

**Baker  
McKenzie.**



# **Beyond The Courts: Arbitration and Other Viable Mechanisms to Control Risks and Resolve Disputes**

June 26, 2019



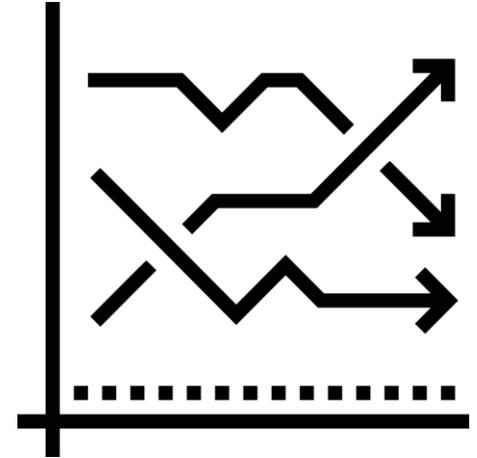
Tom Sikora, Exxon Mobil Corporation  
Brendan Cook, Baker McKenzie  
Eugenie Rogers, Baker McKenzie

# Setting the Table: Dealing With Disputes



# Key Trends and Areas of Discussion

- Arbitration v. Litigation: Myths and Realities.
- Risk mitigation via effective dispute(s) clauses.
- Recent trends:
  - Transparency v. confidentiality.
  - Third party funding.
  - Diversity & Inclusion – Changing the paradigm of “Pale, Male and Stale.”
  - Expediting resolution and controlling costs.
- Enforcement and the End Game.



# Arbitration or Litigation? Myths, Realities (And Practical Necessity)



# Arbitration vs. Litigation

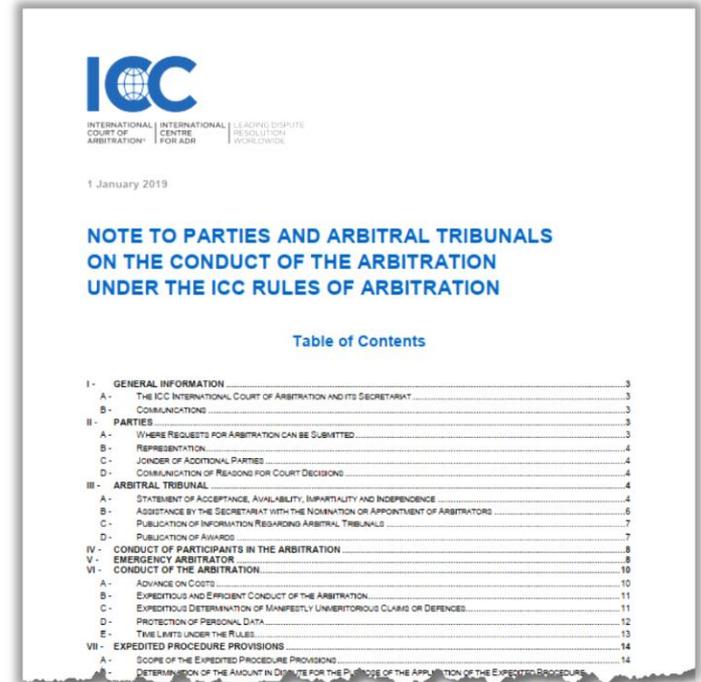
- Speed.
- Cost.
- Convenience and Flexibility.
- Finality.
- Privacy and confidentiality.
- Neutrality.
- Quality of justice.
- Specialized expertise.
- Enforcement.

**arbitration**  
[ahr-bi-trey-shuh n]

**litigation**  
[lit-i-gey-shuh n]

# Hot Trends in Arbitration

- Transparency v. Confidentiality. (23-28)
- Cost Controls (or Synergistics).
- Interim Relief. (50-63)
- Dispositive motions. (72-73)
- Diversity and Inclusion.
- Other.



The image shows the cover page of a document titled "NOTE TO PARTIES AND ARBITRAL TRIBUNALS ON THE CONDUCT OF THE ARBITRATION UNDER THE ICC RULES OF ARBITRATION". The document is dated "1 January 2019". The ICC logo is at the top left, with the text "INTERNATIONAL COURT OF ARBITRATION" and "INTERNATIONAL CENTRE FOR ADR". To the right of the logo, it says "LEADING DISPUTE RESOLUTION WORLDWIDE". The title is in blue text. Below the title is a "Table of Contents" section with a list of topics and page numbers.

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# Drafting Effective Arbitration Clauses



# Particulars of an Arbitration Clause

- Commit to arbitration (intention to arbitrate must be clear).
- Choose number of arbitrators.
- Specify the language of the arbitration.
- Specify the legal seat (venue) of the arbitration.
- Scope of disputes which will be arbitrated.
- Provide for entry of judgment (if enforcement will be in the US).

## 31.0 CLAIMS, DISPUTES AND ARBITRATION

Any dispute, unresolved question or difference arising under this Subcontract between the Parties may be submitted to arbitration pursuant to this Clause. The place of arbitration shall be Paris, France. The language of arbitration shall be English.

# Sample Basic Arbitration Clause

Any dispute, controversy or claim arising out of or in connection with or relating to this Agreement, or the formation, interpretation, breach, termination or validity thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules. The place of arbitration shall be New York, New York. There shall be three arbitrators and the arbitration will be conducted in English. The award rendered by the arbitrators shall be final and judgment may be entered thereon in any court having jurisdiction thereof.



# Enforcement

**Combined Certificate of Judgment and Request for Writ of Fieri Facias or Writ of Possession**

**Part 1**

In the **Luton** County Court  
**Civil Section**

Handwritten: **NF 7048/08**

Claim No:	BL02799
Creditor's/Claimant's Ref:	SLC 209438
Debtor's/Defendant's Ref:	
Date	6/10/2008

Creditor/Claimant: [Redacted]

Debtor/Defendant: [Redacted]

Date of Judgment: 01/10/2008

Total amount of judgment including any costs: £ 66,707.30

Details of order for possession including any costs: £ 73.10

Total amount of interest accrued at the rate of 8 per day to date (if any):

I certify that the details I have given are correct and that to my knowledge there is no application or other procedure pending.

I request an order for enforcement in the High Court by:

Writ of Fieri Facias  
 Writ of possession

I intend to enforce the judgment by execution against goods in the High Court and require this Certificate for

LEGAL SOLUTIONS PARTNERSHIP  
signed - (Creditor/Creditor's Solicitor)  
(Claimant/Claimant's Solicitor) 6/10/2008

**Part 2 (for court use only)**

I certify that this is a true extract of the court record in this case.

Order for enforcement in the High Court

Writ of Fieri Facias  
 Writ of possession

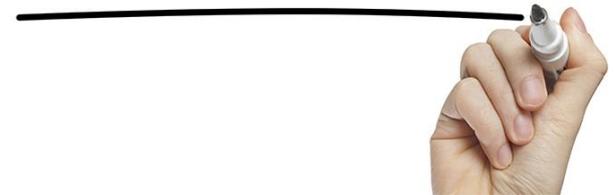
Made on (date) 21/10/08

**LUTON COUNTY COURT**

# Practical Considerations

- Enforcing the judgment or arbitral award.
- Multi-jurisdictional factors.
- Advance due diligence (and forum selection).
- Collection issues.

ACTION PLAN



# Tools To Control Your Destiny

1. Know your client's litigation history.
  - Which activities or patterns reappear in litigation.
  - Causes and lessons learned.
2. Rapid reporting and response procedures
  - Learn which situations are likely to erupt and get the right people involved ASAP.
  - Do not sit on it and hope it goes away.

**Eliminate the Key Factors and Incentives to sue.**

3. Tighten contracts:
  - Mandatory mediation prior to arbitration.
  - Jury waiver clauses.
  - Limitations on damages.
  - Indemnities.
  - Third party Insurance.

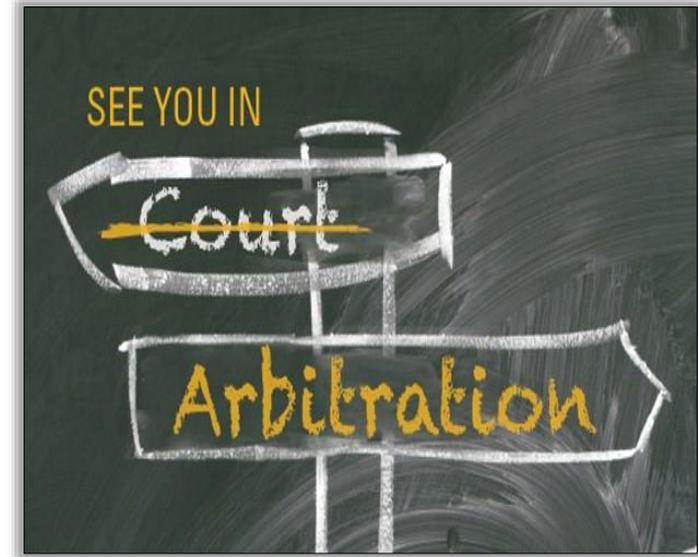


4. Arbitration.

- Is it always better?
- Clauses tailored to your business.

5. Exclusive, mandatory, forum selection clauses.

- Cross border, reasonable relation to forum.
- Texas Supreme Court will enforce; cases dismissed.



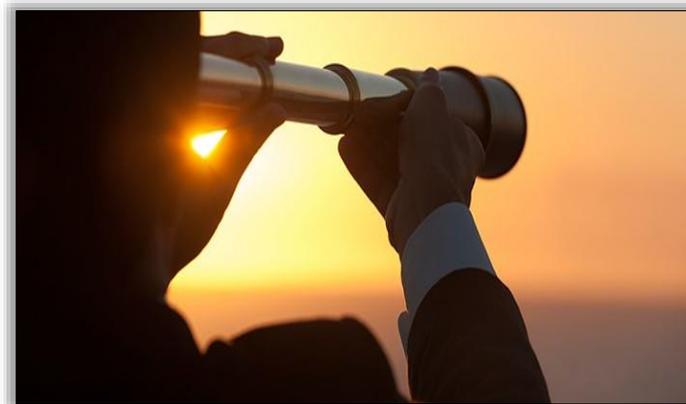
6. Require employees to sign employment contracts.

- Clear.
- **At will** or beyond a certain period.
- If terminated for cause, no cause.
- **Require a release** prior to severance.

**Litigation Avoidance and  
Prevention Articles Abound**



7. Insist on early case assessments and AFA's to share risk.
8. Insist on solutions, not battles.
  - A proactive game plan that gets you there.
  - Texas Supreme Court will enforce; cases dismissed.
9. Don't be afraid to ask outside counsel to train on any aspect – for free.



## 10. Apologize.

- From the top.
- Protected, inadmissible setting.
- Mediation is best.
- Diffuse the anger and revenge motive.



**End**