

**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

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2022 Edition

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# Debevoise International Arbitration Clause Handbook

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# 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. We have divided this volume into two key sections:

- (i) the basic **model clause**, which provides a succinct arbitration provision that, in one variation or another, will be

## I. Introduction

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,<sup>a</sup> shall be resolved by arbitration. The arbitration shall be conducted by [*one or three*] arbitrators<sup>b</sup> [and administered by [*name of institution*]] in accordance with [*identify rules*] in effect at the time of the arbitration,<sup>c</sup> except as they may be modified herein or by mutual agreement of the parties. [*Method of selection of arbitrators.*]<sup>d</sup> The seat of the arbitration shall be [*city, country*],<sup>e</sup> and it shall be conducted in the [*specify*] language.<sup>f</sup> Notwithstanding [*the choice of law clause*], the arbitration and this agreement to arbitrate shall be governed by [*law governing the arbitration agreement*].<sup>g</sup> The arbitration award shall be final and binding on the parties, and the parties undertake to carry out any award without delay.<sup>h</sup> Judgment upon the award may be entered by any court having jurisdiction over the award or over the relevant party or its assets.<sup>i</sup>

### 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

## II. Model Arbitration Clause

dispute will delay the proceeding and make eventual resolution of the primary dispute more expensive. For that reason, it is usually preferable to use a broad clause as the model text proposes.

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 subsection 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 (see, e.g., French Code of Civil Procedure, Article 1451; 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 ("AAA's") International Center for Dispute Resolution ("ICDR Rules") (Article 12), the Rules of Arbitration of the International Chamber of Commerce ("ICC Rules") (Article 12(2)), the Rules of the London Court of International Arbitration ("LCIA Rules") (Article 5.8) and the Singapore International Arbitration Centre Arbitration Rules ("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 ("ICSID Convention") (Article 37(2)(b)) and the United Nations Commission on International Trade Law Arbitration Rules ("UNCITRAL Rules") (Article 7(1)).

## II. Model Arbitration Clause

The Hong Kong International Arbitration Centre Administered Arbitration Rules (“HKIAC Rules”) (Article 6.1) and the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (“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.

### 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 2.** 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.

Institutional rules, by their nature, contemplate that the arbitration will be administered by the institution that promulgated the rules. In **Russia**, however, the enforceability of arbitration clauses which do not contain a specific reference to an arbitration institution has been called into question. In particular, in 2018, a Russian court refused to enforce an ICC award that referred to the ICC Rules but did not specifically identify the ICC International Court of Arbitration as the administering institution (*see* Arbitrazh (Commercial) Court of Moscow, Case No. A40-176466/2017). Subsequently, the Russian Supreme Court has moved to a less formalistic approach, stating that doubts with respect to an arbitration agreement should be resolved in favor of its validity and enforceability and that standard arbitration clauses recommended by arbitral institutions will be enforced (*see* Resolution of the Plenum of the Supreme Court of the Russian Federation No. 53, December 10, 2019).

To avoid any argument about whether consent to institutional rules amounts to consent to administration by the institution, we

## II. Model Arbitration Clause

recommend that if the parties opt for institutional arbitration, they include the bracketed language making explicit that the relevant institution will administer the arbitration if the arbitration is seated in **Russia** or **China**. The bracketed words may not be necessary if the arbitration is seated elsewhere, and they should be omitted if the parties have selected *ad hoc* arbitration rules for an arbitration seated in a jurisdiction that permits *ad hoc* arbitration.

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 29(2); 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. 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.

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.

The selection of rules for arbitration agreements in investor-state contracts is 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 2*). 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. In other cases, the variants described below should be



## II. Model Arbitration Clause

considered. For the appointment of arbitrators in multiparty or multi-contract transactions, see Section III.1.c.i 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 13 (ICDR); ICC Rules, Articles 12-15 (ICC International Court of Arbitration); LCIA Rules, Article 5.7 (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

## II. Model Arbitration Clause

**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. In the absence of an express choice of law governing the arbitration agreement, many national courts will apply the law of the seat as the law of the arbitration ("*lex arbitri*"), which governs a number of aspects of arbitration procedure (see subsection g below). The arbitration may be subject to mandatory laws in effect at the seat of arbitration even if the parties agree that another law will govern. 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. Law Governing the Arbitration**

In the absence of a contrary agreement by the parties, it has often been assumed that the law of the seat of arbitration will provide the law governing the arbitration, including any procedural requirements, questions of arbitral jurisdiction, and grounds for

## II. Model Arbitration Clause

setting aside the award. Recent jurisprudence, however, has come to conflicting conclusions about the breadth of that principle.

In particular, in the *Kabab-Ji* case, the courts of **France** and of the **United Kingdom** reached conflicting decisions, in respect of the same contract, about which law governed nonparty consent to arbitration. The contract in that case contained a general governing-law clause calling for the application of English law and an arbitration clause calling for arbitration in France. The respondent denied that it was a party to the contract or its arbitration clause, sought to set aside the award in the French courts, and resisted enforcement of the award in the English courts. The Paris Court of Appeal held that the law of France, as the law of the seat, governed questions of the arbitral tribunal's jurisdiction, and that the respondent was bound by the agreement to arbitrate under French law (*Kout Food Group c. Kabab-Ji SAL*, Paris Court of Appeal, Chamber 1-1, June 23, 2020, No. 17/22943). The UK Supreme Court, however, held that English law governed the jurisdictional question and that the arbitral tribunal lacked jurisdiction over the respondent under that law (*Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48). The court reasoned that, where the law applicable to the arbitration clause is not specified separately, the court will infer that the choice of governing law for the contract as a whole was intended to apply to the agreement to arbitrate, and the choice of a seat in a different jurisdiction is not sufficient by itself to negate that inference.

To avoid any uncertainty, we recommend that the parties explicitly specify the law governing the arbitration and the arbitration agreement. In many situations, the parties will want to select the law of the seat as the law governing the arbitration and the arbitration clause. The law of the seat may contain mandatory

## II. Model Arbitration Clause

provisions that will apply regardless of the agreement of the parties, and the need to apply multiple sources of arbitration law could lead to confusion. Moreover, courts at the seat will have jurisdiction over any application to set aside or modify the award and will be most familiar with their own law. In other situations, however, the law of the seat may have undesirable features that the parties wish to avoid, and the parties may agree that another body of law, such as the governing law of the contract, should govern the arbitration.

For arbitrations seated in the **United States** or governed by the law of a U.S. jurisdiction, a different possible complication arises from the nature of the U.S. federal system. A federal law, Title 9 of the United States Code (commonly called the “Federal Arbitration Act” or “FAA”), will govern most international arbitrations, but the FAA may be supplemented by the law of the individual states to the extent those laws are not in conflict with the FAA (*see, e.g., Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995)). When choosing a U.S. seat, 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.”**

### **h. 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 setting aside awards or challenging their enforcement:

**“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.

Before agreeing to a provision waiving *all* rights 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.

National laws at the seat of arbitration may have varying rules governing the validity of agreements to waive the right to challenge an award. The law of **Russia**, for example, allows the parties to waive the right to challenge an arbitral award in an institutional arbitration but not in 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 courts.

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. However, 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 exclusion of the right to appeal under section 69, which 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 to appeal any determination of the LCIA Court). The 2010 revision of the UNCITRAL Rules contains a broad model waiver statement in



## II. Model Arbitration Clause

its Annex, which should also be effective. The ICDR Rules similarly contain a waiver of any right to appeal (see ICDR Rules Article 33.1).

Most of the widely used international arbitration rules include a provision stating that the arbitral tribunal may determine its own jurisdiction. Some courts in the **United States** have treated incorporation of these rules as an agreement that the arbitral tribunal's determination of jurisdiction will be final and, therefore, judicially unreviewable except on narrow grounds such as corruption or failure to give a party an opportunity to present its case (see, e.g., *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 935 F.3d 274, 279–80 (5th Cir. 2019), cert. dismissed, 141 S. Ct. 656 (2021); *Shaw Group Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115 (2d Cir. 2003)). The American Law Institute's *Restatement of the U.S. Law of International Commercial and Investor-State Arbitration* has taken the opposite position, arguing that the adoption of arbitral rules allowing an arbitral tribunal to determine its own jurisdiction is not a sufficiently clear delegation to the arbitral tribunal of the power to make a final and binding determination of jurisdiction. (*Restatement of the U.S. Law of International Commercial and Investor-State Arbitration* § 4.12 cmt. e (final draft, approved May 20, 2019, publication forthcoming).) It remains unclear whether U.S. jurisdictions that have not yet definitively resolved this question will give substantial weight to the Restatement's view. For an arbitration seated in the **United States** or governed by its law, the following language is recommended to preserve the right to challenge an award on jurisdictional grounds:

**“The arbitral tribunal’s authority to determine its own jurisdiction under [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.”**

If, however, the parties wish to prevent a judicial redetermination of the arbitral tribunal's determination of its own jurisdiction, language along the following lines may be used:

**“The arbitral tribunal’s determination of its own jurisdiction and the arbitrability of the dispute shall be final and binding.”**

**i. 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, conciliation, or mediation 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 doing 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.

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Clauses imposing a negotiation, conciliation, or mediation 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 the 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. Although they may be enforceable in more jurisdictions than sole-option clauses, mutual-option clauses can be very complex and run the risk of parallel proceedings if one party

### III. Optional Clauses

elects to arbitrate and the other elects to litigate. For that reason, before agreeing to any such provision, the parties and their counsel should give careful consideration to how the provision is worded and how it is likely to play out in practice.

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 the court, then the arbitration shall be discontinued, unless the arbitral tribunal finds that [Party A]’s election was untimely so that discontinuing the arbitration would substantially prejudice any party, in which case the court proceeding shall be discontinued.”**

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

**“Notwithstanding [*the initial arbitration clause*], either party 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 each party irrevocably submits[, or to any other court or courts which have jurisdiction to determine such dispute or claim]. The party choosing to submit the dispute to the court shall exercise this election promptly. If arbitration has been commenced by the other party at the time that a party chooses to submit the matter to the court, then the arbitration shall be discontinued, unless the arbitral tribunal finds that the election was untimely so that discontinuing the arbitration would substantially prejudice any party, in which case the court proceeding shall be discontinued.”**

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

In the **United States**, split clauses are generally enforceable. 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 in particular circumstances (*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**, mutual-option split clauses 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 Court of the Russian Federation has ruled that a clause that grants an option only to one party shall be invalid insofar as it deprives one or more parties of a choice as to dispute resolution forum that is available to other parties. In



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consequence, any party to the agreement will be deemed to have the right to resort to any litigation or arbitration option available under the split clause (see Resolution of the Plenum of the Supreme Court of the Russian Federation No. 53, December 10, 2019).

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. Multi-Party 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.

#### **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(9); ICDR Rules, Article 13(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 the 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 one or more 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.”**

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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 or 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.

The following language may be used:

**“Any party to this agreement [or to [identify any related agreement with different parties]] (a “Contracting Party”) serving a request for arbitration or any other document initiating a claim in an arbitration commenced under**

**this clause (a “Claim Document”) shall send a copy of the Claim Document to every other Contracting Party. Any respondent to a claim 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 substantially related claim. 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 or to assert against any other Contracting Party a substantially related claim. 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.**

**Any joinder or intervention pursuant to this clause shall be made by serving written notice on all Contracting Parties within [30 days] from receipt of the Claim Document to which the joinder or intervention relates. The arbitral tribunal shall resolve any disputes as to whether the joinder or intervention is admissible under the terms of this clause and whether and to what extent any other pending arbitration proceedings between Contracting Parties shall be stayed or 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, or claim by or against a joined or intervening party.”**

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This clause may not be appropriate in all circumstances in which the parties wish to provide for joinder or intervention. For example, a requirement to serve a claim on all contracting parties may raise confidentiality or privacy concerns in some situations. Any clause that provides for joinder or intervention should be carefully reviewed to ensure that it suits the parties' particular contractual arrangements.

Where it is possible for a party to intervene or be joined 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 subsection 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. If it is not possible for a party to intervene or be joined after the arbitral tribunal has been constituted, the language noted in subsection i above for appointment of arbitrators in multi-party arbitrations may be used.

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 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 as an additional party to the arbitration with the consent of all parties, including the party to be joined (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 Rules** permit joinder prior to the confirmation or appointment of any arbitrator. After that point, joinder will only be permitted (i) with the consent of all parties, including the party to be joined, or (ii) if so determined by the arbitral tribunal once constituted, but subject to the party to be joined accepting the constitution of the arbitral tribunal and agreeing to the Terms of Reference (ICC Rules, Articles 7(1), 7(5)). 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

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arbitrators. If an application for joinder is made, 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 separate (see ICC Secretariat Guide Section 3-249).

- The **ICDR Rules** do not permit joinder after any arbitrator has been confirmed or appointed, except (i) with the consent of all parties including the party to be joined, or (ii) as directed by the arbitral tribunal once constituted, provided that the party to be added consents to the joinder (ICDR Rules, Article 8(1)). Under the ICDR Rules, any jurisdictional issues are referred to the arbitral tribunal once constituted (ICDR Rules, Articles 8(1) & 21).
- 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 other sets of rules discussed above (see LCIA Rules, Article 22.1(x) (allowing joinder only where the party to be joined has consented in writing, either in the arbitration agreement or after the arbitration has commenced)). However, 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 expressly consents, 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. Optional Clauses

#### 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 instead of or 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 or where multiple arbitrations have been commenced between the same parties.

#### A. Institutional Rules

Many institutional rules, discussed below, have recently been revised to provide a useful framework for consolidations (see **Appendix 1**). 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 Rules** allow consolidation where (i) the claims arise under the same arbitration agreement or agreements, 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).

The **ICDR Rules** are similar, except that where the claims do not arise under the same arbitration agreement, the parties must have expressly agreed that consolidation is permitted (ICDR Rules, Article 10).

The **SIAC Rules** also are similar to the ICC Rules 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 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 the LCIA Court approves, and (ii) when arbitrations have

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commenced, under either the same or compatible arbitration agreements, between the same parties or arising out of the same transaction or series of related transactions (LCIA Rules, Articles 22.7(i)-(ii)). Alternatively, where the same tribunal has been constituted for more than one arbitration under the same or compatible arbitration agreements, and the arbitrations are between the same parties or arise out of the same transaction or series of transactions, the tribunal may order that the arbitrations be conducted concurrently (LCIA Rules, Article 22.7(iii)). If the tribunal has not yet been constituted, the LCIA Rules provide the LCIA Court with similar power to order consolidation (LCIA Rules, Article 22.8). Relatedly, the LCIA Rules expressly permit composite Requests for Arbitration, which allow claimants to commence a single arbitration against one or more respondents in respect of disputes under multiple contracts and for respondents to file composite responses (LCIA Rules, Articles 1.2 and 2.2).

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 9). 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

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(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 (i) there are issues of fact or law common to the two proceedings so that a consolidated proceeding would be**

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**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 tribunals constituted hereunder or under the [the related agreement(s)], the ruling of the [identify one panel] shall control.”**

The tribunal whose ruling takes precedence in the event of a conflict may be, for example, the tribunal in the first-filed arbitration in the disputes to be consolidated or the first tribunal to be fully constituted in the disputes to be consolidated. If the clause provides for consolidation of arbitrations under multiple agreements, the parties may want to specify that the ruling of the arbitration tribunal under the main agreement will take precedence.

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 U.S. states). The Federal Arbitration Act 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); *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* Section II.g above).

### 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

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primary contract will be the one to hear the consolidated proceedings:

**“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.”**

There are, however, some concerns that the first two of these methods for selecting arbitrators may call into question the validity of any award they ultimately issue. This concern is illustrated by the 1992 decision of the highest court of **France**, which determined that a method for selecting arbitrators that denied one or more parties an opportunity to have a say in the appointment process would unfairly

violate the principle of equality between the parties (*Siemens AG & BKMI Industrienlagen GmbH v. Dutco Consortium Constr. Co., Ltd.*, Cass. 1re Civ., 7 Jan. 1992, Nos. 89-18.708 & 89-18.726. The principle was more recently reaffirmed by the Paris Court of Appeal, Chamber 5-16, 26 Jan. 2021, No 19/10666). Parties to complex contractual arrangements should agree to a mechanism for appointing the tribunal that is flexible enough to anticipate the possible alignment of interests between multiple parties and guarantee equality in the appointment process even after a dispute has arisen.

## 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 6.1; 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, Article 13(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. Under the law of **England &**



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**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).

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 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.

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 Rules, Article 14; LCIA Rules, Article 5(3)–(5);

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UNCITRAL Rules, Articles 11 and 12(1); SCC Rules, Article 18; SIAC Rules, Rules 13.1-13.5; HKIAC Rules, Articles 11.1 and 11.4).

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 IBA Guidelines on Conflicts of Interest in International Arbitration (“IBA Guidelines”) contain general standards of independence and disclosure that may be applied in the selection, 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 21(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. For arbitrations seated in or governed by the law of the **United States**, however, we recommend adding language as discussed above in section II.h to avoid any doubts as to whether the arbitrators' determination of their jurisdiction is subject to judicial review at the conclusion of the arbitration.

**e. Freedom to Decide *Ex Aequo et Bono***

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 that 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, 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 subjective *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 34(3); ICC Rules, Article 21(3); LCIA Rules, Article 22.4; SIAC Rules, Rule 31; HKIAC Rules, Article 36.2). Courts may set aside or refuse to enforce an award if the arbitral tribunal decides the dispute *ex aequo et bono* or as *amiable compositeur* without due authorization. This may be difficult to establish in practice absent specific circumstances.

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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 a court in 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*, 2008 QCCS 5903 (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 27; 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 27(3); 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.

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.”**

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, e.g.*, ICC Rules, Article 28(2) (“appropriate circumstances”); LCIA Rules, Article 25.3 (“exceptional

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circumstances” and with the arbitral tribunal’s authorization); SIAC Rules, Rule 30.3 (“exceptional circumstances”).

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. For example, in **Russia**, the parties may agree that before the constitution of the arbitral tribunal, the permanent arbitral institution can order such interim measures as the institution deems appropriate. However, provisional measures orders of either arbitral tribunals or permanent arbitral institutions cannot be enforced by Russian state courts (*see* Article 17 of the Federal Law on Arbitration (Arbitration Proceedings); Article 17 of the Law of the Russian Federation on International Commercial Arbitration). Additionally, some institutional rules do not provide an available procedure for the arbitration institution, as opposed to an arbitral tribunal, to order provisional measures.

#### **b. Emergency Arbitrations**

Several of the widely used sets of 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 7; ICC Rules, Article 29 & Appendix V; SCC Rules, Appendix II; SIAC Rules, Rule 30.2, Schedule 1; HKIAC Rules, Article 23.1 & Schedule 4).

Under all of the major 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 9.16; HKIAC Rules, Article 1.5).

In **England & Wales**, the High Court held that 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. If this result is desired, language such as the following may be used:

**“The emergency arbitration provisions in [identify article or rule of applicable arbitration rules] shall not apply.”**



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Generally, the emergency arbitration 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 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 7(4)).

In some jurisdictions, an order of an interim arbitrator (as opposed to an award) may not 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 reaching a different decision on the issue.

#### 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, Appendix IV; ICDR Rules,

Articles 22(5), 20(6), and 20(7); 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 (“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, Article 22(2) & Appendix IV; ICDR Rules, Article 24(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).

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The IBA Rules contain provisions that address the production of documents and valid objections to a production request (Articles 3 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 require such production of documents 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 may not by contract grant the arbitrators authority to require third persons to provide evidence 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.

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Under **United States** federal law, a U.S. district court may compel production of evidence from a person found within its 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 even if the arbitration is held outside the United States, if parties or nonparties with evidence pertaining to the arbitration have a presence within the United States. 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 (“AAA Guidelines”), Articles 4, 20(2); CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration (“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 party’s 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.

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#### 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 28; ICC Rules, Article 25(3); LCIA Rules, Article 21(v); 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 40; SCC Rules, Article 3 & Appendix 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, Ch. 5,



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§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.

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.

Although the **ICC Rules** do not specifically address the publication of awards, the ICC introduced a procedure regarding the publication of awards in its Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, effective January 1, 2019. All ICC awards made after that date may be published no less than two years after their notification to the parties unless one or more of the parties opts 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. If the ICC Rules are selected for an arbitration clause and the parties do not want any future award to be published,

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the following sentence may be added at the end of the first paragraph in the above-proposed confidentiality 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 **Appendix 4**.

#### **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 37; LCIA Rules, Article 28; SIAC Rules, Rule 35; HKIAC Rules, Article 34). The **UNCITRAL Rules**, however, recognize that "in principle", costs should be borne by the unsuccessful party, while reserving to the arbitral tribunal the authority to apportion costs in any manner that it determines to be "reasonable" under the circumstances (see UNCITRAL Rules, Article 42(1)). 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

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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.”**

#### **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 34(5)). The ICC, LCIA, UNCITRAL, SCC, SIAC, and HKIAC Rules are silent on this issue.

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#### 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 that could be inconsistent with prevailing market rates of interest.

The parties may choose a fixed rate or a rate based on a publicly available reference rate (such as one of the Euribor rates or one of the risk-free rates that have replaced LIBOR). 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 34(4); LCIA Rules, Article 26.4; SIAC Rules, Rule 32(9)). The HKIAC, SCC, and UNCITRAL Rules are silent on this issue.

Some 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, quarterly, etc.*].”**

**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 close of proceedings, being 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.] For the avoidance of doubt, no award issued by the tribunal shall be rendered invalid or improper by reason of it being delivered after the expiry of this time limit.”**

When this type of provision is used or when the selected institutional rules impose similar deadlines, arbitrator candidates should be informed of those requirements and should commit to adhering to them prior to their appointment. The parties should also agree with the arbitrators what the consequence of failing to adhere to the deadline should be and record that agreement in writing at the outset of the proceedings. However, some caution is required with attempting to set deadlines in this manner. Parties generally will not wish to call into question the validity of an arbitration award merely because it is issued by the tribunal after the expiry of a contractual deadline, as that would potentially leave the parties to repeat the entire arbitration process if they wished to obtain an enforceable award, assuming no limitation defenses would intervene. Instead, a stipulation in the parties' agreement as to the



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time limit for delivery of the award may be better regarded as strong encouragement for the tribunal to deliver its award promptly rather than a provision that any party will seek to enforce.

#### 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 33(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 AAA's Optional Appellate Arbitration Rules provide a framework for the appeal of arbitral awards based on the agreement of the parties, whether or not the underlying arbitration was governed by the AAA or ICDR Rules. Similarly, the CPR Arbitration Appeal Procedure provides an optional framework for the appeal of awards rendered in binding arbitrations conducted in the **United States**, whether the underlying arbitration is governed by the CPR Rules or otherwise. Parties may invoke this procedure by agreement in writing.

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 Optional Appellate Arbitration Rules of the American Arbitration Association/the Arbitration Appeal Procedure of the International Institute for Conflict Prevention & Resolution*].”**

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**, a party may appeal to the courts on questions of the relevant national law arising out of an award unless such rights are excluded by the parties' agreement (see English Arbitration Act, Section 69; Hong Kong Arbitration Ordinance, Schedule 2, Section 5). However, clauses providing for an expanded scope of review by national courts must be thoroughly vetted with counsel knowledgeable in the applicable law and otherwise approached with caution, as local-law exceptions

### III. Optional Clauses

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 of assets of a foreign state or its agencies or instrumentalities 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 categories of state assets. A state party may wish to draft the waiver clause expressly to 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.

### III. Optional Clauses

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 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. Republic 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 inconvenience of the forum in which enforcement is sought 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 Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters or, in the absence of a treaty, service through letters rogatory directed to a foreign court. Service through these channels can prove costly and time-consuming, in some cases taking a year or more.

There is some uncertainty, including in the **United States**, over whether a party may agree to service outside the jurisdiction by means other than the Hague Convention or other treaties. The California Supreme Court has held that an agreement to waive service and accept notice of a lawsuit by other means is not inconsistent with the Hague Convention (*Rockefeller Technology Investments (Asia) VII v. Changzhou Sinotype Technology Co., Ltd.*, 9 Cal. 5th 125, 460 P.3d 762 (2020)), but it remains unclear whether that decision will be followed by other courts in the United States and elsewhere.

To avoid uncertainties about the ability to make prompt service on a party outside the jurisdiction, each party may designate an agent for service of process within the jurisdiction where enforcement is likely to be sought, with an express waiver of any objection based on service of process on the agent. In that case, the Hague Convention would not apply by its terms because the documents would not be served outside the jurisdiction where the proceeding was commenced. Such a clause may be expressed as follows:

**“[Party] hereby irrevocably appoints, with respect to itself and to its assets, [Process Agent] for service of all pleadings, process, pleadings, requests for discovery**

### III. Optional Clauses

**and/or other papers in connection with any proceedings, wherever brought, for the recognition and or enforcement of any award resulting from an arbitration brought pursuant to this clause of the arbitral tribunal or any judgment of any jurisdiction resulting therefrom. Service of process, pleadings and other papers in accordance with this paragraph may be made by delivering a copy of such process to [Process Agent] at [address within jurisdiction where enforcement is likely to be sought] by hand delivery, first-class mail or courier, and [Party] irrevocably authorizes [Process Agent] to accept such service on its behalf. [Party] hereby irrevocably 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.”**

The parties also should consider including a mechanism for a party to change its agent’s address for service if the agent moves to a new address, or to replace its agent if the agent resigns, dies, or is otherwise unwilling or unable to act in that capacity or if the party wishes to replace the agent for other reasons.

If the waivability of a treaty mechanism for service of process is unlikely to be an issue (for example, if the parties are domiciled in countries that have not objected to transmission of legal documents by mail under Article 10(a) of the Hague Convention), parties could instead include in their arbitration clause an agreed means of service directly on each party and its counsel, with an express waiver of any objection based on service of process by those means. Such a clause may be expressed as follows:

**“Service of all process, pleadings and other papers in connection with any proceedings, wherever brought, for the recognition or enforcement of any award of the arbitral tribunal or any judgment of any jurisdiction resulting therefrom may be made by delivering a copy of such process to the relevant party and to the attorney that represented the party in the arbitration, at such party’s or attorney’s last known address, by courier or first-class mail. Each party hereby irrevocably waives any objection to service by such means. Nothing in this paragraph limits the right to serve legal process, pleadings or other papers in any other manner permitted by law.”**

Other means of service may be chosen as well, subject to any restrictions imposed by applicable law or treaties, but the means of service should be reasonably calculated to give actual notice. Where a specific address for service is included in the agreement, a provision for changes of address on notice to all parties should also be included.

**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**



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**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, that the forum is inconvenient 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, that the forum is inconvenient or that the court lacks jurisdiction over any party.”**

## **7. Particular Procedures**

### **a. Expert Determination**

Parties 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.

Normally, the provisions require final adjudication of such disputes by the expert, but it is possible (though usually undesirable) to provide for review of the expert determination in arbitration. 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 by written notice to the other party. The expert shall be agreed between and appointed by the parties. *[Specify expert qualifications, if desired.]* If the parties are unable to agree within [5] days of receipt of written notice 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].”***

Because a quick and economical disposition is normally desirable, provisions for a determination by an expert ordinarily do not provide

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for an administrator or a set of rules governing the expert determination. However, there are institutions that have established rules and are available to provide administrative services for such proceedings if the parties so agree. For example, should the parties wish the ICC's Centre for Expertise to administer an expert determination proceeding, they may add language such as the following to the above provision:

**“The expert proceedings shall be administered by the Centre for Expertise of the International Chamber of Commerce in accordance with its Expertise Rules as in effect at the time the dispute is referred for expert determination.”**

The parties also may choose the ICC Centre for Expertise as an appointing authority without choosing it as administrator.

It is important that a clear differentiation be made between the types of disputes that may be referred to the expert 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.

#### **b. Interim Adjudication and Dispute Boards**

In construction contracts, it is common to have provisions for adjudication of certain types of disputes that may arise while construction is ongoing. Most commonly, these provisions refer disputes regarding technical and operational matters arising during construction to an independent adjudicator for resolution within a predetermined time frame. 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.

This type of interim adjudication may be accomplished either through a provision like that for the appointment of an expert, as discussed above, or through a provision for appointment of a board as described below. 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.

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.

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 AAA, and the International Federation of Consulting Engineers (“**FIDIC**”), among others, provide procedures for the

### III. Optional Clauses

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. The 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 several standard form construction contracts for different procurement methods, including the "Red Book", "Yellow Book" and "Silver Book". Under Clause 21 of each of these 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 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 that has arisen. The parties are not bound by any such informal advice or assistance.

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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 U.S. dollars (US\$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.

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.



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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 exists in the absence of clear and unambiguous consent to classwide arbitration. In cases in 2010 and 2019, the Supreme Court held that consent to classwide arbitration cannot be inferred where the arbitration clause is silent or ambiguous on the point (*Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010); *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019)). In other 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*, 580 U.S. 228 (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 *20/20 Commc'ns, Inc. v. Crawford*, 930 F.3d 715 (5th Cir. 2019); *Herrington v. Waterstone Mortg. Corp.*, 907 F.3d 502 (7th Cir. 2018); *JPay, Inc. v. Kobel*, 904 F.3d 923 (11th Cir. 2018); *Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966 (8th Cir. 2017); *Del 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 circumstances 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 AAA, 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.”**

Final offer arbitration forces the parties to submit figures that are reasonable in the hope that the arbitrator will choose that figure.

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For that reason, the exchange of those figures often facilitates settlement.

One 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. 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. If hearings are taking place at the seat, 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. As the COVID-19 pandemic has demonstrated, public-health and other emergencies may also result in significant barriers to travel.

In 2015, the Chartered Institute of Arbitrators published a set of ten principles, officially titled the *CI Arb 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 CI Arb's website at [www.ciarb.org](http://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. Specific considerations relevant to each of the seats are highlighted below.

### **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. As discussed in Section II.g of this Handbook, for any arbitration seated in the United States, language specifying the application of the Federal Arbitration Act should be included in the arbitration clause to avoid any uncertainty over the possible application of state law.
5. For an arbitration seated in New York, courts may vacate an arbitral award based on the grounds listed in Section 10 of 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. Additionally, Section 11 of the Act empowers courts to correct or modify an arbitral award "so as to effect the intent thereof and promote justice" if (i) there was an evident material miscalculation of figures or evident material mistake in the description of any person, thing or property referred to in the award; (ii) the arbitrators awarded upon a matter not submitted to them, unless the matter does not affect the merits of the decision; or (iii) the award is imperfect in form not affecting the merits of the controversy.

### 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 III.6.a of this Handbook, 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. However, where there is no urgency, the court can only act in support of the arbitration with the consent of the tribunal or of all the parties (*VTB Commodities Trading DAC v JSC Antipinsky Refinery* [2020] EWHC 72 (Comm)). Even when interim relief is urgent, the courts' power to act under the Arbitration Act is curtailed where timely and effective interim relief could instead be granted by an arbitral tribunal or institution, including through an emergency arbitrator process (see *Gerald Metals SA v Timis* [2016] EWHC 2327 (Ch)). Should the parties wish to preserve the right to apply for urgent relief to the English courts, they may need to include language in their arbitration clause opting out of any emergency arbitration procedure in the applicable arbitration rules, as discussed in Section III.3.b of this Handbook.
4. Under the Arbitration Act, an arbitral award may be set aside if English courts find a lack of substantive



jurisdiction (Section 67 of the Arbitration Act) or serious irregularity affecting the tribunal, proceedings, or the award (Section 68 of the Arbitration Act). 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) they obtain leave of 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 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 (see, e.g., *Martin and others v Harris* [2019] EWHC 1962 (Ch)).

5. The LCIA is headquartered in London. The International Dispute Resolution Centre, established in 2000, provides dedicated arbitration hearing facilities in London, as does the International Arbitration Centre, which opened in 2019.

### 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 separability 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' mandate or a violation of international public policy (see French Code of Civil Procedure, Article 1520). French courts review the issue of arbitrators' jurisdiction *de novo*, and as long as an objection to jurisdiction was argued before the arbitral tribunal, parties may raise new arguments and adduce new evidence with respect to jurisdiction in a proceeding to set aside the award (*Schooner v. Poland*, Cass. 1re Civ., Dec. 7, 2020, No. 19-15.396).
4. A notable innovation in the Code was to permit parties to agree to waive their right to seek to set aside 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. Created in 2018 and active since 2019, the "International Chamber" of the Paris Court of Appeal

hears disputes arising out of international commercial contracts, as well as proceedings for setting aside arbitral awards rendered in international arbitrations seated in Paris. Composed of English-speaking judges, English may be used in the proceedings, and witnesses and experts may be examined in English.

6. 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.

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 ("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 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. On November 27, 2020, the PRC Supreme People's Court and the Hong Kong Department of Justice entered into the Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region. This modified the existing arrangement by (i) clarifying that the procedures for enforcing arbitral awards under the arrangement covers both recognition and enforcement; (ii) expanding the scope of arbitral awards covered by the arrangement to all arbitral awards rendered pursuant to the Hong Kong Arbitration Ordinance or the PRC Arbitration Law; (iii) allowing parties to make simultaneous enforcement applications before both the Mainland Chinese courts and the Hong Kong courts; and (iv) clarifying that Mainland Chinese courts and Hong Kong courts may issue preservation measures before or after the court's acceptance of an application for enforcement of an arbitral award.

5. On October 1, 2019, the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region came into force. This arrangement enables parties to certain Hong Kong arbitration proceedings (including CIETAC, HKIAC, and ICC arbitration proceedings) to apply to courts in Mainland China for interim measures to secure claims pending their final determination. Under the arrangement, PRC courts may grant three types of interim measures in aid of Hong Kong arbitration

proceedings: preservation of property, preservation of evidence and preservation of conduct.

6. 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.
7. The HKIAC is experienced in administering international arbitration. Its Administered Arbitration Rules were amended effective November 1, 2018.

### **Other Frequently Used Seats**

*(in alphabetical order within each 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. A revised version of the Law entered into force on January 2, 2021.
  - 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) a sole arbitrator was improperly appointed or 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. The Act permits parties to waive their right to seek to set aside an award, save with respect to review of an award on the grounds that it was influenced by matters constituting a criminal offence.

- 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.

- b. Under the Dutch Arbitration Act, an award may only be set aside on the following grounds: (i) a valid arbitration agreement does not exist, (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 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 most recent version of the CAM Arbitration Rules entered into force on July 1, 2020.
4. Moscow
- a. Russian arbitration legislation underwent significant changes in September 2016 and March 2019. The current legislation is based predominantly on the UNCITRAL Model Law and provides a special regulatory framework applicable to domestic and international arbitration in Russia.
  - b. The grounds for setting aside an award are limited and substantively mirror those under the UNCITRAL Model Law.
  - c. Russian law distinguishes sharply between institutional and *ad hoc* arbitration. For example, only the parties to an institutional arbitration may agree that the award will not be subject to a setting-aside proceeding or waive the right to challenge the arbitral tribunal’s decision on jurisdiction before the Russian courts. The

## Appendix 1 – Overview of Arbitral Seats

benefits of institutional arbitration, however, are only available to institutions with a permit to administer disputes in Russia as a “permanent arbitral institution” (“PAI”).

- d. Several Russian arbitral institutions currently have PAI status: the International Commercial Arbitration Court (“ICAC”), the Maritime Arbitration Commission at the Chamber of Commerce and Industry (“MAC”), the Russian Arbitration Center at the Russian Institute of Modern Arbitration (“RAC”), the Arbitration Center at the Russian Union of Industrialists and Entrepreneurs (“AC RUIE”), the National Center of Sports Arbitration at the Sports Arbitration Chamber (“NCSA”), the Arbitration Institution at the Union of Machine Builders of Russia (“Rostec Arbitration Center”) and the Arbitration Center at the National Institute of Arbitration Development in the Fuel and Energy Sector (“Gazprom Arbitration Center”).
- e. Several foreign and international institutions also have obtained PAI status: HKIAC and the Vienna International Arbitral Centre (“VIAC”) in 2019 and SIAC and the ICC in 2021. However, because HKIAC, VIAC, SIAC and the ICC have not yet established permanent representative offices in Russia, they may not administer Russian domestic disputes other than those arising from special administrative districts as defined in the law.

- f. Some narrow categories of corporate disputes in respect of Russian companies, such as disputes concerning mandatory tender offer procedures in joint stock companies or exclusion of shareholders, are non-arbitrable under Russian law and may only be resolved in Russian state courts. Other categories of corporate disputes in respect of Russian companies may be arbitrated only if the arbitration is administered by a PAI with a permanent office in Russia in accordance with special arbitration rules. If a PAI has not adopted such special rules, it may administer corporate disputes only if they relate to ownership of shares (including share purchase agreements), arise from the activities of share registrars, or arise from shareholders' agreements. Several of the Russian PAIs (ICAC, RAC and AC RUIE) have adopted new sets of arbitration rules allowing them to administer the full range of arbitrable corporate disputes, but none of the foreign PAIs (HKIAC, VIAC, SIAC or ICC) has yet adopted such special rules.
- g. Disputes concerning privatization of state property are non-arbitrable under Russian law. Disputes regarding public procurement also are currently non-arbitrable, but special legislation on the arbitration of such disputes is expected.
- h. Under a law adopted in 2020, Russian *arbitrazh* (commercial) courts have exclusive jurisdiction over disputes (i) involving Russian persons or entities who are subject to foreign sanctions

(restrictive measures) or foreign entities subject to foreign sanctions as a result of their connection to sanctioned Russian persons or (ii) arising from foreign sanctions against Russian persons. Sanctioned persons deprived of access to justice as a result of foreign sanctions may apply to the *arbitrazh* court for an injunction restraining pursuit of foreign litigation or arbitration seated outside of Russia. Noncompliance with the injunction can lead to unenforceability of the judgment or award in Russia and a court order to pay compensation to the sanctioned party.

5. Stockholm

- a. The Swedish Arbitration Act was revised in 2019, with the new version entering into force on March 1, 2019. It 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.
- 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).

## Appendix 1 – Overview of Arbitral Seats

- 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. VIAC, established in 1975, has considerable experience administering arbitrations, particularly in Central and Eastern Europe. VIAC arbitrations commonly apply either the Vienna Rules published by VIAC or the ICC Rules. In 2021, VIAC updated the Vienna Rules and also issued new Vienna Investment Arbitration 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.
- b. In 2017, the Act was amended to introduce an emergency arbitrator procedure and a body outside of the High Court to resolve disputes over arbitrator appointment. Further amendments came into force in May 2019 clarifying the procedure for challenging jurisdictional decisions and narrowing the

grounds an application to set aside an arbitral award can be made.

- c. The Arbitrators' and Mediators' Institute of New Zealand ("AMINZ") and the New Zealand Dispute Resolution Centre ("NZDRC"), through its related entity the New Zealand International Arbitration Centre ("NZIAC"), 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. Mainland China also has a unique arrangement with Hong Kong, which empowers mainland Chinese courts to grant interim measures in



## Appendix 1 – Overview of Arbitral Seats

support of certain Hong Kong arbitrations, and vice versa.

- 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, in particular, to distinguish between CIETAC, SHIAC and SCIA.
- d. The PRC Arbitration Law, introduced in 1995 and amended in 2009 and 2017, 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. China issued rules that allow foreign arbitration institutions to administer “foreign-related” arbitration cases in the Lin Gang Area of the Shanghai Free Trade Zone and the Beijing Free Trade Zone in 2020 and 2021 respectively. The rules for the Lin Gang Area of the Shanghai Free Trade Zone will expire on December 31, 2022, whereas the rules for Beijing Free Trade Zone do not have an expiry date. With the two rules in effect, arbitration cases with “foreign-related” elements may be seated within mainland China and administered by foreign arbitration institutions registered in the designated areas. It is unclear whether foreign arbitration institutions that are not registered in accordance with these two sets of rules 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 that do not have favorable treatment under the new rules 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 – such a decision is for the PRC Supreme People’s Court alone. 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 and 2018, largely adopts the UNCITRAL Model Law.
- b. The law gives parties flexibility to select the procedures governing the appointment of arbitrators and the proceedings. Malaysia recognizes the doctrine of *Kompetenz-Kompetenz* under section 18(1) of the Arbitration Act. The Act also provides that the awards of arbitral

tribunals are final and binding, and can only be set aside on limited grounds.

- c. In early 2018, the Arbitration (Amendment) Act 2018 renamed the primary arbitration institution in Malaysia from the Kuala Lumpur Regional Centre for Arbitration (“KLRCA”) to the Asian International Arbitration Centre (“AIAC”). The AIAC 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. Part I of the Arbitration Act deals with arbitrations seated in India and Part II with arbitrations seated outside India. There have been a series of judicial decisions and legislative amendments in recent years.
- b. For arbitrations seated in India, restrictions may apply to the parties’ choice of arbitrators. Amendments made to the Act in 2021 removed any statutory requirements that arbitrators should possess any particular qualifications or characteristics, but the amended legislation provides that standards for the accreditation of arbitrators may instead be promulgated by the Arbitration Council of India. However, the 2021 amendments deleted Schedule VIII of the Act, which had potentially limited the ability of foreign-qualified lawyers to work as arbitrators in India.

## Appendix 1 – Overview of Arbitral Seats

- c. For international commercial arbitrations, amendments made to the Act in 2019 provide that tribunals “must endeavor” to complete the arbitration within 12 months.
- d. The grounds for setting aside an award seated in India are limited. Amendments to the Act in 2015 clarified that the Indian courts cannot review the merits of an award. The grounds for refusing to enforce a foreign award are limited to those in the New York Convention. However, further amendments to the Act in 2021 introduced specific powers for the Indian courts to stay proceedings to enforce any award which it is alleged is tainted by fraud.
- e. The Indian courts previously displayed an interventionist approach both in arbitrations seated in India and in foreign-seated arbitrations. However, 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, September 6, 2012), save to grant interim relief or assistance in taking evidence, but even such assistance can be excluded by agreement of the parties. Further amendments to reduce the interference of the courts in arbitral proceedings were made in 2015.
- f. There are several arbitral institutions in India, including the Mumbai Centre for International Arbitration (“MCIA”) and the New Delhi

International Arbitration Centre (“NDIAC”). 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. In 2018, KCAB and the Seoul International Dispute Centre (“SIDRC”) were consolidated to form “KCAB International” which is an independent division of KCAB aimed at meeting the growing demand for cross-border commercial dispute resolution.
- 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. In June 2017, South Korea introduced the Arbitration Promotion Act, 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. Amendments introduced in 2015 and 2018 align the language of the Act 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 2021 ACICA Arbitration Rules and Expedited Arbitration Rules were formally approved and adopted by the ACICA Board in March 2021 and came into effect on April 1, 2021. The revised ACICA Rules reflect developments in international best practice, including with reference to improved online practices developed during the COVID-19 pandemic.

7. Tokyo

- a. Japan's Arbitration Law is based on the UNCITRAL Model Law and applies to arbitral proceedings seated in Japan, as well as proceedings in Japanese courts related to arbitral proceedings.
- b. The Arbitration Law expressly acknowledges the principles of separability and *Kompetenz-Kompetenz*, and limits the ability of the Japanese courts to intervene in arbitral proceedings. The

grounds for set-aside under the Arbitration Law largely track the UNCITRAL Model Law.

- c. The Japanese Commercial Arbitration Association (“JCAA”) administers international arbitrations. The most recent amendments to the JCAA Rules, which came into force on July 1, 2021, expanded the scope of expedited arbitration under the rules to include arbitrations with an amount in dispute less than JPY 300 million. The 2021 amendments also added new procedures for the appointment of arbitrators when the parties have selected the JCAA as the appointing authority for an arbitration that is not administered by the JCAA. An earlier amendment, in 2019, introduced provisions regarding arbitrator impartiality, tribunal secretaries, a restriction against arbitrators providing dissenting opinions, expedited procedures, emergency arbitrators, interim measures, and joinder of third parties to an arbitration, among others. The JCAA also offers a set of Interactive Arbitration Rules, which are designed to hew more closely to a civil law approach than its Commercial Arbitration Rules.

## 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, Bermudian 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 not to apply the Model Law, in which case the Arbitration Act 1986 (based on the UK Arbitration Acts 1950-1979) will apply 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 of challenges against arbitral awards. The Supreme Court of Bermuda may 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 of applications to set aside 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, a subject matter not capable of settlement by arbitration under Bermudian law, or a conflict between the award and Bermudian public policy (for example, if the making of the award was induced or affected by fraud or corruption).

2. British Virgin Islands

- a. International arbitration in the British Virgin Islands (“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.
- b. 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.
- c. BVI courts generally take a liberal approach to upholding arbitration agreements and awards, and have experience handling complex international commercial cases.

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- d. Costs of arbitration in the BVI may be considerably lower than in other leading arbitration centers.
3. Mexico City
    - a. Mexico has adopted the UNCITRAL Model Law, with minor modifications. Under Mexico's Commerce Code, those modifications include additional court procedures for the enforcement of interim or provisional measures awarded by arbitral tribunals, which can take six months to a year to complete.
    - 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 intended to protect constitutional rights.
  4. Miami, San Francisco, or Washington, D.C.
    - a. **New York**, which is discussed above under *Top Five Seats Generally Recommended*, remains the

## *Appendix 1 – Overview of Arbitral Seats*

most commonly accepted seat of international commercial arbitration in the United States. However, many other cities in the United States also are frequently chosen and may be appropriate arbitral seats.

- b. Because of **Miami**'s location and culture, Latin American parties may consider it a sufficiently "neutral" site.
- c. Miami may afford lower costs than some other seats, including for bilingual professional services, flights and hotels. The ICDR maintains a regional office in Miami.
- d. International arbitrations seated in Florida will generally be governed by the U.S. Federal Arbitration Act, though it may be supplemented in some instances by Florida's International Commercial Arbitration Act, which is based on the UNCITRAL Model Law. As discussed in Section II.g of this Handbook, for any arbitration seated in the United States, language specifying the application of the FAA should be included in the arbitration clause to avoid any uncertainty over the possible application of state law.
- e. A rule adopted by the Supreme Court of Florida in 2006 removed restrictions on non-Florida lawyers participating in international arbitrations in Florida.
- f. The Florida state court system has created an International Commercial Arbitration Court, as a subsection of the Florida Circuit Court seated in

Miami, to hear cases related to international commercial arbitration. Cases related to international commercial arbitration may also be heard in the U.S. District Court for the Southern District of Florida, which is the federal court seated in Miami.

- g. Other U.S cities, including **Washington, D.C.** and **San Francisco**, are also suitable and frequently chosen seats of arbitration.
- h. 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 allows parties to contract for broader court review of arbitration awards than would normally be permitted. As discussed in Section II.g of this Handbook, language specifying the application of the FAA should be included in the arbitration clause to avoid any uncertainty over the possible application of state law. If California law may apply to the arbitration, 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, as this may be interpreted to expand the scope of judicial review of the arbitral award.

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.
- c. The ICC, ICDR and LCIA all manage cases with seats in Brazil, and the ICC maintains 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 province of Canada has its own international arbitration statute. Arbitration in Toronto is governed by Ontario’s International Commercial Arbitration Act, which is based on the UNCITRAL Model Law. 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, ADR Chambers and JAMS Canada. During the COVID-19 pandemic, Arbitration Place, with the International Dispute Resolution Centre in London and Maxwell Chambers in Singapore, jointly formed the International Arbitration Centre Alliance to facilitate hybrid virtual hearings.

**D. Africa**

1. Casablanca

- a. Morocco’s Code of Civil Procedure governs domestic and international arbitrations and is inspired by French law and, in part, 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 on the ground that 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 May 4, 2018.

2. Lagos

- a. Nigeria’s Arbitration and Conciliation Act 1988 (“ACA”) governs international arbitration in Nigeria and mirrors the 1985 UNCITRAL Model Law. Legislation that would incorporate the 2006 UNCITRAL Model Law amendments has been proposed. The state of Lagos passed its own arbitration legislation, the Lagos State

## Appendix 1 – Overview of Arbitral Seats

Arbitration Law of 2009, which is largely based on the UNCITRAL Model Law including the 2006 amendments.

- b. The Lagos Court of Arbitration (“LCA”) is based in Lagos. Its 2018 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 three 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 home to the Mauritius Chamber of Commerce and Industry's Arbitration and Mediation Center ("MARC"), which was established in 1996. In 2017, MARC announced a new governance structure reflecting international best practices in arbitration, with a court and an advisory board composed of leading international practitioners.

## **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. Doha
  - a. In March 2017, Qatar's 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

## *Appendix 1 – Overview of Arbitral Seats*

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. In 2021, the Qatar International Court confirmed its status as an opt-in court for arbitration.
- c. The Qatari arbitration law 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.

2. Dubai International Financial Centre

- a. The Dubai International Financial Centre (“DIFC”) is a special economic zone in the center of Dubai’s financial district where United Arab Emirates 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 and amended in 2013, 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 September 2021, the Emirate of Dubai unexpectedly issued a decree abolishing the DIFC LCIA Arbitration Centre, which had been jointly established by the DIFC and LCIA in 2008, as well as other arbitration institutions operating in the DIFC. They were replaced by the Dubai International Arbitration Centre (“DIAC”), which is associated with the Dubai Chamber of Commerce and Industry. The decree does not affect the existence of the DIFC and its courts.

## Appendix 1 – Overview of Arbitral Seats

- e. Arbitration in Dubai outside of the DIFC is not recommended.
3. 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 July 2021, 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 (“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

## *Appendix 1 – Overview of Arbitral Seats*

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. In January 2021, the BCDR published draft amendments to its arbitration rules, for consultation and potential future adoption.





## **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 January 1, 2021, continue the ICC’s efforts to improve efficiency and transparency. In particular, the 2021 revision includes provisions for the tribunal to conduct hearings remotely after consultation with the parties and “on the basis of the relevant facts and circumstances of the case”; for parties to disclose the “existence and identity” of any third-party funder with “an economic interest in the outcome of the arbitration”; and for the tribunal to exclude from proceedings new counsel where the introduction of the new representatives would create a conflict of interest with an existing arbitrator. These developments are in

## Appendix 2 – Overview of Arbitral Rules

addition to the ICC’s Expedited Procedure Rules, introduced in its 2017 revision to the Rules (Article 30 and Appendix VI of the 2021 revision). These Rules apply to cases received by the ICC’s International Court of Arbitration from January 1, 2021.

The ICC’s “Note to Parties and Arbitral Tribunals on the Conduct of Arbitration”, last updated on January 1, 2021, 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 Note also provides updated guidance to parties on the conduct of virtual hearings. Among other things, the note provides that the ICC will publish awards no less than two years after their notification to the parties unless the parties opt out (see section III.4.e of this Handbook, above).

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](http://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”, as well as in the LCIA’s Annual Casework Reports. The LCIA Rules, most recently amended in 2020, include provisions for emergency relief (Article 9B), virtual hearings (Article 19.2), electronic communications (Article 4.1) and other provisions concerning speed and procedure (Articles 5, 14 and 15). Importantly, the 2020 LCIA Rules include new provisions relating to early or summary determination of a dispute (Article 22.1(viii)), intended to give tribunals the express power to determine disputes on a summary basis where it is appropriate to do so.

The text of the LCIA Arbitration Rules can be found on the LCIA’s website at [www.lcia.org](http://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 on March 1, 2021. The amendments introduce a new provision for early disposition of issues in advance of the hearing on the merits (Article 23), enhanced arbitrator ethical obligations (Article 14), and an acknowledgement of the use of videoconferencing for both preliminary matters and merits hearings (Articles 22 and 26).

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 October 1, 2017, 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](http://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 (HKD 25,000,000 as of June 2021), 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](http://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

## *Appendix 2 – Overview of Arbitral Rules*

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](http://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 (Appendix III) deals specifically with investor-state disputes (see **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](http://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, released its CPR Administered Arbitration Rules in 2014 and released updates to those rules effective from March 1, 2019. 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 in costs (Article 19.2). The 2019 revisions provide for single-arbitrator proceedings in cases not exceeding US\$3 million (Rule 5.1), apply as a default CPR’s “screened selection” procedure for the anonymous selection of party-designated arbitrators (Rule 5.4), and allow arbitrators to encourage lead counsel to permit more junior lawyers to examine witnesses and present argument at the hearing (Rule 12.5).

Proceedings under the Administered Rules are administered from the CPR’s offices in New York. Parties may also file cases pursuant to the CPR Administered Arbitration Rules for International Disputes with the Centre for Efficient Dispute Resolution (“CEDR”) in London.

The text of the CPR Administered Rules can be found on the CPR’s website at [www.cpradr.org](http://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 and 2013. 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 (Article 14), the requirement for reasonableness of costs and a review mechanism for arbitration costs (Article 40), as well as additional provisions dealing with multiparty arbitration (Article 10(1)), joinder (Article 17(5)), and interim measures (Article 26). The Rules also make express reference to the use of modern technologies (Articles 6(3), 28(4)).

The 2013 revision to the Rules incorporated the UNCITRAL Transparency Rules in Treaty-based Investor-State Arbitration (“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](http://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 2018, provide an effective framework for *ad hoc* arbitration. The standard clauses provide for the parties to select the seat of arbitration, and for CPR to perform the certain functions in support of the selection of, and determination of any challenges to, arbitrators (Rules 5, 6 and 7). Rule 14 allows for emergency measures by an emergency arbitrator prior to tribunal selection. The Rules provide for comparatively broader document exchange than some other rules (see Rule 11), but they simultaneously encourage efficiency, including by committing the parties and arbitrators to meet select time limits (Rule 15.7) and empowering the tribunal to set time limits for each phase of the proceeding (Rule 9.2). CPR also offers rules for administered arbitration of international disputes, as noted in the discussion of major institutional rules above in this appendix.

The text of the CPR Non-Administered Arbitration Rules can be found at [www.cpradr.org](http://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 based on the 2010 UNCITRAL Arbitration Rules, 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](http://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](http://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, 2020.

The text of the WIPO Arbitration Rules can be found on the WIPO ADR website at [www.wipo.int](http://www.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 January 1, 2021).
- International Centre for Dispute Resolution (“ICDR”) of the American Arbitration Association (“AAA”) International Dispute Resolution Procedures (Including Arbitration Rules) (in force March 1, 2021).
- London Court of International Arbitration (“LCIA”) Arbitration Rules (in force October 1, 2020).
- 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**

	<b>HKIAC</b>	<b>ICC</b>	<b>ICDR</b>	<b>LCIA</b>	<b>SCC</b>	<b>SIAC</b>	<b>UNCITRAL</b>
<b>ARBITRAL TRIBUNAL</b>							
<b>DEFAULT NUMBER OF ARBITRATORS IF PARTIES DO NOT AGREE</b>	HKIAC decides. (Article 6.1)	ONE Unless the ICC says three. (Article 12.2)	ONE Unless the ICDR Administrator says three. (Article 12)	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)
<b>APPOINTMENT OF THREE-MEMBER TRIBUNAL IN MULTIPARTY DISPUTES</b>	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 12.4, 12.8, 12.9)	Administrator appoints each member of the tribunal unless the parties have agreed otherwise within 45 days of start of arbitration. (Article 13.5)	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

	<b>HKIAC</b>	<b>ICC</b>	<b>ICDR</b>	<b>LCIA</b>	<b>SCC</b>	<b>SIAC</b>	<b>UNCITRAL</b>
<b>DEFAULT RESTRICTIONS ON THE NATIONALITY OF ARBITRATORS</b>	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) If the arbitration arises from a treaty, no arbitrator shall have the same nationality as any party (Article 13.6)	No restrictions, but Administrator shall take into account nationality as a factor in making an appointment. (Article 13.4)	If parties are of different nationalities, sole or presiding arbitrator shall not be of the same nationality as any party, unless parties so agree in writing. (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, but the appointing authority shall take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties. (Article 6.7)
<b>GROUND FOR CHALLENGE OF ARBITRATORS</b>	Lack of impartiality or independence; lack of qualifications agreed by the parties; inability to perform his or her functions;	Lack of impartiality or independence, or “otherwise”. (Article 14.1)	Lack of impartiality or independence, or failure to perform duties. (Article 15.1)	Lack of impartiality or independence; deliberate violation of arbitration agreement; or failure to conduct or participate in	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)

Appendix 3 – Comparative Table of Major Rules

	HKIAC	ICC	ICDR	LCIA	SCC	SIAC	UNCITRAL
	or failure to act without undue delay. (Article 11.6)			the arbitration with efficiency, diligence and industry. (Articles 10.1–10.2)			
<b>TIMING FOR CHALLENGE OF ARBITRATORS</b>	15 days from notification of appointment or from becoming aware of grounds for challenge. (Article 11.7)	30 days from notification of appointment or from becoming aware of grounds for challenge. (Article 14.2)	15 days from notification of appointment or from becoming aware of grounds for challenge. (Article 15.1)	14 days from formation of the arbitral tribunal or from becoming aware of grounds for challenge. (Article 10.3)	15 days from becoming aware of grounds for challenge. (Article 19.1—19.3)	14 days from notification of appointment or from becoming aware of grounds for challenge. (Article 15.1)	15 days from notification of appointment or from becoming aware of grounds for challenge. (Article 13.1)
<b>JOINDER AND CONSOLIDATION</b>							
<b>JOINDER</b>	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	A party may apply for joinder of an additional party to ICC Secretariat any time before confirmation/ appointment of any arbitrator. (Article 7.1)	Before the appointment of any arbitrator, a party may submit notice of arbitration against an additional party. After appointment,	A party may apply for joinder of an additional party provided that any additional party and the applicant party consent to the joinder in	A party may apply to the Board for joinder of an additional party. (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	A party may apply for joinder if the additional party is a party to the arbitration agreement. (Article 17.5)

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	<b>HKIAC</b>	<b>ICC</b>	<b>ICDR</b>	<b>LCIA</b>	<b>SCC</b>	<b>SIAC</b>	<b>UNCITRAL</b>
	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. Third parties may also request joinder. (Article 27)	After the confirmation or appointment of any arbitrator, a request for joinder is subject to (i) consent of all parties, including the additional party; or (ii) the approval of the tribunal and the agreement of the additional party to the constitution of the tribunal and to the Terms of Reference (Article 7.5)	parties may be joined only: (i) with the consent of all parties, including the additional party, or (ii) if the tribunal determines that joinder is “appropriate” and the additional party consents to the joinder. (Article 8.1)	writing. (Article 22.7(i))		submit a request for joinder. (Article 7)	

Appendix 3 – Comparative Table of Major Rules

	HKIIAC	ICC	ICDR	LCIA	SCC	SIAC	UNCITRAL
<b>CONSOLIDATION</b>	HKIIAC may consolidate at the request of any party where (a) the parties agree to consolidation; (b) all claims are made under the same arbitration 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,	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 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)	A consolidation arbitrator (appointed by Administrator at request of a party) may be appointed where: (a) the parties have agreed; (b) all claims are made under the same arbitration agreement; or (c) the arbitrations are between the same or related parties, arise in connection with the same legal relationship, and the arbitration agreements are compatible.	Tribunal may consolidate with approval of LCIA Court where (a) the parties agree to consolidation in writing or (b) when arbitrations have commenced between the same parties under either the same or compatible arbitration agreements, arising out of the same transaction or series of related transactions. The LCIA Court has similar powers prior to the constitution of	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 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)	Prior to the constitution of the tribunal, the Registrar may consolidate where (a) all parties have agreed to consolidation; (b) all claims 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	N/A

Appendix 3 – Comparative Table of Major Rules

	<b>HKIAC</b>	<b>ICC</b>	<b>ICDR</b>	<b>LCIA</b>	<b>SCC</b>	<b>SIAC</b>	<b>UNCITRAL</b>
	<p>provided that the arbitration agreements are compatible. (Article 28.1)</p> <p>Parties may also commence a single arbitration under this last category. (Article 29)</p>		<p>(Article 9.1)</p> <p>The consolidation arbitrator will determine whether to consolidate, and may take into account all relevant circumstances, including</p> <ul style="list-style-type: none"> <li>(a) applicable law;</li> <li>(b) the arbitrators appointed in the various proceedings;</li> <li>(c) the progress made in the arbitrations;</li> <li>(d) whether the arbitrations raise common issues of law and/or facts;</li> <li>and</li> <li>(e) whether consolidation</li> </ul>	<p>the tribunal. (Articles 22.7)</p>		<p>grounds, provided that a different tribunal has not been constituted in the other proceeding. (Article 8).</p>	

Appendix 3 – Comparative Table of Major Rules

	HKIAC	ICC	ICDR	LCIA	SCC	SIAC	UNCITRAL
			serves interests of justice and efficiency. (Article 9.3)				
<b>PROCEDURAL VARIETY</b>							
<b>EXPEDITED PROCEEDINGS</b>	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 if the arbitration agreement was concluded on or after March 1, 2017 and before January 1, 2021; or US\$3,000,000 if the arbitration agreement was concluded on or after January 1, 2021. (Article 30.2; Appendix VI,	If the parties so agree or if no claim or counterclaim exceeds US\$500,000. (Article 1.4)	The Tribunal has the power to determine that any claim, defence, counterclaim, cross-claim, defence to counterclaim or defence to cross-claim is manifestly outside the jurisdiction of the Arbitral Tribunal or is inadmissible or manifestly without merit; and where appropriate to issue an order or award to	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.

Appendix 3 – Comparative Table of Major Rules

	HKIAC	ICC	ICDR	LCIA	SCC	SIAC	UNCITRAL
		Article 1.2)		that effect Art 22.1(viii).			
<b>TERMS OF REFERENCE REQUIRED?</b>	No.	Yes, except in proceedings governed by the Expedited Rules. (Article 23)	No.	No.	No.	No.	No.
<b>DEFAULT SEAT</b>	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, subject to the arbitral tribunal’s determination within 45 days after its constitution. (Article 19.1)	London, unless and until the arbitral tribunal 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)
<b>PLACE OF HEARING</b>	No restrictions. (Article 14.2)	No restrictions. (Article 18.2) Provisions are made for virtual hearings. (Article 26.1)	No restrictions. (Article 17.2) Provisions are made for virtual hearings. (Article 26.2)	No restrictions. (Article 16.3) Provisions are made for virtual hearings. (Article 19.2)	No restrictions. (Article 25.2)	No restrictions. (Article 21.2)	No restrictions. (Article 18.2)

Appendix 3 – Comparative Table of Major Rules

	<b>HKIAC</b>	<b>ICC</b>	<b>ICDR</b>	<b>LCIA</b>	<b>SCC</b>	<b>SIAC</b>	<b>UNCITRAL</b>
<b>DEFAULT LANGUAGE OF THE ARBITRATION</b>	Tribunal decides. (Article 15.2)	Tribunal decides. (Article 20)	Presumption in favor of the language(s) of documents containing the arbitration clause, subject to tribunal’s determination. (Article 20)	Tribunal decides. (Article 17.4)	Tribunal decides. (Article 26.1)	Tribunal decides. (Article 22.1)	Tribunal decides. (Article 19.1)
<b>CONFIDENTIALITY THE DEFAULT RULE?</b>	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	Yes, subject to certain exceptions. (Article 40)	Yes, subject to certain exceptions. (Article 30.1)	Yes. (Article 3)	Yes, subject to certain exceptions. (Articles 39.1, 39.2)	Rules are silent as to confidentiality.



Appendix 3 – Comparative Table of Major Rules

	HKIAC	ICC	ICDR	LCIA	SCC	SIAC	UNCITRAL
		January 1, 2019 may be published no less than two years after their notification to the parties unless the parties opt out. (ICC Note to Parties and Arbitral Tribunals, ¶¶ 56-64)					
<b>EMERGENCY ARBITRATOR / INTERIM RELIEF</b>							
<b>EMERGENCY ARBITRATOR</b>	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 7.1, 7.2, 7.5)	Available before the constitution of the tribunal, if arbitration agreement entered into after October 1, 2014, and parties have not opted out of emergency	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

Appendix 3 – Comparative Table of Major Rules

	HKIAC	ICC	ICDR	LCIA	SCC	SIAC	UNCITRAL
				arbitration provisions. (Article 9B)			
<b>INTERIM RELIEF</b>	At the request of either party, the tribunal may order interim measures it deems appropriate. (Article 23.2)	At the request of either party, the tribunal may order interim measures it deems appropriate. (Article 28)	At the request of either party, the tribunal may order interim measures it deems necessary. (Articles 27.1, 27.2)	At the request of either party, the tribunal may order interim measures it deems appropriate. (Article 25.1)	At the request of either party, the tribunal may order interim measures it deems appropriate. (Articles 37.1, 37.3)	At the request of either party, the tribunal may order interim measures it deems necessary or appropriate. (Article 30.1)	At the request of either party, the tribunal may order interim measures it deems necessary or appropriate. (Article 26)
<b>AWARD</b>							
<b>TIME LIMIT FOR FINAL AWARD (subject to extensions)</b>	No fixed time limit.	6 months from the date of terms of reference. (Article 31.1)	60 days from end of final hearing. (Article 33.1)	No fixed time limit.	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)	No fixed time limit.
<b>PUBLICATION OF REDACTED AWARDS PERMITTED?</b>	Yes, unless one of the parties objects. (Article 45.5)	All ICC awards made after January 1, 2019 may be published, no less than two years after	Yes, unless parties agree otherwise. (Articles 40.3, 40.4)	No, unless the prior written consent of all parties and the tribunal is obtained.	Silent.	No, unless the prior written consent of all parties and the tribunal is obtained.	N/A

Appendix 3 – Comparative Table of Major Rules

	HK/AC	ICC	ICDR	LCIA	SCC	SIAC	UNCITRAL
		their notification to the parties, unless the parties opt out. (ICC Note to Parties and Arbitral Tribunals, ¶¶ 56-64)		(Article 30.3)		(Article 32.12)	
<b>SCRUTINY OF THE AWARD?</b>	No.	Yes, by ICC Court. (Article 34)	No.	No.	No.	Yes, by Registrar. (Article 32.3)	No.
<b>CAN AWARD BE CORRECTED OR INTERPRETED?</b>	Yes, within 30 days of receipt of the award, either by application of a party or on the initiative of the Tribunal. (Articles 38.1–38.3)	Yes, within 30 days of receipt of the award, either by application of a party or on the initiative of the Tribunal. (Articles 36.1, 36.2)	Yes, within 30 days of receipt of the award, either by application of a party or on the initiative of the Tribunal. (Articles 36.1, 36.3)	Yes, within 30 days of receipt of the award, either by application of a party or on the initiative of the Tribunal. (Articles 27.1, 27.2)	Yes, within 30 days of receipt of the award, either by application of a party or on the initiative of the Tribunal. (Articles 47.1, 47.2)	Yes, within 30 days of receipt of the award, either by application of a party or on the initiative of the Tribunal. (Articles 33.1, 33.2)	Yes, within 30 days of receipt of the award, either by application of a party or on the initiative of the Tribunal. (Articles 38)

Appendix 3 – Comparative Table of Major Rules

	HKIAC	ICC	ICDR	LCIA	SCC	SIAC	UNCITRAL
<b>COSTS &amp; FEES</b>							
<b>ADMINISTRATION FEE</b>	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
<b>FEES OF THE TRIBUNAL</b>	Hourly rates <i>or</i> 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 38)	Hourly rates, generally not exceeding £500. (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)
<b>RESPONSIBILITY FOR LEGAL COSTS</b>	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 37)	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**

##### **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.

##### **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)).

### **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 (Articles 6 and 7). 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 (“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 April 1, 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 of this Handbook, the law of the seat may also contain implied duties of confidentiality. These duties may, however, be subject to exceptions where state interests are involved. Investment treaties may also contain their own transparency provisions.

### **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).

### **Third-Party Funding**

A growing number of institutional rules expressly address third-party funding arrangements. At present, the HKIAC Rules, ICC Rules, ICDR Rules and SIAC Investment Arbitration Rules include such provisions. 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 44.1). 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). The ICC Rules require the parties promptly to inform the Secretariat, the tribunal, and the other parties of the existence and identity of any non-party funder, in order to assist prospective arbitrators and eventual arbitrators to comply with their ethical and disclosure obligations (ICC Rules, Article 11.7). The ICDR Rules permit the tribunal, on the application of a party or on its own initiative, to order the parties to disclose the identity of third-party funders (Article 14.7). The SIAC Investment Arbitration Rules state that the arbitral tribunal may order disclosure of third-party funding arrangements (Rule 24), and the tribunal may account for such arrangements when apportioning the costs of the arbitration (Rules 33.1 and 35). The other major rules are silent on the topic.

The 2021 proposed revision to the ICSID Rules, if adopted in its current form, will require parties to disclose third-party funding, will authorize arbitral tribunals to provide further information about the third-party funding arrangement and will require arbitrators to consider the existence of third-party funding in connection with an application for security for costs.

## 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.

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. Following extensive consultations, ICSID published five working papers, most recently in June 2021, which introduce proposed amendments based on feedback from states and other

stakeholders. Member states have been invited to send any final written comments on the Fifth Working Paper to the ICSID Secretariat by the end of August 2021, but the ICSID Secretariat is hopeful that a developing consensus will allow for a vote on the amended rules by the end of 2021.

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 (including a 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 2020, one or both parties commenced annulment proceedings in 88 cases, compared to 225 total awards (see *The ICSID Caseload – Statistics, Issue 2021(1)*). Of these proceedings, seven granted requests for annulment in full or in part, 56 rejected such requests, and 25 were discontinued. Even if the incidence of actual annulment remains infrequent, annulment proceedings 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 some aspects of award enforcement. For example, some courts in the United States have interpreted consent to arbitration under the ICSID Convention to imply waiver of sovereign immunity with respect to jurisdiction, but not with respect to execution of the award (*see Continental Casualty Co. v. Argentine Republic*, 893 F. Supp. 2d 747, 752 (E.D. Va. 2012)). The following language is recommended if the parties wish to adopt a broad waiver of any sovereign immunity rights one or more parties may have:

**“[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.”**

However, even with a waiver in place, in the U.S. the Foreign Sovereign Immunities Act imposes procedural requirements that will likely delay U.S. court entry and execution of a judgment against a foreign state (see 28 U.S.C. § 1608). Similar procedures may apply in other jurisdictions.

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** (“Additional Facility 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 Additional Facility 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 (Additional Facility 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.

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](http://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” (1) “with the consent of all parties” or (2) 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 of this Appendix, 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](http://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](http://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](http://www.sccinstitute.com).

### **Vienna International Arbitration Centre**

#### **“the Rules of Investment Arbitration (Vienna Investment Arbitration Rules) of the Vienna International Arbitral Centre (VIAC) of the Austrian Federal Economic Chamber”**

In 2021, VIAC issued new Rules of Investment Arbitration, also known as the Vienna Investment Arbitration Rules. Although the rules are designed for disputes between investors and state entities,

there are no requirements regarding the identity of the parties and the nature of the dispute; rather, the rules apply whenever the parties agree they should apply.

The Vienna Investment Arbitration Rules allow for submissions by non-disputing state parties on a factual or legal issue with leave of the arbitral tribunal. If the arbitration arises under a treaty, the rules give the non-disputing treaty party a right to make submissions on the interpretation of the treaty. The rules also allow the tribunal to invite the non-disputing treaty party to make such submissions.

The rules provide that hearings are closed to the public and require the arbitrators to keep confidential any information that they receive in the course of the arbitration. The rules also allow VIAC to publish anonymized extracts from the award unless the parties otherwise agree. VIAC also may publish general information about the arbitration, limited to the nationality of the parties, the identity and nationality of the arbitrators, the date of commencement of the arbitration, the instrument under which the arbitration has been commenced and whether the proceedings are pending or have been terminated.

Because the Vienna Investment Arbitration Rules were issued in 2021, there is at present little experience with their application.

The text of the Vienna Investment Arbitration Rules can be found at [viac.eu](http://viac.eu).



A technical drawing of a mechanical part, possibly a turbine or engine component, rendered in black lines on a light blue background. The drawing shows a curved, cylindrical structure with various internal and external features, including a rectangular section at the top with two small circles and a larger circular feature on the right. The drawing is overlaid on a grid of dashed lines.

**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.

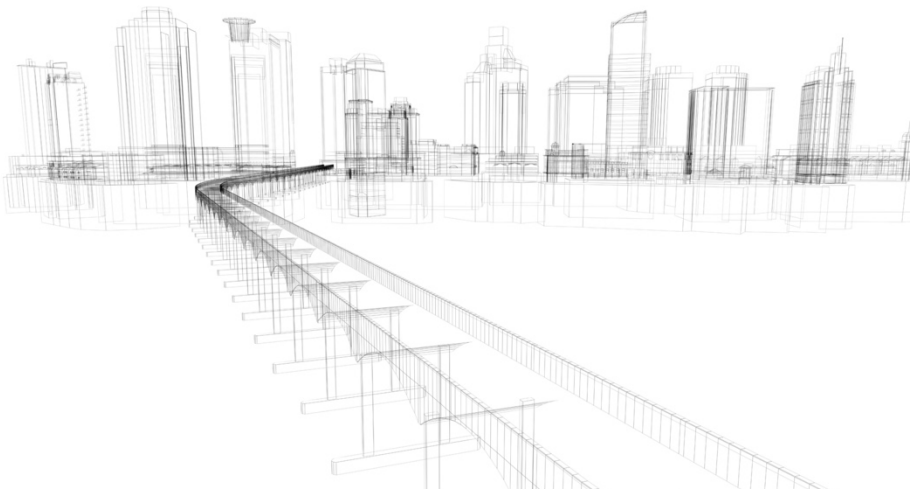
## The Hearing

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.







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# Protocol to Promote Cybersecurity in International Arbitration

# Debevoise Protocol to Promote Cybersecurity in International Arbitration

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.

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**Debevoise's Senior  
International Dispute  
Resolution Team**





## Debevoise's Senior International Dispute Resolution Team



### Catherine Amirfar

Catherine Amirfar is Co-Chair of the International Dispute Resolution Group, Co-Chair of the 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. Ms. Amirfar is the Immediate Past President of the American Society of International Law (ASIL) and is a member of the American Law Institute, the Council on Foreign Relations, the State Department's Advisory Council on International Law and the Court of Arbitration of the Singapore International Arbitration Centre. She is a member of the International Council for Commercial Arbitration (ICCA) and also serves as Co-Chair of the ICCA- ASIL Task Force on Damages in International Arbitration. From 2014-2016, she served as the Counselor on International Law in the U.S. State Department in the Obama administration.

Ms. Amirfar was named the 2021 International Arbitration Litigator of the year by *Benchmark Litigation*.

She is admitted to practice in New York.



### Conway Blake

Conway Blake is a Partner in the International Dispute Resolution Group. Dr. Blake represents corporate clients, sovereigns and international organizations on a range of

contentious matters, particularly in investor-state arbitration, public international law disputes and commercial arbitrations governed by various substantive laws and conducted under the major arbitral rules. His court work focuses on disputes raising complex issues of private international law, applications related to arbitral proceedings, and cases addressing issues of corporate social responsibility. He has acted on cases at all levels of the court system, including before the UK Supreme Court, the Judicial Committee of the Privy Council and the courts in Commonwealth jurisdictions. Dr. Blake is actively involved in the public international law and arbitration communities (including the YIAG, YPILG and YICCA).

## Debevoise's Senior International Dispute Resolution Team (cont'd)

Dr. Blake is admitted as a solicitor advocate in England & Wales. He is also called to the bar of the Eastern Caribbean Supreme Court.



### Tony Dymond

Tony Dymond is a partner in the International Dispute Resolution Group and Co-Chair of the firm's Asia Arbitration practice. His practice focuses on complex, multijurisdictional 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 Co-Chair of 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 pharmaceuticals, 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 past Vice President of the ICC International Court of Arbitration and is a former Chair of the International Bar Association Arbitration Committee. Mr. Friedman was twice named International Arbitration Attorney of the Year by *Benchmark Litigation*.

Mr. Friedman is admitted to practice in New York and Massachusetts.



### Lord Goldsmith KC

Lord (Peter) Goldsmith KC, PC is the firm's Chair of European and Asian Litigation, Co-Chair of the firm's Public International Law Group and its Caribbean Law Practice, and the Co-Managing Partner of the London Office. 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. He became Queen's Counsel in 1987.

Lord Goldsmith is fluent in French. 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.



### Ina C. Popova

Ina C. Popova is a partner in the International Dispute Resolution Group. Dual-qualified in civil and common law, her practice focuses on international arbitration, international litigation and public international law. Ms. Popova leads matters in English, Spanish and French and regularly handles complex disputes arising out of Latin America and Africa. She sits as arbitrator and serves as counsel in a broad range of international matters and has particular experience in the energy, mining, and technology, media and telecommunications sectors. Ms. Popova also holds a variety of leadership positions, including as a Member of the ICC International Court of Arbitration, a member of the Court of the Casablanca International Mediation and Arbitration Center (CIMAC), and Chair of the Corporate Counsel Task Force of the Silicon Valley Arbitration & Mediation Center (SVAMC).

Ms. Popova speaks Spanish, French, Italian, Portuguese and Bulgarian and 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 a Vice Chair of the IBA Arbitration Committee, a member of the Board of the Vienna International Arbitration Centre (VIAC) and a member of the Vance Center Committee, the governing body of the Cyrus R. Vance Center for International Justice. He is a former Vice Chair of the Institute for Transnational Arbitration (ITA).

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, Co-Chair of the Public International Law Group and Co-Chair of Debevoise's Caribbean practice. Ms. Reid focuses on international arbitration, public international law and complex commercial litigation matters in proceedings in U.S. courts and a wide range of international fora, including the International Court of Justice and international arbitration tribunals. A Jamaican national, she regularly advises and represents states, multinational corporations, international organizations and non-governmental 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 and sits as an arbitrator in commercial cases. She currently serves as a Board Member of the London Court of International Arbitration (LCIA), as a member of the ICC International Court of Arbitration, and as President of the LCIA North America User's Council. She is a member of the ICC Commission on Arbitration & ADR and serves on multiple committees of the American Society of International Law (ASIL).

## Debevoise's Senior International Dispute Resolution Team (cont'd)

Ms. Reid is proficient in French. She 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. She currently serves on the Board of the Business and Human Rights Lawyers Association, a member of the Executive Board of the International Centre for Dispute Resolution's Young & International Group, and the Editorial Board of the European Investment Law and Arbitration Review, among other leadership positions.

Ms. Rowe is fluent in French and Spanish and proficient in Portuguese. She is admitted to practice in New York and England & Wales and is a solicitor advocate with full rights of audience before all civil courts of England & Wales.



### Laura Sinisterra

Laura Sinisterra is a partner in the firm's International Dispute Resolution Group, and her practice focuses on international arbitration and international litigation. A Colombian national, Ms. Sinisterra advises and represents private clients and States in a broad range of disputes under the rules of the major arbitral institutions, and frequently leads bilingual arbitrations in English and Spanish. She has particular experience in the mining and energy sectors, in which she regularly handles complex disputes arising out of Latin America. Ms. Sinisterra currently serves on the board of the Asociación Latinoamericana de Arbitraje (ALARB), as Vice Chair of the International Arbitration Committee of the ABA's International Law Section, as Vice-Chair of ITA's Communications Committee, and previously was the inaugural Chair of the ITA's Young Mentorship Program. She has been

## Debevoise's Senior International Dispute Resolution Team (cont'd)

recognized as a Rising Star and Future Leader by *The Legal 500 US*, *The Legal 500 Latin America* and *Who's Who Legal*.

Ms. Sinisterra is a native Spanish speaker and fluent in English, with a conversational knowledge of French. She is admitted to the Bars of New York and Colombia.



### Jeff Sullivan

Jeff Sullivan KC is a partner in the International Disputes Resolution Group and Co-Chair of the firm's International Arbitration in Europe practice. His practice focusses on international arbitration and public international law. He is one of the market's leading and most respected advocates, representing clients in commercial and investor-state arbitrations before all the major arbitral institutions. He also regularly sits as an arbitrator, and advises clients in all aspects of public international law. Mr. Sullivan has advised clients from a range of sectors and regions, but has a particularly deep practice focussed on disputes in the energy, extractive industries and infrastructure sectors. *Legal 500 UK* names him in its Hall of Fame for International Arbitration, and *Chambers UK* has described him as "a fantastic lawyer [who is] calm, smart and strategic. His ability to understand what the client needs is terrific."

Mr. Sullivan is admitted to practice in England & Wales, the District of Columbia, and Florida.



### William H. Taft V

William H. Taft V is a partner in the Litigation Department. His practice focuses on international commercial disputes and corporate governance litigation. Mr. Taft regularly acts for clients in cross-border litigation in U.S. courts involving issues such as jurisdiction, foreign discovery and the enforcement of arbitration agreements and awards. He also advises clients in arbitrations and litigations arising from joint venture and partnership agreements, including investments in private equity funds, commercial real estate and infrastructure projects. He is a member of the American Society of International Law and currently serves on the Board of Directors of the International Institute for Conflict Prevention & Resolution (CPR) and the Program Committee of the Federal Bar Council.

Mr. Taft is admitted to practice in New York.

## Debevoise's Senior International Dispute Resolution Team (cont'd)



### Christopher K. Tahbaz

Christopher Tahbaz serves as Debevoise & Plimpton's General Counsel. Mr. Tahbaz is also a member of the firm's International Dispute Resolution Group. 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 previously served 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 are geared towards advising clients in the most high-stakes, complex and valuable disputes. He regularly advises clients on investment protection and investment dispute settlements in high-risk jurisdictions; tax-related disputes; fiscal and legislative stabilisation rights; shareholder, joint venture, distribution, post-M&A and general contractual 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 frequently sits as an arbitrator. He is a member of the IBA Arb40 Committee and regularly speaks at conferences on arbitration-related topics.

Mr. Taylor is fluent in French and Spanish.





### Alexandre Bisch

Alexandre Bisch is an international counsel in the International Dispute Resolution Group. Mr. Bisch has experience in complex domestic and international commercial litigations, including enforcement of foreign judgements and arbitral awards. He frequently argues cases before civil and commercial courts in the Paris area. Prior to rejoining the firm, Mr. Bisch served for three years as a senior legal officer for the AMF enforcement division, where he worked on cases of financial misconduct.

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

## Debevoise's Senior International Dispute Resolution Team



### Gavin Chesney

Gavin Chesney is an international counsel in the International Dispute Resolution Group. His practice focuses on international arbitration and litigation. He has represented major corporate clients and multinational companies from the energy, mining, defence, telecommunications, manufacturing and construction sectors in a range of complex, high-value disputes. 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 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.



### Aymeric Dumoulin

Aymeric D. Dumoulin is an international counsel in the firm's Litigation Department and International Dispute Resolution Group, based in the Paris office. His practice focuses on international arbitration, white collar criminal defense and internal investigations. Mr. Dumoulin has particular experience in the financial industry. He is dual-qualified in civil law and common law and holds degrees in French law and an advanced degree in Financial Engineering.

Mr. Dumoulin is admitted to the New York Bar.

## Debevoise's Senior International Dispute Resolution Team



### Robert Hoose

Robert Hoose is an international counsel in the International Dispute Resolution Group, resident in the firm's London office. His practice focuses on international commercial arbitration and commercial litigation, particularly in the construction and engineering sectors. Mr. Hoose has experience of representing companies in litigation in the UK and related jurisdictions; of domestic and international arbitration before major institutions including the ICC, LCIA, and SIAC; as well as ad hoc and informal proceedings such as domestic UK construction adjudication, pre-arbitral processes and mediation. Mr. Hoose is an Exhibitioner of the Middle Temple, London, and qualified as a barrister in 2010 after undertaking training with a London barristers' chambers specializing in construction, engineering, insurance and shipbuilding.

Mr. Hoose is admitted to practice in England & Wales.



### Floriane Lavaud

Floriane Lavaud is a counsel in the International Dispute Resolution Group in New York and Paris. Her practice focuses on international arbitration and litigation and public international law, with a particular emphasis on matters involving the Middle East. Ms. Lavaud represents multinational corporations and sovereign states in domestic courts and before arbitration tribunals and international courts, including before the International Court of Justice. Prior to joining Debevoise, she worked in the oil and gas industry. She is the Co-Chair of the International Arbitration Committee of the American Branch of the International Law Association (ABILA) and regularly speaks and publishes on international law- and arbitration-related issues.

Ms. Lavaud is a native French speaker and is proficient in Spanish and has basic knowledge of Dutch. She is admitted to the New York and Paris bars, in addition to being a solicitor in England & Wales.

## Debevoise's Senior International Dispute Resolution Team (cont'd)



### Aimee-Jane Lee

Aimee-Jane Lee is an international counsel in the International Dispute Resolution Group. Her practice focuses on international commercial and treaty arbitration, and public international law. Ms. Lee has advised private clients, corporate entities and states across multiple jurisdictions (notably in Asia, Africa and Eastern European) and a number of industries, including advertising, energy, pharmaceuticals and private equity. She also advises on the international protection of investments (notably under bilateral investment treaties, the Energy Charter Treaty and investor-state contracts).

In addition to her legal experience, Ms. Lee has passed all three levels of the Chartered Financial Analyst (CFA) exams. She is therefore particularly proficient in assisting clients with the quantum-related aspects of their disputes.

Ms. Lee is admitted to practice in England & Wales and is a solicitor advocate with full rights of audience before all civil courts of 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.

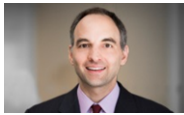
## Debevoise's Senior International Dispute Resolution Team



### Friedrich Popp

Dr. Friedrich Popp is an international counsel in the Frankfurt office and a member of the firm's Litigation Department. His practice focuses on arbitration, litigation, internal investigations, corporate law, data protection and anti-money laundering. In addition, he is experienced in Mergers & Acquisitions, private equity, banking and capital markets. Dr. Popp is a member of the Bar Associations of Vienna, Frankfurt am Main and New York.

His native language is German and he is fluent in English.



### Carl Riehl

Carl Riehl is a counsel in the firm's Litigation Department and its Commercial Litigation, International Dispute Resolution and Intellectual Property Practice Groups. He has litigation experience in the areas of international arbitration, contract and other commercial disputes, consumer fraud, securities, real estate, patent, trademark, copyright, white collar crime, bankruptcy, insurance, and trusts and estates. He also provides assistance acquiring and licensing intellectual property to clients in a wide variety of industries, including e-commerce clients.

Mr. Riehl is admitted to practice in New York.



### Cameron Sim

Cameron Sim is an international counsel in the International Dispute Resolution Group. He acts as counsel in international arbitration proceedings worldwide, with a focus on Asia-related disputes. Mr. Sim has represented corporates and sovereigns across a range of industries, including banking and finance, energy, insurance, pharmaceuticals, private equity, retail, and telecommunications. He has acted in arbitrations under all major rules, frequently involving multiple parallel proceedings in courts. Prior to joining Debevoise, Mr. Sim clerked for the President of the Supreme Court of the United Kingdom and in the Judicial Committee of the Privy Council. He regularly speaks and writes on arbitration-related issues, and is the author of the treatise *Emergency Arbitration* published by Oxford University Press.

Mr. Sim is admitted in Hong Kong, New York, England & Wales, and Australia.



### Ashika Singh

Ashika Singh is a counsel and a member of the International Dispute Resolution Group. Her practice focuses on public international law, particularly on advising and representing sovereign clients and international organizations on questions of international human rights, international humanitarian law and international criminal law. From 2011 to 2015, Ms. Singh was an Attorney-Adviser in the Office of the Legal Adviser at the U.S. Department of State, where she advised the Department on various legal issues relating to military operations, counterterrorism, and diplomatic security. Ms. Singh received Superior and Meritorious Honor Awards from the State Department for her work on Guantanamo detainee issues and human rights in armed conflict. She regularly speaks and writes on public international law, particularly international human rights law and international humanitarian law. Ms. Singh is a member of the American Society of International Law (ASIL), where she serves on the Program Committee, and she also serves as the Co-Chair of the International Humanitarian Law Committee of the American Branch of the International Law Association.

Ms. Singh speaks English and French. She is admitted to practice in New York.

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