

## Arbitration Agreements – DOs and DON'Ts

CIArb “Nuts & Bolts” Lecture series

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# Arbitration Agreements – DOs and DON'Ts

## Introduction

1. Before a dispute arises
2. After a dispute has already arisen
3. Sample clauses in use
4. Model clauses

# 1. Before a dispute arises - The DOs

FIRST : DO AGREE the submission to arbitration

- Produce an enforceable agreement to arbitrate  
The New York Convention provides: *“Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which... may arise between them a subject matter capable of settlement by arbitration.”*
- The disputes to be arbitrated (broad or narrow)  
Example : *“all disputes and claims arising out of or in connection with this Agreement shall be referred to arbitration”*

# 1. Before a dispute arises - The DOs

- The rules that will govern the arbitration  
If ad hoc : UNCITRAL Arbitration Rules 2010, HKIAC Domestic Arbitration Rules (2012 Edition)
- The institution, if any, that will administer the arbitration administered arbitration e.g. ICC, HKIAC, CIETAC, SIAC
- The number of arbitrators and how they will be chosen
  - Single for simple, low value case
  - Three, higher value cases
  - Qualifications (caution)

# 1. Before a dispute arises - The DOs

- Agree the seat of arbitration

*Importance*

- determines place award made or published for enforcement under New York Convention
- determines procedural law governing the arbitration
- determines the courts having supervisory or supportive jurisdiction

*Practical considerations:*

- Proximity to witnesses and documents
- Availability of professional support

# 1. Before a dispute arises - The DOs

- The governing law of the contract :  
the law that the arbitral tribunal has to apply to the substantive matters in dispute
- The language of the arbitration
- Consider above questions as early as possible
- Consider model or “off the shelf” clauses

# 1. Before a dispute arises - The DOs

## Other possible DOs

- Stepped clause : Negotiate, mediate then arbitrate?
- Interim measures : Extend powers of arbitrators?
- Non-signatories (affiliates / third party beneficiaries):  
Should they be covered under the arbitration clause?  
Or just the signatories?
- Multiple related contracts : Consolidate, concurrent or same tribunal?
- Service of process : still the same names and addressees? Any other parties?

## 2. After a dispute has arisen – DOs and DON'T'S

*What if previously drafted arbitration clause is no longer applicable?*

*Or there has never been an arbitration clause in the contract?*

- Do consider a submission agreement for existing dispute
  - Parties can decide after a dispute arises that the dispute should be submitted to arbitration
  - Defines a particular dispute that has arisen
  - Precise nature of the dispute is informed to the Parties
  - Parties can craft the arbitration procedure accordingly



## 2. After a dispute has arisen – DOs and DON'T'S

### **LCIA recommends the following language for submission of an existing dispute to LCIA arbitration:**

- “A dispute having arisen between the parties concerning [ ], the parties hereby agree that the matter shall be referred to and finally resolved by arbitration under the LCIA Rules.
- The number of arbitrators shall be [one / three].
- The seat, or legal place of arbitration, shall be [City and / or Country].
- The language to be used in the arbitral proceedings shall be [ ].

## 2. After a dispute has arisen – DOs and DON'T'S

- Do consider the presentation of evidence
  - Parties may have different views when the dispute arises
  - International arbitrators may apply *sua sponte* – IBA Rules on the Taking of Evidence in International Commercial Arbitration (1999) as guidelines.
  - **Article 4 of the International Bar Association Rules** provides “The Arbitral Tribunal may order each Party to submit within a specified time to the Arbitral Tribunal and to the other Parties a written statement by each witness....”
  - Parties can choose to be silent / specify if IBA rules are to be adopted / specify a specific method to be adopted

## 2. After a dispute has arisen – DOs and DON'T'S

- Do consider Time Limits and Fast – Tracking
  - Difficult to set before dispute arises
  - An unmet deadline may result in an invalid award
  - Provide a time limit on the duration of the arbitration, which time limit should be subject to extension by the arbitrators at their discretion
  - Non- absolute time limit on the duration of an arbitration
  
- Do agree the most appropriate arbitration rules
  - Small claims procedure?
  - Documents alone procedure?

### 3. Sample Clauses in Use – Some DON'Ts

- *Sample clause 1*

*“In case of dispute, the parties undertake to submit to arbitration, but in case of litigation the Hong Kong Court shall have exclusive jurisdiction.”*

- *Sample clause 2*

*“Arbitration if any in Hong Kong. English law to apply.”*

### 3. Sample Clauses in Use – Some DON'Ts

- *Sample clause 3*

*...If no settlement can be reached, the case in dispute shall then be submitted for arbitration to the arbitration commission in London, United Kingdom, for arbitration in accordance with rules of arbitration.*

- *Sample clause 4*

*If no agreement can be reached through negotiation, any party can submit the dispute to Hong Kong International Arbitration Centre for arbitration. This agreement and arbitration shall be governed by the laws and regulations of the People's Republic of China.*

### 3. Sample Clauses in Use – Some DON'Ts

- *Sample cl 5 : “Any dispute, difference or disagreement between the Parties arising under or in relation to this Agreement, including (but not limited to) any dispute, differences or disagreement as to the meaning of the terms of this Agreement or any failure to agree on any matter required to be agreed upon under this Agreement shall, if possible, be resolved by negotiation and mutual agreement by the Parties within 30 (thirty) days as of the date one Party raises a complaint. Should no agreement be reached within such period of time, then the dispute shall be finally settled by arbitration upon the written request of either Party hereto in accordance with the rules of conciliation and arbitration of the Hong Kong International Arbitration Center by 3(three) arbitrators and place of such Arbitration shall be Hong Kong and shall be conducted under the Rules and Regulations of ICC (International Chamber of Commerce). The result of all such arbitration shall be final and binding for the Parties and for all purposes.*

## 4. Model Clauses

### **HKIAC – General Arbitration Clause for International Arbitration :**

- “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 and as may be amended by the rest of this clause.
- The appointing authority shall be the HKIAC.
- The place of arbitration shall be in Hong Kong at the HKIAC.
- There shall only be one arbitrator][three arbitrators].
- The language(s) to be used in the arbitral proceedings shall be.....(insert language).”

## 4. Model Clauses

### **Arbitration Administered by the HKIAC :**

- “Any dispute, controversy or claim arising out of or relating to this contract, including the validity, invalidity, breach or termination thereof, shall be settled by arbitration in Hong Kong under the **Hong Kong International Arbitration Centre Administered Arbitration Rules** in force when the Notice of Arbitration is submitted in accordance with these Rules.
- (a) The number of arbitrators shall be..... (one or three).
- (b) The arbitration proceedings shall be conducted in.....(insert language).”



## 4. Model Clauses

### **International Chamber of Commerce :**

- “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][three] arbitrator[s] appointed in accordance with the said Rules.
- (a) The place of arbitration shall be.....(town or country).
- (b) The language(s) to be used in the arbitral proceedings shall be.....
- (c) All aspects of the arbitration shall be confidential.”

## 4. Model Clauses

### **Uncitral Model Arbitration Clause :**

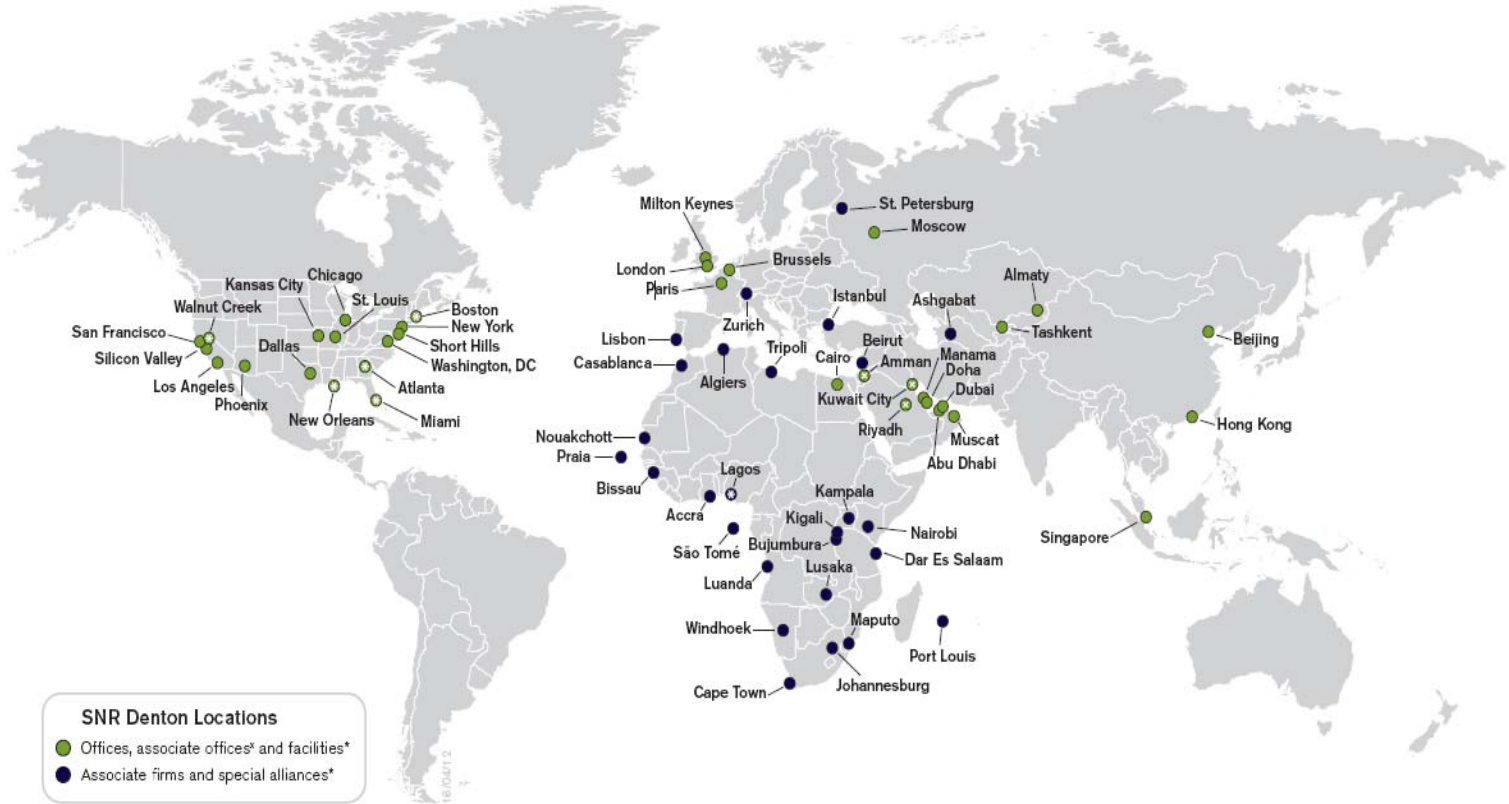
- “Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.
  - (a) The appointing authority shall be.....(name or institution 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.....
  - (e) All aspects of the arbitration shall be confidential.”

Any questions?



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