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Forum on the Construction Industry

The Future Is Now - The Impact of Globalization on Construction Dispute Resolution

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I. Stranger in a Strange Land – An Introduction To International Disputes Resolution

A. What is an International Dispute?

Construction law has never been parochial. Although, the law of the jurisdiction where the project is physically located has been and still remains the applicable substantive law in most situations, the resolution of disputes has often been governed or strongly influenced by outside sources. For example, the Federal Arbitration Act, 9 U.S.C. § 1 et seq., mandates that any arbitration be governed by the agreement of the parties. This supersedes State law requirements that a construction arbitration must take place in the state where the project is located.

The massive expenditures by the federal government have made most construction lawyers at least passingly familiar with the requirements of the Contract Disputes Act of 1978, 41 U.S.C. §§ 7101-7109 and the Miller Act, 40 U.S.C. § 3131 et seq. Even when the federal government only provides grants, the construction lawyer must learn the contract claims procedures and policy requirements that such grants bring with it.

Globalization is not just a social or political concept. It is pervading all aspects of the commercial world. Again, construction lawyers have to expand their knowledge; this time into the world of international transactions and methods of dispute resolution.

An international arbitration is defined in large part by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Article I(1) provides as follows:

This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

Recognizing that the term “State” in this context means “country” and not one of the fifty States of the United States, any arbitration award made outside the United States or even an
arbitration award between two United States citizens made outside the United States is a foreign arbitration.

Even when an arbitration takes place in the United States between a U.S. citizen and a foreign person or entity and thus could be considered domestic for enforcement purposes, it could well be governed by international arbitration procedures, not the familiar rules of the American Arbitration Association (“AAA”).

Foreign prime subcontractors, suppliers, designers and even financiers now regularly participate in the U.S. market. They look to contract forms and disputes resolution procedures with which they are familiar. Even the applicable substantive law can be affected. For example, a purchase of construction materials or equipment from a foreign entity can be governed by the Convention on the International Sale of Goods, not the Uniform Commercial Code.

The purpose of this paper is to provide an introduction to the concepts, legal framework, institutions, and terminology of the international construction disputes resolution field.

II. Statutory Framework

Construction lawyers have a long-standing, intimate and comfortable relationship with the streamlined procedures set forth in the Federal Arbitration Act (“FAA”). The FAA’s procedures for enforcing domestic agreements to arbitrate, seeking confirmation and vacation of domestic arbitration awards is both fair and predictable. The evolution of arbitration jurisprudence since the FAA’s enactment in 1947 is remarkable. The Supreme Court has repeatedly weighed in on the interpretation and application of the major sections of the FAA applicable to domestic arbitrations to such an extent that its decisions, buttressed by those from the Circuit Courts of Appeal and State Courts, have led to well defined, guiding principles that have become second nature to drafters of dispute resolution provisions. Arbitration advocates
have justified comfort in the FAA’s streamlined and predictable procedures and protocols for arbitration and award that this well-developed body of law reinforces. The net effect of 65 years of practice under the FAA is an exceedingly high bar for avoiding domestic agreements to arbitrate or domestic awards of arbitrators.

Institutionalized reliability has also allowed arbitration to keep pace with global economic expansion. Twenty-first century construction projects are no longer confined to the territorial borders of the United States. The globalization of construction projects, project participants and project equipment and materials have shattered any provincial notion that our construction clients’ disputes are inherently domestic. Coinciding with the expansion of our clients’ businesses outside the borders of the United States is the evolution of international arbitration as the “default” method of resolving cross-border disputes.¹

The principal reason for the growth in international arbitration is fear—fear of subjecting one’s claims, disputes and projects to the vagaries and prejudices of foreign courts. Indeed, the wide-spread acceptance and use of international arbitration has virtually eliminated such concerns.

No matter whom we represent, equipment or material suppliers, engineers or architects, subcontractors, fabricators, contractors, or EPC firms, twenty-first century projects inevitably will involve one or more international/cross-border transactions in which the controlling agreement is with an entity from outside the United States and the chosen dispute resolution mechanism is arbitration. In order to effectively function as an advocate in this environment, one must fully understand the “New York Convention” and its applicability to foreign arbitral proceedings and awards in our own country.
A. The New York Convention

The Federal Arbitration Act is found in Title 9 of the United States Code. The first chapter of the FAA covers domestic arbitral law, meaning situations in which all parties to the agreement and the subject matter of the agreement are located in the United States. The second chapter of the FAA codifies the New York Convention (the treaty discussed in more detail below), and governs the enforcement of foreign arbitral awards. The third and final chapter of the FAA codifies the Inter-American Convention on International Commercial Arbitration, commonly known as the Panama Convention.

While the three separate parts of the FAA typically operate independently from one another, what the second and third chapters lack in procedure, the arbitration procedures and protocols set forth in the FAA’s first chapter provide guidance.

The New York Convention, formally known as The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, was adopted in 1958 by 10 countries. The United States ratified the Convention in 1970. By 1978, fifty-one countries had adopted the treaty. Today, more than 147 countries have become members of the Convention.

The primary purpose of the second chapter of the FAA (incorporating the New York Convention) is to provide a standard method of enforcement for international arbitral awards. In the 55 years since the New York Convention was ratified, it has become the most utilized method for enforcing international arbitral awards in the United States.

As its formal name suggests, the Convention exists primarily to allow for easy enforcement of foreign arbitral awards, an end towards which it has been very effective. As of 2006, less than five-percent of all Convention cases have resulted in unenforceable judgments.
The high enforcement rate of awards by the Convention is due in part to the statutory provisions governing the enforcement of awards.\(^\text{15}\)

Under chapter two of the FAA, the United States only applies the Convention to an arbitration agreement that evolved from a commercial legal relationship in which the parties are from different countries; a domestic relationship involving foreign property, or foreign performance; or if there is a “reasonable relation” with a foreign state.\(^\text{16}\) The federal district courts have jurisdiction over these types of enforcement actions and venue is proper in the district in which the original action would have been brought, were it not for the arbitration agreement.\(^\text{17}\)

The real force behind the Convention resides in 9 U.S.C. § 207. This section requires a district court to enforce a foreign arbitral award unless a defendant can prove one of a small, select number of defenses.\(^\text{18}\) A prima facie case for enforcement requires only an original or certified copy of an arbitration agreement and subsequent award.\(^\text{19}\) Only seven defenses to an enforcement action exist under the Convention, and if none are applicable, the award must stand.\(^\text{20}\) The defenses are: “(1) incapacity of the parties or invalidity of the arbitration agreement; (2) improper notice of the arbitration proceedings; (3) inability to properly present one’s case; (4) the arbitral award exceeds the scope of the arbitration agreement; (5) the arbitration procedure or panel is not in accordance with the arbitration agreement or governing law; (6) the arbitral award has been suspended or set aside by a competent authority in which, or under the law of which, the award was made; or (7) enforcement of the award is contrary to public policy.”\(^\text{21}\)

At first blush, the grounds set forth in the Convention for refusal to enforce foreign arbitral awards are greater in number than those set forth in the FAA’s first section for domestic
award vacatur (seven versus four). Upon closer scrutiny, however, the Convention does ensure fundamental fairness and integrity of the arbitration process. The Convention differs from the domestic aspect of the FAA in two significant ways: the Convention allows refusal of a foreign award suspended or vacated by “a competent authority of the country in which, or under the law of which, the award was made,” and refusal of an award where enforcement is contrary to public policy. As is consistent with their application of the domestic sections of the FAA, federal district courts read the Convention’s vacatur grounds “narrowly,” especially when premised on violation of public policy.

While federal jurisprudence interpreting the New York Convention is considerably less robust and voluminous than that concerning the domestic sections of the FAA, the current state of the law is nonetheless well developed. In that respect, perhaps the Convention’s greatest function is enabling the construction law practitioner’s familiarity and comfort with domestic arbitration to extend to international arbitration agreements and foreign arbitral awards.

B. Convention of Contracts for the International Sale of Goods (“CISG”)

Contracts for the International Sale of Goods, more commonly referred to as the CISG, is the statutory body of law that governs certain global transactions of goods due to their international character. The CISG shares many similarities with the United States’ Uniform Commercial Code (“UCC”); however, there are substantial differences between the two.

Much like the UCC governs disputes related to the purchase and sale of movable goods in the United States, the CISG governs the sale of goods between parties whose ‘places of business’ are in different countries. The countries in which the parties’ places of business reside must have ratified the CISG (“Contracting States”) in order for the CISG to apply.
The United Nations Commission on International Trade Law ("UNCITRAL") created the CISG and adopted it in 1980. The United States ratified the CISG in 1986. Currently, seventy-eight other states have ratified the CISG. Its stated purpose is to promote development of international trade by developing a standard set of rules that control contracts for the international sale of goods. 

Again, while CISG operates in a similar fashion to the UCC, there are noteworthy differences between the two bodies of law. One glaring example is CISG does not recognize the statute of frauds. Under CISG a contract for the international sale of goods can be enforced without a signed written agreement. Along the same lines and in another departure from the UCC, CISG allows consideration of ‘subjective intent’ when considering an agreement between parties. Not surprising given these departures from the UCC, CISG does not recognize the parole evidence rule when construing contracts.

1. Application

CISG is an international treaty. Therefore, the body of law it represents is federal in nature and federal district courts have jurisdiction. Much like the UCC, CISG automatically applies to any contract that meets the statutory definition: (1) the parties reside in countries described as Contracting States and (2) the contract is for the sale of goods. Parties can contractually waive application of the CISG by express language in the contract. If no such language is present, the CISG will govern the transaction. A choice of law provision for substantive law other than the CISG does not qualify as an express waiver of the CISG.

2. Defining Place of Business

Determining whether the parties’ places of business qualify as residing in different Contracting States can lead to interesting results. A relevant example is Asante-Technologies v.
PMC-Sierra. In this case, two companies were registered as Delaware corporations, with one operating in Canada, and the other in California. The California company bought products from the Canadian company through a distributor in California. In subsequent litigation, a court determined that the principal place of business of the Canadian company was Canada and CISG applied even though both companies were registered as Delaware corporations and the transaction took place between two companies in California.

3. Defining Goods

To determine what qualifies as a ‘good’ under CISG should be a less difficult task than deciding the appropriate place of business. However, CISG’s failure to define the term “goods” is a glaring omission that can create uncertainty as to whether the transaction at issue is subject to CISG. CISG adds to this confusion by specifically excluding certain items and sales from its jurisdiction. Expressly excluded goods are, items for personal, family or household use, and ships, vessels, hovercraft or aircraft. Additionally, expressly excluded “types” of sales are auctions, sales on execution, stocks, shares, investment securities, negotiable instruments, money and electricity.

Contracts for which a majority of the transaction is for labor are not covered by the CISG. Hybrid or mixed contracts involving furnishing goods and services are generally viewed as falling within the purview of CISG. That being said, CISG applies a preponderance test to determine whether the party furnishing “goods” is obligated preponderantly to furnish services. An advisory opinion issued by CISG candidly admits the shortcomings of this test leading to confusion over its practical application.

For our clients, the determination of whether a particular international construction related agreement is one preponderantly to furnish good or services carries with it far reaching
implications. While discussion of those implications is beyond this paper’s scope, there are ways to avoid falling into this trap through careful drafting language, which should avoid (or evade) resort to this test so that there is no controversy over CISG governing the transaction.57

III. International Arbitration

International arbitrations generally fall into one of two categories: institutional arbitration or ad hoc arbitration. Institutional arbitrations are conducted according to rules promulgated by one of several non-profit organizations. These organizations supply an array of administrative services, including: the appointment of arbitrators, the fixing of arbitrator compensation, and the resolution of challenges to arbitrators. The administering organization does not itself resolve the merits dispute or make awards; rather, the organization’s role is to provide administrative support and ensure the proper application of the organization’s rules. Ad hoc arbitration, on the other hand, involves a situation where the parties simply agree to arbitrate and do not identify an organization to administer the arbitral proceeding. In this situation, the parties’ agreement should make provision for the functions ordinarily performed by the institutional providers, such as the appointment and removal of arbitrators.

Institutional arbitration is often preferred because of their comprehensive procedural rules and professional staffs, which provide a known and predictable framework for the arbitration proceeding.58 All that structure comes at a cost, however, and advocates of ad hoc arbitration point to lower costs and greater flexibility as the benefits of non-administered proceedings.

A. Arbitral Institutions and Their Rules

According to the PwC Study, supra note 60, the preferred institutional providers of case administration are the International Chamber of Commerce (“ICC”) (50% of respondents), the London Court of International Arbitration (“LCIA”) (14%), and the American Arbitration
Association’s International Centre for Dispute Resolution (“ICDR”) (8%). Each of these institutions will be discussed in turn.

1. **International Chamber of Commerce**

   In 1919, a group of industrialists, financiers and traders under the leadership of Etienne Clementel, a former French minister of commerce, established the International Chamber of Commerce (“ICC”) with the aim of restoring economic prosperity to a world that was still devastated by World War I. At the time, there were few functioning business organizations to promulgate rules governing international trade and commerce. The ICC was established with the fundamental objective “to further the development of an open world economy with the firm conviction that international commercial exchanges are conducive to both greater global prosperity and peace among nations . . .” Since its founding, the ICC has played a significant role in international trade and business, forging international policies, rules and practices on variety of topics, including banking, corporate responsibility, marketing and advertising, and transportation and logistics.

   In 1923, the ICC established an internal International Court of Arbitration. The ICC Court is not a “court” in the legal sense in that it does not itself resolve disputes or make awards. Rather, the Court’s role is to administer arbitrations conducted pursuant to the ICC Rules of Arbitration and ensure the application of those rules. While headquartered in Paris, the ICC Court administers arbitration proceedings worldwide. Of all the major institutional providers, the Court is the most “hands-on” administrator, and the Court is empowered to resolve a number of issues, including:

   - The place of arbitration (ICC Rules, art. 18).
   - The existence of a *prima facie* agreement to arbitrate under the ICC Rules (ICC Rules, art. 6, ¶4).
• The consolidation of proceedings, joinder of parties, and other matters arising out of complex multi-party arbitrations (ICC Rules, arts. 7-10).

• Confirming, appointing and replacing arbitrators (ICC Rules, arts. 13 and 15).

• Deciding on any challenges filed against arbitrators (ICC Rules, art. 14, ¶3).

• Scrutinizing and approving all arbitral awards, in the interests of improving their quality and enforceability (ICC Rules, art. 33).

• Setting, managing and, if necessary, adjusting costs of the arbitration, including the ICC’s administrative expenses and the arbitrators’ fees and expenses (ICC Rules, arts. 36-37).

• Overseeing emergency proceedings (ICC Rules, Appendix V).

These administrative activities are performed by the Court’s Secretariat, which is tasked with day-to-day case administration under the Court’s internal operating procedures.64

2. London Court of International Arbitration

The London Court of International Arbitration (“LCIA”)65 was established in 1892 for the arbitration of domestic and trans-national commercial disputes arising within the City of London.66 Like the ICC Court, the LCIA is not a court of law.67 The LCIA does not resolve merits disputes or make awards, but serves to promulgate and implement the LCIA Arbitration Rules, the current version of which became effective January 1, 1998 (“LCIA Rules”).68 The LCIA consists of three tiers, the Company, the Arbitration Court, and the Secretariat. The Company manages LCIA’s business affairs. The Court is comprised of up to thirty-five members, including leading practitioners in commercial arbitration, from the major trading areas of the world. The Court is the final authority regarding the application of the LCIA rules, and its main functions are the appointment of tribunals, the determination of challenges to arbitrators, and the control of costs. The LCIA Secretariat, which is led by an official called the “Registrar,” is responsible for the day-to-day administration of all disputes referred to the LCIA.
Contrary to its name, the LCIA’s docket is not predominated by cases from the United Kingdom. In 2011, less than 20% of the 224 disputes referred to the LCIA for arbitration, were brought by residents of the United Kingdom.69

3. International Centre for Dispute Resolution

Historically, the American Arbitration Association administered international arbitrations pursuant to whatever standing rules applied to the dispute. In 1991, the AAA promulgated arbitration rules specifically designed for international proceedings, which rules were the genesis for the current International Dispute Resolution Procedures of the International Centre for Dispute Resolution (“ICDR”).70 The ICDR was established in 1996 as the international division of the American Arbitration Association, and the organization maintains offices in New York as well as Dublin.

The ICDR rules are modeled on the UNCITRAL arbitration rules71, and are intended to respect party autonomy, and maximize flexibility with a minimum of administrative supervision. One distinctive feature of the ICDR arbitration rules is the provision for emergency relief. While all of the major arbitration rules allow the tribunal to order necessary interim measures, the ICDR rules are unique in containing provisions that permit a party to obtain emergency relief, such as an injunction, prior to the appointment of the arbitration tribunal.72 In this regard, the ICDR rules specifically provide for the appointment for an emergency arbitrator to handle requests for interim relief prior to the selection of the arbitration tribunal. Further, the ICDR rules expressly reserve the parties’ right to seek interim relief in a judicial forum and provide that such a court filing “shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.”

The ICDR procedures are also unique with regard to the issue of arbitrator selection. The ICDR rules encourage the parties to agree on the procedure for appointing arbitrators, with or
without the assistance of the ICDR. In this regard, the arbitrators chosen by the parties need not be members of the ICDR roster. Finally, to aid efficiency, the ICDR rules provide a 45-day period for the parties to agree on arbitrators, after which the case manager may appoint the arbitrators and designate the presiding arbitrator.

The ICDR reports receiving 994 case filings in 2011, which involved parties and arbitrators from 90 countries.73

4. Regional and Local Institutions

As discussed above, the 2006 PwC study that a significant percentage of respondents expressed a preference for “regional” arbitration institutions that were closer to the location of the dispute.74 At present, there are literally dozens of regional and local providers of arbitration services, including the following:

- Arbitration Foundation of Southern Africa (http://www.arbitration.co.za/);
- Arbitration Center of Mexico (CAM) (http://www.camex.com.mx/english/);
- Arbitration Institute of the Stockholm Chamber of Commerce (SCC) (http://www.secinstitute.com/uk/Home/);
- Australian Centre for International Commercial Arbitration (ACICA) (http://www.acica.org.au);
- British Columbia International Commercial Arbitration Centre (BCICAC) – http://www.bacicac.com/);
- Cairo Regional Centre for International Commercial Arbitration (CRCICA) (http://www.crcica.org.eg/);
- Chamber of National and International Arbitration of Milan (http://www.camerarbitrale.it/index.php?lng_id=14);
- China International Economic and Trade Arbitration Commission (CIETAC) (http://www.cietac.org/index.cms);
- Court of Arbitration at the Polish Center of Commerce (SAKIG) (http://www.sakig.pl/);
- German Institution of Arbitration (DIS) (http://www.dis-arb.de/scho/);
- Hong Kong International Arbitration Centre (HKIAC) (http://www.hkiac.org/);
- International Arbitration Centre of the Austrian Federal Economic Chamber (http://portal.wko.at/wk/startseite_dst.wk?angid=1&dstid=8459);
- International Centre for Settlement of Investment Disputes (ICSID) (https://icsid.worldbank.org/ICSID/Index.jsp);
- Japan Commercial Arbitration Association (JCAA) (http://www.jcaa.or.jp/e/index.html);
• Korean Commercial Arbitration Board (KCAB) (http://www.kcab.or.kr/jsp/kcab_eng/index.jsp);
• Netherlands Arbitration Institute (http://www.nai-nl.org/english/);
• Permanent Court of Arbitration, The Hague (http://www.pca-cpa.org/showpage.asp?pag_id=363);
• Singapore International Arbitration Centre (SIAC) (http://siac.org.sg);
• Swiss Chambers’ Arbitration (http://www.swissarbitration.ch);
• Ukrainian Chamber of Commerce and Industry International Commercial Arbitration Court and Maritime Arbitration Commission (http://www.ucci.org.ua/en/arb.html); and
• WIPO Arbitration and Mediation Center (http://www.wipo.int/amc/en/index.html).

B. Other Rules and Guidelines


UNCITRAL is the acronym for the United Nations Commission on International Trade Law. UNCITRAL was established by the United Nations General Assembly pursuant to Resolution 2205 (XXI) of December 17, 1966, for the purpose of promoting “the progressive harmonization and unification of the law of international trade . . ..” The Commission accomplishes this goal through the promulgation of model laws and rules, the publication of legal and legislative guides, technical assistance with law reform projects, and regional and national seminars on uniform commercial law topics.

In December, 1976, the U.N. General Assembly recommended the use and dissemination of Arbitration Rules adopted by UNCITRAL earlier in the year. These rules, which were revised in 2010, provide a comprehensive set of procedural rules, which may be used in both ad hoc arbitrations as well as administered arbitrations.

2. The International Bar Association

The International Bar Association (“IBA”), established in 1947, is a world-wide organization of international legal practitioners, bar associations, and law societies, with 45,000 lawyer members, and over 200 Bar Association and Law Society members. According to its
constitution, the objectives of the IBA include “establish[ing] and maintain[ing] relations and exchanges between Bar Associations and Law Societies and their members throughout the world;” “assist[ing] Members of the Legal Profession throughout the world, whether in the field of legal education or otherwise, to develop and improve their legal services to the public;” “advanc[ing] the science of jurisprudence in all its phases;” and, through common study of practical problems, “promot[ing] uniformity and definition in appropriate fields of law.”

While the IBA has not promulgated a full set of arbitration rules, it has published an influential series of guidelines and rules that reflect “best practices” - Guidelines on Conflicts of Interest in International Arbitration (2004); Rules on the Taking of Evidence in International Commercial Arbitration (2010); and, Guidelines on Drafting International Arbitration Clauses (2010) - which are available in several languages on the IBA website. The IBA issued these documents as a resource to be used in conjunction with other institutional, ad hoc or other rules or procedures governing international arbitrations. Arbitration tribunals will often suggest that the Rules on the Taking of Evidence be used as guidelines for the conduct of the arbitration proceeding, if not order outright their use.

IV. Key Issues in International Arbitration

A. Overview of International Arbitration

George Bernard Shaw famously stated that “England and America are two countries separated by a common language.” That observation equally applies to American and international arbitration. In reviewing the various international rules, the basic outline of the arbitration is deceptively familiar: a proceeding is commenced, arbitrators are selected, a preliminary conference is held, the matter proceeds to merits hearing, and the tribunal renders an award. In practice, however, international arbitration differs substantially from American arbitration.
The Influence of Civil Law

The principal reason for the difference results from the fact that most European countries and their former colonies have civil law regimes rather than common law regimes. Civilian jurisdictions place primary weight on the written “civil code” that sets forth general principles of law that govern orderly society, which principles are then applied to the particular situation at hand. The difference between the two systems was aptly described as follows:

In the civil-law tradition, the reasoning process is deductive, proceeding from stated general principles or rules of law contained in the legal codes to a specific solution. In common-law countries the process is the reverse - judges apply inductive reasoning, deriving general principles or rules of law from precedent or a series of specific decisions and extracting an applicable rule, which is then applied to a particular case.

Because of the primacy of the written code, the doctrine of stare decisis and deference to prior case law (sometimes referred to as “judge-made law”) is not found in civil law jurisdictions.

Putting aside the different philosophical underpinnings of the civil law approach, civil law jurisdictions also have a vastly different view of litigation than their common law counterparts. The “traditional” view of the two regimes has been summarized as follows:

As mentioned above, the traditional differentiation between the civil and common law systems is the difference in the responsibilities of judges and lawyers. This differentiation is basically founded on the assumption that, in civil law systems, civil cases are actually directed by the judge, with subordinate participation by the parties' advocates. An illustration of this conception of the judge's role is that traditionally it was thought to be up to him to determine the matters in dispute, identify the necessary evidence, schedule the necessary intermediate and final hearings, and eventually formulate the judgment according to the law and the proof. In such a system, the lawyers' activities may be characterized as residual. They may make suggestions concerning the evidence, as well as propose either issues to be examined or questions to be asked at the hearings, or eventually submit comments concerning the legal basis of the dispute. In a metaphorical comparison, the judge is conceived as the priest, while the advocates act as the acolytes - deferential assistants in a ceremony controlled thoroughly by the judge.

A similar and grossly simplistic conception of the common law judge is that of a passive moderator between presentations organized and directed by rival advocates. The fundamental responsibility for identifying the legal contentions to
be considered, the evidence to be considered, and the ultimate basis of judgment remains with the advocates. Furthermore, the presence of the jury to determine facts—as in the United States system of litigation—renders the judge even more passive. The jury is bound to decide the facts on the basis of legal instructions that, while given by the judge, are initially proposed by the advocates.  

The differences between civil law and common law litigation can be summarized as follows. First, civil law judges tend to be more active in managing the process, particularly the presentation of evidence and testimony. Second, civil law courts tend to place greater emphasis on contemporaneously created documents than the oral testimony of witnesses. Third, procedure codes in civil law countries typically do not contain “discovery” provisions like those found in American civil procedure rules. Fourth, civil law trials tend to be conducted largely through the submission of written materials, with parties submitting information to the court, and then the judge deciding what information is relevant and material to the dispute. These systemic differences permeate the international arbitration landscape as well.

2. International Arbitration Procedure Generally

While the specific terminology may vary among the rules, international arbitrations are commenced by filing a request for arbitration with the administering institution, or in the case of an ad hoc arbitration, delivering a notice of arbitration to the respondent. The rules generally provide that the notice of arbitration be accompanied by a general statement of the nature and circumstances giving rise to the claim, and the relief sought. The major rules also contain provisions that, in the absence of the parties’ agreement, establish the number of arbitrators and the selection process for the arbitrators. The rules require that arbitrators be independent and impartial, and provide procedures for challenging arbitral appointments and the removal of arbitrators for cause.

Once the tribunal is in place, a pre-hearing conference is generally held for purposes of establishing a merits hearing date and to address various procedural matters, such as bifurcation
of the proceeding, the preparation of statements of case, defense, and counterclaim, the disclosure of documents, the need for expert witnesses, the preparation of factual witness statements, and pre-hearing and post-hearing submissions. 93

The major international arbitration rules all generally provide that, subject to the applicable rules, the tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with the quality and that each party is given a full, fair, or reasonable opportunity to present its case. 94 International arbitration tribunals thus have wide latitude for determining the manner and method by which evidence is presented, including the submission of witness statements in lieu of oral direct testimony, witness conferencing for fact and expert witnesses, and the use of tribunal-appointed experts. Some of these issues are discussed in the next section of this paper.

International arbitration tribunals are generally permitted by the rules to issue final, interim, partial, and interlocutory awards. 95 In the event of a settlement, the tribunal is generally authorized to make a consent award on the terms agreed to between the parties. With the exception of the ICC rules, which require a reasoned award, the other major rule sets provide for reasoned awards unless the parties agree otherwise. 96 International arbitration awards are made at the place of arbitration, and the major rules prescribe certain formalities with respect to the award, such as signatures. 97 In regard to the relief that may be awarded, the major arbitration rules are generally silent on a number of important issues, including currency of the award, pre-award and post-award interest, remedies, and limitations on relief. The rules do however, provide for the award for costs and prescribe the categories of recoverable costs. 98 Importantly, the award of costs may include an award of the prevailing parties’ legal fees.
As might be suspected, the international rules address issues not commonly found in American arbitration. For example, the rules generally provide that the seat of the arbitration will be designated by the institution or the tribunal unless it has been fixed through the parties’ agreement.\textsuperscript{99} The rules generally provide that the tribunal will determine the substantive law applicable to the arbitration if it has not been designated by the parties.\textsuperscript{100} Finally, the rules provide that in the absence of the parties’ agreement, the language of the arbitration will be determined by the tribunal, usually based on the language of the contract containing the arbitration agreement.\textsuperscript{101}

As the foregoing discussion makes plain, while the arbitration rules of the various organizations present different means of achieving the same end, one common characteristic is that they provide a general framework for arbitration leaving the details to be hammered out between the parties and the tribunal. This lack of detail is purposeful and reflects a desire to allow arbitration to be flexible enough to meet the needs of a particular case:

One of the salient characteristics of arbitration as a dispute resolution mechanism is that the rules of arbitration themselves present a framework for arbitral proceedings but rarely set out detailed procedures for the conduct of the arbitration. For example, rules of arbitration do not generally specify whether there should be one, two or more exchanges of briefs. They do not contain any detailed provisions concerning document production. They do not specify how hearings should be conducted and how witnesses, if any, should be heard.

This important characteristic entails that the specific procedures can be tailor-made as appropriate for each dispute and adapted to the legal cultures of the parties and the arbitrators. In order to establish the appropriate procedures for a given arbitration, it is useful and efficient for the parties and the tribunal to make conscious decisions as early as possible on the procedures best suited to the dispute at hand. In making those decisions, it is possible to shape the arbitral proceedings so that the duration and cost of the arbitration are commensurate with what is at stake in the case and appropriate in light of the claims and issues presented.\textsuperscript{102}

As in the United States, the flexibility afforded by the international rules ultimately resulted in concerns over the length and cost of arbitration proceedings. These concerns, in turn, lead to the

B. International Arbitration - Specific Considerations

1. Seat of Arbitration – Why Important

The seat of arbitration can affect the outcome of the arbitration. Unless otherwise provided in the arbitration agreement, the location of the seat establishes both the lex arbitri (i.e., the procedural rules) and the courts that will have supervisory jurisdiction over the arbitration and resolve any challenges to decisions of the tribunal. Depending on the country, the courts can have significantly different approaches to their jurisdiction, and thus it is important to evaluate the likelihood of judicial intervention (interference) when selecting the arbitral seat.

2. Applicable Law

Equally important is the law governing the agreement and the arbitration proceeding. Critical points to consider are the breadth and depth of the law pertaining to the critical contract issues that might lead to an arbitration, as well as the jurisdiction’s track record regarding the confirmation or vacatur of arbitral awards. Another important consideration is the coordination of the governing law with the arbitration selection criteria. If the contract specifies Indonesian law as the governing law and none of the arbitrators are familiar with that law, the parties may be required to incur additional expense, such as experts, in order to establish their claim or defense.

3. Tribunal Secretary

One of the perceived advantages of ad hoc arbitration is lower costs through the avoidance of fees charged by administering organizations. Such savings may be illusory
inasmuch as it is common for the tribunal to request the appointment of a “Tribunal Secretary,” who performs administrative functions for the tribunal for an hourly fee that is charged to the parties.

The Tribunal Secretary performs his duties under the supervision of the tribunal, and typically is responsible for the following:

- transmitting documents and communications on behalf of the tribunal;
- organizing and maintaining the tribunal’s case file;
- scheduling hearings and meetings;
- taking notes or minutes of conferences, meetings and hearings;
- conducting legal research for the tribunal; and
- proofreading orders and awards prior to issuance by the tribunal.105

4. Initial Conference/Terms of Reference

As previously noted, once the tribunal is in place, a pre-hearing conference is generally held for purposes of establishing a merits hearing date and to address various procedural matters, such as bifurcation of the proceeding, the preparation of statements of case, defense, and counterclaim, the disclosure of documents, the need for expert witnesses, the preparation of factual witness statements, and pre-hearing and post-hearing submissions.

5. Statements of Claim, Defense, and Counterclaim

In international arbitration, it is common for the tribunal to require that the parties make more detailed written submissions regarding their claims and defenses, similar to a Specification of Claims under the AAA arbitration rules. The claimant will submit a “Statement of Claim” (sometimes called a “Statement of Case”) in which that party will supply detailed factual allegations and legal arguments in support of its claims. The respondent will then have an opportunity to submit a “Statement of Defense,” in which the opposing party makes an equally
detailed submission regarding why the claimant’s claim should be denied. The respondent also will have the opportunity to submit a “Statement of Counterclaim.” The claimant typically will then have an opportunity to submit a reply to the respondent’s Statement of Defense and its own Statement of Defense in response to any counterclaim that may be interposed. Finally, the respondent will have an opportunity to reply to the Statement of Defense to counterclaim.

At the procedural conference, these written submissions will be the subject of considerable discussion. In the first instance, there will be debate over the scope of these written submissions. Depending on the tribunal, these statements can range from very brief and informal submissions, to extensive “bundles” where the submission is accompanied by witness statements, reliance documents, and legal authorities. Closely related to the scope issue are the issues of sequence (sequential or simultaneous submission) and timing (i.e., how much time each party will have to prepare its submissions). Finally, there is the issue of which party is entitled to the “last word.”

6. Disclosure (Discovery)

The influence of civil law is probably heaviest in the area of document disclosure in international arbitration. As noted above, civil law practitioners are leery of American-style discovery, which is generally regarded as an expensive “fishing expedition.” Document production generally occurs in three phases. First, at the preliminary conference the tribunal usually will set a deadline (often the same date that statements of claim and defense are due) on which a party is required to furnish to the tribunal and the opposing party all documents upon which the party intends to rely in proving its case (or defense). Additional reliance documents may be produced along with the statement of defense to a counterclaim, and any statements in reply permitted by the tribunal.
After this in the initial document exchange, the arbitration rules provide that the parties may submit to the tribunal a request for document production by the opposing party. This request to produce is commonly made in the form of a “Redfern Schedule,” named after its inventor, Alan Redfern, a leading authority on international commercial arbitration. A Redfern Schedule is a simple matrix containing five columns (1) the identification of documents or categories of documents being requested, (2) a short description of how the documents requested are relevant and material to the outcome of the case, (3) a short description of the opposing party’s objection, if any, (3) a short description of the requesting party’s reply to the objection, and (5) the decision of the tribunal. Columns 1 and 2 of the matrix are completed by the requesting party, who then submits the matrix to the opposing party. That party then indicates any objections to production (Column 3) and returns the matrix to the requestor. The requesting party then replies to objections as warranted (Column 4) and then submits the matrix to the tribunal for decision. The tribunal’s determination (Column 5) is typically quite curt—i.e., “Request allowed” or “Request denied.”

The third document production phase occurs in conjunction with the submission of witness statements when additional documents, not previously produced, may be identified or discussed. The IBA Rules provide that “Documents on which the witness relies that have not already been submitted shall be provided.”

Finally, it should be noted that document production in international arbitration is more than a simple matter of bates-numbering documents and submitting them to the tribunal in the opposing party. It is not unusual for the tribunal to order that documents be furnished in both hardcopy and electronically, specifying that the electronic documents be in a text-searchable format, indexed by issue, and hyperlinked to the index so that documents can be accessed from
the index. Further, it is also common that the tribunal require that "where practicable" any pleadings, expert reports and witness statements also contain hyperlinks to referenced documents.

7. **Witness Statements**

In international arbitration, it is common practice for the tribunal to require that direct testimony be presented through “witness statements” in lieu of oral examination at the hearing. A witness statement is roughly equivalent to an affidavit or declaration under common law practice, and sets forth the substance of the witness’ direct testimony regarding the issues relevant to the arbitration proceeding. The statement is attested to and signed by the witness. The statements are typically submitted to the tribunal and the opposing party at a time specified in the procedural order that results from the preliminary conference.

With the exception of the ICC Rules, the major institutional rules discussed above permit the use of witness statements. The rules, however, are silent as to the content of the witness statements. The IBA Rules on the Taking of Evidence fills this gap and supplies specific guidance on content, providing that a statement “shall contain” a “full and detailed description of the facts, and the source of the witness’s [sic] information as to those facts, sufficient to serve as that that witness’s [sic] evidence in the matter in dispute.”

8. **Witness Conferencing**

“Witness Conferencing” a/k/a “hot-tubbing” refers to the practice of having fact or expert witnesses testifying on the same issue sit together and give evidence in a panel discussion led by the Tribunal. The precise methodology can vary. One formulation combines traditional cross-examination and panel discussion. The witnesses give evidence together in the same session. Counsel then cross-examine the opposing witnesses first and then turn to their own witnesses for rebuttal. The process repeats until the entire process of cross-examination by counsel is complete. The tribunal may request clarification during the examination, but will generally hold
off questioning until counsel are finished. A second variant is a free-form panel discussion lead by the tribunal chair in which the arbitrators take the lead in controlling the witness discussion, with counsel asking questions. The process continues until all parties are satisfied with the evidence.

The perceived benefits of witness conferencing are a reduction of time (and therefore cost) compared to the traditional approach of presenting evidence by direct examination, cross-examination, and re-examination, and the ability to focus the experts on addressing specific issues raised by the opponent expert, which allows the Tribunal to better recall and understand the evidence presented. In order to be effective, however, witness conferencing requires that the tribunal have a good working knowledge of the technical issues, and requires extensive preparation by the tribunal so that the tribunal can control the flow of the discussion. The most serious drawback of witness conferencing is the potential inability of the tribunal to effectively lead the discussion, resulting in the tribunal not fully understanding the technical issues for which the experts were employed.

9. Experts

Most international arbitration rules provide that expert witnesses may be appointed by the tribunal, although that procedure is rarely used. Expert testimony is more typically presented through party-designated experts, which are specifically permitted by most international rules. The tribunal, however, has significant input – “procedural directions” - into the manner and method by which such testimony is presented. For example, the tribunal may require that the parties meet and confer to develop a set of common questions to be addressed by the experts, with the panel then determining which disputed questions will also be submitted to the experts. The tribunal may also require that the experts confer and identify for the tribunal the issues on which there is mutual agreement, so that the expert testimony at
hearing may be concentrated on the areas of disagreement. Finally, the tribunal may direct that expert direct testimony be presented through witness statements, and/or that witness conferencing be employed.

10. “Chess Clock” Arbitration

“Chess Clock” or “Stop Clock” arbitration refers to a proceeding in which the tribunal limits the duration of the hearing and then allocates the hearing time between the parties and the tribunal.\textsuperscript{111} The presumption is that the parties will be allocated “equal time,” with the parties then free to use their time as they see fit. Once their allotted time has expired, however, they are precluded from soliciting further testimony, either by direct or cross-examination, absent extenuating circumstances.\textsuperscript{112} Use of this device thus requires the tribunal to be actively involved in time management. As one commentator has observed:

This principle of "equal time" applies more generally in managing the hearing, where parties are ordinarily granted equal amounts of time and left free to devote that time to either cross-examination, redirect examination, or oral presentations. Critical to this approach is that the tribunal (or its secretary) actively monitors the usage of each party of "its" time, including by taking account of objections or other submissions made by one party during the course of the other party's time. In this regard, calculating counsel or witnesses sometimes seek ways to consume their opponent's time, particularly through lengthy testimony on irrelevant points, feigned misunderstandings, translation problems and the like. Although such points appear trivial, in a regime where time is rationed ("a precious commodity"), the opposite is true: tribunals that allocate time owe a responsibility to ensure that their allocations are not manipulated.\textsuperscript{113}

One of the areas for intense disagreement in “stop clock” arbitration occurs when one of the parties requests that the time be allocated disproportionately. As noted above, the starting presumption in international is that “equal time” be allocated to the parties. International treatises, however, generally recognize “that an ‘equal’ division of time does not necessarily mean a 50/50 division of time: there are circumstances where a 50/50 division of time is not required, and may instead amount to unfair or unequal treatment. For example, if one party's
case requires much more detailed affirmative factual proof than the other party, it may be unfair to limit that party to only the amount of time required for proof of its adversary's case."114 There is very little published literature regarding the factors a tribunal should consider in deciding whether to deviate from allocating time on an equal basis to the parties.115

V. Enforcement/Challenge to Arbitration Awards

A. Finality of Arbitration Awards

1. Appeal

One of the primary distinguishing factors of arbitration as compared to litigation is finality. In virtually every court system in the world there is a right to appeal the final decision of the court of first instance/trial court to a reviewing or Appellate Court.116 The scope of appeal and the procedure varies greatly from country to country and indeed from state to state in the United States, but in general, there is almost always the right to a de novo review of issues of law and a more limited review of issues of fact.117

Arbitration awards, domestic or international, are final. This does not mean that there are no bases on which an arbitration award can be challenged but the grounds are quite limited and as set forth in section V.C below are mostly limited to the “fairness” of the procedure. Alleged errors of law and fact are virtually never the basis for a successful challenge.

2. Enforcement

An arbitral tribunal, again whether domestic or international, once it has rendered its award, has no means of enforcing that award. This is another major difference from litigation. A court, once its judgment has become final, has a variety of means to enforce that judgment including the seizure of assets. Thus, in order to execute on an arbitration award, the prevailing party must apply to a court for enforcement. As set forth in section V.B below, this is a fairly
simple procedure and the grounds for preventing enforcement are, like the grounds for challenging an award, quite limited.

A distinct advantage of an international arbitration award as compared to a court judgment, is that the enforcement of an award is governed by the 1958 New York Convention on the Recognition and Enforcement of Foreign Awards, hereinafter “New York Convention,” see 9 U.S.C. §§ 201-208 for enforcement in the United States. This allows enforcement of an award in the courts of any of the 148 signatory countries. There is no comparable agreement for enforcement of foreign court judgments. Thus, it is considerably easier to enforce an arbitration award in any signatory country where the assets of a party may be located than it is to enforce the decision of a foreign court.

B. Enforcement of Awards Under the New York Convention

1. Procedure

In order to enforce an award under the New York Convention, a party must provide an appropriately authenticated original or copy of the award, the agreement to arbitrate and, if the award is not in an official language of the country where enforcement is sought, a translation of the award and the agreement to arbitrate, “certified by an official or sworn translator or by a diplomat or consular agent.” New York Convention, art. IV.

The procedure must be in accordance with the Rules of Court where enforcement is sought. New York Convention, art. III. For example, if enforcement is being sought in one of the states of the United States, the procedure prescribed by the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2012) (“FAA”) shall apply. An action to enforce an award under the FAA shall be filed as a motion, 9 U.S.C. § 6. The following materials shall be filed with the motion:
The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The Court’s ruling shall be treated as a final judgment. 9 U.S.C. § 13.

2. Jurisdiction and Venue

Actions to enforce an award under the New York Convention are deemed a federal question, 9 U.S.C. § 203, and thus the jurisdiction of a Federal District Court is based on 28 U.S.C. § 1331. If an action is filed in a State Court it can be removed to Federal Court under the removal statute, 28 U.S.C. § 1441-1445; 9 U.S.C. § 205.

General venue rules apply except venue is also proper in the district designated in the arbitration agreement or the place of arbitration. 9 U.S.C. § 204.

3. Timing

Actions to enforce an award under the New York Convention must be brought within three years of the date of the award. 9 U.S.C. § 207. If the arbitration agreement specifically requires a confirmation of the award by a court, a motion for confirmation shall be made to the court within one year of the date of the award. 9 U.S.C. § 9.

4. Grounds for Challenging an Award

The New York Convention provides that a motion to enforce an award shall be granted unless the party against whom the award was made establishes one of the following grounds:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some capacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

New York Convention, art. V, section 1.

Under Section 2, “[r]ecognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that county; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Id.

The first four grounds for non-enforcement can all be characterized as procedural due process. Exception 1(a) relates to the validity of the arbitration agreement or the incapacity of the legal person who entered into the agreement. Exceptions 1(b)-1(d) relate to the process of the arbitration from the appointment of the Tribunal to the form of the award. These grounds are closely parallel in the FAA as grounds for vacation and are discussed in Section V.C. infra.
Section 1(e) refers to a situation where the award has been set aside or is being challenged at the “seat” of the arbitration. This exception is also discussed in Section V.C., *infra*; but in general, a court will not enforce an award that has been set aside or is being challenged in the courts of the country where the arbitration took place, the “seat” of the arbitration. *See* Section IV.A.3.a, *supra*.

Article V, Section 2 sets forth what can be described as substantive defenses for resisting an arbitration award. Section 2(a) covers situations where the law of the country where enforcement is sought does not allow the particular subject matter of the dispute to be resolved by arbitration. These situations are extremely rare in the commercial arbitration context generally and in construction disputes in particular. Section 2(b) allows enforcement to be denied where the award is against the public policy of the jurisdiction where enforcement is sought.

The “public policy” argument appears to be a rather broad exception that could be invoked for a variety of very parochial reasons. This is unfortunately the case in some countries where the “public policy” defense seems to apply whenever the local party is the party against whom enforcement is sought.120 In most jurisdictions, however, it is very narrowly applied.121

Most parties when resisting an enforcement action will raise as many of the defenses of article V as possible. Two examples illustrate how strictly the defenses are interpreted. In Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969, 973 (2d Cir.1974), a U.S. company sought to prevent enforcement of an arbitration award rendered in Egypt in favor of an Egyptian company. The U.S. company argued that its failure to complete a construction project was due to the U.S. government policy favoring
Israel in the 1967 Israeli-Arab war. It asserted that its continued performance of the contract would be contrary to the public policy of the U.S. The Court rejected the defense stating:

We conclude, therefore, that the Convention’s public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state’s most basic notions of morality and justice.

Id. at 974.

The Court went on to reject the U.S. Company’s defenses to enforcement under 1) V(2)(a) that the claim was not arbitrable because the war context somehow affected the U.S. Government’s national security interests, 2) V(1)(b) because the arbitrators did not reschedule the hearing dates, 3) V(1)(e) because the arbitrators awarded damages on an issue that the U.S. company believed was barred by the contract, and 4) because the defense of “manifest disregard of the law”, whatever its application to domestic arbitration, was not a basis for setting aside an award under the New York Convention. Id

The same result was reached in Fertilizer Corp. of India v. IDI Management, Inc., 517 F.Supp. 948, 961 (S.D. Ohio 1981) where a similar laundry list of defenses to enforcement by a U.S. company was rejected.

Courts in many other countries have a comparable or even more restrictive view of the defenses to enforcement, e.g., the United Kingdom, France and Belgium.

In summary, absent the potential for corruption in some countries, the defenses to enforcement of an international award are generally narrower and more narrowly construed than domestic awards.
C. Challenges to an Award

1. New York Convention

The New York Convention does not provide an independent procedure or grounds for setting aside an award. The reason for this is that the New York Convention has a “pro-enforcement” view and limits the grounds for non-enforcement. It provides in Article VI as follows:

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article V(1)(e) of the Convention is one of the grounds upon which a Court can refuse enforcement of an award and provides that if an award has been, “set aside or suspended by the country in which or under the law of which that award has been made”, enforcement can be refused. See infra V.B. Thus, it is only the legal (court) system of the country under where the award was made (the “seat”) that can vacate an award.

2. The United States

a. Procedure and Timing

If the “seat” of the arbitration, see infra Section IV.A, is in the United States, the FAA, 9 U.S.C. §§ 1-16 sets forth the timing and procedure for a Motion to Vacate. The application shall be made as a “Motion”, 9 U.S.C. § 6, within three months after the award is “…delivered to the parties.” 9 U.S.C. § 12. Usually the Motion is made in the District Court where the award was made.
b. **Grounds**

The grounds for setting aside an award are set forth in 9 U.S.C. § 10. See, e.g., **Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara**, 364 F.3d 274 (5th Cir. 2004). These are as follows:

1) where the award was procured by corruption, fraud, or undue means;

2) where there was evident partiality or corruption in the arbitrators, or either of them;

3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.


These grounds all relate to the fairness or impartiality of the arbitration procedure rather than errors in evaluating the evidence or applying the law and are very close to the grounds for not enforcing an award under the New York Convention, art. 5 § 1 (a-d).

The exception of “corruption, fraud or undue means” was applied in **Bonar v. Dean Witter Reynolds, Inc.**, 835 F.2d 1378 (11th Cir. 1988). In that case, the arbitration award was vacated because an expert had lied about his qualifications and his testimony related to the central issue in the case. A possible fruitful area for vacating an award is the area of “evident partiality or corruption in the arbitrators….” 9 U.S.C. §10(a)(2). Although detailed disclosure requirements and vetting procedures for potential arbitrators can usually eliminate this problem, it can still arise. **Commonwealth Coatings Corp. v. Continental Casualty Co.**, 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed.2d 301 (1968); where the Chairman of the Arbitral tribunal had a meaningful
business relationship with one of the parties prior to the arbitration. See also Applied Indus. Materials Corp. v. Avalon Makine Ticaret, 492 F.3d 132 (Id. Cir. 2007); where an arbitrator failed to disclose or adequately investigate a potential conflict.

Probably the most common situation where an arbitration award is overturned is when the arbitrator(s) do not hear evidence arguably relevant to a dispute. For example, in Gulf Coast Industries Workers Union v. Exxon Co., USA, 70 F.3d 847 (5th Cir. 1995), the exclusion of a clearly relevant report based on the hearsay rule resulted in the vacation of the Award.

The fourth situation is somewhat amorphous, “arbitrators exceeded their powers, or so impartially executed them that a material, final and definite award upon the subject matter was not made”. 9 U.S.C. §10 (a)(4). The first part of this exception, “exceeded their powers” is relatively clear. For example in Vold v. Broin & Associates, Inc., 699 N.W.2d 482 (2005), the arbitrator’s failure to prepare a reasoned award when he was required to do so was grounds for vacating the award. The second part, “so impartially executed them [powers]” is much more difficult to apply. Several of the Federal Circuit Courts of Appeals have interpreted this language to cover a situation where there was a “manifest disregard of the law,” by the arbitrator, see e.g., Halligan v. Piper Jaffray, Inc., 148 F.3d 197, 204 (2d Cir.1998); Timegate Studios, Inc. v. Southpeak Interactive, L.L.C., 860 F.Supp.2d 350 (2012).

3. Countries That Have Adopted the UNCITRAL Model Law on International Commercial Arbitration

a. Procedure and Timing

As set forth in Section IV.A.3.a above, it is very important to select a “seat” of arbitration, which is arbitration friendly such as France, England, Belgium, or Switzerland. It is far beyond the scope of this paper to review the laws of even those four countries much less all 148
signatory countries to the New York Convention. It is helpful, however, to look at the UNCITRAL Model Law on International Commercial Arbitration (1985) (amended in 2006) (“UNCITRAL Model Law”) which has been adopted with variation in approximately 66 countries.122

Recourse to the appropriate court must be made within three months of the date of receipt of the award. Id. Art. 34(3).

b. Grounds

The grounds for setting aside awards under the UNCITRAL Model Law are as follows:

(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indicated thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

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(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

Id. art. 34(2).

These grounds closely parallel the grounds for denying enforcement set forth in Article V of the New York Convention. They are more expansive than the FAA’s grounds.

4. United Kingdom

a. Procedure and Timing


An action to set aside an award must be made within 28 days of the date of receipt of the award. Id. § 57.

b. Grounds

The United Kingdom Arbitration Act provides for a challenge to the award if the Tribunal did not have jurisdiction of the matter, Id. § 67, or for serious irregularities which are defined as follows:

(a) failure by the tribunal to comply with Section 33 (general duty of tribunal);

(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction; see Section 67);

(c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties.

(d) failure by the tribunal to deal with all the issues that were put to it.

(e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
(f) uncertainty or ambiguity as to the effect of the award;

(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to the public policy;

(h) failure to comply with the requirements as to the form of the award; or

(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

Id. § 68(2).

These grounds for vacation of an award are more numerous than those set forth in the FAA or even the UNCITRAL Model Law. Nevertheless, England is “arbitration friendly” because there is considerable judicial restraint in their application.

5. The Law and its Application

As set forth above, England is “arbitration friendly” because of judicial restraint in its application on the grounds for vacating. Other countries that have adopted a variation of the United Kingdom Arbitration Act of 1996 or the UNCITRAL Model Law can be much more “activist” in challenges to an award. In some countries, it is an unfortunate fact that the court system is corrupt especially when a public entity or prominent commercial citizen is seeking to vacate an arbitration award against it by a foreign party. A useful website listing a variety of cases dealing both with actions to vacate and to enforce is www.uncitral.org.

6. Actions to Vacate Other Than in the Seat of Arbitration

As set forth in Section V.C.1 above, an action to vacate must be brought under the law of the country where the award was made. Thus, original actions to vacate in countries other than where the award was made are rare. They do arise, however, as cross-motion (counterclaims) in actions to enforce.
In Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274 (5th Cir. 2004), the “seat” of the arbitration was Switzerland. The losing party lost its motion to vacate in the Swiss Courts, but was successful in an action to vacate in its home country of Indonesia. Although procedurally complex, the losing party effectively moved to vacate the award in response to a motion to enforce under the New York Convention in the United States. The Court denied the Motion to Vacate and enforced the award because the Award was made in and was subject to the procedural laws of Switzerland not Indonesia. Id. at 309-10. The law of Indonesia did not apply to the award under the New York Convention.

7. **Actions to Vacate at the “Seat” That Were Not Followed**

There are some rare occasions when an Order to Vacate at the ‘seat” of arbitration will not be enforced. For example in Chromalloy Aeroservices, a Div. of Chromalloy Gas Turbine Corp. & Arab Republic of Egypt, 939 F. Supp. 907 (D.D.C. 1996), the Court affirmed an award even though it had been vacated in Egypt. The reason why the Egyptian’s court order was ignored was because the parties had agreed not to appeal the award. The Chromalloy case has, however, been criticized frequently and is typically distinguished or ignored, see e.g., TermoRio S.A. E.S.P. v. Electranta S.P., 487 F.3d 928 (D.C. Cir. 2007).

**VI. Tiered Disputes Resolution Procedures**

Disputes resolution in the international construction context is not limited to arbitration. Arbitration and the occasional judicial effort to vacate or enforce an award is the culmination of the process. It is typically preceded, however, by several increasingly formal steps. Although this tiered process originated in the international arena, it is already working its way into the domestic United States market, especially on large civil works projects.
A. *Fédération Internationale Des Ingénieurs-Conseils (FIDIC) Forms of Contract*

1. **FIDIC**

The Fédération Internationale Des Ingénieurs-Conseils (“FIDIC”) is a federation of engineering associations from numerous countries and is located in Switzerland. One of its principal activities is the preparation of the terms and conditions of contract specifically for international projects. It currently publishes the following contract forms:

- Short Form of Contract 1st Ed. (1999 Green Book)
- Standard Prequalification Form 3rd Ed. (2008)
- Joint Venture Agreement 1st Ed (1992)
- Sub-Consultancy Agreement 1st Ed. (1992)
- Model Representative Agreement Test Ed. (2004)
- Electrical and Mechanical Works 3rd Ed. (1987 Yellow book)
- Construction Contract MDB Harmonised (Version 2: March 2006 Harmonised Red Book)
- Construction Contract MDB Harmonised Ed. (Version 3: June 2010 Harmonised Red Book)
- Design-Build and Turnkey 1st Ed. (1995 Orange Book)
- EPC/Turnkey Contract 1st Ed. (1999 Silver Book)
- Construction Contract 1st Ed. (1999 Red Book)
- Dredgers Contract 1st Ed. (2006 Blue-Green Book)
- DBO Contract 1st Ed. (2008 Gold Book)
- Plant and Design-Build Contract 1st Ed. (1999 Yellow Book)

As can be determined from the listing, the documents cover a variety of types of projects. They also address in some detail the types of risks that are typically not included in domestic U.S. contracts, such as currency fluctuations, revolutions, civil wars, and changes in legislation. This paper, however, only addresses the disputes resolution procedure.
2. **FIDIC Disputes Procedure**

Each of the construction contracts listed above has a similar disputes resolution procedure. The one set forth in Clause 20, “Claims, Disputes, Arbitration” of the Works of Civil Engineering Construction 4th Ed. 1992 (Red Book) is representative.

- **Notice of Claim**

  The disputes procedure starts with a notice of claim, “given as soon as practicable, and not later than 28 days after the Contractor became aware…” of the claim situation (Clause 20.1). The notice is given to the Engineer. *Id.* The contractor is then required to keep records of the claim and give full details within 42 days of becoming aware of the original claim event and to provide a final accounting within 28 days of the end of the effects of the claim event. *Id.*

- **Engineer’s Determination**

  The Engineer shall provide his determination of the claim within 42 days of receipt of all information. *Id.*

- **Appeal to Disputes Adjudication Board (DAB)**

  If either party, the Claimant (Contractor) or Employer (Owner), is dissatisfied with the Engineer’s Determination, it can refer the matter to the Disputes Adjudication Board (DAB) for a decision. (FIDIC, 20.4). The DAB has 84 days to render a written, reasoned decision. *Id.* That decision becomes final and binding unless one party gives a notice of dissatisfaction to the other within 28 days of receiving it. *Id.*

- **Amicable Settlement**

  If a party gives a notice of dissatisfaction with the DAB decision, the parties are required to attempt “amicable settlement” for a period of 56 days before they can commence arbitration.
This time period can be expanded or reduced. The process of “amicable settlement” is not specified and can include both negotiations and mediation.

e.  Arbitration

If the amicable settlement process is not successful, the parties, after the expiration of 56 days, can then proceed to arbitration. (FIDIC, 20.6). The arbitration is “de novo”; neither an Engineer’s Determination under FIDIC, Article 20.1, nor a DAB decision under FIDIC, Article 20.4 is binding on the arbitrator(s) in any fashion.

As set forth above, the time period between when a claim arises and when it is ripe for arbitration can be lengthy with many procedural steps. The failure to follow any step within the times specified can result in forfeiture of the claim.

B.  Disputes Adjudication Boards and Disputes Review Boards

1.  Disputes Adjudication Boards

As set forth in VI.A above, the FIDIC contracts use a dispute resolution mechanism known as the Dispute Adjudication Board. This can be one or three persons. They are appointed by the parties at the commencement of the contract (FIDIC, 20.2). If the parties fail to agree upon the appointment of the Board, then an “appointing authority as named in the particular (special) conditions of the Contract shall make the appointment(s)” (FIDIC, 20.3)

Pursuant to its terms, the decision of the DAB must be implemented “promptly” unless and until it is revised by an amicable settlement or arbitration award. (FIDIC, 20.4) It is not enough simply to give the 28-day notice of dissatisfaction to avoid compliance with the DAB decision. Moreover, if a party fails to comply with the DAB decision (e.g., an order to pay money), the other party can commence an arbitration to force compliance with the decision. (FIDIC 20.7).
The DAB procedure with its requirement to abide by the Board’s decision is based on the United Kingdom Housing Grants, Construction and Regeneration Act 1996, Order c.53, §§ 1-151, schs. 1-3 (U.K.). Under the Act, all construction contracts performed in the United Kingdom have mandatory adjudication. The decision of the adjudicator must be rendered in a very short period and must be implemented. A de novo appeal to arbitration or the United Kingdom Court system is allowed; however, the DAB decision must still be implemented.

2. *Disputes Review Boards*

A Disputes Review Board (DRB) is quite similar to a DAB. It is appointed by the parties at the beginning of the Contract. It hears the disputes of the parties although unlike a DAB, its jurisdiction is sometimes limited to technical issues, e.g., differing subsurface conditions. Also, the DRB proceeding often specifically prohibits legal representation at the hearing.

The primary difference from a DAB; however, is that a DRB decision is not binding on the parties. The parties can either accept it in whole or in part or reject it. If rejected, the parties then follow the balance of the disputes procedure in the contract, arbitration or litigation. The DRB decision is typically admissible into evidence in that proceeding and perhaps highly persuasive, especially on technical issues, but of no binding effect.

C. *Preconditions to Arbitration*

As set forth in Section II above, the New York Convention will enforce a written agreement to arbitrate. New York Convention, art. IV. The tiered disputes procedure of FIDIC makes several steps conditions precedent to arbitration. Since these conditions are not agreements to arbitrate, they are not by their terms enforceable under the New York Convention. Thus, is it possible to avoid the preconditions and simply commence arbitration? In general, the answer is “No”; either a Court or an arbitrator will enforce the conditions precedent.
In *HIM Portland, LLC v. Devito Builders, Inc.*, 317 F.3d 41 (1st Cir. 2003), the Court held that it could not compel arbitration where the preconditions of mediation have not been fulfilled. The Court stated:

Where contracting parties condition an arbitration agreement upon the satisfaction of some condition precedent, the failure to satisfy the specified condition will preclude the parties from compelling arbitration and staying proceedings under the FAA.

*Ibid.* at 44.

Similar results were reached in *Kemiron Atl., Inc. v. Aguakem Int’l Inc.*, 290 F.3d 1287 (11th Cir. 2002) and *Perdue Farms, Inc. v. Design Build Contracting Corp.*, 263 F. App’x 380 (4th Cir. 2008). A different result was reached, however, when the party attempting to avoid arbitration did not participate in the precondition of mediation. The Court held:

“It is an elemental principle of contract law that [a] party cannot insist upon a condition precedent, when its non-performance has been caused by himself.”


In a 2012 case the Court in *Knowles v. Cmty. Loans of Am., Inc.*, CIV.A. 12-0464-WS-B, 2012 WL 5868622 at *4 (S.D. Ala. Nov. 20, 2012), the Court held:

Unlike questions concerning the validity of an arbitration agreement, “procedural questions which grow out of the dispute and bear on its final disposition are presumptively not for the judge, but for an arbitrator, to decide.”

*Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002) (emphasis in original; internal quotes omitted). Thus, “an arbitrator should decide whether the first two steps of a grievance procedure were completed, where these steps are prerequisites to arbitration.”


*Ibid.* at 85 (internal quotes omitted); accord *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1107 (11th Cir.2004).

The *Knowles* case is probably the correct result. Like the AAA domestic rules, arbitrator(s) under most international arbitration rules decide their own jurisdiction. See, e.g.,
ICC Rule 6.6, LCIA Rule 23.1. The Courts enforce these provisions. It would seem that in most international arbitration cases, the Court would rely on Article II of the New York Convention and refer the matter to arbitration so the arbitrator could determine if the preconditions to arbitration had been fulfilled.

VII. Conclusion

One of the exciting aspects of the construction law practice is that it never stands still. The globalization of the World economy has introduced several new and unique concepts into the practice, especially in the area of disputes resolution. In another few years, they will probably be as commonplace as AAA arbitration is today. Hopefully, this Paper and the corresponding session at the 2013 Annual Meeting of the ABA Forum on the Construction Industry will help ease the transition to this future.


5 When measured against the New York Convention, the Panama Convention emerges as a section of the Act that is rarely litigated and whose scope is much narrower and more restricted than the New York Convention. Therefore, the emphasis will be on the New York Convention.

6 Pinkston, supra note 4, at 644. 644.


9 McLean, supra note 1, at 1090.

10 See, New York Convention Countries, supra note 7; Buoncristiani, David, Enforcement of International Arbitration Awards in the United States, 27-Fall CONSTRUCTION LAW 14 (2007).


12 Buoncristiani, supra note 10, at 14. David


14 Jenkins and Stebbings, supra note 13, at 295.

15 One commentator has observed many consider the Convention to be the “most successful multi-lateral convention adopted by the United Nations to date.” McLean, supra note 1, at 1089-90.


17 9 U.S.C. §§ 202-3. That said, as is the case with the first section of the Act dealing with domestic arbitration awards, the Convention and its enabling provisions in section two of the Act are not jurisdictional, which could mean “traditional jurisdictional defenses” may be asserted to an action in federal court seeking enforcement of a foreign arbitral award. Buoncristiani, supra note 10, at 16.

18 9 U.S.C. § 207 (“Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration”).


20 Id.

21 Id. at 15, citing New York Convention, supra note 7, at art 5. These defenses are specified in the Convention and not the Act. See 9 U.S.C. §207 (“The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in said Convention.”).

22 Compare 9 U.S.C. § 10 (a), with New York Convention, supra note 7.

23 Id.

24 Buoncristiani, supra note 10, at 15.

Id.


Id.

Id. at 217-18.

Id.

See, Table of Contracting States, available at, http://www.cisg.law.pace.edu/cisg/countries/entries.html. (Among the Contracting States are Argentina, Canada, China, France, Iraq, Japan, Mexico, Russian Federation, Singapore, South Korea and Turkey. Curiously, England is not a Contracting State.)


Id.

Id. at 104.

Id. at 103-04.

Id.


Kokoruda, *supra* note 25, at 103-04

Id.

Id.

Id.

Id.


Asante Technologies, Inc. v. PMC-Sierra, Inc., 164 F. Supp. 2d 1142 (N.D. Cal. 2001)

Id. at 1145-46.

Id.

Johnson, *supra* note 27, at 220

*Id.*

*Id.*

*Id.*

Martin-Davidson, *supra* note 44, at 675.

See CISG, art. 3(2).

See CISG Advisory Opinion Council Opinion No. 4, *Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts* (Article 3 CISG), Oct. 24, 2004. While Opinion No. 4 attempts to clear up the confusion by advocating an “economic value approach” in determining whether the goods or the services are preponderant, “there is room for disagreement.” Martin-Davidson, *supra* note 44, at 678.

A 2006 study published by PricewaterhouseCoopers and Queen Mary University in London, *International arbitration: Corporate attitudes and practices 2006* (“PwC Study”), found that 76% of the 103 respondents favored institutional arbitration, with the top three reasons for choosing such arbitration being a strong reputation for managing arbitration proceedings (37%), familiarity with proceedings (19%), and an understanding of costs and fees (15%). The respondents that stated a preference for *ad hoc* arbitration were primarily employed by large corporations with sophisticated legal departments and experience with managing international arbitration. *Id.* at 12-13. The PwC study is available at [http://www.arbitrationonline.org/research/Corpattitempirical/index.html](http://www.arbitrationonline.org/research/Corpattitempirical/index.html) (last accessed 11/10/12).

A follow-up study by the White & Case law firm and Queen Mary University, *2010 International Arbitration Survey: Choices in International Arbitration* (“WC Study”), found that the top 6 influences on the choice of an arbitral institution were neutrality/“internationalism,” reputation/recognition, arbitral rules, the law governing the substance of the dispute, previous experience with the institution, and overall cost of service. *Id.* at 22. The WC Study is available at [http://www.whitecase.com/files/upload/fileRepository/2010International_Arbitration_Survey_Choices_in_International_Arbitration.pdf](http://www.whitecase.com/files/upload/fileRepository/2010International_Arbitration_Survey_Choices_in_International_Arbitration.pdf) (last accessed 11/10/12).

WC Study, *supra* note 58, at 23. In the 2006 PwC study, the preferences were ICC (42%), LCIA (20%), and ICDR (13%). *Id.* at 12. The PwC Study further noted that 15% of respondents expressed a preference for “regional” arbitration institutions that were closer to the location of the dispute, and which might provide less expensive dispute resolution than the more established institutions. Most corporations surveyed were reluctant to use less established regional institutions due to the lack of a “proven track record.” *Id.* at 12.
ICC Constitution, Preamble, available at http://www.iccwbo.org/constitution (last accessed 11/9/12). Organized under French law, the ICC is a private, non-profit association headquartered in Paris. The ICC is made up of National Committees from 90 countries and national trade organizations, industrial companies and associations from over 120 countries. See generally, Handbook of ICC Arbitration 2d, Part I.


The ICC reports that in 2011, 796 Requests for Arbitration were filed with the ICC Court, which requests involved 2,293 parties from 139 countries and places of arbitration in 63 countries. See http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/ (last accessed 11/9/12).

The Internal Rules of the International Court of Arbitration appear as Appendix II to the ICC Rules.

The LCIA’s website is http://www.lcia.org (last accessed 11/2/12).

The history of the LCIA can be found at http://www.lcia.org/LCIA/Our_History.aspx (last accessed 11/2/12). The LCIA was originally named “The City of London Chamber of Arbitration” and later renamed “The London Court of Arbitration.” In 1981, the Court was renamed “The London Court of International Arbitration” to better reflect the nature of its work, which was predominantly international. Id. Interestingly, the LCIA was established for reasons that sound all too familiar:

This Chamber is to have all the virtues which the law lacks. It is to be expeditious where the law is slow, cheap where the law is costly, simple where the law is technical, a peacemaker instead of a stirrer-up of strife.

Id.

The LCIA is a private, not-for-profit company.

The LCIA Rules can be accessed at http://www.lcia.org (last accessed 11/2/12).


The title reflects that the ICDR procedures include both mediation and arbitration rules like their American counterparts. The current International Dispute Resolution Procedures, effective as of June 1, 2009 (“ICDR Rules”) are available at http://www.adr.org/aaa/faces/rules/searchrules/rulesdetail?doc=ADRSTG_002008&_afrLoop=355573981348401&_afrWindowMode=0&_afrWindowId=ws4twnmdq_1#%40%3F_afrWinod
“UNCITRAL” is the acronym for the United Nations Commission on International Trade Law. The UNCITRAL rules are discussed in Section III, B.1.

ICDR Rules, supra note 70, art. 37.

ICDR Director General Report 2011.

PwC Study, supra note 58.


The first model law adopted by UNCITRAL was a Model Law on International Commercial Arbitration in 1985. The Model Law was “designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration.” See UNCITRAL website at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html (last accessed 11/18/12).

U.N. General Assembly Resolution 31/98.


http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#conflictofinterest (last accessed 12/1/12).

For example, the Forward to the IBA Rules on the Taking of Evidence in International Arbitration states:

The IBA issued these Rules as a resource to parties and to arbitrators to provide an efficient, economical and fair process for the taking of evidence in international arbitration. The Rules provide mechanisms for the presentation of documents, witnesses of fact and expert witnesses, inspections, as well as the conduct of evidentiary hearings. The Rules are designed to be used in conjunction with, and adopted together with, institutional, ad hoc or other rules or procedures governing international arbitrations. The IBA Rules of Evidence reflect procedures in use in many different legal systems, and they may be particularly useful when the parties come from different legal cultures.

Id. at 2.
Civil law is the dominant legal tradition today in most of Europe, all of Central and South America, parts of Asia and Africa, and even some discrete areas of the common-law world (e.g., Louisiana, Quebec, and Puerto Rico).” James G. Apple & Robert P. Deyling, A Primer on the Civil-Law System (Federal Judicial Center 1995) at 1, available at http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/$file/CivilLaw.pdf (last accessed 12/9/12).

For example, Article 1320 of the Indonesian Civil Code Article sets forth the requisite elements of a valid contract:

In order to be valid, an agreement must satisfy the following four conditions:

1. there must be consent of the individuals who are bound thereby;
2. there must be capacity to conclude an agreement;
3. there must be a specific subject;
4. there must be an admissible cause.

Each stated element will have its own code articles defining “consent,” “capacity,” “specific subject,” and “cause” in a variety of contexts. For example, the current Louisiana Civil Code, which traces its roots to 18th Century French civil law, contains 20 separate code articles on the topic of consent. Ultimately, the core concept of civil law is that legal principles can be written down (in much the same way that Samuel Williston wrote down the principles of common law contracts in his Treatise On Contracts) and that those written principles are the starting point for legal analysis.

Apple & Deyling, supra note 81, at 37.

Civil law jurisdictions do recognize the concept of jurisprudence constante under which a series of decisions forming a “constant stream of uniform and homogenous rulings having the same reasoning” has “considerable persuasive authority” that should be “respected” absent intervening legislative action. Borel v. Young, 989 So.2d 42 (La. 2007), quoting James L. Dennis, Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent, 54 La.LawRev. 1, 5 (1993).

Geoffrey C. Hazardt & Angelo Donditt, Responsibilities of Judges and Advocates in Civil and Common Law: Some Lingering Misconceptions Concerning Civil Lawsuits, 39 Cornell Int'l L.J. 59, 61 2006; see also Apple & Deyling, supra at 37 (contrasting the roles of trial judges in the two systems).

Apple & Deyling, supra note 81, at 26.

One set of commentators observed:

The civil process tends to be conducted primarily in writing, and the concept of a highly concentrated and dramatic “trial” in the common-law sense is not emphasized. Thus, a lawyer who wishes to question a witness must first submit to
the judge and opposing counsel “articles of proof” describing the scope of the potential questions. The witness will be questioned at a later hearing at which the judge will typically ask the questions, often framing or reformulating the issues raised in the case. Cross-examination is uncommon. Instead, opposing counsel’s role is to make certain that the record summary of the testimony is complete and correct.

The judge supervises the collection of evidence and preparation of a summary of the record on which a decision will be based. Since there is no “pretrial” phase of the proceeding, the evidence is not “discovered” in the sense understood by common-law lawyers. Instead, the parties submit proposed evidence to the judge in writing or at oral hearings, and the judge delivers rulings concerning the relevance and admissibility of evidence. Admissible evidence is presented, for the first and only time, in the final hearing that constitutes the trial.

Apple & Deyling, supra note 81, at 27.

88 ICC Rules, art. 4; ICDR Rules, art. 2; LCIA Rules, art. 1.
89 UNCITRAL Rules, art 3.
90 ICC Rules, art. 4, ¶ 3; ICDR Rules, art. 2, ¶ 3; LCIA Rules, art. 1.1; UNCITRAL Rules, art 3, ¶ 3.
91 ICC RULES, arts. 12-13; ICDR Rules, arts. 5-6; LCIA Rules, arts. 5-9; UNCITRAL Rules, arts. 7-10.
92 ICC Rules, arts. 11, 14-15; ICDR Rules, arts. 7-11; LCIA Rules, arts. 10-11; UNCITRAL Rules, arts. 11-14.
93 ICC Rules, art. 24; ICDR Rules, art. 16, ¶ 2; UNCITRAL Rules, art. 17.
94 ICC Rules, art. 22; ICDR Rules, art. 16, ¶ 1; LCIA Rules, arts. 14, 22; UNCITRAL Rules, art. 17.
95 ICC Rules, art. 28-34; ICDR Rules, arts. 21, 26-27; LCIA Rules, arts. 25-26; UNCITRAL Rules, arts. 26, 33-38.
96 ICC Rules, art. 31; ICDR Rules, art. 27, ¶ 2; LCIA Rules, art. 26.1; UNCITRAL Rules, art. 34, ¶ 3.
97 ICC Rules, art. 34; ICDR Rules, art. 27; LCIA Rules, art. 26; UNCITRAL Rules, art. 34, ¶ 4.
98 ICC Rules, art. 37; ICDR Rules, art. 31; LCIA Rules, art. 28; UNCITRAL Rules, art. 40.
99 ICC Rules, art. 18; ICDR Rules, art. 13; LCIA Rules, art. 16; UNCITRAL Rules, art. 18.
100 ICC Rules, art. 21; ICDR Rules, art. 28; LCIA Rules, art. 16.3; UNCITRAL Rules, art. 35.
101 ICC Rules, art. 20; ICDR Rules, art. 14; LCIA Rules, art. 17; UNCITRAL Rules, art. 19.

See id.

These evidence rules are available on the IBA website at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#takingevidence (last accessed 12/5/12). The IBA also publishes a companion document, Commentary on the Revised Text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration, which can be found on the same webpage.


Article 4, ¶5(b).

CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration (International Institute for Conflict Prevention & Resolution, 2009) at 14 (“Although the tribunal is empowered to appoint neutral experts, this authority appears to have been seldom employed.”). As a general proposition, arbitrators with a common law background are more likely to permit party-appointed experts than “civilian” arbitrators who may be skeptical about the benefits and costs of party-appointed experts. Born, International Commercial Arbitration, Vol. II at 1861 (footnotes omitted).

See, e.g., ICC Rules, art. 25(3); ICDR Rules, Rules, art. 27; UNCITRAL Rules, Rules, art. 29.

For a detailed discussion of the history and use of “chess clock” arbitration, see Monichino, Stop Clock Hearing Procedures in Arbitration, Asian Dispute Resolution Journal (July 2009).

For example, a party may be granted addition time where opposing counsel makes unjustified objections, wastes his opponent’s time, or an opposing witness gives long-winded non-responsive answers to simple questions. In such circumstances, the source of the added time may be through the reduction of the transgressor’s allotted time.


Id.
The Technology, Engineering and Construction ("TEC") Case Rules established by the Supreme Court of Victoria, Australia, provide that a judge exercising the discretion to time-limit a proceeding should "hav[e] regard to the following matters, in addition to any other relevant matter—"

(a) the time or number limited shall be reasonable;
(b) the direction shall not prejudice the right of each party to a fair trial, and in particular, to a reasonable opportunity to adduce evidence and cross-examine witnesses;
(c) the degree of complexity of the case;
(d) the number of witnesses a party intends or seeks to call;
(e) the volume and character of the evidence a party intends or seeks to adduce;
(f) the time expected to be taken for the trial;
(g) the importance of the proceeding as a whole or of any question in the proceeding.

TEC Rule 3.05(3).

The right to appeal decisions of a U.S. District Court to U.S. Circuit Courts of Appeals is more or less typical. 28 U.S.C. § 1291 (2012).


Afghanistan, Albania, Algeria, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Benin, Bolivia (Plurinational State of), Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Cambodia, Cameroon, Canada, Central African Republic, Chile, China, Colombia, Cook Islands, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Fiji, Finland, France, Gabon, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Haiti, Holy See, Honduras, Hungary, Iceland, India, Indonesia, Iran (Islamic Republic of), Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Lao People’s Democratic Republic, Latvia, Lebanon, Lesotho, Liberia, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malaysia, Mali, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Monaco, Mongolia, Montenegro, Morocco, Mozambique, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Rwanda, Saint Vincent and the Grenadines, San Marino, Sao Tome and Principe, Saudi Arabia, Senegal, Serbia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, Tajikistan, Thailand, The former Yugoslav, Republic of Macedonia, Trinidad and Tobago, Tunisia, Turkey, Uganda, Ukraine, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay, Uzbekistan, Venezuela (Bolivarian Republic of), Viet Nam, Zambia, Zimbabwe.
Recognition of foreign judgments is governed by the judicially developed concept of comity, e.g., Hilton v. Guyot, 159 U.S. 113 (1985) or by statute, e.g., the Uniform Foreign Country Money Judgments Recognition Act (2005) or its predecessor the Uniform Foreign Monetary Judgments Act (1962) in several states of the United States.


Id.

Armenia, Australia, New South Wales, Northern Territory, South Australia, Tasmania, Victoria, Austria, Azerbaijan, Bahrain, Bangladesh, Belarus, Brunei Darussalam, Bulgaria, Cambodia, Canada, Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, Ontario, Prince Edward Island, Quebec, Saskatchewan, Yukon, Chile, Hong Kong, China, Macao, China, Costa Rica, Croatia, Cyprus, Denmark, Dominican Republic, Egypt, Estonia, Georgia, Germany, Greece, Guatemala, Honduras, Hungary, India, Iran (Islamic Republic of), Ireland, Japan, Jordan, Kenya, Lithuania, Madagascar, Malaysia, Malta, Mauritius, Mexico, New Zealand, Nicaragua, Nigeria, Norway, Oman, Paraguay, Peru, Philippines, Poland, Republic of Korea, Russian Federation, Rwanda, Serbia, Singapore, Slovenia, Spain, Sri Lanka, Thailand, The former Yugoslav Republic of Macedonia, Tunisia, Turkey, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, Bermuda, Scotland, United States of America, California, Connecticut, Florida, Illinois, Louisiana, Oregon, Texas, Venezuela (Bolivarian Republic of), Zambia, Zimbabwe.

See Note 118, supra.

See Note 118, supra.