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Panel I: Negotiating Arbitration Clauses

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PANEL I: NEGOTIATING ARBITRATION CLAUSES

PANEL 1: NEGOTIATING ARBITRATION CLAUSES

M = Moderator

P = Panelist

A = Attendee

M1: **M**, thanks so much. We are pleased to be the first panelists today. We are going to start with the basics, but first — a very, very quick introduction. My friend to my right, **P2** at [Redacted] and a WCL graduate, then, **P1** with [Redacted], and **P3**, [. . .], with [Redacted]. I guess they[are all global firms now. We have a couple of missions in our panel today. One we probably will not get to is careers and career paths. Maybe you can grab our panelists afterward, but I would just note that it is all fluid and friendly: private practice, in-house, and those connections. We probably will not get to it but maybe highlight it along the way.

Our two fundamental topics for the first panel would be arbitration: is it worthwhile? Does it make sense? We are going to start with **P1** at [Redacted]. [Redacted] has all kinds of agreements: domestic, international. When does it make sense to do it? When not? **P1** will set the stage. Then I have asked **P2** and **P3** to talk about where we are legally. **P2** is going to talk about the Supreme Court case, **P3** is going to talk about drafting. If **P1**, the client says, “Yes, we want arbitration. We really want it, make sure it happens,” it is not always that simple. **P1**, we will start with you, maybe very quickly. We all know [Redacted], but what is [Redacted], and what is the decision making about how and when you want arbitration? So, thank you.

P1: Thank you and good morning. It is nice to see so many people here. I will say it before I jump in that this would be a lot more fun for us and probably for you guys if you asked questions or jump in. So please feel free to interrupt us; I hope you do.

Like **M1** said, I am [at] [Redacted]. I have been there for about six years. I’m in the dispute resolution group. There are four attorneys who do all of [Redacted]’s disputes worldwide, so we have a pretty broad portfolio across the globe. Just to give you an idea: right now, I have probably three or four

international arbitrations going and then a bunch of court cases in the United States and in other countries. We have a broad portfolio. To give you an idea about [Redacted], the first hotel was built in 1957, and, as of last year, we are closing in on 7,000 properties. We have 1.3 million rooms in 130 countries. If you think about how it is structured, there are really two types of hotels. Does anyone know how many hotels [Redacted] owns?

A: Zero.

P1: Close. We were down to about five until we got [Redacted], and [Redacted] had about fifty. Slowly, they would be sold off. Right now, I think there is about fifteen, and those will probably be sold So, we really are not in the business of owning real estate. We are in the business of either managing hotels or franchising the hotels, which is licensing out the brand. When you think about a managed hotel, there is an owner who signs an agreement with us to manage the hotel. Those agreements are normally twenty, thirty, forty, even fifty years. Even as you look back at the first hotel in 1957, which is not in the system anymore, the second hotel from that year is in the system still. Some of those agreements can last for quite a while. So, as you think about dispute resolution and where the company is and where it wants to go, it is not necessarily a quick transition as you move through those 7,000 hotels. As they get sold, as new agreements get entered into, it is a slow process. So, it is not unusual for me to see agreements from thirty years ago, where the dispute resolution provisions are quite unsophisticated and different from what we are doing now.

I wanted to break down the managed hotels and franchises. The managed — we have about 2,027, and franchise — we are [at] about 4,900. On the franchise side, then, we are licensing out under a franchise agreement; those tend to be a little faster, twenty years or so. And then, we are also entering into an agreement with whoever is going to manage the hotel. So, there is a lot of tri-party agreements and a lot of agreements that are going on, you have to think about dispute resolution in all of those. Traditionally, all of the agreements were court-focused, and we would waive a jury trial. We thought we would get quicker decisions that way, we thought we would get fairer decisions that way. Corporate America does not always get a fair shake in the courts with the jury, that is my view. So that is where we have been. As we move through time, though, we see arbitration is really where we are going, particularly internationally. I think if you look in some of the countries where we are in, I will say Russia, for example, you are not necessarily going to get a great shake when you are an American company with a Russian hotel owner in a Russian court. So, we set up international arbitration, and that is kind of where we have been moving over time. I think that is where the agreements are going, so the company is very arbitration focused. I would say, me, personally, I am actually not a giant arbitration

fan. I think you really have to work hard to get the benefits of arbitration. It is not always faster, unless the parties really can work together and make it faster. It is usually not cheaper, unless the parties really work together and make it cheaper. So, I think it is an imperfect forum, but really, it is the best you can get in a lot of these countries. What else? You have anything else you want me to answer?

M1: One side point: this may be particular to your industry, but you are not dealing with one franchise at a time. You might have a franchisee with ten properties [or] twelve properties?

P3: Yes.

M1: Hold on one second. Just as background, they do not want to come to loggerheads necessarily, but they have a dispute. Does arbitration help you, in a sense, mediate and get some resolution so the other eleven hotels can continue the relationship, rather than having a drawn-out fight?

P3: Yes, I think we have done a couple of things. So, there are a lot of hotels that are owned by either REITs, or corporate-owned, or multiple hotels. Those are a little easier to work out whether it is arbitration or court because it is big entities that have a lot to lose on either side. I think where we end up in disputes more often are the wealthy family that owns one or two hotels, or the second generation coming in who we do not really have the relationship with and wants to establish themselves. That is where we end up in disputes. I think arbitration helps us in those cases. The fee-shifting really helps — it puts a lot of pressure on whatever party does not have the best case. It puts a lot of pressure on them. That really helps us, but we kind of built in other mechanisms before we get there. So, one of the things I think you see in hospitality is this idea of expert proceedings. So, before you get to arbitration, for certain disputes you will set up an expert. That really gets you the efficiency, the quickness, and the cost that you are looking for because both parties submit one thing to the expert. He or she makes a decision — and that is it. So, before we get to arbitration, because we have seen that it is not really getting the cost-benefit all the time, we have tried to find other ways, whether it is required mediation or expert proceedings, to resolve disputes before you get into full-blown litigation.

M1: Great. So, by fee-shifting are you talking about the prevailing party?

P3: Correct.

M1: Okay, which I assume you have in every one of your agreements or you try to have in every one of your agreements.

P3: Yes, this goes back to what I was saying before. If you go back to an agreement that is thirty or forty years old, it does not necessarily have strong fee-shifting provisions. More and more, I see it is left to the discretion of the arbitrators, and I think this is something the other guys will talk about. I look for certainty in these arbitration provisions. I do not necessarily always care

what is certain, but I want to have certainty, so that we are not fighting down the road [whether] the prevailing party get[s] fees. It is better for me if it says, “the prevailing party gets fees,” and then you know what you are up against. I think in drafting a lot of times, whether it is in our agreements or other agreements, I see a little bit more discretion left to the arbitrators. From a litigator’s perspective, that just creates more issues to fight about down the road as opposed to a provision that just says, “prevailing party gets their fees.”

M1: Great. So, just to sharpen or to summarize: you own the [Redacted] brand in Africa, you talked about Russia. Presumably you would prefer, even though it is imperfect, to have arbitration in those regions, and maybe you would consider it for certainly the United States, maybe South America, and Europe.

P3: Internationally, where we are going — almost everything is arbitration. In the United States, where we have been, almost everything is a waiver of jury trial, but where we are going is arbitration as well.

M1: Sure. One side note, we have a mutual friend. [Redacted] had an unfortunate data breach and I got a call from —

P3: I have no idea what you are talking about!

M1: Yes — which is going to lead to class action, but I got a call from a colleague who is an excellent attorney saying, “can you call **P3** and see if you can get us on the list for this case?” To which **P3** laughed. It is a long game in practice. You cannot just call **P3** now, it is relational. **P2**, why do not you tell us where we are. We had a recent Supreme Court case; we are in law school. What is the case law? Where are we on arbitration matters?

P2: Absolutely. Thank you. Good morning.

M1: Do you want to stand at the podium?

P2: No. Good morning. My name is **P2**, I’m counsel at [Redacted]. My practice is mainly investment arbitration, but I also do some international commercial arbitration, disputes between the two companies. I have been at [Redacted] for about six months, and previously I worked with **P1** at [Redacted]. Thank you very much to the [*American University Business Law Review*] and to **M1** in particular for inviting me to participate in this panel. It is nice to see familiar faces on the panel as well as in the audience.

So, my presentation today is going to address the importance of carefully drafting an arbitration clause. When a company negotiates a contract, it often focuses on the commercial aspects of a contract, paying little attention to the dispute resolution clause in the agreement. Here is a quote from the general counsel of KBR. Please raise your hand if you are familiar with the company KBR. For those of you who are not, let me fill you in: KBR is a large US construction company with 35,000 employees worldwide. It has operations in forty countries, customers in seventy-five countries, and annual revenue

in excess of four billion. In other words, KBR is a major international player, but just last month, the general counsel of KBR gave a keynote address where she explained that an arbitration clause is, quote, “too often overlooked until it is needed.”¹ Why is this? Well, akin to a prenup, contract drafters are often reluctant to talk about the divorce while negotiating the terms of the marriage. This is only natural — companies enter into contracts with the expectation of a positive commercial relationship. Why is this? Companies are in the business of doing business, not resolving conflicts. As a result, contract drafters often use model dispute resolution clauses, which are published by one of the major international arbitration institutions such as the ICC or LCIA. In other situations, contract drafters even cut and paste dispute resolution clauses from one agreement into another agreement [with] the mentality of, “Hey, if it worked last time, it is got to work this time.” However, the point of my presentation today is to explain that a carefully drafted dispute resolution clause can save major time, expense, and headaches later on if a dispute does in fact arise.

So, to illustrate this, I’m going to talk about *Henry Schein [v.] Archer & White*,² which is a dispute regarding who decides whether to arbitrate a dispute — a judge or an arbitrator — based on an ambiguous arbitration clause in a contract. Archer & White is a low-price seller of dental equipment; Henry Schein is the largest distributor and manufacturer of dental equipment in the United States. Archer had a dealer agreement with Henry Schein and a distribution contract with Danaher. In 2012, Archer sued Henry Schein and Danaher in U.S. federal court, alleging that they violated federal and state anti-trust laws by conspiring to fix prices and refusing to compete with each other.³ In particular, Archer alleged that Henry Schein had conspired with Danaher to terminate or reduce Archer’s distribution territory. Why? Because Archer was selling the products at discounted low prices. Archer sought millions of dollars in damages and injunctive relief. On the screen, here, is the dispute resolution clause in the contract at issue in the case: “[p]rovide for arbitration under the American Arbitration Association rules except for claims seeking injunctive relief.”

So, Archer sues Henry Schein and Danaher in U.S. federal court. In 2012, defendants moved to compel arbitration based on the arbitration clause in the contract.⁴ One year later, in 2013, a magistrate judge ruled in favor of the

1. Eileen Akerson, Vice President & Gen. Counsel, KBR, Keynote Address at the Int’l Energy Arbitration Conference (Jan. 24, 2019).

2. See generally *Henry Schein v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019).

3. *Archer & White Sales, Inc. v. Henry Schein, Inc.*, No. 2:12-CV-572-JRG, 2016 WL 7157421, at *1 (E.D. Tex. Dec. 7, 2016).

4. *Id.*

defendants.⁵ The magistrate judge found that because the arbitration clause incorporated the AAA rules, the parties had intended for an arbitrator to decide the dispute.⁶ Three years later, in 2016, a district court judge reversed the magistrate court judge and ruled in favor of the plaintiff.⁷ The district court judge found the dispute was not arbitrable because the plain language of the arbitration clause specifically excluded claims for injunctive relief. Another year later, 2017, the Fifth Circuit rules in favor of the plaintiff.⁸ Another two years later, January 2019, last month, the U.S. Supreme Court, in an opinion authored by Justice Kavanaugh, unanimously ruled in favor of the defendants and reversed the Fifth Circuit.⁹ [The Supreme] Court held that when a contract delegates the question of arbitrability to an arbitrator, the courts must respect the party's decision. The Supreme Court found that the Fifth Circuit hadn't ruled on this issue, so the court remanded the case to the Fifth Circuit to determine whether the contract, in fact, delegated the question of arbitrability to an arbitrator. Now, a lot has been written and a lot has been said about *Henry Schein* and arbitration jurisprudence in the United States following this recent case. With apologies to the Supreme Court junkies in the room, I am not going to talk about that, I am sorry.

My main takeaway here is that *Henry Schein* shows that carefully drafting an arbitration clause can have real world consequences. Why? After seven years of litigation and likely hundreds of thousands of dollars, if not millions of dollars, in lawyers' fees, the underlying dispute between [the] parties have not been resolved, nor has it ever been argued on the merits. This has been a colossal waste of time and money due to an ambiguous arbitration clause.

One last point I would like to share. So, I was in the doctor's office last month getting a flu shot, and I was thinking about this panel, drafting arbitration clauses. I saw this picture: you are supposed to tell the doctor how much pain you are in, and you use the little smiling faces and frowny faces to demonstrate how much pain you are in. I came up with an analogy between drafting arbitration clauses and the pain continuum. So, please bear with me. On one extreme, the ten, the severe pain, this is the situation where contract drafters without guidance blindly draft arbitration clauses. Here, there is a high risk of encountering pitfalls and making arbitration clauses

5. *Archer & White Sales, Inc. v. Henry Schein, Inc.*, No. 2:12-CV-572-JRG-RSP, 2013 WL 12155243, at *3 (E.D. Tex. May 28, 2013)

6. *Id.*

7. *Archer & White Sales, Inc.*, 2016 WL 7157421, at *1.

8. *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 878 F.3d 488, 497–98 (5th Cir. 2017).

9. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 526–27, 531 (2019).

that are unenforceable; potentially, arbitration awards that are unenforceable. To give you an example: **P3** and I enter into an agreement. We put in the agreement an arbitration clause that says, “Any disputes are going to be resolved by our friend, **M1**. He is a good guy.” Later on, a dispute does arise, we go to **M1**. Unfortunately, he is no longer available, or he has a conflict, or, God forbid, he has died. What do we do? Our arbitration clause may be unenforceable. If we go to arbitration, the ultimate arbitration award may also be unenforceable.

Going back to our continuum, to the five, we have the grin — I do not know, the straight face — this is using a model dispute resolution clause in your agreement. One of those that are published by the major international arbitration institutions such as the ICC or the LCIA.¹⁰ Now, model dispute resolution clauses, they are vetted, they are tried, they are tested. So, by incorporating one of those model clauses into your arbitration agreement and your contract, you avoid the risk of creating an unenforceable arbitration agreement, [and] in turn, an unenforceable arbitration award. So, you minimize the risk, but we do not stop there.

We continue on the pain continuum down to zero where you have no pain and a really big smile. On this other extreme, the contract drafter can make the arbitration clause work for him or her. In this scenario, the contract drafter works with dispute resolution attorneys to tailor the dispute resolution clause to their advantage, taking into consideration the company, the contracts, and the commercial relationship. For example, I have a contract and there are documents that are privileged surrounding this contract, potentially privileged, or questionably privileged. To avoid the possibility that a dispute arises, it goes to arbitration, and an arbitrator orders that I have to turn over for document production these privileged, potentially privileged, or questionably privileged documents, upfront, in the arbitration clause in the contract, I can limit or exclude the possibility of document production and discovery [and] make the arbitration clause work for [me], tailored based on the particular circumstances. **P3**, you mentioned fee-shifting provisions — same thing. If fee shifting is important to you, put it up front in the arbitration clause instead of waiting until a dispute arises. Make the arbitration clause work for you.

So, to this conference’s provocative question, which **M1**, it is provocative, international arbitration, we are asking, friend or foe of corporations? My

10. See *Arbitration Clauses*, INT’L CHAMBER OF COMMERCE, <https://iccwbo.org/content/uploads/sites/3/2016/11/Standard-ICC-Arbitration-Clause-in-ENGLISH.pdf> (last visited Feb. 9, 2020); *Recommended Clauses*, LONDON COURT OF INT’L ARBITRATION, https://www.lcia.org/Dispute_Resolution_Services/LCIA_Recommended_Clauses.aspx (last visited Feb. 9, 2020).

answer is friend, if used correctly, starting with the proper drafting of the arbitration clause.

M1: I have a couple of questions. Let's start with the very basics. Everyone might not know, ICC, LCIA, any one of you — **P1**, do you want to jump in? What do those mean?

P1: Sure. These are institutions that are ventures . . . that for arbitration . . . I see **M2** at these institutions. Guidelines that the parties must follow, and a lot more than the parties can then such as emergency provisions.

M1: Great. Next question: in federal regulation, state regulation, county, and city, a consumer is often dealt with gently, and regulations [for] consumer protections, are strong. [In] the commercial [setting], usually, the parties are freer to engage in negotiated provisions. I'm thinking about State Farm Insurance versus car owner, there's a lot of regulation. I'm assuming **P3** in [Redacted], you are dealing with RLJ,¹¹ and you are also dealing with a husband and wife in Tennessee. Are the arbitration rules different there, or is it all a broad brush? I will start with **P2**.

P2: The arbitration rules?

M1: Yes. Are consumers treated or individuals treated differently, or is it all considered a commercial arbitration even for an underlying hotel property?

P2: Yes, if you go to arbitration, the parties will be treated equally. I think the bigger issue is: if you have a big company and a small company, it is similar to these contracts of adhesion where the big company says, "Here's the contract — sign it. There are some issues we may be willing to negotiate, but we can't really wiggle that much because this is our standard contract. We do not want to have a thousand variations amongst all of our different parties." So, there's an issue of bargaining power when you have a smaller company negotiating with a larger company.

M1: Right. Maybe my question was asked unartfully. Will arbitration clauses be more likely enforced if it is commercial to commercial? If it is brought to a court, they might say, "This is onerous, a consumer was forced to sign." That was more my question. **P1**?

P1: Yes, I would agree. I mean, an arbitration, depending on the jurisdiction you are in, different courts approach it differently. Typically, yes, a commercial-to-commercial contract would be given more deference by a court just instinctively. Now, if you have consumer-related issues, it does not mean that arbitration will not be enforced. But the court would probably scrutinize the clause and the impact it has on consumer regulations, especially if they are by law — certain consumer-related safety regulations

11. THE RLJ COMPANIES, <https://www.rljcompanies.com> (last visited Feb. 9, 2020).

must be respected. The court would probably look into it a little bit more.

M1: A1.

A1: [audience question]

M1: P3?

P3: Yes, from my perspective, I think having predictability is ultimately more important, and having certainty is more important than necessarily winning the negotiation and deciding that ahead of time. I think it is important. When **P2** was talking about “mak[ing] the clause work for you,” it does not necessarily mean make it so slanted that it is favored for you. But I think to actually make it work for you, you have to understand your client and where they have been, what disputes they have had, what things are important to them. What history looks like, so you can anticipate what the issues will be coming down the road. Then you can decide which issues you can give on a little bit, which issues you want to hold firm, but I do not think anybody thinks you need to make it so slanted for you, I am not even sure you could do that. If you have a fee-shifting provision, you could lose. It does not necessarily mean you are always going to get your fees, but I think you have got to understand the company. This is something I tell outside counsel all the time or people who ask how they can work with us. I say, you have got to understand the company. You have got to go read our 10-K. You have got to see what disputes we have had in the past to understand what a well-drafted provision looks like for us as opposed to [sic].” These model clauses get stuck in different industries, different companies, different sized companies, and one size doesn’t fit all for all of these companies.

M1: Maybe a quick question for all three would be, how often are the litigators brought in when either drafting a template or drafting a major agreement? Are you asked to take a look and say, “is this thing sound procedurally?”

P3: Yes. So, I have some experience with this in the very large contract negotiations where there have been different areas of the contract and the law firm team composed of different experts. Towards the dispute resolution portion of it, I have been involved in cases where they have brought in dispute resolution attorneys in order to advise on that particular aspect of the contract, that particular provision. I have also been involved in cases where a person at the law firm is drafting an arbitration clause, and they run it by a dispute resolution attorney, but the dispute resolution attorney doesn’t know about the company, about the contract, about the commercial relationship, so all that they can really do is make sure that it is internally consistent. It is in accordance with best practice but may not be able to know that **P3** really cares about having certainty in fee-shifting provisions. So, that is something that we should add in. It is an area that the more you can get a dispute resolution expert involved, the more that they can do to make the clause work

for you.

M1: P1, did you have an add-on?

P1: Absolutely. I would agree with what **P2** said. I would add that it is best practice, especially if it is a big transaction or an investment, to go to a dispute resolution specialist because there are commercial arbitration options, in which case you would have to think about where you want the arbitration to be seated, the rules, which had touched upon earlier, and various other considerations. Then there is also the potential for protecting your client through investor-state arbitration, which may impact where the investment is structured. The company that is investing in the host countries. So, yes, we are asked to look at that, and it is best practice, especially in a big transaction or investment.

M1: I have a question for **P1** before we get there. One practice pointer that all three have mentioned is knowing your client, 10-K, 10-Q. **P3**, if you do [not] mind, what's in them and why is it so invaluable? If you do [not] mind taking the first shot at it.

P3: Yes, of course. The 10-K, a public company files an annual statement — it is really a statement of the business. It will describe what the business is, what the past year looks like, what are some of the risks and prospects going forward. It is the best place to get an annual look at what the company is doing, what it thinks about the industry, what it thinks about its prospects. I always tell people who are coming to meet with us that they really should read it before they come to talk to us because you can't get a better background of a company without looking at that first.

M1: There is civil unrest in Venezuela, so we are going to dial down our expectations for the North part of South America. You can get some insight into thinking, as an example.

P2: I would just add that looking in the newspaper or even just setting up a Google alert for [Redacted], so you know what happens on a daily or a weekly basis. So, when you see this guy, you could be like, "Hey, I heard about what happened and I'm familiar," instead of blindly asking, "What is going on?"

M1: Okay. So, by way of analogy into **P1** and actually starting with the "no pain" to "severe pain," just very quickly, at [Redacted] and in the hotel industry there were terminations by owners, which we will not get into. **P3** and his predecessors kept drafting in response to court losses and kept redrafting in response to court losses and kept redrafting. Finally, to the point where I think [Redacted] and your brethren said, "Okay, we get the idea. The court just doesn't want to give it." So, **P2**'s slide is excellent. He is a smart guy. Then going into **P1**, can you draft if a court doesn't want to give the arbitration or how do you draft so that — maybe it is an outlier, [that] I'm talking about, **P3**.

P3: No, I do not think it is necessarily an outlier. I think you always learn a lot more from when you lose than from when you win. If you are not doing something different after you lose, you are missing an opportunity, but I think you can draft to get what you want, you just have to do it very carefully. This goes back to what I'm saying when you are having agreements over a span of fifty years and working through forward, and then you acquire [Redacted], and their agreements look different than what you have been doing for the last twenty years. You just have to streamline and think about it going forward, but it is never going to be perfect — you are never going to have every hotel agreement looking the same.

M1: Okay. So, we [have] set it up with [Redacted], at times, once the arbitration [sic]. Certainly, other clients are going to want it. **P2** set the stage for where we are especially with *Archer & White*.¹² **P1**, it is all yours on how do we go about thinking about drafting in drafting?

P1: Thank you, **M1**, **M**, and American University for inviting me today. For those of you who just joined, I'm **P1**. I'm an associate at [Redacted]. Before I start, I'm going to just focus on my remarks today on certain considerations that a party may take into account while thinking about the inclusion of an arbitration clause. I'm going to focus my presentation and remarks on international business. By that I mean I'm going to focus on FDI, what do parties have to think about when they are going into jurisdictions where the rule of law may not be as established as here, for example, Russia. Let's start here for some general context: on this slide you can see FDI flows over the last decade have been well over a trillion dollars.

M1: We want to just talk about what FDI is.

P1: Sure. FDI is “foreign direct investment.” It is money that is poured into a country for the betterment of different sectors: oil and gas, telecom, hospitality, and so on and so forth. So, in the last decade globally, FDI flows have totaled over a trillion dollars. Typically, they will be private, but you also have state-owned enterprises that can go in and invest. One example could be for [Saudi Arabia Oil to] go and build petrochemical refineries in Malaysia, or you may have Chinese state-owned companies that are partially state-owned that may go into a country and invest in a joint venture with a private party — that would still be considered FDI. So, given this amount of FDI flows, it is always interesting to see how do [sic] lawyers acting for these companies, such as **P3**, like to see their disputes, if any, that may arise. How do they get resolved? Well, there was a survey done by Queen Mary in London in partnership with [Redacted] that surveyed about 900 lawyers, arbitration counsel, and in-house practitioners.¹³ These lawyers and others

12. 139 S. Ct. 524 (2019).

13. QUEEN MARY UNIV. OF LONDON & WHITE & CASE LLP, 2018 INTERNATIONAL

who were surveyed were from every continent and several jurisdictions across the world. There was a strong preference; around ninety-seven percent expressed a preference for international arbitration.

Now, one caveat, international arbitration here does not mean only international arbitration. It also means about fifty percent expressed a preference for multi-tiered clauses, which is something **P3** touched upon early. Which would mean some of them preferred a clause that would first allow for negotiations, mediations, or an expert determination. If that doesn't work out, you would go escalate your arbitration. The reason they expressed a preference for that, around fifty percent of those surveyed, it helped settle the dispute before arbitration, it saves costs, and if it does proceed to arbitration, you have narrowed the issues and contentions. So, it helps crystallize the dispute, so that the arbitration panel has less work in terms of the issues that are in dispute. On the other hand, some people, not quite the majority, but a good number, did not like such clauses because they just felt like when the parties are in dispute it is going to end up in arbitration anyway. So, you might as well get there and resolve the dispute. The escalated provisions end up costing more time than money.

P3: We briefly touched upon this earlier to reflect this increased popularity in international arbitration. We have the Queen Mary survey,¹⁴ [which] identified the five most popular institutions in the world for resolution of these disputes: ICC Paris; I think it was LCIA in London, that was the second most popular; Singapore International Arbitration Center, which probably was not so well-known twenty years ago, is now the third most popular. Then you had the Hong Kong International Arbitration Center and the Stockholm Chamber of Commerce as the fifth most popular institution. As you can see here, the caseload is increasing steadily at many of these institutions over the last ten years. Do you have a question?

M1: Do you mind if I jump in?

P3: Sure.

M1: For each of these that you have mentioned — Singapore, Hong Kong, London, Paris — I assume it governs the rules, procedures, and also the forum. Can you just give us a little bit of background?

P3: Sure.

M1: I'm sorry to interrupt.

P3: No, not at all. So, those institutions would administer the proceedings. It would be the rules that they publish that would apply. The parties can still choose a different jurisdiction for seating the arbitration; they could pick

ARBITRATION SURVEY: THE EVOLUTION OF INTERNATIONAL ARBITRATION 2 (2018).

14. *Id.*

LCIA and seat the arbitration in Singapore and have New York law apply. So, that is the beauty of arbitration is that you have flexibility.

M1: **P2**, do you want to add something?

P2: How are the arbitrators selected?

P3: So, again, one of the beautiful things about arbitration is its choice. So, the parties get to select their arbitrators. It is advisable for the reasons **P2** explained it earlier. You do not want to identify the arbitrator in advance, but you get to pick the arbitrator you want, provided there are no conflicts and other issues. Sometimes the [arbitrator] may be appointed by the institutions, if the parties cannot agree.

M1: Do you have a question?

P3: Yes, there are jurisdictions we want to avoid, I think we generally try to avoid. We will find a neutral third country to seat arbitrations. If the United States is not acceptable, and if there is a hotel in Colombia — well, Colombia is okay — but let's say Venezuela, maybe we will seat it in Chile or somewhere like that. So, we try to find a neutral spot as opposed to getting on someone else's home turf. I think the thing we look most at is if we get an award — are we going to be able to enforce in the country? Are that country's courts going to enforce the award? Do they have a good history of enforcing the arbitration awards? That is really the main factor for us on that.

I did want to say, on choosing experts, I mean, this is something that I care a lot about because I think when you get into the hospitality industry it is pretty specialized. So, it gives you an opportunity to pick someone who is familiar with it as opposed to if you go straight to AAA arbitrations. Sometimes you are going to get whatever the arbitrator is who is doing it that day and not necessarily someone who knows about your industry or your issues. To me, that becomes a foe to a corporation, when you have essentially a judge who is not really familiar with your issues. You might as well be in court. If in arbitration you get an opportunity to pick an expert in your industry or someone who is familiar with the issues that you are presenting, that is when I think arbitration can work better for a company.

M1: I'm just going to interrupt for one second. In the hotel law program, we spend probably a day and a half just explaining who the parties are. So, they need to do that in court — that is not always an efficient use of time, but you are dealing with people who still might not know the nuances of those interweaving relationships.

P3: You know, you would be amazed how many people think that [Redacted] owns every hotel in the system. Really sophisticated people, that is just the way the business presents itself. So, if you can get someone already familiar with those issues, you are one step ahead.

M1: Great. **P1**, we interrupted you.

P1: Not at all. So, how do parties, to a contract or an agreement, express a clear, binding requirement for arbitration whether it is institutional or ad-hoc, so, that they can avoid clauses, the risk that their clauses later would be deemed as a pathological or defective clause.

Well, to illustrate how parties can avoid this, let me walk you through two cases: one quite recent and one very old to explain how parties can avoid being scrutinized for their clause being potentially defective. This case, in 2015, a company called Sinolanka in Columbo awarded an Italian company, Interna, a contract for refurbishing works for the Grand Hyatt Hotel in Columbo.¹⁵ The document was titled “Contract Agreement.” It was a contract, essentially, that was signed between the parties along with the Memorandum of Understanding (“MOU”), in January 2015. So, Interna, the Italian company, starts work, and then there is a dispute. The Sri Lankan company decides to terminate the contract. So, what Interna does then is they wisely negotiated an arbitration clause, or so they thought, and they went ahead [and] sued Sinolanka. I do not know if it is super clear, but at the bottom, you can see a slide that provides for ICC arbitration. Defeat, itself, is not clearly listed, but it does say the arbitration venue shall be Singapore. So, an ICC tribunal was formed, and they decided that the seat would be in Singapore, and they went ahead and heard the case. Now, during the case, during the ICC case, Sinolanka, which is the hotel company in Sri Lanka, made a jurisdictional objection. They argued that the ICC tribunal did not have jurisdiction over the dispute, which is a bit funny, given you have this clause at the bottom of the screen. Sinolanka argued that the arbitration must be conducted pursuant to the Sri Lankan rules (which is the middle of the slide) because a document that was provided for during the tender process to the Italian company provided for Sri Lankan arbitration. Essentially, the Sri Lankan company was arguing that Interna, the Italian company, made its offer on the contract based on the Sri Lankan arbitration clause during the tender period. They insisted that the Sri Lankan clause was never displaced by the ICC arbitration clause. The ICC tribunal rejected this argument. They went ahead and awarded \$12 million to the Italian company, but you would think that is the end of the story — it is not.

What happens next is that the Sri Lankan company, Sinolanka — remember I said this arbitration was seated in Singapore — so they decide to seek set aside of the award, vacatur, or annulment of the award in Singapore. They approached the Singapore courts and argued that the tribunal — the ICC tribunal — lacked jurisdiction, or, in the alternative, that the tribunal had found jurisdiction invalid arbitration clause [sic]. The

15. *Sinolanka Hotels & Spa (Private) Ltd. v. Interna Contract Spa*, [2018] SGHC 157 (High Ct. Sing. 2018).

Singapore court rejected this argument, and they said they looked at the negotiating history, and they focused also on the interpretation priority of documents doesn't [sic]. The letter of acceptance, which was the clause that I had provided for ICC arbitration, had been listed in the contract as second in order of priority. The document that was given first priority was the MOU, which did not contain an arbitration clause. The second document, in terms of priority as identified in the contract, was the letter of acceptance, and then ultimately the Singapore court rejected and set aside argument.

So, this case is important because it illustrates the importance of ensuring that a contract includes only, ideally, one dispute resolution clause, unless there is a specific reason to have more than one, which I can't really think of, but maybe there is. Anyway, in this case, you can see that the two dispute resolution clauses were just included by happenstance. So, when you are looking at voluminous documents, tender period, pre-tender, and then ultimately the contract is signed, and it does not include an arbitration clause — make sure you do your due diligence and ensure the clause you want is there.

One other case I think that is very interesting and also relevant is a famous permits case. This case is for a very simple point — make sure that you ensure that an agreement clearly identifies the parties, all relevant parties, to a contract, as simple as that; otherwise, you run [into] the risk of encountering the problems the claimant did in this case. In brief, this case involved an ICC arbitration and later an ICSID arbitration, which was heard at the World Bank, in relation to the decision of Egyptian authorities to cancel the project for a hotel near the pyramids.¹⁶ The agreement was initially signed by SPP, the claimant, the Egyptian government, and the Egyptian tourism organization. Later, a supplemental agreement was signed where the Egyptian government was not a party to the contract, but the Egyptian tourism minister approved, signed, and ratified the contract. Well, after the Egyptian government canceled the contract, SPP sued. They sued under the ICC rules in an arbitration seated in Paris. They sued both the tourism organization and the government. The government argued that they were not a party to the contract because they had not signed the main contract. The ICC tribunal rejected this argument and said [that] the minister's signature approving signing and ratifying the contract meant that Egypt was a party. Egypt was asked to pay \$12 million. Well, what happens, again, is Egypt now tries to set aside the award in Paris, while SPP, the hotel builder, tries to enforce the award in Amsterdam. Coincidentally, on the same day, the two courts reached a different decision: the Paris court decides

16. *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3 (May 20, 1992).

that Egypt was not a party to this agreement, and the Amsterdam court decides that they were. So, again, very illustrative to show that different jurisdictions, both sophisticated, can reach different conclusions on the same set of facts and really the same agreement. Now, in short, what happened in this case, which spanned about fifteen years in total, the SPP went ahead and sued Egypt at the World Bank, brought a claim under Egypt's foreign investment law. They won there, Egypt sought to annul the award, and then the dispute was ultimately settled.

So, the Sinolanka and SPP case that we just talked about are from two different eras, really. One relates to a contemporary hotel project, while the second one relates to project from the '70s — but one common lesson persists. Despite the explosion of international arbitration and the increased study of subject, counsel must always remain alert to ensure that arbitration clauses are carefully drafted. So, coming back to the basics. We had discussed this earlier: when you are counsel, and you are working with your client, you should always try and go to the model clauses offered by these various institutions. I have picked three. Now, they have different levels of detail, but these are good model clauses, which can serve as a starting ground. It touches upon a lot of what we just discussed. You can use these model clauses [as a] starting point, and then look to these different elements that you may want to ensure are included in your clauses.

So, on the critical elements list, I would point out, it is very important to state the arbitration is binding, identify the institution, the seat, the governing law, and the language. On the right-hand side, confidentiality is one issue that I think is quite important, especially if you are dealing with proprietary trade secrets, those kinds of issues, or politically sensitive investments. Then, as **P3** had touched upon earlier, you should definitely evaluate the pros and cons of multi-tier dispute resolution clauses. Thank you.

M1: Great. **M**, are these slides available for the attendees? That would be great. I think that last slide, in particular, was invaluable. That is great, **P1**. So, we started with **P3** on pros and cons of arbitration when he values it, when he is perhaps indifferent, **P2** on the Supreme Court case, and **P1** with the drafting. But, maybe, we should take a moment to look ahead. **P3**, right now, [Redacted] is signing agreements that will be in effect for 2060 or 2055. You can't lie about the future, so **P2**, what do you see for the future of arbitration? Are we heading that way more? Is it going to replace litigation, stay where it is? Where do you think we are heading?

P2: Yes, I think that as there are more and more international business transactions, there are going to be more and more international disputes. I think we will be seeing more and more international arbitration. With the Supreme Court case, you should talk to your Supreme Court professor about the relevance of it, but I do think that despite that it was unanimous and that

it was Justice Kavanaugh's first opinion, I think it is a real wake-up call that arbitration clauses are really important. People are writing about the subject now. They are having panel discussions on this subject. Lawyers are advising their clients how to properly and carefully draft arbitration clauses. I think that the Supreme Court, regardless of what the jurisprudence in the United States on arbitration law is going to look like, I think it is a real wake-up call of the importance of carefully and properly drafting an arbitration clause. So, I think we are going to be seeing more attention paid to that upfront instead of after the fact once the dispute has arisen.

M1: P3, your business leaders are always making strategic decisions about whether to go to China, whether to go to India, what is next. Right now, we have unrest in Venezuela. **P1**, we have tension, at least politically, with China. I'm assuming you are not writing these templates and putting them in a drawer. You are constantly measuring them, evaluating them, tweaking them, I guess. Yes or no?

P1: Absolutely, yes. One thing I would add to what **P2** mentioned is international arbitration, commercial arbitration is booming, there is no doubt about it. Investor-state, which is a different form of arbitration, there is a backlash, but I think it is a very vigorous debate on whether it is going to be booming or not. That is for another day, but I would say that is also very active and prominent right now, but there's talk of, "Is winter coming?"

M1: For sure. Everyone, I know, is busy. We all have busy lives and great pressures, but I know **P3**, **P1**, and **P2** have a great spirit of helping students, helping the community. I will speak on their behalf and urge you to contact them. See if you can meet them for coffee. [Redacted] has a wild commute — but come to Bethesda and try and learn more. I'm right upstairs, three floors, and there are a lot of topics worth having. I do not know, is there such a thing as an arbitrator clerkship? Are there ways to learn about potential arbitration career paths?

P3: There are some.

M1: How would students get more involved on their own or professionally? I will make that the last question.

P1: Sure. So, there is a number of things you can do. If you are a student here, there are some very prominent arbitration practitioners who are adjunct professors. There are some very prominent arbitration practitioners who are tenured professors, like Susan Franck. There is also the arbitration institution here run by Horacio [Grigera Naón] and Susan [Franck]. They are really wonderful resources, and really some of the world's experts in arbitration are here in this building on a daily basis. So, there are a lot of resources at your disposal, but you should also feel free to reach out to **P3** and me. But there is really a sense of helping people out in the international arbitration community, and people love to talk about what they do and helping people

out who are interested in the field.

M1: I want to thank **P1**, **P3**, and **P2** for taking time out. This is a tremendously important topic, and thank you to [AUBLR Symposium Editor], [AUBLR Editor-in-Chief], and [AUBLR Managing Editor] for inviting us and all of the AUBLR. Thank [you] so much.

M: I want to take a quick break. We will be back in a little bit. About twenty-five minutes or so.