INTERNATIONAL CENTRE
FOR DISPUTE RESOLUTION®

Guide to Drafting International Dispute Resolution Clauses

Introduction

Arbitration, mediation and other alternatives to litigation are most frequently accessed by reference to a "future disputes" clause in a commercial contract. The following "Model" dispute resolution clauses, accompanied by short commentary, are intended to assist contracting parties in drafting alternative dispute resolution (ADR) clauses. Parties with questions regarding drafting an International Centre for Dispute Resolution® (ICDR®) clause should email ICDR at **websitemail@adr.org** or contact their regional ICDR or AAA® office for assistance (see ICDR contact details at end of document).

Several cautionary notes at the outset: Too often, discussion regarding the dispute resolution clause of the contract is left until the close of negotiation. Best practice is to consider the matter of problem solving and dispute resolution early in the negotiation, so providing a positive environment for further negotiation and avoiding the undue pressure of a closing deadline. In any case, each and every commercial relationship is unique. Contracting parties are well advised to seek appropriate guidance when drafting such clauses.

Model "Short Form" Arbitration Clause

The short form arbitration clause below will guide the parties through all the major aspects of international arbitration. Incorporating by reference a modern set of arbitral procedures which meet the expectations of the parties in international arbitration proceedings, the short form clause serves as an excellent starting point for the drafter, with additional language added only as necessary to either address particular needs of the contract or to emphasize certain powers of the tribunal. Incorporation of the short form clause provides for the following critical aspects of the arbitral process:

- Notice Requirements
- Form of Claim and/or Counterclaim
- Interim and/or Emergency Relief
- Appointment of the arbitral tribunal,
- Arbitrators' Conflicts of Interest
- Scheduling
- Place of Arbitration
- Jurisdiction—Powers of the Tribunal
- Conduct of the Arbitration—The Taking of Evidence
- Proceedings in the Absence of a Party's Participation
- Costs
- The Form and Effect of the Award

All references to arbitration rules in this guide, excepting the reference to ICDR administration under UNCITRAL Rules, are to the International Arbitration Rules of the ICDR. ICDR also administers cases under various American Arbitration Association® (AAA) Rules where the parties have provided for those Rules in their contract. See **www.adr.org** for further information and a separate drafting guide.

The ICDR offers the following short form standard clause for International Commercial Contracts:

> *"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."*

The parties should consider adding:

- *"The number of arbitrators shall be (one or three)";*
- *"The place of arbitration shall be [city, (province or state), country]";*
- *"The language(s) of the arbitration shall be ___."*

As the ICDR is a division of the American Arbitration Association, albeit with separate administrative offices, its own roster of arbitrators and mediators and a unique set of arbitration rules which meet international expectations, contracting parties may also use the following short form standard clause for international Commercial Contracts:

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

The parties should consider adding:

- *"The number of arbitrators shall be (one or three)";*
- *"The place of arbitration shall be [city, (province or state), country]";*
- *"The language(s) of the arbitration shall be ___."*

Model "Step" Dispute Resolution Clauses

Contracting parties may wish to include a provision requiring negotiation or mediation before arbitration is initiated. Such clauses, which are often referred to as "step-clauses", are particularly appropriate where the parties have a long-standing and on-going commercial relationship, and where there may be factors to consider other than the narrow scope of a particular dispute. While those factors are missing in a commercial relationship arising out of a single transaction, it is the rare case that would not benefit from settlement discussions.

A legitimate concern about the use of "step clauses" is the potential for a party to unnecessarily delay an adverse decision. However, this problem can be addressed by providing time limits on each step. These limits are, at best, an educated guess regarding appropriate timing for negotiations or a mediation to be completed by the disputing parties. Alternatively, the clause might be drafted to allow each party to demand arbitration without recourse to the previous step(s), or by permitting mediation and arbitration to proceed concurrently. Otherwise, having agreed to a series of conditions precedent, parties should be prepared to go through each required dispute resolution process.

There are various examples of "step-clauses". They may require parties to seek resolution of the dispute by negotiation and/or mediation before resorting to arbitration.

For the benefit of parties drafting commercial contracts who wish to include an express obligation to seek resolution of disputes by negotiation and/or mediation prior to arbitration, the International Centre for Dispute Resolution (ICDR) offers the following model Negotiation-Arbitration, Mediation-Arbitration, and Negotiation-Mediation-Arbitration "step" clauses:

Negotiation-Arbitration Clause

> *"In the event of any controversy or claim arising out of or relating to this contract, or a breach thereof, the parties hereto shall consult and negotiate with each other and, recognizing their mutual interests, attempt to reach a satisfactory solution. If they do not reach settlement within a period of 60 days, then, upon notice by any party to the other(s), any unresolved controversy or claim shall be settled by arbitration administered by the International Centre for Dispute Resolution in accordance with the provisions of its International Arbitration Rules."*

The parties should consider adding:

- *"The number of arbitrators shall be (one or three)";*
- *"The place of arbitration shall be [city, (province or state), country]";*
- *"The language(s) of the arbitration shall be ___."*

The model negotiation-arbitration clause above provides a single negotiation "step". Parties sometimes provide multiple steps, by way of an "issue escalation" clause, in an attempt to encourage the surfacing and resolution of problems quickly during an ongoing project. Again, parties in those circumstances should be careful to provide time frames for moving the negotiation to the next level to avoid delay.

Mediation-Arbitration Clause

Use of the Mediation process is growing globally. In mediation, parties are free to negotiate business solutions not constrained by law or contract. Parties to ICDR/AAA administered mediations have historically enjoyed a settlement rate exceeding 85%.

Increasingly, parties perceive that mediation is more effective if an unresolved dispute is to be followed, and resolved, by arbitration. Since the requirement to mediate may be seen as a condition precedent to arbitration, a deadline should be established allowing parties to move from mediation to arbitration if necessary to avoid delay.

The ICDR Model "Step-Clause" for mediation-arbitration is as follows:

> *"In the event of any controversy or claim arising out of or relating to this contract, or a breach thereof, the parties hereto agree first to try and settle the dispute by mediation, administered by the International Centre for Dispute Resolution under its Mediation Rules. If settlement is not reached within 60 days after service of a written demand for mediation, any unresolved controversy or claim arising out of or relating to this contract shall be settled by arbitration in accordance with the International Arbitration Rules of the International Centre for Dispute Resolution."*

The parties should consider adding:

- *"The number of arbitrators shall be (one or three)";*
- *"The place of arbitration shall be [city, (province or state), country]";*
- *"The language(s) of the arbitration shall be ___."*

It should be noted that parties could agree to mediate at any time, even in the absence of a future disputes clause providing for mediation. Indeed, disputing parties frequently find that mediation is particularly effective when conducted against the deadline of a pending arbitration hearing.

Model Negotiation-Mediation-Arbitration Clause

Parties to commercial contracts, most particularly those involving strategic commercial relationships, will sometimes provide for both negotiation and mediation as precursors to arbitration. The intent is that the parties should try to solve the problem themselves first, and, if that proves difficult, utilize the services of a third party mediator, before resorting to a third party decision-maker/arbitrator.

Once again, time limits or an opt-out provision should be considered to avoid delay tactics.

The ICDR Model "Step-Clause" for Negotiation-Mediation-Arbitration is as follows:

> *"In the event of any controversy or claim arising out of or relating to this contract, or the breach thereof, the parties hereto shall consult and negotiate with each other and, recognizing their mutual interests, attempt to reach a solution satisfactory to both parties. If they do not reach settlement within a period of 60 days, then either party may, by notice to the other party and the International Centre for Dispute Resolution, demand mediation under the Mediation Rules of the International Centre for Dispute Resolution. If settlement is not reached within 60 days after service of a written demand for mediation, any unresolved controversy or claim arising out of or relating to*

this contract shall be settled by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules."

The parties should consider adding:

- *"The number of arbitrators shall be (one or three)";*
- *"The place of arbitration shall be [city, (province or state), country]";*
- *"The language(s) of the arbitration shall be ___."*

Model Concurrent Arbitration-Mediation Clause

Some parties prefer not to obligate themselves to mediate as a condition precedent to the filing of arbitration. They could be concerned that early mediation will not allow them sufficient time to understand the case, so making negotiation more perilous. That said, not providing for mediation in the dispute resolution clause may result in a lost opportunity to make clear the parties' preference for a negotiated settlement. With those countervailing concerns in mind, ICDR has developed a model "Concurrent Arbitration-Mediation" Clause. The Clause obligates the parties to mediate, but does so after the initiation of arbitration, when the parties are presumably more informed regarding both the matters in dispute and their respective needs and interests.

The ICDR Model Concurrent Arbitration-Mediation Clause is as follows:

"Any controversy or claim arising out of or related to this contract, or a breach thereof, shall be resolved by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules. Once the demand for arbitration is initiated, the parties agree to attempt to settle any controversy or claim arising out of or relating to this contract or a breach thereof by mediation administered by the International Centre for Dispute Resolution under its International Mediation Rules. Mediation will proceed concurrently with arbitration and shall not be a condition precedent to any stage of the arbitration process."

The parties should consider adding:

- *"The number of arbitrators shall be (one or three)";*
- *"The number of mediators shall be (one or two)";*
- *"The place of arbitration shall be [city, (province or state), country]";*
- *"The place of mediation shall be [city, (province or state), country]";*
- *"The language(s) of the arbitration shall be ___.";*
- *"The language(s) of the mediation shall be ___."*

Model Stand-Alone Mediation Clause

Parties can adopt mediation as a stand-alone dispute settlement procedure. In the event that mediation does not result in settlement, the parties can agree to utilize other dispute resolution procedures or default to national courts for the resolution of their dispute.

The ICDR Model Stand-Alone Mediation Clause is as follows:

> *"In the event of any controversy or claim arising out of or relating to this contract, or a breach thereof, the parties hereto agree first to try and settle the dispute by mediation, administered by the International Centre for Dispute Resolution under its Mediation Rules, before resorting to arbitration, litigation or some other dispute resolution procedure."*

The parties should consider adding:

- *"The number of mediators shall be (one or two)";*
- *"The place of mediation shall be [city, (province or state), country]";*
- *"The language(s) of the mediation shall be ___."*

Appointment of Arbitral Tribunal—Party-Appointed Arbitrator Clause

For parties and their counsel, the appointment of the arbitral tribunal is arguably the single most critical issue in arbitration. Unless parties provide otherwise, the ICDR uses a list selection process for arbitrator appointments. The other notable method for arbitrator selection is the party-appointed selection process. The ICDR will follow whatever method of appointment is provided by the parties' agreement. The ICDR International Arbitration Rules require that all arbitrators, regardless of method of appointment, shall be impartial and independent. For cases with multiple claimants or respondents, unless the parties have agreed otherwise, the ICDR will make all appointments.

There is no need to mention any arbitrator selection method in the arbitration clause if the parties wish to use the ICDR's list selection process. One perceived advantage of the list selection method is that it eliminates the need for any *ex parte* contact between parties and arbitrators. The ICDR begins the list selection process by consulting with the parties regarding arbitrator qualifications. After consultation, the ICDR sends an identical list of names along with their corresponding Curriculum Vitae to the parties with an invitation to strike unacceptable arbitrators, rank order the remaining arbitrators in order of preference and return the list to the ICDR. The ICDR appoints the presiding arbitrator or tribunal from the closest mutual preference of the parties.

As an alternative to the list-selection process, parties can agree to use the party-appointed method of appointment. The perceived advantage of the party-appointed method is that with direct appointment of an arbitrator each party will

have increased confidence in the tribunal. Parties who wish to use the party-appointed method should consider adding the following language to their arbitration clause:

> *"Within [30] days after the commencement of arbitration, each party shall appoint a person to serve as an arbitrator. The parties shall then appoint the presiding arbitrator within [20] days after selection of the party appointees. If any arbitrators are not selected within these time periods, the International Centre for Dispute Resolution shall, at the written request of any party, complete the appointments that have not been made."*

Limitations on Time and Information Exchange

The parties may agree to amend the rules to suit their particular needs. For example, they may wish to restrict or expand time limits provided for in the ICDR International Arbitration Rules, limit information exchanges or change other aspects of the process. They may do so by addressing those issues in their dispute resolution clause.

The following clause limits the time frame in arbitration:

> *"The award shall be rendered within [9] months of the commencement of the arbitration, unless such time limit is extended by the arbitrator."*

The parties should be wary of the dangers inherent in setting artificial deadlines. If time frames can't be met, the ability to enforce the award may be compromised. The alternative clause set forth below addresses the consequences of a "late" arbitration.

> *"It is the intent of the Parties that, barring extraordinary circumstances, arbitration proceedings will be concluded within [120] days from the date the arbitrator(s) are appointed. The arbitral tribunal may extend this time limit in the interests of justice. Failure to adhere to this time limit shall not constitute a basis for challenging the award."*

The parties may limit information exchange by using the following clause:

> *"Consistent with the expedited nature of arbitration, pre-hearing information exchange shall be limited to the reasonable production of relevant, non-privileged documents explicitly referred to by a party for the purpose of supporting relevant facts presented in its case, carried out expeditiously."*

There is a danger in limiting the exchange of information at the time of contracting. In the event that more information exchange would be advantageous to a party in a particular dispute, that additional evidence cannot be taken without further agreement.

The parties should always exercise caution when restricting arbitration procedures and arbitral authority. Doing so may prevent international arbitrators from doing what they usually do so well, managing the process according to the immediate needs of the parties.

Confidentiality Clause

The type of contract may also call for additional language. So, for example, parties to an exclusive information contract or sensitive technology contract may wish to consider a confidentiality provision in their agreement. Parties to international contracts frequently mistake privacy, which is a standard feature of international commercial arbitration, for the obligation to maintain confidentiality, which absent party agreement under the ICDR International Arbitration Rules will extend only to the arbitrator and the ICDR. Parties should also be aware of the limits of party agreement to confidentiality as regards non-signatories to the agreement such as witnesses and the requirements of law otherwise.

The ICDR Model Confidentiality Clause is as follows:

> *"Except as may be required by law, neither a party nor its representatives may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of (all/both) parties."*

Other Drafting Considerations

Contracting parties might also consider adding language to address specific procedural or remedial concerns. So, for example, notwithstanding the availability of emergency and interim relief under ICDR International Arbitration Rules, parties may wish to underscore their expectation that such relief will be available by providing language to that effect in the dispute resolution clause.

The ICDR Administration under the UNCITRAL Arbitration Rules

Certain parties, including most especially nation states, may feel more comfortable in contracting for application of the UNCITRAL Arbitration Rules. The ICDR is particularly well suited to providing administrative assistance in connection with the UNCITRAL Arbitration Rules. The ICDR International Arbitration Rules were originally drafted, in 1986, using the UNCITRAL Arbitration Rules as a model. Providing for ICDR administration can add significant value, especially as regards the establishment of the tribunal, scheduling and numerous other administrative concerns.

The ICDR offers the following model for providing administered UNCITRAL 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 accordance with the UNCITRAL Arbitration Rules in effect on the date of this contract.*
>
> *The appointing authority shall be the International Centre for Dispute Resolution.*
>
> *The case shall be administered by the International Centre for Dispute Resolution in accordance with its "Procedures for Cases under the UNCITRAL Arbitration Rules"."*

The parties should consider adding:

- *"The number of arbitrators shall be (one or three)";*
- *"The place of arbitration shall be [city, (province or state), country]";*
- *"The language(s) of the arbitration shall be ___."*

The ICDR offers the following model where parties seek to have ICDR act as the appointing authority only under UNCITRAL 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 accordance with the UNCITRAL Arbitration Rules in effect on the date of this contract.*
>
> *The appointing authority shall be the International Centre for Dispute Resolution."*

The parties should consider adding:

- *"The number of arbitrators shall be (one or three)";*
- *"The place of arbitration shall be [city, (province or state), country]";*
- *"The language(s) of the arbitration shall be ___."*

A Final Word

It must be emphasized that a poorly drafted arbitration clause may result in a "pathological" dispute resolution clause, which is worse than no clause at all.

For further information regarding dispute resolution clauses as well as general information regarding the ICDR rules and services, email the ICDR at **websitemail@adr.org** or contact the ICDR Executives identified below.

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