GUIDANCE NOTES
AIPN Model Dispute Resolution Agreement (2017)

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I. INTRODUCTION

The AIPN published its first Model Dispute Resolution Agreement in 2004 to reconcile the many different versions of dispute resolution provisions that were included in various AIPN Model Contracts over the years. To ensure that a "state of the art" dispute resolution agreement was produced, Tim Martin, AIPN VP Education at the time, formed a drafting committee chaired by R. Doak Bishop and John P. Bowman. They succeeded in drafting such provisions, which have served the international petroleum sector extremely well for more than a decade. However, as stated in the Guidance Notes for that first model, it was a "work in progress, in that it is expected that future Committees will add to and improve upon this initial version." This second version of the AIPN Model Dispute Resolution Agreement ("Model DR Agreement") is meant to accomplish that goal. It also reflects the AIPN's desire to make Model DR Agreement and Guidance Notes available to the industry and other interested parties who want access to cutting edge dispute resolution procedures for their own agreements.

Tim Martin and Jennifer L. Price co-chaired the drafting of this second version of the Model DR Agreement. They were ably assisted by a drafting committee of leading disputes and transactional lawyers and experts. The committee held numerous meetings over 2015 and 2016 to discuss the most appropriate provisions to include in the Model DR Agreement. It also conducted an industry survey to get users' input and provided a number of presentations explaining the objectives of this Model DR Agreement. The result is a Model DR Agreement that incorporates the best available provisions from the dispute resolution world. The drafting committee for this model has made every effort to create a "state of the art" provision for resolving disputes in complex, international agreements, whether they be in the petroleum sector or elsewhere.

Similar to the 2004 version, this second version of the Model DR Agreement emphasizes international arbitration as the primary method of dispute resolution. However, to ensure maximum flexibility for parties in drafting dispute resolution clauses for their agreements, the Model DR Agreement provides three basic approaches: i) a short, simple model arbitration clause, ii) a more detailed arbitration agreement consisting of the essential elements of an enforceable agreement to arbitrate, with a variety of options and alternatives to fit the nature of the transaction or project and the special concerns of the parties, and iii) a multi-step dispute resolution process that would culminate with arbitration for a binding decision. To provide complete flexibility to parties, the alternatives of expert determination and litigation in the courts are also included.

These dispute resolution provisions can serve a number of purposes. They can be i) inserted into international petroleum agreements as a dispute resolution clause, ii) used as a stand-alone master or umbrella dispute resolution agreement, to be incorporated by reference into various, related contracts, or iii) used as a submission agreement by parties after a dispute arises. And finally, they are meant to be used in other AIPN model contracts.

The drafting committee surveyed the AIPN membership to determine their issues and concerns in drafting dispute resolution provisions. It attempted to strike a balance between the complexities of international arbitration law and the need to provide model clauses that parties can draft into a contract in a straightforward, practical, and effective manner. It also took into consideration the impact of using different governing laws, different cultures, and different legal traditions in resolving complex disputes, which is explained in the section below that deals with the common law, civil law, and *Shari'ah*. To meet all these objectives, the committee provided a reasonable range of alternatives and options on major issues that were identified in the survey and various discussion groups.

The result is a lengthy and complex Model DR Agreement. This could possibly lead to confusion, because of the many choices it offers and the interdependence of several of the choices provided. Therefore, anyone relying on these provisions should proceed with care, bearing in mind that simplicity and brevity are always best when drafting dispute resolution provisions. If parties wish to minimize the length and complexity of their dispute resolution clause, they would be best served by using the short, simple arbitration clause provided at the beginning of the Model DR Agreement.

Finally, anyone using the Model DR Agreement should consult these Guidance Notes, which can guide the novice (and even the more experienced) drafter in preparing a dispute resolution agreement that will promote the fair, speedy, efficient, and cost effective resolution of disputes, rather than one that gives rise to additional disputes over the meaning and enforceability of the dispute resolution provisions.

II. GOVERNING LAW

A. Governing Substantive Law vs. Procedural Law

If not drafted properly, choice-of-law clauses can be confusing or misinterpreted. For example, depending on how the clause is drafted and whether it is placed within the arbitration provision or elsewhere in the contract, the clause might be interpreted as i) a choice of substantive law, ii) a choice of the law that provides the conflicts of law rules, or iii) a choice of the procedural law of the arbitration. In some instances, the interpretation of the clause might be influenced or even determined by treaty or even by extrinsic evidence. It is thus imperative that parties ensure their choice-of-law clause is clear and consistent with their intent.

In most modern contract settings, but especially in international contracts, parties should clearly identify the substantive law that is to govern their contract. Otherwise, uncertainty will exist regarding what the applicable substantive law is; which, in turn, will result in uncertainty respecting the exact nature and enforceability of the parties' rights and obligations. If the parties do not identify their choice of governing law, the choice will be left to an arbitral tribunal when a dispute arises. The tribunal could then potentially select the law of the country with the closest connection to the dispute, the law of the country of operations, the law where the contract was negotiated, the law where it was executed, or some other law.

Even though the modern trend is to interpret the choice-of-law provision as supplying the substantive law, when parties intend the chosen law to be the law of the dispute, they should expressly exclude the conflicts of laws rules of the chosen law so that it does not send them to the law of another country. A choice-of-law provision that excludes the conflicts of laws rules of the chosen law, however, will not necessarily serve to eliminate the application of international law or so-called "transnational law" in an ensuing international arbitration proceeding. When contracting parties intend to eliminate the application of such law, they should expressly state so in the governing law provision. Phraseology that purports to eliminate the application of the law of "any other jurisdiction" should be avoided if the parties' intent in using that phrase is to eliminate the potential application of international or transnational law because international or transnational law inherently is a type of law that transcends the law of any particular jurisdiction.

Parties need to be aware that the governing or substantive law of the contract is a separate matter from the procedural law governing the dispute resolution process. Normally, in the absence of a provision identifying a different procedural law, the procedural law will be the law of the seat of the arbitration proceeding. Thus, if parties provide for arbitration with London as the seat of arbitration, then, unless the parties expressly provide otherwise, the procedural law of the dispute resolution process would be that of England (*i.e.*, the English Arbitration Act 1996), regardless of the parties' choice of the substantive law of the contract.

Parties may designate a governing procedural law other than that of the seat of arbitration. However, this is seldom advisable and should be avoided. Selecting the procedural law of a country or jurisdiction other than the seat may lead to disputes, extra expense, and delays. The arbitration laws of many countries contain mandatory provisions that the arbitrators must apply,

so it may not be possible to entirely divorce the procedural law from the law of the seat. And, because the award can only be set aside by the courts of the seat of arbitration, ignoring mandatory provisions of the arbitration law of that country could be fatal to the award. An exception to this practice may be warranted if the procedural law of the seat is poorly developed or contains extraordinary provisions to the detriment of the parties and the parties cannot agree on a seat with a more developed arbitration law. In that situation, parties may wish to choose another country's procedural law or the UNCITRAL Model Law on International Commercial Arbitration to govern the arbitration, subject to any mandatory rules of the seat.

The choice of seat, and of procedural law, have important impacts on the arbitration process and enforcement of the parties' agreement and any award. These important issues are discussed in more detail below in Section III(E) regarding the choice of seat. The remainder of this section deals with the choice of substantive, not procedural, law.

B. Selecting the Governing Substantive Law

In countries with strong federalist traditions, such as the United States, Australia, and Canada, parties must select the law of a particular State of the United States or of Australia or the law of a particular Province of Canada. In the United Kingdom, parties should select the law of England and Wales, or of Scotland. It would generally be a mistake to select the law "of the United States" or "of the United Kingdom," although it is worthwhile to note that on occasion the contract might warrant the application, in whole or in part, of specialized law enacted by those nations. For example, the application of the U.S. Outer Continental Shelf Lands Act might be mandatory in some instances. In contrast, it would not be an error to select "the law of France," as France has a single body of contract law. The contracting parties should thus be familiar with the role of local and national laws in a particular jurisdiction in selecting the correct governing law.

Selecting the law of a particular jurisdiction as the governing or substantive law of the contract can be difficult. It is much easier to identify jurisdictions that should be avoided. The choice of law is very important because it may affect the enforceability of certain contractual provisions, provide some unintended benefit or remedy, or allocate legal duties and responsibilities in a manner significantly different than another jurisdiction. As a general observation, the parties should be especially cautious about the effect their choice of law may have on the enforceability of the indemnity or compliance provisions in the contract. For example, under the law of a number of states of the United States, the indemnity provisions may not be fully enforceable as written. Good examples are the states of Texas and Louisiana.

Occasionally, the ultimate choice of substantive law may depend on the relative bargaining power of the parties or the nature of their respective roles in the underlying contract. For example, while the designated operator under a joint operating agreement might prefer that the governing law be the substantive law of Texas, a non-operating working interest owner might prefer the law of France or Brazil. They may agree upon one of them, or they may compromise with selecting a governing law that they are all comfortable with, such as the law of England and Wales. Contracting parties also need to be aware that they may not be able to avoid the application of certain laws of the country of operations, such as environmental, labor, or safety

laws, or of extra-territorial laws from a number of countries, such as economic sanction or compliance laws.

Parties' express choice of law will depend on a number of factors, including the respective nationalities of the parties (and their parent companies), the country of operations, the parties' familiarity and experience with particular legal systems, and potential future legal developments in particular jurisdictions. Other factors that affect choice of law include whether one of the parties is a State or an entity owned by a State. States generally do not agree to be subject to the law of another sovereign State. If the host State or state-owned company insists that its own law serve as the governing law, but the private party cannot agree to it, a compromise may be sought by applying the host State's law, but only to the extent it is consistent with either general principles of the law of nations or international law. Keep in mind that the term "international law" may be ambiguous. The best definition of international law is found in Article 38 of the Statute of the International Court of Justice, which provides that the sources of international law are to be found in:

> (a) international conventions;
>
> (b) international custom, as evidence of a general practice accepted as law (customary international law);
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> (c) the general principles of law recognized by civilized nations; and
>
> (d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

With respect to contracts with States, such as production sharing contracts or certain agreements with state-owned companies, when parties are evaluating the host country's law, they should consider whether it takes the monist view that deems international law as part of the national law, whether it is based on older law (*e.g*., French or English law) and whether the law of France, England or another country whose law is more developed may be selected to fill gaps in the host State's law or to interpret it.

1. Failing to Select the Governing Law

Most international arbitration rules, and many local laws aimed at facilitating dispute resolution through arbitration, provide that if the parties have not selected the governing law, the arbitrators shall apply the rules of law the tribunal determines to be appropriate. Commentators have suggested that the phrase "rules of law" has been adopted in international arbitration rules, instead of the term "national law," to authorize the arbitrators in appropriate cases to adopt non-national law such as the so-called *lex mercatoria* (the law of merchants), which is not clearly delineated. Some commentators suggest the *lex mercatoria* may be found in the UNIDROIT Principles of International Commercial Contracts.

In appropriate situations, parties may desire to give the arbitrators the power to decide the case on equitable grounds (which may be done by authorizing the arbitrators to act as *amiable compositeurs)*, decide the case *ex aequo et bono,* or by the principles of good faith and good will. It is worth mentioning that in some jurisdictions, arbitrations decided in equity, by *amiable*

compositeurs or *ex aequo et bono* might be limited or prohibited by local laws, especially when dealing with national oil companies or state entities. Parties can also explicitly agree to have their dispute decided by non-national law such as the *lex mercatoria*, by general principles of the law of nations, or by international law. Parties could provide more specificity to the *lex mercatoria* by expressly including the UNIDROIT Principles. In unusual cases, parties can resort to the principle of *depecage*, by which they provide that certain types of disputes will be decided by a specified law while other disputes will be decided by different law.

2. Other Issues in Selecting the Governing Law

Choice-of-law clauses may also attempt to stabilize the host law applicable to the parties' agreement or relationship. One formulation is to provide that the law of the host State applies as it exists on the date of the contract signing. Another is to state in the agreement the specific laws of the host State that will apply rather than including a clause adopting the host State's law generally. A modern stabilization clause generally does not attempt to freeze the law applicable to the parties but, instead, may provide that if the host State's laws or regulations change in a way that significantly affects the economic equilibrium of the contract, then the private party has a right to a modification of the financial terms to maintain the original economic equilibrium. The law related to stabilization and equilibrium clauses can be particularly complicated and parties using such clauses should therefore ensure that they are guided by the advice of experienced legal counsel when they incorporate such clauses in their dispute resolution provision.

Finally, it should be kept in mind that parties' choice of the substantive law to govern any disputes between the parties will not necessarily cover all issues. Issues such as the parties' capacity to enter into a contract, disregard of the corporate form, and bankruptcy may be subject to other law. In addition, some countries with a close connection to the parties or the transaction may have mandatory rules of law that apply, regardless of the parties' choice of law or intent. Other issues may be covered by treaty, such as bilateral or multilateral investment treaties or by customary international law, all of which apply to investment disputes relating to such matters as expropriation and currency transfers.

C. Significance of Applicable Legal Systems and Traditions

Parties should consider the following characteristics of the contract in selecting the governing law of their contract:

a) **Context of the engagement**: PSC, JVA, Unitization, Farm Out, Seismic Surveys, E & P, subsea development, onshore exploration, JOA or assets Sales Purchase Agreements (SPA), oil & gas pipeline installation (domestic or cross-borders), etc., and the origin of the parties to a contract. This will determine the place(s) that will have the closest connection with a contract.

b) **Legal Regime**: The prevailing legal regime, i.e. common law, civil law or *Shari'ah law* regimes, which will have influence on the interpretation of the substantive law of a contract.

c) **Scope of a Contract**: The terms and conditions will be interpreted in view of the obligations of the parties and nature of the subject matter. This may encompass labour, material, at site construction, EXIM (export, import), customs and excise duty regulations, IP rights, technology transfer, copyrights, confidentiality clauses, safety, security and environmental regulations. Unless each of these and other matters likewise, are dealt with separately within a contract's terms & conditions, a simple choice of substantive law without addressing such matters will give rise to a contract with deficiencies and prone to disputes.

1. Common Law

The common law developed in England as a result of Parliament leaving most matters relating to private disputes to the courts. Like civil law, the early source of the common law was often Roman law as expressed in the Justinian Code. However, contract and commercial law also devolved from judicial recognition of common trade customs and usages among merchants. Unlike the civil law, the common law was gradually developed by courts in the process of resolving specific disputes.

The chief advantage of the common law is that particular disputes are resolved after full and careful consideration of the arguments proffered by the opposing sides. The chief disadvantage is that, because of this case-by-case approach, the common law of a particular body of law, *e.g.,* contract law, must be gleaned from reading and synthesizing a great many cases. Although legal treatises, authored by scholars of particular legal topics, summarize the common law, there may still be gaps in the law, important differences among particular jurisdictions and disagreement among treatise writers as to the proper interpretation or scope of a particular rule, the preferred rule where the rules conflict, and various details.

Commencing in the 1800s, there has been a slow but accelerating movement toward codification. Common law countries are developing large bodies of statutory laws that collectively resemble civil codes. Thus, although courts still develop common law, the legislative arms in common law States have become very active in codifying large bodies of law, especially commercial law. Nevertheless, the courts remain the branch of government that interprets and applies these codes in the context of actual disputes in much the same way as they interpret contracts between disputing parties

Common law may therefore be an appropriate choice for the substantive law governing a complex contractual relationship because it is "judge-made law" that is regularly updated through court decisions; and because it is reflective of current commercial issues, comprehensive, and adaptable to changes in business practices and attitudes. The common law is of course not identical across jurisdictions, and certain fundamental principles may be interpreted quite differently. One example is the duty of good faith. This generally does not exist in English law (arguably it may exist in certain situations or under different guises), while it generally does exist in New York law. Drafters should investigate the major commercial differences between the different common law jurisdictions before finalising a choice of substantive law.

There are fundamental differences between the various common law jurisdictions on the procedural laws that govern international commercial arbitration. In some jurisdictions, such as England and Wales or in certain states in the U.S., arbitration is viewed favourably by the courts, which will support the parties' choice of arbitration. Certain differences do however exist; for example, in England and Wales, except where specifically excluded by the parties, section 69 of the English Arbitration Act 1996 provides for the ability for the parties to appeal an arbitral tribunal's award to an English court on an error of (English) law as determined in the award.[1] In contrast, the U.S. Federal Arbitration Act does not allow for such a challenge. As above, the choice of a specific common law jurisdiction as the seat/legal place of proceedings, should be taken only after an investigation into the legal regime applicable for arbitration proceedings within that jurisdiction, and in particular, the attitude of the jurisdiction's local courts towards arbitration.

2. Civil Law

Civil law is the most widely used legal system in the world. Today's civil law is the result of a codification movement in the aftermath of the French Revolution that did away with ancient feudal structures. The primary source of law in civilian jurisdictions is a codified statement of broad, abstract, and general principles with the judiciary being limited to the application of these codified principles and, at least in theory, not bound by precedent (*stare decisis*). There is a strong reliance on doctrine.

In countries with civil law legal systems, the hierarchical structure of their legislation is clearly identified. Constitutions are typically at the top of the legal pyramid (usually in a single instrument) and the rest of the laws follow progressively in descending order, including general laws of national scope, decrees equivalent to laws, general regulations, and legal precedents. State or provincial laws and regulations also come into play depending on the federal or Unitarian nature of the legal structure of a particular country. Adhering to that hierarchical order, it is desirable that international treaties – in this case those treaties related to arbitration, and mainly for the sake of legal certainty for the arbitral proceedings and awards - are inserted within the country's legal system at the same level or immediately below the nation's constitution. That way, third parties have more certitude when dealing with the courts and institutions at the time of enforcing and recognizing foreign arbitral awards and proceedings. Also, parties to an arbitration can make use of those international treaties to protect their rights when national laws are less favorable and do not guarantee a level playing field.

The judicial branch of government plays the most important role in countries with civil law systems for they interpret the laws of the land. Countries with such legal systems have heavily codified legal structures and rely on their courts to elucidate the meaning of the laws (when deciding legal controversies) and, at a higher level, to control the constitutionality of laws, regulations, decrees and government decisions and activities.

[1] Note that optional clause III.H.1 of the Model DR Agreement allows the parties to exclude that particular provision of the English Arbitration Act when the parties have selected London as their seat of arbitration, thus preventing an appeal to the English courts on a point of law.

Civil law legal systems of modern societies are in line with current trends on international commercial arbitration. According to the UNICTRAL Secretariat, by year 2016, a total of 102 jurisdictions in 72 states had adopted the UNCITRAL Model Law on International Commercial Arbitration as their legislation for arbitral proceedings, and at least half of those 72 states have, or are strongly rooted in, civil law systems. The adoption of the UNCITRAL Model Law by such jurisdictions gives more clarity about their adherence to standardized rules and institutions produced and accepted by the international community.

In civil law systems, there are several governmental decisions or actions, that cannot be arbitrated and that can only be challenged before national courts. There are some disputes that governments deem too important to be left for private arbitrators to decide. Within civil law systems, this often happens to controversies in connection with termination or rescission of contracts, bankruptcies, labor controversies, and tax disputes, among others. These exclusions are sometimes listed in the legislation applicable to the contract, and most of the times are included in the same dispute resolution agreement or clause. Furthermore, in some cases, arbitration proceedings can only be held in specific places, pursuant certain *lex arbitri*, language, venue, etc.

Intrinsically, civil law legal systems do not have a hostile position towards arbitration as a means to solve controversies. In other words, there is nothing within such legal systems theoretically opposed to arbitration. In fact, arbitration has been present in Roman law - the origin of civil law systems - from the early stages of codified legislation. In any case, arbitration laws are determined based on specific experiences, perspectives and theories held by each jurisdiction.

Civil law contracts are usually less detailed than contracts using the common law. This is a consequence of the abstract character of the Code, which is more comprehensive as to circumstances that may possibly affect the execution of contractual obligations. The Code determines the contractual obligations unless the parties modify them. Consequently, parties are not required to take responsibility for any possible difficulty that might develop over the course of contractual relationship but may adjust contractual obligations in the long run. In common law contracts, parties are required to take their responsibilities into their own hands. Hence, common law contracts in which every word counts are generally lengthier and more detailed. Interestingly, international petroleum contracts tend to be detailed and comprehensive in nature. This probably arises from their unique provisions, which are not found in most civil codes, and from the hand of common law lawyers who often draft them.

Notwithstanding fundamental differences between the legal cultures of the common law and the civil law, legal practice has generally been able to find solutions that achieve similar results under both systems and to enable businesses to perform in a cross-border context. Today, instead of relying on judge made law, common law systems are increasingly codifying their laws while civil law systems are beginning to accept the existence of judicial precedent. Hence, there seems to be a convergence of common law and civil law systems, which may further facilitate cross-border transactions.

3. *Shari'ah* Law

The development and application of laws under *Shari'ah* law regimes for commercial transactions and business contracts, has a lot in common with civil law regimes. The major difference being in the interpretation of certain terms of a contract and procedural steps of *Shari'ah* courts. Even if the parties are given the freedom of choice of applicable law, the terms and conditions of a contract should not be in conflict with *Shari'ah* principles. However, the interpretation and application of *Shari'ah* principles is neither consistent nor restrictive but divergent across various jurisdictions of *Shari'ah* law regimes. This often leads to ambiguity, and uncertainty resulting in conflicts or disputes.

The general rule of contract under *Shari'ah* is "all is permitted unless specifically prohibited." Under Islamic law, parties are therefore free to enter into any contract they wish and will be bound by its terms, except for certain matters prohibited by *Shari'ah*. The most common contractual terms that cause disputes and that may not be enforceable in *Shari'ah* jurisdictions include:

a) Interest (*Riba*) on contractual payments overdue or outstanding. *Riba* literally means "an excess" in Arabic;

b) *Gharar*, which amounts to speculation or gambling on a specified but unsure event, such as selling shares in an unformed company;

c) Limitation of liabilities;

d) Liquidated damages vs penalty clauses;

e) Obligation to complete a contract despite payment of compensation for losses incurred; and

f) Special agreements if found to contradict the public morals or public order will be rendered void.

Shari'ah law is the law laid down by the Qur'an, which is the holy book of Islam, and the Sunnah (the sayings, teachings and actions of Prophet Mohammad). These are the principal sources of the *Shari'ah*. The Sunnah is the most important source of the Islamic faith after the Qur'an and refers essentially to the Prophet's example as indicated by the practice of the faith. The only way to know the Sunnah is through the collection of Ahadith, which consists of reports about the sayings, deeds and reactions of the Prophet.

One principle expressly stated in the Qur'an and Sunnah is that the charging of interest upon a loan, in whatever form, is *Riba* and is contrary to the *Shari'ah*.

At Sura II, 275-79 of the Qur'an it is stated that:

> Allah has made buying and selling lawful and has made the taking of interest unlawful. Remember, therefore, that he who desists because of the admonition that has come to him from his Lord, may retain what he has

> received in the past; and his affair is committed to Allah. But those who revert to the practice, they are the inmates of the fire; therein shall they abide.
>
> O Ye who believe, be mindful of your duty to Allah and relinquish your claim to what remains of interest, if you are truly believers. But if you do not, then beware of war from the side of Allah and his Messenger. If, however, you desist, you will still have your capital sums; thus you will commit no wrong, nor suffer any wrong yourself.

Sura III 130 states that:

> O Ye who believe, devour not interest, for it goes on multiplying itself; and be mindful of your obligation to Allah that you may prosper.[2]

Clauses that deal with limitation of liabilities, penalty, liquidated damages, title in tangible assets[3] and special agreement etc. should be drafted after taking into consideration similar *Shari'ah* principles, instead of making the *Shari'ah* principles as the applicable or substantive law of a contract.

Even if the local law provides freedom of choice of a foreign law as an applicable law to a contract, certain domestic laws may prevail for certain aspects of a subject matter. For instance, in Article 19(ii) of UAE Civil Code, Federal Law No. 5 of 1985, "The lex situs of the place in which the real property is situated shall apply to contracts made over such property."[4]

The lack or inadequacies of terms in contracts are often filled by local traditions and custom of each jurisdiction. The wide diversity in such customs is a norm, despite being similar states adopting Shari'ah law regimes. The typical example is of UAE Federal Law on Commercial Transactions,[5] which provides that "[w]here is no specific agreement, the rules of commercial customs and practices shall apply to any matters, regarding which, there is no provisions herein or in another law related to trading issues." This introduces a fluid and subjective body of local customs, which may often be cited as public policy.

In view of the above, there is no universal fix when it comes to drafting *Shari'ah* compliant contracts. One solution is to reference the interpretation of *Shari'ah* principles to some known

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[2] *The Quran, translated by Muhammad Zafrulla Khan, Curzon Press, 1971*.

[3] Glencore International AG v Metro Trading International Inc [2001] 1 Lloyd's Rep 283. The title in the goods in possession of a solvent company was decided to be determined according to *lex situs*, Law of Fujairah, UAE, even though the contracts between the parties contained English Law as the applicable law.

[4] Supreme Court of Cassation Judgment 92 for the year 6 dated 28 April 1985, cited in Essam Al Tamimi. "*Practical Guide to Litigation and Arbitration in the United Arab Emirates*," The Hague: Kluwer Law International, 2003.

[5] Article 2(2) UAE Federal Law No. 18 of 1993 for Commercial Transactions.

designated authority such as the *Shari'ah* Advisory Council of Bank Negara, Malaysia; the Kuwait Finance House, or the Permanent Committee for Islamic Research and Fatwah in Saudi Arabia.

Alternative 1 in the Model DR Agreement for the governing law may be adopted without editing for contracts that require compliance to relevant *Shari'ah* principles.

However, if the parties cannot agree on whether certain provisions of their contract are *Shari'ah* compliant, they may wish to add the following:

> The issues of disagreement on the interpretations if any, for compliance to *Shari'ah* principles, shall be referred to the *Shari'ah* Advisory Council of [name specific body, as per choice of the parties], the interpretation of which shall be binding on the parties.

It is recommended that parties consult *Shari'ah* scholars before drafting contract clauses incorporating *Shari'ah* principles.

4. Other Legal Systems and Traditions

The commonly adopted categorisation of legal jurisdictions as being governed by either civil, common or *Shari'ah* law is not exhaustive. Any of those legal systems when applied in a particular jurisdiction is applied variably and is influenced by other legal elements present in that jurisdiction.

Those other elements may include customary laws or statutes, ordinances or other legal instruments operative in the jurisdiction.

Customary law, for example, may affect land tenure or property title or rights, create co-existent rights (for example, in favour of local indigenous peoples) or regulate how natural resources may be exploited. Examples of such laws are to be found in many developing economies.

Statutes, ordinances and other legal instruments may modify both the content and application of the principles generally associated with a mainstream legal system applicable in a jurisdiction. Such elements might range from instruments issued by superior courts as to the meaning of an applicable arbitration law, as in the case of interpretations issued in China, to instruments that create hybrid legal mechanisms that do not fit into one of the categories of primary legal systems (*e.g.*, the processes for *Shari'ah* law rulings in Malaysia).

Before deciding to apply the law of a jurisdiction parties should familiarise themselves with the laws of the relevant jurisdiction insofar as those laws might affect the conduct of a dispute resolution process. Generalisations about the content of the particular primary legal system (*i.e.,* common law compared to civil law, and so on) in operation in a jurisdiction should be resisted.

This familiarisation should involve assessing the recent trend in the relevant domestic jurisprudence and, for example, whether the courts of the jurisdiction display a pro arbitration or pro alternate dispute resolution attitude.

D. Selecting Governing Law Clause

When making a choice between Alternative 1 and Alternative 2 of the Governing Law clause in the Model DR Agreement, parties should first review the guidelines of this section to clearly understand the principles of various legal systems when interpreting the rights and obligations of the parties to the contract. The next step is to draft the governing law clause as a separate and distinct clause from the dispute resolution clause to ensure that there is no confusion between the substantive law of the contract and the procedural law governing any dispute.

Alternative 1 should be sufficient for most international commercial contracts. If the parties have defined "Dispute" in a separate clause (such as in III(A) of the Model DR Agreement), then they can delete the following phrase in brackets: "disputes, claims, or controversies of any nature arising out of or relating to this Agreement, including but not limited to its formation, existence, performance, interpretation, breach, validity, or termination" and simply use the word "Dispute", which has been defined elsewhere in the agreement. If the parties want to be doubly sure that the correct definition of "Disputes" is used, they can add the phrase "as defined in this Agreement."

Alternative 2 can be used when one or more of the parties is not comfortable with the particular governing law selected. As described above, when a host state or state-owned company insists that its own law serve as the governing law, but the private party cannot fully agree to it, a compromise may be to agree to the host State's law, but only to the extent it is consistent with the general principles of international law. Alternative 2 defines "international law" as described in Article 38 of the Statute of the International Court of Justice, which is explained above in these Guidance Notes. Similar to Alternative 1, Alternative 2 provides various ways of defining "Dispute."

III. DISPUTE RESOLUTION: ARBITRATION

A. Agreement to Arbitrate Disputes

Arbitration is fundamentally a matter of consent, whether by contract or by treaty. It is therefore essential that there is a clearly drafted arbitration clause in a contract if the parties wish to use arbitration as their dispute resolution method (as opposed to relying upon the courts). The scope of the matters subject to arbitration is defined by the parties' consent in their arbitration clause. Parties may make their agreement as broad or as narrow as they wish, but absent some specific reason to narrow the submission, a contract should include the widely accepted language of a "broad form" clause; that all disputes, claims, or controversies "arising out of or relating to" the contract will be finally resolved by arbitration. The Model DR Agreement therefore provides a number of broad form arbitration clauses to meet the varying needs of parties.

1. Basic vs. Detailed Arbitration Agreement

The Model DR Agreement provides for (i) a basic dispute arbitration clause (Section II), which is short and simple and (ii) a more detailed arbitration clause (Section III) that has all the essential elements of an enforceable arbitration agreement, with a variety of options and alternatives to fit the nature of the transaction or project and the special concerns of the parties. In addition to the essential element of an arbitration agreement/clause, the Model DR Agreement also provides a number of optional provisions (Section IV) and a multi-step dispute resolution process (Section V), which are explained in more detail later in these Guidance Notes.

If parties wish to minimize the length and complexity of their dispute resolution clause, they should use the basic model arbitration clause. If parties wish to tailor make their arbitration clause to address the specific circumstances of their agreement, then they can use the detailed model arbitration clause, along with any of the optional provisions or the multi-step process.

2. Basic Arbitration Agreement

As explained in the Model DR Agreement, the Basic Model Arbitration Agreement (Section II) is a short self-contained, stand-alone clause that includes, by reference to a recognized set of international arbitration rules, the key elements of an effective and enforceable international arbitration agreement, including: (i) an express agreement to submit disputes to binding arbitration, (ii) a definition of the scope of the agreement, (iii) a designation of the applicable arbitral regime and rules, (iv) a seat (place) of arbitration, (v) a language for the arbitration, and (vi) the number and method of appointment of the arbitrators.

Parties should select Alternative 1 of the basic arbitration clause when they are using an arbitral institution that will administer their arbitration, which would include the appointing of arbitrators when the parties are unable to agree upon them. If the parties decide to use *ad hoc* arbitration rules, then Alternative 2 should be used. It has the additional provision of designating an appointing authority for the appointment of arbitrators, which is necessary if the parties wish to avoid relying upon the local courts to appoint arbitrators pursuant to the arbitration law of the place of arbitration or the default provisions of the UNCITRAL Arbitration Rules (if those are the rules they select) that designate the Permanent Court of Arbitration to select an arbitral institution to act as the appointing authority. This adds uncertainty to the process and can be unnecessarily lengthy and expensive, and if at all possible, should be avoided.

3. Detailed Arbitration Agreement

If parties decide to use the detailed version of the Model DR Agreement (Section III), then they will need to first determine if they wish to define what disputes are covered in their arbitration agreement. There are three alternative ways to define “Disputes” provided in the Detailed Arbitration Agreement: Alternative 1 for a single contract (which will meet most requirements), Alternative 2 for a master dispute resolution agreement to cover multiple, related agreements, and Alternative 3 to deal with a specific, existing dispute.

The next important component to draft is a broad form clause that will ensure that all disputes arising out of or relating to the agreement are resolved through final and binding arbitration. There are two alternatives provided: Alternative 1 is to be used where "Dispute" is already defined in a separate clause and Alternative 2 when "Dispute" is defined within the broad form arbitration clause.

The remaining alternatives and options provided in the Detailed Arbitration Agreement are addressed in the relevant sections below in these Guidance Notes.

B. Arbitration Institutions

There are no reliable statistics on the extent to which users of dispute resolution services have recourse to institutional as compared to *ad hoc* arbitral processes. However, some survey data suggests that major stakeholders favour institutionally administered arbitral processes (see Queen Mary's Survey 2015[6]).

There are many arbitral institutions throughout the world. Many of them are found in signatory countries to the New York Convention. The larger, well-established, and well-recognized commercial international arbitration institutions include:

- International Chamber of Commerce International Court of Arbitration (ICC) http://www.iccwbo.org
- American Arbitration Association/International Centre for Dispute Resolution (ICDR) http://www.adr.org
- London Court of International Arbitration (LCIA) http://www.lcia.org

Other well-established and qualified arbitral institutions in various regions of the world also provide arbitration services. These include:

Asia

- Singapore International Arbitration Centre (SIAC) http://www.siac.org.sg
- Kuala Lumpur Regional Centre for Arbitration (KLRCA) http://klrca.org/
- Hong Kong International Arbitration Centre (HKIAC) http://www.hkiac.org
- China International Economic and Trade Arbitration Commission (CIETAC) http://www.cietac.org

[6] Queen Mary University of London 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration

- Australian Centre for International Commercial Arbitration (ACICA)
  http://www.acica.org.au

Europe

- Arbitration Institute of the Stockholm Chamber of Commerce (SCC Institute)
  http://www.sccinstitute.com
- Swiss Chambers Arbitration
  http://www.swissarbitration.ch

Americas

- Mediation and Arbitration Commission of the Mexico City National Chamber of Commerce (CANACO)
  http://www.arbitrajecanaco.com.mx
- ADR Institute of Canada
  http://www.adrcanada.ca/
- British Columbia International Commercial Arbitration Centre
  www.bcicac.com
- International Institute for Conflict Prevention and Resolution (CPR) – Administered Arbitration of International Disputes Rules
  http://www.cpradr.org

Africa

- Cairo Regional Centre for International Commercial Arbitration
  http://www.crcica.org.eg/
- Mauritius International Arbitration Centre
  http://www.miac.mu
- Ghana Arbitration Centre
  http://www.ghanaarbitration.org

Middle East

- Dubai International Arbitration Centre (DIAC)
  http://diac.ae
- DIFC/LCIA Arbitration Centre
  http://www.difcarbitration.com

- Bahrain Chamber for Dispute Resolution (BCDR)

  http://www.bcdr-aaa.org

The above list is non-exhaustive, and other quality institutions exist around the globe. Parties should familiarise themselves with all available institutional options before selecting an administering institution. When possible parties should review current feedback on an institution's recent performance. The performance and comparative reputation of institutions may vary over time.

C. Arbitration Rules

Parties can prescribe in detail how they will conduct an arbitration setting out all essential elements of substance and process required to give rise to an enforceable award. This is unnecessary and not recommended, since there are many well drafted and accepted international arbitration rules, either administered or *ad hoc* (non-administered), that parties can use. Instead, parties should adopt or incorporate into the agreement between them the rules of an administering institution, or rules published by a non-administering dispute resolution body.

All of the arbitration institutions listed above have their own arbitration rules, which can be found on their websites. The best known examples of *ad hoc* rules for the conduct of arbitrations promulgated by a non-administering body are the rules of UNCITRAL and CPR:

- United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules
  http://www.uncitral.org
- International Institute for Conflict Prevention and Resolution (CPR) – Non-Administered International Arbitration Rules

  http://www.cpradr.org

While the UNCITRAL Rules are designed to be non-administered and work well in that regard, many of the major arbitral institutions will administer an UNCITRAL arbitration to the extent the parties request and agree. The Permanent Court of Arbitration at The Hague (PCA) will also administer arbitrations under the UNCITRAL Rules.

Some parties consider that the incorporation of institutional rules, which have generally understood meaning and operation, may contribute to process efficacy and lessen the likelihood of challenges to award enforcement.

The selection of the arbitration rules of an institution does not require parties to have that institution administer the arbitration. Parties may decide to conduct an arbitration on an *ad hoc* basis but in accordance with the rules of an institution (excluding rules that mandate the institutions involvement in administering the arbitration). Some jurisdictions like China do not unqualifiedly embrace the efficacy of *ad hoc* arbitrations. Care must be taken to ensure that the incorporation of arbitration rules is effective and valid, and does not produce uncertainty as to the applicable arbitral process or render the arbitration agreement invalid.

Most institutions provide model arbitration agreement clauses along with their rules. These standard clauses include:

ICC: http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/standard-icc-arbitration-clauses/

LCIA: http://www.lcia.org/dispute_resolution_services/lcia_recommended_clauses.aspx

ICDR: https://www.icdr.org/icdr/

SIAC: http://www.siac.org.sg/model-clauses/siac-model-clause

HKIAC: http://www.hkiac.net/en/arbitration/model-clauses

CIETAC: http://www.cietac.org/index.php?m=Page&a=index&id=188&l=en

KLRCA: http://www.klrca.org/rules/arbitration

SCC Institute: http://www.sccinstitute.com/dispute-resolution/model-clauses/english/

ACICA: http://acica.org.au/acica-services/arbitration-clauses

1. Conflicts between Arbitration Rules and *Lex Loci Arbitri*

Although international arbitration exists within the context of international arbitration treaties such as the New York Convention, the Washington Convention, etc., it does not exist in total detachment from domestic law considerations.

An arbitration must attach to a seat and that brings with it the potential for applicable mandatory laws of the selected seat *(i.e.*, jurisdiction) to apply to the conduct of the arbitration and for special provisions operative in the jurisdiction to affect the validity of the award. The general domestic arbitration laws of a jurisdiction, save to the extent that they give express effect to party autonomy, independently of the parties wishes may mandate aspects of how an arbitration is to be conducted or an award recognised or rendered enforceable.

Those laws may regulate matters as diverse as the right of the arbitrator or counsel representing a user to conduct professional activities within the jurisdiction, and whether (and if so on what basis) particular classes of damages, interest or costs may be awarded. Importantly, domestic arbitration laws may prescribe a user's right to appeal a tribunal's decision to decline jurisdiction, or a user's right to appeal an award on a merits basis to a competent appellate judicial body.

There is necessarily the potential for the conflict of laws principles applying in the seat to apply to the subject matter of the arbitration. Given the potential significance of this fact parties often exclude conflict of laws of the seat from applying to the arbitration. Careful thought should be given as to what conflict of laws principles are to apply to the conduct of the arbitration. When selecting a seat, similar consideration should be given to the subject matter in dispute, local taxation laws, legal capacity laws and any other law that might affect the conduct of the arbitration or the enforceability of the award.

2. Familiarity with Arbitration Rules

The rules of arbitral institutions vary. Arbitral institutions, are private entities operated for public benefit purposes or profit. The quality and efficacy of the rules institutions promulgate is one of their marketing messages.

Institutions compete for the business of administering arbitrations and providing related services. In that sense, they are offering services similar in nature and in part effected in differing ways through their respective rules. Institutions regularly update their rules and copy or mirror best practice developments in other rules. Best practice concepts, such as emergency arbitrator rules and expedited arbitration rules, are quickly copied.

Differences however remain. Some are minor that go to issues such as the form of documentation the parties must adopt, time periods for the taking of steps in the arbitration and so on. These matters may affect the conduct of the arbitral proceedings and affect costs but not be outcome determinative. Some rules such as the ICC and SIAC Rules may have provision for peer based award (technical) review of answers. These additional elements may add to cost or delay but not affect the arbitration outcome.

Other rule differences may be of greater importance. Rules may:

- mandate that more than one arbitrator be appointed;
- not provide for emergency conservatory orders, emergency arbitrator appointment or other features present in many jurisdictions;
- provide for elements of merits based review;
- proscribe the form of an award in a manner which if not complied with may render an award unenforceable; and
- permit or exclude the oral examination or cross examination of a witness.

Such matters may go to process and may in some instances, have potential effect on the outcome.

Parties must review in detail rules with which they are not fully familiar and consider the practical significance of differences in rules before deciding what institutional rules, if any, to adopt.

It has been suggested that when making that selection:

> Six criteria (should be considered): (i) the relative advantages or disadvantages of any distinctions among the sets of institutional rules; (ii) the relative abilities and preferences of the institutions with respect to arbitrator appointments; (iii) the relative experience and ability of the institutions' administrators or secretariats respecting case administration; (iv) relative reputation insofar as reputation may enhance or undermine the prospects for enforcement of an arbitral award; (v) cost, both administrative

and arbitrator fees; and (vi) whether certain institutions are better suited for arbitration in certain locations.[7]

Such an analysis is appropriate even where no choice between competing rules exists because the parties must use one particular institution. The reason for this fact is that consistent with the concept of party autonomy that underlies international commercial arbitration, institutions invariably provide for some of its rules only to apply if "the parties do not otherwise provide". A decision on what position is to be adopted may affect matters of both substance and process within the arbitral process. It is necessary for parties to decide what position will apply in place of the default position in the rules.

This discipline about the detailed selection of rule content applicable to any arbitration applies to *ad hoc* arbitrations governed by institutional rules even when the promulgating institution is not administering the arbitration.

Care must be taken when modifying standard institutional rules to conform to user intent to ensure that consistency within the selected rules is maintained. Piecemeal or partial consideration of rules is not appropriate. Therefore, rules ought to be reviewed in their entirety to avoid unintentional gaps and inconsistency in the rules.

Where sovereigns/nation States are involved in an arbitral process, selection of rules and institutions is subject to additional considerations because of the availability of the International Centre for Settlement of Disputes (ICSID) and the operation of the Washington Convention.

3. Appointing Authority for *Ad Hoc* Arbitrations

In circumstances where parties decide to conduct an arbitration on an *ad hoc* basis (i.e., not to have the arbitration administered by an institution) they should, in the absence of agreement between them as to the identity of the arbitrator(s), decide to nominate a body to undertake the specific task of appointing the arbitrator(s) to conduct their arbitration.

Parties should select an institution that will undertake the role of appointing authority, which they will usually do on a fee for service basis. Most institutions offer this service. Examples of institutions that will act as an appointing authority and their relevant provisions are:

- International Chamber of Commerce (ICC)
  ICC Arbitration Rules – Appendix III (Arbitrations Costs and Fees) – Article 3 (ICC as Appointing Authority)
- London Court of International Arbitration (LCIA)
  Constitution of the LCIA Arbitration Court – Article D.1(a) (Functions of the Court)
- International Centre for Dispute Resolution (ICDR)

[7] Paul D Friedland, ARBITRATION CLAUSES FOR INTERNATIONAL CONTRACTS.

ICDR Appointment Services – ICDR Rules, Article 12: Appointment of Arbitrators

- Permanent Court of Arbitration (PCA)
  UNCITRAL Arbitration Rules – Article 8(2) & 13 of 2010 Rules

Parties need to be mindful that in some jurisdictions a failure to effectively appoint an arbitrator(s), or to nominate an appointing authority to do so, may entitle a party to have recourse to the domestic court of the seat to affect a default appointment, or in some cases under domestic statutes, to a local arbitral institution that will act as the appointing authority. This may be disadvantageous to one or more of the parties.

4. Detailed Arbitration Agreement: Alternatives for Arbitration Rules

Alternative 1 in the Model DR Agreement (III.C) provides for an administered set of arbitration rules. Parties simply need to insert the name of the institution's rules if they use this alternative. They should ensure that they insert the exact title that the institution uses for its rules. Alternative 2 provides for the UNCITRAL Arbitration Rules if the parties wish to conduct an *ad hoc* arbitration. As explained in other sections of these Guidance Notes, it is important to designate an appointing authority in the Alternative 2 clause.

Both Alternatives 1 and 2 provide an optional clause "in effect at the time the arbitration is commenced." This clause is not really necessary, since by default, the arbitration rules in effect at the time of the arbitration would apply. However, it is usually better to use this additional phrase, rather than a phrase such as "in effect at the time of this Agreement." Even though parties may wish to lock themselves into arbitration rules that they are familiar with, institutions are always improving their rules based upon procedural problems encountered by their users, and parties are usually better off taking advantage of these improvements.

Alternative 3 provides for the ICSID Rules. This can be used when one of the parties is a sovereign state or a state owned/controlled entity and if the subject of the dispute concerns a defined "investment". Before using this alternative, parties should seek specialized advice on the applicability of the ICSID Rules and how best to manage a state investment dispute.

D. Appointment of Arbitrators

The selection of suitable arbitrators to serve in an international arbitration is critical to the outcome of the proceeding. The drafting of arbitration provisions pertaining to the selection of arbitrators thus requires careful consideration by the parties. Regardless of whether they pertain to *ad hoc* or administered arbitrations, most international arbitration rules permit the parties to either (i) contractually agree on the method for the appointment or nomination of arbitrators or (ii) defer to the appointment mechanism set forth in the rules. In drafting provisions regarding the selection of arbitrators, contracting parties should be aware of the options afforded by various rules and should take into account the relevant provisions of the rules they have adopted to govern an arbitration relating to their contract.

1. Number of Arbitrators

The first consideration parties confront when drafting arbitration agreement provisions relating to the appointment of arbitrators is whether the arbitration proceeding should involve a single arbitrator or multiple arbitrators. Some international arbitration rules provide for an arbitral tribunal with three arbitrators, while others confer discretion on the administering institution to determine the appropriate number of arbitrators (one or three). The parties can always specify the number of arbitrators in their agreement. In the absence of agreement on this number, either expressly or by incorporation of a set of arbitral rules, the number of arbitrators may be prescribed by the arbitration law at the place of arbitration. In the United States, for example, Section 5 of the Federal Arbitration Act provides that "unless otherwise provided in the agreement the arbitration shall be by a single arbitrator."

The monetary value of most disputes concerning international petroleum agreements can be substantial. Even when such disputes do not directly involve a monetary claim but instead seek a declaration of the parties' rights under their agreement, the financial implications can be significant. Although some petroleum contracts pertaining to high-cost projects provide for a single arbitrator to resolve all arbitrable disputes that arise under, or concern, the contract, most parties to international petroleum agreements typically prefer that three arbitrators resolve such disputes. The involvement of three arbitrators in an international petroleum arbitration obviously increases the costs of the arbitration, but the prevailing view is that the involvement of three arbitrators serves to eliminate the danger that the dispute will be resolved by a single arbitrator who might materially misunderstand the applicable law or material facts adduced in the arbitration and render an erroneous award. The use of three arbitrators allows for the circumstance in which at least one of those three arbitrators will be able during deliberations on the award to disabuse the others of any patent misconceptions regarding the applicable law or relevant evidence.

Despite the above observations, it is obvious that some disputes relating to a contract are simply too small to justify the added expense and potential for a more protracted arbitration proceeding that often results when the arbitral tribunal is composed of three arbitrators. If the parties adopt a set of arbitral rules that confer discretion on the administering institution to determine the number of arbitrators, they thus should consider explicitly providing for a single arbitrator when the potential exposure is less than some minimum threshold—perhaps the equivalent of US$1 Million to US$5 Million. When an arbitration agreement does provide for the appointment of a single arbitrator, the agreement must not allow a single party to unilaterally nominate and appoint a sole arbitrator as this may be seen as violating principles relating to equity and fundamental fairness.

Arbitration agreements that exclusively provide for a single arbitrator inherently provide the parties with additional options regarding the process for appointing that arbitrator. For example, the agreement could provide any party with the right to submit a "notice to concur" on the appointment of an arbitrator. Through the service of the notice, a party may propose the appointment of a sole arbitrator, or even more than one arbitrator, by offering a short list of

arbitrators who might be acceptable to the other party. When this process is included in an arbitration agreement, the agreement should provide a time limit by which the opposing party must either select one of the arbitrators from the submitted list or provide the names of one or more alternative candidates. When this process is incorporated in an arbitration agreement, the agreement should provide deadlines by which i) a party may submit a notice to concur, ii) the opposing party must respond to the notice and either accept or reject the first party's proposal or otherwise make its own proposal, and iii) either party may declare the process to be at an impasse such that the appointment of the arbitrator may be made by the administering institution, the appointing authority or, if necessary, a court.

To allow the parties flexibility in determining what approach to take with respect to the question whether an arbitration concerning their petroleum agreement should be resolved by one or three arbitrators, the Model DR Agreement (III.D) provides three alternatives relating to when, and whether, the arbitral tribunal shall be composed of a single arbitrator or three arbitrators. Alternative 1 provides for a tribunal of three arbitrators, while Alternative 2 provides for a sole arbitrator. Alternative 3 provides more flexibility to parties by first fixing the number of arbitrators but then allows them to reconsider at the time of the dispute whether they want a sole arbitrator or a three-member tribunal. This last alternative is not technically necessary, but it has the benefit of giving the parties an opportunity (or excuse) to discuss the appropriate number of arbitrators when they know what their dispute is about.

The Model DR Agreement provides a fourth alternative that allows the parties to decide the number of arbitrators based upon the amount in dispute, at the time of the dispute arising. Parties sometimes cannot agree on the amount in dispute that would trigger that threshold, so this alternative addresses that problem by having the arbitral institution or appointing authority make that decision for them.

2. Method of Appointing Arbitrators

Independent research reflects that most parties involved in international transactions prefer to be able to select at least one of the members of a tripartite arbitral tribunal. The Model DR Agreement (III.E) thus includes an alternative provision (Alternative 1) that allows the claimant and respondent to each nominate an arbitrator and for the two party-appointed arbitrators to then nominate the third arbitrator. The Model DR Agreement similarly provides an alternative (Alternative 2) allowing the parties to agree to the nomination of a particular arbitrator when their agreement provides that a single arbitrator shall resolve their dispute.

There is no reason, however, why the parties cannot also expressly agree that the administering institution or the appointing authority will appoint some or all of the arbitrators in the proceeding. Since some arbitration institutions (such as the LCIA) require arbitrators to be confirmed (and not just appointed by the parties) under their rules, the optional language of "confirmation" is included.

Most international arbitration rules address the question of how the arbitral tribunal shall be constituted where the arbitration involves multiple parties (*i.e.,* more than two). The rules strive

to give each party a voice in the selection of the arbitrators so that no party is denied equal treatment in connection with what is arguably the most important step in the arbitration, the appointment of the tribunal. In that regard, however, it should be noted that some courts have held that an arbitral process that does not provide the parties with absolute equality in the selection of arbitrators is unenforceable for reasons relating to fundamental fairness.

There are at least three possible contractual solutions to the question of how arbitrators are to be selected when multiple parties are involved in the proceeding, although none of them are ideal. The parties can call for alignment of the parties, with i) the claimant(s) and respondent(s) each collectively selecting a single arbitrator, ii) the two party-appointed arbitrators then selecting the third arbitrator, and iii) the default being that the arbitral institution shall make the appointment(s) in the absence of the necessary agreement by multiple parties or the party-appointed arbitrators. The parties can also require unanimous agreement of all parties to all three arbitrators, with default to the administering institution or appointing authority when unanimity is lacking. Finally, the parties can agree that all of the arbitrators will be appointed by the arbitral institution. The commonly accepted view is that an unacceptable solution would be to provide for expansion of the number of arbitrators based on the number of parties to the dispute. Coordinating the schedules of three arbitrators is difficult enough without expanding the tribunal to five or more arbitrators.

As mentioned above, none of the above-mentioned solutions to the multiple-party issue are ideal for all circumstances. A provision that calls for the "alignment" of the parties disregards the fact that in some cases the parties cannot be easily aligned due to the existence of counterclaims and cross claims. Unanimous agreement amongst multiple parties is often difficult to obtain when each party prefers to solely select its own arbitrator. And defaulting to the administering institution or appointing authority can mean that the parties will have little input—and sometimes no input—in determining who will serve as arbitrators.

The solution proposed in the Model DR Agreement (III.F) is to first align the parties as claimants and respondents. If one or both sides cannot agree on an appointment, the administering institution or appointing authority will appoint all three. The intent is to avoid the situation in which parties on one side cannot agree on an appointment (perhaps due to one unreasonable party) while those on the other side can, resulting in some of the parties aligned on one side being denied a meaningful voice in the selection process. If the two party-appointed arbitrators cannot agree on the third arbitrator, the appointing authority shall make that choice.

3. Arbitrator Qualifications

The arbitrator qualifications identified in the Model DR Agreement (III.G) are intended to address two separate issues—the ability of the arbitrators to ensure that the parties receive a fundamentally fair hearing and the arbitrators' ability to render a well-reasoned decision given the nature of the dispute. In international commercial arbitration, all of the arbitrators are expected to be impartial and independent of the parties and their counsel. The arbitral rules of all major international arbitration institutions so provide, although the precise choice of words used to delineate this requirement may vary slightly. Therefore, when the parties have

incorporated a set of arbitral rules as part of their agreement to arbitrate, there is no reason for them to include this express requirement.

It should be noted, however, that the requirement that the arbitrators be impartial and independent does not mean that there can be no *ex parte* communications between arbitrator candidates and the parties at the arbitrator-appointment stage. Instead, the general prohibition on *ex parte* communications with the arbitrators normally does not prohibit the parties from communicating with potential candidates for appointment as a neutral party-appointed arbitrator for the purpose of determining the candidate's suitability to serve as an arbitrator in the proceeding, as well as the arbitrator's rates and availability. Most rules and some ethical guidelines therefore permit the parties, at the pre-appointment stage, to discuss with arbitrator candidates the general nature of the dispute, matters bearing on arbitrator qualifications, such as knowledge of an industry, language proficiency, and experience as an arbitrator, arbitrator rates, and arbitrator availability. Thereafter, *ex parte* contacts are severely restricted, although parties are also allowed to communicate with their party-appointed arbitrator regarding suitability of candidates to serve as the chairman or presiding arbitrator of the tribunal. Anyone contemplating *ex parte* communications with the tribunal after its constitution should refrain from doing so unless the parties and members of the tribunal expressly agree otherwise. Sometimes circumstances will necessitate *ex parte* contacts, for example, with regard to logistical matters; but if such *ex parte* communications do occur, they should be promptly disclosed to the other parties and arbitrators.

Drafters of international petroleum agreements should be careful not to define the qualifications of the arbitrators too narrowly, because unnecessary restrictions on arbitrator qualifications can make it difficult or even impossible to find suitable arbitrators and can exclude well qualified candidates. Nonetheless, the parties may want to exercise some control over who is appointed as an arbitrator by requiring that "[a]rbitrators shall be qualified by education, training, or experience to resolve the Dispute", which is the basic qualifications language provided in the Model DR Agreement. Requirements that arbitrator candidates have a certain amount of experience in a particular industry, that they have specific legal or technical training or experience, or that they have a particular nationality or hail from a particular region thus are usually avoided, although there may be instances in which such a requirement might be logical. Indeed, when arbitral institutions appoint arbitrators in international arbitrations, they often search for arbitrator candidates with specific and even long-term experience in the industry involved in the parties' dispute or, depending on the magnitude of the claim, that the arbitrators are located in a particular region or even city. For example, in some instances, it simply will not make sense to incur arbitrator expenses relating to travel when the size of the claim cannot justify such costs.

The basic qualifications in the Model DR Agreement also provide that all appointed arbitrators be fluent in the designated language(s) of the arbitration proceeding. This provision is considered necessary because when one or more arbitrators are not fluent in the designated language(s) of the proceeding; risk of delays, increased costs, and the potentiality that the arbitrators might not

understand the relevant facts and governing law can be heightened by the existence of language barriers and the increased need for translations of documents, testimony, and legal authorities.

The Model DR Agreement provides two additional options that deal with the nationality of either the sole/presiding arbitrator (Alternative 1) or all the tribunal members (Alternative 2). These optional provisions concerning the nationality of the arbitrators help ensure not only the independence and impartiality of the arbitrators, but also the appearance of independence and neutrality, which can sometimes be of equal importance. Not all arbitration rules contain a requirement that the sole or presiding arbitrator shall be a different nationality than the parties. Some rules make this qualification discretionary with the arbitral institution. Note that this provision requires that the single or presiding arbitrator shall not be the same nationality as any of the parties or their ultimate parent entities.

The Model DR Agreement does not specifically address issues concerning the availability of arbitrator candidates. Issues concerning an arbitrator's availability and related ability to ensure an expeditious process that provides for a fundamentally fair hearing can nonetheless be of importance to parties involved in arbitration proceedings. At a minimum, parties should do everything possible to ensure that arbitrator candidates will be sufficiently available to fulfill their obligations throughout the duration of the arbitration proceeding. To accomplish that objective, the parties can inquire of candidates in that regard or even insist that arbitrators certify in writing their availability prior to the confirmation of their appointment. Despite the above, however, including a provision requiring that each arbitrator be "available" to fulfill their obligations probably will incur unseen risks that cause such a provision to be inadvisable. In this respect, it is worth noting that some administering institutions and appointing authorities now require arbitrator candidates to provide a written declaration of independence and neutrality and, further, to affirm in writing that they are, and will be, available to fulfill their duties as an arbitrator.

Contracting parties should also be aware that under certain international rules an arbitrator's appointment is not confirmed until the arbitrator accepts limitations on the arbitrator's fees established by the applicable rules. In contrast, other rules provide that an arbitrator's appointment is valid from the day it is made by the institution. Arbitrators should recognize that they have an obligation to avoid unnecessary expense. The parties nevertheless should make it clear to arbitrator candidates at the outset whether they have a maximum ceiling for arbitrator's fees or rates in mind. It may also be significant to the parties that certain arbitration rules do not limit the fees that may be charged by arbitrators. When institutional rules restrict the arbitrator's fees, parties sometimes find that such a limitation can create difficulties in terms of attracting top quality international arbitrators.

4. Timing of Arbitrator Appointment

International arbitration rules vary regarding when party-appointed arbitrators shall be appointed or nominated, with some rules being silent on the issue and some providing that the claimant and respondent shall respectively appoint or nominate their arbitrators by specified deadlines. Contractual provisions and rules that provide for the sequential appointment or

nomination of arbitrators are common and thus are provided as an option in the Model DR Agreement (III.E Alternative 1). Such provisions, however, arguably afford the respondent the unfair advantage of being able to know who the claimant's party-appointed arbitrator will be, and to thus select an arbitrator better able to offset the abilities of that arbitrator. Parties thus should also consider whether they prefer that their arbitration agreement provide a mutual deadline by which both parties are required to simultaneously appoint their designated arbitrators.

Deadlines associated with the appointment or nomination of party-appointed arbitrators can sometimes result in undue delays in the arbitration proceeding. Fifteen days is probably the minimum amount of time that should be allowed to any party for this purpose. If the contracting parties believe they will be better served by having a longer deadline, they can so provide in their arbitration agreement.

Extended deadlines by which the party-appointed arbitrators must agree to the selection or nomination of the chairperson or presiding arbitrator can also be problematical due to the amount of time that can elapse between the filing of the demand for arbitration and the constitution of the arbitral tribunal. For example, if the parties' arbitration agreement provides that the claimant shall appoint its arbitrator within 30 days of the filing of the demand, that the respondent then shall have 30 days to appoint its arbitrator, and that the two party-appointed arbitrators shall then have 30 days to select the chairperson or presiding arbitrator, a period in excess of three months can easily pass before the three arbitrators are appointed and confirmed. The Model DR Agreement thus provides the parties with the ability to truncate these deadlines to better ensure a more expeditious arbitration proceeding.

5. Limitations on Arbitrators' Authority

Except in the few instances in which the applicable rules prohibit contractual provisions limiting the arbitrators' authority, the contracting parties are free to include provisions in their arbitration agreement that specify or limit the scope of the tribunal's authority. The section of the Model DR Agreement pertaining to damages provisions in the arbitration agreement, and the related discussion in these guidelines, address how the arbitrators' authority to grant certain forms of relief may be limited. But there are many other ways in which the parties may agree to further limit the tribunal's authority regarding the conduct of the arbitration proceeding. For example, the parties could expressly adopt any or all of the various existing IBA guidelines regarding to such matters as arbitrator disclosures, the taking of evidence and party representation. The parties could also agree to limit or broaden prehearing exchanges of information in a manner that differs from the applicable rules. Or the parties could provide that the arbitrators' award will contain certain findings of fact and conclusions of law. When the parties are considering limiting or broadening the arbitral tribunal's authority, it is imperative that they first confirm that any such provision does not run afoul of the applicable arbitration rules and the applicable procedural law, which normally will be the arbitration law of the seat of the arbitration.

6. Disqualification or Replacement of Arbitrators

Virtually all international arbitration rules provide for the process by which arbitrators may be disqualified or replaced. It is therefore unusual for parties to include a provision in their arbitration agreement addressing that subject. If the parties do desire to include such a provision—for example for the purpose of better ensuring the impartiality and independence of the arbitrators or to truncate the time that might be required to replace an arbitrator—they should first ensure that the applicable rules permit such a provision and that the provision would be enforceable by a court at the seat of arbitration in a set-aside proceeding.

E. Seat or Place of Arbitration

The place of arbitration in dispute resolution and arbitration clauses is referred to as the "seat of the arbitration". As mentioned above in the section on choice of law, the choice of the seat is a very important decision to be taken at the time of signing an arbitration agreement or a dispute resolution clause. The reference to a seat provides the procedural law governing the arbitration, in the absence of an express agreement otherwise. The seat is the first place, and often the only place, at which any assistance from courts or regulatory authorities if needed, either for interim measures, protection or production of witnesses, evidence, subject matter, or for sources of interpretation of procedural law, can be obtained. The seat is also the place where an award may be set aside. When filling in the blank provided for the city and country in section III.H of the Model DR Agreement, one must be mindful of the foregoing and the guidance provided in this section.

1. Minimum Requirements for Suitable Arbitration Seat

The seat of arbitration should be in a country that is party to the New York Convention. The choice of the place of arbitration can have profound consequences for the parties' arbitration and the enforceability of the award. Here "place of arbitration" is synonymous with the "seat of arbitration" – its legal situs for purposes of the origin of the award.

At least five important consequences flow from this choice:

a) First, the choice of the place or seat of arbitration can determine the enforceability of the award under the New York Convention.

b) Second, the choice of the place of arbitration determines where the arbitral award can be set aside.

c) Third, this choice normally determines the national arbitration law governing the arbitral proceedings – the *lex loci arbitri*. Therefore, the parties should be careful to select a site for arbitration that has a developed law supportive of arbitration and a judiciary that respects the right to arbitrate and the applicable national law of arbitration.

d) Fourth, it is generally understood that by choice of site, the parties confer on the courts of that site personal jurisdiction over the parties for purposes of judicial actions

related to the arbitration, including requests for interim relief from the courts in aid of arbitration.

e) Fifth, the choice of site may result in the waiver by a Host Government or state oil company of its sovereign immunity for purposes of exercise of jurisdiction over it by the courts at the site. The United States Foreign Sovereign Immunities Act, for example, expressly provides that a foreign State shall not be immune from the jurisdiction of United States courts in any case in which an action is brought to enforce an arbitration agreement or award if "the arbitration takes place or is intended to take place in the United States."

2. Importance of Neutral Seat

In context of international arbitration, despite the high standards of the legal profession in most of the developing and developed economies, oil & gas industry professionals display a degree of skepticism about choices of jurisdictions of the opposing parties. Though it may be prudent from a logistics and convenience point of view to choose a seat closest to the site of a project, parties will often designate a neutral seat, *i.e.*, a city and country different from the domicile of any of the parties to the contract. This is often done to avoid the perception of any party gaining a tactical advantage over the other party. It therefore makes it easier to focus on the negotiation of other important terms of a contract.

However, for contracts between States and investors, parties must first determine whether the host country is signatory to the ICSID Convention. If yes, then consider the option of designating ICSID arbitration and seat of arbitration accordingly. However, in doing so, parties need to seek specialized advice in managing investor State disputes, since they are quite different than international commercial disputes.

The salient features of a neutral seat should include but not limited to the following:

a) The Arbitration Law or *lex arbitri* or procedural law should be pro arbitration with no interference but only supervisory powers vested in the courts;

b) The arbitration law preferably adopted from the Model Law (UNCITRAL Model Law on International Commercial Arbitration) 2006, or based on similar principles;

c) Limited exclusions for arbitrability of the subject matter of a dispute either as a matter of public policy or by a statute; the pro-arbitration example is found in words similar to: "The fact that any written law confers jurisdiction in respect of any matter on any court of law but does not refer to the determination of that matter by arbitration shall not, of itself, indicate that a dispute about that matter is not capable of determination by arbitration[8]." In contrast, in jurisdictions like Thailand and Saudi Arabia, government bodies are not allowed to enter into an arbitration agreement. In Saudi Arabia it is only possible by the approval of the Prime Minister or unless allowed by a

[8] s11(2) International Arbitration Act (Cap 143A) of Singapore

special provision of the Saudi laws.[9] Similar restrictions may be found in several other countries as well, so due diligence is desired when selecting a neutral seat;

d) Costs and ease in logistic arrangements for attending hearings and meetings by the parties and their counsel;

e) Costs and availability of legal counsel with experience in oil & gas contracts; and

f) Courts and judges in the country have either expertise in deciding complex oil & gas infrastructure related disputes or specialized courts for such matters and doctrine of case precedence is available.

3. Importance of Procedural Law of Seat

In view of the increasing complexity of oil & gas projects with multi-party agreements, disputes often occur at different stages of a project. The parties also engage in resolving the issues through series of novel and innovative strategies. The choice of seat should take into consideration that sufficient jurisprudence encompassing all procedural steps till the final award is available in the *lex arbitri*. The tribunal should be empowered by the procedural law to give orders and decisions on interim matters. A sample of stages and interim measures commonly sought after by the parties are:

a) Security for costs;

b) Discovery of documents and interrogatories (may not be permitted in *Shari'ah* law and some civil law jurisdictions);

c) *Mareva* injunctions and *Anton Pillar* orders;

d) Expedited arbitrations, concurrent hearings, consolidation of arbitrations;

e) Joinder of third parties;

f) Multi-party arbitrations;

g) Procedure for treating a decision of emergency arbitrator as an emergency award capable of enforcement in foreign states signatory to the New York Convention 1958;

h) Ship[10] arrest and court orders in support for seizures, and protection of assets; and

i) Recognition of tribunal's orders for enforcement outside the seat in non-situs jurisdictions.

In addition to the above, arbitration friendly (seats) jurisdictions also allow freedom of foreign lawyers to participate in arbitrations without being a licensed lawyer in the country of the seat of arbitration. Foreign arbitrators are also exempted from the requirement of work permits while acting as a tribunal in the country and their fees are exempted from withholding taxes. In contrast, in some countries like Thailand, the tribunal must first obtain a special pass, equivalent

[9] Article 10(2) Kingdom of Saudi Arabia Law of Arbitration, Royal Decree No. M/34 dated 16 April 2012

[10] See the definition of Ship in relevant jurisdiction as not many jurisdictions treat offshore rigs, floating structures etcetera as ships.

of work permit to conduct hearings and meeting. The parties should explore similar fine details when selecting the seat of arbitration.

Where the parties have selected London as their seat of arbitration, optional clause III.H.1 of the Model DR Agreement allows the parties to exclude section 69 of the English Arbitration Act 1996, which provides that a party can appeal an arbitral tribunal's award to an English court on an error of (English) law as determined in the award.

4. Distinction between Locations of Hearings versus Seat of Arbitration

The work scope in international contracts often spans across multiple jurisdictions, and work sites or witnesses and evidence could be located far from the seat of arbitration. It may sometimes be more convenient to hold the hearings where witnesses can be present without cost burden and time. Also, experts or physical evidence available at another location may be used by the parties.

By agreement of the parties or procedural rules of arbitration and the arbitration law of the seat, the tribunal is empowered to conduct hearings and case management meetings at places other than the seat, but without changing the procedural law of the seat, either by physically being present or through video or telephonic conferencing. In most procedural laws, provisions are made for the arbitral tribunal to meet at places it considers appropriate for consultation, hearing witnesses or for inspection of goods, etc.[11]

Caution:

a) Parties are advised to be cautious not to create conflict of arbitration laws by choosing a seat of arbitration in a country A and the laws of arbitration of country B.

b) The term "Place of Arbitration" in Article 20(1) of the UNCITRAL Model Law refers to the seat of arbitration and should not be confused with the actual place of hearings or similar meetings.

c) These matters should not be included in drafting an arbitration clause but are provided in these guidelines for reference and general information only.

F. Language of Arbitration

The choice of the language of the arbitration can have a significant impact on the cost and length of the proceedings, particularly with respect to interpreter, transcription and translation services. In addition, a party conducting an arbitration in an unfamiliar language is often considered to be at a disadvantage in terms of the precision and speed with which it can follow the proceedings. For these reasons, the designation of the language(s) of the arbitration should be made in the arbitration agreement to avoid problems with the choice of language at a later date. As a practical matter, the choice of the language of the arbitration is often driven by the language of the contract, and its related documents and correspondence. In the absence of agreement of the

[11] See s22(3) Malaysian Arbitration Act 2005 (Revised 2011); s34(2)(a) English Arbitration Act 1996; s48 Hong Kong Ordinance (Cap 609) 2014 (UNCITRAL Model Law Article 20(2).

parties, or the default designation of the language in the applicable procedural law or arbitration rules, the tribunal or institution needs to make a determination, which will usually take into account the languages of the parties, the language of the contract and other material documents, and the language at the place of arbitration.

In addition to designating the language of the arbitration, parties need to also address the language fluency of the arbitrators in the arbitrator qualification section of their dispute resolution clause. Designating the language of the arbitration does not automatically mean that all of the arbitrators are fluent in that language and are able to read complex contracts and participate in arbitral hearings in the designated language. If they are not, problems will arise. Parties therefore need to address language requirements under both the selection of the arbitral language (III.I) and the qualifications of the arbitrators (III.G).

Arbitrations with multiple official languages are possible, but the translation, transcription and interpreter costs can rise exponentially with each additional language unless the key participants are fluent in all the official languages. In addition, it can sometimes be hard to find suitable arbitrators and counsel who have the necessary language skills to conduct the multi-lingual proceedings efficiently. Such multiple official language arbitrations are therefore normally avoided unless all the parties are already comfortable with a multi-lingual environment.

The Model DR Agreement provides two alternatives on the language of the arbitration. The first alternative (III.I.1) provides for one designated language, which should be the preferred choice. The second alternative (III.I.2) provides for two languages with the inherent difficulties described above.

G. Entry of Judgment

Inclusion of a consent-to-judgment clause ("Judgment on the award may be entered and enforced by any court of competent jurisdiction") as provided in III.J of the Model DR Agreement is not necessary for many parties. But it does not hurt, especially if parties want to enforce their arbitral award in the United States, and so adoption of this provision persists. The grip of this provision on the enforceability of domestic awards has been lessened over the years by court decisions holding that it was sufficient if the parties' arbitration agreement provided that the award was to be final or binding.

In the United States, Section 9 of the Federal Arbitration Act provides for confirmation of an award "[i]f the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration ..." The Federal Arbitration Act also allows for judgments to be denied in limited circumstances as stated in Sections 10 and 11. The U.S. Supreme Court stated: "On application for an order confirming the arbitration award, the court 'must grant' the order 'unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.' There is nothing malleable about 'must grant,' which unequivocally tells courts to grant confirmation in all cases, except when one of the 'prescribed'

exceptions applies."[12] Therefore, although explicit language regarding entry of judgment does not appear to be necessary, adding it in could avoid any misunderstanding and delay in the validation of the judgment. Parties should therefore consider including Clause III.J of the Model DR Agreement to ensure that their arbitral award is recognized and enforced by U.S. courts.

In most of the States signatory to the New York Convention, the prescribed procedures for enforcement of arbitral awards (issued within the State) and foreign awards (awards issued at a seat of arbitration in a foreign State) would be available in Court Procedure Rules (CPR)[13] or as Rules of Court (ROC). This information may not be necessary at the time of drafting an arbitration agreement, but it is good to have some knowledge of such provisions under relevant CPR or ROC. Some States have unique requirements on the format of an award and additional endorsements from the tribunal, or attestation/authentication of the original awards, by the administering arbitral institutions, or courts at the seat of arbitration. Once the award is published the tribunal is *functus officio,* so parties must secure such formative requirements together with the award, to avoid complications in enforcement proceedings.

A brief sample of some requirements for seeking enforcement in foreign jurisdictions is:

d) Duly authenticated original award or certified true copy of it;[14]

e) An Arabic translation of the arbitration award attested by an accredited authority, if the award is not issued in Arabic;[15]

f) If seat is in Indonesia, the enforcement procedure requires arbitrator to deliver the original award to the District Court.[16] Such requirement can only be fulfilled when the tribunal is making the final award and not thereafter when tribunal becomes *functus officio*; and

g) In some of the Arabian Gulf or Middle East countries, enforcement of awards may be refused if the cover page of an award does not start with specific wording like "In the Name of …"

The need for an authenticated copy of an arbitral award is becoming increasingly common to curb money laundering and fraudulently procured awards.

IV. OPTIONAL ARBITRATION PROVISIONS

In addition to the key elements needed for a valid arbitration agreement or clause described above, parties may wish to include a number of other optional provisions in their dispute

[12] *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).
[13] CPR 62.18 for England and Wales; RoC O.73 r.10 of The Rules of High Court, Hong Kong; s85 Hong Kong Arbitration Ordinance (Cap 609) 2014.
[14] s85 Hong Kong Arbitration Ordinance (Cap 609) 2014; s19C: Authentication of awards and arbitration agreements, in Singapore International Arbitration Act (Cap 143A) 2012; and others.
[15] Article 53(3) Law of Arbitration, Kingdom of Saudi Arabia.
[16] Article 59 Arbitration and Dispute Resolution Act, Law No. 30 of 1999, Indonesia.

agreement/clause that can provide clarity around other procedural matters that may be important to them. The Model DR Agreement provides a number of optional arbitration provisions that address those issues as explained below.

A. Emergency and Expedited Proceedings

Parties need to consider whether they will want access to emergency or expedited proceedings either through their selection of arbitration rules or by drafting specific provisions into their dispute resolution agreement.

1. Emergency Arbitrator/Emergency Measures

Most international arbitration rules now contain rules providing for the filing of applications for emergency relief and the appointment of an emergency arbitrator who is authorized to grant such relief. Those rules typically provide that the emergency arbitrator may grant any form of interim or conservatory measures that are permitted to be granted by the constituted tribunal. As discussed elsewhere in these Guidance Notes, international arbitration rules that provide for emergency relief substantially, but not entirely, eliminate the need for a rule permitting the parties to seek court-ordered interim relief.

When the arbitration rules adopted by the parties in their arbitration agreement do not contain rules providing for emergency relief, the parties should consider including in their arbitration agreement a provision allowing for the appointment of an emergency arbitrator. The authority granted to the emergency arbitrator in the arbitration agreement should be consistent with the constituted tribunal's ultimate authority under the applicable rules to grant interim and conservatory measures. Moreover, pending the constitution of the tribunal, the emergency arbitrator should be authorized to revise, amend, or revoke any order or award the emergency arbitrator issues and further should be empowered to award fees and costs associated with the emergency proceedings, subject to the tribunal's authority to alter or revoke any decision made by the emergency arbitrator. Finally, given the exigent circumstances that can attend emergency proceedings, the emergency arbitrator should be authorized to impose procedures, including procedures relating to any hearing the emergency arbitrator might conduct, designed to ensure an expeditious, and yet fair, process.

The Model DR Agreement includes an optional clause (IV.A.1) allowing a party to seek emergency relief under limited circumstances and for the appointment of an emergency arbitrator authorized to grant such relief when warranted. If the parties do adopt this optional clause, they may desire to embellish the clause by providing that any decision by the emergency arbitrator shall expire on the earlier of the constitution of the arbitral tribunal [or appointment of the sole arbitrator] or the expiration of a set period of time. Such a provision is consistent with some international rules and helps to ensure that a party that succeeds in obtaining emergency relief will not attempt to simply permanently rely on the emergency arbitrator's decision rather than having to seek confirmation of that decision from the tribunal once it is constituted. The Model DR Agreement also provides an alternative (IV.A.2) for parties who want to opt out of the emergency arbitrator procedures of the designated rules.

2. Expedited Constitution of Tribunal

Some international arbitration rules provide that under some circumstances the administering institution may expedite the constitution of the tribunal or the appointment of the sole arbitrator. The circumstances that would warrant the administering institution's intervention for such a purpose presumably differ from the circumstances that would warrant the appointment of an emergency arbitrator. For example, the expedited appointment of the tribunal or sole arbitrator might be warranted when there is a greater imperative for the issuance of the final award in the arbitration proceeding at an earlier date than otherwise would be possible.

If the applicable rules do not provide for the expedited appointment of the tribunal or the sole arbitrator, the parties can include a provision in their arbitration agreement allowing such an expedited appointment. Before they do, however, they should consider whether such a provision might unduly impair their ability to vet arbitrator candidates who will decide disputes relating to their contract and, further, whether the related expedited process might limit their ability to fully prepare for the early stages of the arbitration proceeding. Any provision allowing for the expedited constitution of the tribunal or the appointment of the sole arbitrator should specify that such expedited appointments should only occur when the applying party has demonstrated the existence of exceptional urgency or has satisfied some other standard that justifies the expedited appointment process.

3. Expedited Arbitration Proceedings

Many international arbitration rules now provide for a procedure by which parties' disputes may be resolved through expedited arbitration proceedings. Indeed, some of those rules are mandatory when the monetary amount at issue equals, or is less than, a certain specified amount. Rules providing for expedited arbitration may i) specify truncated deadlines for the issuance of the final award; ii) establish circumstances in which the arbitration will be conducted on a "documents only" basis; iii) provide that the matter will be decided by a single arbitrator; and iv) require the use of other procedures designed to ensure that the parties' dispute is resolved in an expedited and efficacious manner.

The Model DR Agreement contains an optional provision (IV.C.1) that allows a party to request, in its notice of arbitration or response, that any expedited arbitration rules contained in the applicable rules be applied to the parties' dispute. When the applicable rules do not provide for expedited arbitration proceedings, the parties may still include a provision in their arbitration agreement allowing for expedited arbitration under certain circumstances. When they do, they must ensure that their agreement clearly sets forth the criteria for when a party is entitled to have the dispute decided by expedited procedures and, further, must ensure that the agreement sufficiently describes any procedural limitations or deadlines, or limitations on the arbitrators' authority to manage the arbitration proceeding and issue a final award.

4. Time Limits on Issuing Award

Some international arbitration rules set deadlines or target deadlines for the issuance of the final award in an arbitration proceeding. Those deadlines might be triggered by a variety of events, such as the "closing of the record" or, in an ICC arbitration, the operative date of the terms of reference. The desire to establish deadlines for the issuance of awards is logical for a variety of reasons, including the need to ensure efficiency and to bring the parties' dispute to a final and enforceable conclusion. Such deadlines, however, can often be difficult to satisfy through no fault of the arbitrators. Experienced arbitrators obviously have busy schedules that can render it difficult for the tribunal members to immediately deliberate, come to a decision, and reduce their decision to writing within the time provided for in some rules, especially when it was not possible in the first instance to project when the award writing period would commence running. Additionally, delays in the completion of the award sometimes are attributable to the fact that the administering institution also must review a draft of the award or because of other intervening circumstances.

In contrast, the nature of some arbitrations is such that it should be relatively easy for the arbitrators to promptly, and sometimes almost immediately, issue their award upon the completion of hearings and any post-hearing submissions. Depending on the nature of the contract and the types of disputes that may reasonably be expected to arise under that contract, contracting parties thus might conclude that it would be wise either to extend the deadline for the issuance of an arbitral award provided for in the applicable rules or, alternatively, to truncate that deadline.

Parties thus should not be entirely averse to establishing a contract-specific deadline for the issuance of the final award in an arbitration proceeding. When they do consider establishing deadlines, they must realize that some arbitral institutions might not permit the alteration of the deadlines established under their rules and that few arbitration provisions can contemplate the broad range of disputes that can arise under a contract and, in particular, under long-term contracts that are typical in many sectors of the petroleum industry. Generally, shortened deadlines for the issuance of an arbitral award are best reserved for proceedings that are themselves expedited. For more substantial disputes, or for arbitration agreements that are likely to apply to substantial disputes, a deadline of sixty or ninety days for the issuance of the arbitration award generally is more practical. Any rule or contractual provision relating to deadlines for the issuance of an arbitral award should provide for a grant of authority—whether to the arbitral tribunal, the administering institution, or an appointing authority—to extend the deadline when justified by extenuating circumstances.

Optional clause IV.C.2 of the Model DR Agreement addresses the topic of deadlines for the issuance of arbitral awards and attempts to provide some flexibility in the interest of ensuring that the substantial expenditure of time, money, and other resources associated with an arbitration proceeding are not wasted due to the expiration of the award deadline. As noted in the commentary to this optional clause, parties should be very careful in setting time limits, especially if they are unrealistic.

B. Interim Measures of Relief

Availability of interim measures largely depends on international conventions, national legislation and institutional rules. Interim measures are seen as crucial to protecting the parties' rights by assisting the arbitral tribunal and court to manage risk and improve effectiveness of the arbitration proceedings. Nevertheless, the parties may have valid concerns that the national courts in foreign jurisdictions will not act sufficiently quickly, or will fail to provide an impartial and competent solution. Therefore, the parties may seek to constrain the supporting role of the national courts and the consequent risk by granting the arbitrator the power to order interim relief. In this regard, the parties may seek to adopt rules that provide a definition of interim measures that is non-prescriptive to provide the tribunal with a broad power to apply interim measures to the range of actions to be prevented or refrained from being taken during the arbitration process.

All the major international arbitration rules now contain provisions that confer on the arbitral tribunal the authority to grant interim and conservatory measures. The arbitration rules define the scope and function of the tribunal's power to grant interim measures and, in some instances, may describe the enforcement role of national courts. The extent of enforcement nonetheless ultimately is determined by the national law of the pertinent court. Generally, the parties may seek either to restrain or stay an activity, order that a particular action be taken, or provide security for costs. The arbitration rules, however, can differ with respect to the specified forms of interim relief that may be granted. Some arbitration rules simply provide that the tribunal may grant any interim or conservatory measures the tribunal "deems necessary," while others provide for a highly specific identification of available relief, the breadth of which must be interpreted by the arbitrators on a case-by-case basis. Tribunals established under certain arbitration rules will have the power to issue interim measures by default (unless the parties agree otherwise) without the need for an authorization by the parties.

Rules also differ with respect to the considerations the tribunal should take into account before granting or denying a party's application for interim relief. As an example, some rules provide that a party must satisfy a particular evidentiary showing before an application for interim relief should be granted and others do not. Finally, institutional rules vary with respect to the degree to which courts may have concurrent jurisdiction to grant interim relief during the pendency of the arbitration proceeding, with some rules vaguely indicating that an attempt to obtain court-ordered interim relief is permissible as long as that relief is not incompatible with the parties' arbitration agreement or the arbitration proceeding, and other rules stating that such a request shall not be deemed to be incompatible with the arbitration agreement.

Contracting parties should also be aware that there can be significant limitations regarding the arbitral tribunal's authority to grant interim measures. First, arbitral tribunals do not have authority over nonparties to the arbitration proceeding and therefore cannot grant interim measures that are directed at the conduct of nonparties. Second, an arbitral tribunal's authority to grant interim relief may be proscribed by the law of the seat of arbitration as well as the law of the jurisdiction in which any granted interim measures would have force and effect. Finally,

even when arbitrators are authorized by the applicable arbitration rules and procedural law to grant interim relief, it is possible that a court at the seat of arbitration or the jurisdiction in which the interim measures would have force and effect would conclude that it does not have authority to enforce the tribunal's order or award granting interim or conservatory measures.

It generally is preferable to avoid incorporating an interim measures provision into an arbitration agreement when the agreement adopts international arbitration rules that provide for interim measures. In some instances, however, it is possible that the parties will desire i) an interim measures provision that expands or narrows the arbitral tribunal's authority to grant interim measures in a manner different than that provided in the rules, ii) to provide for different considerations the tribunal must take into account when deciding whether to grant interim measures, or iii) to limit the possibility of court involvement in the parties' dispute to only those circumstances in which such involvement is absolutely necessary.

Most international arbitration rules provide that, prior to and after the constitution of the tribunal, the parties may apply to the national courts for interim measures. They further provide that recourse to the national courts does not constitute a waiver of the arbitration agreement. However, a party will need to seek confirmation by a court of the interim order before gaining access to judicial enforcement of the order. This is also the case where the parties select the UNCITRAL Rules to govern an *ad hoc* arbitration.

Parties normally apply to the national courts either at the start of the process to enforce an arbitral agreement or at the end to enforce awards on the merits. In exceptional circumstances, however, national courts get involved in supporting arbitration proceedings. Courts are nevertheless reluctant to grant interim relief and particularly attachment orders when the arbitration has commenced, as a request for court-ordered relief may be seen as an attempt to bypass the agreed method of dispute resolution. In addition, some courts have reasoned that the words "refer the parties to arbitration" contained in the New York Convention eliminate a court's jurisdiction to grant interim measures. Although the applicable arbitration rules may allow an arbitral tribunal to issue an "award" granting interim measures, those courts hold that the enforcement mechanisms established in the New York Convention do not apply to interim measures.

Accordingly, in drafting the arbitration agreement the parties should take into account the law of the seat of arbitration and consider what form an arbitral decision granting interim measures should take. When the parties include an interim measures provision in their arbitration agreement, they should also provide for the risks associated with a request for an interim measure. For example, the parties may provide that the party requesting interim relief may be liable for any costs or damages if it is later determined that its request for interim relief was unjustified.

There may be good reasons for a party to seek the support of the national courts instead of the tribunal to grant interim relief. International conventions are largely silent on the issue of interim measures. The New York Convention requires the finality of the arbitration award in order for an arbitral award to be enforceable in member states. As interim measures do not normally finally

resolve the parties' dispute, in some instances—and in particular when the national courts of the jurisdiction will not enforce arbitral orders or awards granting interim relief—it might make more sense to seek court-ordered interim relief. Another reason may be where a party requires urgent interim relief on a matter prior to the constitution of an arbitral tribunal and where it is unable to apply to an emergency arbitrator for emergency relief in time to maintain the status quo. In such a circumstance, it may be necessary for a party to apply to the national court to protect property and conservation of evidence.

Although the support of the national courts may be important to the final outcome there are questions as to when and how much the courts may intervene in arbitration. There may be restrictions on the court to act only when i) a party's application for court-ordered relief is made with the permission of the tribunal or the agreement in writing of the other parties or ii) the arbitral tribunal, or an emergency arbitrator, has no power to grant the requested relief or is unable to act effectively at the time of the application.

Courts from various jurisdictions have taken differing views regarding both their authority, and that of arbitrators, to grant interim measures. Therefore, the contracting parties in drafting an arbitration agreement will need to assess what the court's position is likely to be, at the seat of arbitration, regarding the enforcement of interim measures. The main criticism against allowing courts the authority to grant interim measures concerns the inevitable encroachment on the substantive issues in dispute that are ultimately to be decided by the arbitrator. It is arguable that if the parties ensure the arbitration agreement, institutional rules, or national law authorizes the tribunal to grant interim relief, the courts may be more inclined to treat the interim order in the same way it deals with a final ward.

The question whether the parties may, without restriction, seek court-ordered interim relief can be particularly important. Institutional arbitration rules that permit concurrent court jurisdiction with respect to the granting of interim relief create the possibility that an ensuing court proceeding will increase costs due to expanded court litigation and discovery, result in conflicting decisions as between the pertinent court and the tribunal, and otherwise undermine or impair the arbitration proceeding.

The potentiality of court-ordered interim relief that interferes with the arbitral process or preempts the ultimately constituted tribunal from finally adjudicating the issues in the arbitration proceeding is problematical for several reasons, including the fact that it increases the risk of exposing international parties to biased courts and to a lack of due process. The parties thus should determine whether they desire to eliminate or modify any rule that permits any party to seek court-ordered interim or conservatory relief even though that same relief may be sought from the tribunal or from an emergency arbitrator prior to the constitution of the tribunal.

The national court of another country may have powers to support arbitral proceedings outside the jurisdiction of the seat of the arbitration. If the parties want to ensure that the only court permitted to grant interim relief is the court of the seat, they should draft their arbitration agreement to ensure that it excludes any rights the parties may have to seek interim relief in any other court other than the court of the seat. This constraint, however, could be detrimental to

parties that would otherwise benefit from applying to a foreign court in aid of arbitration to protect the dissipation of property and conserve a primary piece of evidence located in a jurisdiction other than the seat of arbitration.

It is also important for the contracting parties to consider how the rules provide for a party's non-compliance with an order for interim relief, such as provision for the tribunal's powers to issue further directions, draw adverse inferences, proceed to an award, or make an appropriate order as to costs of the arbitration. In some jurisdictions, the tribunal may also seek assistance from a national court to enforce the order.

Given the above, the Model DR Agreement contains an optional provision (IV.B) that states that any party to the dispute may apply to a court for interim measures or other injunctive or conservatory relief prior to the constitution of arbitral tribunal or the appointment of the sole arbitrator on the basis that obtaining a court ordered interim measure does not waive the right to arbitration or impair the enforceability of the arbitral award.

The optional provision also allows the tribunal to require a party to provide security in connection with any interim or conservatory measures. Without that authority, the granting of many forms of interim and conservatory relief, which generally are intended to be temporary in nature, might prove to be irreversible. The remainder of the model provision is intended to provide the tribunal with sufficient flexibility to ensure that interim relief is available when necessary. The provision may also be modified by the parties to address the issues mentioned above.

C. Relief/Remedies

1. Interest

Most, but not all, international arbitration rules grant the arbitral tribunal broad authority to grant interest on any monetary award. When they do, such interest typically may be simple or compounded, and at a rate deemed appropriate by the tribunal. When the rules adopted by the parties do not specifically authorize the arbitral tribunal to grant interest on a monetary award, the parties may conclude that they prefer their arbitration provision to expressly address that topic.

Optional Clause IV.D.1 of the Model DR Agreement empowers the arbitrators to award pre-award and post-award interest—and, for those jurisdictions in which it might matter, "post-judgment interest"—on amounts included in the award. When an award is reduced to a civil judgment in the United States, it is uncertain whether the post-award rate of interest stated in the award will govern the accrual of post-judgment interest or if the rate set by 28 U.S.C. § 1961 will apply.

As noted in that section of the Model DR Agreement, if the contract or arbitration is subject to *Shari'ah* law or a party intends to enforce an award in a *Shari'ah* jurisdiction, then the application of interest on an award may invalidate part or all of the award and render part or all of it unenforceable in such jurisdictions.

2. Currency of Award

Just as international oil companies frequently want to be paid in dollars, euros, pounds, or yen for their services or their share of oil and gas production, they presumably also want an arbitral award to be paid in that currency rather than in the local currency of the place of production or the seat of arbitration. Unless dealt with elsewhere in the international petroleum agreement, inclusion in the arbitration provision of a clause regarding the currency of the award is advisable. The Model DR Agreement thus includes optional clause IV.D.2 that allows the parties to designate the currency of the arbitration award. The clause further serves to emphasize that payment on an award shall not be reduced to take into account taxes or other deductions.

3. Consequential/Exemplary Damages

Some international arbitration rules specifically provide that the parties waive any right they might otherwise have to be awarded consequential, punitive or exemplary damages. The Model DR Agreement includes two alternative clauses (IV.D.3) that provide, to the extent legally permissible, for the tribunal to award or for the parties to waive their rights to recovery of punitive, exemplary, or moral damages. The waiver operates to limit the arbitrators' authority. Failure on the part of the arbitrators to respect this waiver could result in setting aside the award by a court at the seat of the arbitration on the grounds that the arbitrators exceeded their authority, or in a refusal by a court to recognize or enforce the award under Article V(1)(c) of the New York Convention or the comparable provision of the Panama Convention. The United States Supreme Court has recognized that in the absence of such a waiver, arbitrators generally do have the power to award punitive damages. Court decisions from other jurisdictions—and, indeed, at least one decision of the United States Supreme Court—suggest that such a waiver might not be enforceable when it pertains to exemplary and multiple damages awards required or authorized under certain public laws, such as competition laws.

Exclusion clauses (such as in IV.D.3) that prohibit the recovery of consequential damages and other indirect, secondary, or remote damages are interpreted differently in different jurisdictions. Varying court decisions in some jurisdictions sometimes distinguish lost profits or loss of use from consequential damages, or accord different treatment to different forms of so-called "remote" or "indirect" damages. When contracting parties desire to deny or grant an arbitral tribunal the authority to award consequential damages or other forms of indirect damages, or wish to include other forms of exclusion clauses in their dispute resolution provision, they should take into account whether, in light of the governing substantive law and perhaps the law of the seat of arbitration, more substantial definition of those terms is warranted.

D. Costs and Fees

The question whether costs and attorney's fees may be awarded by the arbitral tribunal in an international commercial arbitration can depend on a variety of factors, including the applicable rules, the governing substantive or procedural law, the parties' arbitration agreement, and whether the parties request an award of costs and fees. For example, by agreement of the parties some international arbitrations are governed by rules—*e.g.*, the AAA Commercial Arbitration

Rules—that only permit an award of attorney's fees under limited circumstances. Moreover, arbitration rules vary to some extent concerning what constitutes awardable costs. When parties draft their arbitration provision they therefore should ensure either i) that the applicable rules treat the awardability of costs and attorney's fees in the manner desired by the parties or ii) that their arbitration provision reflects the manner in which the parties' desire to treat the subject of costs and attorney's fees.

There are, of course, innumerable ways in which the parties could address this topic. Arbitration rules vary to some extent concerning what constitutes awardable costs. Costs generally include any filing and administrative fees paid to an arbitral institution and the fees and expenses of the arbitrator(s), but they can also include other costs and fees such as those relating to experts or other assistants retained by the tribunal or the parties, the expenses of witnesses, or costs as determined by the administering institution. When contracting parties do desire to specifically address costs and fees in their arbitration agreement, they should separately address arbitration costs and fees and those costs and fees incurred by their representatives in the presentation of their case.

The optional Costs and Fees provisions of the Model DR Agreement provide contract drafters with three choices. The first alternative provision simply provides that the tribunal has the authority to award costs and apportion them amongst the parties at its discretion. The second alternative follows the "English" rule in which "costs follow the event", *i.e*. the tribunal is authorized to award costs to the prevailing party. This alternative provides drafters a number of choices, including whether the tribunal "may" or "shall" follow the costs follow the event rule. The third alternative follows the "American" rule, which provides that unless the parties agree otherwise, the parties equally share the costs and expenses of the arbitrators, and as an alternative, the arbitral institution.

Of course, the parties may also refrain from including a provision regarding costs and fees and defer to the manner in which they are treated in the rules adopted by the parties.

E. Joinder and Consolidation

Dealing with more than two parties under the same arbitration agreement is conceptually relatively simple, save for the arbitrator appointment process, which is dealt with in Section III.F of the Model DR Agreement. Where the interests of two or more parties are aligned, they can often be represented by the same counsel and treated as a single party for the purposes of the proceedings. Where this cannot be done, the arbitral tribunal will need to carefully manage the proceedings to accommodate the rights of each of the parties to present their cases and respond to the cases being put against them. The Model DR Agreement includes an alternative to deal with disputes between the same parties under multiple contracts using the same arbitration agreement (III.A.2), which can be a very efficient way of dealing with the same commercial relationship across multiple contracts. Most sets of Rules also allow a party, under limited circumstances, to join an additional party in an arbitration proceeding, provided the proceedings have not gone beyond a certain stage. Where the selected arbitration rules do not provide for

joinder of additional parties, optional clause IV.F of the Model DR Agreement can provide for the potential joinder of an additional party.

Consolidation becomes relevant where two or more separate arbitrations are anticipated in relation to claims involving similar issues of fact or law. If these claims are dealt with in different arbitration proceedings, there may be a risk of conflicting or inconsistent awards on the same issues. Such separate claims could arise under the same arbitration agreement or under separate arbitration agreements. Although some rules give the first-appointed tribunal the power to decide whether to consolidate a separate set of proceedings between the same parties into their proceedings, others provide that decisions regarding consolidation will be made by the administering institution or by a special consolidation arbitrator. Moreover, most rules require that in order for consolidation to occur, the relevant arbitrations must all be governed by the same institutional rules. Option IV.G.1 is meant to provide a tribunal a similar ability to consolidate separate arbitrations where the designated rules do not address the issue of consolidation. Option IV.G.2 envisages the appointment of an independent consolidation arbitrator to determine whether the proceedings should be consolidated to avoid the concern about the tribunal in the first proceedings have some self-interest in deciding to increase the scope of their proceedings. It should be noted that a provision for appointment of a consolidation arbitrator may not be enforceable under certain arbitration rules. Option IV.G.3 deals with the scenario where there are different parties to the various proceedings, and consolidation can only occur with the consent of all the parties involved.

F. Document Disclosure and Evidence

In cross border disputes, the parties may come from different legal systems and bring different approaches to evidentiary rules and procedure, as found in the civil law, common law and *Shari'ah*. The diversity in approach may apply to a number of issues including the procedure for taking evidence, methods of presentation, admissibility, materiality and relevance, weight of documentary and oral evidence. Contracting parties should carefully consider the national law of the seat in respect of disclosure in drafting an arbitration agreement. This may assist in determining whether the courts can provide assistance to ensure compliance with requests for taking evidence.

1. Range of Options for Evidentiary Process

There are important differences in methodology in the approach to taking of evidence and the weight that each legal system gives to oral or documentary evidence. When these differing methods are applied in international arbitrations, they can have a significant influence on the outcome of an arbitration. In common law jurisdictions the emphasis is on the parties who are required to introduce all the relevant evidence in their possession associated with the issues of the dispute in the proceedings. The approach in these jurisdictions adopts procedure involving oral evidence and hearings.

Civil law jurisdictions are characterized by the inquisitorial method, which focuses on the active role of the arbitrator. This approach involves the tribunal investigating the case, establishing the

facts and the law while the parties and their counsel assist in this process. The parties are not required to present all the relevant evidence and may withhold documents that are not in their best interests. There is greater emphasis on written evidence and documents rather than the necessity for oral explanation of the evidence to the tribunal during the hearings.

In practice, party autonomy and flexibility provides a means to adopt a procedure that is a combination of both legal systems thereby achieving a fair and efficient method for the parties in taking of evidence. The International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration ("IBA Evidence Rules") can provide a means to bridge the gap between the diverse legal backgrounds and cultures in arbitration.

2. Relevant Rules and Standards

All the major institutional rules contain provisions that enable the parties to engage in pre-hearing disclosure. Their rules provide only general provisions in terms of the evidentiary procedure and require supplementary provisions to be agreed between the parties or set by the arbitral tribunal. As an example, the UNCITRAL Arbitration Rules only provide that each party shall have the burden of proving the facts relied on to support the claim or defence without clearly stating the degree of document disclosure.

The absence of clear evidentiary provisions in institutional rules may cause party dissatisfaction in respect of a fair outcome. To avoid uncertainties, the contracting parties can address the issue of disclosure in the arbitration agreement. The adoption of the IBA Evidence Rules provides the parties with a solution to fill the gaps in the evidentiary procedures provided in the rules. The IBA Evidence Rules may not satisfy all requirements for the parties, but they have bridged a divide between the common law and civil law jurisdictions in respect of taking of evidence. The IBA Evidence Rules can also be used by the parties as non-binding guidance. These two different approaches to applying the IBA Evidence Rules are found in alternative clauses IV.H.1 and IV.H.2.

An alternative approach in limiting the U.S. litigation practice of allowing extensive and wide ranging discovery was found in the ICDR Guidelines for Arbitrators Concerning Exchanges of Information. The ICDR Guidelines limited document production to the standards normally expected in international arbitration. The ICDR has now incorporated its Guidelines into the ICDR arbitration rules, which would make them the default evidentiary rules to follow in any arbitration governed by the ICDR Rules. More details on these rules and guidelines can be found at the IBA and ICDR websites.

Where the parties have selected only the institutional rules without adopting additional guidelines such as the IBA Evidence Rules, the parties retain the freedom to set their own rules. Alternatively, it provides a general discretion for the tribunal to set the evidentiary rules and proceed to establish the facts of the dispute. This includes deciding the applicable rules of evidence, presentation and exclusionary rules. An agreement on the applicable rules may be facilitated through the arbitrators' terms of reference or initial procedural order signed by all parties.

There may be issues regarding admissibility of evidence when a party, based on the party's legal background, has expectations that evidentiary rules prohibit the admission of this evidence. To avoid confusion, the parties should explicitly provide for any rules of evidence restricting admissibility of evidence, that they consider important to the outcome of the arbitration. This will be important when the arbitral tribunal assesses the relevance and materiality of the evidence.

Evidence maintained in electronic form may be requested by one disputing party or by the tribunal. The IBA Evidence Rules definition of a document contemplates different forms by which data can be stored including electronically. The rules make specific reference to documents recorded or maintained in electronic from. This seeks to achieve the taking of evidence in an efficient and economical manner.

Arbitral tribunals may issue a procedural order in respect to the disclosure of documents. If a party does not comply with the order without good reason, the tribunal may draw an adverse inference. The tribunal will assume that the documents were either harmful to the producing party's case or helpful to the requesting party's case. This power is reflected in the IBA Rules, but it also requires satisfactory explanation of non-compliance.

3. Document Production/Disclosure

The disclosure of documentary evidence is an important feature in the pre-hearing stage of the arbitral proceedings. The evidence produced in the disclosure stage will depend on the jurisdiction and includes documents such as correspondence, emails, drawings and other information. The extent of disclosure will vary depending upon the rules and on the national law of the seat of arbitration. For example, the US courts permit disclosure of an extremely broad variety of documents, which often results in a costly and time consuming process creating a burden on the party to satisfy those requirements.

Contracting parties may agree on the procedure of disclosure and include detailed provisions in the arbitration agreement on the availability, scope and timing of disclosure. They may agree to limit or expand the extent of disclosure by specifically agreeing to disclosure procedures in the arbitration agreement or on commencement of the proceedings. Depending on the parties' views on document production, the Model DR Agreement provides for two additional alternative and completely different approaches to the disclosure of documents. Alternative IV.H.3 provides for no disclosure of documents, with a number of variations and clarifications. Alternative IV.H.4 provides for expanded document disclosure (akin to a U.S. style discovery process).

Unless these issues are addressed in the dispute resolution clause, the arbitral tribunal has broad authority to take and evaluate evidence to ensure the development of legal and factual issues. This is subject to respecting party equality and procedural fairness. Usually, the arbitral tribunal will issue a procedural order setting out a timetable for the proceedings that includes document disclosure.

Generally, disclosure requests must be sufficiently detailed to identify specific types of evidence. The IBA Evidence Rules adopt a formal approach in respect to requests for production of documents. Under the IBA Evidence Rules the parties may use a Redfern Schedule for the exchange of requests for documentary evidence and responses between the parties in arbitration. The party's counsel will only submit the documents relevant to the issues as evidence in the proceedings.

In civil law jurisdictions, the arbitral tribunal conducts the proceedings in an inquisitorial way by assessing the documentary evidence submitted to the tribunal. Generally, there is limited time allocated for disclosure, since the parties are not obligated to produce all the relevant documents in their possession.

The tribunal distinguishes between direct and indirect evidence, with more weight attributed to direct evidence and uses indirect evidence if direct evidence is not available. Generally, in international arbitration more weight is given to contemporary documentary evidence than to oral witness testimony.

Contracting parties also need to consider the admissibility and assessment of evidence by the arbitral tribunal as this can be an important factor influencing the outcome of the arbitration. The institutional rules of arbitration provide little guidance on admissibility, but provide the arbitral tribunal with a wide discretion in assessing the taking of evidence as it deems necessary or appropriate. However, the tribunal is likely to be flexible by allowing the parties to present their case in order that they have an efficient and fair hearing. There may be considerations as to whether evidence is admissible due to matters concerning public policy, privilege, confidentiality and privacy. Procedural considerations will also raise issues as to the admissibility of evidence, such as compliance with deadlines and directions.

A party's request for disclosure of documents will be assessed by the tribunal on the basis of whether they are material to the outcome of the dispute. Therefore, these documents should allow the party to discharge the burden of proof. A party's request should be specific and proportional, which allows the other party to satisfy the request without undue burden. Institutional rules do not provide details of the burden of proof, but in international arbitration the tribunal applies a flexible approach, usually based on the 'balance of probability'.

The approach to privilege differs between jurisdictions, which will determine whether evidence is excluded from disclosure. In common law jurisdictions, privilege applies to documents produced in preparation of arbitration proceedings. While in civil law jurisdictions there is little reliance on privilege as protection of evidence. Parties need to be aware that certain jurisdictions do not recognize the concept of 'without prejudice' and will need to agree to a procedure to exclude certain types of evidence. Where a party indicates documents are privileged, unless otherwise agreed, the tribunal will have discretion as to the admissibility of the documents. An option for the tribunal would be to agree to apply the same level of protection by privilege to both parties' evidence.

If objections are raised on disclosure of documents, the tribunal may be able to agree to a procedure with the parties to circumvent an objection such as having a third party expert review particular types of documents to address admissibility.

4. Witnesses

There are differences in approach to witness testimony depending on applicable national laws and the seat of arbitration. In common law jurisdictions, witness testimony is a crucial part of the hearing and is given considerable weight after having undergone examination and cross-examination of the witness. The arbitral tribunal does not lead the examination of the witness, but in general controls the way in which the examination of the witness takes place. Even if there is no specific provision in the arbitration agreement, tribunals generally have the authority to order a party to produce a witness within its control at the hearing.

The common law system gives greater importance to oral submissions and the presentation of the evidence to arbitral tribunals. This may require additional time at the hearing for oral explanation of evidence and oral arguments to reveal the facts of the dispute. However, witness statements and live testimony is considered more efficient than relying on large volumes of paper documents. The examination of witnesses can be divided into direct examination of a witness called by the same party (examination-in-chief) and cross-examination of a witness called by the opponent party.

In civil law jurisdictions witness examination is not as important a part of the proceedings. Where there is provision for a hearing, the arbitral tribunal controls the conduct of the proceedings in accordance with the inquisitorial approach to witness examination. The preparation of a witness for examination by counsel in civil law jurisdictions is seen as unacceptable.

5. Experts

Experts are appointed by the parties to give the opinion, through an expert report, on technical or other specialist matters. The expert serves the arbitral tribunal rather than acting as a party advocate. The evaluation of the expert report is conducted through a cross-examination to assess whether it is impartial and is not misleading the tribunal.

The arbitral tribunal will determine whether the expert evidence is presented either in a sequential or concurrent manner. The latter method is often referred to as “hot tubbing”, which involves the party-appointed experts giving evidence at the same time and in each other's presence. This involves the arbitral tribunal questioning the experts to assess the evidence and may be used in conjunction with cross examination.

While it is common for expert evidence to be presented in arbitrations, there are various options in the method and presentation. This may have implications on how the tribunal assesses the evidence. Rules of arbitration provide for party-appointed experts to present expert testimony on each party’s behalf. This may be subject to cross-examination by counsel of the opposing party. In civil law jurisdictions, the tribunal will take a more inquisitorial approach in questioning

the party's experts. A more common approach in civil law jurisdictions is the tribunal appointed expert to assist with deciding discrete issues. In civil jurisdictions, there may be objections to witness testimony and it may be necessary to ensure the arbitration rules allow the parties to cross-examine an expert at a hearing.

The expert report will serve as the direct testimony but there is no guarantee that oral testimony will be presented at a hearing. The IBA Evidence Rules provide for conferencing of the party appointed experts at the discretion of the panel. This enables the experts to meet and confer on reports and record matters of agreement, thereby narrowing the issues in dispute. It also allows the tribunal to hear both expert testimony and how the experts interact with one another. The rules may also allow the tribunal-appointed expert to be examined by the tribunal and parties to rebut the conclusions of the tribunal's expert.

6. Site Inspection

On application from a party, the tribunal may order the inspection of any property, site or thing under a party's control relating to a dispute. The tribunal may invite the parties to agree on the rules governing the site visit that will require all parties to be in attendance. This allows the tribunal to gain first-hand knowledge relevant to the issues. A tribunal appointed expert may also request the party to provide access to a site for inspection, but the parties may have the right to object to a request, which is reflected in the provisions of the IBA Evidence Rules. A party has the right to receive documents obtained by the tribunal appointed expert and attend any site inspection.

G. Confidentiality

A widespread belief exists that arbitration is a confidential process. However, although most arbitral rules exclude third parties from the hearing room and impose on the arbitrators a duty of confidentiality, they often do not require the parties to maintain the confidentiality of the submissions, disclosures, rulings, or awards made in the course of arbitral proceedings. English courts recognize an implied duty of confidentiality. In the United States, the courts do not recognize such a duty and that also seems to be the case in Sweden and Australia. Accordingly, if the parties want to keep information about the arbitration of future disputes confidential, they will need to either incorporate a set of rules containing sufficiently restrictive confidentiality provisions or include such language in their agreements. The Model DR Agreement offers a comprehensive provision (IV.1) on confidentiality, applicable to mediations, negotiations, and arbitrations. At the same time, it recognizes that situations may arise when a party has a legitimate need to disclose information about the mediation, arbitration, or award that will not void any expert determination, award, or settlement.

H. Waiver of Sovereign Immunity

When entering into a host government contract, an international oil company should obtain a waiver of sovereign immunity from the host government or its agency or instrumentality, so that an action can be brought against it to enforce the party's contractual rights as provided in their

contract. Optional Clause IV.J in the Model DR Agreement is intended to provide as complete a waiver as possible of sovereign immunity, both with respect to arbitration proceedings and judicial proceedings relating to the execution on the assets of the sovereign.

I. Other Procedural Matters

The parties' choice of arbitration provides a number of opportunities to tailor the dispute resolution procedure to the parties' needs. When drafting the contract, it is often difficult to anticipate the parties' needs for specific dispute resolution procedures. Drafters are therefore generally advised to choose arbitral rules that give broad powers to an arbitrator to introduce case management procedures, pleadings and hearings that would be appropriate to the nature of the dispute without specifying in advance any one particular case management or procedural approach. If drafters do not wish to incorporate institutional or *ad hoc* arbitral rules, drafters should carefully consider whether they wish to restrict the arbitral tribunal's general power to determine the procedures appropriate to the dispute.

Nonetheless, if parties are certain in advance that they wish to impose specific provisions for case management procedure, pleadings or hearings (for example, very short timetables to force a quick resolution of a dispute), these should be specified in detail, and generally on the advice of dispute resolution specialists. In such cases, drafters may also consider whether to include an option for the arbitral tribunal to modify the imposed procedural process on the application of a party if the tribunal so decides, to avoid the imposition of impractical or impossible procedures that may be unsuitable for the dispute ultimately arising under the contract.

1. Provisions in Designated Rules

There are distinctions between specific institutions in their rules and case management practices. In addition, the chosen procedural law, arbitral seat or jurisdiction may also have specific provisions that could be relevant.

Institutional arbitration allows the parties to follow the rules as set out by an institution. On a practical basis, the use of institutional rules provides a proven alternative to the parties drafting their own procedural provisions. There are certain differences to the various institutions, and these should be researched before choosing; for example, drafters may be attracted to rules for confidentiality or non-disclosure of the arbitral proceedings as recognised by certain institutions rather than others. However, the parties may consider the presence of administrative charges and the possibility of being subject to set and possibly unattainable deadlines, to be drawbacks to using institutions.

In contrast, in *ad hoc* arbitral proceedings the appointed arbitrators may administer rules to govern the arbitration without reference to an institution. Therefore, from the outset the parties will need to decide between themselves all aspects of the arbitration that will allow them a significant degree of flexibility. It is common for the UNCITRAL Rules to be used in *ad hoc* proceedings, and is particularly useful where the parties cannot agree on a set of procedures and are comfortable to allow the arbitrators to administer the procedure themselves.

Although reaching an initial agreement of arbitral rules could complicate or lengthen contract negotiations, a lack of agreement when a dispute arises will most likely cause far greater delays to resolving the dispute. If the parties are relying on institutional rules to be adapted to *ad hoc* proceedings, ambiguities may arise if certain rules have not been excluded or adapted properly.

2. Arbitrator Powers to Establish and Control Proceedings

Generally, the procedural laws of the seat/legal place of arbitration will provide wide powers to the tribunal to determine the procedure for the dispute. Parties may wish to exclude certain powers from the arbitrators (for example, the power to order interim or conservatory measures in relation to property that is the subject of dispute), although this is generally not advised as negotiating parties may be unable to anticipate the issues that could arise in a dispute. Institutional rules also set out the powers of the arbitral tribunal, which again are expressed in broad terms. While there may exist some minor differences as to the management of proceedings or the way that case management is dealt with across the available rules, on a general basis the procedure and conduct of proceedings is normally within the discretion of the arbitrator(s) as part of their existing powers.

It is for this reason that parties may wish to carefully assess the level of expertise of an arbitrator and the arbitrator's competence to exercise his/her power. Arbitral institutions may be able to support the proceedings by the appointment of appropriately experienced arbitrators, although parties generally prefer to retain the power of appointment for themselves in the first instance and may rely on institutional appointees if problems arise in the party-appointment process.

3. Power of Attorney

Some jurisdictions require that an arbitral award be registered in their local courts upon issuance to be valid and enforceable. These requirements can be managed by requesting the tribunal to issue a Power of Attorney to the lawyers of the successful party, to register the award on behalf of the tribunal. The list of designated accredited bodies for authentication of awards and formats of some powers of attorney are usually available from the administering arbitral institutions in such jurisdictions.

4. International Sanctions Preventing Enforcement

There are two most commonly known authorities imposing sanctions or embargoes either on certain countries or specific entities: the U.S. Department of the Treasury and the UN Security Council. The nature and subject matter of a sanction related to economic, trade or investments and list of entities are regularly published on the following websites:

(https://www.un.org/sc/suborg/en/sanctions/un-sc-consolidated-list)

(https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/ques_index.aspx)

When drafting dispute resolution clauses for oil & gas industry related contracts, parties are advised to refer to the latest updates on the above web links. Sanctions change over time. Oil &

gas contracts run for a number of years and it is possible that countries or entities that were not under sanctions at the time of entering into a contract may be subjected to new sanctions.

V. DISPUTE RESOLUTION: MULTI-STEP

A multi-step or staged dispute resolution clause is a clause allowing the parties to resolve their dispute through multiple steps, such as negotiation or mediation, before they reach the stage of binding arbitration or litigation. Such a clause may give the parties an opportunity for an early resolution of a dispute. However, it may also be problematic where a party sees the stages as an opportunity to further delay the resolution of a dispute or where a party is uninterested in the settlement opportunities offered by the early steps and wants to proceed to arbitration as soon as possible.

Drafters are advised to pay careful attention when defining the procedure for each step, and in particular, to include framing timelines with defined and time-determined (rather than action-determined) periods for each step to prevent unnecessary delaying tactics or to prevent a party from rushing through to the arbitration stage. If a procedure outlining a clear unavoidable path of progression is not adopted, the parties also risk the problem that the clause may become inoperative in practice or otherwise unworkable, particularly in situations where one party may not wish to take an action that it should take. An unworkable or inoperative clause may result in the parties being unable to access arbitration at all. Similarly, a party wishing to resolve a dispute should ensure that it correctly follows the procedural steps outlined, or it may forfeit or delay its right to seek arbitration.

An explanation of the steps and how to avoid potential pitfalls is set out below.

A. Notification of Existence of Dispute

The multi-step procedure should commence with a Notice of Dispute by one party to another, briefly describing the parties, the dispute and the relief sought. Drafters should specify a defined timeline in which to serve a Notice of Dispute and any subsequent acknowledgement of receipt before the parties may move onto the next step. Triggers for when each step in the multi-step process should occur and the relevant time frames applicable to each step should also be clearly defined to avoid the potential situation where the parties remain in the same phase for an extended period of time and without the ability to reach a final binding decision.

Optional clauses V.B.1 and V.B.2 in the Model DR Agreement provide for alternative dispute resolution processes that must either be completed before a party can initiate arbitration or can be used in parallel with arbitration.

B. Negotiation

Drafters may wish to first consider allowing the parties the opportunity to resolve the dispute at an early stage through negotiation between members of each party, such as senior managers or

executives. However, an obvious problem may arise from the outset where one party is unwilling to negotiate and therefore consideration must be given as to what extent this part of the clause can be enforceable under the relevant law of the jurisdiction governing the dispute resolution clause. In some jurisdictions, the courts may not necessarily recognise and enforce an agreement to negotiate or may view such an agreement on a case by case basis only (for example, a non-uniform approach has been taken in some U.S. states such as New York).

Another potential problem is that the procedural law chosen may not necessarily oblige the parties to negotiate in good faith, thereby possibly derailing the ability to reach a settlement from the outset. While it is of course difficult, if not impossible, to police whether parties are in fact negotiating in good faith, drafters may wish to consider whether an obligation to negotiate in good faith may benefit the multi-step dispute resolution procedure. Additionally, what constitutes "good faith" is often in the eye of the beholder, and imposing this requirement may unintentionally supply grounds for challenging the process, for example by application for an injunction, or even the award. For example, good faith negotiations are required and upheld in Swiss law (although difficult to enforce in practice, except in egregious examples of bad faith actions) but there is no general obligation on contracting parties in England and Wales to negotiate in good faith. Ultimately, the law governing the dispute resolution clause will govern the good faith element of the dispute resolution between the parties.

Senior Executive Negotiations **-** Optional provision IV.C calls for a meeting of senior executives to negotiate a resolution of the dispute. By this time, the representatives of the parties directly involved in the dispute will presumably have attempted, without success, to settle it. In fact, by agreeing to involve senior executives in the settlement process, the parties give the actual protagonists a significant incentive to resolve their differences before exposing their actions and the terms of the contract that they probably drafted and negotiated to the scrutiny of senior management. By requiring the participation of senior executives, the intent is to promote a fresh look at the dispute by persons without the vested interests and damaged dignities of the principal actors in this drama.

C. Mediation/Conciliation

Moving on from negotiation, mediation is taken as a more serious step towards settlement because it requires more effort and action from the parties to resolve the dispute. As with arbitration, consideration should be given on whether to have the mediation administered by an institution or whether to adopt an *ad hoc* approach. In both cases, parties will be required to submit details of the claim and adhere to timelines to carry out the mediation process. The same considerations will apply to administered or *ad hoc* conciliation. The Model DR Agreement provides for the alternative of either mediation administered by an institution (V.D.1) or *ad hoc* mediation (V.D.2).

1. Institutional Administered Mediation/Conciliation

Where the parties choose mediation under institutional rules, optional provision V.D.1 prescribes the time when the mediation process can be initiated under this multi-step procedure, the

manner of initiation, and the applicable rules (rather than attempt to set out any details for submittal of a claim to mediation). By agreeing to submit to mediation under the rules of a recognized institution, the parties agree to the administration of the mediation by the governing institution. This naturally means payment of a filing fee. It also means that an appointing authority will be available to name a mediator if the parties are unable to agree on this key component of this process. Before agreeing to be bound by a particular set of mediation rules, a party should make sure its representative has read or sought advice from someone knowledgeable concerning the selected rules. To avoid confusion and possibly inconsistent procedures or terminology, it is suggested that the parties agree to incorporation of the mediation rules of the same institution whose arbitration rules have been selected by the parties.

There are many possible sets of mediation rules and mediation organizations to consider including: International Mediation Rules of the International Centre for Dispute Resolution (ICDR International Mediation Rules); Mediation Rules of the International Chamber of Commerce (ICC Mediation Rules); Mediation Procedure of the International Institute for Conflict Prevention and Resolution (CPR Mediation Procedure); and Mediation Rules of the London Court of International Arbitration (LCIA Mediation Rules).

2. Ad Hoc Mediation/Conciliation

Where parties choose *ad hoc* mediation without reference to institutional rules, optional provision V.D.2 sets out the basic structure of the mediation procedure, the appointment of the mediator, the parties' submission of position papers and supporting documents, and the requirement for a mediation meeting at which the mediator actively seeks to find common ground between the parties to try to settle the dispute.

D. Arbitration

If the parties have provided for a multi-step approach to resolving their disputes using any combination of the above steps, they must then provide for a final, binding process, which would either be arbitration or litigation in the courts. Assuming that arbitration is the preferred dispute resolution choice, the parties would draft the appropriate arbitration clauses provided in Sections II, III or IV of the Model DR Agreement into their dispute provisions or agreement.

VI. DISPUTE RESOLUTION: EXPERT DETERMINATION

As an alternative dispute resolution mechanism, the Model DR Agreement provides for expert determination in alternative clause VI. Expert Determination is independent of arbitration and other alternative dispute resolution processes. Unlike an arbitral award, an expert determination is not directly enforceable in the courts of foreign jurisdictions. The decision of an expert is only binding contractually. As a result, if an expert determination is not carried out voluntarily by one of the parties, further legal proceedings would be necessary. Under such circumstances, a party could either enforce an expert determination in a court with competent jurisdiction for breach

of contract or a party could enforce the expert determination by initiating an arbitration whose award could then be enforced through an arbitration treaty such as the New York Convention.

Parties must take extreme care in defining the issues subject to expert determination, which should be limited to discrete and defined technical, accounting, valuation, and similarly narrow questions suitable for analysis by an expert. Failing to do so can lead to disputes over whether an issue may be submitted to arbitration or must be submitted to expert determination.

Alternative clause VI provides that the parties can first agree upon an expert, failing which, an arbitral institution will select the expert. Many institutions are willing to appoint experts and administer expert determination proceedings. These include the major arbitration institutions and many of the regional institutions. Their rules and procedures may have significant impact on the conduct of the expert determination proceedings. The parties should therefore be familiar with the rules' contents and make an informed choice based on their needs.

VII. DISPUTE RESOLUTION: COURTS AND LITIGATION

Alternative clause VII in the Model DR Agreement is a court or jurisdiction election clause, not a litigation selection clause for the resolution of disputes by the courts rather than an arbitral tribunal. Therefore, it should be noted that Parties who wish to maintain rights to resolve disputes through litigation in courts of law under applicable statutes, procedural rules and legal precedent need enter no further agreements and should be aware that attempting to do so by express agreement may inadvertently modify or limit such rights.

This alternative clause should ***not*** be used with the provisions providing for binding arbitration as provided because they are mutually exclusive, and including both would lead to jurisdictional disputes and possibly void the arbitration agreement.

The court election clause is short but complete, addressing in two short sentences jurisdiction, venue, and the inapplicability of the doctrine of *forum non conveniens* or similar doctrines to divest the selected court of jurisdiction. Parties may provide for exclusive or non-exclusive submission of disputes to the designated court. However, it should be kept in mind that non-exclusive submission to the designated court will not divest the parties of their rights to submit a dispute to other courts that have jurisdiction.

The court selection clause should be distinguished from a submission to jurisdiction clause that is sometimes used with an arbitration clause to designate courts in which a party may commence an action in aid of the arbitral proceeding or to enforce the award. Since designation of the place of arbitration operates to confer personal jurisdiction over the parties by the courts at the place of arbitration with respect to matters relating to the arbitration agreement and award, use of a submission to jurisdiction clause is not recommended. Moreover, if including a submission to jurisdiction clause with an agreement to arbitrate, care should be taken to make clear that such a clause is intended to assist the arbitral process. Without such a clear designation, this clause

may be mistaken as a court selection clause that conflicts with the parties' arbitration agreement, which may render the arbitration agreement unenforceable.

VIII. ACKNOWLEDGMENTS

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