

**American Bar Association
35th Annual Forum On Franchising**

DISPUTE RESOLUTION INTERNATIONAL STYLE

**Ronald K. Gardner, Jr.
Dady & Gardner, P.A.
Minneapolis, Minnesota**

**Peter J. Klarfeld
Gray Plant Mooty Mooty & Bennett, P.A.
Washington, D.C.**

**Geoffrey B. Shaw
Cassells Brock & Blackwell, L.L.P.
Toronto, Canada**

October 3 - 5, 2012
Los Angeles, CA

TABLE OF CONTENTS

	<u>Page</u>
I. ARBITRATION AND MEDIATION CHOICES IN INTERNATIONAL FRANCHISE AGREEMENTS: WHEN SHOULD A FRANCHISOR OR MASTER DEVELOPER INCORPORATE THEM?.....	1
A. Major Factors To Consider In Choosing Whether To Arbitrate	1
1. Is There A Process For Appeal?.....	1
2. What Domestic Or International Jurisdictional Issues Exist In The Treatment Of Dispute Resolution Through Arbitration?	2
3. Are There Confidentiality Issues That Must Be Addressed? How Do Arbitration Institutions Ensure Confidentiality?	4
4. Is There Arbitrator Expertise In The Area? When Are Institutional Arbitration Models Preferable?	5
5. What Is The Trade-Off Between Institutional Arbitration And Other Models Of Dispute Resolution?	6
II. THE PRE-NEGOTIATED RULES OF INTERNATIONAL ARBITRATION	8
A. Why “Pre-negotiated”?.....	8
B. Alternatives to Pre-negotiated Rules	9
III. COMPARISON OF KEY RULES OF INTERNATIONAL ARBITRATION PROVIDERS	10
A. The Players.....	10
1. United Nations Commission on International Trade Law (UNCITRAL).....	10
2. International Centre for Dispute Resolution (ICDR)	10
3. International Chamber of Commerce (ICC)	10
4. JAMS	11
5. London Court of International Arbitration (LCIA)	11
6. Hong Kong International Arbitration Centre (HKIAC)	11
7. Singapore International Arbitration Centre (SIAC)	12
8. World Intellectual Property Organization (WIPO).....	12
9. Swiss Chambers’ Arbitration Institution (hereinafter Swiss Rules)	12
B. Key Issues Addressed by the Rules: A Comparison	13
1. Filing Requirements	13
a. Documents Required	13

TABLE OF CONTENTS
(continued)

	<u>Page</u>
b. The Language of the Arbitration Demand	14
c. Notice to Opposing Party	14
d. Fees	15
2. Procedure For The Selection Of Arbitrator(s)	17
a. How Many Arbitrators Will There Be?	17
b. What Happens When The Parties Cannot Agree On A Single Arbitrator?	18
c. How Do The Organizations Deal With Appointment Of A Third Arbitrator In A Three Arbitrator Panel?	19
d. Can The Organization Override The Arbitrator Selections Made By The Parties?	20
e. What Standards Govern Challenging The Other Party's Arbitrator Choice?	20
3. Venue.....	20
4. The Language of the Arbitration	21
5. Choice of Law	22
6. Discovery	23
7. Arbitration Costs and Attorney's Fees	24
8. Availability of Interim and/or Equitable Relief.....	25
9. Confidentiality of Proceedings	26
10. Scope of Award.....	27
C. Best Practices in Rule Selection	27
IV. DRAFTING AN ARBITRATION PROVISION FOR USE IN AN INTERNATIONAL FRANCHISE AGREEMENT	28
A. Choice of Substantive Law.....	29
B. Choice Of Venue/Rules/Administering Organization	31
C. Selection of Arbitrators.....	33
1. Number of Arbitrators	33
2. Selection of Arbitrators	33
D. The Language In Which The Proceedings Will Be Conducted	34

TABLE OF CONTENTS
(continued)

	<u>Page</u>
E. The Availability Of Discovery.....	34
F. The Right To Apply To A Court For Emergency Relief	35
G. Procedures For The Taking Of Evidence	35
H. Resolution Of Disputes Between A Franchisor And Foreign Subfranchisees	36
V. CONCLUSION	36
APPENDIX.....	38
Biographies	

DISPUTE RESOLUTION INTERNATIONAL STYLE

I. ARBITRATION AND MEDIATION CHOICES IN INTERNATIONAL FRANCHISE AGREEMENTS: WHEN SHOULD A FRANCHISOR OR MASTER DEVELOPER INCORPORATE THEM?

A. Major Factors To Consider In Choosing Whether To Arbitrate

The use of arbitration as a mechanism for dispute resolution in commercial agreements is increasing around the world. Area Development Agreements, Master Franchise Agreements and unit level franchise contracts are no exception to this trend. A study by Christopher R. Drahozal of franchise agreements in the United States indicates that 45% of the franchise agreements considered contained an arbitration clause.¹ The significant percentage, at least at the domestic level is, in part, based on the prevalent understanding that an arbitration clause can serve as a useful mechanism for allocating risk to the mutual benefit of franchisors and franchisees.² At the international level, recent surveys suggest that 73% of corporations prefer international arbitration, and 95% of corporations expect to continue using international arbitration.³

But although there is potential benefit for both parties, this “sacred cow” as one commentator terms the arbitration clause, may be used to prevent a wide range of actions, such as class actions or the right to a jury trial in some jurisdictions.⁴ That being said, not all arbitration clauses are created equal and not all arenas for international dispute resolution are the same; as such, franchisors venturing into the global marketplace should consider a number of factors before adopting arbitration as a one-size fits all solution for dispute resolution in their agreements with area developers, masters and unit level franchisees.

1. Is There A Process For Appeal?

As stated by the United States Supreme Court in *Glimmer v. Interstate/Johnson Lane Corp.*, a party to arbitration “trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”⁵ From a procedural standpoint, arbitration does not have the same appeal procedures as litigation. In fact, it is “far more likely that a trial court’s erroneous ruling will be overturned on appeal than an arbitrator’s erroneous ruling will be vacated

¹ Christopher R. Drahozal, *Arbitration Clauses in Franchise Agreements: Common and Uncommon Terms*, 22 FRANCHISE L.J. 81, 82 (2002) (Drahozal).

² William L. Killion, *An Informal Study of Arbitration Clauses Reveals Surprising Results*, 22 FRANCHISE L.J. 79 (2002).

³ *International Arbitration Franchise Agreements (Webinar)*, DLA Piper 3 (2012); <http://www.dlapiper.com/files/Uploads/Documents/PRESENTATION-DECK-Franchise-Arbitration-1.pdf>.

⁴ Jennifer Gehrig, *Arbitration: A Franchisee’s Perspective*, 22 FRANCHISE L.J. 121, 122 (2002).

⁵ 500 U.S. 20, 29-33 (1991); see also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

by a court.”⁶ By contrast, any resolution proposed by a mediator is ‘non-binding’; as such either party can simply not agree to a resolution that it views as unfair.

Without question, there are limited avenues for overturning an arbitrator’s decision in most jurisdictions. For example, although there is some debate in the United States as to whether an arbitrator’s “manifest disregard of the law” is sufficient for a court to set aside an arbitrator’s award under the Federal Arbitration Act,⁷ an arbitrator’s error “in ruling on the merits of a case” is not enough for a court to overturn the award.⁸ Similarly, developments in Indian arbitration regulation provide an international example of the binding nature of arbitral decisions. The adoption of the Arbitration and Conciliation Act of 1996 was structured to incentivize the use of mediation, conciliation and other forms of alternative dispute resolution to achieve settlement without litigation. In doing so, the Arbitration and Conciliation Act characterized arbitration decisions as “binding on the parties and the person claiming under them.”⁹

In Italy, national courts have viewed arbitration as a “positive” step as opposed to jumping straight to litigation. Although the courts hold that arbitration decisions should be treated as contracts (*i.e.*, based on the general principle that neither is self-enforcing), the Italian Code of Civil Procedure contemplates that no State can interfere with a pending arbitration proceeding and must remain neutral until an award has been finalized.¹⁰ In sum, franchisors need to be comfortable with the varying appeal mechanisms available before committing to arbitration as the exclusive form of dispute resolution in their international franchise agreements. Although there are generally safeguards, there is no “one-size-fits-all” solution satisfactory to all international situations.

2. What Domestic Or International Jurisdictional Issues Exist In The Treatment Of Dispute Resolution Through Arbitration?

Jurisdictional issues can arise when considering international arbitration based on the simple fact that there does not exist an absolute right to arbitration in all jurisdictions. Each jurisdiction has specific rules of accessibility and substance based on the applicable contract. Although this can provide a challenge in ensuring that the wording of the clause is specific in indicating what methods are preferred by the parties, the arbitration option is also beneficial in providing flexibility in constructing options that do not have the rigorous and disparate criteria of regional, non-domestic litigation. In this regard, legislation in each jurisdiction will often point parties

⁶ Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433 (2010) (Drahozal and Ware).

⁷ See Annie Chen, *The Doctrine of Manifest Disregard of the Law after Hall Street: Implications for Judicial Review of International Arbitrations in U.S. Courts*, FORDHAM INT’L L.J., 1872, 1875 (2008) (“Since *Hall Street (Hall Street Associates v. Mattel, Inc.)*, U.S. circuit courts have disagreed on the status of manifest disregard, leaving the doctrine highly unsettled.”).

⁸ Drahozal and Ware, *supra* note 6, at 19.

⁹ See “The Arbitration and Conciliation Act, 1996”, § 35, INDIA CODE (1996); Arbitration Laws in India, India Juris. (Nov. 1, 2004) 6, <http://www.indiajuris.com/pdf/Arbitration%20Laws%20in%20India.pdf> (last visited July 18, 2012).

¹⁰ Codice di procedura civile [C.p.c.] [CODE OF CIVIL PROCEDURE] Art. 808, 819; see Italy: International Arbitration, <http://www.cdr-news.com>, <http://www.cdr-news.com/component/content/article/263-italy-international-arbitration>.

considering arbitration in the direction of creating their own agreement or, alternatively, provide “fallback” terms of arbitration if the parties have not settled on a regime.¹¹

Because of these variations, franchisors should recognize the distinct governing structure of each jurisdiction and how legislative structures potentially impact the forms of oversight. For example, Canada’s federal structure encompasses 14 separate provincial and territorial regions, each of which participates in two parallel arbitration structures. Although the Commercial Arbitration Act¹² applies to issues arising in the province of Ontario where both parties originate in Canada, the International Commercial Arbitration Act¹³ applies to situations where at least one of the concerned parties is from outside of Canada.¹⁴ In comparison, German arbitration law does not differentiate between matters of domestic and international arbitration proceedings.¹⁵

Another jurisdictional distinction that franchisors should consider is variations in the adoption of international arbitration models. Take, for example, the adoption of the UNCITRAL Model Law as a mechanism for assisting States in structuring international commercial arbitration proceedings. Mexico, for example, has adopted the complete version of the UNCITRAL Model Law as part of its domestic Commerce Code.¹⁶ In comparison, some jurisdictions have stopped short of adopting the UNCITRAL Model Law in its entirety, but have integrated certain provisions. For instance, some Canadian jurisdictions have adopted the UNCITRAL Model Law through direct amendments, as in Ontario,¹⁷ while others have only integrated specific terms into local legislation, as in British Columbia.¹⁸ Similarly, while the Italian international arbitration process is said to be “inspired” by the UNCITRAL Model Law,¹⁹ the Italian Code of Civil Procedure regulates international commercial arbitration in the jurisdiction.²⁰ Again, there is no “one-size-fits-all” solution for this important issue.

¹¹ Judy Rost et al., *Comparative International Perspectives of Arbitration in the Franchising Context*, 31 *FRANCHISE L.J.* 124, 124 (2012).

¹² Commercial Arbitrations Act, R.S.B.C. 1996, ch. 55(2)(1) (Can.). The provincial counterpart in Ontario is: Arbitration Act, S.O. 1991, ch. 17 (Can).

¹³ RSO 1990, c I.9 P.30 (Can.).

¹⁴ Rost, *supra* note 11, at 125.

¹⁵ See ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE] § 1025; Germany: International Arbitration, CDR-NEWS.COM, <http://www.cdr-news.com/component/content/article/260-germany-international-arbitration>.

¹⁶ See Código de Comercio [CCo] [Commercial Code], art. 1415-63, Diario Oficial de la Federación [DO], October 19, 2011.

¹⁷ See International Commercial Arbitration Act, RSO 1990, c I.9 (Can.).

¹⁸ See International Commercial Arbitration Act, RSO 1996, c. 233 (Can.).

¹⁹ C.p.c. Art. 808, 819; see Italy: International Arbitration, CDR-NEWS.COM, <http://www.cdr-news.com/component/content/article/263-italy-international-arbitration>.

²⁰ Martindale-Hubbell International Law Digest, 2005 DIGEST at ITL-19. See also John Lorn McDougall & Meghan L. Thomas, *Thoughts on Discovery in International Arbitration*, Rome: The Commercial Bar Association -North American Meeting, 14 (2006).

In this regard, franchisors should not assume that the adoption of arbitration as the mechanism for dispute resolution in a franchise agreement will produce the same outcome in every jurisdiction, even if it appears as though they have adopted similar legislative regulation based on a common format, such as the UNCITRAL Model Law.

**3. Are There Confidentiality Issues That Must Be Addressed?
How Do Arbitration Institutions Ensure Confidentiality?**

One oft-stated benefit of arbitration in the context of commercial dispute resolution is the ability to keep the proceedings and outcome confidential. As stated by a former Secretary-General of the International Chamber of Commerce (“ICC”), “the users of international commercial arbitration, *i.e.* the companies, government and individuals who are parties in such cases, place the highest value upon confidentiality as a fundamental characteristic of international commercial arbitration.”²¹ In structuring an arbitration clause, it is important for both parties to consider the need for privacy in terms of the ongoing relationship. The degree of privacy extended to the parties by different arbitration organizations will be covered in Section III, below. There may well be a benefit to ensuring that, in the event of a dispute going to arbitration, the parties’ information and discussions will remain protected from public exposure. This general benefit also applies to mediation in the franchise context: both parties can agree to enter into mediation proceedings and that the results will remain outside of the public realm. Article 26 of the ICC Arbitration Rules provides an example of how some arbitration rules seek to control disclosure of information produced during an arbitration:

3. The Arbitral Tribunal shall be in full charge of hearings, at which all the parties shall be entitled to be present. Save with the approval of the Arbitral Tribunal and the parties, persons not involved in the proceedings shall not be admitted.²²

The rules of other major international commercial arbitration organizations, such as the China International Economic and Trade Arbitration Commission and the Japanese Commercial Arbitration Association, provide confidentiality for the hearing process similar to the ICC model.

However, although the hearing process is protected as confidential in the rules of many arbitration organizations, different jurisdictions have adopted a range of disclosure mechanisms for the remainder of the arbitration process. While there exists an “implied duty” of confidentiality in English arbitrations, there is no guarantee of confidentiality in the arbitration procedure under Mexican Law, and therefore parties often agree to an express confidentiality provision from the outset in order to avoid public disclosure.²³ Further variations may exist within countries between the federal and the local levels. For example, certain provinces within Canada require that

²¹ Boyd, S, *Expert report of Stephen Bond in Esso/BHP v Plowman*, 11 *Arbitration International* 273 (1995); Alan Redfern, et al, *Law and Practice of International Commercial Arbitration* 32 (London: Thomson, 4th ed. 2004).

²² See International Chamber of Commerce, *International Arbitration Rules*, Art. 26(3), *available at* http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf [hereinafter ICC Rules].

²³ Rost, *supra* note 11, at 126.

franchisors disclose their policies with regards to mediation and arbitration of disputes, whereas others do not.²⁴

One commentator has suggested that public disclosure of commercial arbitration is a “growing trend” internationally, where there is a belief amongst jurists and regulators that the disclosure of the arbitration proceedings is in the best interest of the public.²⁵ The Australian case of *Esso Australia Resources Ltd v. The Honorable Sidney James Plowman* underscores this reasoning.²⁶ There, the court held that while the arbitration process called for *in camera* hearings, a prohibition on the public disclosure of documents is not essential to commercial arbitration as a whole. Retaining only a *relative* (as opposed to an *absolute*) degree of confidentiality was approved because of the “public’s legitimate interest in obtaining information about the affairs of public authorities.” This contrasts, for example, with the established privacy of the hearing process in the ICC model.

In light of these considerations, franchisors should understand the limitations of confidentiality provisions when considered against the backdrop of jurisdictional minimum public information requirements. Although confidentiality may be guaranteed in the hearing process, it is wrong to assume that arbitration will necessarily protect the information of the parties involved. Considering that certain jurisdictions may overturn confidentiality agreements if they are not in the public interest, depending on the particular interests of the parties involved, the best option for franchisors to ensure confidentiality in the proceedings is to include an express clause indicating the relevant rules based on an established formula.

4. Is There Arbitrator Expertise In The Area? When Are Institutional Arbitration Models Preferable?

Most disputes arising from international franchise agreements are submitted to the administration of institutional arbitration organizations, such as the American Arbitration Association (“AAA”), the London Court of International Arbitration (“LCIA”) or the ICC. By submitting their dispute to these institutions, the parties garner the benefit of the established rules and the legal expertise of the institution, which, as Johannes Willheim observes, provides “more legal certainty” than *ad hoc* arbitration.²⁷ In the EU, there has been an influx of arbitration organizations specializing in niche areas such as competition law. Examples of such bodies include the Zurich Chamber of Commerce and the Stockholm Chamber of Commerce. However, an equivalent body has not developed in the area of franchise arbitration.

Studies have pointed to a differentiation of preference in opting for arbitration based on the type of industry of the franchise. For example, Drahozal’s study suggests that, of the franchises studied, “all four (100 percent) of the franchise agreements for hair care franchises in the sample

²⁴ See Alberta Franchises Act, RSA 2000, c F-23, para. 3 (Can.); Ontario Arthur Wishart Act (Franchise Disclosure), 2000, SO 2000, c 3, para 5(4) (Can.); *Ibid.*

²⁵ Redfern, *supra* note 21, at 34.

²⁶ (1995) 183 CLR 10.

²⁷ *Id.*

included arbitration clauses, as did 70 percent for retail-oriented franchises and 67 percent for business and accounting services franchises. By contrast, none of the franchise agreements for real estate, fitness, or training franchises included arbitration clauses, and only one of six (17 percent) of franchise agreements for travel services franchises did so. For food service or restaurant franchises--the most common line of business in the sample--eleven of twenty-five (44 percent) of the franchise agreements contained arbitration clauses."²⁸

Due to constraints in the expertise of arbitrators in certain sectors and the reliability that institutions provide, franchisors tend to prefer establishing a connection with an institution, such as the AAA. In fact, Drahozal's study suggests that "all but one clause (97 percent) provided for the arbitration to be administered by the [AAA] under some version of the AAA Commercial Arbitration Rules."²⁹ The one exception was "under the then-prevailing commercial arbitration rules of a recognized independent alternate dispute resolution service to be selected by Franchisor such as the American Arbitration Association, JAMS/Endispute or United States Mediation and Arbitration."³⁰

However, from the perspective of franchisees, opting to hire an international arbitration institution can be seen as a prohibitive expense to the arbitration process.³¹ As one commentator has emphasized, the cost of bringing a claim before an international commercial arbitration organization "is likely to be considerably higher than that of bringing or defending the same claim before a national court."³² This additional expense is in part due to the necessity of paying the fees and the expenses of the arbitral tribunal, the costs associated with accommodations for the hearings themselves, as well as the fees and expenses for the arbitral institution.³³ In the case of the ICC, the parties to the dispute must pay a fixed fee before the arbitration occurs, which is evaluated on an *ad valorem* basis. By contrast, the actual cost of facilitating litigation in most jurisdictions, including the salary of the judge and price of renting courtroom space, is borne by the state. This cost prevents many franchisees from opting for arbitration, which makes less-costly options, such as litigation, more appealing.

5. What Is The Trade-Off Between Institutional Arbitration And Other Models Of Dispute Resolution?

Mediation of international franchise disputes is considered to be more cost and time efficient than the arbitration alternative. From a temporal standpoint alone, mediations can be "fairly short affairs", often running for only a single day and not requiring the arduous proceedings of litigation,

²⁸ Drahozal, *supra* note 1.

²⁹ Drahozal, *supra* note 1, at 2.

³⁰ See *supra* notes 1, 2, 7.

³¹ Gehrig, *supra* note 3 at 1-2.

³² Redfern, *supra* note 21, at 268.

³³ *Ibid.*

such as discovery and motions.³⁴ Moreover, the number of mediation and ADR-focused centers (as opposed to institutions, such as the ICC, that focus primarily on arbitration) has increased substantially. For example, New York has the Center for Public Resources, while London has the Center for Dispute Resolution, which has received support from professional firms since its inception in 1990. In India, the first mediation center was established in 2005, and there are now a total of four centers, including the Mediation Rules of Delhi Centers, in the capitol, and at least one other mediation center in every Indian province. In this regard, mediation can be less costly to the parties and more accessible on the international stage than either arbitration or litigation.

But this reasoning only accounts for costs incurred in the mediation itself and not the costs that are borne by the parties in the event the underlying dispute goes unresolved. Mediation does not impose a result; thus, it is not equipped to provide immediate relief to a party, such as a temporary restraining order or summary judgment.³⁵ In situations where there is a high-risk of harm that cannot be cured by the payment of money (*i.e.*, irreparable harm), a dispute resolution clause that requires mediation prior to arbitration or litigation can actually work against the party suffering irreparable harm. By contrast, a judge can grant a temporary restraining order to preserve the status quo or grant relief almost instantaneously. Even where immediate relief is not necessary, the mediation process, however short, can draw out the proceedings with no guarantee of resolution or settlement. This only further drains the funds and resources of the parties.

In this light, although clauses that require mediation before a franchisee can sue the franchisor have become “standard”,³⁶ franchisors should be careful when entering into agreements in regions where mediation is compulsory. For example, Italy introduced Decreto Legislativo on March 4, 2010, which makes mediation a first step before most disputes can reach the litigation stage.³⁷ This legislation builds upon existing Italian legislation promoting mediation for labor disputes, such as Articles 409 and 410 of the Italian Civil Procedural Code, while integrating directives from the European Union, such as the 2008/52/EC Directive,³⁸ which specifies the promotion of mediation services within and across European borders. Thus far, only four European Union member states have not complied with the directive.

In conclusion, there has been an increase in the number of international arbitration organizations, which makes the availability of alternatives to litigation more prevalent than ever. However, the costs associated with opting for institutional arbitration and the lack of franchise-specific arbitration organizations in the international arena makes the alternatives less attractive,

³⁴ Elizabeth M. Weldon and Patrick W. Kelly, *Prelitigation Dispute Resolution Clauses: Getting the Benefit of Your Bargain*, 31 FRANCHISE L.J. 28, 31 (2011).

³⁵ Drahozal and Ware, *supra* note 7, at 19.

³⁶ Edward Wood Dunham, *Enforcing Contract Terms Designed to Manage Franchisor Risk*, 19 FRANCHISE L.J. 91, 92 (2000).

³⁷ Luca Barbero, *Mediation Practice in Italy*, INTA.ORG, (Jan. 15, 2012), <http://www.inta.org/INTABulletin/Pages/MediationPracticeinItaly.aspx>.

³⁸ Directive 2008/52/EC of the European Parliament and of the Council (21 May 2008); <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF> [viewed: 10 July 2012].

particularly for the franchisee, who is usually at a financial disadvantage. As such, international franchise organizations would be advised to evaluate the opportunity to create their own niche arbitration institutions that offer services that are equally accessible to the franchisor and the franchisee alike. In the context of mediation, franchisors should ensure that the franchise agreement imposes strict time constraints on the parties to resort to mediation, so that the franchisee does not draw out the proceedings to produce added expense.³⁹ Moreover, franchisors can push to make compliance with a mediation provision a condition precedent to a franchisee being able to sue or seek arbitration, which will extinguish potential scenarios of unnecessary stalling on the franchisee’s behalf, particularly in the international arena where jurisdictional distinctions can make mediation a compulsory step.⁴⁰

II. THE PRE-NEGOTIATED RULES OF INTERNATIONAL ARBITRATION

A. Why “Pre-negotiated”?

“The international business community has long considered international arbitration preferable to litigation in national courts for a variety of reasons, including neutrality of forum, privacy, speed, lower costs, and enforcement.” Peter N.W. Sherwin and Douglas C. Rennie, *Interim Relief Under International Arbitration Rules And Guidelines: A Comparative Analysis*, 20 Am. Rev. Int’l Arb. 317 (2010).

The following chart demonstrates many of the incentives that drive parties to accept pre-determined rules of international arbitration.

Common Features of Many IP Disputes	Court Litigation	Arbitration
International	-Multiple proceedings under different laws, with risk of conflicting results	-A single proceeding under the law determined by the parties -Arbitral procedure and nationality of arbitrator can be neutral to law, language and institutional culture of parties
Technical	Decision maker might not have relevant expertise	Parties can select arbitrator(s) with relevant expertise

³⁹ *Ibid.*

⁴⁰ *Ibid.*

Common Features of Many IP Disputes	Court Litigation	Arbitration
Urgent	-Procedures often drawn-out -Injunctive relief available in certain jurisdictions	-Arbitrator(s) and parties can shorten the procedure -WIPO Arbitration may include provisional measures and does not preclude seeking court-ordered injunction
Require Finality	Possibility of appeal	Limited appeal option
Confidentiality/Trade Secrets and Risk to reputation	Public proceedings	Proceedings and award are confidential

WIPO Arbitration and Mediation Center, WIPO.INT, <http://www.wipo.int/amc/en/center/background.html>.

B. Alternatives to Pre-negotiated Rules

Although this section focuses on the “pre-negotiated rules” that exist around the world, practitioners should be aware that there is ALWAYS room for negotiation about what rules should be used after a dispute breaks out. For instance, if the “rules” that were selected in the original contract do not, on their face, allow for discovery of a certain type, and both parties agree that such discovery would be beneficial to the process, the parties can always agree to modify their compliance with the selected rules to allow for this type of an “exception.” In addition, as reflected in Section IV below, the parties can agree to the rules promulgated by a particular arbitral organization as modified by the parties in their original agreement to arbitrate.

In short, and despite the details that flow from this point forward regarding the various rules, arbitration is, at its core, subject to the agreement of the parties -- and “agreement of the parties” is a fluid concept. What we agreed on yesterday is subject to changing our mutual minds tomorrow. Often times, even the most experienced litigators will get caught up in reading arbitration rules like they are statutory in nature -- they are not. These rules will generally function like court rules in the absence of any agreement of the parties, but at their core, they are “guidelines” rather than rules, subject to change by the parties, or in the absence of agreement of the parties, order of the arbitrator for good cause shown.

With this significant caveat in mind, we now turn to a comparison of the significant provisions of the rules adopted by some of the major providers of international arbitration services.

III. COMPARISON OF KEY RULES OF INTERNATIONAL ARBITRATION PROVIDERS

A. The Players

1. United Nations Commission on International Trade Law (UNCITRAL)

UNCITRAL was established in 1966 as a subsidiary body of the United Nations General Assembly⁴¹ The body has prepared a variety of conventions, model laws, and instruments dealing with the substantive law governing trade transactions and business law generally.⁴² UNCITRAL texts are formulated by a body of 60 elected member States, as well as observer states, inter-governmental organizations and non-governmental organizations.⁴³ The Secretariat of UNCITRAL is the International Trade Law Division of the Office of Legal Affairs of the United Nations Secretariat.⁴⁴

2. International Centre for Dispute Resolution (ICDR)

The ICDR was established in 1996 as the international division of the American Arbitration Association.⁴⁵ The American Arbitration Association is a not-for profit organization with offices in the United States comprised of a worldwide panel of more than 650 independent arbitrators and mediators.⁴⁶ The ICDR offers those who submit to it choices on procedural rules that will apply, how appointments will be scheduled, language, etc.⁴⁷

3. International Chamber of Commerce (ICC)

The ICC was founded in 1919, and currently has thousands of member companies in over 120 countries.⁴⁸ Since 1945, the ICC has had the highest level of consultative status with the UN

⁴¹FAQ-Origin, Mandate and Composition of UNCITRAL, UNCITRAL.ORG, http://www.uncitral.org/uncitral/en/about/origin_faq.html.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See International, ADR.ORG, http://www.adr.org/aaa/faces/aoe/icdr?_afWindowId=mw5gf8hp1_109&_afLoop=133975102626630&_afWindowMode=0&_adf.ctrl-state=mw5gf8hp1_34.

⁴⁶ See ICDR Services, adr.org, http://www.adr.org/aaa/faces/aoe/icdr/icdrservices?_afLoop=134171567580047&_afWindowMode=0&_afWindowId=mw5gf8hp1_31#%40%3F_afWindowId%3Dmw5gf8hp1_31%26_afLoop%3D134171567580047%26_afWindowMode%3D0%26_adf.ctrl-state%3Dmw5gf8hp1_167.

⁴⁷ *Id.*

⁴⁸ What is ICC?, ICCWBO.ORG, <http://www.iccwbo.org/id93/index.html>.

and its agencies.⁴⁹ The body now has over 12 commissions of experts in specialized fields in business, such as banking techniques, financial services, and others.⁵⁰

4. JAMS

JAMS claims to be the largest ADR provider in the world.⁵¹ The organization was founded in 1979, and now has over 280 full-time neutrals, including retired judges and attorneys, and 195 employee associates.⁵² Just last year, JAMS and the ADR Center in Italy formed JAMS International, a body that provides mediation and arbitration of cross-border disputes.⁵³ JAMS International is headquartered in London, but also has locations in Amsterdam, Milan, New York, and Rome.⁵⁴

5. London Court of International Arbitration (LCIA)

The LCIA has a three-tiered structure, consisting of the company, the arbitration court, and the secretariat.⁵⁵ The board appoints members of the arbitration court, which has thirty-five members, of whom no more than six may be citizens of the United Kingdom.⁵⁶ The LCIA became a non-profit company, limited by guarantee, and fully independent of its founding bodies, in 1986.⁵⁷ Those who are interested in being governed by the LCIA should be aware that other organizations, such as LCIA India (an independent arbitral institution based in New Delhi) offer rules that are “closely modeled on the LCIA rules.”⁵⁸

6. Hong Kong International Arbitration Centre (HKIAC)

The HKIAC was established in 1985 to meet the demand for arbitral services in Asia.⁵⁹ Today, the HKIAC is completely independent from the government of Hong Kong.⁶⁰ The

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See About JAMS, JAMSADR.ORG, http://www.jamsadr.com/aboutus_overview/.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Organisation Structure, LCIA.ORG, <http://www.lcia.org/LCIA/Organisation.aspx>.

⁵⁶ *Id.*

⁵⁷ See History of the LCIA, LCIA.ORG, http://www.lcia.org/LCIA/Our_History.aspx.

⁵⁸ See Overseas, LCIA.ORG, <http://www.lcia.org/LCIA/Overseas.aspx>.

⁵⁹ See About Us, HKIAC.ORG, <http://www.hkiac.org/index.php/en/hkiac/about-us>.

⁶⁰ *Id.*

organization is a non-profit company that is governed by a council of businesspeople and professionals selected from across the globe.⁶¹ The Secretariat is located in the Central Business District in Hong Kong.⁶²

7. Singapore International Arbitration Centre (SIAC)

The SIAC is an independent, nonprofit organization founded in 1991 to meet the demand for arbitration in Asia.⁶³ SIAC is operated pursuant to a published Code of Practice that includes a Code of Ethics for arbitrators.⁶⁴ The SIAC is a party to the 1958 New York Convention and awards offered by it can be enforced in over 140 countries.⁶⁵ Moreover, there is no restriction on foreign law firms “engaging in and advising on arbitration in Singapore.”⁶⁶

8. World Intellectual Property Organization (WIPO)

WIPO is based in Geneva, Switzerland and also has an office in Singapore.⁶⁷ The WIPO Arbitration and Mediation Center was established in 1994 to offer ADR services for international commercial disputes.⁶⁸ WIPO assists parties in selecting a mediator, arbitrator, or expert from its database of over 1,500 neutrals.⁶⁹

9. Swiss Chambers’ Arbitration Institution (hereinafter Swiss Rules)

The Chambers of Commerce and Industry of seven Swiss cities established the Swiss Chambers’ Arbitration Institution.⁷⁰ The organization consists of an arbitration court that is fully autonomous, and a secretariat, which assists the court in administering the arbitrations.⁷¹ The secretariat has seven locations throughout Switzerland.⁷²

⁶¹ *Id.*

⁶² *Id.*

⁶³ See About US, SIAC.ORG, http://www.siac.org.sg/index.php?option=com_content&view=article&id=46&Itemid=66.

⁶⁴ *Id.*

⁶⁵ What Singapore Has to Offer, SIAC.ORG, http://www.siac.org.sg/index.php?option=com_content&view=article&id=47&Itemid=65.

⁶⁶ *Id.*

⁶⁷ WIPO Arbitration and Mediation Center, WIPO.INT, <http://www.wipo.int/amc/en/center/background.html>.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Organization, swissarbitration.org, <https://www.swissarbitration.org/sa/en/organisation.php>.

⁷¹ *Id.*

⁷² *Id.*

B. Key Issues Addressed by the Rules: A Comparison

It should come as no surprise that the rules of the foregoing organizations differ. Understanding these differences is essential to determining which organization may be right for your client.

The vital questions practitioners must consider in deciding whether arbitration before one of these organizations is right for their client should include: (1) how does a claimant initiate an arbitration; (2) in what language must the arbitration take place; (3) what type of notice must be given to an opposing party; (4) what are the initiation fees; (5) how do the parties select an arbitrator; (6) how is venue determined; (7) are interpreters allowed; (8) what substantive law will apply; (9) what procedures are there for discovery; (10) are attorneys' fees recoverable; (11) will interim or equitable relief be available; (12) will the proceedings be kept confidential; and finally, (13) what is the scope of the award? We will consider how the Rules of the various noted organizations address each of these issues seriatim.

1. Filing Requirements

a. Documents Required

Generally, initiating an arbitration requires a notice of arbitration and a statement of claim. The notice must be given to both the arbitration administrator and the opposing party.⁷³ A typical notice consists of:

- (a) a demand that the dispute be referred to arbitration;
- (b) the names, addresses and telephone numbers of the parties;
- (c) a reference to the arbitration clause or agreement that is invoked;
- (d) a reference to any contract out of or in relation to which the dispute arises;
- (e) a description of the claim and an indication of the facts supporting it;
- (f) the relief or remedy sought and the amount claimed; and
- (g) [it] may include proposals as to the means of designating and the number of arbitrators, the place of arbitration and the language(s) of the arbitration.⁷⁴

⁷³ International Centre for Dispute Resolution, International Arbitration Rules, Art. 2(1), *available at* http://www.adr.org/aaa/faces/rules/searchrules?_afLoop=145567827590862&_afWindowMode=0&_afWindowId=13jodbzgI4_6#%40%3F_afWindowId%3D13jodbzgL4_6%26_afLoop%3D145567827590862%26_afWindowMode%3D0%26_adf.ctrl-state%3D13jodbzgL4_54 [hereinafter ICDR Rules].

⁷⁴ ICDR Rules, *supra* note 33, Art. 2(3).

Under the ICDR Rules, the arbitration is deemed to commence on the date on which the administrator receives the notice, and after receipt of such notice the administrator shall communicate to all the parties involved that the arbitration has commenced.⁷⁵ The arbitration organization may have its own required number of copies to submit and may allow a limited time in which to pay the filing fee, so an attorney should carefully examine these requirements, or risk the closing of the arbitration without prejudice.⁷⁶ Not all arbitration rules make allowance for electronic filing. The JAMS rules are advanced in this area. They allow (unless prohibited by law in the place to be filed) a request for arbitration to be filed electronically, and further allow all communications and filings to be done through electronic means if the parties agree, or if the arbitrator so orders.⁷⁷

b. The Language of the Arbitration Demand

It is not entirely clear in what language the demand is required to be under most of the arbitration rules. The Hong Kong International Arbitration Center is unique in specifying that the notice must be submitted in English or Chinese (unless otherwise agreed to by the parties).⁷⁸ As the language the arbitration will be conducted in will be critical for a Claimant in deciding whether to hire an interpreter or work with other counsel, the language of the demand will likely set the stage for this more critical inquiry.

c. Notice to Opposing Party

Most arbitration organizations contemplate a separate statement of claim that will be submitted, either at the time of filing the arbitration demand, or within a period of time following the initiation of the arbitration determined by the arbitrator. For example, the Singapore International Arbitration Centre requires a separate filing by the Claimant that includes:

- (a) a statement of facts supporting the claim;
- (b) the legal grounds or arguments supporting the claim; and
- (c) the relief claimed together with the amount of all quantifiable claims.⁷⁹

⁷⁵ ICDR Rules, *supra* note 33, Art 2(2),(4).

⁷⁶ For example, the International Chamber of Commerce requires the claimant submit enough copies so that each party, each arbitrator, and the secretariat, will have a copy. See International Chamber of Commerce, International Arbitration Rules, Art. 3(1), *available at* http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf. JAMS requires that the claimant submit one copy for each respondent and two copies for the administrator. JAMS, International Arbitration Rules, Art. 2.2, *available at* <http://www.jamsadr.com/international-arbitration-rules/> [hereinafter JAMS Rules].

⁷⁷ JAMS Rules, *supra* note 36, Art. 3.

⁷⁸ See Hong Kong International Center, HKIAC Administered Arbitration Rules, Art. 4.5, *available at* <http://www.hkiac.org/index.php/en/arbitration-rules-a-guidelines/hkiac-administered-arbitration-rules> [HKIAC Rules].

⁷⁹ Singapore International Arbitration Centre, Arbitration Rules, R. 17.2, *available at* http://www.siac.org.sg/images/stories/documents/rules/SIAC_Rules_2010-revised_030311_3.pdf?phpMyAdmin=OP8vu698vunuzJZYZoW2%2CoDB3yb [hereinafter SIAC Rules] (allowing for thirty days following the request for arbitration for the claimant to submit its statement of claim). The statement required by WIPO should “contain a comprehensive statement of the facts and legal arguments surrounding the claim, including a statement of the relief

Footnote continues on next page.

Whereas the SIAC is silent as to whether documentary evidence must be submitted with the statement of claim, the WIPO Rules demand that a party include with it, “to as large an extent as possible, ... the documentary evidence upon which that Claimant relies, together with a schedule of such documents.”⁸⁰ The Swiss Rules similarly require a Claimant to include “all documents and other evidence on which it relies.”⁸¹ A copy of the contract, and of the arbitration agreement, if not in the contract, upon which the Claimant relies must also be attached to the statement of claim under the Swiss Rules.⁸² The WIPO Rules are unique in allowing for situations where there is “voluminous” documentary evidence that will be proffered by the Claimant. In these circumstances, the organization allows the Claimant to add a reference to documents that the Claimant would be prepared to submit.⁸³

d. Fees

There is significant variation between the organizations on the question of initiation fees. Some organizations have a flat fee, while others determine their required fee based upon the amount in controversy. As an example of the latter, the ICDR (like the AAA) will charge separate fees if the amount in controversy is between \$0 and \$10,000, \$10,000 and \$75,000, \$300,000 and \$500,000, and so on. To add a layer of complexity, the ICDR offers two options to Claimants to pay a fee, the standard fee schedule and the flexible fee schedule.⁸⁴ The standard schedule includes two payments, while the flexible schedule includes three payments with a lower initial filing fee, but potentially higher administrative fee of between 12% and 19% for cases proceeding to a hearing.⁸⁵ Under either option, the initial filing fee is payable in full by the filing party. Consider a comparison of the costs of filing a lawsuit for \$15,000, and \$2,500,000. Under the standard schedule, the \$15,000 suit would have an initial filing fee of \$975, and the \$2,500,000 would cost \$8,200. Under the flexible fee, the \$15,000 suit would have an initial fee of \$625 (though it would also mean a \$500 fee were the case to proceed to a hearing); the \$2,500,000 suit would have an initial fee of \$2,500 (with a proceed fee of \$6,700).⁸⁶ If the Claimant has selected the standard fee, and that

sought.” WIPO Rules, *supra* note 47, at Art. 41(b); Nations Committee on International Trade Law, Arbitration Rules, Art. 20, *available at* <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf> [hereinafter UNCITRAL Rules] (allowing a party to treat its request for arbitration as a statement of claim so long as it contains the information required by Article 20 while requiring that, “as far as possible,” documents and other evidence the claimant relies upon be annexed to the claim statement).

⁸⁰ World Intellectual Property Organization, Arbitration Rules, Art. Art. 41(c), *available at* <http://www.wipo.int/amc/en/arbitration/rules/> [hereinafter WIPO Rules].

⁸¹ Swiss Chambers’ Arbitration Institution, Arbitration Rules, Art. 18(3), *available at* https://www.swissarbitration.org/sa/download/SRIA_english_2012.pdf [hereinafter Swiss Rules].

⁸² Swiss Rules, *supra* note 43, Art. 18(1).

⁸³ WIPO Rules, *supra* note 47, at Art. 41(c).

⁸⁴ See ICDR Rules, *supra* note 33, ADMINISTRATIVE FEES.

⁸⁵ *Id.*

⁸⁶ See *Id.*

party does not know the monetary amount that will be at stake, they must either provide a range, or pay an initial filing fee of \$10,200. This is reduced to \$3,500 if the Claimant has chosen the flexible fee schedule (with an \$8,200 proceed fee). There is also a minimum initial fee that must be paid in order to have three arbitrators. For the standard schedule, that fee is \$2,800. For the flexible fee, that fee is \$1,000 for the filing.

The Swiss Rules also require a varying initiation fee depending on the amount in controversy. The scale is as follows:

1. CHF 4'500 for arbitrations where the amount in dispute does not exceed CHF 2'000'000;
2. CHF 6'000 for arbitrations where the amount in dispute is between CHF 2'000'001 and CHF 10'000'000;
3. CHF 8'000 for arbitrations where the amount in dispute exceeds CHF 10'000'000.⁸⁷

If the Claimant does not quantify the amount in dispute, it must pay a provisional deposit of CHF 5'000.⁸⁸

Contrast the ICDR and Swiss Rules approach with the ICC approach. The ICC requires a \$3,000 initiation fee (non-refundable) regardless of the size of the claim.⁸⁹ Immediately upon receipt of the arbitration demand, the Secretary General may also require Claimant to pay a provisional advance.⁹⁰ This advance is intended to cover the costs of the arbitration until the terms of reference have been drawn.⁹¹ JAMS, HKIAC, and SIAC offer the lowest initial filing fee of \$1,000 (also subject to the administrator's ordering a deposit to cover arbitration costs).⁹²

Outside of cost, another key factor bearing on a party's decision to initiate arbitration may be its strong desire to see that a particular person, because of skill, experience, or other qualities, becomes an arbitrator in the dispute. Examining how parties can secure their choice is the next topic.

⁸⁷ Swiss Rules, *supra* note 43, App. B, 1.1.

⁸⁸ *Id.*

⁸⁹ ICC Rules, *supra* note 36, App. III, Art. 1(1).

⁹⁰ ICC Rules, *supra* note 36, Art. 30(1).

⁹¹ *Id.*

⁹² See JAMS International Schedule of Fees and Costs, JAMSADR.COM, *available at* <http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS-International-Arbitration-Fees.pdf>; Fees, HKIAC.ORG, *available at* <http://www.hkiac.org/index.php/en/fees/fee-calculator>; See Estimate Your Fees, SIAC.ORG.SG, *available at* http://www.siac.org.sg/index.php?option=com_siaccalculator&view=sicacalculator&Itemid=102 [the author had difficulty finding the SIAC initiation fee, but the website allows a litigant to calculate their estimated fees based on the amount in controversy. The author computed \$5k, \$500k, and \$5,000,000, and all required a \$1000 non-refundable file fee].

2. Procedure For The Selection Of Arbitrator(s)

A few of the significant areas where international organizations differ when it comes to the way arbitrators are selected are: (A) how to decide whether to have one or three arbitrators when the arbitration agreement is silent on the issue; (B) what happens when the parties are unable to select a single arbitrator; (C) what is the process for selection of a third arbitrator when the tribunal is comprised of three arbitrators; (D) does the administrator alone have the authority to appoint an arbitrator? Phrased differently, can the administrator overrule the parties' choices; and finally, (E) what is the process for challenging an arbitrator selection? Each topic will be taken up in turn. For a chart detailing how long the parties have to select an arbitrator, see the Appendix.

a. How Many Arbitrators Will There Be?

The most common method for an arbitral tribunal to determine the number of arbitrators is to look to see if the parties have agreed on the number. If they have not, one arbitrator shall be appointed, unless the administration organization determines that three arbitrators would be appropriate.⁹³ Some of the organizations have provided detailed factors that will be considered in determining whether one or three arbitrators will be appointed. The most comprehensive of these would be the HKIAC list. The considerations include:

- (a) the amount in controversy;
- (b) the complexity of the claim;
- (c) the nationalities of the parties;
- (d) any relevant customs of the trade, business or profession involved in the said dispute;
- (e) the availability of appropriate arbitrators; and
- (f) the urgency of the case.⁹⁴

These factors are important because parties may be allowed to enter a brief on the matter.⁹⁵ Others organizations provide no factors at all and do not provide for the parties feedback on the issue.⁹⁶ An outlier in this regard is the UNCITRAL Rules, which state that if within 30 days of the Respondent's receipt of the arbitration notice the parties have not agreed on the number of arbitrators, there are to be three arbitrators.⁹⁷

⁹³ See e.g., JAMS Rules, *supra* note 36, art. 7.1 (JAMS International will review the "size, complexity, or other circumstances of the case."); ICC Rules, *supra* note 36, Art. 12(2); LCIA Rules, *supra* note 46, Art. 5.4; HKIAC Rules, *supra* note 38, Art. 6.1 (the HKIAC council is the one to appoint the arbitrator).

⁹⁴ HKIAC Rules, *supra* note 38, Art. 6.1(a)-(f).

⁹⁵ HKIAC Rules, *supra* note 38, Art. 6.2.

⁹⁶ E.g., WIPO Rules, *supra* note 15, Art. 14(b).

⁹⁷ UNCITRAL Rules, *supra* note , at Art. 7.1. This will be true unless a party proposes (within this time) to appoint a sole arbitrator and no other party appoints a second arbitrator, and the appointing authority decides one arbitrator would be appropriate.

b. What Happens When The Parties Cannot Agree On A Single Arbitrator?

There are generally two approaches when the parties are unable to select a sole arbitrator. The first says that the organization will appoint an arbitrator. An example of this is provided by the Swiss Rules. Article 7 essentially provides that where the parties have stipulated a sole arbitrator shall hear the case, or where the administrator decides only one arbitrator shall hear the case, the parties have 30 days to agree on an arbitrator--if they cannot, the administrator proceeds with the appointment.⁹⁸ The SIAC is similar. If the parties are unable to agree on an arbitrator within 21 days of the receipt of the notice of arbitration, the chairman of the SIAC shall make the appointment as soon as possible.⁹⁹ Note that there is no appeal mechanism provided for: parties have no occasion to complain if they can't agree on an arbitrator.¹⁰⁰

The second approach provides for the organization to send out a list of potential candidates to the parties to review and pass upon before the court takes into consideration their preferences. Under UNCITRAL rules, if the parties have agreed to use a single arbitrator, but are unable to agree within 30 days on a person to fill the position, the appointing authority sends to the parties an identical list of at least three names.¹⁰¹ This occurs unless the parties have agreed not to use this procedure or the appointing authority determines the procedure should not be used. The parties then have 15 days to delete the names of the potential arbitrators that they object to and order the remaining potential arbitrators in order of preference.¹⁰² Thereafter, the appointing authority will select the most highly mutually ranked arbitrator who is available to hear the matter. The appointing authority is limited to appointing arbitrators from the approved names, unless "for any reason the appointment cannot be made according to this procedure[;]" in which case the authority has discretion to appoint an arbitrator.¹⁰³ This qualifier seems to place a significant limit on the authority of the parties to select their own arbitrator.

Under the JAMS Rules, the parties are sent a list of at least five potential arbitrators, and may only strike the names of two of these candidates (while ordering the remaining arbitrators by preference).¹⁰⁴ A party has twenty days to return to the administrator their selections; if they fail to

⁹⁸ Swiss Rules, *supra* note 43, Art. 7(1)-(3).

⁹⁹ SIAC Rules, *supra* note 42, R. 7.2; *c.f.* HKIAC Rules, *supra* note 38, Art. 7.2; ICC Rules, *supra* note 36, Art. 3; ICDR Rules, *supra* note 33, Art. 6.3.

¹⁰⁰ SIAC Rules, *supra* note 42, R. 6.4.

¹⁰¹ UNCITRAL Rules, *supra* note 39, Art. 8(1)-(2); *c.f.* WIPO Rules, *supra* note 47, Art. 19(b)(i-iii). Under WIPO rules, when the parties are unable to agree on a single arbitrator, the Center will send out a list of three candidates in alphabetical order. Each party can delete the name of any candidate(s) to whom they object, and then list any remaining candidates in order of preference. If a party does not return a market list to the Center within 20 days, they are deemed to have assented to any person on that list.

¹⁰² UNCITRAL Rules, *supra* note 39, Art.8(2)(a)-(d).

¹⁰³ UNCITRAL Rules, *supra* note 39, Art. 8(2)(c)-(d).

¹⁰⁴ JAMS Rules, *supra* note 36, Art. 7.5(a)-(b).

do so, they are deemed to have consented to all the arbitrators.¹⁰⁵ There seems to be less discretion for JAMS International to select an arbitrator if both parties have objected to him or her: Article 7.5 reads that JAMS International will appoint a sole arbitrator “taking into account the preferences and objections expressed by the parties.”¹⁰⁶

It must also be noted that many of these organizations have prohibitions on having an arbitrator who is of the same nationality as any party.¹⁰⁷

c. How Do The Organizations Deal With Appointment Of A Third Arbitrator In A Three Arbitrator Panel?

The majority position amongst the organizations when there will be a three arbitrator panel is that each party will appoint an arbitrator and collectively these two arbitrators will appoint the remaining arbitrator.¹⁰⁸ This is not always the case. The ICC default rule is that the court appoints the third arbitrator (parties must have agreed otherwise for a different result to occur).¹⁰⁹ Although there generally aren't too many surprises in this area, it bears emphasizing that each organization may have an unexpected rule, so attorneys must be diligent studying the rules.¹¹⁰

¹⁰⁵ JAMS Rules, *supra* note 36, Art. 7.5(c).

¹⁰⁶ JAMS Rules, *supra* note 36, Art. 7.5(d).

¹⁰⁷ Compare ICC Rules, *supra* note 36, Art. 13(1) (“in confirming or appointing arbitrators, the court shall consider the prospective arbitrator’s nationality, residence, and other relationships with the countries of which the parties or the other arbitrators are nationals[.]”) with LCIA Rules, *supra* note 46, Art. 6.1 (“Where the parties are of different nationalities, a sole arbitrator or chairman of the Arbitral Tribunal shall not have the same nationality as any party unless the parties who are not of the same nationality as the proposed appointee all agree in writing[.]”). See also HKIAC Rules, *supra* note 38, Art. 11.2 (requiring all parties agree in writing to a sole arbitrator or three-member chairman when they are of the same nationality as a party).

¹⁰⁸ See, e.g., UNCITRAL Rules, *supra* note 39, Art. 9 (giving arbitrators thirty days to agree on a presiding arbitrator. If the arbitrators fail to agree within this time, the appointing authority decides); HKIAC Rules, *supra* note 38, Art. 8.1(b) (also giving the arbitrators thirty days); WIPO Rules, *supra* note 47, Art. 17(b) (two arbitrators have 20 days to select the presiding arbitrator).

¹⁰⁹ ICC Rules, *supra* note 36, Art. 12(5); *c.f.* SIAC Rules, *supra* note 42, R. 8.3.

¹¹⁰ Perhaps the most unexpected rule in this area comes from the WIPO. That organization, when dealing with appointment of three arbitrators in cases of multiple claimants or respondents, has a rule that applies when the parties have not agreed on an appointment procedure and the arbitration request names more than one respondent. See WIPO Rules, *supra* note 47, Art. 18(b). If the respondents fail to agree on an arbitrator within 30 days of receiving the arbitration request, any appointment made by the claimant is considered void and the Center instead appoints two arbitrators who will then select a third.

d. **Can The Organization Override The Arbitrator Selections Made By The Parties?**

Because arbitrators election is so critical, it is important to note that under certain circumstances the Arbitral Authority may override the selection made by the parties.¹¹¹ It is possible there could be a situation where the parties have agreed to a particular arbitrator at the time of entering into the arbitration agreement but this arbitrator is ultimately found incompetent (and thus would not be appointed) because of lack of knowledge in the field. Not all of the organizations make this reservation; some organizations would enforce the parties' choice without question.¹¹²

e. **What Standards Govern Challenging The Other Party's Arbitrator Choice?**

Impartiality is important for an arbitrator and there is almost a universal set of procedures requiring disclosure about the potential arbitrator. There is a great deal of coherence in this particular area, so only one organization need be considered. Take for example the ICDR. A potential arbitrator will have to disclose to the administrator "any circumstance likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence."¹¹³ There is also a continuing duty to disclose as the case proceeds.¹¹⁴ Ex-parte communications between the parties and an arbitrator and potential arbitrator are condemned (with limited exception).¹¹⁵ The party seeking to make a challenge based on any such disclosures must do so in a writing that contains the grounds for the challenge within 15 days of being notified of the appointment or within 15 days of learning of the circumstances giving rise to the challenge.¹¹⁶ The administrator then may rule on the challenge if the other party does not accept the challenge.¹¹⁷

3. **Venue**

It is important to understand that "venue" as used here refers to the "seat of the arbitration," *i.e.*, the country or city where the arbitration will be formally deemed to have taken place and whose procedural law regarding arbitration is likely to govern. The general rule to remember about venue is that the legal place of the arbitration will be where the parties have agreed in advance, or will be where the court/tribunal decides. There are often no black letter standards governing the

¹¹¹ See SIAC Rules, *supra* note 42, R. 6.3 ("In all cases, the arbitrators nominated by the parties, or by any third person including the arbitrators already appointed, shall be subject to appointment by the Chairman in his discretion."); LCIA Rules, *supra* note 46, Art. 5.5 ("The LCIA Court alone is empowered to appoint arbitrators.")

¹¹² See JAMS Rules, *supra* note 36, Art. 7.2 ("If the parties have agreed on a procedure of appointing the arbitrator or arbitrators, that procedure *will* be followed.") (emphasis added).

¹¹³ ICDR Rules, *supra* note 33, Art. 7(1).

¹¹⁴ *Id.*

¹¹⁵ ICDR Rules, *supra* note 33, Art. 7(1).

¹¹⁶ ICDR Rules, *supra* note 33, Art. 8(1).

¹¹⁷ ICDR Rules, *supra* note 33, Art. 9.

arbitrator's decision.¹¹⁸ Predictably, a number of the organizations designate that their home territory will be the seat of arbitration. The Singapore International Centre declares Singapore shall be the seat of arbitration;¹¹⁹ the Hong Kong International Arbitration Centre makes Hong Kong the seat of all arbitrations absent agreement to the contrary;¹²⁰ the London Court of International Arbitration makes its venue London.¹²¹ Not all meetings need to take place in the seat of arbitration--almost every rule allows for the arbitrator to hold hearings, meetings, and deliberations at other locations.¹²² Although an arbitration may physically take place in one location, it is very possible that the language of the arbitration will be in a language foreign to the venue of the arbitration.

4. The Language of the Arbitration

There is a split between organizations regarding which language will be used at the arbitration. About half of the organizations say (subject to agreement of the parties), that the arbitrator has discretion to decide the language of the arbitration, while the other half say (again, subject to agreement of the parties), that the language of the arbitration will be the same language of the arbitration agreement. The first half includes UNCITRAL;¹²³ ICC;¹²⁴ HKIAC;¹²⁵ SIAC,¹²⁶ and

¹¹⁸ The ICDR allows the administrator to determine the seat of the arbitration where the parties disagree, and only requires they take into account the "contentions of the parties and the circumstances of the arbitration." ICDR Rules, *supra* note 33, Art. 13(1). UNCITRAL likewise only requires the arbitrator review the "circumstances of the case." UNCITRAL Rules, *supra* note 39, Art. 18(1). Neither the ICC, nor JAMS, provide standards at all. See ICC Rules, *supra* note 36, Art. 18(1); JAMS Rules, *supra* note 36, Art. 14.1. Analogous to the ICDR, the WIPO requires the Center to consider any "observations of the parties and the circumstances of the arbitration." WIPO Rules, *supra* note 47, Art. 39(a). The Swiss Rules state that the court shall determine the seat of arbitration taking into account the "relevant circumstances[.]" or may allow the arbitral tribunal to make that decision. Swiss Rules, *supra* note 43, Art. 16(1).

¹¹⁹ Though it does allow the tribunal to determine whether another seat is more appropriate. SIAC Rules, *supra* note 42, R. 18.1.

¹²⁰ HKIAC Rules, *supra* note 39, Art. 15.1.

¹²¹ LCIA Rules, *supra* note 46, Art. 16.1.

¹²² *E.g.*, JAMS Rules, *supra* note 36, Art. 14.2. An example of a rule putting some restraint on the ability to conduct business outside the legal venue is the Swiss Rules, which require that "prejudice" not occur to the "determination of the seat of arbitration." Swiss Rules, *supra* note 43, Art 16(2).

¹²³ UNCITRAL Rules, *supra* note Art. 19(1). Though under UNCITRAL the arbitrator's decision is subject to agreement by the parties. *Id.*

¹²⁴ See ICC Rules, *supra* note 36, Art. 20. This provision requires the tribunal to look to the "contentions of the parties and the circumstances of the arbitration." *Id.*

¹²⁵ HKIAC Rules, *supra* note 38, Art. 16(1)-(2). This provision does give the parties the ability to agree to a language. Article 16.2 allows the tribunal to order any documents annexed to the statement of claim, or "defence," as well as any documents or exhibits submitted in their original language, to be accompanied by a translation into the language of the arbitration.

¹²⁶ SIAC Rules, *supra* note, at R. 19.1. Note that the SIAC also allows the Registrar to order a party to submit a translation of a document written in a language other than the language of the arbitration. Thus, it seems the SIAC envisions a situation where a party files a request for arbitration in a language not understood by the opposing party and having no connection to the arbitration: the Registrar could order this party to submit a translation of the notice.

the Swiss Rules.¹²⁷ The bodies that say the language shall be that of the arbitration agreement include: ICDR;¹²⁸ JAMS;¹²⁹ LCIA;¹³⁰ and WIPO.¹³¹

Most of the organizational rules allow the arbitral tribunal discretion to order documents, or witness testimony, be translated into the language of arbitration, but, curiously, not both. For example, the ICDR, at Article 20, allows the tribunal to order (where mutual agreement of the parties has not already provided for it) oral testimony be translated, or for a record of a hearing to be translated, while remaining silent on the issue of translation of documents.¹³² Alongside ICDR, HKIAC, and the Swiss Rules provide expressly for arbitrator discretion to order translation of testimony at a hearing.¹³³ Conversely, JAMS Article 15.1 provides for documents to be translated to the language of arbitration if they are submitted in a different language, but makes no mention of oral testimony.¹³⁴

5. Choice of Law

The rule followed by a majority of the organizations with regard to choice of law is simple: the law the parties have agreed upon will apply; failing such designation, the law chosen by the arbitrator will apply.¹³⁵ In contrast, the LCIA declares that the law of the seat of arbitration will apply unless the parties have agreed, in writing, to apply the law of another place and such agreement is

¹²⁷ Swiss Rules, *supra* note 42, Art. 17(1).

¹²⁸ ICDR Rules, *supra* note 33, Art. 14.

¹²⁹ JAMS Rules, *supra* note 36, Art. 15.

¹³⁰ The London Court of International Arbitration, arbitration rules, Art.17.1-3, available at <http://www.lcia.org/> [LCIA Rules].

¹³¹ WIPO Rules, *supra* note, at Art. 40.

¹³² ICDR Rules, *supra* note 33, Art. 20(3). Even though there is no express authority, a tribunal could still make a demand under the catchall provision of the evidence provision, Art. 19(3), allowing the tribunal to order a party to “produce other documents, exhibits, or other evidence it deems necessary or appropriate.” Another similarly broad provision is seen in the SIAC rules at Art. 24(i), allowing a tribunal to “direct any party to give evidence by affidavit or in any other form.” SIAC Rules, *supra* note 10, Art. 24(i).

¹³³ HKIAC Rules, *supra* note 39, Art. 23.6; Swiss Rules, *supra* note 38, Art. 25(5).

¹³⁴ JAMS Rules, *supra* note 36, Art. 15.1. Note that the rules do provide in the sample arbitration clause for the parties to stipulate as to the language of arbitration, and the request for arbitration may include a request for a particular language. Yet, no express power is given to the tribunal to order translation of oral testimony at a hearing. *C.f.* UNCITRAL Rules, *supra* note 39, Art. 19(2); WIPO Rules, *supra* note 41, at Art. 47.

¹³⁵ ICDR Rules, *supra* note 33, Art. 28(1); UNCITRAL rules, *supra* note 39, Art. 35(1); ICC Rules, *supra* note 36, Art. 21(1); JAMS Rules, *supra* note 36, Art. 18.1; SIAC Rules, *supra* note 42, R. 27.1; WIPO Rules, *supra* note 47, Art. 59(a). Also note that all of these organizations forbid, absent mutual consent of the parties, the arbitral tribunal from deciding the case *amiable compositeur* or *ex aequo et bono*. *Amiable compositeur* means that the arbitrator is merely suggesting a solution the parties may accept of their own volition. BLACK’S LAW DICTIONARY 98 (9th ed. 2009). *Ex aequo et bono* means that the arbitrator is deciding the case “[a]ccording to what is equitable and good.” BLACK’S LAW DICTIONARY 641 (9th ed. 2009).

not forbidden by the law of the seat of arbitration.¹³⁶ Two of the organizations require the arbitrator to apply the substantive law which has the “closest connection” to the dispute.¹³⁷

6. Discovery

Every organization has in place a provision allowing the arbitrator to require production of documents, and most allow the arbitrator to require production of “other evidence” that a party intends to rely upon to prove their case.¹³⁸ The organizations are inconsistent regarding the procedure for how or when a party can make such a request, or how a party can object to such a request.¹³⁹ Some of them allow the arbitrator to require production at any time, while others envision a schedule for production.¹⁴⁰ Indeed, some of the organizations make no mention of the ability to object to a discovery request at all; the power to require or excuse production of the evidence is squarely vested in the arbitrator.¹⁴¹

Another interesting question is whether there is a duty to preserve documents and tangible things under the organizational rules. The vast majority of the organizations make no mention of the preservation of evidence (or the arbitrator’s ability to order such preservation of evidence).¹⁴² The failure of the rules to provide explicitly for sanctions for destruction of evidence when litigation was reasonably foreseeable appears to be universal.

Attorneys may be surprised to learn the organizations do not have specific rules providing for the taking of depositions. Although the arbitrator’s authority to order depositions probably exists under broad authority granted by most organizations to require a party to turn over “other

¹³⁶ LCIA Rules, *supra* note 46, Art. 16.3. As already indicated, the LCIA declares that the seat of arbitration will be London. LCIA Rules, *supra* note 46, Art. 16.1.

¹³⁷ HKIAC Rules, *supra* note 38, Art. 31.1; Swiss Rules, *supra* note 43, Art. 33(1).

¹³⁸ See, e.g., LCIA Rules, *supra* note 46, Art. 22.1. The arbitrator is empowered:

(a) to order any party to make any property, site or thing under its control and relating to the subject matter of the arbitration available for inspection by the Arbitral Tribunal, any other party, its expert or any expert to the Arbitral Tribunal; [and]

(b) to order any party to produce to the Arbitral Tribunal, and to the other parties for inspection, and to supply copies of, any documents or classes of documents in their possession, custody or power which the Arbitral Tribunal determines to be relevant.

¹³⁹ See, e.g., ICC Rules, App. IV(d)(ii). The provision allows an arbitrator to “avoi[d] requests for document production when appropriate [...] to control time and cost.”

¹⁴⁰ Compare ICC Rules, *supra* note 36, App. IV(d)(iv) (giving the arbitrator the power to “establis[h] reasonable time limits for the production of documents”) with JAMS Rules, *supra* note 36, Art. 25.2 (allowing the tribunal to order an exchange of evidence “[a]t any time during the proceedings.”).

¹⁴¹ See UNCITRAL Rules, *supra* note 39, Art. 27.

¹⁴² *Contra* SIAC Rules, *supra* note 42, R. 24(f).

evidence,¹⁴³ it is more unclear whether some organizations have provisions that would allow an arbitrator to make such an order.¹⁴⁴

To discuss more generally the rules of evidence in an arbitration for a moment, there is little doubt that the rules of evidence are far looser in international arbitration than, for example, the Federal Rules of Evidence. The arbitrator alone determines the admissibility of evidence, without any formal evidentiary rules to guide him or her.¹⁴⁵ An attorney should be cognizant of the fact the organizational rules may make no specific mention of privilege at all; the arbitrator determines whether they are necessary.¹⁴⁶ When the rules do mention privilege, the arbitrator is likely allowed to disregard it when he/she deems necessary.¹⁴⁷ All of the foregoing should concern an attorney counseling a client to enter an arbitration when his or her case is dependent upon the production of evidence from the opposing party.

7. Arbitration Costs and Attorney's Fees

Every organization includes a provision that places attorneys' fees within the arbitral award,¹⁴⁸ and all but one require that such fees be reasonable.¹⁴⁹ A number of organizations provide that the general rule with respect to attorneys' fees is that they will be paid by the unsuccessful party, but allow the arbitrator to apportion them differently if such an apportionment would be reasonable.¹⁵⁰ Other organizations do not have a general rule requiring loser pays.¹⁵¹

¹⁴³ See ICDR Rules, *supra* note 33, Art. 19(3).

¹⁴⁴ See e.g. LCIA Rules, *supra* note 46, Art. 22.1(d). The closest rule the LCIA has allows the arbitrator to demand any party make available "any property, site or thing *under its control* and relating to the subject matter of the arbitration available for inspection by" the other party. *Id.* (emphasis added).

¹⁴⁵ A perfect example of this is provided by HKIAC Article 23.10, which allows the tribunal to determine "admissibility, relevance, materiality and weight of any matter presented by a party, including as to whether or not to apply strict rules of evidence." HKIAC Rules, *supra* note 38, Art. 23.10. The LCIA gives the arbitrator precisely the same discretion. LCIA Rules, *supra* note 46, Art. 22.1(f).

¹⁴⁶ See WIPO Rules, *supra* note 47, Art. 48.

¹⁴⁷ See JAMS Rules, *supra* note 36, Art. 25.4. Even perhaps the most fundamental privilege, the attorney client privilege, is only something to be "take[n] into account." *Id.*

¹⁴⁸ ICDR Rules, *supra* note 33, Art. 31(d); UNCITRAL Rules, *supra* note 39, Art. 40(2)(e); ICC Rules, *supra* note 36, Art. 37(1); JAMS Rules, *supra* note 36, Art. 34.1(d); LCIA Rules, *supra* note 46, Art. 28.3; HKIAC Rules, *supra* note 38, Art. 36.1(e); SIAC Rules, *supra* note 42, R. 33(1); WIPO Rules, *supra* note 47, Art. 72; Swiss Rules, *supra* note 43, Art. 38(e).

¹⁴⁹ The only organization which does not explicitly say the fees need be reasonable is the SIAC. See SIAC Rules, *supra* note 42, R. 33.1.

¹⁵⁰ UNCITRAL Rules, *supra* note 39, Art. 42(1); HKIAC Rules, *supra* note 39, Art. 36.4, Art. 36.5.

¹⁵¹ Consider the Swiss Rules. While they generally require loser pays, they do not apply the rule to attorneys' fees. See Swiss Rules, *supra* note 43, Art. 40(2).

There are more similarities than differences between the organizations as to the scope of the award, so a brief review of the UNCITRAL rule regarding the award of the costs of the arbitration will demonstrate how the organizations treat them. UNCITRAL Article 40 defines “costs” to include the fees of the tribunal and of each arbitrator (they must be reasonable in amount), including their reasonable travel expenses and other expenses incurred; the reasonable cost of expert advice and other assistance the tribunal requires; the reasonable travel and other expenses of witnesses the tribunal has approved; reasonable legal costs; and any fees or expenses of the appointing authority or of the Secretary General of the PCA.¹⁵² As mentioned earlier, under the UNCITRAL rules, the costs are, “in principle,” borne by the losing party, but the tribunal may apportion them as it determines reasonable under the circumstances.¹⁵³

Most organizations will include their method for determining arbitrator fees and administrative expenses, so consult each one individually when attempting to ascertain the potential costs.¹⁵⁴

8. Availability of Interim and/or Equitable Relief

Every organization allows for some type of interim relief.¹⁵⁵ Additionally, a number of organizations provide for emergency relief prior to the constitution of the tribunal,¹⁵⁶ although standards can differ significantly between each organization. Some may explicitly require notice and an opportunity to be heard before relief can be granted.¹⁵⁷ Only one organization provides standards for the requesting party to meet in order to receive injunctive relief.¹⁵⁸ A number of organizations explicitly provide that a party seeking injunctive relief will be held responsible for damage caused by the relief if it is later determined injunctive relief was improper.¹⁵⁹ The great majority of the organizations allow the arbitrator to require the party seeking relief to provide security.¹⁶⁰ Generally, a party will be allowed to seek equitable relief in a court without violating in

¹⁵² See UNCITRAL Rules, *supra* note 7, Art. 40, Art. 41.

¹⁵³ UNCITRAL Rules, *supra* note 7, Art. 42(1).

¹⁵⁴ See ICC Rules, *supra* note 4, at 25-26.

¹⁵⁵ See, e.g., WIPO Rules, *supra* note 47, Art. 46.

¹⁵⁶ See, e.g., ICC Rules, *supra* note 36, Art. 29.

¹⁵⁷ See SIAC Rules, *supra* note 42, Sched. 1(1) (requiring notice when seeking emergency arbitrator); Swiss Rules, *supra* note 11, Art. 26(3).

¹⁵⁸ See, e.g., UNCITRAL Rules, *supra* note 7, Art. 26(3).

¹⁵⁹ See JAMS Rules, *supra* note 4, Art. 26.4; see also Swiss Rules, *supra* note 6, Art. 26(4).

¹⁶⁰ See, e.g., ICDR Rules, *supra* note 1, Art. 37(7).

any way the arbitration agreement or waiving its rights under the arbitration agreement.¹⁶¹ For a table containing all of this information, see Appendix 2.

As previously mentioned, some organizations now allow an expedited process (emergency relief) intended to provide a quick response for a party where there is a risk of imminent harm to their interests and the ordinary delay of arbitration is unacceptable. These provisions are all relatively similar, and a review of the Swiss Rules demonstrates their function. At Article 43, the Swiss Rules provide that a party may submit to the secretariat an application for emergency relief.¹⁶² This statement must contain the reasons behind the urgency, comments on the language, seat of arbitration, substantive law to be applied in the arbitration, and confirmation of payment.¹⁶³ As long as there is an agreement to arbitrate referring to the Swiss Chambers' Arbitration Institution, and it does not appear more appropriate to refer the application to the arbitral tribunal, the secretariat will transmit the file to a single emergency arbitrator.¹⁶⁴ At that point, if the application was submitted before the arbitration, the person seeking emergency relief has ten days (and perhaps more if there are exceptional circumstances) to file its notice of arbitration.¹⁶⁵ The respondent(s) has three days to challenge an arbitrator if it wishes to do so.¹⁶⁶ Each party must have a reasonable opportunity to be heard in emergency relief proceedings.¹⁶⁷ The arbitrator then has fifteen days to decide on the application; but, in appropriate circumstances, this time can be extended or shortened.¹⁶⁸

9. Confidentiality of Proceedings

The base amount of confidentiality that will be required in arbitral proceedings is the guarantee that hearings are private and nonparties will be excluded.¹⁶⁹ Other than a guarantee that the arbitrator or administrator will not divulge confidential information disclosed during the

¹⁶¹ ICDR Rules, *supra* note 1, Art. 21(3) (injunctive relief), Art. 37(8) (emergency relief); UNCITRAL Rules, *supra* note 7, Art. 26(9); ICC Rules, *supra* note 4, Art. 28(2); JAMS Rules, *supra* note 4, Art. 26.3; HKIAC Rules, *supra* note 6, Art. 24.3; SIAC Rules, *supra* note 10, R. 26.3; Swiss Rules, *supra* note 11, Art. 26.5.

¹⁶² Swiss Rules, *supra* note 11, Art. 43.

¹⁶³ Swiss Rules, *supra* note 11, Art. 43(1)(a)-(c). A party applying for emergency relief has to pay a non-refundable registration fee of CHF 4'500 and a deposit as an advance for the costs of the emergency relief proceedings of CHF 20'000 together with their application. If the registration fee and the deposit are not paid, the court will not proceed with the emergency relief proceedings. *Id.*, at App. B, 1.6.

¹⁶⁴ See Swiss Rules, *supra* note 11, Art. 43(2).

¹⁶⁵ Swiss Rules, *supra* note 11, Art. 43(3).

¹⁶⁶ Swiss Rules, *supra* note 11, Art. 43(4).

¹⁶⁷ Swiss Rules, *supra* note 11, Art. 43(6).

¹⁶⁸ Swiss Rules, *supra* note 11, Art. 43(7).

¹⁶⁹ ICDR Rules, *supra* note 1, Art. 20; UNCITRAL Rules, *supra* note 7, Art. 28. Similarly, the UNCITRAL Arbitration Rules specify that hearings will be held "*in camera* unless the parties agree otherwise." UNCITRAL Rules, *supra* note , Article 28.3.

proceedings, this is all the protection parties receive under the ICDR.¹⁷⁰ However, most of the organizations take a far more sweeping view of what is confidential. For example, the LCIA declares confidential all arbitral awards, all materials “created for the purpose of the arbitration and all other documents produced by another party [...] not otherwise in the public domain[.]”¹⁷¹ Confidentiality also extends to the deliberations of the arbitrators.¹⁷² This allowance for disclosure of information that is already in the public domain is a common exception to the nondisclosure rule.¹⁷³ Some of the organizations treat as confidential the very existence of the proceedings themselves.¹⁷⁴ Other frequent exceptions to these broad confidentiality rules are where disclosure is required to: (1) protect a legal duty; (2) protect or pursue a legal right; or (3) enforce or challenge an award in a legal proceeding in front of a judicial authority.¹⁷⁵

10. Scope of Award

As to the relief a tribunal can give, most organizations are silent on the issue of specific performance, JAMS being the rare exception, allowing for specific performance.¹⁷⁶ Most of the organizations are silent on the issue of punitive or exemplary damages, but at least a few organizations bar them unless a statute requires compensatory damages be increased in a certain manner.¹⁷⁷ Most of the organizations lack a provision detailing whether a party can recover simple or compound interest, but the SIAC allows for this.¹⁷⁸

C. Best Practices in Rule Selection

A lawyer who thinks arbitration is the right course of action for his client should take the time to review each organization’s rules. Many of them have their own unique provisions, and a reckless decision could mean harmful consequences for a client, such as the client’s claim of privilege is disregarded, a client is unable to seek emergency relief, or a client loses millions of dollars in interest in his award.

¹⁷⁰ See ICDR Rules, *supra* note 1, Art. 20, Art. 34.

¹⁷¹ LCIA Rules, *supra* note 14, Art. 30.1.

¹⁷² LCIA Rules, *supra* note , Art. 30.2.

¹⁷³ See WIPO Rules, *supra* note 15, Art. 74; HKIAC Rules, *supra* note 6, Art. 39.1; SIAC Rules, *supra* note 10, R. 35.3; Swiss Rules, *supra* note 11, Art. 44(1).

¹⁷⁴ *E.g.*, WIPO Rules, *supra* note 15, Art. 73(a).

¹⁷⁵ See LCIA Rules, *supra* note 14, Art. 30.1; HKIAC Rules, *supra* note 6, Art. 39(1); SIAC Rules, *supra* note 10, R. 35.2(a)-(c); Swiss Rules, *supra* note 11, Art. 44.

¹⁷⁶ See JAMS Rules, *supra* note 4, Art. 30.

¹⁷⁷ JAMS Rules, *supra* note 4, Art. 30.2; ICDR Rules, *supra* note 1, Art. 28(5).

¹⁷⁸ SIAC Rules, *supra* note 10, R. 28.7.

IV. DRAFTING AN ARBITRATION PROVISION FOR USE IN AN INTERNATIONAL FRANCHISE AGREEMENT

The growing number of prominent international arbitral organizations operating in different parts of the world provide a practical and convenient resource for use in resolving international franchise disputes through arbitration. But familiarity with those organizations and their rules is only the starting point for franchise counsel endeavoring to construct a satisfactory international dispute resolution program. We turn now to some of the critical decisions that must be made in the drafting of an international arbitration provision to tailor the process to the needs of a particular international franchise relationship.

International franchise agreements are more likely to be negotiated than are domestic franchise agreements with respect to which franchisors are not inclined to venture very far from their standard forms. In conducting those negotiations, it is not uncommon for a dispute resolution clause to come toward the end of the list of matters discussed. That may be both because it can be awkward to focus too early on the potential for disputes while the parties are structuring what they hope will be a harmonious relationship and because dispute resolution can genuinely be an after-thought for business people who are trying to agree on the structure of a long-term collaborative undertaking.

But careful drafting of a dispute resolution provision -- drafting that takes account not only of all of the issues normally addressed in a domestic arbitration provision but also of important additional considerations that are introduced by the international nature of the relationship -- will become critical when the disputes that inevitably arise over the course of a long-term relationship come to pass. As stated in the International Center For Dispute Resolution's Guide To Drafting International Dispute Resolution Clauses: "A poorly drafted arbitration clause may result in a 'pathological' dispute resolution clause, which is worse than no clause at all."¹⁷⁹ Therefore, resources devoted to the thoughtful construction of an international arbitration provision at the drafting stage can save substantial amounts of time and money when the provision is later invoked.

The goal in drafting an arbitration provision is usually to maximize the enforceability of the provision and the integrity of the decision-making process, while minimizing the time and expense likely to be involved in obtaining and enforcing an award.¹⁸⁰ In drafting an international arbitration agreement, however, it is necessary to view these goals through a prism that includes the additional potential complications of international enforcement. Issues that warrant particular drafting attention in this setting include:

- **The choice of the law that will govern the validity and interpretation of the franchise agreement and the agreement to arbitrate;**

¹⁷⁹ *Guide To Drafting International Dispute Resolution Clauses*, International Centre for Dispute Resolution, 8, http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002539.

¹⁸⁰ It is, of course, possible for parties to draft a dispute resolution provision that is intentionally difficult and expensive to invoke, in order to encourage informal resolution of their disputes. We leave to the reader's imagination what such a provision might look like.

- **The choice of where and pursuant to what rules the arbitration proceeding will take place (choice of venue/choice of rules/choice of administering organization);**
- **The number of arbitrators and the process by which the arbitrators will be selected;**
- **The language(s) in which the proceeding will be conducted;**
- **The availability of pre-hearing discovery;**
- **The ability of a party to apply to a court for emergency relief;**
- **The procedures for the taking of evidence; and**
- **Resolution of disputes between the franchisor and foreign sub-franchisees.**

The optimal feasible resolution of each of these issues for a particular international franchise relationship will depend to some extent on where the franchisor and the franchisee are located, where the franchised units will be located, and, most of all, the respective bargaining power of the parties. It is always desirable to collaborate with foreign local counsel both in the jurisdiction where the arbitration will take place and in the jurisdiction where any award will have to be enforced to determine whether peculiarities of local law will affect either the arbitration procedures agreed to or the enforceability of the award.¹⁸¹ Although there may be unfavorable aspects of a particular country's law that cannot be changed by private agreement (e.g., foreign practice requirements, a country's requirement of local venue for certain claims, what a country considers an arbitrable issue), a franchisor that is aware of a problem can sometimes draft to overcome a local issue or at least not be surprised when the issue later presents itself.

A. Choice of Substantive Law

As discussed above, the arbitration rules of most major international arbitral organizations accept a choice by the parties of the substantive law to govern their franchise agreement. Generally, a franchisor will prefer that the law of its own state or country control. That is the law with which the franchisor is most familiar, and it is usually the law that was assumed to govern when its standard form franchise agreement was drafted. If the franchisee is willing to accept that choice, there is generally no reason that that law should not be chosen. In the United States, that would be the law of a particular state.

¹⁸¹ The Arbitration Committee of the International Bar Association has recently released a guide to arbitration practice in more than 30 countries, which can serve in many cases as a useful initial overview. *Arbitration – country guides*, International Bar Association, <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=A646CF32-0AD8-4666-876B-C3D045028E64>. For a recent comparison of arbitration law in Canada, the United Kingdom, the United States and Mexico as it relates specifically to international franchise relationships, see Rost, Schachter, Dodd and Grajeda, "Comparative International Perspectives of Arbitration In The Franchising Context," 31 *Fran. L. J.* 124 (Winter 2012).

If the law of the franchisor's home state is chosen and that state has a franchise disclosure or relationship law, or other law unfavorable to the franchisor, the drafter should take care not to subject an international relationship to that law if that law would not otherwise apply to a foreign entity with foreign franchised locations.¹⁸² It may also be possible to waive application of the statutory franchise law of a state whose law is chosen even if it would otherwise apply and/or to waive application of a franchise law that might otherwise be applicable in the franchisee's home country. In addition, it is desirable in the international setting to specifically provide that the arbitrators must base their decision on the law chosen and not "ex aequo et bono,"¹⁸³ to limit their decision to the dispute presented, and to provide that the decision of the arbitrators will be final and binding.

If the law of the franchisor's home jurisdiction is not acceptable to the franchisee and the franchisor is willing to entertain an alternate choice, the obvious possibilities include the law of the franchisee's home state or country and the law of the state or country where the franchised units will be located. Before agreeing to either, a franchisor should consult with local counsel in those jurisdictions regarding any features of both local contract law and local arbitration law that might prove troublesome. The parties' ability to choose the law of a jurisdiction other than these is somewhat constrained by the fact that the law of most states in the United States and many countries requires a substantial connection between the parties or the transaction and the state or country whose law is chosen for the choice to be respected. There are exceptions however. New York, for example, in order to enhance its role as a center for commercial activity, allows choice of New York law to be enforced with respect to any dispute involving an amount in controversy of \$250,000 or more.¹⁸⁴

In choosing the substantive law to govern their agreement, international franchisors and franchisees should bear in mind that although the law they choose will likely control the interpretation and validity of their franchise agreement generally, it will not necessarily control the conduct of the arbitration or the substantive enforceability of the arbitration clause itself. Instead, those arbitration-specific issues may be controlled by the law of the jurisdiction where the arbitration is "seated." In other words, the law that will control the arbitration can be established as the result of selection of venue, which is discussed below.¹⁸⁵ Rather than leave the issue to later interpretation, an international arbitration provision should separately specify the substantive law that is intended to govern the parties' agreement to arbitrate, whether it is the same as the law governing the franchise agreement generally, the law of the seat of the arbitration or the law of a third jurisdiction.

¹⁸² The FTC Rule, for example, does not apply to franchised businesses located outside of the United States. 16 C.F.R. 436.2.

¹⁸³ "A decision-maker (esp. in international law) who is authorized to decide *ex aequo et bono* is not bound by legal rules and may instead follow equitable principles." Black's Law Dictionary 600-01 (8th ed. 2007).

¹⁸⁴ N.Y. Gen. Obl. Laws § 5-1401.

¹⁸⁵ See, e.g., *Sulamerica CIA Nacional De Seguros SA v. Enesa Engenharia SA*, [2012] EWCA Civ. 638 (applying English arbitration law despite general choice of Brazilian law to govern the contract).

B. Choice Of Venue/Rules/Administering Organization

Choice of venue for an international franchise arbitration can be of considerable importance. Much of the perceived value of arbitration as an international dispute resolution mechanism is based on the relative ease of enforcement of international arbitration awards provided by what is popularly known as the New York Convention,¹⁸⁶ the applicability of which can depend on where the award was entered. In addition, choice of venue can have important implications for the enforceability of the arbitration agreement itself, the arbitration procedure that will be followed, the cost and convenience of the proceeding (including travel costs for counsel and witnesses), the availability of arbitrators familiar with the chosen law and the language of the arbitration, the availability of appropriate local counsel, and the risk of local bias. Therefore, the choice of a venue for arbitration can be the subject of strong feelings on both sides in the negotiation of an international franchise agreement, and it is an issue that often lends itself to agreement on a compromise or neutral location.

It usually makes sense to consider choice of the “seat” of the arbitration, choice of the arbitral organization that will administer the arbitration, and choice of the rules to be used in the arbitration together.¹⁸⁷ First, it will be desirable for the seat of the arbitration to be in a country where local law is generally hospitable to arbitration, so as to minimize the likelihood that local courts will be inclined to interfere with the arbitration. Second, looking toward enforcement of an award, it is desirable for the arbitration to be seated in a country that is a party to the New York Convention.¹⁸⁸ That is because Article 1.3 of the New York Convention allows signatories to choose only to recognize and enforce awards entered in other countries that have signed the Convention, and a number of commercially important countries (including the United States and China) have taken that position.¹⁸⁹ Third, it is usually desirable, for reasons of predictability, efficiency and potential enforceability, to have the proceeding administered by a respected international arbitral organization with experience in the region and applying its own rules as tailored by the parties in their agreement to arbitrate.

¹⁸⁶ United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958. 330 U.N.T.S. 3, 9 U.S.C. § 201, *et. seq.* The United States is also a party to the Inter-American Convention On International Commercial Arbitration (1975 O.A.S.T.S. No. 42, 9 U.S.C. § 301, *et. seq.*), which provides similar mutual enforcement rights with respect to 15 Latin American countries.

¹⁸⁷ Once an administering entity is agreed upon, the standard arbitration clause recommended by that organization can be used as a starting point or check list for the drafting of a tailored arbitration clause by the parties. While it is possible for the parties to provide for an “ad hoc” arbitration (*i.e.*, a proceeding run by the arbitrators without the assistance of an administering entity), the added complication and uncertainty of such a proceeding often make it unattractive in a franchising setting.

¹⁸⁸ More than 140 countries are now signatories to the New York Convention. See www.uncitral.org/uncitral/en/uncitral_text/arbitration/NYConvention_status.html.

¹⁸⁹ India imposes an additional condition that bears on choice of venue for an arbitration where the award will have to be enforced in India. Indian courts will only enforce awards entered into in countries that are parties to the New York Convention and that have also been identified by the Indian government for inclusion in the official Gazette of India. Only approximately a third of New York Convention signatories are currently listed in the official Gazette. The People’s Republic of China, Hong Kong and Macau were added only in March of this year.

Thus, for an American franchisor with sufficient bargaining power to dictate the terms of a venue selection clause, the provision might designate that any dispute relating to the franchise agreement or franchise relationship must be resolved by arbitration in New York City (or another major arbitration center in the United States) and administered by the International Center for Dispute Resolution (“ICDR”), the international arm of the American Arbitration Association, pursuant to the “International Dispute Resolution Procedures” promulgated by the ICDR.

However, venue is an issue on which push-back from prospective foreign franchisees who themselves have bargaining power is not uncommon. As discussed in the previous section of this paper, there are a variety of international arbitration rules that have been promulgated by major arbitral organizations around the world, and there are a number of cities in different parts of the world that have become recognized as centers of international arbitration activity. In many cases, that role has been supported by local legislation that is conducive to the conduct of arbitration proceedings and the enforceability of arbitration awards.

For matters arising in Europe, major arbitration centers include London, Geneva, Stockholm (particularly for matters involving a Russian party) and Paris; for matters arising in Asia, they include Hong Kong and Singapore; for matters arising in Latin America, they include Miami, Houston and Mexico City. Although many international arbitral organizations can administer arbitrations in any part of the world, these centers have become associated with major arbitral organizations with substantial offices located there and, by extension, with the rules promulgated by those organizations. As discussed earlier, there are differences in the rules promulgated by the major organizations; however, most of those rules are subject to modification by the parties in their arbitration agreement.¹⁹⁰ Thus, in seeking to dispel a franchisee’s concerns regarding the seat of the arbitration, it is usually a viable option to choose one of these arbitration centers in the part of the world in which the franchisee is located and to use the rules promulgated by one of the major arbitral organizations operating in that city, as modified by the parties’ agreement.

Although the New York Convention generally provides for recognition and enforcement of arbitral awards by countries that are parties to the Convention, it also contains certain exceptions. For the most part, those exceptions relate to the absence of basic procedural fairness in the arbitration proceeding. However, Art. II.2 of the Convention provides that enforcement of an award may be also refused where:

- (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
- (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

The recent trend has been to interpret these exceptions narrowly, thus supporting the integrity of the international arbitration process.¹⁹¹ That is generally true in the countries in which

¹⁹⁰ See, e.g., ICDR Rules, Art. 1.1.

¹⁹¹ See, e.g., Hoover, “Enforcement of Foreign Arbitral Awards in Asia,” 41 Int’l Law News 24, 24-25 (ABA Spring 2012).

major arbitration centers are located. Nonetheless, the courts of some countries have interpreted the “public policy” exception contained in the New York Convention broadly, thereby providing the basis for a protectionist approach to enforcement of awards.¹⁹² Although the exceptions specifically relate to the recognition of an award by countries where the award is to be enforced, it is also desirable to establish the seat of an international arbitration in a country that has adopted a narrow interpretation of the Convention’s “public policy” exception in order to lessen the risk that local courts will use that exception to interfere with the arbitration process itself.

C. Selection of Arbitrators

Generally, the parties to international franchise agreements can specify in their arbitration provision the number of arbitrators that will hear a dispute and how those arbitrators will be selected.

1. Number of Arbitrators

Traditionally, cases in arbitration are decided by a single arbitrator or a three arbitrator panel. Most international arbitration rules allow the parties to choose the number of arbitrators that will be appointed. A proceeding before a single arbitrator is likely to be less expensive and to result in a quicker decision. On the other hand, a three arbitrator panel is likely to render a more considered decision. Therefore, to some extent the choice of the number of arbitrators to designate in an arbitration provision can be a function of how important the parties think the issues that will be arbitrated are likely to be. To the extent disputes are likely to involve a substantial amount in controversy or issues that could have important franchise system ramifications beyond the particular franchisee involved, a three arbitrator panel may be preferable, even if more expensive.

If the parties do not wish to commit themselves in all instances to either one or three arbitrators, they can provide for a single arbitrator for disputes in which the amount in controversy does not exceed a chosen limit and for three arbitrators when the sum or value in dispute is over that limit. In addition, the rules of many international arbitral organizations provide that if the number of arbitrators has not been agreed to by the parties, the organization will make that decision based on the nature of the controversy. The parties can also so specify in their agreement.

2. Selection of Arbitrators

If the parties agree that three arbitrators will hear a case, international arbitration agreements often provide for each party to choose one arbitrator, and for those two to choose the third or “presiding” arbitrator. Particularly in international arbitration, the ability of a party to choose a member of the arbitration panel in whose expertise and judgment the party has confidence can be tremendously important in establishing that party’s confidence in the arbitral proceeding as a whole. If the two party appointed arbitrators are unable to agree on the third arbitrator, or if only a single arbitrator is to hear the case and the parties cannot agree on who that arbitrator will be, the rules of the various international arbitral organizations, as discussed above, provide mechanisms by which

¹⁹² *Id.* at 25-26 (indicating that Indonesia, India, Vietnam and mainland China remain “more reluctant to enforce a foreign arbitral award”). Even if an arbitration award is set aside by a court in the seat of the arbitration, Article 5 of the New York Convention permits other signatory countries (where seizable assets might be located) to enforce the award.

the third arbitrator can be chosen. Often those procedures involve providing the parties with a list of potential arbitrators with international experience, and according the parties the opportunity to strike unacceptable names and rank the remainder.

If the parties wish to do so, they can provide in their arbitration agreement that the single arbitrator or the presiding arbitrator on a three-member arbitration panel must have certain qualifications. However, in some parts of the world, requiring certain industry experience or knowledge can significantly reduce the number of qualified candidates. In addition, when the parties can themselves provide for industry expertise on the panel by directly choosing one of the arbitrators, among the most important credentials of the presiding arbitrator may be a reputation for good judgment and expertise in presiding over international arbitrations, rather than any specific industry involvement. On the other hand, international arbitration agreements often provide that the presiding arbitrator must be of a nationality different from that of either of the parties, proficient in the language of the arbitration and familiar with the chosen law. Under the rules of most international arbitral organizations, all arbitrators selected to hear a case must perform their duties independently and impartially, even if they have been appointed by one of the parties.

D. The Language In Which The Proceedings Will Be Conducted

An international franchise agreement should specify the language(s) in which the arbitration will be conducted and who will bear the cost of translation of documents and testimony into the language(s) of the proceeding. If there are counterparts of the franchise agreement prepared in different languages, the agreement should also provide whether one of those versions will be considered authoritative. Often, it makes sense to have the language of the proceeding be the same as the language of the controlling version of the franchise agreement. Although the choice of the language of the proceeding can limit the pool of qualified arbitrators in various parts of the world, the language in which the arbitration takes place can be an important factor in a party's confidence in the proceeding.

E. The Availability Of Discovery

If the parties to an international franchise agreement want certain forms of discovery to be available when it comes time to arbitrate their disputes, they should say so expressly in their arbitration provision. One way to do so would be to provide that the arbitrator(s) can direct that discovery take place "consistent with the expedited nature of the proceeding" or some comparable phrase placing reliance on the arbitrator's discretion.

Parties should be aware, however, that arbitrators from civil law countries are likely to be less experienced and less comfortable with the broad discovery that is typically available in the United States and other common law countries. Therefore, for example, if the opportunity to take depositions is contemplated, both the right to do so and any limitation on that right should be expressly set out in the arbitration provision.¹⁹³

In June of this year, the United States Court of Appeals for the Eleventh Circuit (which includes Georgia, Florida and Alabama) approved a new (and likely to be controversial) vehicle by

¹⁹³ See also footnote 196, *infra*.

which parties to international arbitrations can conduct discovery in the United States for use in their foreign arbitral proceeding. In *Application of Consorcio Ecuatoriano de Telecomunicaciones SA v. JAS Forwarding (USA), Inc.*, No. 11-12897, 2012 WL 2369166 (11th Cir. June 25, 2012), the court held that 28 U.S.C. § 1782, which was previously thought by many to allow federal courts to provide assistance only in connection with foreign judicial proceedings, also applies to private international arbitrations seated in foreign countries. Under the court's ruling, a party to an international arbitration can apply to a federal district court in the United States for an order compelling a person found in the district to produce documents and provide testimony for use in a private foreign arbitration. Although the district court can consider the nature of the proceeding in deciding the scope of the discovery to be allowed, this ruling opens the door to foreign franchisees pursuing discovery from their American franchisors and third parties in the United States when no reciprocal opportunity for discovery is available to the franchisor in the franchisee's home country or in the seat of the arbitration.

It remains to be seen whether the United States Supreme Court will review this decision and whether other circuit courts of appeal will follow it. In the meantime, American franchisors may want to consider the desirability and enforceability of including a specific waiver in the arbitration provisions of their international franchise agreements waiving the right of either party to pursue discovery under 28 U.S.C. § 1782.

F. The Right To Apply To A Court For Emergency Relief

As happens as well in litigation, the nature of the conduct complained of in an international arbitration may be of a nature requiring provisional or preliminary relief in order to avoid irreparable harm to one of the parties. As previously indicated, more and more international arbitral organizations are including procedures in their rules for the arbitration panel to provide that type of relief, and even for the appointment of an emergency interim arbitrator to consider and rule on such relief before the permanent arbitration panel is in place.¹⁹⁴ Nonetheless, to avoid potential delay and because local judicial enforcement may be necessary in any event, international arbitration provisions often expressly provide that the parties retain the right to seek such emergency relief directly from a court if the circumstances warrant. If such a provision is included, it would also be desirable to include consents to jurisdiction and venue in the court where the request for emergency relief would be filed. If an arbitration provision is sufficiently clear that a request for emergency relief, whether to an arbitrator or to a court, is contemplated by the parties' agreement, the decision as to which route makes more sense in a particular case can be made when the need arises.¹⁹⁵

G. Procedures For The Taking Of Evidence

The rules promulgated by most international arbitral organizations provide for the production of relevant documents at the final evidentiary hearing, but few provide for the use of party-appointed expert witnesses. Both subjects are covered in detail by the International Bar Association's "Rules On The Taking Of Evidence In International Arbitration," adopted by a resolution of the IBA Council

¹⁹⁴ See, e.g., ICDF Rules, Arts. 21, 37.

¹⁹⁵ One potential problem with providing for provisional relief solely from an arbitrator is that it is unclear whether provisional relief granted by an arbitrator qualifies as an award that is enforceable under the New York Convention.

on May 29, 2010, which can be incorporated by reference into an international arbitration agreement to provide additional certainty in these areas.¹⁹⁶

H. Resolution Of Disputes Between A Franchisor And Foreign Subfranchisees

A franchisor may choose to expand internationally by entering into a Master Franchise Agreement pursuant to which the Master Franchisee is expected to enter into subfranchise agreements within a particular foreign country or region. If so, the franchisor will want to reserve control over the form of the subfranchise agreement used by the Master Franchisee. Thus, although it will normally be the duty of the Master Franchisee to enforce the subfranchise agreement, the franchisor may require that the franchisor be expressly identified in the subfranchise agreement as an intended third-party beneficiary, with the independent right, but not the duty, to directly enforce certain provisions of the subfranchise agreement. For example, the franchisor may want the ability, if necessary, to enforce provisions relating to the protection of its intellectual property or the franchisee's obligation not to operate certain competing businesses. The franchisor may also want the subfranchise agreement to allow the franchisor to assume or to terminate the subfranchise agreement in the event that the Master Franchise Agreement is for any reason terminated.

Such provisions in the subfranchise agreement increase the potential for disputes directly between the franchisor and the subfranchisee. The concerns of a franchisor facing the prospect of resolving a dispute in a foreign country with a foreign subfranchisee are no different from those arising in connection with potential litigation between the franchisor and the foreign Master Franchisee. As a countryman of the subfranchisee, the Master Franchisee may not be concerned about those issues, and may be content to have the dispute resolution provisions of the subfranchise agreement require local litigation. Moreover, the law of certain countries (e.g., China, India) can be different in its treatment of internal dispute resolution, on the one hand, and international dispute resolution, on the other. Therefore, a franchisor may want to require inclusion in the subfranchise agreement of separate dispute resolution provisions, similar to some or all of those in the Master Franchise Agreement, that become operative in the event of a dispute directly between the franchisor and the foreign subfranchisee. It is also desirable for both the Master Franchise Agreement and the subfranchise agreement to provide for multiparty arbitration in the event of disputes that involve the franchisor, the Master Franchisee and the subfranchisee.

V. CONCLUSION

As franchising continues to expand internationally, legal disputes between franchisors and franchisees operating in different parts of the world will necessarily increase as well. Therefore, when new international franchise relationships are initially formed, the parties will be well advised to think about and plan for how any future disputes between them will be resolved. Although litigation in the franchisor's home country may seem attractive to the franchisor, it may not to a foreign franchisee. Moreover, a judgment entered in the franchisor's home country may still have to be

¹⁹⁶ *IBA Guidelines on the Taking of Evidence in International Arbitration*, International Bar Association, <http://www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49-4106-46BF-A1C6-A8F0880444DC>. The IBA Rules also provide for orderly pre-hearing document production by the parties, thereby addressing an important area of discovery that is often not addressed in international arbitral organization rules.

enforced in a court where the franchisee does business or has assets, where different substantive law and judicial procedure -- to say nothing of local bias -- can make the outcome uncertain.

Increasingly, therefore, franchisors and franchisees are choosing to provide for arbitration of their international disputes, which allows them to take advantage of the relative simplicity and flexibility of arbitral procedure and the relative ease of enforcement of foreign arbitral awards under the New York Convention. But implementation of that decision to arbitrate is by no means easy. Not only are there now a wide variety of international arbitral organizations each with its own standard procedural rules, there are critical practical and legal concerns that must be carefully considered and addressed in the franchise agreement's arbitration provision as well. Nonetheless, although no party to an international franchise agreement looks forward to future disagreements, the groundwork can be laid to resolve international franchise disputes efficiently and effectively.

Appendix

What deadlines apply in the arbitrator selection period?

	Single arbitrator (parties must have arbitrator selected or must return list of potential arbitrators; may be subject to parties' agreement)	Multiple arbitrators (note that this may be separately governed by the parties agreement)
ICDR	45 days after arbitration commences for parties to agree	45 days for parties to agree
UNCITRAL	30 days after respondent receives arbitration request for parties to agree; 15 days to return list of names	30 days to respond after a party has given notice of the appointment of an arbitrator
ICC	30 days after respondent receives arbitration request or within additional time allowed by the Secretariat	Each party nominates in the arbitration request and the answer
JAMS	20 days to return list of names	Claimant appoints an arbitrator in its request for arbitration, respondent then has 30 days
LCIA	Tribunal has sole discretion to appoint	If agreement allows a claimant to appoint an arbitrator, this must be in the request for nomination to guarantee that arbitrator is seated
HKIAC	30 days for the parties to agree	30 days for party to designate arbitrator once it receives notice of the other party's appointment of an arbitrator
SIAC	21 days after Registrar receives notice of arbitration	Party must nominate within 14 days after receiving a party's nomination of an arbitrator

WIPO	30 days to agree; 20 days to return list	If Center decides three arbitrators are required, claimant has 15 days to appoint arbitrator, the respondent, upon receipt of claimant's notice, has 30 days; if three arbitrators are to be appointed and the parties do not have an appointment procedure, where there is more than one claimant, they must make a joint appointment in their arbitration request
Swiss Rules	30 days to agree	(in multi-party proceedings) thirty day time limit for the claimant's decision, and following that thirty days for the respondent to select an arbitrator

	What type of notice is required to be given to opposing parties when making a request for injunctive or emergency relief?	Does the organization provide for costs to temporarily be apportioned?	Are there pre-determined standards for showing party has to make to receive injunctive relief?	Provide for liability for requesting party if later determined relief should not have been granted?	Can the party requesting relief be required to provide a security?	Do the rules provide for a party to seek relief in the courts before and after submitting to arbitration?	Are parties entitled to an opportunity to be heard?
ICDR	None for injunctive; notification in writing to all parties for emergency, at least good faith measures taken to notify, Art. 37(2)	Yes for emergency relief, subject to power of tribunal to finally apportion costs. Art. 37(9).	No.	No.	Yes. Art. 37(7).	Yes, places no constraint on when interim relief requested. Art. 21(3) (interim); Art. 37(8) (emergency).	Yes for emergency relief, a reasonable opportunity to be heard, though not necessarily a formal hearing. Art. 37(4).
UNCITRAL	None.	No.	Yes: (1) harm not adequately reparable by damages likely to result, such harm substantially outweighs harm likely to result to opposing party; and (2) reasonable possibility requesting party will succeed on merits. See Art. 26(3).	Yes. Art. 26(8).	Yes. Art. 26(6).	Yes, places no constraint on when interim relief requested. Art. 26(9).	No.
ICC	None. Emergency relief requires submit copies of request for so each party may have a copy.	No	No.	No.	Yes. Art. 28(1).	Yes. If parties' file has been transmitted to tribunal, must be in "appropriate circumstances." Art. 28(2).	No.
JAMS	None.	Yes. Art. 26.4.	No.	No.	Yes. Art. 26.2.	Yes, places no constraint on when interim relief requested. Art. 26.3.	No.
LCIA	None.	No.	No.	Yes. Art. 25.1(a); 25.2.	Yes. Art. 25.1(a); 25.2.	No.	No.
HKIAC	None	Yes. Art. 24.4.	No.	No.	No.	Yes, places no constraint on when interim relief can be requested. Art. 24.3.	No.

	What type of notice is required to be given to opposing parties when making a request for injunctive or emergency relief?	Does the organization provide for costs to temporarily be apportioned?	Are there pre-determined standards for showing party has to make to receive injunctive relief?	Provide for liability for requesting party if later determined relief should not have been granted?	Can the party requesting relief be required to provide a security?	Do the rules provide for a party to seek relief in the courts before and after submitting to arbitration?	Are parties entitled to an opportunity to be heard?
SIAC	For emergency relief, in writing to all parties, either actual notification or steps taken in good faith to notify. Sched. 1(1).	Yes for emergency relief. Sched. 1(10).	No.	No.	Yes. Art. 26.1 (injunctive relief); Sched. 1(8) (emergency relief).	Yes, though if after tribunal is constituted needs to be "exceptional circumstances." Art. 26.3.	No.
WIPO	None.	No.	No.	No.	Yes. Art. 46(a).	No. Art. 46(d).	No.
Swiss Rules	No, provided there are "exceptional circumstances" and the communication is made "at the latest together with the preliminary order and that the other parties are immediately granted an opportunity to be heard." Art. 26(3).	Yes. Art. 26(6).	No.	Yes. Art. 26(4).	No.	Yes, places no constraint on when interim relief can be requested. Art. 26(5).	Art. 26(3) indicates they are entitled for injunctive relief. Yes for emergency relief. Art. 43(6).

RONALD K. GARDNER, JR.

Ronald K. Gardner is the Managing Partner of the firm of Dady & Gardner, P.A., and limits his practice to the representation of franchisees, dealers and distributors when they are in disputes with their franchisors, manufacturers and suppliers. Ron, along with the rest of his colleagues at Dady & Gardner, P.A., prides himself on the fact that the firm has an international reputation for effectively and efficiently helping their franchisee, dealer and distributor clients to resolve their disputes through litigation, negotiation, mediation and arbitration. More specifically, Ron has helped clients in dozens of industries, including fast food, automobile, trucking, construction equipment and agricultural implements.

Ron is a member of the American, Minnesota, Hennepin County and Rice County Bar Associations. He is an active member of the ABA Forum on Franchising, being the ONLY "franchisee lawyer" to EVER be elected as the Chair, is currently the immediate Past Chair of the Forum, and is the past Membership and Program Officer, as well as a past Division Director of the Forum on Franchising's Litigation and Alternative Dispute Resolution Division. Ron was the co-chair of the 2005 Forum on Franchising convention.

Ron is a frequent speaker at various gatherings on franchise and distribution-related topics, such as the ABA's Annual Forum on Franchising, the National Convention of the American Association of Franchisees and Dealers, the International Franchise Association, the International Distribution Institute and International Bar Association. He also speaks regularly to various franchise and industry groups about their rights. Ron is formerly one of the primary authors of the widely cited treatise "Franchising: Realities and Remedies," published by Law Journal Seminars Press and distributed nationally, as well as being a co-author of the "Annual Franchise and Distribution Law Developments 2002" volume published by the American Bar Association. He also frequently lectured on franchise issues at the University of St. Thomas' School of Entrepreneurial Leadership.

Ron has represented businesses of all sizes, including multi-unit franchisees, as well as single owner operations. He represents numerous franchisee associations, including the associations of several of the largest franchise systems in the world. He has handled disputes ranging from unlawful terminations to encroachment to cases regarding franchisor's failure to comply with registration and disclosure requirements of the FTC and state governments. He has represented or counseled clients in virtually all 50 states, and over a dozen foreign countries. Ron has also been named one of the Best Lawyers in America the last ten years, as one of Minnesota's "Rising Young Stars of the Legal Profession" by Law & Politics magazine, as one of Minnesota's "Super Lawyers." also by Law & Politics, as a "Hot Shot under Forty" by the Franchise Times, and as one of Franchise Times "100 Legal Eagles" every year since the list started. The past six years (2007-2012), Ron has been selected by Chambers USA independent research firm as one of the top 12 franchise lawyers in America---and is the only one of the top 12 under the age of 50. In 2010 and 2011, Ron was listed, along with his partner, Michael Dady, as the only "Tier 1" Franchisee lawyers in the United States, and Dady and Gardner are 2 of only 3 Tier 1 Franchisee lawyers listed in 2012. In August, 2012, Ron was recognized for the fourth time by Law & Politics magazine as one of Minnesota's Top 100 lawyers.

Ron graduated magna cum laude in 1991 from Mankato State University, and is a 1994 cum laude with honors graduate of the Hamline University School of Law, and was honored to be the 2010 Hamline Law Alumnus of the Year. Among his other activities, Ron has been an adjunct professor at Hamline University School of Law, as well as being the former Chairman of the Board of Trustees of Prairie Creek Community School. He and his wife Becky are also the proud parents of Devyn and Zach.

PETER J. KLARFELD

Mr. Klarfeld is a principal in the Washington, D.C. office of Gray Plant Mooty. He has specialized in franchise dispute resolution and counseling for over 30 years and has appeared as lead counsel for some of America's largest franchisors in courts, arbitrations and mediations across the United States, and as an arbitrator in international arbitration. From 2007 - 2010, Mr. Klarfeld served on the Governing Committee of the American Bar Association's Forum on Franchising and as the Forum's Membership Officer, and in 2008 he served as Co-Chair of the Forum's Annual Meeting. He was the Editor-In-Chief and a co-author of the first edition of *Covenants Against Competition In Franchise Agreements* (ABA 1992) and served in the same capacity for the second edition of that work, published in 2003. He is the author of numerous articles and a frequent speaker on domestic and international franchise litigation and arbitration issues and was the co-author of the manual *FRANCHISE LITIGATION* (Federal Publications, 1996).

Prior to entering private practice, Mr. Klarfeld served for two years as an Attorney/Advisor in the Office of Legal Counsel of the United States Department of Justice. He is a member of the Virginia and District of Columbia bars and of the bars of numerous federal trial and appellate courts.

Mr. Klarfeld received a Master's degree from the University of Chicago and his law degree from the University of Virginia Law School, where he was a member of the editorial board of the Virginia Law Review and the Order of the Coif. After graduation from law school, he served as law clerk to the Honorable Robert R. Merhige, Jr., United States District Judge for the Eastern District of Virginia.

GEOFFREY B. SHAW

Geoff is a partner in the commercial litigation department where the main focus of his practice is the resolution of business disputes through trial, appeal, mediation or arbitration. Geoff has several specialties including: franchise litigation, professional liability for accountants and financial advisors, securities regulatory work, and income tax litigation. Geoff has over 40 reported decisions and rulings in these areas. A few of his notable cases include:

- Clearing chartered accountants of liability to numerous clients for the failure to file.
- Successfully acting for brokers and traders on investigations and hearings before the Ontario Securities Commission regarding alleged insider trading and non-registered trading in securities.
- Acting for a number of franchisors to successfully restrict departing franchisees from doing franchise business in a restricted geographical region contrary to their non-competition covenants.
- Defending franchisors in class proceedings.

Geoff is a past instructor at the Bar Admission Course - Civil Procedures Section and Intensive Trial Advocacy Workshop - Osgoode Hall Law School in the area of expert testimony and cross-examinations. He is a guest lecturer at the Franchise Law Course of the University of Western Ontario Law School. Geoff is a member of the International Franchise Association (IFA) Legal Symposium Task Force, and regularly speaks and contributes articles in the area of franchise law.

Geoff is an entirely “home grown” product having articulated and practised at Cassels since his call to the bar in 1986. He completed three years of commerce and finance with distinction at the University of Toronto before graduating from law school at Queen’s University in 1984. Geoff graduated from the LL.M. program at Osgoode in 2011, with a focus on alternative dispute resolution.

Education: LL.B., Queen's University, 1984; LL.M., Osgoode Hall Law School, 2011

Call to the Bar: Ontario, 1986

Associations: The Advocates' Society; American Bar Association/Forum on Franchising; American Trial Lawyers Association; Canadian Bar Association; Canadian Franchise Association; Canadian Tax Foundation; Ontario Bar Association (Taxation Section Executive Committee Member 1995-1996); Toronto Lawyers Association

Achievements: *Who's Who Legal: Canada* 2010–2012 (Franchise); *Canadian Legal Lexpert Directory* 2006–2012 (Franchising Law); *The Best Lawyers in Canada* 2008–2012 (Franchise Law); *Martindale-Hubbell*, BV Distinguished™ rating