

2020

## *Henry Schein v. Archver & White: A Lesson in the Importance of Carefully Drafting an Arbitration Clause*

Charles B. Rosenberg  
*King & Spalding LLP*, [crosenberg@kslaw.com](mailto:crosenberg@kslaw.com)

Follow this and additional works at: <https://digitalcommons.wcl.american.edu/aubl>



Part of the [Dispute Resolution and Arbitration Commons](#)

---

### Recommended Citation

Rosenberg, Charles B. "*Henry Schein v. Archver & White: A Lesson in the Importance of Carefully Drafting an Arbitration Clause*," *American University Business Law Review*, Vol. 8, No. 3 (2020) .  
Available at: <https://digitalcommons.wcl.american.edu/aubl/vol8/iss3/7>

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *American University Business Law Review* by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact [kclay@wcl.american.edu](mailto:kclay@wcl.american.edu).

# HENRY SCHEIN V. ARCHER & WHITE: A LESSON IN THE IMPORTANCE OF CAREFULLY DRAFTING AN ARBITRATION CLAUSE

CHARLES B. ROSENBERG\*

I. Introduction .....	381
II. <i>Henry Schein v. Archer &amp; White</i> : A Dispute Over an Ambiguous Arbitration Clause.....	383
III. Drafting an Arbitration Clause: Practice Pointers .....	386
The Scope of Arbitration .....	387
Arbitral Institutions.....	387
Seat of the Arbitration .....	388
The Arbitrators.....	389
Confidentiality .....	390
Document Production/Discovery.....	391
IV. Conclusion.....	393

## I. INTRODUCTION

When a company negotiates a contract, it often focuses on the commercial aspects of the agreement, paying little attention to the agreement's dispute resolution clause. Indeed, often added at the last minute, as the parties toast the conclusion of their negotiations, it has become common practice for companies to use model dispute resolution clauses<sup>1</sup> or even cut and paste from other agreements.<sup>2</sup> In fact, a

---

\* Charles B. Rosenberg is Counsel at King & Spalding LLP in Washington, D.C. He is a specialist in public international law and international arbitration, focusing on both investment treaty arbitration and international commercial arbitration. Mr. Rosenberg graduated first in his class, *summa cum laude*, and *Order of the Coif* from the American University Washington College of Law.

1. See, e.g., *Standard ICC Arbitration Clauses*, INT'L CHAMBER OF COM. (Jan. 3, 2017), <https://cdn.iccwbo.org/content/uploads/sites/3/2016/11/Standard-ICC-Arbitrat>

commentator on the Oil, Gas, Energy, Mining, Infrastructure Dispute Management (OGEMID) discussion forum recently observed that while “[p]arties commonly use the AAA’s recommended arbitration clause from its drafting guidelines . . . [m]any if not most parties don’t know the details of the institution’s rules.”<sup>3</sup>

This is only natural as companies enter into contracts with the expectation of a positive commercial relationship. Companies are in the business of doing business, not resolving conflicts. But disputes can and do arise.

While model dispute resolution clauses — or “template” clauses — copied and pasted from other agreements may be adequate, a company may be able to strengthen its position in a dispute resolution proceeding by tailoring the contract’s dispute resolution clause to the unique circumstances of the transaction and the company.<sup>4</sup> Indeed, if a dispute

---

ion-Clause-in-ENGLISH.pdf (“All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.”); *Standard Clauses*, LCIA, [http://www.lcia.org/Dispute\\_Resolution\\_Services/LCIA\\_Recommended\\_Clauses.aspx](http://www.lcia.org/Dispute_Resolution_Services/LCIA_Recommended_Clauses.aspx) (last visited Feb. 8, 2020) (“Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause. The number of arbitrators shall be [one/three]. The seat, or legal place, of arbitration shall be [City and/or Country]. The language to be used in the arbitral proceedings shall be [ ]. The governing law of the contract shall be the substantive law of [ ].”); *Clauses*, AM. ARBITRATION ASS’N, <https://www.adr.org/Clauses> (last visited Feb. 8, 2020) (“Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules.”).

2. See LEW, MISTELIS, & KROLL, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* ¶ 8-2 (2003) (“In practice too little attention is given to the drafting of the arbitration agreement. The arbitration clause is frequently included late in contract negotiations, sometimes as a boilerplate clause or as an afterthought, without debate or consideration of the specific needs of the case.”); see also ILEANA M. SMEUREANU, *CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION* 14 (2011) (noting that contract drafters are reluctant to “talk about the funeral while negotiating the terms of marriage”).

3. See generally Ken Adams, *My Version of the AAA Standard Arbitration Clause*, ADAMS ON CONTRACT DRAFTING (Aug. 30, 2009), <https://www.adamsdrafting.com/my-version-of-the-aaa-standard-arbitration-clause/> (last visited Feb. 8, 2020) (showing an example of how one may use the AAA Standard Arbitration Clause for their company).

4. Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the “New Litigation”* (Symposium Keynote Presentation), 7 DEPAUL BUS. & COM. L.J. 3, 383, 400–01 (2009).

arises, a carefully drafted dispute resolution clause can save major headache, time, and expense later by, for example, avoiding litigation in domestic courts to determine the scope of the agreement to arbitrate.<sup>5</sup>

The U.S. Supreme Court recently rendered its decision in *Henry Schein, Inc. v. Archer & White Sales, Inc.*,<sup>6</sup> a dispute regarding whether a judge or an arbitrator will arbitrate a dispute based on an ambiguous arbitration clause.<sup>7</sup> The dispute was originally filed in U.S. courts in 2012.<sup>8</sup> More than seven years later, the dispute *still* has not been resolved.<sup>9</sup> *Henry Schein* is an important reminder that a carefully drafted arbitration clause has real-world consequences.

This article discusses *Henry Schein* and uses this dispute as a springboard to explain the importance of carefully drafting an arbitration clause that takes into consideration the transaction and the parties' needs for an economical and efficient dispute resolution process.

## II. *HENRY SCHEIN V. ARCHER & WHITE*: A DISPUTE OVER AN AMBIGUOUS ARBITRATION CLAUSE

*Henry Schein* involves a disagreement over whether a dispute falls within the scope of an ambiguously worded arbitration clause in a contract. In August 2012, Archer & White Sales, Inc. (“Archer”), a low price distributor, seller, and servicer for dental equipment manufacturers, sued Henry Schein, Inc. (“Henry Schein”), the largest distributor and manufacturer of dental equipment in the United States, and certain subsidiaries of Danaher Corporation (“Danaher”) (together, “Defendants”) in the U.S. District Court for the Eastern District of Texas, alleging that they violated federal and state antitrust laws by conspiring to fix prices and refusing to compete with each other.<sup>10</sup> Specifically, Archer maintained that its competitor Henry Schein conspired with Danaher to terminate or reduce

---

5. *Drafting Dispute Resolution Clauses: A Practical Guide*, AM. ARBITRATION ASS'N, [https://www.adr.org/sites/default/files/document\\_repository/Drafting%20Dispute%20Resolution%20Clauses%20A%20Practical%20Guide.pdf](https://www.adr.org/sites/default/files/document_repository/Drafting%20Dispute%20Resolution%20Clauses%20A%20Practical%20Guide.pdf) (last visited Feb. 8, 2020) (noting the benefits of a well-written dispute resolution clause that clearly defines the “process prior to a dispute, after which agreement becomes more problematic”).

6. 139 S. Ct. 524 (2019).

7. *Id.* at 527.

8. See *Archer & White Sales, Inc. v. Henry Schein, Inc.*, No. 2:12-CV-572-JRG-RSP, 2013 WL 12155243, at \*1 (E.D. Tex. May 28, 2013).

9. See *Henry Schein Inc.*, 139 S. Ct. at 532 (remanding the case for further adjudication on the merits).

10. See *Archer & White Sales, Inc.*, 2013 WL 12155243, at \*1.

Archer's distribution territory because Archer was selling dental equipment at discounted prices.<sup>11</sup> Archer sought tens of millions of dollars in damages and injunctive relief.<sup>12</sup> Defendants moved to compel arbitration based on the arbitration clause in the distribution contract between Archer and Danaher, which provided:

Disputes. This Agreement shall be governed by the laws of the State of North Carolina. Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to . . . intellectual property . . .), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association [(AAA)]. The place of arbitration shall be in Charlotte, North Carolina.<sup>13</sup>

More than a year later, in May 2013, a magistrate judge ruled in favor of Defendants, granted the motion to compel arbitration, and held that the gateway question of the arbitrability of the claims belonged to an arbitrator.<sup>14</sup> The magistrate judge found that the incorporation of the AAA Rules in the arbitration clause evinced an intent to have an arbitrator decide questions of arbitrability and that there was a reasonable construction of the arbitration clause that would provide for arbitration of the dispute.<sup>15</sup>

In December 2016, another three and a half years later, the U.S. District Court for the Eastern District of Texas vacated the magistrate judge's order, ruled in favor of Archer, and held that a court could decide the question of arbitrability.<sup>16</sup> The district court found that the dispute was not arbitrable because the plain language of the arbitration clause expressly excluded suits that involved requests for injunctive relief,<sup>17</sup> reasoning that the court would "not re-write the terms of the Parties' agreement to accommodate a party . . . that could have negotiated for more precise

---

11. *See id.*

12. *See Archer & White Sales, Inc. v. Henry Schein, Inc.*, 878 F.3d 488, 491 (5th Cir. 2017) (emphasis added).

13. *Id.* (emphasis added).

14. *See Archer & White Sales, Inc.*, 2013 WL 12155243, at \*1, \*3.

15. *See id.* at \*1 ("The incorporation of the rules of the AAA provides the answer to this problem, as those rules very clearly state that the question of the arbitrability of a dispute is referred to the arbitrator under the AAA rules.")

16. *See Archer & White Sales, Inc. v. Henry Schein, Inc.*, No. 2:12-CV-572-JRG, 2016 WL 7157421, at \*6, \*9 (E.D. Tex. Dec. 7, 2016).

17. *See id.* at \*5 ("[T]he phrase 'except actions seeking injunctive relief' [in the arbitration clause] is clear on its face – any action seeking injunctive relief is excluded from mandatory arbitration. Plaintiff's action seeks injunctive relief. Applying the plain meaning of the clause, Plaintiff's action is excluded from mandatory arbitration.").

language.”<sup>18</sup> The court scheduled a trial on the merits for more than a year later in February 2018.<sup>19</sup> But that trial never happened, as Defendants appealed to the U.S. Court of the Appeals for the Fifth Circuit.

In December 2017, another year later, the Fifth Circuit ruled that the parties had not “clearly and unmistakably” intended to delegate the question of arbitrability to an arbitrator, reasoning that “the interaction between the AAA Rules and the carve-out is at best ambiguous.”<sup>20</sup> The court concluded that the carve-out in the arbitration clause excluded the claim from arbitration and, consequently, a court could decide the question of arbitrability.<sup>21</sup>

Defendants then appealed to the U.S. Supreme Court, which granted the petition for a writ of certiorari.<sup>22</sup> Prior to the oral argument, a prominent U.S. Supreme Court commentator opined that the “long delays and high expenses” incurred by the parties may be a decisive factor in the Court’s determination:

[T]he one key fact that might be enough to keep [Defendants] in the game is the protracted delay of the judicial proceedings here. [Archer] filed this complaint in 2012. *The litigation over arbitrability has consumed seven years and doubtless expended several hundred thousand dollars in legal fees (if not more)*. I will be surprised next week if the justices [sic] who commonly have joined the majority in broad readings of the FAA are not troubled by the prospects of imposing such *long delays and high expenses* on parties that had bargained for a swift and presumably less expensive resolution in arbitration.<sup>23</sup>

---

18. *See id.* at \*5–6 (noting that “[s]uch an intentional drafting effort as opposed to dropping in standard language is worthy of the Court’s notice.”).

19. *See id.* at \*9.

20. *See Archer & White Sales, Inc. v. Henry Schein, Inc.*, 878 F.3d 488, 494–95 (5th Cir. 2017) (“On one reading, the Rules apply to ‘[a]ny dispute arising under or related to [the] Agreement.’ On another, the provision expressly exempts certain disputes and the Rules apply only to the remaining disputes.”).

21. *See id.* at 497 (“The arbitration clause creates a carve-out for ‘actions seeking injunctive relief.’ . . . We see no plausible argument that the arbitration clause applies here to an ‘action seeking injunctive relief.’ The mere fact that the arbitration clause allows Archer to avoid arbitration by adding a claim for injunctive relief does not change the clause’s plain meaning.”).

22. Petition for Writ of Certiorari, *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 138 S. Ct. 2678 (No. 17-1272); *Henry Schein Inc. v. Archer and White Sales Inc.*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/henry-schein-inc-v-archer-and-white-sales-inc/> (last visited Feb. 8, 2020).

23. Ronald Mann, *Argument Preview: Justices to Mull Who Decides Whether to Arbitrate — the Judge or the Arbitrator*, SCOTUSBLOG (Oct. 22, 2018, 10:25 AM), <http://www.scotusblog.com/2018/10/argument-preview-justices-to-mull-who-decides-whether-to-arbitrate-the-judge-or-the-arbitrator/> (emphasis added).

On January 8, 2019, the Court rendered a unanimous decision in favor of the Defendants.<sup>24</sup> The Court vacated the Fifth Circuit's decision, reasoning that "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract."<sup>25</sup> While the Court "express[ed] no view about whether the contract at issue in this case in fact delegated the arbitrability question to an arbitrator," the Court noted that "[t]he Court of Appeals did not decide that issue" and indicated that "[o]n remand the [circuit court] may address that issue in the first instance."<sup>26</sup>

Thus, after more than seven years and likely hundreds of thousands of dollars in lawyer fees litigating a preliminary issue before a magistrate judge, a district court, a circuit court, and the U.S. Supreme Court, the dispute still has not been resolved or even argued on the merits.<sup>27</sup> A clear and non-ambiguous arbitration clause could have prevented this situation.

### III. DRAFTING AN ARBITRATION CLAUSE: PRACTICE POINTERS

An arbitration clause provides contract drafters with the opportunity to streamline the resolution of a potential future dispute, to ensure that it will be resolved by appropriate decision-makers, and to maximize the chances that the ultimate award will be enforceable. However, inattentive drafting can lead to disputes similar to *Henry Schein* or disputes over arbitration clauses that are unenforceable, procedural requirements that are impossible to satisfy, and provisions that endanger the enforceability of the award.<sup>28</sup>

In general, an arbitration clause should be simple, economic, and clear. As Professor Rusty Park has explained:

The cardinal rule of drafting an international arbitration agreement is to avoid ambiguity and equivocation. Uncertainty about whether, where and how the parties wished to arbitrate will delight only the party wishing to drag its feet, and will often render the clause unenforceable.<sup>29</sup>

This section provides practice pointers with respect to the following critical issues in drafting an arbitration clause: (i) the scope of arbitration;

---

24. See *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 531 (2019) (rejecting the "wholly groundless" exception and remanding the case for further proceedings).

25. *Id.* at 528, 531.

26. *Id.* at 531.

27. See *id.*

28. See generally *id.* (highlighting the consequences of poorly drafted arbitration clauses).

29. William W. Park, *Arbitration in Banking and Finance*, 17 ANN. REV. BANKING L. 213, 246 (1998).

(ii) the arbitral institution; (iii) the seat of the arbitration; (iv) the arbitrators; (v) confidentiality; and (vi) document production or discovery.<sup>30</sup>

### *The Scope of Arbitration*

An arbitration clause confers a mandate upon an arbitral tribunal to adjudicate disputes that come within the ambit of the clause. It is important that an arbitral tribunal not exceed this mandate; otherwise, the ultimate arbitral award may be set aside or refused enforcement.<sup>31</sup> Further, as illustrated by *Henry Schein*, narrowly drafted arbitration clauses can lead to uncertainties regarding the scope of arbitration and challenges to an arbitral tribunal's jurisdiction, with consequent increased expense and time to resolve the dispute.<sup>32</sup> To avoid these risks, it is advisable to consider drafting arbitration clauses in broad, inclusionary terms.

- Recommended: “All disputes arising out of or in connection with this agreement shall be resolved by arbitration . . . .”
- Not Recommended: “In the event of a dispute in respect of the amount of any Indemnification Claim or in respect of whether such Claim is indemnifiable . . . .”

### *Arbitral Institutions*

Disputes may be resolved by arbitration administered by an arbitral institution or ad hoc without the use of an institution.<sup>33</sup> The advantages of institutional arbitration — including well-established arbitral rules, trained staff to help administer proceedings and deal with recalcitrant parties, and review of the arbitral award by some institutions — normally outweigh the additional expense of the institution.<sup>34</sup>

30. This list is not exhaustive. Other important issues that should be addressed in the arbitration clause include the governing law, language of the arbitration, and number of arbitrators.

31. See United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(1)(c), June 7, 1959 (providing that recognition and enforcement may be refused “[i]f the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or if it contains decisions on matters beyond the scope of the submission to arbitration”).

32. See generally *Henry Schein, Inc.*, 139 S. Ct. at 531 (remanding to the Court of Appeals to address whether an arbitrator or court should rule on the contract issue).

33. See RÉMY GERBAY, *THE FUNCTIONS OF ARBITRAL INSTITUTIONS* 5–6 (2016). See generally PAUL D. FRIEDLAND, *ARBITRATION CLAUSES FOR INTERNATIONAL CONTRACTS* 37–43 (2d ed. 2007) (discussing the choice between administered and non-administered arbitration).

34. See JEFFREY WAINCYMER, *PROCEDURE AND EVIDENCE IN INTERNATIONAL*

In selecting institutional arbitration, it is advisable to not use newly formed arbitral institutions that lack proven track records. A party runs the risk that an inexperienced institution may appoint an unqualified arbitrator or experiment with untested arbitral procedures. Well-established arbitral institutions with a history of administering international arbitrations include the International Chamber of Commerce (“ICC”),<sup>35</sup> the London Court of Arbitration (“LCIA”),<sup>36</sup> and the International Centre for Dispute Resolution (“ICDR”),<sup>37</sup> the international arm of the American Arbitration Association (“AAA”).<sup>38</sup>

In choosing among established arbitral institutions, it is important to consider the nature of the transaction, the identities of the parties, and the likely nature of future disputes. For example, to ensure that both parties perceive the arbitration as legitimate and respect the resulting arbitral award,<sup>39</sup> it is advisable to select an arbitral institution based in a third country where none of the parties reside or have a place of business.<sup>40</sup> Thus, parties that contract with Chinese state entities should think twice before agreeing to arbitration administered by the China International Economic and Trade Arbitration Commission (“CIETAC”).<sup>41</sup>

### *Seat of the Arbitration*

The seat — or legal place of arbitration — generally plays a central role in an arbitration. The seat, which will not necessarily be the place where the arbitration hearing is physically held, is the jurisdiction that may deal with issues relating to, among other things, the constitution of the tribunal,

---

ARBITRATION 211–13 (2012).

35. See generally INT’L CHAMBER OF COM., <https://iccwbo.org> (last visited Feb. 9, 2020).

36. See generally LONDON COURT OF INT’L ARBITRATION, <http://www.lcia.org/> (last visited Feb. 9, 2020).

37. See generally INT’L CTR. FOR DISP. RESOL., <https://www.icdr.org/> (last visited Feb. 9, 2020).

38. See generally AM. ARB. ASS’N, <https://www.adr.org/> (last visited Feb. 9, 2020).

39. See Charles N. Brower & Charles B. Rosenberg, *The Death of the Two-Headed Nightingale: Why the Paulsson — van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded*, 29 ARB. INT’L 7, 19 (2013) (explaining that “[l]egitimacy of the proceedings in turn may translate into respect for the arbitral award, regardless of the outcome, as well as for the ultimate enforcement proceedings, if needed at all.”).

40. See BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 164 (6th ed. 2015).

41. See generally CHINA INT’L ECON. & TRADE ARB. COMMISSION, <http://www.cietac.org/?l=en> (last visited Feb. 9, 2020).

challenges to arbitrators, interim measures of protection, and the finality of the award.<sup>42</sup> The seat of the arbitration is important because an arbitral award that does not comply with the law of the seat may be set aside or refused enforcement.<sup>43</sup>

It is advisable to select an arbitration seat that has a modern national arbitration law, support from local court judges, but also freedom from judicial interference, limited appeals on law or substance, and a proven track record of enforcing arbitration agreements and arbitral awards. Examples of well-established arbitral seats include London, Paris, Hong Kong, Geneva, Singapore, and New York.<sup>44</sup>

### *The Arbitrators*

One of the principal advantages of arbitration over domestic litigation is that the parties have a role in selecting who decides the dispute;<sup>45</sup> the parties can choose the arbitrators that they believe are best suited to resolve the dispute rather than being stuck with a judge randomly assigned to the case.<sup>46</sup> Contract drafters can specify in an arbitration clause the type of experience, expertise, or other qualifications that they desire in the arbitrators.

However, it is strongly advisable to not name a specific individual in an arbitration clause. The parties risk finding out that the desired arbitrator may have a conflict, is not available, or is deceased. Nor is it advisable to

---

42. See WAINCYMER, *supra* note 34, at 159–60.

43. See United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Award, art. V(1)(d), June 7, 1959 (providing that recognition and enforcement may be refused if “the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.”).

44. See QUEEN MARY UNIV. OF LONDON & WHITE & CASE LLP, 2018 INTERNATIONAL ARBITRATION SURVEY: THE EVOLUTION OF INTERNATIONAL ARBITRATION 2 (2018).

45. See, e.g., *id.* at 7 (reporting that the “ability of parties to select arbitrators” is one of the most valuable characteristics of international arbitration).

46. See GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1641 (2d ed. 2014) (“The parties’ involvement in the selection of the tribunal contrasts markedly with the parties’ non-involvement in selecting judges to hear their dispute in a national court. In virtually no legal system are the parties permitted to agree that a particular judge may hear and resolve their dispute; the assignment of the judge in a litigation is the task of the judicial administration – almost invariably conducted in a random or otherwise arbitrary fashion – and party-involvement in this process is not only nonexistent but often mandatorily forbidden. Indeed, in many jurisdictions, the suggestion that the parties might choose their judge would be regarded as implausible.”).

create a laundry list of requirements that only a few select people may meet.

- Recommended: “Each arbitrator shall be fluent in English and be a lawyer in good standing admitted to the New York Bar for at least 10 years.”

- Not Recommended: “Each arbitrator shall be fluent in Mandarin, hold a law degree from Université Panthéon-Assas (Paris II) in France, and have more than 20 years of experience in the chemical industry.”

If the parties have designated a procedure for constituting the arbitral tribunal, it must be respected; if the tribunal is constituted in a manner contrary to the parties’ agreement, the award may be set aside or refused enforcement.<sup>47</sup> Along these lines, contract drafters and parties in an arbitration should keep in mind that younger arbitrators may be able and willing to devote more time and attention to a case than more experienced, and often busier, practitioners.

### *Confidentiality*

Another major advantage of arbitration over domestic litigation is that arbitration is a private proceeding in which “the parties may air their differences and grievances, and discuss their financial circumstances, their proprietary ‘know-how’, and so forth, without exposure to the gaze of the public and the reporting of the media.”<sup>48</sup> An important issue related to privacy is confidentiality: the parties have an obligation to not disclose information concerning the arbitration to third parties.

The rules of some leading arbitral institutions do not restrict parties from disclosing to third parties the existence, nature, or other facts about an arbitration. For example, the ICDR Arbitration Rules impose a confidentiality obligation on the tribunal and the arbitral institution, but not on the parties.<sup>49</sup> The ICC Arbitration Rules go further and contemplate the

---

47. See United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Award, art. V(1)(d), June 7, 1959 (providing that recognition and enforcement may be refused if “[t]he composition of the arbitral authority . . . was not in accordance with the agreement of the parties . . .”).

48. See BLACKABY, *supra* note 40, at 134; see also BORN, *supra* note 46, at 2780 (explaining that some commentators describe arbitration as “not a spectator sport”).

49. INT’L CTR. FOR DISP. RESOL., INTERNATIONAL DISPUTE RESOLUTION PROCEDURES, Art. 37(1) (2014), [https://www.icdr.org/about\\_icdr](https://www.icdr.org/about_icdr) (“Confidential information disclosed during the arbitration by the parties or by witnesses shall not be divulged by an arbitrator or by the Administrator. Except as provided in Article 30, unless otherwise agreed by the parties or required by applicable law, the members of the arbitral tribunal and the Administrator shall keep confidential all matters relating to the arbitration or the award.”).

possibility of confidentiality upon the request of a party:

Upon the request of any party, the arbitral tribunal *may* make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.<sup>50</sup>

Contract drafters concerned with the confidentiality of the transaction, the business relationship, or a potential future dispute should consider including confidentiality provisions in their arbitration clauses to restrict the contracting parties from disclosing any confidential information to third parties.<sup>51</sup>

- **Recommended:** “The parties undertake to keep confidential the fact of the arbitration, all orders and awards, all materials submitted in the proceedings that were created for the purpose of the arbitration, and all other documents produced by another party in the proceedings that are not otherwise in the public domain, to save and, to the extent that disclosure may be required of a party by law, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a court or other judicial authority.”

#### *Document Production/Discovery*

Document production in international arbitration is generally more expansive than discovery in civil law jurisdictions. Most international arbitration rules provide an arbitral tribunal with broad discretion regarding the taking of evidence, including document disclosure.<sup>52</sup> Further, the

50. Compare INT’L CHAMBER OF COMMERCE, ARBITRATION RULES, Art. 22(3) (2017) (emphasis added), with LONDON COURT INTERNATIONAL ARBITRATION, LCIA ARBITRATION RULES, Art. 30(1) (2014) (“The parties undertake as a general principle to keep confidential all awards in the arbitration, together with all materials in the arbitration created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain, save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a state court or other legal authority.”).

51. See ILEANA M. SMEUREANU, CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION 13 (2011) (observing that “[a]lthough it seems more practical to agree on confidentiality when entering into the arbitration agreement (or the contract containing the arbitration clause), it is not unusual that parties conclude such agreements after the proceedings commence”).

52. See, e.g., INT’L CHAMBER OF COMMERCE, ARBITRATION RULES, Art. 25(1) (2017) (“The arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means.”); LONDON COURT INTERNATIONAL ARBITRATION, LCIA ARBITRATION RULES, Art. 22(1)(v) (2017) (“The Arbitral Tribunal shall have the power, upon the application of any party or . . . upon its own initiative, but in either case only after giving the parties a reasonable opportunity

International Bar Association's Rules on the Taking of Evidence in International Arbitration ("IBA Rules"), which have gained "wide acceptance within the international arbitral community"<sup>53</sup> and are "frequently used in practice,"<sup>54</sup> provide specific rules for document production, including limited grounds for excluding documents from production.<sup>55</sup>

To minimize risk and enhance legal certainty, it is advisable for parties to specify in their arbitration clause what type of discovery, if any, they want. Depending on the circumstances, a party may want to exclude discovery, allow it, or find some middle ground. For example, a party that has sensitive documents that potentially may be privileged may opt to prohibit document production to avoid the risk that an arbitral tribunal may determine that the documents are not protected by privilege and order that they be produced.<sup>56</sup>

- **Recommended:** "The parties agree that they shall have no right to seek production of documents in the arbitration proceeding."
- **Recommended:** "The IBA Rules on the Taking of Evidence in International Commercial Arbitration shall apply together with [the designated arbitration rules]. Where there is an inconsistency, the IBA Rules shall prevail, but solely as regards the taking of evidence."

---

to state their views and upon such terms (as to costs and otherwise) as the Arbitral Tribunal may decide . . . to order any party to produce to the Arbitral Tribunal and to other parties documents or copies of documents in their possession, custody or power which the Arbitral Tribunal decides to be relevant.").

53. See INT'L BAR ASS'N, IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION 2 (2010).

54. See RETO MARGHITOLA, DOCUMENT PRODUCTION IN INTERNATIONAL ARBITRATION 33 (2015).

55. See INT'L BAR ASS'N, IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION 7, 19 (2010).

56. See *id.* at 19 ("The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons . . . legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable."). Failure to comply with an arbitral tribunal's order to produce a document may cause the tribunal to make an "adverse inference" and presume that if the document had been produced, it would not have been in the party's favor. See generally Michael Polkinghorne & Charles B. Rosenberg, *The Adverse Inference in ICSID Practice*, 30 ICSID REVIEW – FOREIGN INVESTMENT L.J. 741 (2015) (describing that an adverse inference should not "shift a party's burden of proof but rather alleviates the standard (or quantum) of proof by allowing the party to discharge its burden of proof using indirect or circumstantial evidence rather than direct or primary evidence").

#### IV. CONCLUSION

An arbitration clause provides an opportunity to tailor the dispute resolution process in the manner desired by the contracting parties. A company may be able to strengthen its position in a dispute resolution proceeding by carefully tailoring the contract's dispute resolution clause to the unique circumstances of the transaction and the company. However, care should be taken in drafting an arbitration clause to ensure that it is simple, economic, and clear. Otherwise, parties risk a *Henry Schein* situation where significant time and expense may be unnecessarily wasted.