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The Pitfalls of International Commercial Arbitration

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THE PITFALLS OF INTERNATIONAL COMMERCIAL ARBITRATION

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I. INTRODUCTION

Having made the decision to use arbitration, parties are tempted to consider the major issue in the negotiations settled. The parties may then choose an arbitral institution by relying on no more than familiarity with its name. Parties often adopt a set of rules because of convenience without considering the implications of their choice. It is not until a dispute arises that the lacunae in the rules appear and the parties and counsel flounder. Too

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often an arbitration proceeding results in an unsatisfactory award and the litigation that the parties originally wished to avoid is commenced. The delays created by the need to resolve a multitude of intermediate disagreements before considering the primary dispute often sacrifices one of the main benefits of arbitration—its speed.

The purpose of this Article is to examine the pitfalls of international arbitration on a broad scale.[1] These pitfalls can be roughly grouped into two categories: (1) those endemic to the process of dispute resolution by a "private extra-judicial tribunal which derives its power from the agreement of the parties,"[2] including difficulties unforeseen in the drafting of the agreement that add delay, complications, and expense to the proceedings; and (2) those related to using the rules of a particular institution. Ideally, planning and skillful drafting can eliminate both types of pitfalls and preserve the advantages of arbitration over other available national judicial forums. The pitfalls inherent in institutional arbitration can be eliminated either by drafting provisions for ad hoc arbitration or by drafting complementary provisions to the rules of a chosen arbitral institution. Although the two categories of pitfalls are related, this Article will treat them separately. The initial focus will be on the choice of either ad hoc or institutional arbitration. This Article will consider supplementing by contract the rules of three of the major arbitral institutions: the American Arbitration Association (AAA), the International Chamber of Commerce (ICC), and the UNCITRAL rules. The most useful comparisons of the three bodies of rules[3] converge at several

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1. *See* Higgins, Brown & Roach, *Pitfalls in International Commercial Arbitration*, 35 BUS. LAW. 1035 (1980). The Higgins article examines the subject from the viewpoint of supplementing the rules of the International Chamber of Commerce (ICC), and states that "the observations are susceptible to broader application." *Id.* at 1038. The ICC is a commonly chosen arbitration institution. Its "pitfalls" and benefits are best illustrated by comparing the ICC rules to those of other institutions and to ad hoc arbitration. This comparison, in addition to making the "pitfalls" more obvious, will highlight the questions to be raised when drafting provisions to complement institutional rules and the goals of such drafting.

2. *Id.* at 1036.

3. Several approaches have been advanced, but the methods converge on several basic subjects: the manner of submission to the chosen institution; the procedures stipulated, especially as they concern the establishment of terms of reference and the submission of evidence; the method of choosing arbitrators and, as a subset, how the arbitrators are paid; the form of the award and its finality

points: the method of submission to the institution; the selection of arbitrators; the costs of the proceedings; the availability of provisional relief and antifrustration devices; the principles of procedure; the principles for determining applicable law; the form and substance of the award; and the enforceability of the award.

The problems most often associated with international arbitration are easily categorized, thereby making the task of drafting an agreement around the pitfalls much easier. The first category of problems concerns the goals of the overall process. Arbitration should be faster than adjudication in the court system, less expensive than more traditional litigation, and specifically adaptable to the particular problem before the tribunal. Arbitration, however, is often slow, expensive, and unsuited to the dispute considered.

The second category of problems are procedural in nature. Procedural pitfalls include the following: the validity and scope of the submission clause; the unavailability of prescribed or familiar methods of obtaining evidence; the order, timing, and manner of pleading; the presentation of both lay and expert witness testimony; the method of proving a case, including documents, depositions, briefs, and testimony; the location and language of the arbitration proceedings; and the method of choosing applicable law. One further procedural consideration is the prevention or creative use of delaying tactics.

The third problem category is substantive. This category includes the choice of arbitrators, a decision crucial to the whole proceeding and potentially determinative of applicable substantive and procedural law; the form of the award; and the vulnera-

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and enforceability; the costs of the procedure; and time. One group has followed another recommended approach, compiling statistics and information to support their method. *See* HANDBOOK OF INSTITUTIONAL ARBITRATION IN INTERNATIONAL TRADE (E. Cohn, M. Domke & F. Eisemann eds. 1977). Recognizing the need for a method of comparison between the available choices, the editors attempted to gather information on the major arbitration centers around the world. They chose a longer format with two major parts: (1) Statistical Information, which includes a brief history of the proceedings, the number of proceedings handled in the last year, the costs involved, and the percentage of awards followed; and (2) Procedural Aspects, consisting of the arbitral agreement and its usual wording, resolution of jurisdictional conflicts, language problems and their resolution, choice of the arbitrator, representation, principles of procedure, principles followed for the determination of applicable law, the authority of award, reasons accompanying the award, unanimous or majority award, *amiable compositeur*, decisions on costs, and availability of archives. *Id.* at xiii-xiv.

bility of an award to review and attack by national courts that want to refuse enforcement.

II. The Choice Between Ad Hoc Arbitration and Institutional Arbitration

Initially, counsel and contracting parties must choose between institutional arbitration, which allows a party to choose the rules of a particular organization experienced in administering arbitrations, or ad hoc arbitration, which requires that the parties agree on their own set of rules at the time of contract negotiation.

Drafting a contract provision for ad hoc arbitration can be a long and drawn-out process.[4] Although this type of provision need only contain an agreement to submit disputes to arbitration and a method to appoint arbitrators,[5] such a skeletal provision may leave the parties in an untenable position when a dispute actually arises. Fortunately, in 1976 the United Nations Commission on International Trade Law (UNCITRAL) adopted a set of arbitration rules, drafted in consultation with leading experts, to replace individually composed rules for use in ad hoc arbitration.[6]

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4. A basic provision for ad hoc arbitration should include at least the following points:

1. the location of the proceedings;
2. the manner of choosing the tribunal;
3. the method of paying costs;
4. the governing procedural rules—either those of a chosen institution, the domestic arbitration rules of the country in which the arbitration will be held, the UNCITRAL rules, or those devised by the arbitral tribunal;
5. the applicable substantive law to be applied by the tribunal in interpreting the contract and establishing the rights of the parties—usually the substantive law of a country related to the contract and not the law of the country of any of the parties, or the law of the place of the arbitration.

Goekjian, *ICC Arbitration from a Practitioner's Perspective*, 14 J. Int'l Law & Econ. 487, 489 (1980).

Because the substantive law is a difficult negotiating point, the usual compromise is to not mention it at the proceedings. Maintaining this silence creates another issue for the tribunal to decide and usually necessitates a preliminary hearing. Another compromise is to insert the phrase "customary rules of equity and international commerce" into the agreement. This standard, however, gives so much discretion to the tribunal that it may endanger the enforceability of the award, especially in countries that require awards to be based on legal standards. *Id.* at 411-12.

5. Deciding only the method of appointing arbitrators is attractive when the parties have so many other facets of a contractual relationship to resolve.

6. U.N. Committee on International Trade Law, 31 U.N. GAOR Supp. (No.

A. The UNCITRAL Rules

In a sense, the UNCITRAL rules are a halfway house between ad hoc arbitration and institutional arbitration. Parties may choose to adopt the UNCITRAL rules simply by designating in the contract that the rules govern the resolution of disputes. The UNCITRAL rules may also be applied in institutional arbitration. Provisions for third party assistance when the parties cannot agree are available in a limited number of locations.[7] The AAA has announced that it is prepared to administer arbitration under UNCITRAL rules and has recently published administrative rules for this purpose.[8] UNCITRAL is considering, and is likely to issue, its own guidelines encouraging more arbitration associations to "offer their services in this context."[9]

The UNCITRAL rules are presented as model provisions to be incorporated into contracts and are subject to mandatory provisions of applicable arbitration law.[10] In response to the disparities in arbitration law and to its limited focus on domestic arbitration, UNCITRAL has requested that the Secretariat draft a model law on arbitral procedure[11] as a supplement to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[12] The Secretariat is to design the model law specifically for international cases to lessen the impact of domestic law that might govern the arbitration simply because of the situs of the arbitration hearings.[13] At present, however, the UNCITRAL

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17) at 34, U.N. Doc. A/31/17 (1976) [hereinafter cited as UNCITRAL Rules], *reprinted in* G. WILNER, DOMKE ON COMMERCIAL ARBITRATION app. XI (rev. ed. 1984) [hereinafter cited as WILNER].

7. Suy, *Achievements of the United Nations Commission on International Trade Law*, 15 INT'L LAW. 139 (1981).

8. *Id.* at 143.

9. *Id.*

10. For example, arbitration in the United States is subject to the provisions of Title 9 — Arbitration, 9 U.S.C. §§ 1-208 (1982); arbitration in France is subject to the provisions of French Decree No. 81-500, May 12, 1981, 1981 Journal Officiel de la République Français [J.O.] 1380, 1981 Dalloz-Sirey, *Législation* [D.S.L.] 222 (amending the Code of Court Procedure). Arbitration also can be subject to various multinational conventions such as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 [hereinafter cited as New York Convention].

11. Suy, *supra* note 6, at 143.

12. New York Convention, *supra* note 10.

13. "The arbitration site, in turn, may have been chosen because of the

rules are no freer of domestic law than are any of the other institutional rules.

Although adoption of the well-drafted UNCITRAL procedural rules may be helpful, more is needed to ensure the satisfactory outcome of an arbitral proceeding. Even if the parties approach the proceeding with good faith, a referee may still be helpful at times. For example, if the parties have not named a sole arbitrator in advance of the proceeding, an arbitrator cannot perform at the time of the dispute. In addition, if the parties cannot agree on a third arbitrator, the arbitration breaks down. A solution is to designate a referee to step in and restore order. Thus, the UNCITRAL rules provide for the naming of an "appointing authority."[14]

B. Factors to Consider Before Making the Choice

An arbitration may take place in counsel's office, a hotel room, or a restaurant. The crucial point to remember about the ad hoc arbitration structure is that all of the administrative details are left to the parties. In international arbitration, such details may include translation of documents and testimony, which may be cumbersome and expensive.

Arbitral institutions often are better equipped than the parties to provide the basic necessities of arbitration, including rooms, translators, and secretarial services. This reason alone may be sufficient to make institutional arbitration the more sensible choice. To be sure, parties will pay for the conveniences of institutional arbitration; however, not having to make these arrangements might be well worth the fee. Institutions also offer technical expertise to facilitate the making of an award and to ensure its ultimate enforcement. Some countries are less than ideal hosts for arbitrations because of local legal peculiarities. An award may also be subject to certain form requirements imposed by national law to be enforceable.[15] Furthermore, although arbitral institu-

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pleasant climate, excellent hotels or the neutrality of a given state. Yet, as one arbitrator once put it, the mere fact that a country was not engaged in a war for four hundred years does not necessarily make its law more suitable or relevant to the international case arbitrated within its borders." Suy, *supra* note 6, at 143.

14. UNCITRAL Rules, *supra* note 6, arts. 6-7.

15. Awards may be vulnerable even under the New York Convention, which was written to ensure and facilitate enforcement between signatories. Grounds

tions do not usually play a role in determining the merits of an individual dispute, these organizations may have records on hand that can serve as a type of precedent to guide the arbitrators. The ICC staff reviewing a draft award may suggest that the arbitrators have missed some aspect of the case or that the decision is out of line with similar cases.[16] The ICC also offers assistance in enforcement of arbitral awards.[17]

The choice of ad hoc arbitration over institutional arbitration highlights all three categories of problems—the problems of the process itself, the procedural problems, and the substantive problems—in a particularly acute manner simply because the entire process is up to the parties. Singling out the possible savings of institutional fees as the decisive factor in making the arbitration choice could be a grave error. Once the decision to pursue institutional arbitration has been made, the process of selecting the most appropriate rules involves analyzing the various provisions for inherent pitfalls. Counsel should be familiar enough with the rules of arbitration to choose those most appropriate for his client's particular circumstances and particular negotiations.

III. Submission Clauses

The AAA, ICC, and UNCITRAL rules recommend the insertion of their respective standard submission clauses into a contract.[18] The language of these clauses suggests that the first prob-

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for refusing enforcement include the invalidity of the agreement under the applicable law as selected by the parties or, if the parties made no selection, "the composition of the arbitral authority or the arbitral procedure was not in accordance with . . . the law of the country where the arbitration took place." New York Convention, *supra* note 10, art. V, para. 1(a), (d). In addition, enforcement may be refused if the award was not binding, *id.* at para. 1(e), was contrary to public policy, or the subject matter of the dispute was not arbitrable under the applicable law. *Id.* at para. 2. Challenges based on most of these grounds, however, are seldom successful. *See* Sanders, *A Twenty Years' Review of the Recognition and Enforcement of Foreign Arbitral Awards*, 13 Int'l Law. 269, 270 (1979).

16. Stevenson, *An Introduction to ICC Arbitration*, 14 J. Int'l Law & Econ. 381, 387 (1980).

17. Goekjian, *supra.* note 4, at 429.

18. These clauses are drawn broadly. The AAA would have its submission clause apply "whenever [the parties] have provided for arbitration by the [AAA]." Commercial Arbitration Rules of the American Arbitration Association (amended 1982) [hereinafter cited as AAA rules], rule 1, *reprinted in* Wilner, *supra* note 6, app. VII. UNCITRAL would have its rules apply to "[a]ny dis-

lem usually encountered in any arbitral proceeding is the validity and scope of the submission clause. The most common question is whether or not the language of the clause applies to a claim of fraud in the inducement of a contract containing an arbitration clause.[19]

In the landmark case of *Prima Paint Corp. v. Flood & Conklin*,[20] the Supreme Court held that the language "any controversy or claim arising out of or relating to this agreement or the breach thereof" under the Federal Arbitration Act[21] was broad enough to include the charge of fraud in the inducement of the contract.[22] As exemplified by a recent New York case,[23] the language "or relating to" appears crucial in lower courts' application of *Prima Paint*. In *Michele Amoruso E. Figli*,[24] fraud was alleged in the inducement of both the contract itself and the arbitration clause.[25] Citing *Prima Paint*, the court found that both questions of fraud were for the court to decide because the arbitration clause, by omitting the "or relating to" language, was not broad enough to cover the situation.[26]

Although the language of the ICC submission clause may be slightly broader than that of the AAA clause, French law is consistent with the United States position on the charge of fraud in the inducement of a contract. French courts, however, have decided that in international arbitration, the arbitration clause is severable from the main contract, empowering the arbitrators to

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pute, controversy or claim arising out of or relating to [the] contract." UNCITRAL Rules, *supra* note 6, Model Arbitration Clause. The ICC clause would cover "[a]ll disputes arising in connection with the present contract." Rules for International Chamber of Commerce Court of Arbitration (effective 1980) [hereinafter cited as ICC Rules], Standard ICC Arbitration Clause, *reprinted in* WILNER, *supra* note 6, app. XIII.

19. There are, of course, many other "initial" problems, but the focus of this paper is a comparison of the rules of three major arbitration institutions. This focus limits the discussion here to problems raised by the submission clauses suggested in the different sets of rules.

20. 388 U.S. 395 (1967).

21. 9 U.S.C. §§ 1-14 (1982).

22. 388 U.S. at 406.

23. Michele Amoruso E. Figli v. Fisheries Dev. Corp., 499 F. Supp. 1074 (S.D.N.Y. 1980).

24. *Id.* at 1079.

25. *Id.* at 1080.

26. Société Gosset C. Société Carapelli, May 7, 1963, Courde cassation, Premiére section civile, Fr., 1963 Dalloz, *Jurisprudence* [D. Jur.] 545.

decide the validity of the contract as a whole.[27] The "in connection with" language of the ICC clause[28] would certainly pass this initial hurdle in French courts. Furthermore, under ICC rules, the Court of Arbitration may determine the existence of an agreement to arbitrate.[29]

The UNCITRAL version of the submission clause[30] seems to cover all possibilities. Its sweeping coverage, however, suggests another problem to consider at the drafting stage. In any contractual relationship, one of the parties may not want to submit certain acts to arbitration. For example, a party may not want to leave the issue of statutory rights to the arbitrators. A more narrowly drafted clause may specify that disputes arising out of only certain provisions of the agreement will be submitted to arbitration. By restricting the type of disputes that an arbitral tribunal can adjudicate, costs may be limited and delays avoided.

Although the use of the standardized clauses may provide some security that the dispute will be decided before an arbitral panel and not before a national court judge, the use of standard clauses leaves the parties completely in the hands of the designated institution because the rules of arbitration are incorporated by reference. The rules, however, are not always appropriate for the particular dispute between the parties. For this reason it is best that counsel understand the rules of the chosen institution, decide what changes are needed, and include the necessary changes in the submission clause.

The drafting of a clause which submits disputes to arbitration ideally should take into account the types of disputes likely to arise under the contract and the position of the parties at the time of the dispute. The problems to which the arbitration clause should be responsive will vary with the type of dispute. The controlling questions, however, should be why arbitration was chosen initially; what the arbitration expected to accomplish;[31] and the extent to which the institutional or specially drafted arbitration rules protect those goals. Counsel should consider what gaps must

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27. *See supra* note 18.

28. ICC Rules, *supra* note 18, art. 8; *see also* Higgins, *supra* note 1, at 1038.

29. ICC Rules, *supra* note 18, art. 8.

30. *See supra* note 18.

31. Possible goals include speed of resolution, confidentiality of proceedings, availability of technical experts to decide the merits of the dispute, and freedom from possible national prejudice.

be filled because the rules allow parties to supplement procedures by agreement. The overall focus of any drafting, therefore, should be the arbitration process itself; thereafter, procedural and substantive problems may be addressed both on their own merits and in light of the objectives of speed of resolution, cost savings of alternatives, efficiency in problem solving, and suitability to foreseeable disputes.

IV. SELECTION OF THE ARBITRATORS

The choice of arbitrators is perhaps the most crucial part of any arbitral proceeding (*"L'Arbitrate vaut ce que vaut l'arbitre"*).[32] Once the proceedings begin, the sole arbitrator or the arbitral tribunal is in charge. Any aspect of the arbitration that the parties or the institutional rules have left to chance is in the arbitrator's hands.[33] Because not every contingency can be addressed in a contract, significant control may rest in the arbitrator's discretion and judgment. Although at first glance the choice of an arbitrator presents procedural problems that are in many cases outcome dispositive, the choice is really substantive.

Each of the three bodies of institutional rules has provisions on the procedure for choosing an arbitrator. Within these rules, however, the parties have wide latitude to designate their own procedures.[34] Short of designating specific individuals and substitutes at the time of contract negotiations, the drafted provision should indicate the number of arbitrators to be appointed, any particular or approximate qualifications needed (especially if the contract calls for technical expertise), and the language that will govern the proceedings.[35] In the case of ICC rules it is generally contemplated that the governing language will be found in the contract if no other language is indicated. Many contractual deals, especially those with the People's Republic of China, have contracts written

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32. Eisemann, *The Partisan Arbitrator in International Arbitration, Seminar on Commercial Arbitration* 37 (New Delhi 1968); *see also* Higgins, *supra* note 1, at 1043.

33. For an example of the explicit provision that casually grants this sweeping authority, see AAA Rules, *supra* note 18, art. 53.

34. *See generally* Aksen, *A Practical Guide to International Arbitration, Problems and Solutions in International Business in 1975*, 1976 PRIVATE INVESTORS ABROAD, SW. LEGAL FOUND. 51.

35. *See* McClelland, *International Arbitration: A Practical Guide to the System for the Litigation of Transnational Commercial Disputes*, 17 VA. J. INT'L L. 729, 742 (1977).

in the languages of both parties.

Parties may decide to have a single arbitrator. In this case, draftsmen should adopt institutional rules that allow the parties some input in the selection process. Without special provisions, choosing the arbitrator will be left up to the institution. The importance of maintaining this control goes to the heart of choosing arbitration over litigation. In most national forums, there is little or no control over which particular judge will hear a case at trial; one of the goals of arbitration is to remove some of this uncertainty.[36] Most international arbitrations, however, are conducted by panels of three arbitrators—the two party-appointed arbitrators and a chief, chairman, or presiding arbitrator chosen either by the party arbitrators or by the arbitral institution.

If three arbitrators are to be selected, it is important to consider whether the party arbitrators should take the role of advocates on the panel or whether they should be neutral.[37] The prevailing custom in international arbitrations is for the party-appointed arbitrators to be completely impartial. Enough doubt about this custom exists, however, that the parties may provide otherwise.[38]

To avoid future criticism and to guard against challenges, parties should define the scope of permissible communications be-

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36. It could be argued that predictability of the outcome is sacrificed for the speed of arbitration. Courts apply predictable laws in a more or less consistent manner. Arbitration, however, is much less predictable because it is so dependent on the personalities, idiosyncracies, and individual backgrounds of the members of the tribunal. In addition, the choice of law, whether that of a particular country, *lex mercatoria* or *ex aequo et bono* decreases the parties' control of the process. Careful selection of arbitrators, along with other controls that can be written into an arbitration agreement may substantially reduce that risk.

37. Under United States law, the party-appointed arbitrators do not have to be neutral. Section 10 of 9 U.S.C., however, does cite "partiality or corruption" of the arbitrators as grounds for vacating an award. *See* Aksen, *supra* note 33, at 64-65.

38. Aksen, *supra* note 33, at 65. Because most international arbitrations are conducted before an impartial tribunal, an arbitrator who is employed by one of the parties, has a financial interest in the outcome, or is related to or in some other way associated with the party appointing him, can usually be challenged. This would certainly delay the proceedings, and in some instances, take the power of appointment away from the party and give it to the administrative authority. If an opposing party was originally unaware of the grounds for disqualification and failed to make the challenge until after the award, the national courts of most jurisdictions would declare the award invalid because a member of the tribunal was not impartial. *Cf.* 9 U.S.C. § 10, (1982).

tween the party arbitrator and the neutral arbitrator, the *ex parte* communications between the party arbitrator and the neutral arbitrator, and the communications between the party and his arbitrator. Furthermore, if parties wish to provide for neutral arbitrators, the procedure for paying the arbitrators' fees may undermine any bite in the neutrality requirement. The method of payment may raise the following questions: (1) should a neutral, party-appointed arbitrator be paid directly by a party; (2) should the fee be identical for each party arbitrator; (3) is the matter resolved by using the arbitral institution as a conduit to clear the checks; and (4) should the parties make prior arrangements to set identical fees, deposit the money with the institution or some presiding body, and pay the arbitrators out of a common pool? Prior to appointing the arbitrators, the parties also should specify the standards of disclosure for the arbitrators and the factors that call for an arbitrator's removal upon the request of the parties.[39]

A nonneutral arbitrator appears to contradict the purpose of the arbitration process itself. The tactical advantage of having a skillful advocate on the panel cannot be superior to having skilled counsel argue the case before an impartial panel. A two-tiered system of party representation can prolong the proceedings and sacrifice the efficiency and expediency of the arbitration. Although the added assurance that the case will be completely presented after the hearings and in the deliberations may be a psychological advantage, this assurance can be more efficiently built into other provisions governing the arbitration.[40]

Compared to the other institutions' rules, the AAA rules provide the parties with the most control over the arbitrator selection process, even if the Association itself actually appoints the arbitrators. The parties eliminate unacceptable arbitrators from the group presented by the AAA and order by preference those arbitrators remaining on the list. The AAA chooses the arbitrators from the remaining names "in accordance with the desig-

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39. The AAA has published a code of ethics for arbitrators that provides insight into the perceived differences between neutral and non-neutral arbitrators and the consequent restrictions on their behavior during the hearings. CODE OF ETHICS FOR ARBITRATION IN COMMERCIAL DISPUTES (American Arbitration Ass'n and American Bar Ass'n 1977), *reprinted in* WILNER, *supra* note 6, app. XIV.

40. For a thorough discussion of the issue, *see* McLaughlin, *Selecting Arbitrators and Counsel, Seminar in International Commercial Arbitration*, Section E; *see also* Higgins, *supra* note 1, at 1043-44.

nated order of mutual preference."[41] The ICC, however, will decide on the arbitrators if the parties fail to agree on or nominate arbitrators. The ICC Court of Arbitration may select arbitrators from national committees of countries other than those of the parties to the dispute. The Court must confirm the arbitrators, but its standards and deliberations are private and final.

The ICC rules provide for independent party-appointed arbitrators,[42] and its payment provisions are consonant with this requirement. The Court, however, chooses the third or presiding arbitrator, in contrast to the AAA rules under which the party-appointed arbitrators pick the third member of the tribunal. The Court is also the sole judge of challenges,[43] but, unlike the AAA rules, ICC rules have no guidelines for disclosures that establish a minimum basis for such challenges.

Section two of the UNCITRAL rules provides for the intervention of either a party-designated "appointing authority" or one appointed by the Secretary General of the Permanent Court. The challenge provisions[44] point toward neutral arbitrators, but if the parties wish otherwise, any contract provision that names non-neutral arbitrators will govern.[45] A sole arbitrator may be appointed by agreement of the parties, or the parties may designate an appointing authority to do so.[46] If three arbitrators are to be impaneled, each party selects one, and the two arbitrators chosen appoint the presiding arbitrator.[47] In addition, the UNCITRAL rules provide that, unless otherwise agreed upon, the tribunal makes the decision on the language or languages to use in the proceedings and orders the necessary translations.[48] This provision could be an unpleasant surprise if not anticipated because the expense of translation is often considerable. The expense of translation involved may explain the repetition of the language "subject to agreement of the parties" that begins this rule. This language serves as a red flag to those parties who only give the rules a cursory glance before incorporating them into an agreement.

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41. AAA Rules, *supra* note 18, rule 13.
42. ICC Rules, *supra* note 18, Arbitration art. 2(4).
43. *Id.*, art. 2(7).
44. UNCITRAL Rules, *supra* note 6, arts. 9-12.
45. *Id.* art. 1(1).
46. *Id.* art. 6.
47. *Id.* art. 7.
48. *Id.* art. 17.

Although each set of institutional rules has some advantages, the above review should point out the importance of selecting the arbitrators and the dangers of placing blind faith in institutional rules. Each choice with respect to the appointment and duties of arbitrators is outcome determinative as much as it is a part of the mechanics of arbitration.

The institutional rules can be used as an outline of the considerations to weigh in drafting a selection procedure. Any well-drafted contract provision should designate the number of arbitrators, their special qualifications, the language of the proceedings, the method of selecting each arbitrator including the tie-breaking provisions, the neutrality or nonneutrality of the arbitrators, the provisions for challenges and their resolution, and the replacement of successfully challenged arbitrators. No one set of rules covers all of these topics. Depending on the nature of the dispute and, of course, the amount of control that a party wishes to exercise over the arbitration proceedings, the considerations listed may be too complete or too sketchy. The importance of the choice of an arbitrator, however, cannot be overstated; if time is to be spent anywhere in the drafting of arbitration provisions, it should be spent at this stage.

V. Costs of the Proceedings

Reliance on the phrase "cheaper than litigation" with respect to the costs of arbitration somehow implies just "cheap," which is often not the case. Because most arbitrations are basically adversary proceedings, any expectation of great savings may be ill-founded. Knowledge of the chosen institution's fee schedule may modify expectations, provide some guidance, and induce the parties to narrow the types of disputes brought before the arbitral panel, especially when an institution's fees are based on a percentage of the amount in dispute.

The AAA cost provisions are set out in rules 48 through 52.[49] The schedule by which administrative costs are calculated begins with a minimum of $200, or three percent of a claim between $1 and $40,000, and goes to a maximum of $1800 plus one-quarter percent of any amount over $160,000. In claims over $5,000,000, the AAA has the power to set an "appropriate fee."[50] Neutral ar-

49. AAA Rules, *supra* note 18, rules 48-52.

50. *Id.* Administrative Fee Schedule, *reprinted in* Wilner, *supra* note 6,

bitrators appointed from the national panel serve "in most cases without fee,"[51] for a fee agreed to by the parties, or for a fee set by the AAA as "appropriate." In contrast, the ICC is expensive with a minimum fee of $1,000, or four percent of claims under $50,000. The fee schedule does not drop to AAA-level percentages until the claim rises to between $1,000,000 and $2,000,000. Arbitrator's fees similarly are set by a schedule based on the amount of the claim.[52] In UNCITRAL arbitration, the tribunal sets the fees.[53] Although under AAA and ICC rules the parties divide the costs, under UNCITRAL rules, the unsuccessful party must pay unless the arbitral tribunal decides that apportionment is reasonable.[54] The fees are to be reasonable in light of "the amount of the dispute, the complexity of the subject matter, the time spent by the arbitrator and any other relevant circumstances of the case."[55] Such a provision seems overbroad. If the parties choose UNCITRAL rules and are able to administer the proceedings themselves, they may have some control over the costs; but if an administrative authority assists, its fee schedule will govern. Any real control over costs, therefore, must come at the drafting stage.

VI. Availability of Provisional Relief and Antifrustration Devices

The New York Convention[56] contains no express provisions for pre-award attachments, a type of provisional relief in arbitration.[57] Although the legislative history is sketchy, article II can be viewed as including such measures as attachment under the dis-

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app. VII at 56.

51. *Id.* rule 51. In spite of rule 51, most neutral arbitrators get paid.

52. ICC Rules, *supra* note 18, app. III, *reprinted in* Wilner, *supra* note 6, app. XIII, at 157-60.

53. UNCITRAL Rules, *supra* note 6, art. 38.

54. *Id.* art. 40(1).

55. *Id.* art. 39(1).

56. New York Convention, *supra* note 10.

57. *See* Carolina Power & Light Co. v. Uranex, 451 F. Supp. 1044 (N.D. Cal. 1977), "The Convention and its implementing statutes contain no reference to prejudgment attachment . . . ." Some cases, however, state that although the Convention does not refer to provisional relief, neither does it proscribe such measures. *See, e.g.*, Cooper v. Ateliers de la Motobecane, S.A., 86 A.D.2d 568, 569-70, 446 N.Y.S.2d 297, 299 (1982); Atlas Chartering Serv., Inc. v. World Trade Group, Inc., 453 F. Supp. 861, 863 (S.D.N.Y. 1978).

cussion of "suitable security."[58] Commentators are split on this issue of provisional relief: some argue that the necessary involvement of national courts undermines the purpose and effect of the Convention, while others posit that it is an "effective means of enforcing an arbitral award."[59] Recent court decisions and the rules of the ICC and UNCITRAL support the argument that the Convention allows provisional relief.[60] Resolution of the question will determine whether the parties may provide for interim relief within their contract without violating the agreement to arbitrate, waive their right to arbitrate, or create additional grounds for challenging the award.

A. Pre-award Attachment

Foreign courts have upheld the jurisdiction of courts over the pre-award attachment question, but have left resolution of the dispute on the merits in the arbitrators' hands.[61] United States courts that enforce the Convention through its implementing legislation[62] have handled the issue in two ways. The first method involves a strict reading of the relevant statutory language. Under this reading, such attachment action is barred[63] as an "impermissible attempt to 'bypass' the agreement to arbitrate."[64] Other district courts, however, have rejected this reading of the Convention and have found that neither the Convention nor the Federal Arbitration Act precludes pre-award attachment.[65] The power to compel arbitration, granted to courts by section 4 of the Act, does not deprive courts of continuing jurisdiction.[66] Admiralty courts have applied a policy-oriented approach to the controversy by

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58. Holmes, *Pre-Award Attachment Under the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 21 VA. J. INT'L L. 785, 790-91 (1981).

59. *Id.* at 792 (quoting G. DELAUME, TRANSNATIONAL CONTRACTS: APPLICABLE LAW AND SETTLEMENT OF DISPUTES 85 (1975)).

60. ICC Rules, *supra* note 18, art. 8(5); UNCITRAL Rules, *supra* note 6, art. 26(3).

61. *See* Holmes, *supra* note 57, at 794-95.

62. 9 U.S.C. §§ 201-208 (1982).

63. *See, e.g.*, McCreary Tire & Rubber Co. v. CEAT S.P.A., 501 F.2d 1032 (3d Cir. 1974).

64. Holmes, *supra* note 57, at 798 (citing *McCreary*, 501 F.2d at 1038).

65. Carolina Power & Light Co. v. Uranex, 451 F. Supp. 1044, 1051-52 (N.D. Cal. 1977).

66. *Id.* at 1052; *see* Holmes, *supra* note 58, at 799.

reading section 8 of the Act, which expressly provides for pre-award attachment in admiralty cases, in harmony with the Convention.[67]

The UNCITRAL rules provide for provisional relief. Article 26 gives the arbitral tribunal broad powers to take any necessary measures regarding the subject matter of the dispute. Section 3 of that same article provides that any party's application to a judicial authority for interim measures "shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement."[68] Although not dispositive, these provisions lend strong support to the argument that pre-award attachments are consistent with the overall purpose and policies of the Convention because of UNCITRAL's connection with the United Nations and the Commission's goal of providing rules that are specifically tailored for the resolution of international disputes.

Under the ICC rules, parties are allowed to apply to any competent judicial authority for interim or conservatory measures before the file is transmitted to the arbitrator and the arbitration begins. In addition, an application may be made in "exceptional circumstances even thereafter" without being found to have "infringe[d] the agreement to arbitrate or to [have] affect[ed] the relevant powers of the arbitrator."[69] The ICC rules, however, do not provide the arbitrators with similar powers. Nevertheless, an arbitrator could receive the application power from parties who want to ensure that the option of asking the courts for interim or provisional relief if a provision similar to that found in the UNCITRAL rules is included in the contract. Rule 34 of the AAA allows an arbitrator to take procedural measures to safeguard property that is the subject matter of arbitration.[70] Rule 47(a) states that "[n]o judicial proceedings by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate."[71] This provision gives support to courts that believe provisional relief relates to the merits of the dispute, under the rationale that the provision would take away what was given by adoption of the rules—an illogical reading. How far this

67. Holmes, *supra* note 58, at 800-01.
68. UNCITRAL Rules, *supra* note 6, art. 26(3).
69. ICC Rules, *supra* note 18, art. 8(5).
70. AAA Rules *supra* note 18, rule 34.
71. *Id.* rule 47(a).

conclusion can be stretched, however, depends on the particular court.[72]

B. Delaying Tactics

Another problem in this area concerns provisions in the rules that deal with delaying tactics used to stall or disrupt arbitration proceedings. Delaying tactics are easily used in five identifiable stages of the arbitration process. Parties should keep these stages in mind when drafting to prevent potential stalling or, if desirable and possible, to leave room for maneuvering.[73]

In the first stage, the drafting stage, disputes can be as numerous and varied as the possible permutations of the number of provisions being drafted. It may be advisable, therefore, to confine redrafting or complementary provisions to a few crucial clauses, rather than rewriting all of the rules. This may be the strongest argument for choosing institutional over ad hoc arbitration.

The second stage in which delaying tactics may be used occurs when a dispute has arisen. This is the first test of an arbitration clause and, in the case of institutional arbitration, the first test of the institution's efficiency in countering any delaying tactics. Common techniques used to delay at this stage are: (1) claiming that neither the notice nor the claim was received; (2) contesting the validity of the arbitration proceeding itself; (3) claiming that the matter in dispute falls outside the scope of the agreement; (4) contesting the existence of a dispute at all; (5) charging that the claim is incomplete or needs amplification; (6) refusing to contribute to the down payment for the costs of the arbitration; (7) failing to appoint an arbitrator; (8) challenging the other party's arbitrators; (9) disputing the number of arbitrators; (10) delaying the appointment of lawyers; (11) appointing additional lawyers and demanding additional preparation time; and (12) raising questions about language. Many of these tactics are effectively precluded from use by provisions within the rules; others can be met by drafting and agreeing upon procedural parries in advance. Because delays can be expensive, cost should be considered when dealing with delaying tactics once the tribunal is empaneled and the "meter is running." In addition, remedies for certain procedu-

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72. Holmes suggests in his article that pre-award attachments should not be allowed "[u]ntil the United Nations elects to solve the problem by means of an explicit interpretive ruling." *See* Holmes, *supra* note 58, at 801.

73. It may not be an advantage to rid the process of all possible delay.

ral delays, such as claims of defective notice, incompleteness of claims, and refusals to choose arbitrators, always must address the substantive effects of any attempt to fight an opposing party's action questioning the fairness of the proceeding. Obtaining a victory in getting the process started could later turn into defeat if enforcement of the award is denied because the proceeding violated the substantive rights of one of the parties.

The third identifiable stage is during the arbitration itself when many of the delaying tactics of the second stage can be used. Furthermore, at this stage, disagreements on procedure can be raised, new challenges to the choice of arbitrators asserted, disputes on time limits initiated, evidence disputed, and appeals taken to courts in order to block the arbitration proceeding.

Disagreements among members of the arbitral tribunal also can delay the procedure. The most common disagreements center on independence of party-appointed arbitrators and the participation or nonparticipation of an arbitrator in deliberation. In some cases, an arbitrator may be forced to withdraw before an award is rendered.

Delay also can occur in the execution and enforcement of an award. Intervention of a court may be called for by one of the parties at several of the stages. Issues asserted before the courts include designation of the arbitrators, the scope of the arbitration, the arbitration agreement itself, the extension of a time limit to render the award, the measures enforcing provisional orders, assistance in taking evidence and appointing experts, the deposit and notification of an award, and the declarations of enforceability. Furthermore, courts will need to intervene if one party has to force the other party to comply with the award.[74]

Antifrustration devices inserted in the initial contract must not interfere with the ultimate enforceability of an award by contradicting mandatory provisions of applicable local law. The basic dilemma is to avoid leaving too much to the discretion of the arbitrators without destroying the flexibility of the arbitral setting or the speed with which a dispute can be resolved. To the extent that delay can be used to obtain a tactical advantage or to harrass opponents, any contract-regulated arbitration proceeding should provide time limits from which the parties can deviate only upon

74. The preceding discussion appears in a presentation by Dr. Robert Briner, *Procedural Problems*, ICC SEMINAR PAPER, sec. G (copies of the paper are on file with the authors and the VAND. J. TRANSNAT'L L.).

circumscribed showings.[75] Because of the necessarily personal nature of arbitration, however, the incentive to delay and harrass may be adequately policed by the hesitation of the parties to annoy the tribunal.

VII. Principles of Procedure

A. Issue Determination

An important part of any arbitral procedure is framing the issues in conjunction with determining the degree of participation accorded to the parties. The AAA rules provide that the arbitrator "may, at the beginning of the hearing, ask for statements clarifying the issues involved."[76] The UNCITRAL rules are silent on the determination of the issues, but the ICC does have an extensive rule on drawing up the terms of reference[77] and places the tribunal in control of both a "summary of the parties' respective claims"[78] and the "definition of the issues to be determined."[79] The ICC rules give the arbitrator discretion to permit the parties to participate in this issue formulation process.[80] In addition, the ICC's terms of reference may include the particulars of the applicable procedural rules and authorize the power of the arbitrator to act as *amiable compositeur*.[81]

The terms of reference can be quicksand for the parties because the terms may include a statement of the issues that could be drawn up by the arbitrators alone. The possibility of losing control of the proceedings is a real one, especially considering the reference provision in conjunction with article 19 in which the chairman of the panel is empowered to make an award if no majority agreement is reached. Even if the terms of reference are in practice drawn up by the parties,[82] the arbitral agreement should

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75. All of the rules have time limits attached to the filing of claims, answers, and the announcement of the award itself. *See, e.g.*, time limits for filing answers, AAA Rules, *supra* note 18 rule 7(b); ICC Rules, *supra* note 18, art. 4; UNCITRAL Rules, *supra* note 6, art. 19.

76. AAA Rules, *supra* note 18, rule 29.

77. ICC Rules, *supra* note 18, art. 13(1).

78. *Id.* art. 13(1)(c).

79. *Id.* art. 13(1)(d).

80. Those reading the rules critically will note the importance of the selection process. The choice of the arbitrators is central to the entire system.

81. ICC Rules, *supra* note 18, art. 13(1)(g).

82. *See* Briner, *supra* note 74.

include a provision to ensure this participation in issue determination.

The AAA rules seemingly leave the determination of the issues to the parties.[83] The rules make it clear that the arbitrators do not have control over the issues; the parties should handle any redefining or "clarification."[84] Rule 29 also contains more specific provisions for the general procedure of framing the issues. The rule states that the claimant should present his claims, proofs, and witnesses, after which the defending party is to present his complete case, subject to the discretion of the arbitrator.[85] The arbitrator may vary the order of presentation, but he must "afford full and equal opportunity to all parties for the presentation of any material or relevant proofs."[86] The terms "material" or "relevant" are not defined in the AAA rules. Article 53 gives the arbitrators the power to interpret the rules, and therefore, determine what is material or relevant proof by majority vote. The AAA will supply an interpretation if no majority is obtainable upon submission by either the arbitrators or the parties.

B. Pleading, Discovery, and Witnesses

Pleading practice under the three sets of institutional rules is similar to that followed by United States courts. The claims are to be brief, nonconclusory statements with supporting facts and requests for specific relief.[87] Although both the AAA and UNCITRAL rules expressly provide for amendments to the claims, the differences in the working provisions of the three are worth investigating. Rule 8 of the AAA allows either party to make "any new or different claim" and the opposing party to answer until the arbitrator is appointed; after that time, the arbitrator's consent is needed to make amendments to the claims. The UNCITRAL provisions for amendments to claims or defenses require that the arbitrator make a judgment on the appropriateness of the change "having regard to the delay in making it or prejudice to the other party or any other circumstances."[88] The arbitrator, therefore,

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83. *See supra* note 72 and accompanying text.
84. *Id.*
85. *Id.*
86. *Id.*
87. AAA Rules, *supra* note 18, rule 7(a); ICC Rules, *supra* note 18, art. 3(2); UNCITRAL Rules, *supra* note 6, art. 18.
88. UNCITRAL Rules, *supra* note 6, art. 20.

has a lot of discretion. In addition, changes under the UNCITRAL rules must fall within the scope of the arbitration clause or separate arbitration agreement. To amend or change under the rules of the ICC, a party must stay within the provisions of the terms of reference, or petition the court for a rider to those provisions.[89]

The parties should consider how much native procedure they wish the arbitrator to bring to the arbitration and how much of their own legal procedure they wish to incorporate. Considering the latitude given the arbitrators under the rules, if the parties feel that a particular procedure will enhance their case, they should provide for it in the arbitration agreement. For United States practitioners, the silence of the rules on matters such as discovery may be a blessing or a tragedy. It is a blessing because the lack of discovery will save time and money prior to the hearings. How often, however, will a party have all the evidence needed to press a claim at the time the dispute arises? Will the lack of discovery cripple a case considering that the rules of the various institutions and UNCITRAL also provide for representation at the hearings by counsel? At the very least, consideration of the problem at the outset may lead parties to take precautionary steps toward preserving evidence throughout the contractual relationship. If arbitrators must conduct an extensive evidence-collecting process,[90] their fees under any of the payment schedules will increase, their efficiency will diminish, and the proceeding will be prolonged.

The arbitrators are empowered to call expert witnesses themselves. This practice conforms to most civil law systems. Such experts are appointed by the tribunal, but are paid jointly by the parties. The parties, however, may wish to call in their own experts. Witnesses may be examined by the arbitrators, by party representatives, or even by the parties themselves. Under the UNCITRAL and ICC rules, hearings may be omitted and the case decided on documents alone.[91] Under ICC rules, the parties must

89. ICC Rules, *supra* note 18, art. 16.

90. Under all of the rules, arbitrators are empowered to ask for the information they need to make a fair evaluation of the case before them. *See, e.g., id.* art. 14; AAA Rules, *supra* note 18, rule 33; UNCITRAL Rules, *supra* note 6, art. 24(3).

91. UNCITRAL Rules, *supra* note 6, art. 15; ICC Rules, *supra* note 18, art. 14.

request that the hearings be omitted.[92] Under UNCITRAL rules, however, the parties must fail to request a hearing and the arbitrator must decide that the proceedings should continue on the basis of the documents alone.[93]

C. Additional Considerations

Under the scope of powers given to the arbitrator in matters of evidence, it is essential that if the parties wish to provide for certain procedures, they do so in their arbitration agreement. If the parties fail to prescribe procedures at the time of selection, they should pay attention to the professional habits of the arbitrator because those habits will likely govern the procedure and presentation of evidence.

In framing the procedure to be followed by an arbitration tribunal, parties should not overemphasize speed at the expense of fairness. Denying a claimant adequate opportunity to present his case is a valid defense to the enforcement of the foreign arbitral award in any of the countries that have signed the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The simplified procedures of arbitration actually can leave more room to maneuver and disagree than do the more comprehensive rules of judicial systems. The lack of settled procedure may lead to even greater delay because of the complicated issues usually present in an international commercial dispute. Moreover, it is unlikely that the lawyers involved in arbitration will cease to fight over procedural rules "in the spirit of arbitration."

VIII. Procedure for Determination of Applicable Law

Under ICC and UNCITRAL rules, the parties may stipulate the substantive law to be applied in arbitration. If the parties have not designated the substantive law, the tribunal will apply the conflict of law rules it deems applicable.[94] The AAA rules contain no provisions for determining applicable law. In practice, arbitrators often apply the substantive law of the country where the arbitral tribunal is located or choose the law according to that

92. ICC Rules, *supra* note 18, art. 14(3).

93. UNCITRAL Rules, *supra* note 6, art. 15(2).

94. ICC Rules, *supra* note 18, art. 13(2); UNCITRAL Rules, *supra* note 6, art. 33.

country's conflict of law rules. In deciding whether or not to specify applicable law, one must consider the extent to which any choice will provide an opportunity for future litigation. This is particularly important in the context of a reasoned award in which the procedure provides for review by a court.

Another drafting issue is whether arbitrators will be empowered to act by provisions in the rules, by local law, or by custom and habit as *amiables compositeurs* or *ex aequo et bono*. In addition, parties must determine whether or not the arbitrators should apply any ascertainable *lex mercatoria*. These issues concern the power arbitrators have over the resolution of the dispute and present both procedural and substantive problems or pitfalls. The ICC rules grant an arbitrator the power to act as *amiable compositeur* only if the parties have agreed to give him such authority.[95] Although this rule provides some protection against unpredictable legal standards, the arbitrator is additionally directed to take account of relevant trade usages and provisions of the contract at all times.[96] The AAA rules have no such provision, leaving the decision on this question to either the parties or the arbitrators. The provision in the UNCITRAL rules states: "The arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorized the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration."[97] The UNCITRAL rules also contain a section that mirrors the ICC's provision for trade usage and law of the contract.

IX. The Award

The relevant inquiry on the form and content of an award should take into account the applicable law governing its enforcement. Beyond that, draftsmen should consider carefully whether or not they want to have a reasoned award. Its advantages are that parties will have the satisfaction of knowing the reasoning behind the arbitrators' decision and guidelines for future conduct

95. ICC Rules, *supra* note 18, art. 13(4).

96. *Id.* art. 13(5).

97. UNCITRAL Rules, *supra* note 6, art. 33. The rules of the Stockholm Chamber of Commerce, however, grant the arbitrator this broader power. Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (adopted 1976), rule 19, *reprinted in* I International Commercial Arbitration (Oceana) part IV.B, at 77 (1979).

in any ongoing or new contractual relationship. Because arbitration awards are confidential and not published in any organized system of reporting precedent, their value to future arbitrations is minimal at this time. The International Court of Arbitration, however, reviews draft awards by the ICC and uses the reasoned awards as guidelines, if not as formal precedent. In addition, the ICC is currently examining the possibility of publishing anonymous excerpts of awards. The disadvantages, however, may override any of these considerations: a reasoned award may provide specific grounds for a court to review and possibly refuse to enforce the award.

Other areas to consider are whether the award is to be a unanimous or a majority decision, and what provisions should be made if the arbitrators cannot agree. The role of the presiding arbitrator and the amount of power he is to wield, is obviously of significance in the context of the award. Because the presiding arbitrator is generally appointed by the administrating body when institutional rules are observed, he may have the final decision under the applicable rules.

An award from the AAA is "in writing" and signed by the sole arbitrator or by at least a majority of the arbitrators.[98] In contrast, the ICC rules, although not mentioning the form or substance of an award, provide for either a majority award or, in the absence of a majority, an award to be made by the presiding arbitrator alone.[99] UNCITRAL arbitration provides for a majority decision; if the parties have left a "question of procedure" with respect to a lack of a majority, "the presiding arbitrator may decide on his own, subject to revision, if any, by the arbitral tribunal."[100]

One last measure to protect an award might be included in any arbitration clause: if an award is not voluntarily complied with, the parties must seek confirmation in a court of competent jurisdiction to arm themselves with a judgment that may be more easily enforced where the losing party has assets. A contract clause giving consent to immediate entry and waiving rights to appeal through any national court system may make the procedure of confirmation proceed more smoothly.

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98. AAA Rules, *supra* note 18, rule 42.

99. ICC Rules, *supra* note 18, art. 19.

100. UNCITRAL Rules, *supra* note 6, art. 31(2).

X. Conclusion

It is clear from the preceding overview of the rules of the most well-known arbitral institutions that it is impossible to consider any provision in isolation. The success of any arbitral proceeding grows out of the final mix of provisions. Curing the defects of a single rule might throw off the balance ostensibly achieved by the rules as a whole. Even worse, such stop-gap measures might lull a party into a false sense of security if the ideal arbitrator is forced by another rule of the institution or by some quirk buried in local law to render a long, detailed award that is unenforceable in any country holding the opponent's assets or ripe for judicial challenge in a host of national courts.

Counsel cannot draft against every possible contingency or be an expert on each facet of all questions. Blindly choosing a set of institutional rules, however, can lead to serious problems. A personalized checklist of considerations, dependent on the needs and goals of a particular client, may be helpful to counsel. In addition, acquiring a familiarity with one institution's rules and drafting possible tailored provisions to cure any given situation is a task of manageable proportions. Such a checklist might include:

(1) Scope of arbitration clause:

(a) Broad: any and all disputes arising out of or relating to this agreement;

(b) Narrow: only specific disputes.

(2) The number of arbitrators and method of their selection, with participation in the process reserved for the parties.

(3) Qualifications of arbitrators (technical, legal, business) and whether they may act as *amiables compositeurs* or *ex aequo et bono*.

(4) Languages for arbitrators, documents, submissions, proceedings: if possible designate only one language to keep costs down.

(5) The location for arbitration, considering applicable local arbitration law, availability of qualified local counsel, availability of secretarial or administrative staff including interpreters, and costs including transportation and housing.

(6) Form of the award: reasoned or not, by majority or unanimity (provisions for lack of unanimity), availability of dissenting opinions.

(7) Possibility of consent to immediate entry of judgment in a court of competent jurisdiction and a waiver of any or all rights to appeal in any national court system.

Although by no means exhaustive, this checklist should be a

useful starting point for the study of an arbitral institution's rules and a basis upon which to negotiate changes.