

**DRAFTING THE ICC ARBITRAL CLAUSE<sup>o</sup>**

**By**

**R. Doak Bishop  
King & Spalding**

**1100 Louisiana , Suite 3300  
Houston, Texas 77002  
713/751-3200 (Tel.)  
713/751-3290 (Fax.)  
dbishop@kslaw.com (E-mail)**

## DRAFTING THE ICC ARBITRAL CLAUSE<sup>Ó</sup>

**R. Doak Bishop  
Baker & McKenzie  
Dallas, Texas**

### **A. Introduction**

The Cornerstone of international commercial arbitration is its consensual nature. In the course of drafting their agreement to arbitrate, the parties to an international contract may – to an extent – design the manner in which the arbitral proceedings are conducted.

In drafting the clause, there are a few mandatory requirements that must be met, and a few provisions that must be included. These provisions should be clear and unequivocal. In addition to these provisions, however, a clause may be ornamented with a cornucopia of other provisions.

A word of caution is in order. There is no such thing as a single “model”, “miracle” or “all purpose” clause appropriate for all occasions.<sup>1</sup> Each clause should be carefully tailored to the exigencies of a given situation, taking into account the likely types of disputes, the needs of the parties’ relationship and the applicable laws.

The International Chamber of Commerce (ICC) is the major arbitral institution in the world. When considering an institution to administer an arbitration proceeding, parties will often find it easier to negotiate an arbitration clause if the ICC is selected because of its brand name and quality advantages such as its scrutiny of party-appointed arbitrators and arbitral awards.

---

<sup>1</sup> Stephen Bond, How to Draft an Arbitration Clause (Revisited), 1 ICC Int’l Ct. Arb. Bull. 14 (Dec. 1990).

## **B. ICC Model Clause**

The ICC suggests the following sample arbitration clause for inclusion in international contracts:

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.<sup>2</sup>

This clause has been said to contain the three “key expressions” for an arbitral clause – “All disputes”. . . “in connection with”. . . “finally settled”.<sup>3</sup> The term “all disputes” encompasses all types of controversies, without exception. The language, “in connection with”, creates a broad form clause that will cover non-contractual claims such as tort and fraud in the inducement,<sup>4</sup> while “finally settled” indicates the parties intend the arbitrator’s ruling to be final so a court will not try the case de novo.

## **C. Different Versions of the ICC Arbitration Rules**

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

The parties can decide this matter by providing in their clause either that the adopted rules “then in force” on the date of their agreement or the rules “as modified or amended from time to

---

<sup>2</sup> ICC International Court of Arbitration Pamphlet.

<sup>3</sup> Lawrence Craig, William Park & Jan Paulsson, *International Chamber of Commerce Arbitration* § 6.03 at 111 (2d ed. 1990).

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

time” shall be applied.<sup>5</sup> In this respect, the parties may wish to adopt the rules in existence at the time of contracting because these are the rules they know, and future rule changes may have unpredictable effects. On the other hand, the parties may wish to take advantage of future rule amendments, assuming the ICC will only adopt changes that will better the arbitral process.

While allowing the parties expressly to choose which version of the rules they prefer, the rules of the ICC contain a default provision stating that in the absence of an agreement to the contrary, the arbitration shall be conducted according to the rules in effect on the date of the commencement of the arbitral proceeding.<sup>6</sup>

#### **D. Derogation From the ICC Rules**

In drafting a detailed arbitration clause, the parties should consider whether they can modify the ICC Rules. A few of the ICC Rules explicitly allow the parties to agree otherwise, but in some cases the ICC has refused to administer an arbitration because of alterations made by the parties' agreement to particular rules deemed by the ICC to be fundamental to its arbitral procedure.<sup>7</sup> For example, the ICC has refused to administer arbitrations in situations in which the parties provided for non-binding arbitration, in which the parties' agreement both called for an umpire procedure and adopted the ICC Rules, and in which the parties provided that the chairman of a tripartite panel could not alone decide the case in the absence of a majority,

---

<sup>5</sup> Bond, supra note 1, at 17.

<sup>6</sup> ICC Rules art. 6(1) (effective Jan. 1. 1998).

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

although the ICC Rules permit him to do so.<sup>8</sup> The ICC has also refused to set in motion arbitration proceedings when arbitral clauses provided that the ICC Court could not confirm arbitrators, handle challenges to arbitrators, replace arbitrators, determine arbitrators' fees, or scrutinize the draft award.<sup>9</sup> It has also been suggested that the ICC would probably refuse to administer an arbitration if the parties' agreement attempted to alter the ICC Rules regarding the Terms of Reference.<sup>10</sup>

If a party wishes to adopt the ICC Rules but to alter them, it should consider including a clause providing that any alteration of the ICC Rules may be disregarded if the ICC will otherwise refuse to administer the arbitration.

#### **E. Pathological Arbitration Clauses<sup>11</sup>**

Pathological arbitration clauses might be defined as those drafted in such a way that they may lead to disputes over the interpretation of the arbitration agreement, may result in the failure of the arbitral clause or may result in the unenforceability of an award.<sup>12</sup> Examples of such problems include (1) equivocation as to whether binding arbitration is intended,<sup>13</sup> (2) naming a

---

<sup>8</sup> Schwartz, supra note 7, at 11-12.

<sup>9</sup> Takla, supra note 7, at 9.

<sup>10</sup> Schwartz, supra note 7, at 11.

<sup>11</sup> Defective arbitration clauses were first denominated as "pathological" in 1974 by Frederick Eisemann, who served at that time as the Secretary General of the ICC International Court of Arbitration. Craig, Park & Paulsson, supra note 3, § 9.01 at 158.

<sup>12</sup> Id.

<sup>13</sup> In a French case, the dispute resolution clause was headed, "Choices of forum", and read: "In case of a dispute the parties undertake to submit to arbitration but in case of litigation the Tribunal de la Seine shall have exclusive jurisdiction." Decisions of 1 Feb. 1979, T.G.I. Paris, 1980 Rev. Arb. 97 (1980), and 16 Oct. 1979, 1980 Rev. Arb. 101 (1980), cited in William W. Park, Arbitration of International Contract Disputes, 39 Bus. Law. 1783, 1784 n.2 (1984).

Another defective clause provided, "In the event of any unresolved dispute, the matter will be referred to the International Chamber of Commerce," but it failed to say whether the dispute would be settled by

specific person as arbitrator who is now deceased or who refuses to act,<sup>14</sup> (3) misidentifying the ICC by name or stating that its headquarters is located elsewhere than Paris,<sup>15</sup> (4) providing unreasonably short deadlines for action by the arbitrators,<sup>16</sup> (5) providing too much specificity

---

arbitration. Alan Redfern & Martin Hunter, *Law & Practice of International Commercial Arbitration* at 178 (2nd Ed. 1991).

Finally, one clause read simply: "Arbitration – all disputes will be settled amicably." Drewitt & Wingate-Saul, Drafting Arbitration Clauses, 62 *Arbitration* 39, 43 (1996).

<sup>14</sup> See Marcus v. Meyerson, 170 N.Y.S.2d 924, 925-26 (1958) (court had no authority to name a substitute for a resigning arbitrator who was specifically named in the parties' contract); Swedish Arbitration Act of 1929 § 9: "If a person who is designated as arbitrator in an arbitration agreement dies, the agreement shall lapse unless otherwise agreed between the parties," cited in Craig, Park & Paulsson, supra note 3, § 9.03 at 160 n.5.

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

But see Jean Benglia, Inaccurate Reference to the ICC, 7 *ICC Int'l Ct. Arb. Bull.* 11, 12 (Dec. 1996); Societe Asland v. Societe European Energy Corp., Rev. arb. 1990, p. 521 (reference to "the official Chamber of Commerce in Paris, France" was held to mean the ICC), cited in Bond, supra note 1, at 15-16.

Naming a person by title to appoint the arbitrators can be risky. While the President of the International Court of Justice and the President of the Swiss Federal Tribunal have made appointments of arbitrators in the past, they have no obligation to do so and may not continue to make such appointments in the future. See Craig, Park & Paulsson, supra note 3, § 9.03 at 161. The ICC will make appointments of arbitrators for a fee, so it should be considered at least as a back-up appointing authority.

<sup>16</sup> "An overly strict time limit may have the unavoidable result that the arbitral tribunal's mandate expires before it is practically possible to conduct an international arbitration." Craig, Park & Paulsson, supra note 3, § 9.08 at 165. In one case, a time period of three months was specified for the arbitrators to issue an award from the date of the arbitration agreement, which period could be extended four times, but one party refused to extend the period, and the arbitrators ruled their mandate had expired. Belgian Enterprise v. Iranian Factory, 7 *Y.B. Com. Arb.* 119, 120-21, 124 (1983).

with respect to the arbitrators' qualifications,<sup>17</sup> or (6) providing for conflicting or unclear procedures.<sup>18</sup>

Sometimes, pathological clauses can be saved. In one case, a clause provided merely: "English law – arbitration, if any London according ICC Rules." An English court held this was a valid arbitration clause and enforced it.<sup>19</sup>

## **F. Conditions Precedent to Arbitration**

The ICC has promulgated Rules of Conciliation, which may be used in an attempt to settle a dispute. The parties may provide in their contract that conciliation be attempted prior to the initiation of an arbitral proceeding. The parties may also specify that other actions or events will occur prior to the initiation of an arbitration proceeding. For example, in different arbitration clauses reviewed by the author, a meeting of senior executives to negotiate a

---

<sup>17</sup> "It would be tempting the devil to require that the arbitrator be an English-speaking Italian, with a French law degree and a familiarity with Mid-East construction contracts." Park, Arbitration of International Contract Disputes, *supra* note 13, at 1786. See also Piero Bernardini, The Arbitration Clause of an International Contract, 9 J.Int'l Arb. 45, 56 (1992).

<sup>18</sup> Benjamin Davis, Pathological Clauses: Frederic Eisemann's Still Vital Criteria, 7 Arb. Int'l 365, 387 (1991). One reported arbitral clause read: "Disputes hereunder shall be referred to arbitration, to be carried out by arbitrators named by the International Chamber of Commerce in Geneva in accordance with the arbitration procedure set forth in the Civil Code of Venezuela and in the Civil Code of France, with due regard for the law of the place of arbitration." Craig, Park & Paulsson, *supra* note 3, § 9.04 at 163. This compromise on the procedural law is virtually guaranteed to lead to delays and costly disputes, and may well lead to the unenforceability of an award.

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

<sup>19</sup> Arab-African Energy Corp. v. Olieprodukten Nederland, B.V., (1983) 2 Lloyd's L. Rep. 419 (Q.B. Com. Ct.).

settlement, the occurrence of mediation<sup>20</sup> or a lack of jurisdiction of a specific court have been provided as conditions to the filing of arbitration.<sup>21</sup> Exhaustion of other alternative dispute resolution (ADR) procedures may also be listed as conditions to the initiation of arbitration.

Three problems may occur in the drafting of such clauses. The first occurs when the parties provide for the occurrence of an event prior to arbitration but are unclear whether it is merely preferred that the action or event occur before the arbitration or whether it is actually intended as a condition to initiating a proceeding.<sup>22</sup> This lack of clarity may result in litigation, delay and extra expense.

Second, it is sometimes not clearly stated when the condition will be deemed satisfied and an arbitration may be commenced. If the condition involves settlement negotiations, mediation or conciliation, it is generally helpful to state a time period so it is clear when the

---

<sup>20</sup> See DeValk Lincoln Mercury, Inc. v. Ford Motor Co., 811 F.2d 326, 335 (7th Cir. 1987) (summary judgment granted in part because party did not comply with mediation clause, which required an appeal to the Policy Board within 15 days as a condition precedent to pursue any other remedy); White v. Kampner, 1992 Conn. Super. LEXIS 931 (Conn. Sup. Ct. Apr. 2, 1992).

<sup>21</sup> One arbitration agreement reviewed by the author provided that all disputes be submitted to the federal district court for the Southern District of New York "to the extent such court has jurisdiction." The clause went on to say that all disputes for which the federal court does not have jurisdiction shall be decided by arbitration in accordance with the Rules of the ICC, with the arbitration to be filed "within a reasonable time after the dispute has arisen."

<sup>22</sup> In Belmont Constructors, Inc. v. Lyondell Petrochemical Co., 896 S.W.2d 352, 357 (Tex. App. – Houston [1st Dist.] 1995, no writ), the alternative dispute resolution clause read: "If the parties cannot agree within 10 days on a different method of resolving the matter, the matter shall be submitted by the parties to and be decided by binding arbitration." The court held that failure to agree to another method of resolving the dispute was a condition precedent to binding arbitration, and since the parties agreed to mediation, the arbitration provision was not binding on them even though the mediation failed to settle the dispute. See also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jana, 835 F. Supp. 406, 409-10 (N.D. Ill. 1993) (filing claim within six years after the event in question is a condition precedent to arbitration, not a procedural stipulation, under section 15 of the NASD Code of Arbitration Procedure); NL Indus., Inc. PaineWebber, Inc., 720 F. Supp. 293, 304 (S.D.N.Y. 1989) (timely filing of written protest was a condition precedent to arbitration).

condition has been met.<sup>23</sup> If the condition is even more vague, such as the lack of jurisdiction of a court, it is important to delineate what is required to satisfy the condition.

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

### **G. Expert Determination**

In lieu of arbitration for all controversies, parties may desire to provide for an expert determination for certain types of disputes that require particular expertise. Historically, an expert determination typically involved a valuation, such as a certifier in construction contracts determining the amount of an interim payment to be made to a contractor.<sup>24</sup> Today, expert determinations may be used for a variety of decisions, for example, for valuations, technical decisions and situations in which there is a possibility of a deadlock among companies to a consortium agreement over management issues.<sup>25</sup> In such situations, it may be necessary to obtain a quick determination by an expert in the subject matter.

---

<sup>23</sup> As a corollary, the parties should be careful about imposing deadlines after the expiration of which an arbitration proceeding may not be filed. In a case before a court in Geneva, the parties' clause provided that an arbitration proceeding could be filed within 30 days after the failure of negotiations. An arbitration proceeding was filed, but the opposing party claimed it was untimely. One party claimed the negotiations failed in January, while the claimant argued they failed in April. The arbitration was filed within 30 days after the April date. The Geneva court held the negotiations failed in January; therefore, the arbitration was not timely filed, and arbitration failed.

<sup>24</sup> Doug Jones, Is Expert Determination a 'Final and Binding' Alternative?, 63 *Arbitration* 213, 213-14 (1997).

<sup>25</sup> See id. at 214.

The ICC is the only major institution that has established a Centre for Expertise. The ICC Centre for Expertise may be designated by the parties in their agreement to administer an expert determination, in which case the Centre will locate and appoint an expert with the appropriate qualifications for the dispute, unless the parties agree on the identity of the expert.<sup>26</sup> The Centre has also promulgated rules for conducting an expert determination.

Under the ICC Rules for Expertise, the expert may make findings, recommend measures for the performance of the contract or for safeguarding the subject matter and supervising the performance of contractual obligations.<sup>27</sup> The expert determination is not binding on the parties.<sup>28</sup> The parties may, however, provide in their contract that the expert determination will be binding on them, but it will be binding only as a contractual undertaking.<sup>29</sup> An expert determination is not an arbitral award and is not enforceable under the New York or Panama Conventions. To enforce the determination, a party must sue on it, but one commentator has observed that courts will generally enforce it.<sup>30</sup>

The parties should be careful not to mix the concepts of arbitration and expert determination for the same category of disputes because the two involve different procedures and are enforced differently, and a confusion of the two may lead the ICC to treat them either as an arbitration or as an expert determination when the parties intended the opposite result. It may

---

<sup>26</sup> ICC Rules for Expertise art. 5(2).

<sup>27</sup> Id. art. 8(1)

<sup>28</sup> Id. art. 8(3).

<sup>29</sup> Id.; Jones, supra note 24, at 221.

<sup>30</sup> Jones, supra note 24, at 221.

also lead to litigation over the ICC's interpretation or the enforceability of a resulting award or determination.

The parties should also take care in imposing deadlines. Strict time limits that are too brief may lead to the expiration of the expert's authority before a report can be rendered.<sup>31</sup>

## **H. Factors Relevant to the Enforceability of an Arbitration Clause**

### **1. Treaty Requirements**

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the Inter-American Convention on International Commercial Arbitration (Panama Convention) list the requirements that must be met for an arbitral agreement to be enforceable by the authority of the treaties. Both Conventions include similar requirements for enforcing arbitral agreements. First, the arbitration agreement must be reduced to writing.<sup>32</sup> A writing may consist of a separate arbitration agreement or an arbitral clause contained in a contract.<sup>33</sup> Second, the writing must either be signed by the parties or be contained in an exchange of letters or telegrams.<sup>34</sup>

These simple requirements still exclude from enforceability both oral agreements, such as sales made by telephone, and contracts formed by conduct. The latter category encompasses deals in which one party sends a written document containing an arbitration clause, the other

---

<sup>31</sup> It is recommended that any deadline provide no less than 60 days for the expert to issue a determination from the date of his appointment.

<sup>32</sup> New York Convention art. II(1)&(2); Panama Convention art. 1.

<sup>33</sup> New York Convention art. II(1) & (2).

<sup>34</sup> New York Convention art. II(2); Panama Convention art. 1 (also includes telex communications in the list of non-signed documents that may contain an enforceable arbitration agreement). See DIETF, Ltd. v. RF, AG, decision of Obergericht [Court of Appeal], Basel-Land (Switzerland), 5 July 1994, 21 Y.B. Com. Arb. 685, 688 (1996) (telex acceptance of written confirmation of order, which explicitly referred to general conditions, which contained an arbitration clause, satisfied writing requirement).

party neither signs the document nor responds in writing, but the parties perform the implicit agreement. Despite the existence of a writing and a performed agreement, courts have refused to enforce arbitration clauses in such cases.<sup>35</sup>

## **2. Capacity of the Parties**

One of the few grounds in the New York and Panama Conventions for refusing to enforce an arbitration award exists when the parties to the arbitration agreement are under some incapacity (pursuant to the law applicable to them) or when the arbitration agreement is invalid under the governing law agreed by the parties or, in the absence of an agreement on the governing law, under the law of the country where the award is made.<sup>36</sup>

With this incentive in mind, sometimes a State (or a subdivision or agency of a State) will argue that it did not have the capacity to agree to arbitration. Swiss law provides that a State or an enterprise or organization controlled by it cannot rely on its own law to contest either its capacity to be a party to an arbitration or the arbitrability of a dispute covered by the arbitration agreement.<sup>37</sup> Thus, if Swiss law governs, the capacity and arbitrability issues may be eliminated for a State party. Nevertheless, it is advisable at the outset to verify the capacity of a State entity to agree to arbitration.<sup>38</sup> It may also be useful to include a representation that the State has the capacity to agree to arbitrate.

---

<sup>35</sup> E.g., Smal v. Goldroyce, [1994] 2 HRC 526 (Hong Kong). See Sciff Food Products, Inc. v. Nader Seed & Grain Corp. (Saskatchewan Court of Queen's Bench, Melfort 1 Oct. 1996).

<sup>36</sup> New York Convention art. V(1)(a); Panama Convention art. 5(1)(a).

<sup>37</sup> Swiss Federal Private International Law Act art. 177(2).

<sup>38</sup> Bernardini, supra note 17, at 47.

### 3. Authority of the Signators

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

In the case of All Union Foreign Trade Association Sojuzneftexport v. JOC Oil, Ltd.,<sup>39</sup> a Soviet organization entered into a contract for the sale of oil. The Chairman of the Soviet organization signed the contract, but Soviet law required the signatures of two persons properly authorized by power of attorney from the Chairman. The arbitral institution held the contract invalid because of the mandatory nature of the two-signature requirement of Soviet law. The arbitrators also decided that the risk of the lack of authority of the Association's Chairman to sign the contract fell upon the private party, which was found to have a duty to satisfy itself as to the authority of the signator for the opposing party.

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

---

<sup>39</sup> 18 Y.B. Com. Arb. 92, 93, 99 (1993).

#### 4. Parties Bound By An Arbitration Clause

Generally, an arbitration clause binds only the persons or companies who sign the agreement.<sup>40</sup> This requirement reflects the fact that arbitration is consensual in nature, and is dependent upon the parties' agreement.

There are, however, exceptions to this rule. For example, when claims are brought by or against a corporation that is a signatory to an arbitration agreement, U.S. courts may require arbitration of claims by or against a non-signatory, affiliate company if the claims are "intimately intertwined" with, or are "inherently inseparable" from, the claims brought by or against the affiliate signatory, provided the non-signatory affiliate consents to arbitration.<sup>41</sup> As some courts have said when a parent company was sued in tort as a means of circumventing an arbitration clause in a subsidiary's contract, "If the parent corporation was forced to try the case, the arbitration proceedings would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted."<sup>42</sup> Some courts have based these holdings on a theory of equitable estoppel.<sup>43</sup> At least one celebrated French case has similarly held that a non-signatory parent company could voluntarily participate in an arbitration between the signatories to a

---

<sup>40</sup> F.C. & S.C. v. F.D. & S.D., Partial Award of 17 March 1983 in ICC Case No. 4402, 9 Y.B. Com. Arb. 138, 140 (1984); Thomson-CSF, S.A. v. American Arbitration Ass'n, 64 F.3d 773, 780 (2d Cir. 1995). See also Pierre Lalive, Le droit suisse de l'arbitrage, in L'Arbitrage 279, 281; Roger Perrot, Le droit française de l'arbitrage, in L'Arbitrage 249, 250.

<sup>41</sup> Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 757-58 (11th Cir. 1993), cert. denied, 115 S.Ct. 190 (1994); J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 320-21 (4th Cir. 1988); Carlin v. 3V, Inc., 928 S.W.2d 291, 294-97 (Tex. App. – Houston [14th Dist.] 1996, n.w.h.).

<sup>42</sup> J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 321 (4th Cir. 1988), quoting Sam Reisfeld & Son Import Co. v. S.A. Etero, 530 F.2d 679, 681 (5th Cir. 1976).

<sup>43</sup> Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S., 9 F.3d 1060, 1064 (2d Cir. 1993); Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 757-58 (11th Cir. 1993); McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co., 741 F.2d 342, 344 (11th Cir. 1984).

contract, one of which was its subsidiary.<sup>44</sup> This has come to be known as the “group of companies doctrine”.

Second, a non-signatory corporation that is held to be the alter ego of an affiliate company that signed an arbitration agreement may be required to participate in an arbitration proceeding involving claims against its alter ego.<sup>45</sup> Third, an arbitral agreement may be held to include non-signatories when assent may fairly be implied by their conduct.<sup>46</sup> Fourth, a successor in interest is bound to its predecessor’s arbitration agreement.<sup>47</sup> Fifth, a principal is subject to an arbitration clause in its agent’s contract.<sup>48</sup> An agent who does not disclose the fact it is acting as an agent in contracting will, of course, be bound to the arbitration agreement,<sup>49</sup>

---

<sup>44</sup> Dow Chemical France v. ISOVER SAINT GOBAIN, Cour d’Appel de Paris, 21 October 1983, 110 Journal du droit international (Clunet) 899 (1983), 9 Y.B. Com. Arb. 131, 137 (1984). See also Map Tankers, Inc. v. MOBIL Tankers, Ltd., Partial Final Award No. 1510 of 28 November 1980, 7 Y.B. Com. Arb. 151, 153 (1982) (award of Society of Maritime Arbitrators).

<sup>45</sup> Fisser v. International Bank, 282 F.2d 231, 234-35 (2d Cir. 1960); Builders Federal (Hong Kong) Ltd. v. Turner Constr., 655 F. Supp. 1400, 1406 (S.D.N.Y. 1987). Typically, however, the alter ego theory must be tested in court prior to the arbitration proceeding. See Hidrocarburos y Derivados, C.A. v. Lemos, 453 F. Supp. 160, 177 (S.D.N.Y. 1977); Fridl v. Cook, 908 S.W.2d 507, 514 (Tex. App. – El Paso 1995, writ dismissed w.o.j.).

<sup>46</sup> Deloitte Neraudit A/S v. Deloitte Haskins & Sells, U.S., 9 F.3d 1060, 1064 (2d Cir. 1993); In re Transrol Navegacao, S.A., 782 F. Supp. 848, 851-52 (S.D.N.Y. 1991).

<sup>47</sup> See generally Juan Antonio Cremades, Problems That Arise From Changes Affecting One of the Signatories to the Arbitration Clause, 7 ICC Int’l Ct. Arb. Bull. 28, 29-30 (Dec. 1996).

<sup>48</sup> Wintershall, A.G. v. Government of Qatar, Partial Award of 5 February 1988 and Final Award of 31 May 1988, 28 I.L.M. 795 (1989) (Qatar General Petroleum Corporation, wholly-owned by the Government, was held to be the Government’s agent because the Government appointed most of the Board of Directors, most of whom were Government officials, and thus, the Government was bound to arbitrate under its agent’s arbitration clause). See Marc Blessing, The Law Applicable to the Arbitration Clause and to Arbitrability: Academic Solutions versus Practice and “Real Life” at 12, included in the First Working Group Papers of the ICCA Congress, May 3-6, 1998, in Paris (arbitral tribunal and Swiss Federal Supreme Court imputed arbitration clause of provincial organization of an Asian State to the national government) (“Blessing, The Law Applicable”).

<sup>49</sup> Yorkshire Int’l, Inc. v. Raytex Fabrics, Inc., 355 N.Y.S.2d 1, 2 (App. Div., Dept. 1, 1974).

while an agent who discloses its agency will not.<sup>50</sup> Sixth, third-party beneficiaries of a contract are bound to the arbitration clause because they cannot avoid the burdens of a contract while accepting the benefits.<sup>51</sup>

On the other hand, some authorities have ruled that assignees of a contract are not required to arbitrate unless the assignee agrees to be bound to the arbitration clause.<sup>52</sup> Guarantors and sureties are generally bound to arbitrate only if the guaranty or performance bond either includes an arbitration clause or incorporates a contract containing an arbitration clause.<sup>53</sup>

## 5. Unified Contractual Scheme

Some arbitral tribunals and courts have decided that an arbitration clause in one contract between the parties would also apply to other agreements between the same parties if the agreements relate to the same project.<sup>54</sup> Some arbitrators refer to this as “a unified contractual scheme”.<sup>55</sup> Other cases have referred to agreements without an arbitral clause as “merely accessory” to a contract containing an arbitration agreement as a way of justifying the extension

---

<sup>50</sup> In re Littlejohn & Co. and J. Berlage Co., 247 N.Y.S.2d 60, 61 (App. Div., Dept. 1), aff'd, 202 N.E.2d 566 (N.Y. 1964).

<sup>51</sup> Interpool, Ltd. v. Through Transport Mutual Ins. Ass'n., 635 F. Supp. 1503, 1504-05 (S.D. Fla. 1985).

<sup>52</sup> All-Union Foreign Trade Ass'n “Sojuznefteexport” v. JOC Oil, Ltd., Award in Case No. 109/1980 of 9 July 1984, 18 Y.B. Com. Arb. 92, 100 (1993); Lachmar v. Trunkline LNG Co., 753 F.2d 8, 9-10 (2d Cir. 1985). But see Cremades, supra note 47, at 29.

<sup>53</sup> See Compania Espanola de Petroleas, S.A. v. Nereus Shipping, S.A., 527 F.2d 966, 973 (2d Cir. 1975), cert. denied, 426 U.S. 936 (1976); Cianbro Corp. v. Empresa Nacional de Ingenieria y Tecnologia, S.A., 697 F. Supp. 15, 18-19 (D.Me. 1988).

<sup>54</sup> Societe Quest-Africaine des Bétons Industriels (SOABI) v. Republic of Sengal, ICSID Case No. ARB/82/1, 17 Y.B. Com. Arb. 42, 52 (1992); G.I.E. Acadi v. Societe Thomson-Answare, Revue de l'Arbitrage 1988, 573 ss, cited in Blessing, The Law Applicable, supra note 48, at 15.

<sup>55</sup> Southern Pacific Properties, Ltd. v. Arab Republic of Egypt, Award in ICC Case No. 3493 of 16 February 1983, in Collection of ICC Arbitral Awards 1974-1985 at 124, 128 (Kluwer 1990); ICC Case No. 7929 of 8 February 1995, cited in Blessing, The Law Applicable, supra note 48, at 16.

of the clause.<sup>56</sup> In one case successfully argued by the author, a U.S. court ordered arbitration of all contractual and tort claims between the parties although only the letter of intent included an arbitration clause.<sup>57</sup>

## 6. Separability Doctrine

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

To deal with these claims, arbitral panels and courts promulgated the separability doctrine. The essence of this doctrine is that the arbitration clause is an independent agreement, separate from the remainder of the contract in which it is contained.<sup>58</sup> With this logic in mind, courts have held that the arbitration clause did not terminate with the contract containing it, could not be rescinded with a rescission notice for the contract as a whole and was not invalid for fraud in the inducement of the contract, unless the arbitration clause itself was specifically induced by fraud.<sup>59</sup>

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

---

<sup>56</sup> KCA Drilling v. Sonatrach, Award in ICC Case No. 5651 of 16 September 1988, cited in Blessing, The Law Applicable, *supra* note 48, at 16.

<sup>57</sup> Anderra Energy Corp. v. SAPET Development Corp., 22 Y.B. Com. Arb. 1077, 1080 (1997).

<sup>58</sup> Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402 (1967).

<sup>59</sup> Id. at 406.

## 7. Arbitrability of Disputes

One of the issues that occasionally arises is whether the type of dispute involved is “arbitrable” – that is, whether under a given nation’s view of public order or public policy a particular species of controversy may properly be arbitrated, or whether it must be litigated in the nation’s courts. Traditionally, certain kinds of claims such as antitrust or competition law issues,<sup>60</sup> securities issues,<sup>61</sup> intellectual property disputes,<sup>62</sup> and personal status and employment issues<sup>63</sup> were considered not proper subjects for arbitration. That view has been eroding for the past quarter century.

In the past 25 years, both antitrust and competition law issues<sup>64</sup> and securities law questions<sup>65</sup> have been held by courts to be arbitrable. Although many nations will not allow arbitral panels to invalidate patents,<sup>66</sup> some countries allow arbitration of all intellectual property issues.<sup>67</sup> The U.S. Supreme Court has also ruled that claims under the Age Discrimination in

---

<sup>60</sup> American Safety Equip. Corp. v. J.P. Maguire Co., 391 F.2d 821, 828 (2nd Cir. 1968).

<sup>61</sup> Wilko v. Swan, 346 U.S. 427, 438 (1953).

<sup>62</sup> Marc Blessing, Arbitrability of Intellectual Property Disputes, 12 Arb. Int’l 191, 201-02 (1996) (“Blessing, Arbitrability”).

<sup>63</sup> Bernardini, supra note 17, at 47.

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

<sup>65</sup> Scherk v. Alberto-Culver Co., 417 U.S. 506, 515, reh’g denied, 419 U.S. 885 (1974). See also Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 480 (1989); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 238, reh’g denied, 483 U.S. 1056 (1987).

<sup>66</sup> Blessing, Arbitrability, supra note 62, at 201-02 (Australia, France, Germany, Great Britain, and The Netherlands).

<sup>67</sup> Id. at 200-01 (Switzerland, Canada and the United States); 35 U.S.C. § 294; Saturday Evening Post Co. v. Rumbleseat Press, Inc., 816 F.2d 1191, 1199 (7th Cir. 1987); Beckman Instruments, Inc. v. Technical Develop. Corp., 433 F.2d 55, 63 (7th Cir. 1970).

Employment Act are arbitrable when covered by an arbitration clause in an employment agreement.<sup>68</sup>

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

### **8. Incorporation of Arbitration Clauses by Reference**

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

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

---

<sup>68</sup> Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 27 (1991).

with the document incorporated.<sup>69</sup> In France, for an incorporation by reference to be valid, the existence of the arbitration agreement must either be mentioned in the main contract or the contents of the incorporated document must be known to the parties.<sup>70</sup> It is generally preferable for the language incorporating the other document to refer specifically to the arbitration clause in order to show the parties were aware of it and intended arbitration.

If an arbitral clause from an unrelated agreement is to be incorporated by reference into a specific contract, the parties should be careful to insure that all aspects of the clause fit their agreement.<sup>71</sup>

## **9. Unconscionable Arbitration Clauses**

Recently, a few plaintiffs in U.S. courts have attacked the selection of the ICC Arbitration Rules in contracts on the ground that the ICC's administrative fees are excessive, and thus, the arbitration clause is unconscionable. An example of these attacks is demonstrated by the case of Brower v. Gateway 2000, Inc.<sup>72</sup> There, a computer manufacturer's Standard Terms and Conditions Agreement, which is included in the box with the computer, provided for arbitration of any disputes in accordance with the ICC Arbitration Rules. The Agreement also stated that by keeping the computer more than 30 days, the consumer accepted the Terms and Conditions. A New York court rejected the plaintiffs' claims in a domestic class action lawsuit that the

---

<sup>69</sup> Tradax Export, S.A. v. Amoco Iran Oil Co., 11 Y.B. Com. Arb. 532, 534-35 (1986) (Swiss Federal Supreme Court); Craig, Park & Paulsson, supra note 3, § 5.08 at 94.

<sup>70</sup> Bomar Oil v. Enterprise Tunisienne d'Activites Petrolieres, decision of the French Cour de Cassation, 11 October 1989, cited in Richard Kreindler, Practical Issues in Drafting International Arbitration Clauses, 63 Arbitration 47, 51 (1997).

<sup>71</sup> Progressive Casualty Ins. Co. v. Reaseguradora Nacional de Venezuela, 802 F. Supp. 1069, 1079 (S.D.N.Y. 1992), rev'd, 991 F.2d 42, 47 (2d Cir. 1993). See Drewitt & Wingate-Saul, supra note 13, at 44.

<sup>72</sup> 1998 WL 481066 (N.Y.A.D. 1 Dept. – Aug. 13, 1998).

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

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

## **I. Essential Clauses**

### **1. Adoption of Arbitration as the Method to Resolve Disputes**

The first requirement for an arbitration clause is that the parties' agreement must expressly state they intend to resolve their disputes by arbitration. While this seems obvious, occasionally parties have said that controversies would be referred to an institution that administers arbitration proceedings, but without mentioning arbitration as the method for deciding their issues.<sup>73</sup> The ICC has other methods for determining disputes that do not include arbitration. These procedures encompass conciliation, expert determination and a pre-arbitral referee procedure. Thus, if the parties want their disputes decided by arbitration, they should say so explicitly.

### **2. Final And Binding**

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

resolve the dispute and be enforceable by national courts against the losing party.<sup>74</sup> It will not result merely in an advisory opinion that the parties are free to disregard. A reference that any award will be “final” means the substance of the award will not be reviewed by the courts.<sup>75</sup>

Even if the parties do not say explicitly that the award will be final and binding, they may accomplish the same result by adopting the ICC Rules. The ICC Rules provide that any award shall be “binding” on the parties, and by submitting to those rules, the parties waive their right to any form of recourse, to the extent such waiver may be validly made.<sup>76</sup>

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

### **3. Scope of Arbitration**

At the outset, the parties should consider what types of disputes they want arbitrated. If they desire to restrict arbitration only to contract disputes, they should draft a narrow-form arbitration clause. In the United States, this may be accomplished by using the phrase, "all disputes arising under this agreement," to define the scope of the disputes encompassed within

---

<sup>73</sup> Redfern & Hunter, supra note 13, at 178.

<sup>74</sup> U.S. courts have held that the phrase “final and binding” means “that the issues joined and resolved in the arbitration may not be tried de novo in any court.” M&C Corp. v. Erwin Behr, GmbH & Co., 87 F.3d 844, 847 (6th Cir. 1996); Iran Aircraft Industries v. Avco Corp., 980 F.2d 141, 145 (2d Cir. 1992).

<sup>75</sup> Bond, supra note 1, at 20.

<sup>76</sup> ICC Rules art. 28(6).

the arbitration clause.<sup>77</sup> This phrase may preclude arbitration of matters that are closely connected to the contract, but do not "arise out of " it.

If all potential disputes are intended to be encompassed, including tort claims, statutory claims, fraud-in-the-inducement claims, and any others that may arise from the relationship established by the parties' agreement, then a broad-form clause should be drafted. This is accomplished in the U.S. by the following wording: "all disputes arising out of, connected with, or relating in any way to this agreement." The U.S. Supreme Court has referred to this language as a "broad-form clause", and has held that a claim of fraud in the inducement of the contract as a whole falls within the broad sweep of this language.<sup>78</sup>

In contrast, it is reported that in the United Kingdom, the phrases "under this contract", "in connection with" and "in relation to" have been limited in scope by some authorities, the terms "in respect of " and "with regard to" have been afforded a fairly-wide meaning and the words "arising out of" have been construed to have the widest meaning.<sup>79</sup>

Because of this difference in interpreting these phrases, to create a broad clause, it may be useful to include all of these phrases in series or to state outright the clause is intended to be a broad-form clause that will encompass all possible claims between the parties. To insure the breadth of the clause, some parties include language stating the disputes covered include any relating to "the contract, its negotiation, performance, non-performance, interpretation, termination, or the relationship between the parties established by the contract."

---

<sup>77</sup> Mediterranean Enterprises, Inc. v. Ssangyong Corp., 708 F.2d 1458, 1464-65 (9th Cir. 1983); In re Kinoshita & Co., 287 F.2d 951, 952 (2d Cir. 1961).

<sup>78</sup> Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 398 (1967).

<sup>79</sup> See Ethiopian Oilseeds & Pulses Export Corp. v. Rio Del Mar Foods, Inc., [1990] 1 Q.B. 86, 97 ("arising out of" should be given a wide interpretation); Ashville Investments, Ltd. v. Elmer Contractors, Ltd., [1989] Q.B. 488, 508; Drewitt & Wingate-Saul, supra note 13, at 41; Redfern & Hunter, supra note 13, at 152-53.

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

## **J. Important Clauses**

### **1. Number of Arbitrators**

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

### **2. Method of Selecting Arbitrators**

The appointment of a three-person panel usually involves each party appointing one arbitrator, and these two then agreeing on a third arbitrator to be the chairman of the tribunal. If the parties simply adopt the ICC Rules, the ICC will determine the number of arbitrators and will select the third arbitrator when three are deemed appropriate.<sup>80</sup>

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

---

<sup>80</sup> ICC Rules art 8(2) & 8(4).

costs, is less than a threshold amount – say US \$1 million – but will be conducted by a panel of three arbitrators if the dispute involves the threshold amount or more.

Occasionally, the contract will provide for a named individual to act as arbitrator. This is generally not a wise procedure because the unavailability of the person named may render the arbitration agreement invalid or, even if not, it may cause problems regarding the appointment of a substitute.<sup>81</sup>

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

### **3. Place**

If the parties fail to agree to the place of the arbitration, the ICC Rules authorize the ICC itself to select the situs.<sup>82</sup> U.S. courts will rarely overturn the parties' choice of arbitral forum when the agreement specifies one.<sup>83</sup> If the parties do not specify a venue, but have agreed to submit to particular arbitration rules that allow the arbitrators to decide the forum, it will be difficult for the parties to challenge the arbitrators' choice of venue.<sup>84</sup> It should be noted that choosing a situs does not mean that all arbitral proceedings have to take place there; the

---

<sup>81</sup> Marcus v. Meyerson, 170 N.Y.S.2d 924, 925-26 (1958).

<sup>82</sup> ICC Rules art. 14 (ICC International Court of Arbitration shall fix the place of arbitration if not agreed by the parties).

<sup>83</sup> National Iranian Oil Co. v. Ashland Oil, Inc., 817 F.2d 326, 335 (5th Cir. 1987); Snyder v. Smith, 736 F.2d 409, 419-20 (7th Cir. 1984), cert. denied, 469 U.S. 1037 (1984).

<sup>84</sup> Stanicoff v. Hertz, 406 N.E.2d 1318, 1319 (Mass. App. 1980).

arbitrators generally have discretion under the arbitral rules to conduct some proceedings at other venues.<sup>85</sup>

In selecting the situs, perhaps the most important factor is the legal environment of the forum. Parties should consider the following factors related to the legal system of the venue.<sup>86</sup>

- (1) It is especially important to select a forum whose arbitral awards will be enforceable in other countries (e.g., a country that has ratified the New York or Panama Conventions recognizing arbitral awards).
- (2) The forum's law should recognize the agreement to arbitrate as valid. Article V(1)(a) of the New York Convention contemplates that the validity of an arbitration agreement may be determined by the law of the country where the award was made, so compliance with local laws is important.
- (3) Because the arbitral site is usually the country whose courts will hear an action to vacate an award, it is important to consider the scope of review of awards available in that country.<sup>87</sup>
- (4) The national courts of the situs should not unnecessarily interfere in ongoing arbitral proceedings, thereby creating an incentive for dilatory tactics and expensive procedural disputes.
- (5) The forum's courts should, however, assist the proceedings when necessary (e.g., by compelling arbitration or by enforcing discovery orders made by the tribunal).<sup>88</sup>
- (6) The host country should allow non-nationals to appear as counsel in international arbitration proceedings. This is not always the case; for example, Japan and Singapore have at times required that the parties' representatives be lawyers admitted to practice, and reside, in the forum state.<sup>89</sup> Other countries require that representatives be lawyers (e.g., Indonesia, Israel, Saudi Arabia and Spain),<sup>90</sup>

---

<sup>85</sup> ICC Rules art. 14 (arbitrators may conduct hearings or deliberate at any location they deem appropriate).

<sup>86</sup> See Gary B. Born, *International Commercial Arbitration in the United States* at 73-75 (1994).

<sup>87</sup> See, e.g., *Southern Pacific Properties Ltd. v. Arab Republic of Egypt*, 2 Int'l Arb. Rep., No. 1, at 17 (Cass. Civ. Ire 1987) (French court's reversal of ICC arbitral award rendered in Paris).

<sup>88</sup> See, e.g., U.S. Arbitration Act, 9 U.S.C. §§ 4, 7.

<sup>89</sup> David Rivkin, *Keeping Lawyers Out of International Arbitration*, 6 Int'l Lit. Q. 4-5 (March 1990).

<sup>90</sup> *Id.* at 4.

while others require representatives to present a power of attorney to the arbitral panel (e.g., Argentina, Greece, Austria).<sup>91</sup>

- (7) The situs should not unduly restrict the choice of arbitrators. In Saudi Arabia, arbitrators must be Muslim and male.<sup>92</sup> In Venezuela, arbitrators must be lawyers licensed to practice law in Venezuela if Venezuelan law applies.<sup>93</sup> Certain other countries have also required that arbitrators be nationals of their country.<sup>94</sup>

The location of the arbitration may also determine the language of the arbitration if the parties have not specified the language. Even if the parties do specify a venue, some countries' laws require that their language be used. For example, arbitrations in China and some Arab countries must be conducted in those countries' languages.<sup>95</sup>

A location that is inconvenient for the parties or expensive for travel may affect the availability of witnesses or the cost of proceedings. The tax treatment of the award may also be a relevant consideration.<sup>96</sup>

In some cases, the parties may provide for two different places for the arbitration, depending on which party initiates the proceeding. This has been referred to as a “home and home” provision.<sup>97</sup>

The most notable venues for international arbitration include London, Paris, Geneva, New York and Stockholm. For cases involving Asian parties, proceedings may be held in

---

<sup>91</sup> Id. at 3.

<sup>92</sup> Bond, supra note 1, at 18.

<sup>93</sup> James Rodner, Arbitration in Venezuela, in ICC International Court of Arbitration Bulletin: International Commercial Arbitration in Latin America – Special Supplement at 99 (1997).

<sup>94</sup> Bernardini, supra note 17, at 54.

<sup>95</sup> Id. at 58.

<sup>96</sup> Id. at 55.

<sup>97</sup> Kreindler, supra note 74, at 53.

Singapore, Kuala Lumpur, Hong Kong or, with Chinese parties, Beijing. With Latin American parties, the more popular venues include Paris, Mexico City, New York, Miami, and Houston. With the looming expansion of NAFTA, Buenos Aires and Santiago may soon grow in popularity. The ICC will administer arbitration proceedings in any of these venues.

#### **4. Language**

Absent agreement by the parties, the ICC Rules allow the arbitrators to decide the language, taking into account the language of the contract and other relevant circumstances.<sup>98</sup>

Generally, the parties should specify the language to be used in the proceedings if they can agree. If the language selected is not the native language of the client, counsel may wish to provide both for simultaneous translation and for sharing equally the cost of translating testimony and documents.<sup>99</sup>

#### **5. Entry of Judgment**

The Second Circuit Court of Appeals in the U.S. held, in the early 1970's, that in the absence of a clause that a court may enter judgment on an arbitral award, courts may not do so.<sup>100</sup> Later courts have softened the impact of Varley by holding that consent to entry of judgment may be implied by the conduct of the parties.<sup>101</sup> A reference that the award would be “final” was heavily relied upon in one case to authorize entry of judgment upon the award.<sup>102</sup>

---

<sup>98</sup> ICC Rules art. 16.

<sup>99</sup> Kreindler, supra note 74, at 52; Bond, supra note 1, at 20.

<sup>100</sup> Varley v. Tarrytown Ass., Inc., 477 F.2d 208, 210 (2d Cir. 1973). See also Splosna Plovba of Piran v. Agrelak Steamship Corp., 381 F. Supp. 1368, 1370-71 (S.D.N.Y. 1974).

<sup>101</sup> I/S Stavborg v. National Metal Converters, Inc., 500 F.2d 424, 426-27 (2d Cir. 1974).

<sup>102</sup> Id.

If enforcement may be required in the U.S., it is important that parties include an entry-of-judgment provision in their arbitration clause.

**K. Conclusion**

The foregoing discussion should provide parties with the essential elements for their arbitral clause. When negotiating an arbitration clause, parties should seriously consider the ICC to administer the arbitration.