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Standard Arbitration Clause for Construction Contract

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A Standard Clause providing sample language for the parties to a domestic US or international construction agreement to agree to arbitration of disputes. This Standard Clause contains options for parties to agree on either institutional administered or ad hoc arbitration. It features integrated drafting notes explaining the provisions the parties may want to include to address tiered dispute resolution, the seat, language, the governing law of the arbitration, the number, qualifications, and appointment of the arbitrators, joinder and consolidation options, and cost allocation.

DRAFTING NOTE: READ THIS BEFORE USING DOCUMENT

Arbitration of Construction Disputes

For construction practitioners, arbitration clauses are an important but often overlooked provision in a construction contract. No party with a high-value or time-sensitive construction claim wants to find itself confronted with an ambiguous or poorly drafted arbitration clause.

Arbitration is the most common dispute resolution process for the construction industry (see generally Practice Note, Overview: Construction Arbitration in the US). It provides parties to a construction dispute certain advantages over court litigation, such as:

- Procedural flexibility.
- Faster and more efficient resolution of the dispute.
- The ability to select the arbitrators.
- Confidentiality of the proceedings.
- Greater certainty in the finality of the resolution.

However, the disadvantages of arbitration include:

- The parties' additional costs in paying administrative and arbitrator fees.
- The inability to appeal the final award unless the parties agree.
- Heightened complexity in proceedings involving multi-party disputes.

For information on the differences between litigation and arbitration generally, see Practice Note, Why Arbitrate? For information on arbitrating construction disputes in the US, see Practice Note, Arbitrating Construction Disputes in the US.

This Standard Clause may be inserted into a domestic US or international construction contract. It assumes that the underlying contract is between an owner and a general contractor (often referred to as a contractor) on a design-bid-build project, but it can also be used in an agreement between an owner and construction manager, an owner and design-builder, or an owner and design professional such as an architect or engineer.

In some provisions, this Clause uses language that is similar to the language the American Arbitration Association (AAA) proposes in its Construction Industry Arbitration Rules and Mediation Procedures (AAA Construction Rules) and the language the International Bar Association (IBA) proposes in the IBA Guidelines for Drafting International Arbitration Clauses. For more information on drafting an

arbitration agreement for a US construction contract, see Practice Note, Arbitration Clauses in Construction Contracts in the US: Drafting Strategies.

Bracketed Language

The drafting party should replace bracketed language in ALL CAPS with case-specific facts or other information. Bracketed language in sentence case is optional language that the drafting party may include, modify, or delete in its discretion. A forward slash between words or phrases indicates that the drafting party should include one of the words or phrases in the document.

Arbitration Clause

[In the event of any dispute arising out of or relating to [this Contract/the Contract Documents] [, including any question regarding [its/their] existence, validity, or termination], the parties shall first endeavor to resolve amicably by [FORM OF TIERED RESOLUTION] [between [NAMES/ROLES]]. If the dispute remains unresolved [NUMBER] days after either party requests in writing negotiation under this clause or within such other period as the parties may agree in writing, the dispute shall then be resolved by final and binding arbitration [in accordance with the arbitration agreement set forth below].]

Any controversy or claim arising out of or relating to [SPECIFIC SCOPE] [[this Contract/the Contract Documents], or the breach thereof,] shall be settled by binding [ad hoc] arbitration [before [NUMBER] arbitrator[s] [administered by [INSTITUTION] [under [the/its] [RULES]]]], and judgment on the award rendered by the arbitrator[s] may be entered in [[COURT]/any court having jurisdiction thereof].

DRAFTING NOTE: ARBITRATION CLAUSE

The arbitration clause should be simple and straightforward in identifying the scope of matters the parties agree to arbitrate, any applicable arbitration rules, and the institution (if any) administering the arbitration. Parties may also agree in advance to the number of arbitrators.

Contract Documents

Construction contracts sometimes define the term Contract Documents to refer to the prime contract and all related contracts, agreements, and other documents that together form the parties' overall agreement for the project (for example, AIA Doc. A101-2017); see Practice Note, Representing the Owner in Construction Litigation: Initial Considerations: Review the Construction Documents). The sample paragraphs above provide optional language for parties to include reference to either this contract or any previously defined term referring to the project's other contract documents.

Tiered Dispute Resolution

Parties to construction agreements may use a tiered dispute resolution provision that requires the parties to satisfy one or more pre-conditions before starting an arbitration. The pre-arbitration steps can vary from settlement negotiations between project executives to mediation or dispute boards determinations. These methods can help parties resolve disputes in a timely and cost-effective manner and avoid a lengthy arbitration proceeding. Parties may use the optional paragraph above to require a tiered dispute resolution process before a party resorts to arbitration.

For more information about tiered dispute resolution, see Practice note, Hybrid, multi-tiered and carve-out dispute resolution clauses.

Scope of Arbitration

The arbitration clause must specify what disputes the parties agree to arbitrate. Disagreements

over whether a dispute is subject to the parties' arbitration agreement may add time and cost to the dispute's resolution as the parties litigate the issue. To minimize the risk of costly delay, parties should agree at the outset on the scope of the arbitration clause.

The most straightforward agreement is a broad arbitration clause that provides for arbitration of any controversy or claim arising out of relating to the arbitration agreement or contract documents (as applicable). Parties may limit the scope by identifying the specific topics or provisions in the contract documents that are subject to the arbitration agreement. Identifying only specific topics subject to arbitration may increase the risk of delay and disputes over whether a specific dispute is arbitrable.

To ensure that the arbitration of disputes is mandatory, the arbitration clause should state that the agreed disputes "shall" be resolved by arbitration, instead of "may" be resolved by arbitration. Although most courts consider arbitration mandatory where the parties' agreement says they "may" arbitrate a dispute, some courts have held that the parties' use of the word "may" renders the arbitration clause permissive (see, for example, *Young v. Dharamdass*, 695 So. 2d 828 (Fla. 4th DCA 1997)).

Administered Versus Ad Hoc Arbitration

This Clause provides optional language for either an administered or ad hoc arbitration. Parties to construction arbitration agreements usually agree to administered arbitration, where an arbitral institution administers the arbitration and typically has a roster of experienced construction arbitrators from which the parties may select the arbitrators to preside over the case. The institution assists the parties throughout the arbitration by, for example, managing the appointment of and any challenges to the arbitrators, arranging for hearing rooms if necessary, handling the billing of arbitrator time and expenses, and ensuring the timely delivery of the award.

An ad hoc arbitration is not administered by an institution. Instead, the parties and arbitrator administer the proceedings.

Administered Arbitration

Parties should review the institution's rules and fee schedule before deciding on the institution to administer the arbitration. The most common arbitral institutions for administering domestic US construction arbitration are:

- The AAA, which has a roster of construction arbitrators, including arbitrators experienced in construction mega-projects, and separate construction arbitration rules (see Practice Note, AAA Construction Arbitration: A Step-by-Step Guide).
- JAMS, which has a roster of construction arbitrators and separate construction arbitration rules (see Practice Note, JAMS Construction Arbitration: A Step-by-Step Guide).
- The International Institute for Conflict Prevention and Resolution (CPR), which has a specialty panel of construction arbitrators but does not have a separate set of construction arbitration rules (see Practice Note, Administered US Domestic Arbitration with the CPR Institute: A Step-by-Step Guide).

For international arbitrations, the most common arbitral institutions are:

- The International Chamber of Commerce (ICC) (see Practice note, ICC arbitration (2021 Rules): a step-by-step guide).
- The International Centre for Dispute Resolution (ICDR) (see Practice Note, ICDR Arbitration: A Step-by-Step Guide).
- The London Court of International Arbitration (LCIA) (see Practice note, LCIA arbitration (2020 Rules): a step-by-step guide).
- The Singapore International Arbitration Centre (SIAC) (see Practice note, SIAC arbitration (2016 Rules): a step-by-step guide).
- The Hong Kong International Arbitration Centre (HKIAC) (see Practice note, Arbitrating under the HKIAC Administered Arbitration Rules (2018): a step-by-step guide).
- The Stockholm Chamber of Commerce (SCC) (see Practice note, SCC arbitration (2017 Rules): a step-by-step guide).
- CPR (see Practice Note, Administered International Arbitration with the CPR Institute: A Step-By-Step Guide).

The international institutions do not generally provide arbitration rules specific to construction arbitration. However, because the ICDR is the international division of the AAA, parties in international construction disputes administered by the ICDR often agree to the AAA Construction Rules.

Ad Hoc Arbitration

In ad hoc arbitration the parties and arbitrators must administer the entire arbitration process, from selecting the arbitrators to issuance of the final award. The principal advantage of ad hoc arbitration is that the parties may avoid the institution's administrative fees. However, the absence of an administrative body to oversee disputes concerning the arbitration process can add delay and arbitrator expense.

Parties in an ad hoc arbitration may agree to any set of institutional rules to govern the arbitration proceeding (see Arbitration Rules).

For more information about the differences between institutional and ad hoc arbitration, see Practice Note, Ad hoc arbitrations without institutional support.

Arbitration Rules

The arbitration clause should specify the rules governing the arbitration. Where the parties agree to administered arbitration, the institution's rules typically apply (see Administered Arbitration). The institutional construction arbitration rules that parties usually select for domestic US construction arbitrations include:

- The AAA Construction Rules.
- The JAMS Construction Arbitration Rules & Procedures.

Parties may also agree to general arbitration rules not specific to the construction industry, such as:

- The AAA Commercial Arbitration Rules and Mediation Procedures.
- The JAMS Comprehensive Arbitration Rules & Procedures.
- The International Institute for Conflict Prevention and Resolution (CPR) Administered Arbitration Rules.
- The CPR Non-Administered Arbitration Rules, which parties may use for ad hoc arbitrations.
- The rules of the United Nations Commission on International Trade Law (UNCITRAL), which parties may use for ad hoc international arbitrations (see Practice note, Arbitrating under the UNCITRAL Rules 2010, 2013 and 2021: a step-by-step guide).

Number of Arbitrators

Construction arbitrations usually involve either one or three arbitrators. Parties do not have to specify the preferred number of arbitrators in their arbitration clause, but many practitioners do. If the parties do not specify the number of arbitrators the arbitration agreement, the arbitral institution usually decides the number based on the institution's arbitration rules, the amount in dispute, and the perceived complexity of the arbitration.

The number of arbitrators impacts the overall cost and duration of the arbitration proceedings. Arbitrations with three-member panels are typically more costly than an arbitration involving a sole arbitrator. However, parties often prefer three-member panels, especially in complex cases, because three-member panels may reduce the risk of unfair or poorly reasoned results.

Parties sometimes decide not to specify the number of arbitrators in their arbitration agreement because they believe it is better to decide between a one or three-member panel after a dispute arises. Proceeding in this way may avoid having a costly three-member panel preside over a relatively low value construction claim.

Parties in international construction arbitrations often agree to a three-member panel with each party selecting one arbitrator and the party-selected arbitrators choosing the third arbitrator who chairs the panel (see Arbitrator Selection).

Judgment on the Award

The Federal Arbitration Act (FAA) permits the entry of judgment on an arbitration award only if the parties have agreed that a court may enter judgment on the award (9 U.S.C. § 9). Some US courts have held that Section 9 of the FAA requires language permitting the entry of judgment (see, for example, *Phoenix Aktiengesellschaft v. Ecoplas, Inc.*, 391 F.3d

433 (2d Cir. 2004)). The parties' agreement to the entry of judgment can be implied from the facts and circumstances and is sometimes incorporated into the institutional rules. However, it is good practice to expressly provide in the arbitration clause for entry of judgment on the award.

The parties may specify the court for enforcement of the award or agree that any court with jurisdiction may enforce it. By agreeing on the court in which the prevailing party in an arbitration may enforce the resulting award, the parties consent to the court's jurisdiction.

The arbitration shall take place in [CITY], [STATE[, COUNTRY]].

DRAFTING NOTE: LOCATION OF ARBITRATION

Parties to an arbitration agreement usually specify the seat of the arbitration, which is the geographic location where the parties expect the arbitration proceedings occur.

The seat of the arbitration identifies the arbitral law to govern the arbitration-related court proceeding. Where possible, parties often seat the arbitration in a pro-arbitration jurisdiction that imposes few restrictions on the conduct of the arbitration proceedings, such as New York, London, Paris, Singapore, Hong Kong, Geneva, and Stockholm.

Some jurisdictions require counsel in an arbitration to be licensed to practice law in the jurisdiction. Parties may want to seat the arbitration in a jurisdiction that does not impose this requirement because seeking temporary admission adds an unnecessary procedural step to the process.

[There shall be [one/three] arbitrator[s], chosen by the parties pursuant to the [INSTITUTION]'s arbitration selection method under the [RULES]. The arbitrator[s] shall be [EXPERTISE][and shall be nationals of [COUNTRY/COUNTRIES]].

OR

There shall be one arbitrator, selected jointly by the parties. If the arbitrator is not selected within [NUMBER] days of the receipt of the demand for arbitration, the [INSTITUTION] shall make the selection. The arbitrator shall be [EXPERTISE][, and][, may not [DISQUALIFYING FACTORS]][, and shall be a national of [COUNTRY]].

OR

There shall be three arbitrators, one selected by the initiating party in the demand for arbitration, the second selected by the other party within [NUMBER] days of receipt of the demand for arbitration, and the third, who shall act as chairperson of the panel, selected by the two party-appointed arbitrators within [NUMBER] days of the selection of the second arbitrator. If any arbitrators are not selected within these time periods, the [INSTITUTION] shall make the selection(s). If replacement of an arbitrator becomes necessary, the replacement shall be chosen by the same method as above. The arbitrators shall be [EXPERTISE][, and][, may not [DISQUALIFYING FACTORS]][, and shall be nationals of [COUNTRY/COUNTRIES]].

OR

There shall be three arbitrators, one selected by the initiating party in the demand for arbitration, the second selected by the other party within [NUMBER] days of receipt of the demand for arbitration, and the third, who shall act as chairperson of the panel, selected by the two party-appointed arbitrators within [NUMBER] days of the selection of the second arbitrator. The arbitrators shall be [EXPERTISE][, and][, may not [DISQUALIFYING FACTORS]][, and shall be nationals of [COUNTRY/COUNTRIES]]. If any arbitrators are not selected within these time periods, any party may apply to a court of competent jurisdiction to have the court make the selection(s).]

DRAFTING NOTE: ARBITRATOR SELECTION

The arbitration selection process can lead to protracted disputes and delays in putting an arbitration panel in place if the arbitration agreement does not set out a clear method for selecting the arbitrators.

Where the parties agree to administered arbitration and the application of institutional rules, they do not need to set out in their agreement a detailed arbitrator selection process because the rules provide for arbitrator selection and contain rules on disqualifying factors for arbitrators. The parties may list any qualifications they want, including the nationality of the arbitrators for an international arbitration. Parties should list only essential arbitrator qualifications to avoid an expansive qualification list that may limit the pool of potential arbitrators. The first sample paragraph above is for use in administered arbitration where the parties agree to the selection method under the institution's rules.

The parties in an administered arbitration may also agree to their own arbitration selection method by setting out the protocol in their arbitration agreement. The second alternative sample paragraph above is for use in an administered arbitration agreement where the parties agree to a single arbitrator and want to set out their own selection protocol. The third alternative sample paragraph above is for use in an administered arbitration agreement where the parties agree to a panel of three arbitrators and wish to set out their own selection protocol.

For more information on arbitrator selection in construction arbitrations under:

- The AAA Construction Rules, see Practice Note, AAA Construction Arbitration: A Step-by-Step Guide: Appointment of the Arbitrator.
- The JAMS Construction Rules, see Practice Note, JAMS Construction Arbitration: A Step-by-Step Guide: Appointing the Arbitrator.

Under the FAA, a party may seek court intervention when the parties' agreement provides no arbitrator selection method and there has been a lapse in the selection of an arbitrator, such as a lapse in time or some other mechanical breakdown in the selection process (9 U.S.C. § 5; see *Global Reinsurance Corp.-U.S. Branch v. Certain Underwriters at Lloyd's, London*, 465 F. Supp. 2d 308, 310–12 (S.D.N.Y. 2006)). Resorting to judicial intervention may reduce the parties' discretion, and the court may devise its own method of selection or fashion a compromise between the selection methods each party advocates (see *In re American Home Assur. Co.*, 958 N.Y.S.2d 870, 777 (N.Y. Sup. Ct. N.Y. Cty., 2013) (court devised method of umpire selection by combining "strike and draw" and ranking approaches proposed by the parties)).

Where the parties agree to ad hoc arbitration with no arbitration rules, parties may minimize disputes over selecting the arbitrators by setting out the protocol for arbitration selection. The provision should include the parties' agreement on arbitrator qualifications, disqualifying factors, and nationalities for an international arbitration. The fourth alternative paragraph above is for use in an ad hoc arbitration and provides for court intervention if their arbitrator selection method fails.

[The language of the arbitration shall be [LANGUAGE].]

DRAFTING NOTE: LANGUAGE

Parties to an international construction project should specify in the arbitration agreement the language of the arbitration proceedings. Failing to specify the language in the arbitration agreement may lead to a delay of the arbitration proceedings if a dispute over the language arises.

A language provision is not usually necessary for a US-based construction project.

[[This Contract/The Contract Documents], and any disputes relating to, arising out of or in connection with [this Contract/the Contract Documents], shall in all respects be governed by and construed in accordance with the laws of [JURISDICTION], without giving effect to any choice of law rules thereof.

OR

This arbitration agreement, and any disputes relating to, arising out of or in connection with it, shall in all respects be governed by and construed in accordance with the laws of [JURISDICTION], without giving effect to any choice of law rules thereof.]

DRAFTING NOTE: GOVERNING LAW

Parties usually incorporate in their dispute resolution clauses a governing law provision to establish the law of the contract documents. The parties may also want to include a governing law provision for the arbitration clause itself to ensure that the law governing the arbitration clause is the same as the law governing the contract documents. This may be necessary where, for example, the agreement involves an international project and the arbitration proceedings may be held in a locale with its own arbitration law. The first optional paragraph above may be used if the parties agree that the law governing the contract documents is the same law governing the arbitration clause.

Parties may alternatively want to have their arbitration clause governed by law that is different from the law governing the other contract documents. Parties should be cautious if they prefer to do this because having their arbitration clause governed by a law that is different from the governing law of the other contracts adds complexity to the arbitration clause, risks ambiguity, and increases the likelihood of disputes concerning the intent of the clause. The second optional paragraph above may be used in this situation.

[Each party consents to joinder as an additional party to an arbitration involving their performance under this contract at the request of the other party.]

[The [DOWNSTREAM PARTY] shall bind its lower-tier subcontractors, suppliers, [and] their respective sureties[, and [OTHERS]] for the project to the dispute resolution provisions contained in this arbitration agreement.]

DRAFTING NOTE: JOINDER AND CONSOLIDATION

Parties to construction projects are part of a complex network of upstream contracts (for example, between the owner and contractor, construction manager, and design professionals) and downstream contracts (for example, the contractor's agreements with subcontractors, suppliers, and subconsultants) that all support the underlying project (see Practice Note, Representing the Owner in Construction Litigation: Initial Considerations: Identify the Construction Parties). When a dispute arises, the parties often find themselves embroiled in a multi-party proceeding where they must either join third parties to the action or consolidate several parallel proceedings into a single action if the disputes arise out of similar facts and circumstances.

Where parties agree to use arbitration to resolve their disputes, they should ensure that all the upstream and downstream project participants agree to:

- Be joined in any parallel arbitration proceedings involving the project.
- The consolidation of any parallel arbitration proceedings into a single action.

Some institutional arbitration rules permit parties to seek joinder or consolidation by motion. For example, under the AAA Construction Rules, a party may request joinder or consolidation and the AAA appoints a special arbitrator to consider the request (AAA Constr. Rule R-7). This process necessarily risks delay in resolving the dispute.

The arbitration rules for joinder of third parties typically require the third parties to have compatible arbitration agreements. Although the precise standards may vary, compatible arbitration agreements often contain the same provisions for the:

- Arbitration rules.
- Seat of arbitration.
- Arbitrator selection method and criteria.
- Governing law.

For example, if an owner starts an arbitration against a contractor with whom it has an arbitration agreement, the contractor may join a subcontractor if the contractor also has an arbitration agreement with the subcontractor containing the same provisions. Similarly, if an owner starts two parallel arbitrations against two separate contractors, the two arbitrations may be consolidated if the two underlying arbitration clauses are compatible, and the disputes arise out of similar facts.

One way to ensure compatible arbitration agreements among the various project participants is to require all upstream and downstream contracts to contain the same arbitration clause.

Alternatively, parties may avoid the delay of motion practice over joinder and consolidation by including a provision in their arbitration agreements with the other project participants to require the parties to consent to being joined as an additional party to an arbitration involving arbitration. The first optional paragraph above may be used in each contract's arbitration clause to memorialize the parties' consent to joinder.

Flow-Down Provision

To ensure the parties' ability to consolidate parallel actions, parties may also use flow-down provisions that incorporate by reference the dispute resolution procedures of the upstream contract into the downstream contract. For example, the owner-contractor contract may contain a flow-down provision requiring the downstream contractor to bind its subcontractors to the arbitration provisions contained in the owner-contractor contract. The second optional paragraph above may be used as a flow-down provision.

The joinder and consolidation language provided by this Standard Clause is simple and straightforward. For a more detailed joinder and consolidation provision for a US construction arbitration agreement, see Standard Clause, Consolidation and Joinder (Construction) (US).

The parties agree that the arbitrator(s) shall have jurisdiction to rule on their own jurisdiction, including any objection with respect to the existence, scope, or validity of the arbitration agreement.

DRAFTING NOTE: DELEGATION

Parties may want to include a delegation provision that ensures the arbitrators retain jurisdiction to decide whether they can hear a dispute. This is particularly true for arbitrations located in the United States where the courts generally retain primary jurisdiction to decide whether a dispute is arbitrable unless there is clear and unmistakable evidence the parties agreed to delegate the issue to the arbitrators (see *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 939 (1995); see generally Practice Note, Arbitrability in US Arbitration: Determination by a Court or Arbitrator).

[The arbitral tribunal may include in its award an allocation to any party of such costs and expenses, including attorneys' fees, as the tribunal shall deem reasonable. In making an allocation, the arbitral tribunal shall consider the relative success of the parties on their claims and counterclaims and defenses.

OR

The arbitral tribunal shall not allocate the fees and costs incurred by the parties in connection with this arbitration. Each party shall bear the costs and expenses of the arbitral tribunal [and arbitral institution] equally. Each party shall bear its own costs and expenses (including the costs and fees of its own counsel, experts, and witnesses) involved in the preparation.]

DRAFTING NOTE: COST ALLOCATION

Under the various institutional arbitration rules, arbitrators in international arbitrations generally have the authority to allocate costs (such as administrative fees, arbitrator fees, and attorneys' fees and expenses) as they deem appropriate (ICC Arbitration Rule, Art. 38; ICDR Rules, Art. 37; LCIA Rules, Art. 28). The arbitrator's decision to allocate costs often hinges on the identity of the prevailing party, but also raises questions about whether the parties conducted the proceedings in an expeditious and cost-effective manner.

The American rule (each party pays for its own costs and attorneys' fees) is the default rule in most US construction arbitrations unless the parties agree that the arbitrator may or must include an award of attorneys' fees in the award (AAA Construction Rule R-48(d)(ii); JAMS Construction Rules 24(f) and (g)). Parties often include fee and cost shifting provisions in their arbitration agreements to allow the arbitrators to order the non-prevailing party to pay for the prevailing party's costs. This can be a useful provision in cases where the cost of pursuing an arbitration is high relative to the amount in controversy. The first optional paragraph above may be used to permit the arbitrators to shift costs and fees.

If the parties wish the follow the American rule, especially parties in an international arbitration, they should include language that prohibits the arbitrators from allocating costs between the parties. The second optional paragraph above may be used to prohibit cost and fee shifting.