

# Planning and Protecting Your Projects Through International Contracts – Beyond the Boilerplate

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# Protecting Your International Project (the litigator's perspective)

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# Arbitration is Voluntary

- ✓ Freedom to customize
- ✓ But parties use “boilerplate” provisions because “it’s what my company uses”
- ✓ Boilerplate involves certain assumptions



# Misplaced Assumptions in Boilerplate

## 1. Standard clauses are safe

- ✓ Choose NY or English law
- ✓ Arbitrate in a neutral forum
- ✓ Enforcement via the NY Convention

## 2. You can avoid local courts through arbitration

- ✓ Arbitration is popular
- ✓ Established forums and well-known rules
- ✓ Common procedure

## 3. You can enforce your arbitration awards

- ✓ New York Convention well accepted world-wide

# Problem with Assumption 1 (Standard clauses are safe)

- ✓ **Industry changes but contracts do not**
  - o Service companies are taking on greater role and assuming more risk
  - o *E.g.*, well design, technology, well placement, development (horizontal drilling)
  - o Greater potential profit but traditional contracts shifted risk to the service providers
- ✓ **Increasing trend in industry**
  - o May result in shifting of liability in case of disaster

# Problem with Assumption 1 (Standard clauses are safe)

- ✓ **Risk of doing nothing in a changing industry**
  - o Stagnation: Use same boilerplate contracts with language that does not fit changed commercial circumstances
  - o Outdated: Customer stays the same but risks change (e.g., same service company but different responsibilities, with change made only in “scope of work”)
  - o Misfit: Circumstances change and so does contract, but with unintended consequences

# Problem with Assumption 1 (Standard clauses are safe)

- ✓ **Local laws may be mandatory**
  - o Property rights like mining rights and concessions
  - o China, South America, Africa: seize assets due to project indebtedness
- ✓ **Standard clause, non-standard result  
(e.g., UK vs. NY law)**
  - o “Consequential” damages defined differently in UK
  - o “Punitive” damages unenforceable

# Problem with Assumption 2: (You can avoid local courts through arbitration)

- ✓ Trend in emerging market countries = don't recognize arbitration provisions
- ✓ Venezuela = well established arbitration provisions ignored



# Assumption 3: Enforceability - “I won – pay up”

- ✓ NY Convention (“the most successful multilateral treaty in history”)
- ✓ Ratified by 148 countries
- ✓ Increasing use of exception based on “public policy”

# Planning Is Key (“the rest of the presentation”)

- ✓ Choice of law
- ✓ Determining arbitrability
- ✓ Picking arbitrators
- ✓ Consciously choosing how you will conduct the arbitration
- ✓ Managing the award (e.g., who pays expenses, enforcement)

# Choice of Law – Arbitration Clause

- The arbitration clause - separate choice of law from the main contract.
- A “contract within a contract”
  - Courts look at the parties’ intent If no separate choice of law for arbitration clause
  - Best practice – separately choose law regarding arbitrability, particularly if contractual choice of law may not enforce arbitration automatically (e.g., Chinese law).

# Choice of Law in Contract (NY, England, Texas . . . )

- **It matters as to substantive rights**
  - Choice of law in contract may define and/or limit your available causes of action and remedies.
  - For example, consequential damages are defined much more broadly under English law than in most US state laws
- **It matters as to enforceability** – may render other provisions unenforceable (e.g., punitive damages do not exist in some jurisdictions)

# Determining Arbitrability (*i.e.*, do you have to arbitrate, even if you don't want to?)

- Who decides:
  - Courts usually determine arbitrability
  - The parties can agree to let the arbitration panel decide

# Determining Arbitrability (*i.e.*, if arbitration is voluntary, who can be compelled to arbitrate?)

- Non-signatories who implicitly AGREED to arbitrate:
  - Express third-party beneficiaries
  - Express assignees
  - Successor in interest
  - Agents
  - Guarantors

# Determining Arbitrability (*i.e.*, if arbitration is voluntary, who can be compelled to arbitrate?)

- Non-signatories who DID NOT AGREE to arbitrate. Unusual but possible – legal concepts include:
  - Piercing corporate veil / alter ego
  - Reliance = a non-signatory may be held to an arbitration agreement when its agreement to arbitrate may fairly be implied by its conduct
  - Equity (e.g., equitable estoppel) = accepted benefit of contract with arbitration clause, now must accept associated responsibilities

# Determining Arbitrability (*i.e.*, can you intervene in someone else's arbitration?)

- **Maybe**
  - If the arbitrators are given the authority to decide (either in contract or institutional rules, such as the ICC)
  - Court proceeding to compel arbitration under accepted legal theories (*e.g.*, third party beneficiary, unified contractual scheme)
- **No**, if there no intention to allow a non-party to intervene or arbitrate



# Where to Arbitrate?

# Arbitral Tribunal Choices



中国国际经济贸易仲裁委员会  
华南分会  
CIETAC South China Sub-Commission



香港國際仲裁中心  
Hong Kong International  
Arbitration Centre





# Most Commonly Accepted Institutions



56%



10%



10%



**ARBITRATION INSTITUTE**  
OF THE STOCKHOLM CHAMBER OF COMMERCE

3%



<2%

# What's the Difference? (see chart)

1. How to commence arbitration?
2. Costs:
  - a) administration fees
  - b) arbitrator fees
  - c) do you prepay costs (deposit)
  - d) security for costs
3. Restrictions on nationality of arbitrators?
4. Multi-party disputes?
5. Confidentiality?
6. How fast do you get an award?
7. Other advantages/disadvantages?

# Who Will Be Your Tribunal (Picking Arbitrators)

- How many - One or three arbitrators usual
  - Can specify a different number in contract
  - Rules of institution (see chart)
- How do you select them – many choices
  - The institution nominates
  - Parties “rank and strike” arbitrator candidates from a list
  - Each of the parties nominate an arbitrator and the two select the 3<sup>rd</sup> arbitrator chairman
  - Etc.



# Picking Arbitrators (cont.)

- Should party appointed arbitrator wholly independent?
  - If NOT, can have ex parte communications with the appointing party about candidates for 3<sup>rd</sup> arbitrator.
  - If the parties agree to make the arbitrators wholly independent, no ex parte communications.
- Is it necessary for the arbitrator to have any **specialized expertise** (e.g., engineer, chemical industry experience, banking, etc.)?
- What **language** should he speak fluently?
- **Cultural differences** considerations

# Special Considerations in Conduct of Arbitration (Wait and Maybe Force a Resolution)

- **Escalation:** The parties may choose to go through a series of steps before going to arbitration.
  - Party negotiations
  - Mediation
  - Examples of key considerations
    - Who is your counterparty (customer, one-time supplier, gov't)
    - Who will negotiate/mediate (requiring “C level” executives)?
    - Who has to attend?
    - What rules apply to the mediation (ICC rules – expensive)?
    - How long will the parties be required to negotiate/mediate and where (Paris, Texas or Paris, France)?



# Special Considerations: Customized Arbitrations

- **If small dispute (e.g., less than \$5 million)**
  - One arbitrator
  - Two fact witness and one expert
  - Documents used must be produced with initial pleadings
  - No pre-hearing discovery, except depo of the 2 fact witnesses and expert
  - Cannot compel the production of evidence (except upon written request and at the sole discretion of the arbitrator)
- **If large dispute (e.g., more than \$5 million).**
  - Three arbitrators
  - No limits to fact or expert witnesses
  - Standard discovery – but what does that mean?

# Special Considerations – Defining “Discovery”

- Parties can agree to anything.
- If they do not agree in contract:
  - Will be at discretion of arbitrator
  - *Lex arbitri* – procedural law of the site of arbitration may apply
  - Dramatic differences depending on the system implemented (civil vs common law, UK or US common law)

- **US style discovery**

- Full blown depositions
- Broad-based document requests
- Claims are permitted that are made on “information & belief”

- **UK style**

- Most documents produced by parties initially
- Very specific document requests
- No depositions
- Written witness statements instead of direct examinations
- Cross-examine opposing witnesses for the first time at trial

- **Civil law = no discovery**

- Pre-trial discovery illegal
- All “discovery” conducted in a series of hearings which, cumulatively, are considered a trial
- Only judges may question witnesses

# Award - Should It Be “Reasoned”?

- “Reasoned award” - gives reasons for award.
  - Parties must request before appointment of the arbitrator.
  - Can also agree in contract or initial meetings with tribunal
- “Bottom line” award - who wins, who loses, and what do they get.
  - Less likely to be successfully appealed.
  - May have commercial appeal as precedent

# Timing of Award - How Long Will It Take?

- Parties can specify how long the arbitrators have to issue an award. May be difficult to enforce
- May have to disqualify arbitrator if he does not comply (e.g., takes too long).

# Who Decides If You Win and If Can You Appeal

- **Do you need a unanimous decision** from three arbitrators or can majority rule?
  - Depends on arbitral institution (AAA = majority, ICAC = presiding arbitrator)
  - Depends on contract
- **Usually can't appeal, but possible**
  - General rule - only to determine if arbitrator (1) acted outside of his authority or (2) failed to consider key evidence
  - New rules (AAA and ICC) permit party-agreed appeals

# Who Pays Fees and Expenses

- **Loser pays (e.g., English system)** – common contractual provision
- **Each party pays its own**
  - Also a common provision.
  - May be default depending on applicable law
- **“Predominant winner”** gets his fees and expenses – defined contractually

# What Are “Fees & Expenses”

- **Specify in contract or default in choice of law**
  - **Usual**
    - Attorneys’ fees
    - Arbitrators’ fees
    - Administrative fees of the arbitral institution (ICC)
  - **Unusual**
    - Fees and expenses of ancillary proceedings (e.g., emergency arbitrators, court associated with interim measures)
    - Deposit for interim measures
    - Witnesses (experts)
    - “Internal legal personnel”



# I Won – Can I Enforce the Award (particularly in emerging markets)

- ✓ **Russia** = less than 50% of awards enforced (“against national interest”)
- ✓ **Kazakhstan and certain African nations** = review merits of case, sometimes before questionable judiciary
- ✓ **Certain Middle Eastern countries** = enforcement subject to political influence

# Arbitration Awards – Enforcement Hot Spots

