Nuts and Bolts of International Arbitration

Craig R. Tractenberg

Mr. Tractenberg

International arbitration is bespoke dispute resolution that enables resolution of cross-border franchise disputes. This made-to-order resolution mechanism provides for the highest-quality jurists in a setting that emphasizes courtesy, dignity, respect, privacy, and enforceability. Tailor-made to resolve issues by and among franchisors and franchisees, including masters and developers,[1] the rules and procedures of international arbitration are designed to minimize cultural bias and nationalism and to facilitate fair resolution even where the parties may be from different countries speaking different languages.

As Justice Harry Blackmun wrote in 1985, "As international trade has expanded in recent decades, so too has the use of international arbitration in the course of that trade. The controversies that international arbitral institutions are called upon to resolve have increased in diversity as well as complexity."[2] Expansion and globalization of investment and trade have resulted in a need for commercial arbitration between businesses and other businesses, between businesses and sovereign countries, and between sovereign countries themselves. International arbitration allows commercial disputes to resolve without interrupting the flow of commerce, while minimizing or eliminating claims of nationalism.

I. The Benefits of International Arbitration

International arbitration is popular because the awards are more enforceable than court judgments. The parties can select the forum and the arbitrators to maximize neutrality. The parties can select arbitrators who have familiarity with the relevant subject matter and appropriate experience and

1. *See* Sankalp Recreation PVT, Ltd. v. Prayosha Rest. Grp., LLC, 2014 WL 1056402 (D.N.J. Mar. 14, 2014) (termination of master licensee).

2. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 639 (1985) (holding that an international tribunal was the proper forum to resolve U.S. antitrust claims which previously could only be heard in U.S. courts).

Craig R. Tractenberg (ctractenberg@foxrothschid.com) is a Partner of the New York and Philadelphia offices of Fox Rothschild LLP and is co-chair of the Franchise and Distribution Practice Group and its International Arbitration practice.

who can streamline the procedures they craft. The protocols allow parties the autonomy to tailor their dispute resolution process to address the challenges posed by international commerce.

The popularity of international arbitration is apparent not only by the number of cases reportedly filed in each forum but also by the increasing number of arbitration centers being established, even where the national court systems are well established and reliable. For example, the New York International Arbitration Center (NYIAC) was launched in 2013 to provide needed space to conduct arbitrations administered by other agencies. Only three months later, the International Chamber of Commerce (ICC) established a presence in New York. Each institution has improved New York's appeal as a center for international arbitration. Today, there are specialized international arbitration courts, such as the Jerusalem Arbitration Center, intended to resolve commercial disputes between Palestinians and Israelis, necessary to promote bilateral business.

All international arbitration is designed to encourage international commerce by use of international conventions and treaties[3] that place arbitration awards above national court judgments. The arbitral rules are specifically designed to avoid national bias.

Arbitration as a general proposition has often been touted as "better, faster and cheaper" than litigation. With courts becoming more efficient and arbitration parties becoming more sophisticated, the supposed advantages of commercial arbitration may be narrowing. In contrast, international arbitration is completely different from commercial arbitration common in the United States, and presents great advantages, and some disadvantages, over dispute resolution in the national courts, particularly where the parties are from different countries.

A. *International Arbitration Awards Are Generally Final and Enforceable*

Judgments from national courts are by themselves unenforceable in a foreign country as a general manner of sovereignty. No country trusts the decision of another's court, and no international arrangement short of a treaty will recognize the judgment of one country as enforceable in another. In contrast, arbitration awards are recognized internationally among the 150 countries which are members of the New York Convention, a treaty among the member countries. The New York Convention[4] provides that

3. As used by the U.S. government, a "treaty" is an agreement where diplomatic parties negotiate to reach common ground and avoid further conflict or disagreement, and is ratified by the lawmaking authority of each signatory country. In the United States, for example, a treaty must be ratified by the Senate. U.S. Const. art. II, § 2, cl. 2. In contrast, a "convention" begins with an international meeting of representatives from many nations resulting in a general agreement about procedures and protocols taken on specific topics, such as the enforcement of foreign arbitration awards. A "protocol" is an agreement signed by diplomats that forms a basis for a final convention or a treaty, which may not be ready for many years. *See generally*, U.S. Fish & Wildlife Serv., International Protocols, Treaties, and Conventions, 530 FW 2 (May 7, 2009), https://www.fws.gov/policy/530fw2.pdf.

4. 9 U.S.C. § 201 *et seq*.

arbitration awards involving foreign parties or property fall within the Convention[5] and are enforceable by federal courts regardless of the amount in controversy.[6]

The grounds for refusal or deferral of recognition or enforcement of the award are the same as those for commercial arbitration awards.[7] In addition to these factors, universally accepted by signatories to the New York Convention as grounds for not confirming an award as a national judgment, national courts will also apply a public policy test to ensure that enforcement will not violate public policy.[8] Absent these factors, signatory countries to the New York Convention will confirm an arbitration award to allow for enforcement.[9]

B. *International Arbitration Awards Provide Finality and Immediacy*

National courts are typically very deferential to the enforcement of arbitration awards. For example, in *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576 (2008), the U.S. Supreme Court considered whether the parties could enter into an agreement permitting judicial review of the sufficiency of the evidence at trial and the international arbitration tribunal's conclusions of law.[10] The Supreme Court rejected this agreement as antithetical to the national policy favoring limited review, stating that "legal and evidentiary appeals . . . can render informal arbitration merely a prelude to a more

5. B & B Jewelry, Inc. v. Pandora Jewelry LLC, 247 F. Supp. 3d 1283 (S.D. Fla. 2017) (noting that a valid and effective arbitration agreement must exist at the time of filing the arbitration).

6. 9 U.S.C. § 203.

7. 9 U.S.C. § 10. The statute provides, in relevant part, as follows:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> (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 that a mutual, final, and definite award upon the subject matter submitted was not made.

8. Lucy F. Reed & James Freda, *Narrow Exceptions: A Review of Recent U.S. Precedent Regarding the Due Process and Public Policy Defenses of the New York Convention*, 25 J. of In'tl Arbitration 649, 656 (2008); Peter F. Schlosser, *Arbitration and European Public Policy*, L'Arbirage et le Droit Europeen 81, 86 (1997).

9. In the State of New York, a special provision of the court rules, N.Y. Civil Practice Laws and Rules § 7502(c), allows a party to a pending or to-be-commenced arbitration to obtain an order of attachment or preliminary injunction to secure any future recovery. *See* Moquinon v. Gliklad, 55 Misc. 3d 1212(A) (N.Y. Cnty. Apr. 6, 2017); *Rockwood Pigments NA v. Elementis Chromium LP, 124 A.D.3d 509* (N.Y. App. Div. Jan. 22, 2015). This provision has not been applied during the award confirmation process but does support prejudgment attachment pending confirmation. *See* Oksana G. Wright, *How to Insure Your Foreign Arbitration Award Is Collectible*, N.Y.L.J. (Oct. 13, 2017), https://www.foxrothschild.com/publications/how-to-ensure-that-your-foreign-arbitral-award-is-collectible.

10. Hall St. Assocs. v. Mattel, 552 U.S. 576 (2008).

cumbersome and time-consuming judicial review process, and bring arbitration theory to grief in post-arbitration process."[11]

Generally no appeal exists with respect to international arbitration awards as a matter of right.[12] There are some limited exceptions. The International Centre for Dispute Resolution (ICDR), which is the international affiliate of the American Arbitration Association (AAA), does allow the parties to agree to an option of appellate review of its awards, as does an optional process with JAMS.[13] The International Centre for Settlement of Investment Disputes (ICSID) provides for an annulment procedure allowing a second ICSID appellate tribunal to annul the award.[14]

All arbitration centers by rule provide that the award may be carried out immediately and without delay.[15] Both the finality and immediacy of international arbitration awards are desirable to businesses seeking certainty in the final resolution of a dispute, with only a limited ability to challenge the award.

C. *International Arbitration Is Designed as a Neutral Forum*

A party is often reluctant to submit to the jurisdiction of another party's national courts. Yet international expansion often creates unforeseen liability exposure due to national and cultural differences.[16] Local courts deciding such issues are frequently criticized for letting nationalism influence the results of their decisions.[17]

---

11. *Id.* at 588 (citations and quotations omitted). Note that the ICC Rules require that every award be reviewed by an ICC Court and approved in form, and "without affecting the arbitral tribunal's liberty of decisions, may also draw its attention to points of substance. Int'l Chamber of Commerce, Rules of Arbitration, Art. 34, https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration [hereinafter ICCWBO].

12. The English Arbitration Act of 1966 is unusual in that it allows parties to appeal points of English law to the English courts by consent of the parties or through leave of court. Section 66 of the Act provides: "An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted." *Id.* This appeal right can be excluded by the parties in the governing language of the arbitration clause.

13. JAMS Optional Arbitration Appeal Procedure, https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Optional_Appeal_Procedures-2003.pdf.

14. Annulment is an exceptional recourse to safeguard against the violation of fundamental legal principles relating to the process. ICSID Convention, Art. 52, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159, T.I.A.S. No. 6090.

15. For example, ICC Rule 35(6) provides: "By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made."

16. *See* Andrew Loewinger, Stéphane Teasdale & Richard White, *A World of Trouble: How to Limit Liability Exposure in International Franchise Expansion*, 51st Ann. IFA Legal Symposium (2018).

17. *See, e.g.*, Bertico, Inc. v. Dunkin' Brands Canada, Ltd., 2012 QCCS 2809 (June 21, 2012) (Canadian court awarding $7.4 million for lost profits and $9 million for lost investment against foreign franchisor for failing to use best efforts to prevent the failure of Canadian franchisees). The damages in *Bertico* were reduced to $4,372,472 on appeal. Dunkin' Brands Canada Ltd. v. Bertico Inc., 2015 QCCA 624 (Apr. 15, 2015); *see also* Loewinger, Teasdale & White, *supra* note 16.

Conversely, through procedural rules, international arbitration provides a neutral forum for dispute resolution. Examples of procedural rules promoting neutrality include the appointment of a neutral who is not of the same nationality as the parties unless the parties agree,[18] requiring arbitrators to be available, impartial, and independent,[19] and fairly determining the language of the arbitration if not specified in the governing contract,[20] among other safeguards. Most practitioners are surprised to learn of the detail of the disclosures by international arbitrators, and most arbitration institutions will not appoint a neutral that has presided over an arbitration before the same counsel or party in the past two years if a party objects to the appointment.

D. *International Arbitrations Are Highly Confidential*

Although franchise disputes are regularly resolved through international arbitration, the public hears little about the cases. Private commercial arbitration[21] provides greater privacy and confidentiality than litigation, which is typically public. In addition, parties can draft their arbitration clause to require that the matters discussed within the proceeding must remain confidential. This step may be necessary because, although many tribunals provide for confidentiality of their deliberations and decision, these procedural rules do not compel the parties to keep all of their dispute resolution activities confidential.

Once an award is announced by an arbitration tribunal, even if the award is confidential, confirming the award as a judgment in a national court may be a very public event. As a practice note, to maintain confidentiality, the arbitration clause should state the confirmation of the award is to be confidential, and the party enforcing the award should file the confirmation proceeding under seal, referencing the intent of the parties in drafting their agreement to maintain the confidentiality of the result of any dispute.

E. *International Arbitration's Procedural Rules Provide for Greater Flexibility*

1. Parties Can Select Arbitrators with Experience and Expertise

Unlike court proceedings where the parties have little control over the selection of the judge, the parties to an arbitration usually appoint, nominate, or provide criteria for selection of arbitrators. In the commercial context, the parties' selection of an arbitrator with specialized expertise can eliminate hearing days and is more likely to ensure that the decision-maker has a full understanding of the issues. Although some jurisdictions have specialized business courts with judges who are familiar with commercial issues, few courts have international experience, and by extension, the understanding

18. ICC Rules of Arbitration, Art. 13(5), https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration.

19. *Id.*, Art. 11(2).

20. *Id.*, Art. 21.

21. All ICSID cases involving investment treaty disputes are substantially public to promote confidence in the adjustment of investor claims against sovereign states.

necessary to adjudicate disputes with significant cultural and language differences. Arbitration reduces the risk that the case will be decided by a judge with little understanding of the commercial issues between the parties.

In addition, arbitrators often have more advanced education and professional experience in their fields than judges in national courts. Most arbitrators have civil law backgrounds and place more emphasis on contemporaneous writings than on witness credibility. For civil law arbitrators, witnesses primarily function to illuminate the documentary record.[22]

2. Parties Can Customize Their Dispute Resolution Procedures

Unlike court rules which are detailed and structured to address every contingency in anticipation that the parties can agree on nothing, arbitration rules are a framework that require the parties to find common ground on virtually all procedural issues. Simplicity and flexibility are the hallmarks of arbitration rules, and they allow the parties to adjust dispute resolution to suit their particular relationship. As a result, despite the complicated nature of many of the cases in international arbitration, arbitration can generally be better and faster than proceeding in court. The simplicity and flexibility of the rules also allow the parties from injecting delay into the process, and arbitrators retain the authority to decide procedural issues that are not either addressed by the procedural rules or agreed to by the parties.

3. Provisional Remedies Are Still Available

Generally, the arbitration tribunal will enforce any provisional or interim remedy that is available under the law of the jurisdiction where the arbitration is proceeding.[23] Preliminary relief, such as injunctions against enforcement of contracts, and the issuance of preliminary injunctions, are available and may be more likely to be issued by a tribunal interested in granting temporary equity than a court bound by rigid precedent.[24] Often, the arbitral forum will provide for a temporary arbitrator during the selection process

22. George Ruttinger, *Where Common Law Litigation and International Arbitration Divide*, Law 360, Dec. 7, 2015, https://www.law360.com/articles/729335/where-common-law-litigation-and-int-l-arbitration-divide.

23. ICC Article 28(1) provides:

> *Conservatory or Interim Measures*. Unless the parties have otherwise agreed, as soon as the file has been transmitted to it the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The arbitral tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an award, as the arbitral tribunal considers appropriate.

24. Michael Grando, *The Coming of Age of Interim Relief in International Arbitration: A Report from the 28th Annual ITA Workshop* (July 20, 2016), http://arbirationblog.kluwerarbitration.com/2016/07/20/coming-of-age-of-interim-relief-in-international-arbitration-a-report-from-the-28th-annual-ita-workshop. The reasons an arbitration panel may be more likely to provide interim relief "are because the arbitrators might already be familiar with the facts of the dispute; have specialized legal or technical knowledge required to decide the application; know the language of the dispute; provide a neutral alternative to potentially unfriendly courts; and be in a better position to ensure privacy of the proceedings." *Id.*

to consider any requests for interim relief.[25] In contrast, courts differ about whether interim relief is available pending arbitration and whether such court intervention will impair or waive the right to arbitrate.[26] The prevailing rule in the United States is that even where a claim filed in court is subject to arbitration, a court retains the authority to enter a preliminary injunction to maintain the status quo if an arbitral award could not return the parties substantially to the status quo.[27]

4. Default Judgment and Summary Judgment

The tradition of arbitration is to decide cases on the merits rather than on procedural grounds. No default judgments are available against parties that fail to respond to the Tribunal or flout the arbitration rules.[28] Rules imposed by the arbitration forum, and by national laws, require an examination of the claims for merit. Arbitrators will typically deny a claim that lacks merit, even if an adverse party ignores the arbitration process entirely.

Nonetheless, the growing trend is to allow shortened procedures akin to summary judgment in arbitration cases.[29] But summary disposition is generally only available in limited circumstances. For example, summary judgment is often only appropriate for statute of limitations defenses, simple loan defaults, and other instances where it is unnecessary to conduct a full evidentiary hearing.[30] The general test, as explained in Article 22 of the ICC Rules, is whether such claims or defenses are manifestly devoid of merit or fall outside of the tribunal's jurisdiction.[31] The International Bar Association

25. *Id.* The article reports that, in 2016, emergency arbitrators were requested in at least sixty-seven ICDR cases, fifty in SIAC, thirty-four in the ICC, twenty-three in the SCC, and six in HKIAC.

26. *See* Gray Holdco, Inc. v. Cassady, 2010 U.S. Dist. LEXIS 119344 (W.D. Pa. Nov. 10, 2010) (holding that "[w]hile [the party seeking arbitration] is correct that its pursuit of injunctive relief cannot in and of itself constitute waiver, neither can the 'no waiver' clause provide a shield against a finding of waiver. Thus, while [the party seeking arbitration]'s pursuit of preliminary relief does not in and of itself weigh against it, the existence of the no waiver clause does not 'alter the ordinary analysis undertaken to determine if a party has waived its right to arbitration'").

27. Bruce E. Meyerson, *Interim Relief in Arbitration: What Does the Case Law Teach Us?*, 34 Alternatives to the High Cost of Litig. 9, 131–34, (Oct. 2016).

28. Under ICDR Rules, where a party fails to respond or appear at a hearing without sufficient cause, "the arbitral tribunal may proceed with the arbitration." *See* ICDR Rules, Art. 26(1)–(2). However, the arbitrator "may make the award on the evidence before it" where "a party, duly invited to produce evidence or take any other steps in the proceedings, fails to do so within the time established by the tribunal without showing sufficient cause for such failure." *Id.*, Art. 26(3).

29. ICC Rules, Art. 30, Expedited Procedure (effective Mar. 1, 2017).

30. *See* Philip Chong & Blake Primrose, *Summary Judgment in International Arbitrations Seated in England*, 33 Arbitration Int'l 63, 68 (2017).

31. *See* Int'l Chamber of Comm., *Note to Parties and Arbitral Tribunals on the Conduct of Arbitration Under the ICC Rules of Arbitration*, ¶¶ 59–64 (Oct. 30, 2017), https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf; *see also* Singapore International Arbitration Centre Rule 29.1, http://www.siac.org.sg/our-rules/rules/siac-rules-2016; Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, Art. 39, https://sccinstitute.com/media/293614/arbitration_rules_eng_17_web.pdf.

Rules provide that "[t]he Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, any issues . . . for which a preliminary determination may be appropriate."[32]

II. The Mechanics of International Arbitration

A. *The Arbitration Tribunal*

Typically, an international arbitration tribunal consists of either one or three arbitrators.[33] A sole arbitrator is ideal in smaller cases where parties can save on arbitrator fees and benefit from the scheduling flexibility of a solo arbitrator. Most cases, however, involve three arbitrators, one selected by the claimant, one by the respondent, and a third appointed either by the two arbitrators selected, or by the parties.[34] If the parties cannot agree on the neutral arbitrator, then the forum rules provide for various mechanisms for selection.[35] These rules may have a list and strike system, with weighing of the parties' choices, or the forum may make the appointment without party input to ensure fairness, independence, and impartiality.[36]

International arbitrator selection is an art. If the tribunal is composed of three arbitrators, then each party will select its appointed "wing" arbitrators, with the third selected by the two wing arbitrators. The most important question is whether the wing arbitrator that the client has selected can help swing the vote of the neutral to have a majority decide the case. Parties should seek advice from their counsel regarding industry expertise, experience, personality, and the *gravitas* of the arbitration candidates. Various publications catalogue the available arbitrators and industry specialist arbitrators that are available.[37] The relevant criteria for selection are the candidate's familiarity with the governing law, legal education, industry experience, past decisions, awards, speeches and writings, experience with the firm or the counsel of the parties, and the general reputation of the individual. The ethics rules that bind arbitrators require that they not be advocates for the parties but rather independent, fair, and impartial.[38] In selecting party-appointed arbitrators, it is not unusual to lightly interview potential appointees regarding their views

32. Int'l Bar Ass'n R. on the Taking of Evidence in Int'l Arbitration, Art. 2, https://www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49-4106-46BF-A1C6-A8F0880444DC.

33. ICC Rules of Arbitration, Art. 12(1), https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration; ICDR Rules, Art. 11; LCIA, Art.5.8.

34. ICC Rules of Arbitration, Art. 12(2); ICDR Rules, Art. 12; LCIA, Art. 5.8.

35. ICC Rules of Arbitration, Art. 12(2)–(5); CIETAC Art. 27; LCIA, Arts. 5.6, 5.8.

36. ICC Rules of Arbitration, Art. 13(3).

37. *See, e.g.*, International Arbitration Institute, Who's Who in International Arbitration, whoiswholegal.com; Global Arbitration Rev., https://globalarbitrationreview.com; Chambers and Partners, Chambers.com; Chartered Institute of Arbitrators, CIARB.org.

38. Am. Bar Ass'n, Code of Ethics for Arbitrators in Commercial Disputes (Mar. 1, 2004), https://www.americanbar.org/content/dam/aba/migrated/dispute/commercial_disputes.pdf. It is possible to have the swing arbitrators act as advocates during the deliberations if the parties agree to that role in the arbitration clause or thereafter. Given the mischief that can occur from this option, it is an option rarely chosen by the parties. The arbitrators themselves generally

or knowledge regarding anticipated issues, as long as these candidates are not being asked to prejudge the dispute.

B. *Drafting and Selection of Arbitration Rules or Institution*

As discussed previously, the parties are free to agree upon a specific procedure for their arbitration. In the absence of selection of rules or an institution for arbitration, the parties may default to any national laws of the relevant countries to provide a minimal framework for arbitration and may tailor their arbitration with their own rules.

Despite the freedom available to parties in crafting their own specialized dispute resolution procedures, most drafters select the well-tested rules of recognized arbitration institutions and then augment the rules and procedures through a collection of best practices based on their experience. Parties should rely on outside counsel with experience in international arbitration when drafting these procedures.

Parties should also be careful when selecting the rules of an institution for arbitration. Some institutions focus on broad resolution of disputes, while others may be highly specialized, with rules customized to their focus. Only a cursory examination of the pre-eminent institutions[39] reveals why parties should take care in selecting their preferred institution for resolving disputes:

- International Court of Arbitration of the International Chamber of Commerce (ICC).The ICC is a well-known, worldwide arbitration institution and a favorite among European countries. Based in Paris, with a recently opened office in New York, the ICC's arbitration panels and cases are world-class. Its rules contain the iconic "Terms of Reference" that establish and confirm the scope of the arbitration, claims and defenses, procedure, and substantive laws selected by the parties. The Terms of Reference streamline the arbitration timeline.[40]
- International Centre for Dispute Resolution (ICDR). The ICDR is the international side of the American Arbitration Association (AAA). U.S.-based parties often select the ICDR because its offices are based in New York City.[41]
- London Court of International Arbitration (LCIA). Based in London, with affiliated offices in Dubai (DIFC-LCIA) and Mauritius (LCIA-MIAC), the LCIA is a favorite among parties located in the United Kingdom and those who are comfortable with hearings in the Middle

prefer to be independent, fair, and impartial, as well to avoid ethical challenges in such settings. *See id*., Canon III.

39. These institutions are notable because sovereign countries, having waived sovereign immunity to allow enforcement of their contracts by private parties under private law, select these institutions to resolve their disputes.

40. *See* www.ICCWBO.org.

41. *See* Alternative Dispute Resolution, www.ADR.org.

East. The LCIA is particularly well-known for insurance, banking, and finance cases.[42]

- Hong Kong International Arbitration Centre (HKIAC). Based in Hong Kong, the HKIAC is a well-respected institution, often chosen for China-related dispute resolution. It is one of the most obvious choices for matters involving Asia.[43]
- Singapore International Arbitration Centre (SIAC). The SIAC is mostly used for disputes arising in Asia and the Indian subcontinent. It is now well-established and selected as a comfortable forum for disputes among transactions involving U.S., Middle East, and African companies.

The benefit of these arbitration institutions is that their published rules are suitable for application in all countries, they allow for arbitrations to be conducted in various languages (or with little problem through interpreters), and they are consistent with national laws of the arbitration seat. These institutions assist with the arbitrator appointments, resolve challenges, and provide sufficient rules to keep the parties focused on dispute resolution.[44]

1. Fee Structures Vary with the Institution

ICC and SIAC fees are paid in advance in different stages of the case based on an institutional estimate.[45] ICDR administrative fees are based on the amount in controversy, but the arbitrators fees are calculated based on time spent.[46] The LCIA charges exclusively on time spent and can include significant advances.[47]

2. Optional Appellate Rules of the ICDR and JAMS

The parties before the ICDR or JAMS may agree to optional appellate rights before, during, or after the arbitration award.[48] The ICDR Optional Appellate Arbitration Rules (OAA Rules) provide that if the parties, either by stipulation or in their contract, agree to the appeal of an arbitration award rendered by the ICDR, then a notice of appeal may be filed within thirty days of the award, and the award will not be considered final for purposes of judicial proceedings or enforcement.[49] An appellate panel will be selected from the AAA International Appellate Panel list[50] and, absent agreement

42. *See* London Court of International Arbitration, www.LCIA.org [hereinafter LCIA].
43. *See* www.HKIAC.org.
44. In addition to the locale and focus of these institutions, some also allow for expedited procedural resolution of disputes. For example, the ICC has adopted expedited procedures for cases of under $2 million, which allows a single arbitration to limit or eliminate a witness examination or hearing briefs. Parties should carefully examine the rules of each institution when selecting a preferred dispute resolution procedure.
45. ICC, Art. 36(1)–(5); SIAC Rule 34.
46. ICDR, Arts. 34–36.
47. LCIA, Art. 38.
48. *See* ICDR Optional Appellate Arbitration Rules; JAMS Optional Appellate Arbitration.
49. OAA Rule C.
50. OAA Rule A-3, https://www.adr.org/sites/default/files/AAA%20ICDR%20Optional%20Appellate%20Arbitration%20Rules.pdf.

otherwise, will be selected by the list and strike method.[51] Grounds for appeal are "(1) an error of law that is material or prejudicial, or (2) determinations of fact that are clearly erroneous."[52] The appeal is submitted on briefs, and the appellate tribunal may (1) adopt the award, (2) substitute its own award, or (3) request additional information.[53] The decision of the appellate panel then becomes the final arbitration award. Unlike the courts, the appellate panel cannot order a new arbitration. The JAMS Optional Appellate Procedure is more expedited as the appeal must be filed and served within fourteen calendar days, and the decision is rendered twenty-one days after oral argument, unless good cause justifies an extension.[54]

C. *Selection of Non-Institutional Arbitrations*

The parties may not wish to arbitrate before an institution but, rather, appoint their own arbitrators. The parties may not even specify the rules to be applied. These arbitrations are referred to as "ad hoc," which occur regularly to save on the cost of institutional arbitration. The UNCITRAL Arbitration Rules, which were developed by the United Nations Commission on International Trade Law, are an alternative to institutional rules.[55] But ad hoc arbitrations under UNCITRAL Arbitration rules have their own limitations. By failing to include all of the structure of institutional arbitrations, an ad hoc arbitration often results in court intervention earlier in the proceeding.[56] For example, if the parties fail to pay on time, claim a conflict of interest in the arbitrator, dispute the award or the procedure, or have an issue with some aspect of administration of the proceedings, an institution has staff to address the issue. In ad hoc arbitration, the arbitrator may be a lawyer without a research staff or administrators to deal with the ministerial aspects of the arbitration and may have no other resources for legal or administrative guidance.

D. *The Seat and Place of Arbitration*

The "seat" is the location which provides the legal framework of the arbitration. The place of arbitration is the physical location of the hearings. Usually, these locations coincide, but not always. Selection in drafting or filing of the seat of arbitration should take into account the conduct of the arbitration and the enforceability of the ultimate award.

The seat determines the procedural law that applies. The procedural law applied may have profound effects on limitations on actions, language of the arbitration (unless specified), the qualifications of lawyers who may participate, and the burdens of proof. If the seat is located in a signatory to the

51. *Id.* Rule A-4.
52. *Id.* Rule A-10.
53. *Id.* Rule A-19.
54. *Id.* Rule C.
55. United Nations Commission on International Trade Law, Arbitration Rules, www.UNCITRAL.com.
56. Gerald Aksen, *Ad Hoc Verses Institutional Arbitration*, 2(1) ICC Bull. 8–14 (1991).

New York Convention, then the New York Convention applies and might aid in enforcement among the signatory countries to the Convention.[57]

E. *What to Expect in International Arbitration*

International arbitrations are conducted with business-like formality and a politeness and humility not usually evident in dispute resolution. International arbitration is designed to resolve some of the largest disputes in the world, and, as a result, arbitrators typically maintain decorum, deference, and dignity to all.

International arbitrations typically follow a set pattern that includes at least the following steps:

- The case is initiated by a Request for Arbitration, which at least summarizes the claims.
- Respondent then answers, and perhaps counterclaims, followed by Petitioner's reply.
- The tribunal appointments, which started with the filing of the Request for Arbitration, are finalized.
- The arbitral panel schedules a procedural conference to establish a timetable for the hearings and mileposts in the arbitration. Tribunals liberally grant extensions until the parties have established a procedural timetable, after which arbitrators typically demand rigid adherence to the deadlines agreed upon by the parties.[58]
- In an ICC proceeding, the iconic Terms of Reference, which is akin to a pretrial order, are finalized.
- If desired by the parties, the parties may file a robust Statement of Case referencing evidence, and Respondent can file a responding Statement of Defense.[59]
- Disclosure of documents relied upon and categories of documents requested by the other party.
- Parties exchange of witness statements and rebuttal statements.
- Parties exchange of expert reports, sometimes followed with rebuttal reports.
- Opposing experts meet to narrow issues and review joint statements by parties or their experts.
- Prehearing submissions are exchanged.
- Hearing is conducted.

57. Joseph T. McLaughlin & Laurie Genevro, *Enforcement of Arbitral Awards Under the New York Convention-Practice in U.S. Courts*, 3 Int'l Tax & Bus. Law 249 (1986),

58. ICC Rules, Arts. 34, 35.

59. *See, e.g.*, ICDR, Art. 9. Many arbitration institutions suggest following the memorial approach to briefing, where the parties' statements of the case are served together with the witness evidence and expert reports, and the Respondents do the same with their defense materials. Usually there are two rounds of memorials, the initial round, and the rejoinder.

- Parties provide, when permitted, post-hearing submissions.
- Arbitrator(s) carries (carry) out entry of award.[60]

Thus, international arbitration not only differs procedurally with litigation, but also differs significantly in discovery obligations.

F. *Differences from Litigation in Discovery*

The tradition in arbitration is to limit discovery to party document exchanges and to prepare the case without depositions. The parties may agree in their arbitration clause to provide for depositions, allow limits on discovery, or to provide for full-scale litigation discovery. The Redfern Schedule[61] requires the requesting party to state its rationale for document requests. Tribunals have the ability to issue subpoenas to third parties,[62] but there is no method for enforcing the subpoenas.[63] Instead, parties need to use national courts to enforce a subpoena against a third party.[64] In the United Kingdom, it is a criminal violation to coach or even prepare witnesses expected to testify in court, so parties must be aware of the local rules regarding witness preparation.[65]

Note that because discovery is limited, and depositions are generally non-existent, cross-examination is substantially limited. Counsel will find that impeachment with prior inconsistent statements is difficult without depositions and deep document productions.

G. *Differences from Litigation at the Arbitration Hearing*

In international arbitrations, the panel acts as the inquisitors, and the parties' counsel act as advocates. After the witness is sworn, he or she is introduced to the tribunal, and then the proffering counsel typically asks ten minutes of introductory questions to establish the witness's credibility and ultimate conclusions. The witness is then asked to confirm the accuracy of his or her witness statement, and the statement is offered into evidence. Once the statement is proffered, the witness is passed to opposing counsel for questioning on the oral evidence and the proffered witness statement. This expedited procedure reduces hearing time significantly, especially as

60. *See*, *e.g.*, ICC Arts. 31–34. Unlike most awards, ICC awards are scrutinized by ICC members before the award is communicated to the parties.

61. The Redfern Schedule (devised by practitioner Allen Redfern) is a procedural device for requesting the production of documents. It is a collaborative document to which the claimant, respondent, and tribunal all contribute. Different columns of the schedule are completed by the parties at various times. The first column requests documents from the opposing side and also explains why the documents are logically needed, why they are relevant to the case, and why they are unavailable to the requesting party. The next column provides a space for objection to the request, and the last column provides a space for the Tribunal to explain its ruling on the objection.

62. *See* 9 U.S.C. § 7.

63. Anthony J. Rospert, *Third-Party Discovery in Arbitration; Between a Rock and a Hard Place*, ABA Sec. of Litig., Alternative Disp. Resol. (Summer 2016).

64. *Id.*

65. Ian Meredith & Hussain Khan, *Witness Preparation in International Arbitration—A Cross Cultural Minefield*, 26 Mealy's Int'l Arb. Report 92 (Sept. 2011).

the tribunal is likely to have read and highlighted the pertinent portions of each witness statement and can ask its own questions. At the hearing, counsels' presentations of opening statements and closing arguments are typically accompanied by PowerPoint presentations, which also serve as outlines during witness testimony to show the relevance of the testimony and reinforce the points made during closing arguments.

Expert witnesses may be presented like fact witnesses, but the tribunal or the parties may choose to present opposing expert witnesses at the same time, sworn and testifying at the same time.[66] This method is thought to aid the tribunal in identifying small but important differences in the respective opinions of the experts. This procedure—referred to as "hot-tubbing" the witnesses—can provide transparency to complicated testimony. For example, where the dispute is over valuation, the tribunal already knows from experiences in other cases, and may even remind the parties that reasonable people should be able to agree to a range of valuation, differing primarily on the assumptions that each expert witness uses. The experts are then seated side by side and are asked to explain how their assumptions differ and why they chose their assumptions over that of their opponent.[67] This procedure eliminates much of the posturing and drama in expert testimony by eliciting straightforward information and by providing arbitrators with the ability to directly confront the parties about their differing opinions.

Unlike traditional litigation, little time is spent cross-examining witnesses on prior inconsistent statements. The main reason is that without depositions and deep discovery, it is harder to find prior inconsistencies. Another reason is that the time spent in arbitration is pre-scheduled and limited. Most arbitrations follow the chess-clock method of reserving time for presentations of evidence and argument, so it is best not to linger unnecessarily on soft issues. Because time is of the essence, cross-examination is best conducted by demonstrating that no documents support the witness's testimony, or that the testimony is not consistent with commercial or market realities. Impeachment of a witness with prior statements, often time consuming, can be reserved for instances where the case turns on differing witness accounts or where supporting documentation is lacking. Because arbitrators may be from different legal backgrounds, such as civil or common law, and not well schooled in the choice of law that applies to the case, it may be necessary to have legal experts testify as to the meaning or application of some of the contractual or technical concepts. Sometime the parties cannot simply rely on case law or textbooks to explain the contractual obligations and instead need law professors or academics to explain certain concepts. While this option does escalate the cost of the proceeding, it also eliminates the risk of

66. Presentation of concurrent expert evidence is authorized by Civil Procedural Rule 35 in courts in England and Wales, and was adopted by international arbitrators.

67. Martha Neil, *When Expert Witnesses Disagree, 'Hot-Tubbing' is a Possible Solution*, ABA J., August 11, 2008, http://www.abajournal.com/news/article/when_expert_witnesses_disagree_hot_tubbing_is_a_possible_solution/.

creeping nationalism from national courts, which do not rely on worldwide expertise to decide broad issues.

III. Other Considerations

Arbitration is a creature of contract, governed by contractual provisions, much of which is designed to anticipate procedural disputes that are beyond the contemplation of the parties when the agreement containing the arbitration clause is signed. Many of these "boilerplate" provisions will pay dividends when hostilities occur.

A. *Mediation Requirements Before Arbitration and Enforcement*

The parties' dispute resolution agreement may provide for mediation and other alternative dispute procedures at any stage of a dispute. Planning for alternative dispute resolution (ADR) before an arbitration hearing, however, avoids concern that suggesting mediation early in the process is a sign of weakness. Alternatively, the parties may not be prepared to settle at the initiation stage of the arbitration, so the arbitration clause might require time to be reserved for mediation immediately before or after briefing.

Historically, settlement agreements of international arbitration have been difficult to enforce because they did not have the strength and procedural advantages that the New York Convention provided arbitration agreements. Looking ahead, however, the Singapore Convention, which will be signed on August 1, 2019, is intended to bring settlement agreements on par with arbitration agreements, The Convention will be effective six months after it is ratified by three countries, and it will make it much simpler to enforce settlement agreements in international arbitrations.

With greater certainty over enforcement of settlement agreements, it is likely that parties will increase the use of evaluative mediation, where the mediator gives the parties not only an assessment of strengths and weaknesses of the merits of the case, but also a damages analysis.[68] The use of evaluative mediation will no longer be viewed as "showing one's hand" in the mediation process.

B. *Clauses Giving the Parties Options to Arbitrate*

Arbitration clauses, which only apply when one of the parties exercise the option to arbitrate, rather than litigate, may not be enforceable on grounds of being one-sided, unfair, uncertain, or non-mutual.[69] This is especially true in countries other than the United States of America.[70] China, for example, bars such provisions by statute.[71] Japan bars asymmetric arbitration clauses

68. Cedric C. Chao, *6 Trends Which Will Shape Future International Arbitration Disputes*, Law 360 (July 28, 2018), https://www.law360.com/articles/1066653/6-trends-will-shape-future-international-commercial-disputes.

69. *See*, *e.g.*, *Global Client Solutions, LLC v. Ossello*, 2016 WL 825140 (D. Mont. Mar. 2, 2016).

70. Bruce Paulson & Jeffrey Dine, *Is Your Asymmetric Arbitration Clause Valid?*, Law 360 (Nov. 21, 2018), https://www.law360.com/articles/1103602.

71. *Id.*

as against public policy.[72] France provides that such clauses are valid so long as the jurisdictions available for litigation are predictable.[73] Russia and India have issued decisions that are skeptical of such agreements on the basis that they may lack mutuality.[74]

C. *Scope of Arbitration*

Most arbitration clauses are broadly worded to prevent interference by the courts. Such broader clauses seek to capture the parties, persons claiming through the actual parties of record, and any issues related thereto. The scope of the arbitration, however, can be narrowly defined, so that only discrete issues need be arbitrated. The more narrow clauses deal with technical or mathematical issues, such as appraisal rights, or adjustments of non-compete requirements where market changes may suggest flexibility in determining the scope of the non-compete requirement. The clause should be tailored to the changing needs of the franchise system.

D. *Rules for Disclosure and Discovery*

Usually, arbitration clauses adopt the International Bar Association (IBA) Rules of Taking Evidence. But a clause could reference the Federal Rules of Civil Procedure to require procedures like initial disclosures or expert disclosure.

E. *Language*

The language of the arbitration should be designated in the arbitration clause, especially if English is not the official language of the seat of the arbitration. If the language of the arbitration is not specified, then the official language of the seat may be the default language. Moreover, the arbitrators themselves probably want to discuss the case. If the arbitrators speak different languages, then interpreters may be needed for the arbitrators rather than for the witnesses. Also, recruiting arbitrators will be extremely difficult if they are obligated to speak and discuss technical issues in a language in which they are not fluent.

F. *Governing Law*

The law to be applied can be complicated and case determinative.[75] Care should be taken to select governing law that is helpful and will not exacerbate possible conflict of law issues. For example, in an arbitration seated in Miami, Florida, over a Peruvian franchise, calling for the application of New York law, the parties should know whether the New York conflict-of-

72. *Id.*
73. *Id.*
74. *Id.*
75. *See* Minn. Supply Co. v. Mitsubishi Caterpillar Forklift Am., Inc., 822 F. Supp 2d 896 (D. Minn. 2011) (holding that a German manufacturer was subject to arbitration in London over Minnesota and Wisconsin dealership claims).

law rules would apply. It would be unfortunate for the franchisor to unexpectedly discover that the laws of Peru might be controlling in this situation.

G. *Investment Arbitration*

A franchisor seeking to establish a beachhead in a foreign country is protected against discrimination by investment treaties. Discrimination by the sovereign, like the expropriation by the sovereign country of franchise interests, might actually be subject to investment arbitration. Unlike commercial arbitration between private parties, another form of international arbitration exists between private parties as investors and sovereign countries. Instead of a private contract law, the arbitration procedure is controlled by a bilateral investment treaty (BIT) between the country of the investor and the host state where the investor is located.[76] Investment arbitration can be instituted even without a contract between the sovereign and the investor because the "contract" is effectively the treaty between their countries.[77] The World Bank provides a forum for arbitration, the International Centre for Settlement of Investor Disputes (ICSID), where one can arbitrate against a country without an arbitration clause.[78]

Investment arbitration may be a vehicle for compensation where the sovereign (or even a remote arm or agent of the sovereign) violates the rights of the investor within the sovereign state. Investment arbitration protects the following commercial rights of a foreign entity operating in a different country:

1. Expropriation. Seizure or nationalization of a business, or unreasonable interference with a business to such a degree that the investor is deprived of rights of ownership is prohibited. Forced cancellation of an operating license or renegotiation of a contract can be expropriation. Opportunistic behavior of the sovereign country should be examined.
2. Fair and equitable treatment. This relates to protection against discriminatory or arbitrary treatment that would prohibit the state from frustrating the legitimate expectations of foreign-investment-supported activities. For example, parties should determine if the host state failed to provide proper authorizations for an otherwise approved investment or if the courts, as organs of the government, discriminated against the foreign investor.
3. Protection and Security. Reasonable measures must be taken by the state and its organs to prevent either physical harm to property during armed conflict or, alternatively, failure to investigate or prosecute acts of violence.

76. ICSID, Worldbank.org.
77. *Id.*
78. The ICSID Convention is a treaty that had been ratified by 154 Contracting States and has been in effect since October 14, 1966.

4. Discrimination. The host country must treat the foreign investor the same as its own investors.
5. Freedom to Transfer Funds. Investors have the right to pay dividends or debt payments outside of the host country.

Decisions to assert investor arbitrations require advance notice to the host country of the intent to assert a violation of the BIT, and the prerequisites to initiation can be technical as they depend in part of the BIT between the countries. Most countries do have a BIT with other countries and do resolve these cases informally. If an investor arbitration is initiated, all aspects except those involving state secrets or other confidential information are public for the purpose of ensuring public confidence in the international system of justice.

IV. Conclusion

International commercial arbitration is the preferred method of dispute resolution for international commerce. The protocols and outcomes are trustworthy, reliable, and commercially reasonable. The alternative is for the parties to rely on the tender mercies of the national court systems, with national biases, rather than the world-class arbitrators deciding international matters regularly without regard to nationality. The power and respect for international arbitration are perhaps best recognized by the effectiveness of treaty arbitration against sovereign powers. The jurists who decide these international issues are trained to avoid bias and dispense justice to both the great and the small. As franchising becomes more international, parties should expect more international dispute resolution as well as the use of international arbitration for franchise disputes to become more common.