



**GOWLINGS GUIDE  
TO  
INTERNATIONAL AND DOMESTIC  
ARBITRATION AND ADR**

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Appendix “A” Canadian and International Arbitral Institutions

Appendix “B” Model of Arbitrator Competence – A Skills Analysis

## INTRODUCTION

Gowlings has been a national and international pioneer in promoting all forms of dispute resolution.

This Gowlings Guide to International and Domestic Arbitration and ADR focuses on basic principles of negotiation, mediation and arbitration where at least one party is Canadian. This Guide, authored by our Partner, Robert Nelson, whose text *Nelson on ADR* is a full description of negotiation, mediation and arbitration, should be considered a general primer and has been made available to offer general guidance only. We encourage you to contact any one of our arbitration practitioners who can assist in providing practical and sound legal advice to address your particular dispute.

In considering dispute resolution for your organization we encourage you to be proactive in identifying appropriate dispute resolution mechanisms from the outset. With that, we cannot over emphasize the importance of the dispute resolution clause.

The dispute resolution clause may ultimately prove to be the most important provision in any agreement once the parties become engaged in a dispute. We recommend that considerable attention be placed on considering and negotiating such clauses from the outset. A flawed dispute resolution clause can make a mockery of the objects of arbitration in that a debate around the dispute clause can elongate proceedings and increase expense defeating the goals of expediency and efficiency.

## **CHOOSING THE METHOD OF ADR**

There are four major types of dispute resolution:

1. Direct negotiation;
2. Mediation;
3. Arbitration; and
4. National Courts.

### **NEGOTIATION PRINCIPLES**

In negotiation, the parties engage in direct discussions, without the assistance of a third party, in order to reach an agreement. Negotiation is often unique to the participants and the circumstances. The development of a negotiating strategy will involve a consideration of many factors including: how to approach the issue of settlement; where negotiations should take place; who should be involved for optimal results; what are the parameters of negotiation and what is our “bottom line”; amongst others.

### **MEDIATION PRINCIPLES**

At a basic level, mediation is a negotiation carried out with the assistance of a third party, i.e. the mediator. The mediator, in contrast to an arbitrator or judge, has no power to impose an outcome on disputing parties. A mediator’s role is to facilitate and assist the parties to communicate and reach their own mutually acceptable settlement.

## **Benefits of Mediation**

- **Cost Efficiency.** Mediation has proven to significantly reduce the costs associated with dispute resolution when compared with arbitration or traditional litigation.
- **Timeliness.** Mediation can significantly reduce the duration of the dispute as well as the amount of individuals' time actually required to bring the dispute to resolution.
- **Confidentiality.** Like arbitration, mediation is generally a confidential process making it preferable to the public dispute resolution of the court system.
- **Face Saving.** Related to confidentiality, an effective mediator can assist all parties in finding an acceptable solution and still save face — individual dignity remains intact.
- **Durability and Sustainability.** Resolutions crafted by the disputants in mediation appear to be more durable than outcomes imposed by a court or arbitrator.
- **Relationships.** Mediation can be less damaging to the relationship between disputants than traditional court processes — an important consideration where the future integration of the parties is a factor.
- **Control over Outcome.** In mediation, the disputants agree on their own resolution to the dispute. A court or arbitrator does not impose it.
- **Creativity.** Mediation encourages disputants to think “outside the box” and consider creative solutions to their dispute that go far beyond what a judge or arbitrator could order.
- **User Friendly.** People that have participated in mediations have reported that they find the process much more satisfying than the traditional court process.
- **Transformation.** It is suggested that mediation provides the opportunity for individuals to better understand the perspective of others and that this

“acknowledgement” leads to personal empowerment that can be transformative for the parties involved.<sup>1</sup>

## **ARBITRATION PRINCIPLES**

Arbitration is a binding method of resolving disputes which depends on the existence of an agreement between the parties. Once a party has contracted to arbitrate a current or future dispute, it cannot unilaterally withdraw. The arbitration process ends with a ruling by the arbitrator called an award.

### **Non-Institutional Arbitration vs. Institutional Arbitration**

There are two essential forms of arbitration, non-institutional and institutional arbitration. In principle, agreements for non-institutional arbitration are intended to be self executing through voluntary implementation by the parties backed by the support of the national legal system. The advantage of non-institutional arbitration is that the procedure may be customized to meet the wishes of the party and the facts of the particular dispute. The disadvantage of non-institutional arbitration is that its effectiveness depends upon the voluntary cooperation of the parties and their lawyers in formulating and complying with procedural rules – often at a time when they are already in dispute. The parties may have to make a number of potentially time-consuming applications to the court to appoint arbitrators, rule on challenges, fix arbitrator fees, and the like. On the other hand, non-institutional arbitration permits the parties to create an arbitration process that is specifically tailored for their own particular circumstances.

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<sup>1</sup> Robert M. Nelson, *Nelson on ADR*, (Scarborough, Ont.: Thomson Carswell Ltd., 2003) at pp. 58-59.

In Canada, provincial arbitration legislation, like the *Arbitration Act (Ontario)* outline a process which the arbitrator can follow when the parties cannot agree (discussed below).

Non-institutional arbitration ensures that the parties, not an institution, make the most critical decision in arbitration – the selection of a skilled arbitrator.

Institutional arbitration is sometimes described as an administered or supervised arbitration. In choosing an arbitral institution the parties automatically adopt the rules and procedures of the arbitral institution.

In Canada, the major institutional arbitration organizations are:

1. ADR Chambers ([www.adrchambers.com](http://www.adrchambers.com));
2. The ADR Institute of Canada, Inc. ([www.adrcanada.ca](http://www.adrcanada.ca));
3. British Columbia International Commercial Arbitration Centre ([www.bcicac.com](http://www.bcicac.com)); and
4. The Canadian Commercial Arbitration Centre ([www.cacniq.org](http://www.cacniq.org)).

The major international institutional arbitration organizations are as follows:

1. **The ICC ([www.iccwbo.org](http://www.iccwbo.org))**. The International Court of Arbitration of the International Chamber of Commerce is the most comprehensively supervised of all the international arbitration organizations/institutions.

2. **The LCIA ([www.lcia-arbitration.com](http://www.lcia-arbitration.com))**. The London Court of International Arbitration was founded in 1892. LCIA arbitrations may take place anywhere in the world. In an LCIA arbitration there is a relatively low level of supervision by the institution itself.

3. **The AAA ([www.adr.org](http://www.adr.org))** . The American Arbitration Association. This is the foremost American arbitration organization with domestic and international divisions.

4. **CPR Institute for Dispute Resolution ([www.cpradr.org](http://www.cpradr.org))**. This international arbitration organization is well respected and developed the ADR pledge where major corporations agree to use ADR before resorting to litigation.

The arbitrator appointed may well be from a culture or country or legal system unknown to the parties.

As a general rule the parties should resist delegating away the power to appoint the arbitrator in the dispute resolution clause.

A party enforces an arbitral award by seeking an order of the Court incorporating the terms of the award.

## **The Canadian Legal Framework for Domestic and International Arbitration**

### **New York Convention**

The New York Convention is an international treaty which recognizes and enforces foreign arbitral awards. It was signed in 1959 but it was not until 1986 that Canada approved and declared the New York Convention to have the force of law in Canada.

A contracting state to the Convention has the right to declare that it will only recognize and enforce awards made in other states that have ratified the convention. There are very limited grounds whereby a state may refuse to recognize and enforce an arbitral award made in another state that is a party to the convention.

### **UNCITRAL**

In response to Canada signing the New York Convention, various provinces in Canada enacted arbitration acts which govern international arbitrations, e.g. where one party to the arbitration is situated outside Canada. For example, the Province of Ontario enacted the International Commercial Arbitration Act (Ontario). This act incorporates the UNCITRAL Model Law, international arbitration rules.

UNCITRAL is the acronym for the United Nations Commission on International Trade Regulation. The *UNCITRAL Model Law* differs from

the New York Convention in that it was not drafted as a treaty, but rather as UNCITRAL's attempt to harmonize the global practice of international arbitration.

Every arbitration is governed by the relevant arbitration statute. The mandatory provisions of the arbitration act will over-ride the parties/ dispute resolution clause. In all other circumstances, the arbitration clause governs.

### **Provincial Arbitration Acts**

Each Province of Canada has an arbitration act governing domestic arbitrations in that province. The legislation will govern the conduct of the arbitration where the parties have not been able to agree. Further, as stated above, mandatory provisions of the domestic arbitration act will over-ride an individual dispute resolution clause.

### **Negotiation of the Dispute Resolution Clause**

The terms of the dispute resolution clause are critical to a successful arbitration. Theoretically, a successful arbitration is one that moves efficiently and with relative economy. The success or failure of the outcome of the arbitration is another issue. There are two approaches to the development of a dispute resolution clause. First, the parties may choose to develop their own clause sensitive to their own unique needs and circumstances. Second, the parties may choose a relatively simple clause provided by an arbitral organization but which attaches all the rights and responsibilities outlined in that organizations rules and procedures.

Depending upon the nature of the clause, this may be an onerous responsibility upon the parties and considerable time should be spent reviewing those rules and procedures prior to agreeing to those terms. The clear standardized words of an ADR institution can be both positive and negative. The clear standardized words will enable you to avoid a pathological ADR clause as discussed below but will require you to adopt the complete procedures of that institution.

Remember the four basic questions of any arbitration clause:

1. What is to be arbitrated?
2. By whom is it to be arbitrated?
3. Where is it to be arbitrated?
4. How is it to be arbitrated?

### **Jurisdiction**

The arbitration agreement sets out the lawful powers and authority of the arbitrator – i.e. the jurisdiction of the arbitrator.

Use broad language in the scope of the arbitrator's power i.e. his/her jurisdiction such as “any and all disputes, controversies or claims in any way connected”.

Under the doctrine of party autonomy, the parties can give the arbitral tribunal the power to award damages, punitive damages, interest, costs and all forms of equitable relief including injunctive and specific performance.

## **Place of Arbitration**

The law applicable to the conduct of the arbitration will usually be the law enforced at the place of arbitration absent a contractual agreement otherwise.

## **Interests and Costs**

Unless specific provision is made to give the arbitrator the power to award costs, the arbitrator does not appear to have any power to award costs in an international arbitration at common law. Domestic arbitration statutes, like that found in Ontario, generally give the arbitrator the power to award interest and costs. One should ensure that the arbitration agreement provides that the arbitrator has the power to award interest and costs.

## **Choice of Law**

A well drafted arbitration agreement will identify the multi-faceted nature of choice of law issues. A drafter should specify what law will apply for each of the substantive and procedural aspects of the arbitration. Note that the procedural and substantive law governing the dispute need not be the same system of law although in practice this is generally the case.

## **Choice of Rules**

You will want to specify what procedural rules will apply during the arbitration proceedings. The parties in choosing the applicable Rules have several options which include:

1. Rules of an Arbitral Institution;
2. Rules of any provincial arbitration statute;
3. Rules substituted by the parties themselves;
4. The procedure set out in national or provincial arbitration acts.

If the parties choose to develop their own rules they may wish to consider issues related to the service of documents, witnesses, discovery, how evidence will be tendered, briefs and submissions, language of the proceedings costs, arbitration fees, interest, and the type of awards to be given.

One recommended approach is that business agreements include a multi-step Dispute Resolution Clause. A draft multi-step clause can be found in Appendix A to this guide.

**(a) Pathological Clauses<sup>2</sup>**

Frédéric Eisemann, former Secretary-General of the ICC International Court of Arbitration, established four essential functions of an arbitration clause. They are:

1. An arbitration clause must produce mandatory consequences for the parties;
2. It must exclude the intervention of state courts in the settlement of the conflict, at least before an award is issued;

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<sup>2</sup> Excerpts from *Nelson on ADR*, pp. 165-172

3. It must empower the arbitrator to settle the dispute likely to arise between the parties;
4. It must allow for the most efficient and rapid procedure leading to an award that is judicially enforceable.<sup>3</sup>

Eisemann referred to those clauses that do not respect these four essential functions as “pathological clauses”.

Unclear, ambiguous or conflicting clauses can be the cause of delays and create additional expense arising from the litigation of these clauses. It is to be noted that using such “pathological clauses” does not necessarily mean that they will be invalidated for being too vague or ambiguous, but that the intervention of the court will most likely be needed in order to identify the intention of the parties, hence increasing the cost and time of a procedure that was meant to be short and effective.

It is not imperative that an arbitration clause be lengthy or complicated, but it is critical that the clause be clear if it is to be effective. As a result, the parties should ensure that the clause is tailored to the specific circumstances of the transaction or dispute rather than being vaguely worded.

Drafters of arbitration clauses must consider a number of factors in order to avoid many complications that can arise from a “pathological clause”. The following is a list of some of the most crucial mistakes that must be avoided.

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<sup>3</sup> “La clause d'arbitrage pathologique”, *Commercial Arbitration Essays in Memoriam Eugenio Minoli*, U.T.E.T., 1974, p. 130.

(i) *Misnaming an Institute*

When referring to an institute, such as the ICC, either to adopt its Rules or to have its tribunal administer the proceedings, the parties should ensure that their clause refers to the official name of the chosen institute. Otherwise, a party which is reluctant to resolve the dispute could argue that the clause refers to another institute rather than the one intended.

The International Chamber of Commerce, for example, is often mistakenly referred to as “The International Chamber of Commerce in Geneva” or “in Zurich”.<sup>4</sup> In such a case, the ICC has a practice of interpreting the clause as meaning that the parties intended the place of arbitration to be Zurich or Geneva, pursuant to the Rules of the ICC. Another clause referring to the ICC stated that the arbitration was to be held before the “official Chamber of Commerce in Paris, France”.<sup>5</sup> In this case such a mistake could prove to be very costly. There is no official Chamber of Commerce in Paris so one party could argue that what was intended was the ICC while another could just as appropriately claim that the “Chambre Arbitrale de Paris” was the intended Institute.

(ii) *Use of “may” vs. “shall”*

For example, an arbitration clause that has been referred to the ICC provided:

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<sup>4</sup> Davis, B.G., “Pathological Clauses: Frédéric Eisemann’s Still Vital Criteria”, *Arbitration International*, 1991, Vol. 7, No. 4, p. 368. See also *supra*, note 35.

<sup>5</sup> *Ibid.*, p. 369.

Any dispute of whatever nature arising out of or in any way relating to the Agreement or to its construction or fulfilment *may* be referred to arbitration.<sup>6</sup> [emphasis added]

The problem with this clause is that it is not clear whether the arbitration is mandatory or whether there is another possible method for resolving the dispute. Furthermore, the clause is not clear as to who can decide whether or not to refer the dispute to arbitration. This clause does not respect the first of Eisemann's essential functions, which is to produce mandatory consequences for the parties. Also, since this provision is not clearly worded, the courts are likely to be asked to intervene in the interpretation of the clause, which in turn will cause delay.

**(iii) *Failing to Name Place of Arbitration***

According to most institutional rules, the parties are free to designate the place of arbitration. However if the parties fail to specify the place of arbitration, then the arbitral tribunal will choose one for them. Parties have to be very careful when choosing the place of their arbitration because its legislation will determine the extent of involvement of the courts in the arbitration proceedings and the likelihood that the arbitral award will be enforced (depending on whether the State is a signatory to the *New York Convention*, for example). Also, unless the parties have agreed otherwise, the law of the place of arbitration determines the procedural law to be applied to arbitration or, even if the parties have agreed on another system of

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<sup>6</sup> *Ibid.*, p. 367.

procedural law, they will have to follow the mandatory procedural rules of the situs during the arbitration.

***(iv) Adopting the Rules of an Institute without a Clear Understanding of those Rules***

Arbitration agreements are sometimes drafted quite hastily after the transactional elements have been agreed upon. The parties may agree to adopt the rules of an institute without having an in-depth knowledge of those rules. For instance, drafters might be inclined to adopt the Rules of the ICC because of its widespread use and recognition although these rules might not be completely appropriate for the kind of dispute that can arise between the parties to the agreement.

Most institutional rules will allow parties to modify or adapt certain aspects of the rules. For example, parties can agree to use the rules of the ICC but provide certain modifications specific to the disputes relative to their agreement. Finally, if the parties choose the rules of an institution, they should also clarify whether the rules are those in force at the time of signing the agreement or those in force at the time of the arbitration since most institutional rules are subject to frequent changes.

***(v) Using Vague and Unclear Terminology***

Once again if the clause is not clear and precise, court intervention will be necessary in order to interpret the wording, hence causing more delays and increasing the overall cost of the procedure.

A clause that was presented to the ICC stated:

Any disputes arising from the interpretation of the present contract will be settled by an arbitral tribunal sitting in a country other than that of each of the parties.<sup>7</sup>

This clause lacks in two main areas. First, there is nothing indicating what is meant by “arbitral tribunal”. One could argue that it refers to a tribunal of three arbitrators while another party could claim that it means a single arbitrator appointed by both parties. Secondly, there is no established place of arbitration. Presuming there was no specification as to the procedural law that applied, what procedure would be followed if the parties cannot agree on an arbitrator? Usually, that question is determined by the specified procedural law or, if none has been defined, by the procedural law of the place of arbitration.

***(vi) Combining Non-Institutional Arbitration with Institutional Arbitration***

Although parties are allowed to modify the rules of procedure of an arbitral institution, they must be very careful when doing so. The parties must be aware that most institutional rules have certain provisions which are mandatory and cannot be avoided or modified. Also, when combining non-institutional elements with institutional arbitration there can arise a tension between the clause and the institutional rules.

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<sup>7</sup> *Ibid.*, p. 385.

In the case of *Spectra Innovations Inc. v. Mitel*,<sup>8</sup> the parties had a clause stipulating:

In case such a dispute is not settled amicably by senior management within (30) days of escalation to senior management, such dispute shall be resolved and determined by an arbitration board acting in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce (I.C.C.), whose decision shall be final and binding upon the parties.

The applicants were arguing that this clause should be interpreted as meaning that the appointed arbitration board would only have recourse to the ICC Rules for procedural guidance whereas the respondents wanted to follow all the ICC Rules. The Court concluded that strict adherence to the ICC model clause was not mandatory in order to provide for arbitration pursuant to the ICC Rules. Therefore, if parties wish to adopt the rules of an institution with certain *ad hoc* provisions, they must make it clear in the clause and they must ensure that there is no incompatibility with mandatory terms of the institutional rules.

***(vii) Too Narrowly Defining the Scope of the Arbitration Clause***

Again, when drafting the arbitration clause, the parties should be very careful in choosing the terminology, in order to avoid inadvertently restraining the scope of the arbitration. For example, in *Huras v. Primerica Financial Services Ltd.*,<sup>9</sup> the Ontario Court of Appeal refused to institute a stay of Court proceedings, because the dispute did not fall within the scope

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<sup>8</sup> [1999] O.J. No. 1870 (Ont. S.C.J.).

<sup>9</sup> *Supra*, note 35.

of the arbitration clause. In this case, the Court found that the defendant's failure to pay a minimum wage to the plaintiff during her mandatory training program was a dispute that arose in the trainer-trainee relationship, prior to the plaintiff becoming a hired employee of the defendant. However, the agreement containing the arbitration clause was entered into by the parties after the training program had ended. The Court found that a proper construction of the clause revealed that the parties had intended those disputes arising from the contractual relationship be resolved by arbitration and not the disputes arising from the prior trainer-trainee relationship. The parties could not present their dispute to an arbitration panel since the clause was not construed broadly enough to encompass the dispute raised in this action.

Further, in the U.S. decision of *Mediterranean Enterprises, Inc. v. Sangyong Corp.*,<sup>10</sup> the Court held that the expression “*arising hereunder*” was somewhat limited in relation to an arbitration clause in that it was considered to be restricted to “disputes and controversies relating to the interpretation of the contract and matters of performance”. However, in another U.S. case, the Court of Appeals concluded that the ICC's recommended clause, which uses the expression “*arising in connection with the present contract*”, was to be “construed to encompass a broad scope of arbitration issues” and should embrace “every dispute between the parties having a significant relationship to the contract regardless of the label attached to the dispute”.<sup>11</sup>

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<sup>10</sup> 708 F.2d 1458 (Cal. C.A., 1983).

<sup>11</sup> *J.J. Ryan & Sons, Inc. v. Rhône Poulenc Textile, S.A.*, 863 F.2d 315 (4th Cir. S.C., 1988).

Therefore, although these two phrases seem alike at first glance, the parties should be careful when choosing the wording of a clause since it can have a serious repercussion on the arbitrability of the disputes that may arise.

***(viii) No Clear Divisions between Dispute Resolution Methods***

A dispute resolution clause can provide for various methods of resolution. For example, an agreement can expressly state that when a dispute arises, the parties are to attempt to negotiate in good faith, then mediate and finally submit the dispute to arbitration. However, if the clause does not specify on how to go from one method to the next, it could provide an excellent opportunity for a recalcitrant party to further delay the proceedings.

If, for example, a clause provides for mediation before turning to arbitration, without specifying a time frame for the mediation process, a reluctant party could try to delay the settlement of the dispute by arguing that mediation is still a realistic solution and should be continued as the clause provides for it. This idea of setting a clear time frame for any ADR process prior to litigation or arbitration is discussed further by Earle:

In setting a time frame, it is important that a clear beginning and end be specified. The event which starts the clock running should be one which is in the power of either party to bring about, such as delivery of a notice of appointment of mediator. Care should be taken that one party is not left to the mercy of the co-operation of the other party or some uncontrollable event before the start of the time frame. Otherwise, one party can

refuse co-operation in order to gain additional bargaining power or to delay or prevent the process from getting off the ground.<sup>12</sup>

Although other methods of dispute resolution can be very beneficial, the parties should provide for relatively short time periods within which they must be used in order to restrain the duration of the process. The setting of a time period in which to conduct the various steps of ADR is very important since the courts will enforce an agreement to negotiate or mediate a dispute before pursuing arbitration or mediation. In *Angelo Breda Ltd. v. Guizzetti*,<sup>13</sup> the Court refused the application for a stay of court proceedings in order to continue with arbitration. However, Feldman J. ordered that the parties proceed to mediation as stipulated in their agreement before the matter would be referred to the Commercial List.

***(ix) Does Not Specify Applicable Law***

The choice of applicable law is not a necessary aspect which, if not specified, would render the arbitration clause invalid. However, if the parties specify the applicable law in the agreement, it could save them a considerable amount of time and costs. If the parties do not specify the law that applies to the contract, it is an issue that is to be decided by the arbitrators, and this decision could bring an unfortunate surprise to the parties. One imperative consideration is that the parties chose a legal system in which the subject matter of the contract is arbitrable. Also, it is

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<sup>12</sup> Earle, W.J., *Drafting ADR and Arbitration Clauses for Commercial Contracts*, Toronto: Carswell, 2001, p. 3-12.

<sup>13</sup> [1995] O.J. No. 3250 (Ont. Gen. Div. [Commercial List]).

favourable that the parties chose a legal system that is developed with regard to the issues addressed in their contract.

(x) *Naming Two Authorities*

The parties should also ensure that they clearly define the arbitral tribunal or the appointing authority in order to avoid further disputes. Again if the institution is not specifically identified or if the clause seems to name more than one, a lengthy and costly confrontation can arise as to who is the intended authority. The following is an example of an agreement that seems to combine two arbitral institutions in the same clause:

Any controversy or claim arising out of or relating to this Agreement or the breach hereof shall be settled by arbitration in Seoul, Republic of Korea, before the Korean Commercial Arbitration Tribunal by a single arbitrator in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce.<sup>14</sup>

The parties to this arrangement were not capable of agreeing on which arbitral institution was intended and had to engage in several court actions to settle this conflict.<sup>15</sup> This clause could have been interpreted as selecting the Korean Commercial Arbitration tribunal as the appointing authority for the nomination of the arbitrator under the Rules of the ICC or again as designating the Korean Commercial Arbitration Tribunal as the arbitral tribunal, adhering to the Rules of the ICC. Furthermore, a party could also argue that the clause referred to an ICC arbitration and that the reference to the Korean Commercial Arbitration Tribunal was merely for specifying the

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<sup>14</sup> See Davis, *supra*, note 51, p. 377.

<sup>15</sup> See Bond, *supra*, note 49, p. 15.

place of arbitration.<sup>16</sup> When referring to an institution, the parties should clearly indicate whether they intend to have the institution administer the proceedings or simply to incorporate its rules of procedure.

Here is another example of a defective clause:

Attribution of jurisdiction: in case of contestation, the parties agree to seek recourse to the arbitration of the French Advertising Federation. In case of disputes, only the Seine Court will have jurisdiction.<sup>17</sup>

This clause is extremely problematic. Firstly, there is no specification as to what is the difference between a “contestation” and a “dispute”. Therefore a court would have to intervene in order to determine whether a particular disagreement is a contestation or a dispute and such a decision could be very difficult to reach. Secondly, because of the ambiguous wording, this clause is very far from being clear as to who is the deciding authority.

### **Selection of the Arbitrator**

The selection of an appropriate arbitrator is critical. Whether or not the arbitration clause calls for party nominations, there remains the problem of the method for selecting sole or presiding arbitrators. The best arbitrator is one skilled in process, one skilled in weighing evidence and one skilled in maintaining an orderly and fair procedure. Retired Judges or senior advocacy counsel are well placed to act in this capacity.

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<sup>16</sup> See Davis, *supra*, note 51, pp. 377-378, discussing the complications of this particular clause.

<sup>17</sup> *Ibid.*, p. 384.

On the other hand a notable advantage of arbitration is that the parties may choose as arbitrators specialists in the field in question. The freedom of the arbitrants to choose an arbitration panel equipped with expertise in the subject matter is a feature that the arbitrants cannot find in court. A retired judge is often unaware of the technical intricacies or jargon of the subject matter and must be educated in this regard. Keep in mind, however, that the arbitrator who was selected for his or her “specialized knowledge” may turn out to be biased and intolerant, filled to the brim with his or her own pet theories.

The most commonly seen requirements linked to professional qualifications are language proficiency, nationality and place of residence. Should non-lawyers act as international arbitrators? Under all the rules described in this guide the parties are free to nominate arbitrators whose field of experience and expertise is not in the law. It is generally safer to select lawyers in international arbitrations. While an understanding of a range of legal issues, from matters of jurisdiction to private international law, may not be essential in domestic arbitration, it is generally required in the international context, even in cases which appear at first sight to involve only comparatively simple factual or technical issues.

### **The Arbitration Process**

Upon appointment of an arbitrator, counsel will schedule a preliminary motion to settle the timetable. The timetable is the key to a successful arbitration. This preliminary motion can be done by telephone. The purpose

of the timetable is to schedule the exchange of pleadings, the delivery of documents, the examinations for discovery and the date of the hearing itself. There may well be critical preliminary motions with respect to the jurisdiction of the arbitrator. As a general rule, the courts will encourage the arbitrator to make a preliminary ruling on his or her jurisdiction even if the making of this ruling determines key issues not yet presented fully into evidence.

The arbitrator's jurisdiction is defined by the arbitration agreement. The arbitrator's procedural authority is set out in the rules governing the arbitration. If the rules are silent, the mandatory provisions of the governing law would apply. If there are no mandatory provisions in the governing law, the arbitrator has his or her own discretion.

The demands of complex commercial arbitration require the arbitrator to control the process. As a general principle, arbitrators enjoy great authority over the proceedings and should govern proceedings with a firm but fair hand. Many key issues will be considered by the arbitrator prior to the hearing itself.

Experienced counsel will be continually re-evaluating their case in light of the productions and discoveries ordered pursuant to the timetable. A propitious time for further negotiations or mediation may arise. Further, modern arbitrators are aware of the dynamic aspect of mediation and may

seek to encourage the parties to schedule a mediated session which may lead to a settlement.

With respect to the timetable, the arbitrator must exercise strict authority over the timetable. For example, if the arbitration is to be run effectively and efficiently counsel cannot have unlimited time for examinations for discovery as in standard litigation. One approach is to clearly delineate the amount of time proposed for examinations for discovery or depositions to direct counsel to complete their discoveries within the period fixed. Further complex or unnecessary motions related to the production of documents on discovery or questions flowing from the examination for discovery can be resolved speedily by telephone motions. Short of settlement, the arbitrator must insist that the parties comply with the timetable.

Another critical component of the timetable is the motion to determine the actual hearing itself. There are a number of matters which must be resolved. Unlike a normal case, the arbitrator must govern the arbitration process, at all times of course, by being sensitive to the need to treat each party fairly and equally. The matters to be resolved by the arbitrator include:

- The preparation of a common document brief.
- The exchange of expert reports.
- Witness statements in the place of live witnesses.
- Evidence by video technology to save travel expense.

The arbitrator must also demand the respect of the parties and prevent bad behaviour from counsel or witnesses. Most arbitrators have little difficulty maintaining civility in the hearing room. The same principles which must govern civil relations between counsel must also govern the arbitration process.

At the conclusion of the hearing, the arbitrator must prepare the final award. As a general rule, the arbitrator must prepare his award on recognized legal principles of the jurisdiction of the “law” governing the award. If expressly provided in the arbitration statute or individual clause, an arbitrator may decide based on what the arbitrator believes to be fair and equitable in the circumstances.

### **Costs Award of an Arbitrator**

Depending on the dispute resolutions clause or the applicable statute, an arbitrator has broad jurisdiction to allow costs appropriate to the circumstances. Furthermore, while parties are entitled to play hardball in arbitration, the consequence, if unsuccessful, may be expressed in costs. Personal attacks upon a party which turn out to be unfounded may attract a high level of costs for the arbitrator. Furthermore, the arbitrator may take into consideration offers to settle which have been made by a party during the course of the arbitration which are then bettered in the actual award.

Arbitration can be an effective tool in resolving disputes if the process is carefully controlled. The key decision, of course, is to select someone as an arbitrator who will tightly control the process.

**Canadian Arbitral Institutions**

Canada’s accession to the New York Convention and Model Law in the mid-1980s, encouraged the development of Canadian autonomous arbitral institutions dedicated to the resolution of disputes between private parties. The most recognized Canadian institutions are: (1) ADR Chambers<sup>1</sup>; (2) The ADR Institute of Canada<sup>2</sup> (“ADR Canada”); (3) The British Columbia International Commercial Arbitration Centre<sup>3</sup> (“BCICAC”); and (4) The Canadian Commercial Arbitration Centre<sup>4</sup> (“CCAC”).

**(1) ADR Chambers**

ADR Chambers in Toronto is perhaps the most respected arbitration institute in Canada. Its roster of arbitrators is comprised mainly of retired judges of the Superior Court of Ontario.

**(2) The ADR Institute of Canada (“ADR Canada”)**

In 2000, ADR Canada was created following the joining together of the Arbitration and Mediation Institute of Canada (AMIC) and The Canadian Foundation for Dispute Resolution (CFDR). The Institute’s members include over 1,600 individuals and 60 business and community organizations from across Canada. In concert with its seven regional

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<sup>1</sup> <http://www.adrchambers.com>

<sup>2</sup> <http://www.amic.org>

<sup>3</sup> <http://www.bcicac.com>

<sup>4</sup> <http://www.cacniq.org>

affiliates, ADR Canada represents professionals who provide mediation and arbitration services and the individuals and organizations that use those services. It can provide disputants with a choice of professional arbitrators or mediators who meet the Institute's standards. As of 2002, commercial parties may have recourse to the Institute's national rules for administered arbitrations.

The Model Dispute Resolution Clause of ADR Canada is as follows:

All disputes arising out of or in connection with this agreement, or in respect of any legal relationship association with or derived from this agreement, shall be arbitrated and finally resolved, pursuant to the National Arbitration Rules of the ADR Institute of Canada, Inc. [the Simplified Arbitration Rules of the ADR Institute of Canada, Inc.]. The place of arbitration shall be [specify City and Province of Canada]. The language of the arbitration shall be English or French [specify language].

Their Model Dispute Resolution Clause – Mediation is:

All disputes arising out of or in connection with this agreement, or in respect of any legal relationship associated with or derived from this agreement, shall be mediated pursuant to the National Mediation Rules of the ADR Institute of Canada, Inc. The place of mediation shall be [specify City and Province of Canada]. The language of the mediation shall be English or French [specify language].

ADR Canada also has a Model Dispute Resolution Clause – Mediation and Arbitration which gives the option to mediate first and, if unsuccessful at solving the dispute, then arbitrate:

All disputes arising out of or in connection with this agreement, or in respect of any legal relationship associated with or derived from this agreement, shall first be mediated pursuant to the National Mediation Rules of the ADR Institute of Canada, Inc. Despite this agreement to mediate, a party may apply to a court of competent jurisdiction or other competent authority for interim measures of protection at any time. All disputes remaining unsettled after mediation shall be arbitrated and finally resolved pursuant to the National Arbitration Rules of the ADR Institute of Canada, Inc. [the Simplified Arbitration Rules of the ADR Institute of Canada, Inc.]. The place of mediation and arbitration shall be [specify City and Province of Canada]. The language of the mediation and arbitration shall be English or French [specify language].

**(3) The British Columbia International Commercial Arbitration Centre (“BCICAC”)**

The BCICAC headquartered in Vancouver, British Columbia (Canada), is an organization committed to offering commercial parties arbitration services as an alternative to litigation. The Centre offers important services for the effective resolution of commercial conflicts to domestic and international parties. These services include: (i) separate rules of procedure for domestic and international commercial arbitration matters; (ii) a roster of qualified arbitrators and administrative services to facilitate an efficient, fair, and economical dispute resolution process; (iii) assistance in determining where and when proceedings are held, and providing guidelines and resources, such as written material.

Their model arbitration clause states:

All disputes arising out of or in connection with this contract, or in respect of any legal relationship associated therewith or derived therefrom, shall be referred to and finally resolved by arbitration administered by the British Columbia International Commercial Arbitration Centre pursuant to its Rules.

The place of arbitration shall be Vancouver, British Columbia, Canada.

Their model arbitration clause for international disputes reads:

All disputes arising out of or in connection with this contract, or in respect of any defined legal relationship associated therewith or derived therefrom, shall be referred to and finally resolved by arbitration under the International Commercial Arbitration Rules of Procedure of the British Columbia International Commercial Arbitration Centre.

The appointing authority shall be the British Columbia International Commercial Arbitration Centre.

The case shall be administered by the British Columbia International Commercial Arbitration Centre in accordance with its Rules.

The place of arbitration shall be Vancouver, British Columbia, Canada.

BCICAC's model mediation clause is:

The parties agree to attempt to resolve all disputes arising out of or in connection with this contract, or in respect of any legal relationship associated with it or from it, by mediated negotiation with the assistance of a neutral person appointed by the British Columbia International Commercial Arbitration Centre administered under its Mediation Rules.

#### **(4) Canadian Commercial Arbitration Centre (“CCAC”)**

Established in 1986, the Canadian Commercial Arbitration Centre (CCAC) provides domestic and international arbitration services, from its head office in Quebec City and from its second office in Montreal. CCAC is a founding member of the Commercial Arbitration and Mediation Centre for the Americas (CAMCA) and a member of the International Federation of Commercial Arbitration Institutions. The Centre administers arbitration, mediation and other ADR procedures for business disputes under its own Regulations. It disposes of three sets of rules: (i) General Commercial Arbitration Rules; (ii) International Arbitration Rules; and, (iii) Fast-track Arbitral Proceedings rules. It provides regulatory supervision and customized follow-ups of dispute resolution proceedings. CCAC maintains a directory of arbitrators trained and/or accredited by the Centre. It also provides an online arbitration service. Arbitrations are conducted in either English or French, and documentation is administered in English, French and Spanish.

The CCAC’s standard arbitration clause is:

All disputes arising out of or in connection with the present contract, in particular concerning its formation, existence, validity, effects, interpretation, implementation, violation, resolution or annulment, shall be finally resolved by means of arbitration in accordance with the International Arbitration Rules of the Canadian Commercial Arbitration Centre.

## **International Arbitral Institutions**

The major international commercial arbitration organizations include: (1) the International Chamber of Commerce<sup>5</sup> (ICC) in Paris; (2) the London Court of International Arbitration<sup>6</sup> (LCIA); and, (3) the American Arbitration Association<sup>7</sup> (AAA). Also noteworthy is the Commercial Arbitration and Mediation Centre for the Americas<sup>8</sup> (“CAMCA”) for parties living in America. These institutions are all private and non-profit organizations.

### **(1) The International Chamber of Commerce (“ICC”)**

In 1923, the ICC established the International Court of Arbitration, located in Paris, leading the way in international commercial arbitration. The ICC Court’s scope is truly international, conceived specifically for business disputes in an international context. The ICC Arbitration Court is governed by its own rules of arbitration: Rules of Arbitration of the International Chamber of Commerce (1998). The Court oversees the ICC arbitration process and, among other things, is responsible for: appointing arbitrators; confirming, as the case may be, arbitrators nominated by the parties; deciding upon challenges of arbitrators; scrutinizing and approving all arbitral awards; and fixing the arbitrators' fees.

The standard clause used in contracts designating ICC arbitration is:

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<sup>5</sup> [www.iccwbo.org](http://www.iccwbo.org)

<sup>6</sup> [www.lcia-arbitration.com](http://www.lcia-arbitration.com)

<sup>7</sup> [www.adr.org](http://www.adr.org)

<sup>8</sup> [www.bcicac.com](http://www.bcicac.com)

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.

There are also several suggested ADR clauses which lead to ICC arbitration should the parties be unable to settle their dispute:

#### Optional ADR

The parties may at any time, without prejudice to any other proceedings, seek to settle any dispute arising out of or in connection with the present contract in accordance with the ICC ADR Rules.

#### Obligation to Consider ADR

In the event of any dispute arising out of or in connection with the present contract, the parties agree in the first instance to discuss and consider submitting the matter to settlement proceedings under the ICC ADR Rules.

#### Obligation to Submit Dispute to ADR with an Automatic Expiration Mechanism

In the event of any dispute arising out of or in connection with the present contract, the parties agree to submit the matter to settlement proceedings under the ICC ADR Rules. If the dispute has not been settled pursuant to the said Rules within 45 days following the filing of a Request for ADR or within such other period as the parties may agree in writing, the parties shall have no further obligations under this paragraph.

## Obligation to Submit Dispute to ADR, followed by ICC arbitration as Required

In the event of any dispute arising out of or in connection with the present contract, the parties agree to submit the matter to settlement proceedings under the ICC ADR Rules. If the dispute has not been settled pursuant to the said Rules within 45 days following the filing of a Request for ADR or within such other period as the parties may agree in writing, such dispute 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 of Arbitration.

## **(2) The London Court of International Arbitration (“LCIA”)**

Formed in 1985, the LCIA Court has dealt with a variety of commercial disputes, including the areas of foreign trade, transport, distribution, high-tech, know-how, construction and engineering. The LCIA Court developed its own arbitration rules that are intended for use in the widest range of commercial disputes, domestic and international and under any system of law. The LCIA Court is the final authority for the proper application of the LCIA Rules. It oversees the appointment of tribunals, the determination of challenges to arbitrators, and the control of costs. The LCIA has a unique database of arbitrators with the widest range of professional qualifications and expertise (legal and non-legal), guaranteeing an effective tribunal.

The LCIA recommended arbitration clauses are as follows:

### **Future Dispute**

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 under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.

The number of arbitrators shall be [one/three].

The seat, or legal place, of arbitration shall be [City and/or Country].

The language to be used in the arbitral proceedings shall be [ ].

The governing law of the contract shall be the substantive law or [ ].

### **Existing Disputes**

A dispute having arisen between the parties concerning [insert particulars], the parties hereby agree that the dispute shall be referred to and finally resolved by arbitration under the LCIA Rules.

The number of arbitrators shall be [one/three].

The seat, or legal place, of arbitration shall be [City and/or Country].

The language to be used in the arbitral proceedings shall be [ ].

The governing law of the contract shall be the substantive law or [ ].

### **Mediation Only**

In the event of a dispute arising out of or relating to this contract, including any question regarding its existence, validity or termination, the parties shall seek settlement of that dispute by mediation in accordance with the LCIA Mediation

Procedure, which Procedure is deemed to be incorporated by reference to this clause.

### **Mediation and Arbitration**

In the event of a dispute arising out of or relating to this contract, including any question regarding its existence, validity or termination, the parties shall first seek settlement of that dispute by mediation in accordance with the LCIA Mediation Procedures, which Procedure is deemed to be incorporated by reference into this clause.

If the dispute is not settled by mediation within [ ] days of the appointment of the mediator, or such further period as the parties shall agree in writing, the dispute shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference to this clause.

The language to be used in the mediation and arbitration shall be [ ].

The governing law of the contract shall be the substantive law of [ ].

In any arbitration commenced pursuant to this clause,  
i. the number of arbitrators shall be (one/three); and  
ii. the seat, or legal place, of arbitration shall be [City and/or Country].

### **(3) The American Arbitration Association (“AAA”)**

The AAA was founded in 1926 and is the United State's foremost provider of dispute settlement services. It administers arbitration, mediation and other ADR cases and provides a wide-range of specialized arbitration rules, notably: (i) Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes); (ii)

International Dispute Resolution Procedures (which include international arbitration rules); (iii) Arbitration Rules for the Real Estate Industry; (iv) Arbitration Rules for Wills and Trusts; and (v) Construction Industry Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Construction Disputes).

The International Centre for Dispute Resolution (ICDR) is a division of the AAA. It is the international division of the AAA charged with the exclusive administration of all of the AAA's international matters. ICDR also has many cooperative agreements with arbitral institutions around the world for facilitating the administration of its international cases. Their model arbitration clauses which may be inserted into any contracts are:

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 with its International Arbitration Rules.

ICDR also participates in international mediation in accordance with its International Mediation Rules. Their model mediation clauses are:

If the parties want to adopt mediation as part of their contractual dispute settlement procedure, they can insert the

following mediation clause into their contract in conjunction with a standard arbitration provision:

If a dispute arises out of or relates to this contract, or breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation in accordance with the International Mediation Rules of the International Centre for Dispute Resolution before resorting to arbitration, litigation, or some other dispute resolution procedure.

If the parties want to use a mediator to resolve an existing dispute, they can enter into the following submission:

The parties hereby submit the following dispute to mediation administered by the International Centre for Dispute Resolution in accordance with its International Mediation Rules. (The clause may also provide for the qualifications of the mediator(s), method of payment, locale of meetings, and any other item of concern to the parties.)

**(4) The Commercial Arbitration and Mediation Centre for the Americas (“CAMCA”)**

Created jointly by the American Arbitration Association, the British Columbia International Commercial Arbitration Centre, the Mexico City National Chamber of Commerce and the Canadian Commercial Arbitration Centre, the Commercial Arbitration and Mediation Centre for the Americas (CAMCA) is designed to provide commercial parties involved in the free

trade area with an efficient, international forum for the resolution of private commercial disputes. CAMCA disposes of uniform arbitration rules (1996), policies and administrative procedures, relating to arbitrations. Representatives of each institution administer these rules. A multi-national panel of arbitrators and mediators is available to serve under these rules.

The standard arbitration clause for the CAMCA is:

Any dispute, controversy or claim arising out of or relating to this contract, or the breach thereof, shall be finally settled by arbitration administered by the Commercial Arbitration and Mediation Centre for the Americas in accordance with its rules and judgment on the award rendered by the arbitrator(s) may be entered into any court having jurisdiction thereof.

CAMCA also has a standard clause with respect to providing mediation first and, if the mediation is unsuccessful, for the dispute to be arbitrated under the CAMCA Arbitration Rules as follows:

The parties agree that they will endeavour to settle any dispute, controversy or claim arising out of or relating to this contract, which they are unable to settle through direct discussions, by mediation administered by the Commercial Arbitration and Mediation Centre for the Americas under its rules before resorting to arbitration. Thereafter, any dispute, controversy or claim arising out of or relating to this contract shall be settled by arbitration administered by the Commercial Arbitration and Mediation Centre for the Americas in accordance with its rules and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. The requirement of filing a notice of claim with respect to the dispute, controversy or claim submitted to mediation shall be suspended until the conclusion of the mediation process.

## **ADDITIONAL MODEL ARBITRATION CLAUSES**

We have attached model clauses from other ADR Institutions for your assistance.

(1) **Center for Public Resources (CPR) (Headquarters in New York)**

### **Negotiation between Executives**

The parties shall attempt in good faith to resolve any dispute arising out of or relating to this Contract promptly by negotiation between executives who have authority to settle the controversy and who are at a higher level of management than the persons with direct responsibility for administration of this Contract. Any person may give the other party written notice of any dispute not resolved in the normal course of business. Within fifteen (15) days after delivery of the notice, the receiving party shall submit to the other a written response. The notice and response shall include (a) a statement of that party's position and a summary of arguments supporting that position, and (b) the name and title of the executive who will represent that party and of any other person who will accompany the executive. Within thirty (30) days after delivery of the initial notice, the executives of both parties shall meet at a mutually acceptable time and place, and thereafter as often as they reasonably deem necessary, to attempt to resolve the dispute. All reasonable requests for information made by one party to the other will be honoured.

### **Mediation**

If the dispute has not been resolved by negotiation as provided herein within [45] days after delivery of the initial notice of negotiation, [or if the parties failed to meet within [30] days], the parties shall endeavour to settle the dispute by mediation under the CPR Mediation Procedure [then currently in effect

OR in effect on the date of this Agreement], [provided, however, that if one party fails to participate in the negotiation as provided herein, the other party can initiate mediation prior to the expiration of the [45] days]. Unless otherwise agreed, the parties will select a mediator from the CPR Panels of Distinguished Neutrals.

### **Arbitration**

Any dispute arising out of or relating to this [Agreement/Contract], including the breach, termination or validity thereof, which has not been resolved by mediation as provided herein [within [45] days after initiation of the mediation procedure] [within [30] days after appointment of a mediator], shall be finally resolved by arbitration in accordance with the CPR Rules for Non-Administered Arbitration [then currently in effect OR in effect on the date of this Agreement], by [a sole arbitrator][three independent and impartial arbitrators, of whom each party shall designate one][three arbitrators of whom each party shall appoint one in accordance with the “screened” appointment procedure provided in Rule 5.4][three independent and impartial arbitrators, none of whom shall be appointed by either party]; [provided, however, that if one party fails to participate in either the negotiation or mediation as agreed herein, the other party can commence arbitration prior to the expiration of the time periods set forth above]. The arbitration shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 – 16, and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. The place of arbitration shall be (city, state).

### **Stand-Alone Mediation**

The parties shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement promptly by confidential mediation under the CPR Mediation Procedure [then currently in effect OR in effect on the date of this Agreement], before resorting to arbitration or litigation. Unless otherwise agreed, the

parties will select a mediator from the CPR Panels of Distinguished Neutrals.

**(3) World Intellectual Property Organization (WIPO)  
(Headquarters in Geneva, Switzerland)**

The following are recommended contract clauses for the submission of future disputes under a particular contract and submission agreements for the reference of an existing dispute following procedures administrated by the WIPO Arbitration and Mediation Center.

**Future Disputes**

**Mediation**

Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be submitted to mediation in accordance with the WIPO Mediation Rules. The place of mediation shall be [specify place]. The language to be used in the mediation shall be [specify language].

**Arbitration**

Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be referred to and finally determined by arbitration in accordance with the WIPO Arbitration Rules. The arbitral tribunal shall consist of [three arbitrators][a sole arbitrator]. The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute,

controversy or claim shall be decided in accordance with the law of [specify jurisdiction].

## **Existing Disputes**

### **Mediation**

We, the undersigned parties, hereby agree to submit to mediation in accordance with the WIPO Mediation Rules the following dispute:

[brief description of the dispute]

The place of mediation shall be [specify place]. The language to be used in the mediation shall be [specify language].

### **Arbitration**

We, the undersigned parties, hereby agree that the following dispute shall be referred to and finally determined by arbitration in accordance with the WIPO Arbitration Rules:

[brief description of the dispute]

The arbitral tribunal shall consist of [three arbitrators][a sole arbitrator]. The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute shall be decided in accordance with the law of [specify jurisdiction].

## **(4) The Korean Commercial Arbitration Board (KCAB)**

### **(Headquarters in Seoul, Korea)**

All disputes, controversies, or differences which may arise between the parties, out of or in relation to or in connection with this contract, or for the breach thereof, shall be finally settled by arbitration in Seoul, Korea, in accordance with the Arbitration Rules of the Korean Commercial Arbitration Board and under the Laws of Korea. The award rendered by the

arbitrator shall be final and binding upon both parties concerned.

**MODEL OF ARBITRATOR COMPETENCE — A SKILLS  
ANALYSIS**

**(a) Case Management Skills**

General Definition: The ability to organize and prepare for the arbitration in an efficient and effective manner.

- Ability to design and maintain office systems
  - maintains a recording system
  - sets up a correspondence system
  - regularly reviews and controls diary entries
  - maintains a case file monitoring system
  - maintains full and up to date costing files
  - maintains full and up to date accounting files
  
- Ability to allocate time, effort and other resources effectively
  - reviews documents received from parties
  - develops an overall perspective of the case
  - draws up a timetable for preparation and conduct of the arbitration
  
- Ability to work according to systems or rules governing the handling of cases
  - records details of the appointment (e.g., terms, conditions and fee)
  - confirms the appointment in writing with both parties

- ensures all correspondence is provided to both parties
- ensures all correspondence received has been provided to the other party
- draws up a timetable
  
- Ability to bring the file to completion
  - quickly drafts award
  - if on a panel, works co-operatively to draft the decision
  - promptly notifies the parties on completion of the award

**(b) Procedural Skills**

General Definition: The ability to conduct matters that are referred to arbitration using fair, flexible and effective procedures.

- Ability to determine if appointment is legitimate (jurisdiction)
  - checks contract between the parties and in particular the arbitration clause
  - checks to ensure agreement is effective or in existence
  - ensures that issues in dispute are covered by the terms of the arbitration clause
  - ensures there is no reason for parties to challenge the appointment (e.g., independence and impartiality)
  - ensures appointment is not inconsistent with local laws or institutional rules
  
- Ability to deal with preliminary matters

- calls preliminary meeting if requested or required, in consultation with the parties
  - gives directions to parties on pleadings and disclosure of evidence
  - requests that parties disclose all relevant information at the earliest opportunity (to arbitrator and parties)
  - encourages parties to come to an agreement on as many facts as possible prior to the arbitration
  - ensures all procedural steps have been exhausted as required
- 
- Ability to supervise preliminary meetings or pre-trials
    - supervises conduct of the meeting
    - explains in advance the procedure of the meeting or pre-trial and particularly that which might cause surprise
    - intervenes when necessary
    - persuades parties to come to agreement on as many procedural aspects of the case as possible
- 
- Ability to handle interlocutory matters
    - hears the parties' arguments on the matter
    - characterizes and decides the points at issue
    - defines and supervises a fair interlocutory procedure
- 
- Ability to conduct a fair hearing

**(c) Introductory**

- clearly explains the role of the arbitrator
- clearly defines ground rules and procedure
- clearly explains procedure to parties
- invites parties to estimate time necessary for the hearing

**(d) Hearing**

- affords each party full and proper opportunity to present its case
- allows each party the opportunity to examine the other party's witnesses
- allows parties to make and respond fully to objections
- allows parties adequate time to respond to surprises
- decides quickly on procedural objections
- keeps interruptions to a minimum
- narrows issues (by clarification without unnecessarily adding or interjecting)
- maintains order
  
- Ability to handle witnesses
  - explains procedure to witnesses where necessary
  - for expert witnesses, considers legitimacy of expertise
  - encourages expert witnesses to make use of lay language

- Ability to keep a record of the evidence
  - ensures a proper record is kept of submissions and evidence
  - subjects record to review and organization frequently
  - analyzes record periodically during the hearing
  - limits evidence to relevant topics
  
- Weighs the evidence, and if necessary, decides upon admissibility

**(e) Decision Making Skills**

General Definition: The ability to reach a principled decision determining the rights and liabilities of the parties in the dispute and to expound that conclusion in the form of a reasoned award.

- Ability to understand the factual issues
  - separates the parties' claims and issues
  - identifies the real issues between the parties
  - reconstructs the issues in terms which will facilitate a solution
  - evaluates the strengths of arguments and counter-arguments
  - evaluates the submissions and the relevant evidence
  - acknowledges those issues that are of no or little relevance
  
- Ability to define the legal issues and apply them to the facts
  - determines the relevant principles of law
  - applies the relevant law to the specific facts of the case
  - distinguishes between different sources of law (i.e., the contract between the parties, the local law, or the law of an institution)
  - uses deduction to determine the application of relevant principles of law
  
- Ability to come to a decision
  - reaches an independent and impartial decision after careful analysis of all the relevant data

- Ability to articulate the decision
  - articulates succinctly the reasons and the terms of the award as well as the evidence considered and the weight given to the evidence
  - uses terminology appropriate to the audience to which it is directed

**(f) Award Writing Skills**

General Definition: The ability to effectively convey a decision in writing.

- Ability to address formalities
  - cites parties' names, dates, etc.
  - knows requirements of formalities
- Ability to summarize briefly facts and issues
  - briefly describes the nature of the dispute and how it arose
  - summarizes evidence and submissions
  - identifies undisputed facts and law agreed upon
  - distinguishes parties' claims and issues
  - reconstructs issues in terms which facilitate a solution
  - separates relevant and irrelevant facts
- Ability to reference the law relied on
- Ability to substantiate the decision
  - correlates findings with relevant evidence
  - explains chosen weighting of evidence
  - shows inconsistencies in the evidence
- Ability to convey the decision clearly to the parties
  - writes clearly and concisely
  - logically proceeds with thoughts (e.g., connected paragraphs)
  - uses appropriate language for the audience
  - presents decisions in an impartial manner
  - articulates succinctly the reasons for reaching the decision

**(g) Interpersonal Skills**

General Definition: The ability to control the arbitration process in a manner which engenders mutual respect between all those involved in an arbitration, to communicate effectively and facilitate others in doing so and to demonstrate commitment to resolving satisfactorily the dispute entrusted.

- Ability to maintain a good relationship with the parties
  - acts with courtesy, respect and patience
  - indicates interest in the issues and the parties
  - does not pre-judge the parties or the issues
  - is modest in attitudes held towards others and in self regard
  - devotes such care and attention to the case as the parties might reasonably require
  
- Ability to remain impartial and independent
  - does not send unilateral correspondence
  - discloses all facts which may give rise to doubts about potential impartiality
  - allows equal opportunities to both parties to correspond with arbitrator
    - remains detached but not unfriendly
    - avoids relationships which might expose pressure or coercion
    - controls emotion
    - never discusses the merits of the case with one party in the absence of the other
    - ensures each party has all documents
  
- Ability to maintain legitimacy
  - personal appearance commands respect
  - is punctual
  - has a quietly assured manner
  - maintains consistent behaviour
  - if uses own expertise, gives parties a chance to comment
  - is discreet and diligent
  - keeps all information confidential
  - acts with self confidence and authority

- demands respect for the office of arbitrator
- Ability to listen actively
  - remains visibly alert at all times
  - does not interrupt
  - intervenes selectively
- Ability to speak effectively
  - uses clear diction
  - clarifies or paraphrases where necessary
  - asks succinct questions if necessary
  - is direct but not intimidating
  - adopts a moderate volume and pace of speaking
  - uses an unemotional detached tone of voice
  - uses simple language
  - uses terminology of the parties' profession
- Ability to maintain a civil atmosphere at the hearing
  - uses civil language
  - uses some humour
  - displays understanding of evidence and submission
  - puts parties and witnesses at ease
  - does not use distracting body movements
  - discourages an excessively adversarial climate