

# ICC Dispute Resolution Services



## Arbitration Clauses

**PALU – ALSF Capacity-building Project on  
International Commercial Law in Africa**

**Regional Seminar for the Southern Africa**

**25 -27 May 2011**

**Cape Town, South Africa**



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## The ICC's history and purpose

- The ICC was established in 1919 out of the ashes of the First World War. Its founders called themselves “the merchants of peace”. They believed that by fostering international commerce they could promote friendly relations between nations.
- The ICC is a nongovernmental organisation. It is neutral and independent and an active voice of the business community. It is actively involved in a great many important issues that affect trade relations: climate change, the Doha round, counterfeiting and Intellectual Property protection, anti-corruption initiatives and advertising standards, to name but a few.



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- Very early in the ICC's inception and central to its philosophy was, and remains, the belief that an effective method of dispute resolution is necessary to facilitate trade. In 1923 the ICC created the International Court of Arbitration to administer international disputes. Since then the Court has administered over 17000 cases, from all parts of the world.



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**Why use arbitration as a method to resolve disputes of an international character?**

- *Final, binding decisions*
- *International recognition of arbitral awards*
- *Neutrality*
- *Specialized competence of arbitrators*
- *Speed and economy*
- *Confidentiality*



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## key issues and common pitfalls when drafting arbitration clauses

- **What are the provisions to look out for in every arbitration clause?**

Should you choose ad hoc or institutional arbitration?

Advantages of institutional arbitration

- Certainty in drafting
- Taking care of fundamentals
- Without recourse to the courts
- Control of costs
- Knowledge of arbitrators
- Keeping the process moving



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## The services an institution may offer are exemplified by the role of the ICC Court

- the ICC Court will, as necessary:
  - (i) determine whether there is a *prima facie* agreement to arbitrate;
  - (ii) decide on the number of arbitrators;
  - (iii) appoint arbitrators;
  - (iv) decide challenges against arbitrators;
  - (v) ensure that arbitrators are conducting the arbitration in accordance with the ICC Rules and replace them if necessary;
  - (vi) determine the place of arbitration;
  - (vii) fix and extend time-limits;
  - (viii) determine the fees and expenses of the arbitrators; and
  - (ix) scrutinize arbitral awards



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## The distinctive characteristics of ICC arbitration

- the ICC method of designating arbitrators
- Professional monitoring of procedure by the court and its secretariat
- Control of all financial aspects of the case
- Scrutiny of the award



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## Scope of the arbitration clause

### ICC Model Clause

- “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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## Typical wording

- “**claim**”, “**differences**” and “**disputes**”: confer the widest jurisdiction on arbitrators even over extra-contractual claims
- “**arising out of**” –this usually includes all claims which could be submitted to arbitration, save for disputes about whether the contract was ever made;
- “**arising under**” – was until recently given a more restricted meaning so as to exclude extra-contractual disputes. However, now, at least in international contracts, it has the same meaning as “.



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- “**in connection with**” – is now given a wide interpretation and covers tortious claims connected with the contract, rectification and misrepresentation;
- “**in respect of**” and “**with regard to**” – are also generally given a wide interpretation.

To avoid later disputes, expressly state whether or not the tribunal has jurisdiction over questions regarding ***the existence, validity or termination*** of the agreement



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## What if there are more than two parties or more than one contract (multi-party, multi-contract arbitration)

Particular Attention shall be given to the:

- Appointment of the Arbitral Tribunal
- Joinder and intervention of third parties
- Compatibility of clauses (multi-contract cases)
- Possibility of consolidation (multi-contract cases)



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## Arbitrators

- How many arbitrators?
- What kind of arbitrator?
- What method of appointment?

- ICC Model Clause:

“All disputes arising out of or in connection with the present contract shall be finally settled...***by one or more arbitrators appointed in accordance with the said Rules.***”



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## Procedural law, the seat and court intervention

- What law governs the arbitration proceedings?  
the law of the seat of arbitration
- How do I choose the seat of the arbitration
  - \* Is the seat “arbitration-friendly”?
  - \* How much can the court supervise or interfere?
  - \* Is the seat member of the New York Convention on the Recognition and Enforcement of the Arbitral Awards (1958)?



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## Practical factors:

- Are there likely to be qualified arbitrators?
- Will there be suitable venue for the proceedings?
- Where are the witnesses and documents based?
- Are costs likely to be prohibitive?



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## The rules that govern the arbitration

- What arbitral rules should I choose, if any?
- Should I draft my own rules?
- What if I choose arbitration, but do not specify the rules?
- What about costs?
- Should I provide for a timetable or time limits?
- Do I need to choose a language for the proceedings?



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## The drafting of arbitration clauses: Recent issues in ICC cases

### Drafting problems may result from

- Inexperienced drafters
- Translation or language problems
- The use of a form of contract which have not been adapted to the specific transaction
- The growing complexity of international business transactions and the increase of multiparty and multicontract situations.



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## Did parties agree on arbitration?

- Cases providing for both state court jurisdiction and arbitration
- Cases which refer to arbitration and other forms of dispute resolution in an incompatible manner
- Cases which may be considered to render arbitration optional



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## Cases providing for both state court jurisdiction and arbitration

Conflict jurisdiction due to a poor drafting:

1/ “the Rules of Conciliation and Arbitration of the International Chamber of Commerce”. However the same contract included a clause entitled “Competent court” which stated “Any dispute arising out of or in relation to the Contract shall be settled solely by the court of law of the seller , however, notwithstanding the provision hereinabove, the seller shall be entitled to take legal proceedings at the court of law of the buyer”.



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**2/ “all disputes would be finally settled in accordance with the Rules by the court at the place of residence of the claimant”.**

The respondent did not answer or participate. The ICC Court took a positive Article 6(2) decision and sent the case to an arbitral tribunal. At the same time, the ICC Court fixed the city of the Claimant’s residence as the place of arbitration.



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3/ A clause stipulating that disputes should be submitted to arbitration in Paris, France under the Rules of the Paris International Chamber of Commerce Arbitration.

The same clause continues further: **“Any dispute shall fall within the exclusive jurisdiction of the French courts and only the laws of France shall be applicable”** Interestingly the respondents in this case objected to jurisdiction, but requested that the jurisdictional issue be dealt with by the arbitral tribunal.

The ICC Court allowed the matter to proceed.



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- Conflict jurisdiction due to reference to standard contract conditions

In one case, the agreement provides :

**«the court of jurisdiction for all disputes arising directly or indirectly from the contractual relationship in the responsible court for the place of business of (the respondent) ».**

The agreement subsequently stated that **« the FIDIC containing an ICC arbitration formed an integral part of the agreement ».**



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- Conflict jurisdiction in Multicontract cases
- In a multicontract case, the Claimant introduced a Request for Arbitration on the basis of two contracts. One contract provided that **the Mexican State Courts had jurisdiction**. The other submitted all disputes to **ICC arbitration**.

The respondents objected to the matter being set in motion by the ICC court. The Claimant thereafter modified their Request and specified that their claims were based only on the agreement including the ICC Clause. The ICC court set the matter in motion, leaving it to the arbitral tribunal to decide which clause should prevail.



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- In another matter, parties from USA and Philippine entered into a contractual relationship based on a series of documents which provided for **exclusive** jurisdiction of the Philippine State Courts as well as an amendment which contained a FIDIC clause providing for ICC arbitration.



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## Cases which refer to arbitration and other forms of dispute resolution in an incompatible manner

1/ In a Brazilian case, a clause provided :

*“In case of a dispute not being able to be settled ...both parties agree to try to come to a solution by a **mediator /arbitrator** chosen from the **International court of arbitration in Paris, France** and acting under the Regulations International court of arbitration in Paris, France”;*

the respondent in this matter argued that there was no binding agreement to submit disputes to arbitration as the clause indeed referred to a mediator/arbitrator. The ICC Court left it to the arbitral tribunal to determine the parties' intention when drafting this contract.



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- Another confusingly drafted clause provided: if for any reason **mediation** by a third party is required to **arbitrate** a Purchase Order dispute, the precise mechanism utilised during the **mediation** shall be the International Chamber of commerce **Rules of arbitration**, the site of **arbitration** shall be London, England.”
- In another case, the clause provided that the parties must submit their dispute to **arbitration**, but if the matter did not **settle**, they would be required to proceed to **Mexican courts**. This case illustrates a misunderstanding in the parties’ minds as to what arbitration is, as they seemed to liken it to a form of mediation or conciliation preceding state court action.



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- In one case , the clause provided:
  - « ...disputes shall be subjected to **mediation** in accordance with the ICC Rules of arbitration and conciliation in Paris. The Arbitration Court shall consist of three representatives nominated in the following way: each contractual partners shall nominate one of their mediators, who will nominate by their own the third mediator. The **Arbitration court** gives their judgments by majority of votes. The **seat of arbitration** court is in Paris.



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## Cases which may be considered to render arbitration optional

***“In the event of any dispute...the Parties shall undertake to make every reasonable effort to reach an amicable settlement. Failing any such settlement, a controversy or claim arising out of or relating to this Subcontract may be finally settled by arbitration...”***

the respondent raised objections, arguing that the language of the arbitration clause indicated that the parties had retained the possibility of choosing between either arbitration or litigation to resolve their disputes. In addition, there were related state court proceedings taking place before a US Court.



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2/ In a similar matter the clause provided:

“All disputes arising in connection with the present contract **may, by agreement of the parties**, be submitted to arbitration and be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce...”



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3/ In different case the arbitration clause reads as follows:

***« In the event the parties shall decide that any disputed matters arising out of or related to the contract shall be resolved by arbitration, such disputes shall be determined by arbitration »***

In subsequent court action, a US Federal Court decided that there was no requirement for respondent to accept to arbitrate because claimant did not have a unilateral right to compel arbitration. The district Court held that the arbitration clause was optional.



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4/ In a contract both in English and Spanish:

Spanish version: « **all disputes arising out of the said Agreement may be settled by arbitration... »**

English version: « **all disputes arising out of the said Agreement will be settled by arbitration... »**

5/ Another matter:

« **the ruling Court of disputes arising out of this contrat shall *the District Court* in matters relating to services by respondent and in case of disputes related to services by claimant shall be *an international court of arbitration well established in international construction disputes.*** »



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## Is there an arbitration agreement under the ICC Rules of Arbitration?

- No reference or incorrect reference to the ICC
- Inexact reference to the ICC Rules of Arbitration
- Mixing of arbitral institutions and rules



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## No reference or incorrect reference to the ICC

In some cases, despite the incorrect reference to the institution, the parties do not object to an ICC proceedings. Thus, for example, in a case where the clause provided for dispute to be submitted to the “**Arbitral Tribunal of Paris**”, the parties did not raise any objection. Often, however, when there is an inaccurately drafted clause, there will be an objection.

Also, the ICC Court will have to examine the clause if there is non-participating party.

Another case: « Arbitration in international Court situated at **Paris/Geneva/London/Hague.** »



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1/ The clause in one case provided that any dispute **“shall be submitted to and settled by arbitration in the City of New York, in accordance with the rules of the Chamber of Commerce.”**

The respondent objected to jurisdiction. As there was no Chamber of Commerce located in New York which administered arbitration, the ICC Court accepted jurisdiction under Article 6 (2).

2/ Another case: « all disputes shall be finally settled under the Rules of conciliation and arbitration of the **European Chamber of Commerce** »



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3/ “Any dispute arising out of this contract shall be referred to Arbitration at London and shall be subject to the law and procedures applicable there”. The respondents objected, alleging that there was no agreement to refer disputes to ICC arbitration. The ICC Court decided that this matter would not proceed and applied a negative Article 6 (2) decision.

4/ Clauses may refer to “**ICC, Paris**” or “**International Chamber of Commerce, Paris**”. In such cases, it is not certain whether the parties included Paris to identify the institution or to indicate the place of arbitration. When this occurs, the ICC Court’s practice is to request comments from the parties. If any party asserts that the intention of the drafters was that Paris would be the place of arbitration, the ICC Court will generally fix Paris as the place of arbitration.



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## Inexact reference to the ICC Rules of Arbitration

- 1/ A clause provided that the parties would submit their disputes to the **“Reconciliatory and Arbitration Regulations of the International Chamber of Commerce, Geneva”**.
- 2/ Another clause stated that the arbitration would take place **“in compliance with the rules of the consolation and arbitration of the International Chamber of Commerce”**.
- 3/ In one case, the clause referred to the **“regulations of the International Chamber of Commerce”** without further precision.
- 4/ In one case, the clause stated **“Any dispute arising under this agreement shall be settled by referring the same to an arbitrator appointed in accordance with the rules of conciliation and arbitration of the International Chamber of Commerce...”**



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## Mixing of arbitral rules and institutions

1/ “Disputes shall be submitted to the Singapore International Arbitration Center for arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce...”

2/ “...either party may elect to submit the controversy for final or binding arbitration to the International Arbitral Centre of the Hong Kong Chamber of Commerce...ICC rules will apply”.

3/ “If disputes cannot be settled, then the parties agree to arbitration with either: a) International Chamber of Commerce, (ICC) Paris, or b) The American Arbitration Association of New York, New York, United States of America at Buyers’ option with arbitration to be under the rules of the ICC.”



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4/ Certain parties indicate that they wish to have ICC arbitration, but administered by their local or regional arbitration center. These parties do not seem to be aware that only the ICC Court can administer cases under its Rules. This results from the obligatory role played by the ICC Court and its Secretariat in the administration of the Rules.

5/ “Disputes shall be submitted to the Singapore International Arbitration Center for arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce...”



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## Q&A

## THANK YOU



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