



PACE LAW SCHOOL  
PACE UNIVERSITY

LACCM

# DRAFTING STEP CLAUSES:

AN EMPIRICAL LOOK AT THEIR PRACTICALITY AND LEGALITY



## TABLE OF CONTENTS

I. Introduction .....	3
A. Scope .....	3
B. Survey Method .....	3
C. Step Clauses Generally .....	4
D. Drafting an Alternative Dispute Resolution Clause .....	5
II. Considerations for Drafting Step Clauses .....	6
A. Basic Elements Necessary in Step Clauses .....	6
B. “Plug and Play” Method .....	6
III. Best Practices in Drafting a Step Clause .....	6
C. Mandatory Negotiation Element .....	6
D. Mandatory Mediation Element .....	8
E. Mandatory Arbitration Element .....	10
i. <i>Ad Hoc</i> v. Institutional Arbitration .....	11
ii. Designating Substantive Law .....	13
iii. Designating the Arbitral Seat .....	14
iv. Additional Considerations in Drafting an Arbitration Provision ..	14
v. Method of Selecting and Replacing Arbitrators .....	15
vi. Rules of Evidence and Discovery .....	16
vii. Arbitral Awards .....	17
viii. Award Enforcement .....	18
IV. Compelling Compliance with Step Clauses .....	18
Appendix A .....	22
Appendix B .....	23

# I. INTRODUCTION

## A. SCOPE:

There is an upward trend towards the use of multi-step clauses, also known as escalation clauses, as the preferred alternative dispute resolution (“ADR”) clause in international commercial contracts. The purpose of this project is to compare the content and assess the effectiveness and general use of multi-step clauses in the context of those contracts.

Through the partnership of the Pace Institute of International Commercial Law and IACCM, a survey was conducted by IACCM members as well as outside counsel who specialize in international commercial law and alternative dispute resolution processes. This manual, by incorporating the survey results and legal research, sets forth some of the best practices and model language to be utilized in the drafting and ultimate application of step clauses. Additionally, the appendices provide for a chart which compares institutional model clauses and provides statistics on the caseloads of some of the most popular arbitral institutions around the globe.

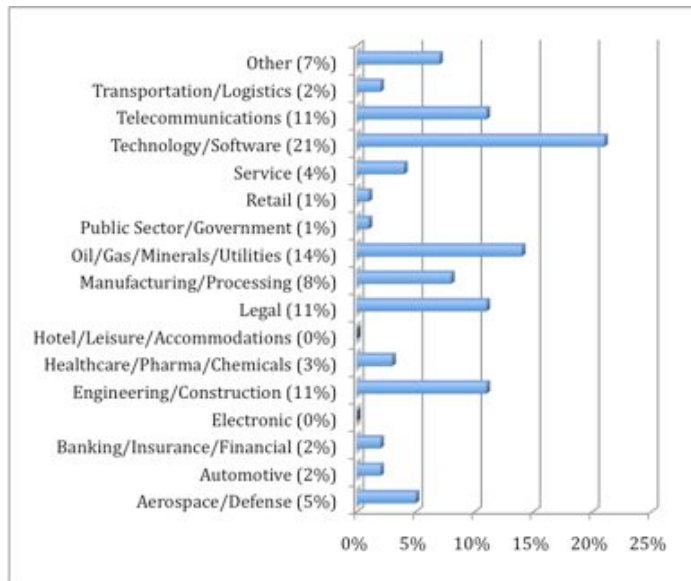
## B. SURVEY METHOD:

The survey was designed to gather information from in-house counsel and corporate lawyers on their use of escalation clauses in business contracts. Furthermore, the survey results intend to answer three basic questions:

- When are step clauses included?
- Why are step clauses included?
- Are step clauses more effective than standard ADR clauses?
- What are the essential ingredients to be included when drafting a step clause?

The survey was narrowly tailored to focus on these main questions. However, it was divided into four sections (general, negotiation, mediation, and arbitration/litigation) to illicit answers regarding each specific dispute resolution step. 133 IACCM members, representing various industries, and twenty-five selected law firms have completed the survey to provide us with information of best practice standards, emerging trends, and ultimately, a selection of escalation model clauses.

*Figure 1 - Percentage of Industries Represented in Survey*



Most survey takers conduct business in North America (43%), Western Europe (23%), and Southeast Asia (15%) with an annual revenue of over \$1 Billion (58%).

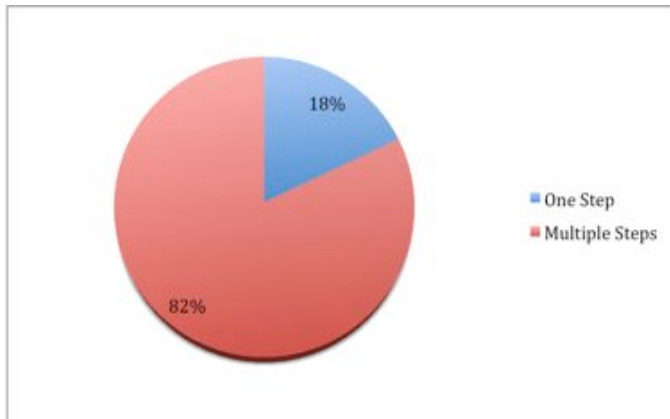
### C. STEP CLAUSES GENERALLY:

“Step” clauses, also known as “escalation” clauses, refer to ADR agreements which feature multiple tiers that require disputants to employ two or more dispute resolution steps in sequence before resorting to arbitration (if specifically consented to by the parties) or litigation (the default final step). These clauses typically utilize negotiation and/or mediation as the initial steps which give parties control and permit them to address foundational interests and preserve business relationships.

Arbitration, as a system of resolving disputes, has roots that can be traced back to ancient Greece, with mentions of its use in the Bible. However, not until the maritime industries of pre-colonial England did it become a process widely accepted in the commercial realm.<sup>1</sup> In its early stages, arbitration was based on voluntary compliance, allowing for the process to exist completely autonomous from the court systems.

However, as the Industrial Revolution roared on and populations began to disperse, community ties began to weaken, eroding the age of compliance and leading to the use of promissory notes and conditioned bonds to compel parties to arbitrate and enforce awards.<sup>2</sup>

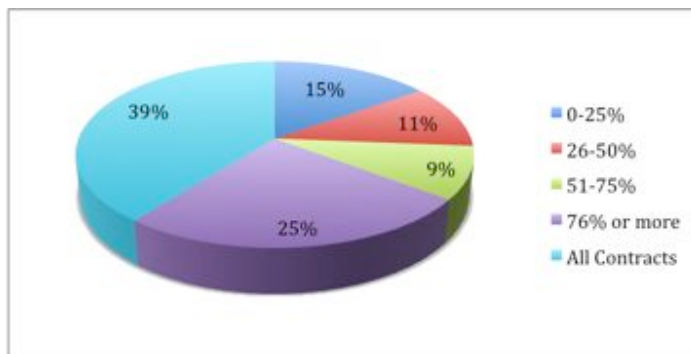
**Figure 3 - Use of One Step vs. Multi-Step ADR Clauses**



Today, as arbitration has become more costly due to increased formalities in the process, and as parties become more concerned with preserving business relationships after a dispute arises; parties have begun to rely on the pre-arbitral processes like negotiations and mediation to cut costs and resolve disputes earlier. Note that 82 % of survey respondents have indicated that they use multiple steps in their ADR clauses. To achieve this goal, contract drafters have chosen to include step clauses in their initial agreements to ensure that opposing parties are required to make a “good faith” effort to settle their disputes amicably.

Stepped processes are already well established in both the commercial and employment contexts in the United States, but recently, they have become more common in the international business transaction context.<sup>3</sup> When asked why parties generally incorporate multiple steps into their ADR clauses, 45% of the respondents answered that time efficiency was their main focus, indicating a belief in faster settlement or resolution of the dispute. Additionally, 37% indicated that the earlier steps, if not successful in resolving the dispute, generally assist in putting the issues on

**Figure 2 - Use of ADR Clauses in Contracts (generally)**

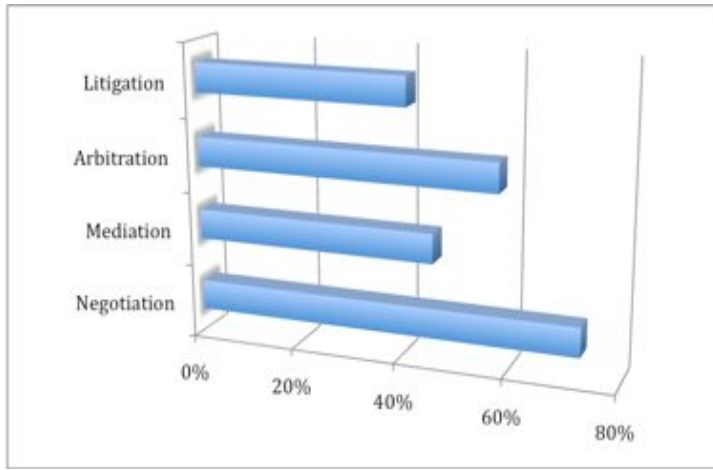


Step clauses are “grounded on the notion that disputes are best resolved by relatively informal, flexible, efficient and inexpensive means, and that binding adjudication through arbitration or litigation should be reserved as a final step in the event all else fails.”<sup>35</sup>

“By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”<sup>36</sup>

the table at an earlier point, helping to narrow the issues in dispute and better facilitate resolution at later stages. However, the most popular answer, with 76% of respondents, was that the earlier processes help to preserve the relationship between

**Figure 4 - Preferred ADR Processes in Multi-Step ADR Clauses**



the parties through amicable resolution. In the business world, where many long-term relationships can be significant, this is considered to be of the utmost importance.

Of the 82% of respondents who indicated that they use multiple steps in their ADR clauses, 73% incorporate negotiations into their clause, 46% use a mediation

provision, 58% finish their clause with binding arbitration, and the only 41% of respondents will use litigation as the final stage in their step clauses. These results indicate the increasing trust placed in the pre-arbitral processes and should be seen as a vote of confidence for incorporation into ADR clauses.

#### **D. DRAFTING AN ALTERNATIVE DISPUTE RESOLUTION CLAUSE:**

It is easy for parties, especially those not familiar with the intricacies of arbitration, to gloss over the arbitration clause during their contract negotiations, however, given that the drafting stage is the only time when the parties can actually have a hand in designing the process before a dispute exists, it is important not to ignore this stage.

When drafting an alternative dispute resolution clause, whether it involves one or several steps, it is recommended the first step is to begin with a model or standard clause. Once the parties have found a sufficient model or standard clause, they can add to the model language to adapt it to the independent circumstances involved in the particular contract, although it is suggested that revisions or additions are never made lightly. Parties must realize that different disputes might call for different processes, and as such, boilerplate clauses used in every contract are rarely sufficient.

Whichever model clause you use, it is important to ensure that the ultimate clause inserted into your contract contains the language necessary to create an enforceable and effective ADR agreement. It has been stated that “[a]n astonishing number of dispute resolution clauses in international contracts are inadequate or defective because the drafters fail to begin the drafting process by consulting and using readily available model or standard forms.”<sup>4</sup>

## II. CONSIDERATIONS FOR DRAFTING STEP CLAUSES

### A. BASIC ELEMENTS NECESSARY IN STEP CLAUSES:

Recognizing that every situation is different, and every contract will require different provisions to be included in the ADR clause, there are certain requirements that are recommended necessary to be included in each and every step clause, regardless of what processes are adopted or individual provisions are chosen:

- Order of steps which must be followed
- Desired rules and limitations placed on each step
- Indication of time limits for each step (triggering the following step)
- Specifying an undisputable trigger for the tolling of such time limits
- Who must be notified when the step has been completed or moot
- How and when this notification should be completed

Example of general model clause which encompass those elements say from where:

- ❖ *In the event of any dispute arising out of or in connection with the present contract, the parties agree to submit the matter, in the first instance, to administered mediation/conciliation in accordance with the rules of [specify institution rules]. If the dispute has not been resolved through such administered proceedings within [set time frame] or written notification is given to all parties declaring the inability to resolve the matter through mediation/conciliation and reasoning for said inability, it shall, after [party/person/institute] confirms receiving notification of the termination of the proceedings, be finally settled under [chosen rules of arbitration] by [number of arbitrators] appointed in accordance with [specify manner for appointing arbitrators or institutional rules act as default]. The seat of arbitration shall be [location].*

### B. “PLUG AND PLAY” METHOD:

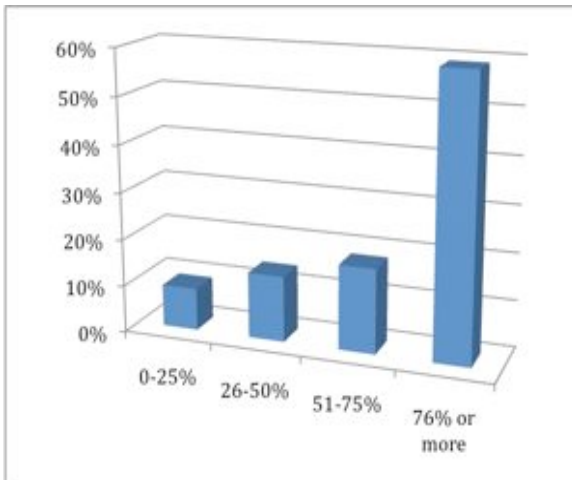
Many companies engaged in international business may find it useful to use a “plug and play” method for drafting an ADR step clause. While certain basic elements should be incorporated into all ADR step clauses, regardless of company size or industry, there are other elements which prove either more or less useful in some particular situations than in others.<sup>5</sup> Additionally, as clearly indicated by the response to the survey, different companies prefer to use different ADR processes.

## III. BEST PRACTICES IN DRAFTING A STEP CLAUSE

### A. MANDATORY NEGOTIATION STEP:

Including a negotiation stage in a company’s step clause is by far the most common decision, with 75% of participants who use multi-step clauses including a mandatory negotiation step in their clauses. A large factor in the success of a negotiation provision depends on the *reasons* behind using negotiation. Generally, negotiation is more practical for settlement when the parties’ need to continue the business relationship outweighs their need to get their way on a particular issue.<sup>6</sup> As indicated by Figure 5, there is a high rate of success for the resolution of disputes when the ADR clause includes a mandatory negotiation step. With 59% of parties who use such a provision finding success in 76% or more of their disputes, who use a mandatory

**Figure 5 - Successful Resolution Using Negotiation**



- Indication of when it is clear that one step has been exhausted in order to allow progression to the next step (specific time frames may be set for each stage).
- Who to notify when step has been completed or is moot
- How and when this notification should be completed

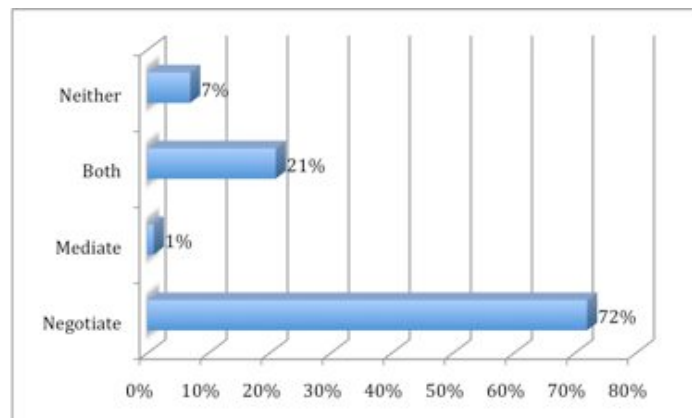
negotiation step, indicated that 76% or more disputes are resolved during the negotiation phase (see Figure 5). Should it be decided that a negotiation step would be useful in an ADR clause, in drafting it is recommended to provide the following information so as to avoid court intervention:<sup>7</sup>

- Order of steps to be exhausted prior to arbitration/litigation
- Desired rules/limitation for each step preceding arbitration/litigation

Parties that include a mandatory negotiation step generally name the following reasons:

- Enhances working relationships (64%)
- High percentage of successful resolutions at this step (58%)
- Cost-efficiency (58%)
- Less formal (45%)
- Provides a better understanding of client needs (39%)
- Client requests it (17%)
- Other (e.g., the need or desire to encourage mid-level managers to resolve issues at this level on their own<sup>8</sup>) (5%)

**Figure 6 - Pursuing Non-Mandatory Negotiations and/or Mediation**



The Uniform Mediation Act “UMA” is one prominent source for defining the scope of confidentiality within mediation proceedings. Currently, there are no prominent sources for defining the same within negotiation proceedings; however, the UMA may be used as a guide post. “The primary interests of the UMA include providing a privilege, something the parties cannot accomplish by contract, respecting confidentiality for mediation proceedings and encouraging the use of fair process conducted with integrity.”<sup>9</sup>

If language does not specify that negotiation is a mandatory step, many parties will not willingly participate or purposefully take a rigid stance in order to progress to the next step.<sup>10</sup> This may be explained by the lack of rules protecting confidentiality available

The survey results indicated various time periods allotted to negotiation, ranging from fourteen days up to three months. 16% of survey takers who use a mandatory negotiation step do not provide for a time limit.

76% of survey takers recommend step clauses because they want to preserve relationships through amicable resolutions. Other reasons for the use of step clauses are time-efficiency and knowing the issues early on in the proceedings.

38% of survey takers provide for a confidentiality agreement in their dispute resolution clauses; however, 42% say that although they do not have a confidentiality agreement, they should provide for one.

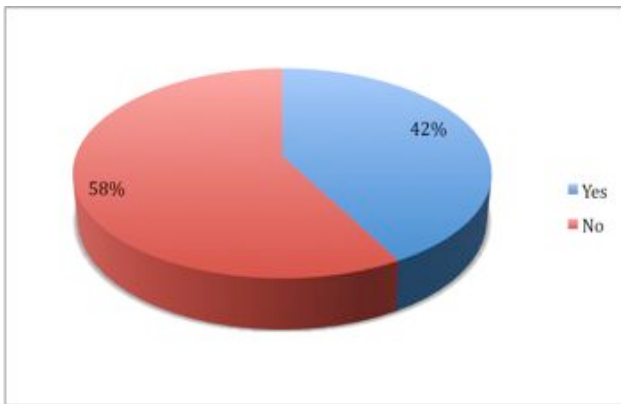
in negotiation proceedings and the fact that any result reached from this mechanism is non-binding.<sup>11</sup> Neither negotiation nor mediation proceedings habitually provide for confidentiality.

One of the interesting results of the survey relates to the parties' interest in entering into negotiations regardless of whether they had included a mandatory negotiation provision in the original contract. As shown by Figure 6, while mediation was not sought without a pre-dispute agreement, negotiations are much more common, being pursued 72% of the time.

## B. MANDATORY MEDIATION STEP:

Mediation is the intervention of an acceptable, neutral, third party with no binding decision-making authority, who assists the parties involved in the dispute to reach a mutually acceptable settlement of the issues in dispute.<sup>12</sup> Like arbitration, mediation is a consensual process, so parties cannot be forced into mediation without an agreement

**Figure 7 - Mandatory Mediation Step in ADR Clauses**



or a court-sponsored program. In addition to addressing substantive issues, mediation may also establish or strengthen trust and respect between the parties or terminate relationships in a manner that minimizes emotional cost and psychological harm.

The requirement of consent ensures that the intervention of the mediator as a third party is not counterproductive, in that it occurs at a moment when the

parties are able to move toward settlement by themselves. The parties remain not only in total control of the process, but they can also walk away from it at any time, making mediation popular in the multi-step context.<sup>13</sup>

For any mediation step to be perceived mandatory, there are certain requirements necessary to be included in that portion of a step clause:

- Reasonable transition from negotiation to mediation (*i.e.*, clear indication that the negotiation step has been exhausted in order to allow progression to the mediation step);
- Desired rules and limitation for the mediation;
- Any party or parties to a dispute may initiate mediation by making a request for mediation;
- Nature of the disputes intended to be submitted to mediation; and
- Any specific qualifications the mediator should possess

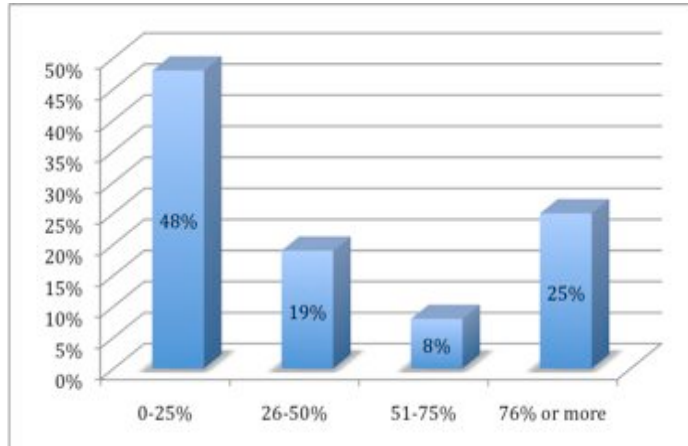
Where there is no pre-existing stipulation or contract by which the parties have provided for mediation of existing or future dispute, a party may request the other party to participate in “mediation by voluntary submission.” However, without specific language in the provision, there will be no way to compel a party to enter into mediation. As noted above in Figure 6, it is extremely rare that a party will pursue voluntary mediation when it is not included in the step clause explicitly.

Unlike the overwhelming use (75%) of a mandatory negotiation step, survey takers are split on providing for a mandatory mediation step. 42% of survey takers expressly provide for mediation while 58% do not. (See Figure 7)

Parties must be careful in drafting to make sure they set time limits on negotiation so that the progression to mediation will be triggered. While 19% of respondents do not set a mediation time frame, 81% provide for timelines anywhere between 2 weeks and 3 months (with 21% providing for more than 3 months)

Although a mere 25% of respondents indicated that they experience the successful resolution of disputes more than 75% of the time they enter mediation (as opposed to 59% for negotiations as shown in Figure 8), there are several well-recognized benefits that are typically associated with the use of mandatory mediation in ADR clauses.

**Figure 8 - Successful Resolution Using Mediation**

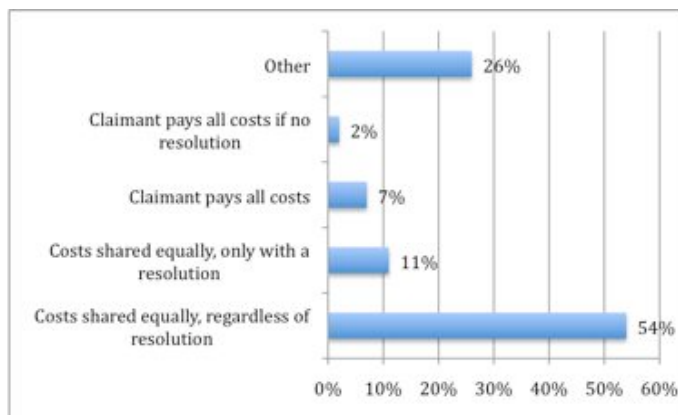


Some of these benefits (and percent of results) include:

- Non-binding, but more structured than negotiation (30%)
- Third-party neutral involvement (26%)
- High percentage of successful settlements at this step (23%)
- Enhances working relationships (21%)
- Institutional support (13%)
- Cost-efficiency (3%)

Another consideration to take into account when using a mediation provision is to name the mediator and/or the mediation institution which will assist in the resolution of the dispute. While it is possible, only 4% of the respondents choose to name a specific mediator for the dispute. Most likely, this preference is a result of the fact that in the event that the named mediator is unavailable, the rigidity resulting from naming a specific mediator will become a roadblock in resolution. However, naming an institution (e.g., JAMS) to administer the mediation is a more popular choice, with 44% of respondents indicating that they prefer institutional definition in the clause.

**Figure 9 - Allocation of Mediation Costs**



Other examples of provisions to include in clauses are allocation of mediation costs (see Figure 9), qualifications for mediators, location of the mediation, language, and confidentiality. While these are not common provisions to be included, depending on your own situations, they might be helpful.

An example of such a provision, based on the AAA’s Pre-Dispute Mediation Clause is:

- ❖ *If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by [ad hoc or institutional] mediation [if institutional, then add: under the rules of [institution’s] Mediation Procedures]*

*before resorting to [state next step provided for in the clause].*

If the parties want to use a mediation institution to resolve an existing dispute, they can enter into the following submission:

- ❖ *The parties hereby submit the following dispute to [institution name] mediation whose rules and procedures they agreed upon or administered by one of the institution under their Mediation Procedures. [Note: The clause may also provide for the qualifications of the mediator(s), method of payment, locale of meetings, and any other item of concern to the parties]*

If language in the contract does not specify that mediation is a mandatory step, parties are not obliged to negotiate or mediate. However, that will not preclude parties from entering into voluntary mediation. In the event that one party request mediation, it will then be up to the parties to decide if they will participate in mediation proceedings, regardless, or demand to progress to the next step.

If the parties do not include a mandatory mediation provision in their clause before the dispute, as indicated above in Figure 6, it is very rare that both parties will agree to mediate after a dispute arises. This is most likely because, even if a party wants to go to mediation, the mere inquiry about the opponent's thoughts are seen as weakening a party's position, whether true or not. Hopefully, with more information about the successful resolution of disputes using mediation is disseminated, parties will become more comfortable asking for, and agreeing to, post-dispute mediation agreements.

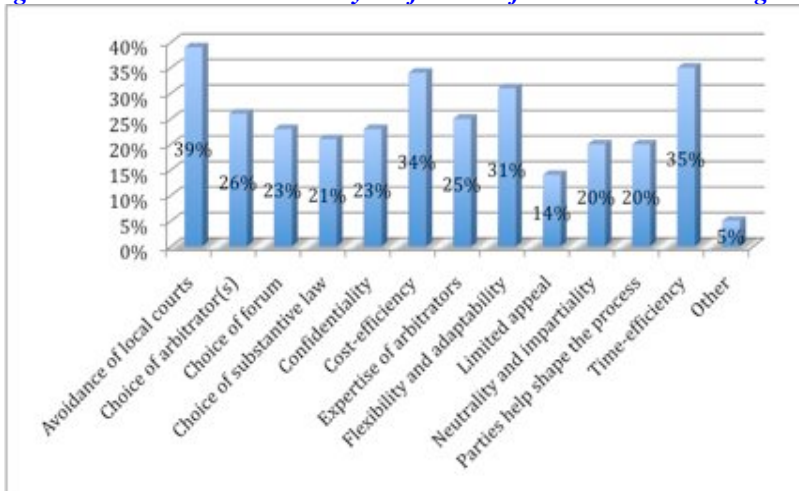
72% of survey responses indicated that they will enter into negotiation or mediation regardless of whether their ADR clause made it mandatory with 21% responding that they will enter into both.  
(See Figure 4)

### C. MANDATORY ARBITRATION STEP:

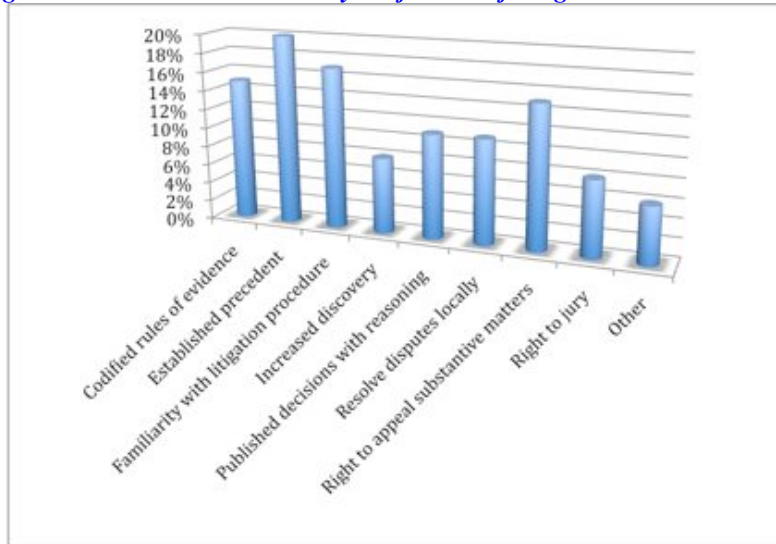
It is understood that pre-arbitral processes of an ADR clause may not result in a complete and final resolution of the dispute (even if the pre-arbitral processes resolved a portion of the underlying issues). Because of that possibility, it is necessary to include a binding process that will finally resolve any outstanding issues. Today, litigation has been supplanted by arbitration as the primary process to be implemented in this regard. Responses to the survey show that 60% of parties will use arbitration rather than litigation to finally resolve any outstanding disputes, a result which is expected given the skyrocketing costs of litigation.

See Figures 10 and 11 for the common rationale used in making this decision

**Figure 10 - Reasons Behind Party Preference of Arbitration Over Litigation**



**Figure 11 - Reasons Behind Party Preference of Litigation Over Arbitration**

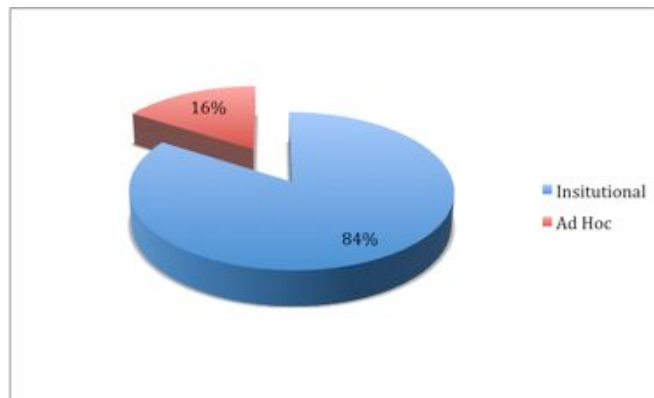


One of the most basic decisions parties must decide in the drafting of their arbitration provision is whether to use *ad hoc* arbitration (see below) or to submit their dispute to arbitration administered by an arbitral institution (e.g., American Arbitration Association, International Chamber of Commerce, London Court of International Arbitration). While institutional arbitration is clearly preferred (see Figure 12), it is a decision which should be carefully considered when drafting a contract.

**i. Ad Hoc vs. Institutional Arbitration**

*Ad hoc* arbitration is managed by the parties and by the arbitrators (once appointed) without the assistance of an administering institution. Thus, it requires the parties to make their own arrangements for the selection of arbitrators and the designation of rules, applicable law, procedures and administrative support. In some *ad hoc* arbitrations, an institutional presence may not be entirely absent since the parties may designate an established set of rules even without an administering institution (e.g., UNCITRAL Rules) and may also designate an institution to act as an appointing authority for the arbitral tribunal in the event that the parties are unable to agree upon tribunal by themselves. “Hybrid” arbitrations, which

**Figure 12 - Institutional vs. Ad Hoc Arbitration**



retain both institutional and *ad hoc* characteristics remain non-institutional in the sense that no institution is formally available to assist the parties in the application of its own rules, but the tried-and-true rules and common understanding of those rules will help to facilitate the arbitration even without the institutional support.

*Ad hoc* arbitration places more of a burden on the arbitrator(s), and to a lesser extent upon the parties, to organize and administer the arbitration in an effective manner. A distinct disadvantage of the *ad hoc* approach is that its effectiveness may be dependent upon the willingness of the parties to agree upon procedures at a time when they are

84% of survey takers provide for institutional arbitration while only 16% use *ad hoc* arbitration.

Provided that the parties approach the arbitration with the spirit of cooperation, *ad hoc* proceedings can be cheaper than institutional arbitration, but not necessarily.

If the parties decide to design their own rules, experience shows that the process can take considerable time, so the majority of parties use established rules.

already in dispute. Failure of one or both of the parties to cooperate in facilitating the arbitration can result in an undue expenditure of time in resolving the issues. The primary advantage of *ad hoc* arbitration is flexibility, which enables the parties to decide upon the dispute resolution procedure. This necessarily requires a greater degree of effort, co-operation and expertise of the parties in determination of the arbitration rules. Another primary advantage of *ad hoc* arbitration is that it can possibly be less expensive than institutional arbitration. The parties only pay fees of the arbitrators, lawyers or representatives, and the costs incurred for conducting the arbitration, *i.e.*, expenses of the arbitrators, venue charges. They do not have to pay fees to an arbitration institution. In *ad hoc* arbitration, parties negotiate and settle fees with the arbitrators directly, unlike institutional arbitration wherein the parties pay arbitrators' fees as stipulated by the institution.

An institutional arbitration involves a specialized institution that intervenes and assumes the function of administering the arbitral process. These institutions do not arbitrate the dispute (they are not the arbitrators), but rather facilitate the resolution of the dispute.

When naming an arbitral institution at the contract stage, certain factors should be taken into account:

- Nature of the dispute (institutional expertise and connection to various industries)
- Value of the dispute (damage thresholds for various procedures)
- Institutional rules (whether they are in line with current practice)
- Reputation of the institution

Care should be taken in the selection of an arbitral institution. There are approximately 1,200 institutions, organizations and businesses worldwide offering institutional arbitral services, and many of these arbitral institutions are operating under rules that are not artfully drawn or that may be applicable only to a particular trade or industry. The greatest threat presented by the less prestigious arbitral institutions is the possibility that the institutional provider will be unable to deliver what motivated the parties to select institutional arbitration over *ad hoc* proceedings, *i.e.* a proper degree of administration which may be the key to a successful arbitration.

Some of the perceived advantages of institutional arbitration by the respondents:

- Established procedural rules (46%)
- Expertise in arbitration (42%)
- Assistance in the appointment of arbitrators (37%)
- Institutional reputation (33%)
- List of qualified arbitrators (27%)
- Cost-efficiency (21%)
- Time-efficiency (19%)
- Case management services (18%)
- Aid in the enforcement of the award (13%)
- Other (*e.g.*, physical facilities, compulsion of reluctant parties) (2%)

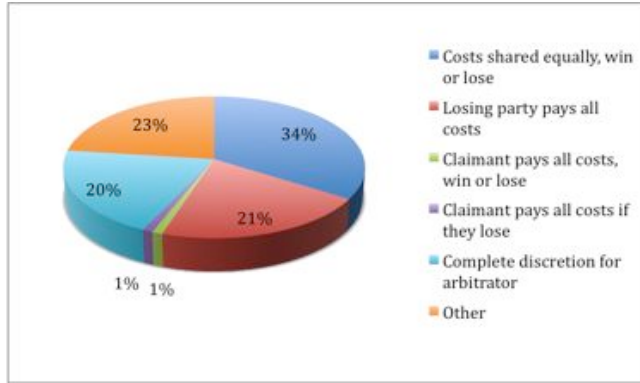
Some considerations named by respondents as their rationale for preferring *ad hoc* arbitration were the ability to customize proceedings, the lack of institutional fees, and no institutional limitations.

“[The] parties agreed on a [institutional] arbitration and that therefore they must be deemed to take [that nation’s] arbitral practices and procedures as they find them.”<sup>37</sup>

Survey takers tend to prefer institutions, such as the International Chamber of Commerce, the American Arbitration Association, and the London Court of International Arbitration; however, many also use local institutions that are specific to a certain dispute.

Another consideration to be taken into account when using either institutional or *ad hoc* arbitration is the allocation of arbitral costs (e.g., arbitrator fees, forum fees, any institutional fees administrative costs). The parties may determine how those costs will be allocated, or they may leave the entire question up to the discretion of the arbitrator. Additionally, many institutional rules will leave this decision to the discretion of the arbitrator.

**Figure 13 - Allocation of Arbitration Costs**



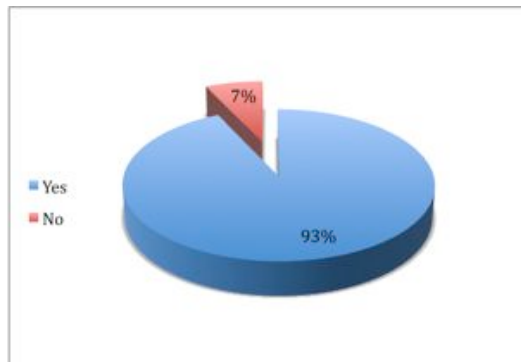
55% of survey takers explicitly designate the location of arbitration in their dispute resolution clauses.

**ii. Designating the Substantive Law**

The substantive law is that which governs the substantive rights and obligations of the parties, presenting a significant step in the drafting of any dispute resolution clause. Although the determination of governing substantive law is one of the most

**Figure 14 - Percentage of Parties Designating Governing Law**

important questions if a dispute reaches the judiciary, for many parties, such determinations are subject to the will of the parties, and therefore can be indicated in the contract governing the dispute.



As indicated in Figure 14, it is clear that parties have come to recognize the importance of this opportunity, with 93% of survey respondents indicating that they designated the governing law that will apply to their disputes.

Parties should be aware that they are able to designate different laws to apply to the:

- Governing the performance of the contract
- Governing the dispute
- Governing the procedure of the arbitration

Every substantive law provision should make clear whether it encompasses either or both designations, and parties must recognize that every nation’s laws differ in the substantive rights provided.

An model of such a provision is:

- ❖ *This Agreement shall be governed by the laws of [insert nation], and any and all disputes arising under or in connection with this Agreement shall be resolved under and in accordance with the laws of [insert same or different nation]. [Note: Parties may also include an exclusion of a nation’s conflict of laws rules by adding language as follows] The designation of such substantive law is to the exclusion of its conflict of laws rules.*

### iii. Designating the Arbitral Seat

The arbitral seat represents the “place” where the arbitration is held from a legal perspective, While the seat is usually evidenced by the physical location where the proceedings are held, parties are free to designate whichever arbitral seat they desire, regardless of where they ultimately desire the proceedings to take place.<sup>14</sup>

Designating the arbitral seat is important for five main reasons:

- Standards on setting aside awards differ between states, and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>15</sup> (“New York Convention”) allows the courts of the arbitral seat to set aside the award. Since some states have strong pro-arbitration policies, making them more beneficial.
- Courts of the arbitral seat may have to step in to compel parties to comply with a clause, enjoin parties hindering the process, or enforce provisional orders
- The convenience of certain locations should be taken into account in relation to the nationalities of the parties involved in the contract
- Local courts may be called in to appoint the presiding arbitrator if the party-appointed arbitrators fail to agree and the institution does not provide for recourse in that situation

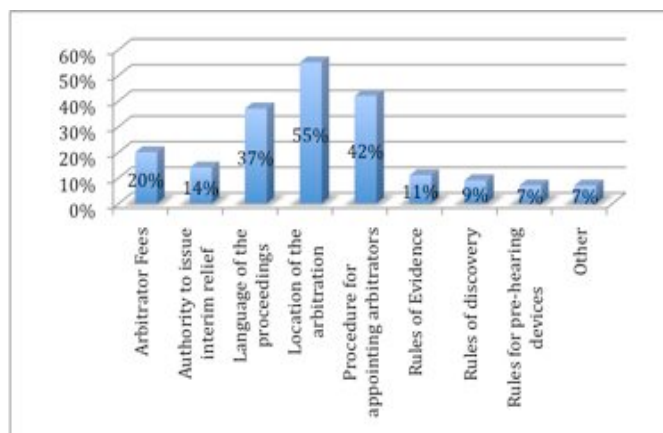
If the parties fail to agree to an arbitral seat, if an institution is administering the proceedings, designation of the seat shall fall to the institution, taking certain considerations into account:

- Nationality of the parties
- Subject matter of the dispute
- Substantive law designated to govern the dispute
- Any other “relevant” circumstances
- Institutional guidelines (e.g., ICC Rules of Arbitration Art. 14.1)

### iv. Additional Considerations in Drafting an Arbitration Provision Based on Survey Results

In addition to those considerations mentioned above, parties tend to vary on how they approach some of the following provisions. While some parties feel very strongly about including language designations or provisions concerning the issuance of interim relief by the arbitrator (see Figure 15), others will not touch upon these subjects and will rely on the default provisions of the governing rules of procedure.

Figure 15 – Various Considerations to be Included in Arbitration Clauses



In hindsight, provisions such as the designation of a language to be used may seem like their inclusion would be common sense, but some clauses require court appearances to clear up disputes over such a provision

which, at the time of drafting, seemed almost self-evident. Drafters of ADR clauses must realize that it is better to specify issues that may seem obvious while striking a balance in keeping the process flexible. It is possible to over-complicate arbitration, eating into its cost-saving benefits.

#### *v. Method of Selecting and Replacing Arbitrators*

When parties choose an arbitral institution to administer their arbitration, they are in effect agreeing to abide by the process set down by that institution for the selection of arbitrators, thus, it is important to research the rules of whichever institution you agree to in order to ensure that you agree with the process laid out. In the event that you do not want to use the institutional process, if the parties agree, they may choose to design their own rules which will override the rules of the institution.

Considerations in designing the selection process:

- Number of arbitrators (traditionally single or tripartite)
- Party-appointment or “strike-and-rank” appointments,<sup>16</sup>
- Time frame for appointment and result of missing deadlines
- How the Chair of the tribunal is selected (*e.g.*, the parties, the two party-appointed arbitrators, or the institution’s director)
- Process for reviewing and challenging arbitrator nominations
- Removal of arbitrators after appointment

As to the number of arbitrators, a tripartite tribunal is generally more appropriate in large disputes involving complex factual and legal questions. If the parties agree to more than one arbitrator, it allows them to provide for expertise in different fields, bringing a diversity of thought and experience to the table. Each party must be cognizant of the increase in costs and time that will result since it is much more difficult to coordinate the schedules of three arbitrators rather than one. If time is of the essence, parties might want to consider using a single arbitrator, but that is a determination to be made on a case-by-case basis. Note that parties can agree to different numbers of arbitrators for different circumstances, such as creating a monetary damage ceiling, above which the parties *must* have three arbitrators.

An model of such a provision is:

*Within [specify time] after the arbitration is commenced, each party shall select one person to act as arbitrator, and [choose parties, party-appointed arbitrators, institutional neutral, etc] shall select a third arbitrator within [specify time] after the appointment of the party-appointees. If any arbitrators are not selected within the specified time, the appointing authority shall be the [institution or appointing authority] shall make such selection(s).*

Additionally, survey takers indicate that they require certain arbitrator qualifications, such as:

- Industry knowledge (54%)
- Years of experience as an arbitrator (33%)
- Specific language skills (17%)
- Nationality (3%)
- Other (such as legal experience) (5%)

41% of survey takers prefer to submit disputes to a tripartite arbitration panel while 36% prefer a single arbitrator.

An example of such a provision is:

*It is agreed by the parties that one arbitrator shall have legal expertise in the field of [name field of law] who shall serve as the Chair of the Tribunal. Each arbitrator must be proficient in both English and French [name any language necessary] and must have served in at least [#] arbitrations.*

Parties have to be careful not to over-qualify the nominations because the more conditions placed on the appointees, the less likely it will be to find someone who will fit the mold. Also, while the initial appointment process is important, parties must realize that replacement occurs as well, and if they do not specify such replacement procedures, the institutional rules will be used as the default.

#### **vi. Rules of Evidence & Discovery**

Though lauded for its flexibility with regard to deciding which rules parties choose to be bound by, arbitration and its inherent flexibility may serve equally as a detriment. Most institutions, if at all, provide only generally guidance for evidentiary issues and even these bestow a large amount of discretion upon the arbitrators. If rules of evidence are absent from an ADR clause then decisions regarding all evidence will be left up to the discretion of the arbitrator(s). In response to the lack of a standardized evidentiary practice amongst the international arbitration world, some institutions have promulgated rules intended to be used in conjunction with either institutional or ad hoc arbitration proceedings.<sup>17</sup>

Each of these rules cover the following issues:

- Procedural due process requirements in certain circumstances;
- Arbitral conferences and hearings and any resulting orders;
- Allowing or prohibiting *ex parte* communications;
- Availability of written or oral evidence;
- Scope of discovery and discovery request procedure;
- Scope of witness examination (both lay and expert);
- Requirements for notice with regard to all evidentiary requests;
- Admissibility of evidence (*i.e.*, arbitrator authority, limited or broad, to determine the existence thereof);
- Privileges or immunities and the arbitrator enforcement;
- Timing provisions mandating quick resolutions at all stages;<sup>18</sup>
- Availability of interim measures of protection;
- Scope of discovery sanctions;

Determining which evidentiary rules to include, or whether to include any at all, is for the drafter to decide based upon the particular circumstances of the contract or dispute involved. In making such determinations it may be helpful to consider the purposes of discovery in arbitration which are as follows:

- Eliminating “surprise” and thus avoiding “ambush” strategies;
- Ensuring that the relevant facts are fairly developed; and
- Expediting proceedings by eliminating the *need* for live testimony.<sup>19</sup>

Generally, document discovery is the most common form of discovery in international arbitration.<sup>20</sup> Thus, if the disclosure of trade secrets or similarly situated information is a concern, it may be useful to consider placing an evidentiary rule protecting that information within the ADR clause.<sup>21</sup> Although a Tribunal or an Arbitrator may not

11% of survey takers incorporate certain rules of evidence in their dispute resolution clause.

“Arbitrators...are not required to follow strict rules of procedure or evidence . . . [r]ather they concentrate on establishing the facts necessary for the determination of the issue . . . using whatever means appropriate”<sup>38</sup>

“The arbitrator shall determine the admissibility and weight of the evidence and shall not be bound by the rules of evidence.”<sup>39</sup>

9% of survey takers incorporate certain rules of discovery in their dispute resolution clause.

have the power to enforce compliance with such orders, “it may advise the parties that it will draw whatever inferences it deems appropriate from a failure to comply with such orders...” that it may also “apportion the costs of the arbitration in light of party’s refusal to comply...and, in extreme cases, issue an award in the nature of a default or summary disposition.”<sup>22</sup>

### *vii. Arbitral Awards*

In international arbitration, the general practice has been to require reasoned awards, with 60% of survey respondents following this international norm.<sup>23</sup> Arbitral institutions tend to either require the issuance of reasoned awards or to make reasoned awards their default rule, subject to contrary agreement of the parties. If parties do not want a reasoned opinion, they should therefore explicitly specify this in their arbitration clause. The parties should, however, also be aware of the procedural laws they chose. For example, parties cannot opt out of reasoned awards in Belgium, Brazil, and Russia because these countries always require reasoned awards.<sup>24</sup>

Despite these rules, parties should understand that a reasoned award normally cannot be appealed for insufficient reasoning because it does not necessarily contain a “legal treatise of the issue at stake” but rather a plain “reasoning of the decision.”<sup>25</sup>

Parties should carefully consider whether or not they want a reasoned award. Here are some considerations to keep in mind:

Advantages of a reasoned opinion:

- Understanding the arbitrators’ reasoning
- Making sure arbitrators didn’t act arbitrarily

Disadvantages or disincentives to require of a reasoned opinion:

- More grounds to appeal
- Reasoned awards don’t set precedent
- Additional cost to the parties

Our survey results tend to show that parties are split between requiring reasoned awards and not requiring them. If the parties chose to have a reasoned opinion, they should make it clear in their arbitration agreement.

Several examples of such a provision are:<sup>26</sup>

- ❖ *The award of the arbitrators shall be accompanied by reasoned opinion.*
- ❖ *The award shall be in writing, shall be signed by a majority of the arbitrators, and shall include a statement setting forth the reasons for the disposition of any claim.*
- ❖ *The award shall be in writing, shall be signed by a majority of the arbitrators, and shall include a statement setting forth the reasons for the disposition of any claim.*
- ❖ *The award shall include findings of fact [and conclusions of law].*
- ❖ *The award shall include a breakdown as to specific claims*

“To the extent that none of the laws requiring a statement of reasons on which the award is based is specific as to the extent of reasoning, only total lack of reasons should lead to setting aside.”<sup>40</sup>

### **viii. Award Enforcement**

The New York Convention ensures enforcement of foreign awards in a state that is a party to this Convention. Article III specifically states that “[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon . . . .”<sup>27</sup> A party seeking enforcement must supply the court with two documents: the duly authenticated original award or a duly certified copy thereof and the original agreement referred to in article II or a duly certified copy thereof.<sup>28</sup>

Because courts look at the arbitration agreement to enforce awards, it is crucial to draft a valid and non-ambiguous arbitration clause. Though courts tend to enforce awards when the agreement, on its face, is valid, parties should also be aware of possible public policy violations that might hinder a court in a certain country to enforce an award.<sup>29</sup>

When drafting a clause, including “entry of judgment” language might be useful. Though not necessary in international arbitration clauses, parties can include “entry of judgment” language to ensure enforcement of an arbitral award under the New York Convention. If required under local law, parties should comply with the formalities of the chosen seat of arbitration.<sup>30</sup> If the parties choose to arbitrate in such a jurisdiction, the parties may want to include “entry of judgment” language into their clause, such as:

- Judgment upon the arbitral award may be entered in any court having jurisdiction thereof,<sup>31</sup> or
- We further agree that we will faithfully observe this agreement and the rules, and that a judgment of any court having jurisdiction may be entered on the award.<sup>32</sup>

## **IV. COMPELLING COMPLIANCE WITH STEP CLAUSES**

While the popularity of step clauses (82 % of survey takers use multiple steps) has grown in the recent past, with it has come litigation over the question of compelling parties to comply with the steps provided for in such clauses. While the ultimate goal of ADR clauses is to stay *out* of court, improper drafting and straying from the designated process will result in delays, or worse – unintended litigation.

In mediation and arbitration, consent is absolutely necessary to provide the enforceability of any step clause, and one of the major factors to determining if consent was present is the satisfaction of any pre-conditions placed on the parties. Thus, if any pre-conditions have not satisfied – and have not been waived – a party may raise a jurisdictional objection, effectively removing the jurisdiction and authority of the arbitrator since the clause’s conditions have not been met. This removal of the tribunal’s power leads the parties to resort to litigation unless they can resolve their differences and waive the conditions.

To put this problem in context, 59 % of survey takers answered that they will raise objections to the jurisdiction of the arbitral seat in court rather than with the tribunal when the objection is based on allegations that any of the pre-conditions in the step clause have not been satisfied.

One practical example where this objection will come into play can be found when the parties have, in the language of their step clause, named an individual who must be

Under the U.S. Federal Arbitration Act (“FAA”),<sup>41</sup> for example, language regarding “confirmation of awards has led to the practice” of including such language in domestic arbitration clauses.<sup>42</sup> In addition, many Swiss cantons require such language as well.<sup>43</sup>

“[T]he FAA’s proarbitration policy does not operate without regard to the wishes of the contracting parties”<sup>44</sup>

“The ability to determine the conclusion of . . . [pre-arbitral mechanisms]...and thus, the point at which the parties may be free to pursue litigation or...[arbitration] ...must be a *telling indicium* of the certainty and thus enforceability of the agreement”<sup>45</sup>

“[A] party cannot be required to submit to arbitration any dispute which he has not agreed to submit”<sup>46</sup>

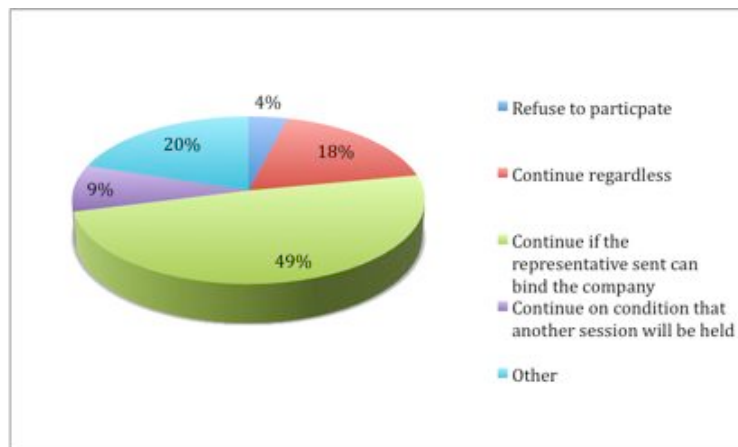
present at any mediation proceedings to resolve the disputes. The parties are within their right to specify either the individual (*e.g.*, John Smith) or the position held (*e.g.*, Corporation Counsel) to be present, but if they are not present, then technically, one of the pre-conditions placed on the mediation provision will not be satisfied and an objection can be raised.

The survey showed that a mere 21% of respondents find it helpful to name the specific individual, with the remainder preferring to name a specific position held to be present in the proceedings. The top positions named were the General Counsel (35 %), the Chief Operations Officer (18 %), the Relevant Sales Manager to a dispute (17 %), the President/Chief Executive Officer (12%), or the Head of the Sales Department (8%) to handle a certain dispute.

With the realities of business, it is possible that on the date of a mediation session, the named individual or officer will be unavailable for whatever reason. Therefore, it is recommended, although usually not adopted, to include language which provides the named officer the ability to send a representative in their stead who can attend the proceedings in their absence.

While only 34% of the respondents typically include such language, such language would prevent the any jurisdictional objection based on preconditions.

**Figure 16 - Opposing Party's Reaction to the Named Officer Failing to Attend**



While 49 % of survey takers indicated that they will only continue with the proceedings if the available company representative has the authority to bind the company, 9% have indicated that they will demand an additional session(s) to be held where the named officer will be present, adding costs, even if litigation is not pursued. Surprisingly, in this specific context, only 4% of respondents will completely refuse to continue.

Although step clauses have reached mainstream use in international business contracts, United States courts have yet to catch up to their practical use still battling interpretive differences and split opinions on how to effectively determine what clauses are enforceable and when a party must abandon their attempts to mediate or arbitrate and proceed to court.

Generally, there are three main considerations taken into account:

- *Nature of Dispute* – Parties may only be compelled to negotiate/mediate/arbitrate claims falling under the terms of the agreement
- *Binding Nature* – If any step of the process includes an option by the parties, courts have considered the next steps an “unconditional right” which courts refuse to compel under the FAA<sup>33</sup>
- *Conditions Precedent* – Parties must be careful about creating conditions precedent which, if not met, may lead courts to refuse compulsion of subsequent steps until the condition is satisfied<sup>34</sup>

Of course, if all parties involved agree to skip a specific step in the agreed upon process, they may do so freely, effectively waiving any or all pre-conditions which were originally placed in the clause. This would allow parties who realize that their one month negotiation period will not result in a resolution and would prefer for a mediation to take place sooner to skip the mandatory time limits. To do so, both parties must consent to the change, so if one party objects to the waiver, the parties must continue to comply with the designated conditions.

In order to avoid that situation completely, the parties should focus on drafting clear and unambiguous terms including the types of disputes covered, the timelines, and any conditions to move forward with the next step.

---

<sup>1</sup> STEVEN C. BENNETT, *ARBITRATION: ESSENTIAL CONCEPTS* 9 (2002).

<sup>2</sup> *Id.*

<sup>3</sup> See JAY FOLBERG ET AL., *RESOLVING DISPUTES* 619 (2005).

<sup>4</sup> Paul D. Friedland, *ARBITRATION CLAUSES FOR INTERNATIONAL CONTRACTS* 57 (2007).

<sup>5</sup> See Klaus Peter Berger, *Law and Practice of Escalation Clauses*, 22 *ARB. INT'L.* 1, 9 (2006) (explaining that certain contracts warrant provisions that others do not).

<sup>6</sup> See Dana H. Freyer, *Practical Considerations in Drafting Dispute Resolution Provisions in International Commercial Contracts: A US Perspective*, 15 *J. INT'L ARB.* 4 (1998).

<sup>7</sup> Arthur W. Rovine, *ICA Congress Series No. 12: Introduction to Session on Issues in Integrated Dispute Resolution Systems*, pp.439-445, at 442 (2005) (discussing parties' ability to manipulate the execution of a negotiation step due to its lack of precise definition).

<sup>8</sup> See The Institute of Conflict Prevention and Resolution,

<http://www.cpradr.org/PracticeAreas/ArbitrationCommittee/tabid/177/Default.aspx> (for all model clauses). See also Freyer, *supra* note 7.

<sup>9</sup> Luis Miguel Diez & Nancy Oretskin, *The U.S. Mediation Act and Draft UNCITRAL Model Law on International Commercial Conciliation* (2002), available at <http://www.mediate.com/articles/daiz2.cfm>.

<sup>10</sup> See The Institute of Conflict Prevention and Resolution,

<http://www.cpradr.org/PracticeAreas/ArbitrationCommittee/tabid/177/Default.aspx>.

<sup>11</sup> See Rovine, *supra* note 8, at 422; see also CHRISTIAN BUHRING-UHLE, LARS KIRCHOFF & GABRIELE SCHERE, *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS* 247-268, (2006).

<sup>12</sup> CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* (3d ed. 2003).

<sup>13</sup> KLAUS P. BERGER, *PRIVATE DISPUTE RESOLUTION IN INTERNATIONAL BUSINESS: NEGOTIATION, MEDIATION, ARBITRATION* 125, 126 (Kluwer Law International vol. II 2006).

<sup>14</sup> Friedland, *supra* note 5, at 35-37 (2000).

<sup>15</sup> New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 *U.N.T.S.* 38 (1959) [hereinafter "NY Convention"].

<sup>16</sup> In a "strike-and-rank" appointment system, the parties will receive a list of qualified arbitrators from the institution, and they must then strike (limited number of strikes provided) the names which they will not accept as arbitrator and then rank the remaining names in order of preference. Then, the institution will compile the list and find the common names which are ranked the highest, and that will be the arbitrator(s) appointed.

<sup>17</sup> See THE CENTER FOR PUBLIC RESOURCES [hereinafter "CPR"], *Rules for Non-Administered Arbitration of International Disputes* (West, 1991); UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW [hereinafter "UNCITRAL"] *Arbitration Rules* (1976); INTERNATIONAL CHAMBER OF COMMERCE'S [hereinafter "ICC"] *Rules for Pre-Arbitral Referee Procedure*; THE AMERICAN ARBITRATION ASSOCIATION'S [hereinafter "AAA"] *International Arbitration Rules*, arts. 19, 20 (West, 1998); INTERNATIONAL BAR ASSOCIATION'S [hereinafter "IBA"] *Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration*.

<sup>18</sup> CPR Rule 9.2 (authorizing the Tribunal "to impose time limits it considers reasonable on each phase of the proceeding.").

<sup>19</sup> See, e.g., Fed. R. Civ. P. 26, Advisory Committee's notes to 1983 amendments; Louis H. Willenken, *The Often Overlooked Use of Discovery in Aid of Arbitration and the Spread of the New York Rule to Federal Common Law*, 35 *BUS. LAW.* 173, at 173 (1979).

<sup>19</sup> See Monica Petraglia McCabe, *Arbitral Discovery and the Iran-United States Claims Tribunal Experience*, 20 *INT'L LAW.* 499, 501 (1986).

<sup>20</sup> See *id.*

<sup>21</sup> See CPR Rule 11 (authorizing the Tribunal to issue orders "protecting the confidentiality of proprietary information, trade secrets and other sensitive information disclosed.").

<sup>22</sup> Robert D. Fischer & Roger S. Hancock, *International Commercial Disputes: Drafting an Enforceable Arbitration Agreement*, 21 *WM MITCHELL L. REV.* 941, 290 (1996) (citing CPR Rule 15 (authorizing an award on default as a remedy for non-compliance with the Rules)); see also, UNCITRAL, art. 28(3) (giving express authorization for a

---

Tribunal to “make the award on the evidence before it” in the event a party does not comply with requested documentary evidence).

<sup>23</sup> JULIAN D. M. LEW, LOUKAS A MISTELIS, AND STEFAN M. KRÖLL, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 649 (Kluwer Law Int’l 2003).

<sup>24</sup> *Id.* at 648.

<sup>25</sup> *Id.* at 649.

<sup>26</sup> American Arbitration Association, *Drafting Dispute Resolution Clauses*, Sept. 1, 2007, <http://www.adr.org/si.asp?id=4125> (last visited: Nov. 12, 2009).

<sup>27</sup> *Id.* at art. III.

<sup>28</sup> *Id.* at art. IV.

<sup>29</sup> *Id.* at art. V.

<sup>30</sup> William W. Park, *Arbitration of International Disputes*, 39 *BUS. LAW.* 1783, n.11 (1984).

<sup>31</sup> *Id.* at 1788.

<sup>32</sup> Agnes Wilson, *Drafting Dispute Resolution Clauses – A Practical Guide*, 13 *PRAC. LAW INST. N.Y.* 19, 35 (1998).

<sup>33</sup> *Advanced Bodycare Solutions, LLC v. Thione Int’l, Inc.*, 524 F.3d 1235, 1240-41 (11th Cir. 2008) (sending parties to domestic contract law, other statutory provisions, or the discretionary authority of district courts to seek a stay while the parties mediate). The Eleventh Circuit has held that the mandatory provisions found in the Federal Arbitration Act, including mandatory stays and the compelling of arbitration will not be triggered if the agreement includes optional language. *Id.* See also Barbara A Mentz, *Step Clauses: Obstacles to Enforceability*, 2 *N.Y. DISP. RESOL. LAW.* 54, 54 (2009).

<sup>34</sup> *Kemiron Atl., Inc. v. Aguakem Int’l, Inc.*, 290 F.3d 1287, 1291 (11th Cir. 2002) (denial of motion to stay arbitration due to the lack of a failed good faith attempt to mediate); *HIM Portland, LLC v. Devito Builders, Inc.*, 317 F.3d 41 (1st Cir. 2003) (involving a multi-tiered construction contract); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964) (finding that the completion of conditions precedent is a question of procedural arbitrability).

<sup>35</sup> Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution*, 8 *NEV. L.J.* 427, 458 (2007).

<sup>36</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

<sup>37</sup> *Paklito Inv. Ltd. v. Klöckner East Asia Ltd.*, 2 *H.K.L.R.* 40 (1993).

<sup>38</sup> Fisher & Hancock, *supra* note 22, at 941 (citing Laurence Craig et al., *International Chamber of Commerce*, xxi, pg. 376-81 (2d ed. 1990)).

<sup>39</sup> NAT’L ARB. FORUM CODE OF PROC., 35(c) (Equilaw Incorporated, 1992).

<sup>40</sup> LEW, MISTELIS & KRÖLL, *supra* note 23, at 649.

<sup>41</sup> 9 U.S.C. § 9 (2009).

<sup>42</sup> Park, *supra* note 31, at 1788.

<sup>43</sup> *Id.* at n.11.

<sup>44</sup> *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 57 (1995).

<sup>44</sup> *Aiton Australia Party Ltd. v. Transfield Party Ltd.*, 153 *FLR* 236, n.26 (1999) (emphasis added.); see also Berger, *Law and Practice of Escalation Clauses*, *supra* note 6.

<sup>44</sup> *AT&T Tech., Inc. v. Commc’n Workers of America*, 475 U.S. 643, 648 (1986).

## APPENDIX A – INSTITUTIONAL MODEL CLAUSE PROVISIONS

INSTITUTIONS								
ELEMENTS	ICC	AAA (ICDR)	LCIA (London)	SIAC (Singapore)	SCC (Sweden)	JAMS	HKIAC (Hong Kong)	Pace
One-Step								✓
Multi-Step	✓	✓	✓	✓	✓	✓	✓	✓
Order of Steps	✓	✓	✓	✓	✓	✓		✓
“Arise from Contract”	✓	✓	✓	✓	✓	✓	✓	✓
Location		✓	✓	✓			✓	✓
<i>Ad Hoc</i> or Institutional	✓	✓	✓	✓	✓	✓	✓	✓
Name Administering Institution	✓	✓	✓	✓	✓	✓	✓	✓
Substantive Law	✓	✓	✓	✓		✓		✓
Procedural Rules	✓	✓	✓	✓	✓	✓	✓	✓
Language			✓					✓
End-of-Phase Notification		✓				✓		✓
Who is Notified?		✓						✓
How to Notify								✓
When Notified								✓
Confidentiality						✓		✓
Dispute Initiation	✓							✓
Time Limits	✓	✓		✓	✓	✓		✓
NEGOTIATION PROVISIONS								
Exhaustion Criteria (Trigger)						✓		✓
Who Mediates	✓	✓	✓	✓	✓	✓	✓	✓
Location		✓	✓	✓	✓			✓
Confidentiality						✓		✓
Time Limitation	✓	✓		✓	✓	✓		✓
End of Mediation	✓	✓				✓	✓	✓
ARBITRATION PROVISION								
<i>Ad Hoc</i> v. Institutional	✓	✓	✓	✓	✓	✓	✓	✓
Arbitral Seat		✓	✓	✓	✓		✓	✓
Procedural Rules	✓	✓	✓	✓	✓	✓	✓	✓
Substantive Law	✓	✓	✓	✓	✓	✓	✓	✓
Evidentiary Rules			✓			✓		✓
Arbitrator Selection	✓		✓		✓	✓		✓
Enforcement Under New York Convention						✓		✓
Authority to Enjoin or Compel						✓		✓
Appeal of Award								✓

**APPENDIX B – NUMBER OF ARBITRATIONS ADMINISTERED  
BY INSTITUTION**

	<i>2004</i>	<i>2005</i>	<i>2006</i>	<i>2007</i>	<i>2008</i>
<i>AAA-ICDR</i>	614	580	586	621	703
<i>BCICAC (British Columbia)</i>	84	77	76	82	N/A
<i>CIETAC</i>	461	427	442	429	548
<i>HKIAC (Hong Kong)</i>	280	281	394	448	602
<i>ICC</i>	561*	521*	593*	599*	663*
<i>JCAA (Japan)</i>	21	11	11	15	12
<i>LCIA* (London)</i>	87*	118*	123	132	210
<i>SCC (Sweden)</i>	45	53	64	81	74
<i>SIAC (Singapore)</i>	48	45	65	70	71