

FedArb—Model Clause for International Arbitrations

International Arbitrations. Unless the parties have otherwise expressly agreed, arbitrations involving parties of different nationalities and that are thus subject to the NY Convention, will be governed by the UNCITRAL Arbitration Rules* in effect at the time the arbitration is commenced, as modified by **FedArb’s UNCITRAL Appendix** (below). This Appendix sets forth five modifications to the UNCITRAL Arbitration Rules: (1) the language in Article 6 with respect to the “appointing authority” is modified to reflect that FedArb is to be the appointing authority, (2) a new provision is added regarding confidentiality, cybersecurity and data privacy; (3) a new provision is added regarding Emergency Relief; (4) a new provision is added regarding consolidation of arbitrations; and (5) a new provision is added regarding Early Dismissal of Claims and Defenses.

FedArb’s UNCITRAL Appendix

FedArb modifies and amends UNCITRAL Arbitration Rules as follows:

I. Appointing Authority. The language in Article 6 is amended **[in bold]** as follows:

Designating and appointing authorities

Article 6

1. **FedArb shall be the appointing authority to administer the arbitration.**
2. **Omitted**
3. **Omitted**
4. Except as referred to in article 41, paragraph 4, if the appointing authority refuses to act, or if it fails to appoint an arbitrator within 30 days after it receives a party’s request to do so, or fails to act within any other period provided by these Rules, or fails to decide on a challenge to an arbitrator within a reasonable time after receiving a party’s request to do so, any party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate a substitute appointing authority.
5. In exercising their functions under these Rules, the appointing authority may require from any party and the arbitrators the information they deem necessary and they shall give the parties and, where appropriate, the arbitrators, an opportunity to present their views in any manner they consider appropriate. All such communications to and from the appointing authority shall also be **simultaneously** provided by the sender to all other parties.
6. When the appointing authority is requested to appoint an arbitrator pursuant to articles 8, 9, 10 or 14, the party making the request shall send to the appointing authority copies of the notice of arbitration and, if it exists, any response to the notice of arbitration.
7. The appointing authority shall **take into account** such considerations as are likely to secure the appointment of an independent and impartial arbitrator, the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties, **and any agreements between or among the parties as to the necessary qualifications for the arbitrator.**

Similarly, the language in Article 6 of “Appendix UNCITRAL Expedited Arbitration Rules” with respect to the Appointing Authority is amended as follows:

Article 6

1. FedArb shall be the appointing authority to administer the arbitration.
2. Deleted
3. Deleted

* https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/21-07996_expedited-arbitration-e-ebook.pdf

II. The following language regarding Confidentiality is added as an Addendum:

Confidentiality.

Confidentiality, Cybersecurity and Data Privacy

- (a) Unless all the parties otherwise agree, all papers, exchanges, hearings, and decisions in the proceeding shall be and shall remain confidential and may not be disclosed to any third parties, except to the extent that the information is being, or has been previously, disclosed by agreement of the parties, or disclosure is necessary in connection with a legal proceeding relating to confirmation of, enforcement of, or a challenge to an Award, or disclosure is otherwise required by law.
- (b) The parties shall confer regarding and address issues of cyber security and data privacy in accordance with the procedures and guidelines for handling such issues as set forth in the most recent edition of the Protocol on Cybersecurity in International Arbitration | ICCA, NYC Bar, & CPR, with the assistance of the Permanent Court of Arbitration Peace Palace, The Hague.**

III. The following language regarding Emergency Relief is added as an Addendum

Emergency Relief

These emergency Relief provisions are not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority at any time prior to making an application for such measures, and in appropriate circumstances even thereafter, pursuant to these Rules. Any application for such measures from a competent judicial authority shall not be deemed to be an infringement or a waiver of the arbitration agreement. Moreover, it is not necessary for the parties to have complied with any requirement to engage in mandatory mediation to seek Emergency Relief pursuant to these Rules unless the parties' agreement expressly provides otherwise.

Pre-Tribunal Emergency Relief

- (a) A party seeking emergency relief prior to the appointment of a Tribunal may apply for such relief by notifying FedArb and all other parties in writing of the emergency relief sought and the basis for granting such relief. This application shall contain:
 - i. the name in full, description, address and other contact details of each of the parties;
 - ii. the name in full, address and other contact details of any person(s) representing the applicant;
 - iii. a statement certifying that all other parties have been or are being simultaneously notified. If all other parties have not been notified, the Application shall include an explanation of the efforts made to provide such notification
 - iv. a description of the circumstances giving rise to the application including identification of the arbitration agreement pursuant to which the underlying dispute referred or to be referred to arbitration, and the basis for the arbitration claim;
 - v. a statement of the emergency measures sought;
 - vi. the reasons why the applicant needs emergency interim relief including any conservatory measures that cannot await the constitution of an arbitral tribunal;
 - vii. copies of any relevant agreements including, in particular, the arbitration agreement, and any agreement as to the place of the arbitration, the governing law, the applicable arbitration rules, and the language of the arbitration;
 - ix. proof of payment of the amount set forth in Rule 4.03;

The Application may contain such other documents or information as the applicant considers appropriate or as may contribute to the efficient examination of the Application.

** https://www.cpradr.org/resource-center/protocols-guidelines/icca-nyc-bar-cybersecurities/_res/id=Attachments/index=0/Cybersecurity%20ICCA-NYC%20Bar-CPR-protocol-international-arbitration-2022.pdf

(b) FedArb shall terminate the emergency relief proceedings if a Notice for Arbitration and related documents has not been received by FedArb from the applicant within 5 days of FedArb's receipt of the application for Emergency Relief, unless FedArb determines that a longer period of time is necessary

(c) Upon receipt of the Application, FedArb shall promptly appoint an Emergency Arbitrator to rule on the emergency request. When practicable, appointment of an Emergency Arbitrator will be initiated by FedArb within 24 hours of receipt of the request with preference to FedArb's panel who have agreed to act as Emergency Arbitrators. Within 36 hours the Emergency Arbitrator shall disclose any circumstance that might, on the basis of the application, be deemed to affect the Arbitrator's ability to be impartial or independent. Any challenge to the appointment of the Emergency Arbitrator shall be made within 24 hours of any disclosure(s) by the Emergency Arbitrator. FedArb will promptly review and decide any such challenge.

(d) Within two business days after appointment, or as soon as practicable thereafter, the Emergency Arbitrator shall establish a schedule for the consideration of the request for emergency relief. The Emergency Arbitrator will have the authority to rule on his or her own jurisdiction and shall resolve any disputes with respect to the request for emergency relief. The Emergency Arbitrator may conduct the emergency proceedings in any manner determined by the Emergency Arbitrator to be appropriate in the circumstances, taking account of the nature of such emergency proceedings, the need to afford to each party, if possible, an opportunity to be consulted on the application for emergency relief (whether or not that party avails itself of such opportunity), the claim and reasons offered for the need for emergency relief and the parties' further submissions (if any). The Emergency Arbitrator may, but is not required to, hold a hearing with the parties (whether in person, by telephone or otherwise) and may decide the claim for emergency relief, in his or her sole discretion, on the basis of the parties' written submissions.

(e) The Emergency Arbitrator shall determine whether the party seeking emergency relief has shown that immediate and irreparable loss or damage will result in the absence of emergency relief and whether the requesting party is entitled to such relief under applicable law. The Emergency Arbitrator shall enter an order granting or denying relief, as the case may be, and stating the reasons therefor.

(f) Any request to modify the Emergency Arbitrator's order or award must be based on changed circumstances and may be made to the Emergency Arbitrator until such time as the Tribunal is appointed in accordance with the parties' Agreement and FedArb's usual procedures. Thereafter, any request related to the relief granted or denied by the Emergency Arbitrator shall be determined by the Tribunal appointed in accordance with the parties' Agreement and applicable FedArb procedures.

(g) The Emergency Arbitrator may grant whatever interim measures are deemed necessary, including injunctive relief and measures for the protection or conservation of property and disposition of disposable goods. At the Emergency Arbitrator's discretion, any interim order for emergency relief may be conditioned on the provision of adequate security by the party seeking such relief.

(h) The Emergency Arbitrator may modify or vacate the interim order. Any interim order shall be binding on the parties when rendered. The parties shall undertake to comply with such interim order without delay.

(i) The Emergency Arbitrator shall have no further power to act after the arbitral Tribunal is constituted. Once the Tribunal has been constituted, it may modify or vacate the interim award or order of emergency relief issued by the Emergency Arbitrator. The Emergency Arbitrator may not serve as a member of the Tribunal unless all the parties agree otherwise.

Post-Tribunal Emergency Relief

The Emergency Arbitrator shall have no further power to act after the Tribunal is constituted. Once the Tribunal has been constituted, it may on application of a party, reconsider any orders of the Emergency Arbitrator and/or adopt such interim measures as it deems necessary, including measures for the preservation of assets, the conservation of goods, or the sale of perishable goods. The Tribunal may require appropriate security as a condition of ordering such measures. The orders of the Emergency Arbitrator, however, remain in full force and effect until such time as they are expressly revoked or substituted by the Tribunal.

Costs of Emergency Arbitrator

To apply for Emergency Relief, the applicant must deposit an amount determined by FedArb; for 2023, the rate is \$75,000, consisting of US \$25,000 for FedArb's administrative expenses and US \$50,000 as a deposit for the Emergency Arbitrator's fees and expenses. It is preferred that the payment for this amount be made by wire transfer (contact FedArb at 650.328.9500 for information).

FedArb may, at any time during the Emergency Arbitrator proceedings, decide to require an additional amount for the Emergency Arbitrator's fees and expenses or for FedArb's administrative expenses, taking into account, *inter alia*, the nature of the case and the amount of work performed by the Emergency Arbitrator and FedArb. If the party which submitted the application fails to pay the additional amount within the time limit fixed by FedArb, the application shall be considered as withdrawn. In the event that the emergency relief proceedings do not take place or are otherwise terminated prior to the making of an order, FedArb shall determine the amount to be reimbursed to the applicant, if any. The amount of US \$25,000 for FedArb's administrative expenses is non-refundable in all cases.

IV. The following language regarding Consolidation of Arbitrations is added as an addendum.

Consolidation of Claims

The Tribunal may, at the request of a party, consolidate two or more arbitrations into a single arbitration, where:

- a) the parties have agreed to such consolidation; or
- b) all of the claims in the arbitrations are made under the same arbitration agreement or agreements; or
- c) the tribunal decides that consolidation is in the best interest of a just and efficient result.

In deciding whether to consolidate, the Tribunal may take into account any circumstances it considers to be relevant, including whether one or more arbitrators have been confirmed or appointed in more than one of the arbitrations and, if so, whether the same or different persons have been confirmed or appointed.

V. The following language regarding Early Dismissal of Claims and Defenses is added as an addendum.

Early Dismissal of Claims and Defenses

1. A party may apply to the Tribunal for the early dismissal of a claim or defense on the basis that:
 - a. a claim or defense is manifestly without legal merit; or
 - b. a claim or defense is manifestly outside the jurisdiction of the Tribunal.
2. An application for the early dismissal of a claim or defense shall state in detail the facts and legal basis supporting the application. The party applying for early dismissal shall, at the same time as it files the application with the Tribunal, send a copy of the application to the other party.
3. The Tribunal may, in its discretion, allow the application for the early dismissal of a claim or defense to proceed. If the application is allowed to proceed, the Tribunal shall, after giving the parties the opportunity to be heard, decide whether to grant, in whole or in part, the application for early dismissal and the Tribunal shall make an order or Award on the application, with reasons, which may be in summary form. The order or Award shall be made within 60 days of the date of filing of the application.

FedArb—Model Clause for International Arbitrations of Intellectual Property Disputes in Asia

The parties are directed to use the arbitration rules issued by the Singapore International Arbitration Centre (“SIAC”) at the time the arbitration is commenced and to insert the SIAC-FedArb Model Clause requiring the use of FedArb’s panel of IP arbitrators. For reference, the SIAC-FedArb Model Clause is as follows:

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 administered by the Singapore International Arbitration Centre (“SIAC”) 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 seat of the arbitration shall be Palo Alto, California.

The Tribunal shall consist of _____ arbitrator(s). The arbitrator(s) shall be selected from the FedArb IP Panel of Arbitrators and/or SIAC IP Panel of Arbitrators.*

The language of the arbitration shall be _____.

*This contract is governed by the laws of _____***

** State an odd number. Either state one, or state three.*

***State the country or jurisdiction.*