Goodbye Boiler-Plate: Practical Advice for Drafters of Domestic and International Arbitration Agreements

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GOODBYE BOILER-PLATE: PRACTICAL ADVICE FOR DRAFTERS OF DOMESTIC AND INTERNATIONAL ARBITRATION AGREEMENTS

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I. INTRODUCTION

Parties agree to arbitrate disputes because, among other things, arbitration can be quicker and more flexible than judicial proceedings. This leads to advantages that all parties desire: decreased costs and better predictability of outcome. However, problems arise in domestic and international arbitrations that may defeat these advantages. As explained below, well thought-out and effective arbitration provisions can significantly reduce the incidence of these problems. While primarily relying on specific examples from the domestic sphere, the following discussion also applies to the international sphere unless otherwise indicated.

The core assertion of this article is this: instead of cutting and pasting boiler-plate arbitration clauses into contracts, one should identify in advance as many details as possible, including, inter alia: (A) the scope of the arbitral agreement; (B) decisions as to substantive and procedural choice-of-law; (C) the chosen institutional rules and the administering institution; (D) the location of the arbitration and the venue for confirmation of the award; (E) whether significant access to facts will be needed to establish claims; (F) available remedies, fees and expenses; and (G) limitations of grounds for vacatur.1

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1 This list is by no means exhaustive. Other factors include the number of and selection process for the arbitrators, the neutrality of party-appointed.
The goal of this article is thus to aid the practitioner in identifying and addressing as many questions and issues as possible during the process of drafting an arbitration clause, so as to avoid costly confusion and conflict later. Its focus is therefore on the questions more than the answers. Various rules and examples are offered to help refine the drafter's inquiry and define the possible universe of drafting choices, but this discussion is far from exhaustive. Practitioners must always keep in mind the opportunities for and limitations on their drafting as defined by the dispute, the parties and the specific rules of the administering institution.

II. DISCUSSION OF FACTORS

A. Determine the Scope of the Arbitral Agreement

Although one commonly encounters disputes concerning the scope of arbitration provisions, careful drafting can help prevent costly collateral challenges. For example, drafters should determine the claims that fall within the arbitration provision; this can include only the contract at issue, related tort claims, statutory rights, or a broad combination. Likewise, drafters must decide whether the party prefers that courts or arbitrators determine the arbitrability of particular claims.2

Before determining how broadly to draft the provision, a party must consider the types of claims that can arise under the contract. For example, a patent licensing agreement can give rise arbitrators, the language of the arbitral proceedings (see, e.g., International Chamber of Commerce Rules of Arbitration (Jan. 1, 1998) (hereinafter “ICC Rules”), art. 16, available at http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf), and the desire for a “reasoned award,” (see infra, note 19) as opposed to a quick decision issued without any explication of reasons, or with merely a truncated discussion. These latter methods are often chosen by corporations locked in conflict, the resolution of which is necessary for ongoing business decisions.

2 “Arbitrability” has a different meaning outside the U.S.; that is, determining, as a matter of public policy, which types of disputes may be resolved by arbitration and which are reserved for the courts. See, e.g., REDFERN & HUNTER, INTERNATIONAL COMMERCIAL ARBITRATION §§ 3–12 et seq. (4th ed.); Convention on the Recognition and Enforcement of Foreign Arbitral (“New York Convention”), art. II(1) & art.V(2)(a) (1958).
to many disputes, from one as simple as a breach of contract to patent infringement and challenges to a patent’s validity. A licensing agreement can also involve breaches of statutory rights, such as antitrust and unfair competition. Because U.S. federal law permits arbitration of patent infringement and invalidity issues (35 U.S.C. § 294), as well as antitrust and other rights based on statutes, parties wishing to avoid arbitration of such disputes should draft specific exclusions for these potential claims. Conversely, parties wishing to ensure arbitration of these issues should expressly include such matters in the arbitration agreement.

Some U.S. arbitral institutions provide form language for broad or inclusive arbitration clauses, as well as specialized language for disputes affecting particular industries. For instance, for contracts involving patents, the American Arbitration Association (“AAA”) recommends the following arbitration provision: “Any controversy or claim arising out of or relating to this contract, or the breach thereof, including any dispute relating to patent invalidity or infringement . . . shall be settled by arbitration.” Similarly, the Judicial Arbitration & Mediation Services’ (“JAMS”) standard commercial arbitration clause recommends: “Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof . . . shall be determined by arbitration.”

For international contracts, an example of such form language can be found in the standard arbitration clause of the International Chamber of Commerce (“ICC”): “All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.”

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3 The Ninth Circuit has described a similar arbitration provision as “broad and far reaching.” Chiron Corp. v. Ortho Diagnostic Sys. Inc., 207 F.3d 1126, 1131 (9th Cir. 2000).

4 ICC Rules, “Standard ICC Arbitration Clause.” In the paragraphs preceding the “Standard ICC Arbitration Clause,” the ICC reminds drafters “that it may be desirable . . . to stipulate in the arbitration clause itself the law governing the contract, the number of arbitrators and the place and language of the arbitration.” The AAA’s international division, the International Centre for
In addition to determining the scope of arbitration, drafters must decide whether courts or arbitrators will determine the arbitrability of particular claims. If they desire the broadest possible interpretation of the arbitration provision, then drafters should designate arbitrators rather than courts to decide the arbitrability question. Courts traditionally determine whether a valid agreement to arbitrate exists, and whether the agreement encompasses the dispute at issue. See 9 U.S.C. § 4. However, courts will enforce “clear and unmistakable” agreements to place the scope determination in the hands of arbitrators.5

An explicit arbitration provision represents the best way of showing such clear and unmistakable intent to give arbitrators the power to determine their own jurisdiction. For example, JAMS recommends inserting the language “including the determination of the scope or applicability of this agreement to arbitrate.” Many arbitral institutions offer rules and procedures stating that arbitrators have the authority to determine arbitrability disputes.6 Although some courts have held that designating an arbitral institution with such rules suffices to show a “clear and unmistakable” intent,7 better practice may require a more explicit statement of intent in the arbitration provision.8

Dispute Resolution (“ICDR”), has a similar model clause: “Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the American Arbitration Association in accordance with its International Arbitration Rules.”


6 See, e.g., JAMS Comprehensive Arbitration Rules and Procedures, Rule 11(c); AAA Commercial Arbitration Rules and Procedures, Rule 7(a).


8 This is the principle of compétence-compétence, which is well established under the leading arbitration laws of other countries. See, e.g., Redfern & Hunter, supra note 2 at §§ 5-39 – 5-42. Provisions of international arbitration rules that stipulate this rule (and thus obviate the need for including it in the arbitration clause) include, inter alia: ICC Rules, art. 6(2); ICDR Rules, art. 15(1); LCIA Rules, art. 23.1.
B. Consider Substantive and Procedural Choice-of-Law Issues

There are many motivations for identifying a body of law to govern disputes, including efficiency, familiarity, predictability, and strategic advantage. While useful in the domestic sphere, carefully drafted choice-of-law provisions become an indispensable tool for conflicts before they occur in the international sphere. In fact, choice of law constitutes one of the most important issues for international arbitration clauses. Although most contracts identify the law that will govern their interpretation, this represents just the tip of the iceberg when it comes to the hidden choice-of-law issues in arbitration provisions – particularly with broad provisions that may encompass claims such as patent invalidity, antitrust or unfair competition.

If the parties to the arbitration agreement do not designate the substantive and procedural laws that apply to the arbitration, then predicting with certainty which law will apply becomes extremely difficult. The rules of many arbitral institutions do not require tribunals to apply choice-of-law rules or to follow any particular rules of evidence or procedure. With the absence of an agreement by parties on governing laws, JAMS arbitrators, for example, “shall be guided by the rules of law and equity that the Arbitrator deems to be most appropriate.” As for evidence, neither AAA nor JAMS arbitrators need to comply with legal rules of evidence, except that JAMS arbitrators “shall apply the applicable law relating to privileges and work product.” Thus, just as identifying the substantive law that will apply increases predictability, designating the applicable evidentiary rules likewise promotes certainty; the default rules for most domestic arbitral institutions do not provide for such.

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10 JAMS Comprehensive Arbitration Rules and Procedures, Rule 24(c).

11 Id. Rule 22(d).

12 Drafters should also consider, with caution, including procedural rules allowing for summary disposition of claims, and provisions relating to the time for opposition or reply, and how and when evidence will be submitted. For
In international arbitrations, with the absence of an agreement by parties on the governing law, the various institutions have similar rules. For example, a London Court of International Arbitration (“LCIA”) tribunal “shall apply the law(s) or rules of law which it considers appropriate.” Usually, an LCIA tribunal will apply only the procedural law of the seat of arbitration. Similarly, the ICC rules state: “The parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate.”

The situation is even more complicated in investment disputes where, absent party agreement between the investor and the host State, an International Centre for Settlement of Investment Disputes (“ICSID”) tribunal “shall apply the law of the Contracting [or Host] State party to the dispute (including its rules on the conflict of law) and such rules of international law as may be applicable.” If the parties stipulate to a governing law, or if they mutually accept a certain law in their arbitral pleadings, that law will govern. However, an ICSID tribunal must then consider how “such rules of international law as may be applicable” interact with the governing law. That is, the tribunal must test the requirements of the governing law against the tenets of international law to the extent “applicable,” and international law is “hierarchically superior.” Predictability in this situation becomes almost impossible without an explicit agreement.

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13 LCIA Rules, art. 16.3, 22.3; see also Arbitration Rules of the Singapore International Arbitration Centre (“SIAC”) (3d ed., 1 July 2007), art. 1.1, 32.

14 See, e.g., ICC Rules, art. 17.

15 ICSID Convention, Regulations & Rules, art. 42(1) (April 2006) available at http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp; see also Zhinvali Devel. Ltd v. Republic of Georgia, ICSID Case No. ARB/00/1, Award ¶¶ 296-301 (Jan. 24, 2003), reprinted in 10 ICSID Rep. 68-9 (2007). Note that most ICSID arbitrations will arise from situations where there is no contract between the claimant investor and the respondent government; hence, no possibility of choosing a governing law.

16 Zhinvali Devel., at ¶¶ 297-98.
Moreover, the scope of the arbitration provision will determine choice-of-law issues. For example, given a narrow provision that excludes torts and statutory rights, identification of the law that governs interpretation of the contract typically suffices for substantive law application. This represents the law that U.S. courts will apply to determine whether a valid contract exists before granting a motion to compel arbitration. Therefore, before selecting the applicable law, the drafter should carefully consider the legal and equitable claims provided by the different jurisdictions.

For broad arbitration provisions – covering tort claims, statutory rights, etc. – parties should give considerable thought to the choice-of-law provisions. Of course, drafters should attempt to ascertain the law most favorable to the client. Moreover, in the domestic sphere, if federal circuit splits favoring a client’s position exist (or elaborations of legal tests that seem easier or harder to meet), then drafters should identify the body of law and tie it to a particular federal circuit’s interpretation. For instance, with respect to patent infringement and invalidity claims, the parties must determine if they want to arbitrate these claims in the absence of evidentiary rules, particularly those relating to expert testimony. If not, then they should specify that Article VII, “Opinions and Expert Testimony,” of the Federal Rules of Evidence, and Daubert v. Merrell Dow Pharmaceuticals\textsuperscript{17} and its progeny, shall apply in any arbitration relating to patent infringement and invalidity. And, if they desire that the arbitration hearing not be the first time they speak to the opposition’s experts, they should consider including procedural provisions allowing for depositions or similar procedures to those found in Federal Rules of Civil Procedure 26(a)(2) and (b)(4).

In the international sphere, the choices become even more complex. When deciding which procedural rules to follow in an international arbitration, procedural choice-of-law questions arise especially where such thorny issues as privilege and document disclosure practices can lead to complex and unexpected results. For instance, without prior party agreement, how is a tribunal to determine if a document should be produced to the other party when the document was produced in a country in which it clearly would be protected by an inviolate privilege,

\textsuperscript{17} 509 U.S. 579 (1993).
but the tribunal is applying the law of a jurisdiction in which such documents are readily required for review? Even more importantly, how is a corporate client to protect its communications in light of this uncertainty? International tribunals generally recognize that parties may regulate by agreement procedural matters such as the applicability of privileges and the form of objections to such assertions. Absent such agreements, these collateral issues can waste both time and money.  

Finally, to ensure that the arbitrators apply the substantive and procedural laws identified (and to record the panel’s deliberative process and rationale for its award), the arbitration agreement can specify that the arbitrators must apply the facts to the applicable law and provide a “reasoned award” in writing. Of course, where the applicable arbitration rules expressly require the arbitral tribunal to render a “reasoned award,” it is unnecessary to add that stipulation to the arbitration clause.

C. Determine Institutional Rules and the Administering Institution

To further ensure predictability or to take advantage of a familiarity with specific rules and/or institutions, parties can agree to employ certain institutional rules to be applied by the issuing institution or an ad hoc tribunal. For example, if a party is comfortable with, or if a certain body of rules somehow favors the client’s position, parties can explicitly agree to apply them. But if the parties cannot agree to employ the administering institution, or if, for example, the institution’s administrative fees are cost-prohibitive, parties can agree to employ an ad hoc tribunal. It is not recommended that parties agree to employ an institution

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18 For a view of what can happen when a tribunal must determine document production and specifically privilege issues on its own, see Glamis Gold v. United States, UNCITRAL/NAFTA, Award, ¶¶ 218-29 (June 8, 2009), available at http://www.state.gov/documents/organization/125798.pdf.

19 A “reasoned award” issued by the arbitral panel should be requested or included in the arbitration provisions; it can range from formal findings of fact and conclusions of law to a short explanation of the award. See Charles Forer, Many Reasons Exist for a “Reasoned Award,” 226 THE LEGAL INTELLIGENCER 57 (Mar. 25, 2002) available at http://www.eckertseamans.com/media_center/publications/articles/2002_03_25_162.asp.

20 See, e.g., ICC Rules, art. 25(2); LCIA Rules, art. 26(1); ICDR Rules, art. 27(2).
other than the one that drafted the agreed-upon rules (e.g., parties should not employ the Singapore International Arbitration Centre ("SIAC") to administer cases under ICC rules). Employing this mixed approach will create a host of future problems: the rules may be based on the institution’s structure and therefore may not be compatible with another institution’s make up, the rules may be copyrighted, or the implementing institution simply may refuse to apply another institution’s rules.

The advantage of institutional arbitration in this respect, compared to ad hoc arbitration, involves the capacity of the administering institution to provide assistance whenever problems in the appointment of arbitrators arise. For example, if the agreement provides for one arbitrator, but the parties fail to agree on the arbitrator, an ad hoc arbitration proceeding may be unable to move forward. In an institutional arbitration, by contrast, the administrating institution will choose the arbitrator for the parties if the parties cannot agree. Moreover, an institution will fix the arbitrators’ fees, relieving the parties of a delicate and difficult task. Institutions will also hear and decide challenges against an arbitrator, and some actively monitor the arbitral proceedings and/or exercise “quality control” by reviewing the tribunal’s draft award.

On the other hand, parties can shape ad hoc arbitrations to meet their desires and the facts of the case. This can have both advantages and disadvantages, however. When addressing the issue of composition of the tribunal in ad hoc arbitration, for instance, one must make sure to set forth specifics in the

23 This procedure also applies if the arbitrator somehow becomes unavailable during the proceedings and no new appointment can be agreed upon by the parties.
24 See, e.g., ICC Rules, art. 27.
25 Lehmann, supra note 22, at 395.
arbitration agreement: the number of arbitrators, how they will be selected, whether they can be non-neutral and, to save time, a limited period for designation of tribunal members. In addition, to avoid the problem illustrated above, parties to an ad hoc arbitration should agree on a third party to appoint the arbitrator in the case of an impasse.

D. Designate the Location of the Arbitration and the Venue for Confirmation of the Award

Typically, unless parties have agreed on the location of the arbitration, the arbitral institution or the tribunal will select the place of arbitration. Agreeing on the LCIA, for example, will not

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26 Under some institutional rules, for example the ICC, if the number of arbitrators is not set forth in the agreement, the institution will decide: “Where the parties have not agreed upon the number of arbitrators, the Court shall appoint a sole arbitrator, save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators.” ICC Rules, art. 8(2).

27 In the international sphere, ad hoc arbitrations are often conducted under the UNCITRAL Arbitration Rules, which include provisions for, inter alia, action by an Appointing Authority (appointment of arbitrators; decisions on challenges; replacement of arbitrators).

28 For example, in an important arbitral dispute before the Permanent Arbitration Court of the Croatian Chamber of Economy (“PAT CCE”), the arbitration clause provided:

Arbitration shall be conducted in accordance with the Rules for Conciliation and Arbitration of the PAT CCE in Zagreb, but each party shall appoint one arbitrator [ ]. These two arbitrators shall appoint a third one who will preside. If the parties refuse or fail to appoint an arbitrator within 30 days following receipt of the arbitration application, or if the appointed arbitrators are unable or refuse to appoint the presiding arbitrator within 30 days following the appointment of the second arbitrator, the arbitrator whose appointment is requested shall be appointed by the ICC, which acts as a Commission for appointment in accordance with the laws adopted by the ICC for such cases, at the request of any of the parties . . . .


29 See, e.g., ICC Rules, art. 14 (“The place of the arbitration shall be fixed by the Court unless agreed upon by the parties.”).
necessarily guarantee a London forum. Thus, parties should expressly designate the place of arbitration.

Similarly, parties may seek confirmation of awards in any venue. Although the U.S. Federal Arbitration Act (“FAA”), 9 U.S.C. § 1 et seq., for example, permits confirmation of an award in the district in which the tribunal issued its award, this represents a permissive venue. To ensure that confirmation occurs where the tribunal issues its award – if the parties so desire, and if assets lie in that jurisdiction – drafters should include this choice of venue for enforcement in the arbitration clause. Otherwise, the place of confirmation will depend on the standards set within each jurisdiction.

E. Identify How Much Access to Evidence the Parties Will Be Accorded

In the United States, attorneys usually assume that they will have the opportunity to discover all facts that are “reasonably calculated to lead to the discovery of admissible evidence.” Attorneys from many other jurisdictions do not, however, share that assumption. In fact, broad discovery may lose its appeal in arbitration, as it can significantly extend proceedings. Assessing

30 See LCIA Rules, art. 16.1. Note, however, that the LCIA Rules do create a presumption in favor of London.

31 Drafters must be aware, however, that choosing a location is not simply a convenience issue. For example, the place of arbitration involves a choice of law; that is, the law governing the arbitral procedure. It may also be relevant to enforcement under the New York Convention, because many parties to the Convention have made the “reciprocity” declaration, pursuant to Article I(3).


33 See id.

34 FED. R. EVID. 26(b)(1).


Had the UNCITRAL Arbitration Rules and the IBA Rules been more specific, the Parties in Glamis Gold could have avoided the extensive debate on the procedural rules, thus saving time and money. . . . To provide an estimate of cost, the Tribunal issued six procedural orders, four decisions and held one
the parties’ needs for evidence early on will help them draft appropriate provisions relating to information exchanges (i.e., discovery or, as it is more frequently called in international arbitration, document production); or, in the absence of tailored arbitration provisions, identify the arbitral institution with the most appropriate default rules.36

When little document exchange is necessary: If potential disputes seem likely to require little or no information from opposing or third parties, one may ensure a speedy and cost-effective arbitration by limiting information exchanges to the exhibits, witnesses and experts. Agreeing to these limitations in writing will leave no doubt regarding the intent of the parties and will help secure enforcement because, absent an agreement, the arbitral tribunal will apply its own rules relating to information exchanges.37

By way of example, the chart below compares the information exchange rules of two well-known domestic arbitral institutions – AAA and JAMS – that differ in significant ways and that will apply absent an agreement to vary the procedures.

In a scenario where neither party sees great need for document disclosures or witnesses, the AAA may be a better fit hearing on this issue over the course of eleven months. The production phase was so extensive that it also resulted in the delay of the final arbitral hearing.

36 Document production is very limited in international arbitrations, especially those outside the U.S. and where at least one party is non-American. This is a vast topic that exceeds the scope of this article, but drafters should thoroughly review IBA Rules on the Taking of Evidence in International Commercial Arbitration; in particular, Article 3 thereof. See Michael Bühler & Carroll Dorgan, Witness Testimony Pursuant to the IBA Rules of Evidence in International Commercial Arbitration-Novel or Tested Standards?, 17 J. INT’L ARB. 3, 12-13, 15 (2000). It is common now for parties and arbitrators to refer to the IBA Rules for guidance, without necessarily accepting them as applicable. Whether to adopt or refer to the IBA Rules is an issue that often arises, and should be considered in drafting related arbitration clauses.

37 See, e.g., ICSID Convention, supra note 15, art. 43 ("Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings . . . (a) call upon the parties to produce documents or other evidence, and (b) visit the scene connected with the dispute, and conduct such inquiries there as it may deem appropriate"); AAA Commercial Arbitration Rules, Rule 1 ("Agreement of the Parties"); JAMS Comprehensive Arbitration Rules and Procedures, Rule 1 ("Scope of Rules").
than JAMS because the AAA's Commercial Arbitration Rule 21 imposes fewer information exchange obligations than the automatic exchange of “all [relevant] non-privileged documents and information” as found in JAMS’ Streamlined Arbitration Rule 13. In either case, however, if any claim or counterclaim meets or exceeds the arbitral institution’s triggering amount ($500,000 for AAA; $250,000 for JAMS), the parties will have greater information exchange obligations unless the arbitration provisions specifically identify the rules that will govern (e.g., “The arbitration shall be administered by JAMS pursuant to its Streamlined Arbitration Rules and Procedures.”).

<table>
<thead>
<tr>
<th>AAA Commercial Arbitration Rules (including large and complex disputes)</th>
<th>JAMS Arbitration Rules (Streamlined ('S') &amp; Comprehensive ('C'))</th>
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<tr>
<td><strong>Rule 21 “Exchange of Information”</strong></td>
<td><strong>S-Rule 13 “Exchange of Information”</strong></td>
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| • At the request of either party or at the discretion of the arbitrator, the arbitrator may direct:  
  ▪ production of documents and other information, and  
  ▪ identification of any witness called at the hearing.  
• Five business days prior to the hearing, parties shall exchange copies of exhibits to be introduced at hearing. | • The parties shall cooperate in the exchange of all non-privileged documents and information relevant to the dispute or claim, including:  
  ▪ documents on which they intend to rely or to introduce at the hearing,  
  ▪ names of all individuals with knowledge of dispute or claim,  
  ▪ names of all experts who may be called.  
• This exchange should be concluded 14 days after all pleadings and notices of claims are received.  
• The arbitrator shall determine the necessity of additional information exchange.  
• Ongoing duty to supplement is imposed with the possibility of preclusion if it is not complied with. |
<table>
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<th>L-4 “Management of Proceedings”</th>
<th>C-Rule 17 “Exchange of Information”</th>
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<tr>
<td>• Parties shall cooperate in the exchange of documents and information within each party's control if the arbitrators consider exchange to be consistent with goal of just, speedy and cost-effective resolution.</td>
<td>• Immediately after the start of arbitration, the parties shall cooperate in the exchange of all non-privileged documents and information relevant to the dispute or claim. This initial exchange includes:</td>
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<tr>
<td>• Parties may undertake document production as agreed upon by all parties, but the arbitrators may place limitations. If no agreement is reached, then the arbitrators establish the extent of document production.</td>
<td>• documents on which they rely to support their positions,</td>
</tr>
<tr>
<td>• At discretion of the arbitrators and upon good cause shown, arbitrators may order depositions of, or the propounding of interrogatories to, persons who may possess information that the arbitrators determine to be necessary to resolution.</td>
<td>• names of individuals whom they may call as witnesses,</td>
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<td>• names of all experts with expert's report.</td>
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<td>• The exchange shall be completed 21 days after all pleadings and notices of claims are received.</td>
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<td>• Each party may take one deposition of an opposing party or of one individual under the control of opposing party. Necessity of additional depositions shall be determined by arbitrators.</td>
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<td>• There is an ongoing duty to supplement imposed with the possibility of preclusion if not complied with.</td>
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</table>
When significant information is needed from opposing or third parties: If potential disputes seem likely to require large amounts of information from opposing and/or certain third parties, drafters can help prevent prolonged and expensive disputes concerning the scope of information exchanges by drafting provisions that identify the types of document production permitted and limit their usage. This becomes particularly important if the parties anticipate the need to conduct depositions, as many institutional rules, including the AAA’s standard Commercial Arbitration Rules and JAMS’ Streamlined Arbitration Rules, permit depositions. Even under the rules applicable to complex arbitrations, the AAA leaves the decision to grant depositions to the arbitrators’ “discretion” after a showing of “good cause.” JAMS permits only one deposition as a matter of right, with the decision to grant additional depositions left to the arbitrators. The only way to ensure that a party can obtain the information needed from opposing parties is to draft tailored arbitration provisions granting the right to conduct certain document production and placing reasonable limits on its use.

In the domestic sphere, should the drafter choose not to include tailored provisions, JAMS may be a better fit than AAA because JAMS’ automatic exchange of “all [relevant] non-privileged documents and information” should lead to production of many of the documents and much of the information needed (from opposing parties at least) to support the claims. It will also help to identify any information needed, thus facilitating the narrow tailoring of additional requests for information and, therefore, increasing the likelihood that tribunals will grant such requests. In any event, whether the parties select the AAA, JAMS or another arbitral institution, they should draft the arbitration provisions to identify the particular set of rules that provide more expansive information exchange obligations or opportunities (e.g., AAA’s Commercial Arbitration Rules including Procedures for Large, Complex Commercial Disputes; or JAMS’ Comprehensive Arbitration Rules).

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38 See AAA L-4.

Obtaining information from third parties (i.e., non-signatories to the arbitration agreement) poses more complex problems, because the third parties have not consented to the jurisdiction of the arbitral institution. Although domestic tribunals can issue subpoenas for production of witnesses or documents,\textsuperscript{40} enforcement must occur through the courts if the receiving third party objects to the subpoena. In the international sphere, the arbitration laws of many countries provide for court assistance in obtaining evidence from third parties.\textsuperscript{41} However, due to the difficulties of obtaining timely hearings for subpoena matters, the arbitration hearing may pass before a court enforces a subpoena.

Where one party seems likely to require documents from companies affiliated with or related to the adverse party (such as a parent or sister company), which are not bound by the arbitration provision, one possible solution involves the drafting of arbitration provisions that encourage compliance with subpoenas by creating “sanctions” when related parties refuse to comply with subpoenas. For example, where the information needed seems likely to be in the possession of a party’s subsidiary, parent or affiliate, consider a provision stating that the parties agree to use their best efforts to obtain relevant information from affiliated entities; and that, if affiliated entities refuse to comply with reasonable requests for information, then the party to the arbitration will suffer some negative consequence.\textsuperscript{42} For example, arbitrators may draw adverse inferences from the failure to produce, or they may impose other sanctions such as preclusion of certain issues or evidence altogether. Provisions like this will create significant incentives for parties to ensure that their affiliates comply in a timely manner with reasonable requests for information.

If vital information seems likely to be in the possession of an unaffiliated third party, then consider a provision that identifies the third party, acknowledges the importance of information from


\textsuperscript{41} See, e.g., Swedish Arbitration Act of 1999, art. 26; English Arbitration Act 1996, § 43; Swiss Private International Law (“PIL”) Statute, art. 184(2).

\textsuperscript{42} For an example of such a request in an investor-State dispute, see Glamis Gold, Award, supra note 18, at ¶¶ 252-56, 706-13, 750-55, and 822-23.
this third party to a just resolution of disputes between the parties, and instructs the tribunal not to set the arbitration hearing until information from this third party can be obtained or all reasonable attempts to obtain the information have failed. In addition, consider adding language that parties to the arbitration will not actively oppose attempts to subpoena such information. Although this provision may sacrifice speed, it should ensure that arbitration on that claim or issue is not futile due to failure to receive needed evidence.

F. Identify Available Remedies, Fees and Expenses

To predict the monetary outcome of arbitration with greater certainty, arbitration provisions should define the available remedies and identify whether the tribunal may award fees and expenses against the unsuccessful party. Resolving these issues can significantly influence whether parties pursue arbitration or settlement.

**Remedies:** For broad arbitration agreements, it becomes paramount to identify the range of available (and excluded) remedies. For example, some statutes provide for treble damage awards and fines, and certain torts contemplate the assessment of punitive damages. Commercial parties often agree to forego rights to these punitive-type remedies. Other rules provide prevailing parties rights to attorneys’ fees. For example, both AAA and JAMS permit awards of attorneys’ fees if allowed by applicable law or by party agreement.

Specific performance and injunctive relief represent another important class of remedies to consider. The default rules for both AAA and JAMS, for example, empower arbitrators to grant specific performance. If the parties wish to exclude specific performance, they should state so expressly in the arbitration agreement.

Turning to preliminary injunctions and similar relief, in the past, parties to arbitration agreements had to go to the courts for interim measures. Taking this action arguably jeopardized any future right to arbitrate the underlying dispute because some

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43 See AAA R-43(a); JAMS Comprehensive Arbitration Rules and Procedures, Rule 24(c).
courts have ruled that this operated as a waiver of the party's right to arbitrate under the agreement. Some domestic arbitral institutions have attempted to provide new alternatives for emergency relief. For example, the AAA provides “Optional Rules for Emergency Measures of Protection,” which permit appointment of one emergency arbitrator to hear applications prior to the appointment of the regular arbitral panel.\textsuperscript{44} The emergency arbitrator has the power to make interim awards upon a showing of immediate and irreparable loss or damage.\textsuperscript{45} However, because these are optional rules, the arbitration agreement must identify these rules before the AAA will apply them.\textsuperscript{46}

\textbf{Fees \& Expenses:} Because arbitrations often entail significant outlays for fees and expenses, arbitration agreements should expressly address the allocation of such costs. The default rules for JAMS, for example, provide that the parties will pay their \textit{pro rata} share of fees and expenses.\textsuperscript{47}

The default rule in international practice is that the arbitral tribunal has the power to allocate costs, and the prevailing party will be awarded at least some (but rarely all) of its costs of arbitration. For example, Article 31(3) of the ICC Rules provides: “The final Award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.”\textsuperscript{48} The UNCITRAL Arbitration Rules address the topic in more detail:

1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

\textsuperscript{44} \textit{Available at} http://www.adr.org/sp.asp?id=22440#A10.

\textsuperscript{45} \textit{See id.}

\textsuperscript{46} \textit{See id.} Moreover, for international issues, \textit{see} the ICC Rules, art. 23; ICDR Rules, art. 21; LCIA Rules, art. 25; and the new Article 37 of the ICDR Rules, which provides for emergency measures of protection by an emergency arbitrator.

\textsuperscript{47} JAMS Comprehensive Arbitration Rules and Procedures, Rule 31(a).

\textsuperscript{48} \textit{See also} ICSID Additional Facility Rules, \textit{available at} http://icsid.worldbank.org/ICSID/StaticFiles/facility/AFR_English-final.pdf.
2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.49

If the arbitration agreement does require the shifting of fees and expenses to the losing party, one may encounter limits on enforceability. For instance, JAMS Comprehensive Rules 24(f) and 31(c) state that a prohibition on allocating expenses and fees may not limit the power of the arbitrator to allocate JAMS arbitration fees and arbitrator compensation and expenses, for which the parties are jointly and severally liable.

Moreover, an arbitration agreement specifying fee shifting for the arbitration, or setting forth the underlying law of the arbitration, does not necessarily apply to the confirmation or enforcement of the arbitral award by U.S. courts. Unlike many foreign jurisdictions, when faced with a claim for attorneys’ fees, U.S. federal courts follow what is aptly known as the “American rule.” This rule is simple: the prevailing party is not entitled to collect attorneys’ fees from the losing party absent contractual obligation, statutory authorization, or a finding that the losing party has acted vexatiously or in bad faith.50 The U.S. Congress has accepted the “American rule,” and has made specific provisions allowing attorneys’ fees under selected statutes granting or protecting various rights.51

However, the FAA – which governs U.S. enforcement actions for international arbitral awards – does not provide for an award


50 Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 247, 257-59 (1975). In 1796, the U.S. Supreme Court ruled that the Judiciary would not create a general rule – independent of statute – allowing awards of attorneys’ fees in federal courts. Id. at 249-50 (citing Arcambel v. Wiseman, 3 U.S. 306 (1796)). Since that time, more than two hundred years ago, the Court has not changed course. See, e.g., F. D. Rich Co., Inc. v. United States ex rel. Industrial Lumber Co., Inc., 417 U.S. 116, 126-131 (1974); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717-718 (1967).

51 Alyeska, 421 U.S. at 259-60.
of attorneys’ fees in an enforcement action. Thus, there is no statutory authorization for a party to collect attorneys’ fees from an unsuccessful opposing party. If a party desires to collect attorneys’ fees due to an opposing party’s unsuccessful attempt at opposing U.S. enforcement proceedings, one must include an appropriate arbitration provision in the contract. This may deter enforcement delays that do not rise to the level of vexatiousness or bad faith (e.g., frivolous oppositions to enforcement including oppositions meant to simply delay payment).

G. Identify Limitations of Grounds for Vacatur

Parties in the domestic and international spheres can contract to alter grounds for vacatur of arbitral awards, but generally only for the purpose of restricting – rather than expanding – statutory rights to vacatur. The FAA provides for expedited judicial review to confirm, vacate, or modify arbitration awards in U.S. courts. The FAA provides, in relevant part:

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

52 9 U.S.C. § 1 et seq.

53 Id. §§ 9-11.
(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.54

In Hall Street Assocs. v. Mattel, Inc., the Supreme Court addressed the exclusivity of the grounds for vacating arbitral awards under the FAA.55 The parties agreed in their arbitration provision that U.S. courts could vacate, modify or correct any award for legal error. However, the Court declined to enforce that agreement because the FAA does not allow parties to expand the grounds for vacatur beyond those listed in 9 U.S.C. § 10.56

Hall Street pertained to domestic arbitration between U.S. parties. Thus, the Court had no reason to address “the application of [its] holding to international commercial arbitrations.”57 However, since an international commercial arbitration conducted in the U.S. would be governed by the FAA,58 the reasoning in Hall will apply equally to such arbitration. Thus, as with other mainstream arbitration laws, arbitration provisions can restrict – but, under Hall Street, cannot expand – the statutory ground for vacatur set forth by the FAA.59

III. Conclusion

To ensure the advantages all parties look for in international and domestic arbitrations, arbitration provisions must be well thought-out and carefully drafted. Such provisions require the consideration and inclusion of many topics, including those

54 Id. § 10.
57 Id.
59 Certain national laws permit parties to exclude recourse against the award under certain circumstances, see, e.g., Swiss PIL Statue, art. 192, while others stipulate rules for recourse against the award that cannot be altered or waived, see, e.g., French Code of Civil Procedure, arts. 1501-1507.
discussed above. The best arbitration clause is one designed with prospective disputes in mind, an understanding of what is important for the client – both in terms of the process and the outcome – and an allowance for the limitations and restrictions placed on the process by governing courts and administering institutions.

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