

JAMS International Clause Workbook

A Guide to Drafting Clauses for International and Cross-Border Commercial Contracts **EFFECTIVE JUNE 1, 2018**

In a competitive global marketplace, few companies welcome the time, expense and adverse business consequences of traditional litigation. Such concerns are magnified when doing business abroad and litigating in another country under a different legal system and possibly in a foreign language. No widely accepted international treaty for the enforcement of court judgments exists at present. The real possibility that a judgment might not be enforced is, for many, an unacceptable risk. One way to mitigate that risk is to provide in advance for alternative dispute resolution (ADR).

There are many alternatives to litigation, including arbitration, mediation, negotiation, dispute review boards and hybrid processes, which include elements of some or all of the above. Parties opting for international arbitration leading to an arbitral award face few of the hurdles posed by a court judgment from a foreign court. Enforcement of a foreign arbitral award may be achieved through the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”), adopted by more than 157 countries. The New York Convention mandates that States recognize agreements to arbitrate and that the resulting awards be enforced (with some limited exceptions). ADR processes other than arbitration provide somewhat less formality and do not necessarily result in a definitive solution. Nevertheless, processes such as mediation or dispute review boards may be better suited to the parties’ needs.

It is recommended practice, therefore, that when entering into a contract or business relationship, companies should consider and decide upon the procedures that will govern the resolution of any disputes that may arise in the course of the relationship. By providing for effective dispute resolution before a conflict arises, parties may avoid attempting to negotiate in the midst of a substantive dispute in circumstances where trust on both sides has diminished. JAMS provides sample dispute resolution clauses for insertion into a contract prior to a dispute arising. These samples are set forth below, and some are briefly discussed.

JAMS successfully resolves and manages business and legal disputes by providing efficient, cost-effective and impartial ways of overcoming barriers at any stage of conflict. JAMS offers customized dispute resolution services locally and globally through a combination of industry-specific experience, first-class client service, top-notch facilities and highly trained panelists.

JAMS International Clauses for Transnational Commercial Contracts can be downloaded in Word or PDF format. By suggesting the contract language in this Guide, JAMS is not purporting to offer legal advice. Rather, the legal effect of the clauses should be weighed by the parties in the specific context of applicable law, in consultation with counsel.

Part I: Arbitration Clauses

Standard JAMS International Arbitration

Clause

JAMS has a standard clause that provides for submission to arbitration. While the standard clause does not set forth details as to procedures to be followed, it provides a simple means of assuring that any future dispute will be arbitrated. An additional benefit is that it is sometimes easier for contracting parties to agree to a simple, straightforward clauses rather than to negotiate complex provisions such as those detailed in subsequent sections of this Guide. The standard JAMS International Arbitration Clause is as follows:

Any dispute, controversy or claim arising out of or relating to this contract, including the formation, interpretation, breach or termination thereof, including whether the claims asserted are arbitrable, will be referred to and finally determined by arbitration in accordance with the JAMS International Arbitration Rules. The tribunal will consist of [three arbitrators][a sole arbitrator]. The seat of the arbitration will be [location]. The language to be used in the arbitral proceedings will be [language]. Judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof.

The standard JAMS International Arbitration Clause allows the parties to make some choices about where, how and by whom their disputes will be decided. It provides the parties with a blueprint to which they can add, depending on the needs of their dispute. While the standard clause is an effective vehicle to get the parties to arbitration, parties have the option to refine the clause to provide for more specificity in the process. Set forth below are some of the elements that the parties may wish to consider including in their arbitration agreement.

Number of Arbitrators

It is not always clear at the time of contracting what a future dispute might entail, or how complex it might be. Parties have the option to choose one or more arbitrators to decide their dispute. While one or three are the most common choices, parties could conceivably provide for a larger number. It is important that the parties keep in mind that an odd number of arbitrators be chosen to avoid a deadlock in the decision-making process. The parties should also take into account the increased costs that would result from a larger tribunal.

It is increasingly common in international arbitration for the dispute to be decided by a sole arbitrator, particularly when cost and speed of resolution are of the essence. Many arbitral institutions have now made a sole arbitrator the default choice, unless the parties provide otherwise. However, not every dispute is necessarily suited to a one-person tribunal. Parties may prefer three arbitrators so that each party has an opportunity to appoint an arbitrator to the tribunal. A three-person tribunal is also the norm when a State party is involved in the dispute. A particularly complex dispute might benefit from having a three-person tribunal, as may a “bet the company” matter, where the parties have a great deal at stake.

Arbitrator Qualifications

It is common for a contract clause to require that one or more of the arbitrators have certain specified qualifications. In drafting such a provision, care should be taken, as specific qualifications can narrow the number of available, competent and qualified arbitrators. Specification of arbitrator qualifications often works best in a three-person panel since it is possible to require that one of the arbitrators (perhaps the Chair) have certain expertise without limiting the entire panel to a potentially narrow area of expertise. In this way, it is possible to ensure that the desired technical expertise is available, while assuring that the chair of the panel has necessary experience in the arbitration process.

If the arbitration is to be conducted by a sole arbitrator, the contract clause might provide that the arbitrator must be:

1. A retired judge from a particular court; or
2. A lawyer with 10 years of active practice in a specified area, such as construction or computer technology; or
3. A professional experienced in a particular sector, such as intellectual property or information technology; or

4. A professional fluent or proficient in a particular language; or
5. An individual of a particular nationality.

If the arbitration is to be conducted by a three-arbitrator panel, the contract clause might provide that:

1. The Chair be an attorney with at least 20 years of active litigation/arbitration experience; or
2. One of the co-arbitrators be an expert in an area such as construction; or
3. The Chair must have served as Chair or sole arbitrator in at least 10 arbitrations where an award was rendered following a hearing on the merits; or
4. The Chair be of a nationality different from either of the parties.

The foregoing are merely examples. The point is that the qualifications of the arbitrator(s) should be considered at the time the contract clause is drafted. The parties, in drafting such a list of qualifications, must take care not to have an overly onerous or specific list of qualifications and should avoid naming a particular individual to serve as arbitrator to prevent the circumstance that the desired candidate is not available when the dispute arises.

Diversity and Inclusion

Businesses increasingly recognize that diverse workforces produce better results, and many have robust initiatives to promote inclusivity in terms of gender, ethnicity and sexual orientation. Parties may choose to include diversity as a consideration when selecting an arbitrator or arbitration panel. The following clause, modeled after the Equal Representation in Arbitration pledge, attempts to promote diversity while recognizing that other qualifications are also important when selecting an arbitrator.

The parties agree that, wherever practicable, they will seek to appoint a fair representation of diverse arbitrators (considering gender, ethnicity and sexual orientation), and will request administering institutions to include a fair representation of diverse candidates on their rosters and list of potential arbitrator appointees.

Seat of Arbitration

The seat of arbitration is an important consideration. Not only should the parties provide for a seat of arbitration that will be convenient for the parties, but they should also consider whether the chosen venue has a modern judiciary and solid experience with respect to international arbitration. They should choose a venue that is a signatory to the New York Convention. While there are over 150 countries that are signatories to the New York Convention—and thus many options for the parties to choose from—the parties need to know that when they choose a particular venue, they will typically be governed, from a procedural standpoint, by the chosen venue’s international arbitration law. Importantly, the New York Convention provides that an application to set aside an award must be made at the seat of the arbitration. Thus, selection of the seat is quite important. In the United States, for example, the parties’ arbitration would be governed by the Federal Arbitration Act. State procedure would also apply to such matters as grounds for provisional remedies and the like. In many countries, the UNCITRAL Model Law is the governing procedural law. In other countries, there may be a well-developed arbitration law that has been applied consistently by the local courts. When the parties choose a venue that is not known for robustly applying the New York Convention, they may face difficulties and even risk the ultimate non-enforcement of their arbitral award.

Parties should also keep in mind that not all activities have to take place in the chosen venue. Hearings and other matters can, and often do, take place at sites other than the chosen seat of the arbitration. Nevertheless, the legal implications for the choice of an arbitral seat cannot be overstated, and the parties are advised to consult local counsel before agreeing to a venue with which they are unfamiliar.

Language of Arbitration

Another option the parties have is to specify the language in which the arbitration will be conducted. While this might seem an obvious element that need not be specified in the contract, it is best to avoid a circumstance where one party demands that the arbitration be bilingual or simultaneous translation be part of the procedure. The tribunal may feel obligated to agree to such a request where it is unclear from the underlying contract or the arbitration agreement as to what language should be used for the arbitration. If the language of the arbitration is agreed to in the arbitration clause, the tribunal will not have to second-guess the parties’ intent.

Confidentiality

Article 17 of the JAMS International Arbitration Rules provides that JAMS and the arbitrator(s) must maintain the confidentiality of the arbitration proceeding. If it is desired that the parties should also maintain the confidentiality of the arbitration proceeding, this can be accomplished with the following language:

The parties shall maintain the confidential nature of the arbitration proceeding and the Award, including the privacy of the Hearing, except as may be necessary to prepare for or conduct the arbitration hearing on the merits, or except as may be necessary in connection with a court application for a preliminary remedy, a judicial challenge to an Award or its enforcement, or unless otherwise required by law or judicial decision.

Article 17 further provides that unless otherwise required by law, an award will remain confidential unless all of the parties consent to its publication.

Governing Law

It is common for the governing law to be specified in the parties' contract. This provides some certainty for the parties and the tribunal. If the parties opt to include a governing law provision, the following language can be used as a model:

This Agreement and the rights of the parties hereunder shall be governed and construed in accordance with the laws of the State of _____, exclusive of conflict or choice of law rules.

Amiable Compositeur and Ex Aequo Et Bono

Another option available to the parties is to authorize the arbitral tribunal to decide the merits of the arbitration as an *amiable compositeur* or *ex aequo et bono*. This allows the tribunal to decide the dispute in an equitable, as opposed to a strictly legalistic, manner. The parties must expressly provide for this in their arbitration clause or expressly authorize the tribunal to do so once the dispute has arisen.

Limitation of Liability

The parties may choose not to allow the arbitrators to grant certain types of relief, such as specific performance or lost profits. If the parties choose to limit the relief that may be sought, they can do so by inserting a clause similar to the following:

In any arbitration arising out of or related to this Agreement, the arbitrator(s) may not award any incidental, indirect or consequential damages, including damages for lost profits.

The parties may also wish to provide for whether the tribunal may award punitive damages, or whether they are prohibited from doing so, although most institutional rules (including the JAMS International Arbitration Rules) forbid an award of punitive damages.

Fees and Costs to Prevailing Party

While it is common practice in international arbitration for the losing party to pay the costs of an arbitration, parties may wish to make that clear in the arbitration clause. Apportionment of arbitration costs is a feature of the JAMS International Arbitration Rules; however, a "prevailing party" clause, such as the following, tends to discourage frivolous claims, counterclaims and defenses:

In any arbitration arising out of or related to this Agreement, the arbitrator(s) shall award to the prevailing party, if any, the reasonable costs for legal representation incurred by the prevailing party in connection with the arbitration.

If the arbitrator(s) determine a party to be the prevailing party under the circumstances where the prevailing party won on some but not all of its claims and counterclaims, the arbitrator(s) may award the prevailing party an appropriate percentage of the reasonable costs for legal representation incurred by the prevailing party in connection with the arbitration.

If the parties intend not to allow cost-shifting, they can specifically state that each party shall bear its own fees and costs of arbitration.

JAMS International Arbitration Efficiency Guidelines

Article 21 of the JAMS International Arbitration Rules provides for the “Conduct of the Arbitration” and sets forth the manner in which the tribunal will conduct the arbitration. In addition to the provisions in Article 21, JAMS has adopted “Efficiency Guidelines for the Pre-Hearing Phase of International Arbitrations.” The Guidelines are an effort to assure parties around the world that an international arbitration before JAMS will be conducted in accordance with internationally accepted standards and practices, and will be a fair, focused and cost-effective proceeding.

Pre-hearing disclosure in international arbitration will be based on the judgment of the arbitrator, taking into account the applicable rules, industry norms and expectations and preferences of the parties and counsel. In exercising this judgment, JAMS international arbitrator(s) 1) produce a protocol for pre-hearing disclosure that is specific and appropriate to the given case and is consistent with the accepted norms of international arbitration practice, and 2) exercise sound judgment to ensure enough pre-hearing disclosure and evidence to permit a fair result, balanced against the need for an efficient process.

The JAMS Efficiency Guidelines provide, *inter alia*, guidance on e-discovery, witness statements, pre-hearing disclosure disputes and dispositive motions. They provide key points in managing e-discovery. The Chair (or other arbitrator) can act alone to resolve disclosure disputes. Lengthy briefs on pre-hearing disclosure are discouraged, and parties are obliged to negotiate pre-hearing disclosure differences in good faith.

Parties do not need to provide for the use of the Efficiency Guidelines in their arbitration clause but should be aware that the tribunal will act in accordance with the Guidelines unless the parties have provided otherwise.

JAMS International Arbitration Mediator-in-Reserve Policy

The JAMS International Arbitration Rules have a unique provision titled “Mediator-in-Reserve for International Arbitrations.” This provides that once parties commence an arbitration under the JAMS International Arbitration Rules, they may at any time during the course of the arbitration decide to enlist the services of a mediator who has been put on “reserve” for the case. Parties may decide to exercise the option to put a mediator on reserve.

Within one week of the commencement of the arbitration, a suggested list of mediators will be sent to the parties. The parties will be encouraged to select a mediator from the list, who will then be placed on reserve during the pendency of the arbitration. There will be no charge to the parties for the appointment of the Mediator-in-Reserve, and the parties will not incur fees unless and until they choose to utilize the mediator’s services.

The Mediator-in-Reserve will not be informed of the parties’ selection until and unless the parties decide to request the mediator’s services. The parties will not be bound to use the Mediator-in-Reserve and may, at any time, mutually select another mediator to assist in their settlement discussions.

The arbitrator(s) in the proceeding will have no knowledge of the identity of the Mediator-in-Reserve, or whether the parties may have engaged her or his services at any point in the arbitration proceedings.

Modified Time Limits

There are circumstances where the parties may wish to shorten the time limits set forth in the JAMS International Arbitration Rules. Article 22 of the Rules provides that the parties may agree to shorten the time limits. Care should be taken, however, not to specify time limits that are unrealistic and hence might jeopardize the ultimate enforceability of the award. Parties may either provide for modified time limits in the arbitration clause or agree once the matter has been commenced. Once the arbitral tribunal has been constituted, however, the parties must obtain the approval of the tribunal to shorten any time limits.

Interim Measures of Protection

Under the provisions of Article 32 of the JAMS International Arbitration Rules, the parties have the right to apply for interim measures of protection, either from the arbitral tribunal or from a judicial authority. Parties do not have to include a separate provision for interim relief in their arbitration clause. A request by a party for interim relief from a judicial authority will not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

Award on Agreed Terms

If the parties reach a settlement of their dispute during the course of the arbitration, they may request the tribunal to record the settlement in the form of an award on agreed terms. Such an award need not contain reasons.

Part II: Mediation Clauses

Standard JAMS International Mediation Clause

Another dispute resolution option available to parties in addition to arbitration is to provide for mediation of any disputes. The Standard JAMS International Mediation Clause is set forth below:

The parties agree that any dispute, controversy or claim arising out of or relating to this contract shall be submitted to JAMS or its successors for mediation under the JAMS International Mediation Rules. Either party may commence mediation by providing a written request for mediation (“Request for Mediation”) to JAMS and the other party, setting forth the subject matter of the dispute and the relief requested. If the dispute has not been settled within 45 days following the filing of a Request for Mediation or within such other time period as the parties may agree in writing, the parties shall have no further obligation under this paragraph.

Pursuant to Paragraph 3 of the JAMS International Mediation Rules, a party may request JAMS to invite another party to participate in mediation. Upon receipt of such a request, JAMS will contact the other party involved in the dispute and attempt to obtain an agreement to participate in mediation.

Statement of the Nature of the Dispute

When filing a request for mediation under the JAMS International Mediation Rules, the requesting party should set forth a brief statement of the nature of the dispute as well as the contact information of all of the parties to the dispute and the counsel, if known, who will represent them in mediation.

Appointment of the Mediator

The parties to a JAMS international mediation are always at liberty to agree on the mediator who will decide their dispute. If the parties cannot agree, JAMS will provide the parties with a list of no fewer than five persons who would, in the estimation of JAMS, be qualified to mediate the dispute. JAMS will take into account such relevant factors as the nationalities of the parties, language in which the mediation will be conducted, the place of mediation and any substantive expertise that may

be required in the resolution of the dispute. Each party may strike up to two names and will number the remaining names in order of preference. JAMS will take into account the parties’ expressed preferences in appointing the mediator.

Typically, a single mediator will be appointed unless the parties agree otherwise. JAMS may recommend co-mediators in appropriate cases.

Representation

While not required, it is typical for parties to be represented by counsel in a mediation. Paragraph 7 of the JAMS International Mediation Rules provides that a party may be represented by persons of that party’s choice, including a non-attorney. Parties other than natural persons are expected to have present throughout the mediation an officer, partner or other employee authorized to make decisions concerning the resolution of the dispute.

Conduct of the Mediation and Authority of the Mediator

Under the JAMS International Mediation Rules, a mediator is at liberty to conduct the mediation in such manner as he or she considers appropriate, taking into account the circumstances of the case, the wishes of the parties and the need for a speedy settlement.

The mediator is authorized to conduct both joint and separate meetings with the parties and, if requested, may make oral or written recommendations concerning the appropriate resolution of the dispute. The mediator does not have the authority to impose a settlement on the parties.

Confidentiality

Confidentiality is a hallmark of the mediation process and one of the many reasons parties opt to mediate over what might be less confidential processes. Paragraph 11 of the JAMS International Mediation Rules provides for extensive confidentiality provisions with respect to, for example, documents, views expressed by the parties or the mediator, admissions relating to the merits, or the willingness to settle by one party or the other.

The mediator may not be compelled to divulge any information with regard to the mediation unless required by law.

Governing Law and Jurisdiction

Paragraph 17 of the JAMS International Mediation Rules provides that the mediation shall be governed by the laws of the place where the mediation is conducted. The courts of the State where the mediation takes place have exclusive jurisdiction to settle any claim, dispute or matter or difference that may arise out of or in connection with the mediation.

Termination of the Mediation

Paragraph 18 of the JAMS International Mediation Rules provides that any party may withdraw from the mediation at any time. A withdrawing party must immediately notify the mediator and the other representatives in writing. The mediation will be considered terminated when a) a party withdraws from mediation; b) the mediator, in his or her discretion, withdraws from the mediation; or c) a written settlement agreement is concluded.

The mediator has the authority to adjourn the mediation in order to allow the parties to consider specific proposals or get further information, or for any other reason that the mediator considers helpful in furthering the mediation process. The mediator will then reconvene with the agreement of the parties.

Settlement Agreements

Paragraph 19 of the JAMS International Mediation Rules provides that any settlement reached in the mediation will not be legally binding until it has been reduced to writing and signed by, or on behalf of, the parties.

Part III: Combined ADR Procedures, or “Step Clauses”

It is becoming increasingly common in international practice for the parties to provide for combined ADR procedures, or “step clauses.” These clauses allow the parties to incorporate different ADR procedures in one clause, with the resultant benefits that each process provides. Set forth below are several options the parties may wish to incorporate into their dispute resolution clause.

Resolution Prior to Arbitration

It is common practice for a contract clause to provide for negotiation and/or mediation in advance of arbitration. There is much to recommend such clauses because they represent by far the most cost-effective means of resolving a dispute and they often lead to an early settlement. Unless drafted with care, however, such clauses can also have negative side effects since they can be a vehicle for delay and can result in required empty negotiations where one or all parties have no intention of moving toward a settlement. In the experience of JAMS, such downsides can be greatly minimized by setting strict deadlines marking the early ends of the negotiation and mediation periods.

Clause Providing for Negotiation in Advance of Arbitration

- 1. The parties shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement promptly by negotiation between executives who have authority to settle the dispute and who are at a higher level of management than the person with direct responsibility for administration of this Agreement. Any party may give to the other party written notice of any dispute not resolved in the ordinary course of business. Within 15 days after delivery of the notice, the receiving party shall submit to the other a written response. The notice and response shall include with reasonable particularity a) a statement of each party's position and a summary of arguments supporting that position, and b) the name and title of the executive who will represent that party and of any other person who will accompany the executive. Within 30 days after delivery of the notice, the executives of both parties shall meet at a mutually acceptable time and place.*
- 2. Unless otherwise agreed in writing by the negotiating parties, the above-described negotiation shall end at the close of the first meeting of the executives described above (“First Meeting”). Such closure shall not preclude continuing or later negotiations, if desired.*

3. *All offers, promises, conduct and statements, whether written or oral, made in the course of the negotiation by any of the parties, their agents, employees, experts and legal representatives are confidential, privileged and inadmissible for any purpose, including impeachment, in arbitration or other proceeding involving the parties, provided that evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its use in the negotiation.*
4. *At no time prior to the First Meeting shall either side initiate litigation related to this Agreement except to pursue a provisional remedy that is authorized by law. Neither may either side initiate arbitration except to pursue a provisional remedy authorized by the JAMS International Arbitration Rules. However, this limitation is inapplicable to a party if the other party refuses to comply with the requirements of Paragraph 1.*
5. *All applicable statutes of limitation and defenses based upon the passage of time shall be tolled while the procedures specified in Paragraphs 1 and 2 above are pending and for 15 calendar days thereafter.*
6. *If the dispute has not been settled at the close of the First Meeting as defined above, or within such time period as the parties may agree in writing, either party may initiate arbitration with respect to the matters submitted to negotiation by filing a written demand for arbitration with JAMS or its successors. The negotiations may continue after the commencement of the arbitration if the parties so desire.*

Clause Providing for Mediation in Advance of Arbitration

If the matter is not resolved by negotiation pursuant to paragraphs above, then the matter will proceed to mediation as set forth below.

Or in the Alternative

If the parties do not wish to negotiate in advance of arbitration, but do wish to mediate before proceeding to arbitration, they may accomplish this through use of the following language:

The parties agree that any and all disputes, claims or controversies arising out of or relating to this Agreement shall be submitted to JAMS, or its successor, for mediation. Either party may commence mediation by providing a written request for mediation to JAMS and the other party, setting forth the subject of the dispute and the relief requested. If the dispute has not been settled within 45 days following the filing of a Request for Mediation or within such longer time period as the parties may agree in writing, either party may initiate arbitration with respect to the matters submitted to mediation by filing a written demand for arbitration with JAMS. The mediation may continue after the commencement of the arbitration if the parties so desire.

At no time prior to the 45 days following the filing of the request for mediation referred to above shall either side initiate litigation related to this Agreement except to pursue a provisional remedy that is authorized by law. Neither may either side initiate arbitration except to pursue a provisional remedy authorized by the JAMS International Arbitration Rules. However, this limitation is inapplicable to a party if the other party refuses to comply with the requirements of the paragraph above.

The above-referenced sample clauses are merely to provide parties with a template for drafting their own unique dispute resolution clause. Parties are advised to consult with counsel in the drafting process and to consult with local counsel in the event they are contracting in a jurisdiction with which they are unfamiliar. Parties are welcome to contact JAMS for information on clause drafting or applicable rules, or if they have any other questions.