

SYDNEY
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LAW



THE UNIVERSITY OF
SYDNEY

WORKING PAPER #28
**“DRAFTING ARBITRATION CLAUSES TO
MINIMISE COSTS AND DELAYS IN ICA:
AN ASIA-PACIFIC PERSPECTIVE”**
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**“Drafting Arbitration Clauses to Minimise Costs and Delays in ICA:
An Asia-Pacific Perspective”***

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INTRODUCTION

Concerns about growing delays and (especially) costs in International Commercial Arbitration (ICA) have spread from West to East:¹

Advantages of ICA over Cross-Border Litigation (‘East’ vs ‘West’)

Response: ‘highly relevant’ or ‘significant’ (* Statistically significant at 99% confidence level)	Region of Practice	
	East (Ali study ‘06)	West (CBU ‘94)
Forum’s neutrality	88 (%)	78 (%)
Forum’s expertise	83	76
Results more predictable	36	42
Voluntary compliance*	42	24
Treaties ensure compliance abroad	85	69
Confidential procedure*	76	56
Limited discovery	47	56
No appeal	64	58
Procedure less costly	36	20
Less time consuming*	57	35
More amicable	52	35

* Particular thanks (but no responsibility attributable) to co-panellists, Sarah Lancaster (Chair) and Malcolm Holmes QC, for helpful discussions on this topic before and during the “CI Arb Asia Pacific Conference 2011 – Investment and Innovation” held in Sydney, 27-8 May 2011. This paper draws on research for the project, ‘Fostering a Common Culture in Cross-Border Dispute Resolution: Australia, Japan and the Asia-Pacific’, supported by the Commonwealth through the Australia-Japan Foundation, which is part of the Department of Foreign Affairs and Trade.

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¹ Adapted from: Ali, Shahla, ‘Approaching the Global Arbitration Table: Comparing the Advantages of Arbitration as Seen by Practitioners in East Asia and the West’ (2009) 28(4) *Review of Litigation* 799-844, at p833 (and her *RESOLVING DISPUTES IN THE ASIA PACIFIC REGION*, Routledge, 2010); compare Buhning-Uhle, Christian et al, *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS*, Kluwer, 2nd ed 2006.

Costs and delays also represent major and long-standing concerns for Japanese corporations, for example. This explains why they still do not contest many ICA cases, even at the Japan Commercial Arbitration Association (JCAA), despite increasingly incorporating arbitration clauses in cross-border contracts.² It also helps explain their reluctance to initiate investor-state arbitration (ISA) claims, despite their peak associations having successfully pressed the Japanese government to include ISA provisions in almost all its investment treaties.³

The International Chamber of Commerce, which has a growing Asia-Pacific caseload, has produced a useful Report suggesting various means to manage costs and delays in ICA.⁴ Yet the ICC distinguishes itself as a “high-quality, high-cost” arbitral venue, evidenced eg by the hands-on service provided by its Secretariat and its “Court of Arbitration”. Other arbitral institutions and experts in ICA, especially in our region, should at least consider some potentially more radical approaches. This paper outlines a dozen possibilities that I proposed at an ICC Seminar held in Sydney in 2010, some of which (asterisked below) were elaborated at the CIArb Asia Pacific conference this year.

These suggestions stem partly from teaching LLM courses in ICA since 1997 in Japan, Thailand and Australia, including many practitioners from around the Asia-Pacific region. Some seem less radical than when first mooted at the ICC Seminar in Sydney, because they echo a few of the suggestions contained in a “Protocol to Promote Efficiency in International Arbitration” released in 2010 by a major international law firm (and CIArb conference sponsor), Debevoise & Plimpton,⁵ and/or the International Bar Association’s “Guidelines for Drafting International Arbitration Clauses” released on 7 October 2010.⁶ The IBA Task Force charged with compiling the Guidelines included practitioners from many other large law firms (including Rajan & Tann from Singapore, with some 300 lawyers), and it is good to see leaders in the profession begin to explore new ways to reduce costs and complexities in ICA. But especially for smaller law firms

² Kitagawa, Toshimitsu and Nottage, Luke R., ‘Globalization of Japanese Corporations and the Development of Corporate Legal Departments: Problems and Prospects’, Sydney Law School Research Paper No. 06/46; in RAISING THE BAR: THE EMERGING LEGAL PROFESSION IN EAST ASIA, William Alford, ed., Harvard, 2007; also at <http://ssrn.com/abstract=837906>.

³ Hamamoto, Shotaro and Nottage, Luke R., Foreign Investment In and Out of Japan: Economic Backdrop, Domestic Law, and International Treaty-Based Investor-State Dispute Resolution (December 26, 2010). Sydney Law School Research Paper No. 10/145: <http://ssrn.com/abstract=1724999>.

⁴ Greenberg, Simon, ‘ICC Arbitration in Australia’ in INTERNATIONAL ARBITRATION IN AUSTRALIA, Luke Nottage and Richard Garnett, eds, Federation Press, 2010, at pp 122-3.

⁵ See <http://www.debevoise.com/arbitrationprotocol/>.

⁶ See http://www.ibanet.org/ENews_Archive/IBA_27October_2010_Arbitration_Clauses_Guidelines.aspx.

(perhaps more likely to advise smaller companies), or for in-house counsel, or for other practitioners involved in markets where the disputes and amounts in dispute are generally low, even more innovative approaches to drafting arbitration clauses should be considered. We all need to be alert to finding ways to go beyond what Toby Landau QC has criticized as ICA's "standard model", in his Clayton Utz / University of Sydney lecture in 2009.⁷

It may be tempting to just leave such innovation to arbitration law reform, or amendments to the Rules of arbitral institutions. But involvement in both in Australia since 2004 confirms what one might generally expect when many stakeholders get involved: that the "standard" or "common" solutions tend to prevail.⁸ By contrast, when it comes to drafting innovative arbitration clauses, legal advisors generally only need to persuade their clients or companies and especially (usually) the other side, so there is scope for greater originality. Clauses can also be better tailored to the particular market or transaction type, as well as the mostly likely types of disputes, and negotiations over arbitration agreements happen much more frequently than amendments to arbitral Rules – let alone arbitration legislation.

Nonetheless, in this field as in many areas of commercial law, there can be benefits in "keeping it simple". We also need to be sensitive to the reality that companies originating from legal systems more imbued by the "civil law" tradition, such as Japan, have traditionally tended to draft shorter contracts – in the shadow of more predictable (or at least accessible) codifications. Large Japanese companies also still tend to have comparatively high thresholds before business departments need to get legal departments involved, particularly at the early stages of negotiations, which may make it more difficult to get approval for more innovative clauses proposed by the non-Japanese counterpart. However, such practices depend strongly on the sector involved, especially now that foreign investment into Japan has increased quite significantly over the last decade.

There also exist more general concerns about innovating too much with arbitration clauses. Modifying or abandoning time-honoured wording or concepts (including the bare-bones "model clauses" often proposed by arbitral institutions to go with their Rules) may result in "pathological" clauses, or at least risk unpredictable interpretations by arbitrators or even various courts. But this can be partly addressed by better education in ICA. Another counter-measure is to phrase drafting innovations in less prescriptive

⁷ Transcript at http://www.claytonutz.com/ialecture/2009/transcript_2009.html.

⁸ See especially Garnett, Richard and Nottage, Luke R., 'The 2010 Amendments to the International Arbitration Act: A New Dawn for Australia?' (2011) 7(1) *Asian International Arbitration Journal* 29-53; Sydney Law School Research Paper No. 10/88 (September 14, 2010), at <http://ssrn.com/abstract=1676604>.

ways: rather than “requiring” something, for example, the clause can “require consideration” of something. This alerts the arbitrators (and appointing authorities) about the parties’ initial general expectations about important matters, and they should factor in their openness to such matters when proposing or accepting appointments. Wording innovative provisions in less intrusive ways also reduces another valid concern: that they will turn out to be very unsuitable because the type of dispute which does eventuate is highly unexpected.

INNOVATIONS IN DRAFTING ARBITRATION CLAUSES

1. Chose ad hoc arbitration only where particularly large-scale disputes are likely. Nowadays, even regional arbitration institutions often offer similar Rules, levels of experience, and even often charges.
2. Chose a sole arbitrator, unless the disputes are likely to be very large in amount or complexity. However, urge the arbitral institution to provide a list of diverse candidates, including extensive biographical information. That could include statistics on past cases arbitrated and underway; sample/redacted awards; other experience, including appearances as expert or arbitration-law related court proceedings; substantive law and sectoral knowledge, as well as procedural law expertise; familiarity with foreign languages and legal/cultures; and willingness to charge fixed fees or time charge caps, to waive immunities for negligence, or to accept payment in relevant foreign currencies (at the payer’s option). To minimize risks of a rogue or incompetent sole arbitrator, consider building in an internal arbitral appeals mechanism – allowing a different sole arbitrator to review the award for a serious error of law, but only on the documents (with no further oral hearings).

Alternatively, allow the institution to choose the number of arbitrators depending on the complexity of the actual dispute (see eg ACICA Arbitration Rules Art 9.3).

3. * Maximise tribunal powers to order interim measures, as these may nip disputes in the bud. These powers should include ex parte preliminary orders to support the interim measures (unless clearly prohibited, as now in Australia under s18C of the *International Arbitration Act*).
4. * Limit documentation in arbitral proceedings. First it was the avalanche of paper; now it’s often instead (or additionally) a tsunami of digital documentation, despite initiatives such as the CIArbs “Protocol for E-Disclosure in Arbitration”.⁹ As a starting point, adopt the IBA Rules on Evidence-Taking (revised 2010), or at least require the tribunal to consider using them (as already provided in ACICA Arbitration Rules Art 27.2).

⁹ See <http://www.ciarb.org/information-and-resources/E-Disclosure%20in%20Arbitration.pdf>.

However, parties should consider making those provisions stricter on certain defined issues. For example, discovery can be limited to requests for particular documents (as under ACICA Expedited Arbitration Rules Art 23) rather than identified categories of documents (IBA Rules Art 3.3). Rather than relying on attempts to rein in party-appointed experts (eg through the tribunal's discretion to order them to "hot tub", to produce a written report identifying areas of agreement and disagreement: IBA Rules Art 5.4), the tribunal could be required to appoint its own expert (cf Art 6) unless both parties object and/or "exceptional circumstances" exist. Similarly, the tribunal could be required to use videoconferencing (or indeed internet-based conferencing facilities such as Skype) for witnesses (or at least tribunal-appointed experts), unless exceptional circumstances exist (cf Art 7.1). The parties could even go further and not allow any hearings, except in exceptional circumstances and with agreement of the parties or the tribunal; and, if so, with a specified time limit per hearing (as under ACICA Expedited Arbitration Rules Art 13). If a witness is to give oral evidence, written witness statements can be banned or severely constrained, as urged by Toby Landau QC.

5. * Be innovative in the applicable substantive law(s). Parties can select a simpler, tailored, neutral set of norms like the UNIDROIT Principles of International Commercial Contracts (revised 2010), at least to supplement the application of a specified national contract law governing the underlying dispute.¹⁰

In addition, the parties may require the tribunal to give the parties the opportunity during proceedings to agree instead that minor but narrowly defined issues should be decided based on general fairness (*et aequo et bono*) rather than any system of law, or "without summary reasons" (see ACICA Expedited Arbitration Rules Art 28.3). Parties may not take up the opportunity provided by the tribunal, especially if they happen to develop regrets about the quality of the arbitrators they or the institution have appointed. But this sort of provision would help them (and the tribunal) to remember that the arbitral process exists to resolve a range of disputes as expeditiously and cheaply as possible.

6. * Conversely, for major issues and/or those arising earlier on during proceedings, the tribunal can be required to invite the parties to request partial awards. Likely candidates for early resolution by this means include questions of the applicable laws, questions of liability, or even sometimes first the quantum of compensation (especially if the underlying contract includes limitation clauses).¹¹ As the

¹⁰ See generally SCIL Working Paper No. 8 at <http://sydney.edu.au/law/scil/documents/2009/SCILWP7Finalised.pdf>; updated in [2010] *Australian International Law Journal*.

¹¹ See generally Rivkin, David, 'Towards a New Paradigm in International Arbitration: The Town Elder Model Revisited' (2008) 24(3) *Arbitration International* 375-86.

applicable arbitrational legislation and/or Rules may not be clear, drafters should clarify whether “partial awards” are intended finally to resolve those issues, or instead be open to revision by the tribunal when it comes to its final award.¹²

7. * Parties should then go the next step, and expressly (in writing) authorise or even require the tribunal to facilitate settlement during proceedings (Arb-Med). In principle these attempts should only be carried out in open session, not ex parte, to balance efficiency with concerns about possible bias or natural justice. This is the approach recommended by CEDR in Rules released in December 2009 (with model Directions released in December 2010),¹³ as a means that has been shown to significantly increase settlements during international arbitral proceedings.

Particularly in our region, however, there may be more scope to allow parties to provide further written consent that does permit ex parte “caucusing” to facilitate settlement, which mediation purists assure us is an even more effective technique. After all, this practice is found in judicial and arbitral proceedings in legal systems as diverse as the People’s Republic of China (with its socialist law underpinnings) and Japan. However, the greater risks involved have been highlighted recently by a refusal to enforce a Chinese award in Hong Kong, after a failed ex parte mediation attempt (involving also a third party!).¹⁴

Given the greater risks involved, this consent may be required in a separate document, and/or after confirmation that the parties have received specific legal advice on the pros and cons of allowing caucusing. Legal advisors may consider drafting further protections, such as prohibiting information obtained in ex parte meetings from being used for the award if settlement facilitation fails (as was specified in a recent JCAA arbitration), rather than requiring disclosure of material information obtained from caucusing (as in little-used statutory provisions in Hong Kong and Singapore, and in the *Commercial Arbitration Act 2010 NSW*).¹⁵

¹² Cf eg Grabundzija, A., ‘Partial Arbitral Awards in International Commercial Arbitration’ (2011) 2 *Transnational Dispute Management* at <http://www.transnational-dispute-management.com>; Zaugg, Niklaus ‘Practical Implications of Interim and Partial Awards in International Commercial Arbitration’ (unpublished LLM Independent Research Project paper, University of Sydney, 2011).

¹³ See http://www.cedr.com/about_us/arbitration_commission/arbcomsampledirections.php.

¹⁴ See *Gao Haiyan & Anor v Keeneye & Anor* [2011] HKEC 514 at http://www.hklii.org/hk/jud/eng/hkcfi/2011/HCCCT000041_2010-76050.html. Apparently this decision has been appealed.

¹⁵ See http://blogs.usyd.edu.au/japaneselaw/2009/07/arbmed_and_new_international_c_1.html; Nottage, Luke and Richard Garnett, ‘The Top 20 Things to Change In or Around Australia’s International Arbitration Act’ in *INTERNATIONAL ARBITRATION IN AUSTRALIA*, *ibid*, eds, Federation Press, 2010, at pp 179-84.

8. Parties should set strict but realistic time limits for the final award, counting from when the date when the tribunal is constituted. The generic (as opposed to expedited) arbitration rules of various institutions differ significantly in these respects, as does arbitration legislation. There are risks of challenges to awards that fail to meet the specified limits, but it should be in at least one party's interests to press the tribunal to keep to the deadline. The risks can be further managed by including an exception such as that recommended in the IBA Guidelines (at para 80) for those parties wishing to set a time limit: "unless the arbitral tribunal determines, in a reasoned decision, that the interest of justice or the complexity of the case requires that such limit be extended".
9. * Address party costs, especially legal costs, as party costs constitute over 80% of ICA costs in ICC arbitrations, according to its 2007 study). Consider for example adopting the "American rule" (the starting principle also in Japanese civil procedure, as well as public international law) whereby each sides bears its own party costs, even if successful. Such a rule may prompt more frivolous claims, but those seem less likely than for domestic disputes – if only because one own's lawyers fees are likely to be much higher. The rule does have the benefit of focusing even the claimant's mind on minimizing costs. It may particularly appeal when advising Japanese parties, for example, who often expect to defend cases more often than to initiate them – preferring instead to compromise a potential claim in the hope of long-term benefits. (That expectation also underpins a significant practice, also apparent among some Korean parties, of drafting "finger-pointing" clauses – specifying the exclusive court or seat (and Rules) of the arbitration to be from the respondent's side.)

If instead parties maintain the "English rule" (more common now in ICA), the arbitration clause should require arbitrators to award "reasonable" costs of the prevailing side's lawyers and others, perhaps based on itemised bills. The IBA Guidelines (at para 67) recommends avoiding absolute language as identifying the winner may prove difficult or the tribunal may feel otherwise unduly constrained, but common law civil procedure can add guidance.

The Guidelines also suggest (para 68) that parties should consider providing for compensation for "the time spent by management, in-house counsel, experts and witnesses, as this issue is often uncertain in international arbitration". This could be particularly important for corporations from Japan, for example, which are reluctant to pay the typically higher costs involved in briefing outside counsel to conduct the arbitration. Discussion at the CIArb conference did indicate that it may be difficult to calculate precisely what time is spent even by in-house counsel on arbitration proceedings. But a compromise may be to specify at least a daily amount (or pro rata), indexed to inflation, for time spent travelling to and attending hearings as well as actual disbursements incurred by in-house counsel – or indeed management personnel.

10. If necessary (and permitted) under the applicable arbitration laws (and Rules), parties should also opt-in to allow “compound interest” on awards, and specify relevant rate(s). This should greatly encourage more efficient proceedings.
11. Incorporate strict confidentiality requirements (as under ACICA Arbitration Rule Art 18, extending for example to party-called witnesses).¹⁶ Such requirements are generally appropriate in ICA (as opposed to ISA), so the tribunal can “get on with the job” without being overly concerned about public scrutiny of findings. The Table above shows that confidentiality is particularly valued in the Asian region.
12. * Specify overarching general principles for conduct of the arbitration. Legislation increasingly provides for this, as under s39(2)(b) of the IAA: “(i) arbitration is an *efficient*, impartial, enforceable and *timely* method by which to resolve commercial disputes; and (ii) awards are intended to provide *certainty and finality*” (emphasis added). But such provisions may be aimed more at courts, as especially with para (ii) just cited. More focused, and suitable for arbitration clauses, is the wording set out in ACICA Expedited Rules Art 3: the aim should be to secure “arbitration that is quick, cost-effective and fair, considering especially the amounts in dispute and complexity of issues or facts involved”.

CONCLUSION

In determining therefore the seat of the arbitration, apart from usual considerations such as geographical convenience and critical mass in arbitration caseload, parties and their legal advisors should also determine whether the *lex arbitri* promotes or at least allows these and other measures to minimise costs and delays in ICA.¹⁷

Although not all of these suggestions need to be adopted in full or in part, and indeed hopefully this paper will prompt lively responses from other arbitration aficionados; but we do need to show imagination in limiting delays and especially costs, and greater innovation in drafting arbitration clauses is a promising way forward. Let us take seriously the recent more general reminder from Spigelman CJ (as he then was) about the need to control the cost of providing legal services: “the legal profession is in danger of killing the goose”.¹⁸

¹⁶ Cf also Michael Hwang SC’s ‘Model Procedural Order on Confidentiality’, via <http://www.transnational-dispute-management.com/journal-advance-publication-article.asp?key=383>.

¹⁷ For our part of the world, see generally eg Greenberg, Simon et al, INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA-PACIFIC PERSPECTIVE, CUP, 2010; reviewed at http://blogs.usyd.edu.au/japaneselaw/2011/03/international_commercial_arbit_1.html.

¹⁸ “Global Engagement by Australian Lawyers”, Opening of Law Term Dinner 2011, via http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speeches.