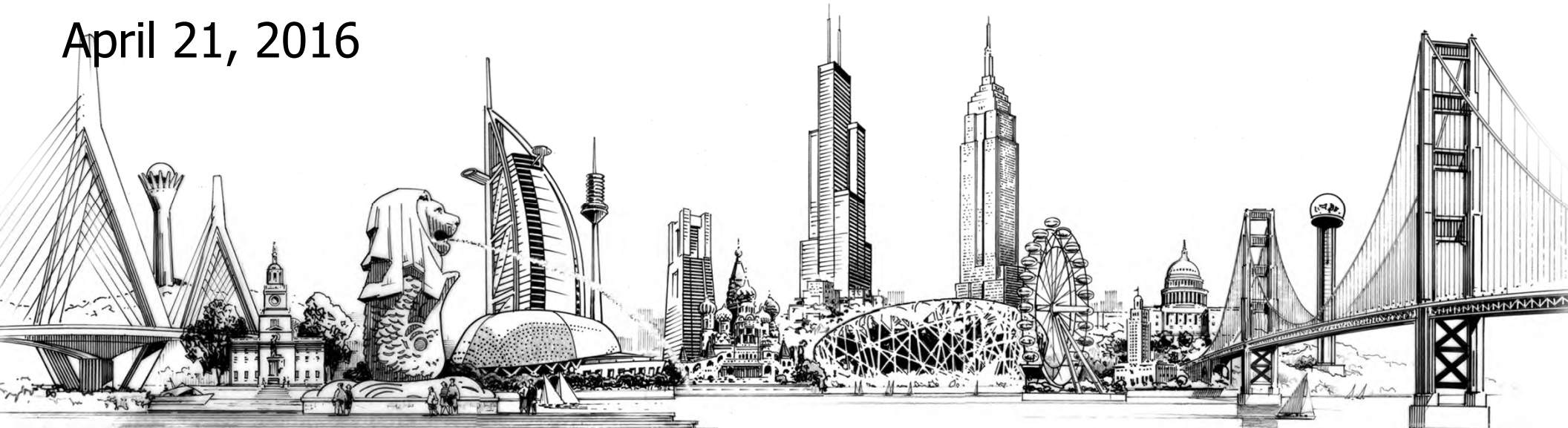


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# **DRAFTING EFFECTIVE JURISDICTION CLAUSES- ARBITRATION**

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# Jurisdiction Clauses

- “*Jurisdiction clauses*” stipulate the **forum** where disputes shall be referred
- An arbitration clause is a (special) form of jurisdiction clause
- THIS IS DIFFERENT FROM A LAW CLAUSE

# Purpose of Jurisdiction Clauses

- Forum selection clauses.
- Arbitration: private forum for the adjudication of disputes.
  - Limited to the determination of private rights.
  - Certain matters are non-arbitrable: conferment of copyright, criminal offence, entitlement to land, winding up/insolvency.
  - Grey areas: secondary rights arising out of state-conferred rights; beneficiaries' competing rights under a trust instrument.

# Purpose of Jurisdiction Clauses

- Court: natural and public forum for the adjudication of disputes.
  - No limitation to the types of rights that can be determined.
  - Can include interim and equitable relief.
  - Has robust summary and default processes.

# Purpose of Jurisdiction Clauses

- Understand the client's needs to decide on litigation v arbitration
  - Confidentiality
  - Speedy resolution
  - The ability to choose the adjudicator
  - Limiting documentary disclosure
  - Neutrality
  - Counterparties
  - Costs and costs recovery
  - Enforceability of the final determination

# Types of Jurisdiction Clause

- Non-exclusive jurisdiction clause
  - Choice by the parties of a specific court/arbitration without excluding the possibility of the dispute being brought before other courts.
  - Still some uncertainty.
- Exclusive jurisdiction clause
  - Choice by the parties of a specific court/arbitration and excludes the possibility of the dispute being brought before other courts.
- Asymmetric jurisdiction clause
  - Gives one party the right to choose a specific court/arbitration and excludes the possibility of the dispute being brought before other courts.
  - Problems with enforcement in some jurisdictions (e.g. France, Russia).

# Elements of an Arbitration Clause

- Clear intention to arbitrate
- Scope of referral
- Residual jurisdiction of court of the chosen “seat”

# Governing law

- What law governs an arbitration agreement?
  - Law of the main contract
  - Law of the seat of arbitration
  - Law of the arbitration clause
- Express provision in the arbitration agreement can avoid unexpected results



# Importance of the “Seat”

- The distinction between seat and venue of arbitration:
  - “**seat**” is the juridical root of the arbitration
    - There can be only one
    - In practical terms, identifies the court with residual jurisdiction over the arbitration proceedings. A party may apply to that court if it wishes to obtain (for example) interim injunctive relief or to set aside an arbitration award
  - “**venue**” is the location where the hearings take place
    - There can be more than one
    - Unimportant as a legal consideration
    - Practical consideration for clients: location of witnesses or project (e.g. for site inspection)
- “**Place**” usually refers to “seat”, but can also refer to “venue”

# Choice of Seat

## Enforcement

- Choosing a seat which is also a signatory to the New York Convention
- An award can only be set aside by the court of the seat of the arbitration
- Be aware of the peculiarities of the jurisdiction in which the award is likely to be enforced

# No one-size-fits-all solution

- Model clause is the starting point
- Choice of institutional arbitral rules in an arbitration clause imports those rules as part of the arbitration agreement (**Article 2(e), Model Law**)
- Popular choices:
  - Singapore International Arbitration Centre
  - International Chamber of Commerce
  - London Court of International Arbitration
  - International Centre for Dispute Resolution (AAA)
  - International Institute for Conflict Prevention and Resolution (CPR)

# Some Basic Clauses – Check with an arbitration lawyer before using

## **Singapore International Arbitration Centre (SIAC)**

"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 **in Singapore** in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") for the time being in force, which rules are deemed to be incorporated by reference in this clause. [The number of arbitrators shall be [one/three]. The language to be used in the arbitral proceedings shall be [ ].]"

## **International Chamber of Commerce (ICC)**

"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/three]** arbitrators appointed in accordance with the said Rules of Arbitration. The seat, or legal place, of arbitration shall be [City and/or Country]. The language to be used in the arbitral proceedings shall be [ ]."

## **London Court of International Arbitration (LCIA)**

"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 [ ]."

## **International Centre for Dispute Resolution (ICDR)**

"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. 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 [ ]."

# Necessary Elements

- What you **must** include:
  - Institutional rules: get the name of the institution right
    - Ad hoc possible but can lead to difficulties
  - Seat (as opposed to venue): choose a city
  - Number of arbitrators
    - Note default position of institutional rules and need to modify
    - Note appointment process in multi-party situations
  - Language

# Tailoring the Clause

- Escalation provisions (treat with great care)
  - Pre-conditions as to admissibility or jurisdiction?
  - Mediation
  - Enforceability of good faith negotiations
- Consider special situations
  - Joint venture agreement
  - Share purchase agreement
  - Finance documentation
  - Construction contracts (standard form agreements, e.g. FIDIC)
  - Interlinked contracts
  - Multi-party contracts

# Tailoring the Clause

- US addition
  - Specifically state that award is final, binding, and enforceable in any court of competent jurisdiction
- Avoid
  - Time limits for decisions to be rendered
  - Hybrids (e.g. SIAC to administer ICC rules)

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Timothy Cooke advises clients in all areas of alternative dispute resolution, with a focus on international commercial arbitration. Timothy has advised clients in a broad array of international commercial disputes, particularly those in the fields of energy and infrastructure, construction and finance, as well as joint venture and other investment disputes. He manages high-value, legally- and factually-complex cross-border disputes, which often involve questions of fraud or corruption. Timothy is a Registered Foreign Lawyer in Singapore and is admitted to practice in England and Wales as a Barrister.

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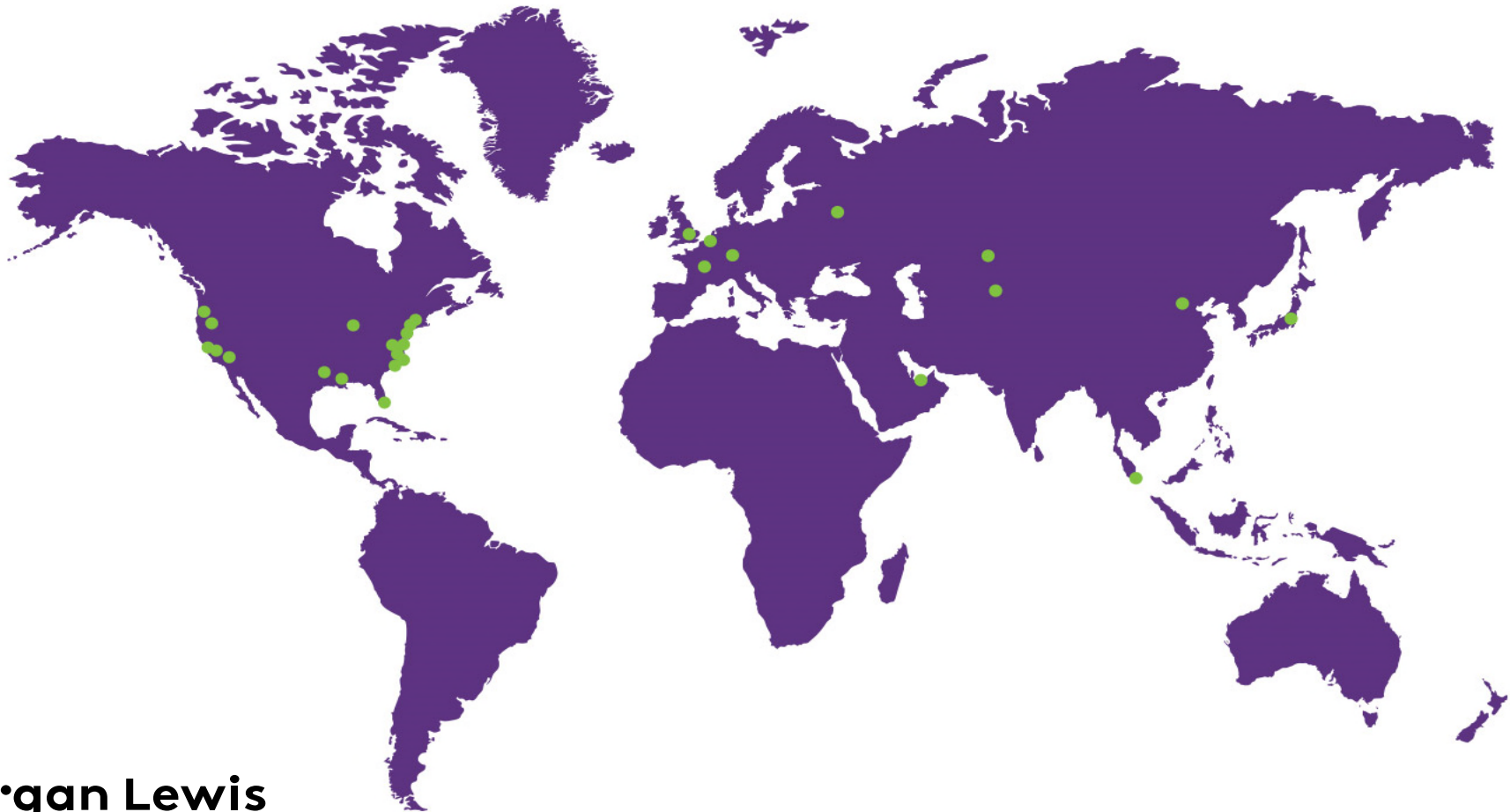
David Levy counsels clients in high-stakes disputes, and focuses his practice on commercial and intellectual property lawsuits. With more than two decades' experience as a trial lawyer, he represents technology, financial services, energy, manufacturing, and retail clients in US federal and state courts, and before US and international arbitration tribunals. He previously co-chaired the international litigation and Asia-Pacific practices at an international law firm. David now leads Morgan Lewis's litigation practice in Houston, and has tried more than a dozen cases and handled numerous appeals.

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