A proud heritage...an ambitious future

LOYOLA UNIVERSITY CHICAGO SCHOOL OF LAW
LOYOLA UNIVERSITY CHICAGO SCHOOL OF LAW
PUBLIC LAW & LEGAL THEORY RESEARCH PAPER NO. 2011-027

INTRODUCTION TO INTERNATIONAL COMMERCIAL ARBITRATION
(CHAPTER ONE OF PRINCIPLES AND PRACTICES OF INTERNATIONAL ARBITRATION, 2ND ED. , PUBLISHED BY CAMBRIDGE UNIVERSITY PRESS)

MARGARET MOSES

CHAPTER ONE

Introduction to International Commercial Arbitration[1]

A. PURPOSE

Arbitration is a private system of adjudication. Parties who arbitrate have decided to resolve their disputes outside of any judicial system. In most instances, arbitration involves a final and binding decision, producing an award that is enforceable in a national court. The decision-makers (the arbitrators), usually one or three, are generally chosen by the parties. Parties also decide whether the arbitration will be administered by an international arbitral institution, or will be ad hoc, which means no institution is involved. The rules that apply are the rules of the arbitral institution, or other rules chosen by the parties. In addition to choosing the arbitrators and the rules, parties can choose the place of arbitration and the language of arbitration.

Arbitration thus gives the parties substantial autonomy and control over the process that will be used to resolve their disputes. This is particularly important in international commercial arbitration because parties do not want to be subject to the jurisdiction of the other party's court system. Each party fears the other party's "home court advantage." Arbitration offers a more neutral forum, where each side believes it will have a fair hearing. Moreover, the flexibility of being able to tailor the dispute resolution process to the needs of the parties, and the opportunity to select

[1] This chapter presents a brief overview of some of the basic characteristics of arbitration and how it works. Specific points mentioned in this chapter will be developed in greater detail in subsequent chapters.

arbitrators who are knowledgeable in the subject matter of the dispute, make arbitration particularly attractive. Today, international commercial arbitration has become the norm for dispute resolution in most international business transactions.

B. DEFINING CHARACTERISTICS

1. Consent

The parties' consent provides the underpinning for the power of the arbitrators to decide the dispute. The parties' consent also limits an arbitrator's power because an arbitrator can only decide issues within the scope of the parties' agreement. Arbitrators are also expected to apply rules, procedures, and laws chosen by the parties. Normally, the parties express their consent to submit any future dispute to arbitration in a written agreement that is a clause in the commercial contract between them. If they do not have an arbitration clause in their contract, however, they can still enter into an agreement after a dispute has arisen. This is known as a submission agreement.

2. Non-Governmental Decision-Makers

Arbitrators are private citizens. They do not belong to any government hierarchy. Compared with judges, they will probably weigh less heavily any questions of public policy or public interest, since they see their primary responsibility as deciding the one dispute the parties chose them to decide. Also, unlike some judges, arbitrators tend to be very thoughtful of the parties, and considerate in their interactions with them. Arbitrators are chosen by the parties, and, of course, they would like to be

chosen again. It is in their interest to be perceived as even-tempered, thoughtful, fair-minded, and reasonable.

Arbitrators do not have to be lawyers. In some industries, the technical skills of architects and engineers cause them to be chosen as arbitrators. When there are three arbitrators, quite often each party will choose one arbitrator, and the third, who will be the chair, will be chosen by the two party-appointed arbitrators. International arbitrators are, however, all expected to be independent and impartial. They can be challenged, either before the arbitral institution or a court, if there is evidence that they are not independent and impartial.

3. A Final and Binding Award

One of the reasons parties choose to arbitrate is that arbitration results in a final and binding award that generally cannot be appealed to a higher-level court. Although there are occasional opportunities to appeal in some jurisdictions,[2] for the most part, a party can challenge an award only if there is some defect in the process. A party can try to vacate the award in the court of the country where the arbitration was held (the seat of the arbitration). However, under most arbitration laws, the only grounds for setting aside an award will be quite narrow, such as a defect in the procedure, or an instance where the arbitrators exceeded their powers and decided an issue that was not before them.

---

[2] Under the English Arbitration Act, for example, in certain limited circumstances, unless the parties have agreed otherwise, a party to an arbitral proceeding may appeal to the court on a question of law. English Arbitration Act of 1996, art. 69(1).

Once the arbitrators render an award, the losing party may voluntarily comply with the terms of the award. If it does not, the prevailing party will try to have the award recognized and enforced by a court in a jurisdiction where the losing party has assets. In the enforcing court, the losing party can also challenge the award, but again, only on very narrow grounds. Basically, the award cannot be challenged on the merits, that is, even if the arbitrators made mistakes of law or mistakes of fact, these are not grounds for non-enforcement, and the award will still be enforced. Once a party's award is recognized in the enforcing jurisdiction, it is generally considered to have the same legal effect as a court judgment, and can be enforced in the same way that a judgment would be enforced in that jurisdiction.

C. ADVANTAGES OF ARBITRATION

The benefits of international commercial arbitration are substantial. An empirical study of why parties choose international arbitration to resolve disputes found that the two most significant reasons were (1) the neutrality of the forum (that is, being able to stay out of the other party's court) and (2) the likelihood of obtaining enforcement,[3] by virtue of the New York Convention, a treaty to which over 145countries are parties.[4] An arbitration award is generally easier to enforce internationally than a national court judgment because under the New York

---

[3] *See* Christian Bühring-Uhle, *A Survey on Arbitration and Settlement in International Business Disputes,* in Christopher R. Drahozal & Richard W. Naimark, TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION, p. 31 (2005).

[4] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, UN DOC/E/CONF.26/8/Rev.1 ("New York Convention"). Available at www.uncitral.org. *See also* Appendix A for text of New York Convention.

Convention, courts are required to enforce an award unless there are serious procedural irregularities, or problems that go to the integrity of the process. The New York Convention is considered to have a pro-enforcement bias, and most courts will interpret the permissible grounds for non-enforcement quite narrowly, leading to the enforcement of the vast majority of awards.

Other advantages include the ability to keep the procedure and the resulting award confidential. Confidentiality is provided in some institutional rules, and can be expanded (to cover witnesses and experts, for example) by the parties' agreement to require those parties to be bound by a confidentiality agreement. Many companies want confidential procedures because they do not want information disclosed about their company and its business operations, or the kinds of disputes it is engaged in, nor do they want a potentially negative outcome of a dispute to become public.

Parties also like being able to choose arbitrators with particular subject matter expertise. In addition, they like the fact that there is less discovery in arbitration, thereby generally resulting in a shorter process than in a full scale litigation, or at least shorter than is found in U.S.-style litigation. The lack of opportunity for multiple appeals of the decision on the merits is also an attractive aspect. For business people, there is great value in finishing a dispute so they can get on with their business.

While one advantage that has been touted in the past is that arbitration is less expensive than litigation, many companies today do not think that advantage actually

exists.[5] As commercial arbitrations have grown in number and in the amount of money at stake,[6] parties have increasingly incorporated many litigation tactics into arbitration. These tactics tend to raise the costs, create delays, and increase the adversarial nature of the process. Nonetheless, even if the arbitration process has begun to resemble litigation in a number of ways, parties tend to find that arbitration is still worth the cost, because of the other advantages it provides.

D. DISADVANTAGES OF ARBITRATION

To an extent, some of the disadvantages of arbitration are the same as the advantages, just viewed from a different perspective. For example, less discovery may be generally viewed as an advantage. Nonetheless, certain kinds of disputes, which typically involve extensive discovery, such as antitrust disputes, are increasingly arbitrated. These kinds of disputes often require the aggrieved party to prove a violation that it can only prove if it has sufficient access to documents under the control of the offending party. Less discovery in this kind of case means less of a chance for a claimant to meet its burden of proof.

Moreover, the lack of any significant right of appeal in most arbitrations may be a benefit in terms of ending the dispute, but if an arbitrator has rendered a decision that is clearly wrong on the law or the facts, the lack of ability to vacate an award on

---

[5] *See* Bühring-Uhle, *supra* note 5 (?), at 33 ("More than half (51%) of the respondents thought that the cost advantage did not exist….").

[6] For example, for contract arbitrations active in 2007-2008, the ten largest amounts in controversy ranged from U.S $4 billion to U.S. $28 billion. *The American Lawyer/Arbitration Scorecard: Contracts*, July 1, 2009. Available at http://www.law.com/jsp/tal/PubArticleFriendlyTAL.jsp?id=1202431683613

those grounds can be frustrating to a party. For this reason, some parties in the United States had included in their arbitration clauses an agreement that any award would be subject to review on the merits in court. However, in 2008, the United States Supreme Court ruled that parties cannot contract for judicial review of the merits of an award.[7] Rather, the exclusive grounds for review are those listed in the Federal Arbitration Act.[8] Those grounds provide for judicial review of issues concerning an unfair process or problems of arbitral bias or misconduct, but do not permit review for arbitrator errors of law or fact.[9]

Another disadvantage is that arbitrators have no coercive powers – that is, they do not have the power to make someone do something by being able to penalize them if they do not. A court, for example, can impose a fine for contempt if someone does not comply with a court order. Arbitrators, on the other hand, cannot impose penalties, although they can draw adverse inferences if a party does not comply with an order of the tribunal. However, with respect to non-parties, arbitrators generally have no power at all. Thus, it may be necessary at times for the parties or the tribunal to seek court assistance when coercive powers are necessary to ensure compliance with the orders of the tribunal.

---

[7] Hall Street Associates, L.L.C.v. Mattel, Inc., 552 U.S. 576 (2008). The Court did leave open, however, the possibility that parties could contract for judicial review of the merits of an award under state statuory or common law. *Id.*, at 590.

[8] 9. U.S.C. §§ 1-16,

[9] 9 U.S.C. § 10.

Moreover, in multiparty disputes, an arbitral tribunal frequently does not have the power to join all relevant parties, even though all may be involved in some aspect of the same dispute. Because the tribunal's power derives from the consent of the parties, if a party has not agreed to arbitrate, usually it cannot be joined in the arbitration. A tribunal generally does not have the right to consolidate similar claims of different parties, even if it would be more efficient for all concerned to do so.

Finally, it could be viewed as a disadvantage that the pool of experienced international arbitrators lacks both gender and ethnic diversity. Although some institutions and a few individual members of this group have made efforts to broaden that pool, on the whole there has been little change.

E. THE REGULATORY FRAMEWORK

The various laws, rules, and guidelines governing the arbitral process will be dealt with extensively in later chapters, but a brief overview is in order. One way to envision the regulatory framework of arbitration is in the form of an inverted pyramid. The point is facing down, and at that point is the arbitration agreement, which affects only the parties to it.

The arbitration agreement is the underpinning for the regulatory framework governing the private dispute resolution process. If the arbitration agreement is not valid, then there is no legal basis for arbitration.

On the pyramid above the arbitration agreement, the framework expands in terms of scope and applicability beyond the immediate parties. At one step above are

the arbitration rules chosen by the parties. These rules, which apply to the arbitrations of all the parties who choose them, may be varied in a particular case by the arbitration agreement. Frequently, a rule will contain a provision that says, "unless otherwise agreed in writing by the parties." This means that the rule is not mandatory, but rather a default rule which will apply if the parties have not reached their own agreement on the particular topic.[10] Therefore, if the parties have agreed on a particular matter, their agreement will trump the arbitration rules, unless the particular rule is considered mandatory by the institution.

At the next level of the pyramid are the national laws. Both the arbitration law of the seat of the arbitration (the *lex arbitri*) and substantive laws will come into play, and they are likely to be different national laws. Many countries have adopted as their arbitration law the UNCITRAL Model Law on International Commercial Arbitration.[11] The Model Law is meant to work in conjunction with the various

---

[10] *See, e.g.*, LCIA Rules, art. 17.1 ("The initial language of the arbitration shall be the language of the Arbitration Agreement, unless the parties have agreed in writing otherwise….")

[11] UNCITRAL is the United Nations Commission on International Trade Law. Its mandate is to further the progressive harmonization and unification of the law of international trade. The following countries, territories, or states within the United States have adopted the UNCITRAL Model Law on International Commercial Arbitration: Armenia, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Belarus, Bulgaria, Cambodia, Canada, Chile, in China: Hong Kong Special Administrative Region, Macau Special Administrative Region; Croatia, Cyprus, Denmark, Dominican Republic, Egypt, Estonia, Georgia, Germany, Greece, Guatemala, Honduras, Hungary, India, Iran (Islamic Republic of), Ireland, Japan, Jordan, Kenya, Lithuania, Madagascar, Malta, Mauritius, Mexico, New Zealand, Nicaragua, Nigeria, Norway, Oman, Paraguay, Peru, the Philippines, Poland, Republic of Korea, Russian Federation, Rwanda, Serbia, Singapore, Slovenia, Spain, Sri Lanka, Thailand, Tunisia, Turkey, Uganda, Ukraine, within the United Kingdom of Great Britain and

arbitration rules, not to conflict with them. Thus, the Model Law also has many provisions that are essentially default provisions: that is, they apply "unless the parties have agreed otherwise." If the parties have chosen arbitration rules that provide for a process or rule that is different from the Model Law, normally the arbitration rules will govern, because they represent the parties' choice of how to carry out the arbitration, that is, they indicate how the parties have "otherwise agreed."

The substantive law chosen by the parties is the national law that will be used to interpret the contract, to determine the merits of the dispute, and to decide any other substantive issues. If the parties have not chosen a substantive law, then the tribunal will determine the applicable substantive law.

At the next step above the national laws in the regulatory pyramid is international arbitration practice, which tends to be utilized to various degrees in all arbitrations. This includes various practices that have developed in international arbitration, some of which have been codified as additional rules or guidelines. There are for example, rules that have been developed by the International Bar Association on the Taking of Evidence (see Appendix E), and on Rules of Ethics (see Appendix F). The IBA has also produced Guidelines on Conflicts of Interest for Arbitrators

---

Northern Ireland: Scotland; Bermuda, an overseas territory of the United Kingdom; within the United States of America: the states of California, Connecticut, Florida, Illinois, Louisiana, Oregon and Texas; Venezuela, Zambia, and Zimbabwe. Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html. *See* Appendix B for text of 1985 UNCITRAL Model Law.

(see Appendix G). The American Arbitration and the American Bar Association have also produced A Code of Ethics for Arbitrators (see Appendix H). UNCITRAL has produced Notes on Organizing Arbitral Proceedings, "to assist arbitration practitioners by providing an annotated list of matters on which an arbitral tribunal may wish to formulate decisions during the course of arbitral proceedings…."[12] Although the Notes do not impose any obligation on the parties or the tribunal, they potentially contribute to harmonizing arbitration practice.

Arbitrators and parties may agree that some of these international practices will be followed, or arbitrators may simply use them as guidelines. International arbitrators are a relatively small group, and international practices – both those that are codified by various international organizations and those that are merely known and shared in the arbitration community as good practices – tend to create a relatively coherent system of procedures.

Finally, at the top of the inverted pyramid are any pertinent international treaties. For most international commercial arbitrations, the New York Convention will be the relevant treaty because it governs the enforcement of both arbitration agreements and awards, and because so many countries are parties to the Convention.[13] In addition to the New York Convention, three other important conventions are the Inter-American Convention on International Commercial

[12] Available at www.uncitral.org.
[13] *See supra*, text accompanying note 6.

Arbitration (the Panama Convention),[14] the European Convention on International Commercial Arbitration,[15] and the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "Washington Convention" or the "ICSID Convention").[16]

The Panama Convention, which has been ratified or adopted by seventeen South or Central American countries and by the United States and Mexico, is similar in intent and effect to the New York Convention. It has been influential in making arbitration much more acceptable in Latin American countries.

The European Convention supplements the New York Convention in the contracting states. It provides for a number of general issues concerning party's rights in arbitration, and also provides specific limited reasons for when the setting aside of an award under the national law of one Contracting State can constitute a ground for refusing to recognize or enforce an award in another Contracting State.[17] The European Convention's effect on awards that have been set aside will be discussed more fully in Chapter 10.[18]

---

[14] O.A.S. Ser. A20 (S.E.P.E.F.), 14 I.L.M. 336 (1975).
[15] 484 U.N.T.S. 349 (1961).
[16] 575 U.N.T.S. 159, T.I.A.S. 6090, 17 U.S.T.1270 (1965).
[17] European Convention on International Commercial Arbitration (1961), 484 U.N.T.S. 349, art. IX. Not all EU countries are parties to the Convention, and some distinctly non-European countries are parties, such as Cuba and Burkina Faso. List of countries available at http://untreaty.un.org/sample/EnglishInternetBible/partI/chapterXXII/treaty2.htm.
[18] *See infra*, Chapter 10, Section 10(D)(5)(f).

The Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States is also known as the ICSID Convention because the Convention created the International Center for the Settlement of Investment Disputes (ICSID). The ICSID Convention was promoted by the World Bank, which wanted to encourage investors to make investments in developing countries. Historically, investors could not bring any kind of action against a government, and had to depend upon their own government to take up their cases against a foreign government. The ICSID Convention provides the opportunity for the country and the investor to arbitrate any dispute directly, either pursuant to an arbitration agreement in a state contract, or by virtue of a bilateral investment treaty that includes a clause whereby the state consents to arbitrate with investors covered by the treaty. The ICSID Convention, and treaty arbitrations generally, will be discussed more fully in Chapter 11.

Thus, as seen above, the regulatory framework for international commercial arbitration includes private agreements, agreed-upon rules, and international practice, as well as national laws and international conventions. Although parties have substantial autonomy to control the arbitration process, the supplementation and reinforcement of the process by both national and international laws help ensure that the process functions in a fair and effective manner. The regulatory framework also gives parties confidence that they will have a reasonable method of recourse when problems develop in their international business transactions.

F. INSTITUTIONAL ARBITRATION V. AD HOC ARBITRATION

One of the choices parties must make when they decide to arbitrate is whether they want their arbitration to be administered by an arbitral institution, or whether they want the arbitration to be ad hoc.[19] There are advantages and disadvantages for each choice. With an institutional arbitration, the institution's performance of important administrative functions is considered advantageous. It makes sure the arbitrators are appointed in a timely way, that the arbitration moves along in a reasonable manner, and that fees and expenses are paid in advance. From the arbitrators' point of view, it is an advantage not to have to deal with the parties about fees.. The arbitral institution handles any issue of fees or payment. Moreover, the arbitration rules of the institution are time-tested and are usually quite effective to deal with most situations that arise. Another advantage is that an award rendered under the auspices of a well-known institution may have more credibility in the international community and the courts. This may encourage the losing party not to challenge an award, and possibly to voluntarily pay the amount awarded.

With an ad hoc arbitration, there is no administering institution. One resulting advantage is that the parties are not paying the fees and expenses of the administering institution. The parties also have more opportunity to craft a procedure that is very carefully tailored to the particular kind of dispute. They may draft their own rules, or they may choose the UNCITRAL Arbitration Rules, which are frequently used in ad

[19] Ad hoc arbitration is not an option in China. *See* Jingzhou Tao & Clarisse von Wunschheim, *Article 16 and 18 of the PRC Arbitration Law – The Great Wall of China for Foreign Arbitration Institutions*, 23 Arb. Int. 309, 324 (2007).

hoc arbitrations.[20] (UNCITRAL itself does not administer arbitrations and is not an arbitral institution.) Ad hoc arbitrations are sometimes particularly useful when one of the parties is a state, and there may be a need for more flexibility in the proceedings. It can be decided, for example, that neither party is the respondent, since both sides have claims against each other. Then each party will simply have the burden of proof of the claims it raises against the other party. An ad hoc proceeding can be disadvantageous, however, if either of the parties engages in deliberate obstruction of the process. In that situation, without an administering institution, the parties may have to seek the assistance of the court to move the arbitration forward.

G. ARBITRAL INSTITUTIONS

As international commercial arbitration has grown and expanded with the growth of international business,[21] arbitral institutions have also grown and changed. The American Arbitration Association, for example, has created an international division – the International Centre for Dispute Resolution (ICDR) – just to deal with international disputes. Arbitral institutions continually update their rules to present an

[20] UNCITRAL Arbitration Rules have been updated, effective August 15, 2010. Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html

[21] The international caseload of major arbitral institutions nearly doubled between 1993 and 2003, and, during the same period, more than tripled before the American Arbitration Association and its International Centre for Dispute Resolution. *See* Christopher R. Drahozal & Richard W. Naimark, TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH, 341, app.1 (2005).

international arbitration-friendly format, and to improve their ability to deal with certain issues

Institutions vary in cost and quality of administration. Many companies prefer to work with the older, better-established institutions, even if the cost may be somewhat higher. Parties are concerned that if they go with a brand new arbitral institution, that institution might not be in business a few years down the road when a dispute might arise. Listed below is a brief description of a few of the major international arbitration institutions.

1. The International Chamber of Commerce (ICC) International Court of Arbitration

The ICC International Court of Arbitration is one of the better-known and most prestigious arbitral institutions. The International Court of Arbitration is not a court in the ordinary sense of the word; it is not part of any judicial system. Rather the Court of Arbitration is the administrative body that is responsible for overseeing the arbitration process. Its members consist of legal professionals from all over the world. In addition, the ICC has a Secretariat, which is a permanent, professional administrative staff.

A few features distinguish the ICC as an arbitral institution. First, every ICC arbitral award is scrutinized by the Court of Arbitration, meaning the award is not provided to the parties until it has been reviewed by the Court.[22] While the Court does not have the power to change the award substantively, if it finds anything amiss,

[22] *See* ICC Rules, art. 33.

it sends the award back to the arbitrators with its comments. Second, another requirement of the ICC is that at the outset of the arbitration, the parties are asked to complete and sign a document called the "Terms of Reference," which lists a summary of the claims and relief sought, all the parties, the place of arbitration, the rules, and sometimes other information pertaining to discovery or scheduling.[23] This ensures that everyone knows at the beginning of the process what the parameters of the arbitration will be. In addition, practitioners before the ICC like the fact that the actual case administrators, who are part of the Secretariat staff, are lawyers. Although the seat of the ICC International Court of Arbitration is in Paris, it administers arbitrations all over the world.[24]

2. The American Arbitration Association's (AAA) International Centre for Dispute Resolution (ICDR)

The ICDR has greatly expanded the number of arbitrations it handles yearly. The number of international arbitration cases filed with the AAA or the ICDR in 2010 was 888, a 6% increase over 2009 and a 26% increase over 2008.[25] Moreover, the ICDR has opened offices in other countries: Mexico City in 2006, Singapore in 2006, and Bahrain in 2010.[26] In Mexico, the ICDR has a cooperative agreement with the Mediation and Arbitration Commission of the Mexico City National Chamber of Commerce (CANACO). In Singapore, the ICDR has entered into a joint venture with the Singapore International Arbitration Centre (SIAC) to establish a dispute resolution center. This step is expected to help make Singapore a leading arbitration

---

[23] *See* ICC Rules, art 23.

[24] In 2004, the place of arbitration for various ICC arbitrations included 49 different countries. *See* Yves Derain & Eric Schwartz, A GUIDE TO THE ICC RULES OF ARBITRATION, 427, app. 6 (2d ed. 2005).

[25] Information on file with the ICDR in its New York office.

[26] *See* The ICDR International Arbitration Reporter, Issue 1, p.3.

center in Asia. In Bahrain, the AAA and Bahrain's Ministry of Justice and Islamic affairs have established the Bahrain Chamber for Dispute Resolution (BCDR-AAA). The ICDR has reached Cooperative Agreements with 66 institutions in at least 46 countries.[27] The ICDR also administers cases on behalf of IACAC (Inter-American Commercial Arbitration Commission).

3. The London Court of International Arbitration (LCIA)

The LCIA is also not a "court" in the judicial sense, but rather the responsible supervising body of the arbitration institution. The LCIA Court is the final authority for the proper application of the LCIA Rules. It also has the responsibility of appointing tribunals, determining challenges to arbitrators, and controlling costs. The LCIA is the oldest international arbitration institution, having been founded in the late nineteenth century. Its Secretariat is headed by a Registrar, and is responsible for the administration of disputes referred to the LCIAThe LCIA will administer cases and apply its rules at any location the parties choose. In 2009 and 2010, the cases filed with the LCIA increased by 9% over the previous 24 month period.[28] In addition to the organization in London, the LCIA has established LCIA India, an independent arbitral institution based in New Delhi, with rules that are closely modeled on the LCIA rules. It has also created the DIFC-LCIA Arbitration Center in Dubai.

---

[27] *See* www.adr.org/icdr (Use the "search" feature for specific information about the various ICDR offices worldwide).
[28] *See* Director General's Report, 2010, available at LCIA website www.lcia.org.

4. Other Arbitral Institutions

A number of other arbitral centers actively conduct international arbitrations. The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) became particularly well-known for handling East-West arbitrations. It has new arbitration rules that came into force on January 1, 2010. Other European institutions include the European Court of Arbitration, the German Institute of Arbitration (DIS), the Netherlands Arbitration Institute (NAI), the Vienna International Arbitration Centre (VIAC), and the Permanent Court of Arbitration in the Hague (PCA). The PCA is an intergovernmental organization that provides dispute resolution services to states, and also handles some international commercial arbitrations between private parties. The China International Economic Trade Arbitration Commission (CIETAC), adopted new arbitration rules in 2005, and has moved toward a more mainstream approach to international arbitration. The World Intellectual Property Organization (WIPO), Arbitration and Mediation Center has rules on mediation and arbitration that are considered particularly appropriate for technology, entertainment, and other disputes involving intellectual property. International arbitrations are handled by institutions in Hong Kong, Switzerland, Cairo, Venezuela, Mexico, and many other cities and countries. U.S. organizations such as JAMS and the CPR Institute for Conflict Prevention and Resolution have adopted international arbitration and mediation rules, and are increasingly handling international arbitrations and mediations. In addition, there are some specialized arbitral institutions such as the Grain and Feed Trade Association (GAFTA), the London Maritime Arbitration

Association (LMAA), the Federation of Oils, Seeds and Fats Association (FOSFA), and the London Metal Exchange (LME), all of which have industry-based rules and procedures for resolving disputes of their members.

H. ARBITRATIONS INVOLVING STATES

1. ICSID Arbitrations

State or State-owned entities are generally immune from suits by individuals or companies. However, if the state or state entity engages in a commercial deal, and particularly if it enters into an arbitration agreement, normally it will be considered to have waived immunity. Moreover, it may be obliged to arbitrate under the provisions of a bilateral investment treaty. For Contracting States who agree to arbitration under the ICSID Rules of Arbitration, any resulting award is not appealable to a court, and national laws are not applicable to the process. The award can, however, under the ICSID Rules, be reviewed by an ad hoc committee of three arbitrators, and, if annulled, may be arbitrated again by yet another tribunal. A monetary award is enforceable in a Contracting State as though it were a final judgment in the court of that state. Treaty arbitrations will be discussed further in Chapter 11.

2. The Permanent Court of Arbitration

The Permanent Court of Arbitration (PCA), located in the Hague, provides a variety of arbitration, conciliation, and fact-finding services. It is primarily known for arbitrating disputes between states and state entities, including disputes arising out of various treaties. However, international commercial arbitration can also be conducted by the PCA. The organization also plays an important role under the UNCITRAL

Rules of Arbitration. When parties to an ad hoc arbitration have not agreed on selecting an arbitrator, or an appointing authority, either party may request the Secretary-General of the PCA to designate an appointing authority.[29] In addition, the Editorial Staff of the International Council for Commercial Arbitration (ICCA) is located on the premises of the PCA in the Peace Palace. ICCA publishes the Yearbook Commercial Arbitration, the International Handbook on Commercial Arbitration and the ICCA Congress Series, which are important sources of arbitration cases, laws and practice, and scholarly papers in the field.

I. OTHER DISPUTE RESOLUTION METHODS

There are other dispute resolution methods, aside from litigation and arbitration, which may be used to try to resolve international disputes. These other methods, which are often non-binding, are sometimes combined with arbitration. For example, parties may agree that they will first try to resolve their dispute by negotiation, and if unsuccessful, they will engage in mediation. If that does not work, then they will commence binding arbitration. The other dispute resolution mechanisms are sometimes referred to under the term of "alternative dispute resolution" or "ADR." However, the term ADR does not mean the same thing to all people. In Europe and much of the rest of the world, ADR refers to dispute resolution methods that exclude both litigation and arbitration. Although many of these methods are nonbinding, such as mediation and conciliation, some kinds of ADR can be binding, such as expert determination and baseball arbitration. In the United States, on the other hand, ADR

[29] UNCITRAL Arbitration Rules, art. 6.

is understood to mean all kinds of dispute resolution methods other than litigation, so the term ADR would include arbitration. Parties should be clear that when they discuss resolving disputes by ADR that they understand what the other party means by ADR.

The methods described below are dispute resolution mechanisms that can be used either in conjunction with an arbitration, or independently. Good lawyers will always try to help a client explore ways of resolving disputes that might avoid the lengthy and costly procedures of either arbitration or litigation.

1. Mediation

Mediation differs from arbitration because it is nonbinding. An arbitral institution is likely to have rules for mediation as well as rules for arbitration. A mediator will try to make sure each party understands the other's point of view, will meet with each party privately and listen to their respective viewpoints, stress common interests, and try to help them reach a settlement.

Mediation is confidential. There is usually a provision in the chosen rules that no disclosure made during the mediation can be used at the next level of the dispute, whether arbitration or litigation. If the rules do not provide for this, then there should be an agreement in writing to the effect that anything disclosed in the mediation process cannot be used at the next level, except to the extent it comes in through documents not created for the mediation.

Mediation can occur at any time in the dispute. If parties get to a point in litigation, or in arbitration, where they want to settle, and need some help, they can get a mediator. Mediators are also sometimes used in the negotiation stage of a contract, when negotiations have reached an impasse, but both parties actually want the deal to go through. Because mediators try to understand and reconcile the interests of the parties, mediation is sometimes referred to as an interest-based procedure, while arbitration is referred to as a rights-based procedure.

2. Conciliation

What is the difference between conciliation and mediation? Often, the terms are used interchangeably. Technically, however, there is a difference. A conciliator listens to the two parties, hears their different positions, and then sets forth a proposed settlement agreement, representing what she believes to be a fair compromise of the dispute. If the proposal does not resolve the dispute, the conciliator may offer another proposal. Although mediators try to get the parties to come up with a settlement agreement themselves, they may also, at the parties' request, make a specific proposal, similar to what conciliators would do.

3. Neutral Evaluation

An institution can arrange for a neutral party, or the parties can find and agree upon a neutral party, who will listen to each side, and then give a nonbinding opinion about an issue of fact, an issue of law, or perhaps a technical issue. The neutral party typically assesses the strengths and weaknesses of the case, which may help parties be more realistic about their claims in subsequent settlement discussions.

4. Expert Determination

When an issue in the arbitration involves a highly technical question, parties can agree that an expert may determine that question. Frequently, the decision of the expert is binding, but parties can agree to use an expert under rules that permit a nonbinding opinion.[30]

5. Mini-Trials

A number of arbitral institutions have rules for mini-trials. In a mini-trial, usually there is a panel composed of one neutral decision-maker and one executive from each of the companies involved in the dispute. The executives should be at a high level in the company, have decision-making authority, and should not be employees who were personally involved in the issues leading to the dispute. A mini-trial usually lasts only one or two days, there is limited exchange of documents, each side puts forth its best case, and the panel (the neutral and the two executives) tries to reach a settlement. The proceedings are generally confidential, so that disclosures at the mini-trial generally cannot be used at a subsequent trial or arbitration. The proceeding is non-binding, but serves the purpose of letting high-level executives know what is at stake, and provides them the opportunity to resolve the dispute at an early stage to avoid expensive arbitration or litigation.

[30] *See e.g.*, ICC Rules for Expertise, art.12(3). ("Unless otherwise agreed by all of the parties, the findings of the expert shall not be binding on the parties.")

6. Last Offer Arbitration (Baseball Arbitration)

This is a technique within an arbitration to try to bring both parties closer together in terms of what the amount awarded should be. Each party states its best offer as to the amount it thinks should be awarded, and the arbitrator only has the ability to choose either one proposal or the other. Thus, each side has an incentive to be reasonable, because to the extent one side is too extreme, the other side's number will be chosen. This is sometimes called "baseball arbitration" because it has on occasion been used in establishing players' contracts in Major League Baseball in the United States.

J. **CONCLUSION**

Any dispute resolution method has its problems and its downsides. International commercial arbitration is sometimes referred to as the "least ineffective" method of resolving international disputes. But many participants express a more positive view. Ingeborg Schwenzer, a professor and arbitrator in Switzerland, finds the atmosphere in arbitration to be very different from litigation – "more professional, less nasty."[31] David Wagoner, a U.S. arbitrator, says that what he likes about arbitration is that "you can take the best practices from civil and common law, use them in arbitration, and keep improving the process."[32] Certainly, the goal in international arbitration is to permit people from different countries and cultures to resolve their differences in ways that leave all parties feeling that the private system of dispute resolution serves a shared sense of justice.

---

[31] Interview with Ingeborg Schwenzer, March 2007. Notes of interview on file with author.

[32] Interview with David Wagoner, March 2007. Notes of interview on file with author.