TORT TRIAL & INSURANCE PRACTICE
Committee News
Defending Liberty Pursuing Justice
Fall 2016

Dispute Resolution Committee

AN INTRODUCTION TO ALTERNATIVE DISPUTE RESOLUTION IN INTERNATIONAL BUSINESS TRANSACTIONS[1]

By: Perry S. Granof & Randy J. Aliment

Alternative Dispute Resolution (ADR) is a generic term, which refers to various processes other than litigation for settling commercial disputes through formal and informal proceedings, including arbitration and mediation. Although arbitration and mediation are both considered two forms of ADR, they are fundamentally different. Arbitration is a procedure that is intended to lead to a legally enforceable remedy as a result of a dispute between two or more parties, whereas mediation is a process to facilitated negotiation that looks beyond rights and allows the parties to focus on their underlying interests. Arbitration leads to a binding determination by a third party decision maker(s) based on a legally enforceable agreement to arbitrate entered into prior to the proceeding. In contrast, mediation is managed by a neutral third party and may or may not result in a binding agreement to settle on mutually acceptable terms, during or after the process. In the last 30 years, ADR has become a standard practice in commercial dispute resolution. In addition to arbitration and mediation, it includes other dispute resolution mechanisms, which will not be addressed in this article. To properly serve companies in international commerce, it is incumbent upon in-house counsel and staff to become familiar with arbitration and mediation in the international setting.[2]

International Arbitration vs. Litigation

Resolving disputes in existing court systems has advantages. Judges are mostly independent, filing fees are much less expensive than arbitration costs, and one

Continued on page 9

1 This article was first published in the 2012.2 edition of *Juriste International,* and revised for the ABA London Program, *Handling Lloyds of London Insurance and Reinsurance Disputes (Including London Arbitrations) Without Going Off One's Trolley!* Presented on June 13, 2015.

2 For information on the other types of dispute resolution mechanisms, see *Mediating Justice Legal Dispute Negotiations,* Hon. George W. Adams, (CCH Canadian Limited 2003).

IN THIS ISSUE:

AN INTRODUCTION TO…

Continued from page 1

has the right to appeal. Notwithstanding these and other positive attributes, obtaining a court judgment takes time and requires legal expertise in the jurisdiction where the litigation is filed. In addition, businesses find it increasingly difficult to maintain their working relationships in the midst of a public legal battle. In contrast, the confidential nature of arbitration may take some of the sting out of a public business conflict. The ability to fashion procedural and substantive flexibility such as the selection of the arbitrator(s), the language of the proceedings, the place of hearings, and the legal standards that will apply make international arbitration an appealing alternative to litigation, especially where complicated rules of procedure and evidence can be modified or excluded. In addition, the speed of resolution makes arbitration more attractive than using the courts of most, if not all, nations. The extent of the award or type of damages may be contemplated beforehand, which allows parties to draft appropriate arbitration clauses. Carefully drafted arbitration clauses will also likely result in significant control over the way a dispute is decided and how much it will cost to achieve a resolution. Perhaps most importantly, a judgment rendered in a court of law against parties from two or more foreign jurisdictions may not be enforceable. In contrast, an arbitration award rendered from a proceeding conducted in a jurisdiction that is a signatory to the 1958 New York Convention is likely enforceable.[3] For these and other reasons, investors and corporations have increasingly turned to international commercial arbitration as the preferred international business disputes resolution method.[4]

Relevant Treaties and Conventions

There is an international treaty that facilitates the enforcement of arbitral awards that is not available for judgments issued by foreign courts. The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention, has been described as "the single most important pillar on which the edifice of international arbitration rests."[5] Since approximately 150 countries out of the 193 current United Nations member states have adopted the New York Convention, the majority of international arbitration agreements are within its application.[6] Under the Convention, if an arbitration award is issued in any country that is a party to it, every other signatory country is legally obligated to enforce the award subject to the seven exceptions listed below. Consequently, increasing numbers of bilateral investment treaties negotiated between foreign states often include arbitration as a means to resolve disputes between foreign states and private overseas investors.[7]

Article V of the New York Convention lists seven exceptions to the enforcement of an arbitral award. They are: (1) one or more of the parties lacked the legal capacity to enter into the arbitration agreement (e.g., due to age, gender in certain jurisdictions, or other grounds), or the agreement is not valid under the law of the country where the award was made; (2) the rare case where the party against who the award is invoked was not given proper notice of the proceeding, the appointed arbitrator(s), or was otherwise unable to present its case; (3) the award exceeded the scope of the arbitration agreement; (4) the composition of the tribunal or its procedure was not in accordance with the agreement of the parties or the law of the country where the arbitration took place; (5) the award is deemed not binding on the parties, or has been set aside by a competent authority of the country under the law of which the award was made;[8] (6) the laws of the jurisdiction where recognition and enforcement is sought prohibits arbitration involving the subject matter at issue, and; (7) recognition or enforcement of the award would be contrary to the public policy of the country where enforcement is sought.

Although countries that are signatories to the New York Convention stipulate complete recognition of obligations established in connection with foreign arbitral awards, there have been instances where arbitration awards have been disregarded or where local courts have denied enforcement. For example, on rare occasions

3 See Redfern and Hunter on International Arbitration, Fifth Edition, Nigel Blackaby and Constantine Partasides, with Alan Redfern and martin Hunter, Oxford University Press, 2009.

4 Press Release, PricewaterhouseCoopers and Queen Mary University of London, International Arbitration: Corporate Attitudes and Practices (2006). At: http://www.arbitration.qmul.ac.uk/docs/123295.pdf

5 J. Gillis Wetter, *The Present Status of the International Court of Arbitration of the ICC: An Appraisal*, 1 Am. Rev. Int'l Arb. 91, 93 (1990).

6 *See* 1958—Convention on the Recognition and Enforcement of Foreign Arbitral Awards, www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

7 *See* Press Release, UNCTAD, Analysis of Bilateral Investment Treaties Finds Growth in Agreements, New Areas of Focus, Apr. 11, 2007, http://unctad.org/en/pages/PressReleaseArchive.aspx?ReferenceDocId=8270.

8 See the case of *The Russian Federation v Yukos Universal Limited,* described in the Reiman, May 2016 ADR Newsletter, with a Link to the Judgment issued by the Hague District Court, found here: http://reimanadr.com/newsletter/, where the court reversed the Interim and Final Arbitral Awards of US $50 billion, based on the incompetence of the arbitral panel to hear the proceeding.

US courts have recognized the common law doctrine of "manifest disregard of the law" as an implied ground for vacating an award. This can occur where US law recognizes common law grounds for challenging an award, which may conflict with the laws of statutory-law-based countries.[9] Still, the U.S. Supreme Court's March 2008 decision in *Hall Street Associates LLC v. Mattel, Inc*.[10] held that the Federal Arbitration Act, 9 U.S.C. Sec. 1-16, exclusively determines the scope of judicial review of an arbitral award. The decision effectively nullifies any contractual provision that expands or narrows judicial review of arbitral awards under Title 9.[11] However, it is unclear whether courts are subject to the same limitations as the parties to a contract.

In addition, several Asian jurisdictions have construed the Convention's "public policy" exception broadly in refusing to enforce foreign arbitral awards. New York Convention signers such as Indonesia, Vietnam, India, and Mainland China may be more inclined to refuse enforcement in the face of challenges where local protectionism is at issue.[12] Therefore, one may want to carefully consider the law of the seat (*the lex arbitri*), which governs the applicable arbitration law. In the US the Federal Arbitration Act, Title 9 of the U.S. Code, would be the *lex arbitri*.

In tandem with the New York Convention, which stipulates complete recognition of obligations established in connection with foreign arbitral awards issued by signatory countries, the Model Law promulgated by the United Nations Commission on International Trade Law (UNCITRAL), adopted in 1976, amended under the Revised Model Law of 2006, and further refined in the UNCITRAL Arbitration Rules of 2010, provides greater flexibility, especially in allowing for interim measures, and offers additional tools for jurisdictions promoting international arbitration. It is a recommended set of rules that can be considered as a model to be adopted as is or modified by countries seeking to adopt a framework for arbitrational proceedings. The UNITRAL Model Law, The Revised Model Law, and The UNCITRAL Arbitration Rules offer a uniform set of procedures that can be adopted as a format which parties in *ad hoc* arbitrations can use to govern the conduct of the proceedings from its initiation, to the arbitration award, and beyond. They also govern the conduct of administered arbitrations in that several arbitral institutions allow the proceedings to be governed by the UNCITRAL Arbitration Law(s) and/or Rules (hereinafter collective referred to as "Rules").[13] The Rules cover all aspects of the arbitral process, including the appointment of arbitrators, the conduct of arbitral proceedings, and effects of any award.[14] With the UNCITRAL Arbitration Rules having been adopted in more than 60 countries in varying degrees, a uniform system of judicial review of awards is developing.[15]

International Arbitral Institutions

When entering into an arbitration arrangement, one is advised to weigh the options of pursuing an *ad hoc* arbitration by agreeing to a customized set of arbitration rules and procedures but without relying on an institution to administer those rules or enforce a decision. Alternatively, one may opt to go through an arbitral institution. In a 2006 survey of general counsels of companies around the world conducted by Queen Mary University of London and sponsored by Price Waterhouse, 75% of the participants responded that they would prefer to arbitrate through an arbitral institution as opposed to an *ad hoc* arbitration. Among the reasons for this is that institutional arbitration firms offer convenience in overseeing administrative procedures, provide a large pool of qualified neutral arbitrators, and offer credibility in the enforcement of judgments.[16]

Arbitral institutions oversee the management of arbitration proceedings. Services may include the oversight of the arbitrator selection process, the forum for the hearing, and the collection of applicable fees and awards, along with oversight of the proceeding as between the parties or between the parties and the

9 "A Misstep in US Arbitral Law: A Call For Change In The Enforcement Of Nondomestic Arbitral Awards", by Kristina Morrison, Tort Trial & Insurance Practice Law Journal, Spring – Summer, 2011(46:3&4) 46 Tort Trial & Ins. Prac. L.J. 803.

10 *Hall Street Associates v. Mattel, Inc.* 128 S. Ct. 1396 (2008).

11 *Ibid*. at 1406.

12 "Enforcement of Foreign Arbitral Awards in Asia", by Dalila Hoover, International Law News, Spring 2012.

13 For further clarification on the interplay of the 1976 and 2006 Laws and the 2010 Rules see "Interim Measures Under Revised UNCITRAL Arbitration Rules: Comparison to Model Law Reflects Both Greater Flexibility and Remaining Uncertainty," *Arbitration Brief*, Volume 1, Issue 2, Article 6, Lee Anna Tucker (2011).

14 United Nations Commission on International Trade Law, *UNCITRAL Arbitration Rules* (1976) available at www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html (last visited Jan.19, 2016).

15 *See* United Nations Commission on International Trade Law, *FAQ—Origin, Mandate, and Composition of UNCITRAL* available at www.uncitral.org/uncitral/en/about/origin_faq.html (last visited Jan. 19, 2016).

16 Nigel Rawding & Lucy Reed, The Freshfields Guide To Arbitration Clauses In International Contracts at 10, 58 (3d ed. 2011); Winston Stromberg, *Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Processes,* 40 Loy. L.A. L. Rev.1337, 1337 (2007).

arbitrator(s). Currently, there are three principal global arbitral organizations. They are the International Court of Arbitration affiliated with the International Chamber of Commerce (ICC), with its principal office in Paris France;[17] The London Court of International Arbitration (LCIA), headquartered in London, England;[18] and the American Arbitration Association, International Center For Dispute Resolution (ICDR), based in New York.[19] All three organizations are international in scope and have affiliated offices around the globe.

In addition to the three principal global organizations, there are number of regional arbitral institutions, including: the Commercial Arbitration and Mediation Center for the Americas (CAMCA), which is an affiliation of US, Canadian and Mexican arbitration organizations;[20] the Hong Kong International Arbitration Centre (HKIAC);[21] the Japan Commercial Arbitration Association (JCAA);[22] the British Columbia International Commercial Arbitration Centre (BCICAC);[23] the Arbitration Institute of the Stockholm Chamber of Commerce (SCC);[24] and the China International Economic and Trade Arbitration Commission (CIETAC). China is fast becoming a principal arbitration center. With the introduction of the 2015 CIETAC Arbitration Rules, there is more certainty in the enforcement of CIETAC arbitration awards from its Hong Kong, Shanghai, Shenzhen, and other branches, especially when administered by CIETAC Beijing.[25] However, there are still some outstanding enforcement issues involving awards from the Shanghai International Arbitration Center (SHIAC), and the Shenzhen Court of International Arbitration (SCIA), especially when enforcement of an award is sought in a provincial court of another Chinese jurisdiction.[26]

There are also other arbitrational organizations which service specific trade groups and circumstances. For example, the International Centre for the Settlement of Investment Disputes (ICSID), based in Washington DC and affiliated with the World Bank, provides a forum for the settlement of investment disputes between national governments that are members of the organization and nationals of member countries.[27] The World Intellectual Property Organization (WIPO) – Arbitration and Mediation Center, based in Geneva, Switzerland, provides alternative dispute resolution services to private parties involved in international intellectual property disputes.[28] Further, the Permanent Court of Arbitration (PCA), located in The Hague, provides a forum for the settlement of disputes among states.[29]

There has been a significant increase in new arbitration venues, legal regiments, and new courts established to enforce arbitral awards around the world. For example, as of 2010, new arbitration laws were enacted in France, Ireland, Hong Kong, Scotland, and Ghana. Also, Australia, India, and Ireland all created courts to oversee international arbitration matters. Further, jurisdictions such as France, the United Kingdom, Switzerland, Sweden, and China have all established courts to hear challenges of, and petitions to enforce arbitration awards.[30] The New York International Arbitration Center (NYIAC) opened a facility in New York City in early 2013 as a "dedicated center for International Arbitration in New York," in order to stay competitive with such jurisdictions as London, France, and Hong Kong.[31] It currently does not administer arbitrations or publish arbitration decisions. Rather, it offers a venue for international arbitration of any kind and develops informational programs and materials. It is also worth noting that The Kuala Lumpur Regional Centre for Arbitration (KLRCA), established in 1978, adopted the KLRCA-Arbitration Rules on September 20, 2012, which provide a procedural framework to

17 At: *www.iccwbo.org/court/*.

18 At: *www.lcia.org/*.

19 At *www.adr.org/icdr*. See: Jan Paulsson, Nigel Rawding, Lucy Reed & Eric Schwartz, The Freshfields Guide To Arbitration and ADR, 52 (2d Revised Ed. 1999).

20 At: *www.adr.org*.

21 At: *www.hkiac.org*.

22 At: *www.jcaa.or.jp/e/index.html*.

23 *At: www.bcicac.com*.

24 At: *www.jurisint.org*.

25 "CIETAC releases 2015 arbitration rules, Freshfields Bruckaus Deringer, Nov. 25, 2014 at http://knowledge.freshfields.com/en/global/r/1131/cietac_releases_2015_arbitration_rules.

26 "Enforcement of CIETAC arbitration awards in China", posted on July 7, 2013, by Robert Rhoda, Smyth & Co., Hong Kong, RPC, Commercial Dispute Blog at: http://www.rpc.co.uk/index.php?option=com_easyblog&view=entry&id=740&Itemid=106.

27 At: *icsid.worldbank.org*.

28 At: *www.wipo.int/amc/en/index.html*.

29 At: *www.pca-cpa.org*.

30 See "New York State Bar Association Task Force on New York Law, Final Report, "International Matters 4 (June 25, 2011).

31 Open Letter from Vincent E. Doyle III, President, New York State Bar Association (July 28, 2011).

resolve disputes arising from commercial agreements based upon Sharia law.[32]

In terms of its absolute number of arbitrations and its international scope, the ICC is the premier global arbitral institution. It was founded in 1919 and it administered over 20,000 cases since its inception. It administered approximately 790 arbitrations in 2014 alone.[33] Although its principal office is located in Paris, it has regional offices in Hong Kong and New York and administers arbitrations throughout the world.[34] The ICC Court, which performs an administrative and oversight role, provides quality control over rulings issued by ICC arbitration panels. This purportedly gives decisions issued by the ICC added scrutiny over other arbitration institutions, which helps to insure that its awards are rarely set aside.[35]

The LCIA is the oldest of the principal global institutions. It was founded in 1892, and maintains a global presence. Unlike the ICC, the LICA administrative rules give arbitrators expanded powers to order the production of evidence, such as experts, and to award security for legal costs. Conversely, it does not generally scrutinize its arbitration panels' awards, other than with respect to typographical or computational clerical errors.[36] In 2013 the LCIA received approximately 300 arbitral submissions.[37]

The ICDR, the international division of the American Arbitration Association, was established in 1996. The ICDR has established cooperative agreements with 62 arbitral institutions in 43 countries. These agreements enable arbitration cases to be filed and heard in any of these 43 nations. Once a case is filed, case managers serve as the court clerks and keep parties appraised on the progress of their case. The ICDR maintains a panel of over 400 independent arbitrators and mediators around the globe. Its institutional philosophy is to move matters forward expeditiously while controlling costs. Its procedures call for less administrative involvement than either the ICC or the LCIA.[38] More often than not, its constituents have included at least one American party, and in recent years it has administered more international arbitrations than the ICC.[39]

In addition to the above, several regional arbitral institutions are worth special mention. The CIETAC, the HKIAC, and the SCC are among the more active and successful regional institutions. The CIETAC was established in 1954 as the Foreign Trade Arbitration Commission and was renamed in 1989. It operates under the China Council for the Promotion of International Trade. Since 2000, the CIETAC has also been referred to as the Arbitration Court of the China Chamber of International Commerce. The CIETAC headquarters is located in Beijing with sub-commissions in Shanghai, Shenzhen, Chongqing, Tianjin and Wuhan City. The CIETAC also has 19 liaison offices located in different regions throughout China. In recent years, the CIETAC has had the most notices filed, per annum. In 2015 alone it had a total of 1968 cases accepted for arbitration, which is an increase over the 1610 cases accepted for arbitration in 2014.[40] It administrates arbitrations only in China and its rules are restrictive in allowing arbitrators from outside of China. Unlike the global institutions listed above, CIETAC allows for a unique combination of arbitration and conciliation in the same proceedings.[41]

The HKIAC was established in 1985 and is considered one of the busiest arbitration institutions. It is flexible in its procedures and operates with minimal interference from the administrative body. The HKIAC recommends that parties adopt its procedures, which incorporate the UNCITRAL rules, while allowing the parties the liberty to adopt any other procedural regime that suits their needs. In addition, although HKIAC arbitrations generally take place in Hong Kong, parties may arbitrate claims in other locations, provided that they assume any off-site administrative costs. In recent years, the HKIAC

32 See the KLRCA i-Arbitration Rules at http://www.globalarbitrationreview.com/cdn/files/gar/articles/KLRCA_i-Arbitration_Rules.pdf.

33 *ICC Dispute Resolution Bulletin, E-Chapter*, "2014 Dispute Resolution Statistics", Issue 1, ICC Publication No. @15BUL1-1, 2015 Edition.

34 *Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Processes,* Winston Stromberg, 40 Loy. L.A. L. Rev.1337, 1352 (2007).

35 *Ibid*, page 1353.

36 *Ibid* page 1356

37 Registrar's report 2013, LCIA website, http://www.lcia.org.

38 *Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Processes,* Winston Stromberg, 40 Loy. L.A. L. Rev.1337, 1353 (2007).

39 According to the *ICDR International Arbitration Reporter*, July 2012, Volume 3: "In 2011, the ICDR administered 994 cases involving parties and arbitrators from 90 countries."

40 The China International Economic and Trade Arbitration Commission website, About US, Statistics, http://www.cietac.org/index.php?m=Page&a=index&id=40&l=en.

41 *Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Processes,* Winston Stromberg 40 Loy. L.A. L. Rev.1337, 1357 (2007).

has lost ground to both Singapore and the CIETAC in the number of notices filed.[42]

The SCC generally deals with arbitrating trade disputes between Western and Eastern countries, especially countries that were part of the former Soviet Union or the Peoples Republic of China, as well as disputes between investors and countries. Despite the breakup of the Soviet Union and Eastern Block, the SCC is still an active institution. In 2014, there were 183 new SCC cases filed, of which 94 involved non-Swedish parties.[43]

Notwithstanding the precipitous increase in CIETAC administered arbitrations, over the last several years, according to the "2015 International Arbitration Survey" sponsored by Queen Mary University of London School of International Arbitration – Survey, and funded by the White and Case law firm, the ICC, LCIA, HKIAC, SIAC, SCC, ICSID and ICDR/AAA, appear to be the most preferred arbitral institutions, in the order listed.

Drafting an Arbitration Provision

When drafting an arbitral provision, special consideration must be given to the (1) choice of forum, (2) choice of law, (3) selection and number of arbitrators, (4) language of the proceedings, (5) discovery rights and obligations, (6) remedies, and (7) the arbitration rules to be followed and/or the applicable arbitral institution.

Parties should select a country that is party to the New York Convention to help guarantee enforcement of the arbitral award. In addition, the *lex arbitri* usually governs the procedural rules of the arbitration. Although the rules of the applicable arbitral institutions typically serve to guide the arbitrator in selecting what substantive law to apply, parties should be mindful of the fact that in certain instances arbitrators must defer to an agreed upon choice of law provision. If the parties speak different languages, drafters should indicate the language of the proceedings. Discovery of evidence from the adverse party in international arbitration is typically much more limited than what a contracting party may be accustomed to, particularly a party from the United States.[44] If contracting parties desire to broaden the scope of such discovery, drafters should explicitly set forth certain evidentiary procedures to be followed. With respect to remedies, the parties may expand the scope of possible arbitral awards beyond compensatory damages. Accordingly, drafters might want to include a clause that defines the type of awards the arbitrator(s) are empowered to render.

When contracting parties desire to have the UNCITRAL Arbitration Rules govern, the following provision is useful:

> 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. The appointing authority shall be [name of person or institution]. The number of arbitrators shall be [one/three]. The place of arbitration shall be [city and/or country]. The language to be used in the arbitral proceedings shall be [insert language].[45]

The various international arbitral institutions described above all offer suggested contractual language in the form of model arbitration clauses that serve as a framework for drafting arbitral provisions. Drafters, however, should be mindful of any transaction-specific needs that should be further addressed.

Commencing Arbitral Proceedings

Arbitral proceedings are commenced under Article 4 of the ICC Rules of Arbitration, Article 1 of the LCIA Arbitration Rules, Article 2 of the ICDR International Dispute Resolution Procedures, and Article 3 of the UNCITRAL Arbitration Rules, as well as the rules of the various regional institution, when a claimant delivers a notice or request for arbitration to the respondent(s) and the respective arbitral institution.[46] The notice or request for arbitration must include the names and addresses of the parties to the dispute, a reference to the arbitration clause(s) or separate arbitration agreement(s) relied

42 *Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Processes,* Winston Stromberg, 40 Loy. L.A. L. Rev. 1357-1358 (2007).

43 Arbitration Institute of the Stockholm Chamber of Commerce, SCC Statistics 2014, http://sccinstitute.com/statistics/.

44 Javier H. Rubinstein, *International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions*, 5 Chi J. Int'l L. 303 (2004).

45 Deborah L. Holland, *Comment, Drafting a Dispute Resolution Provision in International Commercial Contracts, 7 Tulsa J. Comp. & Int'l L. 451, 476 (2000) supra* note 18 (citing Robert Donald Fischer & Roger S. Haydock, *International Commercial Disputes: Drafting an Enforceable Arbitration Agreement*, 21 Wm. Mitchell L. Rev. 941, 983 (1996).

46 British Columbia International Commercial Arbitration Centre (BCICAC) *International Commercial Arbitration Rules of Procedure* [hereinafter *BCICAC Rules*], Article 17 (2000), http://bcicac.com/arbitration/rules-of-procedure/international-commercial-arbitration-rules-of-procedure/ (last visited Jan. 3, 2012).

upon, a reference to the contract to which a dispute has arisen, the general nature of the claim and an estimate of the value of the dispute, the relief or remedy sought, and the preferred number of arbitrators if not already agreed upon. It should also include a reference to the jurisdiction where the arbitration is to take place and the laws of the country that are to be applied. Additionally, a commencement fee must generally accompany the notice or request for arbitration, which is typically nonrefundable.[47]

Although the manner in which arbitration is commenced under the principal and regional arbitrational rules such as the CIETAC's and BCICAC's are similar, there are significant differences.[48] For example, the CIETAC's request for arbitration does not require a reference to the contract from which the dispute arose, an estimated value of the dispute, the relief or remedy sought, or the preferred number of arbitrators. A CIETAC request for arbitration must include a statement of the main issues in dispute, facts and grounds upon which the claim is based, and relevant evidence supporting the facts upon which the claim is based.[49] The applicable rules of arbitration should be carefully studied, in advance of filing a Notice or Request.

Number of Arbitrators

The ICC and LCIA rules both provide that where the arbitration agreement is silent as to the number of arbitrators required, the organization will assign a single arbitrator unless circumstances require the appointment of more arbitrators.[50] Under the ICDR, although the parties may mutually agree upon any number of arbitrators, the general presumption is that one will be appointed if the parties fail to reach a consensus.[51] However, the administrator may determine that three arbitrators are appropriate due to the size, complexity, or other circumstances of the case.[52]

Other institutions such as the SCC and the BCICAC provide that three arbitrators be appointed unless the parties agree on an alternative number of arbitrators or the institution determines otherwise.[53] Where three arbitrators are to be appointed, each party is to name one arbitrator, and the two arbitrators appoint the remaining arbitrator, who is to act as the presiding arbitrator.[54] In international arbitration, the party arbitrators are expected to be impartial at the time of their appointment. If one party fails to name an arbitrator, the other party can generally request the arbitral institution to appoint an arbitrator.[55] Under circumstances where an institution is to select an arbitrator, it will heed any qualifications required of the arbitrator as agreed upon by the parties.[56] Under the CIETAC's commercial arbitration rules, the arbitration tribunal may be composed of one or three arbitrators, as agreed upon by the parties.[57] If the parties fail to agree or if the rules provide otherwise, the tribunal will be composed of three arbitrators.[58] The claimant and respondent each have 15 days from the date a notice of arbitration is received to appoint one arbitrator. If a party fails to name a party appointed arbitrator, then CIETAC would appoint an arbitrator on the party's behalf. Similarly, where there are multiple parties to the proceeding and one party fails to appoint a party arbitrator, CIETAC will appoint all members of the arbitral tribunal and designate the presiding arbitrator.[59]

Representation, Witness Testimony, and Experts.

Parties may be represented or assisted by any person during arbitral proceedings according to Articles 12 of both the ICC's and the ICDR's Rules. Under Article 18 of the LICA's Rules, a "legal practitioner" may represent any party. The ICC, LCIA, and the ICDR all have relatively flexible rules for the introduction of written evidence. ICC, LCIA, and ICDR tribunals all have the authority to employ independent experts and the parties have a right to question the expert at a hearing.[60]

47 *Ibid.* Art. 40.

48 CIETAC issued a set of revised arbitration rules effective January, 1 2015 that added several new provisions addressing emergency arbitrations and joiner of parties.

49 *China International Economic and Trade Arbitration Commission Arbitration Rules* [hereinafter *CIETAC Rules*], Article 12 (2015), http://cn.cietac.org/rules/rule_E.pdf.

50 International Chamber of Commerce Rules of Arbitration [hereinafter ICC Rules] Art. 12 and 12.2 "Formation of the Arbitral Panel" and "Number of Arbitrators" respectively (effective as of Jan. 1, 2012).

51 American Arbitration Association, International Centre for Dispute Resolution (ICDR), *International Dispute Resolution Procedures* [hereinafter *ICDR Rules*], Article 11 (2014), https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTAGE2020868&revision=latestreleased.

52 *Ibid.*

53 *BCICAC Rules, supra* Art. 5.

54 *BCICAC Rules, supra* Art. 7.

55 *Ibid.*

56 *Ibid.* Art. 8.

57 *CIETAC Rules, supra* Art. 20.

58 *Ibid.*

59 *CIETAC Rules, supra* Art.22.3

60 ICC Rules art. 25.4; London Court of International Arbitration Rules [hereinafter LCIA Rules] art. 21.1; ICDR Rules, art. 25].

Evidence of witnesses in an ICDR proceeding may also be presented in the form of signed written statements, in addition to live testimony.[61] A CIETAC tribunal may appoint experts or appraisers to advise the tribunal with respect to any necessary issues. Findings are reported in an expert or appraiser's report. After the submission of findings, at the request of either party and with the approval of the tribunal, the expert and appraiser may be requested to provide explanations of their reports at an oral hearing.[62]

Apportionment of Costs

The rules of the ICC, LCIA, and ICDR all allow arbitration panels the discretion to award legal and administrative costs but are significantly impacted by the terms of the arbitration agreement and the applicable jurisdictional laws.[63] An ICDR tribunal will apportion costs among the parties if it determines such apportionment to be reasonable.[64] These costs may also include the reasonable fees for the successful party. Similar to the above institutions, the presumption in CIETAC arbitrations is that the arbitral tribunal will determine the allocation of the arbitration costs.[65] Contrary to the above, the presumption of the LCIA is that the losing party bears the burden of paying the prevailing party's legal costs, administrative costs, and any expert witness fees incurred.[66]

Language of the Proceedings and Applicable Substantive Law

The UNCITRAL Arbitration Rules gives the parties wide discretion in determining the language to be used in the proceedings. In ICDR proceedings, the language shall be that of the documents containing the arbitration agreement unless the tribunal or parties determine otherwise.[35] The LCIA also gives the parties wide discretion in deciding on the language to be used in the arbitration proceedings, but where the arbitration agreement is written in more than one language, the LCIA empowers the tribunal to decide on the language to be used in the proceeding (LCIA Rules, art. 17.3). This is contrasted with the CIETAC, which provides that the determination of the language to be used in the proceedings is based on the submissions of the parties and the language of the arbitration agreement. However, in the absence of an agreement, Chinese shall be the language shall be used in CIETAC proceedings.[68]

Article 17 of the ICC Rules and Article 28 of the ICDR's Rules provide that the substantive law to be applied is the rule of law it considers to be appropriate given all the circumstances. Article 16.3 of the LCIA Rules provides that the applicable law shall be the "… arbitration law of the seat of the arbitration." In contrast, the CIETAC Rules are formulated in accordance with the Arbitration Law of the People's Republic of China and the "provisions of other relevant laws . . .."[69] In addition, Article 4 of the CIETAC Rules provides that "[w]here the parties have agreed on the application of other rules, or any modification of these Rules, the parties' agreement shall prevail except where such agreement is inoperative or in conflict with a mandatory provision of the law of the place of arbitration." Article 145 of the People's Republic of China General Principles of Civil Law provides that: "The parties to a contract involving foreign interests may choose the law applicable to settlement of their contractual disputes, except as otherwise stipulated by law. If the parties to a contract involving foreign interests have not made a choice, the law of the country to which the contract is most closely connected shall be applied."[70] In the absence of any express choice of law by the parties to a foreign-related arbitration, the tribunal will apply such law as it determines appropriate.

Mediation

Mediation refers to a method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually acceptable solution. Unlike arbitrators, a mediator typically does not render a decision or award except on an advisory basis or at the joint request of the parties to the dispute. Rather, the mediator helps the parties understand each other's position more accurately than would otherwise

61 ICDR Rules *supra* Art. 23.4.

62 CIETAC Rules *supra* art. 38.

63 *The Freshfields Guide To Arbitration Clauses in International Contracts*, Nigel Rawding & Lucy Reed, page 10 (3d ed. 2011).

64 ICDR Rules *supra* Art. 20.

65 *CIETAC Rules supra* Art. 46.

66 *LCIA Rules*, Article 28.4 "Arbitration Costs and Legal Costs" effective October 1, 2014.

67 ICDR *Rules supra* Art. 18.

68 CIETAC *Rules supra* Art. 67.1.

69 CIETAC *Rules supra* Art. 1.

70 General Principles of the Civil Law of the People's Republic of China, art. 145, http://en.chinacourt.org/public/detail.php?id=2696 (last visited Jan 20, 2016).

be possible without the assistance of a neutral third party. Effective mediators are able to identify the strengths and weaknesses in each party's respective case, as well as the potential consequences of not settling the matter.[71] It is a significantly more cost efficient process than either litigation or arbitration. Many international arbitral institutions also provide mediation services, including the ICC, the LCIA, and the ICDR.

Established nearly three decades ago, JAMS (Judicial Arbitration and Mediation Service)[72] is America's largest mediation service and has more than 200 full-time "neutrals," mostly former judges, attorneys, or law professors. It handles about 10,000 cases a year worldwide and now has its own set of international mediation rules.[73]

The International Institute for Conflict Prevention and Resolution (CPR)[74] was founded in 1979 as a resource for in-house lawyers of large corporations to devise and implement alternative dispute resolution strategies to help reduce the high cost of complex litigation. Although JAMS is larger in terms of its panel of "neutrals" and the number of cases it mediates in the US, CPR appears to offer more resources to resolve litigation outside of the US and has significant resources in the Asia Pacific Region, including China. It also has an expansive list of Directors on its Board and Executive Advisory Committee members.

The City Disputes Panel (CDP) at *www.citydisputespanel.org/* was founded in the City of London in 1994 with the intended purpose of resolving complex commercial disputes among parties affiliated with the financial services industry. Several preeminent London institutions including the Bank of England, the City of London Corporation, the Financial Services Authority, and Lloyd's of London sponsor it.

The CPR International Reinsurance Industry Dispute Resolution Protocol is an initiative developed with the support of Lloyd's of London. It provides a four-step method in which the parties are to: (1) identify and give early notice of dispute arising from a reinsurance agreement; (2) exchange information and documents that are public and/or not protected by any claims of confidentiality and are intended to obtain a commercially reasonable assessment of the dispute at issue; (3) directly negotiate with each other to resolve the dispute, and; (4) allow for a skilled, neutral mediator to facilitate the negotiations, if necessary.[75]

This protocol offers a simple, fast, inexpensive, and confidential initial platform for the resolution of commercial disputes, both within and outside of the reinsurance industry, by giving the parties a preliminary look at the opposition's case through an open exchange of non-privileged relevant information and a brief period of time to evaluate the consequences of taking a case to arbitration or trial. It has specific deadlines for delivering the Notice of Negotiation (30 days), Notice of Response (30 days), Direct Meeting (15 Days from last delivered Notice of Response), and Mediation if the Direct Meeting proves unsuccessful (14 days). The protocol also provides the added stipulation that these proceedings will be without prejudice.[76]

Drafting Mediation Provisions.

It has been suggested that the best way to ensure a mediation process before the parties get too caught up in respective positions and become somewhat intractable is to draft a mediation provision into the transactional document or insurance policy.[77] This would have the impact of forcing the parties to the mediation table early in the life of the dispute. To expedite the process, the parties' mediation provision could follow the blue print established under the CPR International Reinsurance Industry Dispute Resolution Protocol, which could serve insurers, policyholders, and other parties in dispute as effectively as reinsurers. This protocol can effectively serve parties in dispute regardless of the amount in question and can extend beyond the parties that are bound to the mediation provision, assuming that there is universal consent to include all parties that have a stake in the dispute.

When drafting a mediation provision, one should be sure to (1) set forth a clear requirement to mediate before using other dispute resolution alternatives, (2)

71 *QCCCH Canadian Limited 2003,* The Honourable George W. Adams, page 155.

72 At: *www.jamsinternational.com/*.

73 Both sets of rules can be found at http://www.jamsinternational.com/rules-procedures/mediation-rules.

74 At: *cpradr.org/Home.aspx*.

75 CPR International Institute For Conflict Prevention & Resolution, CPR International Reinsurance Industry Dispute Resolution Protocol (2006).

76 See F. Peter Phillips, *New Protocol For Reinsurance Coverage Disputes*, Risk Management Magazine, April 2007, at 12. See also, *The CPR International Reinsurance Industry Dispute Resolution Protocol,* Vincent Vitkowsky *Mealey's Litigation Report, February 1, 2007, at 12.*

77 *A Call For Action: Mandatory Mediation of Insurance Coverage Disputes in the D&O and E&O Arenas*, by Joseph P. Monteleone and Perry S. Granof, The PLUS Journal, September 2013, Vol. XXVI, Number 9.

decide whether the mediator should also function as the arbitrator if mediation fails to resolve the entire dispute, (3) consider using the rules of one of the international institutions or establish *ad hoc* rules that can parallel the CPR International Reinsurance Industry Dispute Resolution Protocols, and (4) set forth what steps are to be taken if mediation fails.[78] It is strongly recommended that any arbitration panel expressly excludes the mediator to the dispute, since a separate mediator promotes open and frank discussions that are more likely to lead to an agreed upon settlement.

Conclusion

The international business community requires a quick and efficient resolution of commercial disputes. Attorneys involved in international commercial disputes should properly advise their clients on the availability and attractiveness of international ADR, whether it is in the form of arbitration, mediation, or some other ADR process not addressed in this article. Whatever type or combination of ADR protocol is chosen, parties should be sensitive to the differences in the ADR process often understood by opposing parties to an international commercial dispute. Up-front planning and communication, before the dispute arises, will go a long way toward controlling costs and will likely lead to a more satisfactory dispute resolution process. This is intended to serve as merely a primer on international ADR. A thorough understanding of the applicable arbitrational institutions and the available ADR rules of procedure are essential, before choosing the appropriate forum, and commencing an international ADR proceeding. ⚖

Perry S. Granof *currently serves as Chair-Elect of the Tort Trial and Insurance Practice Section Dispute Resolution Committee of the ABA. He is the Managing Director at Granof International Group LLC, where he consults on insurance issues, provides expert witness testimony, conducts claim audits, and sits as an arbitrator/mediator, specializing in professional liability, with specific expertise in directors and officers (D&O), professional indemnity (PI), financial institutions (FI), and international exposures.* He can be reached at *pgranof@granofinternational.com*.

Randy J. Aliment *is a partner in the Seattle, Washington office of Lewis Brisbois Bisgaard & Smith LLP. His practice emphasizes commercial litigation, international law and arbitration. Aliment has been involved in transactions in Europe, the Middle East, Canada, and China. He was the Chair of the Tort Trial and Insurance Practice Section of the ABA and is a current member of the Executive Committee of the Union Internationale des Avocats headquartered in Paris, France. He can be reached at Randy.Aliment@lewisbrisbois.com.*

78 Deborah L. Holland, *supra* note 18, at 459-61 (2000).