

Standard Arbitration Clauses for the AAA, ICDR and ICC

A selection of standard recommended arbitration clauses of the American Arbitration Association (AAA), International Centre for Dispute Resolution (ICDR) and International Chamber of Commerce (ICC). These Standard Clauses have integrated notes with important explanations and drafting tips. The complete, continuously maintained version of these Standard Clauses, which includes a United Nations Commission on International Trade Law (UNCITRAL) standard arbitration clause is available on practicallaw.com.

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DRAFTING NOTE

GENERAL CONSIDERATIONS IN DRAFTING AN ARBITRATION AGREEMENT

ESSENTIAL ELEMENTS

The arbitration agreement should:

- Define precisely the disputes subject to arbitration.
- State that arbitration is mandatory and final.
- Indicate the number of arbitrators and the method for their appointment.
- Designate the place of arbitration as well as the language(s) of the arbitration.

MEDIATION AND/OR NEGOTIATION BEFORE ARBITRATION

The parties may consider mandatory negotiation between business executives, for example, or mediation, while providing that either party can begin arbitration from a certain date.

NUMBER OF ARBITRATORS

A three-member tribunal is generally advisable for multi-million dollar disputes. In the case of smaller disputes, a one-member tribunal may be preferable due to its lower cost and greater efficiency. The following language provides for the appointment of one arbitrator:

“There shall be one arbitrator agreed to by the parties within twenty (20) days of receipt by respondent of the request for arbitration or in default thereof appointed by the [ARBITRAL INSTITUTION] in accordance with its [INSTITUTION’S RULES TO APPLY].”

Or, for three arbitrators in a case involving two parties:

“There shall be three arbitrators. The parties agree that one arbitrator shall be appointed by each party, and the third presiding arbitrator shall be appointed by agreement of the two party-appointed arbitrators within

fourteen (14) days of the appointment of the second arbitrator or in default of such agreement, by the [ARBITRAL INSTITUTION].”

Alternatively, if there are more than two parties to the agreement, the clause should read:

“There shall be three arbitrators agreed to by the parties within thirty (30) days of receipt by respondent(s) of the request for arbitration, or in default of such agreement, by the [ARBITRAL INSTITUTION].”

SEAT OF THE ARBITRATION

The parties should choose a neutral or otherwise suitable venue that recognizes arbitration as a valid dispute resolution mechanism, such as jurisdictions that follow the UNCITRAL Model Law on International Commercial Arbitration.

The law of the seat establishes the nationality of the award, and therefore the parties should choose a country that is a signatory to the New York Convention. Include the following language to specify the seat:

“The seat or place of arbitration shall be [CITY, COUNTRY].”

LANGUAGE

The arbitration agreement should specify the language of the arbitration:

“The arbitration shall be held, and the award shall be rendered, in the [LANGUAGE OF ARBITRATION] language.”

PARTIES TO THE ARBITRATION

If there are more than two parties to the agreement, the arbitration clause should address the method of appointment and possibly joinder and/or intervention, where appropriate.

CONSOLIDATION

If the agreement is linked to other agreements between the same, related or different parties, the parties should consider providing for a mechanism to consolidate arbitrations arising under different agreements.

SOVEREIGN IMMUNITY

If a sovereign entity is party to the agreement, consider including a waiver of sovereign immunity in the arbitration agreement.

EXPEDITED ARBITRATION

Under certain circumstances, the parties may want a fast-track arbitration. This can be achieved by providing for specific deadlines for filings and tribunal rulings, subject to discretionary extensions to preserve the jurisdiction of the tribunal. An expedited process is generally not recommended for complex arbitrations.

INTERIM RELIEF

To the extent permitted by the arbitration law in the place of arbitration, the parties may consider providing for the jurisdiction of the arbitrators to issue preliminary injunctions while preserving their ability to seek interim relief from the courts.

REMEDIES

The parties may consider specifying the powers of the tribunal to award compensatory damages (excluding punitive damages) and permanent injunctive relief.

- >> For more information on drafting an arbitration agreement calling for arbitration in the US, search [Drafting Arbitration Agreements Calling for Arbitration in the US](#) on our website.
- >> For more information on the US arbitral institutions and their rules, search [Introduction to US Arbitral Institutions and Their Rules](#) on our website.

- >> For more information on the FAA, search [Understanding the Federal Arbitration Act](#) on our website.

WAIVER OF APPEAL

Depending on the place of arbitration, the parties may consider waiving certain grounds for appeal or judicial review of the arbitration award.

CONSIDERATIONS WHEN ARBITRATING IN THE US

DIFFERENCES BETWEEN ARBITRATIONS IN THE US AND ELSEWHERE

Parties should be aware of several differences between an arbitration conducted in the US and arbitrations conducted in other well-known international arbitration venues.

CONFIDENTIALITY

Arbitration is often assumed to be automatically confidential. The Federal Arbitration Act (FAA) and most state arbitration statutes, however, do not address confidentiality. Further, although the relevant arbitration rules, including the AAA, ICDR and ICC rules, may generally impose confidentiality obligations on the arbitrators, they do not do so for the parties themselves. Therefore, parties who want to ensure that the arbitration is confidential should expressly provide for this in their arbitration clauses, bearing in mind that information concerning the arbitration may ultimately be disclosable by law or in litigation related to the arbitration.

DISCOVERY

Depending on the circumstances, a US-based commercial arbitration may entail more extensive discovery than one based elsewhere. Arbitrations between US parties often involve depositions, for example. In fact, the AAA's Procedures for Large, Complex Commercial Disputes expressly authorize the arbitrator to order depositions (*L-4, Procedures for Large, Complex Commercial Disputes*). Depositions are the exception in international arbitrations.

DAMAGES

Depending on the applicable law, arbitrators in US-venued arbitrations governed by the FAA may, under certain circumstances, award punitive damages unless the parties agree otherwise.

JUDICIAL APPEAL

In light of the US Supreme Court's decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.* (128 S.Ct. 1396 (2008)), parties may not contract for enhanced judicial review beyond the grounds set out in Sections 10 and 11 of the FAA. It is also unlikely that parties may contract out of the limited grounds for review that the FAA provides.

ENFORCEABILITY

The following language is recommended for arbitrations venued in the US:

“The award shall be final and binding on the parties and may be entered and enforced in any court having jurisdiction.”

Some US courts have held that this language is required by Section 9 of the FAA (see, for example, *Phoenix Aktiengesellschaft v. Ecoplas, Inc.*, 391 F.3d 433 (2d Cir. 2004)).

AAA: COMMERCIAL ARBITRATION RULES FOR FUTURE DISPUTES

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

DRAFTING NOTE

AAA: COMMERCIAL ARBITRATION RULES FOR FUTURE DISPUTES

COMMERCIAL RULES

The AAA Commercial Arbitration Rules and Mediation Procedures (AAA Commercial Arbitration Rules) are commonly used for domestic arbitrations venued in the US between US parties. Unless the parties agree otherwise, the AAA Commercial Arbitration Rules in effect when the arbitration requirements are met for arbitration to be commenced or a demand for arbitration is filed with the AAA govern the arbitration (*R-1(a), Commercial Arbitration Rules*).

ARBITRATORS

The AAA appoints the arbitrator(s) if the parties have not otherwise provided for appointment or cannot reach agreement (*R-11–R-13, Commercial Arbitration Rules*).

SEAT

The AAA also may choose the seat of the arbitration if the parties cannot reach agreement (*R-10, Commercial Arbitration Rules*).

COMPLEX PROCEDURES

When a party's claim or counterclaim is at least \$500,000 (not including any claimed interest, arbitration fees or costs), the additional Procedures for Large, Complex Commercial Disputes apply unless the parties agree otherwise. These rules require the parties to address certain procedural aspects of the arbitration at the preliminary conference with the arbitrator, including the scope of discovery and whether depositions may be taken (*L-3, Procedures for Large, Complex Commercial Cases*).

INTERNATIONAL ARBITRATION

When the parties have designated the AAA Commercial Arbitration Rules but the arbitration is deemed an international proceeding for reasons including the nationality of the parties or their parent, the International Commercial Arbitration Supplementary Procedures also apply. Among other things, these procedures:

- Specify how an arbitrator may be challenged for alleged partiality or lack of independence.
- Require the default language(s) of the arbitration to be that of the documents containing the arbitration agreement, subject to the authority of the tribunal to determine otherwise.
- Require the tribunal to state its reason for its arbitration award, unless the parties have agreed otherwise.

CLASS ARBITRATION

As of 2004, the AAA rules have included procedures for class actions. In *Stolt-Nielsen S.A. v. Animalfeeds International Corp.* (U.S. Apr. 27, 2010), however, the US Supreme Court issued a decision stressing the importance of determining the existence of the parties' consent to class arbitrations and rejecting implied consent through silence. Nevertheless, the impact of the *Stolt-Nielsen* decision on an arbitration clause post-dating the enactment of the AAA class arbitration rules and incorporating AAA rules by reference and without qualification remains to be decided by the courts. Parties who do not want class action arbitration therefore should avoid arbitration clauses that make unqualified reference to AAA rules.

AAA: COMMERCIAL ARBITRATION RULES FOR EXISTING DISPUTES

We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules the following controversy: [BRIEFLY DESCRIBE CONTROVERSY]. We further agree that the above controversy be submitted to [one/three] arbitrator(s). We further agree that we will faithfully observe this agreement and the rules, that we will abide by and perform any award rendered by the arbitrator(s), and that a judgment of any court having jurisdiction may be entered on the award.

DRAFTING NOTE

AAA: COMMERCIAL ARBITRATION RULES FOR EXISTING DISPUTES

This clause may be used where the underlying contract does not provide for arbitration, but the parties subsequently agree to submit an existing dispute under the contract to arbitration. The considerations discussed above in *Drafting Note, AAA: Commercial Arbitration Rules for Future Disputes* apply, but may be assessed differently because the parties may have a better sense of their respective arbitration needs after a dispute arises.

AAA: OPTIONAL RULES FOR EMERGENCY MEASURES OF PROTECTION FOR INTERIM RELIEF

The parties also agree that the AAA Optional Rules for Emergency Measures of Protection shall apply to the proceedings.

DRAFTING NOTE

AAA: OPTIONAL RULES FOR EMERGENCY MEASURES OF PROTECTION FOR INTERIM RELIEF

The AAA Commercial Arbitration Rules empower the tribunal to issue interim relief (*Rule R-34, Commercial Arbitration Rules*). However, if the parties wish to have access to arbitral (as opposed to judicial) interim relief pending the constitution of the arbitral tribunal, they should reference in their agreement the AAA Optional Rules for Emergency Measures of Protection, providing for the appointment of a single emergency arbitrator who may grant interim relief.

ICDR: INTERNATIONAL ARBITRATION RULES

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules.

OR

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the American Arbitration Association in accordance with its International Arbitration Rules.

[The number of arbitrators shall be [one/three].] [The place of arbitration shall be [CITY, COUNTRY].] [The arbitration shall be held, and the award shall be rendered, in [LANGUAGE(S)].]

DRAFTING NOTE

ICDR: INTERNATIONAL ARBITRATION RULES

APPLICATION OF INTERNATIONAL ARBITRATION RULES

The ICDR International Arbitration Rules apply where the parties have provided for arbitration of an international dispute by the AAA or the ICDR but have not specified whether the AAA Commercial Arbitration Rules or the ICDR International Arbitration Rules apply. The arbitration is subject to the ICDR International Arbitration Rules in effect at the start of the arbitration (*Article 1(a), International Arbitration Rules*).

ARBITRATORS

The ICDR will appoint the arbitrator(s) where the parties have not provided otherwise or where the parties cannot reach agreement (*Article 6(3), International Arbitration Rules*).

MULTI-PARTY ARBITRATION

Where there are two or more claimants and two or more respondents, the ICDR appoints all of the arbitrators unless the parties agree otherwise (*Article 6(5), International Arbitration Rules*).

SEAT

The ICDR selects the seat if the parties have not provided otherwise or cannot reach agreement (*Article 13(1), International Arbitration Rules*).

>> For more information on ICDR arbitrations, search [ICDR Arbitration: A Step-by-Step Guide](#) on our website.

ICC: RULES OF ARBITRATION

All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

DRAFTING NOTE

>> For more information on ICC arbitrations, search [ICC Arbitration: A Step-by-Step Guide](#) on our website.

ICC: RULES OF ARBITRATION

APPLICATION OF ICC RULES OF ARBITRATION

Subject to the parties' agreement providing otherwise, the ICC Rules of Arbitration in effect at the start of the arbitration apply by default (*Article 6(1), ICC Rules of Arbitration*).

ARBITRATORS

Where the parties have not agreed on the number of arbitrators, the ICC Court appoints one or three arbitrators, depending on the nature of the dispute. Where the parties agree to have a sole arbitrator, but fail to make the nomination within the prescribed period of time, the ICC Court appoints the sole arbitrator. Where the dispute is to be decided by three arbitrators, each party must nominate an arbitrator in the Request and the Answer, respectively. If they fail to do so, the ICC Court makes the appointment.

The chairperson of the tribunal is appointed by the ICC Court, unless the parties have agreed on another procedure. If that procedure does not result in a nomination within the time limit fixed by the parties or the ICC Court, the ICC Court makes the appointment (*Article 8, ICC Rules of Arbitration*).

SEAT

The ICC Court chooses the seat absent party agreement (*Article 14(1), ICC Rules of Arbitration*).

TERMS OF REFERENCE

An ICC tribunal, as soon as it has received the file from the ICC Secretariat, must draw up the Terms of Reference, which include a summary of the parties' claims and a list of issues to be determined in the arbitration, unless the tribunal considers this to be inappropriate (*Article 18(1), ICC Rules of Arbitration*). The ICC Court may approve the Terms of Reference despite the non-participation of, or objection by, one of the parties (*Article 18(3), ICC Rules of Arbitration*).

CONSOLIDATION

When a party submits a request for arbitration related to pending ICC proceedings between the same parties, the ICC Court may, on request of a party, include the new claims into the pending proceedings provided that the ICC Court has not already signed and approved the Terms of Reference (*Article 4(6), ICC Rules of Arbitration*). After the execution or approval of the Terms of Reference, the tribunal's permission is required to include the claims in the pending proceedings (*Article 19, ICC Rules of Arbitration*).

SCRUTINY OF AWARDS

The tribunal, before signing any award, must submit it in draft form to the ICC Court, which may make modifications of form and also draw the tribunal's attention to points of substance, including the requirements of mandatory law in the place of arbitration. The ICC Court must approve any award before it is issued (*Article 27, ICC Rules of Arbitration*).

ICC: ARBITRATION IN THE PEOPLE'S REPUBLIC OF CHINA (PRC)

All disputes arising out of or in connection with the present contract shall be submitted to the International Court of Arbitration of the International Chamber of Commerce and shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

DRAFTING NOTE

ICC: ARBITRATION IN THE PRC

THE ICC MUST BE CLEARLY DESIGNATED AS THE ARBITRATION INSTITUTION

The key difference between this clause and the model ICC clause (see above *ICC: Rules of Arbitration*) is that this clause includes the language “shall be submitted to the International Court of Arbitration of the International Chamber of Commerce.” The ICC developed this model clause so that PRC courts would not declare an ICC clause null and void for lack of a sufficiently explicit reference to the arbitration institution. For any arbitration clause where the parties wish to arbitrate in the PRC, explicit reference should always be made to the arbitral institution itself, and not only to the arbitration rules of the institution.

FOREIGN ARBITRAL INSTITUTIONS IN THE PRC

It remains an open question whether ICC awards issued in the PRC may be recognized as valid and enforceable there. PRC arbitration law requires arbitral institutions to be registered with local judicial and administrative departments. The ICC Court is not registered in the PRC.

HONG KONG AS SEAT

Due to the ongoing uncertainty of the status of ICC awards issued in the PRC, parties may want to make Hong Kong the venue for their international ICC arbitrations.

HONG KONG-MAINLAND CHINA ARRANGEMENT

The New York Convention no longer governs the enforcement of Hong Kong awards in the PRC. However, the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and Hong Kong Special Administrative Region (Arrangement) provides for similar enforcement procedures. On December 30, 2009, the Supreme People's Court of China issued a circular confirming that Hong Kong awards should be enforced in the PRC under the Arrangement.

ICC IN ASIA

The ICC opened a branch of its secretariat in Hong Kong in November 2008 and has a liaison office in Singapore.

ICC: PRE-ARBITRAL REFEREE PROCEDURE

Any party to this contract shall have the right to have recourse to and shall be bound by the pre-arbitral referee procedure of the International Chamber of Commerce in accordance with its Rules for a Pre-Arbitral Referee Procedure.

DRAFTING NOTE

ICC: PRE-ARBITRAL REFEREE PROCEDURE

NEED FOR URGENT RESOLUTION

The ICC Rules for a Pre-Arbitral Referee Procedure were enacted in 1990 in response to the perceived need in some contractual disputes for urgent arbitral resolution.

SELECTION

The parties may appoint the referee. If the parties fail to agree on a referee, the chairman of the ICC Court proceeds with the appointment (*Articles 4.1 and 4.2, Rules for a Pre-Arbitral Referee Procedure*).

EXPEDITED PROCEDURE

The Rules for a Pre-Arbitral Referee Procedure provide a speedy dispute resolution mechanism before the start of an arbitration (or the constitution of the arbitral tribunal). A reasoned decision can be obtained within five weeks from the filing of the request for an ICC Pre-Arbitral Referee Procedure.

POWERS OF REFEREE

The referee has broad powers under the ICC Rules for a Pre-Arbitral Referee Procedure, including:

- Issuing conservatory measures necessary to prevent immediate harm or irreversible loss (*Article 2.1(a)*).
- Issuing measures necessary to conserve or establish evidence (*Article 2.1(d)*).
- Ordering a party to make any necessary payment or take any step under the contract between the parties (*Article 2.1(b) and (c)*).

However, the parties may alter and limit the powers of the referee (*Article 2.1.1*).

RELATIONSHIP BETWEEN JUDICIAL AND ARBITRAL RELIEF

The referee's decision is not an arbitration award and does not bind the arbitral tribunal or any competent court (*Article 6.3, Rules for a Pre-Arbitral Referee Procedure*). Measures issued by the referee therefore are binding as a matter of contract only until the tribunal or a court rules otherwise.

ICC: OBLIGATION TO SUBMIT DISPUTE TO ICC EXPERTISE, FOLLOWED BY ICC ARBITRATION AS REQUIRED

In the event of any dispute arising out of or in connection with clause [CLAUSE NUMBER] of the present contract, the parties agree to submit the matter, in the first instance, to administered expertise proceedings in accordance with the Rules for Expertise of the International Chamber of Commerce. If the dispute has not been resolved through such administered expertise proceedings it shall, after the Centre's notification of the termination of the expertise proceedings, be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.

DRAFTING NOTE

ICC: OBLIGATION TO SUBMIT DISPUTE TO ICC EXPERTISE, FOLLOWED BY ICC ARBITRATION AS REQUIRED

APPOINTMENT OF EXPERT AND ADMINISTRATION OF PROCEEDING

The ICC International Centre for Expertise provides services for the appointment of an expert and the administration of expert proceedings.

EXPERTISE

The International Centre for Expertise provides experts for a variety of matters including the:

- Valuation of shares.
- Analysis of the causes of defects in industrial processes and the operational capacity and performance of production units.
- Assistance of dispute adjudication boards in international construction projects.

RELATIONSHIP WITH ARBITRATION

The parties are not bound by the determination of the ICC expert (*Article 12(3), ICC Rules for Expertise*). Submission to ICC expertise may nonetheless be appropriate when the dispute is highly technical and an expert determination may generate consensus between the parties. ICC expertise proceedings may be followed by ICC arbitration.



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