

Drafting Arbitration Clauses

Planning for Success

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GIBSON DUNN

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Overview

1. Introductions and when to consider using arbitration (5 minutes)
2. Drafting arbitration clauses (40 minutes)
3. Unique considerations in arbitrations involving states, and class arbitrations (5 minutes)
4. Questions (10 minutes)



The Basics

Arbitration is a binding form of dispute resolution, conducted before an impartial tribunal

- Arbitration is based on the parties' consent
- Arbitration is a private procedure
- Arbitration leads to a final and binding determination of the rights and obligations of the parties

Considerations in Choosing Arbitration

Benefits

- Enforceability of arbitration awards (*e.g.*, New York Convention)
- Procedural flexibility and simplicity
- Limited discovery
- Confidentiality (but not necessarily)
- Neutrality (avoid foreign courts)
- Choice of arbitrators
- Finality
- Time and cost (possibly)

Tradeoffs

- Loss of home field advantage
- No appeal
- Limited grounds for vacating award
- Limited powers of arbitrators (*e.g.* compelling testimony, injunctions, summary judgments and multi-party disputes)
- Time and cost

Key Goals for Drafting Arbitration Clauses

Key Goals

- Produce a comprehensive agreement to arbitrate
- Minimize the risk of costly court detours
- Obtain an enforceable arbitration award

Takeaway

- If there is no valid agreement to arbitrate, there can be no arbitration and no enforceable award!

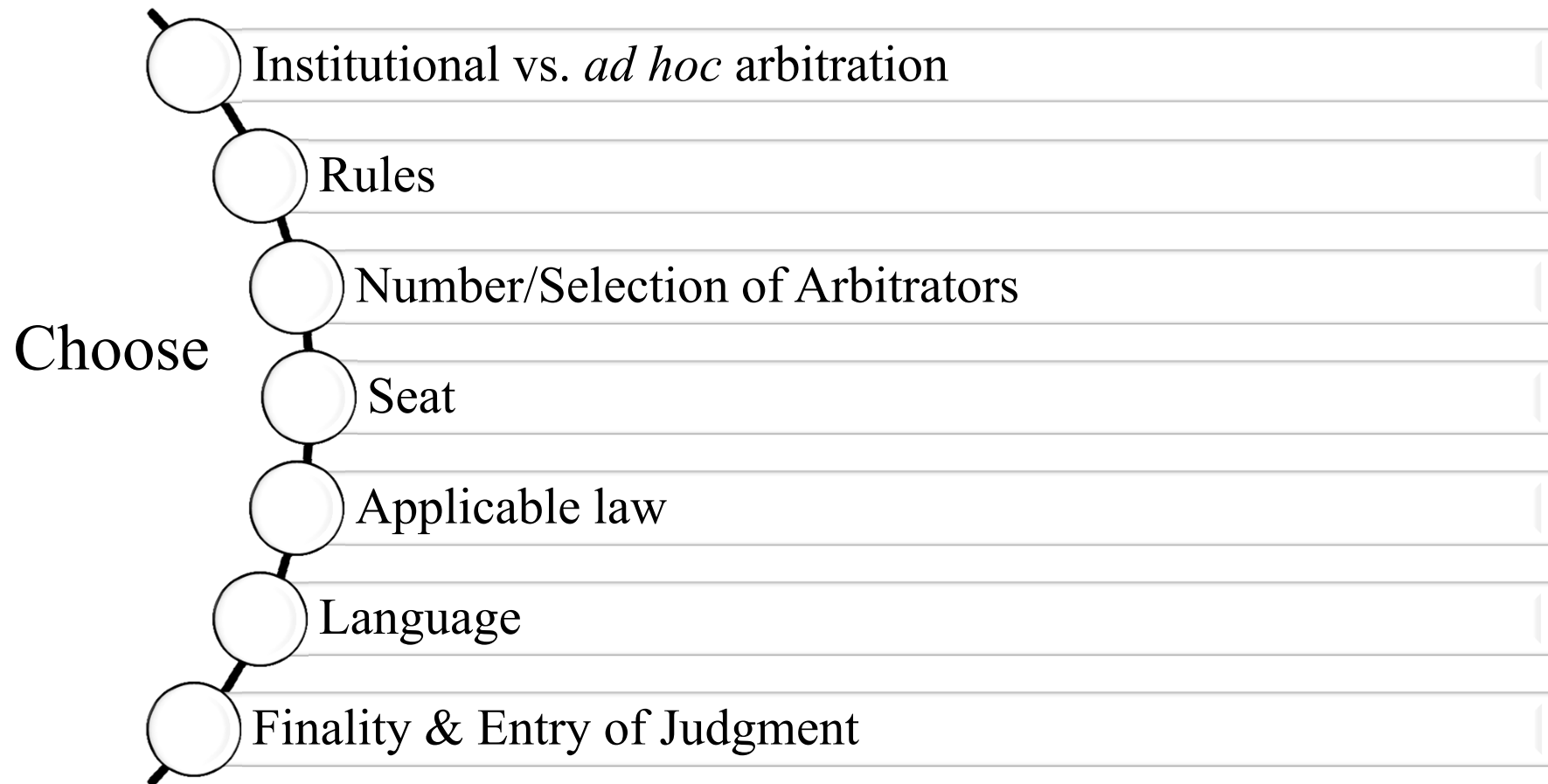




Once you Choose Arbitration, Commit to it

- State unequivocally that the parties have agreed to binding arbitration
 - “Arbitration, if any, by ICC Rules in London”
 - “CONTRACTOR and SUBCONTRACTOR shall try to settle any dispute arising under or in relation to this CONTRACT amicably. If a dispute shall arise between the parties in relation to the CONTRACT that cannot be settled by mutual agreement, it shall be referred to the International Chamber of Commerce of Genève which shall be the exclusive place of jurisdiction”
- Do not split potential disputes between arbitration and domestic courts – you will end up in court!
 - “Disputes over contractual issues to be resolved by SCC arbitration in London; disputes over technical issues to be resolved in the Technology and Construction Court.”
- Use a model clause whenever possible and reproduce it

Key Choices in Negotiating and Drafting



Institutional Arbitration

Benefits

- Tried and tested rules of procedure
- Administrative support (which can save time)
- Can address issues such as arbitrator challenges
- Credibility of institution backs the award (e.g. ICC review)

Tradeoffs

- Additional cost
- More bureaucracy can take longer
- Less flexibility on designing the process



Ad hoc Arbitration

Benefits

- Tailor-made to the dispute
- No need to incur the costs of the arbitration institution
- Avoid bureaucracy and potential timing delays of an institutional arbitration
- Might be the only option if the parties can't agree to an arbitration institution

Tradeoffs

- Additional drafting burden (e.g. choice of appointing authority, detailing rules of procedure)
- Lack of cooperation to address gaps in the rules once the dispute arises
- Additional administrative burden on the tribunal (and/or the parties)
- Costly court detours

Note: You can choose a set of non-administered rules, which helps to mitigate some of the risks of *ad hoc* arbitration (e.g., UNCITRAL Rules, CPR)



Choose the Rules – Institutional Arbitration

- Major International Institutions:
 - International Chamber of Commerce (ICC)
 - London Court of International Arbitration (LCIA)
 - American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR)
- Notable Regional and National Institutions:
 - China International Economic and Trade Arbitration Commission (CIETAC)
 - Dubai International Arbitration Centre (DIAC)
 - Judicial Arbitration and Mediation Services (JAMS)
 - Netherlands Arbitration Institute (NAI)
 - Stockholm Chamber of Commerce (SCC)

Choose the Rules – Institutional Comparisons



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Role of the Institution	<p>Appointments and Challenges</p> <p>Prima facie jurisdictional screening</p> <p>Authority to consolidate proceedings</p> <p>“Scrutinizes” the Award</p> <p>Handles and fixes costs of arbitration</p>	<p>Appointments and Challenges</p> <p>Authority to consolidate proceedings</p> <p>Handles and fixes costs of arbitration</p>	<p>Appointments and Challenges</p> <p>May convene administrative conference prior to constitution of tribunal</p> <p>Handles and fixes costs of arbitration</p>	<p>Appointments and Challenges</p> <p>May convene administrative conference</p> <p>Authority to consolidate proceedings</p> <p>Handles and fixes costs of arbitration</p>	<p>Appointments and Challenges</p> <p>May convene administrative conference</p> <p>Resolves disagreements between arbitrators with respect to interpretation of Rules</p> <p>Handles and fixes costs of arbitration</p>
Number of Arbitrators	<p>Parties’ decision. Default is one unless ICC court orders three. In practice, three if disputed amount is substantial.</p>	<p>Same as ICC</p>	<p>Same as ICC</p>	<p>Sole arbitrator unless all parties agree otherwise</p>	<p>Same as ICC</p>

Choose the Rules – Institutional Comparisons



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Who appoints Three-Member Tribunal?	Parties nominate one each. ICC appoints Chairperson unless parties agree on a different mechanism.	LCIA appoints all three, unless parties agree on a different mechanism	Parties agree upon procedure and may mutually appoint; if no procedure / appointment within 45 days, either may request ICDR to choose	Parties agree on arbitrator(s) or else JAMS designates the arbitrator(s) with party input	Parties agree on arbitrator(s) or else AAA designates the arbitrator(s) with party input
Fast Track Procedures	Parties may agree to shorten the various time limits set out in ICC Rules Appendix IV to Rules outlines efficient case-management techniques	Rules contain fast track appointment procedures Parties may further modify time-frame ad hoc	Parties may adopt expedited procedures in arbitration agreement Tribunal may propose expedited procedures	Parties may adopt expedited procedures in arbitration agreement. Alternatively, either party can opt-in, and arbitrator(s) to decide whether appropriate.	Applicable in any case in which no disclosed claim or counterclaim exceeds US\$75,000 and where only two parties involved Parties can agree or AAA can make determination

Choose the Rules – Institutional Comparisons



Interim Measures	<p>Tribunal may order at the request of a party; a party may also apply to national courts before Tribunal formed and in “appropriate circumstances” thereafter</p> <p>Emergency arbitrator provisions</p>	<p>Same as ICC, except national courts may be used after Tribunal formed only in “exceptional” cases</p> <p>Emergency arbitrator provisions</p>	<p>Tribunal may order</p> <p>No “appropriate” or “exceptional” requirement for appeal to national courts</p> <p>Emergency arbitrator provisions</p>	<p>Tribunal may order</p> <p>Emergency arbitrator provisions</p>	<p>Tribunal may order</p> <p>A request for interim measures to a judicial authority is not deemed a waiver of or incompatible with agreement to arbitrate</p> <p>Emergency arbitrator provisions</p>
Time Limit for Award	<p>6 months after Terms of Reference, but can be extended</p> <p>In practice, approx. 1.5 – 2 years in total</p>	<p>“As soon as reasonably possible following the last submission from the parties”</p> <p>In practice, similar to ICC</p>	<p>No express provision</p>	<p>Within 30 calendar days after the date of the close of the Hearing</p> <p>Can be altered by party agreement of or for good cause</p> <p>In practice, approx. 1 year</p>	<p>No later than 30 calendar days from the date of closing the Hearing, or, if oral hearings have been waived, from the due date set for receipt of the parties’ final statements and proofs</p>

Choose the Rules – Institutional Comparisons




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Institution's Fees	US\$3,000 filing fee Admin fees set on ad valorem basis per chart in Rules; Cost calculator available online	£1,750 filing fee Admin fees billed on hourly basis	Set on ad valorem basis per charts in Rules. Ranges from \$1,550 – \$82,500	Non-refundable filing fee of US\$1,000 Administrative fees are approximately 10% of professional fees	Set on ad valorem basis per charts in Rules. Ranges from \$1,550 – \$82,500
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Choose the Seat

- The arbitration procedural law at the “Seat” governs the arbitration
- Procedural laws in arbitration-friendly centers allow parties more freedom and flexibility in determining certain parameters of the arbitration
- In less arbitration-friendly countries, the courts tend to be more interventionist and the arbitration is subject to more restrictions
- The UNCITRAL Model Law provides a legal framework that national governments can adopt in their own arbitration legislation
 - Over 60 states have based their arbitration law on the UNCITRAL Model Law



Choose the Seat - Enforceability

States that have adopted the New York Convention have agreed to enforce non-domestic commercial arbitration awards made in other contracting states (subject to limited defenses)

- Selecting a seat in a New York Convention State provides greater security in enforcing an award
- As of January 2015, 148 member-states have adopted the New York Convention

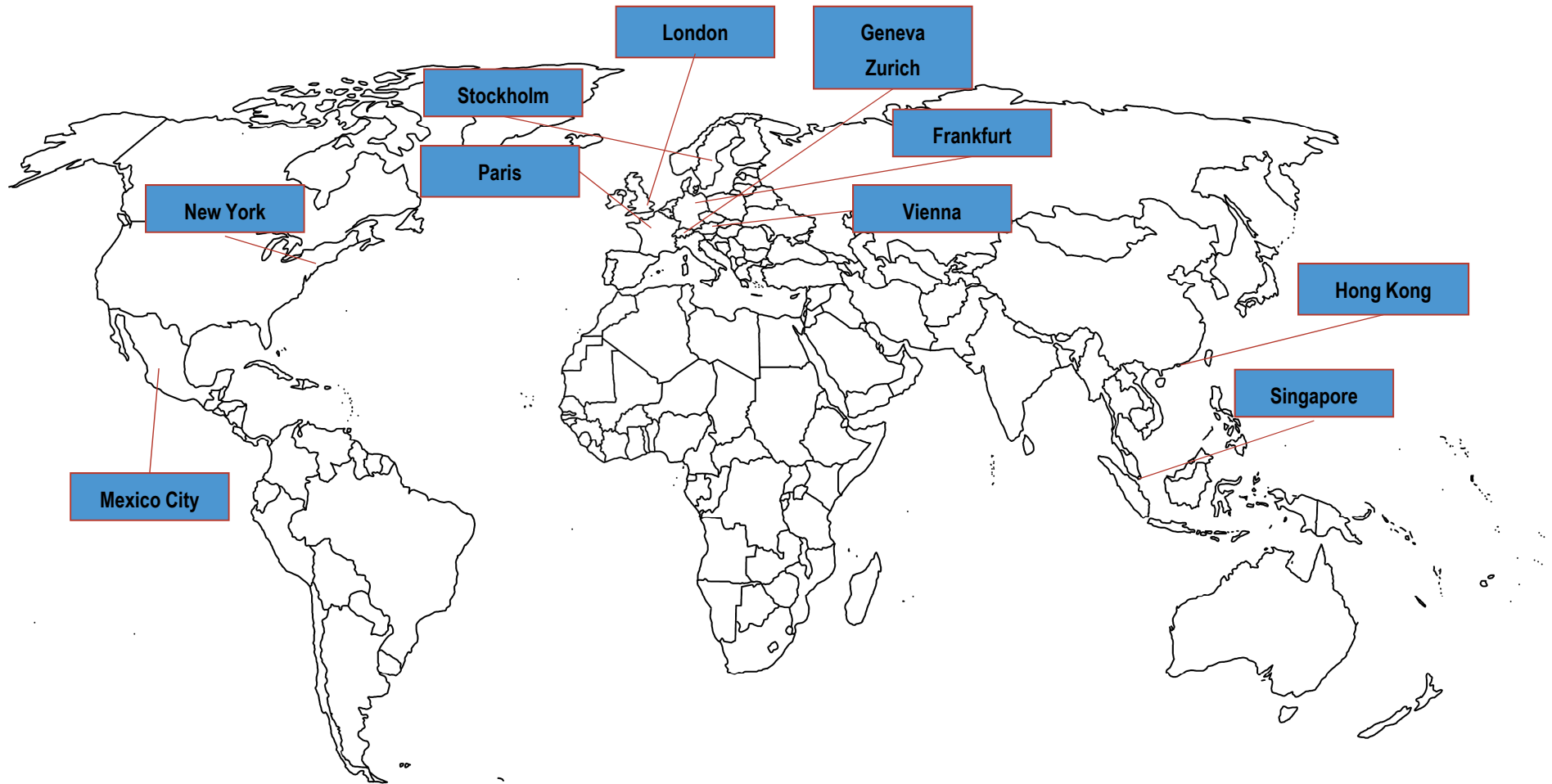
Note: Less arbitration-friendly jurisdictions may apply the New York Convention in an unfavorable, idiosyncratic manner.



Choose the Seat – Other Considerations

- **Expertise in Judiciary** – New York Supreme Court recently designated a judge for international arbitration matters
- **Restriction on Choice of Counsel** – California applies restrictions on the practice of law to arbitrations seated in California
- **Neutrality and Convenience** – location reasonably convenient (or at least equally inconvenient) for both parties
- **Availability of Arbitrators** – sufficient availability of experienced, international candidates
- **Logistical Support** – adequate facilities and services for arbitrators, parties and advisors

International Arbitration – Top Choices



U.S. Domestic Arbitration – Top Choices





Choose the Arbitrators

Parties are generally able to select the arbitrators (either directly or indirectly through a third party institution). Thus, parties maintain some control over who is to determine the outcome of the dispute.

- **Number of Arbitrators** – tribunals made up of one or three members depending on the circumstances of the case and amount in dispute
- **Method of Selection** – include provision for how arbitrators are selected
 - Selection methods are included in any of the major institutional rules (but you can and may want to deviate from default provision)
 - UNCITRAL – remember to designate Appointing Authority
- **Impartiality and Independence** – arbitrators must remain neutral and impartial, including party-nominated arbitrators

Choose the Arbitrators – Qualifications

- Factors to consider when selecting arbitrators include:
 - Familiarity with the governing law and the applicable arbitration rules
 - Positions taken in prior cases/publications
 - Experience in the relevant industry or issue under dispute
 - Fit/Ability to influence the decision of the Tribunal
 - Language and place of the arbitration
- Restrictions on attributes of arbitrators at drafting stage limit ability to select arbitrators that are best-suited for dispute that arises





Choose the Applicable Law

Not part of the arbitration agreement; but still a critical choice

- Make selection in a separate contractual clause
- Ensure the law is suitable – should be internationally respected and compatible with the parties’ contractual expectations
- Avoid unworkable compromises
 - “[This contract shall] in all respects be governed by and interpreted in accordance with the principles common to both English law and French law, and in the absence of such common principles by ... general principles of international trade law ...”

Possible Extras

Consider including:

- Multi-tier dispute resolution (negotiation, mediation prior to arbitration)
- Obligation to continue performing the contract pending arbitration
- Confidentiality provisions
- Multi-party provisions
- Scope of discovery (e.g. per IBA Rules)
- Time limits

Sometimes included:

- Authority of tribunal to apportion costs
- Carve-out of permitted applications to court (e.g., interim measures)
- Exclusion of certain remedies (e.g., punitive damages)
- Agreement that award can be enforced in courts of competent jurisdiction
- Fast-track arbitration



Class or Collective Arbitration: Overview

- Often arises in the context of large-scale consumer product claims or employment claims
- Primary question relates to whether all of the parties consented to arbitration (both generally, and in the form of a class or consolidated proceeding)
- The procedural rules of many arbitral institutions now make implicit provision for class arbitration either by:
 - Empowering institutions to join and/or consolidate multi-party and multi-contract disputes even in the absence of consent from all the parties (e.g., HKIAC Article 27.1 and Article 28.1)
 - Developing specialized rules for resolving large scale disputes where the agreement is silent with respect to class claims, consolidation or joinder of claims (e.g., AAA Supplementary Rules for Class Arbitration)

Class or Collective Arbitration

April 2010: *Stolt-Nielsen SA v. Animal Feeds Int'l Corp*

Where both parties agreed that there is no agreement on class arbitration, a party may not be compelled to submit to class arbitration.

June 2013: *Oxford Health Plans LLC v. Sutter*

Where the parties agree to submit the question of whether the arbitration clause permitted class arbitration to the tribunal, it is for the tribunal to decide the matter.

June 2013: *American Express Co. v. Italian Colors Restaurant*

Class arbitration waivers are enforceable even if the cost[s] of individual arbitration is prohibitive, which may effectively foreclose vindication of a federal statutory right.

Suggestions when attempting to avoid class arbitration

1. Choose an institution that does not have procedural rules for class action and/or consolidation
2. Include class arbitration waiver in arbitration clause



Arbitrating with a Sovereign State or State Entities

- Obtain waiver of sovereign immunity
 - In most cases, the agreement to arbitrate is a waiver of immunity in relation to arbitral proceedings and any ancillary proceedings in national courts
 - Preferably, the waiver should also contain a waiver from enforcement proceedings to ensure that arbitration award is easily enforceable
- Include a stabilization clause where applicable so as to exclude subsequent changes in the state's law that interfere with the investor's contractual rights
 - Such a clause may be subordinate to mandatory provisions of the governing law, and/or the clause may not cover political risk that does not directly interfere with the contract
- Consider investment treaty structuring options
 - Allows for “arbitration without privity” (i.e. open offer to arbitrate against the state)
 - Protects foreign investments against political risk (e.g., expropriation, unfair and inequitable treatment, treatment no less favorable than that accorded to nationals or investors from third states)

Drafting Considerations Checklist: Less = More

Necessary Elements

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- ☐ Defined dispute resolution mechanism
- ☐ Clear scope
- ☐ Exclusive and binding

Recommended Elements

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- ☐ Seat
- ☐ Language
- ☐ Institutional or Ad hoc
- ☐ Choice of Institution/Rules
- ☐ Number of arbitrators
- ☐ Arbitrator selection method
- ☐ Applicable law
- ☐ Entry of judgment (USA)

Optional Elements

☐

- ☐ Provisional measures
- ☐ Confidentiality
- ☐ Scope of Discovery/Disclosure
- ☐ Time limits and fast-tracking
- ☐ Multi-tier (negotiation and mediation)
- ☐ Multi-party proceedings
- ☐ Allocation of costs
- ☐ Arbitrator qualifications
- ☐ Carve-out of permitted applications to court

Conclusion

Spend more time on getting the arbitration clause right now, so you can spend less time in court later.





Steve Buffone

E: sbuffone@gibsondunn.com

T: +1 212.351.3936

A partner in the New York office of Gibson, Dunn & Crutcher, Mr. Buffone serves as Co-Chair of Gibson Dunn's Energy and Infrastructure Practice Group. He is a corporate transactional lawyer who has represented clients in mergers and acquisitions, public and private issuances of debt and equity securities, venture capital financings, corporate restructurings and bankruptcies, and general corporate counseling. Mr. Buffone's clients include corporations, private equity firms, investment banks and commercial banks in a large number of industries, including energy, defense, financial services, steel, aluminum, telecommunications, biotechnology, medical devices, food and beverages, pharmaceuticals, luxury retail goods, financial services, real estate, sporting goods, consumer products, automobile supplies, aggregates, semiconductors, satellites, newspapers, truck, bus and yacht manufacturers, computer hardware and software and insurance. He has extensive experience in drafting arbitration clauses and advising clients with respect to the selection of arbitration bodies and arbitrators.



Rahim Moloo

E: rmoloo@gibsondunn.com

T: +1 212.351.2413

An of counsel in the New York office of Gibson, Dunn & Crutcher and a member of Gibson Dunn's International Arbitration Practice Group, Mr. Moloo's practice focuses on assisting clients to resolve complex international disputes in the most effective and efficient way possible. He has extensive experience in both international commercial and investor-state arbitrations, and also advises clients on the structuring of foreign investments and matters of international law. Mr. Moloo has experience across a number of industries, but especially in disputes relating to energy, mining, infrastructure and consumer products.