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Key Considerations in Drafting The Dispute Resolution Clause in an International Construction Contract

by

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1:0 Introduction

This paper discusses some key considerations to have in mind when drafting and negotiating a dispute resolution clause in an international construction contract. The premise underlying the paper is that parties have agreed to "arbitrate" their disputes, as opposed to "litigate" in a local or foreign court system. The paper outlines the fundamental or core provisions in a dispute resolution clause (i.e., those that are needed to ensure the dispute is arbitrated), and highlights several key additional provisions that can tailor the arbitration process to the parties' needs. Finally, the paper comments on the utility of Dispute Resolution and Adjudication Boards on major construction projects.

1:1 Contract Negotiations and the Dispute Resolution Clause

Negotiating a contract for a major construction project can be a huge task. It can take months of give and take to come to terms on key provisions such as the scope description, contract price, payment terms, schedule guarantees, payment and performance security, liquidated damages, change order regime, insurance requirements, and termination rights, just to name a few. On top of these basic terms, contract negotiators are often faced with several layers complex related agreements that need to be negotiated with the same level of detail and attention, including joint venture agreements, major subcontracts or equipment purchase orders, and project finance agreements. A contract for an international construction project adds even more layers of complexity, as the contract negotiator must address local law issues, including the enforceability of the contract provisions negotiated, local content or agency issues requirements, and import

and export regulations. Most would agree that a critical provision in each of these agreements is the dispute resolution clause – and just as many might also agree that this provision does not get the detailed attention it deserves.

Several theories might explain that perceived lack of attention. One is human nature. Two parties are embarking on a new enterprise, negotiating the details of what project will be built and how, appropriately focusing on how to make the project successful, and there can be a natural reluctance to discuss the possibility that the parties cannot resolve a future dispute. Another explanation for the perceived lack of attention is the parties' unwillingness to spend "negotiating capital" on the dispute resolution clause. For example, as the negotiations wind down to the short list of open issues, a negotiator faced with the prospect of receiving a more favorable term in the change order clause, in exchange for less favorable term in the dispute resolution clause, might reasonably accept that deal. Yet another reason is that the parties may have been faced with a contentious logjam or impasse over the basic jurisdictional question whether disputes will be resolved in "local court" or in "arbitration." It is not hard to imagine a scenario where, after a protracted negotiation, the local party concedes that the dispute resolution procedure will be arbitration, the foreign party declares "victory," and agrees to arbitrate under an ambiguous and unfavorable arbitration provision, with the hope that it will be better than litigating in the local court system.

Assuming the parties have agreed to arbitrate their international dispute, this paper offers some observations on the basic or fundamental parts of the arbitration clause, and highlights several additional provisions that should be considered. This paper is not

intended to be a detailed "how to" guide to drafting such clauses, and as such does not dwell on the basic principles. Rather, the paper is intended to offer some practical considerations and strategies in developing an effective and efficient dispute resolution process.

2:0 Basic or Fundamental Provisions

Much has been written on drafting enforceable arbitrations clauses, and the significant arbitration institutions have published model clauses. There is general consensus among the major international arbitration institutions that the following fundamental provisions need to be present: (1) the agreement to arbitrate; (2) the rules to be applied, assuming the arbitration is institutional; (3) the seat of the arbitration; (4) the number and selection process for the arbitrators; (5) the language to be used and the law to be applied; and (6) the finality and judgment on award.[1] Each of these is discussed below.

2:1 Agreement to Arbitrate

The first fundamental principle is well-known: the contract must clearly establish that the parties have agreed to submit their disputes to arbitration. An example of such a provision is: *"Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the [INSTITUTION] in accordance with its [RULES]."*[2] This simple provision is essential.

2:2 Arbitration Rules

Although parties are free to create their own *ad* hoc rules for arbitrating disputes, this paper assumes the parties have agreed to refer the matter to an established institution and its rules. In a contract lengthy negotiation process, it may be helpful to discuss and negotiate about the selection of the proper institution and arbitration rules, which will result in a shortened arbitration clause, incorporating rules by reference for the details best practices as to both basic procedure and arbitrator selection. There are many international institutions and rules to choose from, and it is advisable to select well-established and more familiar institutions as their procedures are known and well-established, and their rosters of qualified arbitrators are more extensive than smaller, lesser-known institutions.

By way of example, this paper will comment on certain aspects of the rules of three well-known institutions, the ICC, the ICDR and the LCIA:

- Rules of Arbitration of the International Chamber of Commerce (" ICC"). The ICC Rules are well-known in the international construction community, and may be perceived as more acceptable in certain regions than other rules. For example, for projects in Latin America, parties may be more familiar with and more comfortable selecting the ICC Rules. The ICC Rules proscribe more administrative involvement by the ICC, including the preparation of "Terms of Reference" prior to hearing and scrutiny of draft awards before they are released to the parties. These additional steps can reduce the incidence of difficulties in confirmation and enforcement of ICC awards, but can in part result in more expensive arbitration. ICC fees are based on the amount in controversy.[3]

- Rules of the International Centre for Dispute Resolution ("ICDR"). The ICDR is the international division of the AAA and is responsible for administration of all of the AAA's international matters, and also serves as the default appointing authority in those matters. While not identical to AAA domestic arbitration, the ICDR is familiar enough to U.S.-based parties to be an attractive alternative to the LCIA or ICC for international disputes. The ICDR requires a small payment up front and subsequent payments based on the number of hearings and other tasks that may need to be performed by the ICDR. The arbitrators' fees are usually based on an hourly or daily rate.[4]

- Rules of the London Court of International Arbitration ("LCIA"). The LCIA Rules provide administered arbitration, but with little involvement by the administrator. The LCIA's schedule of costs provides administrative fees based on tasks performed, and arbitrators' fees based on a capped daily or hourly rate rather than on the amount in controversy, which may result in lower costs than ICC arbitration.[5] Where the amount in controversy is high (and therefore likely to translate into higher costs under the ICC model), the LCIA provides a good alternative.

2:3 Seat of Arbitration

Perhaps the most important aspect of an arbitration clause is the choice of the seat. This decision will affect not only the enforceability of an award, but also the procedural aspects of the arbitration itself.

Because many countries will not enforce an arbitral award if the seat of arbitration is not in a state party to the New York Convention, it is essential to consider where an arbitral award may ultimately need to be enforced (i.e., where the counterparty may have assets), and to the extent possible, to choose a seat of arbitration that maximizes the likelihood of successful enforcement. In addition, some countries are known to undertake more thorough review than others of arbitral awards issued within their jurisdiction. These countries should generally be avoided, because the review process may delay enforcement of an award, or less commonly, may result in the award being vacated for reasons that would not have been recognized in another country.

In addition to enforceability concerns, mandatory procedural rules of the legal seat of the arbitration cannot be overcome by agreement of the parties or by rulings of the arbitrators. Before drafting an arbitration clause and selecting the seat of an arbitration, counsel should therefore consult with arbitration specialists familiar with the arbitration law of the proposed seat of arbitration to ensure that that law will not hinder arbitration of disputes that may arise under the contract. It is also important that the arbitration clause

It is no surprise that the preferable and safe seats of arbitration include New York, Paris and London. Each of these cities is the headquarters of a major arbitral institution (AAA/ICDR, ICC and LCIA, respectively) and has a strong international arbitration bar. All three countries are parties to the New York Convention, and all have strong arbitration laws that support party autonomy and discourage judicial intervention. When a counter-party is not willing to agree to arbitration in New York, Paris or London, other seats must be considered carefully, applying the touchstone standards above: Is the award

enforceable and effective, and will the arbitration proceed as expected? Some acceptable regional seats may – subject to appropriate due diligence for the particular matter – include Miami, Mexico City, or Sao Paulo for Latin America, and Hong Kong and Singapore for Asia/Pacific region.

2:4 Arbitrators

The arbitration clause should state the number of arbitrators (one or three), and if the clause does not specifically describe how the panel will be selected, the rules chosen will ordinarily provide an acceptable procedure for selection. Parties may wish to designate the number of arbitrators based on the amount in dispute. For example, for a dispute in which the amount in controversy ["X"] or less, the arbitration will be conducted by a single arbitrator, and for a dispute in excess of ["X"] the arbitration will be conducted by a panel of three arbitrators. In most cases, the rules chosen will expressly provide that arbitrators shall be independent and impartial.[6] This standard applies to an arbitrator nominated by a party as well as to an arbitrator appointed by an institution. The rules selected often contain provisions relevant to questions of nationality and independence.[7] Finally, most rules also prohibit *ex parte* communications with the arbitrators,[8] but the ICC Rules are silent on the issue, so consideration should be given to adding an appropriate provision.

2:5 Applicable Law and Language

Although not necessary for an arbitration provision to be enforceable, it is advisable for the arbitration to specify the language in which the arbitration will be conducted (it

may not necessarily be the language of the contract) and the law governing the contract and subsequent disputes.[9]

2:6 Finality and Judgment on Award

Although most rules provide that arbitral awards are final and binding on the parties, it is good practice to include language to that effect as a safeguard, and is necessary to simplify jurisdiction in any enforcement action in the United States under the Federal Arbitration Act. For example, it is recommended that the clause should include a simple statement that the award shall be "final and binding on the Parties," together with, *"[J]udgment on the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof."* [10] Enforcement jurisdiction should generally be a simple matter in those countries that have ratified the New York Convention. In some instances, the applicable law in some countries, including the United States, can lead to disputes over jurisdiction and venue for the enforcement of awards. Including in the arbitration clause language similar to that above may avoid additional future litigation over enforcement issues.

3:0 Additional Arbitration Provisions to Consider

In addition to the fundamental arbitration provisions discussed above, parties should also consider addressing the following questions in their arbitration clauses:

(1) Joinder and Consolidation – Are there related contracts on the project, likely to generate related disputes, such that provisions for joinder or consolidation should be included?

(2) Discovery – Should specific forms of discovery be provided for, or limited, or excluded altogether?

(3) Costs – Should a clause requiring the parties to share, or the prevailing party to pay, the costs of the arbitration be added?

(4) Confidentiality – Should the clause expressly mandate confidentiality of the arbitration proceedings?

These specific issues are addressed below

3:1 Joinder and Consolidation

Depending on the role a party plays on the construction project (owner, prime contractor, architect/engineer, subcontractor/supplier), it will generally have a different view as to whether related disputes involving other related parties should be heard and determined by a single panel of arbitrators. A prime contractor, for example, may feel it is important to have a related controversy involving the owner and a supplier resolved all in one proceeding (to avoid the risk of inconsistent adverse decisions). An owner, however, may want to have the option – at its discretion – to allow such a multi-party proceeding.

As a matter of first principles, the arbitrators have no power to consolidate a number of related arbitrations into a single arbitration unless all parties have consented, and most sets of arbitration rules do not allow joinder of nonparties without at least the consent of the party to be joined. The recent amendments to the ICC Rules provide for joinder and consolidation, in certain circumstances. However, even these amended ICC

Rules will not usually allow a dispute among a prime contractor, an owner and one or more subcontractors to be brought before a single tribunal, absent consent, if all parties are not signatories to a single arbitration provision. As a result, if a party wants to provide for consolidated arbitration, one or both of the following provisions should be inserted in ALL of the related contracts.

An example of a clause permitting joinder is:

"Any Party to an arbitration proceeding may join as a party to that arbitration proceeding any party who is a Party to this agreement or to [related agreements], to afford that party an opportunity to defend against any claim set forth in that arbitration or to assert against a party a claim that is substantially related to the claims or disputes at issue in the arbitration. Such joinder or intervention shall be made within [30 days] from the commencement of the arbitration. If any party so requests within [30 days] after joinder, the tribunal shall decide whether the joinder is admissible under the terms of this clause and of any other relevant arbitration agreement, and whether and to what extent any related arbitration proceedings between contracting parties shall be discontinued in the interest of efficiency."

An example of a clause permitting consolidation is:

"In order to facilitate the comprehensive resolution of related disputes, and upon the request of any Party to an arbitration proceeding, the arbitral tribunal may consolidate the arbitration proceeding with any other arbitration proceeding involving any of the Parties relating to this agreement or to [related agreements]. The

arbitration tribunal shall not consolidate such arbitrations unless it determines that (i) there are issues of fact or law common to the two proceedings so that a consolidated proceeding would be more efficient than separate proceedings, and (ii) no Party would be prejudiced as a result of such consolidation through undue delay or otherwise. In the event of different rulings on this question by the arbitration tribunal constituted hereunder and the tribunal constituted under [the related agreement], the ruling of [name one panel] shall control."

In addition to getting a series of agreements in place where all the parties consent to the multi-party arbitration proceeding, it will also be necessary to specify the methods for selecting the arbitrators in that multi-party proceeding. Where one contract is primary, it is typically preferable to provide that the arbitration tribunal shall be the tribunal constituted under the primary contract. Alternatively, the agreement may provide that the arbitral institution or appointing body shall appoint all three arbitrators.[11]

3:2 Discovery

Usually, the Rules chosen will contain general provisions with respect to discovery and production of documents or provide that such discovery and production shall be made in accordance with the rulings of the arbitration tribunal.[12] Because the Rules are general and do not describe the mechanisms for the taking of evidence, in some instances, it may be a good idea to consider specifying in the arbitration clause how discovery is to be conducted. Generally speaking, it is difficult to anticipate the precise contours of a dispute – and whether a party would benefit from narrow or expansive discovery – so the safe decision may be to rely on general rules, which will provide broad latitude for discovery

strategy to be determined in the context of an actual dispute, with the tribunal available to decide issues that parties cannot resolve.

On occasion it may be possible to anticipate the nature of any disputes, such that it would be advisable to prescribe the extent of discovery in the contract. In some contracts, for example, the counter-party may be most likely in possession of the relevant documents, so broad discovery may be advantageous (or vice versa). Or, the documents necessary to establish each party's case may be in a jointly managed project file system, to which both parties will have access. In such instances, it may be advantageous and more cost effective to preclude discovery altogether.

The agreement may be crafted to limit the universe of discoverable documents to the contents of a defined "project file system," or provide that documents outside that universe are discoverable only upon a showing of need. For example:

> *"All documents contained in the [Project File] shall be available to both Parties. The arbitration tribunal shall not order the production of documents other than those contained in the [Project File] except upon a showing by the requesting Party that: (i) the documents requested are material to the outcome of the case; (ii) the documents requested are not in the possession, custody or control of the requesting Party; and (iii) there is good cause to believe that the documents requested are in the possession, custody or control of the other Party."*

If more general discovery is desired, particularly in the interest of keeping the arbitration clause concise, it may be preferable to incorporate by reference to an existing

set of rules. The International Bar Association Rules on the Taking of Evidence in International Arbitration (the "IBA Rules") contain provisions on the production of documents and valid objections against a request to produce,[13] which seek to provide a good balance between the narrow civil law and the broader common law approach to document production. They require the parties to exchange documents on which they intend to rely, as well as to produce documents identified by the other side, subject to considerations of privilege, burdensomeness and fairness, if they are relevant to the case and material to its outcome. Inclusion of these provisions into an arbitration clause gives the parties sufficient advance knowledge of the procedure which needs to be followed, the conditions which must be fulfilled to obtain an order by the arbitration tribunal for the production of documents, and valid objections available to protect the legitimate interests of the requested party not to produce. Depositions are rarely permitted or appropriate in international arbitration, and are not contemplated under the IBA Rules. The IBA Rules were revised in 2010 to provide enhanced guidance on electronic document discovery, the role of the tribunal in document production, and the considerations underlying privilege determinations.

It may also be advisable to define or limit the scope of electronic discovery where the parties have provided for it or in circumstances where it may otherwise be available. One such approach is by reference to the Chartered Institute of Arbitrators' Protocol for E-Disclosure in Arbitration,[14] which is intended to achieve early consideration of electronic discovery issues, especially in cases where electronic discovery is necessary in order to define and resolve such issues at an early stage, and to provide a set of guidelines for dealing with electronic discovery. An example of a clause to this effect is as follows:

> *"When documents to be exchanged are maintained in electronic form, such production shall be in accord with the Chartered Institute of Arbitrators' Protocol for E-Disclosure in Arbitration, as amended by this Agreement. The Parties shall meet and confer to agree upon the list of custodians from whom electronic data will be collected, which number of custodians shall not exceed ["X"] per Party, except for matters in which the amount in controversy, exclusive of interest and costs, exceeds ["Y" MONETARY AMOUNT], in which case the number of custodians will not exceed ["Z"] per Party. Disclosure will be limited to relevant and material information created between the date of the signing of the Agreement and the date of the filing of the demand for arbitration (except to the extent that the tribunal orders information created prior to the date of signing to be disclosed), or such narrower date range as agreed by the Parties or ordered by the tribunal. Only active data from primary storage facilities will be subject to disclosure. No information is required to be disclosed from back up servers or back up tapes, nor from cell phones, PDAs, voicemails or similarly remote data."*

3:3 Costs

The general rule in international arbitration is that costs are borne by the losing party, or allocated among the Parties by the tribunal.[15] Because most parties to international construction arbitration are familiar with this rule, and because it may serve as a minor incentive towards settlement and deterrent to litigating weak claims, it is recommended that this general rule be followed. The following language may be used to ensure that this general rule is applied in jurisdictions (particularly the United States) where a different rule may be prescribed by local law: *"The arbitrators shall award to the prevailing party its costs and expenses, including its reasonable legal fees and other costs of legal representation, as determined by the arbitrators."*

3:4 Confidentiality

Some, but not all, institutional rules specifically provide that the arbitration is confidential, and the parties must treat it as such. The LCIA Rules, for example, provide that arbitration proceedings are confidential unless the parties otherwise agree.[16] The ICC Rules and ICDR Rules include provisions requiring the institution to keep certain matters confidential.[17] If the parties desire to preserve the confidentiality of the arbitration, it is recommended to include an express provision to that effect. The following clause preserves confidentiality while providing for an exception that allows for disclosure of the award to the extent that disclosure is necessary to enforce rights arising out of the award.

> *"The Parties, any arbitrator, and their agents, shall keep confidential and not disclose to any non-party the existence of the arbitration, all non-public materials and*

information provided in the arbitration by another Party, and orders or awards made in the arbitration (together, the "Confidential Information"). If a Party wishes to involve in the arbitration a non-party – including a fact or expert witness, stenographer, translator or any other person – the Party shall make reasonable efforts to secure the non-party's advance agreement to preserve the confidentiality of the Confidential Information. Notwithstanding the foregoing, a Party may disclose Confidential Information to the extent necessary to: (1) prosecute or defend the arbitration or proceedings related to it (including enforcement or annulment proceedings); (2) respond to legitimate subpoena, governmental request for information or other compulsory process; (3) make disclosure required by law or by rules of a securities exchange; or (4) seek legal, accounting or other professional services, provided that in each case that the recipient agrees in advance to preserve the confidentiality of the Confidential Information. This confidentiality provision survives termination of the contract and of any arbitration brought pursuant to the contract."

4:0 Dispute Review Boards and Dispute Adjudication Boards

A Dispute Review Board ("DRB") or a Dispute Adjudication Board ("DAB") is a panel established by contract to provide quick, typically binding resolution of the kinds of disputes that arise frequently in complex projects. Individual members of DRB/DABs are most often appointed at the beginning of a contract and are responsible for making regular site visits and keeping up to date with activities, progress, developments and problems at the site. Generally speaking, DRBs issue "recommendations" that are binding only if there

is no objection within a specified time, while DABs issue decisions that are immediately binding. Both are not final, in that they may be subject to further review, depending upon the institutional rules selected. DRBs and DABs are common in large construction projects, where many of the disputes that arise are amenable to preliminary decisions, but may also be appropriate for certain other complex, high-value projects, especially those that are expected to last for several years.

It is typically far more efficient to allow review of DRB/DAB decisions (for instance, in an arbitration) only at the end of a construction project, since multiple proceedings can be disruptive and disputes may dissipate with the passage of time. For longer term projects, however, it may not advisable to allow review only at the end of the project, since that may allow many years to elapse before a decision can be challenged; in such instances, providing for review at reasonable intervals (i.e., every one or two years during the contract performance) may be a workable solution.

One advantage of this model is that the DRB/DAB can be convened in the event of a dispute more quickly than an arbitrator or an expert can be appointed. However, the semi-permanent nature of such bodies means that they are expensive. Thus, in most cases, a DRB/DAB should be used only on construction projects involving significant sums of money, where required by the owner's own policies or applicable regulations, or where the owner is a public entity or otherwise operates in a highly regulated environment.

The question whether contracts that provide for a DRB/DAB should provide for mandatory negotiation or mediation before the DRB/DAB provisions can be invoked is a difficult one. The principal advantage of a DRB/DAB is its ability to reach a quick, binding

resolution of disputes that may interfere with the completion of the project or with payments due to a party; even limited periods of mandatory negotiation or mediation before a dispute may be submitted to the DRB/DAB can be counterproductive. In addition, many owners who want or require a DRB/DAB (in particular, public and semi-public entities) often face substantial obstacles in negotiating commercial settlements, but do not face the same obstacles in seeking to comply with a DRB/DAB recommendation or decision. On the other hand, many organizations are committed to the principles of attempting negotiation and resolution at an executive level prior to referral to a third party for decision, and may wish to require some form of negotiation meeting prior to referral.

Contracts that provide for a DRB/DAB should assign all disputes to the DRB/DAB. This minimizes the likelihood of a protracted dispute over whether an issue is to be referred to the DRB/DAB or the arbitrator, which could significantly delay resolution. Conversely, if the parties identify narrow areas of potential dispute that they do not want to be decided by the DRB/DAB, those should be defined explicitly in the contract.

The following sets of rules and procedures may be adopted by reference:

- American Arbitration Association ("AAA") Dispute Resolution Board Guide Specifications, Operating Procedures, and Hearing Rules and Procedures. The AAA procedures provide for a Dispute Resolution Board, the decisions of which (referred to as "Recommendation") are not binding, but are admissible in a later proceeding unless the parties otherwise agree. If the parties want to use AAA procedures but to have the Board render a binding decision, it will be necessary

to specify that in the contract. The AAA procedures set forth detailed timelines for pre-hearing submissions and for the Board's decision, including requiring that a Recommendation will be issued within 14 days of the hearing, which will ordinarily be held at the next site visit after the parties' initial submissions.[18]

- International Chamber of Commerce ("ICC") Dispute Board Rules. The ICC rules provide three options: a Dispute Review Board that issues "Recommendations" that become binding only if no party objects within 30 days; a Dispute Adjudication Board that issues binding "Decisions"; and a Combined Dispute Board that may do either, depending on the circumstances. The parties may provide for review of Decisions by the ICC before the DAB issues them. ICC Rules provide timelines for initial submissions, and also require that a Decision or Recommendation be issued within 90 days of referral of the dispute, or 120 days if the agreement provides for ICC review.[19]

Both sets of Rules above require that a Decision or Recommendation state the reasons for the decision. It is important to note that the AAA Rules allow for counsel to attend Board hearings, but unlike the ICC Rules, they expressly do not permit counsel to participate unless the Board finds that counsel would be helpful in resolving a particular dispute. In cases where ICC Rules are selected, parties may wish to make explicit that unless the Board determines that it would assist resolution of the Dispute, counsel may not examine witnesses, object to questions or evidence, or make motions or offer arguments during the hearing.

Set out below is a suggested DRB / DAB clause:

1. *The Parties hereby agree to establish a Dispute Adjudication Board ("DAB") [or a Dispute Review Board ("DRB")] in accordance with the [select rules] ("Rules"), except as they may be modified herein or by mutual agreement of the Parties. During the pendency of the Project that is the subject of this Agreement, any Disputes shall be referred to the [DRB/DAB] for determination.*

2. *[Disputes concerning [describe disputes excluded from Board determination narrowly and in detail] shall not be referred to the [DRB/DAB] for determination.]*

3. *The [DRB/DAB] will be comprised of three members, two to be nominated by each Party, with the third selected by the two nominated members in consultation with representatives of the Parties within [30 days] after execution of this Agreement by the Parties. The third member shall serve as the Chair. The [Owner] hereby nominates [name and/or title] and [Contractor] nominates [name and/or title] to serve as members of the [DRB/DAB]. [If the [DRB/DAB] requires a hearing to resolve a Dispute, the full board shall be convened to hear the matter if amount in controversy exceeds five hundred thousand dollars ($500,000.00); otherwise, the Chair will hear the matter alone.]*

4. *The decision of the [DRB/DAB] shall be binding on the Parties during the pendency of the Project and unless and until an Arbitration Award issued pursuant to Article [ ] of this Agreement modifies or annuls such decision. An arbitration seeking review of a [DRB/DAB] determination may be commenced only after completion of the Project that is the subject of this Agreement. An arbitration to compel a Party to comply with a determination of the [DRB/DAB] may be commenced at any time.*

5. *Any costs associated with the [DRB/DAB] shall be split equally between the Parties, except in the event of a proceeding to compel a Party to comply with a determination of the [DRB/DAB], in which case in the event the decision is enforced by the arbitration, the Party resisting compliance shall bear all costs associated with the related proceeding, including but not limited to reasonable attorneys' fees.*

5.0 Conclusion

The dispute resolution clause in an international construction contract is a critically important clause that can have a significant impact on a project's final measure of success.

Understanding the realities of contract negotiation, and at the risk of over-simplifying a complex issue, this paper has focused on what might be considered the key provisions to address in crafting a dispute resolution clause.

– End Notes –

[1] ICC Website (http://www.iccarbitration.org), Dispute Resolution Services, "Drafting the Arbitration Agreement," ICC Publication 810; ICDR Website (http:www.idcr.org), Clause Drafting Guidelines; LCIA Website (http:www.lica.org), Recommended Clauses.

[2] ICDR Website (http:www.idcr.org), Clause Drafting Guidelines.

[3] *See generally* ICC Website (http://www.iccarbitration.org).

[4] *See generally* ICDR Website (http:www.idcr.org)

[5] *See generally* LCIA Website (http:www.lica.org),

[6] *See* ICC Rules, Article 11; ICDR International Arbitration Rules, Article 7; LCIA Rules, Article 5.2.

[7] *See* ICC Rules, Article 13(5); ICDR International Arbitration Rules, Article 6(4); LCIA Rules, Article 6.

[8] *See* ICDR International Arbitration Rules, Art. 7(2); LCIA Rules, Art. 13.3.

[9] ICC Website (http://www.iccarbitration.org), Dispute Resolution Services, "Drafting the Arbitration Agreement," ICC Publication 810

[10] *See* AAA Website (http://www.adr.org), "Drafting Dispute Resolution Clauses, A Practical Guide" (2007).

[11] *See* ICC Rules, Articles 7-10; ICDR International Arbitration Rules, Article 6; LCIA Rules, Article 8.

[12] *See* ICDR International Arbitration Rules, Art. 19(3); ICC Rules, Art. 25(5); LCIA Rules, Art. 22.1(e).

[13] *See* IBA Rules on the Taking of Evidence in International Arbitration, (http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx), Articles 3 and 9.

[14] Chartered Institute of Arbitrators Website (http://www.ciarb.org/information-and-resources/E-Discolusure%20in%20Arbitration.pdf), "Protocol for E-Disclosure in Arbitration," (2008).

[15] *See* ICC Rules, Article 39; ICDR International Arbitration Rules, Article 31; LCIA Rules, Article 28.

[16] LCIA Rules, Article 30.

[17] *See* ICC Rules, Appendix II, Internal Rules Article 1; ICDR International Arbitration Rules, Article 34.

[18] *See* AAA Website (http://www.adr.org), "DRB Guide Specifications," "DRB Operating Procedures," and "DRB Hearing Rules and Procedures."

[19]ICC Website (http://www.iccarbitration.org), "Dispute Board Rules."