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Arbitration in Practice: A close look at the IBA Guidelines for Drafting International Arbitration Clauses

5 June 2020 at 0930-1045 BST

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IBA Guidelines for Drafting International Arbitration Clauses

Adopted by a resolution of
the IBA Council
7 October 2010
International Bar Association



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Section II: Basic Drafting Guidelines

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Section II: Basic Drafting Guidelines

8 Basic Guidelines

Institutional vs. ad hoc arbitration

A set of arbitration rules and the model clause

No limitation to the scope of disputes subject to arbitration

Place of arbitration based on both practical and juridical considerations



Rules of law governing the contract and any subsequent disputes

Language of arbitration

Selection and replacement of arbitrators
Selection of an appointing authority (if ad hoc arbitration)

Number of arbitrators

Section II: Basic Drafting Guidelines



Selecting a place of arbitration

Elements for consideration:

- The mandatory provisions national law, which may touch upon issues of arbitrability and public policy
- Adoption of the Model Law and New York Convention status
- Degree of expected supervision, interference, assistance by national courts

*With respect to any and all disputes arising out of or relating to this Agreement, the [p]arties shall initially attempt in good faith to resolve all disputes amicably between themselves. If such negotiations fail, it is agreed by both parties that such disputes shall be finally submitted to the Singapore International Arbitration Centre (SIAC) for **arbitration in Shanghai**, which will be conducted in accordance with its Arbitration Rules. The arbitration award shall be final and binding on both [p]arties.*

Hong Kong as an example:

“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”

Section II: Basic Drafting Guidelines

Language of arbitration

Consistency

The language of arbitration should be consistent with

- the language of the contract and/or
- the language of correspondence between the parties

Multi-lingual

Consider the necessity of multi-lingual arbitration:

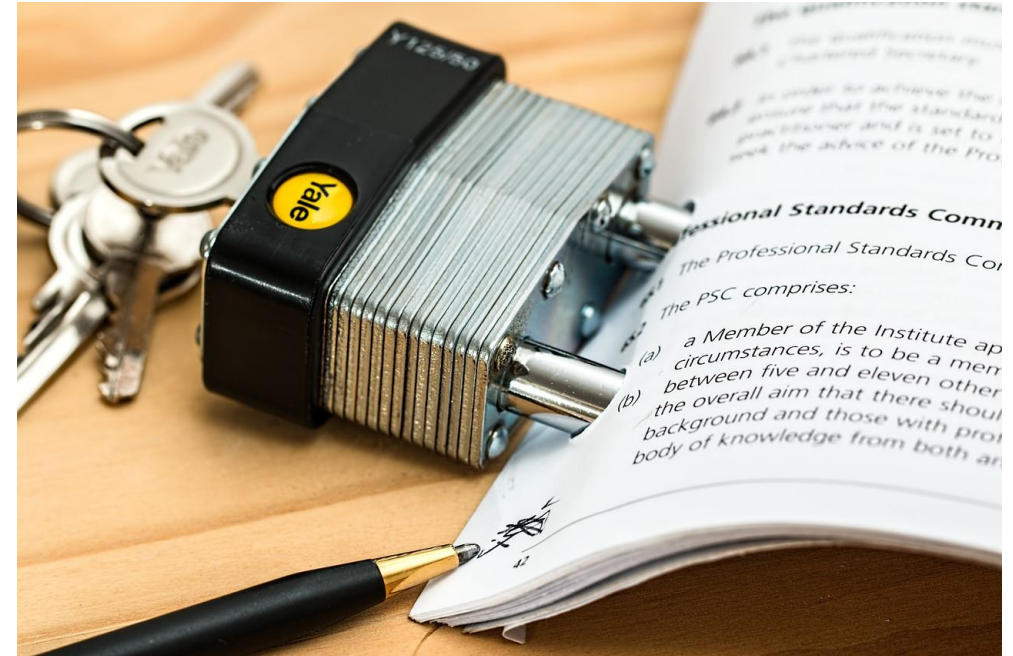
- Often much more costly and time consuming
- Limits arbitrator pool



Section II: Basic Drafting Guidelines

General Recommendations

- Use the model clauses in the chosen rules as a starting point
- Be careful and consistent when seeking to modify the model clause
- Avoid “Hybrid Clauses”, if possible





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Section III: Drafting Guidelines for Optional Clauses

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Section III: Drafting Guidelines for Optional Clauses

Optional elements *can* be considered in order to tailor the process to parties' specific needs

MORE frequently used

- Confidentiality
- Costs and fees
- Finality of arbitration

LESS frequently used

- Authority of tribunal/courts for provisional measures
- Document production
- Qualification of arbitrators
- Time limits

Section III: Drafting Guidelines for Optional Clauses



Confidentiality

- Not necessarily in arbitration laws
- Recent inclusion in most institutional rules
- State clear scope/ explicit exclusion if parties so wish



Costs and fees

- Used to avoid uncertainties arising from different laws/ tribunals
- Methods:
 - tribunal's discretion
 - loser pay
 - proportionate to outcome
 - parties agree upfront



Finality of arbitration

- Confirms finality provided for in arbitration laws/ institutional rules
- Careful when adding a waiver of recourse against the award

Section III: Drafting Guidelines for Optional Clauses

Tribunal or Court's authority for provisional measures

- Rarely necessary : provided for in arbitration laws and institutional rules
- Include provisions when deviation from law/rules are desired:
e.g., limiting resorting to court after constitution of tribunal, providing for *ex parte* applications

Document production clause

- Parties with different legal backgrounds have different expectations
- Methods: leave it up to the tribunal, refer to IBA Evidence Rules, devise own standards
- May need to think about privilege issues
 - Art. 9 of IBA Evidence Rules

Qualifications of arbitrators

- Nationality restriction may be needed in *ad hoc* arbitration clauses
- Usually recommended *not* to include other qualifications
- Even when qualification is needed, do not be overly specific

Time limits

- “Fast-tracking” clauses can become basis for challenges
- Tribunal should be allowed to extend time limits even in fast-tracking clauses



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Section IV, V, VI: Drafting Guidelines for Multi-Tier Dispute Resolution Clauses, Multiparty and Multi-Contract Arbitration Clauses

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Section IV: Drafting Guidelines for Multi-Tier Dispute Resolution Clauses

Timing

Specify a (short) time period beyond which the dispute can be submitted to arbitration



Trigger Events

The first tier of dispute resolution should be triggered by a defined and indisputable event

Arbitration Mandatory

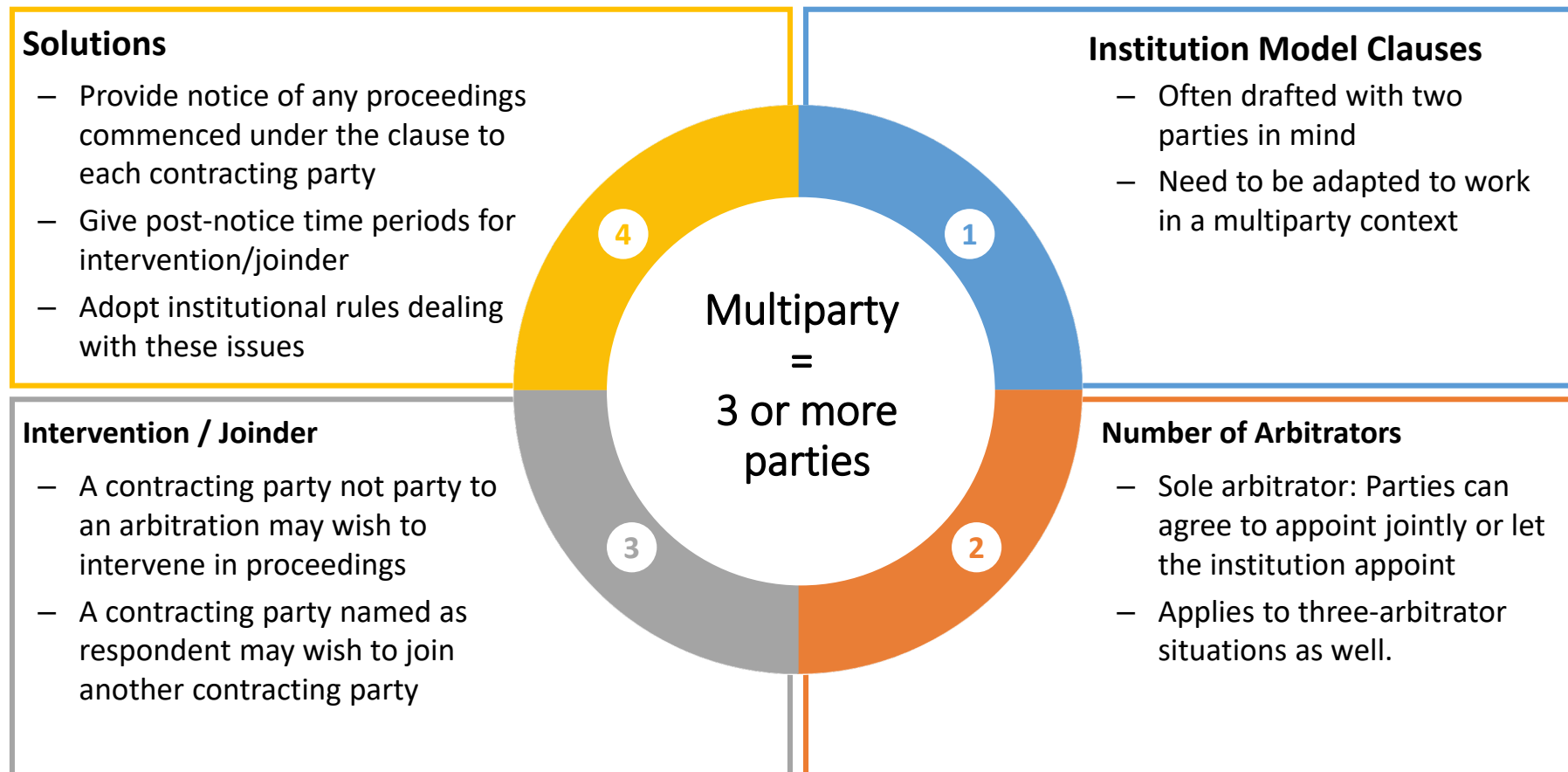
Make arbitration a mandatory, not permissive, next step

Section IV: Drafting Guidelines for Multi-Tier Dispute Resolution Clauses

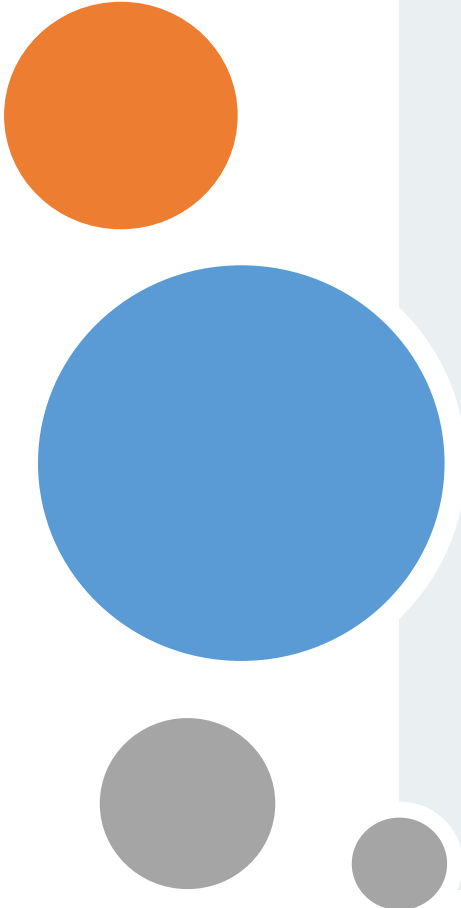


- Identical terms ensures all disputes take the same path, rather than certain disputes going first to negotiation/mediation and others to arbitration.
- Disputes should be defined to include counterclaims so that they also follow the same path.
- Should parties wish to preserve the right to raise counterclaims for the first time in arbitration, they should so specify in their arbitration clause.

Section V: Drafting Guidelines for Multiparty Arbitration Clauses



Section VI: Drafting Guidelines for Multi-Contract Arbitration Clauses

- 
- Ensure consistent DR mechanisms in related contracts to avoid multiple / parallel proceedings.
 - Consider use of stand-alone dispute resolution protocol, or a provision that the appointed tribunal under one contract has jurisdiction to consider issues under related contracts.
 - Consider your client's wishes with regard to consolidation of proceedings, and institutional rules in respect of this.



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Example Clauses and Live Polling

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Example 1

Any claim or dispute or breach of terms of the Contract shall be settled amicably between the parties by mutual consultation. If no amicable settlement is reached through discussions, at the election of the Seller, the dispute may be referred to and personally settled by means of arbitration proceedings, which will be conducted under English Law; and held in Singapore.

Example 2

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre (“SIAC”) in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (“SIAC Rules”) for the time being in force, which rules are deemed to be incorporated by reference in this clause. The seat of the arbitration shall be Singapore.

Example 3

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the Singapore International Chamber of Commerce (SICC) in Singapore in accordance with its arbitration rules for the time being in force.

Example 4

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore, India administered by the Singapore International Arbitration Centre in accordance with the Arbitration Rules of the Malaysian Chamber of Arbitration for the time being in force, which rules are deemed to be incorporated by reference in this clause.

Example 5

In the event of a commercial dispute or difference arising from this contract, the parties hereby agree that such dispute or differences shall be submitted in the first instance to arbitration. The arbitrator shall be well-known of commerce, and shall be designated by mutual agreement between the parties.

Example 6

This Agreement shall be governed by the laws of the People's Republic of China.

With respect to any and all disputes arising out of or relating to this Agreement, the Parties shall initially attempt in good faith to resolve all disputes amicably between themselves. If such negotiations fail, it is agreed by both parties that such disputes shall be finally submitted to the Singapore International Arbitration Centre (SIAC) for arbitration in Shanghai, which will be conducted in accordance with its Arbitration Rules. The arbitration award shall be final and binding on both Parties.

Example 7

The Seller and the Buyer agree that all disputes arising out of or in connection with this agreement that cannot be settled by discussion and mutual agreement shall be referred to and finally resolved by arbitration as per Singapore Contract Rules.

Example 8

Any and all such disputes shall be finally resolved by arbitration before the Singapore International Arbitration Centre in accordance with the Rules of Arbitration of the International Chamber of Commerce then in effect and the proceedings shall take place in Singapore and the official language shall be English.

Example 9

This Agreement is governed by New York law and the parties submit exclusively to the jurisdiction of the High Court of Singapore.

Disputes, controversies or differences arising out of or in connection with this contract including any question regarding its existence, validity or termination shall be resolved by arbitration in accordance with the Rules of Arbitration of the Singapore International Arbitration Centre. There shall be three arbitrators and the language of the arbitration shall be English. Notwithstanding the above, the Seller may at its sole option institute proceedings in any court which has competent jurisdiction by way of suits, actions or proceedings.