International Arbitration: The ADR Technique

Of Choice By International Business

FDCC Annual Meeting
Williamsburg, Virginia
July 29, 2011

Prepared by:

Carlos F. Concepcion
cconcepcion@cfclaw.com

Scott A. Burr
sburr@cfclaw.com

255 Aragon Avenue, 2nd Floor
Coral Gables, Florida 33134
Tel: (305) 444-6669

Moderator: Carlos F. Concepcion
CONCEPCION MARTINEZ & BELLIDO
255 Aragon Avenue, 2nd Floor
Coral Gables, Florida 33134
E-mail: cconcepcion@cfclaw.com

Panel Members: David Bertschi
Bertschi Orth Smith LLP/s.r.l.
Lawyers/Avocat(e)s
1410 Blair Place, Suite 400
Ottawa,ON, K1J 9B9
E-mail: Dbertschi@boslaw.ca

Colin Croly
London, United Kingdom
E-mail: colincroly@btinternet.com

Christian Lang
PRAGER DREIFUSS
Prager Dreifuss AG
Mühlebachstrasse 6, CH-8008 Zürich
E-mail: Christian.Lang@prager-dreifuss.com

C. Ryan Reetz
DLA Piper LLP (US)
200 South Biscayne Boulevard, Suite 2300
Miami, Florida 33131-5341
ryan.reetz@dlapiper.com

I. INTRODUCTION

With the rapid growth and expansion of the world financial and business communities, it is increasingly important for businesses to have an established method of resolving business disputes quickly, efficiently and constructively. When disputes arise in the course of business, parties often prefer to settle them privately and informally, in a businesslike fashion that will enable them to maintain their business relationship.

It is not suprising, therefore, that the use of international arbitration to resolve cross-border disputes has received massive backing from international businesses, wary of the alternative of seeking redress in the national courts. A major survey of nearly 150 in-house counsel worldwide reveals that 73% of corporations prefer international arbitration over transnational litigation.[1] The top reasons given by in-house lawyers for choosing international arbitration are: flexibility of procedure, enforceability of awards, privacy, and the opportunity to choose arbitrators to suit the case/dispute.[2] These far outweigh the most commonly cited disadvantages of this method of dispute resolution – inevitable expense and the occasional difficulties of binding parties into an arbitration process at the outset.[3]

This same study of corporate attitudes and perceptions showed that 95% of corporations expect to continue using international arbitration to help resolve their cross-border disputes.[4] Corporations seek to retain specialized counsel with the knowledge, tools and tactics to conduct international arbitration proceedings to resolve their cross-border disputes effectively, and thereby manage a key investment risk.[5]

With this in mind, this paper provides an overview of the international arbitration process for the aspiring and the seasoned practitioner, from an international arbitration's commencement to the enforcement of an arbitration award. It is not intended to be a comprehensive exposition, however, but simply the fundamental aspects of this emerging alternative dispute resolution process.[6]

---

[1] Price Waterhouse Coopers & Queen Mary University of London School of International Arbitration, "International Arbitration: Corporate Attitudes and Practices 2006," 2 (2006).

[2] *Id*. at 5-6.

[3] *Id*. at 6.

[4] *Id*. at 22.

[5] *Id*. at 18.

[6] For detailed treatises, *see* Joseph Lookofsky & Ketilbjørn Hertz, Transnational Litigation and Commercial Arbitration: An Analysis of American, European and International Law (Juris, 3rd ed. 2011); Gary B. Born, International Commercial Arbitration (Kluwer 2009); Nigel Blackaby, Constantine Partasides, Alan Redfern & J. Martin H. Hunter, Redfern and Hunter on International Arbitration (Oxford Univ. Press 2009).

II. KINDS OF DISPUTES SUBJECT TO ARBITRATION

Generally speaking, there is a two-step process to determine if a controversy is arbitrable: first, parties should specify in an arbitration agreement or in an arbitration clause of a contract whether disputes will be subject to arbitration; second, the parties should consider that the law of the country in which the arbitration takes place may prohibit arbitration for certain types of disputes. Arbitration for commercial matters, however, is normally encouraged.

The types of disputes that are considered arbitrable varies among countries. In the United States, courts have strongly favored arbitration in the resolution of international business disputes.[7] They have held that almost all civil disputes can be arbitrated and have denied arbitration only where Congress has expressly stated that the provisions of a specific law can be enforced only in the courts.[8]

III. DRAFTING THE ARBITRATION AGREEMENT

As with arbitration generally, international arbitration is a creature of contract, *i.e.*, the parties' decision to submit disputes to binding resolution by one or more arbitrators selected by or on behalf of the parties and applying adjudicatory procedures, usually by including a provision for the arbitration of future disputes in their contract.[9] Parties also may consent to submit a dispute arising under a contract to arbitration after the dispute has arisen by concluding a separate arbitration agreement *ex post facto*. Usually, however, parties will agree in advance to the resolution by arbitration of all disputes arising out of or in connection with a particular contract by the incorporation of an arbitration clause in the contract itself.

The optimal way for parties to ensure a successful arbitration is to draft an appropriate arbitration clause that specifically meets their needs. The lack of attention to the negotiation of a suitable international arbitration clause can leave a corporation adversely exposed should a dispute arise. Conversely, by ensuring the inclusion of a well-crafted clause, it may be possible to include advantageous terms should the dispute end up in arbitration proceedings (such as the choice of seat and the selection of arbitrators). Although a model clause may be used in standardized contracts, in complex international transactions the parties should tailor the arbitral provision to the needs of the specific contract.

---

[7] *See generally* Federal Arbitration Act, 9 U.S.C. §§ 3, 4, 10; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *David L. Threlkeld & Co. v. Metallgesellschaft Ltd.*, 923 F.2d 245, 248 (2d Cir. 1991) (stating that "[t]he policy in favor of arbitration is even stronger in the context of international business transactions").

[8] *See, e.g., Wilko v. Swan*, 346 U.S. 427, 438, 74 S.Ct. 182, 188, 98 L.Ed. 168 (1953) (holding that an agreement for arbitration of issues arising under the Securities Act of 1933 is invalid and not enforceable against an investor).

[9] Gary B. Born, International Commercial Arbitration, 187, 197, 217 (2009); Julian M. Lew, Loukas A. Mistelis & Stefan M. Kröll, Comparative International Commercial Arbitration 1-10 to 1-11, 6-1 to 6-6 (2003).

The following elements should be considered for inclusion in any arbitration agreement:

- type of arbitration - administered or *ad hoc*;
- what rules should govern the arbitration;
- the number of arbitrators;
- the seat of arbitration;
- language of the arbitration;
- consolidation of related disputes and joinder of parties; and
- whether to provide for "first tier" methods of dispute resolution such as negotiation, mediation, expert determination, adjudication and dispute resolution boards.

A related and important issue is the choice of governing law for the contract and the allocation of costs.

A. Administered or *Ad hoc* Arbitration

An arbitration clause may provide for either administered (also referred to as institutional) arbitration or *ad hoc* arbitration. Most corporations opt for institutional arbitration because of their reputation for managing arbitration.[10]

1. Administered Arbitration

Administered arbitration refers to arbitration which is administered by an institution such as the International Court of Arbitration of the International Chamber of Commerce (ICC), the LCIA (formerly the London Court of International Arbitration), the American Arbitration Association (AAA) and its international division the International Centre for Dispute Resolution (ICDR), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), and the World Intellectual Property Organization ("WIPO").

While these institutions are discussed below, there are many other regional institutions, including: the Inter-American Commercial Arbitration Commission (IACAC), the Singapore International Arbitration Centre (SIAC), the German Institution of Arbitration (DIS), the Hong Kong International Arbitration Centre (HKIAC), and the China International Economic Trade Arbitration Commission (CIETAC). Also well known is the International Centre for the Settlement of Investment Disputes (ICSID) which deals only with investment disputes between state parties and foreign investors.

[10] Price Waterhouse and Coopers, *supra* note 1 at 12.

a. Advantages of Administered Arbitration:

(1) Availability of pre-established rules and procedures;

(2) Administrative assistance from institutions with a secretariat or a court of arbitration;

(3) Lists of experienced arbitrators, often listed by fields of expertise;

(4) Appointment of arbitrators by the institution if the parties request it;

(4) Physical facilities and support services for arbitrations;

(5) Assistance in encouraging reluctant parties to proceed with arbitration; and,

(6) An established format that has proven workable in prior disputes.

b. Disadvantages of Administered Arbitration:

(1) Institutions charge administrative fees for services and use of facilities. Expenses may be high in disputes over large amounts, especially where fees are related to the amount in dispute. For small amounts in dispute, institutional fees may be greater than amount in controversy;

(2) The institution's bureaucracy may lead to delays and added costs; and,

(3) Parties may be required to submit responses in abbreviated time periods.

c. Issues to Consider in Selecting an Arbitration Institution:

(1) History of the institution's administration of international arbitrations.

(2) Experience:
- How many international disputes has the organization handled and from where did the disputing parties come?
- Has the institution handled disputes similar to the subject of the contract?

(3) Selection of Arbitrators:

- 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?
- Does the institution have arbitrators with experience in the subject matter of the contract?

(4) Procedures:

- Does the institution permit flexibility in the conduct of the arbitration?
- Can parties opt out of certain rules or procedures?
- What are the rules regarding time limits in the arbitration?
- Are time limits enforced?
- Does the institution limit the procedural rules selected by the parties?
- Are the institution's rules clear and neutral for all parties?

(5) Cost:

- What administrative fees are charged by the institution?
- Are these fees fixed or based on the amount in dispute?
- Are the arbitrator's fees based on time spent or amount in dispute?

(6) Services:

- Does the institution's staff have experience with international disputes?
- Does the institution have any affiliations within the region that may facilitate administration of the arbitration?

d. Institutions

(1) International Chamber of Commerce ("ICC") International Court of Arbitration

The ICC is widely considered to be the world's leading international arbitration institution, and the most "international" of the major institutions. It is located in Paris, France and administers arbitrations that take place all over the world.

Where an arbitration agreement provides for arbitration pursuant to the ICC Rules of Arbitration, the proceedings will be held under the auspices of the ICC. The two organs of the ICC that handle or supervise certain aspects of the arbitral proceedings are the International Court of Arbitration itself and its Secretariat.

The Court of Arbitration is constituted by representatives of each member country. The Secretariat consists of several teams of counsel of a variety of nationalities who specialize in different regions of the world. While the proceedings and the decision-making are left to the arbitral tribunal, the Court and/or the Secretariat set and receive payment of advances on costs at the commencement of the proceedings and fix the arbitrators' compensation at the end of the proceedings, select and appoint arbitrators where the parties have not selected any, confirm arbitrators selected by the parties, decide upon challenges to arbitrators, review the first procedural document issued by the tribunal which sets forth the issues in dispute and procedural matters (the "Terms of Reference"), and scrutinizes awards before they are handed to the parties.

The most salient specificities of arbitration under the ICC Rules are:

- the requirement that "Terms of Reference" be prepared.[11] This document forces the parties and the tribunal to define and summarize the parties' positions and the issues the tribunal will need to decide, and set the schedule for the various steps of the procedure. The ICC reviews the Terms of Reference.

- The ICC is unique in that the Court "scrutinizes" the arbitral tribunal's draft of the award, and has the authority to require modifications as to the form of the award and to draw the tribunal's attention to points of substance.[12] This scrutiny is a valuable safeguard, especially in light of the fact that arbitral awards are not subject to appeal.

- Both the administrative costs and the arbitrators' fees are determined by the amount in dispute in accordance with a scale setting forth ranges of costs and fees per amount in dispute.[13] The Court of Arbitration determines the precise amount at the end of the proceedings and takes into consideration factors such as the complexity of the matter, the diligence of the arbitrators and the time spent by them, and the rapidity of the proceedings.

- Under the ICC's "Rules for a Pre-Arbitral Referee Procedure," parties can also obtain a very expedited, non-binding resolution of a dispute. As this procedure is available only where the parties have specifically agreed on it, and parties rarely do so in their arbitration agreements, these rules have not been used very often.

[11] ICC Rules of Arbitration, art. 18.

[12] ICC Rules of Arbitration, art. 27.

[13] ICC Rules of Arbitration, appendix III.

(2) American Arbitration Association ("AAA")

The AAA's International Center for Dispute Resolution (ICDR) is headquartered in New York City and administers international arbitrations held pursuant to the "International Arbitration Rules" of the AAA.

The AAA has also issued "AAA Commercial Arbitration Rules" which are designed for domestic US arbitrations. Where parties to an international dispute have agreed to AAA arbitration without designating a particular set of rules, the ICDR will apply the International Arbitration Rules.

The institution is sometimes considered to be less international, and more American in style, than others.

The ICDR administrators play a much more limited role in the administration of a case than the ICC. They do, however, select arbitrators after consultation with the parties in cases where the parties have not been able to agree on a procedure for the appointment of arbitrators and have not directly designated arbitrators.[14] There is no mandatory requirement that any of the arbitrators be of a different nationality than the parties.

While the number of arbitrators is left for the parties to decide, in the absence of any agreement the rules express a preference for a sole arbitrator unless the circumstances make a three-member tribunal preferable.[15]

Arbitration under the AAA International Arbitration Rules does not involve the creation of a document similar to the Terms of Reference, nor does the ICDR review the tribunal's award before communicating it to the parties.

The ICDR administrator will set the arbitrators' fees in agreement with the parties and the arbitrators on the basis of the arbitrators' rate of compensation and the size and complexity of the case.[16] The AAA's administrative charges are determined by the amount in dispute.

The International Arbitration Rules also provide for an expedited procedure in which a sole arbitrator is appointed within a short time and is empowered to grant provisional measures.

(3) London Court of International Arbitration ("LCIA")

The LCIA has its headquarters in London. It administers international arbitrations conducted pursuant to the LCIA Arbitration Rules. Many cases under the LCIA Rules are heard

[14] ICDR Arbitration Rules, art. 6.

[15] ICDR Arbitration Rules, art. 5.

[16] ICDR Arbitration Rules, Administrative Fee Schedule

in London, but the LCIA has broadened its reach and has distanced itself from its reputation as a primarily English arbitral body.

Beyond the role it plays in the appointment of arbitrators where the parties fail to agree, the LCIA's involvement in the arbitration proceedings is, compared to that of the ICC, fairly discreet. In particular, the LCIA Arbitration Rules do not provide for Terms of Reference or a review of the award prior to its communication to the parties.

The rules set out the tribunal's powers (in particular the power to order discovery) in some detail,[17] and favor the appointment of a sole arbitrator unless the parties have agreed otherwise, or unless the circumstances of the case require a three-member tribunal[18]. The LCIA Rules specifically provide that where the parties are of different nationalities, a sole arbitrator or chairman of the arbitral tribunal must not have the same nationality as any of the parties.[19]

Arbitrators' fees are disconnected from the sums in dispute and are calculated by an hourly rate agreed between the arbitrators and the parties.[20]

Unusually, the LCIA calculates its own fees on the basis of the time spent by its staff in accordance with a published hourly fee.

The LCIA Rules also provide for an expedited procedure, pursuant to which a party can apply to the LCIA Court for the expedited formation of arbitration tribunal on or after the commencement of the arbitration.[21]

(4) Arbitration Institute of the Stockholm Chamber of Commerce ("SCC")

The Stockholm Chamber of Commerce is headquartered in Stockholm, Sweden. he SCC Arbitration Rules are one of the preferred choices for parties from Eastern Europe, Russia and China. SCC arbitrations are usually located in Stockholm, but parties adopting the SCC Arbitration Rules can choose any other situs.

Unlike most other rules, the SCC Arbitration Rules provide for a three-member arbitral tribunal unless the parties have agreed otherwise or unless the amount in dispute and the type of case mandate the appointment of a sole arbitrator.[22]

---

[17] *See* LCIA Arbitration Rules, art. 22.

[18] LCIA Arbitration Rules, art. 5.

[19] LCIA Arbitration Rules, art. 6.

[20] LCIA Arbitration Rules, art. 28.

[21] LCIA Arbitration Rule, art. 9.

[22] SCC Arbitration Rules, art. 12.

Like other institutions, the SCC Institute steps in where a party fails to nominate an arbitrator and, unless the parties agree otherwise, to appoint the Chairman in the three-member panel.[23]

The SCC Institute sets both the arbitrators' fees and the administrative fees in accordance with a table included in the SCC Arbitration Rules, which is based on the amount in dispute.[24]

The SCC also has a special set of rules for expedited arbitration proceedings.

(5) World Intellectual Property Organization ("WIPO")

Founded in 1994 in Geneva, Switzerland, the WIPO has arbitration rules and procedures specifically attuned to the issues related to intellectual property disputes, including specialized discovery rules and rules on disclosure and protection of trade secrets.

As do most institutional bodies, the WIPO favors sole-arbitrator tribunals where the parties have not agreed upon a number of arbitrators.[25]

The WIPO Rules allow the parties to decide upon the procedure for the appointment of the arbitrator, but they otherwise set forth a mechanism by which the WIPO sends a list of arbitrators to the parties in order to give them the opportunity to exclude candidates and to allow them to rank them by preference before the appointments are made.[26]

The WIPO has developed a set of rules dedicated to expedited proceedings.[27]

The WIPO sets the administrative and arbitrators' fees after consultation with the parties and the arbitrators in accordance with a schedule of fees.[28]

2. *Ad Hoc* Arbitration

Under *ad hoc* arbitration there is no administering body. Parties must specify in the arbitration clause all aspects of the arbitration, including applicable law, rules under which the arbitration will be carried out, the number of arbitrators, the method for selecting the arbitrator(s), the language in which the arbitration will be conducted and the place of arbitration. Parties may either develop their own rules or select established arbitration rules to govern the arbitration, the most well-known of which are the rules produced by the United Nations

[23] SCC Arbitration Rule, art. 13.

[24] SCC Arbitration Rules, appendix III.

[25] WIPO Arbitration Rule 14(b).

[26] WIPO Arbitration Rule 19.

[27] *See* WIPO Expedited Arbitration Rules

[28] WIPO Arbitration Rules 67 and 68.

Commission on International Trade Law (UNCITRAL). Parties may use the rules of an arbitration institution without submitting the dispute to that institution. While parties involved in an *ad hoc* arbitration will not incur the administrative fees charged by bodies such as the ICC or LCIA, *ad hoc* arbitrations lack the safety net of intervention by an administering institution where problems are encountered, for example, with the appointment or conduct of arbitrators. However, some parties, particularly states, prefer *ad hoc* arbitration for the very reason that there is no intervention or "interference" from an administering institution.

B. Rules of Procedure

As highlighted above, the various arbitral institutions each have their own rules governing the conduct of arbitrations which they administer. There are some differences between the rules of the various institutions. For example, the ICC arbitration rules provide for, arguably, a more structured approach to the arbitration procedure than other institutional rules by requiring that the arbitral tribunal draw up a formal Terms of Reference for the arbitration[29] and also that the award of the tribunal be approved by the ICC's Court of Arbitration.[30] While these steps may extend the time taken for an award to be rendered, they also help ensure the quality of ICC awards. A specific feature of the LCIA rules, on the other hand, is the provision under Article 9 of the rules for the expedited formation of tribunals where parties require swift interim or conservatory relief.

There are also differences in the manner in which administrative and arbitrators' fees are fixed by the different institutions. Whereas the ICC stipulates that administrative expenses and arbitrators' fees are to be fixed on the basis of the value of the sum in dispute,[31] the LCIA's fee structure applies an hourly rate basis both for time spent on a matter by the tribunal and the LCIA's own staff.

If selecting institutional rules to govern the arbitration, parties should consider whether those rules provide for:

1. The selection of a site where it is not specified in the arbitration clause;
2. Assessment of costs, including allocation between parties;
3. Selection of arbitrators;
4. Powers given to the arbitrator;
5. The language in which the proceeding will be conducted;
6. The substantive law to be applied;
7. The use of experts;
8. The time allowed to arbitrators to make awards;
9. The power of any administering authority over the awards;
10. The availability of provisional relief; and,
11. Flexibility to allow parties to opt out of certain provisions.

[29] ICC Rule 18.

[30] ICC Rule 27.

[31] ICC Rules of Arbitration, Appendix III, Article 4.

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

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

In addition to the institutional and *ad hoc* arbitration rules referred to above, parties may also agree to submit disputes to arbitration under the rules set out in the arbitration statutes of the jurisdiction in which the seat of arbitration is located (for example, in the case of the United States, the Federal Arbitration Act, 9 U.S.C. §1 *et seq*.). However, the rules set out in national statutes are generally less comprehensive than the commonly used institutional rules or the UNCITRAL rules. Such statutory rules also frequently provide for appointment of arbitrators by local courts which may disadvantage a non-national party. Generally, parties contracting with state entities should be wary of agreeing to a seat of arbitration in the state's jurisdiction.

C. Number of Arbitrators

In almost all cases arbitration will be heard by either one or three arbitrators. The number of arbitrators will normally be agreed in advance by the parties in the arbitration clause. Most institutional arbitration rules, however, include a mechanism to decide the number of arbitrators in the event that the parties do not agree on this. Where a sole arbitrator is to be appointed, the arbitrator will either be selected by agreement between the parties or, in default of such agreement, by the administering institution. Where three arbitrators are appointed it is common for each party to appoint or nominate one arbitrator with the chairman of the arbitral tribunal being selected by the two party appointed arbitrators or, as is the case under the ICC and LCIA rules, by the administering institution. Alternatively, all three arbitrators may be selected by the administering institution. Providing for the institutional selection of all three members of an arbitral tribunal is recommended where disputes subject to the arbitration clause may involve more than two parties and it is therefore not possible for each party to appoint or nominate its own arbitrator. It should also be noted, that whereas both the ICC and LCIA rules include default provisions for the appointment of a three member tribunal in circumstances where there are three or more parties to a dispute and the arbitration clause does not specify how the arbitrators are to be appointed,[32] the UNCITRAL rules do not cater for this situation.

Under the UNCITRAL rules, if the number of arbitrators is not specified in the contract arbitration clause, absent agreement between the parties on a sole arbitrator, a three member tribunal is mandated.[33] The UNCITRAL rules provide that, for a three member tribunal, the parties shall each appoint an arbitrator and the two party appointed arbitrators shall choose the presiding arbitrator (chairman). Where either a sole arbitrator is to be appointed and the parties

[32] ICC Arbitration Rules, art.10; LCIA Rules of Arbitration, art. 8.

[33] UNCITRAL Arbitration Rules, art. 7.

cannot agree on a choice or the two party appointed members of a three member tribunal cannot agree on a chairman, the default provision in the rules (Article 6) is for the Secretary-General of the Permanent Court of Arbitration at the Hague to designate an appointing authority. However, parties opting for arbitration under the UNCITRAL rules are advised to designate an appointing authority in the contract arbitration clause.

Generally, the appointment of a sole arbitrator will be appropriate where the value of a dispute is low or, in the case of a higher value dispute, where the issue in dispute is straightforward. Three member tribunals are more appropriate for high value or complex cases. Even in the case of large and complex disputes, however, the appointment of a sole arbitrator rather than a three member tribunal may sometimes result in a more efficient procedure which is less costly to the parties since the need to co-ordinate the schedules of a three member tribunal and the time required for the tribunal to reach consensus both on procedural issues and on the resolution of the dispute (or, at least, to try to reach a consensus before resorting to a majority decision) can result in more lengthy proceedings than is the case where a sole arbitrator is appointed. It is also suggested by some that a three member tribunal may have a greater tendency to look for grounds on which to "split the baby" in its decision in order to secure consensus among the arbitrators rather than deciding wholly in favor of one party. On the other hand, a three member tribunal can provide checks and balances against mistakes, misunderstanding of the evidence or misapplication of the applicable law.

D. Seat of Arbitration

The choice of the seat of arbitration is crucial. Parties may and often do choose a seat of arbitration which is unconnected with the substantive law which governs the contract. For example, Miami could be chosen as the seat of arbitration for a dispute regarding a contract governed by the law of Brazil. However, while the seat of arbitration does not determine the substantive law of the dispute, it may influence "procedural law" issues. Such issues relate not only to the manner in which the arbitration is conducted but may also include important matters such as statute of limitation periods (the period within which a legal action must be brought), what remedies are available to the parties and the applicable rate of interest on sums awarded in the arbitration. While arbitrators are generally not obliged to follow the law of the seat of arbitration on such matters they are often guided by it.

The choice of the seat of arbitration may also determine whether the arbitration award is ultimately enforceable against a paying party. Under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), an award rendered by a tribunal with its seat in one of the signatory countries should, in principle, and subject to certain limited exceptions, be enforceable in any of the other signatory countries. As of 2010, 145 countries were party to the Convention.[34] However, some countries are not. Thus, arbitral awards rendered outside of such countries will not be enforceable in them

---

[34] A list of parties can be found on the Internet at: http://www.newyorkconvention.org/new-york-convention-countries.

under the Convention and, conversely, awards rendered in such countries will not be readily enforceable in other jurisdictions. Parties may still, however, wish to select a non-Convention country as the seat of arbitration where enforcement of the award is likely to be in that country itself pursuant to domestic legislation.

Another important consideration in the choice of the seat of arbitration is that in most jurisdictions, local courts will have the right to set aside arbitration awards on specified grounds. The setting aside of an arbitration award by a court in the jurisdiction of the seat of arbitration will usually make it impossible to enforce such an award internationally. In certain jurisdictions, local courts also have the right to intervene in arbitration during the course of proceedings. Parties should therefore select a seat of arbitration where the local courts have a track record of not setting aside an award or interfering in the arbitral process without good cause.

Locations which have an "arbitration friendly" reputation and which are often chosen as seats include New York, Miami, Paris, London, Geneva, Zurich, Stockholm and Singapore. It should be noted, however, that where the seat of arbitration is in England, Section 69 of the Arbitration Act 1996 permits parties to appeal a point of law to the courts unless this right is excluded by the applicable arbitration rules (as it is under the ICC, LCIA and UNCITRAL rules.) Parties are also advised to select a neutral seat of arbitration *i.e*. a seat in a jurisdiction different from the nationality of either of the parties in order to prevent one party having an actual or perceived home advantage. In particular, as noted above, a private party entering into a contract with a state is advised to avoid agreeing to a seat of arbitration in the state's own jurisdiction.

E. Language

The language in which the arbitration will be conducted should be specified in the contract arbitration clause.

F. Consolidation and Joinder

Where it is possible that multiple related disputes may arise, parties should consider providing in the arbitration clause for disputes which are connected with existing disputes already in arbitration to be resolved by the tribunal already appointed to hear the existing dispute (with appropriate provision in case the existing arbitrators are unwilling to hear the new dispute). The clause may also grant an arbitral tribunal hearing two or more related disputes the power to consolidate the proceedings into a single arbitration.

G. Multi-Tier Dispute Resolution Clauses

The arbitration clause may also be combined with a provision for first-tier or multi-tier methods of dispute resolution. Only if preliminary methods of dispute resolution fail will the dispute be finally resolved by binding arbitration. First-tier dispute resolution may include one or a combination of the following:

- a time-limited period of negotiation between the parties' representatives to reach an amicable settlement of the dispute;

- a requirement to participate in mediation or some other form of non-binding alternative dispute resolution; and

- referral of the dispute for an expedited interim to a neutral third party whose decision may either be a non-binding recommendation or binding unless and until the dispute is referred to arbitration.

For, example, the ICDR Model "Step-Clause" for mediation-arbitration is as follows:[35]

> In the event of any controversy or claim arising out of or relating to this contract, or a breach thereof, the parties hereto agree first to try and settle the dispute by mediation, administered by the International Centre for Dispute Resolution under its Mediation Rules. If settlement is not reached within 60 days after service of a written demand for mediation, any unresolved controversy or claim arising out of or relating to this contract shall be settled by arbitration in accordance with the International Arbitration Rules of the International Centre for Dispute Resolution.
>
> The parties should consider adding:
> The number of arbitrators shall be (one or three);
> The place of arbitration shall be [city, (province or state), country];
> The language(s) of the arbitration shall be ___.

H. Governing Law of the Contract

The choice of governing law in a contract may be an important factor in the outcome of disputes referred to arbitration. Parties should be aware that there are substantial differences in the approach taken by different legal systems to the interpretation and enforcement of contracts. For example, many legal systems permit judges or arbitrators to "adapt" *i.e.* adjust contract terms where there has been a radical change in circumstances between the time of formation of a contract and its performance (*see e.g.* art. 313 of the German Civil Code and art. 147 of the Egyptian Civil Code). By contrast, English law does not allow the adaptation of contracts regardless of any change in circumstances, no matter how radical, provided that the contract is still capable of being performed (*see e.g. Homburg Houtimport BV and Others v Agrosin Private Ltd and another* [2003] 2 WLR 711, 731 and *Davis Contractors v Fareham UDC* [1956] A.C. 696). Again, in contrast to English law, most civil law systems enshrine the concept of good faith in contract law (*see e.g.* Article 221 of the Lebanese Code of Obligation and Contracts). Accordingly, where such laws apply, contracts may be set aside or adjusted where one party is culpable of a breach of good faith. However, English law is consistent with most other common law and civil law systems in making penalty clauses unenforceable.

[35] ICDR, Guide to Drafting International Dispute Resolution Clauses at http://www.adr.org/si.asp?id=6507.

I. Examples of Model Clauses Recommended by Institutions

1. The International Center for Dispute Resolution:[36]

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules.

The parties should consider adding:
The number of arbitrators shall be (one or three);
The place of arbitration shall be [city, (province or state), country];
The language(s) of the arbitration shall be ___.

2. UNCITRAL Arbitration Rules:[37]

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....

3. ICC Arbitration Rules:[38]

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.

[36] ICDR, Guide to Drafting International Dispute Resolution Clauses at http://www.adr.org/si.asp?id=6507.
[37] UNCITRAL Arbitration Rules, Art. I

[38] ICC, "ICC standard and suggested clauses for Disputes Resolution Services" at http://www.iccwbo.org /court/ arbitration/id4424/index.html

IV. CONDUCT OF THE ARBITRATION

A. Choice of Arbitrators

Parties should appoint arbitrators that have experience in the nature of the dispute. Parties (or appointing institutions) are also advised to tailor their choice of arbitrator(s) to the particular circumstances of an individual dispute. Thus, it will usually be appropriate to appoint a civil law qualified lawyer as arbitrator to determine a dispute regarding a point of law or contractual interpretation arising under contract governed by a civil law and a common law qualified lawyer to determine a dispute of such nature arising under a contract governed by English law or other common law system. However, an engineer or other technical specialist may be a more appropriate choice for a dispute of a technical nature. As discussed further below, the background of the arbitrators appointed is likely to have a significant influence on the character of the arbitration proceedings.

B. Admissibility

Prior to commencing arbitration proceedings, parties should verify that any dispute to be referred to arbitration satisfies the admissibility criteria set forth in the contract. This may include providing timely notice of a claim to the other party and complying with any first tier dispute resolution provisions. Failure to comply with the preliminary steps specified in a contract for referral of a dispute to arbitration may result in the arbitral tribunal refusing to hear the dispute on the basis that it is inadmissible.

C. Claims, Defenses, Counterclaims and New Claims

Typically, an international arbitration is commenced by a party filing a Demand for Arbitration and a Statement of Claim along with any administrative filing fee with the arbitral institution agreed upon in the arbitration agreement. Where an *ad hoc* arbitration is established by the arbitration agreement, Notice and the Statement of Claim are served upon the adversary consistent with the terms of the arbitration agreement.

The opposing party, thereafter, will be required to provide a Statement of Defense and deposit its share of the administrative cost of the arbitration with the arbitration institution. The commonly used arbitration rules provide wide latitude to respondent parties regarding the nature of counterclaims that may be introduced in the arbitration provided these are within the scope of the contract arbitration clause. However, it is possible that counterclaims will not be admitted where they fail to satisfy applicable contractual admissibility criteria.

Arbitration rules are generally restrictive regarding the introduction of new claims and counterclaims after the opening pleadings have been exchanged or, in the case of the ICC rules, the Terms of Reference established (*see e.g.* article 19 of the ICC rules and article 20 of the UNCITRAL rules).

D. Procedure of the Arbitration

While the arbitration rules chosen by the parties will provide a general framework for the procedure of the arbitration, most of the well-known institutional rules leave important issues such as the format, number and sequence of pleadings, document production issues, the conduct of the hearing and the manner in which witnesses evidence is adduced to the parties, or in default of agreement, the tribunal to decide.

As noted above, the procedures adopted may be influenced by the seat of arbitration and the background of the arbitrators. International arbitration has brought together attorneys trained in the different legal traditions of the common law and civil law. These systems of law represent fundamentally contrasting approaches to dispute resolution.[39]

1. Document Discovery

It is difficult to overstate the horror with which parties and counsel outside the United States view American-style discovery, with parties able to serve upon one another sweeping requests for production of documents and other information relevant to the arbitration, and to obtain oral deposition testimony of witnesses in advance of a hearing. In civil law countries, such discovery is rarely permitted, and is viewed as an affront to the expectations of privacy and confidentiality that private parties have in their business information.

Under the rules of most international arbitral institutions, the arbitral tribunal is given the broad power to determine whether, and to what extent, discovery will be permitted. For instance, the ICC Rules give the tribunal authority to "establish the facts of the case by all appropriate means," and "may summon any party to provide additional evidence."[40] Likewise, the LCIA and ICDR Rules explicitly authorize the arbitral tribunal to order the pre-hearing production of documents.[41] Although discovery is thus permitted to a certain extent, the scope of such discovery is generally far more limited than is permitted in the United States.

This consensus has been embodied in a set of rules issued by the International Bar Association called the IBA Rules on the Taking of Evidence in International Commercial Arbitration (hereafter "IBA Rules"). Those rules, developed by a committee of lawyers drawn

---

39 The majority of the world's population lives under the civil law. The civil law system is steeped in Roman law, which eventually led to the Napoleonic Code, the foundation of French law. The civil law spread to the rest of continental Europe, Russia, China, most of Asia, Latin America, and part of Africa. The common law system is the Anglo-American legal tradition based on English law. It spread to the United States, Canada, India, Australia and the rest of the British Commonwealth. *See* Urs Martin Laeurchil, "Civil and Common Law: Contrast and Synthesis in International Arbitration," Disp. Resolution J. 89 (Aug. 1, 2007).

40 ICC International Rules of Arbitration art 20, ¶ 1.

41 See LCIA Arbitration Rules art. 22.1(e) (authorizing the tribunal to "order the production of any party to produce to the Arbitral Tribunal, and to the other parties for inspection, and to supply copies of, any documents or classes of documents in their possession, custody or power which the Arbitral Tribunal determines to be relevant"). *See also* ICDR Rule art 19 (empowering the tribunal to "order parties to produce other documents, exhibits or other evidence it deems necessary or appropriate").

from both traditions, permit a party to submit a "Request to Produce" to the arbitrator, in which the requesting party may describe documents or "a narrow and specific requested category of documents" that are reasonably believed to exist and to be in the possession of the adverse party, together with an explanation of how the documents requested are 'relevant and material to the outcome of the case'.[42] The IBA Rules contain no provision for depositions or interrogatories. Both are rare in international arbitration. Interrogatories are almost never used. Depositions tend to be employed only when both sides want them (as may happen if both parties are represented by American lawyers) or when there is no other way to preserve or present the testimony of an obviously important witness. This limited discovery serves to reduce both the cost and the length of time of an arbitration.

2. Use Of Documents At The Hearing

In an international arbitration, a civil law practitioner will likely present the tribunal with a neat set of documents well in advance of the hearing. Those documents will be considered self-authenticating, and counsel will use the hearing to draw the arbitrator's attention to key provisions without any preliminary introduction by a witness. A common law lawyer, in contrast, may well have presented a similar binder to the tribunal in advance, but will expect to have each document authenticated, presented, and explained by the testimony of a live witness. This is a costly process because a live witness must testify about each document a party wishes to introduce.

The emerging practice in international arbitration is for each party to submit in advance to the tribunal and to the adverse party the documents that it intends to use as evidence at the hearing, without any particular form of introduction or authentication. The IBA Rules, however, set forth a list of grounds upon which an adversary may object to the introduction of a document or other evidence, including lack of sufficient relevance, privilege or other grounds for confidentiality, and fairness.[43] The effect is to require a party to show why a document proffered by the other side should not be admitted, rather than as in the United States for the proffering party to show why it should be admitted. The IBA Rules represent a sensible solution in a

---

[42] IBA Rule 3.3:

> (a) (i) a description of a requested document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist;
>
> (b) a description of how the documents requested are relevant and material to the outcome of the case; and
>
> (c) a statement that the documents requested are not in the possession, custody or control of the requesting Party, and of the reason why that Party assumes the documents requested to be in the possession, custody or control of the other Party.

[43] IBA Rule 9.2. All of those grounds, and others, such as burden, are also available as grounds under those rules for opposing a document request.

context that is supposed to be free of the technical rules of evidence that govern exhibits in common law proceedings.

3. Witness Testimony

Perhaps the most fundamental difference between the common law and civil law modes of dispute resolution lies in the manner in which evidence is presented to the finder of fact. In the common law tradition, testimony is presented to the finder of fact principally through live oral testimony of witnesses, rather than in written form. While written declarations are permissible in certain pre-trial settings, such declarations cannot generally be offered at trial in lieu of oral testimony, for they are considered inadmissible hearsay.[44] The questioning of witnesses is also conducted by counsel for the parties, with each party having the right to have their counsel cross-examine witnesses directly in the presence of the finder of fact.

In the civil law tradition, by contrast, evidence and testimony generally is presented to the finder of fact principally in written form. While live testimony may be taken, the questioning of witnesses is conducted not by counsel, but rather by the court, which retains the sole authority to determine which questions will be put to the witness. Direct, adversarial cross-examination of witnesses by counsel is not permitted.

These different approaches to witness testimony have been bridged in international arbitration. Witness testimony is generally presented in the first instance through written witness statements, although the content of such witness statements depends heavily on the requirements imposed by the particular arbitral tribunal in each case.[45] In some instances, the arbitral tribunal will require that the written witness statements serve as a complete substitute for the witness's direct testimony at trial, with oral examination at trial commencing with cross-examination conducted by opposing counsel. In other instances, the arbitral tribunal will require that the written witness statement provide only a general overview of the witness's testimony, with the witness able to supplement their testimony with direct examination by counsel at the hearing. This practice has the advantage of shortening the hearing. It also helps to eliminate surprise, and thus serves to some extent as a substitute for depositions of those same witnesses. However, it is also generally well-established in international arbitration that any witness presented by a party must be made available to testify live before the arbitral tribunal, with the opportunity for the opposing party to cross-examine the witness.[46]

---

[44] F. R. Evid. 801.

[45] This is the approach of the IBA Rules (see IBA Rules 4.4 and 4.5) and is an option under ICDR Rule 20.5.

[46] This procedure again is outlined in the IBA Rules, which provide that:

> The Claimant shall ordinarily first present the testimony of its witnesses, followed by the Respondent presenting testimony of its witnesses, and thenby the presentation by Claimant of rebuttal witnesses, if any. Following direct testimony, any other Party may question such witness, in an order to be determined by the Arbitral Tribunal. The Party who initially presented the witness shall subsequently have the opportunity to ask additional questions on the matters raised in the other Parties' questioning. . . . The Arbitral Tribunal may ask questions to a witness at any time

4. Use of Experts

A further issue where the background of the arbitrators may be determinative, is whether the tribunal will appoint its own expert(s) to advise the tribunal on technical issues as permitted by most commonly used arbitration rules including the ICC, LCIA and UNCITRAL rules. The use of tribunal appointed experts is common practice for civil law qualified arbitrators but is contrary to the usual common law approach whereby an arbitrator will rely on the evidence of expert witnesses presented by the parties.

Thus, where the seat of the arbitration is in a common law jurisdiction such as the U.S. or England and/or one or more of the arbitrators appointed are from a common law background, common law concepts may be adopted such as wide ranging document discovery, limited written pleadings, depositions, extensive cross-examination of witnesses by counsel and an emphasis on oral advocacy during the hearing. On the other hand if a civil law seat such as France is selected and/or the tribunal consists of or includes arbitrators with a civil law background, procedures based on those applicable in civil law courts may be adopted with a greater emphasis on the parties' written submissions and a very limited document production procedure. Further, the cross-examination of witnesses may be restricted compared to what is usual in common law jurisdictions. Indeed, the tribunal may adopt the civil law approach of requiring that all questions to witnesses be submitted in advance and put through the tribunal.

It should be noted, however, that arbitrators are increasingly adopting a mixed approach to procedural issues *e.g.* permitting witness cross-examination by counsel during the hearing but limiting the document production process. As Prof. Hans Smit has stated, there is a "marriage" of civil and common law in contemporary international arbitration.[47] The results have been the best of both systems, taming the common law tendency toward over-litigiousness by greater tribunal control and providing an overall more cost-effective process.

V. ENFORCEMENT OF ARBITRAL AWARDS

A. Court Enforcement of Arbitral Awards

The effectiveness of arbitration in providing final and binding resolution of international commercial disputes depends upon the ability 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. Courts in the United States pursue a consistent, well-articulated policy of recognizing and enforcing awards in both domestic and foreign arbitrations; in fact, arbitral

---

IBA Rule 8(2).

[47]Hans Smit, "Roles of the Arbitral Tribunal in Civil Law and Common Law Systems with Respect to Presentation of Evidence," International Council for Commercial Arbitration Congress 162, 165 (Series 7 Nov. 1994, Kluwer, 1996).

proceedings are recognized and enforced in U.S. courts more readily than are foreign judgments.[48] For further discussion, see *infra* Section C.

B. Conventions for Enforcement of Arbitral Awards

1. 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) [For full text of Convention, see International Legal Materials at 7 I.L.M. 1046.]

The New York Convention is the most widely-recognized convention for enforcement of arbitration awards. As of 2010, 145 countries were party to the Convention. The text of the Convention and a list of parties can be found on the Internet at: http://www.newyorkconvention.org/new-york-convention-countries.

Article I of the Convention provides that it shall apply to awards made in the territory of a state other than that where recognition and enforcement is sought; it shall also apply to arbitral awards not considered as domestic in the state where their recognition and enforcement are sought. This means that an award can be enforced in the country in which it was made.[49] The Convention provides that countries which ratify it may do so with either one or both of two reservations offered in Article I(3). The first so-called reciprocity reservation limits recognition and enforcement of awards to those made in a convention country. The second so-called commercial reservation limits recognition and enforcement to differences that are considered commercial under the national law of the forum in which enforcement is sought.

The United States ratified the Convention with both reservations. Each contracting state is required to recognize a written arbitration agreement, whether contained in a contractual clause or letters or telegrams, and the courts of each contracting country are instructed to refer the parties in dispute to arbitration unless they find such agreements to be invalid (Article II). Contracting states are also required to recognize arbitral awards as binding and enforce them in accordance with their own procedural rules, which cannot be more onerous than those applicable to domestic awards (Article III). The New York Convention thus remits the parties to domestic laws already in place with respect to enforcing awards. If domestic awards are difficult to enforce, the New York Convention does not make the enforcement of foreign awards any easier.

One important provision of the Convention is that it presumes the validity of awards and places the burden of proving invalidity on the party opposing enforcement (Article V). Moreover, awards are not subject to the "double *exequatur*" and need not be confirmed in the arbitral situs before enforcement can be sought abroad.[50]

---

[48] Joseph T. McLaughlin, "Enforcement of Arbitral Awards under the New York Convention: Practice in U.S. Courts," International Commercial Arbitration at 275, 277 (1988).

[49] *See Bergesen v. Joseph Muller Corp.*, 710 F. 2d 928 (2d Cir. 1983); Joseph T. McLauglin, "Enforcement of Arbitral Awards under the New York Convention: Practice in U.S. Courts," International Commercial Arbitration 275, 277 (1988).

[50] Gary B. Born, International Commercial Arbitration in the United States 465 (1994).

In the United States, Articles III and V of the New York Convention are implemented by Section 207 of the Federal Arbitration Act, which provides that a court "shall confirm" awards subject to the Convention "unless it finds one of the grounds for refusal" specified in the Convention to exist. Application for confirmation must be made within three years after the award is made, which means within three years of when the award is decided by the arbitrators, not when it becomes final.[51] To obtain recognition and enforcement, the applicant shall supply the original or a duly certified copy of the award and the original or a duly certified copy of the arbitration agreement, both of which shall be translated if necessary.[52]

Article V of the Convention sets forth limited grounds for refusing to recognize and enforce an award. These include:

a. the parties were suffering under some incapacity or the arbitral agreement was invalid;

b. the party against whom the award is invoked was not given proper notice of the arbitrator's appointment or the arbitration proceedings or was unable to present his case;

c. the award decides matters not within the scope of the arbitration agreement;

d. the composition of the arbitral tribunal or the procedure used did not accord with the parties' agreement or applicable law; or

e. the award has not yet become binding or has been set aside or suspended by a competent authority of the country where the award was rendered.

Article V(2) provides two further grounds for refusing to enforce an award:

a. nonarbitrability of the subject matter;

b. the recognition or enforcement of the award would be contrary to public policy.

The New York Convention (*e.g.*, Articles IV, V, VI) refers only to an application for recognition and enforcement of an award. The only reference to setting aside an award occurs in Article V(1)(e), which states that one ground for refusal of recognition is that the award "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." Courts in the United States and elsewhere have held that the language of the Convention provides that an application to set aside or suspend an award can only be made in the country where the arbitral proceeding was held and the country whose

---

[51]*See Transport Wiking Trader Schiffarhtsgesellschaft MBH & Co. v. Nivimpex Centrala Navala*, 989 F. 2d 572, 581 (2d Cir. 1993).

[52]New York Convention, art. IV; 9 U.S.C. §201.

arbitral procedural, rather than substantive, law is applied (usually the same).[53]

2. Inter-American Convention on International Commercial Arbitration ("Panama Convention"), Jan. 30, 1975 (entered into force in the United States in 1990), [For full text of Convention, see International Legal Materials at 14 I.L.M. 336.]

There are 17 state parties to the Panama Convention. A copy of the Convention as well as a list of the parties can be found on the Internet http://www.sice.oas.org/dispute/comarb/iacac iacac2e.asp

Under the Convention, a non-appealable arbitral award is given the same force as a final judicial judgment. [54] An arbitral award is to be recognized and enforced in the same manner and according to the same procedure as that provided for local court judgments as modified by the provisions of any applicable international treaties. Unlike the New York Convention, the Panama Convention does not distinguish between foreign and domestic arbitral awards.

The most important provision of the Panama Convention is Article 5, which is almost identical to Article V of the New York Convention. It provides the bases for refusing to recognize and execute an arbitral award. The Convention expressly says that the party against whom an award is made has the burden of proving one of the grounds for refusing recognition.[55] The grounds set out in the Panama Convention for non-recognition include the following:

a. the parties to the arbitral agreement are suffering from some incapacity, or the agreement is invalid under applicable law;

b. the complaining party was not duly notified of the appointment of the arbitrator or of the applicable arbitration procedure or was unable to present his defense;

c. a decided issue is not within the scope of the arbitral agreement;

d. the constitution of the arbitral tribunal, or the procedure followed, was not in accordance with the parties' agreement or applicable law; or

e. the award is not yet binding or has been annulled or suspended by a competent authority of the state where the award was made.[56]

---

[53] *International Standard Elec. Corp. v. Bridas Sociedade Anonima Petrolera Industrial V Comercial*, 745 F. Supp. 172, 178 (S.D.N.Y. 1990); Judgment of 1 February 1980, Austrian Supreme Court, summarized in VII Y.B. Com. Arb. 312 (1982) (Int'l Council for Commercial Arbitration).

[54] Panama Convention art. 4.

[55] Panama Convention art. 5.

[56] Panama Convention art. 5.1.

Two additional grounds for non-recognition arise if the state where recognition is sought finds:

a. that the subject of the dispute cannot be settled by arbitration under the law of the recognizing state; or

b. recognition would be contrary to the public policy of the recognizing state.[57]

The final substantive provision of the Convention was taken *verbatim* from the New York Convention and allows a competent authority of the country where the award is rendered to postpone a decision on the execution of the award.[58] Upon the request of the party seeking execution, the country may also require the party against whom the award was made to provide appropriate guaranties.[59]

C. The U.S. "Domestic' Federal Arbitration Act

It is worth briefly mentioning the "domestic" Federal Arbitration Act ("FAA") in the United States, which may be invoked in enforcing a foreign award in the United States. The implementing legislation in the United States for both the New York Convention[60] and the Panama Convention[61] provides that the "domestic" FAA will apply to the enforcement of foreign awards under each Convention, except to the extent that the FAA conflicts with the relevant Convention. Section 1 of the FAA extends the Act to the enforcement of awards affecting interstate or "foreign commerce."[62] This means that when an award does not come within either the New York or Panama Conventions (for example, if not made in another contracting state or if not based on a "commercial" transaction) the domestic FAA will often apply.

Section 9 of the FAA provides that, within one year after the award is made, any party may apply to the court for an order confirming the award, and the court must grant such an order unless the award is vacated, modified or corrected as prescribed in Sections 10 and 11.[63] This section is usually applied to international awards not subject to the New York or Panama Conventions, but it is available as an alternative means of confirming awards that are subject to the Conventions.[64]

---

[57]Panama Convention art. 5.2.

[58]Panama Convention art 6.

[59]*Id*.

[60]9 U.S.C. § 208.

[61]9 U.S.C. § 307.

[62]9 U.S.C. § 1.

[63]9 U.S.C. § 9.

[64]*See Bergesen v. Joseph Muller Corp*., 710 F. 2d 928 (2d Cir. 1983).

Section 10 of the FAA provides that a party may apply to have an arbitral award vacated on the following grounds:

a. where the award was procured by corruption, fraud, or undue means;

b. where there was evident partiality or corruption in the arbitrator;

c. where the arbitrators were guilty of misconduct where the rights of a party were prejudiced;

d. where the arbitrators exceeded their powers or imperfectly executed them.[65]

In addition to these statutory grounds, it is well settled that a court may vacate an award when the arbitrators "manifestly disregarded" the law in reaching their decision.[66] The defense of manifest disregard of the law is not a license to review the record of arbitral proceedings for errors of fact or law. In most U.S. jurisdictions, the manifest disregard standard requires a showing either that the arbitrator simply ignored the applicable law, or was aware of the content of governing law, but refused to apply it.[67]

The showing required to avoid confirmation of an arbitration award is very high.[68] This limited judicial review reflects the desire to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation.[69]

VI. CONCLUSION

The outlook for international arbitration is extremely positive. International business appears confident that arbitration law and practices will generate the solutions required to meet future challenges.[70] Remaining fully informed of developments in this fertile area, therefore, is

---

[65] 9 U.S.C. § 10.

[66] *Spector v.Torenberg*, 852 F. Supp. 201, 206 (S.D.N.Y. 1994), *citing Folksway Music Publisher's Inc. v. Weiss*, 989 F. 2d 108, 111-12 (2d Cir. 1993).

[67] Born, *supra* note 45, at 520.

[68] *Id*. at 206.

[69] *Id* at 209.

[70] *See* Price Waterhouse Coopers, *supra* note 1 at 22.

the key to competing and succeeding as a practitioner.

Carlos F. Concepcion[71]
Scott A. Burr

[71] Carlos F. Concepcion is founder of Concepcion Martinez & Bellido (CMB), a complex commercial litigation boutique law firm located in Miami, Florida. He heads the Firm's Dispute Resolution Practice Group. He also serves as an arbitrator for the International Chamber of Commerce (ICC), the International Center for Dispute Resolution (ICDR) of the American Arbitration Association, and the International Institute for Conflict Prevention and Resolution (CPR).

Scott A. Burrr is a member of the Dispute Resolution Practice Group at CMB and has represented clients in arbitrations in numerous venues applying various institutional rules, including ICDR, ICC, ICSID and IACAC. He is certified by the Florida Bar as a specialist in International Law, including international litigation and arbitration.