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Standard Arbitration Clauses for the AAA and ICDR

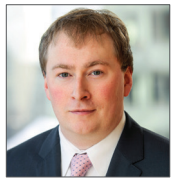
This excerpt of Standard Clauses from our website can be used when drafting an arbitration agreement applying the rules of the American Arbitration Association (AAA) or the International Centre for Dispute Resolution (ICDR). These clauses are modeled on the standard recommended arbitration clauses of the AAA and ICDR, and have integrated notes with important explanations and drafting tips. For the complete, continuously maintained version of this resource, which includes the standard recommended clauses of the International Chamber of Commerce (ICC) and the United Nations Commission on International Trade Law (UNCITRAL), visit Practical Law online.

LEA HABER KUCK
PARTNER
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

Lea concentrates her practice on the resolution of complex disputes arising out of international business transactions. She represents clients in federal and state courts in the US, as well as in international arbitrations conducted under UNCITRAL, the ICC, ICDR, London Court of International Arbitration and other arbitration rules.

JULIE BÉDARD
PARTNER
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

Julie concentrates her practice on international litigation and arbitration. She regularly advises clients on the drafting of dispute resolution clauses and has served as counsel in international arbitration proceedings held under the auspices of the ICC, AAA, ICDR and International Centre for Settlement of Investment Disputes.



COLM P. McINERNEY
ASSOCIATE
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

Colm focuses his practice on international litigation and arbitration. He represents US and international clients in matters involving complex corporate and commercial litigation, in both federal and state courts and in international arbitrations.

An arbitration agreement should identify or describe:

- The arbitral tribunal whose rules will govern the proceeding.
- The parties' rights to judicial review, including the parties' ability to appeal the arbitral award.
- The number of arbitrators and the method for their appointment.
- The specific disputes subject to arbitration, including any disputes that may be consolidated with the arbitration or parties that may be joined to the arbitration.
- The seat of the arbitration and the language used during the arbitration.
- The parties' expectations concerning the confidentiality of the arbitration and any materials used during the proceeding.
- The parties' ability to obtain interim or emergency relief.
- The remedies and damages that the arbitral tribunal may impose.

The provisions that follow are based on the text of various standard arbitration clauses recommended by the AAA and its international arm, the ICDR. The AAA is headquartered in New York and has administrative centers throughout the US, with a roster of more than 8,000 arbitrators. The AAA has specialized rules for various industries and is divided into the following sections:

- The Commercial Division.
- The Construction, Real Estate and Environmental Division.
- The ICDR.
- The Labor, Employment and Elections Division.
- The Government and Consumer Division.
- The AAA Mediation Services.

The ICDR has offices in the US, Mexico and Singapore, and has an international panel of approximately 400 arbitrators and mediators. It also has cooperative agreements with 62 arbitral institutions in 43 countries, allowing ICDR-administered arbitrations to be filed and heard in many parts of the world.

SELECTED PROVISIONS AND DRAFTING NOTES

AAA CLAUSES

1.1 Arbitration of future disputes.

(a) Scope, governing rules. Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be determined by final and binding arbitration administered by the American Arbitration Association (**"AAA"**) under its Commercial Arbitration Rules and Mediation Procedures (**"Commercial Rules"**) [including, if appropriate, [the Procedures for Large, Complex Commercial Disputes] [,/and] [the International Commercial Arbitration Supplementary Procedures] [and] [the Supplementary Rules for Class Arbitrations]].

DRAFTING NOTE

GOVERNING RULES

The AAA Commercial Arbitration Rules and Mediation Procedures (Commercial Rules) are commonly used for domestic arbitrations conducted in the US between US parties. Unless the parties agree otherwise, the Commercial Rules used are those in effect when both:

- A demand for arbitration has been filed with the AAA.
- The administrative requirements to commence an arbitration have been satisfied.

(*R. 1(a), Commercial Rules.*)

Search AAA Arbitration: A Step-By-Step Guide for more on arbitrations under the Commercial Rules.

Complex Procedures

Where a party's claim or counterclaim is at least $500,000 (not including any claimed interest, attorneys' fees, arbitration fees or costs), the additional Procedures for Large, Complex Commercial Disputes apply unless the parties agree otherwise (*R. 1(c), Commercial Rules*). These rules require the parties to address certain procedural aspects of the arbitration at the preliminary conference with the arbitrator, including the scope of discovery and whether depositions may be taken (*L-3, Procedures for Large, Complex Commercial Disputes*).

By contrast, where no claim or counterclaim exceeds $75,000 (not including any claimed interest, attorneys' fees, arbitration fees or costs), the AAA's Expedited Procedures apply unless the parties provide otherwise

(*R. 1(b), Commercial Rules*). Among other things, the Expedited Procedures require a hearing to be set within 30 days of the arbitrator's appointment and the arbitrator must render an award within 14 days of the hearing (*R. E-7, E-8, E-9, Expedited Procedures*). Under certain circumstances, the parties may want an expedited arbitration even where the amount in dispute exceeds $75,000. However, an expedited process generally is not recommended for complex arbitrations.

International Arbitration

Where the parties have designated the Commercial Rules, or other domestic procedural rules, but the arbitration is deemed an international proceeding due to the nationality of the parties or their parent companies, the International Commercial Arbitration Supplementary Procedures (International Supplementary Procedures) also apply. Among other things, these procedures:

- Specify how an arbitrator may be challenged for alleged partiality or lack of independence (*R. 1, International Supplementary Procedures*).
- Require the default language of the arbitration to be that of the documents containing the arbitration agreement, subject to the authority of the tribunal to determine otherwise (*R. 5, International Supplementary Procedures*).
- Require the tribunal to state its reason for its award, unless the parties agree otherwise (*R. 6, International Supplementary Procedures*).

Class Arbitration

Since 2003, the Commercial Rules have included the Supplementary Rules for Class Arbitrations (Class Rules) for arbitrations where a party submits a dispute on behalf of or against a class or purported class (*R. 1, Class Rules*). Arbitrators have applied the Class Rules even where the arbitration clause was silent on the issue of class arbitration.

However, the US Supreme Court cast doubt on this practice with a 2010 decision that held a tribunal had exceeded its authority under the Federal Arbitration Act (FAA) by ordering class arbitration based on an arbitration provision that was silent on resolving class-wide claims. The decision stressed the importance of the parties' consent to class arbitrations and rejected the notion that parties can impliedly consent to class arbitration. (See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685-87 (2010)*.)

The Supreme Court has gone on to provide additional guidance on the availability of the class-wide arbitration of claims. In *AT&T Mobility LLC v. Concepcion*, it upheld an arbitration agreement that included a waiver of class arbitration (*131 S. Ct. 1740, 1750-53 (2011)*). The Supreme Court also upheld a class arbitration waiver even where the cost of individually arbitrating the claim might be greater than the claimant's potential recovery (see *Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309, 2312 (2013)*). However, another recent decision upheld an arbitrator's determination that the parties' agreement permitted class arbitration, even though the clause was facially silent (see *Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064, 2069-71 (2013)*).

Although the Class Rules explicitly provide that their existence should not be a factor in determining whether the parties consented to class arbitration, at least two federal district courts have held that invoking the AAA rules is relevant in determining whether a court or the arbitrator should decide if the parties have agreed to class arbitration. These courts found that the parties' inclusion of the AAA rules in arbitration agreements necessarily demonstrated their consent to the Class Rules, and therefore, to have the arbitrator decide whether the agreement allows class arbitration. (*Crook v. Wyndham Vacation Ownership, Inc., 2015 WL 4452111, at *1, *8 (N.D. Cal. Jul. 20, 2015)*; *Chesapeake Appalachia, LLC v. Burkett, 2014 WL 5312829, at *8 (M.D. Pa. Oct. 17, 2014)*.)

However, the Courts of Appeals for both the Third and Sixth Circuits have held that the

availability of class arbitration is a gateway issue to be decided by the court unless the parties have unambiguously provided otherwise (see *Opalinski v. Robert Half Int'l Inc., 761 F.3d 326, 332 (3d Cir. 2014)*; *Reed Elsevier, Inc. v. Crockett, 734 F.3d 594, 599 (6th Cir. 2013)*).

Given that this is a developing area of the law, parties who wish to preclude class arbitrations should include explicit language in their arbitration clauses making that intention clear.

Search Class Arbitration Waiver for more on class arbitration.

(b) Authority of tribunal, judicial review. The award rendered by the arbitrator[s] shall be final [,/and] [non-reviewable] [,/and] [non-appealable] and binding on the parties and may be entered and enforced in any court having jurisdiction[, and any court where a party or its assets is located (to whose jurisdiction the parties consent for the purposes of enforcing the award)]. [Judgment on the award shall be final and non-appealable.]

DRAFTING NOTE

JUDICIAL REVIEW

Judicial review of arbitral awards is limited under the FAA, which permits:

- Courts to vacate an award only if the award was the result of fraud or corruption, or if the arbitrators:
  - exceeded the scope of their authority;
  - engaged in misconduct; or
  - had evident bias.

  (*9 U.S.C. § 10(a)*.)
- Parties to appeal a district court's order confirming or vacating an award to the appropriate circuit court (*9 U.S.C. § 16(a)(1)(D), (E)*).

Some courts have held that arbitral awards may be vacated on the common law ground of manifest disregard of the law. This "can be established only where a governing legal principle is well defined, explicit, and clearly applicable to the case, and where the arbitrator ignored it after it was brought to the arbitrator's attention in a way that assures that the arbitrator knew its controlling nature." (*Goldman v. Architectural Iron Co., 306 F.3d 1214, 1216 (2d Cir. 2002)* (internal citations and quotations omitted).)

The availability of manifest disregard as a basis for vacatur has been questioned following the Supreme Court's decision in *Hall Street Assocs., L.L.C. v. Mattel, Inc.* In that decision, the court held that parties may not contractually expand the grounds for judicial review beyond those set out in the FAA (*552 U.S. 576, 584, 589-90 (2008)* (holding that parties may not include additional grounds for vacatur or modification of an arbitral award beyond those identified in Sections 10 and 11 of the FAA, but not addressing whether parties may further restrict the limited grounds for review under the FAA by contract)).

However, in a separate decision, the Supreme Court expressly declined to decide whether manifest disregard survived *Hall Street* "as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth" in Section 9 of the FAA (*Stolt-Nielsen, 559 U.S. at 672 n.3*).

After *Hall Street*, some federal district courts have held that parties may contract to waive their right to seek vacatur under Section 10(a)(4) of the FAA, which examines whether an arbitrator exceeded his authority, but cannot eliminate judicial review of other grounds under Section 10(a), such as fraud and corruption (see *Swenson v. Bushman Inv. Props., Ltd., 870 F. Supp. 2d 1049, 1056 (D. Idaho 2012)* (recognizing that parties can contractually eliminate judicial review of an arbitral award); *Kim-C1, LLC v. Valent*

Biosciences Corp., 756 F. Supp. 2d 1258, 1264-67 (E.D. Cal. 2010) (holding that an arbitration provision that stated that an arbitrator's rulings "shall be binding, non-reviewable, and non-appealable" demonstrated that "both parties agreed to waive their ability to seek vacatur")).

However, at least one circuit court has suggested that the grounds for vacatur identified by the FAA "may not be waived or eliminated by contract." The US Court of Appeals for the Ninth Circuit reasoned that the FAA provision governing confirmation of an award "carries no hint of flexibility" and "does not sound remotely like a provision meant to tell a court what to do just in case the parties say nothing else." (*In re Wal-Mart Wage & Hour Employment Practices Litig., 737 F.3d 1262, 1267-68 (9th Cir. 2013)*) (internal quotations omitted).)

(c) Selection of tribunal. There shall be one arbitrator agreed to by the parties within twenty (20) days of receipt by respondent[s] of the request for arbitration or in default thereof appointed by the AAA in accordance with its Commercial Rules.

OR

There shall be three arbitrators. The parties agree that one arbitrator shall be appointed by each party within twenty (20) days of receipt by respondent[s] of the Request for Arbitration or in default thereof appointed by the AAA in accordance with its Commercial Rules, and the third presiding arbitrator shall be appointed by agreement of the two party-appointed arbitrators within fourteen (14) days of the appointment of the second arbitrator or, in default of such agreement, by the AAA.

OR

There shall be three arbitrators agreed to by the parties within thirty (30) days of receipt by respondent[s] of the request for arbitration or, in default of such agreement, by the AAA.

DRAFTING NOTE

SELECTION OF TRIBUNAL

The Commercial Rules supply procedures to appoint arbitrators if the parties have not otherwise contracted an appointment method or cannot reach an agreement (*R. 12, 13, Commercial Rules*). A three-member tribunal is generally advisable for multi-million dollar disputes. For smaller disputes, a one-member tribunal may be preferable due to its lower cost and greater efficiency.

The AAA also appoints a case manager and supervisor for arbitrations conducted under its rules.

(d) Consolidation, joinder. If more than one arbitration is commenced under this Agreement and any party contends that two or more arbitrations are substantially related and that the issues should be heard in one proceeding, the arbitrator[s] selected in the first-filed proceeding shall determine whether, in the interests of justice and efficiency, the proceedings should be consolidated before [that/those] arbitrator[s]. [RELATED PARTIES] are bound to each other by this arbitration clause, provided that they have signed this Agreement or [OTHER RELATED AGREEMENTS]. Each related party may be joined as an additional party to an arbitration involving other parties under this Agreement or [OTHER RELATED AGREEMENTS].

DRAFTING NOTE

CONSOLIDATION AND JOINDER

If there are more than two parties to the agreement, the arbitration provisions should address the possible joinder of claims, in addition to any provisions permitting or prohibiting class arbitration (see above *Drafting Note, Governing Rules: Class Arbitration*). This clause provides for the consolidation of two or more separate arbitrations and the joinder of a third party, which is particularly useful if the agreement is linked to other agreements between the same, related or different parties.

(e) Seat of arbitration, languages. The seat or place of arbitration shall be [CITY, COUNTRY]. The arbitration shall be conducted and the award shall be rendered in the [LANGUAGE(s)] language[s].

DRAFTING NOTE

SEAT OF ARBITRATION AND LANGUAGES

The parties should choose a neutral or otherwise suitable venue that recognizes arbitration as a valid dispute resolution mechanism, such as jurisdictions that follow the UNCITRAL Model Law on International Commercial Arbitration. The AAA may choose the seat of the arbitration if the parties cannot reach agreement or failed to specify a location in the arbitration provisions (*R. 11(a), (c), Commercial Rules*).

When choosing the seat of the arbitration, parties should be aware of several differences between an arbitration conducted in the US and those conducted in other well-known international arbitration venues. The procedural law of the seat of the arbitration typically applies to issues such as court intervention and questions of arbitrability. Additionally, the law of the seat establishes the nationality of the award, and therefore the parties should choose a country that is a signatory to the New York Convention for enforcement purposes.

The arbitration agreement should specify the language of the arbitration. This clause also may address the selection and costs associated with a translator. Under the Commercial Rules, the party that desires and arranges for the translator assumes the costs (see *R. 29, Commercial Rules*).

(f) Confidentiality. Except as may be required by law, neither a party nor the arbitrator[s] may disclose the existence, content or results of any arbitration without the prior written consent of both parties, unless to protect or pursue a legal right.

DRAFTING NOTE

CONFIDENTIALITY

Arbitration often is assumed to be automatically confidential. However, the FAA and most state arbitration statutes do not address confidentiality. Further, many arbitration rules, including the AAA and ICDR rules, do not prescribe confidentiality duties on the parties themselves but instead

offer procedures for the parties to protect confidential materials (see, for example, *R. 23(a), Commercial Rules* (arbitrator shall have the authority to issue orders governing "any exchange or production of confidential documents and information, and the admission of confidential evidence at the hearing"); *Art. 37(2), ICDR International Arbitration Rules (ICDR Rules)* ("Unless the parties agree otherwise, the tribunal may make orders concerning the confidentiality of the arbitration or any matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.")).

Therefore, parties should expressly provide that the arbitration is confidential in their arbitration agreement, even if that information ultimately is disclosable by law or in litigation related to the arbitration.

(g) Remedies. The arbitrator[s] will have no authority to award [[punitive damages] [,/or/.] [consequential damages] [,/or/.] [liquidated damages] [,/or/.] [compensatory damages exceeding $[LIMIT OF COMPENSATORY DAMAGES]]].

DRAFTING NOTE

REMEDIES

The Commercial Rules permit arbitrators to grant any remedy or relief that they consider "just and equitable and within the scope of the agreement," unless the parties agree otherwise. This can include monetary damages and injunctive relief, including specific performance. (See *R. 47(a), Commercial Rules*.)

The Commercial Rules empower the tribunal to issue interim relief (*R. 37, Commercial Rules*), and provide for the appointment of a single emergency arbitrator who may grant interim relief (see *R. 38, Commercial Rules*).

Search Interim, Provisional and Conservatory Measures in US Arbitration for more on interim relief in arbitration.

Parties may consider specifying the powers of the tribunal to award compensatory damages (excluding punitive damages) and permanent injunctive relief. Depending on the applicable law, arbitrators may award punitive damages in arbitrations in the US governed by the FAA, unless the parties agree otherwise.

Search Punitive Damages in US Arbitration for more on punitive damages.

1.2 Arbitration of existing dispute.

(a) Scope, governing rules. We, the undersigned parties, hereby agree to submit to arbitration administered by the AAA under its Commercial Rules the following controversy: [BRIEF DESCRIPTION OF DISPUTE]. We further agree that the above controversy will be submitted to [one/three] arbitrator[s].

(b) Authority of tribunal, judicial review. We further agree that we will faithfully observe this Agreement and the Commercial Rules, that we will abide by and perform any award rendered by the arbitrator[s], and that a judgment of any court having jurisdiction may be entered upon the award.

DRAFTING NOTE

ARBITRATION OF EXISTING DISPUTE

This clause may be used where the underlying contract does not provide for arbitration, but the parties subsequently agree to submit an existing dispute under the contract to arbitration.

Parties submitting an existing dispute to arbitration also may apply any of the other clauses described above. However, because the parties may have a better sense of their respective arbitration needs after a dispute arises, they may assess these clauses differently.

ICDR CLAUSE

1.1 Arbitration. Any controversy or claim arising out of or relating to this Agreement, or the breach thereof shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with the International Arbitration Rules. [The number of arbitrators shall be [one/three].] [The place of arbitration shall be [CITY, COUNTRY].] [The arbitration shall be held, and the award rendered, in the [LANGUAGE(S)] language[s].]

DRAFTING NOTE

ICDR ARBITRATION

The ICDR Rules apply where the parties have provided for arbitration of an international dispute by the AAA or the ICDR, but have not specified whether the Commercial Rules or the ICDR Rules apply.

Where the ICDR Rules apply, the arbitration is subject to the version of the ICDR Rules in effect when the arbitration is commenced (*Art. 1(1), ICDR Rules*).

Selecting the Arbitral Tribunal

The ICDR appoints arbitrators where the parties have not provided otherwise or cannot reach an agreement (*Art. 12(3), (6), ICDR Rules*). Where there are two or more claimants or respondents, the ICDR appoints all of the arbitrators unless the parties agree otherwise (*Art. 12(5), ICDR Rules*).

The ICDR also assigns a case manager to each arbitration proceeding.

Designating the Arbitral Seat

If the parties have not agreed on the seat of the arbitration by a date set by the ICDR, the ICDR may initially determine the seat. Within 45 days of the tribunal's selection, it must determine finally the seat. (See *Art. 17(1), ICDR Rules.*)

Search ICDR Arbitration: A Step-by-Step Guide for more on arbitrations under the ICDR Rules.

Search ICDR Arbitration Flowchart for information on all the stages of an arbitration under the ICDR Rules.

The views expressed in this article are those of the authors and not necessarily those of Skadden, Arps, Slate, Meagher & Flom LLP or its clients.