



103 - Avoiding "Home Cooking" Around the World: Effective International ADR Programs

Jonathon Crook

Partner

Eversheds LLP

Richard Jeydel

Senior Vice President, Secretary & General Counsel

Kanematsu USA Inc.

Glenn Leonardi

Regional Attorney

The Goodyear Tire & Rubber Company

Michael Pillow

Director, OCM

Siemens Power Generation, Inc.

Faculty Biographies

Richard Jeydel

Senior Vice President, Secretary & General Counsel
Kanematsu USA Inc.

Glenn Leonardi

Glenn Leonardi is a corporate attorney with The Goodyear Tire & Rubber Company in Akron, Ohio. His current responsibilities include providing counsel to the corporation on sourcing matters, foreign joint ventures, and other transactional work.

Prior to his current assignment, Mr. Leonardi has served Goodyear as regional attorney for Goodyear's Latin America and Asia Regions, and as director of government regulatory activity. Prior to its acquisition by Goodyear, Mr. Leonardi was general counsel of Dunlop Tire Corporation in Buffalo, New York. His private practice experience was with the law firms Shearman & Sterling and Phillips Lytle in New York.

Mr. Leonardi received a B.B.A. from the University of Michigan and is a graduate of the State University of New York at Buffalo School of Law.

Michael Pillow

Michael Pillow began working with the Westinghouse Electric Corporation Law Department in twenty years ago, which became part of Siemens Power Generation. He has worked internationally for Westinghouse and Siemens on diverse matters such as contracts and projects, M&A and joint ventures and dispute resolution. He currently has global responsibility for contracts and compliance for the Siemens Power Generation service division.



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Michael Pillow, Moderator

Richard Jeydel

Glenn Leonardi

Jonathon Crook



GLOBAL ADR - INTRODUCTION

- What is ADR
 - Arbitration, mediation, creative vehicles
 - Acceptable forms vary around the world
- Goals of ADR
 - Efficient and expeditious resolution
 - More business friendly
 - Enhanced certainty

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GLOBAL ADR - INTRODUCTION

- What is “Home Cooking”
 - Resolving disputes in local, unfamiliar forum
 - Assumption that local party wins
 - Can happen in Albania or Alabama
- Perils of Home Cooking
 - Adverse Decisions
 - Uncertainty of Rules, Processes, etc.
 - Local Expertise over Global Experience
 - More costly settlements?

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GLOBAL ADR - INTRODUCTION

- Most important goals or considerations in drafting clauses and engaging in ADR
- Distinctions based on type of contract (e.g, customer, supplier, JV) or concerns with role (likely protagonist v. defender)
- How does one convince a local partner or customer to accept a neutral forum or an unfamiliar process?
- Measures undertaken to mitigate a hostile forum
- Cultural considerations re ADR

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DRAFTING THE ARBITRATION CLAUSE

There are several critical factors that ought to be considered in drafting an international arbitration clause for business-to-business agreements:

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1. There should be a statement that any (or certain identified) claim(s) or controversy(s) will determined by arbitration in accordance with [ad hoc or institutional arbitration] rules
 - ad hoc - United Nations Commission on International Trade Law (UNCITRAL), and/or other?
 - institutional - which institution? American Arbitration Association (AAA), International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), among others
2. No. of arbitrators (1 or 3)
3. Place of arbitration (city & country) – should be signatory to 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)

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4. Language of the arbitration
5. Substantive law to govern contract
 - Authority to act as *amiables compositeurs* or *ex aequo et bono*.
6. Procedural rules to govern arbitration (institution rules, or UNCITRAL rules with institution administering, or otherwise)
7. Preliminary/Interim relief permitted? (UNCITRAL rules Art 26 provide that either arbitration tribunal or judicial authority may order interim protection measures)
8. Waive punitive damages

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9. Rules of evidence to apply, if any
 - Rules regarding ability to present witnesses (fact or expert)
 - Authority of arbitration panel to appoint experts
10. Arbitrators ruling: Should be written and include reasons
11. Confidentiality
12. Time frame for conducting arbitration and for arbitrator(s) to render decision
13. Arbitrator may/may not take into consideration the custom and usage of the trade in reaching decision. Note that certain institutions provide that the arbitrator must consider (ICC, UNCITRAL Art 33).

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14. Decision to be made solely on the basis of documents?
or otherwise
 15. Who bears the costs?
 - Unsuccessful party or shared equally
 - United Nations Commission on International Trade Law (UNCITRAL) – unsuccessful pays
 - American Arbitration Association (AAA), International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA) – arbitrator's discretion
- Note: ICC, AAA – cost of service based on amount of dispute
LCIA – fees based upon daily rate
UNCITRAL – actual costs incurred, not a percentage of amount of dispute

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Drafting the Arbitration Clause

1. There should be a statement that any (or certain identified) claim(s) or controversy(s) will determined by arbitration in accordance with [ad hoc or institutional arbitration] rules
 - ad hoc - United Nations Commission on International Trade Law (UNCITRAL), and/or other?
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- Any dispute, controversy or claim (other than disputes related to _____) that is not resolved within the time periods set forth in Section 9.01 of the Agreement shall be submitted to and resolved exclusively by arbitration at the Hong Kong International Arbitration Center (“HKIAC”) in Hong Kong, and to the extent not otherwise provided for herein, under the UNCITRAL Arbitration Rules in accordance with the HKIAC Procedures for the Administration of International Arbitration in force at the date of this Agreement, including such additions to the UNCITRAL Arbitration Rules as are therein contained.

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2. Number of arbitrators (1 or 3)

- **Arbitrators.** Any arbitration shall be heard before three (3) arbitrators. Every arbitrator shall be a neutral and impartial lawyer with excellent academic and professional credentials (i) who has practiced law for at least 15 years, specializing in either general commercial litigation or general corporate and commercial matters, and (ii) who has had both training and experience as an arbitrator and is generally available to serve as an arbitrator. Each party will appoint one arbitrator. The Claimant will do so in its Request for Arbitration and the Respondent will do so in its Answer. The party-appointed arbitrators will attempt to agree on a chairman. If, within thirty (30) days after the confirmation of the last party-appointed arbitrator, such appointed arbitrators have not agreed on a chairman, then the chairman will be appointed by the HKIAC. If any party fails to appoint an arbitrator as provided above, the HKIAC will appoint such arbitrator. Upon the request of any party, the chairman of the arbitral tribunal will be of a nationality different than that of the parties.

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3. Place of arbitration (city & country) – should be signatory to 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)
 - **Arbitration.** (a) Any dispute, controversy or claim (other than disputes related to _____) that is not resolved within the time periods set forth in Section 9.01 of the Agreement shall be submitted to and resolved exclusively by arbitration at the Hong Kong International Arbitration Center (“HKIAC”) in Hong Kong, and to the extent not otherwise provided for herein, ...

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4. Language of the arbitration

- The appointing authority shall be HKIAC. All arbitration proceedings shall be conducted in the English language. Any issue as to whether or the extent to which the dispute is subject to the arbitration and other dispute resolution provisions contained in this Agreement, including but not limited to issues relating to the validity or enforceability of these arbitration provisions or the Agreement containing these arbitration provisions, the applicability of any statute of limitations or other defense relating to the timeliness of the assertion of any claim or any other matter relating to the arbitrability of such claim, and any application or request for provisional, injunctive or similar relief, shall be submitted to and determined by, such arbitrators.



5. Substantive law to govern contract

- Authority to act as *amiables compositeurs* or *ex aequo et bono*.

- Governing Law. The arbitration shall be governed by the substantive laws of the State of New York applicable to contracts made and to be performed therein, without regard to conflicts of law rules, and the arbitrators shall have no power or authority to order or grant any remedy or relief that a court could not order or grant under applicable law. The arbitrators shall base their award on the terms of this Agreement, and are permitted to consider custom and usage of the trade. The arbitral tribunal shall not act as *amiables compositeurs* or *ex aequo et bono*. The parties expressly agree that this Agreement shall confer no power or authority upon the arbitrators to render any judgment or award that is erroneous in its application of substantive law and expressly agree that no such erroneous judgment or award shall be eligible for confirmation. Judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof.



6. Procedural rules to govern arbitration (institution rules, or UNCITRAL rules with institution administering, or otherwise)

- Arbitration. (a) Any dispute, controversy or claim (other than disputes related to _____) that is not resolved within the time periods set forth in Section 9.01 of the Agreement shall be submitted to and resolved exclusively by arbitration at the Hong Kong International Arbitration Center (“HKIAC”) in Hong Kong under the UNCITRAL Arbitration Rules in accordance with the HKIAC Procedures for the Administration of International Arbitration in force at the date of this Agreement, including such additions to the UNCITRAL Arbitration Rules as are therein contained.
- (b) The appointing authority shall be HKIAC. All arbitration proceedings shall be conducted in the English language. Any issue as to whether or the extent to which the dispute is subject to the arbitration and other dispute resolution provisions contained in this Agreement, including but not limited to issues relating to the validity or enforceability of these arbitration provisions or the Agreement containing these arbitration provisions, the applicability of any statute of limitations or other defense relating to the timeliness of the assertion of any claim or any other matter relating to the arbitrability of such claim, and any application or request for provisional, injunctive or similar relief, shall be submitted to and determined by, such arbitrators.



7. Preliminary/Interim relief permitted? (UNCITRAL rules Art 26 provide that either arbitration tribunal or judicial authority may order interim protection measures)

- Interim Relief and Provisional and Other Remedies. (a) The arbitrators shall have the authority to order or award any provisional remedy or other remedy or relief which would be available from a court of law pending arbitration of the dispute, including but not limited to interim orders or awards. The arbitrators shall have the power and authority to impose sanctions and to take other actions with regard to the parties to the same extent that a judge could pursuant to the United States Federal Rules of Civil Procedure. Either party may make an application to the arbitrators seeking injunctive or other interim relief, and the arbitrators may take whatever injunctive or other interim measures they deem necessary in respect of the subject matter of the dispute, including measures to maintain the status quo or safeguard the property that is the subject matter of the arbitration or to order the sale of perishable goods, until such time as the arbitration award is rendered or the controversy is otherwise resolved. Such interim measures may be taken in the form of an interim award, and the arbitrators may require security for the costs of any such measures.
- Notwithstanding the provisions of paragraph (a) of this Section, either party may seek from any court having jurisdiction hereof any interim, provisional or injunctive relief that may be necessary to protect the rights or property of any party or maintain the status quo before or after the pendency of the arbitration proceeding; provided, however, that after the arbitrators have been selected and qualified, the arbitrators shall have the sole authority to hear and determine an application for such relief, and the parties agree that any such relief ordered by the arbitrators may be immediately and specifically enforced by a court otherwise having jurisdiction over the parties. The institution and maintenance of any judicial action or proceeding for any such interim, provisional or injunctive relief shall not constitute a waiver of the right or obligation of either party to submit the dispute to arbitration, including any claims or disputes arising from the exercise of any such interim, provisional or injunctive relief.

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8. Waive punitive damages

- Punitive Damages. The arbitrators are not empowered to award damages in excess of compensatory damages, and each party hereby irrevocably waives any right to recover punitive damages with respect to any dispute.



9. Rules of evidence to apply, if any

- Rules regarding ability to present witnesses (fact or expert)
- Authority of arbitration panel to appoint experts



☛ **Discovery: Evidence.** Consistent with the expedited nature of arbitration, and pursuant to a schedule determined by the arbitrators, (i) each party will provide the other with copies of all non-privileged documents relevant to the issues raised by any claim or counterclaim, including copies of all documents in their possession or control on which they rely in support of their position or which they intend to introduce as exhibits at the arbitration hearing; and (ii) each party will provide the other with the names of all persons who it may call as witnesses or experts to testify at the arbitration hearing, and each party may take one deposition of an opposing party or a person under the opposing party's control. The time, place and duration of each deposition shall be agreed to by the parties or determined by the arbitrators if the parties cannot agree. Consistent with the expedited nature of discovery and upon a showing of good cause, other discovery, including discovery by depositions or interrogatories, may be ordered by the arbitrators to the extent the arbitrators deem such additional discovery relevant and appropriate, and any dispute regarding discovery, including disputes as to the need therefore or the relevance or scope thereof, shall be determined by the arbitrators, which determination shall be conclusive. Unless the parties otherwise agree, the arbitrators shall not have the power to appoint experts. The parties explicitly agree that exclusion of evidence by the arbitrators on grounds of irrelevance or redundancy shall not be grounds for failure to confirm and enforce the award.

10. Arbitrators ruling: Should be written and include reasons

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- Right to Full Judicial Review. The arbitrators shall report any decisions in writing and, unless both parties agree otherwise, shall set forth in writing their findings of fact and conclusions of law and shall render their award based thereon. The arbitration shall be final and binding on the parties, provided, however, that upon application by either party to the U.S. District Court for the Southern District of New York for an order confirming, modifying or vacating the award or the arbitrators, such court shall have the power to review (a) whether the findings of fact rendered by the arbitrators are supported by substantial evidence and (b) whether, as a matter of law based on such findings of fact, the award should be confirmed, modified or vacated.

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11. Confidentiality
 - Confidentiality. The arbitration proceedings conducted pursuant hereto shall be confidential. Neither party shall disclose or permit the disclosure of any information about the evidence adduced or the documents produced by the other party in the arbitration proceedings or about the existence, contents or results of the arbitration award without the prior written consent of such other party except in the course of a judicial, regulatory or arbitration proceeding or as may be requested by a governmental authority. Before making any disclosure permitted by the preceding sentence, the party intending to make such disclosure shall give the other party reasonable written notice of the intended disclosure and afford the other party a reasonable opportunity to protect its interests as to confidentiality.

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12. Time frame for conducting arbitration and for arbitrator(s) to render decision
 - By establishing a time frame for the arbitration to conclude and the arbitrators to rule, there is the risk of missing the deadline, aggravating the panel, and creating a dispute over the timing of the arbitration.

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13. Arbitrator may/may not take into consideration the custom and usage of the trade in reaching decision. Note that certain institutions provide that the arbitrator must consider (ICC, UNICITRAL Art 33).

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- **Governing Law.** The arbitration shall be governed by the substantive laws of the State of New York applicable to contracts made and to be performed therein, without regard to conflicts of law rules, and the arbitrators shall have no power or authority to order or grant any remedy or relief that a court could not order or grant under applicable law. The arbitrators shall base their award on the terms of this Agreement, and are permitted to consider custom and usage of the trade. The arbitral tribunal shall not act as *amiables compositeurs* or *ex aequo et bono*. The parties expressly agree that this Agreement shall confer no power or authority upon the arbitrators to render any judgment or award that is erroneous in its application of substantive law and expressly agree that no such erroneous judgment or award shall be eligible for confirmation. Judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof.

14. Decision to be made solely on the basis of documents?
or otherwise



- **Discovery: Evidence.** Consistent with the expedited nature of arbitration, and pursuant to a schedule determined by the arbitrators, (i) each party will provide the other with copies of all non-privileged documents relevant to the issues raised by any claim or counterclaim, including copies of all documents in their possession or control on which they rely in support of their position or which they intend to introduce as exhibits at the arbitration hearing; and (ii) each party will provide the other with the names of all persons who it may call as witnesses or experts to testify at the arbitration hearing, and each party may take one deposition of an opposing party or a person under the opposing party's control. The time, place and duration of each deposition shall be agreed to by the parties or determined by the arbitrators if the parties cannot agree. Consistent with the expedited nature of discovery and upon a showing of good cause, other discovery, including discovery by depositions or interrogatories, may be ordered by the arbitrators to the extent the arbitrators deem such additional discovery relevant and appropriate, and any dispute regarding discovery, including disputes as to the need therefore or the relevance or scope thereof, shall be determined by the arbitrators, which determination shall be conclusive. Unless the parties otherwise agree, the arbitrators shall not have the power to appoint experts. The parties explicitly agree that exclusion of evidence by the arbitrators on grounds of irrelevance or redundancy shall not be grounds for failure to confirm and enforce the award.

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15. Who bears the costs?
 - Unsuccessful party or shared equally
 - United Nations Commission on International Trade Law (UNCITRAL) – unsuccessful pays
 - American Arbitration Association (AAA), International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA) – arbitrator's discretion
- Note:
 - ICC, AAA – cost of service based on amount of dispute
 - LCIA – fees based upon daily rate
 - UNCITRAL – actual costs incurred, not a percentage of amount of dispute

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- **Expenses.** Each party shall pay its own expenses for any arbitration, provided, however, the losing party, as determined by the arbitrators, shall pay all reasonable out-of-pocket expenses incurred by the prevailing party (including legal fees), as determined by the arbitrators in connection with any such dispute.

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- The International Chamber of Commerce, Paris, France, Web site: <http://www.iccwbo.org>
- The London Court of International Arbitration, London, England, Web site: <http://www.lcia-arbitration.com>
- Hong Kong International Arbitration Centre, Hong Kong, Web Site: http://www.hkiac.com.hk/HKIAC/HKIAC_English/main.html
- United Nations Commission on International Trade Law (UNCITRAL), Web site: <http://www.uncitral.org/>

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GLOBAL FORMS OF ADR

- Negotiation by the Parties
- Mediation by Third Party
- Arbitration

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Handling a Global ADR - Negotiations

- Most common non-arbitration contractual ADR provision (usually as a precursor to more formal and binding proceedings)
- Frequently little or no definition of participants, location, language, presence and role of counsel or timelines, therefore “ad hoc” drafting considerations are paramount

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Handling a Global ADR - Negotiations

- Cultural barriers can be almost insuperable without substantial preparation, along the lines of good, thorough mediation advance work
- Outside counsel rarely used in this setting, but a substantial, if not leading, role for experienced in-house practitioners who have the confidence of the business leaders involved

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Handling a Global ADR - Negotiations

- Designate a primary spokesperson on each side who was not directly involved in the problematic aspects of the transaction.
- As in a mediation, the ability to suggest creative, value-adding solutions
- Corporate counsel, when not the spokesman, may act as a mediator or, with the lawyer for the other side, as a co-mediator - the voice of reason

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Handling a Global ADR - Mediation

- A great tool, as long as everyone involved understands the process. Often not the case in international context
- Even societies with a long and productive history of "mediation" in their culture may find mediation in the legal realm to be utterly "foreign."

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Handling a Global ADR - Mediation

- Problems include absence of decision-makers and finding competent neutrals
- Careful research, patience, and the ability to piece together a settlement one issue at a time are all important
- Finding the right mediator, siting the sessions at a location that is equally convenient or inconvenient to the parties, and imposing reasonable, but not "terminal" deadlines can all help.

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Handling a Global ADR – Mediation Timing

- Some believe that mediation works best only after discovery is essentially complete. Others completely disagree.
- While there may be some key documents or facts to be exchanged or ascertained, a major value to early settlement is avoiding as much of the preparatory work as possible.
- The key business (and in-house lawyers, if involved) almost always have a good feel for what the evidence will show from an early point.

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Handling a Global ADR -Arbitration

- Imperative to avoid grafting all of the federal rules of evidence and procedure, particularly as to discovery, onto arbitration
- Outside counsel, particularly US litigators, cannot imagine proceedings without depositions, interrogatories, motions in limine, etc.

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Handling a Global ADR -Arbitration

- Common lawyers tend to over-prepare everything, unless they are experienced in international arbitration. Also wary of "duelling affidavits" or witness statements and the concomitant absence of cross-examination.
- Many of the traditional elements of international arbitration are both effective and efficient. A trier of fact can read a witness statement much more rapidly than listening to some droning direct
- Having a single, truly neutral, expert instead of one from each (and committed to each) side can be an enormous advantage.

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Effective Arbitration Techniques in International Business

Thursday 21 June

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I. How to Create a Binding Commitment to the Use of Arbitration

- A. Separability
- B. Objectives
- C. Effect
- D. "Pathological" clauses
- E. Essential ingredients
- F. Additional options
- G. Special problems: multiple parties and/or Groups of contracts
- H. Model arbitration clauses

II. Cultural influences

III. Comparative benefits

I. **What is an Arbitration Agreement?**

Treaty Requirement:

An agreement in writing to submit a dispute to arbitration is essential (Article II of the New York Convention).

Evidence of consent:

In an international commercial arbitration, the arbitration agreement provides evidence that the parties have consented to resolve disputes by arbitration. This consent is essential. Without it, there can be no valid arbitration.

A. **Separability of Arbitration Agreement**

An arbitration agreement is separate from the contract in which it is contained. This has important consequences:

- survives termination of main contract
- validity independent of main contract
- governing law may not be the same as the law applicable to the main contract

A. **Separability of Arbitration Agreement**

- **ICC Rules – Article 6(4):** *“Unless otherwise agreed, the Arbitral Tribunal shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is non-existent provided that the Arbitral Tribunal upholds the validity of the arbitration agreement. The Arbitral Tribunal shall continue to have jurisdiction to determine the respective rights of the parties and to adjudicate their claims and pleasing even though the contract itself may be non-existent or null and void.”*
- Divergent jurisprudence on separability, e.g. France and England.

B. Objectives of an Arbitration Agreement

- (a) exclude local courts
- (b) identify appointing authority
- (c) confer jurisdiction on arbitrators
- (d) identify arbitrators' jurisdiction *ratione personae*
and *ratione materiae*

C. Effect of Valid Arbitration Clause

(a) Exclusion of local courts

- (i) common law: jurisdiction of local courts
may be “stayed”
- (ii) civil law: local courts have no
jurisdiction in the presence of an
arbitration agreement

(b) Constitution of Arbitral Tribunal

even in the absence of co-operation by both parties, one party alone can effect the appointment of an Arbitral Tribunal

D. “Pathological” Clauses

- failure to achieve objectives
- may or may not be incurable
- may lead to expensive litigation unrelated to the merits
- Article II(3) of the New York Convention:
“The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed”.
- Enforcement of award

E. Essential Ingredients

- (a) identification of parties (“the parties”)
- (b) identification of legal relationship (“this agreement”)
- (c) identification of disputes (“all disputes”)
- (d) mandatory referral of disputes to arbitration:
 - exclude optional language
 - “shall, “not” may”
- (e) identification of arbitration rules
 - ad hoc
 - institutional

E. Essential Ingredients (cont'd)

- (f) identification of appointing authority
 - number of arbitrators
 - nationality of arbitrators
- (g) identification of place of arbitration
- (h) identification of language of arbitration
 - translation of documents
 - interpretation during hearing
 - cost of fully bilingual translated proceedings
 - bilingual un-translated proceedings

E. Essential Ingredients (cont'd)

- (i) identification of applicable law:
 - law applicable to the arbitration agreement
 - law applicable to the contract
 - alternatives to national laws:
 - UNIDROIT
 - CISG
 - general principles
 - equity clauses

F. Additional Options

• **Pre-conditions to arbitration**

- expert determination
- mediation
- notice of dispute
- engineer's decision
- executive meeting

• **Qualifications of arbitrators**

- in a system of law
- in an area of technical expertise

F. Additional Options

- Interim measures
- Waiver of rights to appeal (e.g. England)
- Confidentiality
- Discovery
- Adaptation of contract

G. Multi-parties and/or groups of contracts

- consolidation of proceedings
- joinder of parties
- groups of contracts

H. Model Arbitration Clauses

- ICC: *“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 said Rules”.*
- SCC: *“Any dispute in connection with this agreement shall be finally settled by arbitration in accordance with the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce”.*

H. Model Arbitration Clauses (Cont'd)

UNCITRAL: *“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 as at present in force.*

Note – Parties may wish to consider adding:

- (a) the appointing authority shall be...[name of institution or person];*
- (b) the number of arbitrators shall be...[one or three];*
- (c) the place of arbitration shall be...[town or country];*
- (d) the language(s) to be used in the arbitral proceedings shall be...[specify].”*

II. Cultural Influences

- ⇒ local rules of procedure and evidence do not apply
- ⇒ written proceedings
- ⇒ arbitrators may take a more active role
- ⇒ mediation by arbitrators
- ⇒ civil law notions may appear “academic” to common law lawyers
- ⇒ broader range of legal norms potentially applicable

III. **Comparative Benefits**

- A. Neutrality
- B. International enforceability
- C. Confidentiality
- D. Flexibility
- E. Expertise
- F. Disadvantages of Arbitration

A. **Neutrality:**

In an international transaction, neither party wishes potential disputes to be decided by the domestic courts of the other party. Arbitration offers a neutral forum. In almost all jurisdictions today, arbitration agreements are binding and court proceedings brought contrary to an arbitration clause can be stayed.

B. Enforceability:

Arbitral awards are final and binding. Under the 1958 New York Convention, an arbitration award made in the territory of a Member State must be recognised and enforced in the same manner as a court judgment in another Member State. The Convention restricts the review powers of a local court to limited grounds (essentially procedural). There is, most often, no opportunity for appeal on the merits.

C. Confidentiality:

Arbitration proceedings are held in private. When the parties have on-going commercial relations that might be damaged if their dispute were public or where commercially sensitive information is involved (for example trade secrets), arbitration may assist to protect confidentiality.

D. Flexibility:

The procedure in an international arbitration, including rules of evidence, is most often independent from the law of the place of the arbitration or the law governing the contract. This allows the parties (or the arbitrators where the parties fail to agree) to “tailor” proceedings that are economical or otherwise appropriate to the circumstances of their dispute.

E. Expertise:

International arbitrators are experienced in handling complex cross-border disputes. In highly technical matters, an arbitrator may be selected because of particular expertise in order to minimise the need for additional expert evidence.

F. Disadvantages of Arbitration:

- ⇒ Interim measures
- ⇒ Limited powers the arbitral tribunal may exercise
- ⇒ Inability to consolidate multi-party disputes without consent
- ⇒ Where Arbitrator is technical expert, he/she may not have the legal expertise necessary for difficult points of law.

DRAFTING THE INTERNATIONAL ARBITRATION CLAUSE

There are several critical factors that ought to be considered in drafting an international arbitration clause for business-to-business agreements:

- (1) State that any (or certain identified) claim(s) or controversy(s) will determined by arbitration in accordance with [ad hoc or institutional arbitration] rules
 - ad hoc - United Nations Commission on International Trade Law (UNCITRAL), and/or other?
 - institutional - which institution? American Arbitration Association (AAA), International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), among others
- (2) No. of arbitrators (1 or 3)
- (3) Place of arbitration (city & country) – should be signatory to 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)
- (4) Language of the arbitration
- (5) Substantive law to govern contract
 - Authority to act as *amiables compositeurs* or *ex aequo et bono*.
- (6) Procedural rules to govern arbitration (institution rules, or UNCITRAL rules with institution administering, or otherwise)
- (7) Preliminary/Interim relief permitted? (UNCITRAL rules Art 26 provide that either arbitration tribunal or judicial authority may order interim protection measures)
- (8) Consider waiving punitive damages
- (9) Rules of evidence to apply, if any
 - Rules regarding ability to present witnesses (fact or expert)
 - Authority of arbitration panel to appoint experts
- (10) Arbitrators ruling: Should be written and include reasons
- (11) Confidentiality
- (12) Time frame for conducting arbitration and for arbitrator(s) to render decision
- (13) Arbitrator may/may not take into consideration the custom and usage of the trade in reaching decision. Note that certain institutions provide that the arbitrator must consider (ICC, UNICITRAL Art 33).

- (14) Decision to be made solely on the basis of documents? or otherwise
- (15) Who bears the costs?
- Unsuccessful party or shared equally?
 - UNCITRAL – unsuccessful pays
 - AAA, ICC, LCIA – arbitrator’s discretion
- Note: ICC, AAA – cost of service based on amount of dispute
 LCIA – fees based upon daily rate
 UNCITRAL – actual costs incurred, not a percentage of amount of dispute

SAMPLE DISPUTE RESOLUTION LANGUAGE

**ARTICLE IX.
DISPUTE RESOLUTION**

SECTION 9.01. Requirement for Meetings Regarding Disputes. Neither party may commence any arbitration proceeding respecting any dispute arising under or in connection with this Agreement (other than disputes related to Recalls, Intellectual Property or claims for indemnification for death or injuries resulting from alleged [product] failure) until fifteen (15) calendar days after a meeting between senior representatives of each of the parties has taken place at which a resolution of such dispute was discussed; or, if the other party has not, within twenty (20) calendar days of receiving notice requesting such meeting, consented to such a meeting and actually attends such meeting within the ten (10) calendar days following the expiration of the twenty (20) calendar day period, thirty (30) calendar days after the giving of such notice.

SECTION 9.02. Arbitration. Any and all disputes, controversies or claims (other than disputes relating to Recalls, Intellectual Property or claims for indemnification for death or injuries resulting from alleged [product] failure) arising out of, relating to or in connection with the interpretation or implementation of this Agreement, or the breach hereof or relationships created hereby shall be settled through the consultation process as stipulated under Section 9.01 hereof. If any such dispute, controversy or claim is not resolved within the time periods set forth in Section 9.01 hereof, then it shall be submitted to and resolved exclusively by arbitration as prescribed in Appendix I hereto. With respect to disputes relating to Recalls, Intellectual Property or claims for indemnification for death or injuries resulting from alleged [product] failure, Purchaser may, at its option in its sole and absolute discretion, submit any judgment, order or award relating to such dispute to an arbitral panel for confirmation pursuant to the procedures more particularly described in Appendix I hereto. Any such arbitral determination for confirmation of a final judgment, order or award shall be limited to confirmation of the finality of such final judgment, order or award without necessity for a rehearing on the merits.

SECTION 9.03. Waiver of Jury Trial. For the avoidance of doubt, if a trial occurs notwithstanding Section 9.02 hereof, each party hereby expressly waives any right to trial by jury of any claim, demand, action or cause of action arising under this

Agreement or in any way connected with or related or incidental to the dealings and transactions of the parties hereto with respect to this Agreement, in each case whether now existing or hereafter arising, and whether sounding in Agreement or tort or otherwise. For the avoidance of doubt, in the event of a trial permitted by this Agreement, any party to this Agreement may file a copy of this section with any court as written evidence of the consent of the signatories hereto to the waiver of their right to a trial by jury.

SECTION 9.04. Injunctive Relief. With respect to disputes relating to Recalls, Intellectual Property or claims for indemnification for death or injuries resulting from alleged [product] failure, each Party acknowledges that a breach of any of the obligations under this Agreement may result in irreparable harm and damages to the affected Party in an amount that is difficult to ascertain and that cannot be adequately compensated by a monetary award. Accordingly, in addition to any other relief to which the affected Party may be entitled, such Party shall be entitled to temporary and/or permanent injunctive relief from any breach or threatened breach by the relevant Party without proof of actual damages that have been or may be caused to such Parties by such breach or threatened breach. In particular, Purchaser may at any time initiate an action to prevent the disclosure of its Confidential Information or the use of any Purchaser’s Intellectual Property.

**ARTICLE X.
GENERAL PROVISIONS**

SECTION 10.01. Applicable Law. This Agreement and the performance of transactions pursuant to this Agreement shall be governed by and construed in accordance with the laws of the State of New York, United States of America, without giving effect to its principles or rules of conflict of laws to the extent such principles or rules would require or permit the application of the substantive Laws of another jurisdiction. The parties hereto exclude the application of the United Nations Convention on Contracts for the International Sale of Goods. Except as provided in Article IX, the parties agree that any and all disputes in respect of this Agreement shall be submitted to the U.S. District Court in the Southern District of New York and for the purposes of resolving disputes arising under or with respect to this Agreement, but for no other purposes, the parties agree to consent, and to cause their respective Affiliates to consent, to the jurisdiction of such court.

**APPENDIX I
Dispute Resolution**

SECTION I.01. Arbitration. (a) Any dispute, controversy or claim (other than disputes related to Recalls, Intellectual Property or claims for indemnification for death or injuries resulting from alleged [product] failure) that is not resolved within the time periods set forth in Section 9.01 of the Agreement shall be submitted to and resolved exclusively by arbitration at the Hong Kong International Arbitration Center (“HKIAC”) in Hong Kong, and to the extent not otherwise provided for herein, under the

UNCITRAL Arbitration Rules in accordance with the HKIAC Procedures for the Administration of International Arbitration in force at the date of this Agreement, including such additions to the UNCITRAL Arbitration Rules as are therein contained.

(b) The appointing authority shall be HKIAC. All arbitration proceedings shall be conducted in the English language. Any issue as to whether or the extent to which the dispute is subject to the arbitration and other dispute resolution provisions contained in this Agreement, including but not limited to issues relating to the validity or enforceability of these arbitration provisions or the Agreement containing these arbitration provisions, the applicability of any statute of limitations or other defense relating to the timeliness of the assertion of any claim or any other matter relating to the arbitrability of such claim, and any application or request for provisional, injunctive or similar relief, shall be submitted to and determined by, such arbitrators. The parties expressly agree that this Agreement shall confer no power or authority upon the arbitrators to render any judgment or award that is (i) manifestly erroneous in its findings of fact or (ii) erroneous in its application of substantive law, and expressly agree that no such judgment or award shall be eligible for confirmation.

(c) Arbitration of any such unresolved dispute, controversy or claim may be initiated by the claimant sending a notice of arbitration to the other party (the Respondent) at least three (3) days prior to submission of its request for arbitration to HKIAC. Any notice, request, consent or permission that is necessary, permitted or required to be given, including a request to arbitrate, shall be given pursuant to the notice provisions of Section 10.06 of this Agreement.

SECTION 1.02. Arbitrators. Any arbitration shall be heard before three (3) arbitrators. Every arbitrator shall be a neutral and impartial lawyer with excellent academic and professional credentials (i) who has practiced law for at least 15 years, specializing in either general commercial litigation or general corporate and commercial matters, and (ii) who has had both training and experience as an arbitrator and is generally available to serve as an arbitrator. Each party will appoint one arbitrator. The Claimant will do so in its Request for Arbitration and the Respondent will do so in its Answer. The party-appointed arbitrators will attempt to agree on a chairman. If, within thirty (30) days after the confirmation of the last party-appointed arbitrator, such appointed arbitrators have not agreed on a chairman, then the chairman will be appointed by the HKIAC. If any party fails to appoint an arbitrator as provided above, the HKIAC will appoint such arbitrator. Upon the request of any party, the chairman of the arbitral tribunal will be of a nationality different than that of the parties.

SECTION 1.03. Governing Law. The arbitration shall be governed by the substantive laws of the State of New York applicable to contracts made and to be performed therein, without regard to conflicts of law rules, and the arbitrators shall have no power or authority to order or grant any remedy or relief that a court could not order or grant under applicable law. The arbitrators shall base their award on the terms of this Agreement, and are permitted to consider custom and usage of the trade. The arbitral tribunal shall not act as *amiable compositeurs* or *ex aequo et bono*. The parties expressly agree that this Agreement shall confer no power or authority upon the

arbitrators to render any judgment or award that is erroneous in its application of substantive law and expressly agree that no such erroneous judgment or award shall be eligible for confirmation. Judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof.

SECTION 1.04. Awards; Enforcement of Awards. Any arbitration award shall be in United States Dollars and may, if required, be enforced by any court of competent jurisdiction, and the party seeking enforcement shall be entitled to all costs and expenses, including interest and reasonable attorneys' fees, to be paid (in United States Dollars) by the party against whom enforcement is ordered.

SECTION 1.05. Expenses. Each party shall pay its own expenses for any arbitration, provided, however, the losing party, as determined by the arbitrators, shall pay all reasonable out-of-pocket expenses incurred by the prevailing party (including legal fees), as determined by the arbitrators in connection with any such dispute.

SECTION 1.06. Discovery; Evidence. Consistent with the expedited nature of arbitration, and pursuant to a schedule determined by the arbitrators, (i) each party will provide the other with copies of all non-privileged documents relevant to the issues raised by any claim or counterclaim, including copies of all documents in their possession or control on which they rely in support of their position or which they intend to introduce as exhibits at the arbitration hearing; and (ii) each party will provide the other with the names of all persons who it may call as witnesses or experts to testify at the arbitration hearing, and each party may take one deposition of an opposing party or a person under the opposing party's control. The time, place and duration of each deposition shall be agreed to by the parties or determined by the arbitrators if the parties cannot agree. Consistent with the expedited nature of discovery and upon a showing of good cause, other discovery, including discovery by depositions or interrogatories, may be ordered by the arbitrators to the extent the arbitrators deem such additional discovery relevant and appropriate, and any dispute regarding discovery, including disputes as to the need therefore or the relevance or scope thereof, shall be determined by the arbitrators, which determination shall be conclusive. Unless the parties otherwise agree, the arbitrators shall not have the power to appoint experts. The parties explicitly agree that exclusion of evidence by the arbitrators on grounds of irrelevance or redundancy shall not be grounds for failure to confirm and enforce the award.

SECTION 1.07. Interim Relief and Provisional and Other Remedies. (a) The arbitrators shall have the authority to order or award any provisional remedy or other remedy or relief which would be available from a court of law pending arbitration of the dispute, including but not limited to interim orders or awards. The arbitrators shall have the power and authority to impose sanctions and to take other actions with regard to the parties to the same extent that a judge could pursuant to the United States Federal Rules of Civil Procedure. Either party may make an application to the arbitrators seeking injunctive or other interim relief, and the arbitrators may take whatever injunctive or other interim measures they deem necessary in respect of the subject matter of the dispute, including measures to maintain the status quo or safeguard the property that is the subject matter of the arbitration or to order the sale of perishable goods, until such

time as the arbitration award is rendered or the controversy is otherwise resolved. Such interim measures may be taken in the form of an interim award, and the arbitrators may require security for the costs of any such measures.

(b) Notwithstanding the provisions of paragraph (a) of this Section, either party may seek from any court having jurisdiction hereof any interim, provisional or injunctive relief that may be necessary to protect the rights or property of any party or maintain the status quo before or after the pendency of the arbitration proceeding; provided, however, that after the arbitrators have been selected and qualified, the arbitrators shall have the sole authority to hear and determine an application for such relief, and the parties agree that any such relief ordered by the arbitrators may be immediately and specifically enforced by a court otherwise having jurisdiction over the parties. The institution and maintenance of any judicial action or proceeding for any such interim, provisional or injunctive relief shall not constitute a waiver of the right or obligation of either party to submit the dispute to arbitration, including any claims or disputes arising from the exercise of any such interim, provisional or injunctive relief.

SECTION I.08. Preliminary Legal Motions. The arbitrators may, pursuant to such terms and procedures as the arbitrators deem appropriate, hear and determine any preliminary issue of law asserted by a party to be dispositive, in whole or in part, of a claim or defense to the same extent that a court could do so pursuant to a motion for summary judgment.

SECTION I.09. Punitive Damages. The arbitrators are not empowered to award damages in excess of compensatory damages, and each party hereby irrevocably waives any right to recover punitive damages with respect to any dispute.

SECTION I.10. Confidentiality. The arbitration proceedings conducted pursuant hereto shall be confidential. Neither party shall disclose or permit the disclosure of any information about the evidence adduced or the documents produced by the other party in the arbitration proceedings or about the existence, contents or results of the arbitration award without the prior written consent of such other party except in the course of a judicial, regulatory or arbitration proceeding or as may be requested by a governmental authority. Before making any disclosure permitted by the preceding sentence, the party intending to make such disclosure shall give the other party reasonable written notice of the intended disclosure and afford the other party a reasonable opportunity to protect its interests as to confidentiality.

SECTION I.11. Statutes of Limitation. All applicable statutes of limitations and defenses based upon the passage of time shall be tolled while the procedures specified in this Appendix I are pending, and the parties shall take such action, if any, required to effectuate such tolling.

SECTION I.12. Right to Full Judicial Review. The arbitrators shall report any decisions in writing and, unless both parties agree otherwise, shall set forth in writing their findings of fact and conclusions of law and shall render their award based thereon. The arbitration shall be final and binding on the parties, provided, however, that upon

application by either party to the U.S. District Court for the Southern District of New York for an order confirming, modifying or vacating the award or the arbitrators, such court shall have the power to review (a) whether the findings of fact rendered by the arbitrators are supported by substantial evidence and (b) whether, as a matter of law based on such findings of fact, the award should be confirmed, modified or vacated.

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- The American Arbitration Association, New York, New York, Web Site: <http://www.adr.org>
- The International Chamber of Commerce, Paris, France, Web site: <http://www.iccwbo.org>
- The London Court of International Arbitration, London, England, Web site: <http://www.lcia-arbitration.com>
- Hong Kong International Arbitration Centre, Hong Kong, Web Site: http://www.hkiac.com.hk/HKIAC/HKIAC_English/main.html
- United Nations Commission on International Trade Law (UNCITRAL), Web site: <http://www.uncitral.org/>