



The Arbitration Agreement

11 May 2018, Hanoi

C L I F F O R D
C H A N C E

Paul Sandosham
Clifford Chance



Drafting International Arbitration Clauses



The Importance of Getting it Correct!

Disputes and force majeure shall be solved according to the current FIDIC rules.


```
graph TD; A[Arbitration] --> B[Agreement]; A --> C[Consent];
```

Arbitration

Agreement

Consent

Drafting Arbitration Clauses

Arbitration is a contractually agreed dispute resolution mechanism and it is therefore very important to have the correct wording in the contract.

Conducting an **efficient arbitration** starts with drafting an **effective arbitration clause**

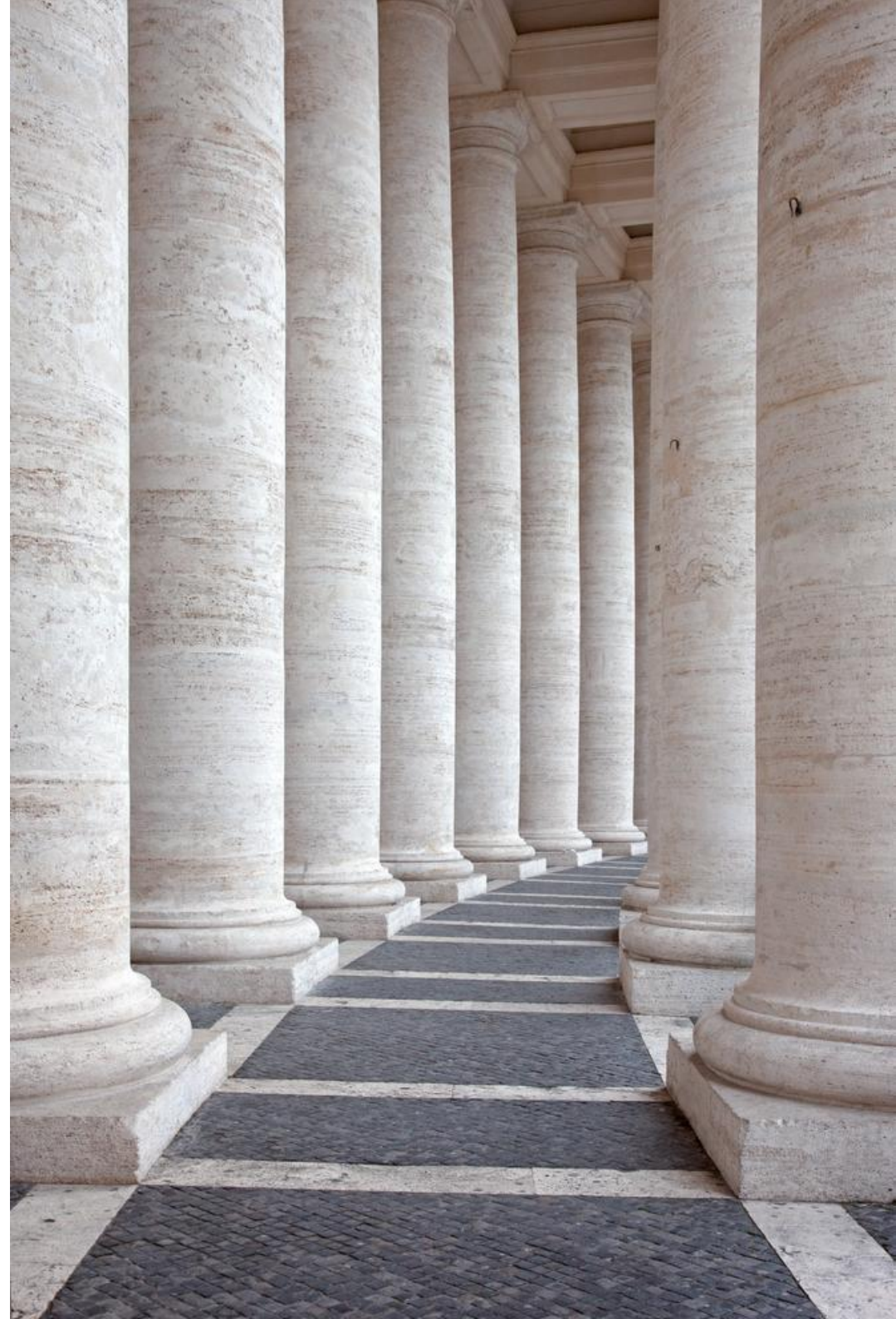
A poorly drafted arbitration clause may:

- Lead to parallel proceedings in different jurisdictions
- Lead to challenges to the tribunal's substantive jurisdiction
- Affect the chances of successfully enforcing an award
- Bind the parties to an unnecessarily expensive or lengthy procedure



7 Key Factors When Drafting Arbitration Clauses

- 1 Institutional or Ad Hoc Arbitration?
- 2 Arbitral Institution (if any) and its Rules
- 3 Scope of the Arbitration Clause
- 4 Seat of the Arbitration
- 5 Law Governing the Arbitration
- 6 Appointment of Arbitrators
- 7 Confidentiality



Institutional v *Ad Hoc* Arbitration

Institutional Arbitration:

- conducted pursuant to (skeletal) institutional rules
- overseen by [non-governmental] administrative body with various supervisory functions (e.g., selection of arbitrators, arbitrator compensation)
- extent of institutional involvement varies

Ad Hoc Arbitration:

- conducted by arbitrators and parties
- without being administered by an arbitral institution, relying only on national arbitration legislation
- often conducted without pre-existing set of rules, which may be difficult to agree upon once dispute arises (although some such rules exist, such as UNCITRAL Arbitration Rules)
- Respondent can create more delays

Institutional v *Ad Hoc* Arbitration (continued)

Rules Play a Key But Incomplete Role

- Leading arbitral institutions have procedural rules that parties incorporate by reference
- National law and institutional rules provide a basic framework, ensuring fundamental procedural rights
- Otherwise, parties are free to agree on procedure. If parties cannot agree, arbitrators enjoy wide discretion
- Typically, where the parties have not otherwise agreed, the arbitral institution will:
 - select the arbitrator(s)
 - resolve challenges to arbitrator(s)
 - serve the Request for Arbitration and other submissions
 - designate place of arbitration
 - fix the fees and costs
- Most institutional arbitration rules address:
 - Basic procedural framework and timetable
 - Filing and service of the request for arbitration
 - Filing and service of the reply and counterclaim(s)
 - Disposition of jurisdictional challenges
 - Written submissions
 - Evidentiary hearings
 - Provisional measures
 - Timetable for an award
 - Formalities of and procedures for making awards

Institutional v *Ad Hoc* Arbitration (continued)

Institutional Arbitration:

Relative Advantages

- Case management – reduces risks of procedural breakdowns, particularly at the outset, and of technical defects in the arbitral award
- Default rules on multiple important issues (e.g., majority votes, finality of award, corrections, competence-competence)
- Provides framework for appointment of arbitrators and challenges to arbitrators
- Avoids problems with the arbitrators' fees
- May enhance the likelihood of voluntary compliance and judicial enforcement

Ad Hoc Arbitration:

Relative Advantages

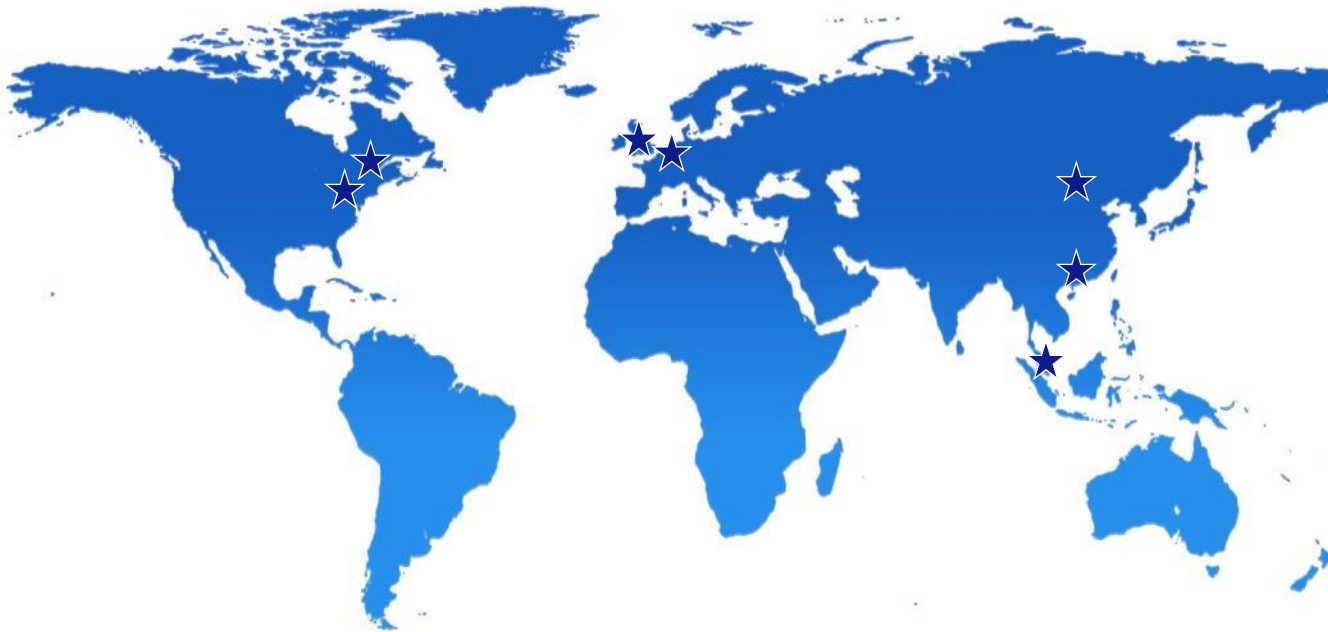
- Can be more flexible and more readily customised
- Can be less expensive (avoids institutional fees)
- Can be more confidential than institutional arbitration
- Increasing number of experienced practitioners and arbitrators increases confidence in proceeding without an institution
- Some courts (e.g. China) do not recognise ad hoc proceedings with no named administering arbitration institution

Arbitral Institution (if any), and its Rules

Institution Arbitration Clauses

- The starting point can be the model arbitration clause of the chosen institution
 - ICC: www.iccwbo.org
 - SIAC: www.siac.org.sg
 - LCIA: www.lcia-arbitration.com
 - HKIAC: www.hkiac.org
 - AAA: www.adr.org
- It may be necessary or desirable to amend the institution's clause. ***Proceed with caution.***
- Does the clause properly name the intended institution and its rules?

Arbitral Institution (if any), and its Rules



Choosing the Institution

- Get the name right
- Reputation and experience
- Rules
- Independence

- International Chamber of Commerce (“**ICC**”)
- Singapore International Arbitration Centre (“**SIAC**”)
- London Court of International Arbitration (“**LCIA**”)
- China International Economic And Trade Arbitration Commission (“**CIETAC**”)
- Hong Kong International Arbitration Centre (“**HKIAC**”)
- American Arbitration Association (“**AAA**”/“**ICDR**”)
- International Centre for Settlement of Investment Disputes (“**ICSID**”)

Some Key Arbitral Institutions

	Key Features	Model Clause
ICC	<ul style="list-style-type: none"> Established in Paris in 1923 Terms of reference procedure 	<p><i>“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.”</i></p>
LCIA	<ul style="list-style-type: none"> Founded in 1892 LCIA India operated from 2009 to 2016 with India-specific rules Fees based on hourly rates, not sums in dispute No institutional review of draft awards 	<p><i>“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.</i></p> <p><i>The number of arbitrators shall be [one/three].</i></p> <p><i>The seat, or legal place, of arbitration shall be [City and/or Country].</i></p> <p><i>The language to be used in the arbitral proceedings shall be [].</i></p> <p><i>The governing law of the contract shall be the substantive law of [].”</i></p>
HKIAC	<ul style="list-style-type: none"> Established in 1985 India has agreed to enforce awards rendered in arbitrations seated in Hong Kong and China Members of secretariat can act as tribunal secretary ‘Light-touch’ approach to administration 	<p><i>“Any dispute, controversy, difference or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted.</i></p> <p><i>The law of this arbitration clause shall be ... (Hong Kong law). *</i></p> <p><i>The seat of arbitration shall be ... (Hong Kong).</i></p> <p><i>The number of arbitrators shall be ... (one or three). The arbitration proceedings shall be conducted in ... (insert language).”</i></p>

Scope of the Arbitration Clause

What Can the Arbitrator Decide?

- Scope of the arbitration agreement defines the jurisdiction of the arbitrators
- Broad scope v. narrow scope
- Some courts hold that “arising under” language does not encompass tort, statutory or other non-contractual claims
- Specific exclusions possible for particular types of claims, e.g. enforcement of IP rights, pricing adjustments, etc.
- Are all relevant agreements covered by the arbitration clause? “All disputes relating to this Agreement...”

Seat of the Arbitration

Why is the seat critical?

- Applicability of NY Convention
- Exclusive forum for annulment actions
- Exclusive forum for judicial appointment / removal of arbitrators
- Standards of arbitrator's independence and impartiality
- Enforcement of arbitration agreement
- Judicial support for arbitral process (e.g. provisional measures, disclosure)
- Effect on selection of presiding arbitrator, arbitral procedures, choice of law

Preferred seat?

- Country that has implemented the NY Convention
- With national legislation hospitable to and supportive of international arbitration:
 - enforceability of arbitration agreements
 - freedom of parties to choose counsel and arbitrator(s)
 - minimal judicial review of awards
 - minimal supervision of arbitrators; no interlocutory judicial interference
 - court assistance in aid of arbitration
- Appropriate logistics / infrastructure
- Beneficial or neutral forum for particular party

Law Governing the Arbitration

Reference should be made to the governing law of the arbitration agreement

- Should the governing law of the arbitration agreement be that of the substantive law of the contract or the law of the seat of the arbitration?
- *SulAmerica Cia Bacuibak De Seguros S.A. and others v Enesa Engenharia S.A.* [2012] 1 Lloyd's Rep 671 cf. *FirstLink Investments Corp Ltd v GT Payment Pte Ltd and others* [2014] SGHCR 12

Drafting International Arbitration Agreements

“...The arbitration agreement shall be governed by [] law ...”

Appointment of Arbitrators

Choosing the Arbitrator(s)

The Single Most Important Decision

- Arbitration is only as good as the arbitrators
- Arbitrators' legal and cultural backgrounds have vital effect on procedures and decision-making
- Partisan co-arbitrators
- Disengaged / unavailable arbitrators
- Choice of co-arbitrator influences choice of presiding arbitrator

Number of Arbitrators

- Agree on the number of arbitrators (1 or 3; not 2, 4, 5)
- Unless disputes are likely to be small, it is generally preferable to have three arbitrators
- Possibility of tiered approach (1 arbitrator for small disputes; 3 arbitrators for larger disputes (e.g., >\$3 million))
- Agree on procedure to appoint chair
- Consider the institutional default rule – the leading institutional and UNCITRAL Rules contain acceptable procedures for the appointment of arbitrators

Appointment of Arbitrators (continued)

Arbitrator Qualifications and Selection

- Possible to agree that the arbitrators should have particular legal expertise, industry / technology-specific experience, nationality, language skills, and other qualifications (or selected by third party appointing authorities (institutes, etc.))
- IMPORTANT:
 - Be sure that qualifications are appropriate for all potential disputes that could arise
 - Be careful not to unduly restrict the pool of potential arbitrators
- Consider nationality requirement for presiding / sole arbitrator
- General requirements of **neutrality / independence and impartiality** – policed by disclosure obligations

Confidentiality

Rules Play a Key But Incomplete Role

- Not necessarily provided by national law
- Provided for by some arbitral rules
- What is confidential? Regulatory limits (e.g., SEC requirements)?
- Consider need for separate confidentiality undertaking covering:
 - fact of dispute / arbitration
 - information disclosed during arbitration
 - arbitration award
 - settlement discussions

“The parties to an arbitration shall keep the arbitration confidential and shall not disclose to any person, other than those necessary to the proceedings, the existence of the arbitration, any information submitted during the arbitration, any documents submitted in connection with it, any oral submissions or testimony, transcripts, or any award unless disclosure is required by law or is necessary for permissible court proceedings, such as proceedings to recognize or enforce an award.”

- UK, Singapore – confidentiality in arbitration proceedings implied under the common law
- Australia – no implied confidentiality obligations in arbitration proceedings

Multi-Tier Clauses

Pre-Arbitration ADR Clause

Possible provisions

“All disputes relating to this Agreement shall be referred to management representatives of the parties for resolution. If such representatives are unable to resolve any dispute(s) referred to them within [30] days of referral, either party may submit such dispute(s) to arbitration in accordance with the provisions of Article [] hereof.”

“In the event of any dispute, controversy or claim arising in any way out of or in connection with this Agreement, **the parties shall attempt in the first instance to resolve such Dispute through amicable discussion.** If the Dispute is not resolved through such amicable discussion within 30 days of a notice of the Dispute being given or such longer period as the parties agree to in writing, then any party may refer the dispute for final resolution by arbitration.”

HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd [2012] SGCA 48

- Singapore courts are willing to enforce “friendly negotiation” and “good faith endeavour to agree” clauses



Common Pitfalls – Badly Drafted Clauses

Badly Drafted Clauses

“For all claims or disputes arising out of this agreement which could not be amicably settled between the parties, is competent the arbitrage for export trade at the Federal Chamber of Commerce in Beograd. In the case that the buyer is accused, the Chamber of Commerce in New York is competent.”

“All disputes arising in connection with the present agreement shall be submitted in the first instance to arbitration. The arbitrator shall be a well-known chamber of commerce (like the International Chamber of Commerce) designated by mutual agreement between buyer and seller.”

Common pitfalls – Badly Drafted Clauses (continued)

Badly Drafted Clauses – more real life examples

“All disputes or difference whatsoever arising between the parties out of or relating to the construction, meaning and operation or effect of this contract or breach thereof shall be settled by arbitration in accordance with the International Rules of Arbitration and the award shall be made in pursuance thereof shall be binding on both parties. The venue of arbitration proceedings will be in Singapore. The contract shall be governed and construed by English law.”

“Any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to executive representatives of the Parties for settlement through friendly consultations In case no agreement can be reached through consultation within 40 days ..., the dispute may be submitted to arbitration for settlement by either Party. Any and all such disputes shall be finally resolved by arbitration before the Singapore International Arbitration Centre in accordance with the Rules of Arbitration of the International Chamber of Commerce then in effect and the proceedings shall take place in Singapore and the official language shall be English.”

Common pitfalls – “pathological” clauses

Insigma Technology Co Ltd v Alstom Technology Ltd [2009] 3 SLR(R) 936

- The Singapore Court upheld a “hybrid” arbitration clause which provided that all disputes should be resolved “by arbitration before the Singapore International Arbitration Centre in accordance with the Rules of Arbitration of the International Chamber of Commerce”.
- Insigma failed in its application to set aside an award rendered by an eminent three-member tribunal in an arbitration that was administered by the SIAC applying the ICC Arbitration Rules.
- Insigma had argued before the arbitral tribunal and the Singapore High Court and Court of Appeal that the “hybrid” arbitration clause was invalid and void for uncertainty.

Speaker

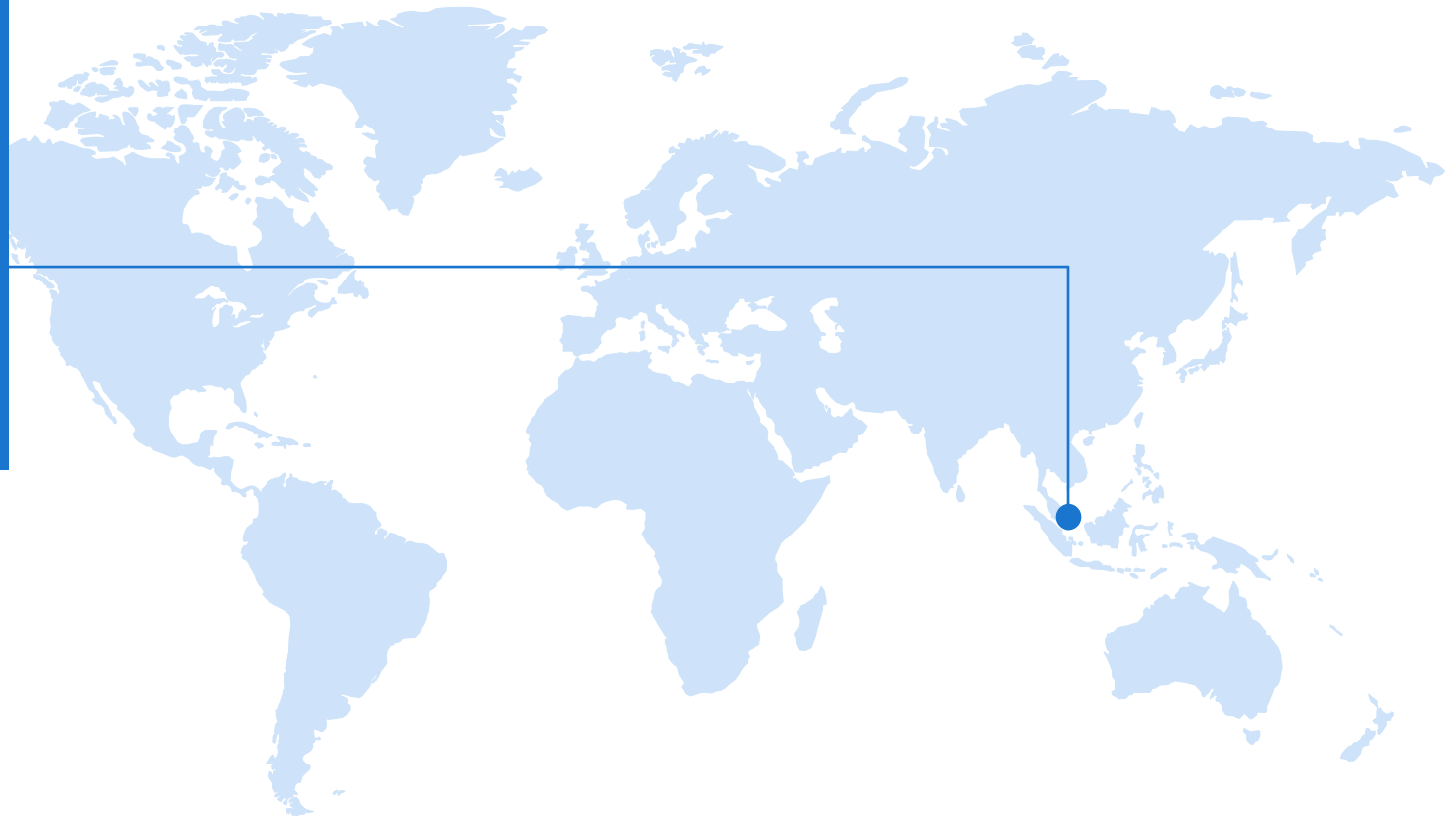


Paul Sandosham

Partner

T: +65 6661 2055

E: Paul.Sandosham@CliffordChance.com



Worldwide contact information

35* offices in 25 countries

Abu Dhabi

Clifford Chance
9th Floor, Al Sila Tower
Abu Dhabi Global Market Square
PO Box 26492
Abu Dhabi
United Arab Emirates
Tel +971 (0)2 613 2300
Fax +971 (0)2 613 2400

Bucharest

Clifford Chance Badea
Excelsior Center
28-30 Academiei Street
12th Floor, Sector 1
Bucharest, 010016
Romania
Tel +40 21 66 66 100
Fax +40 21 66 66 111

Hong Kong

Clifford Chance
27th Floor
Jardine House
One Connaught Place
Hong Kong
Tel +852 2825 8888
Fax +852 2825 8800

Milan

Clifford Chance
Piazzetta M.Bossi, 3
20121 Milan
Italy
Tel +39 02 806 341
Fax +39 02 806 34200

Prague

Clifford Chance
Jungmannova Plaza
Jungmannova 24
110 00 Prague 1
Czech Republic
Tel +420 222 555 222
Fax +420 222 555 000

Singapore

Clifford Chance
12 Marina Boulevard
25th Floor Tower 3
Marina Bay Financial Centre
Singapore 018982
Tel +65 6410 2200
Fax +65 6410 2288

Amsterdam

Clifford Chance
Droogbak 1A
1013 GE Amsterdam
PO Box 251
1000 AG Amsterdam
The Netherlands
Tel +31 20 7119 000
Fax +31 20 7119 999

Casablanca

Clifford Chance
169, boulevard Hassan 1er
Casablanca 20000
Morocco
Tel +212 520 132 080
Fax +212 520 132 079

Istanbul

Clifford Chance
Kanyon Ofis Binasi Kat 10
Büyükdere Cad. No. 185
34394 Levent
Istanbul
Turkey
Tel +90 212 339 0001
Fax +90 212 339 0098

Moscow

Clifford Chance
Ul. Gashka 6
125047 Moscow
Russian Federation
Tel +7 495 258 5050
Fax +7 495 258 5051

Riyadh

Clifford Chance
Building 15, The Business Gate
King Khaled International Airport Road
Cordoba District, Riyadh
P.O. Box: 90239, Riyadh 11613,
Kingdom of Saudi Arabia
Tel +966 11 481 9700
Fax +966 11 481 9701

Sydney

Clifford Chance
Level 16
No. 1 O'Connell Street
Sydney NSW 2000
Australia
Tel +612 8922 8000
Fax +612 8922 8088

Bangkok

Clifford Chance
Sindhorn Building Tower 3
21st Floor
130-132 Wireless Road
Pathumwan
Bangkok 10330
Thailand
Tel +66 2 401 8800
Fax +66 2 401 8801

Doha

Clifford Chance
QFC Branch
Suite B, 30th floor
Tornado Tower
Al Funduq Street
West Bay PO Box 32110
Doha
State of Qatar
Tel +974 4491 7040
Fax +974 4491 7050

Jakarta**

LWP
DBS Bank Tower
Ciputra World One 28th Floor
Jl. Prof. Dr. Satrio Kav 3-5
Jakarta 12940
Indonesia
Tel +62 21 2988 8300
Fax +62 21 2988 8310

Munich

Clifford Chance
Theresienstraße 4-6
80333 Munich
Germany
Tel +49 89 216 32-0
Fax +49 89 216 32-8600

Rome

Clifford Chance
Via Di Villa Sacchetti, 11
00197 Rome
Italy
Tel +39 06 422 911
Fax +39 06 422 91200

Tokyo

Clifford Chance
Akasaka Tameike Tower, 7th Floor
17-7 Akasaka 2-Chome
Minato-ku, Tokyo 107-0052
Japan
Tel +81 3 5561 6600
Fax +81 3 5561 6699

Barcelona

Clifford Chance
Av. Diagonal 682
08034 Barcelona
Spain
Tel +34 93 344 22 00
Fax +34 93 344 22 22

Dubai

Clifford Chance
Level 15
Burj Daman
Dubai International Financial Centre
PO Box 9380
Dubai
United Arab Emirates
Tel +971 4 503 2600
Fax +971 4 503 2800

London

Clifford Chance
10 Upper Bank Street
London, E14 5JJ
United Kingdom
Tel +44 20 7006 1000
Fax +44 20 7006 5555

New York

Clifford Chance
31 West 52nd Street
New York, NY 10019-6131
USA
Tel +1 212 878 8000
Fax +1 212 878 8375

São Paulo

Clifford Chance
Rua Funchal 418 15th Floor
04551-060 São Paulo SP
Brazil
Tel +55 11 3019 6000
Fax +55 11 3019 6001

Warsaw

Clifford Chance
Norway House
ul. Lwowska 19
00-660 Warszawa
Poland
Tel +48 22 627 11 77
Fax +48 22 627 14 66

Beijing

Clifford Chance
33/F, China World Office 1
No. 1 Jianguomenwai Dajie
Chaoyang District
Beijing 100004
China
Tel +86 10 6535 2288
Fax +86 10 6505 9028

Düsseldorf

Clifford Chance
Königsallee 59
40215 Düsseldorf
Germany
Tel +49 211 43 55-0
Fax +49 211 43 55-5600

Luxembourg

Clifford Chance
10 boulevard G.D. Charlotte
B.P. 1147
L-1011 Luxembourg
Grand-Duché de Luxembourg
Tel +352 48 50 50 1
Fax +352 48 13 85

Paris

Clifford Chance
1 rue d'Astorg
CS 60058
75377 Paris Cedex 08
France
Tel +33 1 44 05 52 52
Fax +33 1 44 05 52 00

Seoul

Clifford Chance
21st Floor, Ferrum Tower
19, Eulji-ro 5-gil
Jung-gu, Seoul 100-210
Korea
Tel +82 2 6353 8100
Fax +82 2 6353 8101

Washington, D.C.

Clifford Chance
2001 K Street NW
Washington, DC 20006 - 1001
USA
Tel +1 202 912 5000
Fax +1 202 912 6000

Brussels

Clifford Chance
Avenue Louise 65 Box 2
1050 Brussels
Belgium
Tel +32 2 533 5911
Fax +32 2 533 5959

Frankfurt

Clifford Chance
Mainzer Landstraße 46
60325 Frankfurt am Main
Germany
Tel +49 69 71 99-01
Fax +49 69 71 99-4000

Madrid

Clifford Chance
Paseo de la Castellana 110
28046 Madrid
Spain
Tel +34 91 590 75 00
Fax +34 91 590 75 75

Perth

Clifford Chance
Level 7, 190 St Georges Terrace
Perth, WA 6000
Australia
Tel +618 9262 5555
Fax +618 9262 5522

Shanghai

Clifford Chance
40th Floor
Bund Centre
222 Yan An East Road
Shanghai 200002
China
Tel +86 21 2320 7288
Fax +86 21 2320 7256

* Clifford Chance's offices include a second office in London at 4 Coleman Street, London EC2R 5JJ.

** Linda Widyati & Partners in association with Clifford Chance.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.

