



Explanatory Checklist for Drafting International Arbitration Clauses

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About the Author

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Troutman Sanders is an international law firm with approximately 700 lawyers and 15 offices in North America, Europe and Asia. The firm was recently honored as one of only 30 law firms in The BTI Client Service 30, ranking 9th among the elite law firms that clients (mainly interviews of general counsel) say are the best firms at client service.

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1. *Overview on Drafting Arbitration Clauses*

1. You risk losing the benefits of arbitration if you do not take the time to develop a workable and enforceable agreement.
2. You may be able to substantially advance your client's position if, while the parties are on good terms, you secure parameters of an arbitration process designed to meet the client's particular needs, such as evidentiary needs.
3. Our clients usually enter into a myriad of diverse contracts and it is unlikely that a single type of ADR clause will be universally effective.
4. While consideration should be given as to whether the client is put in a better position by designing a clause to meet particular circumstances, an overly complex clause may create its own troubles.

2. Enforceability

Your drafting must establish clearly the parties' intent to submit all disputes or certain disputes to arbitration.

- As an example of an exclusive remedy clause, the following portion of the Hong Kong International Arbitration Centre model clause may be employed to have any future disputes referred to arbitration under the UNCITRAL Arbitration Rules with the HKIAC as the administrator of the arbitration in accordance with its Procedures:

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in Hong Kong under the UNCITRAL Arbitration Rules in accordance with the Hong Kong International Arbitration Centre Procedures for the Administration of International Arbitration in force at the date of this contract."

2. *Enforceability (...cont'd)*

- While trend is in favor of broader interpretations of arbitration clauses, know the law in the jurisdictions you are reasonably seeking to cover. See, for example, landmark decision in 2007 of the House of Lords in Premium Nafta v. Fili Shipping (House of Lords rejected prior decisions, which had found differences in scope of arbitration clauses referring to disputes “under” as opposed to “arising out of” a contract).
- Avoid use of language like “may” and instead use language like “shall” if arbitration is intended to be the exclusive remedy.

2. *Enforceability (...cont'd)*

- “*Any dispute, controversy or claim*” “*All disputes*” “*Any disputes*” “*Any controversy or claim*” – Usually held to allow for no exceptions. These terms appear to be interchangeable and generally have the same meaning across jurisdictions.
- “*Arising out of or relating to this contract, or the breach, termination or invalidity thereof*” or “*Arising out of or in connection with*” – Usually held to cover all contractual as well as non-contractual claims. You may want to add a clause: “Whether based on contract, tort, statute, or other legal theory.”
- Using only “*arising out of*” language may be more limited in scope than “*in connection with*”. See, e.g., *Vetco Sales, Inc. v. Vinar*, (5th Cir. 2004). Perhaps solved by using “*arising out of or relating to*” as suggested by AAA and UNCITRAL.

2. *Enforceability (...cont'd)*

- “*Settled by arbitration*” “*Finally settled*” or “*Finally resolved*” – Usually held to demonstrate intent that the arbitrator’s ruling is final, precluding a de novo review in court.
- House of Lords in Premium Nafta also rejected attempt by the party that had rescinded the subject contract to restrain arbitration proceedings on the grounds that the arbitration agreement had been rescinded because the main contract had been rescinded. House of Lords ruled that the arbitration clause is treated as a separate agreement from the contract in which it is contained. Therefore question of whether the contract was properly rescinded is for the arbitrators.
- May be possible and advisable to narrow the scope of claims to be submitted to arbitration. See later discussion on Split Clauses.

3. *Administered / Institutional vs. Ad Hoc*

Essentially two different formats for conducting arbitrations. In the contract, you must decide whether the arbitration should be "administered", that is conducted by an arbitration institution, such as the International Chamber of Commerce ("ICC"), American Arbitration Association ("AAA"), or Hong Kong International Arbitration Centre ("HKIAC"), or ad hoc, that is, conducted by the parties under the direction of an arbitrator selected by the parties, without the administrative services of an arbitral institution.

- An ICC proceeding, using the ICC Rules and administered by the ICC Court of Arbitration is a prime example of institutional arbitration. An arbitration proceeding employing the United Nations Commission on International Trade Law ("**UNCITRAL**") Arbitration Rules, without administration by an arbitral institution, is a prime example of an ad hoc arbitration.

3. *Administered / Institutional vs. Ad Hoc* *(...cont'd)*

- The decision usually turns on cost. Reference can be made to the ICC website for its arguments as to why an administered arbitration is of significant value. ICC's Pre-Arbitral Referee Procedure may be particularly useful in certain situations.
- Consider a sliding scale, whereby disputes under a certain monetary threshold will be resolved through an ad hoc arbitration with a single arbitrator; larger disputes will be resolved through an administered arbitration, using a panel.
- If you select an ad hoc arbitration employing for example the UNCITRAL Rules, make sure you specify an "appointing authority" in your contract.
- See Hong Kong International Arbitration Centre's website www.hkiac.org, for recommended clauses for using HKIAC as the appointing authority or as the administrator.

3. *Administered / Institutional vs. Ad Hoc* *(...cont'd)*

- UNCITRAL Rules, the International Institute for Conflict Prevention and Resolution (“**CPR**”) Rules and certain other rules, are designed in part to be used by the appointing authority and the selected arbitrators in non-administered/ad hoc arbitrations.
- For Mainland China, you should designate an arbitral institution in your contract for administration of the proceeding. Based on existing decisional law, the prevailing view is that ad hoc arbitrations are invalid on the Mainland. Consider also whether it is the case that only a Chinese arbitration institution may administer an arbitration on the Mainland.

3. *Administered / Institutional vs. Ad Hoc* *(...cont'd)*

- Note, however, that in a letter dated 25 October 2007, from the China Supreme People's Court to the Secretary for Justice of the Hong Kong Special Administrative Region, the Supreme People's Court stated that ad hoc arbitration awards issued in Hong Kong are valid and enforceable on the Mainland, subject to Article 7 of the Memorandum of Understanding on the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong SAR.

4. *Incorporation or Modification of Major Arbitral Rules*

Consider whether potential changes in the adopted arbitration rules are advantageous or disadvantageous for client.

- To deal with potential changes to the specified rules, provide that any dispute which arises shall be subject to the version of the stated rules in effect at the time the contract was entered into, or existing at the time of the filing for arbitration.
- Compare HKIAC model clause with China International Economic and Trade Arbitration Commission's ("**CIETAC**") model clause.

4. *Incorporation or Modification of Major Arbitral Rules (...cont'd)*

Consider modifying institutional rules to fit client's needs.

- Ensure, however, that your proposed modifications will be acceptable to the arbitration institution. As an example, ICC will not handle an arbitration if its rules have been modified by the parties in certain ways, whereas the AAA allows unrestricted modification of its rules.

5. *Governing / Substantive Law*

Specify the law that will govern resolution of the dispute.

- If you do not specify the substantive law to be applied in the contract, then this becomes an issue for the arbitrators to decide.
- The arbitrators may look to international treaties such as the United Nations Convention on Contracts for the International Sale of Good (1980) as the applicable law to apply to the dispute.
- You may specify that any dispute will be decided under the law governing the subject contract, without application of any principle of conflict of laws.
- *"This Agreement will be governed by and construed in accordance with New York law."*

6. *Arbitrability of the Subject Matter*

Remember that in nearly every jurisdiction there will be some type of claim that will not be allowed to be subject to arbitration.

- Research whether any possible disputes arising between the parties can only be litigated in the courts or administrative bodies under the law governing the contract and under the law of the arbitral forum.
- As an example, some jurisdictions in the United States, such as the State of Georgia, do not allow certain disputes involving insurance carriers to be subject to arbitration.
- See also discussion on Location of Arbitration.

7. *Arbitrator Selection*

Consider what level of control over the selection of the decision maker is necessary.

- Consider whether it is advantageous to specify an arbitrator or alternatively, for the parties to develop a set of qualifications for the future selection of an arbitrator. But, be careful because qualification clauses can provide a party an opportunity to delay.
- If you do identify a particular arbitrator, then provide for an alternative selection process if that arbitrator is not available at a later time.
- Consider whether client can be served by a single arbitrator or whether a panel of three is more advantageous.

7. *Arbitrator Selection (...cont'd)*

- A single arbitrator is a significant savings of money and time, but given the value of collective decision making, three arbitrator panels are the norm for larger contracts. It may be also that a panel decreases the risk of bias on the basis that the third arbitrator selected usually is more neutral.
- Is it advantageous to prohibit the selection of arbitrators of the same nationality of any of the parties or their parent companies or general partners?
- In a multi-party situation, arbitrator selection is problematic, unless an arbitral institution makes the selection. Otherwise, define how each party or groups of parties will be able to make their selection. Remember to ensure odd number of arbitrators if using a panel.

7. *Arbitrator Selection (...cont'd)*

Consider Staggered versus Simultaneous Nominations.

- For staggered nominations, Friedland suggests: *"There shall be three arbitrators, one nominated by the initiating party in the request for arbitration, the second nominated by the other party within [30] days of the receipt of the request for arbitration, and the third, who shall act as presiding arbitrator, nominated by the two parties within [30] days of the appointment of the second arbitrator. If any arbitrators are not nominated within these time periods, the President of the ICC International Court of Arbitration shall make the appointment(s)."*

7. *Arbitrator Selection (...cont'd)*

- For simultaneous nominations, Friedland suggests: *"Within [30] days after commencement of arbitration, each party shall [select] an arbitrator. Within [30] days after [selection] of the two arbitrators, the parties shall [select] a third arbitrator, who shall act as presiding arbitrator. If any arbitrators are not [selected] within these time periods, the [institution or appointing authority] shall make the [selection(s)]."*

8. Confidentiality

Does the client want the arbitration proceedings to be confidential and if so what is the desired scope of confidentiality?

- While the cases of arbitral institutions are not open to the public like court dockets, most national laws and institutional rules do not require the parties to maintain confidentiality of the proceedings. Also, increasingly, arbitral awards are being published on the internet.
- To ensure confidentiality in most jurisdictions, you must expressly provide for it in your arbitration agreement. Notable exception is England, where the courts have mandated the preservation of confidentiality in arbitration proceedings. Check also your proposed arbitration rules. WIPO does require the parties to maintain confidentiality of the proceedings. See WIPO Arbitration Rules, Article 76.

8. *Confidentiality (...cont'd)*

- As for drafting, what do you wish to remain confidential? Do you need the fact of the proceeding itself to remain confidential, for example, when the fact of a claim against the client may be damaging to its reputation? Or, is it sufficient to ensure the confidentiality of the contents of the proceedings and the award?
- You may want to draft an exception to the confidentiality clause to enable the parties to seek intervention of the courts; for example to enforce the award or obtain interim relief, if possible.

9. *Discovery*

Will access to certain documents and witnesses be essential to resolving the dispute advantageously? If so, what extent of discovery is the client willing to buy and live by?

- The major arbitration rules, like UNCITRAL, generally provide the arbitrator or panel with a great deal of discretion to deal with discovery. It is the author's experience that the resulting discovery often mirrors what is customary in the locality of the site of the arbitration or the home jurisdiction of the arbitrators.
- Again, as a general matter, the scope of discovery will be much less in arbitration than allowed in the national courts and American companies in particular will find the scope of allowable discovery to be much less outside of the United States, if allowed at all.

9. *Discovery (...cont'd)*

- If you do not deal with discovery in the arbitration agreement, you will be dealing with it later, should there be a dispute. Incorporation of certain sets of arbitration procedural rules will provide parameters for the discovery process, but these parameters will not eliminate the necessity of further discussion and potentially conflict over the specific discovery regime to be utilized. Further, the rules you incorporate may not be satisfactory. For example, they may not allow you specific items or methods of discovery vital to proving the client's case.
- Consider specifying in the contract certain categories or specific documents that must be handed over in the event of a dispute, audit or other inspection rights, interviews or depositions, and timing.

10. *Provisional Measures*

Consider whether client may need the right to file a court action to seek an injunction or other provisional relief.

- The term “provisional” can refer to various measures, including interim relief, injunctive relief, interlocutory relief, conservatory measures, requests for stay, specific performance, security or deposits, attachment, disposal of property, and sale of perishable goods.
- Look at the arbitration rules that the parties will use and arbitration law in relevant jurisdiction. See, e.g., ICC Rules, Article 23; ICC Pre-Arbitral Referee Procedure Rules, Article 3.1; UNCITRAL Rules, Article 26; AAA International Rules, Article 21; LCIA Rules, Article 25; *Interbulk (Hong Kong), Ltd. v. Safe Rich Industries, Ltd.* (1992) 2 HKLR 185.

10. *Provisional Measures (...cont'd)*

- You may need to draft an exception to the ADR procedures. *"Any party to this Agreement may, without inconsistency with this Agreement to arbitrate, seek from a court any provisional remedy that may be necessary to protect [insert rights or interest to be protected] pending the formation of the arbitral tribunal, or its ruling on the merits of the dispute."*
- You may want to specify the particular provisional relief the arbitrators or the courts are allowed to order.

10. *Provisional Measures (...cont'd)*

- *"Without limitation to any other power conferred on the arbitrators under this Agreement, the arbitrators may award any form of provisional relief they deem necessary [upon the request of a party] including, but not limited to, injunctive relief."*
Consider specifying a standard.

11. *Judicial Review of Awards*

Does the client want judicial review of the award and if so, what is the desired scope of review?

- Arbitration awards may be appealable to the national courts. The scope of judicial review varies from jurisdiction to jurisdiction.
- Institutional rules sometimes provide for a waiver of judicial review. ICC is an example.
- To preclude judicial review, look to incorporate institutional rules, such as the ICC, or expressly provide in your arbitration clause that the parties waive any right to appeal the award to the courts.

11. *Judicial Review of Awards (...cont'd)*

- Note, however, that in some jurisdictions only an express provision in the arbitration agreement will effectively preclude appeal. For example, Switzerland.
- “Final and binding” language may not be sufficient to preclude judicial review in the United States, but likely will preclude judicial review in other jurisdictions, like Switzerland. Draft an express waiver of judicial review.
- Example: *“The parties waive irrevocably their right to any form of appeal, review or recourse to any state court or other judicial authority, insofar as such waiver may be validly made.”*

11. *Judicial Review of Awards (...cont'd)*

- Consider whether client wants heightened judicial review and whether that is possible in the relevant jurisdiction. See, e.g., Cable Connection, Inc. v. DIRECTV, Inc., No. B188278, 2006 WL 2709407 (Cal. Ct. App. 22 September 2006) (“The arbitrators shall not have the power to commit errors of law or reasoning, and award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error.”). Compare with Baize v. Eastridge Companies, 47 Cal. Rptr. 3d 763 (Cal. Ct. App. 25 August 2006). See Hull Street Assocs., L.L.C. v. Mattel, Inc., 128 S. Ct. 1396 (2008), in which the United States Supreme Court ruled that with respect to arbitrations falling under the United States Federal Arbitration Act, a contractual arbitration clause cannot be enforced that provides for expanded judicial review based on manifest disregard of the law by an arbitrator. See Comedy Club, Inc. v. Improv West Assocs., 553 F.3d 1277 (9th Cir. 2009) for an important limiting interpretation of the Hull Street decision.

12. *Legal Capacity / Immunity*

Does the representative of the opposing party possess the legal capacity to bind that party to the terms of the arbitration agreement?

- Especially when dealing with governments and their instrumentalities, ensure that the signatory has the power to enter into the subject arbitration agreement. See, e.g., United States Sovereign Immunities Act, 28 USC Section 1602. In all circumstances, confirm whether internal rules governing the execution of contracts have been followed by the opposing party.
- It may be helpful to include a clause in the full contract to the effect that the signatory is capable of entering into the subject agreement, a boilerplate clause in most commercial contracts.
- Do you need to include a sovereign immunity waiver?

13. *Location of Arbitration*

Location can be critical because it potentially determines a host of issues.

- Select a contracting state to the New York Convention on the Recognition and Enforcement of Arbitral Awards of 1958 because the enforcement of arbitral awards made in another convention country is subject to limited grounds of challenge and the convention prohibits any review of the merits.
- What is arbitral is generally a matter to be determined by the law (public policy) of the national court, that is, the law the forum of the arbitration, not the law of the contract. Under Article II (1) of the New York Convention, the national courts are not required to give effect to an arbitration agreement if the subject matter of the dispute is not allowed to be resolved in an arbitral forum in that jurisdiction.

13. *Location of Arbitration (...cont'd)*

- For up to date list of contracting states to the New York Convention, see <http://www.uncitral.org> at status. China ratified treaty in 1987. Taiwan has not.
- Determine what is the most convenient place to arbitrate for the client considering the location of witnesses and documents.
- Determine what location is most favorable in terms of the applicable national laws, the availability of skilled arbitrators, and the overall fairness of the forum.
- Certain procedural issues like interlocutory appeals, will be determined by local law as a general matter.
- Validity of an international arbitration agreement when the main contract falls away may be determined by reference to the law of the forum, irrespective of the main contract's stated governing law. Switzerland is an example.

13. *Location of Arbitration (...cont'd)*

- Given the wide discretion afforded arbitrators with respect to procedure under rules such as UNCITRAL, the court procedures prevailing in the locality selected for the arbitration may end up being the guiding procedure.
- If no location or governing law is specified, but certain arbitration rules are specified, likely those rules will be determinative of the questions of location and law.
- As to drafting, consider that: "*Place of jurisdiction is Sao Paulo/Brazil*" was held to be permissive, but not a mandatory forum selection clause in Citro Florida, Inc. v. Citrovale, S.A., 760 F.2d 1231 (11th Cir. Fla. 1985).

14. *Language*

Specify the language in which the proceedings are to take place.

- Will save time and money and cut down on uncertainty. In absence of agreement, generally a question for the arbitrators to decide.
- Language requirements may be a way of impacting the choice of arbitrators.
- *"The language of the arbitration shall be [specify language]."*

15. *Multiple Contracts and Other Dealings*

Consider whether client wishes to resolve all disputes with another party pursuant to arbitration arising out of various dealings, or just the subject written contract containing the arbitration clause.

- There are some decisions applying an ADR clause in one contract between the parties to other agreements or dealings between the same parties.
- Consider a blanket arbitration agreement and then incorporate into other agreements or attempt to make it applicable to all dealings between the parties.
- In some jurisdictions, such as France, the incorporating clause must specifically refer to the main arbitration clause to establish intent to be bound.

16. *Multiple-step ADR Clauses*

Does the client want to ensure negotiation between senior management, or a mediation, prior to one of the parties being able to initiate arbitration proceedings?

- Can be done, but, the steps and timetables need to be a clear and as certain as you can possibly make them. Otherwise, you risk causing a breach of the agreement due to difficulty in application of the clause, or engendering delay.
- Consider whether it is valuable to allow for the parties to initiate arbitration or even seek interim court relief, prior to fulfillment of the various steps or conditions.

17. *Non-signatory Parties*

Consider whether you may need non-signatories to the contract to also be bound by the arbitration agreement.

- Generally, non-signatories are not going to be bound, but certain very limited exceptions may exist (alter ego, parent-subsubsidiary relationships or the “group of companies” theory, agency, assignment, succession). Likely need to secure some form of written agreement with a non-signatory to ensure that party is bound by the agreement to arbitrate.
- Consider adding: *“It is the intent of the Parties that all disputes should be resolved in accordance with this Article, including disputes that may involve the parent company, subsidiaries, or affiliates under common control of any Party.”* May not be effective, depending on the circumstances.

17. *Non-signatory Parties (...cont'd)*

- See *Bridas S.A.P.I.C. et. at v. Government of Turkmenistan and State Concern Turkmenneft*, 345 F.3d 347 (5th Cir. 2003) for an ICC case illustrating issues involving whether the arbitration agreement applied to a non-signatory government.

18. Time Bars

Consider defensively and offensively the application of limitation periods.

- To deal with the risk of a time bar, to the extent applicable, provide that “all defenses based on the passage of time, including but not limited to statutes of limitation, are tolled during the time the parties are seeking to resolve a dispute between them.”
- To interject a limitation period into the contract for giving notice of a claim, provide that “any claim or prospective claim arising out of or in connection with this contract must be served by written notice on the other party within fourteen (14) days of the [insert precise trigger language], otherwise the claim is waived or barred.”

18. *Time Bars (...cont'd)*

- You can also draft language barring a claim if the action is not commenced within a certain time period, after notice of the claim was given, or should have been given.

19. Performance to Continue

You may want to include language providing that the parties are to continue carrying out their obligations under the subject contract during the pendency of any dispute between them.

- *“Work Continuation. Time is of essence and therefore Design-Builder agrees to continue with and complete the Project during the pendency of any dispute, including a payment dispute. Design-Builder agrees that its remedy for any claim it has against Owner is to file an arbitration claim at the completion of the Project. Design-Builder agrees to give up any right to stop work prior to completion of the Project and that its right to file an arbitration claim at the completion of the Project is an adequate remedy.”*

20. Unconscionable Clauses

If the requirement to arbitrate results in excessive cost or burden, making it impossible for a weaker party to arbitrate and therefore have no remedy at all, then the clause may be held to be unenforceable.

- For example, in the US, ICC advance fees have been held to be excessive, making it impossible for certain parties to arbitrate, thereby depriving the weaker party of a remedy.

21. *Questions of Jurisdiction*

Does the client want challenges to the jurisdiction of the arbitrator, including challenges to the validity of the arbitration clause, or the scope of the clause, to be resolved by recourse to the courts or by the arbitrator?

- Expressly provide whether disputes concerning the jurisdiction of the arbitrator are to be resolved by the arbitrator, or by the courts.
- Institutional arbitral rules may deal with this issue. If the client wishes to rely on the arbitrator to decide questions of jurisdiction, then incorporation of certain rules is another drafting option.
- National laws may override. For example, the P.R.C. arbitration law allows for a party to test jurisdictional issues in court or before the arbitrator.

22. Remedies

- You may want to consider defining the available remedies. For example, you may want to exclude the availability of punitive or exemplary damages.
- If exemplary or punitive damages are not expressly limited/excluded in the parties' contract, the arbitrator may have the power to award punitive or exemplary damages. It is not possible in all circumstances to exclude punitive damages in the US, but in commercial contracts between businesses, it is possible.
- The institutional arbitral rules usually define the scope of relief that an arbitrator can award.

23. *Split Clauses*

Consider whether our client needs the flexibility of being able to choose arbitration or court action depending on the nature of the dispute, and perhaps carve out certain defined disputes as capable of being resolved only in an arbitration or in the courts.

- Split clauses likely not enforceable in all jurisdictions. However, expect that ambiguity will cripple clause in all jurisdictions.
- Consider including waiver language, precluding a party from objecting to the split cause on specified grounds akin to waivers in jurisdiction clauses. Uncertainty as to enforceability will however remain.
- Significant pros and cons.

23. *Split Clauses (...cont'd)*

- Example of a Freshfields clause from a contract giving a bank the choice of arbitration or litigation:

“[a] Subject to the option in favour of the Bank set out in subsection b below, any dispute, controversy or claim arising out of or relating to this Agreement, or the breach, termination or validity thereof, shall be referred to and finally resolved by arbitration in accordance with the UNCITRAL Arbitration Rules as in force and effect on the date of this Agreement which are deemed to be incorporated by reference into this Section. There shall be one arbitrator, and the appointing authority shall be the LCIA. The place of arbitration shall be London, England, and the language of the arbitration shall be English.

[b] Notwithstanding subsection a above, at the option of the Bank, the Company agrees for the benefit of the Bank that...

23. *Split Clauses (...cont'd)*

... the courts of England and Wales and any other court having jurisdiction are to have jurisdiction to settle any disputes (including claims for set-off and counterclaims) and enforce any rights which may arise in connection with the validity, effect, interpretation or performance of, or the legal relationships established by, this Agreement or otherwise arising in connection with this Agreement.”

- Friedland suggests the following: “Except for those matters which are specifically excluded from arbitration hereunder, all disputes [use standard language]. The following matters are specifically excluded from arbitration hereunder.”
- See also discussions on Enforceability and Unconscionable Clauses above.

24. *Class Action Arbitrations in US*

- See Green Tree Financial v. Bazzle, 123 S. Ct. 2402 (2003) (U.S. Supreme Court ruled that the question of whether the parties' agreement allowed for class actions was for the arbitrator to decide in the first instance, not a court.)
- See also <http://www.adr.org/classactionarbitrationpolicy> for a discussion of the American Arbitration Association's policy on administering class action arbitrations in response to Bazzle.
- Note that some courts have invalidated arbitration clauses seeking to preclude class actions in the context of consumer contracts.

25. Impartiality

Consider whether the client is better served with “interested” party appointed arbitrators, or whether it is better to seek to have neutral disinterested party appointed arbitrators, and in turn what is allowed and not allowed.

- Institutional rules usually require impartiality, but it is not required in all jurisdictions, including, for example, the US. If specify impartiality, what is allowed and not allowed?
- *“All arbitrators shall be impartial. Upon selection of third arbitrator, no arbitrator shall have ex parte communications with any party or agent thereof.”*

25. *Impartiality (...cont'd)*

- In ad hoc/self-administered arbitrations, consider whether valuable to incorporate International Bar Associations' Guidelines on Conflicts of Interests in International Arbitrations.
- Consider disclosure requirements. See the American Bar Association's Code of Ethics for Arbitrators in Commercial Disputes.

26. *Various Issues*

Right of Termination

- *"This Section/Article/Provision does not operate to waive or otherwise preclude any right of termination under this contract/agreement."*

Costs/Fee Shifting Provisions

Form of Award

- Consider also specifying the currency in which an award must be paid.

Regulation of the Hearing and Hearing Procedures

26. *Various Issues (...cont'd)*

Transcript

- Likely critical for any appeal, but appeal rights limited.

Summary Rulings

- Consider whether the arbitrators should be empowered to resolve issues or claims on dispositive motions. If so, consider adopting a standard if in the US. For example, Rule 56 of the Federal Rules of Civil Procedure.

27. Sources and Additional Reading

Hong Kong International Arbitration Centre website at www.hkiac.org

UNCITRAL site at www.uncitral.org

China International Economic and Trade Arbitration Commission website at www.cietac.org.cn

International Chamber of Commerce website at www.iccbo.org

K. Scanlon, *Drafting Dispute Resolution Clauses: Better Business Solutions for Business* (International Institute for Conflict Prevention and Resolution, 2006)

L. Newman & G. Hanessian, Editors, *International Arbitration Checklists* (Juris Publishing, 2004)

27. Sources and Additional Reading (...cont'd)

Friedland, *Arbitration Clauses for International Contracts*, 2nd ed.,
(Juris Publishing, 2007)

Y. Derains & E. Schwartz, *A Guide to the ICC Rules of Arbitration*,
2nd Ed. (Kluwer, 2005)

Thank You

謝謝

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These materials are written as a general guide for teaching and discussion purposes only. Any of the statements made herein may be subject to modification depending on the facts of a particular situation and the applicable law.