranted.
- To the extent not dealt with in the applicable rules, the arbitration clause should address the consequences stemming from the multiplicity of parties for the appointment process of the arbitral tribunal (in particular if three arbitrators are to be selected) and for the arbitral procedure (such as intervention and joinder).
- Similarly, the parties may want to clarify that the arbitration agreement is also binding on their successors and affiliates.

- Sample clauses:

*“(1) All disputes arising out of, relating to, 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.*

*(2) The place of arbitration shall be [city, country]. The language of arbitration shall be [...].*

*(3) There shall be three arbitrators, who should be appointed by [the designated arbitral institution/appointing authority].*

*or*

*(3) There shall be three arbitrators, selected as follows. If no party to this Agreement objects in writing, within [15 days] after receipt of the request for arbitration, to the alignment of parties as claimants and respondents made therein, then each side shall appoint one arbitrator within [30 days] after receipt of the request for arbitration. The two party-appointed arbitrators shall appoint the third arbitrator, who shall serve as chair, within [30 days] of the appointment of the second arbitrator. Any arbitrator(s) not selected within the time limits set forth above be appointed by [the designated arbitral institution/appointing authority]. If any of the parties to this Agreement does object in writing, within [15 days] after receipt of the request for arbitration to the alignment of parties as claimants and respondents made therein, and if the parties do not agree within [15 days] thereafter on an alignment into two sides each of which shall appoint an arbitrator, then [the designated arbitral institution/appointing authority] shall appoint all three arbitrators.*

*or*

*(3) There shall be three arbitrators, selected as follows.*



*In the event that no more than two parties are named in the request for arbitration, 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 co-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 a co-arbitrator, then, upon the application of any party, such co-arbitrator shall be appointed by [the designated arbitral institution]. The two co-arbitrators shall appoint the third arbitrator, who shall act as presiding arbitrator. If the two co-arbitrators fail to appoint the presiding arbitrator within [30] days of the appointment of the second co-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 co-arbitrator and the respondent(s) shall jointly appoint the other co-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 disagree about their classification as claimant(s) or respondent(s), or if the multiple claimants or the multiple respondents fail to appoint a co-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 co-arbitrators as provided above, the two co-arbitrators shall appoint the third arbitrator, who shall act as presiding arbitrator. If the two co-arbitrators fail to appoint the third arbitrator within [45] days of the appointment of the second co-arbitrator, the presiding arbitrator shall be appointed by [the designated arbitral institution/appointing authority].*

*(4) 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].*

*(5) 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.*

*(6) 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.*

(7) *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.*

(8) *This arbitration Agreement is binding upon the parties, their principals, successors, assigns and affiliates.”*

### **C. Multiple Agreements**

- Complex international transactions often involve several related agreements. Careful drafting of the dispute resolution provisions is necessary to avoid an unwarranted fragmentation of the dispute resolution process, including parallel arbitrations or litigations.
- The cleanest solution is to establish a single stand-alone dispute resolution protocol, which is then incorporated by reference in all related agreements.
- If it is impractical to establish a single protocol:
  - Use identical or complementary arbitration clauses.
  - Clarify that a tribunal appointed under one agreement has jurisdiction to consider and decide issues related to the other related agreements.
  - Provide for consolidation (where desired).
- Sample clauses:

If a single stand-alone dispute resolution protocol cannot be achieved:

*“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)].”*

*“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 under [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, whether to consolidate the several arbitrations would serve the interests of justice and efficiency, and whether any party would be prejudiced as a result of such consolidation through undue delay or otherwise.*

*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, and (iii) the date when any claim or defense was raised for the purpose of applying any limitation bar or any like rule or provision.*

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

**D. Interim Adjudication And Dispute Resolution Boards**

- Particularly in the construction industry, delays increase costs, if not jeopardize a project altogether. As such, disputes need to be resolved as quickly as possible, even on an interim basis.
- One method, coming from England, is adjudication. The adjudicator decides disputes as they arise during the course of a construction contract. He or she makes a decision within a relatively short timetable, based on a rather informal procedure. The decision is binding unless and until subsequently reviewed by an arbitral tribunal or a court of law (or a final agreement between the parties).
- A special form of adjudication is Dispute Boards (DBs), which have become a standard dispute resolution mechanism for mid- and long-term contracts. See, *e.g.* Clause 20 of the FIDIC Conditions of Contract for Construction. A DB is a “standing arbitral tribunal” consisting of one or three members set up at the outset of a contract and remaining in place throughout its duration. Since the DB members “accompany” the contract and the parties’ performance from the very beginning, they become familiar with the relevant issues and can resolve disputes quickly by making recommendations or binding decisions if so requested by the parties.
- There are different types of DBs:
  - Dispute Review Boards (DRBs) issue “recommendations.” If the parties do not wish to comply with them voluntarily, they may submit the entire dispute to arbitration (if the parties have so agreed) or the courts, and are not bound by the recommendation in the interim.
  - Dispute Adjudication Boards (DABs), as the name indicates, issue “decisions,” which the parties may also submit to arbitration (if the parties have so agreed) or the courts, but are bound by them in the interim.
  - Combined Dispute Boards (CDBs) offer an intermediate approach: they normally issue recommendations, but may also issue decisions if one party so requests and no other party objects.
- Another option is to carve out certain issues for technical expertise. Only if the determination by the expert is not accepted by the parties will the dispute be submitted to arbitration. The ICC offers specialized expertise services.
- The owner-employer may want to make sure that the contractor is required to perform pending the arbitration.

- Sample clauses:

- Dispute Review Board followed by arbitration if required (ICC):

*“The Parties hereby agree to establish a Dispute Review Board (‘DRB’) in accordance with the Dispute Board Rules of the International Chamber of Commerce (the ‘Rules’), which are incorporated herein by reference. The DRB shall have [one/three] member[s] appointed in this Agreement or appointed pursuant to the Rules.*

*All disputes arising out of, relating to, or in connection with this Agreement shall be submitted, in the first instance, to the DRB in accordance with the Rules. For any given dispute, the DRB shall issue a Recommendation in accordance with the Rules.*

*If any Party fails to comply with a Recommendation when required to do so pursuant to the Rules, the other Party may refer the failure itself to Arbitration under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.*

*If any Party sends a written notice to the other Party and the DRB expressing its dissatisfaction with a Recommendation, as provided in the Rules, or if the DRB does not issue the Recommendation within the time limit provided in the Rules, or if the DRB is disbanded pursuant to the Rules, the dispute 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 of Arbitration.”*

- Dispute Adjudication Board followed by arbitration if required (ICC):

*“The Parties hereby agree to establish a Dispute Adjudication Board (‘DAB’) in accordance with the Dispute Board Rules of the International Chamber of Commerce (the ‘Rules’), which are incorporated herein by reference. The DAB shall have [one/three] member[s] appointed in this Agreement or appointed pursuant to the Rules.*

*All disputes arising out of, relating to, or in connection with this agreement shall be submitted, in the first instance, to the DAB in accordance with the Rules. For any given dispute, the DAB shall issue a Decision in accordance with the Rules. \**

*If any Party fails to comply with a Decision when required to do so pursuant to the Rules, the other Party may refer the failure itself to Arbitration under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.*

*If any Party sends a written notice to the other Party and the DAB expressing its dissatisfaction with a Decision, as provided in the Rules, or if the DAB does not issue the Decision within the time limit provided for in the Rules, or if the DAB is disbanded pursuant to the Rules, the dispute 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 of Arbitration.”*

*[\* Parties may, if they wish, provide for review by ICC of a DAB’s Decisions by inserting the following text in place of the asterisk above: “The DAB shall submit each Decision to ICC for review in accordance with Article 21 of the Rules.”]*

- Combined Dispute Board followed by arbitration if required (ICC):

*“The Parties hereby agree to establish a Combined Dispute Board (‘CDB’) in accordance with the Dispute Board Rules of the International Chamber of Commerce (the ‘Rules’), which are incorporated herein by reference. The CDB shall have [one/three] member[s] appointed in this Agreement or appointed pursuant to the Rules.*

*All disputes arising out of or in connection with this Agreement shall be submitted, in the first instance, to the CDB in accordance with the Rules. For any given dispute, the CDB shall issue a Recommendation unless the Parties agree that it shall render a Decision or it decides to do so upon the request of a Party and in accordance with the Rules.\**

*If any Party fails to comply with a Recommendation or a Decision when required to do so pursuant to the Rules, the other Party may refer the failure itself to Arbitration under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.*

*If any Party sends a written notice to the other Party and the CDB expressing its dissatisfaction with a Recommendation or a Decision as provided for in the Rules, or if the CDB does not issue the Recommendation or Decision within the time limit provided for in the Rules, or if the CDB is disbanded pursuant to the Rules, the dispute 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 of Arbitration.”*

*[\* Parties may, if they wish, provide for review by ICC of a CDB’s Decisions by inserting the following text in place of the asterisk above: “The CDB shall submit each Decision to ICC for review in accordance with Article 21 of the Rules.”]*

- Obligation to submit certain disputes to ICC Expertise:

*“In the event of any dispute arising out of or in connection with Article [X] of this Agreement, the parties agree to submit the matter, in the first instance, to administered expertise proceedings in accordance with the Rules for Expertise of the International Chamber of Commerce. If the dispute has not been resolved through such administered expertise proceedings it shall, after the Centre’s notification of the termination of the expertise proceedings, 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 of Arbitration.”*

- Continued obligation to perform pending the outcome of the dispute resolution:

*“Pending the final resolution of the dispute, the parties shall proceed diligently with the performance of this Agreement.”*<sup>8</sup>

*“The obligations of the Parties, the Engineer and the DB shall not be altered by reason of any arbitration being conducted during the progress of the Works.”*  
(FIDIC, 20.6).

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<sup>8</sup> The contractor may want to require the owner-employer to post a bond or provide other security — otherwise the contractor effectively finances the disputed work with a non-recourse lien.