

1996

International Commercial Disputes Drafting an Enforceable Arbitration Agreement

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INTERNATIONAL COMMERCIAL DISPUTES DRAFTING AN ENFORCEABLE ARBITRATION AGREEMENT

Robert Donald Fischer and Roger S. Haydock[†]

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I. Introduction

Disputes are inevitable in the international business world. Fortunately, parties have a choice regarding how best their disputes can be resolved. Arbitration is fast becoming the primary way international companies resolve their transnational problems. Global businesses understand that arbitration provides a very fast, efficient, fair, private, and final process. Arbitration can resolve controversies businesses have with companies, customers, vendors, debtors, governments, and others with whom they do business. All it takes is the relatively simple inclusion of a pre-dispute binding arbitration clause in a written agreement and their disputes are resolved through arbitration.

This article is designed to assist American corporations doing business overseas and across national borders, attorneys and arbitrators with an interest in international commercial law, and commercial lawyers who demand to know the impact of an

arbitration clause on contracts they write. The article is written as a practical guide to lawyers for making reasoned decisions about inserting an arbitration clause into a contract, and for considering what that clause must say. Many disputes are tempered because of the careful planning of a commercial attorney when an agreement is originally drafted. It is most disheartening to see a well-drafted contract, obviously the result of lengthy drafting by specialists, that cannot be enforced because of a defective arbitration clause.

Part II of this article explains why a corporation may wish to negotiate and include pre-dispute binding arbitration clauses in its agreements with manufactures, suppliers, distributors, partners, joint venturers, or customers located in other countries as opposed to relying on litigation and the vagaries of a host country's laws and legal system. Part III of the article details how to draft an enforceable arbitration clause; provides a checklist of considerations and examples of effective arbitration clauses; and refers to several arbitration forums to consider when drafting an agreement with a transnational party. The appendix contains practical information meant to assist parties considering arbitration as a means to solve international business problems.

Because of the scope and diversity of the subject matter, the continual revision of arbitration statutes, and changes in common law decisions, readers are encouraged to use this article as an introductory guide and reference point from which to begin further in-depth analysis of particular circumstances. Specific cases should be reviewed with the advice of expert local counsel.

II. The Affirmative Choice to Arbitrate

A. *Background*

Arbitration is the voluntary submission of a dispute to a neutral third party, arbitrator or arbitral panel, that makes a binding and enforceable decision following a hearing. Mediation, conciliation, and negotiation are additional forms of alternative dispute resolution.¹ Arbitration, mediation, concilia-

1. STEPHEN PATRICK DOYLE & ROGER SILVE HAYDOCK, WITHOUT PUNCHES: RESOLVING DISPUTES WITHOUT LITIGATION 7-17 (1991).

tion, and negotiation are referred to as alternative dispute resolution because they offer an alternative to litigation. If parties do not expressly choose an alternative dispute resolution method in a transaction or agreement, then they impliedly select litigation to resolve any disputes.²

Various alternative dispute resolution ("ADR") organizations such as the International Chamber of Commerce ("ICC") and the American Arbitration Association ("AAA") have been using arbitration in the business setting for well over half a century. Informal dispute resolution has its roots in many of the world's societies, dating back to Confucian China, 12th Century England, and Colonial North America.³ The ICC's Court of Arbitration was created shortly after World War I by business people who wrestled with the practical difficulties of resolving disputes with merchants of different national backgrounds.⁴ At that time, American businesses were less accustomed to binding arbitration than European businesses.⁵ The use of ADR has seen tremendous growth since then, both domestically and in the international commercial setting. The ICC has handled roughly 7500 international arbitrations since it was founded in

A "mediator" is a person accepted by the parties who takes on the role of helping the parties reach an agreed settlement. The mediator attempts to bring the parties together so they themselves might reach a compromise solution. *Id.* at 63-89.

In contrast, a "conciliator" draws up and proposes the terms of an agreement designed to represent what the conciliator deems is a fair compromise of a dispute, after having discussed the dispute with the parties. ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 20-2 (1986) [hereinafter REDFERN & HUNTER (1986)].

2. See NEIL KAPLAN ET AL., *HONG KONG AND CHINA ARBITRATION: CASES AND MATERIALS* xxxv (1994) (defining arbitration as, "[t]he voluntary submission by the parties of a dispute for decision by recognized and regular procedure other than litigation").

3. Betty Southard Murphy, *ADR Impact On International Commerce*, *DISP. RESOL. J.*, Dec. 1993, at 68. This article also discusses the Puritan idea of "covenant" pledged by community members:

This concept of "moral codes or spiritual contracts" led to resolution of disputes within the group, and not by use of the legal process. Similarly, in 1540, the Rhode Island Colony established a compact which provided "for a government by arbitration for our 'loving friends and neighbors, the inhabitants of this Towne of Providence.'"

Id. at 75 n. 1 (citing Susan L Donegan, *ADR in Colonial America: A Covenant for Survival*, *ARB. J.*, June 1993, at 14, 18).

4. W. LAURENCE CRAIG ET AL., *INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION*, xxi (2d ed. 1990).

5. *Id.*

1923, about 3,500 taking place between 1983-1993.⁶ In the international commercial setting, between 1987 and 1992 the AAA nearly doubled its international commercial arbitration caseload, from 106 to 204 cases.⁷ Modern dispute resolution, such as Advanced Dispute Resolution and its International Arbitration Forum provide arbitration and other ADR services throughout the world. ADR is now the most used method of international commercial dispute resolution.⁸

The growth in international commercial arbitration has been fueled by several factors. Globalization and the impracticability of traditional justice systems are two major forces fueling growth in the use of arbitration.⁹ Due to the impracticability of traditional justice systems, governments and businesses from around the world have embraced arbitration as an efficacious way of handling international commercial disputes.¹⁰ Prior to the use of arbitration, corporations and individuals were clearly not subjects under international law or “the law of nations.”¹¹

6. Murphy, *supra* note 3, at 69. See generally 2 SIGVARD JARVIN ET AL., COLLECTION OF ICC ARBITRAL AWARDS 1986-1990: RECUEIL DES SENTENCES ARBITRALES DE LA CCI (1994) (containing arbitral awards published in the English language between 1986 & 1990).

7. Murphy, *supra* note 3, at 69.

8. *Id.*

9. Thomas E. Carbonneau, *National Law And The Judicialization Of Arbitration: Manifest Destiny, Manifest Disregard, Or Manifest Error*, in INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS “JUDICIALIZATION” AND UNIFORMITY? 116 (Richard B. Lillich & Charles N. Brower eds., 1993) (containing a series of papers presented at the Twelfth Sokol Colloquium in Charlottesville, Virginia) [hereinafter INTERNATIONAL ARBITRATION IN THE 21ST CENTURY]. In this paper, Carbonneau describes traditional legal systems as follows:

[L]egal systems are the repository of fundamental cultural, political, and social values that are instrumental to the life of national societies. Law cannot be removed from its enabling community without a serious impact upon that society's lifeblood [I]t is also true that litigation systems, through their length, cost, and destructive dynamic, have drained national societies. Lawyers and courts, it seems, perform their roles to the detriment of the welfare of the society and even of the individual litigants.

The responsibility for redressing the failure of the law and for protecting core values has fallen squarely upon the shoulders of arbitration. That responsibility is immense.

Id. at 117 (citations omitted).

10. Roger S. Haydock & Jane L. Volz, *The Recognition and Enforcement of Foreign Arbitral Awards—Enforcing the Award Against The Recalcitrant Loser*, 21 WM. MITCHELL L. REV. 867, 937 (1995).

11. HOUSTON PUTNAM LOWRY, CRITICAL DOCUMENTS SOURCEBOOK ANNOTATED: INTERNATIONAL COMMERCIAL LAW AND ARBITRATION xix (1991).

While this may still be strictly true today, parties to an agreement are given substantial rights by the various international instruments drafted under the auspices of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), the International Institute for the Unification of Private Law ("UNIDROIT"), the Hague Conference on Private International Law, the United Nations Commission on International Trade Law ("UNCITRAL"), and other international conventions and rules.¹² In

12. See generally *id.* This Critical Documents Sourcebook contains the text of 27 documents, which include, but are not limited to conventions, rules, codes of conduct, and procedures, and are categorized into two parts: (1) commercial and corporate practice, and (2) arbitration and dispute resolution. The list of documents below provides a glimpse of the breadth of international law that has evolved over the years. The documents include:

1. *Commercial and Corporate Practice*

- (a) 1980 United Nations Convention on Contracts for the International Sale of Goods.
- (b) Conventions on the Limitation Period in the International Sale of Goods.
- (c) 1988 United Nations Convention on International Bills of Exchange and International Promissory Notes.
- (d) UNIDROIT Convention on International Financial Leasing.
- (e) UNIDROIT Convention on International Factoring.
- (f) Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents.
- (g) Hague Convention on the Law Applicable to Products Liability.
- (h) 1980 European Economic Community Convention on the Law Applicable to Contractual Obligations.
- (i) UNIDROIT Convention on Agency in the International Sale of Goods.
- (j) Hague Convention on the Law Applicable to Agency.

2. *Arbitration and Dispute Resolution*

- (a) 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
- (b) 1975 Inter-American Convention on International Commercial Arbitration.
- (c) Permanent Court of Arbitration: 1962 Rules of Arbitration and Conciliation for Settlement of International Disputes Between Two Parties of Which Only One Is a State.
- (d) International Convention on the Settlement of Investment Disputes ("ICSID") Between States and Nationals of Other States.
- (e) ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings and Rules of Procedure for Arbitration Proceedings.
- (f) UNCITRAL Model Law on International Commercial Arbitration.
- (g) UNCTRAL Arbitration Rules.
- (h) International Chamber of Commerce Rules of Arbitration.
- (i) International Chamber of Commerce Rules for Adaptation of Contracts.

addition to the impracticability of traditional justice systems, the interest in and growth of arbitration has been prompted by the tremendous expansion of international commerce and the recognition of our global economy. There has also been a corresponding growth in the availability of institutions experienced in handling arbitration and other forms of ADR, providing a practical alternative to litigation.

International arbitral proceedings and arbitrators operate nearly as autonomously and independently as courts of law, and with a similar level of adjudicatory authority.¹³ History has shown a remarkable sovereign acquiescence in the development of the arbitration process, which has shifted to a proactive positioning to encourage the use of arbitration, in part as an economic development tool.¹⁴ National laws have been highly receptive to arbitration. The typical statute governing arbitration provides for cooperation between the judicial and arbitral processes, limits judicial supervision of awards, and perhaps most importantly divests courts of the jurisdiction to hear matters submitted to arbitration in recognition of the legitimate exercise of contractual rights between parties.¹⁵

B. Strengths of Arbitration

Given the growth in popularity of arbitration, the strengths of arbitration usually outweigh its weaknesses in the international commercial arena. The tremendous growth in the use of

-
- (j) International Chamber of Commerce Rules for a Pre-Arbitral Referee Procedure.
 - (k) International Chamber of Commerce Rules for Technical Expertise.
 - (l) American Arbitration Association Commercial Arbitration Rules and Supplemental Rules for International Commercial Arbitration.
 - (m) Rules of Procedure of the Inter-American Commercial Arbitration Commission.
 - (n) International Bar Association Rules of Evidence.
 - (o) International Bar Association Rules of Ethics for International Arbitrators.
 - (p) American Arbitration Association/American Bar Association Code of Ethics for Arbitrators in Commercial Disputes.
 - (q) American Arbitration Association Procedures for Cases Under the UNCITRAL Arbitration Rules.

Id.

13. INTERNATIONAL ARBITRATION IN THE 21ST CENTURY, *supra* note 9, at 119.

14. *Id.*

15. *Id.*

arbitration for dispute resolution may be attributed to a host of its strengths, including:

- (1) flexibility and adaptability of procedure;
- (2) the ability to customize the process;
- (3) party participation;
- (4) predictability;
- (5) expertise of arbitrators;
- (6) procedural and evidentiary advantages;
- (7) finality of decisions and awards;
- (8) enforceability of awards;
- (9) speed and efficiency of arbitration;
- (10) cost savings;
- (11) privacy; and
- (12) fairness and accountability.

Each of these strengths is addressed below.

1. Flexibility and Adaptability

Although there are internationally accepted concepts of what is required to constitute a properly conducted arbitration, there is not a single, uniform way to conduct an international commercial arbitration. The adaptability and flexibility parties have in choosing or shaping their own arbitral process is one of arbitration's strengths. Most practitioners recognize that the adaptability of arbitration will suffer if the process becomes excessively "institutionalized" by rigid rules or customs.¹⁶ It is important to note that institutional arbitration and ad hoc arbitration are "distinct methods of proceeding."¹⁷ Parties to an institutional arbitration conduct the arbitration in accordance with the procedural rules of the particular institution concerned.¹⁸ The parties to an ad hoc arbitration may establish their own rules of procedure, allowing additional flexibility to fit the facts of the dispute between them.¹⁹ Regardless of which method is used, the parties still have a significant degree of flexibility since there are numerous institutions or procedural rules to choose from when drafting an arbitration clause.

16. See REDFERN & HUNTER (1986), *supra* note 1, at vii.

17. *Id.* at 37.

18. *Id.* For an example of a set of procedural rules applicable to international arbitrations, see International Arbitration Forum Code of Procedure, Advanced Dispute Resolution, P.O. Box 50191, Minneapolis, Minnesota 55403, (612) 782-2534, fax (612) 782-2329.

19. *Id.* at 39-40.

2. *Ability to Customize the Process*

In addition to being able to choose between institutional or ad hoc arbitration, the element of choice in arbitration also provides parties the ability to deal with language and cultural differences in a proactive fashion. Some would say that as methods of dispute resolution, arbitration and litigation are becoming procedurally more alike than ever.²⁰ Nevertheless, it appears that several distinct and unique features of arbitration will not change, including the following: the privacy of the proceedings; the parties' agreement on applicable rules of procedure; the use of party-appointed arbitrators; the selection of arbitrators who are experts in the field; and the ability to severely limit grounds for vacation of a judgment.²¹

3. *Party Participation*

Parties choose the role lawyers play in arbitral proceedings, and whether to avoid them altogether. Because of the relatively lower degree of complexity, it is often easier for the "lay-person" or non-lawyer to participate in an arbitral proceeding. In addition, the person representing a party to an arbitral proceeding is not required to be a licensed attorney at law.

4. *Predictability.*

Parties to arbitration are insured a predictable process, because they have had the opportunity to select, in advance of a dispute, the place of arbitration and the rules under which the arbitration will proceed. An arbitration clause may indicate the rules under which the arbitration will take place, the number of arbitrators, the place of arbitration, and the language to be used. Appendix B contains examples of arbitration clauses.²²

5. *Expertise of Arbitrators*

Arbitration offers parties the opportunity to choose the arbitration organization that will appoint an arbitrator or to

20. Arthur W. Rovine, *Fast-Track Arbitration: A Step Away From Judicialization Of International Arbitration*, in INTERNATIONAL ARBITRATION IN THE 21ST CENTURY, *supra* note 9, at 46.

21. *Id.*

22. *See infra* app. B.

select their own arbitrator. One or more arbitrators may be chosen because of their special expertise and background in a given industry, such as construction, information technology, transportation, or because of the arbitrator's technical expertise in process engineering, accounting, product development and other areas.²³ An experienced arbitral tribunal may be better equipped than judges in a courtroom to grasp the salient facts, heed the technical subtleties, and envision a sensible award.²⁴ This may save the parties time, money, and a continued working relationship. Moreover, arbitrators are usually certified and accomplished attorneys; sometimes they are former judges with a great deal of trial experience applying the law to various disputes. Arbitral organizations maintain lists of experienced arbitrators.

6. *Procedural and Evidentiary Advantages*

Arbitrators apply broad rules of evidence based on general relevance and reliability standards and are not required to follow strict rules of procedure or evidence. Although an experienced arbitrator may have been trained in either a common law or a civil law approach to evidence and fact-finding, they tend not to favor one or the other.²⁵ Rather, they concentrate on establishing the facts necessary for the determination of the issues between the parties, using whatever means are appropriate.²⁶ Experienced arbitrators are extremely reluctant to be limited by any restrictive rules of evidence that might frustrate them from achieving this goal.²⁷ Institutional rules of arbitration for the admissibility of evidence from AAA, ICC and UNCITRAL bear

23. REDFERN & HUNTER (1986), *supra* note 1, at 17.

24. *Id.*

25. REDFERN AND MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 327 (2d ed. 1991) [hereinafter REDFERN & HUNTER (2d ed.)]. The civil-law approach to evidence emphasizes documents and not witnesses. Hearings tend to be shorter. Arbitrators have the duty to evaluate the weight and authenticity of the documents. Witnesses are heard, if at all, only after the exchange of briefs and documents by the parties, or when the documents are not decisive. CRAIG ET AL., *supra* note 5, at 376-81. In contrast, common-law proceedings emphasize hearings, oral testimony, and the examination of witnesses. CRAIG ET AL., *supra* note 5, at 376-81. This is the trial by jury tradition, which results in far longer and usually more adversarial proceedings. CRAIG ET AL., *supra* note 5, at 376-81.

26. CRAIG ET AL., *supra* note 4, at 376-81.

27. *Id.*

this out.²⁸ Article 25(6) of the UNCITRAL Rules states that, “[t]he arbitral tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence offered.”²⁹ The ICC Rules have no express provision and do not contain a detailed code of arbitration procedure.³⁰ However, Article 14(1) of the ICC Rules supplies the framework for the conduct of the proceedings and gives wide powers to the arbitrator to fill the gaps as follows:

The arbitrator shall proceed within as short a time as possible to establish the facts of the case by all appropriate means. After study of the written submissions of the parties and of all documents relied upon, the arbitrator shall hear the parties together in person if one of them so requests; and failing such a request he may of his own motion decide to hear them.³¹

Article 14(1) further provides that, “the arbitrator may decide to hear any other person in the presence of the parties or in their absence provided they have been duly summoned.”³²

Similarly, National Arbitration Forum (“NAF”) Rules and the AAA Rules for arbitration provide broad discretion to the arbitral panel.³³ International Arbitration Forum Rule Code of Procedure 35(C) states: “The arbitrator shall determine the admissibility and weight of evidence and shall not be bound by the rules of evidence.”³⁴ Section 31 of the AAA rules states that: “The arbitrator shall be the judge of the relevance and materiality of the evidence offered, and conformity to legal rules of evidence shall not be necessary.”³⁵

The International Bar Association (IBA) has developed supplementary rules to govern the presentation and reception of evidence in international commercial arbitration.³⁶ These rules may be adopted together with institutional and other

28. See THOMAS OEHMKE, *INTERNATIONAL ARBITRATION* 829-40, appendix A:4-4 (1990 & Supp. 1994), (listing AAA rules); REDFERN & HUNTER (2d ed.), *supra* note 26, at 571-94, 688-704, (listing ICC and UNCITRAL rules).

29. REDFERN & HUNTER (2d ed.), *supra* note 25, at 698, appendix 12.

30. *See Id.* at 571-94.

31. *Id.* at 583.

32. *Id.* at 584.

33. OEHMKE, *supra* note 28, at 829-40.

34. NAT’L ARB. FORUM CODE OF P. 35(c).

35. OEHMKE, *supra* note 28, at 835.

36. REDFERN & HUNTER (2d ed.), *supra* note 25, at 704-07.

general rules or procedures governing international commercial arbitration.³⁷ Article 7 of the IBA Rules of Evidence also gives the arbitrator broad powers as follows:

- (a) to vary, extend, or limit any time-periods provided in the Rules of Evidence, or previously ordered by him;
- (b) to order that a witness whose Witness Statement has been delivered be available to be called by any party;
- (c) to call witnesses to testify orally or in writing, whether the parties agree thereto or not;
- (d) to rule that a witness' evidence be ignored if the witness fails to appear without good cause;
- (e) to rely on his own expert knowledge;
- (f) to appoint experts to assist him or to give expert evidence or reports in the arbitration;
- (g) to regulate the right of the parties to call expert witnesses and to make provisions with regard to their activities and the presentation of their evidence; and
- (h) to exercise all the powers he deems necessary to make the arbitration effective and its conduct efficient as regards the taking of evidence.³⁸

37. See *infra* app. B (suggesting language to include in an arbitration clause).

38. REDFERN & HUNTER (2d ed.), *supra* note 25, at 707. The table of appendices in this book provides an excellent reference for various acts and rules relevant to the practitioner or student of international commercial arbitration. The appendices contain the following:

- Appendix 1 Example of an ad hoc Arbitration Clause;
- Appendix 2 Example of Submission Agreement;
- Appendix 3 Model Clauses of Arbitral Institutions and Arbitration Centers;
- Appendix 4 American Arbitration Association International Arbitration Rules (1991);
- Appendix 5 Euro-Arab Chambers of Commerce Rules of Conciliation, Arbitration and Expertise (1983);
- Appendix 6 International Chamber of Commerce Rules of Conciliation and Arbitration (1988);
- Appendix 7 ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (1965);
- Appendix 8 London Court of International Arbitration-Arbitration Rules (1985);
- Appendix 9 USSR Chamber of Commerce and Industry Rules of the Arbitration Court (1988);
- Appendix 10 Netherlands Arbitration Institute Arbitration Rules (1986);
- Appendix 11 The Arbitration Institute of the Stockholm Chamber of Commerce Arbitration Rules (1988);
- Appendix 12 UNCITRAL Arbitration Rules (1976);
- Appendix 13 International Bar Association Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration (1983);

7. *Finality of Decisions and Awards*

The arbitrator decides a case and issues a written award shortly after the arbitration hearing. The award issued by the arbitrator is the final and binding decision, except in those arbitrations where the parties agree the award will be non-binding. There is no appeal of a binding arbitration award.³⁹ Court review of an award occurs only in unusual circumstances where for example, fraud or corruption occurred or the arbitrator improperly exceeded their authority.⁴⁰ The finality of the arbitrator's decision usually eliminates lengthy appeals.⁴¹

8. *Enforceability of Awards*

In many countries, arbitration awards are more easily recognized and enforced than judgments issued by foreign judicial courts.⁴² The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention, recognizes the enforceability of

Appendix 14	International Bar Association Ethics for International Arbitrators (1987);
Appendix 15	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958);
Appendix 16	English Arbitration Acts, 1950-1979;
Appendix 17	French Code of Civil Procedure, Book IV (Decree Law No 81-500 of May 12, 1981);
Appendix 18	Netherlands Arbitration Act, 1986;
Appendix 19	Swiss Private International Law Act, Chapter 12 (1987);
Appendix 20	United States Federal Arbitration Act 1925 (Title 9 U.S.C.);
Appendix 21	UNCITRAL Model Law on International Commercial Arbitration (1985);
Appendix 22	Mutual Co-operation Agreement between the Permanent Court of Arbitration at the Hague and International Council of Commercial Arbitration (1989); and Scoreboard of Adherence to Transnational Arbitration Treaties (as at January 1, 1991).
Appendix 23	

REDFERN & HUNTER (2d ed.), *supra* note 25, at 531-819.

39. REDFERN & HUNTER (1986), *supra* note 1, at 316.

40. OEHMKE, *supra* note 28, at 349.

41. Haydock & Volz, *supra* note 11, at 937 (providing a chart of countries indicating signatory and ratification of various international conventions).

42. LOWRY, *supra* note 11, at xix; *see also* CRAIG ET AL., *supra* note 4, at 318-39, 359-70 (discussing arbitral awards and entering into the effect of the award); OEHMKE, *supra* note 28, at 105-22 (discussing enforcement of U.N. Convention in U.S. federal courts); REDFERN & HUNTER (1986), *supra* note 1, at 313-59 (discussing the challenge, recognition and enforcement of arbitration awards); MAURO RUBINO-SUMMARTANO, INTERNATIONAL ARBITRATION LAW 475-502 (1990) (discussing enforcement in the state or origin, and in other states).

arbitration awards.⁴³ Many countries have signed this treaty and have agreed to enforce arbitration awards issued by signatory countries.⁴⁴ Further, other conventions such as the Inter-American Convention on International Commercial Arbitration and the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States similarly enforce arbitration awards.⁴⁵

9. *Speed and Efficiency*

The arbitration process is typically measured in months instead of the years it can take to resolve disputes in the litigation system. Because of the flexibility and adaptability of arbitration, it is generally quicker and more efficient than litigation. Trials are dictated by detailed rules and proceedings that have evolved to accommodate an extremely broad array of disputes in society. Arbitration procedures have developed as a streamlined alternative to provide fast, fair and final resolutions.

10. *Cost Savings*

Two major cost savings of arbitration include significantly reduced attorney fees and transaction costs. Because there is less need for the services of an attorney and much less for an attorney to do, parties involved in arbitration proceedings usually pay significantly lower attorney fees than if they were involved in similar litigation proceedings. Transaction costs are also significantly reduced because of the more efficient and economical arbitration rules which are applicable. Arbitral rules are tailored to fit the specific needs and wants of the commercial parties involved, avoiding the costly and time consuming motion practice to which many corporate litigants have become accustomed. Streamlined discovery and evidentiary rules also facilitate efficiency, along with the specialized expertise of the arbitral tribunal. The finality of an award also saves money in what may otherwise be a series of costly appeals. Often of equal, if not greater significance to the parties, is the avoidance of the costs of a relationship gone bad. Litigation often results in the demise of a commercial relationship, and associated personal

43. See generally sources cited *supra* note 42.

44. See generally sources cited *supra* note 42.

45. Haydock & Volz, *supra* note 10, at 937.

relations. The conciliatory and private nature of arbitration maintains and develops valuable commercial relations.

11. *Privacy*

Arbitration is a private process, a big advantage for those parties who want the details of their quarrels kept out of the newspapers and public record of courts.⁴⁶ Commercial disputes may otherwise be accompanied by attacks on a company's competence or good faith.⁴⁷ The public relations value of such privacy is clear, albeit difficult to measure. In addition to the less adversarial nature of arbitration, the privacy of the process may go a long way toward preserving ongoing business relations between the parties.

12. *Fairness and Accountability*

The impartiality, independence, and neutrality of arbitrators is fundamental to arbitration. The Federal Arbitration Act in the United States requires that all members of a national arbitral tribunal be free of evident partiality or bias.⁴⁸ Rule 20(b) of the International Arbitration Forum Code of Procedure provides that all arbitrators "shall be neutral and independent."⁴⁹ Article 2(7) of the ICC Rules of Arbitration states that, "[e]very arbitrator appointed or confirmed by the Court must be and remain independent of the parties involved in the arbitration."⁵⁰ These rules go on to provide for the challenge of an arbitrator for lack of independence or otherwise.⁵¹ Likewise, Article 10 of the UNCITRAL Arbitration Rules provide for the challenge of an impartial arbitrator, stating that, "[a]ny arbitrator may be challenged if circumstances exist that give rise to

46. REDFERN & HUNTER (1986), *supra* note 1, at 17.

47. *Id.*

48. 9 U.S.C. § 10(b) (1988); *see, e.g.*, *Standard Tankers Co. v. Motor Tank Vessel, AKTI*, 438 F.Supp. 153, 159 (E.D.N.C. 1977). In *Standard Tankers*, the court denied a party's request to vacate an arbitration award because of the "evident partiality" of an arbitration whose law firm has a prior relationship with the winning party. *Id.* The arbitrator has fully disclosed the relationship and had not been personally involved in the previous matters. *Id.* at 157.

49. NAT'L ARB. FORUM CODE OF P. 20(b).

50. LOWRY, *supra* note 11, at 399.

51. *Id.* at 400 (ICC Rules of Arbitration, Article 2(8)).

justifiable doubts as to the arbitrator's impartiality or independence."⁵²

There has been some question about the independence of party-appointed arbitrators in three-person tribunals. Ethics for International Arbitrators adopted in 1987 by the International Bar Association do not distinguish between a party-appointed arbitrator and a third arbitrator.⁵³ The guidelines say that arbitrators must remain free of bias, and be free of impartiality in relation to the parties and the subject matter of the dispute, and must be independent from relationships with one of the parties or someone closely connected with one of the parties.⁵⁴

C. Weaknesses of Arbitration

There are a number of pitfalls or potential weaknesses to arbitration as well. The following section addresses several areas of concern, including reliance on national law, difficulty of obtaining interim relief, attempts by one party to avoid arbitration, costs associated with arbitration, limitations on discovery, and the potential difficulty of dealing with multi-party disputes.

1. Reliance On National Law

There is no universal "law" available to regulate international commercial arbitration.⁵⁵ For example, not all courts provide provisional remedies in aid of arbitration. Different national systems of law and international treaties apply to arbitration situations depending on the place and issues involved.⁵⁶ These issues can include, "[q]uestions of the capacity of the parties to agree . . . , the validity of the arbitration agreement, . . . and the recognition and enforcement of [arbitral] awards."⁵⁷ Even where arbitration is governed by international law, such as the New York Convention, reference to national law may be necessary to recognize or enforce an arbitration award.⁵⁸

52. *Id.* at 377.

53. See REDFERN & HUNTER (2d ed.), *supra* note 25, at 708-711 (providing the full text of the IBA's Ethics for International Arbitrators in Appendix 14).

54. *Id.* at 709 (rules 2.1 & 3.1 relating to bias of an arbitrator).

55. REDFERN & HUNTER (1986), *supra* note 1, at vii.

56. *Id.*

57. *Id.*

58. *Id.*

2. *Obtaining Interim Relief*

Arbitrators may avoid requested interim relief measures because they do not want to appear to favor one party. Sometimes local law is hostile to interim relief orders, and under some circumstances, applying to a court for interim relief may be deemed a waiver of the agreement to arbitrate. In the case of a three-person arbitral tribunal, fast decisions are even more difficult to assure. The International Chamber of Commerce Rules for a Pre-Arbitral Referee Procedure have dealt with this concern by providing a quick summary procedure for interim orders, as distinguished from awards, when such an order is urgently necessary to prevent immediate damage or irreparable loss.⁵⁹ The AAA Commercial Arbitration Rules and Supplementary Rules for International Commercial Arbitration also provides for interim measures, but they are limited only to those “necessary to safeguard the property that is the subject matter of the arbitration”⁶⁰ The NAF specifically allows for interim relief explicitly permitting a party to request a hearing to obtain “an interim order or emergency relief.”⁶¹

3. *Attempts To Avoid Arbitration*

In bitter disputes, there may be litigation resulting from attempts to avoid arbitration, or enforcement of an award. In other words, a party to a dispute may ask a judge to assert initial jurisdiction of a dispute and to disregard the agreement to arbitrate. Likewise, some types of disputes cannot be decided by arbitrators. The arbitrability of a dispute is a question of law which may confront an arbitrator deciding whether they have jurisdiction, the judge at the place of arbitration who may be asked to set aside an award, and the judge in an execution forum who is asked to refuse to recognize the award.⁶² Some sovereigns may consider certain types of disputes not capable of settlement by arbitration, especially in the areas of competition

59. LOWRY, *supra* note 11, at 425-426; Jan Paulsson, *A Better Mousetrap: 1990 ICC Rules for a Pre-Arbitral Referee Procedure*, 18 INT’L BUS. LAW. 214, 215 (May 1990).

60. OEHMKE, *supra* note 28, at 835, app. A:4-4 (rule 34).

61. NAT’L ARB. FORUM CODE OF P. 27(a).

62. CRAIG ET AL., *supra* note 4, at 81.

and antitrust matters, matrimonial status, bankruptcy, and criminal law.⁶³

In certain jurisdictions, an arbitral award may be annulled, set aside, vacated, or declared a nullity, based on one of the following grounds:

- (1) Lack of a valid arbitration agreement.
- (2) Violation of the principles of due process.
- (3) Violation of the scope of authority (*infra, extra or ultra petita*).
- (4) Failure to follow rules on appointment of the arbitrators and the arbitral proceedings.
- (5) Formal invalidity of the award, including lack of signatures and, if applicable, reasons.
- (6) Violation of public policy (including non-arbitrability).
- (7) Error in law.⁶⁴

Most countries, however, do not allow review of an arbitral award on the merits.⁶⁵ Article V of the New York Convention mirrors these categories by stating seven grounds on which a court may, in its discretion, decline to recognize or confirm an arbitral award based on: (1) incapacity of the parties and invalidity of the agreement to arbitrate; (2) lack of procedural due process; (3) excess of authority; (4) invalid composition or procedures; (5) award not binding; (6) or set aside; (7) non-arbitrability; and (8) public policy.⁶⁶ Note that the first five of these grounds are established by the party resisting enforcement, and the last two may be raised either by the resisting party or by the court *sua sponte*.⁶⁷

4. *The Costs of the Arbitral Process*

Arbitration of international disputes may not always be cheaper than litigation. The fees of arbitrators are more expensive than a judge provided by the state, the administrative fees and expenses of some arbitral institutions can be substan-

63. REDFERN & HUNTER (2d. ed.), *supra* note 25, at 138-47.

64. Albert Jan van den Berg, *Annulment of Awards in International Arbitration*, in INTERNATIONAL ARBITRATION IN THE 21ST CENTURY, *supra* note 9, at 134-35.

65. *Id.* at 135.

66. David P. Stewart, *National Enforcement of Arbitral Awards under Treaties and Conventions*, in INTERNATIONAL ARBITRATION IN THE 21ST CENTURY, *supra* note 9, at 175-93.

67. *Id.* at 175.

tial, and renting meeting rooms is more costly than using the public facilities of the courts.⁶⁸

Arbitration organizations typically establish a filing fee which reflects the value of the monetary or other relief sought. The more money sought, the higher the filing fee. This approach in the vast majority of cases actually reduces costs because it forces the claimant to seek a reasonable amount of money rather than an inflated or unrealistic amount. This approach provides both sides with a realistic evaluation of the case, reducing the need to seek information in unrelated areas and also reduces transaction costs. Because of the substantial differences in filing fees charged by different international arbitration organizations, it is wise to review a fee schedule before including an arbitration cost in an agreement to determine which arbitration organization may be the most economical.

Even if it initially appears that arbitration filing fees may cost more than litigation fees, defending a case venued in another country may cause a party to pay substantial travel and lodging expenses and incur unnecessary attorney's fees by having to hire additional attorneys in other countries. An arbitration clause which designates that the arbitration hearing shall be held in the country where the party does business or resides can make arbitration significantly less expensive than litigation in a foreign country.

5. *Typical Limitations on Discovery Proceedings*

In arbitration, parties ordinarily do not engage in the type of complete discovery available in American litigation, such as depositions, interrogatories, and requests for admissions. The parties may only have limited access to information before the arbitration hearing.⁶⁹ The arbitrator may not provide a written, lengthy opinion explaining the arbitration award. Parties may not appeal the decision of the arbitrator to an appellate court for further review. These limitations may cause some

68. REDFERN & HUNTER (1986), *supra* note 1, at 18.

69. Michael F. Hoellering & Peter Goetz, *Piercing the Veil: Document Discovery in Arbitration Hearings*, 47 ARB. J. 58, 59 (Sept. 1992); *see also* Loren Kieve, *Discovery is a Waste Of Time and Money*, 47 ARB. J. 60 (Sept. 1992); and Gregory P. Joseph, *Discovery Should Not Be Abolished*, 47 ARB. J. 61 (Sept. 1992) (discussing the potential advantages and disadvantages to prohibiting discovery in the context of arbitration).

parties to prefer litigation rather than arbitration. Arbitration parties can avoid these limitations by including provisions authorizing these proceedings in the arbitration clause. For example, an arbitration clause can provide for a specific number of depositions or other discovery methods that will be useful in preparing a case for the arbitration hearing. Further, a clause may require that the arbitrator issue an award containing an explanation of reasons supporting the award.

6. The Difficulty Of Multi-Party Disputes

Arbitration is based on the consent of the parties. Thus, it is typically not possible to join other parties in an arbitration without the consent of all parties. In contrast, courts do have the power to order parties to be joined in court proceedings when it is necessary or convenient, particularly if claims arise from the same set of facts and circumstances. Prior to any dispute, however, it may be possible to negotiate an agreement for multiple parties to be joined in arbitral proceedings to a clearly defined series of contracts. For example, a prime contractor in a construction project may agree to an arbitration clause and ask all the various sub-contractors and suppliers for the specific project to adopt the same clause. Such an arrangement maintains the essential consensual element required for the arbitral process.

Diligent practitioners working on international commercial contracts will familiarize themselves with the weaknesses of arbitration, and consider them with their clients as they draft arbitration clauses. Understanding both the strengths and weaknesses of arbitration will help the practitioner better serve their clients seeking to conduct business internationally.

III. Drafting an International Arbitration Clause

When drafting an arbitration clause, drafters should apply the same reasoned and thoughtful approach as the careful

commercial attorney negotiating a contract.⁷⁰ An enforceable agreement to arbitrate generally requires a number of elements:

- (1) The agreement must be in writing.
- (2) The agreement deals with differences past, present or future that have arisen between the parties.
- (3) The differences arise out of a defined legal relationship.
- (4) The subject matter of the dispute is 'arbitrable' under local law.
- (5) The parties had capacity to contract when they agree to arbitrate.
- (6) There must be some indication that the parties intended to be bound by the decision of the arbitrators. If the parties did not intend to be bound by the decision, then the parties have not agreed to arbitrate by the very definition of the term.
- (7) The scope of the dispute being arbitrated should be spelled out sufficiently so it is clear the arbitrators have jurisdiction.
- (8) Every appointing and administering authority mentioned in the clause must exist and be willing to act. . . . Likewise, every arbitrator named in the clause must be ready, willing and able to act as an arbitrator.⁷¹

Parties may add numerous other provisions, which are discussed later in this section. However, many international conventions and rules of arbitration provide "form" clauses. Always keep in mind that a recalcitrant party may seek to bypass arbitration and go straight to court. In such a case, courts may scrutinize a clause that departs too dramatically from the applicable "form" clause recommended by the arbitral institution selected by the parties. Modifications should be made with objectively explainable good cause.⁷² The reader may contact

70. See CRAIG ET AL., *supra* note 4, at 269-82; LOWRY, *supra* note 11, at 234 (suggesting that the same care taken in drafting the rest of the agreement should be taken to avoid "pathological," or defective, elements of arbitration clauses); David E. Wagoner, *Tailoring the ADR Clause In International Contracts*, 48 ARB. J. 77 (June 1993) (discussing issues to consider when selecting and negotiating a dispute resolution provision).

71. LOWRY, *supra* note 11, at 234.

72. LOWRY, *supra* note 11, at 234.

the organization involved with any questions about the organization's arbitration rules or recommended clauses.⁷³

A. *Typical Matters To Address*

At the outset, it is important to note that if a particular set of rules is chosen by the parties (e.g., International Arbitration Forum, UNCITRAL, AAA, ICC, or others), the rules will likely contain several required provisions. These provisions cover numerous matters that must be addressed such as number of arbitrators or place of arbitration. For example, the International Arbitration Forum pre-dispute binding arbitration clause administered by Advanced Dispute Resolution, provides the following clause which parties can choose to include in their agreements:

All disputes, claims, or controversies arising from or relating to this agreement or the relationships which result from this agreement, or the validity of this arbitration clause or the entire agreement, shall be resolved by binding arbitration in accord with the Code of Procedure of the International Arbitration Forum in effect at the time the claim is filed with International Arbitration Forum, Advanced Dispute Resolution, IMC, located at P.O. Box 50191, Minneapolis, Minnesota, 55403, U.S.A. Judgment upon the award rendered may be entered in any court having jurisdiction.⁷⁴

This type of standard arbitration clause addresses many of the key elements of an enforceable arbitration agreement. Key areas to address in an international commercial arbitration clause include:

- (1) Scope of dispute;
- (2) Type of dispute;
- (3) Validity of arbitration clause and agreement;
- (4) Applicable rules;
- (5) Place of arbitration;
- (6) Number of arbitrators and method of selection;
- (7) Language of arbitration proceedings;
- (8) Timing of claims;
- (9) Choice of law;

73. *See infra* app. A.

74. NATIONAL ARBITRATION FORUM: CODE OF PROCEDURE (Equilaw Incorporated, 1992)

- (10) Statement regarding entry of judgment or confirmation of award.

These key elements are each discussed below.

1. *Scope of Dispute*

The terms “agreement” and “relationships” create a broad scope by making all disputes resulting from the agreement or the relationships between the parties involved in the agreement subject to arbitration.⁷⁵ These terms are intended to cover all potential disputes existing or arising between the parties.

2. *Type of Disputes*

The terms “disputes, claims, and controversies” generically describe the types of matters to be submitted to arbitration. It may be sufficient to use the word “disputes” because that term encompasses matters that are “claims” and “controversies.”

3. *Validity of the Arbitration Clause and Agreement*

The provision, “or the validity of this arbitration clause or the entire agreement,” of an arbitration clause requires that disputes regarding the validity of the arbitration clause or the entire agreement be submitted to arbitration. Without this provision, these disputes may need to be resolved through a court proceeding before the arbitration may commence.

4. *Applicable Rules*

The standard clause above identifies arbitration rules and the arbitration organization. References to a specific code of procedural rules and a specific arbitration organization avoid later disputes between the parties regarding what rules apply and what organization will administer the arbitration proceeding. The ADR-International Arbitration Forum administrative headquarters are located in Minneapolis, Minnesota, U.S.A. Reference to a specific code of procedure avoids an incorrect implication that the arbitration hearing will take place where the administrative offices of the arbitration organization is located. Inclusion of the address, telephone and facsimile numbers of

75. RUBINO-SAMMARTANO, *supra* note 42, at 115 (discussing the contractual nature of the arbitration agreement).

the arbitral organization make it very simple for the parties to contact the organization if a dispute arises.⁷⁶

5. *Place of Arbitration*

The clause may identify the location where the participatory hearing(s) will be conducted. It is advisable to select a city in a country which has adopted the New York Convention or another convention providing for the enforcement of arbitration awards. The city and country selected should have a connection with the underlying transaction or agreement as well.

6. *Number of Arbitrators and Method of Selection*

Arbitral institutions typically have the power to appoint arbitrators under their own rules of arbitration. These arbitral institutions offer an advantage of having day-to-day involvement in international arbitration, and up-to-date records of persons who are qualified and active as international arbitrators.⁷⁷ Other than by an arbitral institution, there are many options for appointing an arbitral tribunal consisting of one or more arbitrators. These options include appointing a tribunal by the arbitral organization, by agreement of the parties, by a trade or other association, by a professional institution, by the "list system," by existing arbitrators, or by a competent national court system.⁷⁸ These options are discussed below.

The arbitration organization selected by the parties to administer the arbitration can select and appoint an impartial expert arbitrator. The expert of the arbitration organization can review the case to select an arbitrator with special expertise in the area of the dispute and who has no conflict of interest. The advantage of the arbitration organization appointing an arbitrator is that it is a very quick appointing process and provides the parties with a neutral expert to resolve their case as efficiently as possible.⁷⁹

Agreement by the parties is a possible method of appointing arbitrators. However, the parties must agree on the arbitra-

76. See Susan W. Tiefenbrun, *A Comparison of International Arbitral Rules*, 15 B.C. INT'L & COMP. L. REV. 25 (winter 1992). (comparing key aspects of arbitral rules from the UNCITRAL, ICC and AAA).

77. REDFERN & HUNTER (2d ed.), *supra* note 25, at 210.

78. *Id.* at 206-07.

79. See *Id.* at 20-10.

tor(s), whether they are selected before or after the dispute has arisen. In addition, the person(s) chosen must be willing and able to act as the arbitrator when the dispute arises.⁸⁰ This approach has obvious pitfalls if the proposed arbitrator is unavailable or refuses to be the arbitrator.

Parties may request a trade associations to appoint an arbitrator. An officer of a trade association or professional institution may be named in the arbitration clause as the person who is to appoint a sole arbitrator. Also, the officer of a professional institution may be explicitly designated to appoint the presiding arbitrator of a tribunal if the parties or the two party-selected arbitrators in a three person tribunal fail to agree.⁸¹

The “list system” of selecting an arbitral tribunal may be conducted in two ways. One method is for each party to compile a list of several persons they consider to be acceptable, and then exchange lists.⁸² If they end up with the same names they simply select one or more persons to whom the parties agree.⁸³ If they do not have any names in common, the exchange of lists may at a minimum prepare the ground for agreement of the type of arbitrator they will ultimately select. A second “list system” method is employed by arbitral institutions such as AAA, and by an “appointing authority” under UNCITRAL Arbitration Rules.⁸⁴ The UNCITRAL system illustrates how this works. The appointing authority sends out an identical list to each party. The parties then have the option of deleting any person they object to most strenuously, and rank ordering the remaining arbitrators on the list by preference. The appointing authority then chooses from those remaining on the list, taking the preferences of the parties into consideration. This system is obviously slower than direct appointment systems.⁸⁵ The use of preemptory challenges may disqualify suitable candidates, thereby restricting the options available to

80. *Id.* at 207.

81. *Id.* at 208.

82. *Id.* at 210.

83. *Id.* at 209.

84. *Id.* at 210.

85. *Id.* at 210-11.

the appointing authority, should they be called upon to make the appointment.⁸⁶

When a three-person tribunal is envisioned, the arbitration organization may appoint all three arbitrators. Or the clause may provide that each party will appoint one arbitrator with the two arbitrators selected by the parties choosing the third, who acts as the presiding arbitrator. If the two-party selected arbitrators are unable to agree on the third, and if the arbitral tribunal is being selected under the rule of one of the arbitral institutions, then it is necessary to look at their rules to determine the procedure in such a situation.⁸⁷ For example, the UNCITRAL Arbitration Rules provides: "If within thirty days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by an appointing authority in the same way as a sole arbitrator would be appointed under Article 6."⁸⁸

The arbitration agreement may be inoperable if no arbitral institution is involved and a competent court is unable to appoint an arbitrator.

Petitioning to a national court which has jurisdiction and power to make an appointment is necessary if the parties are unable to agree and no one else is expressly empowered to make the appointment of a sole arbitrator, or of the presiding arbitrator for the parties.⁸⁹ If this fails the claimant may be forced to litigate.

7. *Language Of Proceedings*

The parties may select one language to govern the arbitration process, pleading and hearing. If the parties do not address this issue and fail to agree, institutional arbitration rules typically provide for a decision of language by the arbitral tribunal.⁹⁰ Rule 11(e) of the International Arbitral Forum

86. *Id.*

87. *Id.*

88. HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 1274-75 (1989) (quoting UNCITRAL ARB. R. art. 7.3.).

89. REDFERN & HUNTER (2d ed.), *supra* note 25, at 212.

90. *Id.* at 211 (noting that the arbitral tribunal may have discretion to direct that other languages be used). UNCITRAL ARB. R. art. 7, states:

Code of Procedure specifically provides: "If the parties do not agree to the use of a specific language, the director shall determine the language or language to be used and may order the parties to provide translations."⁹¹ Costs associated with translations for pleading and hearings are often split between the parties. But again, this is subject to agreement of the parties.

8. *Timing Of The Claim*

The reference to the rules "in effect at the time the claim is filed" specifies which set of rules will apply.⁹² Arbitration organizations, periodically amend the rules, and this clause eliminates any problem regarding which code of rules apply.

9. *Choice Of Law*

The parties may agree that the substantive law of a specific country or state will apply to the transaction or to interpret the terms of the agreement. The country or state selected should have some connection with the transaction or agreement.⁹³ Because of the basic notion of party autonomy, an express choice of law clause should be accorded great respect.⁹⁴ There are, however, a host of different legal systems, or legal rules that may impact upon the international commercial arbitration

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1. Subject to an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the statement of claim, the statement of defence [sic], and any further written statements and, if oral hearings take place, to the language or languages to be used in such hearings.
 2. The arbitral tribunal may order that any documents annexed to the statement of claim or statement of defence [sic], and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

HOLTZMAN & NEUHAUS, *supra* note 88, at 1277-78 (quoting UNCITRAL ARB. R. art. 17); REDFERN & HUNTER (2d ed.), *supra* note 25, at 695 (UNCITRAL ARB. R. art. 17).

91. NAT'L ARB. FORUM CODE OF P. 11(c).

92. See *infra* app. B (listing of international commercial arbitration clauses recommended by various arbitral organization).

93. See Steven J. Stein, *The Drafting Of Effective Choice of Law Clauses*, 477 PRAC. L. INST./COMM 103 (1988) (advocating that choice of law becomes clear by virtue of the terms of the agreement or circumstances of the case).

94. *Id.* at 103.

process. The list includes: (1) the law governing the parties' capacity to enter into an arbitration agreement; (2) the law governing the arbitration agreement and the performance of that agreement; (3) the law governing the existence and proceedings of the arbitral tribunal, commonly referred to as "lex arbitri"; (4) the law, or the relevant legal rules, governing the substantive issues in dispute, referred to as the "proper law of contract"; (5) the law governing recognition and enforcement of the award, which may prove to be two or more laws if recognition and enforcement is sought in more than one country in which the losing party has assets.⁹⁵

As a result of this complexity, it is important to caution that local law be checked by an experienced practitioner before selecting applicable law and the place of arbitration. Whether a dispute is legally capable of being settled by arbitration is essentially a matter of public policy, and this is a matter on which countries may differ.⁹⁶

10. Entry of Judgment

The statement "judgment upon the award may be entered in any court having jurisdiction" is usually necessary under the applicable law, including the arbitration statutes and regulations of various countries. This clause provides that any court having jurisdiction is sufficient and reflects the agreement of the parties that the award may be enforced in any court.⁹⁷

B. Other Considerations

There are numerous other potential considerations, some of which will automatically be covered through institutional rules of arbitration. If the parties select a code of arbitration rules, it is prudent to cross reference the drafted clause with the rules to avoid redundancy, or even worse, inconsistency, uncertainty, or inoperability. These traits are the hallmarks of defective international commercial arbitration clauses.⁹⁸ Any problems

95. REDFERN & HUNTER (2d ed.), *supra* note 25, at 72. See generally *id.* at ch. 2 (detailing categories of applicable law).

96. *Id.* at 80.

97. See *infra* app. B (listing of international commercial arbitration clauses recommended by various arbitral organizations).

98. REDFERN & HUNTER (2d. ed.) *supra* note 25, at 177-180; see also CRAIG ET AL., *supra* note 4, at 157-66.

concerning the recognition and enforcement of an agreement to arbitrate are likely to surface at the outset of arbitral proceedings or at the end, when enforcement of the award is sought from a recalcitrant loser. With this caution in mind, the following section discusses several additional considerations for an international commercial arbitration clause.

1. Pre-Dispute Mediation and Arbitration Clause

Parties may prefer to mediate before arbitrating a resolution to a dispute. A pre-dispute clause providing for both mediation and arbitration may state:

The parties agree that any dispute between them shall attempt to be resolved initially by mediation administered by Advanced Dispute Resolution, Inc. The parties further agree that if mediation does not result in a settlement, all disputes between them arising out of or relating to this agreement, including the validity of this clause or their agreement, shall be resolved by binding arbitration by the International Arbitration Forum through its Code of Procedure and that a judgment upon the award may be entered in any court with jurisdiction.

This clause anticipates that every effort will be made to settle disagreements between the parties through a negotiated mediation before relying on a neutral third party to make a binding decision.

2. Location of Arbitration or Mediation

The parties may prefer to specifically identify the location of the mediation or arbitration. The site to be selected may depend upon which party files the arbitration claim or initially requests mediation. For example, the clause may state "If [company-1] shall be the claimant, the arbitration shall take place in St. Paul, Minnesota, U.S.A. If the [company-2] shall be the claimant the arbitration shall take place in Bom Bay India." This clause places a higher burden on the party initiating the arbitration, imposes additional travel and related expenses on the initiating party, and reduces the chance of frivolous claims being made by a party. The parties may choose to agree to any reasonable location and may prefer to agree to a neutral site rather than the home country of either party.

3. *Specific Qualifications for Arbitrators*

The advantage of an arbitration proceeding is that the arbitrator will be an independent and neutral expert knowledgeable about the issues to be resolved. Parties usually prefer that the arbitrator be a citizen of a country different from the countries represented by the parties. The arbitration rules of some international organizations provide for this appointment. For example, Rule 21D of the International Arbitration Forum Code of Procedure provides that the arbitrator shall be a citizen of a country other than the countries of the parties. The parties may choose to have an arbitrator from a specific neutral country and may include that provision in their arbitration agreement. Further, parties may also specify any particular qualifications they wish the arbitrator to have, including a special area of expertise or a minimum number of years of experience.

4. *Service by Registered Mail or Delivery*

One method to reduce costs in international arbitrations is to use inexpensive methods of service. Service by registered mail or by written acknowledgement is specifically authorized by some arbitral organizations, such as the International Arbitration Forum. Parties may review the applicable rules and select another reliable method of service not specifically authorized. For example, parties may agree to use an international delivery service as long as there is written proof that the party receiving the initial arbitration documents accepted the documents.

5. *Provisions for Multiple Parties*

If an arbitration may involve more than two parties, it will be important that rules exist to provide for the inclusion or exclusion of multiple parties and hearings. Issues of joinder, intervention, consolidation, and separation may be critical in a case. If not provided for, the parties may wish to draft a clause relating to these potential proceedings.

6. *Provisions for Remedies*

The general rule is that an arbitrator has the same powers and remedies to provide relief in arbitration that a judge would have in a litigated case. Arbitration awards may permit a wide range of remedies including: monetary compensation, punitive

damages, rectification, restitution and specific performance, injunctions, declaratory relief, interest, costs, and attorney fees.⁹⁹ In international arbitrations, an issue may arise regarding the scope of this power and authority. The code of procedure of the arbitral organization or the laws of the country selected under the choice of laws provision in the arbitration agreement may control this issue.

There may exist some uncertainty regarding the scope of power of an arbitrator or the remedies available for a breach of an agreement. For example, the type of actual damages allowed, the availability of injunctive relief, and the existence of a punitive damage award may be uncertain. The parties may avoid this uncertainty by drafting a clause specifying the broad authority and power of an arbitrator to provide specific remedies. There are some limits as to what an arbitrator can do. Arbitrators do not have the power to imprison anyone or to require the payment of fines to be made to a state or country.¹⁰⁰

7. *Discovery and Disclosure*

As mentioned earlier in this article, parties may select their own discovery and disclosure methods applicable to specific types of disputes. The parties may augment the methods provided for in the applicable arbitration rules regarding the exchange of information and documents. The parties may draft a clause authorizing specific types of discovery in certain types of cases. For example: "The parties agree to allow each party to take a maximum of five depositions with regard to any dispute where the total amount in controversy exceeds \$250,000 American dollars. The parties further agree that any disputes relating to these depositions shall be resolved by the arbitrator." This type of provision allows a party to customize the availability of discovery and disclosure provisions for disputes where the issues and money at stake require these provisions.

8. *Written Reasons Supporting the Award*

Parties may prefer that the arbitrator support an award with reasoned explanations. The rules of the arbitration organization

99. REDFERN & HUNTER (2nd ed.) *supra* note 25, at 360-61.

100. *Id.* at 361.

may provide that the arbitrator issue an award without findings of fact and conclusions of law unless the parties agree otherwise. The parties may do so by including a clause providing: "The written award of the arbitrator shall include reasons supporting the award." The advantages of this requirement provides the parties with knowledge of the supporting grounds for the award and some guidance regarding future business deals or relationships. The disadvantages are that the losing party may perceive the reasons to be unreasonable and the award may be more readily attacked as being inappropriate.

9. *Scope of Judicial Review*

An arbitration clause may include provisions regarding the scope and standards for the judicial review of an award. The applicable code of procedure of the arbitration organization or the choice of law provision determine the scope of any available judicial review. For example, the Federal Arbitration Act which may apply to the arbitration allows a party to seek to vacate an arbitration award based upon specific grounds. A court may make an order vacating the award:

- (1) where the award was procured by corruption, fraud or undue means;
- (2) where there was evident partiality or corruption in the arbitration;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced;
- (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a final and definite award upon the subject matter submitted was not made; or
- (5) where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.¹⁰¹

101. Federal Arbitration Act § 10. The federal Arbitration Act appears in 9 U.S.C. §§ 1-15. The Act codified the laws relating to arbitration in the United States. The Act recognizes the validity, irrevocability, and enforcement of agreements to arbitrate. The Act also provides that any party to the arbitration may seek an order from the court modifying or correcting the award. *Id.* § 11. The grounds upon which the court

The parties may agree to restrict or expand the ground or scope of judicial review or may specify that the laws of a specific country apply regarding the vacation of an award. Further, the parties could agree to explicitly waive any judicial review, or the grounds supporting the vacation of an arbitration award, or any possible appeal. The waiver of these rights should be specifically stated in such a way that it is clear that the parties intend to waive any right they may have to seek relief from a court system able to review the arbitration award. The advantage of this agreement is that the parties are assured that the arbitration award will be final and the case will be completely over at the issuance of the award. The disadvantage is that the losing party may not have an opportunity to attack or vacate an award that is illegal.

An important consideration in drafting every arbitration clause is the opportunity the parties have to customize a proceeding to meet their exact needs and interests. The parties and their attorneys should review the applicable rules of the international arbitration organization and the laws of the countries specified in the source of law provisions to determine whether they need to include any other specific provisions in their arbitration agreement. Of course, parties may mutually agree to changes after a dispute arises, but the parties may not be agreeable to such matters at that time. The better course of practice is to anticipate problems and plan for them before a dispute arises.

IV. Conclusion

Given the continuing struggle for just resolution of inevitable disputes in transnational business affairs, arbitration provides a positive choice by balancing efficiency with due process. This article is intended to provide the reader with an

may grant such order include:

- (1) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the award.
- (2) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
- (3) Where the award is imperfect in matter of form not affecting the merits of the controversy.

Id.

understanding of the arbitral process, its strengths and weaknesses, and advice on drafting an enforceable international arbitration agreement. As one arbitration judge so aptly observed:

Before parting with this case, I would like to add the following. This is not the first case with which I have had to deal where the arbitration clause has left something to be desired. Many contract drafters seem to have difficulty in the fairly simple task of drafting an arbitration clause or even replicating a standard form arbitration clause. Arbitral institutions and associations go to the trouble of drafting standard form clauses and disseminating them for the benefit of users, yet in far too high a percentage of cases something goes wrong.¹⁰²

Hopefully, this article will help prevent or at least minimize this phenomena.

102. KAPLAN ET AL., *supra* note 2, at 224-25 (citing *Lucky-Goldstar Int'l vs. Ng Moo Kee Eng'g Ltd.*, [1993] 2 HKLR 73). The judge in *Lucky-Goldstar* goes on to note:

The former Secretary General of the ICC told an audience in Hong Kong a few years ago that only in a very small number of cases which came to the ICC, did the parties manage to replicate accurately in their contract the standard ICC clause. A badly drafted clause leads to disputes and wasted costs, both of which are anathema to the arbitral process. In many cases in this region, I imagine the problem is caused by contract drafters not drafting in their native tongue and this problem is appreciated. However, anything that can be done to ensure that arbitration clauses are clear, meaningful and effective would enhance the arbitration process quite considerably. It would be salutary for contract drafters to read Benjamin Davis' excellent article on pathological arbitration clauses which appears in *Arbitration International*, Vol 7 No 4, 1991.

Id.

Appendix

A. LIST OF ARBITRAL INSTITUTIONS AND CENTERS

Following is a list of arbitral organizations with their addresses and telephone numbers.

Advanced Dispute Resolution
International Arbitration Forum
P.O. Box 50191
Minneapolis, Minnesota 55403
USA
Phone: (612) 782-2534
Fax: (612) 782-2329

American Arbitration Association
140 West 51st Street
New York, New York 10020
Phone: (212) 484-4000
Fax: (212) 765-4874

Assistant Secretary for Legal Affairs and Legal Counsel
Organization of American States
19th Street and Constitution Avenue, N.W.
Washington, D.C. 20006
Phone: (202) 458-3395

Australian Centre for International Commercial Arbitration
Sixth Floor, Building B
World Trade Centre
Melbourne, Victoria 3005, Australia
Phone: 03-614-1800
Fax: 03-629-3753

Bureau of the Permanent Court of Arbitration
Peace Palace
2517 KJ The Hague
The Netherlands
Phone: (31-70) 46-96-80

The Chartered Institute of Arbitrators
International Arbitration Centre
24 Angel Gate
City Road
London, EC1V 1RS England

China International Economic Trade and Arbitration Commission (CIETAC), used to be the Foreign and Economic Trade and Arbitration Commission (FETAC).

6 East Beisanhuan Road
Beijing 100027
Phone: 4664433, 4675317
Fax: 4677335
Shanghai Commission:
33 Zhong Shan Road E1
Shanghai 200002
Phone: 3295443
Fax: 3291442

Shenzhen Commission:
17th Floor
59 Shennan Zhong Road
Shenzhen 518031
Phone: 3365877, 3365885
Fax: 3364776

China Maritime Arbitration Commission (CMAC)
6 East Beisanhuan Road
Beijing 100027
Phone: 4664433, 4675317
Fax: 4677335

Commercial Arbitration Association
2nd Floor, 98 Tun-Hwa S. Road
Section 2, Taipei
Taiwan
Phone: 7043516
Fax: 7088808
Court of Arbitration

International Chamber of Commerce
38 Cours Albert ler
75008 Paris
France
Phone: 011 33 14953
Fax: 42.25.86.63

The Hong Kong International Arbitration Centre (HKIAC)
1 Arbuthnot Road
Central
Hong Kong¹
Phone: 852-525-2381
Fax: 852-524-2171
2-2 Marunouchi 3-Chome
1 Coleman Street #05-08

**The Institute for Transnational Arbitration: A Division of;
The Southwestern Legal Foundation**
P.O. Box 830707
Richardson, Texas 75083-0707
Phone: (214) 690-2370

Inter-American Commercial Arbitration Commission
O.A.S. Administration Building, Room 211
19th and Constitution Avenue, N.W.
Washington, D.C. 20006
Phone: (202) 458-3249
Fax: (202) 458-3293

**International Arbitral Centre of the
Federal Economic Chamber**
A-1045 Vienna
Wiedner Hauptstrass 63
P.O. Box 190
Telefax: 50206 Ext. 271

1. The rules for the Centers in Hong Kong, Republic of China (Taiwan), and Peoples Republic of China (Mainland China) may be found in NEIL KAPLAN, JILL SPRUCE AND MICHAEL J. MOSER, HONG KONG AND CHINA ARBITRATION: CASES AND MATERIALS (1994).

International Bar Association
2 Harewood Place
Hanover Square
London W1R 9HB
England
Phone: (071) 629-1206
Fax: (071) 409-0456

International Centre for the Settlement of Investment Disputes
1818 H Street, N.W.
Washington, D.C. 20433
Phone: (202) 477-1234

The Japan Commercial Arbitration Association
in the Tokyo Chamber of Commerce & Industry Building
Chiyoda-Ku, Tokyo 100 Japan
Phone: 011-81-33-214-1324
Fax: 011-81-33-201-1336

The London Court of International Arbitration (LCIA)
30-32 St. Mary Axe.
London EC3A 8ET England
Phone: 44-1-626-7962
Fax: 44-1-626-8135

Organization of American States
17th St. Constitution Avenue, N.W.
Washington, D.C. 20006
Phone: (202) 458-6046

Singapore International Arbitration Centre
The Adelphi, Singapore 0617
Phone: 011-65-334-1277
Fax: 011-65-334-2942

**United Nations Commission on International Trade Law
(UNCITRAL)**
Vienna International Centre
P.O. Box 500
A-1400 Vienna
Austria

Phone: (1) 211-310

Fax: (1) 232-156

(Publications include the annual Yearbook. This is available by ad hoc mail or by subscription from the United Nations).

**U.N. Office of Legal Affairs
International Trade Law Branch
Vienna International Center
Donaupark, Room E 0443
P.O. Box 600
A. 1400 Vienna**

B. STANDARD FORM ARBITRATION CLAUSES

The following clauses are recommended by a number of principal arbitral institutions which offer services in the field of international arbitration. These clauses may be modified, as necessary, to properly serve each specific party or transaction.

1. *Advanced Dispute Resolution, Inc.*

International Arbitration Forum

All disputes, claims, or controversies between the parties, whether arising from or relating to this agreement or transaction or the relationships which result from this agreement or transaction, or the validity of this arbitration clause or the agreement, shall be resolved by binding arbitration by the International Arbitration Forum under its Code of Procedure in effect at the time the claim is filed at P.O. Box 50191, Minneapolis, Minnesota, 55405, U.S.A. Judgment upon the award may be entered on any court having jurisdiction.

2. *American Arbitration Association*

Any controversy or claim arising out of or relating to this agreement, or the breach thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules and supplementary procedures for international commercial arbitrations of the American Arbitration Association, and judgment upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof.²

3. *American Arbitration Association (Mediation and optional Arbitration)*

The parties hereby submit the following dispute [cite briefly] to mediation administered by the American Arbitration Association (AAA) under its [applicable] Mediation Rules. Any mediator shall have the following qualifications [specify]; shall be paid as follows [specify]; shall conduct any mediation at [specific location]; and the mediation process shall otherwise be regulated as follows [specify any other item of concern]. If this dispute is not satisfactorily resolved at mediation:

Optional Last Offer Arbitration

2. REDFERN & HUNTER (2d ed.), *supra* note 25, at 535, app.

(a) and if such claim, controversy or dispute involves only a monetary dispute, then the parties may mutually agree at that time to submit their dispute to an arbitrator appointed by the AAA who shall select between their final negotiated positions, that selection being binding upon the parties and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

Traditional Arbitration

(b) then such claim, controversy or dispute shall be settled by arbitration administered by the AAA under its International Arbitration Rules (and the Supplemental Procedures for Large, Complex Disputes, if applicable). The parties will faithfully observe this agreement and the rules and will abide by and perform any award rendered by the arbitrator(s) and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.³

4. *Cairo Regional Centre for Commercial Arbitration*

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be decided by arbitration in accordance with the Rules for Arbitration of the Cairo Regional Arbitration Centre.⁴

5. *China International Economic and Trade Arbitration Commission (CIETAC)*

Any dispute arising out of the execution of or in connection with this contract shall be settled first through consultations directly between the parties to this contract. If such consultations [sic] fails, the dispute shall be submitted to the China International Economic and Trade Arbitration Commission for arbitration in Beijing in accordance with its arbitration rules of procedure. Any arbitral award shall be final and binding on the parties.⁵

6. *Commercial Arbitration Association (CAA)(of Taiwan)*

All disputes, controversies or differences which may arise between the parties, out of or in relation to or in connection with this contract, or the breach thereof, shall be finally

3. OEHMKE, *supra* note 28, at 81-82 (Supp. 1994).

4. REDFERN & HUNTER (2d ed.) *supra* note 25, at 536 app.

5. KAPLAN ET AL., *supra* note 2, at 310-11.

settled by arbitration in Taipei, Republic of China, in accordance with Enforcement Rules for Arbitration Procedure of the Commercial Arbitration Association of the Republic of China. The Award rendered by the arbitrators shall be final and binding upon both parties concerned.⁶

7. *Euro-Arab Chambers of Commerce*

Any dispute arising out of or in connection with this contract shall be finally settled in accordance with the arbitration provisions in the Rules of conciliation, arbitration and expertise of the Euro-Arab Chambers of Commerce, by one or more arbitrator(s) appointed in accordance with the said Rules.⁷

8. *International Chamber of Commerce*

Any disputes arising in connection with the present contract shall be finally settled under the Rules of [Conciliation and] Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.⁸

9. *International Centre for the Settlement of Investment Disputes*

The parties hereto hereby consent to submit to the International Centre for Settlement of Investment Disputes any disputes relating to or arising out of this Agreement for settlement by arbitration pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.⁹

10. *Regional Centre for Arbitration at Kuala Lumpur*

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be decided by arbitration in accordance with the Rules for Arbitration of the Kuala Lumpur Regional Arbitration Centre.¹⁰

6. *Id.* at 347.

7. REDFERN & HUNTER (2d ed.), *supra* note 25, at 536.

8. *Id.* at 537.

9. *Id.* at 537 n.3 ("ICSID arbitration is intended for the resolution of disputes when one party is a state or state agency: the Washington Convention does not apply to disputes between non-state bodies.")

10. *Id.* at 537.

11. *London Court of International Arbitration*

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Rules of the London Court of International Arbitration, which Rules are deemed to be incorporated by reference into this clause.¹¹

12. *Permanent Court of Arbitration*

The parties agree to submit any dispute derived from the present contract or from those resulting therefrom to a procedure of arbitration. For this purpose the parties shall apply to the services of the Bureau of the Permanent Court of Arbitration at The Hague. They shall accept the 'Set of rules on arbitration and conciliation in international disputes between two parties of which only one is a state' elaborated by the Bureau in the year 1962; however, they will be free to replace the rules of procedure by other ones on which they should have agreed.¹²

13. *Arbitration Institute of the Stockholm Chamber of Commerce*

Any dispute in connection with this agreement shall be finally settled by arbitration in accordance with the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.¹³ In addition to the institutional arbitration clauses addressed above, there are also model clauses dealing with ad hoc arbitration or with limited aspects of the arbitral process.¹⁴

14. *UNCITRAL Arbitration Rules*

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

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

11. *Id.*

12. *Id.* at 538 ("These rules are only suitable for arbitration where one party is a state and is or becomes a party to the Hague Conventions of 1899 or 1907.")

13. *Id.*

14. *Id.* at 531-32.

- (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 . . . (language).¹⁵

15. *USA-Russian Trade and Investment arbitration clause prepared by AAA and Chamber of Commerce and Industry of the Russian Federation*

1. 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. The award of the arbitrators shall be final and binding upon the parties.
2. The arbitration shall be in accordance with the UNCITRAL Arbitration Rules as in effect on the date of this contract, except that in the event of any conflict between those Rules and arbitration provisions of this contract, the provisions of this contract shall govern.
3. The Stockholm Chamber of Commerce shall be the appointing authority, except for the specific provisions contained in paragraphs numbers 5.1 and 5.2.
4. The number of arbitrators shall be three.
5. Each party shall appoint one arbitrator. If within fifteen days after receipt of the claimant's notification of the appointment of an arbitrator the respondent has not, by telegram, telex, telefax or other means of communication in writing, notified the claimant of the name of the arbitrator he appoints, the second arbitrator shall be appointed in accordance with the following procedures:
 - 5.1 If the respondent is a natural or legal person of the Russian Federation, the second arbitrator shall be appointed by the Chamber of Commerce and Industry of the Russian Federation.
 - 5.2 If the respondent is a legal or natural person of the USA, the second arbitrator shall be appointed by the American Arbitration Association.
 - 5.3 If within fifteen days after receipt of the request from the claimant, the Chamber of Commerce and Industry of the Russian Federation or the American Arbitration Association,

15. *Id.* at 539.

as the case may be, has not, by telegram, telex, telefax or other means of communication in writing, notified the claimant of the name of the second arbitrator, the second arbitrator shall be appointed by the Stockholm Chamber of Commerce.

6. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the tribunal. If within thirty days after the appointment of the second arbitrator, the two arbitrators have not agreed upon the choice of the presiding arbitrator, then at the request of either party the presiding arbitrator shall be appointed by the Stockholm Chamber of Commerce in accordance with the following procedure:
 - 6.1 The Stockholm Chamber of Commerce shall submit to both parties an identical list consisting of the names of all of the persons listed on the then existing joint panel of presiding arbitrators established by the Chamber Of Commerce and Industry of the Russian Federation and the American Arbitration Association.
 - 6.2 Within fifteen days after receipt of this list, each party may return the list to the Stockholm Chamber of Commerce after having deleted the names to which he objects and having numbered any remaining names on the list in the order of his preference.
 - 6.3. After the expiration of the above period of time, the Stockholm Chamber of Commerce shall appoint the presiding arbitrator from among the names not deleted on the lists returned to it and in accordance with the order of preference indicated by the parties.
 - 6.4 Should no joint panel then be available, or if any other reason the appointment cannot be made according to this procedure, the Stockholm Chamber of Commerce shall appoint as presiding arbitrator a person not on the joint panel who shall be of a nationality other than that of Russia or the U.S.A.

7. The arbitration, including the making of the award, shall take place in Stockholm, Sweden.
8. The parties will use their best efforts to agree on a single language for the arbitration proceedings, in order to save time and reduce costs. However, if the parties do not agree on a single language:
 - 8.1 Each party shall present its statement of claim or statement of defense, and any further written statements in both English and Russian.
 - 8.2 Any other documents and exhibits shall be translated only if the arbitrators so determine.
 - 8.3 There shall be interpretation into both Russian and English at all oral hearings.
 - 8.4 The award, and the reasons supporting it, shall be written in both Russian and English.¹⁶

16. IBA Rules of Evidence

The International Bar Association (IBA) has developed supplementary rules to govern the presentation and reception of evidence in international commercial arbitration.¹⁷ These rules may be incorporated in, or adopted together with institutional and other general rules or procedures governing international commercial arbitration.¹⁸ The model clause recommended for their adoption is as follows:

The IBA Rules of Evidence shall apply together with the General Rules governing any submission to arbitration incorporated in this Contract. Where they are inconsistent with the aforesaid General Rules, these IBA Rules of Evidence shall prevail but solely as regards the presentation and reception of evidence.¹⁹

16. OEHMKE, *supra* note 28, at 79-81.

17. REDFERN & HUNTER (2d ed.), *supra* note 25, at 539 app.

18. *Id.*

19. *Id.* at 540.

C. CHECKLIST FOR DRAFTING AN ENFORCEABLE ARBITRATION AGREEMENT OR CLAUSE²⁰

1. The agreement must be in writing.
2. The parties must have capacity to contract.
3. The arbitration organization mentioned in the clause must exist and be ready, willing and able to act.
4. Scope of disputes:
 - (a) a broad clause provides for arbitration of all disputes including those regarding the validity of the arbitration clause, or the agreement it is a part of;
 - (b) a narrow clause may limit arbitration to those disputes arising exclusively out of the contract.
5. Applicable rules or core of procedure. The selection of institutional rules influences other items on this checklist.
6. Place of arbitration.
7. Number of arbitrators.
8. Applicable law.
9. Specify language(s) of the arbitration proceeding.
10. Entry of judgment line or confirmation of award.
11. Other Considerations:
 - (a) Pre-arbitration procedures, for example, mediation and conciliation;
 - (b) specific qualifications for arbitrators, or for a third arbitrator;
 - (c) provisions for some form of discovery;
 - (d) provisions for evidence;
 - (e) provisions regarding remedies available from the arbitrators.

20. This is not a comprehensive or exhaustive list for all arbitrations and is intended to be a form of review.

