



**Debevoise
& Plimpton**

Debevoise International Arbitration Clause Handbook

A model clause and a checklist of issues to consider in drafting an arbitration clause, with suggested text and commentaries

Includes:

- Updated Debevoise Efficiency Protocol (2018)
- Debevoise Protocol to Promote Cybersecurity in International Arbitration



Debevoise International Arbitration Clause Handbook

A model clause and a checklist of issues to consider in drafting an arbitration clause, with suggested text and commentaries

Includes:

- **Updated Debevoise Efficiency Protocol (2018)**
- **Debevoise Protocol to Promote Cybersecurity in International Arbitration**

© 2018, 2019 Debevoise & Plimpton LLP. All Rights Reserved. 2018

Debevoise & Plimpton LLP is offering this Debevoise International Arbitration Clause Handbook ("Handbook") for informational purposes only. The Handbook is not intended nor is it to be used as a substitute for legal advice. This publication is neither a solicitation nor an offer to represent you. The information provided to you in the Handbook is not intended to create and does not create an attorney-client relationship with Debevoise or with any lawyer at Debevoise. You may inquire about legal representation by contacting the appropriate person at Debevoise.

Debevoise International Arbitration Clause Handbook

CONTENTS

I.	INTRODUCTION	1
II.	MODEL ARBITRATION CLAUSE.....	5
	Annotated Commentary to Model Arbitration Clause	5
	a. Broad/Narrow.....	5
	b. Number of Arbitrators.....	6
	c. Rules	8
	d. Method of Selecting Arbitrators.....	11
	e. Seat of the Arbitration	14
	f. Language	15
	g. Finality of the Award.....	15
	h. Jurisdiction to Enter Judgment.....	18
III.	OPTIONAL CLAUSES	19
	1. Structure of the Arbitration	19
	a. Negotiation, Conciliation or Mediation	19
	b. Split Clauses.....	21
	c. Multiparty and Multi-contract Transactions.....	23
	i. Selection of Three-Member Tribunal	24
	ii. Joinder, Intervention.....	25
	iii. Consolidation.....	30
	2. Constitution and Powers of the Tribunal	37
	a. Nationality of the Arbitrator(s).....	37

b. Qualifications of the Arbitrator(s).....	38
c. Independence and Impartiality.....	39
d. Jurisdiction to Determine Jurisdiction.....	40
e. Freedom to Decide in Equity.....	41
3. Interim Relief.....	42
a. Provisional Measures	42
b. Emergency Arbitrations	45
4. Conduct of the Proceedings.....	46
a. Production of Evidence.....	46
b. Requests for Documents	47
c. Electronic Disclosure.....	50
d. Expert Testimony.....	51
e. Confidentiality.....	53
f. Cybersecurity	56
5. Relief.....	56
a. Costs	56
b. Waiver of Punitive or Exemplary Damages.....	58
c. Interest.....	59
d. Time Limit for Issuance of Award	60
e. Currency of Award.....	61
6. Finality and Enforcement	61
a. Appeal.....	61
b. Sovereign Immunity	62
c. Forum Non Conveniens	64
d. Service of Process.....	65
e. Submission to National Courts.....	66

7. Particular Procedures.....	68
a. Interim Adjudication.....	68
b. Dispute Boards	69
c. Classwide Arbitration.....	73
d. Final Offer/Baseball/Pendulum Arbitration	75
 Appendix 1 Overview of Arbitral Seats	77
 General Considerations	77
 Top Five Seats Generally Recommended.....	78
A. New York	79
B. London	80
C. Paris.....	82
D. Singapore	83
E. Hong Kong.....	84
 Other Frequently Used Seats (in alphabetical order by region)	86
A. Europe and Russia.....	86
1. Geneva or Zurich	86
2. The Hague.....	87
3. Milan	88
4. Moscow or St. Petersburg	89
5. Stockholm.....	92
6. Vienna	93
B. Asia and the Pacific Rim.....	94
1. Auckland.....	94
2. Beijing or Shanghai	95
3. Kuala Lumpur.....	98
4. Mumbai or Delhi	99
5. Seoul	101

6. Sydney or Melbourne	102
7. Tokyo	103
C. Americas.....	104
1. Bermuda.....	104
2. British Virgin Islands.....	105
3. Mexico City.....	106
4. Miami and Other U.S. Seats.....	107
5. Santiago de Chile	109
6. São Paulo or Rio de Janeiro	109
7. Toronto.....	110
D. Africa.....	111
1. Casablanca.....	111
2. Lagos.....	111
3. Mauritius.....	112
E. Middle East.....	113
1. Manama.....	113
2. Doha	115
3. Dubai International Financial Centre	116
Appendix 2 Overview of Arbitral Rules	117
Major Institutional Rules	117
International Chamber of Commerce.....	117
London Court of International Arbitration.....	119
International Centre for Dispute Resolution	119
Hong Kong International Arbitration Centre.....	120
Singapore International Arbitration Centre.....	121
Stockholm Chamber of Commerce.....	122
CPR International Institute for Conflict Prevention & Resolution.....	122

Ad Hoc Rules	124
UNCITRAL.....	124
CPR International Institute for Conflict Prevention & Resolution.....	125
CIArb Chartered Institute of Arbitrators.....	125
Specialized Rules	127
P.R.I.M.E. Finance.....	127
World Intellectual Property Organization.....	127
Appendix 3 Comparative Table of Major Rules.....	129
Appendix 4 Investor-State Contracts.....	141
I. General Considerations	141
A. Specificity of Rules	141
B. Arbitrator Nationality.....	141
C. Confidentiality and Transparency	142
D. Third-Party Submissions	143
E. Third-Party Funding	144
II. Institutional and Ad Hoc Rules.....	144
International Centre for Settlement of Investment Disputes.....	144
UNCITRAL.....	150
Permanent Court of Arbitration.....	151
Singapore International Arbitration Centre.....	152
Stockholm Chamber of Commerce.....	153

Contents (cont'd)

Appendix 5 Debevoise Efficiency Protocol (2018)..... 156

**Appendix 6 Debevoise’s Protocol to Promote
Cybersecurity in International Arbitration 162**

Debevoise’s Senior International Disputes Team..... 165

Debevoise International Arbitration Clause Handbook

I. INTRODUCTION

A well-drafted arbitration clause can save costs and time at the inception of a dispute, facilitate a more efficient arbitration, and even deter breaches of the agreement by providing an effective dispute resolution mechanism. An arbitration clause need not be complex to be effective, but it is prudent to think strategically about the parties' likely posture in any dispute and how that posture should translate into an arbitration clause that maximizes the prospect of successful, efficient dispute resolution.

No single arbitration clause is suitable for all contracts. The drafting of an arbitration clause for international contracts should be informed by careful consideration of the nature of the contract, the parties to the contract, the types of disputes that might be expected to arise under the contract and the jurisdictions likely to be involved in any dispute or enforcement procedure. Drafting an appropriate clause also requires an understanding of any circumstances that may call for special provisions, such as provisions addressing interim relief, confidentiality, or joinder and consolidation in a multiparty or multi-contract dispute.

This publication provides a framework for building a clause that is suitable to the specific transaction at issue and suggests language to address some of the common drafting issues that arise in complex arbitration agreements. This publication is divided into two key sections:

I. Introduction

(i) the basic **model clause**, which provides a succinct arbitration provision that, in one variation or another, will be sufficient standing alone in a broad range of contracts and should generally be included in every arbitration agreement; and

(ii) **optional clauses**, which may or may not be appropriate for a given agreement in light of its specific circumstances.

Both sections are accompanied by relevant annotations and commentary.

In addition, included as appendices to this booklet are:

(i) an overview of frequently considered arbitral seats;

(ii) an overview of major arbitral rules;

(iii) a table comparing the rules of the major institutions;

(iv) specific guidance on arbitration clauses for investor-state contracts;

(v) Debevoise's *Efficiency Protocol* (2018), reflecting our evolving insights into procedures that can make arbitrations faster and less costly; and

(vi) Debevoise's *Protocol to Promote Cybersecurity in International Arbitration*, which provides useful guidance for devising procedures to manage the risk of cybersecurity threats.

The model clause, while offering a number of specific options, does not exhaust all the possible provisions that may be desirable in particular contracts. This model clause should therefore serve as the beginning, not the end, of the process of drafting an arbitration clause.

II. MODEL ARBITRATION CLAUSE

Any dispute, controversy, or claim arising out of, relating to, or in connection with this contract, including with respect to the formation, applicability, breach, termination, validity or enforceability thereof,^a shall be resolved by arbitration. The arbitration shall be conducted by [one or three] arbitrators,^b in accordance with [identify rules] in effect at the time of the arbitration,^c except as they may be modified herein or by mutual agreement of the parties. [Method of selection of arbitrators.]^d The seat of the arbitration shall be [city, country],^e and it shall be conducted in the [specify] language.^f The arbitration award shall be final and binding on the parties, and the parties undertake to carry out any award without delay.^g Judgment upon the award may be entered by any court having jurisdiction of the award or having jurisdiction over the relevant party or its assets.^h

Annotated Commentary to Model Arbitration Clause

a. Broad/Narrow

In most instances, parties will want to submit *all* disputes to arbitration. It is possible however to agree to arbitrate only specific types or categories of disputes. In that case, the scope of arbitration should be carefully and precisely delineated in the arbitration clause. Even with careful drafting, there is a significant risk that when a dispute arises, one party will claim that the dispute does not fall within the scope of the arbitration clause. Such a preliminary dispute will delay and make eventual resolution of the primary dispute more expensive. For that reason, it is preferable to use a broad clause as the model text proposes.

II. Model Arbitration Clause

When a narrow arbitration clause is used, the clause should explicitly state whether the arbitrability of any particular dispute shall be decided in the first instance, through arbitration or by the courts.

In some instances, arbitration agreements include “split” clauses, which provide for arbitration or court litigation at a party’s option. Such clauses must be drafted with caution because they may be unenforceable in certain jurisdictions. For further information on split clauses, see Section III.1.b in the Optional Clauses section below.

b. Number of Arbitrators

The decision to select one or three arbitrators depends on the nature of the contract, the likely amount in dispute, and the complexity of the potential controversies. Having one arbitrator is less expensive and generally more expeditious, so it may be preferred for smaller disputes or disputes raising simple issues. A three-person tribunal may be appropriate for complex factual and legal issues. A three-arbitrator panel also provides the parties with more control over the composition of the tribunal, because each party will normally select one arbitrator, and the parties will also be able to influence the selection of the third arbitrator (who serves as chair of the tribunal). If the dispute is to be heard before a single arbitrator and the parties cannot agree on the identity of the arbitrator, the administering institution will ordinarily appoint the arbitrator. For more information about arbitrator selection methods, see Section II.d below.

Tribunals of more than three arbitrators are rare. It is never advisable to select an even number of arbitrators. In fact, the law in some jurisdictions prohibits the selection of an even number of arbitrators. These include **France** and **Austria** in domestic arbitrations and the **Netherlands**, **Italy** and **Egypt** more generally

II. Model Arbitration Clause

(see, e.g., French Code of Civil Procedure, Article 1453; Austrian Code of Civil Procedure, § 586; Netherlands Code of Civil Procedure, Article 1026(1); Italian Code of Civil Procedure, Article 809; Egyptian Arbitration Law, Article 15(2)).

Applicable arbitration rules will also contain provisions on the number of arbitrators in the event that the parties do not specify the number of arbitrators in their agreement. Some rules provide that one arbitrator is the default, except that the appointing institution may appoint three arbitrators if it determines that the dispute warrants a three-arbitrator tribunal. These include the International Arbitration Rules of the American Arbitration Association's (the "AAA's") International Center for Dispute Resolution (the "ICDR Rules") (Article 11), the Rules of Arbitration of the International Chamber of Commerce (the "ICC Rules") (Article 12(2)), the Rules of the London Court of International Arbitration (the "LCIA Rules") (Article 5.8) and the Singapore International Arbitration Centre Arbitration Rules (the "SIAC Rules") (Rule 9.1).

Other sets of rules provide for a default of three arbitrators. These include the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention") (Article 37(2)(b)) and the United Nations Commission on International Trade Law Arbitration Rules (the "UNCITRAL Rules") (Article 7(1)).

The Hong Kong International Arbitration Centre Administered Arbitration Rules (the "HKIAC Rules") (Article 6.1) and the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the "SCC Rules") (Article 16.2) have no default and instead provide that the appointing institution will determine whether one or three arbitrators should be appointed.

II. Model Arbitration Clause

c. Rules

Appendix 2 in this booklet contains suggested language for selecting arbitral rules and considerations for choosing among them. In addition, **Appendix 3** contains a table comparing features of the main sets of arbitral rules. **Unless otherwise noted, the versions of the rules cited throughout this booklet are the versions listed in Appendix 3.** If other rules not mentioned here are being considered for a particular transaction, it is important to obtain the advice of experienced international arbitration counsel.

One of the key choices in selecting a set of arbitration rules is whether to opt for institutional arbitration or *ad hoc* arbitration. In institutional arbitration, an arbitral institution provides administrative assistance with running an arbitration in exchange for a fee. This can include, for example, facilitating communications between the parties and the arbitrators, arranging for hearings, collecting deposits from the parties and paying the arbitrators. In addition to providing these administrative services, administering institutions can assist in ensuring that arbitrators do their job safeguarding the quality of the award.

Ad hoc arbitration requires the parties to attend to the administrative details of the arbitration themselves. Although *ad hoc* rules may provide cost savings in some cases—particularly if the parties are experienced in international arbitration—the relatively low administrative fee charged by administering institutions often provides good value.

Jurisdiction-specific constraints may also apply. For example, *ad hoc* arbitrations seated in mainland **China** generally will not be recognized under China's arbitration law. However, the Supreme People's Court issued a judicial interpretation in January 2017

indicating that *ad hoc* arbitrations may be recognized if the two parties are both registered in free trade zones and certain other conditions are satisfied. Nonetheless, the safer course is to choose institutional arbitration if a party is unable to avoid agreeing to arbitration in mainland China.

Similarly, in **Russia**, a recent court decision refusing the enforcement of an ICC award may call into question enforceability of arbitration clauses which do not contain a specific reference to an arbitration institution.

In February 2018, the *Arbitrazh* (Commercial) Court of Moscow refused to enforce an ICC award on the ground that, among other things, the underlying arbitration clause only referred to the Rules of Arbitration of the International Chamber of Commerce, but did not specifically identify the ICC International Court of Arbitration itself. (see Case No. A40-176466/2017). According to the Court, the language of the arbitration clause did not meet the requirements of “certainty and enforceability” because it did not evidence the parties’ intention as regards a specific institution for resolution of their disputes. The decision was upheld by the *Arbitrazh* (Commercial) Court of the Moscow District (the Court of Cassation). The Supreme Court of the Russian Federation affirmed the decision and denied further leave to appeal.

The ICC has since recommended that, for arbitration agreements with a Russian or Chinese seat, the arbitration clause should explicitly refer to disputes being submitted “to the International Court of Arbitration of the International Chamber of Commerce and shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators

II. Model Arbitration Clause

appointed in accordance with the said Rules.”

(see <https://iccwbo.org/dispute-resolution-services/arbitration/arbitration-clause/>).

In selecting rules to govern the arbitration, counsel should consider whether the client is more likely to be the claimant or the respondent in any arbitration. Certain rules provide for fee arrangements that require the claimant to bear more up-front costs. Also, if there is some possibility that the other party will refuse to participate in the arbitration, it is important to select one of the arbitration institutions or *ad hoc* rules cited in **Appendix 2**, as each has rules permitting the arbitration to proceed in the absence of a party (see, e.g., ICC Rules, Article 6(8); ICDR Rules, Article 26; LCIA Rules, Article 15.8; UNCITRAL Rules, Article 30; SCC Rules, Article 35; SIAC Rules, Rules 20.9, 27(1); HKIAC Rules, Article 26). These rules make it easier to commence arbitration in circumstances in which the other party declines to participate. If the arbitration clause or the applicable rules do not allow the arbitration to proceed in the absence of a party, lengthy and costly court proceedings to compel arbitration may be necessary.

For institutional arbitrations, the ICDR Rules, the ICC Rules or the LCIA Rules are particularly recommended. These institutions operate on a global basis, and their rules can be selected for arbitrations seated anywhere between parties of any nationality in respect of a dispute in any jurisdiction. A number of major regional arbitration centers also offer rules that can be used for arbitration worldwide including the SCC Rules, the SIAC Rules and the HKIAC Rules.

II. Model Arbitration Clause

Because the major arbitration institutions amend their rules from time to time, it is generally desirable to select the version of the rules in effect at the time of the arbitration, except as they may be modified by mutual agreement of the parties, so that the parties may take advantage of rule amendments or revisions introduced between the date the agreement to arbitrate becomes effective and the date on which a dispute is referred to arbitration under such agreement. Most rules provide that, in the absence of agreement to the contrary, the choice of a particular set of rules refers to the rules in effect on the date of commencement of the arbitration (*see, e.g.*, ICDR Rules, Article 1.1; ICC Rules, Article 6(1); LCIA Rules, Preamble; SCC Rules, Preamble; SIAC Rules, Rule 1.2; HKIAC Rules, Article 1.4). Where the parties wish to adopt the rules in existence at the time of contracting, they should do so expressly in the arbitration clause.

For *ad hoc* arbitrations, the Rules for Non-Administered International Arbitration of the CPR International Institute for Conflict Prevention & Resolution (“CPR Rules”) or the UNCITRAL Rules are recommended. Arbitration agreements in investor-State contracts are discussed further in **Appendix 4**.

There are potentially significant differences among the major rules, including on important substantive issues such as waiver of certain types of damages. *See* **Appendix 3**. For these reasons, careful attention needs to be paid when selecting the applicable rules.

d. Method of Selecting Arbitrators

In most cases, the default method for selecting arbitrators in the rules is satisfactory, and additional text on the subject in the clause is unnecessary. For other cases, the variants described below should be considered. For the appointment of arbitrators in multiparty or

II. Model Arbitration Clause

multi-contract transactions, see Section III.1.c in the Optional Clauses section below.

The words **“except as they may be modified herein or by mutual agreement of the parties”** may be omitted from the clause if the parties are content to follow the arbitrator selection method in the selected rules and do not otherwise modify the rules in the arbitration clause.

In both institutional and *ad hoc* arbitration, an “appointing authority” is typically responsible for appointing arbitrators when the parties fail to nominate them. The appointing authority may also be responsible for confirming the parties’ nominees or considering challenges to party-appointed arbitrators. In administered arbitrations, the arbitration rules usually provide that the administering institution will act as appointing authority (*see, e.g.*, ICDR Rules, Article 12 (ICDR); ICC Rules, Articles 12-15 (ICC International Court of Arbitration); LCIA Rules, Article 5 (LCIA Court); SCC Rules, Article 17 (SCC Board of Directors); SIAC Rules, Rules 9-11 (President of the SIAC Court of Arbitration); HKIAC Rules, Articles 7, 8 (HKIAC Council)). In UNCITRAL or other *ad hoc* arbitrations, the parties should provide for an appointing authority in the arbitration clause. The ICC International Court of Arbitration, the ICDR, the LCIA and the Permanent Court of Arbitration (“PCA”) are most often used as appointing authorities and are all highly recommended.

If the parties are not satisfied with the default appointment method in the applicable rules, the following variants may be considered:

One Arbitrator, Variant 1: Agreement by Parties and Default Appointment by Arbitration Institution

“The parties agree to seek to reach agreement on the identity of the sole arbitrator within [30 days] after the initiation of arbitration. If the parties do not reach agreement on the sole arbitrator, then [name of appointing authority] shall appoint the sole arbitrator within [30 days].”

One Arbitrator, Variant 2: Respondent Chooses from Pre-selected List

“The parties agree that the sole arbitrator shall be one of the persons listed on Schedule [x] hereto. Within [30 days] after receiving the request for arbitration, the respondent shall select one of those persons, and such person shall serve as arbitrator. In the event such person is unable to serve, the respondent shall, within [10 days] after receipt from that person of notice of such inability, select another person from the list in Schedule [x] hereto, and such person shall serve as arbitrator. If necessary, this process shall continue until the arbitrator is so designated. In the event that none of the arbitrators listed on Schedule [x] hereto is able to serve, the sole arbitrator shall be appointed by [name of institution].”

Three Arbitrators:

“The claimant shall nominate an arbitrator in its request for arbitration. The respondent shall nominate an arbitrator within [30 days] of the receipt of the request for arbitration. The two arbitrators nominated by the parties shall nominate a third arbitrator within [30 days] after the nomination of the later-nominated arbitrator. The third arbitrator shall act as chair of the tribunal. If any of the three arbitrators are not nominated within the time prescribed above, then the [name of the institution] shall appoint the arbitrator(s).”

e. Seat of the Arbitration

The juridical “seat” of an arbitration is the jurisdiction in which the arbitration is legally based. This may be different from the location of any hearings. It may also differ from the law governing the substance of the contract, which should be specified in addition to the arbitration clause. The law of the seat (the “*lex arbitri*”) governs a number of aspects of the arbitration procedure and the resulting award. Some considerations regarding selection of a seat are provided in **Appendix 1**.

Before selecting a seat of an arbitration, counsel should carefully review the arbitration law of the proposed seat and the history of court interference with arbitrations at that seat. Mandatory procedural rules, if any, of the legal seat of the arbitration cannot be overcome by agreement of the parties or by rulings of the arbitrators. In addition, national courts in the country of the seat have the power to review and potentially set aside awards on grounds specified in their own national laws. Awards set aside by courts at the seat of the arbitration may not be enforceable elsewhere. For these reasons, it is

important to choose a seat where the courts are not likely to hinder arbitration of disputes and to ensure that the agreement does not contain provisions inconsistent with the mandatory law of the seat.

f. Language

If the parties are from countries with different languages, it is important to provide for the language of the arbitration. In the absence of such a provision, arbitrators will most often select the language of the contract as the language of the arbitration, but this is not always the case.

It is advisable to select only one language in most cases. Selecting more than one language can add to the cost and length of proceedings because of the need to translate materials and testimony into both languages.

If a party wishes to make clear that it may submit documents or witness testimony in a language other than the selected language of the arbitration, with appropriate translation, the following wording may be added:

“but either party may submit testimony or documentary evidence in any other language if it provides [, upon the request of the other party,] a translation into [specify language] of any such testimony or documentary evidence.”

g. Finality of the Award

Although most rules provide that arbitral awards are final and binding on the parties, it is generally preferable to include this language as a safeguard. In addition, the following language is recommended where the law of the seat is uncertain or unduly broad

II. Model Arbitration Clause

as to the grounds for set-aside or challenging the enforcement of awards:

“The parties waive their right to any form of recourse based on grounds other than those contained in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 insofar as such waiver can validly be made.”

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) provides that a court may refuse to enforce a foreign or international arbitral award only on limited grounds, generally focusing on considerations of basic fairness. The courts of most arbitration-friendly countries have construed the New York Convention’s defenses to enforcement narrowly and hold that they represent the exclusive means for challenging the enforcement of a foreign or international award.

For arbitrations seated in **England & Wales**, the Arbitration Act 1996 allows a party to seek judicial determinations of questions of English law, either during the proceeding or on appeal from the award. Parties may exclude such determinations by inserting the following language:

“The parties expressly agree that leave to appeal under section 69(1) or an application for the determination of a preliminary point of law under section 45 of the Arbitration Act 1996 may not be sought with respect to any question of law arising out of an award or in the course of the proceedings.”

Although an express reference to section 69 is not essential, the exclusion of rights of appeal must be clear. Provisions in the arbitration agreement that the award shall be “final, conclusive and binding,” for example, have been held by English courts not to be sufficient to exclude this right of appeal. Notably, the English courts have held that an ICC arbitration clause acts as an exclusion clause, since the ICC Rules state that the parties “have waived their right to any form of recourse insofar as such waiver can validly be made” (see ICC Rules, Article 35(6)). The LCIA Rules contain a similar provision that states “the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other legal authority, insofar as such waiver shall not be prohibited under any applicable law” (see LCIA Rules Article 26.8 and also 29.2, which waives any right of appeal of any determination of the LCIA Court). Therefore, reference to the LCIA Rules also should be interpreted to include an agreement to an exclusion clause. The 2010 revision of the UNCITRAL Rules contains a broad model waiver statement in its Annex, which should also be effective. Reference to the ICDR Rules will probably not be considered a waiver, however, because they do not include such a provision.

National laws at the seat of arbitration may have specific regimes for set-aside and challenge of awards. Legislation in **Russia**, for example, allows the parties to waive the right to challenge an arbitral award in an institutional arbitration but not an *ad hoc* arbitration. Where parties have included such an exclusion in their arbitration agreement, any application to set aside the award will be dismissed by the Russian state court. Before agreeing to a provision waiving any right of recourse against an award, parties should carefully consider the consequences of giving up all rights to challenge the award, including on grounds such as corruption of the arbitrators, lack of fair notice of the proceeding, or lack of jurisdiction.

II. Model Arbitration Clause

h. Jurisdiction to Enter Judgment

The language regarding jurisdiction to enter judgment on the award is recommended to avoid collateral litigation over the proper venue for an action to enforce the award.

III. OPTIONAL CLAUSES

In addition to the issues addressed in the commentary above, the circumstances of each case may also make it appropriate to address other topics within the arbitration clause. These fall into seven broad categories, discussed further below.

1. Structure of the Arbitration

a. Negotiation, Conciliation or Mediation

Parties sometimes want to require that arbitration be preceded by efforts to negotiate a mutually satisfactory result or by conciliation or mediation. Clauses with these provisions are sometimes called “tiered” dispute resolution clauses. Negotiation, conciliation, and mediation may provide a less costly means of resolving a dispute than arbitration and may also be more effective in preserving a continuing relationship among the parties than more adversarial processes.

Including a provision for pre-dispute negotiation, mediation or conciliation in the contract makes it more likely that the parties will make use of one of these procedures. In the absence of such a provision, it may be difficult for either party to suggest resort to one of these procedures in the midst of a dispute because of the concern that to do so may signal a weakness in its position. Such procedures are more likely to be successful if the contract at issue involves an ongoing project or a relationship between the parties. To further increase the likelihood of success, it may be advisable to specify that a senior executive from each party should participate in such negotiations.

III. Optional Clauses

Clauses imposing a negotiation, mediation or conciliation requirement should be used with care, however, because they are subject to abuse by a party wishing to delay arbitration. If such a provision is included, it is important to include the language below (starting with “notwithstanding”) to make clear that either party may commence arbitration at any time or after a short specified time period for negotiation, conciliation or mediation, to prevent the risk that the parties will become embroiled in collateral litigation over whether a party failed to meet a condition precedent to the arbitration. It is also wise to specify that any disputes about compliance with such an obligation are themselves subject to arbitration so that a delaying party does not attempt to litigate the question in court.

The following language may be used if the parties wish to agree to mandatory pre-arbitration negotiation, conciliation, or mediation:

“In the event of any dispute, controversy or claim arising out of, relating to or in connection with this contract, or the breach, termination or validity thereof, a party wishing to commence arbitration shall first serve notice on the proposed respondent(s) that a dispute has arisen and demand that [*negotiation, conciliation or mediation*] commence.”

[Specify procedure of negotiation, conciliation or mediation.]

“Notwithstanding anything else contained herein, any party to such [*negotiation, conciliation or mediation*] shall have the right to commence arbitration at any time after the expiration of [*30 days*] after service of

such demand for [negotiation, conciliation or mediation] under this subsection. Any disputes concerning the propriety of the commencement of the arbitration shall be finally settled by the arbitral tribunal.”

Many arbitral institutions have published mediation or conciliation rules and procedures that complement their arbitration rules. Where this is so, it will generally be advisable to adopt the same institution’s procedures for mediation. Where this is not possible (e.g., where the arbitration provision calls for UNCITRAL Rules), the mediation procedures promulgated by the ICDR, ICC, LCIA and CPR are preferred.

b. Split Clauses

“Split” or “hybrid” clauses allow one or both parties the right to elect litigation or arbitration once the dispute has arisen. These clauses have the advantage of allowing the most appropriate dispute resolution mechanism to be selected once the nature of the dispute and the location of the respondent’s assets are actually known. However, careful consideration needs to be given to the inclusion of such clauses because in some jurisdictions they are not considered to be a proper reference to arbitration and are, therefore, invalid. In other jurisdictions, the validity of split clauses has not yet been tested. Even if split clauses are confirmed to be valid in the seat of arbitration, advice should also be sought on their validity in any jurisdiction of potential enforcement of an award.

Split clauses are of two types: “sole option,” where one party has the right of election, and “mutual option,” where both parties have the right of election. Mutual option clauses can be very complex and run the risk of parallel proceedings if one party elects to arbitrate and the other elects to litigate.

III. Optional Clauses

If the parties wish to adopt a sole-option provision, the following language may be used:

“Notwithstanding [the initial arbitration clause], [Party B] hereby agrees that [Party A], at its sole option and for its benefit, may choose to submit any such dispute, controversy or claim to the courts of [jurisdiction], to the jurisdiction of which for the purposes of such dispute [Party B] irrevocably submits[, or to any other court or courts which have jurisdiction to determine such dispute or claim]. Party A shall exercise this election promptly. If arbitration has been commenced by [Party B] at the time that [Party A] chooses to submit the matter to a court of competent jurisdiction, then such arbitration shall be discontinued, unless the arbitral tribunal finds that [Party A]’s election was untimely so that discontinuing the arbitration would substantially prejudice [Party B].”

Split clauses are enforceable in **England & Wales, Australia, Hong Kong, and Singapore**, among others.

In the **United States**, split clauses are generally enforced. Sole option split clauses may be problematic in some situations, as some courts have found that one-sided arbitration clauses may be unconscionable or otherwise unenforceable (see, e.g., *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593, 605-11 (E.D. Pa. 2007) (California law); *Ticknor v. Choice Hotels Int’l, Inc.*, 265 F.3d 931, 939-40 (9th Cir. 2001) (Montana law); and *Wolfman v. Herbstritt*, 495 N.Y.S.2d 220 (App. Div. 1985) (New York law)).

In **Russia**, split clauses that apply symmetrically to both parties are enforced. Sole-option clauses, however, are valid only if they grant the choice between arbitration or litigation to the claimant regardless of which party is the claimant. The Supreme *Arbitrazh* (Commercial) Court of the Russian Federation has ruled that clauses that grant an option only to one party violate the principle of equality and the adversary nature of the arbitral process (Decision of Presidium of Supreme Arbitrazh Court No. 1831/12, case No. A40-49223/11-112-401, June 19, 2012). Recent court practice, however, suggests that the Russian courts will only strike down the asymmetric part of the arbitration agreement rather than invalidate the arbitration agreement as a whole (*see, e.g.*, Ruling of the Supreme Court of the Russian Federation No. 46-KG16-29, Nov. 29, 2016; Ruling of the Supreme Court of the Russian Federation No. 310-EC14-5919, case No. A62-1635/2014, May 27, 2015).

In **China**, courts have often set aside or refused to enforce an award arising from an arbitration agreement with a split clause. A 2006 decision from the Supreme People's Court clarified that while these clauses are disfavored, it is now incumbent on the respondent to object to the split clause before the first arbitration hearing is held. Otherwise, the respondent will be deemed to have accepted arbitration.

c. Multiparty and Multi-contract Transactions

If a contract has more than two parties, the arbitration clause may need to be adapted to account for the rights of the three or more parties. Similarly, if a transaction involves multiple contracts, parties may adapt the arbitration clause(s) to account for consolidated proceedings of any disputes arising under the contracts.

III. Optional Clauses

i. Selection of Three-Member Tribunal

If there are more than two contracting parties, individual selection of arbitrators for a three-member tribunal is impractical. Under most institutional rules, the institution will appoint all three members unless all claimants jointly agree on one nomination and all respondents jointly agree on another (*see, e.g.*, ICC Rules, Articles 12(6)-12(8); ICDR Rules, Article 12(5); LCIA Rules, Article 8.1; UNCITRAL Rules, Article 10; SCC Rules, Article 17(5); SIAC Rules, Rule 12.2; HKIAC Rules, Article 8.2).

The parties are free to vary this procedure by agreement. The following clause may be used where the default rules are insufficiently precise or are otherwise undesirable:

“(a) If all parties to this arbitration agree that the alignment of parties as claimants and respondents in the request for arbitration is correct, or if no party objects to such alignment within [15 days] after receipt of the request for arbitration, then each side shall nominate one arbitrator within [30 days] of receipt of the request for arbitration. The two arbitrators so nominated shall nominate the third arbitrator within [30 days] after the nomination of the later-nominated of these two arbitrators. The third arbitrator shall act as chair of the tribunal. If any of the three arbitrators is not nominated within the time prescribed above, then [name of the administering institution or appointing authority] shall appoint that arbitrator.”

“(b) If any one of the parties to this arbitration objects in writing to the alignment of parties in the request for arbitration within [15 days] after receipt of the request,

and if the parties do not agree within [15 days] thereafter on an alignment of the parties into two sides each of which shall appoint an arbitrator, then [name of the administering institution or appointing authority] shall appoint all three arbitrators.”

In the alternative, the agreement may provide for the immediate selection of all three arbitrators by the institution:

“If there are more than two parties to an arbitration, there shall be three arbitrators, who shall be appointed by [name of the administering institution or appointing authority].”

ii. Joinder, Intervention

The parties should also consider whether to include a clause allowing additional contracting parties to be joined to, or voluntarily intervene in, an existing arbitration proceeding. If they do so, they should also ensure that all parties who might participate in a dispute agree to the joinder and intervention provision, even if they are not all parties to the same contract.

To facilitate joinder and intervention of parties to a number of related contracts, financing arrangements or funds agreements (e.g., a share purchase agreement and associated escrow agreement), parties may either (i) insert identical arbitration clauses in each contract that expressly cover disputes under all related agreements or (ii) draft an umbrella arbitration agreement signed by all parties. In either case, the arbitration clause should specifically list each of the agreements that are covered by the joinder and intervention provisions.

III. Optional Clauses

The following language may be used:

“Any contracting party serving a request for arbitration or other document in the arbitration containing a claim, including a notice pursuant to this provision (the “Notice”), shall send a copy of the Notice to every other contracting party. Any contracting party named as a respondent to a claim first set forth in the Notice may join any other contracting party as a party to the arbitration to afford that party an opportunity to defend against the claim or to assert against that party a claim that is substantially related to the claim set forth in the Notice. Any contracting party that is not already a party to the arbitration may intervene as a party to the arbitration to defend against a claim first set forth in the Notice or to assert against any other contracting party a claim that is substantially related to the claim set forth in the Notice.

Such joinder or intervention shall be made within [30 days] from the receipt of the relevant Notice by a written notice specifying the joinder or intervention and setting forth the new claim or defense asserted. If any party so requests within [30 days] after receipt of the notice of joinder or intervention, the tribunal shall decide whether the joinder or intervention is admissible under the terms of this clause and whether and to what extent any related arbitration proceedings between contracting parties shall be discontinued in the interest of efficiency. The tribunal’s decision shall be binding.

For the avoidance of doubt, the term “claim” as used in this clause includes any claim, counterclaim cross-claim, and any claim by or against a joined or intervening party.

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

Where it is possible to join a party after the arbitral tribunal has been nominated or appointed, it is advisable to provide that the administering institution shall appoint all three arbitrators as noted in Section III.1.c.i above. If all arbitrators are appointed by the administering institution, a joined party cannot later complain that it was treated unequally in the selection of arbitrators.

Many of the prominent arbitral rules contain provisions for joinder of third parties but with subtle differences. The HKIAC Rules and SIAC Rules are the most expansive in this respect, and also uniquely allow third parties to apply for intervention.

- The **HKIAC Rules** permit joinder of a third party either (i) where all parties, including the additional party, expressly agree (HKIAC Rules, Article 27.1(b); or (ii) without its consent where that party is *prima facie* bound by the arbitration agreement giving rise to the arbitration or by a different arbitration agreement under the Rules, provided that a common question of law or fact arises under the arbitration agreements, the rights to relief claimed are in respect of, or arise out of, the same transaction or series of related transactions, and the arbitration agreements are compatible. (HKIAC Rules, Article

III. Optional Clauses

27.1(a)). The HKIAC Rules also give the HKIAC Council power to join an additional party before the arbitral tribunal is confirmed (Article 27.1).

- The **SIAC Rules** similarly allow an additional party to be joined to the arbitration without its consent by the tribunal, or prior to the constitution of the tribunal by the SIAC Court, provided that the additional party appears *prima facie* to be bound by the arbitration agreement (see SIAC Rules 7.1(a), 7.8(a)). However, even a non-party to the arbitration agreement may be joined with consent of all parties (see SIAC Rules 7.1(b), 7.8(b)).
- The **UNCITRAL Rules** allow third parties to be joined in some circumstances, but only if the party to be joined is also a party to the same arbitration agreement that governs the existing arbitration. Under the UNCITRAL Rules, the arbitral tribunal *may* allow joinder unless it finds that allowing joinder would prejudice any of the new or existing parties (see UNCITRAL Rules, Article 17(5)).
- The **ICC** and **ICDR Rules** also contain joinder provisions. However, they do not permit joinder after any arbitrator has been confirmed or appointed except with the consent of all parties, including the party to be joined (ICC Rules, Article 7(1); ICDR Rules, Article 7(1)). At the cost of reduced flexibility, this avoids the risk that a later-joined party may challenge the award on the ground that it was unfairly denied an opportunity to participate in the selection of arbitrators. Under the ICDR Rules, any jurisdictional issues are referred to the arbitral tribunal once constituted (ICDR Rules, Articles 7(1) & 19).
- Under the **ICC Rules**, the ICC Court initially determines whether (i) all of the arbitration agreements call for the application of the ICC Rules and (ii) the ICC Court is *prima facie*

satisfied that the agreements may be “compatible” and that the parties may have agreed that their disputes can be determined together in a single arbitration (ICC Rules, Article 6(4)).

Arbitration agreements are not compatible, for instance, where they specify different seats of arbitration or different numbers of arbitrators. If all parties are not signatories to all of the relevant agreements, the ICC Court will evaluate the nature of the relationships and may prohibit joinder if the contracts deal with different legal relationships, even if they are part of the same economic transaction. For example, the ICC Secretariat has indicated that the ICC Court will typically not allow joinder in disputes involving an owner-contractor-subcontractor relationship without the agreement of all parties, whether provided at the time of the arbitration or agreed upon in the arbitration clause itself, because the legal relationships are usually entirely distinct (*see* ICC Secretariat Guide Section 3-249).

- Under the **SCC Rules**, any request for joinder is first considered by the SCC Board, which may reject the request if it determines that the SCC manifestly lacks jurisdiction over the dispute between the parties, including the additional party requested to be joined (SCC Rules, Articles 13(1)-(6)). If the SCC Board decides to grant the request for joinder, any jurisdictional issues are decided by the arbitral tribunal. (SCC Rules, Article 13(7)). The rules allow for joinder to occur after arbitrators have been appointed, but if a joined party does not agree to the already appointed arbitrators, the SCC Board may release the arbitrators and appoint an entirely new arbitral tribunal unless the parties agree otherwise (SCC Rules, Article 13(8)).
- Unlike the other major institutional rules discussed above, the **LCIA Rules** provide for joinder only with the consent of the party to be joined and therefore may be less effective than the

III. Optional Clauses

other sets of rules discussed above (see LCIA Rules, Article 22.1(viii) (allowing joinder only where the party to be joined has consented in writing)). The provision in the LCIA Rules permits one party to the arbitration, usually the respondent, to add to the proceeding a party that may or may not have been a signatory to the contract underlying the dispute, as long as that additional party agrees even if the other party to the arbitration does not agree.

- The **HKIAC Rules** and **SIAC Rules** are unique among the rules cited here in that they permit a third party to intervene by initiating an application for joinder independently of the parties to the existing arbitration (see HKIAC Rules, Article 27.9; SIAC Rules, Rules 7.1 and 7.8).

In any case, if the parties wish to provide for joinder or intervention in circumstances other than those allowed by the selected rules, they should include in their agreement language that expressly provides for joinder and intervention as discussed above.

iii. Consolidation

Parties to multiparty or related contracts should also consider expressly providing for the consolidation of parallel arbitration proceedings. It may be desirable to do so in addition to the joinder provision because the two clauses are not necessarily interchangeable:

- *First*, the model joinder clause provides for notice of claims to be provided to all parties to the agreements at issue, while the model consolidation clause set forth below does not. The consolidation clause will therefore be most useful to a party that already has knowledge of the claims and potential claims.

- *Second*, the model joinder provision requires tribunal intervention only if a party objects to the joinder or intervention, while the model consolidation provision requires tribunal approval in every case, which could impose additional costs.
- *Third*, a consolidation provision may be more effective in avoiding duplication where multiple arbitrations have been commenced before a joinder provision can be invoked.

A. Institutional Rules

Many institutional rules, discussed below, have recently been revised to provide a useful framework for consolidations. See **Appendix 2**. The ICDR, ICC, SCC, SIAC and HKIAC Rules all permit consolidation at the request of any party to any dispute, even in the absence of consent from all other parties, with some distinctions:

The **ICC** and the **ICDR Rules** allow consolidation where (i) the claims arise under the same arbitration agreement or (ii) the arbitrations are between the same parties, they relate to claims that arise in connection with the same legal relationship, and the arbitration agreements are compatible (ICC Rules, Article 10; ICDR Rules, Article 8(1)). The **SIAC Rules** are similar except that the arbitrations sought to be consolidated need not be between the same parties (SIAC Rules, Rules 8.1, 8.7).

The **HKIAC Rules** allow consolidation where (i) the parties agree to consolidate; (ii) all of the claims arise under the same arbitration agreement; or (iii) claims made under different arbitration agreements have a common question of law or fact, the rights to relief claimed are in respect of, or arise out of, the same transaction or series of transactions, and the arbitration agreements are compatible (HKIAC Rules, Article 28.1). The HKIAC Rules also

III. Optional Clauses

expressly permit the commencement of a single arbitration under this last category (HKIAC Rules, Article 29).

The **SCC Rules** allow for consolidation at the request of a party if “(i) the parties agree to consolidate; (ii) all the claims are made under the same arbitration agreement; or (iii) where the claims are made under more than one arbitration agreement, the relief sought arises out of the same transaction or series of transactions” and the arbitration agreements are compatible (SCC Rules, Article 15).

The **LCIA Rules** allow a tribunal to consolidate proceedings in two situations: (i) when the parties agree to consolidation in writing and when the LCIA Court approves, and (ii) when arbitrations have commenced, under either the same or compatible arbitration agreements, between the same parties (LCIA Rules, Articles 22.1(ix)-(x)). If the tribunal has not yet been constituted, the LCIA Rules provide the LCIA Court with similar power to order consolidation (LCIA Rules, Article 22.6).

Under the **ICC**, **SCC** and **HKIAC Rules**, only the relevant institutional body has the authority to consolidate parallel arbitrations. The **ICDR Rules** allow the ICDR to appoint a consolidation arbitrator to decide on issues of consolidation (ICDR Rules, Article 8). The **SIAC Rules** empower the arbitral tribunal to decide on applications for consolidation, but in the absence of party consent to the consolidation, consolidation is permitted only if the same tribunal has been constituted or no tribunal has been constituted in the other arbitrations (SIAC Rules, Rule 8.7).

The **HKIAC** and **ICDR Rules** further provide that once the decision to consolidate has been made, the parties to all relevant arbitrations shall be deemed to have waived their right to designate an arbitrator,

and the HKIAC or, under the ICDR Rules, the appointed consolidation arbitrator shall instead appoint the arbitral tribunal (HKIAC Rules, Article 28.8; ICDR Rules, Article 8(6)). The SIAC Rules contain a similar waiver provision for any party who has not participated in the constitution of the tribunal (SIAC Rules, Rule 8.12).

In cases where the rules permit consolidation of claims between different parties, the waiver of the right to appoint a member of the tribunal avoids the earlier-mentioned issue that a party may challenge the award on the ground that it was unfairly denied an opportunity to participate in the selection of arbitrators on an equal footing with the other parties. Notably, the **HKIAC Rules** also provide that the parties waive any objection, on the basis of the HKIAC's decision to consolidate, to the validity or enforcement of any award made by the arbitral tribunal in the consolidated proceedings, insofar as such waiver can be validly made (HKIAC Rules, Article 32.2).

Consolidation clauses should be tailored to the particular situation presented. If selected rules do not satisfactorily provide for consolidation, the following language may be considered for each related agreement or as part of an umbrella arbitration agreement signed by all parties:

“In order to facilitate the comprehensive resolution of related disputes, and upon request of any party to the arbitration proceeding, the arbitration tribunal may consolidate the arbitration proceeding with any other arbitration proceeding relating to this agreement or to [related agreements]. The arbitration tribunal shall not consolidate such arbitrations unless it determines that

III. Optional Clauses

(i) there are issues of fact or law common to the two proceedings so that a consolidated proceeding would be more efficient than separate proceedings, and (ii) no party would be prejudiced as a result of such consolidation through undue delay or otherwise. In the event of different rulings on this question by arbitration tribunal(s) constituted hereunder or under the [the related agreement(s)], the ruling of the [identify one panel] shall control.”

As an alternative, if the drafter considers that consolidation may be undesirable, it may be appropriate to include language providing that consolidation shall not be made unless parties to all of the disputes consent. Such a clause would make consolidation significantly less likely.

B. National Laws

National laws may also permit or restrict consolidation in certain circumstances. For example, the arbitration law of **the Netherlands** permits, in certain circumstances and unless agreed otherwise, an arbitration seated in the Netherlands to be consolidated with one or more other arbitrations seated within or outside the Netherlands (Article 1046 of the Netherlands Code of Civil Procedure). A request to consolidate can be granted by the tribunal seated in the Netherlands at a party's request even without the consent of the other party. Consolidation may be ordered only if it does not cause unreasonable delay in the pending proceedings and where the arbitral proceedings are so closely connected that good administration of justice renders it expedient to hear and determine them together to avoid the risk of irreconcilable decisions resulting from separate proceedings.

In a number of jurisdictions in the **United States**, such as California, Georgia, Massachusetts and New Jersey, state law permits consolidation without the consent of all the parties to an arbitration agreement (*see also* Section 10 of the Revised Uniform Arbitration Act, which has been enacted by a number of States). The Federal Arbitration Act (“FAA”) (Title 9, United States Code) does not expressly address the issue of consolidation, and courts in the United States have overwhelmingly held that the FAA does not itself authorize consolidation of multiple arbitrations in the absence of the parties’ agreement (*e.g.*, *Gov’t of U.K. v. Boeing Co.*, 998 F.2d 68, 73-74 (2d Cir. 1993), *overruled on other grounds by Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *Protective Life Ins. Corp. v. Lincoln Nat’l Life Ins. Corp.*, 873 F.2d 281, 282 (11th Cir. 1989)). The availability of state law procedures in international cases seated in the United States remains uncertain, and parties should not rely on the availability or exclusion of such procedures unless expressly specified in the arbitration clause. See **Appendix 1**, Section A.4.

C. Selection of Arbitrator(s)

Unless the parties decide on rules under which consolidation leads to waiver of the right to designate an arbitrator such as the HKIAC or ICDR Rules and if consolidation is a real possibility, language should be included in the agreement providing a procedure for the selection of arbitrators. Three options for the consolidated proceedings exist.

First, if one contract is primary (*e.g.*, in a construction situation, the contract between the owner and the general contractor), the parties can provide that the arbitration tribunal constituted under that primary contract will be the one to hear the consolidated proceedings:

III. Optional Clauses

“In the case of a consolidated proceeding, the arbitrators in the consolidated proceeding shall be the members of the arbitration tribunal that was first filed pursuant to [name of primary agreement].”

Second, the parties can provide that the arbitration tribunal in the first-filed arbitration pursuant to any of a series of related contracts will be the tribunal for the consolidated arbitration:

“In the case of a consolidated proceeding, the arbitrators in the consolidated proceeding shall be the arbitration tribunal that was appointed for the first-filed of the consolidated proceedings pursuant to any one of this agreement or [name of related agreements].”

Third, if the arbitration is institutional, the parties can provide that the institution will appoint all of the arbitrators:

“In the case of a consolidated proceeding, the arbitrators in the consolidated proceeding shall be appointed by the [name of the institution] at the request of one of the disputing parties.”

A 1992 decision of the highest court of **France**, however, may call into question the validity of the first two methods for selecting arbitrators on the ground that they unfairly deny one or more parties the right to appoint an arbitrator (*Siemens AG & BKMI Industrienlagen GmbH v. Dutco Consortium Constr. Co., Ltd.*, Cass. 1re Civ., 7 Jan. 1992, Nos. 89-18.708 & 89-18.726).

2. Constitution and Powers of the Tribunal

a. Nationality of the Arbitrator(s)

Many arbitration rules contain provisions relevant to the nationality of arbitrators. Some sets of rules provide that the sole arbitrator or chair of the tribunal must be of a nationality different from the parties if the parties are of different nationalities, unless the parties agree otherwise or fail to object (see LCIA Rules, Article 6; SCC Rules, Article 17(6); HKIAC Rules, Articles 11.2-11.3). The LCIA rules further specify that a party's nationality is deemed to include the nationality of its controlling shareholder (LCIA Rules, Article 6.2). Others provide that the appointing authority, when appointing an arbitrator, should consider the nationality of the arbitrator and the parties (see ICC Rules, Article 13(1); ICDR Rules, Rule 12(4); UNCITRAL Rules, Article 6(7)). Depending on the rules adopted, parties may wish to consider providing that the sole arbitrator or the chairman of the tribunal must be a citizen of a country other than those of the parties and, if appropriate, their parent companies or other controlling interests.

Nationality requirements may implicate antidiscrimination rules in the country of the seat of arbitration. In England & Wales, however, the UK Supreme Court has held that arbitrators do not fall within the definition of persons engaged in employment under a contract personally to do work, so that appointing parties are not bound by laws prohibiting discrimination in employment relationships (see *Jivraj v. Hashwani*, [2011] UKSC 40).

III. Optional Clauses

By making the nationality requirement subject to the applicable law, parties may minimize the risk that a nationality provision will be used to challenge the validity of an arbitration agreement:

“The [sole arbitrator/chair of the tribunal] shall not be a citizen of either _____ or _____, to the extent the applicable law permits.”

b. Qualifications of the Arbitrator(s)

In addition, if potential disputes are likely to involve complex business, legal or technical issues, parties may include in their agreement a requirement that arbitrators possess specific qualifications. There are risks associated with adopting this approach. In particular, overly stringent qualifications may unduly narrow the pool of potential candidates, making it difficult or impossible to constitute a tribunal. Parties also should take into account the possibility that the qualifications may not be appropriate for every potential dispute that may arise under an agreement.

Administering institutions usually maintain rosters of highly qualified legal and business experts in a wide range of industries. This should obviate the need for such a provision in most cases.

Where parties nevertheless wish to specify criteria for arbitrators, the following language may be used:

“Each arbitrator shall [list qualifications (e.g., “be admitted to practice law in [the jurisdiction selected by the choice-of-law clause],” “be an attorney experienced in oil and gas contracts,” “have a degree in civil engineering,” “be fluent in both English and Spanish”)]. An arbitrator shall be deemed to meet these qualifications unless a

party objects within [20 days] after the arbitrator is nominated.”

Any qualifications should be carefully and unambiguously drafted to avoid providing an avenue for a party to delay or frustrate proceedings by arguing that one or more of the arbitrators does not meet the criteria. The final sentence of the model language is important to prevent a losing party from later challenging an award on the ground that an arbitrator did not meet the necessary qualifications and thus that the tribunal was not validly constituted.

c. Independence and Impartiality

It is generally accepted that all arbitrators in international arbitrations should be independent and impartial.

This standard applies to an arbitrator nominated by a party as well as to a presiding arbitrator and an arbitrator appointed by an institution. If the chosen rules do not expressly provide for this requirement, it is desirable to include a provision in the arbitration clause stating:

“The arbitrator[s] shall be impartial and independent.”

The leading international rules and many national laws expressly impose such a duty and mandate that arbitrators disclose any circumstances that might give rise to justifiable doubt concerning their independence or impartiality (see ICC Rules, Articles 11(1)–11(3), 13(2); ICDR Article 13; LCIA Rules, Articles 5(3), –5(5); UNCITRAL Rules, Articles 11 and 12(1); SCC Rules, Article 18; SIAC Rules, Rules 13.1–13.5; HKIAC Rules, Articles 11.1, 11.4). In addition, the IBA Guidelines on Conflicts of Interest in International Arbitration (the “IBA Guidelines”) contain general standards of independence and disclosure that may be applied in the selection,

III. Optional Clauses

appointment and continuing service of an arbitrator. The IBA Guidelines, as updated in 2014, are widely regarded as embodying international best practices on arbitrator impartiality and independence.

d. Jurisdiction to Determine Jurisdiction

It is generally accepted that arbitration tribunals have the authority to determine their own jurisdiction (sometimes known as “Kompetenz-Kompetenz” or “*compétence de la compétence*”). Major rules generally state this expressly (*see, e.g.*, ICDR Rules, Article 19(1); ICC Rules, Articles 6(3), (9); LCIA Rules, Article 23.1; UNCITRAL Rules, Article 23(1); SIAC Rules, Rule 28.2; HKIAC Rules, Article 19.1). When the rules selected do not explicitly so provide, or if the parties wish to leave no doubt regarding their intention to invest the tribunal with this authority and thus minimize the possibility of protracted litigation in courts over this threshold issue, the following language may be included:

“The arbitral tribunal shall determine the scope of its own jurisdiction.”

The tribunal’s jurisdiction is generally subject to final review by the court at the seat of arbitration, and lack of jurisdiction is commonly a defense to enforcement elsewhere as well. But courts in some jurisdictions, notably the **United States**, have treated arbitral determinations of jurisdiction as final where the applicable rules state that the arbitral tribunal may determine its own jurisdiction (*see, e.g., Shaw Group Inc. v. Triplefine Int’l Corp.*, 322 F.3d 115 (2d Cir. 2003)). If parties wish to ensure that they preserve the right to challenge an award on jurisdictional grounds, they may consider including language along the following lines:

“The arbitral tribunal’s authority to determine its own jurisdiction pursuant to [Rule [x]] does not affect a competent court’s authority to determine the tribunal’s jurisdiction on an action to vacate, modify, confirm, recognize or enforce the arbitration award.”

In **Russia**, the parties may agree to exclude the right to challenge in court the arbitral tribunal’s decisions on jurisdiction only if the arbitration clause provides for institutional arbitration (as opposed to *ad hoc* arbitration).

e. Freedom to Decide in Equity

The parties may also authorize the tribunal to decide *ex aequo et bono* or as “*amiable compositeur*.” This empowers the tribunal to award any remedy or relief which it deems just and equitable without reference to the law governing the contract and may even allow the tribunal to modify the contract. In certain industries, such as reinsurance agreements, there is a practice and custom of authorizing arbitrators not to apply strict rules of law. The custom and practice of particular industries may sufficiently guide or constrain the arbitrators as to make this option a reasonable choice for contracts in those industries. It may be preferable, however, to specify the relevant custom and practice as the governing law for such contracts rather than rely on the inherently ambiguous *ex aequo et bono* standard.

The UNCITRAL Model Law, on which many national arbitration laws are based, and most arbitral rules provide that an arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if expressly authorized to do so by the parties (see UNCITRAL Model Law, Article 28; ICDR Rules, Article 31; ICC Rules, Article 21; LCIA Rules, Article 22.4; SIAC Rules, Rule 31; HKIAC Rules, Article 36).

III. Optional Clauses

Courts may set aside or refuse to enforce an award if the arbitral tribunal decides the dispute *ex aequo et bono* or as *amiables compositeurs* without due authorization. This may be difficult to establish in practice absent specific circumstances.

The authority to decide *ex aequo et bono* or as *amiable compositeur* does not necessarily vest an arbitrator with unfettered discretion. Under the UNCITRAL Model Law, even an arbitrator who is empowered to decide *ex aequo et bono* or as *amiable compositeur* must decide in accordance with the terms of the contract and taking into account the relevant trade practice (see UNCITRAL Model Law, Article 28). In **Canada**, a 2008 decision of the highest court of the province of Quebec held that an arbitrator acting as *amiable compositeur* exceeded his authority by modifying the parties' agreement (see *Holding Tusculum BV v. Louis Dreyfus SAS* (Case No 500-05-017680-966), Decision of the Superior Court of Quebec, Montreal District, December 8, 2008). In addition, certain national laws may be regarded as mandatory, and the arbitrators may remain bound to follow them.

3. Interim Relief

a. Provisional Measures

It is generally accepted that the arbitration tribunal may award interim injunctive relief (see ICC Rules, Article 28; ICDR Rules, Article 6; LCIA Rules, Article 25; UNCITRAL Rules, Article 26; SCC Rules, Article 37 & Appendix II; SIAC Rules, Rule 30; HKIAC Rules, Article 23).

If the applicable arbitration law and rules do not clearly make such relief available, the following language may be added:

“In addition to the authority conferred on the arbitration tribunal by the rules specified above, the arbitration tribunal shall have the authority to make orders for interim relief necessary to preserve the parties’ rights, including pre-arbitration attachments or injunctions. The parties agree that any ruling by the arbitration tribunal on interim measures shall be deemed to be a final award with respect to the subject matter of the ruling and shall be fully enforceable as such.”

The availability of interim relief from the tribunal may, however, be limited by practical considerations, including the time it takes to constitute an arbitral tribunal and the tribunal’s inability to enforce injunctive relief on its own. For that reason, the rules of most arbitration institutions expressly allow parties to seek interim relief from national courts without waiving their right to arbitrate under the agreement (see ICC Rules, Article 28(2); ICDR Rules, Article 6(7); LCIA Rules, Article 25.3; UNCITRAL Rules, Article 26(9); SCC Rules, Article 37(5); SIAC Rules, Rule 27.1; HKIAC Rules, Article 23.9). This may be particularly useful if urgent relief is required before the tribunal is constituted and the rules make no provision for an emergency arbitrator. Note, however, that after the constitution of the arbitral tribunal, certain rules only allow parties to seek interim relief from national courts in limited cases (see ICC Rules, Article 28(2) (“appropriate circumstances”); LCIA Rules, Article 25.3 (“exceptional circumstances” and with the arbitral tribunal’s authorization SIAC Rules, Rule 30.3 (“exceptional circumstances”), etc.).

III. Optional Clauses

If no such express provision exists in the chosen rules, parties should include the following language:

“A request by a party to a court of competent jurisdiction for interim measures necessary to preserve the parties’ rights, including pre-arbitration attachments or injunctions, shall not be deemed incompatible with, or a waiver of, this agreement to arbitrate.”

If the parties wish to specify that they retain the right to seek provisional relief from the courts only until such time as the arbitrators are able to order provisional relief, the following clause may be added:

“Either party has the right to apply to any court of competent jurisdiction for interim relief necessary to preserve the parties’ rights, including pre-arbitration attachments or injunctions, until the arbitrators are appointed. After appointment of the arbitrators, the arbitrators shall have exclusive jurisdiction to consider applications for interim relief.”

In addition, the law of the seat may have specific provisions regarding interim relief. In **Russia**, the parties may also agree that before the constitution of the arbitral tribunal, the permanent arbitral institution can order such interim measures as the institution deems appropriate. However, orders of arbitral tribunals or permanent arbitral institutions cannot be enforced by the state courts (see Article 17 of the Federal Law on Arbitration (Arbitration Proceedings) (Russian Federation); Article 17 of the Law of the Russian Federation on International Commercial Arbitration).

b. Emergency Arbitrations

Several institutional rules provide for the appointment of an emergency arbitrator to decide applications for interim relief prior to the appointment of an arbitral tribunal (see ICDR Rules, Article 6; ICC Rules, Article 29 & App'x V; SCC Rules, App'x II; SIAC Rules, Rule 30.2, Schedule 1; HKIAC Rules, Article 23.1 & Schedule 4).

Under each of the sets of rules that provide for appointment of an emergency arbitrator, the parties' selection of the general arbitration rules includes access to the emergency arbitrator procedure unless the parties affirmatively opt out (see, e.g., ICC Rules, Article 29(6)(b); SIAC Rules, Schedule 1). However, under the **ICC**, **LCIA** and **HKIAC** Rules, the emergency arbitration provisions are not applicable to arbitral agreements that entered into force before the emergency arbitration provisions were added to the rules (see ICC Rules, Article 29(6)(a); LCIA Rules, Article 9.14; HKIAC Rules, Article 1.5).

In **England & Wales**, the High Court recently held that the court's power to grant urgent relief under Section 44(3) of the Arbitration Act 1996 is curtailed in circumstances where effective relief could be granted in a timely manner by a tribunal, arbitral institution or other relevant body (see *Gerald Metals SA v Timis* [2016] EWHC 2327 (Ch)). Some commentators have observed that parties choosing London as their seat might want to opt out of any potential emergency arbitrator provisions in their chosen rules if they want to preserve the power of the English courts to grant urgent relief under Section 44.

Generally, these rules provide that a party with an urgent need for interim relief can apply to the institution for the appointment of an emergency arbitrator and that the institution will appoint the

III. Optional Clauses

interim arbitrator within 24 hours. Notice must generally be provided to the other party. The emergency arbitrator sets the procedures for a prompt hearing and must issue a decision within a short time period (*see, e.g.*, ICC Rules, Appendix V, Article 6(4) (15 days); SIAC Rules, Schedule 1, Article 9 (14 days); SCC Rules, Appendix II, Article 8 (5 days); HKIAC Rules, Schedule 4, Article 12 (14 days)). The **ICC Rules** provide that the emergency arbitrator's decision takes the form of an order rather than an award so that it is not subject to scrutiny by the ICC Court (ICC Rules, Appendix V, Article 6(1)), while the **ICDR Rules** allow for the decision to take the form of either an order or an award (ICDR Rules, Article 6(4)).

In some jurisdictions an order of an interim arbitrator (as opposed to an award) may not necessarily be enforceable. If the seat of the arbitration has adopted the 2006 version of the UNCITRAL Model Law, the courts of the seat should be able to enforce the decision of the emergency arbitrator regardless of the form it takes.

Although the parties generally must comply with an emergency arbitrator's decision, such a decision generally does not preclude a subsequently-appointed arbitral tribunal from deciding the issue differently.

4. Conduct of the Proceedings

a. Production of Evidence

The rules of most arbitration institutions grant tribunals the authority to prescribe the procedure for obtaining and submitting evidence (*see* ICC Rules, Article 25(5); ICDR Rules, Articles 20(3), 20(4), and 20(6); LCIA Rules, Article 22.1(iii)-(vi); UNCITRAL Rules, Articles 27(3)-(4); SCC Rules, Article 31; SIAC Rules, Rule 27; HKIAC Rules, Articles 22.2-22.4). Because the rules are typically

general and do not describe the mechanisms for the taking of evidence, parties may wish to spell out in the arbitration clause particular rules governing the exchange of documents, the use of experts, or the manner in which the hearing is to be conducted.

The IBA Rules on the Taking of Evidence in International Arbitration (the “IBA Rules”) were updated in 2010 and present internationally recognized standards, which most parties will find acceptable. If the parties wish the IBA Rules to govern the proceeding, they may include the following language in the arbitration clause:

“The procedures for the taking of evidence shall be governed by the IBA Rules on the Taking of Evidence in International Arbitration.”

Alternatively, the parties may wish to include certain provisions of the IBA Rules and not others. If so, clauses specifically incorporating the desired provisions can be incorporated in the arbitration agreement, as discussed in the next two subsections.

b. Requests for Documents

Usually, the rules chosen will address the issue of requests for the production of documents (see ICC Rules, Articles 25(5), 25(6) & App’x IV; ICDR Article 20(4); LCIA Rules, Article 22.1(v); UNCITRAL Rules, Article 27(3); SCC Rules, Articles 31.2 and 31.3; SIAC Rules, Rule 27(f); HKIAC Rules, Article 22.3). Some of those rules expressly instruct the tribunal to take into account applicable principles of privilege (see, e.g., ICDR Rules, Article 22).

The IBA Rules contain provisions that address the production of documents and valid objections to a production request (Articles 3

III. Optional Clauses

and 9). These provisions provide a good balance between the narrower civil law approach and the broader common law approach to document production. Inclusion of these provisions in an arbitration clause gives the parties to an international arbitration sufficient advance knowledge of the procedure that will be followed, of conditions that must be fulfilled before the arbitration tribunal will issue an order for the production of documents, and of valid objections to production requests that are available to protect the legitimate interests of the party from whom documents are requested. If the parties wish to adopt these procedures, the following language may be used:

“The procedure for the exchange of documents shall be governed by Article 3 and Article 9 of the IBA Rules on the Taking of Evidence in International Arbitration.”

In certain circumstances, it may be advantageous to agree specifically to more expansive disclosure of documents than is available under the applicable rules. This may be the case if, for example, the other party will have possession of most of the documents relevant to the dispute. The following language may be used in these circumstances:

“In addition to the authority conferred on the arbitration tribunal by the rules specified above, the arbitration tribunal shall have the authority to order such production of documents as may reasonably be requested by either party or by the tribunal itself.”

In other circumstances, the parties may wish to preclude any exchange of documents in order to provide for a more streamlined

and less costly proceeding. In that case, the following language may be used:

“The parties agree that they shall have no right to seek production of documents or any other discovery in the arbitration proceeding, except that the parties shall exchange the documents on which they intend to rely.”

Depositions (the taking of oral witness testimony before the hearing) and interrogatories are rarely permitted or appropriate in international arbitration. In the unusual event that the drafter believes that pre-hearing depositions may be necessary to prove a party’s case, the following language could be added:

“In addition, either party may request a reasonable number of pre-hearing discovery depositions of party witnesses.”

Usually, however, none of these provisions should be necessary, and it is reasonable to rely upon the arbitration tribunal to afford such discovery and document production as it deems appropriate.

As always, any clause providing for the taking of evidence cannot be inconsistent with the law of the seat of the arbitration. In particular, the parties cannot by contract grant the arbitrators authority over third persons unless that law so allows. The laws of many countries, including **England & Wales**, the **United States** and **Hong Kong**, permit courts in limited circumstances to assist arbitrators in obtaining third-party evidence.

For example, under **United States** federal law, a U.S. district court may compel production of evidence from a person found within its

III. Optional Clauses

jurisdiction “for use in a proceeding in a foreign or international tribunal” (28 U.S.C. § 1782(a)). Such discovery may substantially increase the cost and burden of an arbitration. U.S. courts have reached varying conclusions on whether this provision allows courts to order discovery in support of commercial and investment arbitration proceedings. To preclude this possibility, the following language may be added:

“The parties shall not seek discovery for purposes of the arbitration proceeding under 28 U.S.C. § 1782.”

c. Electronic Disclosure

Technology has changed the way information is stored and communicated, with the effect of making large caches of electronic information potentially subject to discovery obligations. A few arbitration institutions have adopted guidelines that provide for the management of electronic documents and information, primarily in an effort to mitigate the associated financial and efficiency burdens, and the IBA Rules on the Taking of Evidence in International Arbitration also address the subject. (see AAA/ICDR Guidelines for Information Disclosure and Exchange in International Arbitration Proceedings (the “AAA Guidelines”), Articles 4, 20(2); CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration (the “CPR Protocol”), Section 1(d) & Schedule 2; IBA Rules, Articles 3(3)(a) and 3(12)(b)).

The **IBA Rules** include electronic documents within the scope of their general disclosure framework, which gives tribunals broad latitude to order the production of relevant evidence while at the same time encouraging tribunals to conduct the arbitration in an efficient manner. This includes, for example, ordering parties to identify in any document request specific files, search terms,

individuals, or other means of searching for electronic documents in an efficient and economical manner (see IBA Rules, Article 3(3)(a)).

The **AAA Guidelines** provide more detailed guidance than the IBA Rules and call on arbitrators to work towards economic efficiency in electronic disclosure. The AAA Guidelines also recommend that arbitrators order testing or other means of narrowing electronic document requests.

The **CPR Protocol** takes an even more detailed approach by providing parties with four “Modes” providing different levels of disclosure of electronically stored information. The narrowest, Mode A, provides for disclosure in non-native format only of those documents presented in support of each parties’ case. The broadest, Mode D, contemplates full disclosure of electronic evidence concerning non-privileged matters subject only to general limitations of reasonableness, duplication, and undue burden. Modes B and C constrain the scope of disclosure by limiting to different degrees the number of custodians whose records must be searched, the time period covered, and the need to access non-primary sources such as back-up tapes.

If the parties wish to provide in advance for the scope of electronic discovery, they may reference one of these sets of guidelines in their arbitration clause.

d. Expert Testimony

While parties frequently appoint their own experts, the appointment of experts by the arbitration tribunal itself is common in civil law countries. Most arbitration rules make specific provision for the arbitration tribunal to appoint its own expert or experts (see ICDR Rules, Article 25; ICC Rules, Article 25(4); LCIA Rules, Article 21;

III. Optional Clauses

UNCITRAL Rules, Article 29; SCC Rules, Article 34; SIAC Rules, Rule 26; HKIAC Rules, Article 25).

Depending upon the rules used, there may be some question as to the parties' right to examine such expert's report and to question such expert on his or her report. If the selected rules do not provide for tribunal-appointed experts or adequately safeguard the parties' right to examine such experts, the following clause should be considered:

“The arbitration tribunal may, at its option, appoint one or more experts to advise it with respect to any issue in the arbitration. If any expert is so appointed, the parties hereto shall have the right to review such expert’s report(s) to the tribunal and to examine such expert at an oral hearing.”

The parties may also decide to exclude the tribunal's right to appoint experts:

“The arbitration tribunal shall not have the authority to appoint experts, and Article [x] of the [selected rules] shall not apply.”

The **IBA Rules** contain provisions on party-appointed experts (Article 5) and tribunal-appointed experts (Article 6). The IBA Rules outline key elements that should be included in expert reports as well as the various procedural rules by which any expert testimony may be presented, submitted and considered in the arbitration. The IBA Rules also contain an option for the tribunal to order meet-and-confer sessions between party-appointed experts, to narrow the remaining issues of dispute and increase the efficiency of the arbitral

proceedings. The IBA Rules provide a good procedural framework for the handling of expert testimony in arbitral proceedings and the parties may choose to include those rules in the arbitration agreement:

“Article[s] 5 [and 6] of the IBA Rules on the Taking of Evidence in International Arbitration shall apply to expert testimony.”

e. Confidentiality

Most institutional rules contain a specific provision dealing with confidentiality, although these vary considerably in detail and scope and often provide less confidentiality than parties may expect. The **LCIA, SIAC** and **HKIAC Rules** contain fairly comprehensive confidentiality provisions (see LCIA Rules, Article 30; SIAC Rules, Rule 39; HKIAC Rules, Article 45). The **ICDR Rules** and the **SCC Rules**, on the other hand, only impose confidentiality obligations on the tribunal and the institution, not the parties (ICDR Rules, Article 37; SCC Rules, Article 3 & App’x I, Article 9). The **ICC Rules** permit the tribunal, upon request of any party, to make orders concerning the confidentiality of the arbitration (ICC Rules, Article 22(3)).

The approaches of national laws and courts are equally varied. Some national laws, such as that of **Norway**, provide that arbitrations are presumptively not confidential (Norwegian Arbitration Act, Chp. 5, §1). Others establish a strict duty of confidentiality on the parties as an implied term of the arbitration agreement or default statutory rule, qualified by exceptions, which in appropriate circumstances may be waived by a court. That is the case, for instance, in **England & Wales** and **New Zealand**. Even where laws or rules provide for confidentiality, however, the contours and scope of that obligation may not be clear.

III. Optional Clauses

The best way to ensure confidentiality of the arbitration is to include express language to this effect in the underlying agreement before any dispute has arisen. In drafting such a clause, a party should consider whether it will need to disclose the existence of, or details about, the arbitration in order to enforce its rights or to comply with other legal obligations. For example, it will need to provide a copy of the award to the court in an enforcement proceeding. It may also need to disclose certain information to its insurance carrier or its auditors, or in public securities filings.

If the contract contains a satisfactory confidentiality provision, the parties could expressly state that the arbitration and information disclosed in the arbitration shall be subject to that provision. In other contracts, the parties will find it useful to include a separate confidentiality provision in the arbitration clause itself to clarify the scope of confidentiality or the obligations of parties receiving confidential information. The following language may be used:

“The parties agree that the arbitration shall be kept confidential. The existence of the arbitration, any non-public information provided in the arbitration, and any submissions, orders or awards made in the arbitration (together, the “Confidential Information”) shall not be disclosed to any non-party except the tribunal, the [name of relevant institution or appointing authority if applicable], the parties, their counsel, experts, witnesses, accountants and auditors, insurers and reinsurers, and any other person necessary to the conduct of the arbitration.

Notwithstanding the foregoing, a party may disclose Confidential Information to the extent that disclosure

may be required to fulfill a legal duty, protect or pursue a legal right, or enforce or challenge an award in *bona fide* legal proceedings. This confidentiality provision survives termination of the contract and of any arbitration brought pursuant to the contract.”

The exceptions to confidentiality track those listed in Article 3(13) of the IBA Rules, which are commonly adopted as guidance. The parties should consider carefully whether any particular disclosures should be further subject to more precisely defined or limited conditions.

In its Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, effective January 1, 2019, the **ICC** included an important innovation regarding the publication of awards. All ICC awards made as from January 1, 2019 may be published, no less than two years after their notification, unless the parties opt out. The Note adds, however, that if a confidentiality agreement covers certain aspects of the arbitration or of the award, publication is subject to the parties’ specific consent. To avoid any ambiguity, in case of selection of the **ICC Rules**, the following sentence may be added at the end of the first paragraph in the above-proposed language: **“The parties do not consent to the publication of any award.”**

Different considerations apply to investor-State arbitration in light of the public interest in transparency in those kinds of disputes. Those concerns are discussed in the next subsection and in **Appendix 4**.

III. Optional Clauses

f. Cybersecurity

Parties to international arbitrations are increasingly concerned about the potential impact of cyberattacks. While some arbitral institutions have adopted best practices and procedures with respect to protecting data stored within their systems, the main institutional rules are silent on this issue. As a result, parties may want to reference best practices for managing cybersecurity threats in the arbitration clause. Debevoise & Plimpton's Protocol to Promote Cybersecurity in International Arbitration is included as **Appendix 6** to this publication. The parties may use the following language to adopt this Protocol:

“The parties agree to follow the Debevoise & Plimpton Protocol to Promote Cybersecurity in International Arbitration with respect to the transfer, storage, disclosure and use of sensitive information, as well as potential data breaches.”

5. Relief

a. Costs

There are three main approaches to awarding costs: (i) the losing party bears all or a substantial proportion of the prevailing party's costs; (ii) each party bears its own costs; or (iii) costs are awarded in proportion to the relative success of each claim. In this context, “costs” typically include not only institutional and arbitrator expenses but also each party's attorneys' fees, experts' fees and other expenses. In some situations, indemnity provisions that are separate from the arbitration clause may have the effect of imposing the obligation to pay costs on one party or the other.

If parties do not specify standards of cost allocation in the contract, arbitration rules typically afford arbitrators wide discretion in allocating costs and fees between the parties (see ICC Rules, Articles 37 and 38, Appendix III, Article 2; ICDR Rules, Article 34; LCIA Rules, Article 28; SIAC Rules, Rule 35; HKIAC Rules, Article 34). The emerging trend has been for arbitral tribunals to award costs to the prevailing party, although tribunals may also take into account a party's conduct throughout the proceedings.

Although the rules of administering institutions almost always permit an award of costs in the tribunal's discretion, parties may choose explicitly to grant arbitrators this authority. They may also choose to stipulate that the losing party shall bear the costs of the prevailing party or that each party shall bear its own costs. In those instances, one of the following variants may be included:

Variant 1: Arbitrators Have Discretion to Apportion Fees and Expenses

“The arbitrators shall have the power to make an award allocating the costs and expenses of the arbitration between the parties, including reasonable legal fees and other costs of legal representation.”

Variant 2: Losing Party Pays Prevailing Party's Costs

“The arbitrators shall award to the prevailing party its costs and expenses of the arbitration, including its reasonable legal fees and other costs of legal representation, as determined by the arbitrators.”

III. Optional Clauses

Variant 3: Each Party Bears its Own Costs

“All costs and expenses of the arbitrators and [name the arbitral institution] shall be borne by the parties equally. Each party shall bear its own arbitration costs and expenses, including its legal fees and other costs of legal representation.”

b. Waiver of Punitive or Exemplary Damages

In some cases, the law governing the parties’ substantive dispute may permit recovery of punitive or exemplary damages. These damages, which are meant to punish or deter unconscionable conduct, are in addition to any damages awarded to compensate the injured party for its losses.

In 1995, the **United States** Supreme Court held that arbitrators have the authority to award punitive damages unless the parties expressly agree otherwise (see *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995)). A choice of law clause selecting a substantive law that permits courts—but not arbitrators—to award punitive damages, such as New York law, may not be sufficient to preclude an award of punitive damages in arbitration (see *Flintlock Constr. Servs., LLC v. Weiss*, 991 N.Y.S.2d 408 (App. Div. 2014)). Parties that wish to preclude the arbitrators from awarding punitive damages are advised to do so expressly, by including language such as the following:

“The parties hereto expressly waive and forgo any right to punitive, exemplary or similar damages as a result of any controversy or claim arising out of, relating to, or in connection with this agreement or the breach, termination or validity thereof.”

It may be preferable to place this provision in the miscellaneous provisions of the contract or as part of the governing law clause rather than in the arbitration clause to preclude any argument that punitive damages are outside the scope of the arbitrators' authority but are otherwise available in a court proceeding instituted for that sole purpose. Drafters should note, however, that there may be uncertainty in some jurisdictions as to whether such a pre-dispute waiver of punitive damages is enforceable.

The **ICDR Rules** uniquely contain a provision waiving the right to punitive damages in any arbitration pursuant to those rules unless the parties provide otherwise in their contract (ICDR Rules, Article 31(5)). The ICC, LCIA, UNCITRAL, SCC, SIAC, and HKIAC Rules are silent on this issue.

c. Interest

The parties may also consider including a clause that determines the interest to be awarded. Such clauses may be useful to limit the arbitrators' discretion or avoid the possibility that the arbitrators may apply a statutory interest rate established by national law.

The parties may choose a fixed rate or a rate based on a publicly available reference rate (such as LIBOR or Euribor). Where applicable, the tenor (maturity period) of the reference rate (*e.g.*, one-week deposits, one-month deposits, etc.) should be indicated as well.

In the absence of a contrary agreement by the parties, the AAA, LCIA, and SIAC Rules all allow the tribunal to award interest at any rate it considers appropriate (*see* ICDR Rules, Article 31(4); LCIA Rules, Article 26.4; SIAC Rules, Rule 32(9)). The HKIAC, SCC, and UNCITRAL Rules are silent on this issue.

III. Optional Clauses

Many jurisdictions do not allow for the compounding of interest, and some jurisdictions allow the compounding of interest only if the parties specifically agree to compound interest.

The following language may be used:

“Notwithstanding [applicable law clause], pre-award and post-award interest shall be awarded at [specify rate including maturity period]. Interest shall be compounded [monthly or quarterly].”

d. Time Limit for Issuance of Award

In the interest of efficiency and cost control, the parties may wish to stipulate that the tribunal’s award must be issued within a specific time period. The following language may be used:

“The time limit within which the arbitral tribunal must render its final award is [60 days, six months, etc.]. Such time limit shall start to run from the later of the date of the last hearing or the final post-hearing submission. The tribunal shall inform the parties in writing when it considers the proceedings closed. [The tribunal may shorten or extend the time limit pursuant to a joint request from the parties.]”

When this type of provision is used or when the selected rules impose similar deadlines, arbitrator candidates should be informed of those requirements and should commit to adhering to them prior to their appointment.

e. Currency of Award

It may sometimes be in the interest of the parties to specify the currency in which the award should be paid. This can be done simply by providing that:

“Any award shall be payable in [*specify currency*].”

The ICDR Rules state that a monetary award shall be in the currency of the contract unless the tribunal considers another currency more appropriate (ICDR Rules, Article 31(4)). The LCIA Rules say that an award may be expressed in any currency unless the parties have agreed otherwise (LCIA Rules, Article 26.6). The ICC, UNCITRAL, SCC, SIAC and HKIAC Rules are all silent on the issue.

6. Finality and Enforcement

a. Appeal

One of the major advantages of international arbitration is that an award is final and binding and may not be annulled except on strictly limited grounds (see ICC Rules, Article 35.6; ICDR Rules, Article 30(1); LCIA Rules, Article 26.8; UNCITRAL Rules, Article 34(2) & UNCITRAL Annex, Possible Waiver Statement; SIAC Rules, Rule 32.11; SCC Rules, Article 46; HKIAC Rules, Article 35.2).

In the exceptional circumstance that a party wishes to provide for appeal of the arbitration award to a second arbitration tribunal, it is possible to draft such a clause. Such clauses are complex and should be drafted with caution. One variant is to provide for such an appeal only if the award exceeds a certain value. Parties may also opt in to appeals procedures established by arbitral institutions. For example, the CPR Arbitration Appeal Procedure provides an optional framework for the appeal of awards rendered in binding arbitrations

III. Optional Clauses

conducted in the United States, whether the underlying arbitration is governed by the CPR Arbitration Rules or otherwise. Parties may invoke this procedure by agreement in writing. Similarly, the AAA's Optional Appellate Arbitration Rules provide a framework for the appeal of arbitral awards based on the agreement of the parties.

If the parties want to opt in to one of these procedures, the following language may be used:

“Either party may appeal a final arbitral award ordered pursuant to this agreement in accordance with [the AAA’s Optional Appellate Arbitration Rules/the CPR Arbitration Appeal Procedure].”

In addition, specific types of recourse to courts beyond the usual limited grounds for review may be possible. For example, in some jurisdictions, such as **England & Wales** and **Hong Kong**, it may be possible to appeal to courts on questions of the relevant national law arising out of awards under certain circumstances (see English Arbitration Act, section 69, Hong Kong Arbitration Ordinance, Schedule 2, Section 5). However, clauses providing for remedies such as this should be thoroughly vetted with counsel knowledgeable in the applicable law and otherwise approached with caution, as local-law exceptions and idiosyncrasies abound. For example, the United States Supreme Court has held that parties may not by contract expand the grounds for federal court review of arbitration awards beyond those set forth in the Federal Arbitration Act (*Hall Street Assocs. v. Mattel, Inc.*, 552 U.S. 576 (2008)).

b. Sovereign Immunity

Claims of sovereign immunity may be asserted not only by a government and its agencies but also by a company or organization

owned or controlled by a State. While arbitration clauses generally effect a waiver of immunity with respect to the arbitration tribunal's jurisdiction, they do not necessarily do so with respect to enforcement by a national court of an award or execution against the foreign entity's assets. For the private party to an arbitration agreement, therefore, it is of particular importance to consider the inclusion of an explicit waiver of immunity respecting judicial enforcement.

Such a waiver of execution may be expressed as follows:

“To the fullest extent permitted by law, [State party or State enterprise] hereby irrevocably waives any claim to sovereign or any other immunity in regard to any proceedings to enforce an arbitration award rendered by a tribunal constituted pursuant to this Agreement, including without limitation immunity from suit, immunity from service of process, immunity from jurisdiction of any court, and immunity of its property and revenues from execution or from attachment or sequestration before or after judgment.”

Waivers of sovereign immunity are often construed more narrowly than the breadth of their words would suggest. For example, under **United States** law, a general waiver of immunity does not permit prejudgment attachment unless the waiver contains specific language to that effect (see 28 U.S.C. § 1610(d)(1); *Reading & Bates Corp v. NIOC*, 478 F. Supp. 724 (S.D.N.Y., 1979); *E-System Inc v. Islamic Republic of Iran*, 491 F. Supp. 1294 (N.D. Tex., 1980)). In addition, regardless of waiver, the law of the enforcing jurisdiction may not permit execution or attachment against certain State assets. A State party may wish to draft the waiver clause expressly to

III. Optional Clauses

exclude certain classes of assets that it may regard as essential to its sovereign operations, such as assets used for diplomatic or military purposes and assets held by its central bank. A private party, on the other hand, may seek an express waiver of immunity from jurisdiction and enforcement by reference to a specific asset, such as the key asset in a given investment. Specifying an asset in this way will make it more difficult for the State party to claim that the private party cannot enforce against the asset.

The ICDR, ICC, LCIA, UNCITRAL, SCC, SIAC and HKIAC Rules are all silent on the issue of waiver of sovereign immunity.

c. ***Forum Non Conveniens***

In certain common law jurisdictions, most notably in the **United States**, a party may raise the *forum non conveniens* doctrine as a defense to the recognition or enforcement of a foreign arbitral award. The *forum non conveniens* doctrine, which is generally not recognized in civil law jurisdictions, provides a court with the discretionary power to dismiss or stay a case if another court is better suited to hear the dispute.

Prominent commentators have argued that the application of the *forum non conveniens* doctrine in the recognition and enforcement of foreign arbitral awards is contrary to a State's obligations under the New York Convention, which provides an exhaustive list of the acceptable defenses to enforcement. Nevertheless, several lower court decisions in the **United States** have dismissed actions to enforce foreign arbitral awards on the grounds of *forum non conveniens*, reasoning that it is allowed under the New York Convention because it is a procedural rather than substantive rule of the forum state (see, e.g., *Figueiredo Ferraz e Engenharia de Projeto Ltda v. Repub. of Peru*, 665 F.3d 384, 397 (2d Cir. 2011); *Melton v. Oy*

Nautor Ab, 161 F.3d 13 (9th Cir. 1998); *Monegasque de Reassurances SAM v. Nak Naftogaz of Ukraine*, 158 F. Supp. 2d 377, 383 (S.D.N.Y. 2001); but see *TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296 (D.C. Cir. 2005) (rejecting application of *forum non conveniens* doctrine in proceeding to enforce arbitral award)).

Accordingly, particularly if the parties envision having to enforce a foreign arbitral award in the **United States**, the parties may consider including a provision expressly waiving any defense to the recognition and enforcement of an arbitral award on *forum non conveniens* grounds:

“The Parties hereby irrevocably waive any defense on the basis of *forum non conveniens* in any proceedings to enforce an arbitration award rendered by a tribunal constituted pursuant to this Agreement.”

d. Service of Process

In actions to enforce an arbitration award, service of process may become a tricky issue. Service of process outside the jurisdiction where enforcement is sought may require leave of court or compliance with a complex mechanism under a treaty, such as the Inter-American Convention on Letters Rogatory or the Hague Convention on Service of Process. Service through these channels can prove costly and time consuming, in some cases taking a year or more.

For that reason, parties may wish to consider including in their arbitration clause a designated agent for service of process by first-class mail or courier, with an express waiver of any objection based on service of process. Such a clause may be expressed as follows:

III. Optional Clauses

“[Party] hereby irrevocably appoints, with respect to itself and to its assets, [Process Agent] for service of all pleadings, process, requests for discovery and/or other papers in connection with any proceedings, wherever brought, for the recognition and enforcement of any award resulting from an arbitration brought pursuant to this clause or any judgment of any jurisdiction resulting therefrom. Service of process in accordance with this paragraph may be made by delivering a copy of such process to [Process Agent] at [address] by hand delivery, first-class mail or courier, and [Party] irrevocably authorizes [Process Agent] to accept such service on its behalf. [Party] hereby waives any objection to service of process by service on [Process Agent] in accordance with this paragraph. Nothing in this paragraph limits the right to serve legal process in any other manner permitted by law.”

e. Submission to National Courts

It can be useful to select a judicial forum for any necessary court proceedings ancillary to an arbitration, for example, an action to compel arbitration or an application for preliminary measures or court-assisted discovery, particularly if it is not clear that one or both parties are subject to jurisdiction in a suitable and convenient jurisdiction. Because it may be necessary to bring ancillary proceedings in a number of different jurisdictions, the forum selection clause should be non-exclusive.

“The parties irrevocably submit to the non-exclusive jurisdiction of the courts of [name of jurisdiction] solely in respect of any proceeding relating to or in aid of an arbitration under this agreement, [except that a

proceeding to vacate or modify the award may be brought solely in a court having jurisdiction at the seat of arbitration]. Each party waives and agrees not to assert as a defense in any such proceeding in the specified court that the venue is not appropriate or that the court lacks jurisdiction over any party. Nothing in this paragraph limits the scope of the parties' agreement to arbitrate or the power of the arbitral tribunal to determine the scope of its own jurisdiction."

If the specified court is at the seat of arbitration, the bracketed language at the end of the first sentence should be omitted.

If the parties draft a narrow arbitration clause that does not encompass all potential disputes arising under an agreement, they should consider providing an exclusive or non-exclusive forum for the adjudication of disputes not subject to arbitration. The following language can be used either independently or in conjunction with the limited forum selection clause for proceedings ancillary to an arbitration:

"The parties irrevocably submit to the [exclusive / non-exclusive] jurisdiction of the courts of [name of jurisdiction] for the purpose of resolving any dispute, controversy, or claim arising out of, relating to, or in connection with this contract that is not subject to arbitration pursuant to this provision. Each party waives and agrees not to assert as a defense in any such action, suit or proceeding in the specified court that the venue is not appropriate or that the court lacks jurisdiction over any party."

III. Optional Clauses

7. Particular Procedures

a. Interim Adjudication

In construction contracts, it is common to have provisions for adjudication of certain types of disputes that may arise while construction is ongoing. These provisions aim to facilitate a quicker resolution than is possible in arbitration and to allow the construction to proceed where the existence of the dispute could otherwise suspend the construction work.

Parties also may agree to have a particular issue relevant to their contract decided by a subject-matter expert. For example, parties may agree that accounting disputes will be resolved by an accounting expert or that valuation disputes will be resolved by an investment banker.

Most commonly, these provisions refer disputes regarding technical and operational matters arising during construction to an independent expert or experts for resolution within a predetermined time frame. Normally, the provisions require final adjudication of such disputes by the expert, although it is possible to provide for review of the expert determination in arbitration if the determination has not become moot by the passage of time. The following language may be used:

“If a dispute arises as to [*specify disputes*], such dispute may be referred by either party for determination by an expert agreed between and appointed by the Parties. [*Specify expert qualifications, if desired.*] If the parties are unable to agree within [5] days of the referral, the expert shall be appointed by [*name of institution*]. The expert shall have no authority to resolve or determine

any dispute except for those listed in this paragraph. The determination of the expert shall be [final and] binding on the Parties [unless and until an Arbitration Award issued pursuant to this Agreement modifies or annuls the determination].”

Two words of caution should be sounded about these interim adjudication procedures. *First*, it is important that a clear differentiation be made between the types of disputes that may be referred to the interim adjudication procedure and the types of disputes referable to arbitration. Otherwise, significant delay to the eventual resolution of the dispute—potentially including litigation in court—may result from a preliminary disagreement as to the proper means of resolution. *Second*, as with clauses that require pre-arbitration negotiation, conciliation, or mediation, the clause should be carefully drafted to avoid unintentionally creating an opportunity for a party to argue that the interim adjudication procedure is a condition precedent to arbitration if such a result was not intended.

b. Dispute Boards

In large, complex construction projects and in construction matters likely to give rise to disputes among multiple parties, the contract may provide for interim dispute resolution by Dispute Review Boards (“DRBs”) or Dispute Adjudication Boards (“DABs”). These may be standing boards, which are established at the outset of the project and remain in place until completion, or ad-hoc boards which are constituted only when a dispute arises. DRBs are typically empowered to issue recommendations, which may become binding only if there is no objection within a specified time, while DABs issue decisions that are immediately binding unless and until the dispute is finally resolved in litigation or arbitration.

III. Optional Clauses

Standing DRBs and DABs are costly but may be beneficial for complex, high-value projects. Anecdotal evidence suggests that the existence of a DAB or DRB encourages cooperation, enables disputes to be addressed early, and reduces the incidence of arbitration or litigation.

The ICC, the American Arbitration Association (“AAA”), and the International Federation of Consulting Engineers (“FIDIC”), among others, provide procedures for the appointment and operation of DRBs and DABs. Most procedures provide that both DRB recommendations and DAB decisions may be subsequently reviewed in an arbitration or litigation. General considerations and suggested language for selecting a set of rules are set forth below.

In general, contracts that provide for a DRB or a DAB should not provide for mandatory negotiation or mediation before the DRB/DAB provisions can be invoked. The principal advantage of a DRB/DAB is its ability to reach a quick resolution. Even limited periods of mandatory negotiation or mediation before a dispute may be submitted to the DRB/DAB can be counterproductive.

Contracts that provide for a DRB/DAB should assign all disputes to the DRB/DAB. This minimizes the likelihood of a protracted dispute over whether an issue is to be referred to the DRB/DAB or the arbitral tribunal, which could significantly delay resolution. Conversely, if the parties identify narrow areas of potential dispute that they do not want to be decided by the DRB/DAB, those should be defined explicitly in the contract.

The following sets of rules and procedures may be adopted by reference:

- AAA Dispute Resolution Board Specifications, Operating Procedures, and Hearing Rules and Procedures. The AAA procedures provide for a Dispute Resolution Board, the decisions of which (referred to as “Recommendations”) are not binding but are admissible in a later proceeding unless the parties otherwise agree. If the parties want to use AAA procedures but also want to have the Board render a binding decision, it will be necessary to specify that in the contract. The AAA procedures set forth detailed timelines for pre-hearing submissions and for the Board’s decision, including requiring that a Recommendation be issued within 14 days of the hearing, which will ordinarily be held at the next site visit after the parties’ initial submissions.
- ICC Dispute Board Rules. The ICC Rules provide three options: a Dispute Review Board that issues “Recommendations” that become binding only if no party objects within 30 days; a Dispute Adjudication Board that issues binding “Decisions”; and a Combined Dispute Board that may do either, depending on the circumstances. The parties may provide for review of Decisions by the ICC before the DAB issues them. ICC Rules provide timelines for initial submissions, and also require that a Decision or Recommendation be issued within 90 days of referral of the dispute, or 120 days if the agreement provides for ICC review.
- FIDIC. FIDIC’s 2017 edition of its contract suite comprises three standard form construction contracts for different procurement methods. Under Clause 21 of each of the standard forms, parties may bring a dispute to a Dispute Avoidance/Adjudication Board (DAAB), which will issue a reasoned decision within 84 days or another period of time as agreed upon by the parties. A DAAB’s decision becomes immediately binding on the parties and must be put into immediate effect. Either party may serve a “notice of dissatisfaction” within 28 days of the decision, failing which it

III. Optional Clauses

will become final. If a notice of dissatisfaction is served timeously, either party may refer the dispute to arbitration. The DAAB may, if the parties agree, provide informal assistance so as to resolve any issue or disagreement which has arisen. The parties are not bound by any such informal advice or assistance.

All three sets of Rules require that a Decision or Recommendation state the reasons for the decision. It is important to note that the AAA Rules allow for counsel to attend Board hearings, but unlike the ICC Rules, they expressly do not permit counsel to participate unless the Board finds that counsel would be helpful in resolving a particular dispute.

The following language may be used to incorporate AAA or ICC dispute board procedures:

“The Parties hereby agree to establish a Dispute Adjudication Board (“DAB”) [or a Dispute Review Board (“DRB”)] in accordance with the [select rules] (“Rules”), except as they may be modified herein or by mutual agreement of the Parties. During the pendency of the Project that is the subject of this Agreement, any Disputes shall be referred to the [DRB/DAB] for determination.

The [DRB/DAB] will consist of three members, two to be nominated by each Party, with the third selected by the two nominated members in consultation with representatives of the Parties within [30 days] after execution of this Agreement by the Parties. The third member shall serve as the Chair. [Party A] hereby nominates [name and/or title] and [Party B] nominates

[name and/or title] to serve as members of the [DRB/DAB]. [If the [DRB/DAB] requires a hearing to resolve a Dispute, the full board shall be convened to hear the matter if the amount in controversy exceeds five hundred thousand dollars (\$500,000.00); otherwise, the Chair will hear the matter alone.]

The decision of the [DRB/DAB] shall be binding on the Parties during the pendency of the [specify project] and shall continue to be binding after completion of the [project] unless and until an Arbitration Award issued pursuant to Article [X] of this Agreement modifies or annuls such decision. An arbitration seeking review of a [DRB/DAB] determination may be commenced only after completion of the [project]. An arbitration to compel a Party to comply with a determination of the [DRB/DAB] may be commenced at any time.

Any costs associated with the [DRB/DAB] shall be split equally between the Parties, except that the costs of any arbitration arising from a [DRB/DAB] determination shall be [allocated as specified in [arbitration clause]/allocated by the arbitral tribunal/borne by the losing party.]”

c. Classwide Arbitration

Arbitration on a “class action” basis, where a party seeks to represent the interests of similarly situated nonparties, is rare in the context of international business contracts. However, disputes involving bonds or other securities may raise issues affecting large numbers of parties that could be resolved on a common basis. If a provision for class arbitration is desirable, it must be carefully tailored.

III. Optional Clauses

Class claims, where one party seeks to speak for a class of similarly situated persons on a representative basis, should be distinguished from multi-party and “mass” claims, where large numbers of claimants bring individual claims together.

In the **United States**, classwide arbitration is permissible if the agreement of the parties so provides. However, a series of decisions by the Supreme Court has rejected the position that a right to classwide arbitration can be inferred from silence. In 2010, the Supreme Court held that parties who have not agreed to class arbitration may not be compelled to arbitrate on a classwide basis and that a right to classwide arbitration cannot be inferred where the arbitration clause is silent on the point (*Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010)). In later cases, the Supreme Court held that clauses prohibiting classwide arbitration may not be invalidated on the ground that they are unconscionable under state law or on the ground that the cost of arbitrating an individual claim would exceed the potential recovery (*AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *American Express v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013)). Several of the U.S. Courts of Appeals have held that courts, not arbitrators, must decide the issue of whether an agreement permits class arbitration unless the parties have clearly and unmistakably referred the question to the arbitral tribunal (see *Dell Webb Communities, Inc., v. Carlson*, 817 F.3d 867 (4th Cir. 2016); *Opalinski v. Robert Half Int’l Inc.*, 761 F.3d 326 (3d Cir. 2014); *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594 (6th Cir. 2013)).

In the unusual circumstance where classwide arbitration may be desired, the parties will need to include a clause that clearly and expressly permits class arbitration. None of the main institutional rules discussed include a rule on classwide arbitration. Some

institutions, such as the American Arbitration Association, have published supplementary rules for use in classwide arbitration that can be incorporated by reference into an arbitration agreement.

d. Final Offer/Baseball/Pendulum Arbitration

In very specific circumstances, the parties may agree to a “final offer arbitration,” also known as “baseball arbitration” or “pendulum arbitration.” Under such a clause, each party submits to the arbitrator a single proposed amount to be awarded and presents support for that amount in a summation-style argument. The arbitrator is then bound to select one of the amounts as the more appropriate without the authority to diverge from the amounts proposed by the parties or to select an amount between them. The amount selected by the arbitrator becomes a binding arbitration award.

A final offer arbitration clause may be desirable where the parties expect to dispute only the amount owed and not liability itself. It may also be agreed upon for a damages phase of a bifurcated arbitration after liability has already been determined.

The major rules are silent on this issue, so specific contractual language is required. The following language may be used:

“The parties agree that the arbitration shall be a ‘final offer arbitration.’ Each party shall submit to the arbitrator and exchange with each other in advance of the hearing a single figure representing the amount it believes should be awarded. The arbitrator shall be limited to awarding one of the two figures submitted.”

III. Optional Clauses

Final offer arbitration forces the parties to submit figures that are reasonable in the hope that the arbitrator will choose that figure. For that reason, the exchange of those figures often facilitates settlement.

An additional variant on final offer arbitration is known as “confidential final offer” or “night baseball” arbitration. Under the rules of confidential final offer arbitration, the parties exchange their own determinations of the value of the case, but the figures are not revealed to the arbitrator. The arbitrator will assign a value to the case, and the parties agree to accept the high or low figure closest to the arbitrator’s value. If the parties wish to adopt this variant, the following language may be used:

“The parties agree that the arbitration shall be a ‘confidential final offer arbitration.’ Each party shall exchange with the other in advance of the hearing a single figure representing the amount it believes should be awarded, but these figures shall not be provided to the arbitrator. The award shall be the figure closest to the value determined by the arbitrator.”

The advantage of the confidential final offer variant is that the arbitrator must do more than simply determine the prevailing party. Thus, the arbitrator is likely to be engaged to a greater degree with the details of the positions of the parties. On the other hand, for the same reason, the proceeding may not be as streamlined as under an ordinary final offer arbitration. Like ordinary final offer arbitration, confidential final offer arbitration gives both parties the incentive to present reasonable figures in order to increase the likelihood that their figure will be closer to the value assigned to the case by the arbitrator.

Appendix 1

Overview of Arbitral Seats

General Considerations

- A. New York Convention. The seat chosen must be within a State party to the New York Convention to ensure enforceability in other States that are parties to the Convention. Each of the seats below is located in a State party to the New York Convention.
- B. Mandatory Procedural Rules. The law of the seat should permit maximum party autonomy in determining the procedure of the arbitration. For example, some countries impose time limits on the length of proceedings. Depending on the matter in dispute, such time limits could be an advantage or disadvantage.
- C. Judicial Intervention. The law of the seat should limit opportunity for judicial intervention in the arbitration, particularly with respect to the merits of the dispute, either during the conduct of the arbitration or by way of review of the award.
- D. Logistical Considerations. Especially if hearings are taking place at the seat, the chosen seat should:
 - 1. be geographically convenient;
 - 2. have adequate hearing facilities; and
 - 3. have available an adequate pool of local practitioners who can support possible ancillary litigation.

It is *not* essential that either the seat of the arbitration or the hearing location be in the same place as the administering authority's offices, although this can facilitate logistics. The principal administering bodies routinely administer arbitrations taking place outside their home cities. In addition, there are effective rules designed specifically for non-administered arbitration.

- E. Restrictions on Counsel and Arbitrators and Immigration Restrictions. The law of the forum State should not impose restrictions, such as nationality requirements, on the parties' freedom to choose arbitrators or counsel. The immigration regime and professional regulations for the country should also not raise any barriers, to the extent possible, to entry or participation by foreigners as counsel, arbitrators, party representatives or witnesses. In each of the five generally recommended seats listed below, attorneys not admitted in the jurisdiction may represent parties in arbitrations seated in those jurisdictions.

In 2015, the Chartered Institute of Arbitrators published a set of ten principles, officially titled the *CIArb London Centenary Principles*, aimed at helping parties identify “an effective, efficient and ‘safe’ seat for the conduct of International Arbitration.” The Principles, which provide useful guidance on the selection of a seat, can be found on CIArb's website at www.ciarb.org.

Top Five Seats Generally Recommended

While the appropriate seat for a particular transaction will be informed by the circumstances of each case, in our experience five seats are most frequently considered for international contracts:

New York, London, Paris, Singapore and Hong Kong. The foregoing section highlights the key considerations for each of these five seats, some of which may apply to more than one seat.

A. **New York**

1. The United States has a strong policy favoring arbitration. Both the Federal Arbitration Act (Title 9 of the United States Code) and New York's arbitration law (Article 75 of the Civil Practice Law and Rules) are progressive arbitration statutes that recognize party autonomy, discourage judicial intervention and place no nationality restrictions on arbitrators or counsel.
2. The AAA, including its international arm, the ICDR, is headquartered in New York. The ICC also has an office in New York, and the New York International Arbitration Centre ("NYIAC") has hearing facilities in New York.
3. The New York state court system has designated a specialized Commercial Division Justice to hear all proceedings related to international arbitration brought in New York County. Cases related to international arbitration may also be heard in the U.S. District Court for the Southern District of New York, which is the federal court seated in New York.

Appendix 1 - Overview of Arbitral Seats

4. For any arbitration seated in the United States, the following language should be included in the arbitration clause in order to avoid any uncertainty over the possible application of state law:

“Notwithstanding [the choice of law clause], the arbitration and this agreement to arbitrate shall be governed by Title 9 (Arbitration) of the United States Code.”

5. For an arbitration seated in New York, courts may vacate an arbitral award based on the grounds listed in the Federal Arbitration Act, namely, if (i) the award was procured by corruption, fraud, or undue means; (ii) the arbitrators were evidently partial or corrupt; (iii) the arbitrators were guilty of misconduct that prejudiced a party’s procedural rights; or (iv) the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made.

B. London

1. The Arbitration Act 1996 generally confirms party autonomy over procedure and specifically notes that English court procedures need not apply. As discussed in Section II.g above, sections 45 and 69 of the Arbitration Act permit judicial determinations and appeals from awards on points of English law. If parties intend to exclude such determinations, they should include express language to this effect.
2. The English courts are widely recognized as being supportive of arbitration. The Arbitration Act confers

power on the courts (with the permission of the tribunal or agreement of the parties) to secure the attendance of witnesses before the tribunal to give oral testimony or produce documents or other material evidence. It also provides the courts with the power to enforce peremptory orders of a tribunal and to make a wide range of other orders in aid of arbitration.

3. The courts' power to grant urgent relief under the Arbitration Act is curtailed where timely and effective relief could be granted by an arbitral tribunal or institution.
4. Under the Arbitration Act, an arbitral award may be set aside if English courts find a lack of substantive jurisdiction or serious irregularity affecting the tribunal, proceedings, or the award. Under section 69 of the Arbitration Act, unless excluded by the parties' agreement, parties may also appeal a point of English law if (i) they agree or (ii) obtain the leave of the court. The court will only grant leave to appeal if (i) the court is satisfied that the question of law substantially affects the parties' rights, (ii) the question is one which the tribunal had to determine and (iii) the arbitral tribunal's decision was either so obviously wrong or addressed a question of general public importance and was at least open to serious doubt. The English court must also find it just and proper in all the circumstances for the court to determine the legal question.
5. The LCIA is headquartered in London and the International Dispute Resolution Centre (the "IDRC") has hearing facilities in London.

C. **Paris**

1. The French Code of Civil Procedure guarantees party autonomy in establishing the procedures applicable to an international arbitration.
2. In 2011, France undertook a significant reform of its legislative framework on arbitration, adopting a new law on arbitration (see Decree No. 2011-48 of Jan. 13, 2011, effective May 1, 2011) with the express purpose of making France even more arbitration-friendly than it previously was. The law amended the Code of Civil Procedure mainly to consolidate and codify well-established French case law relating to international arbitration. For example, the Code now makes explicit the generally accepted principle of severability of the arbitration agreement, according to which the arbitration clause remains unaffected even if the underlying contract is found void (see French Code of Civil Procedure, Article 1447).
3. Awards are subject to set-aside only on narrow grounds, such as the improper exercise of jurisdiction by the arbitrators, an award in excess of the arbitrators' authority or a violation of international public policy.
4. A notable innovation in the Code was to permit parties to agree to waive their right to challenge an award (see French Code of Civil Procedure, Article 1522). The impact of such a waiver is limited, however, because parties can still appeal an enforcement order (*ordonnance d'exequatur*) on grounds identical to the grounds for setting aside an award.

5. The ICC, with its International Court of Arbitration, has its headquarters and hearing facilities in Paris.

D. **Singapore**

1. **Singapore** has adopted the UNCITRAL Model Law for international arbitrations with slight modification in its International Arbitration Act (“IAA”). When the IAA was amended in 2012, Singapore reportedly became the first jurisdiction in the world expressly to extend the powers of arbitral tribunals to emergency arbitrators.
2. Foreign counsel may conduct arbitrations under the amended Singapore Legal Profession Act even when the substantive governing law is Singapore law (see Legal Profession Act, c. 161, § 35(1)).
3. Case law in Singapore strongly favors arbitration. As described by the Singapore Court of Appeal, Singapore has developed an “unequivocal judicial policy of facilitating and promoting arbitration” (*Tjong Very Sumito v. Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at 28).
4. Singapore law provides only limited grounds for set-aside of an international arbitral award, which largely track those set out in Article 34(2) of the UNCITRAL Model Law. In addition, Section 24 of the International Arbitration Act (Cap. 143A) provides that the Singapore court may set aside an award if the making of the award was induced or affected by fraud or corruption, or a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

Appendix 1 - Overview of Arbitral Seats

5. In the Civil Law (Amendment) Act 2017, adopted in January 2017, Singapore confirmed that third-party funding may be used in international arbitration and related litigation.
6. SIAC is a popular, experienced regional arbitral institution. As noted in Appendices 2 and 4 below, the SIAC Arbitration Rules were recently amended to include provisions for preliminary dismissal of claims, multiparty and multi-contract cases and expedited procedures, and SIAC also has promulgated specific investment arbitration rules.
7. The SIAC has its headquarters and hearing facilities in Singapore.

E. Hong Kong

1. **Hong Kong** remains subject to the New York Convention by virtue of ratification by the People's Republic of China (the "PRC").
2. In November 2010, Hong Kong enacted a new Arbitration Ordinance, which went into force on June 1, 2011. This Ordinance is based on the UNCITRAL Model Law and was adopted with the goal of promoting Hong Kong as a seat for international arbitration. Hong Kong has applied a version of the UNCITRAL Model Law to international arbitrations since 1990 and has substantial experience with international arbitration. The 2011 Ordinance more closely follows the Model Law, including provisions for interim measures and confidentiality. Significantly, the new Ordinance also eliminates the distinction between

domestic and international arbitration that existed under the earlier law.

3. There is no right to set aside of an arbitral award in Hong Kong based on the merits of the award. Pursuant to Section 81 of the Arbitration Ordinance (Cap. 609), which gives effect to Article 34 of the UNCITRAL Model Law, awards are subject to set-aside only on limited grounds, such as defects pertaining to the jurisdiction or constitution of a tribunal, substantial procedural irregularities, or if the award conflicts with the public policy of the jurisdiction where the supervising court is located. The case law also establishes that, even where a violation of Article 34(2) of the UNCITRAL Model Law is established, the Hong Kong court retains a narrow and limited residual discretion not to set-aside an award.
4. In 1999, Hong Kong and mainland China entered into an Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region. That arrangement allows mutual enforcement of arbitral awards between Hong Kong and mainland China. On December 30, 2009, the PRC's Supreme People's Court published a notice confirming that both *ad hoc* and institutional arbitration awards made in Hong Kong are enforceable in mainland PRC.
5. Hong Kong has expressly provided in its Arbitration Ordinance that restrictions on who can serve as counsel in court proceedings do not apply also to arbitration. In June 2017, Hong Kong amended its Arbitration

Ordinance to allow third-party funding for international arbitration and related court proceedings.

6. The Hong Kong International Arbitration Centre (“HKIAC”) is experienced in administering international arbitration. Its Administered Arbitration Rules were amended effective November 1, 2018.

Other Frequently Used Seats (*in alphabetical order by region*)

A. **Europe and Russia**

1. **Geneva or Zurich**

- a. The Swiss International Arbitration Law, chapter 12 of the Private International Law Act, took effect on January 1, 1989. The Act permits parties to waive the right to set aside an award in limited circumstances as long as the waiver expressly invokes Articles 190 and 192 of the Act. In January 2017, the Swiss Federal Council submitted potential amendments to the Swiss International Arbitration Law that would emphasize party autonomy and clarify the scope of issues open for international arbitration.
- b. Under the Private International Law Act, grounds for annulment are limited, and setting-aside proceedings, which are brought directly in the Federal Supreme Court, only last four months on average. The Swiss Federal Supreme Court may annul arbitral awards if (i) the arbitral tribunal was not properly constituted, (ii) the arbitral tribunal wrongly accepted or declined jurisdiction,

- (iii) the arbitral tribunal's decision went beyond or failed to decide the claims submitted to it,
 - (iv) the principle of equal treatment of the parties or the parties' right to be heard was violated or
 - (v) the award is incompatible with public policy.
- c. The Swiss Chambers' Arbitration Institution is based in Geneva and is experienced in conducting international arbitrations under the Swiss Rules of International Arbitration.

2. The Hague

- a. The Dutch Arbitration Act was amended, effective January 1, 2015, to give parties greater autonomy in designing arbitration proceedings and to reduce delay in set-aside and enforcement proceedings, among other things. Notably, parties may now agree to refer certain challenge proceedings to an arbitral institution rather than to Dutch courts. Annulment proceedings are also now heard directly by the Court of Appeal, rather than the district courts, thereby limiting the duration and complexity of challenges to awards. If the Court of Appeal finds grounds to set aside an award, it may remand the matter to the arbitral tribunal so that the error may be corrected rather than annulling the award outright. The new law also creates a legal framework for so-called "e-arbitration," in which pleadings may be submitted and awards rendered solely in electronic form.

Appendix 1 - Overview of Arbitral Seats

- b. Under the Dutch Arbitration Act, an award may only be set aside on the following grounds:
 - (i) non-existence of a valid arbitration agreement,
 - (ii) the arbitral tribunal was composed in violation of the applicable rules, (iii) the arbitral tribunal did not comply with its mandate, (iv) the award was not signed or was not properly or sufficiently reasoned and (v) the award, or the manner in which it was made, violates public policy. Moreover, the ground for setting aside the award must be sufficiently serious.
 - c. Several arbitral institutions are located in The Hague, including the Permanent Court of Arbitration (“PCA”) (which administers many *ad hoc* arbitrations), the Netherlands Arbitration Institute, and PRIME Finance.
 - d. The Hague has a long history of international dispute resolution, including as home to the PCA, the International Court of Justice, and several other international tribunals.
3. Milan
- a. **Italy** has adopted rules of arbitration procedure, codified in Articles 806 to 840 of the Code of Civil Procedure and last amended in 2006. These provisions are not based on the UNCITRAL Model Law, but include similar provisions on most significant issues.
 - b. There are only limited grounds for setting aside an arbitral award under Italian law. There is no basis for challenging an award solely on its merits.

Challenges to arbitral awards are brought before the Court of Appeal of the place of the seat of arbitration.

- c. The Milan Chamber of Arbitration (“CAM”) is often used for the administration of international arbitration proceedings, and has gained an international reputation. The CAM Arbitration Rules entered into force on January 1, 2010.

4. Moscow or St. Petersburg

- a. In September 2016 new legislation on arbitration entered into force in **Russia**. Among other changes, the law expands the scope of corporate disputes that can be arbitrated, explicitly states the types of disputes that are considered non-arbitrable, and clarifies that an agreement to arbitrate may be formed by an exchange of electronic communications.
- b. The new legislation is based predominantly on the UNCITRAL Model Law and significantly alters the regulatory framework applicable to domestic and international arbitration in Russia. It codifies the rules regarding the arbitrability of various categories of disputes and introduces important changes in the regulation of arbitral institutions administering disputes in Russia. It also creates more favorable rules with respect to the form and general treatment of the arbitration agreements, expressly stipulates the (new) ways in which Russian state courts can support the arbitral process, including assisting in obtaining

evidence, and streamlines the process for the recognition and enforcement of arbitral awards.

- c. The new legislation distinguishes sharply between institutional and *ad hoc* arbitration. The benefits of the former are only available if the arbitral institution obtained a permit to administer arbitration disputes in Russia as a permanent arbitral institution. The new legislation expressly states that the International Commercial Arbitration Court (“ICAC” or “MKAS”) and the Maritime Arbitration Commission at the Chamber of Commerce and Industry (“MAC”), Russia’s oldest and leading arbitral institutions, are considered permanent arbitral institutions by virtue of law and are exempt from the requirement to obtain a permit. To date, only two arbitral institutions have obtained a permit from the Russian Government: the Arbitration Center at the Russian Union of Industrialists and Entrepreneurs and the Arbitration Center at the Institute of Modern Arbitration. All the aforementioned Russian permanent arbitral institutions adopted new arbitration rules allowing them to administer domestic and international arbitration in order to comply with the new legislation. It is not clear whether any foreign arbitral institutions will apply for, or even obtain, such a permit.
- d. Under the reformed arbitration legislation, most corporate disputes in respect of Russian companies may only be submitted to

institutional arbitration with the seat in Russia and must be administered in accordance with the specialized corporate arbitration rules to be adopted by eligible arbitral institutions (general/default arbitration rules of the arbitral institution will not be suitable for the administration of corporate disputes). Certain narrow categories of corporate disputes in respect of Russian companies, such as corporate disputes concerning mandatory tender offer procedures in joint stock companies or exclusion of shareholders, are deemed non-arbitrable and are therefore within the exclusive domain of Russian State courts.

- e. Disputes in respect of privatization of State property and public procurement, including concession agreements (notably and for the time being), remain non-arbitrable.
- f. The revised arbitration legislation allows the parties to an institutional arbitration (but not an *ad hoc* arbitration) to agree on the finality of the award or waive the right to apply for the setting aside of the award or the right to challenge the tribunal's decision on jurisdiction before the State courts.
- g. The grounds for setting aside an award under the Russian arbitration and procedural law are limited and substantively mirror those under the UNCITRAL Model Law. Challenges to awards are heard by the court of first instance (by the commercial court or the court of general

jurisdiction), and, by default, are to be resolved within a month. Following the proceedings in the court of first instance, the court issues a ruling which enters into force immediately and may be challenged under cassation procedure rules (a challenge in appellate proceedings is not possible).

- h. In addition, as noted on page 9 above, Russian courts have refused to enforce an ICC award on the grounds that the arbitration clause did not explicitly refer to the ICC International Court of Arbitration as the relevant institution.

5. Stockholm

- a. The Swedish Arbitration Act, which came into force in 1999, is based on the UNCITRAL Model Law.
- b. Under Swedish law, an arbitration award can only be challenged on procedural grounds and cannot be reviewed by a court on the merits. The Swedish Arbitration Act is currently under review, and in 2015 a committee issued an extensive report with suggested revisions to the Act.
- c. The Arbitration Institute of the Stockholm Chamber of Commerce (“SCC”) is experienced in administering international arbitrations. As noted in **Appendix 2** below, the SCC Rules were revised effective January 1, 2017 to include, among other things, specific provisions for investor-State disputes and expedited procedures.

- d. **Sweden** has become one of the most frequently used venues for international commercial arbitration in recent years, with the SCC administering more than 200 arbitrations each year.

6. Vienna

- a. The Austrian Arbitration Act, adopted in 2006, is based largely on the UNCITRAL Model Law. In contrast to the UNCITRAL Model Law, the Austrian Arbitration Act draws no distinctions between domestic and international arbitrations or between commercial and non-commercial disputes.
- b. The Austrian Code of Civil Procedure provides for a limited set of grounds that permit a party to challenge an arbitral award of a tribunal seated in Austria before the Austrian Supreme Court, which is the only instance in these matters (with very limited exceptions).
- c. The grounds largely mirror those in Article 34 of the UNCITRAL Model Law, but for two grounds specifically rooted in Austrian law: (i) if the award is either based on evidence that was affected in a criminal manner, including the falsification of documents or testimony in violation of the obligation to tell the truth, or on a criminal verdict that was reversed on appeal, and (ii) if the proceedings were conducted in a manner that conflicts with fundamental values of

the Austrian legal system (procedural public policy).

- d. The Austrian Arbitration Act was amended effective January 1, 2014. This amendment designated the Austrian Supreme Court as the sole court to hear arbitration-related proceedings other than in consumer and labor law arbitrations.
- e. The Vienna International Arbitral Centre (“VIAC”), established in 1975, has considerable experience administering arbitrations, particularly in Central and Eastern Europe. VIAC arbitrations commonly apply either the Vienna Rules or the ICC Rules.

B. **Asia and the Pacific Rim**

The most frequently accepted seats involving Asian and Pacific parties are **Hong Kong** and **Singapore**. If these are not accepted, the alternatives listed below may also be considered.

1. **Auckland**

- a. **New Zealand** has adopted the UNCITRAL Model Law through its Arbitration Act of 1996, which applies to both international and domestic arbitrations. Two amendments that came into force on March 1, 2017 provide for an emergency arbitrator and a body outside of the High Court to resolve arbitrator appointment dilemmas.
- b. The Arbitrators’ and Mediators’ Institute of New Zealand (“AMINZ”) and the New Zealand

Dispute Resolution Centre administer international arbitrations.

2. Beijing or Shanghai

- a. Under Chinese law, only “foreign-related” disputes can be arbitrated outside of **China**. Foreign ownership of a Chinese entity may not be sufficient to make a dispute “foreign-related.” In recent years Chinese courts have shown a greater willingness to recognize that the involvement of a party that is a Wholly Foreign Owned Enterprise (“WFOE”) registered in a designated free trade zone creates a “foreign element” in the dispute.
- b. The PRC is a party to the New York Convention, and has extended the applicability of the Convention to the Special Administrative Regions of Hong Kong and Macau. In addition, mainland China has entered into special arrangements with Hong Kong, Macau and Taiwan for the mutual enforcement of arbitral awards, which largely mirror the Convention.
- c. The China International Economic and Trade Arbitration Commission (“CIETAC”) is commonly selected by non-PRC parties as the arbitration institution for arbitrations in mainland China. Other arbitration institutions such as the Beijing Arbitration Commission/Beijing International Arbitration Center (“BAC”) have also been steadily increasing their reputation for professionalism and

internationalization in recent years. In 2013, the CIETAC sub-commissions in Shanghai and Shenzhen declared their independence from CIETAC and are now known as Shanghai International Economic and Trade Arbitration Commission/Shanghai International Arbitration Center (“SHIAC”) and Shenzhen Court of International Arbitration / South China International Economic and Trade Arbitration Commission (“SCIA”) respectively. Given the controversies once surrounding the split, it is important for parties arbitrating in mainland China to clearly designate the arbitral institution and, if CIETAC is selected, the sub-commission that should administer the case.

- d. The PRC Arbitration Law, introduced in 1995 and amended in 2009, diverges from the UNCITRAL Model Law in several major respects.
 - i. An arbitration agreement for arbitrations seated in the PRC must designate an administering institution (“arbitration commission”). As noted below, this institution may need to be a Chinese institution. This leaves no room for *ad hoc* arbitration, although there may now be a limited exception for arbitrations seated in free trade zones. The PRC courts usually recognize and enforce *ad hoc* awards made in New York Convention States or in Hong Kong, but agreements for *ad hoc*

arbitration seated in the mainland PRC are generally unenforceable.

- ii. It is unclear whether foreign arbitration institutions may administer arbitration cases seated within mainland China. In April 2014, the PRC Supreme People's Court appeared to recognize, for the first time, the validity of an arbitral clause providing for ICC arbitration seated in Shanghai. Some commentators, however, have disputed the applicability of this decision to other cases, and the PRC is a civil law country whose courts are not bound by legal precedent. For that reason, it is advisable that parties wait for greater certainty before using foreign arbitration institutions for arbitrations seated in the PRC.
- iii. Mainland PRC law does not fully recognize the principle that arbitral tribunals may decide their own jurisdiction (*Kompetenz-Kompetenz*). Arbitration commissions, rather than arbitral tribunals, are generally empowered to rule on jurisdiction. CIETAC may, where necessary, delegate such power to the arbitral tribunal (CIETAC Rules, Article 6(1)). If one party requests that an arbitration commission determine the validity of an arbitration agreement, the other party may

simultaneously apply to a PRC court, and the court's ruling will prevail.

iv. Discovery is likely to be limited in most arbitrations seated in the mainland PRC. Parties that desire a degree of document production should incorporate in their arbitration clause evidentiary rules such as the IBA Rules on the Taking of Evidence in International Arbitration.

e. Since 1995, the PRC has adopted a special reporting system that is applicable to court proceedings involving foreign arbitral awards and awards in arbitrations seated in mainland **China** involving foreign-related factors, such as non-PRC parties or subject matter located overseas. Under this system, a lower court may not refuse to enforce a foreign or foreign-related award made in the PRC or invalidate an arbitration agreement involving foreign-related elements without prior examination and confirmation by a higher court. This system has helped facilitate the enforcement of awards against Chinese parties.

3. Kuala Lumpur

a. The Malaysian Arbitration Act 2005, which came into force on March 15, 2006 and was amended in 2011, largely adopted the UNCITRAL Model Law. The law gives parties greater flexibility to select the procedures governing the appointment of arbitrators and the proceedings and allows the

arbitral tribunal to determine its own jurisdiction, including on the validity of the arbitration clause. It also provides that the awards of arbitral tribunals are final and binding, with several grounds for setting aside the award, including (i) the existence of procedural and jurisdictional defects, (ii) when the subject-matter of the arbitration is not capable of settlement by arbitration under the laws of Malaysia and (iii) when the award is in conflict with Malaysia's public policy.

- b. The Act specifies several instances where the courts are given a right to intervene in certain matters, including staying proceedings, granting interim measures of protection, and assistance in taking of evidence. The Act replaced conflicting case law in this regard. **Malaysia** recognizes the doctrine of *Kompetenz-Kompetenz* under section 18(1) of the Arbitration Act.
- c. The Kuala Lumpur Regional Centre for Arbitration ("KLRCA") is the primary arbitration institution in the country. KLRCA has seen a rise in its caseload in recent years, and adopted revised rules in 2017.

4. Mumbai or Delhi

- a. **India's** Arbitration and Conciliation Act is based largely on the UNCITRAL Model Law with some particularities. The same law applies to domestic arbitrations and to international commercial arbitrations seated in India.

Appendix 1 - Overview of Arbitral Seats

- b. An arbitral tribunal seated in India must render an award within a maximum period of 18 months. If the time limit is not met, the tribunal's mandate is considered terminated. Only a court can extend this timeframe by an order which may involve a reduction of the arbitrators' fees.
- c. The grounds for setting aside an award seated in India are limited, and the 2015 amendments clarify that the courts cannot review the merits of the award. The grounds for refusing to enforce a foreign award are limited to those in the New York Convention.
- d. In 2012, the Supreme Court clarified that Indian courts cannot interfere in arbitrations seated outside India (*Bharat Aluminium Co v. Kaiser Aluminium Technical Services* ('BALCO'), Supreme Court of India, Civ. App. 3678 of 2007, 6 September 2012). Indian courts may still grant interim relief or assistance in taking evidence even in foreign-seated arbitrations, but application of these provisions can be excluded by agreement of the parties.
- e. The Arbitration and Conciliation Act was amended in 2015 with a view to reducing the potential interference of Indian courts in arbitral proceedings, although the prospect of related court proceedings can substantially lengthen the arbitral process.
- f. There are several arbitral institutions in India, including the Mumbai Centre for International

Arbitration (“MCIA”). When choosing an arbitral institution in **India**, parties should be aware of potential restrictions on choosing arbitrators from beyond the institution’s roster.

5. Seoul

- a. **South Korea’s** Arbitration Act is largely based on the UNCITRAL Model Law, and applies to both domestic and international commercial disputes seated in South Korea. As amended effective November 2016, the Arbitration Act now gives arbitral tribunals more control when seeking court-aided discovery, and provides more expeditious enforcement procedures. Unlike the Model Law, the Arbitration Act only allows South Korean courts to enforce interim measures that are issued in arbitrations with a seat in South Korea.
- b. The Korean Commercial Arbitration Board (“KCAB”) administers international arbitrations. Its amended rules, which became effective in June 2016, introduced an emergency arbitrator system.
- c. The grounds for set aside under the Arbitration Act largely track the UNCITRAL Model Law, namely: the arbitration agreement was invalid, a party was not given proper notice of the appointment of arbitrators or was unable to present his or her case, the award goes beyond the agreed upon issues in the arbitration agreement, the composition of the arbitral

tribunal or proceedings were not in accordance with the parties' agreement, the dispute's subject matter is not arbitrable under South Korean law, or the award conflicts with public policy.

- d. Under South Korea's Arbitration Promotion Act, which entered into force in June 2017, the government and arbitration community will implement short- and long-term plans to promote international arbitration in South Korea, including through the expansion and improvement of international arbitral facilities and the promotion of Seoul as a seat of arbitration in international arbitrations.

6. Sydney or Melbourne

- a. **Australia's** International Arbitration Act is based on the UNCITRAL Model Law. It has several default provisions that parties can choose to opt out of, including sections on evidence, costs, and procedure. The 2015 and proposed 2017 amendments to the Act align its language more closely with that of the New York Convention.
- b. Within Australia's federal structure, international arbitration matters fall within the jurisdiction of state supreme courts. In 2009, Australia's Parliament gave the Federal Court concurrent jurisdiction over international arbitration. In addition, in January 2010, the Supreme Court of Victoria appointed an "Arbitration Coordinating Judge," creating an arbitration list that centralizes arbitration matters. The list is managed by a

judge with international arbitration experience who, along with several other commercial judges, will hear all arbitration-specific cases.

- c. The Australian Center for International Commercial Arbitration (“ACICA”), and the Institute of Arbitrators and Mediators Australia (“IAMA”) administer international arbitrations. The revised ACICA Arbitration Rules came into effect in January 2016.

7. Tokyo

- a. **Japan's** Arbitration Law is based on the UNCITRAL Model Law and applies to arbitral proceedings with a place of arbitration in Japan, as well as proceedings in Japanese courts related to arbitral proceedings.
- b. The Japanese Commercial Arbitration Association (“JCAA”) administers international arbitrations. The most recent amendments to the JCAA Rules, in 2014, introduced provisions regarding expedited procedures, emergency arbitrators, interim measures, and joinder of third parties to an arbitration, among others.
- c. The grounds for set aside under the Japan Arbitration Law largely track the UNCITRAL Model Law, namely: the arbitration agreement is invalid, a party was not given notice to appoint arbitrators or during the arbitration, a party was not able to present its case in the arbitration, the award covers matters beyond the scope of the arbitration agreement or claims in the arbitration,

the composition of the tribunal or the arbitral proceedings were not in accordance with Japanese law or the parties' agreement, the claims in the arbitration relate to non-arbitrable subjects under Japanese law, or the content of an arbitral award is in conflict with the public policy or good morals of Japan.

C. **Americas**

The most frequently accepted seats involving Latin American parties are **New York** and **Paris**. If these are not accepted, the alternatives listed below are also regularly used because of geography, convenience, or other factors.

1. **Bermuda**

- a. **Bermuda** is a common seat for arbitration disputes in the insurance industry, as liability insurance policies written on the so-called “Bermuda Form” generally designate either London or Bermuda as the seat of arbitration. As a result, Bermudan courts are experienced in handling commercial arbitration matters.
- b. Under the Bermuda International Arbitration and Conciliation Act of 1993, the UNCITRAL Model Law applies to international commercial arbitrations seated in Bermuda. Parties may agree in writing to not apply the Model Law, in which case the Arbitration Act 1986 (based on the UK Arbitration Acts 1950-1979) applies, unless otherwise agreed in writing.

- c. The Bermuda Commercial Court, an administrative subdivision of the Supreme Court of Bermuda, hears all court applications in Bermuda relating to arbitral proceedings, except that the Court of Appeal of Bermuda has exclusive jurisdiction for challenges against arbitral awards. The Supreme Court of Bermuda can also issue interim measures of protection before or during international arbitrations in order to assist arbitration proceedings seated in Bermuda.
- d. The Court of Appeal for Bermuda has exclusive jurisdiction to review arbitration awards. An application to set aside must be brought within three months of the award date. Grounds on which the court can set aside an arbitral award are limited and derived from the New York Convention, including the invalidity of the arbitration agreement, serious due process flaws, an award beyond the scope of matters submitted to arbitration, subject matter not capable of settlement by arbitration under Bermudan law, and an award conflicting with Bermudan public policy (*i.e.* the making of the award was induced or affected by fraud or corruption).

2. British Virgin Islands

- a. The UK ratification of the New York Convention was extended to the British Virgin Islands (the “BVI”) in 2014.

Appendix 1 - Overview of Arbitral Seats

- b. International arbitration in the BVI is governed by the Arbitration Act 2013, which came into force on October 1, 2014. The Act is based on the UNCITRAL Model Law, with some variations. The Act recognizes the doctrine of *Kompetenz-Kompetenz* and establishes limited circumstances under which an award may be set aside.
 - c. The Act also established the BVI International Arbitration Centre, which provides facilities for arbitral proceedings, administrative services, and other support to tribunals seated in the BVI.
 - d. BVI courts generally take a liberal approach to upholding arbitration agreements and awards, and have experience handling complex international commercial cases.
 - e. Costs of arbitration in the BVI are considerably lower than in other leading arbitration centers.
3. Mexico City
- a. **Mexico** has adopted the UNCITRAL Model Law, with minor modifications.
 - b. In a pro-arbitration ruling in 2006, Mexico's Supreme Court affirmed the applicability of the principle of *Kompetenz-Kompetenz*. However, parties may resort to the courts to annul an arbitration agreement as void or inoperative.
 - c. In 2009, the law governing arbitration procedure and the recognition and execution of arbitral awards was made expressly applicable to federal

government contracts (see Law for Public Works and Services, No. 2748-IV).

- d. In Mexico, there is also an additional risk that courts may review the merits of arbitral awards through an *Amparo* proceeding, which is a legal mechanism which is meant to protect constitutional rights.

4. Miami and Other U.S. Seats

- a. Many U.S. cities are frequently used and may be appropriate arbitral seats. Because of Miami's location and culture, Latin American parties may consider it a sufficiently "neutral" site.
- b. Miami may afford lower costs than some other seats, including for bilingual professional services, and lower-cost flights and hotels. The ICDR has its south-eastern regional office in Miami.
- c. International arbitration seated in Florida (where Miami is located) will generally be governed by the U.S. Federal Arbitration Act, though it may be supplemented by state law in some instances. See **Appendix 1**, Section A above, for language that can be included in an arbitration clause to avoid ambiguities about the possible application of state procedural law to the arbitration. Florida's legislature adopted the UNCITRAL Model Law as state law in July 2010, replacing the previous Florida International Arbitration Act.
- d. A rule adopted by the Supreme Court of Florida in 2006 removed restrictions on non-Florida

lawyers participating in international arbitrations in Florida.

- e. If Miami or another U.S. seat is selected, the parties should include a clause confirming that the FAA governs the arbitration to avoid any uncertainty over the possible application of state law. A recommended clause appears above in the discussion of New York as a seat of arbitration.
- f. Other U.S. cities, including **Washington, D.C.** and **San Francisco**, are also suitable and frequently chosen seats of arbitration. If San Francisco or another California seat is chosen, parties should be careful that they do not inadvertently include language in the arbitration clause that could be read as selecting California arbitration law or providing for judicial review of arbitration awards on the merits. California arbitration law differs from the FAA in some respects and, unlike the FAA, has been interpreted to allow parties to contract for broader court review of arbitration awards than would normally be allowed. To prevent that possible outcome, parties should avoid including language in the arbitration clause to the effect that the arbitrators lack power to commit errors of law or reasoning or to make a decision inconsistent with the terms of the agreement. A provision of that type may be read as opening the award to court review under California law for error by the arbitrators, particularly if the parties have not included a

clause providing that the arbitration is governed by the FAA..

5. Santiago de Chile

- a. In 2004, **Chile** adopted the UNCITRAL Model Law to govern international commercial arbitration taking place in **Chile** (see Law No. 19,971).
- b. Courts in Chile are generally favorable to arbitration and recognize the principle of *Kompetenz-Kompetenz*. Under Chile's International Commercial Arbitration Act, parties may not appeal an arbitration award to the courts.

6. São Paulo or Rio de Janeiro

- a. **Brazil's** Arbitration Act, enacted in 1996 and amended in 2015, is based on the UNCITRAL Model Law and the Spanish Arbitration Law of 1988 (see Act No. 9,307; Act No. 13,129), with some differences.
- b. The number of both domestic and international arbitration cases in Brazil has increased significantly in the last few years. Brazilian courts are generally supportive of arbitration as a form of dispute resolution with strong precedents opposing court intervention into arbitration proceedings. Brazilian courts have also recognized the validity of arbitration clauses in government contracts.

Appendix 1 - Overview of Arbitral Seats

- c. The ICC, ICDR and LCIA all manage cases with seats in Brazil, and the ICC has most recently opened an office in São Paulo. There are also a number of Brazilian arbitration organizations, the most prominent being the Brazil-Canada Chamber of Commerce (“CAM/CCBC”). The CAM/CCBC has its own arbitration rules, which contemplate an abbreviated briefing and award schedule. In August 2017, the PCA also signed a Host Country Agreement with Brazil that will facilitate the conduct of PCA proceedings within the country.

7. Toronto

- a. Each Canadian province has its own international arbitration statute based on the UNCITRAL Model Law. Arbitration in Toronto is governed by Ontario’s International Commercial Arbitration Act, 2017. The 2017 version of the Act adopted the 2006 amendments to the UNCITRAL Model Law, incorporated the New York Convention, and extended the limitation period applicable to proceedings for the enforcement and recognition of arbitral awards.
- b. Toronto has three main arbitral institutions: Arbitration Place (which operates under agreement with the International Chamber of Commerce), ADR Chambers and JAMS Canada.

D. **Africa**

1. **Casablanca**

- a. The Moroccan Code on Civil Procedure governs domestic and international arbitrations and is inspired by French law and, in part, by the UNCITRAL Model Law. The Code differs from the Model Law in some respects, including the appointment and challenge of arbitrators and the available reasons for annulling an arbitral award. Under Moroccan law, an arbitral award rendered in Morocco may be set aside on the grounds of jurisdictional or procedural defects, or if the recognition or enforcement of the arbitral award violates domestic or international public policy. All court submissions in Morocco must be in Arabic. A reform is currently underway to modernize the legal framework.
- b. The Casablanca International Mediation and Arbitration Centre (CIMAC) opened at the end of 2014, and updated rules came into force on 1 January 2017.

2. **Lagos**

- a. The Nigerian Arbitration and Conciliation Act 1988 (“ACA”) governs international arbitration in Nigeria and mirrors the UNCITRAL Model Law. In addition, the state of Lagos passed its own arbitration legislation (the Lagos State Arbitration Law of 2009), which also is largely based on the UNCITRAL Model Law.

Appendix 1 - Overview of Arbitral Seats

- b. The Lagos Court of Arbitration is based in Lagos. Its Rules include, among others, provisions allowing a party to request interim measures from the LCA Secretariat prior to the constitution of an arbitral tribunal. The articulation of the LCA Rules and the ACA is presently uncertain.
 - c. Although section 34 of the ACA provides that “a court shall not intervene in any matter governed by this Act except where so provided,” in practice Nigerian courts have intervened in arbitration proceedings with greater frequency than in other countries, and court proceedings can take many years to reach final resolution.
- 3. Mauritius
 - a. Mauritius’s Arbitration Act, adopted in 2008 and amended most recently in 2013, is based on the UNCITRAL Model Law, with a number of innovative pro-arbitration adjustments.
 - b. Both English and French are widely spoken in Mauritius.
 - c. A specially designated and trained panel of judges of the Supreme Court hears all applications under the Act with the exception of applications for interim measures, which are first heard by a single judge before potentially being returned to the three-judge panel. Appeal from decisions of the panel lies directly, and as of right, to the Privy Council in London.

- d. The Permanent Court of Arbitration opened its first overseas office in Mauritius in 2010. The PCA acts as the appointing authority under the Arbitration Act where the parties have not designated another appointing authority.
- e. Mauritius is also home to several arbitration institutions. The Mauritius Chamber of Commerce and Industry's Arbitration and Mediation Center ("MARC") was established in 1996. In 2017 it announced a new governance structure reflecting international best practices in arbitration, with a court and an advisory board composed of leading international practitioners. In addition, in 2011, the Mauritius International Arbitration Centre Limited ("MIAC") joined forces with the LCIA to establish a joint arbitration center in Mauritius, known as the LCIA-MIAC Arbitration Centre.

E. **Middle East**

Historically, many Gulf state courts have been hostile to arbitration and some Gulf states are not parties to the New York Convention. Recent pro-arbitration reforms and new arbitral institutions may change the outlook for international commercial arbitration in the Gulf, but it may take some time to see their impact.

1. **Manama**

- a. Since 1995, **Bahrain** has hosted the Gulf Cooperation Council Commercial Arbitration Centre ("GCAC"). There are reciprocal arrangements in place between the Gulf

Cooperation Council (“GCC”) states that provide for enforcement of arbitral awards issued within other member states. As of December 2017, the GCC states consist of the **United Arab Emirates, Bahrain, Saudi Arabia, Oman, Qatar and Kuwait.**

- b. Bahrain adopted the UNCITRAL Model Law in 2004. In 2015, Bahrain significantly reformed its arbitration regime through Law No. 9/2015 (the “Bahrain Arbitration Law”), which incorporates the UNCITRAL Model Law and vests the Bahraini High Court with authority to hear all arbitration-related applications, including applications to enforce or set aside arbitral awards. It also permits foreign investors to retain their preferred legal counsel, whether local or international, for “international commercial arbitration” proceedings held in Bahrain.
- c. The Bahrain Chamber for Dispute Resolution (“BCDR”) was established in 2009 in partnership with the American Arbitration Association. BCDR tribunals are composed of two Bahraini judges and a third member chosen from BCDR’s roster of neutrals. Judgments issued by BCDR tribunals are considered final judgments issued by the courts of Bahrain and are subject to annulment by the Court of Cassation only on limited grounds. The arbitration rules of the BCDR came into effect in October 2017.

2. Doha

- a. In March 2017, Qatari Law No. 2 of 2017 Promulgating the Civil and Commercial Arbitration Law entered into force. This law is based on the UNCITRAL Model Law and applies to international arbitrations seated in Qatar that began after or were ongoing at the time the law entered into force in March 2017.
- b. The Qatar International Center for Conciliation and Arbitration and the Qatar International Court and Dispute Resolution Centre are located in Doha.
- c. Qatari Law No. 2 of 2018 Does not impose nationality requirements for arbitrators. However, it differs from the Model Law in providing that parties must choose an arbitrator from a list of approved arbitrators registered at the Arbitrators Registry at Qatar's Ministry of Justice, or alternatively may nominate an arbitrator who is of full legal eligibility and capacity, has not been finally convicted of a felony or misdemeanor relating to honesty and character, and is of good reputation and conduct.
- d. Unless the parties agree to alternative methods of enforcement, in order to enforce an award in Qatar, parties must bring an application for enforcement of the arbitral award to the enforcement judge of the Court of First Instance, once the time for filing an annulment application has expired. The grounds for challenge under

Qatari Law No. 2 of 2017 largely track those under the Model Law, and parties may not challenge an arbitral award based on questions of law or fact.

3. Dubai International Financial Centre

- a. The Dubai International Financial Centre (the “DIFC”) is a special economic zone in the center of Dubai’s financial district where UAE federal and commercial laws do not apply. Parties may choose DIFC as a seat of arbitration regardless of whether the contract has any connection with Dubai or the DIFC.
- b. The DIFC arbitration law, introduced in 2008, governs arbitrations with their seat in the DIFC. The DIFC arbitration law is modeled on the UNCITRAL Model Law and is overseen by independent DIFC courts, which are English-speaking common law courts.
- c. An arbitral award must be confirmed by the DIFC courts before it can be enforced. Arbitral awards made in the DIFC and confirmed by the DIFC courts should be directly enforceable in Dubai and internationally, but there is relatively little precedent.
- d. In 2008, the LCIA and DIFC established the DIFC LCIA Arbitration Centre and adopted rules of arbitration modeled on the LCIA Rules.
- e. Arbitration in Dubai outside of the DIFC is not recommended.

Appendix 2

Overview of Arbitral Rules

We list below the major institutional, *ad hoc* and specialized arbitral rules that are commonly considered in international transactions. Debevoise partners hold senior leadership roles in many of the major international and regional arbitral bodies, and we are well placed to advise on which rules would be most appropriate for any given transaction.

Major Institutional Rules

International Chamber of Commerce

“the Rules of Arbitration of the International Chamber of Commerce”

The ICC Rules are familiar to many parties around the world. In comparison to other commonly used rules, they provide for substantially more administrative involvement at various stages of the proceeding, including scrutiny of draft awards.

The ICC rules, which were revised effective March 1, 2017, continue the ICC’s efforts to improve efficiency and transparency. In particular, the 2017 revision includes the ICC’s new Expedited Procedure Rules (Article 30 and Appendix VI). These Rules apply to cases with arbitration agreements entered into after March 1, 2017 if the amount in dispute is less than US\$2 million, subject to a few limited exceptions.

Along with the 2017 revision, the ICC also published a “Note to Parties and Arbitral Tribunals on the Conduct of Arbitration,” which

is “intended to provide parties and arbitral tribunals with practical guidance concerning the conduct of arbitrations” under the ICC Rules, as well as the practices of the ICC Court. The ICC subsequently released updates to its Note, effective January 1, 2019. One notable innovation is a rule providing for default publication of awards, no less than two years after their notification, unless the parties opt out. If the parties do not wish their award to be made public, they should expressly opt out. They can do so by providing in the arbitration clause that “The parties do not consent to the publication of any award.”

In addition to the increased scrutiny of draft awards, the ICC Rules have two unique features not shared by other rules. *First*, the ICC Rules require the preparation of Terms of Reference at an early stage of the arbitration proceeding. The Terms of Reference set out the nature of the claims and defenses and, unless the tribunal decides otherwise, the issues to be resolved. *Second*, the ICC arbitrators’ fees are based on the amount in controversy. Depending on the size of the claim, these fee arrangements may result in higher fees and more up-front costs being borne by the claimant than with other institutions. The ICC also requires an advance on costs based on the amount in controversy, which is meant to cover all of the costs of the arbitration and must be paid at an early stage of the arbitration (before the Terms of Reference become operative). If the respondent does not pay its share of this advance, the claimant must either pay the respondent’s share or provide a bank guarantee in order for the case to proceed.

The text of the ICC Rules and the Note to Parties can be found on the ICC’s website at www.iccwbo.org.

London Court of International Arbitration

“the Rules of the London Court of International Arbitration”

The LCIA Rules also provide administered arbitration but with less institutional involvement than the ICC Rules. The LCIA generally acts through its President, who makes appointments of arbitrators and appoints panels to determine challenges. The LCIA’s schedule of costs provides administrative fees based on tasks performed and arbitrators’ fees based on a capped daily or hourly rate rather than on the amount in controversy. Depending in part on the amount in controversy, this fee schedule may result in lower costs than under some other rules. Detailed statistics on the costs and duration of LCIA cases may be found in the LCIA’s Report on Facts and Figures: Costs and Duration: 2013-2016. The LCIA Rules, most recently amended in 2014, include provisions for emergency relief (Article 9B) and other provisions concerning speed and procedure (Articles 5, 14 and 15).

The text of the LCIA Arbitration Rules can be found on the LCIA’s website at www.lcia.org.

International Centre for Dispute Resolution

“the International Centre for Dispute Resolution International Arbitration Rules”

The ICDR International Arbitration Rules are based in large part on the 1976 UNCITRAL Rules for *ad hoc* arbitration but provide for administrative involvement in areas where an administrator may be useful, such as the appointment of or challenge to arbitrators. These rules were last amended in 2014.

Appendix 2 - Overview of Arbitral Rules

The ICDR is the international division of the AAA and is charged with the exclusive administration of all of the AAA's international matters. The rules may be used anywhere in the world.

The ICDR offers two administrative fee options for parties filing claims or counterclaims: the Standard Fee Schedule with a two-payment schedule, and the Flexible Fee Schedule with a three-payment schedule that offers lower initial filing fees but potentially higher total administrative fees for cases that proceed to a hearing. The arbitrators' fees are usually based on an hourly or daily rate.

According to the ICDR Fee Schedule, most recently modified on July 1, 2016, the AAA will retain a portion of the administrative filing fee if a party files a demand for arbitration that is incomplete or otherwise does not meet the filing requirements and the deficiency is not corrected within a reasonable period of time.

The text of the ICDR Rules can be found at www.icdr.org.

Hong Kong International Arbitration Centre

“the HKIAC Administered Arbitration Rules”

The HKIAC released its revised Administered Arbitration Rules in 2018, expanding on its 2013 Rules. These Rules continue the HKIAC's practice of working within a “soft administration” framework, where parties have more flexibility while the HKIAC retains structures to ensure that the arbitration functions smoothly. For example, the Rules include provisions for emergency relief (Article 23 and Schedule 4) and multiparty and multi-contract arbitrations (Articles 27-30). The Rules also include expedited procedures for claims under an amount decided by the HKIAC (currently HKD 25,000,000 as of January 2019), or by agreement of the parties or in “cases of exceptional urgency” (Article 42). Under

the expedited procedures, the award “shall be communicated to the parties within six months from the date when HKIAC transmitted the case file to the arbitral tribunal” (Article 42(f)). Additionally, the Rules include an “Early Determination Procedure” (Article 43). This procedure allows the arbitral tribunal to decide points of law or fact at an earlier stage of the arbitration where such points of law or fact are manifestly without merit or manifestly outside the arbitral tribunal’s jurisdiction, or where, even if such points were assumed to be correct, they would not result in an award in favor of the party that submitted them.

The text of the HKIAC Administered Arbitration Rules can be found on HKIAC’s website at www.hkiac.org.

Singapore International Arbitration Centre

“the Singapore International Arbitration Centre Rules 2016”

The SIAC Rules, initially promulgated in 1991 and most recently updated in 2016, provide a structured format for international arbitration proceedings. An innovative new rule permits the tribunal to dismiss a claim or defense that is “manifestly without legal merit” or “manifestly outside the jurisdiction of the Tribunal” (Rule 29.1). Additionally, the Rules contain specific provisions for multi-contract and multiparty disputes (Rules 6-8) as well as for expedited and emergency procedures (Rule 30, Schedule 1). The revised rules also provide an expedited procedure for cases with a value of S\$6 million or less, or by agreement of the parties, or in cases of exceptional urgency. As noted in **Appendix 4** below, SIAC also promulgated rules specific to investor-State arbitrations.

The text of the SIAC Rules can be found on SIAC's website at www.siac.org.sg.

Stockholm Chamber of Commerce

“the Stockholm Chamber of Commerce Arbitration Rules”

The SCC Rules were updated effective January 1, 2017. The SCC Rules strive for flexibility, efficiency, low cost, and minimal administrative interactions. The new Rules also include a summary procedure intended to save time and money (Article 39).

Additionally, the 2017 Rules expressly address joinder of parties and claims (Articles 13 & 14) and abandon the default presumption in favor of a three-member arbitral tribunal, instead adopting a more flexible approach (Article 16). An appendix to the SCC Rules deals specifically with investor-State disputes (Appendix III; *see also* **Appendix 4** below). The SCC also adopted new Rules for Expedited Arbitrations that may be suitable for smaller or simpler disputes.

The text of the SCC Arbitration Rules can be found on the SCC's website at www.sccinstitute.com.

CPR International Institute for Conflict Prevention & Resolution

“the CPR Rules for Administered Arbitration of International Disputes”

The CPR, which has long maintained rules for non-administered arbitration, first released its CPR Administered Arbitration Rules in 2014. The CPR Administered Rules are intended to increase efficiency and lower costs by providing for a high degree of flexibility while maintaining strong institutional support. The CPR Administered Rules allow the arbitrators to establish time limits for each phase of the proceedings (Article 9.2) and penalize parties attempting to delay (Article 19.2). Proceedings under the

Appendix 2 - Overview of Arbitral Rules

Administered Rules are administered from the CPR's offices in New York.

The text of the CPR Administered Rules can be found on the CPR's website at www.cpradr.org.

Ad Hoc Rules

UNCITRAL

“the UNCITRAL Arbitration Rules”

The UNCITRAL Arbitration Rules were originally adopted in 1976 and were substantially updated and revised in 2010. They are the most commonly used rules for *ad hoc* arbitration and therefore may be preferred by certain parties.

The 2010 UNCITRAL Rules include revised procedures for the replacement of an arbitrator, the requirement for reasonableness of costs and a review mechanism for arbitration costs, as well as additional provisions dealing with multiparty arbitration, joinder, and interim measures. The Rules also make express reference to the use of modern technologies.

In 2013, the Rules were revised to incorporate the UNCITRAL Transparency Rules in Treaty-based Investor-State Arbitration (the “UNCITRAL Transparency Rules”). The UNCITRAL Transparency Rules apply to arbitrations initiated pursuant to an investment treaty that was concluded on or after April 1, 2014, unless the treaty parties agree otherwise.

If the UNCITRAL Arbitration Rules are selected, it is recommended that the parties expressly designate an appointing authority as follows:

“The appointing authority shall be [insert, e.g., the International Chamber of Commerce International Court of Arbitration, the American Arbitration Association, or the London Court of International Arbitration].”

Each institution has its own schedule of fees for acting as the appointing authority under the UNCITRAL Rules, which may be used anywhere in the world. If the parties have not agreed on an appointing authority, the default appointing authority will be the Secretary-General of the Permanent Court of Arbitration.

The text of the UNCITRAL Arbitration Rules can be found at www.uncitral.org.

CPR International Institute for Conflict Prevention & Resolution

“the Rules of the CPR International Institute for Conflict Prevention & Resolution for Non-Administered Arbitration of International Disputes”

The CPR Non-Administered Arbitration Rules, originally released in 1989 and most recently revised in 2007, provide an effective framework for *ad hoc* arbitration. The CPR becomes involved only if necessary in the appointment of, and determination of challenges to, arbitrators. Fees charged by the CPR for performing these services are likely to be minimal. The Rules provide for comparatively broader document exchange than some other rules (see CPR Rule 11). CPR also offers rules for administered arbitration of international disputes, as noted above.

The text of the CPR Non-Administered Arbitration Rules can be found at www.cpradr.org.

CIArb Chartered Institute of Arbitrators

“the CIArb Arbitration Rules”

The CIArb Arbitration Rules, effective December 1, 2015 and superseding the CIArb Arbitration Rules 2000, are designed for use in both domestic and international *ad hoc* arbitrations. The Rules are

Appendix 2 - Overview of Arbitral Rules

based on the UNCITRAL Arbitration Rules 2010, but are supplemented by optional clauses aimed at providing parties with more choice to tailor the rules to their needs. These additional clauses have principally been made to enable CIArb to act as the appointing authority. Other significant additions include waiver of the parties' right to appeal (Article 34.2), provisions for emergency arbitrators (Appendix I), and a checklist for case management conferences (Appendix II).

The text of the CIArb Arbitration Rules can be found at www.ciarb.org.

Specialized Rules

P.R.I.M.E. Finance

“the P.R.I.M.E. Finance Arbitration Rules”

The Panel of Recognised International Market Experts in Finance (“P.R.I.M.E. Finance”), established in 2012, provides expert services to help resolve disputes in the financial sector. Arbitration services are a key focus of P.R.I.M.E. Finance, but the panel also offers mediation, judicial training, expert court opinions and recommendations on legal reform for international derivatives markets.

The P.R.I.M.E. Finance Arbitration Rules, which became effective in February 2016, are based on the 2010 UNCITRAL Arbitration Rules. The P.R.I.M.E. Finance Arbitration Rules also include several mechanisms to shorten time frames of arbitral proceedings and address topics such as tax consequences, interest calculation and currency. The PCA administers arbitrations under the P.R.I.M.E. Finance Arbitration Rules.

The text of the P.R.I.M.E. Finance Arbitration Rules can be found at www.primefinancedisputes.org.

World Intellectual Property Organization

“the Rules of the WIPO Arbitration and Mediation Center”

The WIPO Arbitration and Mediation Center, based in Geneva, Switzerland, is part of the World Intellectual Property Organization. The Center provides dispute resolution services designed primarily for disputes arising out of commercial transactions or relationships involving intellectual property. The WIPO Arbitration Rules were

Appendix 2 - Overview of Arbitral Rules

originally promulgated in October 1994. The latest revised version became effective on June 1, 2014.

The text of the WIPO Arbitration Rules can be found on the WIPO ADR website at www.arbiter.wipo.int.

Appendix 3

Comparative Table of Major Rules

COMPARISON OF THE HKIAC, ICC, ICDR, LCIA, SCC, SIAC AND UNCITRAL ARBITRATION RULES

The table below compares the salient features of the following sets of arbitration rules:

- Hong Kong International Arbitration Centre (“HKIAC”) Administered Arbitration Rules (in force November 1, 2018).
- International Chamber of Commerce (“ICC”) Rules of Arbitration (in force March 1, 2017).
- International Centre for Dispute Resolution (“ICDR”) of the American Arbitration Association (“AAA”) International Dispute Resolution Procedures (Including Arbitration Rules) (in force June 1, 2014).
- London Court of International Arbitration (“LCIA”) Arbitration Rules (in force October 1, 2014).
- Stockholm Chamber of Commerce (“SCC”) Arbitration Rules (in force January 1, 2017).
- Singapore International Arbitration Centre (“SIAC”) Arbitration Rules (in force August 1, 2016).
- United Nations Commission on International Trade Law (“UNCITRAL”) 2010 Arbitration Rules (as amended in 2013)

**COMPARISON OF THE
HKIAC, ICC, ICDR, LCIA, SCC, SIAC AND UNCITRAL
ARBITRATION RULES**

	HKIAC	ICC	ICDR	LCIA	SCC	SIAC	UNCITRAL
ARBITRAL TRIBUNAL							
DEFAULT NUMBER OF ARBITRATORS	HKIAC decides. (Article 6.1)	ONE Unless the ICC says three. (Article 12.2)	ONE Unless the ICDR Administrator says three. (Article 11)	ONE Unless the LCIA Court says three. (Article 5.8)	The SCC decides. (Article 16.2)	ONE Unless the SIAC Registrar says three. (Article 9.1)	THREE (Article 7.1)
APPOINTMENT OF THREE-MEMBER TRIBUNAL IN MULTIPARTY DISPUTES	In the absence of joint nomination by claimants or respondents, HKIAC appoints each member of the tribunal. (Article 8.2)	In the absence of joint nomination by claimants or respondents, the ICC Court appoints each member of the tribunal. (Articles 12.6, 12.8)	Administrator appoints each member of the tribunal unless the parties have agreed otherwise within 45 days of start of arbitration. (Article 12.5)	In the absence of agreement on joint nomination by all parties, the LCIA Court appoints each member of the tribunal. (Article 8.1)	In the absence of joint nomination by claimants or respondents, the SCC Board appoints each member of the tribunal. (Article 17.5)	In the absence of joint nomination by claimants or respondents, the SIAC President appoints each member of the tribunal. (Article 12)	In the absence of joint nomination by claimants or respondents, the appointing authority appoints each member of the tribunal. (Articles 10.1, 10.3)

Appendix 3 – Comparative Table of Major Rules

	HKIAC	ICC	ICDR	LCIA	SCC	SIAC	UNCITRAL
DEFAULT RESTRICTIONS ON THE NATIONALITY OF ARBITRATORS	Sole or presiding arbitrator generally shall not be of the same nationality as any party. (Articles 11.2, 11.3)	Sole or presiding arbitrator generally shall not be of the same nationality as any party. (Article 13.5)	No restrictions. (Article 12.4)	Sole or presiding arbitrator shall not be of the same nationality as any party. (Article 6.1)	Sole or presiding arbitrator generally shall not be of the same nationality as any party. (Article 17.6)	No restrictions.	No restrictions. (Article 6.7)
GROUND FOR CHALLENGE OF ARBITRATORS	Lack of impartiality or independence; lack of qualifications agreed by the parties; inability to perform his or her functions; or failure to act without undue delay. (Article 11.6)	Lack of impartiality or independence. (Article 14.1)	Lack of impartiality or independence. (Article 14.1)	Lack of impartiality or independence; deliberate violation of arbitration agreement; or failure to conduct or participate in the arbitration with efficiency, diligence and industry. (Articles 10.1–10.2)	Lack of impartiality or independence or qualifications. (Article 19.1)	Lack of impartiality or independence; lack of qualifications agreed by parties. (Article 14.1)	Lack of impartiality or independence. (Article 12.1)
TIMING FOR CHALLENGE OF ARBITRATORS	15 days from notification of appointment or	30 days from notification of appointment or	15 days from notification of appointment or	14 days from formation of the arbitral	15 days from becoming aware of	14 days from notification of appointment or	15 days from notification of appointment or

Appendix 3 – Comparative Table of Major Rules

	HKIAC	ICC	ICDR	LCIA	SCC	SIAC	UNCITRAL
	from becoming aware of grounds for challenge. (Article 11.7)	from becoming aware of grounds for challenge. (Article 14.2)	from becoming aware of grounds for challenge. (Article 14.1)	tribunal or from becoming aware of grounds for challenge. (Article 10.3)	grounds for challenge. (Article 19.1—19.3)	from becoming aware of grounds for challenge. (Article 15.1)	from becoming aware of grounds for challenge. (Article 13.1)
JOINDER AND CONSOLIDATION							
JOINDER	A party may apply for joinder if all parties consent to the joinder or the additional party is <i>prima facie</i> bound by the arbitration agreement giving rise to the arbitration or by a different arbitration agreement under the Rules, provided that a common question of law or fact arises	A party may apply for joinder of an additional party to ICC Secretariat any time before confirmation/ appointment of arbitrator. (Article 7)	Before appointment of arbitrator, a party may submit notice of arbitration against an additional party. After appointment, consent of all parties and additional party is required. (Article 7.1)	A party may apply for joinder of an additional party provided that any additional party and the applicant party consent to the joinder in writing. (Article 22.1(viii))	A party may apply for joinder of an additional party to the Board. (Article 13)	A party may apply for joinder if the additional party is <i>prima facie</i> bound by the arbitration agreement or upon consent of all parties. Third parties may also submit a request for joinder. (Article 7)	A party may apply for joinder if the additional party is a party to the arbitration agreement. (Article 17.5)

Appendix 3 – Comparative Table of Major Rules

	HKIAC	ICC	ICDR	LCIA	SCC	SIAC	UNCITRAL
	under the arbitration agreements, the rights to relief claimed are in respect of, or arise out of, the same transaction or series of related transactions, and the arbitration agreements are compatible. Third parties may also request joinder. (Article 27)						
CONSOLIDATION	HKIAC may consolidate at the request of any party where (a) the parties agree to consolidation; (b) all claims are made under the same arbitration	ICC Court may consolidate at the request of any party where (a) the parties have agreed to consolidation; (b) all claims are made under the same	Consolidation arbitrator (appointed by Administrator at request of a party) may consolidate where: (a) the parties have agreed to consolidation;	Tribunal may consolidate with approval of LCIA Court where (a) the parties agree to consolidation in writing, or (b) when arbitrations have	SCC Board may consolidate at the request of any party where (a) the parties have agreed to consolidation; (b) all claims are made under the same	Prior to the constitution of the tribunal, the Registrar may consolidate where (a) all parties have agreed to consolidation; (b) all claims	N/A

Appendix 3 – Comparative Table of Major Rules

	HKIAC	ICC	ICDR	LCIA	SCC	SIAC	UNCITRAL
	agreement; or (c) claims made under different arbitration agreements have a common question of law or fact and the rights to relief claimed are in respect of or arise out of the same transaction or series of transactions, provided that the arbitration agreements are compatible. (Article 28.1) Parties may also commence a single arbitration under this last category.	arbitration agreement; or (c) the arbitrations are between the same parties, relate to claims that arise in connection with the same legal relationship, and the arbitration agreements are compatible. (Article 10)	(b) all claims are made under the same arbitration agreement; or (c) the arbitrations are between the same parties, relate to claims that arise in connection with the same legal relationship, and the arbitration agreements are compatible. (Article 8.1)	commenced between the same parties under either the same or compatible arbitration agreements. The LCIA Court has similar powers prior to the constitution of the tribunal. (Articles 22.1(ix)–(x), 22.6)	arbitration agreement; or (c) the relief sought arises out of the same transaction or series of transactions, and the arbitration agreements are compatible. (Article 15)	are made under the same arbitration agreement; or (c) the disputes arise from the same transaction or series of transactions and the arbitration agreements are compatible. The tribunal may also order consolidation on the same grounds, provided that a different tribunal has not been constituted in the other proceeding. (Article 8).	

Appendix 3 – Comparative Table of Major Rules

	HKIAC	ICC	ICDR	LCIA	SCC	SIAC	UNCITRAL
	(Article 29)						
PROCEDURAL VARIETY							
EXPEDITED PROCEEDINGS	Upon application if the amount in dispute does not exceed the amount set by the HKIAC, where the parties agree, or in cases of exceptional urgency. (Article 42.1)	If the parties so agree or the amount in dispute does not exceed US\$2,000,000. (Article 30.2)	If the parties so agree or if no claim or counterclaim exceeds US\$6,000,000. (Article 1.4)	Not available.	The separate SCC Rules for Expedited Arbitrations apply if the parties so agree.	Upon application if the parties so agree, if the amount in dispute does not exceed S\$6,000,000, or in cases of exceptional urgency. (Article 5.1)	Not available.
TERMS OF REFERENCE REQUIRED?	N/A	Yes, except in proceedings governed by the Expedited Rules. (Article 23)	No.	No.	No.	No.	No.
DEFAULT SEAT	Hong Kong, unless tribunal determines another place is more appropriate. (Article 14.1)	Determined by the ICC Court. (Article 18)	Determined by the ICDR Administrator. (Article 17.1)	London, unless the LCIA determines another place is more appropriate. (Article 16.2)	Determined by the SCC Board. (Article 25.1)	Determined by the tribunal. (Rule 21.1)	Determined by the tribunal. (Article 18.1)

Appendix 3 – Comparative Table of Major Rules

	HKIAC	ICC	ICDR	LCIA	SCC	SIAC	UNCITRAL
PLACE OF HEARING	No restrictions. (Article 14.2)	No restrictions. (Article 18.2)	No restrictions. (Article 17.2)	No restrictions. (Article 16.3)	No restrictions. (Article 25.2)	No restrictions. (Article 21.2)	No restrictions. (Article 18.2)
DEFAULT LANGUAGE OF THE ARBITRATION	Tribunal decides. (Article 15.2)	Tribunal decides. (Article 20)	Presumption in favor of the language(s) of documents containing the arbitration clause. (Article 18)	Tribunal decides. (Article 17.4)	Tribunal decides. (Article 26.1)	Tribunal decides. (Article 22.1)	Tribunal decides. (Article 19.1)
CONFIDENTIALITY THE DEFAULT RULE?	Yes, subject to certain exceptions. (Article 45)	No, but the Tribunal may make orders concerning confidentiality of proceedings or of any other matters and may take measures for protecting trade secrets and confidential information. (Article 22.3) All ICC awards made as from January 1, 2019	No, but the Tribunal may make orders concerning confidentiality of proceedings or of any other matters and may take measures for protecting trade secrets and confidential information. (Articles 37.1, 37.2)	Yes, subject to certain exceptions. (Article 30.1)	Yes. (Article 3)	Yes, subject to certain exceptions. (Articles 39.1, 39.2)	Silent.

Appendix 3 – Comparative Table of Major Rules

	HKIAC	ICC	ICDR	LCIA	SCC	SIAC	UNCITRAL
		may be published, no less than two years after their notification, unless the parties opt out. (Note to Parties and Arbitral Tribunals, ¶¶ 40–46)					
EMERGENCY ARBITRATOR / INTERIM RELIEF							
EMERGENCY ARBITRATOR	Available before the constitution of the tribunal. (Article 23.1, Schedule 4)	Available before transmission of the file to the tribunal. (Article 29, Appendix V)	Available before the constitution of the tribunal. (Articles 6.1-6.2)	Available before the constitution of the tribunal. (Article 9B)	Available before the file is referred to the tribunal. (Appendix II, Article 1.1)	Available before the constitution of the tribunal. (Article 30.2, Schedule 1(1))	N/A
INTERIM RELIEF	At the request of either party, the tribunal may order interim measures it deems appropriate.	At the request of either party, the tribunal may order interim measures it deems appropriate.	At the request of either party, the tribunal may order interim measures it deems necessary.	At the request of either party, the tribunal may order interim measures it deems appropriate.	At the request of either party, the tribunal may order interim measures it deems appropriate.	At the request of either party, the tribunal may order interim measures it deems necessary or	At the request of either party, the tribunal may order interim measures it deems necessary or

Appendix 3 – Comparative Table of Major Rules

	HKIAC	ICC	ICDR	LCIA	SCC	SIAC	UNCITRAL
	(Article 23.2)	(Article 28)	(Articles 24.1, 24.2)	(Article 25.1)	(Articles 37.1, 37.3)	appropriate. (Article 30.1)	appropriate. (Article 26)
AWARD							
TIME LIMIT FOR FINAL AWARD (subject to extensions)	Silent.	6 months from the date of terms of reference. (Article 31.1)	60 days from end of final hearing. (Article 30.1)	“Immediately and without any delay.” (Article 26.8)	6 months from the date the case was referred to the tribunal. (Article 43)	45 days from the date of the closure of proceedings. (Article 32.3)	Silent.
PUBLICATION OF REDACTED AWARDS PERMITTED?	Yes, unless one of the parties objects. (Article 45.5)	The Rules are silent on this, but the ICC routinely publishes redacted awards and decisions.	Yes, unless parties agree otherwise. (Article 30.3)	No, unless the prior written consent of all parties and the tribunal is obtained. (Article 30.3)	Silent.	No, unless the prior written consent of all parties and the tribunal is obtained. (Article 32.12)	N/A
SCRUTINY OF THE AWARD?	No.	Yes, by ICC Court. (Article 34)	No.	No.	No.	Yes, by Registrar. (Article 32.3)	No.
CAN AWARD BE CORRECTED OR INTERPRETED?	Yes, within 30 days of receipt of the award, either by application of a party, or on the initiative of the Tribunal.	Yes, within 30 days of receipt of the award, either by application of a party, or on the initiative of the Tribunal.	Yes, within 30 days of receipt of the award, either by application of a party, or on the initiative of the Tribunal.	Yes, within 30 days of receipt of the award, either by application of a party or on the initiative of the Tribunal.	Yes, within 30 days of receipt of the award, either by application of a party, or on the initiative of the Tribunal.	Yes, within 30 days of receipt of the award, either by application of a party, or on the initiative of the Tribunal.	Yes, within 30 days of receipt of the award, either by application of a party, or on the initiative of the Tribunal.

Appendix 3 – Comparative Table of Major Rules

	HKIAC	ICC	ICDR	LCIA	SCC	SIAC	UNCITRAL
	(Articles 38.1–38.3)	(Articles 36.1, 36.2)	(Articles 33.1, 33.3)	(Articles 27.1, 27.2)	(Articles 47.1, 47.2)	(Articles 33.1, 33.2)	(Articles 38)
COST & FEES							
ADMINISTRATION FEE	Ad valorem. (HKIAC Schedule 1, Registration and Administrative Fees, Article 34.1 (e))	Ad valorem. (Article 38, Appendix III)	Ad valorem under both the Standard and Flexible Fee Schedules. (International Arbitration Fee Schedule)	Fixed registration fee and hourly rates. (Article 28.1, LCIA Schedule of Arbitration Costs)	Ad valorem. (Article 49, SCC Schedule of Costs Appendix IV)	Ad valorem. (Article 34, SIAC Schedule of Fees)	N/A
FEES OF THE TRIBUNAL	Hourly rates or ad valorem, depending on agreement of the parties. (Articles 10, 34.1 Schedules 2 and 3)	Ad valorem, reflecting relevant circumstances. (Article 38, Appendix III, Article 2)	Appropriate daily or hourly rates determined by Administrator. (Article 35)	Hourly rates, generally not exceeding £450. (Article 28, LCIA Schedule of Arbitration Costs)	Ad valorem. (SCC Schedule of Costs, Appendix IV, Article 2)	Ad valorem. (Article 36, SIAC Schedule of Fees)	Determined by the tribunal. (Articles 40, 41.1)
RESPONSIBILITY FOR LEGAL COSTS	The Tribunal decides allocation between the parties. (Article 34.2)	The Tribunal decides allocation between the parties. (Article 38.4)	The Tribunal decides allocation between the parties. (Article 34)	The Tribunal decides allocation between the parties. (Article 28.3)	The Tribunal decides allocation between the parties. (Article 49.6)	The Tribunal decides allocation between the parties. (Article 35)	Unsuccessful party or parties responsible for costs unless Tribunal decides otherwise. (Article 42.1)

Appendix 4

Investor-State Contracts

This appendix provides suggestions specific to dispute resolution clauses in investor-State contracts. The unique nature of disputes involving State parties requires careful consideration of specific issues such as transparency, financing, enforcement (including sovereign immunity) and other public interest concerns.

I. General Considerations

- A. **Specificity of Rules.** Investor-State contracts need not be subject to specific investment arbitration rules. For instance, the UNCITRAL Rules were originally drafted as general commercial arbitration rules and only later were adopted in investor-State arbitrations. Similarly, the SCC Rules are general commercial arbitration rules but the most recent version includes an appendix with supplemental provisions specific to investor-State disputes. In contrast, the ICSID Convention and Arbitration Rules, the SIAC Investment Arbitration Rules and the PCA Rules were drafted with the presence of a State, State-controlled entity or intergovernmental organization specifically in mind.
- B. **Arbitrator Nationality.** All the major investment arbitration rules require arbitrators to be impartial and independent. Some arbitration rules also place specific restrictions on the nationality of the arbitrators. For instance, the SIAC Investment Arbitration Rules require the sole arbitrator or chair of the tribunal to be of a different nationality than the parties unless the parties agree otherwise (Rule 5.7). The ICSID Rules also prevent a party from nominating a national

of its own country as a party-appointed arbitrator unless the opposing party agrees (Rule 1(3)).

- C. **Confidentiality and Transparency.** The recent trend towards greater transparency in arbitrations involving State interests may be welcome news to some, but certain parties may be concerned about the potential loss of confidentiality, especially if non-public business information may be disclosed in the arbitration.

Different sets of rules take different approaches to this issue. While acknowledging the need to safeguard confidential or protected information, the UNCITRAL Transparency Rules provide for the publication of (i) information regarding the commencement of the arbitration and (ii) documents, including the parties' submissions as well as orders, decisions and awards of the tribunal (Articles 2 & 3). The UNCITRAL Transparency Rules also require hearings to be public, subject to necessary safeguards for the protection of confidential business and government information (Article 6). These Rules apply automatically to arbitrations initiated under the UNCITRAL Rules pursuant to an investment treaty concluded on or after April 1, 2014 (Article 1). For arbitrations under investment treaties concluded prior to that date, the UNCITRAL Transparency Rules will apply only when (i) the parties to the arbitration agree; or (ii) the State Parties to the relevant treaty (or, in the case of a multilateral treaty, the State of the claimant and the respondent State) have agreed to their application.

In October 2017, the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the "Mauritius Convention on Transparency") entered into force for States that have ratified it. As of the date of entry into

force, only Canada, Mauritius and Switzerland were parties, but a number of other States have signed but not ratified the Convention. Under the Mauritius Convention, States express their consent to apply the UNCITRAL Transparency Rules to investment treaties concluded before 1 April 2014.

The ICSID Convention and associated Rules and Regulations do not contain any general presumption of transparency or confidentiality. The ICSID Secretariat publishes details of arbitral proceedings, including procedural status, on the ICSID website and publishes awards with the consent of the parties. The parties may also agree to allow public access to hearings in person or by video broadcast (ICSID Arbitration Rule 32(2)).

The SCC Rules treat all arbitration-related matters as confidential unless otherwise agreed by the parties, including in investor-State cases (Article 3).

The SIAC Investment Arbitration Rules include a similar provision that presumes confidentiality (Rule 37), although they also permit the publication of limited information about the arbitration—such as the nationality of parties and the legal instrument from which the dispute arose—even without the parties’ consent (Rule 38.2).

As noted in Section III.4.e above, the law of the seat may also contain implied duties of confidentiality. These may, however, be subject to exceptions where State interests are involved. Investment treaties may also contain their own transparency provisions.

- D. **Third-Party Submissions.** Under certain sets of rules, third parties may make written submissions of relevance to the factual or legal issues in dispute (*see, e.g.,* SIAC Rules, Rule 29;

SCC Rules, Appendix III, Articles 3-4; ICSID Rules, Rule 37(2); UNCITRAL Transparency Rules, Articles 4-5).

- E. **Third-Party Funding.** At present, the HKIAC Rules and SIAC Investment Arbitration Rules are unique among the major rules in expressly addressing third-party funding arrangements. The HKIAC Rules require a party to disclose to all other parties, the arbitral tribunal and the HKIAC both (i) that a funding agreement has been made and (ii) the identity of the third-party funder (HKIAC Rules, Article 44.2). Any funded party must also disclose any changes to the initially disclosed funding arrangements (HKIAC Rules, Article 44.3). The funded party may also disclose information relating to the arbitration to the third party funder (HKIAC Rules, Article 45.3(e)). The arbitral tribunal may take into account any third-party funding arrangement in making cost orders in the arbitration (HKIAC Rules, Article 34.4). Rule 24 of the SIAC Investment Arbitration Rules states that the arbitral tribunal may order disclosure of third-party funding arrangements, and Rules 33.1 and 35 allow the tribunal to account for such arrangements when apportioning the costs of the arbitration. Third-party funding may also be addressed as part of the ongoing revision to the ICSID Rules. The other major rules are silent on the topic.

II. Institutional and Ad Hoc Rules

International Centre for Settlement of Investment Disputes

“the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States and the Rules adopted thereunder, or the Arbitration (Additional Facility) Rules of the International Centre for Settlement of Investment

Disputes if the Centre lacks jurisdiction under the Convention at the time when any proceeding hereunder is instituted.”

ICSID is one of the most commonly selected arbitral institutions in investor-State disputes. While many treaties provide for ICSID arbitration, parties are also free to choose ICSID arbitration for contractual disputes involving a State or State entity.

ICSID arbitration under the regular rules—as opposed to Additional Facility Rules (*see below*)—entails a number of specific requirements, many of which should be addressed in the drafting of the arbitration agreement itself. To address these specificities, ICSID has published annotated model clauses, some of which are reproduced here for convenience.

First, for ICSID to have jurisdiction under the regular rules, the dispute must fall within both the arbitration agreement itself and the specific requirements of the Centre established in Article 25 of the ICSID Convention. These jurisdictional requirements include that (i) there must be a legal dispute arising out of an investment and (ii) the parties must be a Contracting State under the ICSID Convention—or a constituent subdivision or agency designated by a Contracting State—and a national (or company) of another Contracting State.

The ICSID Convention does not define the term “investment,” leaving the contracting states to do so, including through the relevant investment treaty provisions. Some tribunals and commentators, however, have interpreted the term “investment” in the ICSID Convention to impose certain minimum requirements independent of those set out in the applicable investment treaty.

Because of these jurisdictional limitations, it may be advisable to stipulate in an ICSID arbitration clause that **“the transaction to which this agreement relates is an investment”** and that **“the investor is a national of [Contracting State other than respondent State].”**

If the intended claimant is a company of the respondent State, the parties must have agreed to treat that company as a foreign national because of its foreign control. Specific language should be inserted in the contract to this effect:

“It is agreed that, although the investor is incorporated in [the respondent State], it is controlled by nationals of [Contracting State other than respondent State] and shall be treated as a national of [that State] for the purposes of the Convention.”

In addition, if the counterparty is not the State itself but a subdivision or agency, specific approvals and designation to the Centre are required under Article 25 of the ICSID Convention.

Second, if the parties fail to appoint an arbitrator or cannot agree on a presiding arbitrator, the President of the World Bank must appoint such arbitrator from the approved ICSID Panel of arbitrators and may not appoint an arbitrator of the same nationality as one of the parties. (See ICSID Convention Articles 38 and 40.)

Third, ICSID publicizes certain information regarding all requests for arbitration and may publish excerpts of a tribunal’s legal reasoning even if the parties do not consent to publication of the award. (See ICSID Institution Rule 22.)

Fourth, ICSID awards are not subject to review or challenge in national courts; instead, parties may apply to annul the award on limited grounds set forth in the Convention and determined by a three-member *ad hoc* committee.

While annulment proceedings were extremely rare in ICSID's early years, they have arisen much more frequently since the early 2000s. From 2011 through mid-2017, one or both parties commenced annulment proceedings in 48 cases, compared to 134 total awards (see *The ICSID Caseload – Statistics, Issue 2017(2)*). Of these proceedings, five granted requests for annulment in full or in part, 26 rejected such requests, and 17 were discontinued. However, even if the incidence of actual annulment remains infrequent, annulment proceedings can delay enforcement and result in further costs to the parties.

Fifth, ICSID awards are subject to a simplified enforcement mechanism under Article 54 of the Convention, which provides that Contracting States “shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.” The reference to enforcement of “pecuniary obligations” only, which has been perpetuated in some national laws (including in **England & Wales** and the **United States**), creates the risk that injunctive relief ordered by an ICSID tribunal would not be enforced under the ICSID Convention's simplified enforcement regime.

Sixth, recourse to ICSID arbitration is in principle exclusive of “any other remedy,” including diplomatic protection and court proceedings (ICSID Convention, Articles 26-27). It can, however, take some months to constitute an ICSID tribunal, which can be a

disadvantage for a party requiring urgent interim relief. Moreover, as noted, only awards of monetary relief will benefit from the simplified enforcement procedure under Article 54 of the ICSID Convention. If the parties wish to preserve their ability to seek interim relief from national courts, they must explicitly say so in their arbitration agreement (see ICSID Arbitration Rule 39(6)). To preserve this possibility, the following language is recommended:

“Without prejudice to the power of the Arbitral Tribunal to recommend provisional measures, either party hereto may request any judicial or other authority to order any provisional or conservatory measure, including attachment, prior to the institution of the arbitration proceeding or during the proceeding for the preservation of its rights and interests.”

Seventh, signature of the ICSID Convention does not in and of itself constitute a waiver of sovereign immunity with respect to enforcement of the award. The following language is recommended to this effect:

“[Host State] hereby waives any right of sovereign immunity as to it and its property in respect of the enforcement and execution of any award rendered by an Arbitral Tribunal constituted pursuant to this agreement.”

Finally, ICSID Rules require the tribunal to issue a final award within 120 days from the close of proceedings (Article 43). However, ICSID tribunals usually render their awards more than 120 days after the hearing or final post-hearing submissions. Tribunals often wait until they are ready to issue the award to formally close the proceedings.

ICSID also administers investor-State arbitrations not falling within the ICSID Convention under its **Additional Facility Rules** (the “ICSID AF Rules”), with the approval of ICSID’s Secretary-General. This most commonly occurs when the host State, the investor’s State or both are not parties to the ICSID Convention. To ensure an arbitral forum in the event that a technical objection to ICSID Convention jurisdiction is upheld, the alternative provision for Additional Facility arbitration noted above should be included.

Since the ICSID Convention does not apply to proceedings under the Additional Facility Rules, the jurisdictional requirements are slightly different and depend largely on the nature of the relevant dispute (see ICSID AF Rules, Articles 2-3, 4(2)-(4)). All proceedings under the Additional Facility Rules are subject to the Secretary-General’s approval and determination, among other things, that all requirements of the relevant arbitration agreement have been met. (ICSID AF Rules, Article 4). In addition, proceedings under the Additional Facility Rules are subject to national court review in the same manner as a commercial arbitration award instead of annulment proceedings by a tribunal constituted under Article 52 of the ICSID Convention.

In October 2016, ICSID announced the beginning of the fourth amendment process since the enactment of the ICSID Arbitration Rules in 1967. ICSID intends to modernize the Rules by addressing issues of particular public concern, including the arbitrator appointment process (and a corresponding code of conduct), third-party funding arrangements, the publication of decisions and orders, security for costs and issues pertaining to witnesses, experts, and other evidence. ICSID has invited suggestions from the public on areas for reform and expects to publish background papers on proposed amendments in early 2018.

The text of the ICSID Convention, Regulations and Rules, as well as the Additional Facility Rules and model clauses for ICSID arbitration, can be found at icsid.worldbank.org.

UNCITRAL

“the UNCITRAL Arbitration Rules”

As discussed in **Appendix 2** above, the UNCITRAL Rules are commonly used and well recognized. The UNCITRAL Rules have some distinctive features as compared to the ICSID Convention that may be relevant in investor-State disputes.

First, the UNCITRAL Rules are not associated with an administering institution and thus may offer greater flexibility. In practice, however, parties to an arbitration under the UNCITRAL Rules often agree to use the services of an administering institution such as the PCA.

Second, the UNCITRAL Rules impose no express restrictions on arbitrator nationality (see Articles 7-10), although the appointing authority is required to take into account nationality when making its appointment (see Article 6(7)). Under the UNCITRAL Rules, unlike the ICSID Rules, the appointing authority is not limited to a fixed roster of arbitrators.

Third, for arbitrations in which the UNCITRAL Transparency Rules do not apply, UNCITRAL awards “may be made public with the consent of all parties” or to the extent disclosure is required “by legal duty, to protect or pursue a legal right or in relation to legal proceedings” (see Article 34(5)). This may provide greater confidentiality than the ICSID Rules. But where the UNCITRAL Transparency Rules do apply, as discussed in Section I.C above, substantial information from the arbitration may become public.

Fourth, unlike the ICSID Rules (see ICSID Arbitration Rule 39(6)), the UNCITRAL Rules recourse to national courts for interim relief is available even if the parties have not specifically stipulated to such recourse. Article 26(9) of the UNCITRAL Rules provides that a request for interim measures to a judicial authority “shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.”

Finally, unlike ICSID awards but like ICSID Additional Facility awards, UNCITRAL awards are subject to review and enforced in the same manner as international commercial arbitration awards. Like commercial awards, they are subject to set-aside under the law of the seat and must be enforced by reference to the New York Convention or other applicable commercial arbitration treaty (without any distinction as to whether they award pecuniary or non-pecuniary relief). As noted, ICSID awards may only be challenged pursuant to the annulment process specified in the ICSID Convention, are not subject to set-aside by national courts and benefit from the simplified enforcement mechanism in Article 54 of the ICSID Convention with respect to the “pecuniary obligations” awarded therein.

Permanent Court of Arbitration

“the PCA Arbitration Rules 2012”

The PCA was established in 1899 as an intergovernmental organization that provides arbitral services to member states, international organizations and private parties.

The PCA adopted the PCA Arbitration Rules in 2012 as standalone rules specific to disputes involving at least one State, State-controlled entity or intergovernmental organization. While the PCA Rules largely mirror the UNCITRAL Arbitration Rules, they differ in some

respects, including the number of arbitrators and provisions related to multiparty disputes. The PCA rules contain several provisions specific to disputes involving states, including a waiver of sovereign immunity from jurisdiction.

The PCA Rules are less often used in practice than the UNCITRAL or ICSID Rules, although parties frequently choose the PCA as appointing or administering authority under the UNCITRAL Rules.

The text of the PCA Rules can be found at pca-cpa.org.

Singapore International Arbitration Centre

“the Investment Arbitration Rules of the Singapore International Arbitration Centre”

SIAC is the first major commercial arbitration institution to release a separate set of rules for international investment arbitration. In January 2017, SIAC promulgated the SIAC Investment Arbitration Rules, a specialized set of rules for international investment disputes involving at least one State, State-controlled entity or intergovernmental organization. The Investment Arbitration Rules build on the standard SIAC Rules, thus retaining some of the advantages of commercial arbitration proceedings, but aim to be responsive to issues of specific concern in investor-State cases, including third-party submissions and third-party funding arrangements. Unless the parties agree to greater confidentiality, SIAC will publicize limited information regarding the dispute. The SIAC Rules also require the tribunal to submit a draft award to the Registrar within 90 days from the close of arbitral proceedings (Rule 30.3).

The text of the SIAC Investment Arbitration Rules can be found at www.siac.org.sg.

Stockholm Chamber of Commerce

“the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce”

In recognition of the distinct issues that arise in investor-State disputes, the 2017 SCC Rules include an appendix (Appendix III) with supplemental provisions specific to investor-State arbitration.

Under Appendix III, non-disputing and third parties may apply to make written submissions to the arbitration. The tribunal may also invite third-party submissions upon consultation with the contracting parties.

SCC Rules require the award to be issued within six months from the case’s date of reference to the tribunal, with limited exception (Article 43).

The text of the SCC Rules can be found at www.sccinstitute.com.

A technical drawing of a mechanical part, possibly a valve or a pump component, is shown in the background. The drawing is a line drawing with various circular and rectangular features, including a large circular flange at the bottom and a smaller circular component at the top. The drawing is overlaid with a grid of dashed lines, suggesting a technical or engineering context. The background is a light blue color.

**Debevoise
& Plimpton**

Debevoise Efficiency Protocol (2018)

To address concerns about increased length and cost in international arbitration, in 2010 the Debevoise & Plimpton International Dispute Resolution Group issued our Protocol to Promote Efficiency in International Arbitration. We now update our Efficiency Protocol. Through this Protocol, we reiterate our commitment to explore with our clients how, in each case, the participants can take advantage of international arbitration's inherent flexibility to promote efficiency without compromising fairness or our clients' chances of success. The procedures set out here are therefore not meant to be inflexible rules, but instead are considerations that, when appropriate for the case, can improve the arbitration

Formation of the Tribunal

1. Before appointing arbitrators, we will ask them to confirm:
 - 1.1 their availability to administer the case, including hearings, on an efficient and reasonably expeditious schedule;
 - 1.2 a commitment to conduct the proceedings efficiently and to adopt procedures suitable to the circumstances of the arbitration; and
 - 1.3 a commitment not to take on new appointments that would reduce the arbitrator's ability to conduct the case efficiently.
2. We will work with our opposing counsel to appoint a sole arbitrator for smaller disputes or where issues do not need the analysis of three arbitrators, even if the arbitration clause provides for three arbitrators.

Establishing the Case and the Procedure

3. We will seek to avoid unnecessary multiple proceedings, for example by considering joinder, consolidation, overlapping appointments, stays, and coordinated hearings and briefing schedules.
4. We will request that the arbitral tribunal hold an early procedural conference to establish procedures for the case.
5. We will request our clients and opposing clients to attend procedural meetings and hearings with the arbitral tribunal, so that they can have meaningful input on the procedures being adopted and consider what is best for the parties at that time.
6. We will propose procedures that are appropriate for the particular case, proportionate to its value and complexity, and designed to lead to an efficient resolution. We will use our experience in crafting such procedures, and we will not simply adopt procedures that follow the format of prior cases. We will encourage

active participation by the tribunal throughout the case. For example:

- 6.1 We will consider including a detailed statement of claim with the request for arbitration so that the tribunal will be able to set the procedures with more knowledge of the issues in dispute.
- 6.2 We will consider a fast-track schedule with fixed deadlines.
- 6.3 We will request additional procedural conferences following certain submissions to consider whether the procedures could be made more efficient in light of the submissions.
- 6.4 We will suggest page limits for memorials in order to ensure that they focus on the most important issues.
- 6.5 We will encourage the arbitral tribunal to establish cyberprotocols to protect transfer and use of sensitive information and to disclose cyber incidents, in line with the **Debevoise Protocol to Promote Cybersecurity in International Arbitration**.
7. When acting for claimants, we will seek to use the time between the filing of the arbitration and the initial procedural conference to prepare the first merits submission so that the schedule can commence soon after the conference.
8. We will explore whether bifurcation or a determination of preliminary issues may lead to a quicker and more efficient resolution.
 - 8.1 For bifurcated proceedings, we will encourage the arbitral tribunal to set deadlines and hearing dates that include all phases of the case. This minimizes delay at a later stage caused by conflicting commitments of the tribunal members or counsel.
 - 8.2 Such a schedule would include a deadline for the arbitral tribunal to indicate whether the proceeding should continue to the next phase. A reasoned decision can follow, but, in the meantime, the parties can be drafting the submissions in the next phase.
9. In order to avoid delays in drafting the award, we will ask the arbitral tribunal to include in the initial procedural schedule:
 - 9.1 the dates on which they will deliberate following the hearing, including at least one day immediately following the hearing; and
 - 9.2 a date by which the award will be issued.
10. We will encourage tribunals to award costs at the time of interim decisions, when appropriate, in order to discourage time-wasting or unmeritorious applications.

Evidence

11. We will limit and focus requests for the production of documents. We believe that the standards set forth in the IBA Rules on the Taking of Evidence generally provide an appropriate balance of interests.
 - 11.1 We will work with opposing counsel to determine the most cost-effective means of dealing with electronic documents.
 - 11.2 We will request the arbitral tribunal (or the Chair) to conduct a telephone conference following the submission of any objections to document requests to the tribunal. Such a conference can lead to a more effective weighing of the need for requested documents compared to the burden of production and potentially narrow the disputes.
12. When possible, we will make filings electronically and encourage paperless arbitrations.
13. We will seek to avoid having multiple witnesses testify about the same facts.
14. We will encourage meetings of experts, either before or after their reports are drafted, to identify points of agreement and to narrow points of disagreement before the hearing. Expert conferencing at the hearing, particularly with respect to quantum experts, can also often be time-saving and more effective.
15. We will brief the applicable law, rather than submit expert evidence as proof, except in unusual circumstances.
16. We will divide the presentation of exhibits between core exhibits and supplementary exhibits that provide necessary support for the claim or defense but are unlikely to be referenced at a hearing.

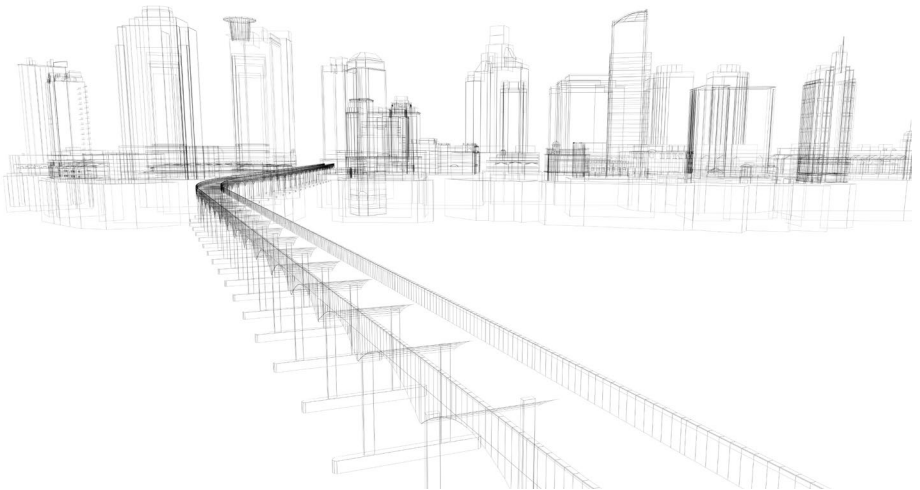
The Hearing

17. In order for the hearing to focus more effectively on the facts and issues that need to be decided, we will ask the arbitral tribunal to set in the initial procedural order:
 - 17.1 a date following the final written submissions on which they will confer regarding the issues in the case and the upcoming hearing, and
 - 17.2 a date for a prehearing conference at which they can discuss with the parties the disputed facts and issues on which they hope the hearing will focus.
18. We will consider the use of videoconferencing for testimony of witnesses who are located far from the hearing venue and whose testimony is expected to be less than two hours.

19. We will generally encourage the use of a chess-clock process (fixed time limits) for hearings.
20. We will not automatically request post-hearing briefs. We will consider in each case whether they would be helpful, and, if so, we will seek to limit the briefing to specific issues identified by the tribunal.
21. We will consider alternative briefing formats, such as the use of detailed outlines rather than narrative briefs, to focus the issues and to make the briefs more useful to the tribunal.
22. We will seek agreement on a common summary format for costs schedules to facilitate the tribunal's comparison and to avoid the expense of removing privileged information from daily time entries. We will also consider whether any argument about entitlement to costs is necessary.

Settlement Consideration

23. We will consider settlement options at the outset of each case and then at appropriate points such as when an exchange of submissions has clarified issues or a preliminary issue has been determined. Routes to settlement could include negotiations or other non-binding ADR such as early neutral evaluation.
24. Where applicable rules or law permit, we will consider making a "without prejudice except as to costs" settlement offer at an early stage.
25. We will consider asking arbitrators to provide preliminary views that could facilitate settlement.





**Debevoise
& Plimpton**

Protocol to Promote Cybersecurity in International Arbitration

Debevoise Protocol to Promote Cybersecurity in International

As the prevalence of malicious cyberactors and cyberattacks on high-profile companies and government organizations grows, parties to commercially or politically sensitive international arbitrations increasingly express concerns with respect to cybersecurity. Cybersecurity threats may create significant operational and legal problems that can compromise the arbitral process, including loss or unauthorized disclosure of sensitive data, breaches of attorney-client confidentiality, adverse media coverage and reputational damage, costs associated with breach notification or data recovery, and legal liability. In addition to the threat cyberattacks pose to the parties to an arbitration, failing to address this problem could ultimately lead to a loss of confidence in the arbitral system.

To respond to these concerns, the practitioners at Debevoise & Plimpton LLP have developed this Protocol to Promote Cybersecurity in International Arbitration. This Protocol operates on three principles: (i) Establishing Secure Protocols for the Transfer of Sensitive Information at the Outset of Proceedings, (ii) Limiting Disclosure and Use of Sensitive Information, and (iii) Developing Procedures for Disclosing Cyber Incidents.

The Protocol reflects our continued commitment to counsel clients on the most critical issues in international arbitration. We believe consideration of the procedures reflected in this Protocol will improve the arbitration process while appropriately managing risks. The procedures reflected in this Protocol are meant to be adaptable, so that parties, counsel and arbitral tribunals can use the flexibility inherent in international arbitration to develop procedures relevant and appropriate for each individual arbitration.



1. We will request that the arbitral tribunal establish protocols and procedures for the transfer of sensitive information at the outset of proceedings, usually in the first procedural conference. What constitutes such sensitive information should be defined in light of the particular circumstances of a dispute.
 - a. These protocols and procedures may include: (i) defining categories of sensitive information, updated as necessary through the course of the proceeding; and (ii) agreeing on processes for the secure transfer of such sensitive information between and among the tribunal and the parties.
 - b. This may include barring certain transfer methods (e.g., use of public WiFi to access sensitive information) or adopting certain transfer methods (e.g., use of secure portals instead of email).
2. We will ask the arbitral tribunal and the parties to consider and, if appropriate, agree to specific encryption standards for the transmission of sensitive information.
3. We will propose and encourage arbitral tribunals to disfavor the use of insecure email for the transmission of sensitive information unless additional measures are taken to secure the information. Such additional measures may include applying passwords to documents containing sensitive information that will be transmitted via separate channels (e.g., texting or via a phone call).
4. We will propose that, where possible, email accounts maintained by third party public servers (e.g., Gmail) have additional access protections such as multi-factor authentication (e.g., use of a token or similar mechanism in addition to username and password).
5. If third-party cloud storage is used, we will consider whether the third-party cloud storage incorporates adequate security protocols.
6. We will consider, and ask that the arbitral tribunal and opposing party consider, applicable governmental cross-border restrictions on the transfer of sensitive information and adopt reasonable measures to facilitate compliance with any restrictions.

Limited Disclosure and Use of Sensitive Information

7. Before submitting any sensitive information to the arbitral tribunal or opposing party, we will weigh the sensitivity of that information against the relevance and materiality of that information for that arbitration.
8. We will explore with the arbitral tribunal whether sensitive information may be submitted in a form that is only screen viewable (i.e., not readily downloadable or printable). If sensitive information is permitted to be printed, we will ask the tribunal to establish consistent policies and procedures related to the destruction of printed materials.
9. To the extent practicable, we will limit the persons who have access to sensitive information to those persons having a need-to-know with respect to such information.

10. To the extent practicable, access to sensitive information on computer systems should be restricted to those using a secure log-in ID and password, with a unique log-in ID and password assigned to each individual. We will consider, and ask that the arbitral tribunal and opposing party consider, the use of multi-factor authentication to access accounts or portals used to transmit and receive sensitive information.
11. We will restrict the ability to transfer sensitive information to mobile devices only if they use encryption or other appropriate security protocols.
12. At the client's request, we will establish procedures for returning or destroying sensitive information upon the conclusion of the arbitration.

Procedure for Disclosing Data Breaches

13. We will take reasonable steps to mitigate any potential breach, including by contracting with third-party vendors as necessary.
14. We will propose and work with the arbitral tribunal to establish policies and procedures related to detecting breaches, determining their scope, and notifying affected parties. Where the existence of the arbitration is itself confidential, we will work with the tribunal to consider means of notifying affected parties that best preserve the confidentiality of the arbitration.
15. We will propose and work with the arbitral tribunal to establish point-persons for each party to the arbitration and the tribunal itself to be responsible for coordinating communications in the event of a data breach or other incident that exposes or affects sensitive information.
16. We will consider whether there are any legal obligations to report the breach to affected parties, regulatory agencies, or other authorities.



Debevoise's Senior
International Disputes Team



Catherine Amirfar

Catherine Amirfar is a partner in the International Dispute Resolution Group, Co-Chair of the firm's Public International Law Group, and a member of the firm's

Management Committee. Her practice focuses on international commercial and treaty arbitration, international litigation, and public international law, and she regularly appears in U.S. courts and before international courts and arbitration tribunals. With over fifteen years of experience, Ms. Amirfar is recognized as a top practitioner in international disputes globally. Prior to rejoining Debevoise in 2016, Ms. Amirfar spent two years as the Counselor on International Law to the Legal Adviser at the U.S. Department of State, and received the State Department's Superior Honor Award in recognition of her contributions to the Department. Ms. Amirfar was one of the youngest lawyers ever to argue before the International Court of Justice.

Ms. Amirfar is admitted to practice in New York.



Donald Francis Donovan

Donald Francis Donovan is Co-Chair of Debevoise's International Dispute Resolution Group and its Public International Law Group, and serves as counsel in

international disputes before United States and international courts, as well as international arbitration tribunals. He is the Immediate Past President of the International Council for Commercial Arbitration (ICCA), the leading global organization of international arbitrators and arbitration practitioners, and regularly sits as arbitrator in international cases, including under the auspices of ICSID, the ICC, and the ICDR, as president, chair, sole arbitrator, and co-arbitrator.

Mr. Donovan is widely regarded as one of the leading international arbitration practitioners, international lawyers, and international advocates in the world. He is admitted to practice in New York.



Tony Dymond

Tony Dymond is a partner in the International Dispute Resolution Group. His practice focuses on complex, multi-jurisdictional construction and engineering disputes in both litigation and arbitration. He has advised clients in a wide range of jurisdictions, having spent the last 20 years in London, Hong Kong and Seoul. Mr. Dymond has advised on some of the largest and most complex market-shaping disputes in these sectors, and is widely acknowledged as a leading lawyer in energy and infrastructure. He has appeared in arbitrations under the principal arbitration rules and in the English and Hong Kong courts. Mr. Dymond is a regular speaker at construction and arbitration conferences and contributor to construction law journals.

Mr. Dymond is admitted to practice in England & Wales and Hong Kong.



Mark W. Friedman

Mark W. Friedman is a partner in the International Dispute Resolution Group. His practice concentrates on international arbitration and litigation, and he also has broad experience in civil and criminal matters. Mr. Friedman has represented clients in a wide variety of complex commercial and investor-state disputes across many industry sectors, including energy, mining, finance, insurance, construction, shareholder relationships, joint ventures, media, telecommunications and manufacturing. He has acted as counsel or arbitrator in disputes under the rules of the ICC, LCIA, AAA, ICDR, CPR, UNCITRAL and ICSID. He is a Vice President of the ICC International Court of Arbitration and is a former Chair of the International Bar Association Arbitration Committee.

Mr. Friedman was named “International Arbitration Attorney of the Year” by *Benchmark Litigation* for both 2016 & 2017. He is admitted to practice in New York and Massachusetts.



Lord Goldsmith QC, PC

Lord Peter Goldsmith QC, PC is London Co-Managing Partner, Chair of European and Asian Litigation, and Co-Chair of Debevoise's Caribbean Practice. He regularly appears in European and international courts and tribunals, acting for a variety of clients in both arbitration and litigation. He conducts arbitrations under all the major institutions, including LCIA, ICC and SIAC, and in ad hoc arbitrations. Significant work includes partnership disputes, joint ventures, oil and gas disputes, investment treaties, auditors' liability, insurance and takeover law, banking law, company law, insolvency litigation, public law and public international law, including judicial review and human rights law. He served as the UK's Attorney General from 2001-2007, prior to which he was in private practice as one of the leading barristers in London. He has judicial experience as a Crown Court recorder and Deputy High Court Judge.

Lord Goldsmith is fluent in French. He became Queen's Counsel in 1987. He is admitted to practice in England & Wales, Paris, New South Wales, Northern Ireland, Belize and British Virgin Islands, and he regularly appears for clients in other Commonwealth courts.



Antoine F. Kirry

Antoine F. Kirry is a partner in the International Dispute Resolution Group. Mr. Kirry has substantial litigation and arbitration experience, with particular emphasis on M&A-related disputes. He has represented defendants in some of the most publicized insider trading cases brought before the French financial market regulator and the French criminal courts, and has also handled arbitrations under the auspices of the ICC Court of Arbitration, the Arbitration Institute of the Stockholm Chamber of Commerce and the Arbitration Court of the Russian Federation Chamber of Commerce and Industry, as well as ad hoc arbitrations in various European countries. For over nine years, Mr. Kirry was a member of the board of directors of Association Droit et Procédure, one of the oldest and most respected associations of litigation practitioners in France.

Mr. Kirry is admitted to practice in Paris and New York, and is fluent in English and French.



Wendy J. Miles, QC

Wendy J. Miles QC is a partner in the International Dispute Resolution Group. Her practice focuses on international arbitration and public international law, and she is recognized as one of the foremost practitioners in those fields. With over twenty years of experience, Ms. Miles has conducted arbitrations under all the major institutions, as well as undertaking significant public international law cases. She has advised a wide range of multi-nationals, sovereign states and state entities, and represents clients across numerous sectors, including energy, natural resources, gaming, manufacturing, financial services, pharmaceutical, licensing, telecommunications, insurance and construction. Ms. Miles is a Vice President of the ICC International Court of Arbitration and former Vice Chair of the International Bar Association Arbitration Committee.

Ms. Miles became Queen's Counsel in 2015. She is admitted to practice in England & Wales and New Zealand.



Ina C. Popova

Ina C. Popova is a partner in the International Dispute Resolution Group who focuses on international arbitration and litigation and public international law, with particular expertise in matters in the mining, energy and media sectors. She represents individuals, corporations and States and has broad experience under the rules of the major arbitral institutions and several regional institutions. She also advises parties in international litigations involving proceedings in foreign and domestic courts, and has represented parties before the federal and state courts in the United States, including the United States Supreme Court. She has assumed leadership positions in various international arbitration organizations, including as a Member of the ICC International Court of Arbitration. Ms. Popova leads matters throughout the world, including in particular disputes arising out of Africa and Latin America.

Ms. Popova is fluent in French, Spanish, Italian and Bulgarian, and is proficient in Portuguese. She is admitted to practice in New York and Paris.



Dietmar W. Prager

Dietmar W. Prager is a partner in the International Dispute Resolution Group who focuses his practice on international arbitration and litigation, with a particular emphasis on

Latin America. He is Co-Chair of the firm's Latin America Practice Group, and has represented parties in numerous arbitrations throughout the world under the auspices of the ICC, ICSID, LCIA, AAA, ICDR and the PCA as well as in *ad hoc* arbitration proceedings. Dr. Prager's recent representations include disputes involving complex construction projects, investment treaties, energy and mining projects, oil & gas projects, the retail sector, the finance sector, sovereign debt, and distribution agreements. Dr. Prager also regularly sits as arbitrator and was one of the youngest lawyers ever to argue before the International Court of Justice.

Dr. Prager is fluent in German, English, Spanish, and French, and is proficient in Portuguese. He is admitted to practice in New York.



Natalie L. Reid

Natalie L. Reid is a partner in the International Dispute Resolution Group and Co-Chair of Debevoise's Caribbean Practice. Ms. Reid focuses on international arbitration,

public international law, and complex commercial litigation matters. A Jamaican national, she regularly advises and represents states, multinational corporations, international organizations, and nongovernmental organizations in proceedings in U.S. courts and international fora. Ms. Reid acts as counsel in commercial and treaty arbitrations conducted under the rules of the major arbitral institutions, where her recent representations include disputes arising under bilateral investment treaties in South Asia and East Asia. She currently serves as a Director of the London Court of International Arbitration (LCIA). Additionally she serves on the Board of Editors of the American Journal of International Law, and multiple committees of the American Society of International Law (ASIL).

Ms. Reid is proficient in French and Spanish. She is admitted to practice in New York.



David W. Rivkin

David W. Rivkin is Co-Chair of Debevoise's International Dispute Resolution Group and Past President of the International Bar Association. Mr. Rivkin is consistently ranked as one of the world's top international dispute resolution practitioners and international lawyers. He has acted as counsel and as arbitrator in international arbitrations throughout the world and in U.S. courts. He has won some of the largest investment treaty and commercial arbitration awards. Subjects of these arbitrations have included long-term energy concessions, investment treaties, public international law, joint venture agreements, financial issues, insurance coverage, construction contracts, distribution agreements, and intellectual property, among others, and they have involved common law, civil law and Islamic law systems.

Mr. Rivkin is admitted to practice in New York.



Samantha J. Rowe

Samantha J. Rowe is a partner in the International Dispute Resolution Group, whose practice focuses on international arbitration and public international law. Ms. Rowe has represented private clients and States across multiple jurisdictions (most notably, Latin America, Asia, the Middle East, and Eastern Europe) in arbitrations governed by various substantive laws and conducted under the rules of the ICC, LCIA, ICSID, UNCITRAL, and SIAC. She has experience across a broad range of industries and sectors, including energy, mining, construction, financial services and pharmaceuticals. She advises clients on a broad range of international law issues, including the international protection of investments, and represents her clients in associated disputes.

Ms. Rowe is fluent in French and Spanish, and proficient in Portuguese. She is admitted to practice in England & Wales and New York.



William H. Taft V

William H. Taft V is a partner in the Litigation Department. His practice focuses on commercial and corporate governance litigation and international arbitration. Mr. Taft regularly acts for clients in U.S. litigation involving foreign parties and issues such as jurisdiction, forum non conveniens and foreign discovery. He also frequently advises clients in disputes arising from joint venture and partnership agreements, including matters involving commercial real estate and infrastructure development project companies, and has experience handling a broad range of contract disputes. He is a member of the American Society of International Law, the New York City Bar Association and has served on the International Disputes Committee of the New York City Bar Association.

Mr. Taft is admitted to practice in New York.



Christopher K. Tahbaz

Christopher K. Tahbaz is a partner in the International Dispute Resolution Group and currently serves as Debevoise's Co-Chair of Asian Litigation. He is a litigator and arbitrator with a broad range of U.S. and international experience. Mr. Tahbaz regularly represents U.S. and Asia-based multinational corporations in commercial arbitration before the ICC, the LCIA and other arbitral institutions; he also regularly represents clients in investment treaty arbitrations. In recent years, Mr. Tahbaz has represented clients in post-M&A disputes, and in commercial and investment treaty disputes arising out of the financial, pharmaceutical, solar energy and gaming sectors, among others. Mr. Tahbaz also regularly serves as arbitrator in arbitrations conducted under the HKIAC, UNCITRAL, ICDR/AAA and ICC rules. He recently concluded a term as Co-Chair of the International Bar Association Litigation Committee.

Mr. Tahbaz is admitted to practice in New York.



Patrick Taylor

Patrick Taylor is a partner in the International Dispute Resolution Group who focuses on commercial and investment treaty arbitration, with particular experience in the upstream oil & gas, energy and telecommunications sectors, and tax-related disputes. Mr. Taylor's practice and experience is geared towards advising clients in the most high-stakes, complex and valuable disputes. He has developed particular expertise advising on investment protection and investment dispute settlements in high-risk jurisdictions, the enforcement of fiscal and legislative stabilisation clauses, production sharing and shareholder/ joint venture disputes and complex damages analysis. Mr. Taylor has advised and represented clients in disputes throughout the world, most frequently in Africa, Eastern Europe, Russia and the CIS, and, increasingly, in Latin America. He has acted in arbitrations under the rules of ICSID, the LCIA, the ICC, UNCITRAL, the Stockholm Chamber of Commerce, the Nigerian Arbitration and Conciliation Act and the Milan Chamber of Arbitration.

Mr. Taylor is fluent in French and is proficient in Spanish. He is admitted to practice in England & Wales and Ireland, and is qualified as a solicitor-advocate (High Rights Civil).



Frederick T. Davis

Frederick T. Davis is of counsel to the firm and a member of the International Dispute Resolution Group. His practice focuses on criminal, regulatory and civil litigation, and investigations involving U.S. and French laws. Mr. Davis is an experienced trial lawyer who has represented clients in high profile matters in both French and English language tribunals. He has represented major U.S., French and multinational companies in both domestic and international criminal investigations. He has also appeared as legal counsel in international arbitrations administered by the ICC, AAA and other institutions, and has served as an arbitrator in ICC arbitrations. The French government has named him a "Chevalier" of the National Order of Merit of France.

Mr. Davis is a former U.S. federal prosecutor. He is fluent in French and proficient in German. Mr. Davis is admitted to practice in New York and Paris.



Alexandre Bisch

Alexandre Bisch is an international counsel and a member of the firm's Litigation Department. He has experience in complex domestic and international commercial litigation. He frequently argues cases before civil and commercial courts in the Paris area. His practice also focuses on white-collar criminal defense before French criminal courts and before the French financial markets regulator, Autorité des Marchés Financiers (AMF). Mr. Bisch previously served for three years as a senior legal officer for the AMF Enforcement Division where he worked on cases involving financial misconduct, including insider trading and market manipulation.

Mr. Bisch is a member of the Paris Bar. His native language is French and he is fluent in English.



Gavin Chesney

Gavin Chesney is an international counsel in the firm's International Dispute Resolution Group. His practice focuses on international commercial disputes, both in international arbitration and in court litigation. Mr. Chesney represents a wide variety of clients including major corporations, high net worth individuals and sovereign states in a range of complex, high-value disputes across sectors including mining, power, oil and gas, and financial services.

He has appeared in proceedings under the auspices of ICSID, UNCITRAL, the ICC, the LCIA, the SIAC and the AAA, as well as in ad hoc arbitrations and litigation proceedings in the English courts. Mr. Chesney also has experience in the construction sector, for which he has been recognized as a "next generation lawyer" by The Legal 500.

Mr. Chesney is admitted as a solicitor of the Senior Courts of England & Wales and as a solicitor-advocate exercises full rights of audience before all civil courts of England & Wales.



Floriane Lavaud

Floriane Lavaud is a counsel in the International Dispute Resolution Group. Her practice focuses on international investment and commercial arbitration and enforcement-related litigation, in particular in the energy and mining sectors. Ms. Lavaud represents clients in arbitrations conducted under the auspices of the main arbitration institutions and in related court proceedings. She has advised clients in a variety of jurisdictions and fora on issues of civil and common law, public international law, and treaty and contract interpretation. Her experience also includes the assessment of damages and the enforcement of arbitration awards, especially under the Foreign Sovereign Immunities Act and other similar legislation.

Ms. Lavaud is a native French speaker and is proficient in Spanish and basic Dutch. She is admitted to practice in New York, Paris, and England & Wales.



Aimee-Jane Lee

Aimee-Jane Lee is an international counsel in the firm's International Dispute Resolution Group, whose practice focuses on international commercial arbitration and litigation, and public international law. Ms. Lee has advised private clients and states across multiple jurisdictions (notably in Asia, Africa and Eastern Europe) and a number of industries, including mining, construction, hospitality, advertising and, especially, energy. She also advises on the international protection of investments (notably under bilateral investment treaties, the Energy Charter Treaty and investor-state contracts) and represents clients in associated disputes.

In addition to her legal experience, Ms. Lee has passed Levels 1, 2 and 3 of the Chartered Financial Analyst (CFA) exams. She is therefore particularly proficient in assisting clients with quantum-related aspects of their dispute and liaising with quantum experts. Ms. Lee is admitted to practice in England & Wales.



Carl Micarelli

Carl Micarelli is a counsel in the International Dispute Resolution Group. His practice has included international and domestic commercial arbitration, international investment arbitration, economic sanctions compliance advice, litigation aspects of insurance regulation, class action defense and general commercial litigation. Mr. Micarelli regularly advises clients in connection with sanctions regulations administered by the Office of Foreign Assets Control (OFAC) in the U.S. Department of the Treasury. This work has included ongoing compliance advice, investigations of potentially noncompliant transactions, licensing matters and litigation. He also has significant experience with litigation regarding the enforceability of arbitration agreements and arbitral awards, and has assisted a number of life insurance companies on regulatory matters.

Mr. Micarelli is admitted to practice in New York.



Evgeny Samoylov

Evgeny Samoylov is an international counsel in the Moscow office and a member of the firm's International Dispute Resolution Group. His practice spans commercial, corporate, construction, infrastructure and real estate disputes. He advises and represents clients from a wide range of sectors both in international arbitration and in court litigation. Since 2010, Mr. Samoylov has been an assistant professor at MSU, lecturing and delivering practical classes on civil (private) law.

Mr. Samoylov is admitted to practice in Russia. A native Russian speaker, he is fluent in English and German.

Debevoise & Plimpton

919 Third Avenue
New York, NY 10022
+1 212 909 6000

801 Pennsylvania Avenue N.W.
Washington, D.C. 20004
+1 202 383 8000

65 Gresham Street
London
EC2V7NQ
+44 20 7786 9000

4 place de l'Opéra
75002 Paris
+33 1 40 73 12 12

Taunustor 1 (Taunus Turm)
60310 Frankfurt am Main
+49 69 2097 5000

Business Center Mokhovaya
Ulitsa Vozdivizhenka, 4/7
Stroyeniye 2
Moscow, 125009
+7 495 956 3858

21/F AIA Central
1 Connaught Road Central
Hong Kong
+852 2160 9800

13/F, Tower 1
Jing'an Kerry Center
1515 Nanjing Road West
Shanghai 200040
+86 21 5047 1800

Shin Marunouchi Bldg. 11F
1-5-1 Marunouchi, Chiyoda-ku
Tokyo 100-6511
+81 3 4570 6680

www.debevoise.com