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## DRAFTING A DISPUTE RESOLUTION PROVISION IN INTERNATIONAL COMMERCIAL CONTRACTS

*Deborah L. Holland*<sup>†</sup>

### I. INTRODUCTION

Disputes concerning international commercial contracts are inevitable. With the number of disputes between international parties increasing, it is easy for these disputes to broaden into major trade conflicts with serious political and economic repercussions.<sup>1</sup> When a dispute arises, business people need to know how the rights and obligations in the contract will be enforced. Without a dispute resolution provision, the parties would have to rely on the uncertainties and difficulties of transnational litigation in foreign courts.<sup>2</sup> Dispute resolution provisions providing for negotiation, mediation, arbitration, or hybrid mechanisms allow for a means of settlement and enforcement while keeping the dispute out of domestic litigation processes. This allows parties to preserve an ongoing business relationship while enjoying the flexibility of a process without regard for formal procedures.<sup>3</sup>

Inserting a dispute resolution provision after an agreement of a contract's substantive terms is potentially dangerous.<sup>4</sup> Several factors must be considered, including the nature of the international contract, the cultural differences between the parties and the expectations of the parties

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1. See Andrew Sagartz, Note & Comment, *Resolution of International Commercial Disputes: Surmounting Barriers of Culture Without Going to Court*, 13 OHIO ST. J. ON DISP. RESOL. 675 (1998).

2. See Harold I. Abramson, *Time to Try Mediation of International Commercial Disputes*, 4 ILSA J. INT'L & COMP. L. 323, 325 (1998).

3. See Steven J. Burton, *Combining Conciliation with Arbitration of International Commercial Disputes*, 18 HASTINGS INT'L & COMP. L. REV. 637, 638 (1995).

4. See Dana H. Freyer, *Practical Considerations in Drafting Dispute Resolution Provisions in International Commercial Contracts: A U.S. Perspective*, N97AICB ABA-LGLED B-75, B-76 (1997).

involved.<sup>5</sup> Ultimately, the provision should reflect the parties' explicit intention to anticipate disputes and to resolve them in a manner helpful to preserving the business relationship.<sup>6</sup> It may deter breaches of the agreement, thus reducing the possibility that the provision will be invoked.<sup>7</sup> Additionally litigation expense and uncertainty will be avoided, and business relationships will be preserved.<sup>8</sup> By providing a competent mechanism of dispute resolution, a more efficient resolution will be reached.

There is no perfect model dispute resolution provision applicable to the entire range of possible international commercial contracts. This article is designed to assist in understanding the careful planning needed when drafting a dispute resolution provision in an international commercial contract. Section II describes the many dispute resolution mechanisms available to the parties of an international commercial contract. Lastly, section III details factors that international parties need to consider when drafting a mediation or arbitration provision. How parties decide to incorporate these factors into the dispute resolution procedure will greatly affect the attitude towards the process and its successful and efficient outcome.

## II. DISPUTE RESOLUTION MECHANISMS

In international commercial contracts, the potential for difficulty in communication increases dramatically and can lead to disputes. Culture is frequently the culprit.<sup>9</sup> Parties to a contract use their background to interpret the other parties' statements and actions.<sup>10</sup> When differences in culture are not considered in the business relationship, disputes will likely result. Alternatives to litigation are perfect for these types of disputes. They provide enough flexibility to recognize and work with cultural differences. Therefore, the first step in drafting a dispute resolution provision is choosing which mechanism to use.

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5. See George W. Coombe, Jr., *The Resolution of Transnational Commercial Disputes: A Perspective from North America*, 5 ANN. SURV. INT'L & COMP. L. 13, 15 (1999).

6. See *id.*

7. See Donald Francis Donovan & David W. Rivkin, *International Arbitration and Dispute Resolution*, 786 PLI/COMM 143, 147 (1999).

8. See Freyer, *supra* note 4, at B-76.

9. See Sagartz, *supra* note 1, at 676. "Culture . . . is the acquired knowledge that members of a given community use to subconsciously interpret their surroundings and guide their interaction with others." *Id.*

10. See *id.*

### A. Negotiation

Negotiation is the most commonly used resolution technique employed in commercial settings.<sup>11</sup> It is non-binding and relatively unstructured; moreover, its success can be dependent on the cultural perspectives of the parties involved. It is the least expensive dispute resolution alternative and the most helpful at maintaining the continuing business relationship.<sup>12</sup> However, when negotiation is not contractually mandated as a dispute resolution mechanism, a party may perceive a tactical advantage by utilizing a more expensive and adversarial dispute resolution mechanism.<sup>13</sup> The negotiations subsequently engaged in are likely to be half-hearted and unproductive.<sup>14</sup>

A properly drafted provision enabling contractually mandated negotiation can help avoid these problems. The clause should provide for good-faith negotiations within a specified length of time, usually 30 or 60 days, in the event of dispute.<sup>15</sup> It should also provide for a binding dispute resolution mechanism in the event that negotiations fail to solve the dispute. A sample negotiation clause follows.

In the event of any controversy or claim arising out of or related to this contract, or the breach thereof, the parties shall use their best efforts to settle the controversy or claim. To this effect, they shall consult and negotiate with each other in good faith, and recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to the parties. If they do not reach such a solution within a period of 60 days, then, upon notice by either party to the other, all controversies and claims shall be settled by arbitration administered by the American Arbitration Association under its International Arbitration Rules, and judgement on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.<sup>16</sup>

The provision can also designate that a "multi-step" or "multi-tier" negotiation arrangement be used.<sup>17</sup> This is arranged by starting negotiations at a specified level of management.<sup>18</sup> If negotiations fail, a higher level of management will then take over and attempt to reach a settle-

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11. See *id.* at 695.

12. See Freyer, *supra* note 4, at B-77.

13. See *id.*

14. See *id.*

15. See *id.*

16. *Drafting Dispute Resolution Clauses - A Practical Guide*, 605 PLILIT 23, 32, 34 (Submitted by American Arbitration Association 1999) [hereinafter AAA, *A Practical Guide*].

17. See Freyer, *supra* note 4, at B-77.

18. See *id.*

ment.<sup>19</sup> Parties may continue adding levels or specify a cut-off level, at which time the binding dispute resolution provided in the clause would be used.<sup>20</sup> The primary disadvantage to contractually mandated negotiation is that the use of binding dispute resolution mechanisms is delayed.<sup>21</sup>

### *B. Mediation*

Mediation, often called conciliation outside the United States, is perhaps the oldest form of structured dispute resolution.<sup>22</sup> It is informal, cost efficient, confidential, voluntary, non-binding, and "gives the parties control over the outcome of the process."<sup>23</sup> Mediation is a structured negotiation process conducted by an impartial mediator selected by the parties.<sup>24</sup> The mediator assists the parties in settling the dispute by guiding them through each stage of the process.<sup>25</sup> "The mediator has no independent authority and does not render a decision;" however, the mediator may help the parties in identifying the issues in controversy.<sup>26</sup>

Mediation works well for parties that do not want to submit to a jurisdiction, whether it is the jurisdiction of another state or an arbitral tribunal.<sup>27</sup> This makes the mechanism well-suited to international commercial contract disputes.<sup>28</sup> Mediation also works well when parties are having trouble communicating directly; a continuing relationship requires a quick and effective solution; parties are reluctant to reveal their real interests and issues; and/or parties prefer a confidential resolution.<sup>29</sup> However, whether mediation or arbitration is preferred by the parties generally depends on the "cultural and legal traditions of the parties" involved.<sup>30</sup> Mediation will be further discussed in section III.

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19. *See id.*

20. *See id.* The reasoning for employing this type of arrangement is that a lower-level manager would be more productive in achieving a resolution to save the embarrassment of his or her conflict ending up on the desk of his or her superior. *See id.* at B-78.

21. *See Freyer, supra* note 4, at B-78.

22. *See Sagartz, supra* note 1, at 696.

23. Abramson, *supra* note 2, at 325; *see also* Freyer, *supra* note 4, at B-78 (as compared to arbitration).

24. *See id.*

25. *See id.*

26. Freyer, *supra* note 4, at B-78.

27. *See Sagartz, supra* note 1, at 697.

28. *See id.*

29. *See Freyer, supra* note 4, at B-79.

30. Sagartz, *supra* note 1, at 696.

### C. Arbitration

Arbitration is the most widely preferred method of international dispute resolution.<sup>31</sup> It is a final, binding process where parties agree to submit the dispute to one or more arbitrators who will settle it with an enforceable award.<sup>32</sup> Arbitration is preferable to litigation for many reasons. Foremost, arbitration yields a binding award which can be easier to enforce than a foreign court judgement.<sup>33</sup> It also maintains the privacy of the parties.<sup>34</sup> Arbitration provides a neutral forum, protecting against any real or perceived prejudices or unfamiliar legal practices in either party's domestic jurisdiction.<sup>35</sup> Additionally, parties can choose arbitrators based on many factors, including expertise in a particular subject matter, international experience, and the ability to understand cross-cultural issues.<sup>36</sup> Finally, parties are able to customize the arbitral procedures for disputes arising out of the contract by utilizing either arbitral institution procedure or ad hoc procedures.<sup>37</sup> Overall, arbitration provides parties with greater control over the management and presentation of the dispute.<sup>38</sup> Arbitration will be more fully discussed in section III.

### D. Hybrid Mechanisms

#### 1. Mediation-Arbitration (Med-Arb)

A dispute resolution process combining both mediation and arbitration can be a satisfying compromise between cultures with differing attitudes towards dispute settlement procedures. Traditionally, Asian cultures prefer non-confrontational forms of dispute resolution that allow for "face-saving" and mutually agreeable compromises.<sup>39</sup> Western cultures tend to prefer procedural processes with awards proclaiming one party's rights.<sup>40</sup> By combining mediation and arbitration, parties have the opportunity to reach a settlement on their own, through mediation; yet, they also have a backup of a final and binding resolution option through arbitration.<sup>41</sup>

When parties wish to combine mediation and arbitration, effective and smooth transition between the two processes needs to be considered.

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31. See Abramson, *supra* note 2, at 325.

32. See Burton, *supra* note 3, at 637.

33. See *id.*

34. See *id.*

35. See *id.*

36. See *id.*

37. See Burton, *supra* note 3, at 637.

38. Allen Holt Gwyn & Benjamin O. Tayloe, Jr., *Comparison of the Major International Arbitration Rules*, 19-JUL CONSTRUCTION LAW. 23 (1999).

39. See Burton, *supra* note 3, at 637-38.

40. See *id.* at 638.

41. See *id.* at 637.

There are two main variations: the "blended method" and the "conjoined method."<sup>42</sup> Blended med-arb employs both mediation and arbitration in a single proceeding.<sup>43</sup> The neutral functions as both the mediator and the arbitrator.<sup>44</sup> Parties are able to move between the two "with no clear lines of demarcation."<sup>45</sup> If mediation efforts produce a settlement, the neutral can incorporate it into an enforceable arbitral award.<sup>46</sup> However, if mediation fails, the neutral can act as arbitrator and issue an arbitral award.<sup>47</sup> This blended method offers advantages of flexibility and efficiency.<sup>48</sup> Stubborn parties balking at compromise may cooperate knowing that the neutral can impose an arbitral award if they do not reach an agreement.<sup>49</sup> Also, parties do not have the added expense and lost time of selecting and educating a new arbitrator.<sup>50</sup>

There are, however, disadvantages to the blended med-arb method. First, it may be difficult to find a neutral that is skilled at both arbitration and mediation.<sup>51</sup> Second, the possibility of later arbitration may interfere with the information exchange between the mediator and a party when they privately consult during mediation efforts.<sup>52</sup> Third, a neutral may not wish to hold private consultations<sup>53</sup> in order to protect the arbitrator role, and thus render mediation ineffective.<sup>54</sup> After all, effective mediation requires an open and unobstructed flow of information between the mediator and each party.<sup>55</sup> Finally, blended med-arb can hamper the integrity of the arbitration.<sup>56</sup> Arbitrators should not aim to compromise the dispute.<sup>57</sup> However, the neutral will have gained information during the mediation that the neutral has a duty to disregard since it does not fall within the factual basis of the arbitration.<sup>58</sup>

A conjoined method of med-arb is the second variation. Here, a two-

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42. Sagartz, *supra* note 1, at 701.

43. *See* Burton, *supra* note 3, at 653.

44. *See id.*

45. Sagartz, *supra* note 1, at 701.

46. *See* Burton, *supra* note 3, at 653.

47. *See id.*

48. *See id.*; *see also* Sagartz, *supra* note 1, at 701.

49. *See* Burton, *supra* note 3, at 653.

50. *See id.*

51. *See id.* at 654.

52. *See id.*

53. A mediator will often separate parties into different rooms after an initial meeting between all parties. The mediator will then consult with each party individually, conveying offers and information between the parties.

54. *See* Burton, *supra* note 3, at 654.

55. *See id.*

56. *See id.*

57. *See id.*

58. *See id.*

step sequence is utilized where arbitration follows mediation after a fixed time has been allowed for settlement.<sup>59</sup> Therefore, both the integrity of the arbitration can be protected and an effective mediation can be supported in two vital ways.<sup>60</sup> First, the parties can elect to employ two different neutrals, one to mediate and another to arbitrate.<sup>61</sup> However, the parties will have to incur the expense of selecting and educating a new arbitrator; although, they can agree to retain the mediator to function as the arbitrator.<sup>62</sup> Second, the parties can agree to exclude from the arbitral proceeding any statements or admissions made during mediation.<sup>63</sup> However, there could be concerns about the integrity of the arbitration if the parties have agreed for the mediator to serve in this capacity. Despite which of the two methods the parties choose to employ, they have committed themselves to a cooperative mode of dispute resolution with an eye towards successfully maintaining an ongoing business relationship.<sup>64</sup> A sample med-arb clause follows.

If a dispute arises from or relates to this contract or the breach thereof, and if the dispute cannot be settled through direct discussions, the parties agree to endeavor first to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Rules before resorting to arbitration. Any unresolved controversy or claim arising from or relating to this contract or breach thereof shall be settled by arbitration administered by the American Arbitration Association in accordance with its . . . [International Arbitration Rules], and judgement on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. If the parties agree, a mediator involved in the parties' mediation may be asked to serve as the arbitrator.<sup>65</sup>

## 2. Mini-trial

The mini-trial is a structured negotiation before a panel of party representatives and a neutral third party.<sup>66</sup> It is informal and flexible, but allows for an orderly presentation of complex issues.<sup>67</sup> Parties may establish their own ad hoc rules of procedure or institutionally developed mini-trial procedural rules, such as those in the CPR Institute for Dispute Reso-

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59. See Burton, *supra* note 3, at 653, 656.

60. See *id.* at 657.

61. See *id.*

62. See *id.*

63. See *id.*; see also Sagartz, *supra* note 1, at 702.

64. See Burton, *supra* note 3, at 657-58.

65. AAA, *A Practical Guide*, *supra* note 16, at 58.

66. See Freyer, *supra* note 4, at B-80.

67. See *id.* at B-81.



lution (CPR) Mini-Trial Handbook.<sup>68</sup> The parties give summary presentations of their respective positions to the panel.<sup>69</sup> The parties' representatives on the panel then try to negotiate a settlement with the neutral acting in any capacity so needed, such as mediator, fact-finder, or facilitator.<sup>70</sup> If there is no settlement, the parties are free to resume any other dispute resolution process, and it is usually agreed that the mini-trial process is confidential and inadmissible in any future processes undertaken by the parties.<sup>71</sup> Due to these attributes, the mini-trial mechanism is useful where parties are at a deadlock in negotiations.<sup>72</sup> Parties can share information in a structured format to focus on issues that are at the heart of the dispute as well as the business interests that will be benefited by resolution.<sup>73</sup> A sample mini-trial clause follows.

Any controversy or claim arising from or relating to this contract shall be submitted to the American Arbitration Association under its Mini-Trial Procedures.<sup>74</sup>

### III. FACTORS TO CONSIDER WHEN DRAFTING AN EFFECTIVE MEDIATION OR ARBITRATION PROVISION

#### *A. Mediation*

For international mediation, almost every international organization offers mediation rules, procedures for selecting mediators, and support for conducting the mediation.<sup>75</sup> These organizations include: International Chamber of Commerce (ICC); American Arbitration Society (AAA); Commercial Arbitration and Mediation Center of the Americas (CAMCA); London Court of International Arbitration (LCIA); and the Stockholm Chamber of Commerce (SCC).<sup>76</sup> Most of these organizations also administer mediation under the United Nations Commission on International Trade Law Rules (UNCITRAL).<sup>77</sup> By agreeing that the mediation process will be governed by rules offered by one of the above inter-

68. *See id.* at B-80.

69. *See id.*

70. *See id.*

71. *See Freyer, supra* note 4, at B-80.

72. *See id.*

73. *See id.*

74. AAA, *A Practical Guide, supra* note 16, at 58.

75. *See Abramson, supra* note 2, at 324.

76. *See generally* Oliver Dillenz, *Drafting International Commercial Arbitration Clauses*, 21 SUFFOLK TRANSNAT'L L. REV. 221 (1998); Gwyn & Tayloe, *supra* note 38; William K. Slate II, *International Arbitration: Do Institutions Make a Difference?*, 31 WAKE FOREST L. REV. 41 (1996); Terry L. Trantina, *An Attorney's Guide to Alternative Dispute Resolution (ADR): "ADR 1.01"*, 1102 PLI/CORP 29 (1999).

77. *See generally* Gwyn & Tayloe, *supra* note 38; Slate, *supra* note 76.

national organizations, parties could avoid potential disagreements over ad hoc rules established by the parties.<sup>78</sup>

When drafting a mediation provision in an international commercial contract, there are five basic factors to consider. First, mediation should be defined by the parties in order to avoid any cultural misunderstandings.<sup>79</sup> This is important because parties from different countries may have different ideas on the definition, structure, and format of mediation.<sup>80</sup> The definition can be as easy as “mediation [as] administered by the American Arbitration Association under its Commercial Mediation Rules,”<sup>81</sup> or it can be assembled from each party’s expectations if a more detailed definition is needed. Second, parties should establish a clear obligation to mediate before using other dispute resolution alternatives, such as arbitration or litigation. A drafter should also design this provision to guard against a reluctant party trying to avoid mediation or a party using mediation to delay arbitration.<sup>82</sup> One solution would be to use a model clause, modified for the parties’ specific needs, provided by the international organization whose rules have been selected for use by the parties. Sample clauses for mediation follow.

If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Rules before resorting to arbitration, litigation, or some other dispute resolution procedure.<sup>83</sup>

Any dispute, controversy or claim arising out of or in connection with this contract, or the breach, termination or invalidity thereof, shall first be referred to Mediation in accordance with the Rules of the Mediation Institute of the Stockholm Chamber of Commerce, unless one of the parties objects. If one of the parties objects to Mediation or if the Mediation is terminated, the dispute shall be finally resolved by Arbitration in accordance with the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.<sup>84</sup>

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78. See Sagartz, *supra* note 1, at 697-98.

79. See Abramson, *supra* note 2, at 325.

80. See *id.*

81. AAA, *A Practical Guide*, *supra* note 16, at 35 (quoting Mediation Model Clause 1).

82. See Abramson, *supra* note 2, at 326.

83. AAA, *A Practical Guide*, *supra* note 16, at 35.

84. Stockholm Chamber of Commerce, *Model Clauses*, (visited May 18, 2000) <[http://www.chamber.se/arbitration/shared\\_files/modclause/medling\\_klausul.html#english](http://www.chamber.se/arbitration/shared_files/modclause/medling_klausul.html#english)>.

In the event of a dispute arising out of or relating to this contract, including any question regarding its existence, validity, or termination, the parties shall first seek settlement of that dispute by mediation in accordance with the LCIA Mediation Procedure in force at the date the dispute is referred to mediation.

If the dispute is not settle by mediation within [30 or 60] days of the appointment of the mediator, or such further period as the parties shall agree in writing, the dispute shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.

The language to be used in the mediation and in the arbitration shall be [specify].

The governing law if the contract shall be the substantive law of [specify].

In any arbitration commenced pursuant to this clause,

(i) the number of arbitrators shall be [one / three]; and

(ii) the seat, or legal place, of arbitration shall be [City and/or Country].<sup>85</sup>

The parties agree that they will endeavor to settle any dispute, controversy or claim arising out of or relating to this contract, which they are unable to settle through direct discussions, by mediation administered by the Commercial Arbitration and Mediation Center for the Americas under its rules before resorting to arbitration, litigation, or other dispute resolution procedure. The requirement of filing notice of claim with respect to the dispute submitted to mediation shall be suspended until the conclusion of the mediation process.<sup>86</sup>

If parties are forming ad hoc rules or wishing to clarify a model rule, other clauses should be considered, such as a (1) clause to establish a procedure for selecting a mediator, (2) a clause to set forth each party's agreement to participate in at least one mediation session, or (3) a clause establishing a timetable for initiating and completing the mediation.<sup>87</sup>

Third, parties should consider whether they want the mediator of their dispute to also serve as the arbitrator if the dispute progresses to arbitration.<sup>88</sup> Most international institution rules prohibit the mediator from also acting in the capacity of the arbitrator on the same dispute un-

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85. London Court of International Arbitration, *Mediation - Recommended Clauses*, (visited Nov. 17, 1999) <<http://www.lcia-arbitration.com/rulecost/mediation.htm>>.

86. American Arbitration Association, *CAMCA - Commercial Arbitration and Mediation Center for the Americas Mediation and Arbitration Rules*, (visited Jan. 6, 2000) <<http://www.adr.org/>> [hereinafter AAA, CAMCA].

87. See Abramson, *supra* note 2, at 326.

88. See *id.*

unless the parties explicitly agree.<sup>89</sup> Parties' confidence in the neutrality of the mediator may be weakened, and the mediator may have difficulty with maintaining the integrity of each separate mechanism.<sup>90</sup> However, less time would be lost by not having to educate a new person about the issues of the dispute.<sup>91</sup>

Fourth, parties should consider using one of the international institutions set out above and/or its rules.<sup>92</sup> Although formulating ad hoc rules creates a process specifically suited to the parties' needs, drafting the rules can waste time and resources, especially when there are systems that have been used and tested.<sup>93</sup> A successful method is to select an organization's model rules and then adapt them to meet the parties' needs.<sup>94</sup> To promote a smooth process, parties should also consider having the international organization administer the revised mediation process.<sup>95</sup>

Lastly, the mediation provision should establish a compulsory next step in the dispute resolution process.<sup>96</sup> This is important in the instance that mediation does not resolve all the issues or in order to enforce a settlement agreement.<sup>97</sup> If arbitration is the back-up mechanism, the mediated agreement can become a "consent arbitration award" that can be enforced under the New York Convention.<sup>98</sup>

## B. Arbitration

### 1. Benefits

There are many benefits to arbitrating international disputes. Generally, arbitrated disputes can be resolved more quickly than in litigation and with less formality, more flexibility, and less expense.<sup>99</sup> In addition, since arbitrated disputes are less adversarial, business relationships can be preserved.<sup>100</sup> Confidentiality can be maintained, and parties can avoid publicity. This can be especially important where trade secrets or other sensitive, or perhaps embarrassing, matters have to be disclosed for set-

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89. *See id.*

90. *See id.*

91. *See id.*

92. *See* Abramson, *supra* note 2, at 326.

93. *See id.*

94. *See id.*

95. *See id.*

96. *See id.* at 327.

97. *See* Abramson, *supra* note 2, at 327.

98. *See id.* The New York Convention (United Nations Convention on Recognition and Enforcement of Arbitral Awards) established procedures for enforcing arbitral awards in foreign courts. *See id.*

99. *See* Trantina, *supra* note 76, at 44.

100. *See id.* at 45.

tlement purposes.<sup>101</sup> The parties can be confident in the quality and expertise of the neutral since they are able to select the neutral themselves.<sup>102</sup> Not only is discovery limited, but complex rules of evidence and civil procedure can be modified or avoided entirely, leading to a more streamlined proceeding.<sup>103</sup> The extent of the award or type of damages can also be pre-determined by the parties, allowing businesses to adequately plan with reserves and insurance.<sup>104</sup>

## 2. International Institutions and Procedural Rules

International arbitral institutions function much like a court or a court clerk by arranging and managing the conduct of the arbitral proceedings.<sup>105</sup> This can include overseeing the arbitrator selection process, hosting the proceedings, collecting fees and monetary awards, and serving as a communication bridge between the parties or between the parties and the arbitrator(s).<sup>106</sup> Below are the most prominent international arbitral institutions.

### a. United Nations Commission on International Trade Law Rules (UNCITRAL)

The United Nations General Assembly adopted UNCITRAL in December 1976.<sup>107</sup> Although UNCITRAL is not an institution, it is a set of guidelines for arbitral clauses and proceedings that have become the basis for most of the existing procedural rules of international arbitral associations.<sup>108</sup> The UNCITRAL Rules are most often used by parties wishing to apply an ad hoc approach to arbitration when drafting the arbitration agreement.<sup>109</sup> However, relying on the UNCITRAL Rules completely can be risky since there is no arbitral institution that could provide support if a need arises.<sup>110</sup> Most arbitral institutions (including the ones listed here) provide a set of procedures for simultaneously using the UNCITRAL Rules and the institution to assist in appointing arbitrators and providing other necessary functions.<sup>111</sup>

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101. *See id.* at 44.

102. *See id.*

103. *See id.*

104. *See* Trantina, *supra* note 76, at 45.

105. *See id.* at 39.

106. *See id.*

107. *See* Gwyn & Tayloe, *supra* note 38, at 24.

108. *See* Dillenz, *supra* note 76, at 224; Donovan & Rivkin, *supra* note 7, at 150.

109. *See id.*

110. *See* Dillenz, *supra* note 76, at 224.

111. *See* Donovan & Rivkin, *supra* note 7, at 150.

b. International Chamber of Commerce (ICC)

Currently, the ICC is the most widely used institution for international arbitration.<sup>112</sup> Unlike other institutions, the ICC Rules delegate to the institution certain functions traditionally reserved for arbitrators.<sup>113</sup> The ICC takes an active role in selecting arbitrators, confirming the validity of the arbitral agreement and reviewing the arbitral award to ensure enforceability.<sup>114</sup> It also takes a predominantly civil law approach in its proceedings.<sup>115</sup> The ICC will undertake the proceeding if the parties have agreed to submit to arbitration by the ICC and the ICC Rules are applicable.<sup>116</sup> However, the ICC will not proceed if there is no agreement or the agreement does not specify the ICC and a prospective party does not respond to the procedure.<sup>117</sup> In response to some criticism that this arrangement could cause undue cost and delay, the ICC rules were modified, effective January 1, 1998, to speed the administrative process.<sup>118</sup>

c. American Arbitration Association (AAA)

The AAA's International Rules (based on UNCITRAL) were first issued in 1991, with the most recent modification in 1997.<sup>119</sup> The AAA can administer arbitral proceedings under both its International Rules and the UNCITRAL Rules.<sup>120</sup> Its rules are applicable if the parties have agreed in writing to arbitrate disputes under the AAA Rules.<sup>121</sup> Its rules are also designed to be used by other arbitral institutions for the flexible administration of international disputes.<sup>122</sup>

d. London Court of International Arbitration (LCIA)

The LCIA concentrates almost exclusively on institutional, fully administered international disputes.<sup>123</sup> It provides comprehensive services for arbitrators either under its own rules or under the UNCITRAL Rules under any system of law and any venue throughout the world.<sup>124</sup> The LCIA takes a decidedly common law approach to arbitration proceed-

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112. See Gwyn & Tayloe, *supra* note 38.

113. See Slate, *supra* note 76, at 47.

114. See Gwyn & Tayloe, *supra* note 38; see also Slate, *supra* note 76, at 47.

115. See Dillenz, *supra* note 76, at 226.

116. See *id.* at 225.

117. See *id.* at 225.

118. See Gwyn & Tayloe, *supra* note 38, at 24.

119. See *id.* at 23.

120. See Slate, *supra* note 76, at 48.

121. See Dillenz, *supra* note 76, at 226.

122. See Slate, *supra* note 76, at 48-49.

123. See *id.* at 49.

124. See *id.*

ings.<sup>125</sup> It will undertake the proceeding where any agreement, submission or reference provides arbitration under the LCIA Rules.<sup>126</sup> Its rules are also the most detailed and comprehensive of the major institutional rules.<sup>127</sup>

e. Stockholm Chamber of Commerce (SCC)

The SCC was formed in 1917<sup>128</sup> and the Arbitration Institute was established in 1949.<sup>129</sup> It came into prominence in the 1970s as a result of its designation as the neutral site for resolving trade disputes between the United States and the Soviet Union.<sup>130</sup> Currently, the SCC still takes an active role in resolving disputes between former Soviet-bloc countries,<sup>131</sup> as well as providing arbitral services to over 40 countries.<sup>132</sup> The current rules of the SCC entered into force April 1, 1999 along with the enactment of the Swedish Arbitration Act of 1999.<sup>133</sup> Its rules largely follow the UNCITRAL Rules and provide for substantial flexibility in structuring and conducting the arbitration.<sup>134</sup>

f. Commercial Arbitration & Mediation Center for the Americas (CAMCA)

CAMCA was created jointly by the American Arbitration Association, the British Columbia International Commercial Arbitration Centre, the Mexico City National Chamber of Commerce, and the Québec National and International Commercial Arbitration Centre.<sup>135</sup> NAFTA specifically provides for the encouragement and use of arbitration and other dispute resolution processes as the desirable means of resolving controversies.<sup>136</sup> The procedures created for CAMCA were designed to provide commercial parties involved in the free trade area with an efficient, international forum for the resolution of disputes.<sup>137</sup> CAMCA is governed by

125. See Dillenz, *supra* note 76, at 226.

126. See *id.*

127. See Gwyn & Tayloe, *supra* note 38, at 24.

128. See *id.*

129. See *New Arbitration Regime in Sweden*, 10 WORLD ARB. & MEDIATION REP. 154, 155 (1999) [hereinafter *New Arbitration Regime in Sweden*]

130. See Gwyn & Tayloe, *supra* note 38, at 24.

131. See *id.*

132. See Stockholm Chamber of Commerce, *Arbitration Institute of the Stockholm Chamber of Commerce*, (visited May 18, 2000) <<http://www.chamber.se/arbitration/english/institute/index.shtml>>.

133. See *New Arbitration Regime in Sweden*, *supra* note 129.

134. See Gwyn & Tayloe, *supra* note 38, at 24.

135. See AAA, *CAMCA*, *supra* note 86.

136. See *id.*

137. See *id.*

representatives from each of the above institutions, and cases can be filed at any of the offices.<sup>138</sup>

### 3. Choice of Forum

The choice of the forum is a crucial consideration for parties when drafting an arbitration provision.<sup>139</sup> The location where the arbitration takes place and the arbitral award is issued carries important legal consequences.<sup>140</sup> Moreover, parties should choose a country which is a party to either the New York Convention or the Panama Convention to ensure enforceability of the arbitral award under one of those Conventions.<sup>141</sup> Parties should also consider the procedural rules and laws of the arbitral forum.<sup>142</sup> Parties should avoid jurisdictions that restrict party autonomy in determining the procedural rules of the arbitration or that have mandatory procedural rules for arbitration that would overrule the parties' preferences.<sup>143</sup> A forum whose courts have wide latitude for judicial intervention in the arbitral proceedings should likewise be avoided.<sup>144</sup> Other aspects, such as travel expenses, office and communication facilities and the availability of a pool of qualified arbitrators, which may seem insignificant, should also be carefully considered.<sup>145</sup> Additionally, the home countries of the parties should be avoided due to actual or perceived "home player" advantages.<sup>146</sup>

If the parties cannot agree on the choice of forum, the arbitral institution will choose the forum for them, taking into account the above considerations.<sup>147</sup> If the parties are proceeding under the UNCITRAL Rules, the arbitral tribunal will determine the forum, taking into consideration the circumstances and needs of the parties.<sup>148</sup> The following summarizes

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138. *See id.*

139. *See* Dillenz, *supra* note 76, at 228; *see also* Freyer, *supra* note 4, at B-89.

140. *See* Dillenz, *supra* note 76, at 228.

141. *See* Donovan & Rivkin, *supra* note 7, at 151.

142. *See* Dillenz, *supra* note 76, at 229.

143. *See id.*; *see also* Donovan & Rivkin, *supra* note 7, at 151.

144. *See id.*

145. *See id.*

146. *See* Dillenz, *supra* note 76, at 229. Using the home country of one of the parties could cause "home player" problems, including giving practical advantages to party, and the court system could treat their own nationals more favorably. *See id.*

147. *See id.*; *see also* Donovan & Rivkin, *supra* note 7, at 151; Slate, *supra* note 76.

148. *See* Dillenz, *supra* note 76, at 229. It should be noted that United States courts have repeatedly upheld choice of arbitral forum clauses in international commercial contracts even where the forum has no relation to the contract or the parties. *See* Freyer, *supra* note 4, at B-75.

In *Scherk v. Alberto-Culver Co.*, the United States Supreme Court held that an American company must arbitrate under the ICC Rules of Paris, as per its contract, even though the other party was German; the contract was



arbitration laws of countries that serve as popular sites for arbitration.<sup>149</sup>

#### a. Austria

Parties enjoy large autonomy under Austrian arbitration law.<sup>150</sup> Parties are able to stipulate the use of an international arbitral institution's set of rules, such as those of the ICC, for the arbitration.<sup>151</sup> Parties may specify substantive law to govern the dispute.<sup>152</sup> If it is not specified, the arbitrator will decide according to Austrian law.<sup>153</sup> Alternatively, the parties may allow the arbitrator to decide *ex æquo et bono* (according to equity and conscience).<sup>154</sup> The arbitral award is a final and binding court judgment, unless the parties have provided for appeal to another arbitral body within the arbitration agreement.<sup>155</sup> The arbitral award can be confirmed by the arbitrator upon request from the party.<sup>156</sup> This is done "to confirm the final binding nature and the enforceability of the award."<sup>157</sup> The award is also enforced by court proceeding.<sup>158</sup> In sum, Austrian law provides for certification by the arbitral tribunal while allowing parties minimal contact with national courts until enforcement.<sup>159</sup>

#### b. Belgium

Belgian arbitration law is on the cutting edge of providing parties with a high level of autonomy.<sup>160</sup> Its arbitration statute provides:

[t]he Belgian court can take cognizance of an application to set aside only if at least one of the parties to the dispute decided in the arbitral

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signed in Austria; the performance of the contract bore no relation to France; and the dispute concerned U.S. securities laws. Since that decision, United States courts have repeatedly reaffirmed the virtually unfettered right of parties to international commercial agreements to choose an arbitral forum.

*Id.*

149. See Theodore C. Theofrastous, Note, *International Commercial Arbitration in Europe: Subsidiarity and Supremacy in Light of the De-localization Debate*, 31 CASE W. RES. J. INT'L L. 455, 474 (1999).

150. See *id.*

151. See *id.*

152. See *id.* at 475.

153. See *id.*

154. See Theofrastous, *supra* note 149, at 475.

155. See *id.*

156. See *id.*

157. *Id.* "This confirmation is a prerequisite for the enforcement of a domestic award in Austria." *Id.*

158. See *id.*

159. See Theofrastous, *supra* note 149, at 476.

160. See *id.*

award is either a physical person having Belgian nationality or residing in Belgium or a legal person formed in Belgium, or having a branch or some seat of operation there.<sup>161</sup>

For a losing party to challenge an arbitral award made in proceedings located within Belgium, it must have a Belgian connection.<sup>162</sup> If there is no connection, a party can only challenge an award in countries (other than Belgium) where enforcement is sought.<sup>163</sup>

#### c. Netherlands

The Dutch arbitration law is an attempt to liberalize international arbitration, while retaining a basic procedural structure.<sup>164</sup> It provides that parties may stipulate the governing substantive law.<sup>165</sup> However, absent a choice of law stipulation, the arbitrators shall determine the arbitral award according to rules of law they consider appropriate.<sup>166</sup> Dutch law requires that the arbitral award be certified by the District Court.<sup>167</sup> This certification is required to bring an action challenging the award.<sup>168</sup> Dutch arbitration law allows parties to exercise a high level of autonomy in structuring the arbitration proceedings.<sup>169</sup> It also provides a range of available challenges.<sup>170</sup>

#### d. France

French arbitration law grants high levels of party and tribunal autonomy in international arbitration proceedings.<sup>171</sup> It provides for party autonomy in choosing the governing substantive law and in regards to the arbitral proceedings.<sup>172</sup> Absent a stipulation of the governing substantive law, French arbitration law grants arbitrators the discretion to decide an award according to relevant trade usages and rules of law they deem appropriate.<sup>173</sup> French law allows for only narrow reasons for challenging an award.<sup>174</sup> Also, for an arbitral award to be enforced, it must be certified by

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161. *Id.*

162. *See id.*

163. *See id.*

164. *See* Theofrastous, *supra* note 149, at 477.

165. *See id.* at 478.

166. *See id.*

167. *See id.*

168. *See id.*

169. *See* Theofrastous, *supra* note 149, at 478.

170. *See id.*

171. *See id.* at 480.

172. *See id.* at 479.

173. *See id.*

174. *See* Theofrastous, *supra* note 149, at 480.

a national court.<sup>175</sup>

e. Sweden

The new Swedish Arbitration Act was enacted in 1999.<sup>176</sup> The law grants a high level of party autonomy and, as a result, a majority of its provisions are optional.<sup>177</sup> Parties are free to customize their arbitral proceedings, restrained only by their mutual agreement.<sup>178</sup> The Swedish law limits the appeals process when enforcement of the arbitral award is sought.<sup>179</sup> However, if both parties are not residents of Sweden, they can mutually agree to waive the right to challenge the award.<sup>180</sup> Parties are also allowed to stipulate the governing substantive law.<sup>181</sup> However, absent stipulation, the arbitrators may apply any national law or rules of law it deems appropriate.<sup>182</sup>

f. Switzerland

Swiss arbitration law allows parties the ability to maintain party autonomy similar to that of Belgium.<sup>183</sup> However, parties must be explicit in making this choice.<sup>184</sup> Complete autonomy from Swiss courts is only available where both parties reside outside Switzerland, and they have provided explicitly by agreement to exclude the availability of court challenges.<sup>185</sup> Parties are allowed to stipulate the governing substantive law.<sup>186</sup> Absent this stipulation, the arbitrators "will perform contacts analysis to determine which forum's rules are most closely connected with the dispute."<sup>187</sup> Swiss arbitration law also provides several bases on which an arbitral award may be challenged.<sup>188</sup> However, parties can exclude court review by explicit agreement but only if neither party is Swiss resident or has any permanent link to Switzerland.<sup>189</sup>

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175. *See id.*

176. *See New Arbitration Regime in Sweden, supra* note 129.

177. *See id.*

178. *See id.*

179. *See id.* at 155.

180. *See id.*

181. *See New Arbitration Regime in Sweden, supra* note 129, at 155.

182. *See id.*

183. *See Theofrastous, supra* note 149, at 482.

184. *See id.*

185. *See id.* at 481.

186. *See id.*

187. *Id.*

188. *See Theofrastous, supra* note 149, at 482.

189. *See id.*

#### g. United Kingdom

The English Arbitration Act of 1996 provides for a high degree of autonomy. Parties are free to choose the governing substantive law of the arbitration.<sup>190</sup> Absent this agreement, the parties can also agree to have the arbitral panel decide the dispute according to considerations determined appropriate by them.<sup>191</sup> Parties may also agree to limit the availability of challenges to the arbitral award rendered in international arbitrations.<sup>192</sup>

#### h. United States

The United States Arbitration Act provides that "a written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable."<sup>193</sup> U.S. courts are bound to observe the terms within the mutually agreed upon arbitration agreement.<sup>194</sup> This allows for a high level of party autonomy: parties are able to draft the arbitration agreement to their specific needs.<sup>195</sup> Parties are able to choose the governing substantive law on which to decide the arbitral award.<sup>196</sup> The U.S. Arbitration Act also provides for enforcement of international arbitral awards by codifying the New York Convention and the Panama Convention.<sup>197</sup> These Conventions can also be used to enforce an arbitration agreement or arbitral award between two domestic companies regarding an international contract.<sup>198</sup>

### 4. Choice of Law

It is essential to the drafting of an arbitration provision for parties to specify the governing substantive law of any disputes arising from the contract.<sup>199</sup> Due to the notion of party autonomy, express choice of law clauses are almost universally accepted by arbitrators and courts.<sup>200</sup> However, in the absence of an express choice of law clause, the arbitrator has

190. *See id.* at 483-84.

191. *See id.* at 484.

192. *See id.* at 483.

193. Trantina, *supra* note 76, at 111.

194. *See* Jessica Thrope, *A Question of Intent: Choice of Law and the International Arbitration Agreement*, 54-NOV DISP. RESOL. J. 16, 18 (1999).

195. *See id.* at 19.

196. *See id.*

197. *See* Trantina, *supra* note 76, at 51. For discussion of the New York and Panama Conventions, *see infra* Part III.B.9.a.

198. *See id.*

199. *See* Steven J. Stein, *The Drafting of Effective Choice-of-Law Clauses*, N97AICB ABA-LGLED A-103 (1997).

200. *See* Freyer, *supra* note 4, at B-95.

several options.<sup>201</sup> The arbitrator can apply the substantive law of the forum if the arbitration provision specifies an arbitral forum,<sup>202</sup> or the arbitrator can apply the substantive law based on general principles of conflicts of law or the conflict rules of the arbitral forum.<sup>203</sup> If the proceedings are being administered under the UNCITRAL Rules or the rules of an arbitral institution, these rules can guide the arbitrator in choosing the applicable substantive law.<sup>204</sup> Parties could also agree to have the arbitrator act as an amiable compositeur, meaning the arbitrator may depart from the strict application of the rules of law, but must do so according to equity and good conscience (called a decision *ex æquo et bono*).<sup>205</sup> Clearly, parties can save time and expense and avoid the difficulty of a conflicts of law problem by choosing the governing substantive law in advance.<sup>206</sup>

### 5. Choosing an Arbitrator

Parties can choose to employ either one arbitrator or a panel of three arbitrators. Using one arbitrator is usually less expensive and more expeditious, but a panel increases the likelihood of a fair, well-reasoned award.<sup>207</sup> Generally, a panel is used for complex disputes or those with a significant amount of money in dispute.<sup>208</sup> If the amount in controversy is relatively small and the dispute will involve only a few straightforward issues, usually one arbitrator can be used effectively.<sup>209</sup>

The procedural rules chosen generally provide for a selection process. These offer the advantage of an institution having day-to-day involvement in international arbitration and an up-to-date list of qualified persons available as international arbitrators.<sup>210</sup> Parties can allow the institution to appoint a neutral, or they can attempt to agree between themselves on an arbitrator. If parties wish to choose by agreement, they can use the "list system" to select the neutral.<sup>211</sup> The list system works in one of two ways. In one method, each party can compile a list of acceptable

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201. See generally Dillenz, *supra* note 76, at 232; Freyer, *supra* note 4, at B-95; Stein, *supra* note 199.

202. See *id.*

203. See Freyer, *supra* note 4, at B-95; see also Stein, *supra* note 199.

204. See Dillenz, *supra* note 76, at 232; see generally Stein, *supra* note 199 (discussing how the rules of the arbitral institution can affect an arbitrator's choice of law).

205. See Dillenz, *supra* note 76, at 232; see also Stein, *supra* note 199, at A-108.

206. See Stein, *supra* note 199, at A-109.

207. See Donovan & Rivkin, *supra* note 7, at 153.

208. See *id.*

209. See *id.*

210. See Robert Donald Fischer & Roger S. Haydock, *International Commercial Disputes: Drafting an Enforceable Arbitration Agreement*, 21 WM. MITCHELL L. REV. 941, 964 (1996).

211. See *id.* at 965.

persons and then exchange lists.<sup>212</sup> Depending on whether there is duplication of names on the lists, parties can select one of the duplicated names, or the lists can provide grounds for agreement of the type of arbitrator the parties wish to select.<sup>213</sup> A second method is employed by arbitral institutions. The appointed institution sends an identical list of available arbitrators to each party, and the parties can delete names and rank those remaining in order of preference.<sup>214</sup> The institution then chooses the arbitrator from those persons remaining, taking into consideration the preferences of the parties.<sup>215</sup>

Where parties wish to utilize a panel of three arbitrators, there are three basic selection possibilities. The arbitral institution can choose the panel itself or by employing the second "list system" method detailed above.<sup>216</sup> Alternatively, each party can choose one arbitrator; these two arbitrators will then appoint the third.<sup>217</sup> If the two party-chosen arbitrators cannot agree on a third, the arbitral institution can appoint the third arbitrator.<sup>218</sup> This third arbitrator should be appointed as the head of the panel to ensure neutrality.

Parties also need to consider the qualities of the arbitrator.<sup>219</sup> The nationality of the arbitrator is of special consideration. Since arbitration is often chosen to avoid the possibility of bias in transnational litigation in foreign courts, parties should consider whether to exclude certain nationalities or agree on one.<sup>220</sup> Often, parties choose to exclude arbitrators of the same nationality to avoid any perceived or actual bias.<sup>221</sup> Furthermore, parties should consider whether the arbitrator should have special knowledge or skills in the area(s) covered by the issues and/or the contract.<sup>222</sup> A legal background and experience can also be desirable attributes since arbitration is a legal process.<sup>223</sup>

## 6. Choosing a Language

At first glance, choosing a language may not seem important.<sup>224</sup> However, language differences can cause problems in selecting an arbi-

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212. *See id.*

213. *See id.*

214. *See id.*

215. *See Fischer & Haydock, supra* note 210, at 965.

216. *See id.* at 966.

217. *See id.*

218. *See id.*

219. *See Dillenz, supra* note 76, at 234.

220. *See id.*

221. *See Donovan & Rivkin, supra* note 7, at 154.

222. *See Dillenz, supra* note 76, at 234.

223. *See id.*

224. *See id.* at 240.

trator, in electing counsel, in communication between the parties and/or the arbitrator, or by causing considerable translation costs.<sup>225</sup> Therefore, if the parties speak differing languages, the arbitration provision should specify the language of the proceedings.<sup>226</sup> Even if the parties share a common language, it would still be advisable to include a language clause since the forum could be in a country with a differing language. Such a clause also helps to ensure the selection of a capable arbitrator.<sup>227</sup> If the parties do not select a language, arbitral institution rules usually provide for the application of a language.<sup>228</sup> The ICC, SCC and UNCITRAL Rules provide for the arbitrator to choose the language, while the AAA and LCIA stipulate that the language of the arbitration agreement will be used in the proceedings.<sup>229</sup>

### 7. Discovery

Compared to the litigation process in the United States, discovery in international arbitration is considerably limited.<sup>230</sup> The amount of allowable discovery can be determined by several factors. First, the rules of the appointed arbitral institution usually contain provisions regarding discovery or provide for the arbitrator to exercise discretion to determine allowable discovery.<sup>231</sup> Second, the parties can establish their own discovery procedures within the arbitration provision.<sup>232</sup> Last, the laws of the arbitral forum can effect the extent of allowable discovery.<sup>233</sup> However, there are limitations on the availability of discovery. A discovery clause cannot be inconsistent with the laws of the arbitral forum.<sup>234</sup> Also, a clause cannot give the arbitrator authority over third parties unless the law so allows.<sup>235</sup>

### 8. Awards

The arbitral award is the manner in which the dispute will be resolved.<sup>236</sup> It describes either the amount of damages to be paid or the ac-

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225. *See id.*

226. *See* Donovan & Rivkin, *supra* note 7, at 152.

227. *See id.*

228. *See* Fischer & Haydock, *supra* note 210, at 966.

229. *See* Gwyn & Tayloe, *supra* note 38, at 26.

230. David E. Wagoner, *Managing International Arbitration: A Shared Responsibility of the Parties, the Tribunal, and the Arbitral Institution*, 54-MAY DISP. RESOL. J. 15, 20 (1999).

231. *See* Donovan & Rivkin, *supra* note 7, at 155.

232. *See* Freyer, *supra* note 4, at B-92.

233. *See id.*

234. *See* Donovan & Rivkin, *supra* note 7, at 155.

235. *See id.*

236. *See* Trantina, *supra* note 76, at 38.

tions that must be taken by one or both of the parties.<sup>237</sup> Generally, arbitrators in international arbitration issue an award which states the reasons for the decision, called a reasoned award.<sup>238</sup> Most arbitral institutions and ad hoc rules require a reasoned award.<sup>239</sup> Unless the parties agree otherwise, the award is final and binding.<sup>240</sup> The finality aspect of the arbitral award eliminates the possibility of lengthy and expensive appeals processes.<sup>241</sup> Time limits for the issuance of the award vary among the arbitral institutions.<sup>242</sup> For example, the ICC and SCC both set out a six-month time frame.<sup>243</sup> The other major institution rules do not specify a length of time.<sup>244</sup> Therefore, it would be advisable for parties to specify a time period for the issuance of the arbitral award in the arbitration provision.

### 9. Enforcement of Arbitral Awards

Most arbitral awards are complied with voluntarily. However, there are instances where a party may fail or refuse to follow an award.<sup>245</sup> In most countries, arbitral awards are easier to enforce than judgements issued by foreign judicial courts.<sup>246</sup> Since arbitrators do not have the power to enforce arbitral awards, successful parties can be assisted in enforcement by statutes and treaties.<sup>247</sup> Generally, statutes allow for an arbitral award to be enforced like a judgement of a court after completing a prescribed process.<sup>248</sup> Treaties tend to stipulate support for the use of arbitration to resolve disputes and specify conditions for enforcement of arbitral awards.<sup>249</sup>

#### a. Treaties

##### (1). New York Convention

The United Nations Convention of the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) entered into force in

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237. *See id.*

238. *See* Donovan & Rivkin, *supra* note 7, at 176. This is unlike the custom in U.S. domestic arbitrations for the arbitrator to simply state the award without providing the reasoning behind it. *Id.*

239. *See id.*

240. *See* Fischer & Haydock, *supra* note 210, at 953.

241. *See id.*

242. *See* Gwyn & Tayloe, *supra* note 38, at 26.

243. *See id.*

244. *See id.*

245. *See* Slate, *supra* note 76, at 43.

246. *See* Fischer & Haydock, *supra* note 210, at 953.

247. *See* Donovan & Rivkin, *supra* note 7, at 177; *see also* Slate, *supra* note 76, at 43.

248. *See* Slate, *supra* note 76, at 43.

249. *See id.* at 44.



1959.<sup>250</sup> As of January 2000, ratifications and accessions to the New York Convention totaled 122 countries.<sup>251</sup> It provides the legal basis for the mutual recognition and enforcement of arbitral awards by contracting states.<sup>252</sup> The New York Convention applies to arbitral awards issued in the territory of a state other than the state in which the recognition and enforcement of the award is sought,<sup>253</sup> as well as to "arbitral awards not considered as domestic awards in the state where the recognition and enforcement is sought."<sup>254</sup> An arbitration clause should meet the minimum requirements of the New York Convention:<sup>255</sup> (1) the agreement is in writing; (2) the agreement deals with differences that have arisen or that may arise between the parties; (3) the agreement is valid under the law to which the parties have subjected it; and (4) the parties have the legal capacity under the law to enter into the agreement.<sup>256</sup> It sets forth several

250. *See id.*

251. *See* United Nations, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (visited on Jan. 19, 2000) <<http://untreaty.un.org/English/sam...ible/partII/chapterXXII/treaty1.asp>>. As of January 2000, the New York Convention has been ratified or acceded to by Algeria, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brunei, Bulgaria, Burkina Faso, Cambodia, Cameroon, Canada, Central African Republic, Chile, China, Colombia, Costa Rica, Cote d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Djibouti, Dominica, Ecuador, Egypt, El Salvador, Estonia, Finland, France, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Haiti, Holy See, Hungary, India, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Lao People's Democratic Republic, Latvia, Lebanon, Lesotho, Lithuania, Luxembourg, Madagascar, Malaysia, Mali, Mauritania, Mauritius, Mexico, Monaco, Mongolia, Morocco, Mozambique, Nepal, Netherlands, New Zealand, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Russian Federation, San Marino, Saudi Arabia, Senegal, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, Thailand, former Yugoslav Republic of Macedonia, Trinidad and Tobago, Tunisia, Turkey, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay, Uzbekistan, Venezuela, Vietnam, Yugoslavia, and Zimbabwe.

252. *See* Donovan & Rivkin, *supra* note 7, at 177; *see also* Slate, *supra* note 76, at 44.

253. *See id.*

254. Donovan & Rivkin, *supra* note 7, at 178.

This last approach takes into account factors such as the law that was applied in the arbitration. According to the majority of U.S. courts to have considered the issue, an award issued in the United States pursuant to an international arbitration is considered non-domestic and thus subject to the New York Convention.

*Id.*

255. *See* Gwyn & Tayloc, *supra* note 38.

256. *See id.*

grounds for the refusal of enforcement:<sup>257</sup> (1) absence of a valid arbitration agreement; (2) lack of a fair opportunity to be heard; (3) the award exceeds the submission to arbitration; (4) improper composition of the arbitral tribunal or improper arbitral procedures; (5) the award has not yet become binding or has been stayed; (6) the subject matter of the arbitration is not capable of settlement by arbitration under the law of the country in which recognition and enforcement is being sought; and (7) enforcement would be contrary to the public policy of that country.<sup>258</sup>

## (2). Panama Convention

The Inter-American Convention on International Commercial Arbitration of 1975 (Panama Convention) can also be used to enforce arbitral awards.<sup>259</sup> As of November 1999, ratifications and accessions totaled 19 countries.<sup>260</sup> It can also be used as a legal basis for the recognition and enforcement of an arbitral award rendered within the Western Hemisphere.<sup>261</sup> However, unlike the New York Convention, the Panama Convention does not distinguish between foreign and domestic awards and is applicable to any arbitral award with respect to a commercial transaction.<sup>262</sup> Furthermore, if the parties do not select a set of procedural rules for the arbitration, the Panama Convention provides that the Rules of the Inter-American Commercial Arbitration Commission (IACAC) will automatically apply to the proceedings.<sup>263</sup> The Panama Convention also provides for the same grounds for the refusal of enforcement as Article V of the New York Convention.<sup>264</sup>

## 10. Model Arbitration Clauses

The following are models of appropriate arbitration provisions which should be modified by the parties per specific needs.

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257. See Donovan & Rivkin, *supra* note 7, at 179; see also Slate, *supra* note 76, at 44. Grounds for refusal are set forth in Article V of the New York Convention.

258. See Donovan & Rivkin, *supra* note 7, at 179-80.

259. See Slate, *supra* note 76, at 45.

260. See T.M.C. Asser Institute, *Inter-American Convention on International Commercial Arbitration* (visited Jan. 19, 2000) <<http://www.asser.nl/ica/iaci-a.htm>>. As of November 17, 1999, the Panama Convention has been ratified or acceded to by Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, United States of America, Uruguay, and Venezuela.

261. See Donovan & Rivkin, *supra* note 7, at 182; see also Slate, *supra* note 76, at 45.

262. See *id.*

263. See *id.*

264. See Donovan & Rivkin, *supra* note 7, at 182; see also Slate, *supra* note 76, at 45.

### a. UNCITRAL Rules

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

The appointing authority shall be *[name of institution or person]*.

The number of arbitrators shall be *[one / three]*.

The place of arbitration shall be *[city and/or country]*.

The language(s) to be used in the arbitral proceedings shall be *[language]*.<sup>265</sup>

### b. AAA

Any controversy or claim arising out of or relating to this contract, or breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its International Arbitration Rules and judgement on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.<sup>266</sup>

Any controversy or claim arising out of or relating to this contract shall be determined by arbitration administered by the American Arbitration Association under its International Arbitration Rules.<sup>267</sup>

Within 15 days after the commencement of arbitration, each party shall select one person to act as arbitrator and the two selected shall select a third arbitrator within 10 days of their appointment. If the arbitrators selected by the parties are unable or fail to agree upon the third arbitrator, the third arbitrator shall be selected by the American Arbitration Association.<sup>268</sup>

The arbitrator(s) shall not be of the nationality of either of the parties.<sup>269</sup>

The place of the arbitration shall be *[city], [state], or [country]*.<sup>270</sup>

The language of the arbitration shall be *[specify]*.<sup>271</sup>

This contract shall be governed by the laws of the *[state/country]* of *[specify]*.<sup>272</sup>

Consistent with the expedited nature of arbitration, each party will,

265. See Fischer & Haydock, *supra* note 210, at 983.

266. AAA, *A Practical Guide*, *supra* note 16, at 32.

267. *Id.* at 37.

268. *Id.* at 46.

269. *Id.* at 47.

270. *Id.*

271. AAA, *A Practical Guide*, *supra* note 16, at 48.

272. *Id.*

upon written request of the other party, promptly provide the other with copies of documents [*relevant to the issues raised by any claim or counterclaim*] [*on which the producing party may rely in support of or in opposition to any claim or defense*]. Any dispute regarding discovery, or the relevance or scope thereof, shall be determined by the [*arbitrator(s)*] [*chair of the arbitration panel*], which determination shall be conclusive. All discovery shall be completed within [*45*] [*60*] days following the appointment of the arbitrator(s).<sup>273</sup>

#### c. UNCITRAL Rules with AAA as the Administering Institution

Any dispute, controversy, or claim arising out of or relating to this contract, or the breach, termination, or invalidity thereof, shall be settled by Arbitration under the UNCITRAL Arbitration Rules in effect on the date of this contract. The appointing authority shall be the American Arbitration Association. The case shall be administered by the American Arbitration Association under its Procedures for Cases under the UNCITRAL Arbitration Rules.<sup>274</sup>

#### d. IACAC under Panama Convention

Any dispute, controversy, or claim arising out of or relating to this contract, or the breach, termination, or invalidity thereof, shall be settled by arbitration in accordance with the Rules of Procedure of the Inter-American Commercial Arbitration Commission in effect on the date of this agreement.<sup>275</sup>

#### e. CAMCA

Any dispute, controversy, or claim arising out of or relating to this contract, or the breach thereof, shall be finally settled by arbitration administered by the Commercial Arbitration and Mediation Center for the Americas (CAMCA) in accordance with its rules, and judgement on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.<sup>276</sup>

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273. *Id.* at 51.

274. *Id.* at 37.

275. *Id.*

276. AAA, *A Practical Guide*, *supra* note 16, at 37; AAA, *CAMCA*, *supra* note 86.

## f. SCC

Any dispute, controversy or claim arising out of or in connection with this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

The Arbitral tribunal shall be composed of *[one / three]* arbitrator(s).

The place of arbitration shall be *[specify]*.

The language to be used in the arbitral proceedings shall be *[specify]*.

This contract shall be governed by the law of *[insert jurisdiction]*.<sup>277</sup>

## g. LCIA

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

The number of arbitrators shall be *[one / three]*.

The seat, or legal place, of arbitration shall be *[City and / or Country]*.

The language to be used in the arbitral proceedings shall be *[specify]*.

The governing law of the contract shall be the substantive law of *[specify]*.<sup>278</sup>

## h. ICC

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

The number of arbitrators shall be *[one / three]*.

The place of arbitration shall be *[City and / or Country]*.

The language to be used in the arbitral proceedings shall be *[specify]*.

This contract shall be governed by the law of *[jurisdiction]*.<sup>279</sup>

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277. Stockholm Chamber of Commerce, *Model Clauses* (visited Nov. 17, 1999) <[http://www.chamber.se/arbitration/shared\\_files/modclause/vanliga\\_klausel.html#english](http://www.chamber.se/arbitration/shared_files/modclause/vanliga_klausel.html#english)>.

278. London Court of International Arbitration, *Recommended Arbitration Clauses* (visited Nov. 17, 1999) <<http://www.lcia-arbitration.com/rulecost/arbitration.htm>>.

279. Dillenz, *supra* note 76, at 250 n.16; Fischer & Haydock, *supra* note 210, at 982.

#### IV. CONCLUSION

For most international parties, mediation and/or arbitration would be the best method of dispute resolution. Institutional as well as independent mediation and arbitration services are readily available. However, neither mechanism should be entered into without substantive research. Civil and common-law lawyers alike would greatly benefit from an in-depth investigation into the laws affecting procedure, choice of law, appeals and enforcement in their country, the opposing party's country, and the country where the dispute resolution would be held.

Regardless of the mechanism chosen to resolve disputes, preserving business relationships is key to stable international commerce. By realizing the possibility of future contractual disputes, international parties can transform a potential business relationship breakdown into a cooperative mode of dispute resolution. Contracts that provide for a competent mechanism of dispute resolution can allow for increased communication and understanding between the parties as well as deter breaches of the contract. It could be the most important contract provision of all.

