Lisa Miller's Guidebook

Resolution of International Business Disputes in Expanding Post-Communist Economies (Arbitration Emphasis)

By Lisa Miller, Attorney

(C) 2012 Lisa Miller / (818) 802-1709 cell/text (USA)

Protem@LMillerconsulting.com

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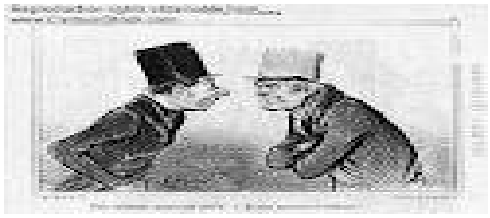

APPENDICES

GLOSSARY

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I. Introduction

What is International Arbitration? (And Why Does Everyone Care So Much?)

Post-communist countries' rapid economic growth and the explosive expansion of their roles in the world financial and business communities has created a demand for efficient dispute resolution mechanisms. It is increasingly important for businesses in these emerging economic markets to establish and enforce methods for efficiently resolving international business disputes.

International arbitration is a voluntary process of dispute resolution. In arbitration, a neutral third party (individual or multi-person panel) renders a final and binding decision after all sides present their positions. Arbitration is especially attractive in international business disputes because not all parties are familiar with the foreign legal systems of their international business associates.

When international business disputes arise, most businesses leaders prefer private, informal resolution, effected in a businesslike fashion. International arbitration is designed to achieve this result. This approach

can help maintain business relationships with partners, vendors, licensees, and other important players.

International arbitration is an attractive option to protect business' best interests because it is a private, contractual creature. It can be uniquely designed and controlled by the parties to foster fast, practical, tailored resolutions.

Impartial arbitrators conduct international arbitrations entirely separate from the court system of any individual country. The parties to the dispute select the arbitrator(s) based on the criteria they believe best fit the individual situation (unlike a traditional judicial process, where hearing officers are assigned randomly).

A thoughtfully structured arbitration provision in a contract sets a framework for the efficient and private resolution of international contract disputes. Although arbitration hearings are usually conducted by either one arbitrator or a panel of three arbitrators, the parties choose the particular process, structure, format, location, and scope of the arbitration.

The parties agreed to all of these details about the arbitration, which they then memorialized in the arbitration clause of their underlying contract. The parties usually negotiate the arbitration clause at the same time they develop the initial contract, but the parties can agree to modifications at any time.

Because arbitration is entirely the product of private negotiation and agreement, the parties to the arbitration agreement have more flexibility than a court proceeding would be able to accommodate. For example, parties can decide to shorten time periods, change locations, or limit discovery of documents or other information if they would like to do so.

II. What are the Advantages of International Arbitration?

The expansive growth of international arbitration has been greatest since the emergence of vibrant national economies as a result of the break-up of the former Union of Soviet Socialist Republics and the expansion of the European Union. Sophisticated international businesses see international arbitration as the natural dispute resolution mechanism for conflicts arising out of international transactions.

International arbitration offers a number of advantages over formal court proceedings, including:

A. Neutrality of the Decision Maker

Arbitration allows international parties to chose their own arbitrators to address their concern that a traditional court in a foreign country may not be truly neutral in its attitudes towards a foreign business in a dispute with a domestic entity. As a result, neutrality is critically important in international arbitration proceedings, so all parties work to avoid the national courts of its opponent. This is one of the most attractive feature of international arbitration.

To foster a truly neutral setting for decision-making, international arbitration proceedings generally take place in countries with which neither party has links. The issues before the arbitrator(s) are usually analyzed in line with transnational rules, or may be considered under the national law of a neutral, pre-determined country. Arbitrators are usually appointed from different countries and are of a variety of nationalities.

In most cases, arbitration tribunals consist of either one arbitrator (jointly selected by both parties), or three arbitrators (each party appoints one arbitrator, who together choose a third arbitrator to act as the panel chair).

The parties can appoint arbitrators who are familiar with their legal or cultural backgrounds.

NOTE:

> *When the parties directly participate in selecting the arbitrator(s), this solidifies their confidence in the process and makes the proceedings move more smoothly.*

B. Expertise of the Decision Maker(s)

Parties may select arbitrators with relevant technical backgrounds who have special insights into the specific issues in the case. They can select arbitrators with the expert subject-matter knowledge required by the unique characteristics of the dispute.

C. Procedural Freedom

Arbitration proceedings are governed to a great extent by the arbitration agreement of the parties. This procedural flexibility and party autonomy make arbitration a particularly attractive dispute resolution mechanism for international commercial transactions.

Based on this freedom to contract, the parties have broad options when crafting the important aspects of their individual dispute resolution processes. The terms can be jointly tailored to meet their individual needs and the particular demands of their disputes.

D. Confidentiality of the Process and the Result

Arbitration proceedings, and the resulting awards, are normally entirely private matters. This is in contrast to traditional court, where proceedings, evidence, and judgments are usually publicly reported. This is an important advantage of arbitration over court proceedings.

The existence of the arbitration itself, the evidence considered and the documents produced or exchanged in the arbitration, and the final award cannot be divulged to third parties, absent consent. Confidentiality is required of the arbitrator(s), the parties, the witnesses, and the lawyers.

E. Limited Evidentiary Discovery

Parties may jointly choose to limit or focus discovery in their arbitration agreement (generally, "discovery" refers to the pre-hearing phase in a legal dispute in which parties obtain evidence from the opposing party by means of requests for answers to interrogatories, requests for production of documents, requests for admissions, and depositions. Discovery can be obtained from non-parties using subpoenas). As a result, the arbitration process can be less burdensome on businesses and individuals, causing les interference with business productivity.

F. Speed

The parties can ensure a faster resolution than traditional court litigation because they can agree to shorter deadlines. However, three-member panels of arbitrators usually move more slowly than sole arbitrators, because it is more challenging to convene meetings, arrange hearings, or reach a final agreement when three arbitrators are involved.

G. Controllable Expenses

Although the parties must pay for the arbitrator(s)'s time, arbitration can nevertheless be less expensive than traditional litigation based on streamlined processes and other time-conscious agreements.

The number of arbitrators involved in the process directly affects the ultimate cost. While a panel of three arbitrators improves the quality of the award and reduces the risk of an arbitrary decision, three-arbitrator tribunals are more expensive.

H. Enforceability of Awards

Arbitration awards are final, unlike court decision (which are subject to post-trial motions and subsequent appeals). Arbitration awards can be legally challenged only in limited factual circumstances.

Interestingly, international arbitration awards are more easily enforced than national judgments, based on the terms of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). Almost 150 countries have adopted the New York Convention.

As a result, the New York Convention has created an internationally harmonized regime for the enforcement of arbitral awards. Under the New York Convention, recognition and enforcement of awards are only disallowed on limited grounds (in contrast, there are no international conventions that support the enforcement of national judgments).

I. Maintenance of Relationships

Unlike traditional litigation, arbitration can be less bitterly adversarial. This can help preserve valued, long-term business relationships, to the extent possible.

Fostering Successful Arbitrations

Parties should consider several factors in order to support successful arbitration proceedings:

- Choose the Right Arbitrator for the Particular Matter

  Arbitrators need to be immediately available for the proceedings. Arbitrators are busy, which can lead to delays in the hearing and issuance of the final award.

  Parties should thoroughly research the skills of all possible arbitrators before selecting one. It is a generally accepted practice for parties to interview potential arbitrators and gather information relating to their previous work.

- Choose the Right Institution for the Parties' Budgets

  In *ad hoc* arbitrations, which are not administered by an institution, parties are expected to directly negotiate the arbitrator(s)'s fees. But in institutional proceedings, fees are calculated in accordance with predetermined rules, which vary among institutions.

NOTE:

> *Some institutions outline recommended ranges of hourly rates, while others calculate the arbitrator(s)'s fees as a proportion of the sum in dispute (the "*ad valorem*" method).*

- Draft Thoughtful Arbitration Clauses

  Business executives focus closely on the substantive clauses of their contracts. But sometimes they fail to focus on the arbitration clauses in those agreements. Because arbitration clauses are usually the last provisions the parties consider, they are drafted without much discussion or consideration of the specific needs of the particular contract in which they are incorporated.

  Even worse, unclear arbitration clauses trigger litigation. Delays and increased costs of arbitration proceedings are the unfortunate result.

- Use Technology

  Considering that arbitration proceedings are supposed to be flexible, and can be crafted to suit the particular case, hearings do not need to be conducted in person, or at any specific venue. Arbitrators and parties should use technology, such as Skype, tele-video conferencing, e-mail, as well as even newer communications technologies, to limit time and costs.

Potential Disadvantages of International Arbitration

Arbitration's increasing popularity has fostered increasingly costly and time-consuming proceedings. In some situations, international arbitration is more expensive than litigation.

The international arbitration community is concerned about this problem. Some arbitration institutions have issued guidelines in an attempt to reduce the time and cost of arbitration proceedings.

Arbitration costs fall into two categories:

- Fees for private counsel, which would be incurred in the ordinary course of traditional litigation, witness' travel costs, and expert fees.

- Direct arbitration costs, including arbitrator fees, institutional administrative fees (if any), and expenses related to the hearings (meeting space, translation costs, and anything else that might arise).

NOTE:

> *Because arbitration is a party-driven mechanism, it is within the power of the parties to take steps to ensure that the proceedings to take less time and money.*

III. What Disputes Can be Arbitrated?

Although arbitration of commercial matters is generally encouraged, a two-step analysis determines if a controversy is arbitrable:

- The specific terms of the arbitration agreement or arbitration clause of a contract

- The law of the country in which the arbitration takes place may prohibit arbitration for certain types of disputes (the types of disputes that are arbitrable vary among countries).

NOTE:

United States courts strongly favor arbitration in the resolution of international business disputes. They have held that almost all civil disputes are arbitrable. The courts deny arbitration only where the provisions of a specific law direct that the law can only be enforced in a traditional court.

The United States Supreme Court, in a series of decisions as recently as 2012, has made clear that, absent a statutory provision expressly restricting or denying arbitration, the Federal Arbitration Act requires enforcement of an arbitration agreement.

See, *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012), construing the Credit Repair Organizations Act, 15 U.S.C. §1679 et seq.

IV. The Agreement to Arbitrate

Most business create arbitration agreements at either one of two points in time:

- During the negotiation of a contract, in anticipation of an ongoing business relationship, or
- After a legal dispute arises with an existing contract partner

The contract negotiation process offers the greater opportunity to easily negotiate an arbitration process (absent the acrimony expected after a dispute arises).

So including an arbitration clause in a negotiated contract is preferable from a business efficiency standpoint, because it streamlines the dispute resolution process.

NOTE:

> *The parties generally incorporate the negotiated arbitration agreement into the contract governing the overall transaction.*

V. Comparing Types of Arbitration: *Ad Hoc* v. Institutional

Parties may conduct their arbitrations either *ad hoc (*meaning "for this," referencing a solution designed for a specific problem or task, not intended for other purposes)*,* or through an established arbitration institution ("institutional").

Parties realize both advantages and disadvantages with each option.

A. Institutional Arbitration

Parties sometimes opt for the advantages of the established procedures of arbitration institutions. Institutions have developed and circulated formal procedures and rules designed to support the process and guide the parties.

NOTE:

> *No matter which institution the parties choose, the institution may administer the arbitration according to its own rules, or, in many cases, according to other rules, as directed by the parties' agreement.*

Advantages of Institutional Arbitration

- Availability of pre-established rules, procedures, and formats that have worked in the past
- Administrative assistance from institutions with a secretariat or a court of arbitration, and appointment of arbitrators by the institution if the parties request it
- Physical facilities and support services for hearings
- Lists of experienced arbitrators, grouped by fields of expertise

Disadvantages of Institutional Arbitration:

- Administrative fees for services and use of facilities can be high, especially related to disputes over large amounts, where fees are related to the amount in dispute.
- The institution's own internal bureaucracy may trigger delays and costs
- Parties may be required to submit responses in abbreviated time frames

What to Consider When Selecting an Arbitration Institution

Parties should think about the historic experience of the institution's administration of international arbitrations, including:

- How many international disputes has the organization handled?
- From where have the parties originated?
- Has the institution handled disputes similar to the subject of the contract?

Selecting Arbitrators

Selection of the arbitrators is centrally important to the success of the process. Considerations include:

- Does the institution have arbitrators with experience in the subject matter of the contract?
- Are the parties involved in the selection of arbitrators?
- Will the institution automatically select arbitrators from neutral countries, or will they do so only on request?
- Does the institution maintain a roster of arbitrators? Can parties select arbitrators outside the roster of the institution?

Procedures

Parties have much control over procedures, based on the contractual nature of the agreement to arbitrate. As a result, there may be concerns about harmonizing the privately agreed terms with the institutional approach. Concerns include:

- Is the institution agreeable to flexibility in the conduct of the arbitration?
- Can parties opt out of select rules or procedures?
- What are the time limits in the arbitration? Are they enforced?
- Does the institution limit the procedural rules negotiated by the parties?

Costs

Costs and fees are a significant considerations in an institutional setting. Parties should examine the fee schedule, including:

- What are the institution's administrative fees?
- Are fees fixed or on a sliding scale, based on the amount in dispute?
- Are the arbitrator's fees based on time spent, or something else?

Services

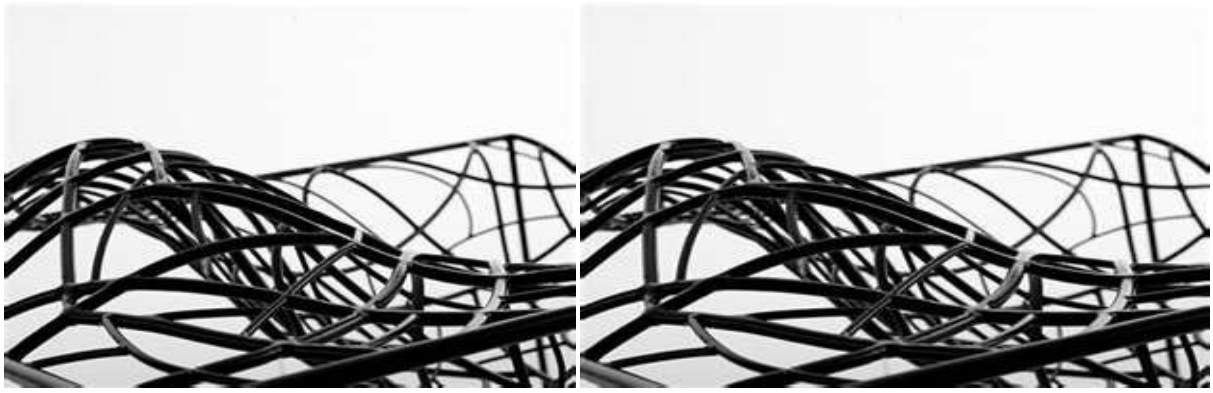
Different institutions offer different areas of depth and expertise, which can play a role in decision making:

- How experienced is the institution's staff with international disputes?
- How large is the staff?
- What local affiliations does the institution have in the region, which may facilitate administration of the arbitration?

B. *Ad Hoc* Arbitration

Ad hoc arbitration is accomplished without any arbitration institution being involved. The parties select the arbitration format and structure without using an arbitration institution for administrative support.

Ad hoc arbitration allows for more personalization when designing a mechanism for arbitration under a particular contract. Parties select *ad hoc* arbitration to reduce costs, accelerate the process, structure proceedings to suit their individual needs, or any combination of these concerns.



In *ad hoc* arbitration, parties either develop their own rules or select established arbitration rules to govern the proceeding.

Parties in *ad hoc* arbitration should try to address all significant aspects of the arbitration within the arbitration clause, including, at a minimum:

- Applicable law
- The place of the arbitration
- The number of arbitrators and the method for selecting the arbitrator(s)
- Published rules under which the arbitration will be carried out
- The language in which the arbitration will be conducted

NOTE:

> *Parties may use the rules of an arbitration institution without submitting the dispute to that institution. All rules are available on-line.*

VI. Considerations When Creating Arbitration Clauses

The best way to support successful arbitration is for the parties to draft arbitration clauses that meet their unique needs. International transactions are complex enough that they require tailored arbitral provision that reflect the needs of the specific contract.

A. Process Possibilities

Parties designing processes to fit their unique needs should try to accomplish this during contract negotiations and drafting, before disputes arise. Processes might include requirements for early neutral evaluation, or describe specific types of arbitration processes.

Two examples of descriptions of specific arbitration process requirements that can be included in a negotiated agreement:

Example #1:

Early neutral evaluation, also called "advisory arbitration," involves the selection of a neutral evaluator with both subject-matter and legal expertise. This neutral values the dispute after a brief hearing. The non-binding opinion of this neutral can result in settlement of a dispute.

Once the process has been initiated, the parties can select from a provided list of evaluators who possess the required expertise to hear the dispute, or agree independently to a neutral (the parties must mutually agree to an evaluator).

The evaluator works with the parties to schedule exchange of initial written statements. Initial statements describe the substance of the dispute, the parties' views of the critical liability and damage issues, important evidence, and other information useful to the evaluator. The evaluator and the parties jointly agree to the length and extent of the initial written statements.

At the evaluation, each party presents its claims or defenses and describes its principal evidence. The evaluation session is informal (formal rules of evidence do not apply).

There is no formal examination or cross-examination of witnesses. The parties provide briefs to the arbitrator. The arbitrator meets with the parties for a discussion of the matter.

The arbitrator offers to the parties the arbitrator's understanding of the future course of the case. The arbitrator usually does not provide a written evaluation of the merits or value of the case.

If the parties want to adopt Early Neutral Evaluation as a part of their arbitration process, they may insert the following clause into their contractual arbitration language:

> *If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation or mediation, the parties agree to try in good faith to settle the dispute by Early Neutral Evaluation before proceeding to arbitration.*

Example #2:

Baseball arbitration determines a ballplayer's salary through arbitration. In baseball arbitration, each side provides a proposed number (presuming a monetary dispute) and the arbitrator is required to pick the number she thinks is most appropriate.

This take on traditional arbitration encourages moderated proposals from each side. If a party proposes too high a number, the party risks leading the arbitrator to pick the other side's (presumably unappealing) number.

The two main benefits are:

- Because both sides see one another's number, settlement often follows quickly

- Even absent settlement, the moderated difference between proposals fosters an efficient arbitration

Additional considerations when negotiating arbitration requirements include:

B. Time Frames

The parties should consider negotiating into their arbitration clause a requirement that the arbitrator, within a set number of days of notice of appointment, schedule a pre-hearing conference call to confirm the rules of the process and craft a scheduling order.

This conference call is useful to avoid surprise and ensure that important evidence (for example, testimony from certain types of witnesses) is not unexpectedly excluded.

The conference call should touch on the following issues, at least:

- Jurisdiction of the arbitrator
- Evidentiary rules
- Document exchange among the parties
- Timing, number, identity, and priority of witness testimony
- Estimated length of the hearing

To ensure an efficient arbitration, the parties should consider creating guidelines for their arbitration that include terms meant to limit both sides. Aspects of this type of language could include:

- Requirement that the hearing commence within a specified number of days of the appointment of the arbitrator
- Use of fail-safe provisions that move the process forward despite one side's inaction
- Limits on the total number of days the arbitrator may grant to each party as an extension of time
- Time limits on activities inherent in arbitration
- Use of a chess clock-type approach ("chess clock" is an agreement to allocate a limited amount of time to each party for the entire arbitration. A party that exhausts its allotted time is barred from proceeding).

- Requirement that the arbitration be completed within a specified number of days of the appointment of the arbitrator

In some industries, it might make sense for the parties to agree to a limited time frame regarding exchanging position papers. An example of this type of schedule:

- Within [set number of days] of the appointment of the arbitrator, the claimant shall send a written statement to both the respondent and the arbitrator outlining the facts supporting the claimant's claim, the points at issue, and the relief or remedy sought.
- Within [set number of days] after the respondent receives the claimant's statement, the respondent shall send a written statement to both the claimant and the arbitrator outlining the respondent's defense, the particulars requested in the statement of claim, and a written statement of the respondent's counterclaim(s), if any.
- The claimant, when responding to a counterclaim, shall send a written statement to both the respondent and the arbitrator outlining the claimant's defense to the counterclaim within [set number of days] after the claimant receives the counterclaim.

In other situations, a traditional briefing schedule might prove to be the more efficient option in the long run.

C. Briefs and Briefing Schedules

To control time spent in arbitration, the parties can set a formal briefing schedule, or direct the arbitrator(s) to establish one. Some considerations include:

Briefs must be submitted to the arbitrator [a set number of days] prior to the hearing, accompanied by a cover letter specifically requesting that the arbitrator read the brief prior to the hearing. Counsel should not attach reams of exhibits to the brief.

Rather, counsel should reference transcripts and reports by page number (or page and line) and attach a copy of the operative page, with the key information highlighted. Counsel should introduce the entire transcript or report at the hearing (unless it is a short report, in which case it may be attached as an exhibit).

Counsel should focus counsel's brief-writing efforts on creating impact on the arbitrator. The brief should be well-written, concise, and as error-free as possible.

To assist the arbitrator in navigating the brief, it should include:

- Table of Contents
- Table of Authorities
- Index to Exhibits

NOTE:

Turgid, ponderous briefs are not effective.

The opening paragraph should be an executive summary of what the case is about, including the remedy sought. Meaningful photographic exhibits should be attached; include them in the Index as well.

D. Neutral Selection

Selection of neutrals can be an opportunity for one side to drag its feet and defeat the efficiency of arbitration. To expedite neutral selection when arbitration begins, the parties might consider the following ideas for their arbitration clause:

- The parties shall appoint a sole arbitrator
- If the parties want a panel of arbitrators rather than a sole neutral, but cannot agree on the composition of the panel, a popular selection process is for each party to select one arbitrator and agree that those two party arbitrators will select a third, neutral arbitrator
- The parties shall appoint the arbitrator within [a set number of days] of the demand for arbitration of the dispute
- Where one party demands arbitration, and the demand is timely under the parties' arbitration clause provisions, this triggers a time limit on arbitrator selection. As a fail-safe, if the parties cannot mutually select a third panel member within the allotted time, the selection of the third arbitrator could automatically default to the presiding judge of a designated court. These selecting officials could be required to select a retired judge from that court or district to hear the matter (with proper conflicts disclosures and attention to other administrative details)

- The parties will select the sole arbitrator from among a pre-determined list of agreed arbitrators, contained in the negotiated arbitration clause in the parties' agreement

E. Location Limits

Selecting a locale for the proceedings can be a time-consuming negotiation for the parties when faced with an impending arbitration. To avoid this delay, the arbitration agreement can address the issue in advance.

The clause could touch on any of the following:

- Unless otherwise agreed, the arbitrator(s) shall select the location for the arbitration
- Unless otherwise agreed, the location of the arbitration must be within a [pre-set number of miles] of the place where the agreement was signed/principal place of business of one of the parties/large metropolitan city/other provision that appeals to both parties at the time of negotiation of the arbitration clause in the agreement

F. Traditional Discovery Concerns

"Discovery" in the litigation context means the compulsory disclosure by a party to an action of relevant information in his possession. The discovery process can be lengthy and burdensome in traditional litigation.

The parties should focus on negotiating pre-dispute agreements on the acceptable scope of discovery, should arbitration occur. If the parties have not crafted discovery guidelines prior to the dispute, the arbitration clause should require that the parties meet and confer and set a discovery schedule acceptable to both sides when a demand for arbitration is lodged.

The agreement should be aimed at avoiding formal proceedings. The parties' agreement should require that counsel work cooperatively to create a discovery schedule and thereafter exchange documents.

The arbitrator can assist with this and then create a formal scheduling order if the parties cannot do this on their own. Absent a negotiated agreement detailing the scope and extent of discovery, the arbitrator must work with the parties to design an efficient, appropriate discovery plan.

NOTE:

> *Where one party is an organization, in-house counsel will likely be working with the finance gurus at the organization as the arbitration progresses. Litigation counsel's arguments that limited discovery will commensurately limit arbitration expenditures will likely be a welcome message for the client.*

NOTE:

> *Sometimes, even after arbitration commences, parties, their lawyers, and the arbitrator must make choices about limiting discovery. The scope of discovery varies depending on the size and nature of the case and the parties.*

G. Considerations in Crafting Discovery Guidelines

The parties can negotiate into the arbitration clause of their agreement the broad requirements of the discovery process. The clause might require that the arbitrator be familiar with the following before ruling on discovery guidelines:

- Whether the arbitrator should first address a potentially dispositive issue that does not require extensive discovery
- Whether any claims appear (based on the pleadings) to have sufficient merit commensurate with the time and expense of the requested discovery
- The amount in controversy
- The complexity of the factual issues
- The number of parties and diversity of their interests
- Whether public policy or ethical issues exist that require in-depth, comprehensive discovery
- Agreement of the parties regarding scope of discovery
- The parties' resources to support discovery (relative to one another or in the absolute)
- Whether the benefit of extensive discovery outweighs the burden on one or more parties
- Whether a party has requested injunctive relief or whether a party has a compelling need to obtain a prompt resolution
- Whether prompt resolution might affect the continued viability of a party

At least [a set number of days] prior to the hearing, the parties could be required to exchange copies of all of the exhibits they intend to submit at the hearing. The arbitrator resolves disputes concerning the exchange of exhibits. Some possible language for the parties' agreement:

- Each party shall submit [on a specific, agreed date in the process] a list of the documents upon which the party intends to rely; the list of documents shall describe each document by specifying its document type, date, author, recipient and subject matter.

But not all discovery hang-ups revolve around written materials and screw-ups with document production. A good deal of discovery effort is focused on depositions.

"Depositions" are statements of parties and witnesses, under oath, taken down in writing and/or video or audio recording, to be used in litigation, arbitration, or other dispute resolution proceeding.

If not reigned in, deposition discovery in arbitration can be needlessly resource-consuming. But when carefully controlled, depositions, especially in complex matters, can shorten cross-examination at the arbitration.

Some considerations when negotiating deposition rules in an arbitration clause:

- Each party shall be entitled to [set number of] deposition(s) of an opposing party or an individual under the control of an opposing party. Each side may request permission of the arbitrator to take additional depositions, assuming good cause for the request.
- Whether limited depositions would likely increase the efficiency of the arbitration; lead to the disclosure of important documents not otherwise available; or cause expense and delay, without aiding in the search for truth
- The arbitrator will determine the scope of deposition activity by conferring with counsel and weighing the following concerns:

- Whether the arbitrator should first address a potentially dispositive issue that does not require extensive discovery
- Whether any claims appear (based on the pleadings) to have sufficient merit commensurate with the time and expense of the request for additional depositions
- The amount in controversy
- The complexity of the factual issues in the case
- The number of parties involved and diversity of their interests
- Whether public policy or ethical issues exist that require in-depth, comprehensive discovery, necessitating the taking of additional depositions
- Agreement of the parties regarding scope of discovery
- The parties' resources to support additional deposition discovery (relative to one another or in the absolute)
- Whether the benefit of additional deposition discovery outweighs the burden on one or more parties
- Whether a party has requested injunctive relief or whether a party has a compelling need to obtain a prompt resolution
- Whether prompt resolution might affect the continued viability of a party

If the arbitrator decides to allow multiple depositions, the parties may agree to the following language:

> Each side may take [set number of] discovery depositions. Each side's depositions are to consume no more than a total of [set number of] hours. The only speaking objection allowed at the deposition is to preserve privilege. The total time period for concluding the taking of depositions shall not exceed [set number of] weeks.

H. Resolution of Discovery Disputes

To realize some of the most significant benefits of arbitration, discovery disputes must be resolved promptly and thoughtfully. The parties should require in their arbitration clause that they negotiate discovery differences in good faith before presenting any outstanding issues to the arbitrator for a ruling.

Generally, teleconference discussion or submission of brief letters adequately informs the arbitrator regarding the issues to be decided. Once counsel submit their letter briefs and replies to the arbitrator and each other, the arbitrator can hold a teleconference call to address the issue and offer a tentative assessment of the merits. If the parties elect, they can thereafter proceed with more formal discovery practice before the arbitrator.

I. Guidance to the Arbitrator in Discovery Disputes

When negotiating their pre-dispute arbitration agreement, the parties should consider the following when giving guidance and direction to the arbitrator in the event of a discovery dispute:

- Relevance of the requested discovery to the material issues in dispute or the outcome of the case. To what extent is the requested discovery likely to lead to a more fair result?
- Whether necessary witnesses and/or documents are beyond the tribunal's subpoena power. Would denial of the requested discovery

deprive the requesting party of reasonably necessary information to prepare and present its case?

- Whether the discovery request is a litigation tactic calculated to unduly burden the other side, in an attempt to extract a particular resolution of the matter. Can the desired material be secured from another source more efficiently than from the party from which the discovery is requested?
- Whether the bulk of the relevant material is in the possession of one side, or the requested discovery seems to be sought merely in an excess of caution, or is duplicative or redundant
- Whether the party seeking the additional discovery commits to advancing the other side's fees and costs in connection with responding to the discovery request

J. Motions and Motion Practice

"Motions" are formal proposals made to a deliberative body, such as an arbitrator or panel of arbitrators.

When negotiating an arbitration agreement, the parties to the contract should consider the benefits and burdens of motion practice in the context of arbitration. Much as discovery should be intelligently limited, so should motions be restricted. Uncontrolled motions practice can be a drag on resources, while thoughtfully controlled motion practice can be an opportunity to increase efficiency and thereby reduce costs and delay.

"Dispositive motions" ask for court or arbitral order that entirely disposes of one or more claims in favor of the moving party without need for further proceedings.

In arbitration, successful dispositive motions can enhance the efficiency of the arbitration if they are focused on discrete legal issues (statute of limitations, defenses based on clear contractual provisions). A winning dispositive motion can eliminate some resource-consuming discovery.

To guide the arbitrator who is tasked to decide dispositive motions during arbitration, the parties should consider negotiating terms into their arbitration agreement as follows:

- Any party wishing to make a dispositive motion must first submit a brief letter, not exceeding [set number of] pages, explaining why the merit of the motion and detailing how it is expected to enhance the efficiency of the arbitration. The other side would have [set number of] days in which to respond
- If the arbitrator decides to hear more on the motion, the arbitrator sets length limits on the briefs and sets an accelerated briefing schedule
- The pendency of a dispositive motion does not stay any other aspect of the arbitration or vacate any pending deadlines

K. Hearings

When the parties request arbitration and an arbitrator is appointed, the parties should include in their negotiated arbitration clause a time limit in which the arbitrator is to set a date, time, and place for the hearing. The parties should agree, in advance of the dispute, if possible, that the arbitrator will set the date no more than [set number of days] after the arbitrator receives notice of appointment.

In less complex matters, the hearing should be required to last no more than a set number of hours, as agreed by the parties. During that time, each party will submit evidence and complete its case.

The arbitrator, in a scheduling conference with the parties, determines the order of the hearing. If further submission of documents is needed, the arbitrator may require this to be completed within [set number of days] after the hearing. For good cause shown, the arbitrator may schedule additional hearing days, ideally within [set number of days] after the initial day of hearing.

NOTE:

> *A "transcript" is a written copy of the exact words that someone said in an official proceeding, such as an arbitration. Generally, there is no transcript required in arbitration proceedings (parties that want a transcript arrange for it).*

The parties should agree, or the arbitrator should order, that the parties prepare and produce all the exhibits.

The parties can agree on a numbering/marking system for exhibits, assuming that counsel has an idea about the order in which the party will be using the documents.

Discuss use of trial technology with the arbitrator during the pre-hearing scheduling teleconference calls. The parties may want to split costs. If the case is document-heavy, put all of the material on a portable drive that is compatible with both the trial technology and the arbitrator's office system. The parties can agree in advance how to arrange the exhibits.

L. Decision Writing

Once the arbitrator closes the hearing, the issues focus on the arbitrator's decision. The parties can agree that the decision can be oral, a one-page summary, extensively reasoned - or anything in between.

The need for detailed analysis and explication must be weighed, in conference with the client, against the cost and delays associated with detailed scrutiny of the entire proceeding. (Clients usually need their counsel to come back to them with a decision that has some reasoning that the client can understand.)

In simpler cases, as an alternative to lengthy summaries, the arbitrator can give an oral opinion within a short time after the end of testimony. (This method saves clients' money by limiting arbitration fees).

The arbitrator offers the opinion on the record, the prevailing party drafts a formal Award, and then sends it to opposing counsel for comment. Once both sides have reviewed the Award, the arbitrator makes necessary changes and the Award becomes final.

The amount of time for creating the award needs to be limited to an agreed-upon number of days. The amount of time for producing a decision should be calculated from the close of the post-hearing briefing schedule, if any.

The parties might want to include the following language in this regard in their arbitration clause:

The sole arbitrator shall render a decision within [14 days, 21 days, or 28 days, for example] after completion of the arbitration.

VII. Special Issues in E-Discovery

The increased use in businesses, law firms, and private homes of electronic media for the creation, storage and transmission of information has greatly increased the volume of potentially discoverable documents.

As a corollary, parties are seeing a jump in the costs of discovery related to electronically stored information (ESI). This is directly related to the international nature of business dealings; more material is electronic, or transmitted electronically, and less and less is exclusively on paper.

Although the e-discovery issues in each case are unique to the facts and issues of the matter, early contemplation of limits on e-discovery is essential to preserve the benefits of arbitration (electronic discovery, or e-discovery, refers to discovery in civil litigation that deals with the exchange of information in electronic format).

The parties should contemplate including in their negotiated arbitration clause language along the following lines:

- The parties shall produce electronic documents from sources relied upon in the ordinary course of business. Absent special circumstances, documents need not be produced from back-up servers, tapes, or other media.
- Electronic documents will be furnished in the format of generally available technology, in a searchable format, which is usable by the

party receiving the e-documents, and convenient and economical for the producing party, absent a showing of special need.

- The parties need not produce metadata, with the exception of header fields for e-mail correspondence, absent a showing of compelling need.
- Where the costs and burdens of e-discovery are disproportionate to the character of the dispute or the amount in controversy, or to the relevance of the materials requested, the arbitrator will either deny such requests, or order disclosure on condition that the requesting party advance the reasonable cost of production to the other side, subject to the allocation of costs in the final award.

NOTE:

When negotiating arbitration clauses in agreements prior to any dispute arising, remember that advances in the creation, categorization, storage, and retrieval of electronic information advances much faster than negotiated agreements can keep up with.

Counsel need to have a grasp of the future of ESI in order to effectively advocate for their clients in front of arbitrators who are setting discovery schedules and hearing discovery disputes.

These are a few of the e-discovery trends counsel should check on before negotiating arbitration clauses or discovery schedules for arbitration:

A. Global E-Discovery Issues Will Explode

United States-based companies are well aware of the horrendous potential legal and business costs for prematurely destroying ESI and are quickly deploying technology to help them preserve ESI.

But now, plaintiffs are realizing that foreign-based companies do a spotty (or non-existent) job at preservation. This could be the new, expensive ESI target.

B. New Sources of Data Will Become Routine Targets

In the not-so-distant past, advocates did not request e-mail in discovery. Then nobody asked for voicemail, IMs, DMs, text messages, or social media posts.

Now, all of these, and more, are routinely sought in all types of lawsuits, including personal injury matters. This will not slow down in 2011. If you aren't aware of Foursquare, Ubiquitous Sensor Networks, or the fact that refrigerators and vending machines contain ESI, strap yourself in.

C. Discovery of Databases and Other Structured Data Will Increase

Because nearly all corporate transaction data is contained in structured databases, discovery of structured ESI is expected to grow substantially in importance.

D. Automated Document Review Will Become Critical

Although fully automated review is still years away, most organizations are seeking solutions to try to lower spending on legal research and fees. As a result, ESI review (the largest of the e-discovery budget line items) is expected to become more automated.

In 2011, many more companies will embrace predictive coding or some other form of automated review. Predictive coding seeks to automate the majority of the e-document review process.

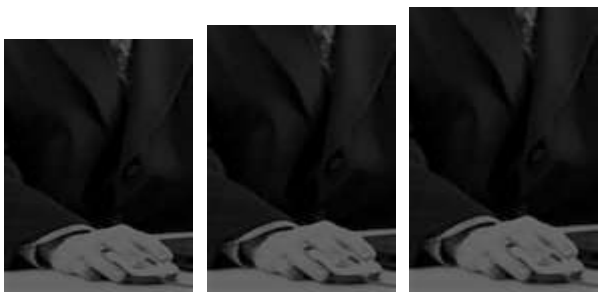
Using a bit of direction from someone knowledgeable about the matter at hand, predictive coding uses sophisticated technology to extrapolate this direction across an entire collection of documents.

Through predictive coding, a computer can "review" and code a few thousand documents at a fraction of the cost of other types of review.

E. E-Discovery Software Will Go In-House

In 2010, in-house lawyers bought multiple discovery software packages to serve multiple needs (and use up budget allocations). But now the lawyers need to do more with less, and cannot rely on outside contractors, who are a separate budget item.

Instead, the best practice for in-house lawyers is now to find a comprehensive solution that can manage the organization's ESI through creation, preservation, collection and review. In-house counsel's ability to proactively handle e-discovery will separate the prepared companies from unprepared competitors - discovery costs are no longer trivial.



F. Standardization is Coming

A number of organizations are now focused on standardizing e-discovery. The Association of Certified E-discovery Specialists (ACEDS) created standardized tests for e-discovery specialists.

The ACEDS review tests a candidate's knowledge of, inter alia, cost controls, preservation holds, budgeting, ethics, project management, e-discovery technology, data culling, document reviews and cross-border discovery, among others.

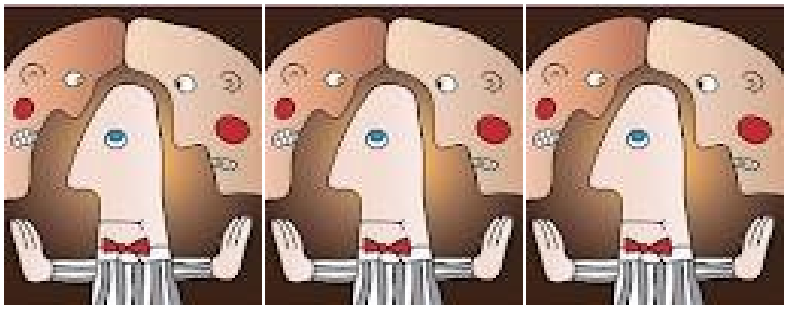
A growing number of organizations are working to standardize both technology and knowledge areas.

The archiving and e-discovery capabilities of relevant products and processes have been tested by organizations. But the capabilities among products often differ in implementation and use.

Standardized data sets and standardized tests allow organizations to leverage past and third-party experiences when conducting their own evaluations. Organizations are now working to create and publish peer reviewed testing protocols and create overall testing principals for the unique requirements of the discovery lifecycle.

VIII. Special Discovery Issues in International Arbitration

Because international contracts contemplate multi-national execution, the issue of discovery in the event of a dispute will be subject to a number of interpretations from varying legal systems.



A. Title 28, United States Code, Section 1782

Section 1782 of Title 28 of the United States Code is a federal statute that allows a party to a proceeding outside the United States to apply to an American court to obtain evidence for use in the non-US proceeding. A recent appellate case in the United States held that Section 1782 applies to private arbitral tribunals.

As a logical extension of the Supreme Court's decision in the *Intel Corp. v. Advanced Micro Devices, Inc*., 542 U.S. 241 (2004), the US Eleventh Circuit Court of Appeals held that a party to a domestic arbitration in Ecuador could obtain US discovery for the Ecuador case pursuant to Section 1782 of the US Judicial Code. (*Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc*., 2012 WL 2369166 (11th Cir. Jun. 25, 2012)).

The US Supreme Court in *Intel* held that the European Commission and the European Union courts with adjudicatory jurisdiction over claims involving violations of EU competition law and regulations are such tribunals. The Court further found that evidence to be gathered in the US for presentation to the EU's investigative Directorate General — Competition ("DG-Competition) was "for use in" such a "tribunal."

The Court came to this conclusion because the investigative record of the DG-Competition proceedings would be the basis for any European

Commission adjudication considering possible penalties. These decisions would be subject to judicial review in the EU Court of First Instance and on further appeal to the European Court of Justice.

In *Intel*, however, there was no doubt about the sovereign status of the DG-Competition, the European Commission, or the EU courts. They were created pursuant to the EU Treaty. As a result, the Supreme Court's decision only had to focus on whether the connection between evidence presented to the DG-Competition and the ensuing adjudications was sufficiently clear that evidence gathered for presentation to DG-Competition was "for use in" an EU adjudication (this was so despite the fact that the adjudicative proceedings was not yet pending).

Unfortunately, the Supreme Court in *Intel* did not state this premise explicitly. In *dicta*, the Court referenced a "foreign or international tribunal" to relate only to adjudicatory function, irrespective of the sovereign or private character of the tribunal.

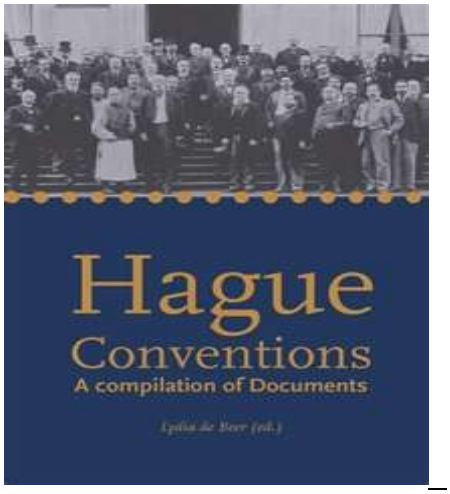
This uncertainty about the *Intel* Court's analysis fueled confusion in some district courts over whether a privately constituted arbitral tribunal seated outside the US is a "foreign or international tribunal" under Section 1782, in light of *Intel.* ("Foreign or international," alone, suggests that the tribunal must be a unit of a sovereign State or States. If the intention of Congress had been only to identify tribunals situated outside the US, sovereign or private, the phrase "foreign or international" is redundant and imprecise.)

Section 1782, in its current iteration, intends to encompass the fact that foreign States, like the US, have numerous adjudicative bodies, none of which should be left out. As a result, the Eleventh Circuit panel majority found that now, post-*Intel*, the current status of the law is that *Intel* has "[set] forth a far broader and wholly functional definition of the term 'tribunal."

Based on the overall lack of clarity in *Intel*, there is a basis to believe that *Intel* was not outlining a "strictly functional" approach to what is a "foreign or international tribunal." Rather, having no need to deal with the private vs. sovereign dichotomy, the Court adopted a functional approach to the

question whether the “for use in” requirement of Section 1782 was met when:

- The only forum to which the US-gathered evidence could be directly submitted, the DG-Competition, was investigative not adjudicatory, but
- The applicant for the 1782 discovery might eventually use the DG-Competition record to pursue its claims before the EU Court of First Instance and then on appeal to the European Court of Justice.



B. The Hague Convention

The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil and Commercial Matters [the Hague Convention], a multi-lateral treaty, states that signatories to the Hague Convention have agreed to allow some form of discovery of documents and testimony.

Document discovery under the Hague Convention is by means of a Letter of Request, issued by the court where the action is pending and transmitted to the “Central Authority” of the jurisdiction where the discovery is located. The Central Authority is then responsible for transmitting the request to the appropriate judicial body for a response (The Hague Convention, arts. 1 & 2). Hague Conference on Private International Law, Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil and Commercial Matters, (Entered into force 7 Oct. 1972), U.N.T.S. 37/1976.

Deposition testimony may be obtained through a Letter of Request, asking that the testimony be taken before a diplomatic or consular officer, or by a specially appointed commissioner in the non-U.S. jurisdiction (The Hague Convention, art. 3). Each of the 44 contracting States to the Hague Convention establishes a Central Authority, which accepts and processes Letters of Request from other contracting States (The Hague Convention, art. 3).

A Letter of Request, which is issued by the court presiding over the litigation, may seek testimony or documentary evidence. Where the request is for deposition testimony, a Letter of Request can result in testimony being taken in a proceeding under the normal evidentiary rules of the country where the witness is located (The Hague Convention, arts. 15-22).

The Hague Convention sets forth procedures for taking testimony in front of a diplomatic or consular officer of the country where the action is pending, or by a commissioner specially appointed by the court in which the action is pending, as an alternative. *Id*.

NOTE:

> *Signatories are permitted to opt out of or limit their submission to the provisions of The Hague Convention. The Hague Convention permits contracting States to "declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries."*
>
> The Hague Convention, art. 23.

Article 23's reach was clarified in 2003 when the following declaration by the U.K. was approved in an effort to improve the effectiveness of the Conventions and promote consistent practices and interpretation:

Article 23 was intended to permit States to ensure that a request for the production of documents was sufficiently substantiated so as to avoid requests whereby one party merely seeks to find out what documents may generally be in the possession of the other party. The U.K. declaration reads as follows:

> "In accordance with Article 23 Her Majesty's Government declare that the United Kingdom will not execute Letters of Request issued for the purpose of obtaining pretrial discovery of documents. Her Majesty's Government further declare that Her Majesty's Government understand "Letters of Request issued for the purpose of obtaining pre-trial discovery of documents" for the purposes of the foregoing Declaration as including any Letter of Request which requires a person:
>
> - to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or
> - to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or to be likely to be, in his possession, custody or power."

Conclusions and Recommendations

of October – November 2003,

Hague Conference on Private International Law

Jurisdictions that have executed some form of declaration under Article 23 include:

- Argentina
- Australia
- Bulgaria
- China
- Cyprus
- Denmark
- Estonia
- Finland
- France
- Germany
- Greece
- Hungary
- India
- Italy
- Lithuania
- Luxembourg
- Mexico
- Monaco
- Netherlands
- Norway
- Poland
- Portugal
- Romania
- South Africa
- Seychelles
- Singapore
- Spain
- Sri Lanka
- Sweden
- Switzerland
- Turkey

- Ukraine
- United Kingdom
- Venezuela

NOTE:

A country may opt out of the The Hague Convention's provisions authorizing testimony to be taken by consular or diplomatic officers, or commissioners appointed by the Court. If so, litigants seeking testimony can rely on the procedural rules of the non-U.S. jurisdiction.

The focus of the Hague Convention is to create standardized procedures (as an alternative to the existing evidence-gathering rules available in the various jurisdictions) to facilitate obtaining evidence from abroad. The local procedures remain available to counsel seeking material from abroad.

NOTE:

Parties seeking discovery of material from jurisdictions that are not signatories to The Hague Convention are limited to discovery procedures that are used domestically in that jurisdiction. Consultation with local counsel can help parties understand the scope and procedures of domestic discovery practice.

IX. Drafting Effective Arbitration Clauses

Sloppy arbitration clauses can prolong the dispute resolution process. To draft effective arbitration clauses, counsel should consider the following points:

- The intention to arbitrate must be clearly and unambiguously stated in the arbitration clause. Avoid permissive language such as “parties may submit any dispute to arbitration.”
- It should be stated clearly whether the arbitration is to be *ad hoc* or institutional. If the parties opt for an institutional arbitration, it is very important that unambiguous reference is made to an arbitration institution that exists (see CASE NOTE, *infra*). If *ad hoc* arbitration is chosen, the exact location ("seat") of the arbitration must be clearly stated.

NOTE:

> *The arbitration clause recommended by the International Chamber of Commerce:*
>
> *“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.”*

CASE NOTE:

Here is an example of how a thoughtlessly drafted arbitration clause resulted in costly and time-consuming litigation for the LG ("Life's Good") brand:

In *Lucky Goldstar (also known as LG appliances and electronics) v. Nag Moo Kee Engineering* (High Court of Hong Kong, 1993) the parties included the below arbitration agreement in their contract:

> "Any dispute or difference arising out of this contract shall be arbitrated in a 3rd Country, under the rule of a 3rd Country and in accordance with the rules of procedure of the International Commercial Arbitration Association."

This is a "pathological" arbitration clause. A pathological clause is one that is drafted in such a way that it leads to disputes over the intention of the parties.

In *Goldstar*, the arbitration clause did not clearly represent the intention of the parties because the institution provided for in the clause (the "International Commercial Arbitration Association") did not exist, and no seat (location) of arbitration was specified (the reference to "a 3rd Country" is not specific enough).

So when a dispute arose, no arbitration institution to which the parties could submit their dispute was named, and the parties could not commence arbitration proceedings. The parties went to a national court, which interpreted the arbitration clause to give effect to the parties' intention to submit to arbitration.

The High Court of Hong Kong found that there was no "International Commercial Arbitration Association," so the parties were referred to the best-known international arbitration institution, the ICC.

A. Examples of Model Clauses Recommended by Institutions

The International Chamber of Commerce

ICC promotes international trade and investment, open markets for goods and services, and the free flow of capital. ICC has members in more than 150 countries. New ICC Arbitration Rules came into force on January 1, 2012.

Since the ICC Court was established, there has been unprecedented growth in the use of arbitration to resolve international commercial disputes. Shifting patterns of economic development and rapid development of international trade assured that the international arbitration became a standard and a routine method to resolve business disputes. ICC is one of the leading institutions for the resolution of international commercial disputes. Its rules of arbitration are among the most-used resources of the international business community.

The ICC 2012 Rules introduced more flexibility and cost efficiency in the administration of ICC arbitration and speed up all arbitration process. The changes codify several existing practices and expand the arbitration forum to resolve more complex arbitration, while preserving the main features of ICC arbitration, such as Terms of Reference, the close supervision of arbitration by the ICC Court, scrutiny procedure, and approval of arbitration awards by the ICC Court.

The major innovations in the new arbitration rules address multi-party arbitration, multi-contracts, joiner parties, consolidation, and emergency arbitrator. These provisions are expected to have long-term effects on international arbitration practices.

ICC Arbitration Rules:

"All disputes arising in connection with the present contract shall be finally settled under the Rules of [Conciliation and] Arbitration at the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules." Parties should also designate the place of arbitration in the clause, otherwise, the ICC will choose."

Provisions Regarding the Case Managements of the Arbitration

Most of the changes in the new ICC Arbitration Rules make arbitration faster, cheaper and more efficient. Articles 22, 24, 27, 37 and Appendix IV of the new arbitration rules implement provisions to ensure efficiency.

Under Article 22(1), the arbitration tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.

According to Article 22(2) of the new arbitration rules, in order to ensure effective case management, the arbitration tribunal is authorized to adopt such procedural measure as it considers appropriate, provided that they are not contrary to any agreement of the parties.

Confidentiality is a substantial argument in favor of arbitration. Article 22(3) requires that, upon the request of any party, the arbitration tribunal is authorized to make orders concerning the confidentiality of the arbitration proceedings (or any other matters) in connection with the arbitration, and may take measures to protect trade secrets and confidential information.

One of the unique features of the ICC arbitration process in ensuring that the Award addresses all of the issues in dispute, based on a document called the "Terms of Reference" (no document of this type is required under any of the other major international arbitration rules, either *ad hoc* or institutional).

The Terms of Reference document is prepared by the arbitration tribunal at the outset of the arbitration. Article 24 of the new rules requires that the parties attend an early case management conference at the time when the arbitration's Terms of Reference are drawn up (or shortly thereafter).

Appendix IV of the ICC 2012 Rules and the ICC 's report on Techniques for Controlling Time and Costs in Arbitration outline possible case management techniques.

Appendix IV includes the following techniques:

- Bifurcating the proceedings or rendering one or more partial awards on key issues.
- Identifying issues that can be resolved by agreement between the parties or their experts.
- Identifying issues that can be resolved entirely on the basis of the production of documents, without the need for oral evidence.
- Establishing reasonable time limits for the production of evidence.
- Limiting the length and scope of written submissions as well as written and oral witness evidence.
- Using telephone or video conference for procedural and other hearings
- Organizing pre-hearing conferences
- Informing the parties that they are free to settle either by negotiation or through any form of amicable dispute resolution (ADR) methods.

New award drafting techniques are introduced in the new rules as well. According to Article 27 of the rules, once arbitration proceedings are closed, the tribunal is required to inform the Secretariat of the ICC Court of the date by which it expects to send its draft award to the ICC Court for approval.

Emergency Arbitrator and Urgent Measures

Substantial amendments are set forth by Article 29 of the new arbitration rules regarding the emergency arbitrator. When a party needs urgent interim or conservatory measures that cannot await the constitution of an arbitration tribunal, the new ICC rules provide for appointment of an emergency arbitrator (the timetable for appointin an emergency arbitrator is found in Appendix V to the ICC 2012 Rules).

NOTE:

> *The emergency arbitrator procedure is only applicable to arbitration agreements formed after January 1, 2012. The parties may opt out of it or agree to substitute other procedures for such interim measures. Although orders issued by the emergency arbitrator bind the parties, such orders do not bind the tribunal, which, when constituted, may modify, terminate or annul the emergency arbitrator's order.*

NOTE:

> *Under Article 29(7), the emergency arbitrator procedure allows parties to apply to national courts for interim measures.*

Multiple Parties, Multiple Contracts and Consolidation

The multiple parties, multiple contracts and consolidation rules are set forth in Article 6, 7, 8, 9 and 10. It is a fundamental principle of arbitration that any submission to arbitration must be based on the agreement of the parties. So although the new rules offer flexibility, all ICC actions, according to Article 6(4), remain subject to the ICC Court's *prima facie* satisfaction that an arbitration agreement binding all parties exists. As a result, the new rules dealing with multiple parties, joiner of additional parties, and consolidation of the arbitration, are all contained within Article 6(3) - 6(7), which require the Court to be satisfied that all participants are parties to an arbitration agreement.

According to Article 6(3), if any party against whom a claim has been made does not submit an answer or raises one or more pleas concerning the existence, validity or scope of the arbitration agreement or concerning whether all of the claims made in the arbitration may be determined together in a single arbitration, the arbitration shall proceed and any question of jurisdiction or of whether the claims may be determined together in that arbitration shall be decided directly by the arbitration tribunal (unless the Secretary General refers the matter to the Court for its decision pursuant to Article 6(4)).

A party may join an additional party to the proceedings by submitting a 'Request for Joiner' to the Secretariat prior to the confirmation or appointment of any arbitrator, or at any time after that date if all parties to the arbitration, including the party to be joined, have consented to the joiner (Article 7).

Claims among multiple parties are addressed in Article 8 of the new ICC rules. In this situation, any party may make a claim against any other party, provided that no new claims may be made after the Terms of Reference are signed or approved by the Court (absent authorization of the arbitration tribunal).

Under Article 9, claims arising out of or in connection with more than one contract may be made in a single arbitration.

Innovations regarding consolidation are found in Article 10. The ICC Court may consolidate separate arbitrations, either with the consent of all parties or where all claims in the arbitration are made under a single arbitration agreement, and even where the claims arise under multiple arbitration agreements, as long as the arbitration are among the same parties and arise from the same legal relationships, and the arbitration agreements are compatible.

Amendments Regarding the Arbitrators

Article 11(1) requires the arbitrators to be “impartial” and “independent” (Article 11(2) requires that before appointment or confirmation, arbitrators must sign a statement of acceptance, availability, impartiality and independence). Article 22(4) states that the arbitration tribunal should act fairly and impartially, and ensure that each party has a reasonable opportunity to present its case.

Constitution of the Arbitration Tribunal

Articles 12 to 13 require that where the Court is to appoint an arbitrator, it shall make the appointment upon proposal of a National Committee or Group that it considers to be appropriate. If the Court does not accept the proposal made, or if the National Committee or Group fails to make the proposal requested within the limit fixed by the Court, the Court may repeat its request, request a proposal from another National Committee or Group that it considers to be appropriate or appoint directly any person whom it regards as suitable.

Where a party is a sovereign state or state entity, the ICC Court may appoint arbitrators directly instead of relying upon the proposal of the ICC's National Committees.

Other Innovations Under ICC 2012 Rules

The ICC Court unequivocally claims exclusive authority to administer arbitration by Article 1 of the ICC 2012 Rules. This provision effectively prohibits the use of hybrid arbitration arrangements (such as *ad hoc* arbitration administered by the ICC Court, or arbitration conducted under the ICC Rules but administered by another institution).

Where a party raises a jurisdictional challenge, the arbitrators makes a *prima face* decision as to whether the arbitration may proceed (unless the Secretary General of the ICC refers the matter to the Court).

UNCITRAL Arbitration Rules:

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force." UNCITRAL notes that "Parties may wish to consider adding:

(a) The appointing authority shall be... (name of institution or person);

(b) The number of arbitrators shall be...(one or three);

(c) The place of arbitration shall be...(town or country);

(d) The language(s) to be used in the arbitral proceedings shall be...."

NAFTA Advisory Committee on Private Commercial Disputes:

"(a) Any dispute, controversy or claim arising out of, relating to, or in connection with, this contract, or the breach, termination or validity thereof, shall be finally settled by arbitration.

The arbitration shall be conducted in accordance with [identify rules] in effect at the time of the arbitration except as they may be modified herein or by mutual agreement of the parties.

The seat of the arbitration shall be [city, country], and it shall be conducted in the [specify] language.

The arbitration shall be conducted by [one or three] arbitrators, who shall be selected in accordance with [the rules selected above]."

(b) The arbitral award shall be in writing and shall be final and binding on the parties.

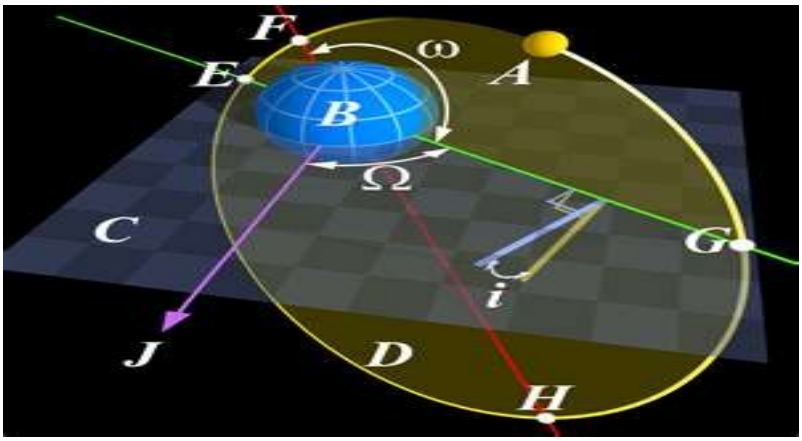
The award may include an award of costs, including reasonable attorney's fees and disbursements. Judgment upon the award may be entered by any court having jurisdiction thereof or having jurisdiction over the parties or their assets."

X. Important Elements of Arbitration Agreements

The parties should consider the following elements for inclusion in their arbitration agreements:

A. Scope of Arbitration

The parties should explicitly state the matters that they want the arbitration agreement to cover. However, they should be aware that local law may restrict issues that may be subject to arbitration.



B. Choice of Arbitrator(s)

The clause must specify the selection process (if not, existing statutes and rules may fill the gaps). But note that if the parties use institutional rules that provide for arbitrator selection, no further reference to selection may be necessary.

A panel of three arbitrators is standard for international commercial arbitrations (the parties each appoint one arbitrator, and the parties or arbitrators select a third arbitrator).

NOTE:

> *If one of the parties refuses to select an arbitrator as a delay tactic, in some circumstances, an appointing authority will designate arbitrator(s).*

If an arbitrator must have a special skill, the parties should carefully note this in the arbitration agreement.

C. Choice of Law

The parties should designate the substantive law that will be applied in the arbitration. The parties may select a procedural law (if they fail to do so, the procedural law of the place where the arbitration take place will apply). Absent an express choice of applicable law, the law of the place of the arbitration will be applied.

D. Choice of Location

A forum country should be selected that is a signatory to an international arbitration convention (i.e., the New York or Panama Conventions). The location determines the extent of potential assistance, or even interference, by national courts during an arbitral proceeding.

This could affect enforcement of the award.

Practical features such as facilities, communications and transportation systems, freedom of movement of persons, documents and currency, and support services should be considered. And the choice of location should include the name of both the city and the country.

E. Choice of Language

Parties may designate one language as the official language of the proceedings, and allow simultaneous interpretation into another language.

F. Choice of Rules

Parties should specify the rules of procedure that will govern their arbitration. When the parties select institutional rules to govern their arbitration, they should examine whether those rules provide for:

- The selection of a site where it is not specified in the arbitration clause
- Assessment of costs, including allocation between parties
- Selection of arbitrators
- Powers given to the arbitrator
- The language in which the proceeding will be conducted;
- The substantive law to be applied
- The use of and limits on the use of experts
- The time allowed in which the arbitrator must make an award
- The power of any administering authority over the award
- The availability of provisional relief, and
- The flexibility to allow parties to "opt out" of and/or replace certain provisions

G. Creating Your Own *Ad Hoc* Rules

If the parties do not use institutional rules, the following items should be included in their own *ad hoc* rules:

- Procedure to initiate arbitration proceedings
- Means for dealing with the refusal of a party to proceed with arbitration
- Scope and limitation of discovery
- Outline of hearing procedures, including notice and form of the award (whether it must be written out with reasons for the decision), and
- Procedures for enforcement of the award

H. Interim Relief

Some arbitration rules specifically address concerns of interim relief ("interim relief" contemplates preliminary relief, such as an injunction, granted by the court, to preserve the *status quo* pending trial). For example, whether the parties may apply to a court for a preliminary injunction, an order of attachment, or other order preserving the *status quo* until the arbitrator(s) decide the case.

The rules of most arbitration institutions provide that resorting to a court in such circumstances is not incompatible with, or a waiver of, the right to arbitrate under their rules (most rules allow the arbitrator(s) to order these types of relief).

I. Costs

The arbitration agreement should provide for the allocation of costs.

J. Award

The agreement should specify that a majority of the arbitrators must agree on an Award, and that it must be based on applicable law.

The agreement should also specify the currency for payment of the Award.

If the Award is to be recognized and enforced internationally, it may need to state reasons and legal bases, including reference to the process by which the legal bases were selected.

Some Awards contain no reasoning or written report.

XI. Enforcement of Awards

A. Court Enforcement

The arbitration process' ability to provide final and binding resolution of international commercial disputes depends on the parties' abilities to obtain court recognition and enforcement if a party refuses to satisfy an Award. When entering into an international business contract, parties should consider whether the country where they expect to enforce an Award (usually the country where the losing party is located) has a domestic legal framework in place for the enforcement of arbitral Awards and whether that country is a signatory to a treaty that obligates it to enforce arbitral Awards.

International commercial arbitration is often conducted through one of the major international institutions and rule-making bodies, including:

- The International Chamber of Commerce (ICC)
- The London Court of International Arbitration (LCIA)
- The Hong Kong International Arbitration Centre
- The Singapore International Arbitration Centre (SIAC)
- JAMS International
- The International Centre for Dispute Resolution (ICDR) (the international branch of the American Arbitration Association)

Subject matter-focused, specialty ADR groups (such as the World Intellectual Property Organization (WIPO)), operate arbitration centers and panels of international neutrals specializing in intellectual property and technology related disputes. [http://www.wipo.int/amc/en/]

The key feature of the ICC rules is the "terms of reference" process. The “terms of reference” is a summary of the claims and issues in dispute and the particulars of the procedure. It is prepared by the neutral organization and signed by the parties at the start of the proceedings.

NOTE:

> *The Swiss Chambers of Commerce of Industry of Basel, Berne, Geneva, Lausanne, Lugano, Neuchâtel and Zurich have recently adopted a new set of Swiss Rules of Commercial Mediation. These new rules focus on integrating the individual Chambers' proceedings with the Swiss Rules of International Arbitration. The Swiss Rules have been adopted by all of these Chambers in an effort to harmonize international arbitration processes across Switzerland.*

Many general ADR institutions have adopted the UNCITRAL Rules for administering international cases.

B. Conventions for Enforcement of Arbitral Awards

United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), June 10, 1958 (entered into force in the United States in 1970)

The New York Convention is the most widely-recognized convention for enforcement of arbitration awards. There are currently 120 parties to the New York Convention (a list of parties can be found on the Internet at: http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/xxii_boo/xxii_1.html). The Convention provides that each country must "recognize [arbitral] awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied on."

Under these rules, a party need only file an authenticated original (or duly certified copy of the) award and the original or a certified copy of the arbitration agreement with the local court in order to apply for enforcement. The New York Convention requires all signatory countries to enforce arbitral awards, subject to a limited number of defenses (discussed in Section XII, *infra,* p. 71).

NOTE:

> *When the United States ratified the New York Convention, it incorporated two reservations. The U.S. courts will only enforce arbitral awards where;*
>
> - *The subject matter of the award is considered to be commercial in nature, and*
>
> - *The award was rendered in a country that is also a party to the New York Convention.*

Inter-American Convention on International Commercial Arbitration ("Panama Convention"), Jan. 30, 1975 (entered into force in the United States in 1990)

The Panama Convention is an agreement among certain members of the Organization of American States providing for the reciprocal recognition and enforcement of international commercial arbitration agreements and awards.

Modeled after the New York Convention, the 1975 Inter-American Convention on International Commercial Arbitration, called the “Panama Convention,” provides for the general enforceability of arbitration agreements and arbitral awards in the Latin American countries that are signatories to the Convention.

The Panama Convention gives validity to arbitration clauses governing future disputes, as well as submission agreements for existing disputes. Similar to the New York Convention, for an agreement to be recognized and enforced, it must be in writing. But absent an express agreement between the parties, arbitral procedure are governed by the Rules of Procedure of the Inter-American Commercial Arbitration Commission (IACAC).

The Panama Convention allows for the appointment of arbitrators "in the manner agreed upon by the parties" and specifies that "arbitrators may be nationals or foreigners."

The Panama Convention sets forth the grounds for refusal of enforcement of an arbitral award (almost identical to those defined in the New York Convention). It does not require that courts of contracting states stay their proceedings and refer the parties to arbitration.

Signatories to the Panama Convention:

- Argentina
- Bolivia
- Brazil
- Chile
- Colombia
- Costa Rica
- Dominican Republic
- Ecuador
- El Salvador
- Guatemala

- Honduras
- Mexico
- Nicaragua
- Panama
- Paraguay
- Peru
- United States
- Uruguay
- Venezuela

The Panama Convention applies when arbitration arises from a commercial relationship between citizens of signatory nations. *Sanluis Developments, L. L. C. v. CCP Sanluis, LLC*, 498 F. Supp. 2d 699 (S.D.N.Y. 2007).

Article V of the Panama Convention nearly mirrors Article V of the New York Convention regarding the bases for refusing to enforce arbitration awards. *International Ins. Co. v. Caja Nacional de Ahorro y Seguro*, No. 00C6703, 2001 WL322005 (N.D. Ill. Apr. 2, 2001) (the Panama Convention defenses are "essentially the same" as the New York Convention defenses).

The legislative history of the Panama Convention's implementing statute shows that Congress intended for the same results to be reached whether the New York Convention or the Panama Convention is applied. *Republic of Ecuador v. Chevron Texaco Corporation*, 376 F. Supp. 2d 334, 348 (S.D.N.Y. 2005).

But the Conventions are not entirely identical.

Either New York Convention or Panama Convention?

When both the New York and Panama Conventions could apply, courts determine which convention to use as follows:

If a majority of the parties to the arbitration agreement are citizens of a state or states that have ratified the Panama Convention, and are member states of the Organization of American States, the Panama Convention will apply.

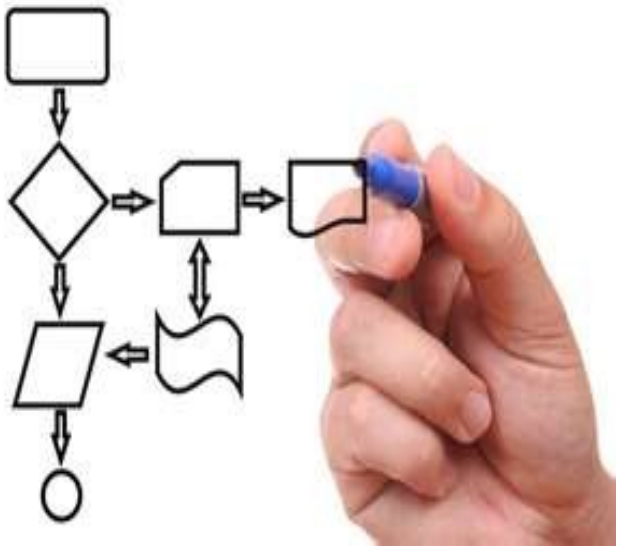
In all other cases, the New York Convention will apply.

Republic of Ecuador v. Chevron Texaco Corporation, 376 F. Supp. 2d 334, 348 (S.D.N.Y. 2005).

European Convention on International Commercial Arbitration of 1961

This Convention was ratified by most countries in Europe, except the United Kingdom and the Netherlands (and a few countries outside Europe). It applies when parties are located in different contracting states.

The convention offers a set of procedural rules for arbitration, including guidance on appointing arbitrators (where the parties cannot agree), and procedures for determining applicable law.



XII. Applying the New York Convention

The New York Convention covers an arbitral award if it arises out of a commercial agreement, and is between parties of more than one contracting state. 9 U.S.C. § 202. If all parties are U.S. citizens, the New York Convention will still apply if the agreement or transaction involves property located abroad, contemplates performance abroad, or has some other relationship to a foreign state. Id.

NOTE:

> *If the business transaction does not constitute a commercial transaction, and instead falls within sovereign activity, then the transaction will be covered by foreign sovereign immunity and the New York Convention will not apply.*

A. What is a "commercial" agreement?

"Commercial" is construed broadly by the courts. *See*, *e.g.*, *Island Territory of Curacao v. Solitron Devices, Inc.*, 356 F. Supp. 1, 13 (S.D.N.Y. 1973) (finding contract between United States manufacturer and foreign government concerning the construction of factory buildings for manufacturer "clearly ... 'commercial.'") Insurance policies are considered commercial. *See*, *Best Concrete Mix Corp. v. Lloyd's of London Underwriters*, 413 F. Supp. 2d 182 (E.D.N.Y. 2006).

A deposit agreement concerning sale of American Depository Shares of Russian oil and gas company, which contained an arbitration clause requiring arbitration in the United States, was found to be "commercial." *JSC Surgutneftegaz v. President & Fellows of Harvard College*, 2005 U.S. Dist. LEXIS 15991, at *4 (S.D.N.Y. August 3, 2005), affirmed, 2006 U.S. App. LEXIS 3846 (2d Cir. N.Y., Feb. 15, 2006).

But a license conferred by a sovereign state to operate within its territory to extract natural resources is not within the contemplation of the New York

Convention. *Honduras Aircraft Registry, Ltd. v. Government of Honduras*, 119 F.3d 1530, 1537 (11th Cir. 1997).

B. Subject Matter Jurisdiction Under the New York Convention

Chapter II of the Federal Arbitration Act (FAA) provides for subject matter jurisdiction in the federal courts for international proceedings falling under the New York Convention. 9 U.S.C. §§ 201-08.

Under the New York Convention, to invoke the federal district court's subject matter jurisdiction for enforcement, the petitioner must file with the court at the time of the petition a certified copy of the arbitral award, the agreement to arbitrate, and certified translations of the two documents (if necessary). Art. IV.

The agreement to arbitrate must be "in writing," among other things. A written agreement is defined as "in an arbitral clause in a contract, or an arbitration agreement, signed by the parties, or contained in an exchange of letters or telegrams." Art. II.

This is construed broadly, in favor of enforcement of foreign awards. *See*, *e.g.*, *Stony Brook Marine Transportation Corp. v. Wilton*, 1996 U.S. Dist. LEXIS 22222, 1997 AMC 351 (E.D.N.Y., 1996) (holding that mention of arbitration provision in an insurance binder was enough to constitute an agreement in writing to arbitrate). But *see*, *Sen Mar, Inc., v. Tiger Petroleum Corp*., 774 F. Supp. 879 (S.D.N.Y., 1991) (FAX from one party, objected to by the other party, was not an agreement to arbitrate).

Example:

The District Court of the District of Columbia recently dismissed a petition to enforce an arbitral award rendered in favor of Moscow Dynamo, a professional hockey club in Russia, against Alexander Ovechkin, one of its former star players. Ovechkin had left Russia to play in the National Hockey League.

The agreement appeared to give Dynamo the right to force Ovechkin to play for it, instead of playing with the NHL's Washington Capitals. *Moscow Dynamo v. Ovechkin*, 412 F. Supp. 2d 24 (D.D.C. 2006).

The court found that the club had failed to demonstrate the court's subject matter jurisdiction to enforce the award under Article II and IV of the Convention. The club could not produce an exchange of written communications between the club and Ovechkin demonstrating Ovechkin's assent either to enter into a new agreement to play for Dynamo after his contract had expired, or to arbitrate any dispute about such agreements.

C. Personal Jurisdiction Under the New York Convention

In order to entertain a petition to enforce a foreign arbitral award, some courts have held that a court must have personal jurisdiction over the parties. *See*, *e.g.*, *Base Metal Trading, Ltd. v. OJKS "Novokuznetsky Aluminum Factory"*, 283 F.3d 208 (4th Cir. 2002), and 47 Fed. Appx. 73 (3d Cir. 2002).

In the two similar *Base Metal* cases, the Circuit Courts of Appeal followed a traditional analysis of personal jurisdiction and found that, because the petitioner could not establish the respondent's minimum contacts with the jurisdiction, the court could not enforce the arbitral award (Petitioner had identified property in states in each circuit that belonged to respondent, but both courts found that insufficient for jurisdictional purposes because the property was not related to the underlying dispute).

NOTE:

> *In* Touchcom, Inc. v. Bereskin & Parr*, 574 F.3d 1403,1414-15 (2009) the Court declined to follow the reasoning in the Base Metal cases, stating that the "[c]onstitutional analysis for each of the 50 States required under the First Circuit's approach is undesirable ...."*

The *Base Metal* decisions, although constitutionally sound, dramatically limit the power of the New York Convention and the goal of international consistency. Enforcement of international arbitration awards, under the terms of the New York Convention, is supposed to satisfy an arbitral award through assets, wherever located.

Requiring personal jurisdiction for what is at its basis merely an execution proceeding suppresses a prevailing party's rights under the Convention (and it allows a losing party to shield assets from execution).

D. Enforcement Under the New York Convention - Statute of Limitations

The statute of limitations to enforce an award under the New York Convention is three years. 9 U.S.C. § 207. The period of time for calculations starts to run from the date of the Award.

E. Initiating a Recognition and Enforcement Proceeding

Proceedings are intended to be summary in nature. The court is not to review or opine on the arbitrator's findings.

Each district court has slightly different rules as to the form of the initial pleading: a petition, a complaint, a motion, or some other type of writing. The burden is on the party opposing confirmation, and the burden is heavy.

"The court shall confirm the award unless it finds one of the grounds for refusal or deferral or recognition or enforcement of the award" applies. 9 U.S.C. § 207; *see also*, *M & C Corp. v. Erwin Behr GmbH & Co., KG*, 87 F.3d 844, 851 (6th Cir. 1996). "Absent extraordinary circumstances, a confirming court is not to reconsider the arbitrator's findings." *Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 315 (2d Cir. 1998).

Foreign arbitral awards are "presumed to be confirmable" and the burden of proof rests with the party defending against enforcement of the Award. *Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286, 1292 n. 3 (11th Cir. 2004). "The showing required to avoid summary confirmance is high." *Yusuf Ahmed Alghanim & Sons, W.L.L v. Toys R Us*, 126 F.3d 15, 23 (2d Cir. 1997), *cert. den*., 522 U.S. 1111 (1998).

F. Special Issues Under the New York Convention

An interesting conundrum regarding application of the New York Convention is where the contracting parties, who are now in conflict and seeking resolution, are from the same nation, but still subject to the New York Convention. How does this happen? The answer is the "reasonableness analysis."

A recent decision from an experienced American federal district judge held that a sale of goods contract, between two US companies, but which provided for discharge of the shipped goods in a foreign port to be designated by the buyer, created a sufficient international characteristic to make the New York Convention applicable to the parties' contractual arbitration clause. (*Tricon Energy, Ltd. v. Vinmar International, Ltd*., 2011 WL 4424802 (S.D. Tex. Sept. 21, 2011).

The terms of the New York Convention nowhere directly address when an award between domiciliaries of the same Convention State is governed by the Convention. This is expressly left to domestic law by Article I(1):

> "[The Convention] shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."

Chapter Two of the Federal Arbitration Act (FAA) in Section 202 addresses the issue. It holds that an agreement or award entirely between US citizens

> "shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states."

The Court in *Tricon*, describing the Federal Arbitration Act Section 202 standard as "expansive," concluded that where the parties intended that the entire contracted product volume was to be delivered abroad, the Award fell under the terms of the New York Convention.

Changing the facts slightly, what if the contract called for a series of deliveries, the bulk of which were to US ports? And what if the parties' dispute was related only to the US deliveries?

In this type of fact scenario, the exact working of Section 202 is determinative. What is a “reasonable relation with one or more foreign states”?

When enacting Section 202, it is unlikely that Congress intended for the Convention's terms to include coverage of an entirely domestic dispute, solely because a part of the contract’s scope involves performance or property abroad (industry watchers have not raised any policy reasons why it should be so).

The takeaway, therefore, is that when a contract involves a series of instances of performance, some of which have occurred or will occur abroad, advocates should examine the specific performance giving rise to the dispute. This would be the relevant "contract" for analysis of the Convention’s coverage. (*See, e.g.*, *Amato v. KPMG LLP*, 433 F. Supp.2d 460 (M.D. Pa. 2006), in which US investors contracted with a US affiliate of Deutsche Bank to provide a certain investment strategy, but execution of the strategy on each transaction at issue in the case involved significant elements of foreign performance, including the purchase of foreign securities and a swap transaction with a foreign taxpayer).

G. Applying the Panama Convention

The Panama Convention was established to (on an international basis) meet the need of international business to ensure enforcement in national courts of arbitration agreements and arbitral awards relating to international commercial transactions.

In this regard, the Convention responds to the deficiencies of prior arbitral regimes in Latin American countries, including:

- Court refusal to enforce agreements to arbitrate future disputes
- The existence of extremely broad grounds for attacking arbitral awards, making enforcement difficult at best
- Restrictions or prohibitions against non-nationals acting as arbitrators
- The requirement that an arbitration agreement be made in a public writing (*escritura publica* - a writing executed before a notary, a judicial officer in civil law countries).

Example:

The U.S. Court of Appeals for the Second Circuit recently found that a petition to enforce an arbitral Award should be dismissed under *forum non conveniens* (a court's discretionary power to decline to exercise its jurisdiction where another court may more conveniently hear a case):

> The United States Court of Appeals for the Second Circuit recently dismissed a petition to enforce an arbitral award against the Republic of Peru on the basis of *forum non conveniens* under Article 4 of the Panama Convention. The Court relied on its 2002 decision in *Monegasque De Reassurances SAM. v Nak Naftogaz of Ukr*., 311 F.3d 488 (2d Cir. 2002), which held that a court is empowered to dismiss a petition for enforcement of an arbitration award on the procedural basis of *forum non conveniens* under Article III of the New York Convention.
>
> In *Figueiredo Ferraz e Engenharia de Projeto Ltda v Republic of Peru*, 2011 WL 6188497 (2d Cir. Dec. 14, 2011), Figueiredo entered into an agreement to provide engineering services with a state-controlled water program in Peru. After a fee dispute arose, Figueiredo commenced arbitration in Peru against the water program. This was done in accordance with the contract's arbitration clause.
>
> He won US$21 million in damages in 2005, and the water program made payments on the award. However, it made its payments subject to a Peruvian statute that limits the amount that a governmental entity may pay annually to satisfy a judgment. The statute states that the government may pay no more than three percent annually of the entity’s budget.
>
> In 2008, Figueiredo filed a petition in the United States District Court for the Southern District of New York seeking confirmation and enforcement of the award against the water program, the Peruvian Ministry of Housing, Construction and Sanitation, and the Republic of Peru, which had assets in New York.

The Peruvian defendants moved to dismiss on several grounds, including lack of subject matter jurisdiction, *forum non conveniens* and international comity. The District Court denied the motion to dismiss, but certified its decision for interlocutory review by the Second Circuit.

On appeal, in conformity with *Monegasque*, the Second Circuit majority confirmed that the district court had jurisdiction under the Panama Convention, and also authority to reject that jurisdiction for reasons of convenience, judicial economy and justice. Clearly, it had confirmed the availability of *forum non conveniens* as a basis for declining jurisdiction. On this basis, the court concluded that the District Court had committed an error in failing to dismiss Figueiredo's petition on that ground.

The court analyzed Peru's interest in enforcing its domestic statute as a public interest factor to be weighed in a *forum non conveniens* analysis. The court found it to be a "highly significant public factor warranting dismissal."

The Second Circuit also rejected Figuerido's argument that dismissal would disregard the public policy favoring international arbitration. The Court found in this case that the general public policy should give way.

This case offers an illustration of how the federal policy favoring arbitration overlaps the courts' analysis of public policy concerns under the *forum non conveniens* standard.

The dissent disagreed with both the applicability of the *forum non conveniens* doctrine on the facts of this case and the majority's conclusion that the relevant considerations weigh in favor of dismissal.

The dissent acknowledged that the precedent established in *Monegasque* permitted dismissal of an enforcement petition on *forum non conveniens* grounds, but it questioned whether *Monegasque* was properly decided.

NOTE:

Figueiredo *confirms that a court's application of procedural rules (including* forum non conveniens) *is compatible with US obligations under the New York Convention and the Panama Convention.*

XIII. Defenses to Enforcement of Arbitral Awards

In general, courts are required to grant requests for enforcement of arbitration award. But some defenses to enforcement are available to the loser in arbitration. However, the grounds upon which a court can rely, when refusing to enforce an arbitration award, are strictly limited.

There are a few generally recognized grounds for refusal to enforce arbitration Awards.

A. Problems with the Conduct of the Arbitration Proceeding Itself

The party who is fighting enforcement, against whom enforcement is sought, has the burden of proving that the award is flawed due to:

- Incapacity of a party, or
- Failure to give proper notice to a party, or the inability of a party to present a case, or
- The award fell outside the scope of the arbitration agreement, or
- The selection of the arbitrators violated the agreement (or, if the agreement did not address selection, the selection process violated the law)

Once the arbitration process has begun, a respondent who objects to the proceeding has a few options:

- Boycott the arbitration

NOTE:

If a respondent decides not to participate in an arbitration, the process will likely proceed ex parte *and an Award will issue.*

Refusing to appear is an extreme choice, but it does occur from time to time. Under the ICC Rules, when a respondent defaults by failing to appear, the ICC Court makes a preliminary jurisdiction

determination (generally, the ICC allows the arbitration to proceed). ICC Rules, Art. 6(2). After the Award issues, the respondent is free to attempt to set aside the Award or challenge enforcement based on lack of jurisdiction.

This maneuver is risky because the respondent loses its ability to challenge the award on the merits. It is likely that the Award will be enforceable against the respondent if the respondent was properly informed of the constitution of the tribunal and was provided the relevant timeline schedule. And the respondent will likely be ordered to pay costs.

- Challenge jurisdiction before the arbitral institution. Jurisdictional challenges can be raised before the arbitral institution administering the proceedings.

- Argue that there has been no agreement to arbitrate at all, that there has been no agreement to arbitrate the specific claims, or that the agreement was to arbitrate under the rules of another institution.

NOTE:

The standard for commencing arbitration (having the file transferred to the arbitral tribunal) is very low.

Example: Under ICC rules at Art. 6(2), the court determine only that "it is *prima facie* satisfied that an arbitration agreement under the Rules may exist." Where all parties to an arbitration have signed an arbitration agreement, the arbitrators will likely proceed (this is the case even when the arbitration clause is "pathological," and is unclear regarding the institution before which the parties agreed to arbitrate).

- Challenge jurisdiction before the arbitral tribunal.

Jurisdictional challenges to the arbitral tribunal can be an option for the objecting party (arbitral tribunals determine their own jurisdictional reach). The arbitrators consider the arbitration agreement, the terms of their appointment, and any other relevant evidence to determine if a particular claim is within its jurisdiction.

B. Arbitrators faced with a jurisdiction challenge have several options:

- The tribunal may decide that it has no jurisdiction. This ends the arbitration process. The claimant is then free to pursue other remedies in other settings (such as national courts).

NOTE:

Arbitrators usually find a way to establish their jurisdiction over the matter.

- The tribunal may hear arguments challenging jurisdiction, and then issue an Interim Award.

If the arbitral tribunal finds that it has jurisdiction, the challenging party can continue to participate in the arbitration, because it has expressly reserved its objection to jurisdiction. As a result of this early challenge, this issue is preserved.

The respondent can again raise the issue after the final award is issued. The respondent may raise the issue by challenging the award in the courts of the place of arbitration, or by fighting the claimant's efforts seek recognition or enforcement of the award. Separately, the respondent may pursue review of the Interim Award.

NOTE:

Intertwined facts on both jurisdiction and the merits of the matter-

Sometimes, the facts for both the jurisdictional challenge and the merits are inseparable. In this situation, the arbitrators can join the issue of jurisdiction to the merits of the matter. When this occurs, the arbitrators do not issue an Interim Award on jurisdiction. Rather, the arbitrators issue a Final Award, which discusses both the jurisdiction of the tribunal and the merits of the claim(s).

NOTE:

The arbitral tribunal's decision on jurisdiction may be subject to review by an appropriate national court. But the possibility of review does not prevent the tribunal from considering its own jurisdiction and arbitrability in the first instance.

- Parties may apply to the national court to resolve the issue of jurisdiction.

If the arbitration has already been constituted, the arbitral tribunal generally proceeds with the arbitration, despite the pending court challenge.

NOTE:

As comprehensive policy requires courts to increasingly defer to arbitration, this type of challenge is often unsuccessful (and expensive and time consuming).

- Parties may continue with the arbitration process, and challenge the Final Award once the tribunal issues it.

The respondent may challenge the Award in the courts of the country in which the arbitration took place, or oppose the winner's attempts at enforcement of the Award.

CAVEAT:

Under many rule regimes, failure to raise an objection to jurisdiction at the earliest possible opportunity is a waiver of the objection. So once a party has entered an appearance and participated in the arbitration process, without objecting to the jurisdiction of the tribunal, the respondent may be deemed by the courts to have submitted to the process. As a result, any subsequent challenge could be viewed with disfavor by the courts.

"A plea by a Respondent that the Arbitral Tribunal does not have jurisdiction shall be treated as having been irrevocably waived unless it is raised not later than the Statement of Defence. . . ."

See, *e.g.*, LCIA Rules, Art. 23.2.

- Challenge to the jurisdiction of the arbitral tribunal before national courts.

  The respondent may:

  - Obtain an injunction to stop the arbitral tribunal from proceeding;

  - Obtain a declaration that the arbitral tribunal does not have jurisdiction with respect to the claim(s) advanced by the claimant; or

  - Attempt to stay the arbitration by filing a lawsuit in the court at the seat of arbitration.

CAVEAT:

If the respondent loses on this maneuver in the courts, this provides considerable support in favor of the propriety of the arbitration. As a result, the respondent will later have a much more difficult battle when attempting to oppose enforcement of any subsequent Award on jurisdictional grounds.

A party challenging the arbitration may apply to another national court, provided that court has jurisdiction to entertain the application and there is some rationale or advantage in applying to that court.

NOTE:

This move implicates the issue of interference by courts in the arbitral process.

A respondent may challenge the arbitral tribunal's jurisdiction when respondent is opposing a claimant's Motion to Compel Arbitration, and/or Motion to Stay existing litigation.

C. The Proper Time to Challenge the Arbitration Process in Court

In some situations, a party will not want to participate in the arbitration process at all. If so, the respondent must challenge the arbitration in court.

When this is the case, the respondent should assert this challenge as soon as possible.

Ideally, the respondent should make this challenge before the arbitral tribunal has even been assembled.

NOTE:

> *If the respondent delays challenging the arbitration until after the tribunal has been assembled, the arbitration will likely proceed, regardless of the challenge advancing through the court system.*

In the alternative, the respondent may challenge the arbitration process before the arbitration tribunal itself. Generally, the respondent must assert this challenge before it submits its defense case on the merits. See, e.g., ICSID Convention, Regulations and Rules, Rule 41(1); UNCITRAL Arbitration Rules, Art. 21(3); LCIA Rules Art. 23.2.

D. Where to Challenge

If the plaintiff/respondent is seeking to litigate in the specified forum of the arbitration, personal jurisdiction will not be an issue in most situations. In the United States, the majority view is that the arbitration clause designating the site of the arbitration ("forum selection clause") is a sufficient basis for personal jurisdiction. *See, e.g., Management Recruiters Int'l, Inc. v. Bloor*, 129 F.3d 851, 854 (6th Cir. 1997) ("When parties have agreed to arbitrate in a particular forum, only a district court in that forum has jurisdiction to compel arbitration. . . ."); *Petrol Shipping Corp. v. Kingdom of Greece, Ministry of Commerce*, 360 F.2d 103, 107 (2d Cir. 1966) ("[B]y agreeing to arbitrate in New York a party makes himself as amenable to suit as if he were physically present in New York.").

NOTE:

> *Because the United States' Federal Arbitration Act does not directly provide bases for personal jurisdiction, courts must look for independent bases to exercise personal jurisdiction over parties.*

If the plaintiff/respondent is seeking to litigate in a forum other than the place of the arbitration, the plaintiff/respondent will need to assert an independent basis for personal jurisdiction.

The federal courts have original jurisdiction over actions or proceedings falling under the New York Convention by deeming such actions to arise under the laws and treaties of the United States. This original jurisdiction is granted regardless of the amount in controversy.

Foreign states are not immune from the jurisdiction of the federal or state courts. Federal courts, therefore, have subject-matter jurisdiction in arbitration actions between foreign entities.

An action or proceeding over which the United States federal district courts have jurisdiction pursuant to the New York Convention may be brought in:

- Any such court in which, except for the arbitration agreement, an action or proceeding with respect to the controversy between the parties could be brought; or

- Such court for the district and division that embraces the place designated in the agreement as the place of arbitration, if such place is within the United States. 9 U.S.C. § 204.

E. Grounds for Challenges

Pursuant to the New York Convention and the implementing provisions of the FAA, courts consider the following threshold issues in international arbitrations:

- Is there a written agreement?
- Is the subject matter of the agreement "commercial"?
- Is the dispute international? and
- Is the claim covered by the arbitration agreement?

NOTE:

> *The analytical focus in this type of litigations is on whether the agreement to arbitrate covers the claim(s) in issue.*
>
> *Smith/Enron Cogeneration Ltd. P'ship. v. Smith Cogeneration Int'l Inc.*, 198 F.3d 88, 92 (2d Cir. 1999).

NOTE:

> *Although arbitration rules for quite a few arbitral institutions do not require an agreement to arbitrate to be in writing, courts considering whether arbitration is appropriate must determine whether the arbitration agreement is in writing.*

The New York Convention and the FAA comprise the enforcement mechanisms for the United States' strong federal policy in favor of arbitration, and govern the analysis regarding arbitrability. However, this "presumption of arbitrability" is merely a presumption, and "is not without limits." *Nordin v. Nutri/System, Inc.*, 897 F.2d 339, 344 (8th Cir. 1990).

F. Directly Challenging the Arbitration Agreement Itself

Under the terms of the New York Convention, courts are directed to refer parties to arbitration "unless [the court] finds that the said agreement is null and void, inoperative or incapable of being performed." Art. II(3); see also 9 U.S.C. § 1 (court may refuse to refer the parties to arbitration if it finds the arbitration agreement itself, as opposed to the entire contract, to be "null and void, inoperative or incapable of being performed"); UNCITRAL Model Law, Art. 8 (a court shall refer the parties to arbitration "unless it finds that the agreement is null and void, inoperative or incapable of being performed").

NOTE:

The courts interpret this exception very narrowly. Courts apply this restriction neutrally on an international scale to situations involving:

- *Fraud*
- *Mistake*

- *Duress*
- *Waiver*

(These are the generally accepted contract defenses.)

The party opposing enforcement of the Award may also demonstrate that a statute or other declaration of public policy of the forum prohibits the essence of the obligation or remedy. *See*, *Antco Shipping Co., Ltd. v. Sidermar S. p. A*., 417 F. Supp. 207 (S.D.N.Y. 1976).

Some matters are generally not arbitrable, including:

- Disputes that affect the financial status of an individual or a corporate entity, such as bankruptcy or insolvency
- Disputes concerning the grant or validity of patents and trademarks
- Criminal matters

Under the New York Convention, bases for refusing to enforce an arbitral Award include that the "subject matter of the difference is not capable of settlement by arbitration" under the law of the country where enforcement is sought (New York Convention, Art. V(2)(a)).

As a result, courts may reject Awards if "recognition or enforcement of the award would be contrary to the public policy of the forum state." (*Id*., at Art. V(2)(b)).

NOTE:

Courts rarely decline enforcement of New York Convention cases based on public policy concerns.

G. Challenges to the Larger Contract as a Whole; Issues of Severability

Challenges to the entire contract are usually based on one of two grounds:

- Issues that directly affect the entire agreement
- Concerns that the impropriety of one of the contract's provisions nullifies the entire contract

NOTE:

> *Effective arguments to attack the entire contract include that the contract was not signed by both parties, the contract was fraudulently induced, or one of the parties did not have the legal capacity or the authority to sign the contract.*

Severability Concerns

An arbitration clause is traditionally separable from the contract containing it under the "severability" doctrine ("severability" is the concept, embodied in a clause in most contracts, that states that if a discrete provision in a contract is determined by a court to be illegal or unenforceable, the remainder of the contract should remain in full force), so it might survive a successful challenge to the validity of the contract itself. *See*, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S. Ct. 1204, 1209 (2006).

For this reason, the validity of the arbitration clause is not completely dependent for its survival on the validity of the contract as a whole. *See*, *e.g.*, UNCITRAL Arbitration Rules, Art. 21; LCIA Arbitration Rules 23.1;

AAA Arbitration Rules, Art. 15.2; Model Law, Art. 16(1); ICC Arbitration Rules, Art. 6.4.

Based on this concept, an arbitral tribunal does not lose jurisdiction in the face of a claim that the contract itself is null and void (assuming that the arbitral tribunal upholds the validity of the arbitration agreement itself).

H. What if One Party Didn't Sign the Agreement to Arbitrate?

Non-signatories can be ordered to arbitrate, surprisingly. Similarly, they can be bound by the resulting arbitral Award (even if they did not participate in the arbitration). *International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000).

Parties can submit to arbitration by means other than signing a contract containing an arbitration clause. Applying common law ("common law," sometimes referred to as "case law" or "precedent," is law developed by judges through decisions of courts and similar tribunals) principles of contract and agency law, courts have enumerated five theories to support binding non-signatories to the arbitration process:

- Incorporation by reference of the arbitration agreement into a subsequent contract
- Assumption by the rights of the respondent or assignment of the rights and obligations under the contract to the respondent
- Where the signatory and the respondent have an agency relationship
- Under the concept of "piercing the corporate veil" ("piercing the corporate veil" is a court's decision to treat the rights or duties of a corporation as the rights or liabilities of its individual shareholders) or "alter ego" theory (under "alter ego theory," the business owner failed to separate his financial affairs from the business entity's financial affairs, and/or observe statutory formalities required of businesses)
- Equitable estoppel ("equitable estoppel" is legal principle that bars a party from denying or alleging a certain fact, based on that party's previous conduct, allegation, or denial).

NOTE:

> *In the arbitration context, courts have held that a party is equitably estopped from asserting that the lack of a signature on a written contract precludes enforcement of the contract's arbitration clause when the party has previously asserted that the other provisions of the same contract should be enforced to that party's benefit.*
>
> *International Paper*, 206 F.3d at 418.

> *A "nonsignatory is estopped from refusing to comply with an arbitration clause 'when it receives a "direct benefit" from a contract containing an arbitration clause.'"*
>
> *American Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999).
>
> *See*, *Smith/Enron Cogeneration Ltd. P'ship*, 198 F.3d at 92; *Thomson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995).

I. Does the Arbitration Agreement Cover the Particular Conflict?

Although a court may determine that a valid and enforceable arbitration agreement exists between the parties, it must nonetheless determine whether the parties contracted to arbitrate the particular dispute.

United States courts decide this issue by applying the "federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the [Federal Arbitration] Act." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

Issues regarding arbitrability of a particular conflict "must be addressed with a healthy regard for the federal policy favoring arbitration. . . . . [A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, ..." *Id.* at 24-25.

In situations where the arbitration clause is very broad (e.g., it provides that "any and all claims" relating to the agreement are arbitrable), this gives rise to a presumption in favor of arbitrability. In this setting, courts will likely refer even collateral matters, or allegations underlying the claims that "touch matters" covered by the parties' agreement, to arbitration. *See*, *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading, Inc*., 252 F.3d 218, 225 (2d Cir. 2001).

J. Defeating Arbitration Clauses

Courts generally do not expand arbitration agreements beyond reason. Parties can overcome the presumption in favor of arbitration by showing "with positive assurance that the arbitration clause is not susceptible to the interpretation that it brings plaintiffs' claims within its sweep." *In re Currency Conversion Fee Antitrust Litig*., 265 F. Supp. 2d 385, 406 (S.D.N.Y. 2003).

NOTE:

> *Courts have held that completely unexpected tortious behavior is not covered by an arbitration clause.*

In cases where the arbitration clause is drafted with specificity (e.g., when the scope of the arbitral authority is limited in some fashion or only certain disputes are subject to arbitral determination in whole or in part), the court will refer to arbitration claims that are *prima facie* (on their face) within the scope of the narrowly drawn clause. As a result, courts usually find that collateral matters are outside the contemplation of the clause.

K. Other Bases to Challenge Arbitration Awards

- Insufficient or improper notice of the appointment of the arbitrator in the proceeding, so the proceeding should be stayed and the appointment process restarted
- The agreement does not effectively provide for arbitration under a certain set of rules
- Inaccurate reference to an arbitral institution ("pathological" arbitration clause)

L. Scope of the Challenge to Arbitration

A challenge to the jurisdiction of an arbitral tribunal may be either partial or total. A partial challenge challenges whether certain claims or counterclaims before the arbitral tribunal are within its jurisdiction. A total challenge questions the very existence of a valid arbitration agreement.

NOTE:

> *Even if some claims or counterclaims are outside the scope of the arbitration agreement, the parties may agree that new matters should be brought within the jurisdiction of the arbitral tribunal.*

M. Deciding the Question of Arbitrability

The presumption is that the arbitral tribunal itself has the authority to determine whether it has the power to hear a dispute (the Kompetenz-Kompetenz doctrine, a.k.a. competence-competence or "jurisdiction concerning jurisdiction").

Many European Union countries, particularly France, have incorporated some form of this doctrine. *See*, *American Bureau of Shipping,* Cass Civ 1ère, 26 June 2001 and *Quarto Childrens Books*, Cass Civ 1ère, 16 October 2001; Article 15 of the AAA's International Arbitration Rules provide that the "tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." See also ICC Rules Art 6(4); UNCITRAL Arbitration Rules Art. 21(1); LCIA Rules Art. 23.1.

NOTE:

> *United States courts apply contract theory to the issue of arbitrability. The central question is, "What did the parties agree to?"*

Generally, issues of arbitrability are to be decided by the court, but the parties may agree to put the question of arbitrability to the arbitral tribunal. But the issue of arbitrability may only be referred to the arbitral tribunal where there is clear language in the arbitration agreement that the question of arbitrability is to be decided by the arbitral tribunal. *See*, *First Options v. Kaplan*, 514 U.S. 938, 944 (1995).

Even without an express contractual agreement, evidence might exist within the arbitration clause, especially if the language is written broadly.

Courts have held that language along the lines of "any and all" conflicts is so broadly written that it establishes a "broad grant of power to the arbitrators."

This reveals the parties “inten[t] to arbitrate issues of arbitrability.” *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1195-2000 (2d Cir. 1996); *see also*, *Smith Barney Shearson Inc. v. Sacharow*, 91 N.Y.2d 39, 43, 46, 666 N.Y.S.2d 990, 991, 994 (1997) (language providing for ‘[a]ny controversy” between the parties to be “settled by arbitration” was sufficiently “plain and sweeping” to indicate an “intent and commitment” to have arbitrability decided by the arbitrators).

When parties consent to be bound by the rules of an arbitral panel that requires arbitrability to be decided in arbitration, courts have found this to establish the parties' consent. Specifically, the federal district court has found that an arbitration clause requiring arbitration be conducted under the Rules of Arbitration of the ICC is an agreement to have issues of arbitrability decided by the arbitral tribunal. *Shaw Group Inc. v. Triplefine Int’l Corp*., 322 F.3d 115, 120-21 (2d Cir. 2003)).

N. Challenges to Jurisdiction: Judicial Review of Interim Arbitral Decisions

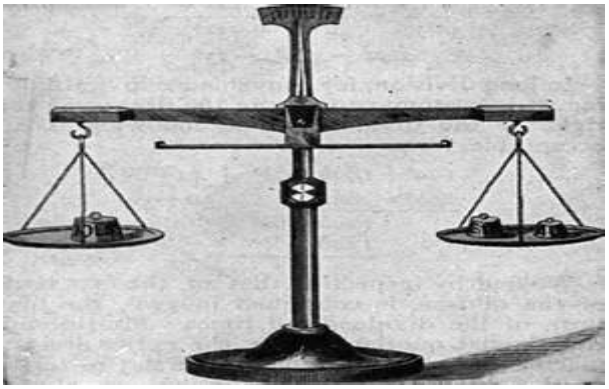
Once an arbitral panel determines it has jurisdiction to hear a dispute, it will then process the matter on the merits. In the United States, because the issue of jurisdiction is so fundamental, court review of jurisdictional issues is available at any time before or during an arbitration on the merits, or even after an award is issues.

NOTE:

> *Courts can grant motions to stay arbitration at any stage of the process, pending review of an arbitral decision on the issue of jurisdiction*.

If a party officially objects to jurisdictional, but continues to participate in the arbitration proceedings, this does not act as a waiver of the parties' right to challenge jurisdiction in an American court. Rather, the objection is preserved for judicial examination. *See*, *China Minmetals Materials Imp. and Exp. Co. v. Chi Mei Corp*., 334 F.3d 274, 290 (3d Cir. 2003).

But if the parties have previously agreed to arbitrate the issue of arbitrability itself, judicial review of the arbitral decision is likely limited to the select grounds noted in the FAA §10. *First Options*, 514 U.S. at 943 (in *dicta*).



In the United States, if the parties have not agreed to arbitrate the issue of jurisdiction, the court will review the issue of jurisdiction *de novo* (courts consider matters on *de novo* review as if the reviewing court were considering the question for the first time).

O. State Sovereignty Considerations

Sometimes, a party can challenge the appropriateness of arbitration on the basis of state sovereignty concerns. In some situations, the integral laws of a particular nation might pay a role in the issue of arbitrability.

The grounds are fairly narrow, however:

- The law of the country where enforcement will be attempted prohibits arbitration on the particular subject matter of the dispute, or

- Recognition or enforcement of the award would be contrary to the public policy of the country where enforcement is sought.

NOTE:

The courts narrowly construe state sovereignty as grounds for challenges to arbitration enforcement. This basis is only effective when enforcing an award violates the most basic notions of morality and justice of the foreign state.

Under Article V(2)(b) of the New York Convention, a court can refuse to enforce the Award if recognizing or enforcing the Award would conflict with the public policy of the country where a party seeks enforcement.

Parson & Whittemore Overseas Co. v. RAKTA,
508 F.2d 969, 973 (2nd Cir. 1974).

XIV. Advocacy in Arbitration Proceedings

Unique advocacy skills are called for in international arbitration proceedings. Advocates must master substantive arbitration law, application of procedural rules, and the nuances of creating written documents (Terms of Reference, Statement of the Case, Statement of Defense, Counterclaims).

Practitioners must operate under generally accepted practices set forth in both the common law and the civil law traditions of the seat of arbitration, or the traditions of the countries of origin of the arbitrators.

NOTE:

> *The expectations and approaches of the parties may even be affected by other legal systems (for example, the Sharia, which is both the moral code and religious law of Islam. Sharia addresses secular law, including politics and economic relationships).*

Advocates must be mindful of the cultural expectations of the parties, their representatives, and the tribunal itself. Depending on the law governing the process and the legal culture, advocates may encounter divergent views on matters such as the application of the rules of evidence, questions such as the extent of legal professional privilege, the treatment of witnesses, the extent of disclosure of documents (discovery) and the length and format of the hearing.

APPENDIX A

Regional Arbitration Institutions

Many regional arbitration institutions exist throughout the world. Some of the more well-known institutions:

A. British Columbia International Commercial Arbitration Centre (BCICAC)

1140 - 1090 West Georgia Street

Vancouver, BC

V6E 3V7

Tel: (604) 684-2821

Fax: (604) 684-6825

www: http://www.bcicac.com

The BCICAC was established by the Government of British Columbia to provide a forum for the resolution of commercial disputes arising out of both international and domestic business relationships. The BCICAC administers international arbitrations under its own rules, which are based largely on the UNCITRAL rules, or under the UNCITRAL rules, upon request.

B. Quéébec National and International Commercial Arbitration Centre

295, Boulevard Charest Est

Bureau 090

Quéébec, G1K 3G8

Canada

Tel: (418) 649-1374

Fax: (418) 649-0845

The Quéébec Centre administers domestic, interprovincial and international commercial disputes in specialized sectors, including construction, insurance, environment, export, commercial representation, maritime transportation and intellectual property. The Centre does not have its own arbitration rules.

C. Mexico City National Chamber of Commerce

Paseo de la Reforma 42

Delegacion Cuauhtemoc

06048 Mexico, D.F. Mexico

Tel: (011-525) 703-2862

Fax: (011-525) 705-7412

The Mexico City National Chamber of Commerce handles both national and international commercial disputes.

D. Arbitration Institute of the Stockholm Chamber of Commerce (SCC)

Väästra Träädgardsgatan 9

P.O. Box 16050

S-103 22 Stockholm

Sweden

Tel: (011-468) 613-1800

Fax: (011-468) 723-0176

www: http://www.chamber.se/arbitration/index.html

Since 1976 the SCC has functioned as an international arbitration institution, and is particularly known for handling disputes involving East-West trade. The SCC administers arbitrations under either its own rules or other rules chosen by the parties. SCC arbitrations are usually conducted by a panel of three arbitrators, with each party selecting one and the SCC choosing the panel chair.

E. Hong Kong International Arbitration Centre

38th Floor, Two Exchange Square

8 Connaught Place

Hong Kong S.A.R.

China

Tel: (011-852) 2525-2381

Fax: (011-852) 2524-2172

www: http://www.hkiac.org/index.html

The Hong Kong International Arbitration Centre (the Centre) was established in 1985 to provide both domestic and international arbitration services in the Southeast Asian region. The Centre administers international arbitrations under the UNCITRAL rules and provides facilities for arbitrations that are held in Hong Kong under the auspices of other institutions such as the ICC and the AAA.

F. China International Economic and Trade Arbitration Commission (CIETAC)

6/F, Golden Land Building

32 Liang Ma Qino Road

Chaoyung District

Beijing, 100016

People's Republic of China

Tel: (011 8610) 6464-6688

Fax: (011 8610) 6464-3500, or 6464-3520

E-mail: cietac@public.bta.net.ch

CIETAC provides arbitration services for disputes arising from international economic and trade transactions. It administers arbitrations only under its own rules. Parties may choose their arbitrators from a CIETAC roster that includes both Chinese and foreign arbitrators.

G. Japan Commercial Arbitration Association (JCAA)

Taishoseimei Hibiya Building

9-1, Yurakucho 1-chome

Chiyoda-ku, Tokyo

Japan

Tel: (011-81-3) 3287-3061

Fax: (011-81-3) 3287-3064

www: http://www.jcaa.or.jp/e/jcaa-e/j-index.html

The JCAA, which is supervised and financed by the Ministry of International Trade and Industry, will administer arbitrations under its own rules or under the UNCITRAL rules. Although the rules do not specify a place of

arbitration, the JCAA expects that the arbitrations that it administers will take place in Japan.

H. Arbitral Centre of the Federal Economic Chamber, Vienna

Wiedner Hauptstrasse 63, (Schaum)

P.O. Box 319

A-1045 Vienna

Austria

Tel: (011 431) 50105-4397

Fax: (011 431) 5020-6216

E-mail: whis@aw.wk.or.at

The Arbitral Centre of the Federal Economic Chamber, Vienna (the Vienna Centre) was established in 1975 to handle exclusively international commercial disputes. The Vienna Centre normally administers arbitrations under its own rules, but will administer arbitrations under the UNCITRAL rules at the request of parties.

I. Cairo Regional Centre for International Commercial Arbitration

Al-Saleh Ayoub Street

Zamalek, Cairo, Egypt

Tel: (011 202) 340-1333, or 340-1335, or 340-1337

Fax: (011 202) 340-1336

E-mail: crcica@idsc1.gov.eg

The Cairo Centre was established in 1978 under the auspices of the Asian-African Legal Consultative Committee of the United Nations (AALCC),

which is comprised of approximately 40 African and Asian countries. The Cairo Centre will administer arbitrations under its own rules, which are adapted from the UNCITRAL Rules, or under the UNCITRAL Rules. The Cairo Centre maintains a list of arbitrators drawn from the African-Asian region.

J. Regional Centre for Arbitration Kuala Lumpur

12, Jalan Conlay

50450 Kuala Lumpur

Malaysia

Tel: (011-603) 242-0103, or 242-0702

Fax: (011-603) 242-4513

The Kuala Lumpur Regional Centre for Arbitration was established in 1978 under the auspices of the Asian-African Legal Consultative Committee of the United Nations. The Centre administers arbitrations under its own rules, which are adapted from the UNCITRAL rules.

K. Singapore International Arbitration Centre

1 Coleman Street #05-08

The Adelphi

Singapore 179803

Tel: (011 65) 334-1277

Fax: (011 65) 334-2942

www: http://siac.org.sg

The Singapore International Arbitration Centre will conduct arbitrations under its own rules as well as under UNCITRAL or other rules as determined by the parties. The Centre has both meeting facilities and support staff to support arbitrations conducted in Singapore.

APPENDIX B

International Arbitration Institutions

The list below only offers a survey of some of the more prominent arbitration institutions available, and is not a complete catalog of all available institutions.

American Arbitration Association (AAA)

American Arbitration Association

International Center for Dispute Resolution

1633 Broadway

New York, NY 10019

Tel: (212) 484-3266

Fax: (212) 246-7274

www: http://www.adr.org

The AAA performs arbitration services for international disputes under any of its specialized subject matter rules, the UNCITRAL rules or any other rules chosen by the parties. The AAA will administer arbitrations anywhere in the world. In addition, the AAA has cooperative agreements with a number of foreign arbitration institutions.

Commercial Arbitration and Mediation Center for the Americas (CAMCA)

American Arbitration Association

International Center for Dispute Resolution

1633 Broadway

New York, NY 10019

Tel: (212) 484-3266

Fax: (212) 246-7274

www: http://www.jurisint.org/pub/03/en/doc/18.htm

CAMCA was created jointly by the AAA, the British Columbia International Commercial Arbitration Centre, the Quéébec National and International Commercial Arbitration Centre and the Mexico City National Chamber of Commerce. It has its own arbitration rules and offers multinational panels of arbitrators and mediators. Parties who wish to use the CAMCA arbitration procedures, rules and services may file a case with any of the cooperating national institutions.

International Chamber of Commerce (ICC) Court of Arbitration

ICC Court of Arbitration

38 Cours Albert 1er

75008 Paris

France

Tel: (011-331) 4953-2878

Fax: (011-331) 4953-2933

www: http://www.iccwbo.org

U.S. Council for International Business

1212 Avenue of the Americas

New York, NY 10036

Tel: (212) 354-4480

Fax: (212) 575-0327

The ICC provides administrative services to facilitate the settlement of international commercial disputes. The ICC Court is based in Paris and has affiliates in 59 countries, including the United States. It will administer arbitrations under its own rules at any location selected by the parties. However, parties must file pleadings and all other paperwork at the Paris location, which serves as a clearinghouse for all documents, sets costs and fees, decides challenges to the appointment of arbitrators and approves draft arbitral awards. The ICC will review the final award to ensure that it meets the basic requirements for enforcement.

Inter-American Commercial Arbitration Commission (IACAC)

c/o Organization of American States,

Administration Building, Room 211

19th & Constitution Avenue N.W.

Washington, D.C. 20006

Tel: (202) 458-3249

Fax: (202) 458-3293

The IACAC operates through a network of arbitration institutions located throughout the Western Hemisphere. Each arbitration institution acts as a "National Section" of the IACAC. IACAC arbitrations are administered exclusively under the IACAC rules, which are nearly identical to the UNCITRAL rules. The IACAC maintains a panel of experienced arbitrators.

London Court of International Arbitration (LCIA)

International Dispute Resolution Centre

8 Breams Building

Chancery Lane

London

EC4A 1 HP

Tel: (011 44) 020 7405 8008

Fax: (011 44) 020 7405 8009

www: http://www.lcia-arbitration.com/lcia/

The LCIA is the oldest international arbitration institution. It maintains a panel of 26 experienced arbitrators from various countries and has developed its own arbitration rules. Although headquartered in London, the LCIA will establish a tribunal and administer arbitrations at any location requested by the parties under any international arbitration rules. If the LCIA administers an arbitration outside of the United Kingdom, it will be assisted by one of its regional Users' Councils.

WIPO Arbitration Center

International Center for the Resolution of Intellectual Property Disputes

34 chemin des Colombettes

P.O. Box 18

1211 Geneva 20

Switzerland

Tel: (011-41-22) 338-9111

Fax: (011-41-22) 740-3700

www: http://www.arbiter.wipo.int/

The World Intellectual Property Organization (WIPO) is a United Nations inter-governmental organization that is responsible for promoting the

protection of intellectual property throughout the world. The WIPO Center administers mediations and arbitrations of international commercial disputes involving intellectual property disputes. At the request of the parties, the WIPO Center will administer an arbitration at any location in the world, but will do so only under WIPO Arbitration Rules. The WIPO Center also offers an Expedited Arbitration Service. Expedited arbitrations are conducted in a shorter time period with only one arbitrator instead of a panel of three.

APPENDIX C

International Organizations - Alternative Dispute Resolution

ADRCI - ADR Chambers International

ADR Chambers International is the leading Canadian organization that specializes in International Arbitration and Mediation. Through the use of the UNCITRAL Arbitration Rules as supplemented by its own state of the art rules, ADRCI provides practitioners and their clients uniformity and credibility in the field of the international arbitration and mediation. The mandate of ADRCI is to provide a single cost effective Canadian source for all types of international dispute resolution, including formal international arbitration, mediation, med-arb or other hybrid systems of dispute resolution.

ADR Institute of Canada

The ADR Institute of Canada (ADR Canada) is a national non-profit organization that provides national leadership in the development and promotion of dispute resolution services in Canada and internationally. In concert with seven regional affiliates across the country, we represent and support professionals who provide dispute resolution services and the individuals and organizations that use those services. Our membership includes over 1,700 individuals and 60 business and community organizations from across Canada. Our standards and programs reflect our commitment to excellence in the field.

Association for International Arbitration (AIA)

The Association for International Arbitration (AIA) works towards promotion of alternative dispute resolution (ADR) in general and arbitration in particular, as a means of dispute resolution and strives to bring together the global community in this field, be it as professionals in the form of judges,

lawyers, arbitrators, mediators or as academics as well research scholars and students. With this unique blend of people, it is our endeavor to inculcate an interest in ADR, not only in the professional sphere but also create an awareness and interest in it among budding professionals in law schools/universities all around the globe.

Canadian Bar Association - National Alternative Dispute Resolution Section

Mandate: The practice and promotion of various forms of alternative dispute resolution including, but not limited to arbitration, collaborative law, facilitation and mediation.

International Alternative Dispute Resolution - World Bank

International alternative dispute resolution (ADR) is the process of settling transnational disputes through the use of dispute resolution mechanisms other than courts. Due to the time, expense and complications involved in resolving and enforcing disputes between transnational parties in courts, international ADR is sought because it can be a confidential, speedy and predictable process and the parties might have more trust in the enforceability of these settlements

International Chamber of Commerce (ICC) - Commission on Arbitration

The Commission on Arbitration aims to create a forum for experts to pool ideas and impact new policy on practical issues relating to international arbitration, the settlement of international business disputes and the legal and procedural aspects of arbitration. The Commission also aims to examine ICC dispute settlement services in view of current developments, including new technologies.

International Court of Environmental Arbitration and Conciliation

The International Court of Environmental Arbitration and Conciliation ("the Court") was established in Mexico D.F. on November 1994, by 28 lawyers from 22 different countries, as a form of Institutionalised Arbitration. The Court facilitates through conciliation and arbitration the settlement of environmental disputes submitted by States, natural or legal persons ("Parties").

LEADR - Association of Dispute Resolvers - Australia

LEADR is an Australasian, not-for-profit membership organisation formed in 1989 to serve the community by promoting and facilitating the use of dispute resolution processes including mediation. These processes are generally known as Alternative Dispute Resolution or ADR.

Permanent Court of Arbitration

The PCA is an intergovernmental organization with over one hundred member states. Established in 1899 to facilitate arbitration and other forms of dispute resolution between states, the PCA has developed into a modern, multi-faceted arbitral institution that is now perfectly situated at the juncture between public and private international law to meet the rapidly evolving dispute resolution needs of the international community. Today the PCA provides services for the resolution of disputes involving various combinations of states, state entities, intergovernmental organizations, and private parties.

APPENDIX D

International Arbitration Rules

Unless parties select an arbitration institution that requires use of its own rules, parties may use any of the following rules:

UNCITRAL - Arbitration Rules of the United Nations Commission on International Trade Law

Tel: (212) 963-8302

Fax: (212) 963-3489

www: http://www.un.or.at/uncitral/en-index.htm

In 1976, the United Nations Commission on International Trade Law (UNCITRAL) promulgated rules for use in ad hoc international arbitrations. The rules are widely accepted. Some arbitration institutions have adopted the UNCITRAL Rules as their institutional rules and other institutions will administer arbitrations under the UNCITRAL Rules, if requested.

American Arbitration Association International Arbitration Rules

Tel: (212) 484-3266

Fax: (212) 246-7274

www: http://www.adr.org/index2.1.jsp?JSPssid=10525

The American Arbitration Association (AAA) is an arbitration institution that has developed International Arbitration Rules, Commercial Arbitration Rules, Securities Arbitration Rules, Patent Arbitration Rules, and rules designed for specific sectors including construction, employment, labor, patents and textiles.

International Chamber of Commerce Rules of Conciliation and Arbitration

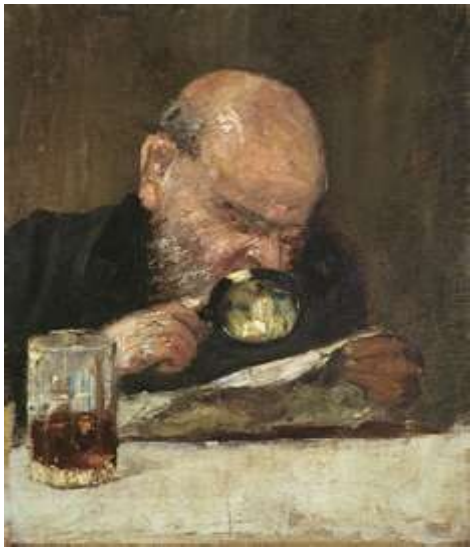
International Chamber of Commerce

Tel: (212) 206-1150

Fax: (212) 633-6025

www: http://www.iccwbo.org/

The International Chamber of Commerce International Court of Arbitration's rules are widely recognized and can also be selected by parties for use in ad hoc arbitrations or in arbitrations conducted by other institutions.



APPENDIX E

Overview of the "New" Protocols for Commercial Agreements

The College of Commercial Arbitrators recently released protocols for commercial arbitration that are meant to provide best practices for an efficient and cost-effective arbitration process. The CCA's Protocols for Expeditious, Cost-Effective Commercial Arbitration are not a new set of rules but rather serve as a guide for in-house counsel, arbitrators, outside counsel and parties to arbitrations on the best ways to manage the process in a manner that returns arbitration to its roots as a quicker, more cost-efficient means of resolving disputes outside the court system.

According to the authors, people focus on what is essential when there are shortened timeframes, and the shorter processes should also serve to limit discovery and force the parties to set a hearing for the dispute. This is the single most important recommendation in the Protocols.

Discovery limits can be established in the original agreement between the parties, after the disputes arises, or by having the arbitrator or arbitration panel set limits on discovery. However, it is clear from practice and experience that the most effective way to limit discovery is to include the limits in a pre-dispute agreement.

Businesses are encouraged to use fast-track arbitration in appropriate circumstances, which would return arbitration to its original structure. They also could set up a three-tiered system whereby the simplest cases would be completed in six months, more complex cases would be resolved in nine months and only the most complex cases would last more than one year.

The Protocols looks at ways that provider organizations can promote cost and time savings. The provider organizations are critical to any change in the practice of arbitration. They already have done a considerable amount of work to drive efficiency by providing parties with greater choice in how arbitration is conducted, by training arbitrators and by efficiently administering cases.

The Protocols also stress that provider organizations and arbitrators must be aware of the need to make a greater effort informing parties that they need to make some hard choices by setting time and discovery limits. They also need to publish rules that parties can use to limit discovery and establish strict timelines for completion of arbitration.

There has been reluctance on the part of arbitration providers to push parties to use expedited processes, but the Protocols stress that this must be done in order to drive users into a more efficient use of arbitration. Use of expedited rules can be promoted through the training of arbitrators and lawyers and through testimonials from satisfied users.

The Protocols also promote effective motion practice. Procedures should be established that would allow arbitrators to distinguish between motions that should be heard and considered versus reflexive motions that are filed but only serve as time wasters.

The Protocols provide guidance for outside counsel on how they can assure a cost-efficient and timely arbitration. Outside counsel are encouraged to pursue their client's goals in an expeditious manner. They also are encouraged to select arbitrators with strong management skills and to be clear with arbitrators from the outset about their desire to be part of an efficient process.

In-house counsel are going to need to stay actively involved in the process. They should attend the scheduling conference and make their views known on the need to limit discovery.

In addition, in-house counsel are limiting the number of depositions and including discovery limits when drafting the arbitration agreement. However, arbitration agreements still need to provide arbitrators with some discretion with regard to discovery and time limits.

E-discovery has opened Pandora's box because lots and lots of information that used to get thrown away is now available to the parties as most communications and information is now stored electronically by companies.

In addition, courts have established precedents in e-discovery, which impose a huge burden on companies. Arbitration could distinguish itself from litigation and make the process more attractive to companies if arbitrators become more conversant in e-discovery and streamline or limit e-discovery during the process, she suggested. All of these undertakings should help empower arbitrators to limit discovery.

APPENDIX F

Sample Fast-Track Arbitration Rules

EXPEDITED ARBITRATION AGREEMENT

I. Agreement to submit case number XX to expedited arbitration.

The Grievant and [organization], individually and by and through their respective representatives, mutually agree to submit case number XX to arbitration, under the expedited procedures outlined below, for a final and binding decision.

Both parties agree to utilize these expedited arbitration procedures, instead of the regular arbitration procedures defined in [insert policy or contract section] which both parties acknowledge to be available. Once this Agreement has been signed, the decision to utilize the expedited arbitration procedures cannot be revoked, except by mutual agreement.

Unless specifically altered by the provisions of this Agreement, all provisions of [insert policy or contract sections regarding arbitration] apply.

II. Hearing Officer Selection and Hearing Scheduling

The Hearing Officer shall be selected as follows.

Upon receipt of a signed copy of this Agreement, the [...] Mediation and Conciliation Service will provide a list of potential hearing officers. After having obtained a list of available hearing dates from the potential hearing officers, the parties will conduct a strike-off procedure. If none of the potential hearing officers have available dates within [ ] days, the Mediation and Conciliation Service will provide a new list. The [ ] day time limit may only be extended by the mutual, written, agreement of the parties.

The Hearing Officer will give the parties two potential hearing dates. Within [ ] calendar days of receipt of the potential dates, the parties will mutually pick one of the dates offered, and will so inform the Hearing Officer. If

neither date is acceptable, the [organization] will ask the Hearing Officer for additional dates. The [organization] will be responsible for making hearing room arrangements.

The Hearing Officer, by accepting the appointment, agrees to hold the hearing under the procedures outlined in both this Agreement, including Section X-Fees and Costs, and in [insert policy or contract section] (copies attached).

Within the rules established by this Agreement, the appointed Hearing Officer shall assure a fair and adequate hearing, providing both parties sufficient opportunity to present their respective evidence and argument.

III. Hearing Officer's Authority

The Hearing Officer's authority is limited to that identified in [insert policy or contract section] and this Agreement. The Hearing Officer shall have no authority to add to, delete from, or otherwise modify the provisions of either [insert name of entire contract or policy manual] or this Agreement.

IV. Pre-Hearing Procedures

No later than [ ] calendar days prior to the hearing date, each party will submit the following three items to the Hearing Officer (with a complete copy to the other party):

1. A concise written statement (no longer than [ ] double-spaced pages) setting forth the basis for their case. This statement will clearly identify the issue(s) to be decided at the hearing. With respect to each issue, the statement will set forth the pertinent facts in the case and identify how policy was violated or followed.

The parties will attempt to agree on a statement of the issue(s) under review. However, if the parties are unable to agree on a statement of the issue(s), the Hearing Officer shall state the issue(s).

2. A copy of all documents that each party plans to introduce as an exhibit at the hearing. These documents must be numbered and clearly identified [Organization] 1, [Organization] 2, etc. It is up to each party to number and identify all exhibits submitted to the Hearing Officer.

3. A list of witnesses who will be called to testify in person or by sworn affidavit. Affidavits, if used, must accompany the witness list. Because the hearing is designed to be completed in one day, care and consideration must be given in deciding whom to call.

No later than [ ] business days prior to the hearing, each party may submit objections to the Hearing Officer pertaining to the admissibility of evidence, the relevance of witnesses, or the use of affidavits. These objections must be submitted in writing, with a copy to the other party. The Hearing Officer will rule on the objections at the start of the hearing, unless he or she determines that further information is required before ruling. Either party may request a conference call prior to the hearing to resolve evidentiary issues.

If one party fails to submit its three items by the deadline, the other party shall then have the option of rescheduling the hearing, with the cost of rescheduling to be borne by the party which failed to submit the items on time.

Documents which have not been provided to the other party and the Hearing Officer at least [ ] calendar days prior to the hearing may be accepted into evidence only for the purpose of rebuttal.

If upon the Hearing Officer's request, a party refuses to produce documents or witnesses under the party's custody or control, the Hearing Officer may draw such inferences as may be appropriate. However, the Hearing Officer has no power to subpoena either documents or witnesses.

V. Representation Rights

Each party is entitled to representation at the hearing. The [moving party] may be represented by any individual of his or her choosing, except that a supervisor may not represent a non-supervisor, and a non-supervisor may not represent a supervisor. The [moving party] may also represent himself or herself. The [moving party] shall be solely responsible for his or her own representative's fees, if any. The Hearing Officer has no authority to award attorney's or representative's fees to either party.

VI. Hearing Procedures

The hearing shall be tape recorded. A court reporter shall not be used. The tape recording shall constitute the official record of the hearing. The tapes will not be transcribed. The [Organization] will maintain custody and control of the tapes. Upon request, the [Organization] will provide a copy of the tapes to the Hearing Officer and/or the [moving party] without charge.

Except by the mutual written agreement of the parties, the hearing shall be closed to all persons other than the principal parties to the case.

At the commencement of the hearing, the Hearing Officer shall state the issue(s) under review. The Hearing Officer shall identify for the record all exhibits submitted by the parties, and shall rule, as appropriate, on any objections to the exhibits.

This Agreement, and the procedures outlined herein, are designed to allow both sides to present their cases fully and completely in one day. At the request of both of the parties, and in extraordinary circumstances only, the Hearing Officer is authorized to allow additional hearing time.

Opening statements are discouraged. The written statement submitted to the Hearing Officer (see section IV, above) should be considered in lieu of an opening statement. If an opening statement is made, it shall not exceed [ ] minutes.

Burden of Proof/Order of Testimony

In discipline or dismissal cases, the [organization] will have the burden of proving by a preponderance of the admissible evidence that the discipline or dismissal was issued for "just cause."

In all other cases, the [moving party] will have the burden of proving, by a preponderance of the admissible evidence, each element of the claim. In discipline or dismissal cases, the [organization] shall present its case first. In all other cases, the [moving party] shall go first.

Witnesses

The testimony of all witnesses shall be given under oath or affirmation; the oath or affirmation shall be administered by the Hearing Officer.

Release Time for Witnesses

The grievant and his/her representative (if an [organization] employee) shall be in a without-loss-of-straight-time pay status at the hearing. [Organization] employee-witnesses who appear to testify at the hearing shall be in a without-loss-of-straight-time pay status for time devoted to giving testimony.

Because this is a one-day hearing, each side will have approximately [ ] hours to present, and conclude, its case; this will include both direct and cross-examination of all witnesses, and, if necessary, rebuttal. This [ ] hour limit is a guideline to help the parties prepare and plan their case. The Hearing Officer will be responsible for ensuring, as far as possible, that the one-day time limit is adhered to.

In order to assure that the hearing is completed in one day, the Hearing Officer is encouraged to take an active role in the proceedings, to limit redundant and repetitive questions and testimony, and to question witnesses himself or herself as appropriate.

Post-hearing briefs are not allowed.

VII. Hearing in the Absence of a Party

The hearing may proceed in the absence of any party who, after due notice, fails to appear. An award shall not be made solely on the default of a party. The Hearing Officer shall require the attending party to submit supporting evidence.

VIII. Evidence

Strict adherence to federal or state rules regarding the admissibility or exclusion of evidence need not apply. The Hearing Officer shall be the sole judge of the admissibility, relevance and materiality of all evidence and testimony offered. The Hearing Officer may receive and consider any evidence offered, including hearsay, but shall give appropriate weight to any objections made.

IX. Hearing Officer's Award and Opinion

The Hearing Officer's decision must be issued within [ ] calendar days from the close of the hearing. The decision should not be longer than [ ] typewritten pages. The Hearing Officer also has the option of issuing a bench decision, or a decision by FAX or telephone within [ ] days of the hearing, to be followed by a brief written memorandum of the decision within [ ] calendar days from the close of the hearing.

The Hearing Officer's decision can be cited as precedent in future cases unless one party objects at least [ ] days prior to the hearing date. The objection must be submitted in writing to the Hearing Officer, with a copy to the other party.

X. Fees and Costs

The [Organization] shall pay the room rental cost, if any. The [moving party] and the [Organization] shall each pay half of all other costs. However, a [moving party] who is personally paying his/her own costs and is not represented, may request a cap of $300 on his/her cost and that the [Organization] shall pay the difference. In the extraordinary event that the Hearing Officer authorizes more than one day of hearing, the cost of additional days of hearing shall be divided equally between the parties.

By way of illustration, the typical cost of a one-day hearing is shown below:

Hearing Officer's per diem fee for one day of hearing: $800

Hearing Officer's per diem fee for pre-hearing work,

and writing the decision: $800

TOTAL FEES AND COSTS $1600

Normal: [Moving party's] share $800, [organization's] share $800

Cap approved: [Moving party's share $300, [organization's] share $1,300

If the hearing is postponed at the request of one party, the requesting party shall pay the Hearing Officer's charge for the postponement, if any. If the grievance is withdrawn or settled, the cancellation costs shall be divided as described above. The Hearing Officer shall inform all parties of his/her cancellation policy upon appointment.

*I certify that I have read and understand this Agreement, and I agree to be bound by the decision rendered. I acknowledge that I am aware of my right to full and complete hearing under [insert policy or contract section], and I freely and voluntarily waive that right.*_____

APPENDIX G

Expedited Arbitration Agreement

Expedited Arbitration

Representation

1. The parties may be represented or assisted by any person during an arbitration.

2. Where a party intends to be represented or assisted by a lawyer, the party shall, in writing, advise the other party of the lawyer's name and the capacity in which the lawyer is acting at least five days before any scheduled meeting or hearing.

Appointment of Arbitrator

3. The parties shall appoint a sole arbitrator within [ ] days of the commencement of the expedited arbitration procedure.

Time and Place of Arbitration

4. Unless otherwise agreed, the arbitration shall be held at a place determined by the arbitrator.

5. A hearing shall be commenced within [ ] days of the appointment of the arbitrator.

Conduct of Expedited Arbitration Process

6. Subject to the rules in this Schedule B, the arbitrator may conduct the arbitration in the manner the arbitrator considers appropriate, but each party shall be treated fairly and shall be given full opportunity to present the party's case.

Exchange of Documents

7. Within five days of the appointment of the arbitrator, the claimant shall send a written statement to the respondent and the arbitrator outlining the facts supporting the claimant's claim, the points at issue and the relief or remedy sought.

8. Within five days after the respondent receives the claimant's statement, the respondent shall send a written statement to the claimant and the arbitrator outlining the respondent's defense, the particulars requested in the statement of claim and a written statement of the respondent's counterclaim, if any.

9. The claimant, when responding to a counterclaim, shall send a written statement to the respondent and the arbitrator outlining the claimant's defense to the counterclaim within [ ] days after the claimant receives the counterclaim.

10. Each party shall submit with the party's statement a list of the documents upon which the party intends to rely and the list of documents shall describe each document by specifying its document type, date, author, recipient and subject-matter.

Production of Documents

11. The arbitrator may, on the application of a party or on the arbitrator's own motion, order a party to produce any documents the arbitrator considers relevant to the arbitration within a time the arbitrator specifies and, where such an order is made, the other party may inspect those documents and make copies of them.

12. Each party shall make available to the other for inspection and the making of copies, any documents upon which the former party intends to rely.

Confidentiality

13. All oral hearings and meetings shall be held in private and all written documents shall be kept confidential by the arbitrator and the parties and shall not be disclosed to any other person, except with the consent of all parties.

Evidence

14. Each party shall provide the facts relied upon to support the party's claim or defense.

15. The arbitrator is the judge of relevancy and materiality of the evidence offered and is not required to apply the legal rules of evidence.

Examination of Parties

16. In an oral hearing, an arbitrator may order a party, or a person claiming through a party, to submit to being examined by the arbitrator under oath and to submit all documents that the arbitrator requires.

Decision of the Arbitrator

17. The sole arbitrator shall render a decision within [ ] days after completion of the arbitration.

Time for Completion of Arbitration

18. The arbitration shall be completed within [ ] days of the appointment of the arbitrator.

APPENDIX H

Expedited Arbitration Rules

Preamble

There is a strong desire among those who have disputes to control the time and cost of a binding dispute resolution process. To create an efficient and cost-effective arbitration process, these Rules, among other things, restrict the length of material that may be presented and time to present evidence and argument. The arbitrator may not extend these limits unless all parties agree. The arbitrator will be expected to manage the proceedings actively and aggressively to ensure adherence to these Rules.

By agreeing to proceed under these Rules, the parties acknowledge the restrictions and agree that the Rules will give them a fair and reasonable opportunity to present their case and respond to the case presented by the other side.

1. Arbitration Under These Rules

The purpose of these Rules is to provide a cost-effective, simple procedure for parties to a dispute who wish to achieve a prompt, practical and just resolution, without extensive pre-hearing procedures or going to court.

These Rules will apply whenever the parties agree in writing to have their dispute decided “under the Expedited Arbitration Rules of ... Arbitration Association” or words to that effect.

Where these Rules are silent, the arbitrator will have the discretion to control the process in such a way as he or she deems appropriate.

These Rules may be changed by the agreement of the parties to the dispute, provided that the changes are not contrary to applicable law. Any changes must be made in writing and filed with the arbitrator within time limits described by these Rules. To the extent that changes may require the

arbitrator to spend more time than is contemplated by these Rules, the fee for the arbitration may be increased above the fees set out in these Rules.

In these Rules, a “page”(when restricting length of documents) is considered to be double-spaced using 12-point font.

Where these Rules require that a communication be in writing, email and fax correspondence are acceptable unless otherwise stated.

2. Starting The Arbitration

Any party (the “Claimant”) can start an arbitration under these Rules by sending a Notice to Arbitrate to the other party to the dispute (the “Respondent”) and sending a copy to Arbitration Association.

3. Notice to Arbitrate

The Notice to Arbitrate must be in writing and must contain or attach the following:

(a) name, address, phone number, facsimile number and e-mail address of all parties;

(b) a brief (maximum [ ] pages) description of the dispute;

(c) the relief sought; and

(d) a copy of the agreement (or other document) that gives the Arbitration Association arbitrator jurisdiction to decide the dispute pursuant to these Rules.

4. Response to the Notice to Arbitrate

A party who receives a Notice to Arbitrate (the “Respondent”) must deliver a Response to the Notice to Arbitrate within [ ] business days after receiving the Notice to Arbitrate. The Response must be in writing with a

copy to Arbitration Association, and must contain confirmation of the accuracy (or corrections to) the names and contact information in the Notice to Arbitrate and a brief (maximum [ ] pages) description of the dispute, if different from the description provided by the Claimant.

5. Appointment of Arbitrator

The arbitration will be conducted by a single arbitrator selected from the Arbitration Association list of arbitrators on the Arbitration Association Expedited Arbitrations roster.

The parties to the dispute may select the arbitrator by agreement. If Arbitration Association is not notified of the selection of an arbitrator by agreement of the parties within [ ] business days after the Response has been delivered (or within [ ] business days after the Notice to Arbitrate was delivered if no Response is delivered), Arbitration Association will select the arbitrator based on the description of the dispute in the Notice and Response and on the availability of arbitrators.

6. Fees and Deposits

For a two-party arbitration with an oral hearing, each party must pay a deposit of $[ ] plus facilities fee and taxes when filing its Notice to Arbitrate or its Response.

For arbitrations with more than two parties with an oral hearing, a fee of $[ ] must be paid one-half by the Claimant(s) and one-half by the Respondent(s) when filing their Notices to Arbitrate or their Responses.

7. Procedures

Unless the parties agree to a different procedure, the procedure shall be as set out in these Rules. The arbitrator will have no discretion to alter these Rules unless the parties unanimously agree to the alteration, or unless

these Rules specifically grant the arbitrator the discretion to alter the Rules (such as is set out in sub-section 9(e)(ii).

8. Initial Meetings

(a) Once appointed, the arbitrator will convene an initial meeting with the lawyers for the parties in order to determine the date and procedure for the arbitration, and the timetable. The initial meeting will be by conference call (except in unusual circumstances as determined by the arbitrator), will occur within one week of the appointment of the arbitrator and will last no more than 1 hour except on consent of the arbitrator.

(b) Issues discussed at the initial meeting may include:

(i) date of the oral hearing, if applicable;

(ii) procedure to be followed including whether there will be an oral hearing, whether the arbitration will be Final Offer Selection or a No Reasons arbitration, whether there will be a mediation before the arbitration, etc.;

(iii) Whether there will be a reporter (at extra cost paid directly by the parties to the reporter);

(iv) whether the parties will prepare a common documents brief;

(v) clarification of the issues the arbitrator is asked to decide; and

(vi) setting specific dates for the tasks required in these Rules (as limited by the time constraints in these Rules).

(c) The initial meeting, and any other meetings to discuss or determine preliminary issues, may take place by conference call.

9. Processes

Unless otherwise agreed, the process will be as follows:

(a) The oral hearing will be held within [ ] months of the appointment of the arbitrator.

(b) [ ] weeks before the date scheduled for the oral hearing, the Claimant shall provide a brief to the Respondent and to Arbitration Association containing the following:

(i) a memorandum (maximum [ ] pages) setting out the Claimant's position on the issues and any arguments that party intends to make;

(ii) copies of any cases (maximum of [ ]) that the Claimant intends to rely on in the arbitration;

(iii) copies of any documents (maximum [ ] documents and [ ] pages) the Claimant considers relevant or intends to rely on. An excerpt from a document is acceptable but is considered one document. For clarity a series of connected documents such as a series of e-mails or a series of letters may be considered one document; and

(iv) affidavits of the evidence in chief of a maximum of [ ] witnesses, with a combined maximum length of [ ] pages;

(v) there will be no expert reports and no evidence of an expert witness.

(c) The Claimant shall produce copies of documents that are only in the Claimant's possession if they may be detrimental to the Claimant's case. These documents shall be produced along with the documents relied on by the Claimant

(d) [ ] weeks before the date scheduled for the arbitration, the Respondent shall provide to the Claimant and to Arbitration Association the information and documentation as set out above in sub-sections 9(b) and 9(c) (modified to apply to the Respondent rather than the Claimant).

(c) [ ] week(s) before the scheduled date for the arbitration, the Claimant may submit a written reply of no more than [ ] pages.

(d) There will be no oral or other documentary discovery.

(e) There will be no preliminary motions other than:

(i) requests for increases to the page limitations for documents as set out in these Rules, in extraordinary circumstances.

(ii) requests to extend the timeframes set out in these Rules because of illness or extraordinary and unforeseen circumstances. For the sake of clarity, lawyers' other work commitments are not grounds for extending time.

Such motions will take place by conference call (arranged by the arbitrator) with no written submissions.

(f) The arbitration hearing shall last no more than [ ] days for a two-party arbitration and [ ] days for a multiple-party arbitration. The hearing will commence at [ ] a.m.; have one morning break of [ ] minutes; break at [ ] pm for lunch; resume at [ ] pm; have one afternoon break; and conclude no later than [ ] p.m.

(g) Each side will have a maximum of [ ] minutes to present its opening argument and to summarize the affidavit evidence of its witnesses.

(h) Each side shall have a maximum of [ ] hours to cross-examine the other side's witnesses.

(i) Each party shall have a maximum of [ ] hour for closing argument. The Claimant may reserve up to [ ] minutes of its hour for reply if it so chooses.

(j) The arbitrator shall enforce the time limitations set out in these Rules. If the parties fail to abide by the limitations in these Rules, the arbitrator will only consider evidence submitted within the time and page allowances prescribed by these Rules.

10. Rules of Evidence

All information is admissible at the hearing and need not be proven in accordance with the Rules of evidence. The Arbitrator will decide how much weight to attach to any information.

11. Mediation

The parties may elect to attend a half-day or full-day mediation in an attempt to settle the dispute prior to arbitration. Fees for the mediation can be found on the Arbitration Association website.

12. "In Writing" Arbitration

The parties may elect to waive their right to an oral hearing. In such a case, the arbitrators will set dates by which they must submit their memoranda and affidavit evidence, still within the page limitations set out above. In such case, the total fee for a two-party arbitration will be $[ ] plus taxes and the total fee for an arbitration with more than two parties will be $[ ] plus taxes.

13. "No Reasons" Awards

Where the parties have specified that their arbitration will be a “No Reasons” arbitration, or words to that effect, this section will apply.

The parties in a two-party arbitration may elect an arbitration with no written reasons. In such a case, the arbitration will be a Final Offer Selection. Each party, in its brief, will submit its final offer. The arbitrator may only select one final offer, in its entirety, without modifications. No reasons will be given for the selection. The total fee for a No Reasons arbitration with an oral hearing will be $[ ] plus taxes and the fee for a No Reasons arbitration without an oral hearing will be $[ ] plus taxes.

The parties also agree that abbreviated and incomplete reasons are acceptable as part of the Expedited Arbitration process and do not provide grounds for appeal or judicial review.

14. Full Answer and Defense

The parties agree that arbitration under these Rules provides both sides with an opportunity to present its case and respond to the case of the other side. The parties also agree that sparse or abbreviated reasons are acceptable as part of the Expedited Arbitration process and do not provide grounds for appeal or judicial review.

15. Interest

The arbitrator may order simple interest to be paid, if applicable, and the date from which interest runs.

16. Costs

The arbitrator may determine liability for the costs of the arbitration and may apportion costs between the parties or to one of the parties. In awarding costs, the arbitrator may take into account the conduct of the parties in the proceedings. If there is an order with respect to costs, the order will stipulate a payment as between the parties, as the arbitration fees will already be on deposit. There will be no order with respect to legal costs as each party will bear his, her or its own legal costs.

17. Cancellation or Adjournment

If the matter is cancelled or adjourned more than [ ] months prior to the oral hearing, [ ] percent of the arbitration fee will be refunded; if the matter is cancelled or adjourned more than [ ] week prior to an oral hearing but less than [ ] month before the oral hearing, [ ] percent of the fee for the arbitration will be refunded to the parties. If the matter is cancelled or adjourned within [ ] week of the oral hearing, [ ] percent of the fees for arbitration will be refunded to the parties.

18. Timing of Decision and Reason

The arbitrator will release the decision in a No Reasons arbitration within [ ] business days of the conclusion of the hearing. In other arbitrations, reasons will be released within [ ] business days of the conclusion of the hearing. Reasons will be brief and need not set out the arguments of the parties, except to the extent necessary to explain the arbitrator's reasoning.

For In Writing arbitrations, the decision will be released no more than [ ] business days after the submission of the Claimant's reply (or the time for submitting the Reply has expired). Reasons will be released no more than [ ] business days after the submission of the Claimant's reply (or the time for submitting the Reply has expired).

The arbitrator does not lose jurisdiction by a failure to complete and release the award in the time specified.

19. Amendments and Corrections to the Award

(a) On the application of a party or on the arbitrator's own initiative, an arbitrator may amend an award to correct a clerical or typographical error, an accidental error, slip, omission or similar mistake, or an arithmetical error made in a computation.

(b) An application by a party under subsection 19(a) must be made within [ ] business days after the Reasons are released.

20. Finality of Award

An arbitration award under these Rules is final and binding on the parties and is not subject to an appeal or review on any grounds including (without limitation) lack of jurisdiction, except where the law in the location where the arbitration is held requires a right of appeal to be maintained.

For clarity, the failure of an arbitrator to comply with a provision of these Rules will not provide the basis for an appeal of the award.

Appendix I

Panama Convention

INTER-AMERICAN CONVENTION ON

INTERNATIONAL COMMERCIAL ARBITRATION, 1975

Done at Panama City, January 30, 1975

O.A.S.T.S. No. 42, 14 I.L.M. 336 (1975)

The Governments of the Member States of the Organization of American States, desirous of concluding a convention on international commercial arbitration, have agreed as follows:

Article 1

An agreement in which the parties undertake to submit to arbitral decision any differences that may arise or have arisen between them with respect to a commercial transaction is valid. The agreement shall be set forth in an instrument signed by the parties, or in the form of an exchange of letters, telegrams, or telex communications.

Article 2

Arbitrators shall be appointed in the manner agreed upon by the parties. Their appointment may be delegated to a third party, whether a natural or juridical person.

Arbitrators may be nationals or foreigners.

Article 3

In the absence of an express agreement between the parties, the arbitration shall be conducted in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission.

Article 4

An arbitral decision or award that is not appealable under the applicable law or procedural rules shall have the force of a final judicial judgment. Its execution or recognition may be ordered in the same manner as that of decisions handed down by national or foreign ordinary courts, in accordance with the procedural laws of the country where it is to be executed and the provisions of international treaties.

Article 5

1. The recognition and execution of the decision may be refused, at the request of the party against which it is made, only if such party is able to prove to the competent authority of the State in which recognition and execution are requested:

(a) That the parties to the agreement were subject to some incapacity under the applicable law or that the agreement is not valid under the law to which the parties have submitted it, or, if such law is not specified, under the law of the State in which the decision was made; or

(b) That the party against which the arbitral decision has been made was not duly notified of the appointment of the arbitrator or of the arbitration procedure to be followed, or was unable, for any other reason, to present his defense; or

(c) That the decision concerns a dispute not envisaged in the agreement between the parties to submit to arbitration; nevertheless, if the provisions

of the decision that refer to issues submitted to arbitration can be separated from those not submitted to arbitration, the former may be recognized and executed; or

(d) That the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the terms of the agreement signed by the parties or, in the absence of such agreement, that the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the law of the State where the arbitration took place; or

(e) That the decision is not yet binding on the parties or has been annulled or suspended by a competent authority of the State in which, or according to the law of which, the decision has been made.

2. The recognition and execution of an arbitral decision may also be refused if the competent authority of the State in which the recognition and execution is requested finds:

(a) That the subject of the dispute cannot be settled by arbitration under the law of that State; or

(b) That the recognition or execution of the decision would be contrary to the public policy ("order public") of that State.

Article 6

If the competent authority mentioned in Article 5.1(e) has been requested to annul or suspend the arbitral decision, the authority before which such decision is invoked may, if it deems it appropriate, postpone a decision on the execution of the arbitral decision and, at the request of the party requesting execution, may also instruct the other party to provide appropriate guaranties.

Article 7

This Convention shall be open for signature by the Member States of the Organization of American States.

Article 8

This Convention is subject to ratification. The instruments of ratification shall be deposited with the General Secretariat of the Organization of American States.

Article 9

This Convention shall remain open for accession by any other State. The instruments of accession shall be deposited with the General Secretariat of the Organization of American States.

Article 10

This Convention shall enter into force on the 30th day following the date of deposit of the second instrument of ratification.

For each State ratifying or acceding to the Convention after the deposit of the second instrument of ratification, the Convention shall enter into force on the 30th day after deposit by such State of its instrument of ratification or accession.

Article 11

If a State Party has two or more territorial units in which different systems of law apply in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification or accession, declare that this

Convention shall extend to all its territorial units or only to one or more of them.

Such declaration may be modified by subsequent declarations, which shall expressly indicate the territorial unit or units to which the Convention applies. Such subsequent declarations shall be transmitted to the General Secretariat of the Organization of American States, and shall become effective 30 days after the date of their receipt.

Article 12

This Convention shall remain in force indefinitely, but any of the States Parties may denounce it. The instrument of denunciation shall be deposited with the General Secretariat of the Organization of American States. After one year from the date of deposit of the instrument of denunciation, the Convention shall no longer be in effect for the denouncing State, but shall remain in effect for the other States Parties.

Article 13

The original instrument of this Convention, the English, French, Portuguese and Spanish texts of which are equally authentic, shall be deposited with the General Secretariat of the Organization of American States. The Secretariat shall notify the Member States of the Organization of American States and the States that have acceded to the Convention of the signatures, deposits of instruments of ratification, accession, and denunciation as well as of reservations, if any. It shall also transmit the declarations referred to in Article 11 of this Convention.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Convention.

DONE AT PANAMA CITY, Republic of Panama, this thirtieth day of January one thousand nine hundred and seventy-five.

Appendix J

New York Convention

Convention on the Recognition and Enforcement of Foreign Arbitral Awards done at New York, on 10 June 1958

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to the Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contact or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a manner in respect of which the parties have made an agreement within the meaning of this article at the request of one of the parties, refer the parties to arbitration unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory when the award is relied upon, under the conditions laid down in the following articles. there shall not be imposed the substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of application, supply:

(a) The duly authenticated original award or a duly certified copy thereof.

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these

documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity #, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, undep the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or

(d) The composition of the arbitral authority or 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; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialised agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the receipt by the Secretary-General of the United Nationals of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention of such territories, subject, where

necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations,supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. this Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall

enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(a) Signatures and ratifications in accordance with article VIII;

(b) Accessions in accordance with article IX;

(c) Declarations and notifications under articles I, X, and XI;

(d) The date upon which this convention enters into force in accordance with article XII;

(e) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

Appendix K

Hague Convention

CONVENTION ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS

(Concluded 15 November 1965)

The States signatory to the present Convention,

Desiring to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time,

Desiring to improve the organisation of mutual judicial assistance for that purpose by simplifying and expediting the procedure,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.

This Convention shall not apply where the address of the person to be served with the document is not known.

Article 2

Each Contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other Contracting States and to proceed in conformity with the provisions of Articles 3 to 6.

Each State shall organise the Central Authority in conformity with its own law.

Article 3

The authority or judicial officer competent under the law of the State in which the documents originate shall forward to the Central Authority of the State addressed a request conforming to the model annexed to the present Convention, without any requirement of legalisation or other equivalent formality.

The document to be served or a copy thereof shall be annexed to the request. The request and the document shall both be furnished in duplicate.

Article 4

If the Central Authority considers that the request does not comply with the provisions of the present Convention it shall promptly inform the applicant and specify its objections to the request.

Article 5

The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either -

a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or

b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.

Subject to sub-paragraph (b) of the first paragraph of this Article, the document may always be served by delivery to an addressee who accepts it voluntarily.

If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.

That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document.

Article 6

The Central Authority of the State addressed or any authority which it may have designated for that purpose, shall complete a certificate in the form of the model annexed to the present Convention.

The certificate shall state that the document has been served and shall include the method, the place and the date of service and the person to whom the document was delivered. If the document has not been served, the certificate shall set out the reasons which have prevented service.

The applicant may require that a certificate not completed by a Central Authority or by a judicial authority shall be countersigned by one of these authorities.

The certificate shall be forwarded directly to the applicant.

Article 7

The standard terms in the model annexed to the present Convention shall in all cases be written either in French or in English. They may also be written in the official language, or in one of the official languages, of the State in which the documents originate.

The corresponding blanks shall be completed either in the language of the State addressed or in French or in English.

Article 8

Each Contracting State shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents.

Any State may declare that it is opposed to such service within its territory, unless the document is to be served upon a national of the State in which the documents originate.

Article 9

Each Contracting State shall be free, in addition, to use consular channels to forward documents, for the purpose of service, to those authorities of another Contracting State which are designated by the latter for this purpose.

Each Contracting State may, if exceptional circumstances so require, use diplomatic channels for the same purpose.

Article 10

Provided the State of destination does not object, the present Convention shall not interfere with -

a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Article 11

The present Convention shall not prevent two or more Contracting States from agreeing to permit, for the purpose of service of judicial documents, channels of transmission other than those provided for in the preceding Articles and, in particular, direct communication between their respective authorities.

Article 12

The service of judicial documents coming from a Contracting State shall not give rise to any payment or reimbursement of taxes or costs for the services rendered by the State addressed.

The applicant shall pay or reimburse the costs occasioned by --

a) the employment of a judicial officer or of a person competent under the law of the State of destination,

b) the use of a particular method of service.

Article 13

Where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security.

It may not refuse to comply solely on the ground that, under its internal law, it claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not permit the action upon which the application is based.

The Central Authority shall, in case of refusal, promptly inform the applicant and state the reasons for the refusal.

Article 14

Difficulties which may arise in connection with the transmission of judicial documents for service shall be settled through diplomatic channels.

Article 15

Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that -

a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or

b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention, and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

Each Contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this Article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled -

a) the document was transmitted by one of the methods provided for in this Convention,

b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,

c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.

Article 16

When a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled -

a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal, and

b) the defendant has disclosed a prima facie defence to the action on the merits.

An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment.

Each Contracting State may declare that the application will not be entertained if it is filed after the expiration of a time to be stated in the declaration, but which shall in no case be less than one year following the date of the judgment.

This Article shall not apply to judgments concerning status or capacity of persons.

Article 17

Extrajudicial documents emanating from authorities and judicial officers of a Contracting State may be transmitted for the purpose of service in another Contracting State by the methods and under the provisions of the present Convention.

Article 18

Each Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence.

The applicant shall, however, in all cases, have the right to address a request directly to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

Article 19

To the extent that the internal law of a Contracting State permits methods of transmission, other than those provided for in the preceding Articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions.

Article 20

The present Convention shall not prevent an agreement between any two or more Contracting States to dispense with -

a) the necessity for duplicate copies of transmitted documents as required by the second paragraph of Article 3,

b) the language requirements of the third paragraph of Article 5 and Article 7,

c) the provisions of the fourth paragraph of Article 5,

d) the provisions of the second paragraph of Article 12.

Article 21

Each Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the following -

a) the designation of authorities, pursuant to Articles 2 and 18,

b) the designation of the authority competent to complete the certificate pursuant to Article 6,

c) the designation of the authority competent to receive documents transmitted by consular channels, pursuant to Article 9.

Each Contracting State shall similarly inform the Ministry, where appropriate, of -

a) opposition to the use of methods of transmission pursuant to Articles 8 and 10,

b) declarations pursuant to the second paragraph of Article 15 and the third paragraph of Article 16,

c) all modifications of the above designations, oppositions and declarations.

Article 22

Where Parties to the present Convention are also Parties to one or both of the Conventions on civil procedure signed at The Hague on 17th July 1905, and on 1st March 1954, this Convention shall replace as between them Articles 1 to 7 of the earlier Conventions.

Article 23

The present Convention shall not affect the application of Article 23 of the Convention on civil procedure signed at The Hague on 17th July 1905, or of Article 24 of the Convention on civil procedure signed at The Hague on 1st March 1954.

These Articles shall, however, apply only if methods of communication, identical to those provided for in these Conventions, are used.

Article 24

Supplementary agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention, unless the Parties have otherwise agreed.

Article 25

Without prejudice to the provisions of Articles 22 and 24, the present Convention shall not derogate from Conventions containing provisions on the matters governed by this Convention to which the Contracting States are, or shall become, Parties.

Article 26

The present Convention shall be open for signature by the States represented at the Tenth Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 27

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 26.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 28

Any State not represented at the Tenth Session of the Hague Conference on Private International Law may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 27. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for such a State in the absence of any objection from a State, which has ratified the Convention before such deposit, notified to the Ministry of Foreign Affairs of the Netherlands within a period of six months after the date on which the said Ministry has notified it of such accession.

In the absence of any such objection, the Convention shall enter into force for the acceding State on the first day of the month following the expiration of the last of the periods referred to in the preceding paragraph.

Article 29

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification referred to in the preceding paragraph.

Article 30

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 27, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 31

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 26, and to the States which have acceded in accordance with Article 28, of the following -

a) the signatures and ratifications referred to in Article 26;

b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 27;

c) the accessions referred to in Article 28 and the dates on which they take effect;

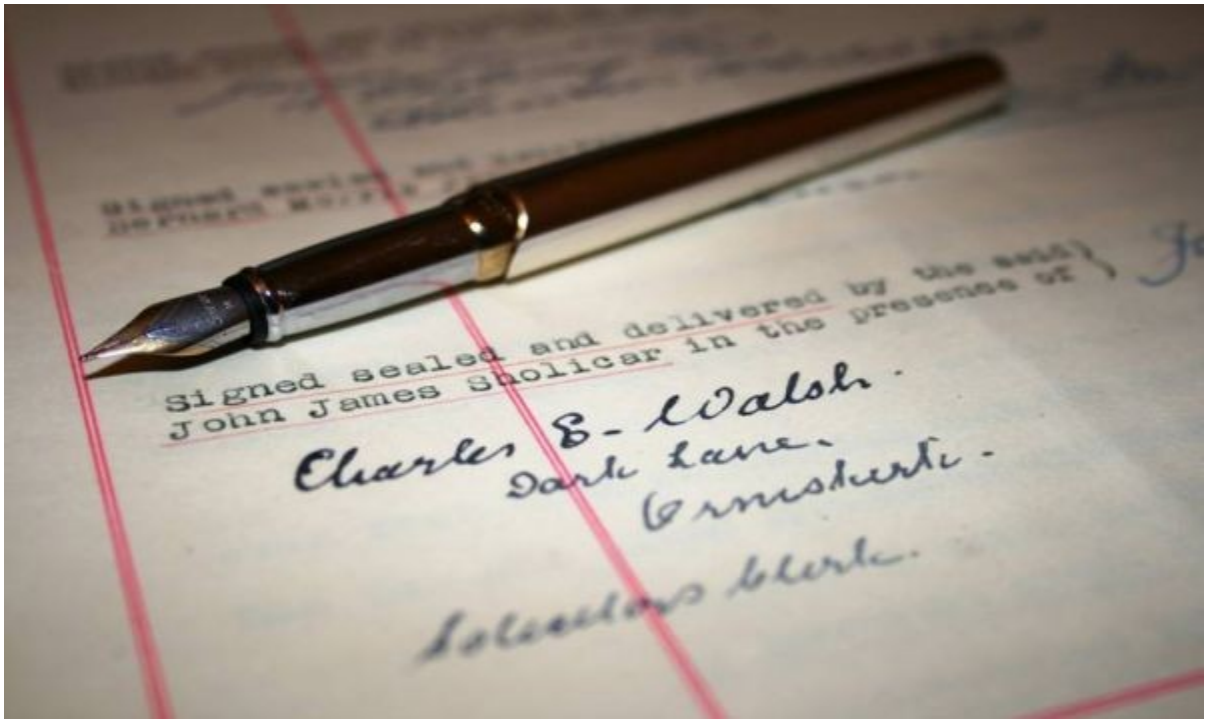
d) the extensions referred to in Article 29 and the dates on which they take effect;

e) the designations, oppositions and declarations referred to in Article 21;

f) the denunciations referred to in the third paragraph of Article 30.

In witness whereof the undersigned, being duly authorised thereto, have signed the present Convention.

Done at The Hague, on the 15th day of November, 1965, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Tenth Session of the Hague Conference on Private International Law.

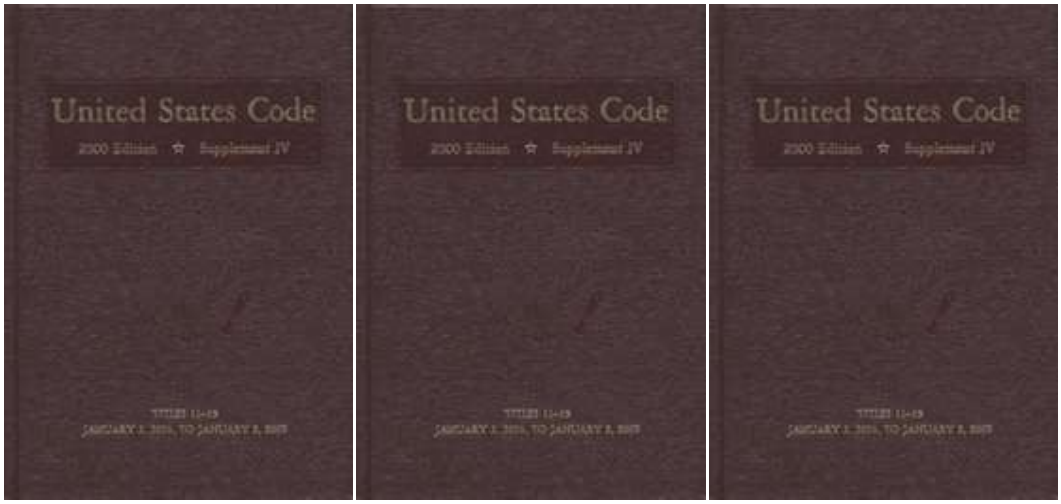


Appendix L

28 United States Code Sec. 278

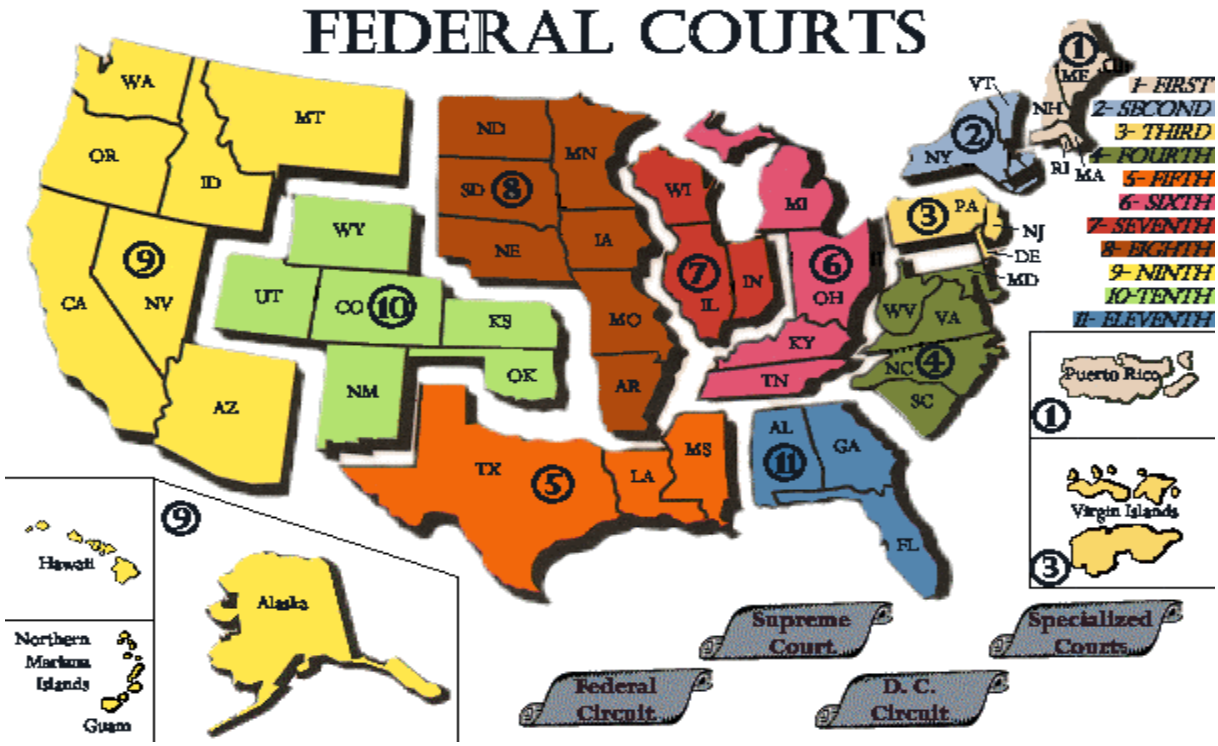
The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person . . . . The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.



Appendix M

Federal Court System of the United States



United States Federal Court System

The most important obligation of the Federal court system in the United States is to protect the rights and liberties guaranteed by the U.S. Constitution.

The overall obligation of the federal courts is to interpret and apply the law without bias or prejudice and resolve disputes. For this reason, the federal courts are sometimes referred to as the "guardians of the Constitution."

NOTE:

> *The courts do not make the laws that they interpret and apply. The Constitution assigns all federal law-making to the U.S. Congress*.

Federal Judges

All federal court judges are appointed to their positions for life, in accord with the language of the U.S. Constitution. The president of the United States, with the approval of the Senate, makes these appointments.

To help ensure impartiality, federal judges can only be removed from office if Congress impeaches and convicts them. And federal judges' pay "shall not be diminished during their Continuance in Office."

The Supreme Court

Created in the U.S. Constitution, the Chief Justice and eight associate justices of the Supreme Court hear and decide appeals involving important questions about the interpretation and application of the Constitution and federal law.

The Circuit Courts of Appeals

Each of the 12 regional circuits has one U.S. court of Appeals that hears appeals of decisions of the district courts (trial courts) located within its circuit, and also appeals of decisions of federal regulatory agencies.

NOTE:

> *The Court of Appeals for the Federal Circuit has nationwide jurisdiction and hears subject-matter specific conflicts, such as patent and international trade cases.*

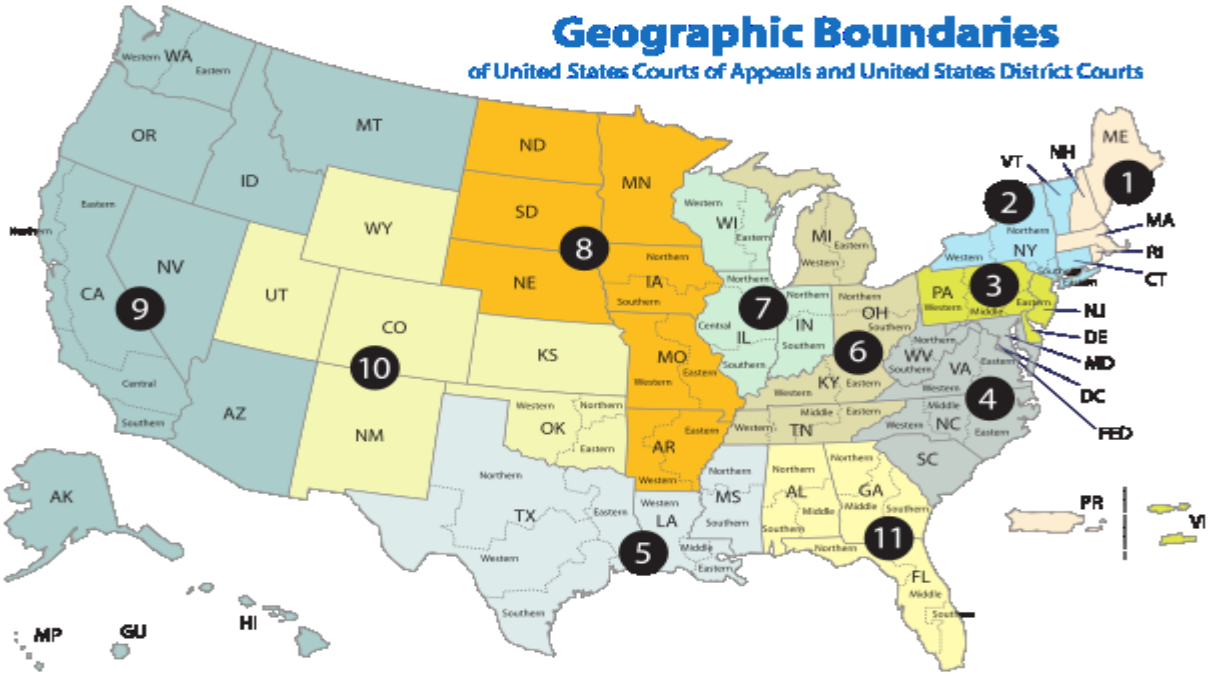
The District Courts

The 94 district courts, located within the 12 regional circuits, are the federal trial courts. These courts hear almost all cases involving federal civil and criminal laws. Decisions are usually appealed to the district's court of appeals.

Specialty Courts

Two specialty courts have nationwide jurisdiction over special types of cases:

- U.S. Court of International Trade - hears cases involving U.S. trade with foreign countries and customs issues
- U.S. Court of Federal Claims - considers claims for monetary damages made against the U.S. government, federal contract disputes and disputed "takings" or claiming of land by the federal government



- 1st Circuit
- 2nd Circuit
- 3rd Circuit
- 4th Circuit
- 5th Circuit
- 6th Circuit
- 7th Circuit
- 8th Circuit
- 9th Circuit
- 10th Circuit
- 11th Circuit
- DC Circuit
- Federal Circuit

GLOSSARY OF INTERNATIONAL ARBITRATION

TERMS AND CONCEPTS

-A-

Action Lines

The telephone complaint processing services, provided by individuals or organizations. Most commonly, action line programs are referred to as "offices of information and complaint" within government agencies, private industries, and the media.

Action to Set Aside

Action aimed at setting aside an Award. Modern arbitration laws permit only limited review of an award by local courts in setting aside actions, and they do not permit any review on the merits. Under French law, the conditions for setting aside an award in international matters are the same as those for refusing its enforcement. Awards set aside in their country of origin (*cf* Seat of Arbitration) cannot be enforced in that country and also may lose the benefit of enforcement under the New York Convention. However, some countries (such as France) allow an Award, which has been set aside in its country of origin, to be enforced in their territory if the conditions for doing so are fulfilled.

Ad hoc Arbitration

Arbitration that is not administered by an arbitral institution (*cf* Institutional Arbitration). The parties do not benefit from any assistance in case of difficulty other than from the courts of the seat of arbitration, who may provide support if they have jurisdiction. Parties to an *ad hoc* arbitration may agree to the use of established arbitration rules, such as UNCITRAL

Arbitration Rules, and may provide for an appointing authority to assist them in the constitution of the arbitral tribunal or the appointment of a sole arbitrator.

Adjudication

The solution to a particular conflict as determined by a judge or administrative hearing officer with the authority to rule on the issue in dispute.

Alternative Dispute Resolution (ADR)

Any procedure involving a neutral that is used as an alternative to trial to resolve one or more issues in controversy. It includes but is not limited to, arbitration, early neutral case evaluation, mini-trial, summary bench trial, summary jury trial, and mediation.

American Arbitration Association - AAA

One of the most well-known arbitration institutions in the United States. The AAA established the International Centre for Dispute Resolution (the ICDR) to administer all of the AAA's international matters. The AAA has numerous sets of rules for dispute resolution in many different fields (commercial, employment, labor union, consumer), including a specific set of rules devoted to international arbitration: the AAA International Arbitration Rules.

Amiable Composition

Power given by the parties to the arbitrators to seek an equitable solution to their dispute, by setting aside, if necessary, the rule of law that would otherwise be applicable, or the strict application of the contract. Using

interchangeable terms, the arbitrator decides "ex æquo et bono", as "amiable compositeur", or "in equity." The only limit to the power of the arbitrator lies in international public policy, a breach of which would constitute a ground for refusing to enforce the award or for setting it aside (*cf* Action to Set Aside).

Answer

A respondent's written reply to a claim.

Appointing Authority

Individual or institution selected by the parties to a dispute or determined by applicable arbitration rules to select the arbitrator(s) who will hear a matter. The appointing authority may select the arbitrator(s) in the first instance or only after the failure of one or more parties to nominate an arbitrator within an established timeframe.

Arbitration

The most traditional form of private dispute resolution. A process where one or more arbitrators issue a judgment (binding or non-binding) on the merits, after an expedited adversarial hearing. The formality varies and may involve presentation of documents and witnesses or simply a summary by counsel. A decision is rendered that addresses liability and damages, if necessary. It can take any of the following forms: binding, non-binding, "baseball" or "final-offer", "bounded" or "high-low", incentive.

Arbitral Case Law / Arbitral Precedent

The body of existing arbitral awards that may be referred to by parties in later disputes seeking a set of legal principles to support the arbitrators'

decision. Prior awards are referred to in relation to both arbitral procedure and substantive law. The vast majority of commercial arbitration awards are unpublished, but excerpts from many awards are published. Public international law arbitral awards (including the majority of awards in investment treaty arbitrations) have, on the other hand, very often been published and are frequently cited by parties in later cases. Unlike certain judgments in common law systems, arbitral case precedent is non-binding and is referred to only in support of arguments.

Arbitral Institution

Organization that manages arbitral procedures, generally taking place under the arbitration rules it issues. Among the leading international arbitral institutions are the ICC / International Chamber of Commerce, AAA / American Arbitration Association (and its international arm, the ICDR / International Centre for Dispute Resolution), CIETAC / China International Economic and Trade Arbitration Commission, HKIAC / Hong Kong International Arbitration Centre, DIAC / Dubai International Arbitration Center, LCIA / London Court of International Arbitration, SIAC / Singapore International Arbitration Centre, SCC / Stockholm Chamber of Commerce, and Swiss Chambers. Some institutions have adopted the UNCITRAL Arbitration Rules (United Nations Commission on International Trade Law), but most have developed their own rules. The institution's role depends on its arbitration rules, but it never has a jurisdictional function. The function of deciding on the merits of a dispute resides with the arbitral tribunal. In addition to the issuance of arbitration rules, the arbitral institution's role consists mainly in assisting the parties in resolving certain procedural difficulties, such as the constitution of the arbitral tribunal, and in supervising the proper conduct of the arbitration proceedings.

Arbitral Tribunal

A collegial body generally consisting of three arbitrators. Usually each party nominates one arbitrator and the two arbitrators then nominate appoint the third, who acts as the chairman of the arbitral tribunal. In some instances, and in particular in multi-party arbitrations, it may be necessary or desirable to have all three arbitrators appointed directly by an arbitral institution or other appointing authority.

Arbitration

Way of resolving disputes whereby the parties withdraw their dispute from the jurisdiction of State courts to submit it to private individuals - the arbitrators - freely nominated by them and charged with the task of resolving the dispute by means of an enforceable decision.

Arbitration Agreement

Agreement in which parties agree that a dispute that has arisen (submission agreement) or that may arise between them in the future (arbitration clause) shall be resolved by arbitration.

Arbitration Institute of the Stockholm Chamber of Commerce (SCC)

Independent body of the Chamber of Commerce of Stockholm devoted to dispute resolution. Its mission is to lend assistance, in accordance with the arbitration rules of the Arbitration Institute of the Stockholm Chamber of Commerce, or other rules that it may adopt in the resolution of domestic or international disputes.

Arbitration Law

Legal system applicable to arbitration in a particular country. It deals in particular with the validity and effects of the arbitration agreement, the functions of the arbitrator, the constitution of the arbitral tribunal, the mandatory procedural rules and actions to set aside the awards and their enforcement. French arbitration law is codified in the Book IV of the Civil Procedure Code and was updated by a Decree No. 2011-48 of 13 January 2011.

Arbitration Rules

Set of provisions that determine the main rules regarding the establishment and conduct of the arbitration, facilitate the constitution of the arbitral tribunal or the appointment of the sole arbitrator and govern the powers and obligations of the arbitrators. They are usually issued by the arbitral institutions and used in arbitration proceedings conducted under their authority. UNCITRAL offers arbitral rules devoted to *ad hoc* arbitrations.

Arbitrator

A person chosen to decide arbitration disputes between parties. Private individual to whom the parties submit a dispute that has already arisen, or which may arise, with a mandate to decide the dispute, and who accepts this mandate. Some national laws require that arbitrators be lawyers when they are deciding matters based on the law. Where more than one arbitrator (usually three arbitrators) together decide a dispute, they act together as an arbitral tribunal. Unless the arbitration agreement provides otherwise, no restriction under French law limits the choice of the arbitrators by the parties except that they must be independent from the parties.

Arbitration Award

An Award is decided by the arbitrator and is issued after the arbitrator files a Notice of Decision with the Court. It is the final judgment if it is not appealed.

Arbitration Case Administrator

The person at FINRA or other institution who handles administrative matters in arbitration proceedings.

Associated Person

An associated person is any person engaged in the investment banking or securities business who is directly or indirectly controlled by a FINRA / Financial Industry Regulatory Authority member, whether or not they are registered or exempt from registration with FINRA. An associated person includes, but is not limited to, every sole proprietor, partner, officer, director, or branch manager of any FINRA member. This individual may also be referred to as a "broker."

Award

A written document provided by the arbitrator(s) stating the disposition of the case. Written decision of the arbitral tribunal or sole arbitrator that finally settles the dispute, in whole or in part, whether on the merits, on jurisdiction or on any other procedural issue that may lead to the end of all or a portion of the proceedings. The award is not subject to appeal but may be subject to an action to set aside.

Award by Consent

The arbitrators record a settlement entered into by the parties. It has the authority and effect of an arbitral award.

-B-

Baseball Arbitration

Used increasingly in commercial disputes, each party submits a proposed monetary Award to the arbitrator. At the conclusion of the hearing, the arbitrator chooses one Award without modification. This approach imposes limits on the arbitrator's discretion and gives each party an incentive to offer a reasonable proposal, in the hope that it will be accepted by the decision-maker. A related variation, referred to as "night baseball" arbitration, requires the arbitrator to make a decision without the benefit of the parties' proposals, and then to make the Award to the party whose proposal is closest to that of the arbitrator.

Binding Arbitration

A private adversarial process in which the disputing parties choose a neutral person or a panel of three neutrals to hear their dispute and to render a final and binding decision or Award. The process is less formal than litigation; the parties can craft their own procedures and determine if any formal rules of evidence will apply. Unless there has been fraud or some other defect in the arbitration procedure, binding arbitration Awards typically are enforceable by courts and not subject to appellate review. In order for the government to use binding arbitration, it must follow special procedures set forth in the Administrative Dispute Resolution Act, 5 U.S.C. sec.s 571-584.

Bounded Arbitration

The parties agree privately, without informing the arbitrator, that the arbitrator's final award will be adjusted to a bounded range.

Example: P wants $200,000. D is willing to pay $70,000. Their high-low agreement would provide that if the award is below $70,000, D will pay at least $70,000; if the award exceeds $200,000, the payment will be reduced to $200,000. If the award is within the range, the parties are bound by the figure in the award.

Broker

See, "Associated Person."

Brokerage firm

See, "Member Firm."

-C-

Certificate of Compulsory Arbitration

This statement is filed with the Clerk of the Court at the time of filing the original complaint, or the answer to the complaint. It includes a statement of whether or not the case is subject to arbitration.

China International Economic and Trade Arbitration Commission / CIETAC

Formerly known as the Foreign Trade Arbitration Commission, CIETAC is the most important international arbitration institution in China. It was established in April 1956 under the China Council for the Promotion of

International Trade (CCPIT). Headquarted in Beijing, CIETAC has sub-commissions in Shanghai, Shenzhen, and Tianjin. CIETAC has its own set of arbitration rules.

CIRDI

See, International Centre for Settlement of Investment Disputes.

Claim

An allegation or request for monetary or other relief.

Claimant

A party that initiates an arbitration or mediation for monetary or other relief.

CNUDCI

See, UNCITRAL.

Co-Med-Arb

In co-med-arb two different people perform the roles of mediator and arbitrator. Jointly, they preside over an information exchange between the parties, after which the mediator works with the parties in the absence of the arbitrator. If mediation fails to achieve a settlement, the case (or any unresolved issues) can be submitted to the arbitrator for a binding decision. The process addresses a problem that may occur in med-arb, in which a party may not believe that the arbitrator will be able to discount unfavorable information learned in mediation when making the arbitration decision.

Competence - Competence

Generally accepted principle according to which the arbitrators have jurisdiction to decide on their own jurisdiction when a party to the arbitral proceedings challenges it, without having to suspend the proceedings until a State court determines whether the dispute it to be arbitrated. In its "negative" sense, acknowledged by some national laws only, especially in France, competence-competence further means that the jurisdiction of the arbitrators to decide on their own jurisdiction is exclusive of the jurisdiction of the State court, which, when faced with an arbitral agreement, does not have any jurisdiction either to decide the dispute or to decide on the validity of the agreement unless it is *prima facie* null and void and cannot be applied. This does not mean that the State court is prevented from ever assessing the validity or the subject matter of the arbitration agreement. But this assessment is postponed until the review of the Award in connection with either its enforcement or an action to set it aside.

Conciliation

Conciliation involves building a positive relationship between parties to a dispute. Often used interchangeably with mediation, as a method of dispute settlement whereby parties clarify issues and narrow differences through the aid of a neutral facilitator.

Confidential Listener

The parties submit their confidential settlement positions to a third-party neutral, who, without relaying one side's confidential offer to the other, informs them whether their positions are within a negotiable range. The parties may agree that if the proposed settlement figures overlap, with the plaintiff citing a lower figure, they will settle at a level that splits the difference. If the proposed figures are within a specified range of each

other (for example, 10 percent), the parties may direct the neutral to so inform them and help them negotiate to narrow the gap. And if the submitted numbers are not within the set range, the parties can repeat the process.

Court-Annexed Arbitration

An adjudicatory dispute-resolution process in which one or more arbitrators issue a non-binding judgment on the merits, after an expedited, adversarial hearing. The arbitrator's decision addresses only the disputed legal issues and applies legal standards. Either party may reject the non-binding ruling and proceed to trial.

Counsel

An attorney or representative who advises and represents a party in an arbitration.

Counterclaim

A claim filed by a respondent against the claimant.

Cross-claim

A claim filed by a respondent against another already-named respondent.

Customer Code

The Code of Arbitration Procedure for Customer Disputes is the set of rules that governs disputes involving customers.

-D-

Dispute

A disagreement between or controversy involving two or more parties, which may consist of one or more claims.

-E-

Early Neutral Case Evaluation

A conference where the parties (and their counsel) present the factual and legal bases of their cases. They then receive a non-binding assessment of the case from an experienced neutral with subject-matter expertise and/or with significant trial experience in the jurisdiction. If the parties would like to settle the matter, this assessment can be the springboard for settlement discussions facilitated by the evaluator. This process can eliminate formal discovery procedures, which are expensive, time-consuming, and potentially embarrassing. Early neutral evaluation is appropriate when the dispute centers around technical or factual issues, or there is a significant gap between the parties regarding how they see the value of their cases, and the decision makers need to be enlightened about the real strengths and weaknesses of their cases.

Enforcement

Arbitral awards are generally subject to immediate enforcement by the losing parties, dating from the time of notification. In the alternative, they may be subject to legal enforcement once they are declared enforceable (via exequatur proceedings or other locally applicable procedures) by a judicial decision rendered in the country where enforcement is sought.

Equity

See, Amiable Composition

Ex æquo et bono

See, Amiable Composition.

Exequatur

Procedure through which the State courts make an arbitral Award enforceable in the territory of that State. State Parties who are signatories to the New York Convention promise not to refuse the enforcement of awards issued by tribunals constituted in other States Parties (called "foreign Awards") unless it is established that they do not comply with certain conditions (which should not be stricter than those provided by the Convention). Under French law, which is more liberal than the Convention, the *exequatur* of foreign awards can be refused only on the following five grounds: The arbitrator has issues a decision in the absence of an arbitration agreement, or on the basis of a void/expired agreement; There was an irregularity in the constitution of the arbitral tribunal or in the appointment of the sole arbitrator; The arbitrator's decision does not conform to the terms of his reference; The principle of due process has not been complied with; or, The recognition or enforcement of the award would be contrary to international public policy. Awards issued in France in international matters (*cf* International Arbitration) may be set aside (*cf* Actions to Set Aside) for these same grounds.

-F-

Fact-Finding

Fact-finding is a component of most alternative dispute resolution ("ADR") procedures, and takes any number of forms. Through this process, facts relevant to a controversy are determined. It can be an investigation of a dispute by an impartial third person who examines the issues and facts in the case. This person then issues a report and recommends settlement terms.

In neutral fact-finding, the parties appoint a neutral third party to perform the function, and typically determine in advance whether the results of the fact-finding will be conclusive, or advisory only.

With expert fact-finding, the parties privately employ neutrals to render expert opinions that are conclusive or nonbinding on technical, scientific or legal questions. In joint fact-finding, the parties designate representatives to work together to develop responses to factual questions.

Final Offer Arbitration

See, Baseball Arbitration.

Filing

A party submits to an institution a statement of claim, which explains the nature of the dispute, and other accompanying documentation to initiate an arbitration.

-G-

-H-

High-Low

See, Bounded Arbitration.

Hearing

A hearing is a meeting of the parties and arbitrators in which the parties present facts and evidence and the arbitrators listen to these presentations to resolve the disputes (sometimes called "hearing on the merits").

Hearing Session

Any meeting between the parties and arbitrator(s) of four hours or less, including a hearing or a prehearing conference.

Hong Kong International Arbitration Centre - HKIAC

Established in Hong Kong in 1985, the HKIAC is among the leading arbitral institutions in Asia. For many years, the HKIAC acted as an appointing authority and administering body for arbitrations under the UNCITRAL Arbitration Rules. While it still performs that function, the HKIAC issues its own Honk Kong International Arbitration Centre Administered Arbitration Rules in 2008.

-I-

IBA Rules on the Taking of Evidence in International Arbitration

Rules issued by the International Bar Association aimed at organizing the presentation of evidence in international commercial arbitration, especially

between parties belonging to different legal systems. The IBA Rules were updated and re-issued by the International Bar Association in 2010.

ICC

See, International Chamber of Commerce.

ICSID

See, International Centre for Settlement of Investment Disputes.

Incentive Arbitration

In non-binding arbitration, the parties agree to a penalty if one of them rejects the arbitrator's decision, resorts to litigation, and fails to improve his position by some specified percentage or formula. Penalties may include payment of attorneys' fees incurred in the litigation.

Independence and Impartiality

Essential characteristics of all arbitrators at all relevant times. The absence of independence and impartiality may lead to a challenge of the arbitrators, the setting aside of the Award (*cf* Action to Set Aside), or a refusal to enforce the Award. Under French law, "the existence of material or intellectual links, a situation which is liable to affect the judgment of the arbitrator by creating a definite risk of bias in favor of a party to the arbitration" establishes a lack of independence. Arbitrators display a lack of impartiality through lack of independence (especially towards one party); through the arbitrator's previous knowledge of the case, which may have led him to take a prior position that could be prejudicial to one of the parties; or it may be evidenced by the arbitrator's behavior during the proceedings (displaying as bias in favor of one party). Some arbitration

rules require the arbitrators to provide the parties with a Statement of Independence, to allow a possible challenge before the proceedings begin, disclosing facts or circumstances that might call into question the arbitrator's independence.

Industry Code

The Code of Arbitration Procedure for Industry Disputes is the set of rules that governs disputes involving securities industry members.

Interest-Based Problem-Solving

A technique that resolves conflicts while improving the parties' relationship.

Institutional Arbitration

Arbitration that proceeds under the supervision of an arbitral institution (*cf*. *ad hoc* arbitration).

International Arbitration

The concept of international arbitration varies from country to country. Each country's local arbitration law treats international arbitration differently from domestic arbitration. Under French law, Article 1504 of the Code of Civil Procedure states that: "an arbitration is international when it involves the interests of international trade[.]" So, apart from external criteria such as nationality, the parties' domicile or headquarters, the seat of the arbitral institution, the place of arbitration, or the law applicable to the merits, the arbitration is "international" under French law if it deals with an economic transaction involving a transfer of goods or services, or even a cross-border payment.

International Centre for Settlement of Investment Disputes (ICSID)

Arbitral institution established under the authority of the World Bank by the Washington Convention of 18 March 1965 ("Convention for the Settlement of Investment Disputes between States and Nationals of other States"). ICSID offers arbitration and conciliation to resolve investment disputes between contracting States and nationals of other contracting States.

International Chamber of Commerce - ICC

Institution founded as a not-for-profit organization under French law in 1919. It focuses on fostering the development of world trade. It offers parties one of the premiere international arbitral institutions, the ICC International Court of Arbitration.

International Chamber of Commerce (ICC) International Court of Arbitration

Arbitral institution established in 1923 as part of the ICC and headquartered in Paris. It focuses on supervising international dispute resolution by the application of the ICC's Rules of Arbitration. It appoints the arbitrators and confirms those nominated by the parties. It reviews draft awards before they are issued.

International Public Policy

Set of rules or principles applicable either to the merits of a dispute or to the arbitral proceeding, which should be mirrored in the law of a particular State. Failure to comply with one of these rules could be grounds for setting aside the award or refusing its enforcement.

Investment Arbitration or Investment Treaty Arbitration

Arbitration between a State and a private party from another State relating to the treatment of the private party's investment. The jurisdiction of the arbitral tribunal arises from a treaty (a bilateral investment treaty, or "BIT") or provisions of a multilateral convention (often a regional free-trade agreement, such as the NAFTA, or the Energy Charter Treaty, or "ECT") addressing the promotion and protection of investment. Investment arbitrations can be conducted pursuant to the ICSID Convention (*cf,* ICSID), as institutional arbitrations supervised by other arbitral institutions, or as *ad hoc* arbitrations.

Investor

A person or entity (not acting in the capacity of an associated person or member) that transacts business with any member firm and/or associated person.

-J-

-K-

-L-

Language of the Arbitration

Language used in the parties' written and oral submissions, in the procedural orders and in the award(s) issued by the arbitrators. It is chosen based on joint agreement of the parties, usually in the arbitration clause, or is otherwise decided by the arbitral tribunal. It is possible to

foresee an arbitration in several languages, for example, with each party expressing itself orally in its own language, while the procedural orders and the Award are drafted in only one language. The written submissions and the Award may be drafted in two different languages, for example.

Last-Offer Arbitration (Baseball)

Parties negotiate to the point of impasse, then respectively submit a final offer to the arbitrator. The arbitrator's sole responsibility is to select one offer or the other.

LCIA - London Court of International Arbitration

London-based arbitral institution. It is the most important arbitration institution in England for international disputes.

Lex Mercatoria

International trade usages and general principles of law developed by arbitral awards, resulting from the convergence of national laws, or stated by public or private international organizations. Parties submitting their disputes to arbitration may direct the arbitrators to apply a national law or may submit their dispute for resolution under the *lex mercatoria* alone.

-M-

Mediation

The intervention into a dispute of an acceptable, impartial and neutral third party who has no decision-making authority. The objective of this intervention is to assist the parties in voluntarily reaching an acceptable resolution of issues in dispute.

Meditation-Arbitration

This variation of arbitration is useful in narrowing issues more quickly than under arbitration alone, and helps parties focus their resources on the truly difficult issues in the dispute. In med-arb, an impartial third party is authorized by the disputing parties to mediate their dispute until they reach impasse. When impasse occurs, the third party is authorized by the parties to issue a binding opinion on the cause of the impasse or the remaining issue(s) in dispute. In some cases, "med-arb" utilizes two outside parties: one to mediate the dispute, and another to arbitrate any remaining issues after the mediation process is completed. This addresses some parties' concerns that the process, if handled by a single neutral, mixes and confuses procedural assistance (a characteristic of mediation) with binding decision making (a characteristic of arbitration). The concern is that parties might be less likely to disclose necessary information for a settlement or are more likely to present extreme arguments during the mediation stage if they know that the same third party will ultimately make a decision on the dispute in the arbitration phase.

Mediator

A mediator assists the parties toward their own resolution in a mediation. Mediators do not issue decisions.

Member Firm

A member firm is a brokerage firm that has been admitted to membership in FINRA (Financial Industry Regulatory Authority), whether or not the membership has been terminated or cancelled. A brokerage firm may be a partnership, corporation or other legal entity.

Mini-Trial

A non-binding hearing procedure in which each party informally presents a shortened form of its case to settlement-authorized representatives of the parties. This is done in front of a presiding judge, magistrate judge, or other neutral. At the conclusion of the mini-trial, the representatives meet (with or without the judge or neutral) to negotiate a settlement. The mini-trial process is generally reserved for complex cases.

Multi-Door Courthouse or Multi-Option ADR

This refers to courts that offer various dispute resolution options or screen cases and then channel them to particular ADR methods, including arbitration.

Multi-Step ADR

Parties may agree, either when a specific dispute arises, or earlier in a contract clause, to engage in a progressive series of dispute resolution procedures. This includes some form of negotiation, preferably face-to-face between the parties. If unsuccessful, a second tier of negotiation between higher levels of executives may resolve the matter. The next step may be mediation or another facilitated settlement effort. If no resolution has been reached at any of the earlier stages, the agreement can provide for a binding resolution through arbitration (or other dispute resoultion method).

Multiparty Arbitration

Arbitration involving more than two parties. Multiparty arbitration can create procedural complications that need to be considered during the drafting of an arbitration clause or during the conduct of an arbitral proceeding. Multiparty arbitration does not pose significant problems when the parties consist of two, clearly-defined groups having common interests and a

common procedural position (claimant or respondent), with each side being able to nominate an arbitrator. When this is not the case, difficulties can arise with respect to the constitution of the arbitral tribunal.

According to a decision of the French Cour de Cassation, each party has, in principle, the right to nominate an arbitrator. Many institutional arbitration rules take this into account by requiring the arbitral institution to appoint all members of the tribunal if the parties have been unable to agree to an alternative procedure.

-N-

Negotiation

A process by which disputants try to resolve their conflicts by communicating their differences to one another through discussions and compromise.

New York Convention

The "Convention on the Recognition and Enforcement of Foreign Arbitral Awards," issued in 1958 by an international conference under the aegis of the United Nations, focuses on facilitating the enforcement of arbitral awards. It is one of the most important tools of international arbitration because it facilitates the international movement of awards. The States Parties promise to recognize and enforce foreign arbitral awards issued in another State Party (unless the defendant in the enforcement action can establish the existence of one of the limited grounds established under the Convention for refusing to enforce the award). The Convention prohibits the enforcement court from reviewing the merits of the dispute.

Non-Binding Arbitration

In this arbitration process, the neutral's decision is advisory only. The parties my agree in advance to use the advisory decision as a tool in resolving their dispute through negotiation or other means.

Notice of Strike

Any party may file this notice to request a different arbitrator. A Notice to Strike generally must be filed within 10 days of an arbitrator being appointed.

-O-

-P-

Panel

A panel is the arbitration panel, whether it consists of one or more arbitrators.

Partnering

Partnering in the contract setting typically involves an initial partnering workshop after the contract award and before the work begins. The purpose of the workshop is to develop a team approach to the project. This generally results in a partnership agreement that includes dispute prevention and dispute resolution procedures, such as arbitration agreements. Used to improve a variety of working relationships, primarily between the Federal Government and contractors, by seeking to prevent disputes before they occur.

Party

A person or member firm making or responding to a claim in an arbitration proceeding.

Pathological Clause

An arbitration clause or arbitration agreement whose defective drafting does not allow the constitution of an arbitral tribunal or the appointment of a sole arbitrator without the intervention, not anticipated by the parties, of the "supporting" judge, or even renders it impossible to establish arbitral jurisdiction. In this last situation, the arbitration agreement is null and void or cannot be applied, and the courts regain jurisdiction to settle the dispute.

Peer Review

A problem-solving process where an employee takes a dispute to a group or panel of fellow employees and managers for a decision. The decision may or may not be binding on the employee and/or the employer, depending on the conditions of the particular process. If it is not binding on the employee, he or she would be able to seek relief in traditional forums for dispute resolution.

Place of Arbitration

See, Seat of Arbitration.

Pleadings

A pleading is a statement describing a party's causes of action or defenses. Documents that are considered pleadings are: statement of claim, answer, counterclaim, cross-claim, third-party claim, and any replies.

Pre-Dispute ADR Contract Clause

A clause included in the parties' agreement to specify a method for resolving disputes that may arise under that agreement, and might even name the arbitrator in the case.

Private Judges / Rent-a-Judge

Retired judges are used to hear cases that would have been taken to civil litigation in a traditional court setting. The parties agree in advance to accept the decision as if it were a decision of a sitting judge. Advantages are speed, privacy, and the ability to select judges with expertise in the disputed subject matter.

Prehearing Conference

A prehearing conference is any hearing session, including an initial prehearing conference, that takes place before the arbitration hearing on the merits begins.

Procedural Law

The set of rules applicable to the conduct of the arbitral proceedings. It is determined by the parties, directly or indirectly, by reference to arbitration rules, or by the arbitral tribunal without reference to a national law (not to be confused with either substantive law or arbitration law).

Provisional and Conservatory Measures

Measures devoted to preserving a situation of fact or of law, to preserving evidence, or ensuring that the ultimate award in a case will be capable of enforcement. Decisions on provisional or conservatory measures do not involve any prejudgment of the decision on the merits. Depending on the

exact circumstances, the local arbitration law of the seat, and the applicable arbitration rules, these measures in principle may be decided both by a judge (*cf* Supporting Judge) and the arbitral tribunal.

-Q-

-R-

Respondent

A respondent is a party against whom a statement of claim or third party claim has been filed. A claimant against whom a counterclaim has been filed is not a respondent.

Request for Arbitration

The initial claim or writ filed by the claimant that starts the arbitral proceedings. Its form and content vary according to the applicable law, the provisions of the arbitration rules agreed by the parties, and the provisions of the arbitration clause.

-S-

Seat of Arbitration

The legal situs of the arbitration proceedings, linking the arbitration procedure and the award to a particular, national legal system. The arbitration award is thus deemed rendered at the seat of the arbitration.

The seat of arbitration is determined by the parties, usually in the arbitration agreement or, in the absence of party agreement, by the arbitral institution or the arbitration tribunal. The choice of the seat of arbitration involves important legal consequences. Among other things, the choice of the seat will determine whether national courts will support or interfere with the arbitral process, will determine whether the benefits of enforcement under the New York Convention will be available, and will determine the competent courts to hear any action to set aside the arbitral award.

Service

The act of delivering the statement of claim or other pleadings to the parties named in the arbitration.

SIAC - Singapore International Arbitration Centre

The Singapore International Arbitration Centre. SIAC was established in 1991 and is considered one of the leading arbitral institutions in Asia. SIAC-administered arbitrations may apply the UNCITRAL Rules of Arbitration or SIAC's own arbitration rules, which were revised in 2010.

Sole Arbitrator

A single individual (as opposed to an arbitral tribunal) to whom a dispute is submitted for resolution by arbitration. The arbitrator can be nominated by joint agreement of the parties, by the institution that the parties have identified in the arbitration agreement, by an "appointing authority," or by the "supporting judge."

Stakeholders

All the individuals, organizations, businesses, and institutions with standing that will be affected by decisions related to an issue in controversy.

Statement of Claim

A statement of claim sets forth the essence of the dispute, filed by the party or parties initiating the arbitration.

Statutory Employment Discrimination Claim

A claim alleging employment discrimination (including a sexual harassment claims) in violation of a statute. If the parties to the dispute agree, the claim may be arbitrated at FINRA.

Statement of Independence

See, Independence and Impartiality.

Subpoena

An order for a witness to appear at a particular time and place to testify. A subpoena for production of documents in the control of the witness is called a "subpoena *duces tecum*."

Substantive Law

Rules and principles of law applicable to the resolution of a dispute on its merits. Their origin may be State law (national law), public international law, or privately determined law (such as via a contractual agreement to apply *lex mercatoria*). When the substantive applicable law has not been

chosen by the parties, the arbitrators apply the substantive law they deem appropriate, taking into account the reasonable expectations of the parties. An important distinction must be made between substantive law and procedural law.

Supporting Judge

The judge who intervenes to lend support to an arbitration by resolving procedural difficulties, especially during the constitution of the arbitral tribunal (in connection with the appointment or challenge of an arbitrator), in evidentiary matters, or to grant provisional and conservatory measures.

Swiss Chambers' Court of Arbitration and Mediation ("Swiss Chambers")

Swiss Chambers offer arbitration in accordance with the Swiss Rules of International Arbitration. Arbitrations under the Swiss Rules can be seated anywhere in the world. The Swiss Chambers Commercial Mediation services, applying the Swiss Rules of Commercial Mediation.

-T-

Terms of Reference

The terms of reference are a characteristic of ICC arbitration (and other institutional arbitration). Under the ICC arbitration rules, it is prepared by the arbitral tribunal and includes at a minimum: the parties' and arbitrators' names and addresses, a summary of the parties' respective claims, the main rules applicable to the proceedings, the place of arbitration, and, if appropriate, a list of issues to be resolved. It is signed by the parties, unless one of them refuses to sign, in which case it is submitted for approved by the ICC International Court of Arbitration. The main purpose of terms of reference is to define the dispute clearly, such that the parties

are not to present new claims beyond the limits of the terms of reference without the authorization of the arbitrators.

Third-Party Claim

A claim by the respondent against a party not already named in the statement of claim or any other previous pleading.

Trial de Novo

New trial. It is an appeal of an arbitration award. The issues are considered as if the original arbitration has never taken place.

-U-

UNCITRAL

The United Nations Commission on International Trade Law. This is the principal legal organ of the United Nations in the field of international commercial law. UNCITRAL is empowered by the General Assembly to promote the progress of international commercial law's harmonization and unification. UNCITRAL has created several arbitration instruments (including arbitration rules applicable to *ad hoc* arbitrations). UNCITRAL rules are used by arbitral institutions. Its model law on international commercial arbitration has been totally or partially adopted by numerous States in their domestic laws.

Unspecified Damages

"Unspecified Damages" is a type of relief a party requests when the amount of monetary relief or the form of other relief is unknown or undisclosed.

-v-

-w-

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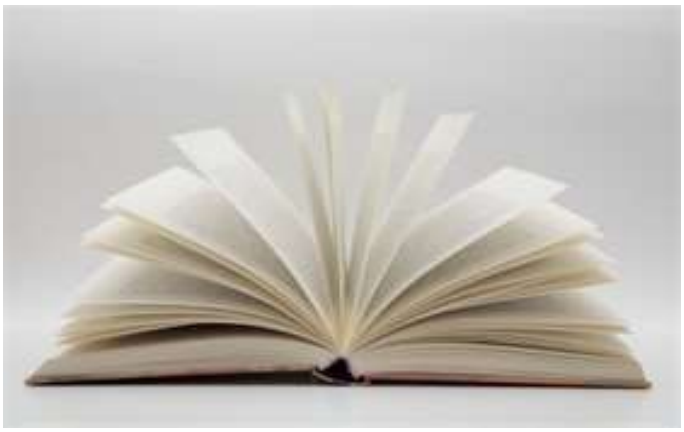

(818) 802-1709 cell/text (USA)

Lisa Miller's Guidebook

Resolution of International Business Disputes

in Expanding Post-Communist Economies

(Arbitration Emphasis)

Professor Lisa Miller

(818) 802-1709 (USA) cell/text / Protem@LMillerconsulting.com

Syllabus

Unless otherwise noted, all homework reading assignments refer to the designated e-text for this class, "Lisa Miller's Guidebook." If you are having trouble accessing the e-text, please notify the dean.

Students will be assessed based on their mastery of the subject matter, participation in class discussions, oral presentations, and the final examination exercise. Final grades will be on a Pass/Fail scale.

At the end of the course students should be able to:

- Understand and explain resolution processes for international business disputes through international arbitration;
- Work with and understand information on the legal aspects of resolution of international business disputes;
- Create resolution plans for resolving international business conflicts through international arbitration processes; and
- Make reasoned decisions about approaches to resolution of business disputes in the international arena.

Class meeting #1

Chapter I

Chapter II

Chapter III

Class meeting #2

Chapter IV

Chapter V

Chapter VI

Chapter VII

Class meeting #3

Chapter VIII

Chapter IX

Chapter X

Chapter XI

Class meeting #4

Chapter XII

Chapter XIII

Chapter XIV

Class meeting #5

Wrap-up / review

Coffee and cake

Class meeting #6

Final oral group presentations

Final examination exercise

I am looking forward to a great class!