

Settling Business Disputes: Arbitration and Alternative Dispute Resolution

SECOND EDITION



International
Trade
Centre

TRADE IMPACT FOR GOOD

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SETTLING BUSINESS DISPUTES

ARBITRATION AND ALTERNATIVE DISPUTE
RESOLUTION

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The second revised edition of the handbook focusing on available methods of commercial arbitration and dispute resolution - deals with different types of disputes encountered in international trade and describes methods for preventing or resolving them; covers the fundamental principles and practicalities of international commercial arbitration. This second edition provides some tools and useful information for business operators new to international trade as well as more experienced business people and lawyers. It describes the types of disputes that can arise in international trade and the dispute resolution mechanisms, some of recent origin, available to resolve them.

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FOREWORD

With the rapid growth of international trade, businesses – including small and medium-sized enterprises (SMEs) – are increasingly exposed to new partners, countries, cultures, legal systems and trade practices. These new opportunities can bring new risks, especially if vital information and market intelligence is missing.

Business dealings can always give rise to disagreements and disputes. This is why dispute prevention and effective dispute resolution are vital components of risk management for any company. In the international context, there are additional difficulties involving various jurisdictions, different legal traditions, laws and procedures, and sometimes multiple languages. International trade disputes entail high costs, which particularly affect small firms trading across borders. How can businesses avoid or resolve disputes during various contractual phases, from negotiation through to performance?

This second edition is a significant revision from the first edition published by the International Trade Centre in 2001. It provides updated information for businesses, especially those that are now embarking on commercial activities across borders. It describes the types of disputes that can arise in international trade and the dispute resolution mechanisms, some of recent origin, available to resolve them.

Arbitration remains the most popular method for resolving international trade disputes, but mediation is growing in popularity. With arbitration and mediation institutions now existing in most countries and regions of the world, this publication provides greater transparency on how these processes work and how they can provide relatively inexpensive and quick access to the resolution of disputes for small firms in developing countries.

Greater awareness and use of various arbitration and alternative dispute resolutions mechanisms will lead to stronger and smoother trade and to a more transparent and efficient business environment. ITC stands ready to support this and enhance alternative dispute resolution services for the benefit of small firms.

A handwritten signature in black ink, appearing to read 'Arancha', written in a cursive style.

Arancha González
Executive Director
International Trade Centre

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The first edition of this book was written by Herman Verbist, Christophe Imhoos and Jean-François Bourque with Geoffroy Loades as editor.

This second edition reflects the growing role of mediation and arbitration in resolving business disputes, and was prepared by Herman Verbist and Jean-François Bourque. David Watkiss made additional contributions.

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ACRONYMS

ADR	Alternative dispute resolution
CDB	Combined Dispute Resolution Board
CEDR	Centre for Effective Dispute Resolution
DAB	Dispute Adjudication Board
DOCDEX	Documentary Credit Dispute Resolution Expertise (ICC)
DRB	Dispute Review Board
FIDIC	Fédération internationale des ingénieurs conseils (International Federation of Engineers)
HS	Harmonized System Convention
IBA	International Bar Association
ICANN	Internet Corporation for Assigned Names and Numbers
ICC	International Chamber of Commerce
ICDR/AAA	International Centre for Dispute Resolution of the American Arbitration Association
IFIA	International Federation of Inspection Agencies
ILO	International Labour Organization
INCOTERMS	International Commercial Terms (ICC)
IP	Intellectual property
ITC	International Trade Centre
PSI	Preshipment inspection
SME	Small and medium-sized enterprise
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
WCO	World Customs Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

USING THIS HANDBOOK

Dispute resolution is an important part of risk management in international trade. Reduced barriers are exposing small and medium-sized enterprises (SMEs) to new markets and international competition, as well as to new partners, countries, cultures and trade usages.

International opportunities generate new risks. International business dealings give rise to disputes. As compared to disputes between entities from the same country, international business disputes have additional problems including various jurisdictions, diverse legal systems and traditions, different procedures, and often involve more than one language.

Commercial dispute resolution strategies have evolved rapidly in the past 20 years. This handbook discusses arbitration and other dispute resolution methods as alternatives to court proceedings that are now commonly used to prevent and/or settle business disputes in an international context. These dispute resolution methods have significant advantages.

This handbook is intended for beginners and experienced business operators, as well as legal counsel. The purpose is to provide professionals with ways to secure stability in their contractual dealings by effectively using dispute resolution methods in international business.

COMMERCIAL ARBITRATION AND ALTERNATIVE DISPUTE RESOLUTION

Arbitration remains the primary dispute resolution mechanism in international trade. Arbitration is effective for big transactions. Other methods, such as mediation, are more adapted to the needs and realities of SMEs. Parties can choose to, and sometimes must, bring their case before a court or a national administrative authority. However, for most contracts involving parties from different countries, business operators may feel at a disadvantage if their dispute is tried before the courts of the other party, in the other party's language and according to the procedural rules of their opponent's country.

Neutrality and flexibility are basic reasons why arbitration and alternative dispute resolution (ADR) processes such as mediation have been developed, with the support and cooperation of courts. But there are other considerations as well for using arbitration or ADR: time constraints, the need for specialized knowledge, confidentiality and, with arbitration, international enforceability.

ADR is a relatively new but widely used acronym. In this handbook, ADR describes all means of preventing and

resolving disputes with the help of a third party, other than through the courts (litigation) and through arbitration. Among ADR processes, use of mediation has dramatically increased in recent decades. Its practical relevance is undisputed. This second edition dedicates more space to mediation, noting that it is still used more in national than in international disputes.

ARBITRATION AND COURT PROCEEDINGS

Arbitration and all ADR processes, which are generally out-of-court processes, do not compete with court proceedings. Arbitration could not have flourished without court cooperation and ultimate control. Court proceedings, arbitration and ADR are complementary processes. This handbook emphasizes arbitration, as arbitration has become a frequently used method for resolving international commercial disputes and is currently the only legally binding and enforceable alternative to court proceedings. However, it is not our intention to convince parties to use arbitration or ADR instead of courts. Numerous business disputes are resolved daily through litigation and are more suited to be resolved by courts. Choices should be made according to the circumstances surrounding each contract.

CONSIDER DISPUTE RESOLUTION BEFORE SIGNING A CONTRACT

There are important practical differences between court proceedings and arbitration, and to a lesser extent ADR processes. Should a party desire arbitration for a particular contract, the decision should be taken as the contract is being drafted in the form of an arbitration clause. Parties can only be required to arbitrate if they have agreed to do so. By contrast, courts are available to hear a case even absent a contractual clause referring to their jurisdiction. Therefore, the advantages of arbitration can only be gained if parties have prior knowledge of its contractual requirements. Once a dispute arises, if parties have not agreed on arbitration, it may be too late. Parties can agree to arbitrate after a dispute has arisen, but this occurs infrequently because after a dispute has arisen one party will often perceive arbitration as a disadvantage.

The parties should also consider mediation, expertise and other ADR processes before signing a contract if they wish to realize the full benefits of these processes. Today, most arbitration institutions offer standard clauses making it possible to combine arbitration with mediation or creating an obligation to mediate before commencing arbitration. Businesses must make their own choices on these matters before entering into an international contract. This is why part of this handbook is devoted to drafting dispute resolution provisions.

This handbook will provide business people with a better understanding of the array of practical means to prevent and resolve commercial disputes. There is considerable evidence that international arbitration and ADR processes work. They are used extensively and are developing constantly.

OVERVIEW

Part 1 – About international business disputes

discusses various types of disputes that occur in international trade, and available methods to prevent and resolve them.

Part 2 – Mediation discusses the basics of commercial mediation.

Part 3 – Arbitration covers the fundamental principles and practicalities of international commercial arbitration.

The Annexes provide some tools and useful reference materials.



PART 1

ABOUT INTERNATIONAL BUSINESS DISPUTES

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TYPES OF INTERNATIONAL BUSINESS DISPUTES

Although dispute resolution is not the first idea that parties have in mind when entering into a contract, they should remember that differences, grievances and disputes could arise at any time. Parties should be aware of potential dispute areas and anticipate a method or a combination of methods to prevent or resolve disputes.

Two fundamental questions should be considered when entering into an international contract:

- First, what types of disputes might arise?
- Second, what dispute resolution processes are available to prevent or resolve the disputes?

SALE OF COMMODITIES AND GOODS DISPUTES

Contracts for the sale of goods may give rise to disputes, among other things, with respect to quality, price and payment, transportation and timing, and conditions of delivery. Disputes may be avoided by providing clear contractual provisions stipulations regarding these matters.

International Commercial Terms (Incoterms), published by the International Chamber of Commerce (ICC), provide a set of international rules for interpreting the most commonly used terms in international trade. Incoterms are a basic reference for avoiding disputes in sales contracts as they clearly define the responsibilities of buyers and sellers regarding delivery, insurance and customs procedures. They are recognized as the international standard by customs authorities and courts in most trading nations. The use of Incoterms helps prevent or considerably reduce uncertainties of interpretation among different countries. In this way, the uncertainties of different interpretations in different countries can be avoided or at least reduced to a considerable degree. As of 2011, there are 11 valid Incoterms. To avoid ambiguity in contracts, ICC recommends to always include the words 'Incoterms 2010' following the Incoterm, for example: FOB (Free on Board Shipping Point) Kuala Lumpur Incoterms 2010.

Disputes may arise regarding letters of credit, the conditions of payment transfer or the time of payment. Letter of credit disputes can be settled through an expertise process called Documentary Instruments Dispute Resolution Expertise (DOCDEX) on the basis of documents only, administered by ICC.

Commodities sales are often made on a consignment basis without reference to any contract. Unless parties have developed a long-term relationship, the absence of a contract will place the seller at a disadvantage if a dispute arises over the quality, quantity or price of the goods. These disputes may have to be brought in the courts of the buyer's place of business.

Trade associations have developed model contracts. For specialized commodity trades, such as coffee, cereals, cocoa, oil and fats, trade associations have developed model contracts that usually refer to their own set of arbitration rules. These expert arbitrations deal mainly with the quality of a commodity and are usually conducted on an expedited basis.

DISTRIBUTORSHIP, AGENCY AND INTERMEDIARY DISPUTES

There is a difference between distributorship and agency contracts. Distributors buy and sell. Commercial agents promote and negotiate the sale of goods on behalf of another person (the principal) who then sells the goods to customers.

The most contentious point in agency contracts is compensation for the agent upon termination. The customers belong to the principal. Many jurisdictions, including EU member states, have mandatory laws aimed to protect agents, irrespective of contractual provisions. Court and arbitrators must take these mandatory laws into account. Other typical disputes arising from distributorship or agency agreements include:

- Manufacturer/vendor fails to supply the goods to distributor in conformity with the contract, or at the time provided in the contract;
- Manufacturer/vendor supplies the goods to competitors of distributor/agent where the contract stipulates exclusivity for the distributor/agent;
- Distributor fails to purchase from manufacturer/vendor contractually required quantities, or at the agreed times;
- Distributor/agent distributes or promotes the goods outside of the licensed territory;
- Distributor/agent appoints a sub-distributor/sub-agent where such appointment is not allowed by the manufacturer/vendor;

Box 1: Standard agency and distributorship contract forms

Parties may refer to standard and internationally accepted agency and distributorship contract forms to avoid disputes. Following are some examples.

- ITC Model Contract for an International Commercial Agency (available at www.intracen.org/model-contracts-for-small-firms/).
- ITC Model Contract for the International Distribution of Goods (available at www.intracen.org/model-contracts-for-small-firms/).
- ITC Model Contract for the Long-Term Supply of Goods (available at www.intracen.org/model-contracts-for-small-firms/).
- ICC Model Commercial Agency Contract (available at ICC Publishing SA, 33-43 avenue du Président Wilson, 75116 Paris, France, www.iccwbo.org).
- ICC Model Distributorship Contract (available at ICC Publishing SA, 33-43 avenue du Président Wilson, 75116 Paris, France, www.iccwbo.org).
- ICC Model Occasional Intermediary Contract (available at ICC Publishing SA, 33-43 avenue du Président Wilson, 75116 Paris, France, www.iccwbo.org).

- Distributor starts producing products similar to those made by the manufacturer/vendor where such parallel production is not permitted;
- Distributor fails to pay manufacturer/vendor for products.

Parties may seek various means to resolve such disputes. For certain disputes, it may be sufficient to use an expert to establish the quality of the goods, or the amount of sales made or organized by the agent. For other disputes, such as those involving contract termination, the case may need to be brought before a judge or arbitrator. As these contracts may involve sensitive confidential commercial information, parties may wish to provide for arbitration in their contracts.

CONSTRUCTION, ENGINEERING AND INFRASTRUCTURE DISPUTES

Performance of international construction and engineering contracts, such as tunnels, dams, bridges, highways and university complexes, is often spread over several years and involves considerable amounts of money. Small-value, short construction time and repetitive construction contracts are an exception to this general rule. Disputes may arise because:

- Work performed does not comply with the contractual requirements;
- Work is not completed within the contractually stipulated time;
- Construction requires new or more materials or structures (variations) that were not provided in the contract and the agreed price;
- Government authorities impose new requirements that materially impact the scope and cost of the works;

- Subcontractors do not perform in accordance with the contractual stipulations agreed between the main contractor and the owner;
- Owner fails to provide a payment guarantee or fails to pay some or all of the agreed price;
- Contractor fails to provide a performance guarantee or other required guarantee.

Often several disputes may have to be settled during the various phases of a construction project. It is important to avoid interrupting the construction schedule while these disputes are being addressed.

Because of the length, scope and high costs of operations in construction contracts, elaborate dispute resolution clauses are often developed, either on an ad hoc basis or in accordance with established standards. In the past, the owner's engineer, acting impartially, had the authority to make on-site decisions in the event of disputes, to be eventually reviewed by arbitration.

Since the mid-1990s, in most large-scale international contracts the owner's dispute resolution powers have been reduced and replaced by the intervention of neutral Dispute Adjudication Boards (DAB) or Dispute Review Boards (DRB). These are usually composed of one to three technical experts, often engineers.

Large project contracts tend to include a combination of both a dispute board and arbitration. Differences arising during a long-term construction project are first submitted to the dispute board while the project usually continues. Disputes not resolved by the dispute board are later referred to arbitration. The operations of DAB and DRB are described later in this handbook.

Box 2: Standard contract forms in the construction industry

The International Federation of Consulting Engineers (FIDIC) publishes the most commonly used construction standard contract forms. Several development agencies including World Bank, Asian Development Bank, African Development Bank and European Bank for Reconstruction and Development have adopted FIDIC Conditions of Contract for Construction as part of their standard bidding documents that their borrowers are required to follow. FIDIC forms include:

- Construction for Building and Engineering Works Designed by the Employer
- Plant and Design-Build
- Design, Build and Operate

- EPC/Turnkey Projects
- Short Form

FIDIC publishes useful guides to assist in deciding which of its main contracts is most suited to the project under consideration. FIDIC Conditions of Contracts contain provisions for disputes to be adjudicated by a DAB of either one or three persons, followed by arbitration.

Other standard forms used in the construction industry include: New Engineering Contract (NEC) developed by the Institute of Civil Engineers (ICE) United Kingdom, and ICC Model Contract for the Turnkey Supply of an Industrial Plant, available at: ICC Publishing SA, 33-43 avenue du Président Wilson, 75116 Paris, France, www.iccwbo.org.

PROCUREMENT DISPUTES

There are two stages of procurement disputes. The first concerns the bidding process and often involves public authorities. A bidder can bring a challenge against the contracting authority when it feels that the process was unfair, the rules were violated or that the bidder was unjustly excluded to the advantage of another bidder. These disputes are bound by very tight time-limits, often 10 days or so, called the 'suspension period' following the decision of the contracting authority to award the tender and before the contract is signed with the successful bidder.

A claimant will usually file a request quickly to the competent court or authority listed in the tender before the contract is issued to obtain an automatic suspension of the contract for a longer period. This is where various negotiation or mediation processes may be used. For example, a settlement could be reached to re-advertise the tender. Public bodies will generally provide details in their procedures for an appeal process and the body responsible for mediation. Public authorities in several countries have adopted mediation to ensure that relationships between buyers and suppliers remain non-adversarial.

The second type of dispute relates to the contract itself. Dispute resolution clauses will not be negotiable and the bidder must conform to whatever process is required by the contract – court, arbitration or combined mediation and arbitration.

INTELLECTUAL PROPERTY DISPUTES

International business contracts often involve intellectual property (IP) rights such as patent licensing, trademarks, technical assistance, transfer of technology and/or of know how. Various types of IP disputes can arise, including:

- Are royalties payable?
- What amount of royalties is due?
- Are new product developments covered by the licence?
- Under what circumstances may a licence be terminated?
- What compensation should be awarded for breach of the licence?
- When do restrictions on the use of the IP violate competition rules?
- When does an employee have the ownership of an IP right?

The methods of settling IP disputes must be carefully considered. Under the laws of some countries, these disputes may be settled by arbitration. For example, in most countries, an arbitrator's ruling on whether a patent is valid or not will be binding, but only on parties in the dispute. It will not be binding on third parties because the decision may be deemed to be under the exclusive jurisdiction of the courts where the patent was issued. In some situations injunctive relief may be necessary and sometimes sufficient to stop the violation or infringement of IP rights. Injunctive relief is obtained through the courts.

IP disputes do not arise solely from pure IP contracts. They could arise from a variety of agreements: IP licensing agreements, including agreements where licensing is only part of a wider commercial venture such as franchising or agency contracts; agreements for the transfer of IP in an acquisition or a joint venture; and agreements involving research and employment.

In selecting a particular dispute resolution process, parties should anticipate the types of disputes that they would probably encounter. This will help them in their choice between litigation and arbitration, both of which are legally binding, or between these processes and conciliation, mediation, technical expertise and other types of 'soft' dispute resolutions. If parties opt for arbitration, anticipating the types of disputes that may arise will help them to select a suitable arbitration institution.

Box 3: Drafting an arbitration clause involving intellectual property issues

To facilitate enforcement of an arbitration award concerning important IP components and to obviate the problems created by arbitrability, the ICC Commission on Arbitration and ADR has proposed examples of clauses, in addition to the standard arbitration clause, whereby the parties agree to the enforcement of the award.

These types of provisions could be included in a contract with a view to persuading a court to give effect to the parties' agreement to submit their differences to arbitration even though they involve an IP issue. The effectiveness of such provisions should be reviewed carefully with regard to the law applicable to the arbitration and the courts of the jurisdiction where enforcement may be sought.

Example 1:

This dispute is a private commercial dispute between the parties and affects international commerce. Or, any dispute arising hereunder is likely to be a private commercial dispute between the parties and to affect international commerce.

Example 2:

The parties agree that such dispute and all aspects thereof shall be resolved by binding arbitration as to the rights of the parties with respect to one another.

Example 3:

In the event that determination of this dispute necessitates consideration by the Tribunal of any issue relevant to the validity, enforceability or infringement of any [intellectual property right] of any party with respect to another party, the Tribunal shall have the authority to consider all such issues and to express a view with respect to all such issues.

It is expressly agreed that the Tribunal shall not have authority to declare any such [intellectual property right] valid or not valid, enforceable or not enforceable or infringed or not infringed, provided, however, that the Tribunal may render an

opinion to the parties as to whether in the Tribunal's view a court or other government agency of competent jurisdiction would uphold the validity, enforceability or infringement of any such [intellectual property right].

The Tribunal shall specify [may state] the Tribunal's reasons underlying any such opinion. However, neither the opinion nor the statement of reasons by the Tribunal shall be regarded by any party as a declaration of validity or invalidity, enforceability or unenforceability, or infringement or non-infringement of any such [intellectual property right].

Example 4:

The Tribunal's Award:

- (a) shall state what acts, if any, each party may or may not undertake with respect to any other party;
- (b) shall be final, binding and effective only between or among the parties;
- (c) shall not be appealable by any party; and
- (d) shall not be regarded or asserted by any party as having any effect on any person or entity not a party.

Example 5:

The parties expressly agree that judgement based on the Tribunal's award may be entered in favor of, or against, any party in any jurisdiction that the Tribunal determines is appropriate under the circumstances, and each party against whom any such judgement may be entered hereby agrees to and shall make itself subject to the jurisdiction of any court in which any such judgement is entered.

Example 6:

The parties agree to incorporate the terms of the award into [an underlying or related technology transfer, license, etc. agreement] as a binding amendment to the agreement and enforceable as such, effective as of the date of the award.

If a contract is mainly or exclusively concerned with IP, the parties may wish to select a dispute resolution system run by an institution that is respected and experienced in that specific field, such as World Intellectual Property Organization (WIPO), which administers various IP dispute resolution mechanisms, or ICC. Although not specialized in IP, some 12% of cases filed with ICC International Court of Arbitration contain a significant IP aspect.

DOMAIN NAME DISPUTES

Internet domain names, such as those ending with .com, .net, .org, represent enormous value. As a result, their attribution and use have given rise to numerous disputes

over abuse of registration of domain names, commonly known as cybersquatting. In 1999, the Internet Corporation for Assigned Names and Numbers (ICANN), which coordinates the assignment of Internet domain names, established the Uniform Domain-Name Dispute Resolution Policy. This has become the accepted international standard for resolving domain names disputes.

Under this policy, the holder of a trademark can submit a cybersquatting case to an approved dispute resolution service provider on ICANN's list. The complainant must demonstrate that the disputed domain name is identical or confusingly similar to its trademark, that the respondent does not have a right or legitimate interest in the domain name and that the respondent registered and uses the domain name in bad faith.

ICANN will cancel, transfer or otherwise make changes to domain name registrations after receipt of a decision of an Administrative Panel acting under its policy. The procedure is usually conducted in writing. Other trademark-based domain-name disputes can also be resolved by agreement, court action or arbitration. For more information on ICANN dispute resolution procedures and a listing of all cases filed, together with the published text of the decisions, see the ICANN site: www.icann.org. For information on WIPO dispute resolution services in this regard, see www.wipo.org

The procedure is designed not to last more than 55 days. Fees may range from US\$ 1,500 for a dispute concerning one domain name before a single panellist, up to US\$ 7,000 for a dispute concerning 10 or more domain names before three panellists.

As of 2015, four organizations were ICANN-accredited dispute resolution service providers:

- Asian Domain Name Dispute Resolution Centre
- CPR Institute for Dispute Resolution
- National Arbitration Forum
- World Intellectual Property Organization (WIPO)

From 1999 to 2014, the total number of cybersquatting cases filed with WIPO, which has handled over half of all domain names disputes, concerned more than 54,000 domain names and some 30,000 proceedings.

Until recently, domain names were dominated by .com and a few other top-level domains such as .org, .int, and .net. Since 2013, some 1,400 new top-level domains are being introduced, such as .express, .cafe, .love, .tickets and .school. This proliferation is expected to disrupt existing trademark protection strategies and create a new series of disputes.

Box 4: Examples of domain name disputes

Decision of 7 March 2000 in Case No. NAF 0092529 (Philips India Limited v. Proton Engineers)

In 2000, Philips India Limited (Philips) filed a complaint against Proton Engineers (Proton), which had registered the domain name 'philipsindia.com'. Proton had started to develop Philips' website and had made an application for the domain name. However, instead of making the application in the name of Philips, Proton registered the domain name under its own name.

The ICANN arbitrator found that the domain name was confusingly similar to Philips' trademark or service mark, that Proton had no legitimate interests in the domain name and that Proton had registered and used the domain name in bad faith. The arbitrator directed the domain name to be transferred to Philips.

Decision of 3 April 2000 in Case No. WIPO D2000-0034 (ISL and FIFA v. Chung, Korea and others)

FIFA, the international soccer federation and organizer of the World Cup, and ISL, its marketing agent (collectively Complainants) complained about Respondent's abusive use of 15 domain names such as worldcup2002.com and 2002worldcup.org. Respondent had offered to sell the domain names to Complainants. Complainants contended that each domain name was confusingly similar to FIFA's World Cup trademarks.

The panel found that 13 domain names containing the words World Cup were confusingly similar to the World Cup registered trademark. However, the two last domain names (wc2002.com and wc02.com) did not likely suggest World Cup. The panel also found the only plausible conclusion from the fact that Respondent had registered such a large number of domain names was that he intended to warehouse them to prevent Complainants reflecting their

World Cup trademark in a corresponding domain name. Accordingly, the panellist required the transfer to FIFA of the 13 first domain names, with the exception of the 'wc' domain names.

Decision in WIPO Case No. D2010-0776 of 14 July 2010 (The LURPA case – Danish Dairy Board, Denmark v. Cykon Technology Limited of Hong Kong, People's Republic of China)

Complainant acquired trademarks throughout the world for the name LURPAK as a collective mark to be used by the Danish dairy industry. Respondent registered the disputed domain name LURPA. The website accessed by the disputed domain name led to a site selling a variety of goods and services, none of them connected with the dairy industry.

Complainant claimed that the disputed domain name was confusingly similar to its well-known trademark and corresponding domain name. The omission of the letter 'k' from the disputed domain name was insufficient to create a substantial difference between the two names

Respondent argued that the two words 'lurpak' and 'lurpa' were neither phonetically similar nor pronounced similarly. However, the panel found that the disputed domain name was confusingly similar to complainant's trademarks, although there is one letter difference between the two names. Neither name is generic nor represents an accepted word. Both names are made-up. The panel cited another case where respondents had sought to take advantage of Internet users' typographical errors when seeking to access a complainant's website, a practice dubbed 'typo squatting' and condemned in several WIPO decisions.

The panel ordered that the domain name LURPA.com. be transferred to the Complainant.

JOINT VENTURE DISPUTES

Large business projects often involve joint venture agreements among companies located in different countries. Drafting a joint venture agreement involves many issues, such as the contribution of each joint venture participant, production and exploitation of licences, technical assistance, supply and training of personnel, currencies, payment methods, and termination of the joint venture.

The complex structure of an international joint venture requires an appropriate method for settling disputes. Because different legal systems may be involved when a dispute arises, courts may not be the best forums. An international panel of arbitrators with experience in the field may be better suited. However, parties need not always have recourse to a full arbitration procedure. Mediation may be a better method for resolving differences within a joint venture, thereby preserving a long-term relationship.

MARITIME DISPUTES

Because international transport of goods is primarily by sea, maritime contracts have an important place in international business transactions. Maritime contracts do not involve only exporters and importers.

There is a tradition in the maritime community to settle most disputes in London through the London Maritime Arbitration Association, or in New York through the Society of Maritime Arbitrators. However, other experienced arbitration centres exist, including the Japan Shipping Exchange Association, Moscow Maritime Arbitration Court, Gdynia Maritime Arbitration Centre (Poland) and *Chambre Arbitrale Maritime de Paris*.

Arbitration agreements in charter parties, which are contracts between a charterer who takes over the use of the whole or a substantial portion of a ship belonging to the owner, are contained in standard form contracts that are rarely negotiated.

Bills of lading are documents evidencing receipt of goods for shipment issued by the transporter or freight forwarder. Bills of lading are transport contracts that determine, among other things, how the goods will be shipped, when they will be loaded, when they should arrive at destination, and sometimes where and how the quality of the goods will be verified. Bills of lading often incorporate by reference maritime arbitration clauses or clauses referring to courts. Validity of such incorporation by reference has given rise to numerous disputes.

In maritime disputes time is generally of the essence as the goods may perish or deteriorate quickly and because demurrage may be payable when a ship arrives late. Courts will rarely be suited to deal rapidly with the substance of these disputes, although their intervention can be important where

conservatory or provisional measures are urgently required, such as restraining a party from removing assets from a certain territory, arresting a vessel or appointing an expert.

Sometimes parties have not been able to sign an agreement because emergency action must be taken, for example in the case of the rescue of a ship. On the basis of usages applicable in some harbours, the parties may become bound by an arbitration agreement without a written document, merely on the basis of an oral acceptance of certain assistance.

DISPUTES WITH PRESHIPMENT INSPECTION AGENCIES

Some governments of importing countries mandate the use of preshipment inspection (PSI) agencies. In 2015, in more than 30 countries, importers and government procurement departments are not allowed to import goods without having obtained a certification of quantity, quality and price prior to shipment. This certification is delivered by a designated PSI agency operating in the country of the exporter. Governments use this policy to control both undervaluation and over-invoicing of goods, and to thwart attempts to avoid customs duties. In practice, the importer will instruct the exporter to obtain a 'clean report of findings' certificate from the government-mandated PSI agency.

The involvement of PSI agencies in the mandatory verification of prices agreed by the importer and the exporter has been viewed with some concern by businesses. In 1995, the World Trade Organization (WTO) Agreement on Preshipment Inspection came into force. The agreement attempts to strike a balance between the concerns of exporters and the interests of countries that consider the PSI services useful.

The WTO agreement provides an institutional mechanism for considering exporters' grievances about arbitrary or wrong decisions. The process is two-fold. First, an exporter can appeal in writing a PSI agency's decision to the administrative office of the PSI agency that performed the inspection.

Second, if the exporter is still dissatisfied two working days after submission of the appeal, it may refer the dispute to an Independent Entity that will administer an independent review and appoint one or three experts. Both parties share the costs of the appeal procedure. Within a 21-day extendable time limit, the expert(s) must decide whether or not the parties have complied with the PSI Agreement. The decision of the expert(s), which also apportions the costs based on the merits of the case, is binding upon the PSI agency and the exporter.

This WTO mechanism has been little used. But the threat of using it can be extremely useful for exporters as leverage and a bargaining chip in discussions with PSI agencies, which generally will wish to avoid this process.

The Independent Entity, constituted jointly by the International Federation of Inspection Agencies and ICC, is a subsidiary body of the WTO Council for Trade in Goods in Geneva, Switzerland.

DISPUTES WITH CUSTOMS AUTHORITIES

There are two major types of disputes involving exporters and importers with customs authorities. The first concerns classification and the second involves valuation.

Classification issues have important financial implications because a product could be subject to higher or lower taxes. Classification also triggers a range of non-tariff barriers such as licenses, inspections and quota restrictions. Unfortunately, a quick form of settlement has not been found in this context. Since the introduction in 1988 of the Harmonized System Convention (HS) by the World Customs Organization (WCO) the HS nomenclature has become used worldwide. The HS system is comprised of about 5,000 separate groups, each identified by a six-digit code. Inevitably, there are differences of opinion concerning how particular products should be treated under the HS.

Science and technology have created new products not envisaged when HS was introduced. Although HS is revisited every five years or so, it is difficult to catch up with the rapid creation of new products. Because it is responsible for amending and interpreting the HS nomenclature, WCO offers the only international forum for resolving international tariff classification questions. However, in contrast with its powers to amend the HS nomenclature, WCO's role in interpreting the HS nomenclature is only advisory and

classification issues may only be referred to WCO by governments, not by private companies.

Most countries have introduced further subdivisions of HS Codes, called national sub-headings, splitting the six-digit HS classification into eight or 10 digits. The power to interpret these national sub-headings lies with national courts and administrative authorities.

A dispute between customs authorities and a company will not relieve the company from paying the required duties first so that the goods can be cleared. Today, classification disputes are referred to national courts and administrations in accordance with different interpretative rules, statutes and procedures. This complexity has led some to refer to the HS system as the 'unharmonized system of tariff classification'.

Disputes over valuation of goods are different in nature. The 1995 WTO Agreement on Customs Valuation establishes the basic rule that the dutiable value for customs purposes should be based on the transaction price, for example, the invoice price.

The agreement recognizes that prices obtained by different importers for the same product may vary. Customs officials can reject the transaction value if they have reason to doubt the truth or accuracy of the declared price of the imported goods, called underinvoicing. In these cases the importer should be allowed a fair opportunity to justify the declared price.

DISPUTES INVOLVING BANKS

When parties have provided for payment through a letter of credit, disputes may arise as to whether the documents

Box 5: Importers' rights in valuation disputes with customs authorities

The 1995 WTO Agreement on Customs Valuation contains provisions that protect the interests of importers in case they disagree with the customs administration's refusal to accept the transactional value declared by the importer.

Article 10

All information which is by nature confidential or which is provided on a confidential basis for the purposes of customs valuation shall be treated as strictly confidential by the authorities concerned who shall not disclose it without the specific permission of the person or government providing such information, except to the extent that it may be required to be disclosed in the context of judicial proceedings.

Article 11

1. The legislation of each Member shall provide in regard to a determination of customs value for the right of appeal, without penalty, by the importer or any other person liable for the payment of the duty.

2. An initial right of appeal without penalty may be to an authority within the customs administration or to an independent body, but the legislation of each Member shall provide for the right of appeal without penalty to a judicial authority.
3. Notice of the decision on appeal shall be given to the appellant and the reasons for such decision shall be provided in writing. The appellant shall also be informed of any rights of further appeal.

Article 16

Upon written request, the importer shall have the right to an explanation as to how customs value of the importer's goods was determined.

Box 6: Dispute resolution in the World Trade Organization's Trade Facilitation Agreement

Dispute resolution in the WTO Trade Facilitation Agreement, adopted in 2013, has two important provisions.

Article 3: Advance rulings

1. Each Member shall issue an advance ruling in a reasonable, time-bound manner to the applicant that has submitted a written request containing all necessary information. If a Member declines to issue an advance ruling, it shall promptly notify the applicant in writing, setting out the relevant facts and the basis for its decision.

Article 4: Procedures for appeal or review

1. Each Member shall provide that any person to whom customs issues an administrative decision has the right, within its territory, to:

- (a) an administrative appeal to or review by an administrative authority higher than or independent of the official or office that issued the decision;
and/or
- (b) a judicial appeal or review of the decision.

conformed to the contractual stipulations and/or the Uniform Customs and Practice for Documentary Credits edited by ICC.

Since 1997, documentary credit disputes may be resolved by obtaining a binding opinion from experts under the DOCDEX procedure administered by ICC. These rules were revised in 2015.

EMPLOYMENT CONTRACT DISPUTES

Most national laws provide that labour disputes must be decided by their courts. However, some countries allow settlement of labour disputes by arbitration or ADR methods.

In international matters, the requirement to bring labour disputes before courts can often be lifted under many national laws. Businesses should choose the appropriate method for settling disputes, particularly when they hire

personnel abroad, when they send their own personnel abroad or when they hire workers from abroad.

DISPUTES INVOLVING STATES OR STATE-OWNED ENTITIES

International commercial contracts may involve one or more state-owned entities or a state itself. A government or a state-owned entity may order a construction project. Government entities may decide to purchase goods abroad.

If a contract is signed by a state or a state-owned entity, the contracting partner needs to verify whether the entity has the power under its laws to agree to arbitration or ADR methods to settle disputes and, if so, under what conditions and by whom such an agreement may be signed. Verifying these issues before signing the contract will avoid difficulties after a dispute has arisen.

Box 7: The state as a party to arbitration

An example of the state as a party to arbitration is the Ad Hoc Award of 18 November 1983, in *Benteler (Germany) v. the State of Belgium*.

In 1980, the State of Belgium and a German engineer, Benteler, entered into an agreement relating to the restructuring of another company. The agreement contained an arbitration clause.

When a dispute arose, Belgium argued that the Belgian Judicial Code prohibited it from submitting this dispute to arbitration. According to Belgium, the state's ability to compromise is a question of capacity that can only be decided in accordance with domestic law.

Benteler invoked Article II (1) of the 1961 European Convention on International Commercial Arbitration, under which 'public law legal entities' have the right to enter into arbitration agreements. Belgium did not deny that the

European Convention was in principle applicable, but only on the condition that the matter involved an international commercial operation. It claimed that the agreement did not relate to a commercial operation under Belgian law.

The arbitral tribunal rejected Belgium's arguments, finding it would be contrary to the objective of the European Convention to admit that its terms had to be interpreted according to domestic law because such an interpretation would lead to the very type of difficulties the Convention's drafters wanted to avoid. The tribunal also held that the agreement concerned international commerce within the meaning of the European Convention.

The tribunal concluded that a state that has subscribed to an arbitration clause would act contrary to international public order by later arguing that its obligation to arbitrate was inconsistent with its domestic law.

Box 8: Who signs an arbitration clause for the state?

The Arbitral Award of 16 February 1983, ICC Arbitration No. 3493, illustrates the importance of who signs an arbitration clause for the state.

1. SPP (Middle East) Ltd (Hong Kong); 2. Southern Pacific Properties Ltd (Hong Kong) v. 1. Arab Republic of Egypt (Egypt); 2. The Egyptian General Company for Tourism and Hotels (EGOTH) (Egypt)

An agreement signed by SPP, a real estate developer and EGOTH concerned construction of two tourist villages in Egypt. Following SPP's and EGOTH's signatures appeared the words 'approved, agreed and ratified by the Minister of Tourism' and the signature of the minister. The agreement contained an ICC arbitration clause.

After opposition in the Egyptian Parliament, the Egyptian government issued decrees effectively cancelling one of the villages. Claimants acknowledged that the government had sovereign power to cancel the project. However, they argued that the cancellation was a breach of contractual obligations into which the government had freely entered.

The Egyptian government disputed that it was a party to the agreement containing the arbitration clause. It contended that the minister's signature had no contractual significance and that this signature was to be ascribed either to the fact that the minister was Chairman of the Assembly of EGOTH and was signing in that capacity, or it was to be ascribed

to supervisory powers that the minister possessed in an administrative capacity. The government also contended that its decrees cancelling the project were legislative and executive acts amounting to acts of state, and as such could not be condemned as breach of contract. Further, the government argued that the arbitration agreement should be explicit, thus attempting to invoke the doctrine that waivers of immunity must be explicit.

The arbitral tribunal rejected the Egyptian government's arguments. It held that the government became a party to the agreement by contractually undertaking a number of obligations under the agreement. By so doing, the government necessarily became bound by the mechanism provided for settling disputes, the ICC arbitration clause.

The tribunal accepted the principle that an arbitration clause should be clear and unequivocal, and found that the agreement contained no ambiguity. The government, in becoming a party to the agreement, could not have reasonably doubted that it would be bound by the arbitration clause contained in it.

The arbitral tribunal also held that an explicit waiver was not necessary and that the recognition of an implicit waiver by submission to arbitration, in the light of doctrinal and jurisprudential evolution of international arbitration, cannot be considered a deviation from the requirements of the international legal order.

PREVENTING AND RESOLVING COMMERCIAL DISPUTES

A well-written and well-balanced contract is crucial to dispute avoidance. Conflict avoidance is promoted by drafting language that contemplates that circumstances prevailing at the time of signature may change.

The best two methods of dispute avoidance are to negotiate a contract in a thoughtful and comprehensive way and to retain the right to modify the contract to address material changes of circumstances. The ability to change the contract at a later date is important when a situation changes and materially impacts the agreed terms.

The best way to deal with dispute resolution is to understand the types of disputes that could arise under the contract, the available methods of dispute resolution, and to provide in the contract for the dispute resolution methods that parties agree to use.

CONTRACT NEGOTIATION

Parties to international commercial contracts should pay particular attention to the contract negotiation stage. A contract that is well negotiated and drafted in clear and simple terms is more easily performed and less prone to disputes than a contract signed at the last minute or drafted in ambiguous and vague terms.

Parties often do not agree on all provisions of a contract. Compromise is usually necessary. Common sense must prevail. The parties must commit themselves to negotiate in good faith.

Parties should consult a qualified lawyer where contracts are complex or where the scope or effect of some provisions may be subject to doubt. Companies with in-house lawyers should use their services. If a contracting party does not have in-house counsel, it is often more prudent to solicit and pay for a legal opinion from an external lawyer rather than run the risk of dispute resolution proceedings whose costs may substantially exceed those incurred in obtaining a legal opinion.

Common sense dictates that parties should never sign a contract in a hurry. When a party is under pressure to conclude a contract rapidly, the contract often results in difficulties of performance. Parties should take the time necessary for research and reflection before signing the contract.

EXEMPTION AND ADAPTATION CLAUSES

Although a contract has been negotiated and signed between the parties in good faith, sometimes the situation prevailing at the time of signature changes considerably. As a result, the contract cannot be performed under the same conditions or cannot be performed at all. For example, if an earthquake destroys the only factory that could produce the goods to be sold, timely performance may become physically impossible.

Sometimes performance may not be impossible, but supervening events put an excessive and unanticipated burden on one of the parties. For instance, a long-term contract for the delivery of crude oil at a fixed price may become financially disastrous for the supplier because the price of oil has risen several times or vice versa for the buyer. In such a situation a party may wish to plead 'hardship' as an excuse for its failure to perform.

Sometimes performance becomes legally impossible. These situations may be characterized as impossibility, Act of God, frustration of purpose, failure of pre-supposed condition or force majeure.

The laws of most countries have provisions that deal with force majeure and some laws address hardship situations. These provisions vary among countries and may not meet the parties' requirements in international contracts. Parties to international contracts frequently need contract clauses on force majeure and hardship which, if well drafted, prevent or resolve disputes that may arise without need for recourse to judicial or arbitral proceedings.

ICC has drawn up two sets of provisions to assist parties in drafting contracts. The first lays down conditions for exemption from liability when performance has become literally or practically impossible (force majeure). The second covers situations where changed conditions have made performance excessively onerous (hardship). Neither set of provisions is tied to any particular legal system. However, care should be taken to ensure that they do not conflict with any applicable mandatory legal provisions.

The force majeure clause grants relief from contractual liability and includes provisions for suspension and termination of the contract. Parties may either reproduce in their contract the text set out in ICC Publication No. 650, or incorporate the ICC force majeure clause by reference

in their contract through the use of the following wording: 'The Force Majeure (Exemption) clause of the International Chamber of Commerce (ICC Publication No. 650) is hereby incorporated in this contract.'

Hardship is a relatively recent theory in international contract law. It is mainly found in long-term contracts that require detailed individual drafting. According to the ICC hardship clause, parties may either reproduce in their contract the text set out in ICC Publication No. 650, or incorporate the ICC hardship clause by reference in their contract through the use of the following wording: 'The Hardship clause of the International Chamber of Commerce (ICC Publication No. 650) is hereby incorporated in this contract.'

Clauses 6.2.1 to 6.2.3 of the 2010 International Institute for the Unification of Private Law (UNIDROIT) Principles for International Commercial Contracts (see Box 9), provide useful guidelines for contract drafting. The hardship provisions envisage renegotiation and revision of the contract terms so that performance may be continued. They are intended essentially for long-term projects. Clauses of a general nature often need to be adapted to the particular circumstances of an individual contract. Parties should take care in using these provisions because they may not be suitable for certain products or trades. The same caution should be exercised when using the ICC hardship clause.

NON-JURISDICTIONAL MEANS OF SETTLING DISPUTES

COURTS, ARBITRATION AND ALTERNATIVE DISPUTE RESOLUTION SCHEMES

Commercial disputes can be resolved through jurisdictional processes or through non-jurisdictional processes. Jurisdictional processes are court litigation and arbitration. Both courts and arbitral tribunals have the power to render binding decisions that can be enforced against the losing party.

Non-jurisdictional processes involve recourse to ADR schemes including conciliation and mediation. In contrast with courts' decisions and arbitral tribunals' awards, the outcomes of ADR proceedings are not enforceable upon the parties. The parties are not legally obligated to comply. Complying with the settlement is a matter of goodwill.

Enforceability of mediation or conciliation agreements and conditions of validity rely on national legal frameworks. Parties may bind themselves contractually to a mediator's or conciliator's recommendation. If one of the parties does

Box 9: UNIDROIT Principles on hardship provisions

The following model provisions on hardship are from the UNIDROIT Principles of International Commercial Contracts (2010). Adaptations may be required prior to their incorporation in contracts. For example, these articles refer to a court, while parties may need to specify which court or arbitral tribunal is envisaged.

Article 6.2.1.

Contract to be observed

Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship.

Article 6.2.2.

Definition of hardship

There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and

- (a) the events occur or become known to the disadvantaged party after the conclusion of the contract;

- (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;
- (c) the events are beyond the control of the disadvantaged party; and
- (d) the risk of the events was not assumed by the disadvantaged party.

Article 6.2.3.

Effects of hardship

1. In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.
2. The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.
3. Upon failure to reach agreement within a reasonable time either party may resort to the court.
4. If the court finds hardship it may, if reasonable,
 - (a) terminate the contract at a date and on terms to be fixed; or
 - (b) adapt the contract with a view to restoring its equilibrium.

not comply with the recommendation with which it had agreed, the other party will need to bring the case before a court or an arbitral tribunal.

The terms conciliation and mediation apply to very similar procedures in the civil law and common law contexts, especially in the international arena. Today, the two terms are used interchangeably in practice.

Since 1919, ICC dispute resolution rules were Rules of Conciliation and Arbitration. In 2001, ICC replaced its Rules of Optional Conciliation with ADR Rules, which covered a wide range of dispute resolution techniques including mediation, mini-trial and neutral evaluation. In 2014, ICC replaced the ADR Rules with ICC Mediation Rules.

The United Nations Commission on International Trade Law (UNCITRAL) adopted Conciliation Rules in 1980, and in 2002 a Model Law on International Commercial Conciliation. The UN General Assembly's Resolution instituting the Model law notes: 'Such dispute settlement methods, referred to by expressions such as conciliation and mediation and expressions of similar import, are increasingly used in international and domestic commercial practice as an alternative to litigation.'

BASIC FEATURES OF CONCILIATION

A conciliation procedure brings the parties together before a third person who they have chosen to settle their dispute. If the procedure is successful, the parties and the conciliator sign a settlement agreement.

During the proceedings, the conciliator sets out for the parties what he or she considers to be the best perspectives to resolve the dispute. The conciliator conducts the process as he or she thinks fit, guided by the principles of impartiality, equity and justice. As with arbitration, there are two types of conciliation proceedings: ad hoc and institutional.

- Ad hoc conciliation is organized and managed by the parties without the assistance of an institution. UNCITRAL Conciliation Rules are an example of ad hoc conciliation rules.
- Institutional conciliation is organized by an institution or a specialized centre that generally also handles administration of arbitrations. However, conciliation proceedings are different from arbitration.

Conciliation proceedings require the agreement of all parties. Agreement can be expressed by a clause in the contract or, subsequently, by a conciliation agreement, which may be either verbal or written. For example: 'All disputes in connection with the present contract shall be submitted to conciliation pursuant to X Rules. The place of conciliation shall be X.'

Some rules that organize conciliation proceedings are inspired by those for arbitration proceedings. They provide for an exchange of memoranda, hearings and also for some procedural rules.

The adversarial principle does not necessarily need to be respected for reasons of efficiency. The conciliator may hear the parties together or separately. It is advisable to provide flexibility in taking of evidence to achieve efficiency. This flexibility involves informal means such as suggestion, proposal and persuasion. This flexibility is not incompatible with the adversarial principle insofar as the parties agree on it. In conciliation, the principle of confidentiality bars the parties from disclosing in subsequent proceedings before arbitral or judicial tribunals the proposals or evidence submitted in the course of the conciliation.

If the conciliation is unsuccessful, the parties may either bring their case before courts or arbitral tribunals.

In most countries, there is a total separation between the persons acting as conciliators and those acting as arbitrators. The walls separating the two are much thinner in some countries such as the People's Republic of China, where arbitrators may encourage parties to conciliate, and then become conciliators in the same proceedings. In the majority of countries, the administering bodies often are distinct. In general, if the conciliation has failed the conciliator will not be appointed as arbitrator in the same case. The proposals or recommendations made by the conciliator have no binding effect. The parties remain free to accept or reject them. However, if the parties agree, they may confirm these proposals in a signed contract, a mediation agreement or in a binding arbitration award.

BASIC FEATURES OF MEDIATION

Mediation is a variation of conciliation where an attempt to settle disputes is made by a third party, the mediator, who examines the claims of the parties and recommends one or more possible solutions. The parties are free to accept or reject these solutions. Like conciliation, mediation may be ad hoc or institutional.

Mediation leaves the decision power to the parties. The mediator does not decide what is 'fair' or 'right'. The mediator acts as a catalyst between opposing interests attempting to bring them together by defining issues and eliminating obstacles to communication, while moderating and guiding the process to avoid confrontation and ill will. The mediator will seek concessions from each side during the mediation process.

MINI-TRIALS

A mini-trial is not a judicial procedure but an amicable way of resolving disputes. It is an abbreviated procedure. Mini-trials are frequently used in the United States, especially in international business disputes. A mini-trial does not fundamentally differ

Box 10: Mediation clause options

Effective 2014, the ICC Mediation Rules provide for the appointment of a neutral third party, the mediator, to assist the parties in settling their dispute. ICC proposes the following contract clauses regarding mediation as: (i) an option, (ii) an obligation to consider, (iii) as an obligation in parallel to arbitration, or (iv) as an obligatory preliminary step before arbitration.

Option to use the ICC Mediation Rules

The parties may at any time, without prejudice to any other proceedings, seek to settle any dispute arising out of or in connection with the present contract in accordance with the ICC Mediation Rules.

Obligation to consider the ICC Mediation Rules

In the event of any dispute arising out of or in connection with the present contract, the parties agree in the first instance to discuss and consider referring the dispute to the ICC Mediation Rules.

Obligation to refer the dispute to the ICC Mediation Rules while permitting parallel arbitration proceedings if required

In the event of any dispute arising out of or in connection with the present contract, the parties shall first refer

the dispute to proceedings under the ICC Mediation Rules. The commencement of proceedings under the ICC Mediation Rules shall not prevent any party from commencing arbitration in accordance with sub-clause XX below.

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

Obligation to refer the dispute to the ICC Mediation Rules, followed by arbitration as required

In the event of any dispute arising out of or in connection with the present contract, the parties shall first refer the dispute to proceedings under the ICC Mediation Rules. If the dispute has not been settled pursuant to the said Rules within [45] days following the filing of a Request for Mediation or within such other period as the parties may agree in writing, such dispute shall thereafter be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.

from conciliation or mediation proceedings. The process is meant to help the parties arrive at an amicable settlement, but only after taking evidence and adversarial debates.

Generally the starting point is an agreement between parties who wish to overcome their differences as soon as possible so they can resume normal commercial relations. Each party provides a senior representative who has power to bind the party in case a settlement emerges.

In the first stage, parties' counsel exchange memoranda and exhibits, and then argue their cases before the parties' senior executives. They may be assisted by neutral advisers or observers. After this first stage, the parties' representatives start negotiations to settle the matter. The basic idea is to submit the dispute into the hands of senior executives after they have been briefed by the exchange of documents and arguments of counsel. A mini-trial aims to transform a legal dispute into a question of commercial policy.

Mini-trials differ from arbitration. In arbitration proceedings, each party presents its arguments before the arbitrators who have the duty to decide the dispute. In mini-trials, party representatives are not vested with any judicial powers. They are appointed to seek an amicable solution. Additionally, neutral advisers may assist the parties' representatives.

These advisers do not impose a solution on the parties. They only attend the proceedings and give advice if requested. The neutral adviser may be asked to chair the mini-trial panel and to propose solutions that may reasonably bring about a settlement. The neutral adviser may deem it appropriate to consult with the parties' representatives separately.

For more information see the mini-trial rules edited by the Zurich Chamber of Commerce (Switzerland) and those of the Belgian Centre for Arbitration and Mediation (CEPANI): www.wipo.int/amc/en/events/conferences/1995/blessing2.html www.cepani.be

DISPUTE REVIEW BOARDS AND DISPUTE ADJUDICATION BOARDS

DRBs are an effective mechanism used in large-scale construction projects to address the wide range and number of dispute that parties encounter during the execution of a multi-year project.

This ADR method originated in the United States in 1975 for the construction of the Eisenhower Tunnel in Colorado. The DRB

Box 11: How a Dispute Review Board works – Ertan Hydroelectric Project, People's Republic of China

This was the first dispute board used in China. The project consisted of a concrete dam and underground hydropower plant. Construction lasted nine years and cost US\$ 2 billion. The owner was the Chinese Hydropower Association. In total there were five European contractors and two Chinese contractors.

FIDIC conditions were used. A three-person DRB was installed for the two main contracts consisting of members from the United Kingdom, Colombia and Sweden. The parties each chose one member and the members chose a chair. Recommendations of the DRB were binding unless a party gave notice of referral to arbitration within a set time limit. Where notice of referral was given by a party, the recommendations were not binding in the interim, and were admissible to arbitration.

The DRB made site visits every four months with a total of over 20 visits. Some parties were wary at first, but they

came to realize that the DRB process could help the project by resolving difficult disputes. As confidence in the DRB grew, it became more proactive and assisted the project in resolving potential disputes on a wide variety of technical and contractual issues. Proceedings were held in English and Chinese. All referrals to the DRB were the subject of hearings onsite. Several disputes were heard by the DRB during onsite sessions. Recommendations were typically rendered in writing several weeks later.

Forty disputes were referred to the DRB. No disputes were referred to arbitration. All disputes were resolved in amicable settlements between the parties either immediately following publication of the recommendation or in final settlements following construction.

Source: The Dispute Resolution Board Foundation

heard three disputes. Owner-constructor relations were cordial throughout the project. It was an overwhelming success.

The first successful international dispute board was in 1981 in Honduras for the construction of the El Cajon Dam. In 1995, the World Bank made dispute boards mandatory for all construction and civil works projects it financed over US\$ 50 million. Since then FIDIC, the American Arbitration Association (AAA), ICC and various professional associations have introduced dispute board rules. Thousands of public works contracts, national and international, have incorporated the concept for large international construction and infrastructure projects.

These contracts provide for the appointment of a panel of experts, generally construction practitioners (engineers, lawyers and/or economists), either at the time of signature or in the process of the execution of the contract.

There are three main types of dispute boards, classified according to the powers conferred on the board by the parties. In 2014, revised in 2015, ICC adopted Dispute Board Rules that provide for three alternative types. FIDIC generally uses the concept of DABs. AAA uses the terms DRB to describe powers similar to ICC DRBs:

DISPUTE REVIEW BOARD

The DRB's authority is limited to making recommendations. In some circumstances, the DRB recommendations may become binding on the parties, if not challenged within a specified time. Under ICC Dispute Board Rules, a recommendation by a DRB becomes binding and enforceable if a notice of dissatisfaction is not served within 30 days.

Similarly, AAA's term 'Dispute Resolution Board' is defined as a panel of three neutral parties selected by the parties to become part of the project team. The panel attends meetings, reviews important project documents and provides advisory recommendations to assist in resolving disputes before they escalate. Within 14 days after the close of the hearing, the board will provide the parties with a non-binding written recommendation for resolving the dispute that becomes binding if not challenged.

DISPUTE ADJUDICATION BOARD

These boards are usually authorized to make interim and binding decisions that must be complied with on receipt. Under FIDIC rules, the DAB's decision is immediately binding on the parties. Whether or not the contractor or the employer is dissatisfied of the decision, they must give it effect unless and until it is revised amicably or in an arbitral award. A DAB decision may subsequently be referred to a final tribunal within a specified timescale. The decision becomes final if not challenged within a specified time.

On the parties' request, a DAB may also make non-binding recommendations. The FIDIC Red Book provides for the establishment of a DAB that issues binding decisions. The DAB may also offer advice and recommendations on issues referred to it jointly by the parties.

COMBINED DISPUTE BOARD

Combined Dispute Boards (CDBs) normally issue recommendations but also have the power to make a decision if a party so requests and no other party objects. In the event of an objection, the CDB will decide whether to issue a recommendation or a decision.

The parties appoint members of DRBs or DABs in the same manner as an arbitral tribunal is constituted, with one major difference: the panel is generally appointed at the beginning of the project and for its whole duration. Each party nominates its expert and the two appointed experts designate the third, unless the parties agree to a different appointment mechanism. A one-member DRB or DAB may also be appointed.

DRBs and DABs typically follow a project from beginning to end through site visits, study of monthly reports, exchange of correspondence and miscellaneous reports. The objective is to be able, upon request, to react promptly and knowledgeably, and if necessary to issue a written opinion, recommendation or decision. DRB and DAB experts are often paid a monthly retainer and an hourly fee for their on-site interventions.

DRBs and DABs also function as advisory bodies. Parties may request a preliminary written opinion. This opinion does not bind the parties or the board. The board has a more formal mission when it issues a decision or a recommendation upon a procedure that enables all parties to express their views.

Once the board has handed down its opinion, decision or recommendation, each party indicates, within a fixed time limit, whether or not it accepts it. If the decision is not accepted, court or arbitration procedures are options.

PARTNERING – A MEANS TO AVOID DISPUTES

Partnering is a way of doing business that emphasizes trust, teamwork and cooperation among parties to a contract. It is a means of avoiding disputes rather than providing a method of dispute resolution.

Partnering is often used in construction projects as a management tool. The concept is to establish a working relationship among the parties through a mutually developed, formal strategy of commitment and communication where trust and teamwork can prevent disputes, create a spirit of cooperation and facilitate the successful completion of the project.

Partnering takes place by organizing workshops in which all parties participate. A neutral facilitator promotes teambuilding and assists the parties to identify their expectations. The aim is to eliminate an 'us versus them' mentality and create a 'we' spirit. This exercise seeks to anticipate possible disputes and the means to prevent them. Partnering requires that the parties be trained and managed by a third party, the facilitator.

TECHNICAL EXPERTISE

Frequently the first problems that arise in international industrial or high tech contracts are technical. Generally, it is more efficient to address these technical issues before

experts rather than in a legal battle before judges or arbitrators who lack specialized knowledge.

The decision to call upon an expert to resolve differences instead of going to the courts or arbitration may depend on the parties' origins. There is an important difference of mentality between lawyers from civil law and common law traditions. Common law lawyers tend to call upon their own experts to support their positions. By contrast, civil law lawyers will request the tribunal, whether judicial or arbitral, to appoint a neutral, independent expert to report on technical issues.

In case technical difficulties arise during a project, the parties may refer the matter to the ICC International Centre for ADR. The Rules of the Centre set out three types of services whereby the Centre proposes names of experts, appoints them, or administers expertise proceedings conducted under the Expert Rules.

Proposals of experts are made when the parties have not agreed to use ICC expertise, but one or both of them wish to have a name of an independent expert. ICC will propose an expert on the request of a party, an arbitral tribunal or a court. The centre's role ends once it has proposed an expert.

Appointments are made when the parties have agreed to appointment of an expert and use of the centre as appointing authority, or when the ICC International Centre for ADR is satisfied there is a sufficient basis for appointing an expert. This can be provided in the parties' contract by using one of the ICC model clauses.

Administering technical expertise becomes involved when parties have not foreseen referring their dispute to an expert, but upon encountering a technical difficulty such as a disagreement over modifications of contractual specifications that will entail higher costs. They then call upon ICC or another institution to appoint an expert and manage the expertise process.

The parties can ask the ICC International Centre for ADR to administer expertise proceedings pursuant to Expert Rules. In this case, ICC International Centre for ADR role does not end with the selection of an expert. The ICC's administration of the expertise proceedings includes:

- Coordinating between the parties and the expert;
- Initiating the appropriate steps to encourage the expeditious completion of the expertise proceedings;
- Supervising the financial aspects of the proceedings;
- Appointing an expert or confirming an expert agreed upon by all of the parties;
- Reviewing the form of the expert's report;
- Notifying the expert's final report to the parties;
- Notifying the termination of the expertise proceedings.

According to ICC Rules for Expertise, the expert's decision has no binding effect unless the parties have agreed otherwise.

Box 12: Technical expertise model clauses

Optional expertise

The parties may at any time, without prejudice to any other proceedings, agree to submit any dispute arising out of or in connection with the present contract to administered expertise proceedings in accordance with the Expert Rules of the ICC.

Obligation to submit disputes to expertise, followed by arbitration if required

In the event of any dispute arising out of or in connection with the present contract, the parties agree to submit the matter, in the first instance, to administered expertise proceedings in accordance with the Expert Rules of the ICC. If the dispute has not been resolved through such

administered expertise proceedings it shall, after the ICC International Centre for ADR notification of the termination of the expertise proceedings, be finally settled under the Rules of Arbitration of the ICC by one or more arbitrators appointed in accordance with the Rules of Arbitration.

International Chamber of Commerce as appointing authority in party-administered expertise

In the event of any dispute arising out of or in connection with the present contract, the parties agree to submit the matter to an expertise as defined in clause [Y] of the present contract. The expert shall be appointed by the ICC International Centre for ADR in accordance with the provisions for the appointments of experts under the Expert Rules of the ICC.

DOCUMENTARY INSTRUMENTS DISPUTE RESOLUTION EXPERTISE

In 1997, ICC produced a system for resolving documentary credit disputes through its ICC International Centre for ADR. The DOCDEX Rules provide a system that is more similar to expert determination than arbitration. These rules were revised in 2015.

A relatively swift and straightforward system to resolve documentary credit disputes is needed because some banks avoid their duty to pay irrevocable letters of credit on the grounds of alleged 'discrepancies'. These alleged discrepancies are due either to misinterpretation or misapplication of the ICC's Uniform Customs and Practice for Documentary Credits Rules or to the fabrication of discrepancies with the intent to delay payment or to justify non-payment by the bank. The system is primarily designed to encourage banks to resolve differences between themselves when faced with disputes between their respective customers.

The DOCDEX Rules are concerned with four ICC codes for bankers:

- Uniform Customs and Practice for Documentary Credits;
- Uniform Rules for Bank-to-Bank Reimbursement under Documentary Credits;
- Uniform Rules for Collections;
- Uniform Rules for Demand Guarantees.

When a dispute is submitted in accordance with the DOCDEX Rules, the Centre appoints three experts from a list maintained by the Banking Commission. These three experts conduct their work anonymously. All correspondence between the parties and the experts passes through the ICC International Centre for ADR. The experts' decision is handed

down after examination by the Technical Adviser of the Banking Commission. The process lasts on average about two months. The DOCDEX decision does not have to satisfy the legal requirements applicable to an arbitral award and, unless otherwise agreed, is not binding upon the parties.

JURISDICTIONAL MEANS OF RESOLVING DISPUTES

RECOURSE TO COURTS

Courts hear cases and make judgements on the merits of disputes in judicial proceedings. But they may also render services through granting a party provisional or conservatory measures, appointing technical experts. In certain jurisdictions, courts set in motion conciliation proceedings that are sometimes initiated as preliminary steps before commencing substantive proceedings.

JUDICIAL PROCEEDINGS

Judicial proceedings are commonly used in litigation involving parties of the same nationality. Disputes are submitted before the courts of the country in which the parties are nationals. However, if the parties are not residing at the same place, it shall be necessary to determine at the outset the proper local seat of the court.

In international matters, which court has jurisdiction – the country of the claimant or of the respondent? The parties can resolve this issue by including a choice of forum clause in their contract. The forum (the court) will generally be in the country of the claimant or the respondent. However, this

type of clause is not often used in international commercial contracts because neither party wants to have the dispute brought in a foreign court.

Occasionally, the parties do not stipulate any provision regarding settling disputes. Then, when a dispute arises courts are called to determine which tribunal has jurisdiction by applying conflict of law rules regarding judicial jurisdiction or by examining bilateral or multilateral treaties. Under these circumstances, a court may decline jurisdiction on the basis that its conflict of law rules refers the case to a court of another country. This may result in considerable delay and in significant increased costs.

Generally, parties do not wish to have their disputes resolved by courts of another country. This is because it may appear inappropriate to submit a dispute governed by another legal system to judges whose qualifications and education are rooted in their own legal system. Another concern is that the contract and the correspondence related to the dispute may have to be translated in the working language of the judge chosen. Likewise, the oral arguments will take place in this language and this may cause some inconvenience for the parties.

The parties may run the risk of choosing the jurisdiction of a court in a country that has not adhered to a bilateral or multilateral treaty on recognition and enforcement of judicial decisions, which means it will be difficult to enforce a judgement. Finally, judicial proceedings are public.

Generally, in court litigation, parties do not have to bear the costs of the judge's time and expenses. In arbitration, the parties pay the arbitrators' fees and expenses.

PROVISIONAL AND CONSERVATORY MEASURES BEFORE COURTS

Parties involved in court litigation generally have the possibility to seek conservatory or provisional measures with one or more of the following objectives:

- Ensure that the subject matter of the dispute does not suffer damages before a final decision is rendered and enforced;
- Regulate the parties' conduct and the relations between them during the proceedings;
- Preserve evidence and organize administration of the proceedings.

For example, a provisional or conservatory measure may be necessary to prevent a party from hiding or transferring out of the jurisdiction in question goods that are the subject of the dispute or the assets that would enable a party to obtain satisfaction if it were to win its case.

A party may also try to obtain an order during the conduct of the proceedings that the other party take or refrain from taking certain measures. A court may order the parties

to maintain the status quo until the final decision on the merits, for instance, that one of them does not call the bank guarantee contractually agreed.

A provisional or conservatory measure may aim at preserving evidence. It may also aim at collecting evidence through the hearing of fact witnesses or experts before examination of the matter on the merits.

Arbitrators lack the powers to order provisional measures such as seizing property and assets or ordering third parties to attend a hearing. This is why in a majority of countries courts cooperate with arbitral tribunals and parties involved in arbitral proceedings by ordering such provisional measures that an arbitrator would not have the power to order.

COURT-ORDERED TECHNICAL EXPERTISE

Courts can order technical expertise. Before commencing proceedings, whether judicial or arbitral, a party may seek appointment of an expert to give a technical opinion on the subject matter in dispute.

Such expertise may be provisional if circumstances require that proceedings be set in motion without delay. This may be the case with respect to sales of food, often perishable, where inspection must be made as soon as possible, without waiting for commencement of substantive proceedings. Court ordered expertise is used more in civil law systems than in common law systems.

COURT-ORDERED MEDIATION

In some countries, judges have power to mediate or conciliate the parties, although in practice they have little time to do so. This option is usually stipulated in the national procedural codes.

Court ordered mediation may seem to be an oxymoron. Mediation is voluntary, confidential and non-binding. It may appear inconsistent for a judge to order litigants to participate in a voluntary process. Yet, several countries have adopted legislation that encourages or compels parties to mediate their cases.

For example, in Australia courts have the power to refer the parties to mediation with or without their consent. There is also legislation requiring 'genuine dispute resolution steps' taken by the parties before any court proceedings may commence. Mediation is considered one of those 'genuine steps'.

In Hong Kong, China, consistent with the court's duty to facilitate resolution of disputes in a cost-effective way, courts have the power to order parties to mediate. In other countries, such as France and Côte d'Ivoire, judges may refer parties to mediation, but only with their consent. The

judge retains jurisdiction of the case. If the mediation is successful, the settlement is recorded and may be enforced as if it were a judgement.

In the United Kingdom, courts cannot compel parties to mediate a commercial dispute. However, they increasingly issue orders requiring the parties to attempt mediation. A party that ignores such an order will likely face cost sanctions. Also in the United Kingdom, if a case is brought to court in violation of the parties' agreement to mediate before commencing litigation, a court may refuse to hear the case.

In some countries, mediation is a mandatory step prior to a court proceeding. For example, in Indonesia litigants are obliged to mediate prior to civil proceedings, and court annexed mediation is possible during case proceedings as well. Failure to follow mediation procedures imposed by law could result in a judgement to be declared null and void.

Italy has introduced mandatory mediation for certain civil and commercial matters before commencing a trial. In Colombia, where the practice of mediation is well established, civil and commercial disputes must undergo a mandatory mediation process before being filed in court.

COMMERCIAL ARBITRATION

Arbitration is a private method of settling disputes based on the parties' agreement. The general rule is if there is no agreement to arbitrate there is no arbitration. Apart from a few exceptions, parties must agree by contract to arbitrate and either determine the rules governing their procedure, or refer to existing arbitration rules under the administration of an arbitral institution. In ad hoc arbitration, the parties determine themselves, without the assistance of an arbitral institution, how the arbitration will be conducted. In institutional or administered arbitration, the arbitration process is managed with the help of an arbitral institution.

Depending on the parties' agreement, the conduct of arbitration proceedings may or may not differ from the conduct of proceedings before a court, except that the proceedings belong to the parties themselves (or to the arbitration institution or any other third party designated by them) to constitute the arbitral tribunal. The procedural rules of arbitration are usually more flexible and less strict than those of courts.

The types of arbitration are described in more detail below. The basic differences between ad hoc and institutional arbitration are also described.

AD HOC ARBITRATION

In ad hoc arbitration the parties set up the arbitral tribunal and they must specify the rules that will govern the proceedings. In the event of difficulties, for example, if an arbitrator must be replaced, the parties may sometimes call

upon the intervention of a court to assist them. In ad hoc arbitrations, the parties must agree with the arbitrators on the arbitrators' fees and expenses.

INSTITUTIONAL ARBITRATION

In institutional arbitration the parties engage an arbitral institution to administer the proceedings according to the institution's arbitration rules. The parties must mutually choose the arbitral institution. The extent of administration varies from one institution to another. Parties should take these differences into consideration.

Generally, the arbitral institution administers the arbitral process 'partially' and limits its assistance to the constitution of the arbitral tribunal (appointment of arbitrators) taking into account the wishes of the parties and managing some financial aspects such as the arbitrators' fees. The arbitral institution applies its own arbitration rules.

Several arbitration institutions, under their rules, will receive a request for arbitration and will notify the other party of that request. The other party will state its position on the case and on the constitution of the arbitral tribunal. These institutions may have the power to fix a sum of money likely to cover the costs of the arbitration, to claim its payment and, at the end of the proceedings, to determine the final costs. They may handle the notification to the parties of the arbitrators' award. Other institutions may do much less. This type of arbitration is generally defined as 'partially-administered' arbitration.

Some institutional arbitration may be 'fully administered'. When institutional arbitration is fully administered the institution receives the request for arbitration and notifies the other party, but also assists in constituting the arbitral tribunal, fixes an advance on costs and perhaps the place of arbitration. Once the advance on costs has been paid, the institution sends the file to the arbitrators and supervises the conduct of the proceedings until the award is rendered.

The institution controls the proceedings and resolves difficulties such as replacement of arbitrators. The institution occasionally ensures that the award is in proper form and may also draw the arbitrators' attention to certain points regarding the merits of the case. It notifies the award to the parties after having fixed the final costs of the arbitration and ensures that the arbitrators are paid. The institution will ensure that the different steps of the proceedings have been accomplished within the time limits prescribed by its arbitration rules. For example, ICC arbitration is a fully administered arbitration system.

COURT LITIGATION OR ARBITRATION?

After having reviewed various means of preventing and resolving disputes, the issue of choosing the appropriate

method of dispute resolution remains. Should a court or arbitral tribunal resolve the dispute?

With respect to international contracts, it is often difficult for the parties to agree on the choice of a national court. Choosing a court in a third country is seldom appropriate.

Judicial proceedings are generally lengthy due to court work overload. In addition, courts have several layers of jurisdiction, including courts of first instance, appellate courts and supreme courts, that offer the possibility for an unsatisfied party to seek lengthy and expensive review of the merits of the case.

Courts are not always specialized in commercial matters and judges do not necessarily have adequate training in resolving international commercial disputes. They may be perceived in some countries as not offering the expected guarantees of independence and impartiality that are fundamental to good administration of justice. Finally, judicial proceedings are usually marked by strict, often inflexible, procedural rules.

In arbitration, party autonomy prevails. Parties are free to organize their proceedings by reference to established arbitration rules or to draft their own rules. They may choose their arbitrators, fix time limits or have them fixed by a third party. The decision is in principle final as to the merits. The bases for setting a decision aside are generally limited to fundamental procedural flaws.

Like judges, arbitrators have a duty of independence and impartiality. Arbitrators may be chosen for their specific professional and technical qualifications, and their availability. The confidentiality that applies to arbitration can create a calm atmosphere compared to court proceedings that are open to the public.

However, there are other considerations. Parties do not pay judges, but they bear all the fees and expenses of arbitrators and the fees of the arbitration institution administering the case. Arbitrators do not have judges' powers to order injunctive relief and various other provisional measures such as seizure of property, or the calling of witnesses or third parties who may not wish to participate in the proceedings. In some countries, courts have experience in specialized fields, such as admiralty, banking or patent disputes.

With the spread of regional integration, commercial court decisions can be quickly enforced between certain countries. This is the case in the European Union through European Commission Council Regulation No. 1215 (2012 (Recast) of 12 December 2012) on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters. This is also the case in several African countries that are members of the Organization for the Harmonization of Business Law in Africa.

Although arbitration may generally be recommended for the resolution of international commercial disputes, recourse to

courts is a valid option, depending on the circumstances. Box 13 presents some of the advantages and disadvantages of arbitration and court litigation.

CONFIDENTIALITY

In arbitration, whether the parties must keep confidential the documents and information disclosed is a complex issue on which opinions diverge in different legal systems. The type of arbitration and the parties involved may affect the answer.

Commercial arbitration is a private method for dispute resolution. Persons not involved in the arbitration proceedings are not admitted to the arbitration unless the parties and the arbitral tribunal agree. Only parties to the arbitration receive copies of the award, which is a great advantage where trade secrets and inventions are at stake.

Some arbitration laws and institutional rules contain provisions on confidentiality, but most laws and rules are silent on the subject. Some arbitration rules allow parties to ask the tribunal for protection of trade secrets. Parties wishing to protect confidential information or to keep the arbitration confidential should include a confidentiality provision either in the arbitration agreement, the terms of reference between the parties and the arbitral tribunal, or a protective order from the arbitral tribunal.

The situation is different in treaty-based investor-state arbitration where disputes are between states and investors of other states based on a bilateral or multilateral investment treaty. Due to the public funds involved in investment arbitration, there is a public interest in the decisions of tribunals in investor-state arbitrations. This need for transparency may sometimes conflict with interests of data protection, protection of national policies or other national interest such as a security. Transparency in international investments contributes to sustainable growth and promotes the rule of law, good governance, due process, fairness and equity. Transparency also leads to greater legitimacy of investment arbitrations.

UNCITRAL has adopted two instruments regarding transparency in treaty-based investor-state arbitration. UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the Transparency Rules) provide a procedural framework for making information available to the public on investment arbitration cases arising under relevant treaties concluded after 1 April 2014. The UNCITRAL Convention on Transparency in Treaty-based Investor-State Arbitration (the Transparency Convention) of 2014 provides a mechanism for application of the Transparency Rules to arbitration cases arising under the almost 3,000 investment treaties.

Box 13: Arbitration or court litigation?

ITEM	Litigation	Arbitration
Finality	Court decisions are subject to various appeals.	Most arbitral awards are not subject to appeal. They may only be challenged before the courts on very limited grounds.
International recognition	Usually difficult. A court judgement will be recognized in another country generally by application of a bilateral treaty or by virtue of rather strict rules. There are regional exceptions (i.e. Organization for the Harmonization of Business Law in African countries and the European Union.).	Yes. Through various international conventions, especially the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
Neutrality	Although judges may be impartial, they apply the language and procedural rules of their country and are often of the same nationality as one of the parties.	Parties can be on an equal footing regarding the place of arbitration, the language(s) used, procedural rules, nationality of arbitrators and legal representation.
Specialized competence and personal follow-up	Not all judges have specialized skills and experience. In lengthy cases, several different judges may follow the case.	Parties may select specialized arbitrators of their choice, provided they are independent. Usually, the arbitrators will follow the case from commencement to conclusion.
Flexibility	Courts must follow their rules of procedure.	Most arbitral rules allow for a great degree of flexibility in defining the arbitral procedure, hearings, time frame, and location of hearings and arbitrators' meetings.
Provisional measures	Where swift and effective action is required against infringement (through an injunction or seizure of infringing material) immediate injunctive relief is obtainable from the courts even prior to commencement of a proceeding on substance. With notice, courts may deliver injunctions against third parties.	Before the arbitral tribunal is in place, parties will have to obtain interim relief through the courts. When the arbitral tribunal is in place, parties may still in most jurisdictions obtain court orders staying the offending conduct. In many countries, the arbitral tribunal itself is also empowered to do this. Arbitrators cannot make orders that affect third parties.
Witnesses	Courts can require third parties and witnesses within their jurisdiction to come before the court.	Arbitrators do not have the authority to call on third parties without their consent and do not have the authority to force a party to bring a witness.
Speed	Procedures may be delayed and lengthy. Parties may get entangled in prolonged and costly appeals.	Arbitration can be faster than litigation. It can be very quick; weeks or months if the parties agree.
Confidentiality	Court hearings and judgements are normally public.	Arbitration hearings are not public and only the parties receive copies of the award, which is an advantage where trade secrets and inventions are involved. Contract provisions containing secrecy provisions should be applicable in the arbitration procedure. As this matter is important in IP disputes, additional provisions for secrecy may be made either by the parties (in the form of contract clauses) or the arbitrators (in the form of a procedural order or in their terms of reference).
Costs	Parties do not pay judges and administrative fees are reasonable. The major costs are lawyers' and expert witnesses' fees.	Arbitrators' fees, travel and accommodation expenses and the arbitral institution's administrative costs are borne by the parties in advance. An ICC arbitration for a US\$ 1 million dispute before three arbitrators will cost on average US\$ 140,000. Before a single arbitrator, it will cost on average US\$ 61,000, based on 2010 scales.

ARBITRATION OR MEDIATION?

Is it better to resort to arbitration than to use ADR methods such as conciliation or mediation? This question is different from the choice between courts and arbitration. An arbitration clause excludes court intervention on the merits of a case. However, conciliation or mediation does not exclude arbitration and arbitration does not exclude conciliation or mediation.

In arbitration, the decision is final and binding on the parties. It is subject to judicial recognition and may be enforced against a losing party. In court proceedings, the decisions of the court of first instance are subject to one or more appeals. However, once the final judgement is issued, the financial effects are retroactive to the date on which the claim was filed.

The efficiency of ADR methods depends on the goodwill of the parties, who are free to participate in the process or not, and to agree or not with the recommendations of a conciliator or mediator. If a party fails to comply, settlement agreements reached through conciliation and mediation must be enforced by a court.

COMBINING ARBITRATION WITH MEDIATION – TWO-TIER CLAUSES

Some contracts use a two-tier approach. The first is recourse to mediation. Second, if mediation is not successful, arbitration proceedings may be commenced. The parties often agree tacitly on this course when they attempt to resolve their dispute amicably prior to recourse to judicial or arbitral proceedings. Sometimes they may agree more formally to use this two-tier system in their contract or when a dispute arises.

For contracting parties involved in a long-term venture, combining arbitration and mediation may be crucial to maintain a healthy, on-going relationship even when a dispute arises.

Box 14: Combined mediation and arbitration clauses

ITC dispute resolution clause, adapted to small firms in developing countries

ITC recommends that all SMEs include a dispute resolution clause specific to the contract, based on negotiation among the parties. Here is a model contract clause that combines mediation and arbitration, which can be adapted to any national environment.

If a dispute arises out of this contract, the Parties shall seek to resolve it on an amicable basis. They shall consider the appointment of a mediator to assist in that resolution. No party shall commence legal or arbitration proceedings unless 30 days' notice in writing has been given to the other party.

Any dispute, controversy or claim arising out of or relating to this contract (including its conclusion, interpretation, performance, breach, termination or invalidity) shall be finally settled under the rules of [specify the arbitration institution] by [specify the number of arbitrators, e.g. sole arbitrator, three arbitrators] appointed in accordance with the said rules. The place of arbitration shall be [specify]. The language of the arbitration shall be [specify].

For more alternatives, see www.intracen.org/model-contracts-for-small-firms

National adaptation example – Arbitration Institute of the Stockholm Chamber of Commerce

A national example of a combined dispute resolution clause is below.

Any dispute, controversy or claim arising out of or in connection with this contract, or the breach, termination or invalidity thereof, shall first be referred to Mediation in accordance with the Mediation Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, unless one of the parties objects.

If one of the parties objects to Mediation or if the Mediation is terminated, the dispute shall be finally resolved by arbitration in accordance with the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

International adaptation example – World Intellectual Property Organization

Finally, an adaptation of this concept by an international organization is below.

Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be submitted to mediation in accordance with the WIPO Mediation Rules. The place of mediation shall be [specify place]. The language to be used in the mediation shall be [specify language].

If, and to the extent that, any such dispute, controversy or claim has not been settled pursuant to the mediation within [60][90] days of the commencement of the mediation, it shall, upon the filing of a Request for Arbitration by either party, be referred to and finally determined by arbitration in accordance with the WIPO [Expedited] Arbitration Rules.

Alternatively, if, before the expiration of the said period of [60][90] days, either party fails to participate or to continue to participate in the mediation, the dispute, controversy or claim shall, upon the filing of a Request for Arbitration by the other party, be referred to and finally determined by arbitration in accordance with the WIPO [Expedited] Arbitration Rules. The arbitral tribunal shall consist of [a sole arbitrator][three arbitrators]. The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute, controversy or claim referred to arbitration shall be decided in accordance with the law of [specify jurisdiction].



PART 2

MEDIATION

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MEDIATION

Rule of law and contract security rank among the most important factors that matter for SMEs and foreign investors. Arbitration and mediation institutions and legal experts worldwide recognize that commercial mediation – which is different from arbitration – can give rise to quicker solutions and more tangible results than the more “legalistic” arbitration or court processes.

The business case for effective commercial mediation services as a necessary component to a healthy business environment is compelling. For instance, since April 2011 all European countries must implement laws that ensure mediation settlement agreements are enforceable as if they are court judgements. (EU Directive 2008/52/EC.)

In several countries in Africa and Latin-America, mediation has shown to be so effective that it has become compulsory before starting a court procedure.

WHAT IS MEDIATION?

The 2008 European Directive on Mediation in Civil and Commercial Matters, Article 3, states:

- (a) ‘Mediation’ means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.

It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seized to settle a dispute in the course of judicial proceedings concerning the dispute in question.

- (b) ‘Mediator’ means any third person who is asked to conduct mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation.

JAMS International, a private mediation services provider in the United Kingdom, uses this definition: ‘Mediation is a process wherein the parties meet with a mutually selected impartial and neutral person who assists them in the negotiation of their differences.’

The Centre for Effective Dispute Resolution, a mediation provider in the United Kingdom, describes mediation as: ‘A flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution.’

SOME HISTORY AND CONTEXT

An international view of the emergence of mediation was captured during meetings of dispute resolution institutions organized by ITC between 2002 and 2009. During these meetings, participants realized that mediation was being adopted on a large scale. Here are a few insights from these meetings.

- In the 1980s, US business leaders were discontent with the public litigation system, because of its high costs, delays, acrimony, diversity of procedures and inefficiencies. Attorneys from the law departments of some large US corporations established an institute to study alternatives to litigation. A statement was distributed and signed by over 4,000 corporations: ‘The undersigned would at least consider the use of alternative dispute resolution with any other company that has signed the statement.’
- In the early 1990s, the Chamber of Commerce of Bogota, Colombia, which traditionally was managing a few hundred arbitrations per year, realized that the city was so plagued with violence that mediation services should be offered not only to businesses, but also to the general population. Mediation was incorporated in the country’s constitution, and 22 mediation centres were created in Bogota to resolve local disputes through trained voluntary mediators. Mandatory lawyers’ mediation training was instituted.

Mediation was also applied in schools. In Bogota, it was estimated that one in every two students had been robbed and one-in-three had suffered beatings and physical abuse from other students. Starting in 2001, a much more ambitious project trained 20,800 mediators in 225 educational institutions to deal with these issues. (www.ccb.org.co)

- In post-apartheid South Africa, the Commission for Conciliation, Mediation and Arbitration was charged with resolving labour disputes primarily through conciliation. According to 2012 figures, the annual number of conciliations exceeds 100,000 and the number of

arbitrations is about 50,000. There is a statutory obligation to refer disputes about unfair dismissals to conciliation with a hearing within 30 days. Unresolved disputes may then go to the Commission for Conciliation, Mediation and Arbitration for arbitration and some to litigation. In 2011 and 2012, the settlement rate was 65%. An ILO report states: 'When compared to conventional courts, whether civil courts with general jurisdiction or specialised labour courts, the Commission for Conciliation, Mediation and Arbitration has proved highly successful.'

- China has a system combining mediation and arbitration. Parties to arbitration or the arbitral tribunal can suggest mediation. The Arbitration Law permits the arbitrator to conduct mediation before rendering an arbitral award. In practice, arbitrators systematically ask parties whether they wish the arbitral tribunal to assist them in reaching an amicable settlement.
- European institutions promoted mediation in member states by adopting the European Commission Directive 200/52/EC in 2008. The Directive seeks to 'facilitate access to dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings'. It only applies to cross-border civil and commercial disputes. The Directive does not impose an obligation to mediate on the parties, but emphasizes the advantages of mediation.

An EU study in 2015 recommends that the European Union consider requiring mandatory mediation in certain categories of cases with the ability to opt out. The study also notes that there is enthusiastic support for measures designed to promote mediation in the European Union.

The emergence of mediation is a worldwide phenomenon. This development has led legal practitioners to re-examine attitudes and assumptions that underlie approaches to court litigation and arbitration. The upsurge of mediation comes in reaction to ever-increasing adversarial and confrontational processes, and also against the advocacy principle, where for centuries lawyers were trained exclusively to defend their clients' interests at the expense of the other party.

As a result, there is a growing recognition that conflicts – traditionally viewed as the mainspring of human interaction – can and should be resolved in many cases through cooperation among the parties.

THE MEDIATION PROCESS

Each mediator will have her or his own style, however, following are the main stages of mediation.

Introduction: The mediator, with both parties present, outlines the course and ground rules of mediation, the role of

the parties, stresses her/his independence and impartiality, and gives her or his understanding of the issues.

Parties express their views: Each party, uninterrupted, will be given an opportunity to tell its story and explain how it frames the issues.

Information gathering: Through open-ended questions, the mediator will build an understanding of the issues and a rapport with the parties.

Issues are identified: The mediator describes her or his understanding of the issues, and refines the issues with input from the parties. The goal is to get agreement on the issues.

Generating options: A commonly used method during this phase is private sessions with each party, exploring with them several possible options and encouraging them to generate solutions together. The information made known to the mediator in caucuses cannot be disclosed to the other party without the consent of the party providing it.

Reaching or failing to reach an agreement: If an agreement is reached, it is put into writing and signed by the parties, their lawyers and the mediator. The court can enforce this signed agreement. If no agreement is reached, any party may resort to arbitration if there is an agreement to arbitrate, or to litigation.

ROLE OF THE MEDIATOR

Mediators generally will not propose or suggest a solution. They are facilitators who assist parties to identify the grounds for an agreement. Each mediator has a particular style. However, parties should know in advance what to expect from the process. Most mediators are trained in facilitative mediation. They will structure a mediation process to assist the parties in reaching a mutually satisfactory outcome.

JAMS provides the following statement on the role of a mediator:

'Mediation leaves the decision power totally and strictly with the parties. The mediator does not decide what is "fair" or "right," does not assess blame nor render an opinion on the merits or chances of success if the case were litigated. Rather, the mediator acts as a catalyst between opposing interests attempting to bring them together by defining issues and eliminating obstacles to communication, while moderating and guiding the process to avoid confrontation and ill will. The mediator will, however, seek concessions from each side during the mediation process.'

ROLE OF LEGAL REPRESENTATIVES

In mediation, the participation of each party's legal adviser may be appropriate and helpful. The adviser will confirm the acceptability of a settlement agreement and may help drafting it. The agreement will then bind the parties.

For a successful outcome, lawyers must move away from their traditional dominant role and transition to the role of adviser and supporter. They must also understand that their client's best case is probably not the best outcome for the mediation.

QUESTIONS AND ANSWERS

How long does mediation last?

Most mediations last no more than two days. Mediations in complex cases may last a week or more.

Is mediation confidential?

Yes. Most codes of conduct specify that mediators are bound by an obligation of confidentiality. Most codes also provide that positions presented by parties in mediation cannot be used by the other parties in subsequent arbitration or litigation.

How much does mediation cost?

Mediation costs much less than arbitration. The Centre for Mediation and Arbitration of Paris stated in 2014 that the average mediation under its rules lasts 15 hours and costs EUR 5,000. According to ICC's 2015 mediation scale, the costs for a mediation for an amount in dispute between US\$ 2 million to US\$ 10 million is a US\$ 2,000 filing fee, US\$ 15,000 for administrative expenses, and the mediators fees and expenses. There is no pre-fixed hourly rate. Hourly fees are fixed by the ICC International Centre for ADR and are calculated on the basis of the time reasonably spent by the mediator. These costs decline substantially in mediations in developing countries.



PART 3

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ARBITRATION

Arbitration is the best known and most accessible alternative mechanism to court litigation to settle disputes. It is mostly used in international transactions, as it is often easier to enforce arbitration awards in a foreign country that is signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) than it is to enforce court judgements.

INSTITUTIONAL ARBITRATION

In institutional arbitration, the parties choose to conduct their arbitration under the rules and assistance of an arbitral institution. By doing so they expect from the arbitral institution certain services for the organization and supervision of the arbitral proceedings. The arbitral institution charges the parties certain fees for its services. This amount will generally cover the administrative expenses of the arbitral institution. Depending on the arbitral institution and the rules chosen, the amount paid by the parties may also cover the fees and expenses of the arbitrators.

To obtain the assistance of an arbitral institution, the parties must agree explicitly, usually in the arbitration clause in their contract or in a submission agreement signed when a dispute arises. The name of the institution must be spelled out correctly. An unclear and incomplete name of the arbitral institution may lead to a conflict between parties at the time the dispute arises.

For example: '[I]n accordance with the Rules of Arbitration of the International Chamber of Commerce of Geneva' is incorrect as there is only one International Chamber of Commerce and its seat is in Paris. The correct wording is the 'International Chamber of Commerce'. This apparently inoffensive mistake has often caused months of delay and expense. The easiest way to prevent this mistake is to use the recommended clause provided by the institution, which is available on the ICC website.

CHOOSING THE ARBITRATION INSTITUTION

The number of arbitral institutions around the world is increasing because arbitration is becoming the generally accepted method of resolving international commercial disputes. Today there are hundreds of arbitral institutions established in practically all countries.

Some arbitral institutions principally administer domestic arbitrations, i.e. arbitration proceedings between nationals

in a given country. Other arbitral institutions emphasize international arbitration and make their rules available in many different languages. Several administer both types.

While most institutions administer arbitrations in all economic sectors, several focus specifically on one economic sector or activity such as maritime cases, commodities disputes or construction disputes. For example, the Tokyo Maritime Arbitration Commission manages the arbitration function of the Japan Shipping Exchange in the areas of shipping, shipbuilding, marine insurance underwriting, trading, ship brokering and longshore facilities, as well as financing. The London-based Grain and Feed Trade Association operates an arbitration service to hear cases related to sales of grain.

Institutions managing arbitration procedures for disputes connected with coffee can be found in several countries, including the Antwerp Coffee Arbitration Chamber, the Italian Coffee Arbitration Chamber in Genoa, the Arbitration Chamber in Trieste and the Coffee Board of Bangalore.

Parties should confirm that the arbitral institution they wish to refer their disputes to has experience in the economic sector concerned. This experience will typically result in the arbitral institution having a list or a panel of potential arbitrators with expertise in the field, among which the institution may appoint one or more arbitrators in case the parties do not appoint the arbitrators themselves.

Some institutions may provide parties with a restrictive list of persons from which they can choose as arbitrators. Some arbitral institutions may limit this list of arbitrators to nationals from their own country or to persons with specific backgrounds. Other arbitral institutions may not use a list system and leave complete freedom to the parties to select the arbitrator(s) of their choice.

ASSISTANCE FROM ARBITRATION INSTITUTIONS

Types of assistance

Arbitral institutions do not all provide the same services. Some institutions simply offer rules and guidelines, and no other services. Other institutions provide rules and a roster of qualified arbitrators, but are not involved in the appointment of arbitrators. As these institutions do not administer cases, they do not charge administrative fees.

Another group of institutions assist in commencing the arbitration and in appointing or helping to appoint arbitrators.

Other institutions will supervise the whole arbitration process from the notification to the defending party of the claimant's request for arbitration to notifying the parties of the arbitral award.

Typical services

Generally, an arbitral institution will receive a request for arbitration and send it to the responding party. The institution may set a time limit for the respondent to file its defense and to provide its comments with respect to the constitution of the arbitral tribunal and the place of arbitration.

Assistance of an arbitral institution can be valuable because it guarantees that the process is set in motion rapidly, even if the respondent is unwilling to participate. If a respondent fails to designate a co-arbitrator or fails to agree with the claimant on the constitution and process of the arbitral tribunal or on the place of arbitration, the arbitral institution will take the necessary measure to constitute the arbitral tribunal and decide on the place of arbitration.

Generally, arbitral institutions will fix a time limit for the tribunal to render its award or within which the tribunal must first establish terms of reference. The arbitral institution will check whether the tribunal follows these time limits. If the arbitral award cannot be rendered within the deadline, the arbitral institution will decide on an extension.

In case an arbitrator fails to fulfill his or her duties, for example, if he or she is not impartial or is unable to do so due to illness, or decides to resign or dies, the arbitral institution will decide on a replacement without delaying the procedure. No court intervention will be required in situations that would otherwise disrupt the arbitration process.

If a party fails or refuses to participate in the arbitration, the arbitral institution will verify that the tribunal has respected due process. This ensures that the award rendered by the tribunal will be enforceable. This supervision may offer a guarantee for an award to be recognized by courts in the country where it must be enforced, most often the country of the losing party.

In institutional arbitration, the tribunal's award will generally be notified to the parties by the institution, not by the tribunal. Some institutions will ensure that the notification is made in accordance with formal standards. Typically, the arbitral institution will fix the arbitral fees at the end of the arbitration. Fixing the costs of the arbitration, administering advances on costs and ensuring that arbitrators are paid are important services rendered by the institutions.

Institutional arbitration has the important advantage that there is generally professional staff available to answer parties' questions regarding the organization and conduct of the arbitration procedure.

Several arbitration institutions offer hearing rooms and arbitrators' rooms as well as secretarial and other services.

The administrative costs may differ considerably from one institution to another depending on the services offered. The amount of the administrative expenses, such as the arbitrators' fees, will generally be fixed accordingly to a scale based on the amount in dispute. Institutions publish these scales along with their arbitration rules.

AD HOC ARBITRATION

Ad hoc arbitration is not conducted under the rules of an arbitral institution. Because parties are not obligated to follow the rules of an arbitral institution, they may agree on their own rules of procedure. Ad hoc arbitration is 'do-it-yourself' arbitration.

Where an ad hoc arbitration takes place is important because most of the difficulties concerning the arbitration will be resolved according to the national law of the place of arbitration.

Assume, for example, that the parties have agreed to ad hoc arbitration before 'one or three' arbitrators and that one of the parties does not participate in the proceedings. How many arbitrators will be appointed? Who will decide the number? Who will appoint the arbitrator(s)? The answers to these questions largely depend on where the arbitration will take place.

Because parties in an ad hoc arbitration do not use the rules of an arbitral institution, they should agree as much as possible to the rules they have chosen to avoid disruption during the arbitration process. They should agree on issues such as how the tribunal will be constituted, the place of the arbitration and the deadline for the award. They also will have to agree with the arbitrators regarding the basis of the arbitrators' remuneration.

If the parties have not provided for any applicable rules for the organization and conduct of the arbitration, they will generally be bound by the arbitration and procedural rules of the country where the arbitration takes place.

BENEFITS AND COSTS

Parties often opt for ad hoc arbitration to avoid the extra cost and potential delays from the application of the rules of certain arbitral institutions.

However, ad hoc arbitration does not always lead to faster and less expensive arbitration proceedings. Because there is no institution that sets and supervises the time limits and there is no fixed scale for fees, the parties will have to agree upon time limits and basis of remuneration with the arbitrators directly. It is possible that the parties will pay the arbitrators at an agreed hourly rate. This rate may result in a total sum exceeding the amount that parties would

Box 15: Ad hoc arbitration under UNCITRAL Arbitration Rules

Parties can agree to conduct ad hoc arbitration under UNCITRAL Arbitration Rules, a complete set of rules dealing with composition of the tribunal, conduct of the proceedings and rendering of the award. The rules have been tested throughout the world and are universally considered to be acceptable.

For example, parties who have not included in their arbitration agreement a stipulation that a particular set of arbitration rules will govern their arbitral proceedings might wish to do so after a dispute has arisen. In this situation, UNCITRAL Arbitration Rules may be very helpful.

To speed up the process if the parties choose UNCITRAL Arbitration Rules they should designate in advance an

'appointing authority' in their arbitration agreement. Under UNCITRAL Rules, the appointing authority may designate an arbitrator when a party fails to do so and it may also decide on challenges and replacements of arbitrators.

If the parties do not designate an appointing authority and if questions arise in the course of the arbitration, one of the parties will have to request the Secretary General of the Permanent Court of Arbitration in The Hague to designate an appointing authority, which will result in an unnecessary loss of time.

Source: www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf

have paid if they had submitted their dispute to an arbitral institution.

In ad hoc arbitration there is no institution to supervise the arbitrators and the proceedings. The success of the proceedings will largely depend on how well the arbitrators organize and keep control over the arbitration. Neither the parties nor the arbitrators will have the opportunity to ask for specific support or assistance from an institution if unforeseen problems arise that the arbitrators are not able to handle. The only assistance available would be from courts.

OBTAINING ASSISTANCE

Even though parties to an ad hoc arbitration do not submit their dispute to the rules of an arbitral institution, they still may agree to call upon an arbitral or other institution such as a chamber of commerce or the head or president of a court acting in a personal capacity as an 'appointing authority'. In this case, the parties do not have to call upon a court, with the procedural requirements that may entail, to ensure that one or more arbitrators be appointed.

The arbitral or other institution acting as appointing authority will usually deal with the matter of the constitution of the arbitral tribunal as rapidly as an institution in a case managed under its own arbitration rules. Generally, it will request payment of a limited sum of money for this appointment.

THE ARBITRATION AGREEMENT

IS AN ARBITRATION CLAUSE NECESSARY?

Arbitration is the dispute resolution mechanism most often used in international trade. As a result, written arbitration clauses are recommended. Without a dispute resolution clause, it is much more complicated to determine which court or tribunal will have jurisdiction. Will it be the tribunal of the place where the parties' transaction takes place, the residence of the respondent or the residence of the claimant?

Without a dispute resolution clause, parties will need to have recourse to application of the conflict of law rules and possibly international conventions or bilateral treaties to determine which tribunal has jurisdiction. This can cause to uncertainty, loss of time and added expense. In addition, there is a risk that more than one tribunal will claim jurisdiction and issue conflicting decisions. This situation creates the risk of that a decision rendered in one jurisdiction will not be recognized and enforced in another.

AN ARBITRATION CLAUSE SHOULD BE IN WRITING

Arbitration is consensual and depends on the will of the parties. The intent to resort to arbitration is expressed by a written contract, the arbitration agreement, negotiated between the parties and separate and distinct from the commercial contract in which it is included.

Even if the original contract is made orally, this is not the case for the arbitration clause. Most national and international arbitration legislation, including the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, require the arbitration clause to be in writing, even if the original agreement is oral. Article II (2) of the New York Convention states: 'The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.'

The arbitration agreement is generally considered to be in writing if it is included in a document signed by the parties or contained in an exchange of faxes, emails or any other means of communication that prove its existence.

FUNCTIONS

The arbitration clause should:

- Produce binding effects for the parties;
- Exclude court intervention in the settlement of a dispute, at least before the rendering of the award;
- Grant power to the arbitrators to settle disputes between the parties;
- Enable efficient proceedings that lead to the rendering of an award enforceable in law.

ARBITRATION CLAUSE OR SUBMISSION AGREEMENT?

Parties wishing to settle a dispute through arbitration have two choices. They can wait until a dispute arises and then agree to arbitration. Alternatively, they can anticipate events by including an arbitration clause in their contract. In both cases, the agreement is called an arbitration agreement, but in practice the differences are considerable.

Experience shows that if a party considers arbitration, it should insert an arbitration clause in the original contract instead of waiting until the dispute arises and then attempting to negotiate a submission agreement with its contracting partner.

Once a dispute arises, the parties likely no longer agree on anything, especially on how to resolve their disputes. The most pressured party will likely seek to invoke the jurisdiction of the courts of its own country. One party could perceive a tactical advantage in court litigation while the other could prefer arbitration. For these reasons it is advisable for a party to anticipate this situation by opting for an arbitration clause to be included in the original contract.

INCORPORATING THE CLAUSE BY REFERENCE

Arbitration may take place without an arbitration clause in a commercial contract. An agreement to resort to arbitration may be obtained when a transaction is made by referring all questions other than cost, shipment and price to the 'General Conditions' of a particular industry or corporation.

This approach is simple, useful and quick as it enables commercial partners to enter into a contract simply by exchanging letters, emails or faxes. If the General Conditions include an arbitration clause, their acceptance may apply to the arbitration clause and create a duty to arbitrate. However, some precautions are required to ensure its validity and clarity. Recourse to arbitration is sometimes not clearly defined. This is particularly true for small print General Conditions that are often used by certain businesses.

Courts in many countries are suspicious of the practice of incorporating arbitration clauses into the General Conditions by reference and will call their validity into question. These jurisdictions may doubt that parties acquiesced to the incorporation of a dispute resolution clause, especially when the dispute is in a third country. Courts may refuse to recognize the arbitration clause contained in General Conditions, but will more readily recognize the validity of an arbitration clause contained in a contract or exchange of letters.

When business partners wish to enter into a contract referring to existing General Conditions, they should explicitly refer to the arbitration clause contained in these conditions. The following is an example of direct reference to arbitration that would normally be recognized:

'We agree to deliver FOB [Free on Board] Hamburg, between 5 and 16 September 2015, 4,000 tons, grade-three quality pulp, according to the General Conditions of the Moroccan Orange Exporters Association. Arbitration according to the Rules of the Geneva Chamber of Commerce and Industry (Switzerland), as per Clause 15 of said General Conditions. Please notify your acceptance by return mail.'

WHO CAN ENTER INTO AN ARBITRATION AGREEMENT?

The New York Convention provides in Article V (1) (a) that recognition and enforcement of an arbitral award may be refused if any of the parties to the arbitration agreement was 'under some incapacity'.

A party's capacity to enter into an arbitration agreement depends on its national law. It is necessary to ascertain whether a state or state-owned entity, a city council, or even a private entity has the capacity under its national laws to enter into an arbitration agreement. If there is any doubt it is advisable to seek a legal opinion from a lawyer of the country concerned.

When a representative, agent or intermediary signs a contract with an arbitration clause it is necessary to verify whether this individual has the power to bind the entity on behalf of which he or she acts. National law where the entity is established generally governs the power of a representative to act for the entity.

SEPARABILITY OF THE ARBITRATION CLAUSE

Separability – or 'autonomy', 'independence', 'severability' – of the arbitration agreement is a broadly accepted legal principle without which arbitration would not have flourished. According to the separability principle, the arbitration clause in a contract has a life of its own, independent of the contract. If the underlying agreement is pronounced invalid for any reason, the arbitration clause remains valid.

This theory is based on the idea that defendants with a weak case and wishing to escape arbitration would use the argument that if a contract is invalid the arbitration clause contained in the contract must also be invalid. As a result, the arbitration should not take place and arbitrators have no jurisdiction.

This argument appears logical and it could have severely limited arbitration had the principle of separability not been adopted. Separability means:

- Should an arbitral tribunal consider that the contract in which the arbitration agreement is contained is non-existent or null and void, this does not result in the arbitration agreement becoming non-existent or null and void.
- The tribunal will have jurisdiction to determine the respective rights and obligations of the parties and to adjudicate their claims and pleas, even if the contract in which the arbitration clause is incorporated is considered non-existent or null and void.
- An arbitration clause may be governed by a different law than the main contract.

The principle of separability is described in Article 16 (1) of UNCITRAL's Model Law on International Commercial Arbitration: 'An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.'

LAW APPLICABLE TO THE ARBITRATION AGREEMENT

VALIDITY OF THE ARBITRATION AGREEMENT

The term 'arbitration agreement' covers two types of agreements: the arbitration clause, incorporated in the contract; and the submission agreement, which parties may make after a dispute arises.

For an arbitration agreement to be effective, it must be valid. In what respects must the agreement be valid and

under what law is validity to be determined? The arbitration clause is normally governed by the same law as the rest of the contract and its validity will be examined under that country's law. It is unusual but it is possible to provide that the arbitration clause be governed by one country's law while the rest of the contract be governed by another country's law.

Arbitrability and capacity are two requirements that must be satisfied to have a valid arbitration agreement. However, these requirements may be governed by different applicable laws. The issue of capacity is determined under the law applicable to the party, whereas the issue of arbitrability may be determined under different laws, including the law of the country of enforcement.

If the dispute cannot be settled by arbitration an award will be without effect. The New York Convention expressly provides in Art. V (2) (a), that recognition and enforcement of an arbitral award may be refused when 'the subject matter of the difference is not capable of settlement by arbitration'.

This issue is resolved under the law of the country where recognition and enforcement is sought. It generally arises in disputes relating to matters such as competition, bankruptcy and labour law. These areas are excluded from the jurisdiction of arbitrators in some countries.

RAISING THE ISSUE OF VALIDITY AT THE START OF AN ARBITRATION

It is fairly common for the issue of validity of an arbitration agreement to be raised by one of the parties, usually the respondent, at one stage or another during arbitration proceedings. At the beginning of an arbitration procedure, a party may seek to challenge a submission to arbitration arguing that the arbitration agreement is invalid. This challenge may be made either to the arbitral tribunal or to a court.

In case parties have previously decided to settle their disputes by institutional arbitration, the institution under its rules may decide whether or not it accepts to set the arbitration in motion. Generally, the institution's decision to set the arbitration in motion is administrative in nature. Once constituted, the arbitral tribunal, pursuant to the principle of *Kompetenz-Kompetenz*, can decide whether it has jurisdiction to resolve a dispute brought before it. In principle, this means a court has no role to play in a decision of an arbitral tribunal on its own competence.

If the arbitral institution decides not to set arbitration in motion on the grounds either that there is no valid arbitration clause or that the clause does not refer to the arbitral institution, the dissatisfied party may challenge this administrative decision before a court where the arbitral institution is located.

RAISING THE ISSUE OF VALIDITY AT THE END OF AN ARBITRATION

At the end of the arbitral proceedings, questions as to the validity of the arbitration agreement may be raised in a court action by the unsuccessful party seeking to have the award set aside or its recognition and enforcement denied.

Where the parties have not agreed on the choice of law, the validity of the arbitration agreement may have to be decided either under the law of the place of arbitration or under the law of the place of enforcement. Even if an arbitral tribunal has decided that the arbitration agreement is valid, the issue of validity can be reexamined by the court at the enforcement stage under the law at the place of enforcement.

If a court at the place of arbitration is asked to set aside the award, it will examine the validity of the arbitration agreement under the law of the place of arbitration.

ARBITRABILITY RULES DIFFER

The requirement of arbitrability means that the subject matter in dispute must be capable of resolution by arbitration. If the subject matter is not arbitrable, the arbitration agreement is invalid as to that dispute. The rules determining arbitrability differ between countries and legal systems. The arbitrators should take these differences into consideration when determining an issue relating to arbitrability.

The concept of arbitrability is a public policy limitation on the scope of arbitration as a method for resolving disputes. Each country may decide, in accordance with its own public policy considerations what issues may be resolved by arbitration. The arbitrators should take into account the public policy considerations of the country where enforcement or recognition of the award will be sought.

As this may be any country in the world where the unsuccessful party has assets, the arbitrators must focus on the subject matters that most states consider as not being arbitrable. These are usually disputes concerning competition and anti-trust law, domestic relations, bankruptcy and certain IP rights.

However, arbitral case law and doctrine in Europe and the United States increasingly recognize that competition law issues arising out of international contracts may be resolved by arbitration, with some limitations.

The New York Convention Article V (2) (a) states that recognition and enforcement of an arbitral award may be refused if the competent authority where the recognition and enforcement is sought finds that: 'The subject matter of the difference is not capable of settlement by arbitration under the law of that country'. See also Article 34 (2) (b)

Box 16: Contracts that violate international public policy are unenforceable

This example explains the award in ICC Arbitration Case No. 1110 of 1963, Argentine engineer v. British company, where the arbitrator found that under French and British law, contracts that seriously violate 'good morals' or international public policy are excluded from arbitration.

The parties made an agreement whereby the British company was to pay the Argentine engineer, an influential businessman, a percentage of the price of electrical equipment contracts the British company sought to obtain from Argentine authorities. The British company received a contract, but it refused to pay a commission to the Argentine engineer. The parties agreed to arbitration under ICC Rules in Paris.

The arbitrator held that under French law arbitrators cannot enforce contracts involving grave offence to 'good morals', whether committed in France or abroad. Referring to the Amsterdam Resolution of the Institut de Droit International of 1957, the arbitrator found that the arbitrability of the case had to be determined pursuant to the law governing the

merits of the case, being Argentine law, as agreed between the parties.

The arbitrator found that under Argentine law all questions affecting good morals are excluded from arbitration and that under a general principle of law recognized by civilized nations contracts that seriously violate *bonos mores* or international public policy are invalid or at least unenforceable and cannot be sanctioned by courts or arbitrators.

The arbitrator found that although the commissions were not to be used exclusively for bribes, a substantial part of them must have been intended for such use. He emphasized that corruption is an international evil and contrary to good morals and international public policy.

The arbitrator declined jurisdiction because he held that a case such as this, involving gross violation of good morals and international public policy, would not be enforced in Argentinian or French courts or in any other civilized country or in any arbitral tribunal.

(i) of UNCITRAL Model Law on International Commercial Arbitration of 1985, amended in 2006.

CAN BRIBERY CLAIMS BE ARBITRATED?

The issue of arbitrability arises when bribery or some other form of corruption is involved. Despite efforts by many countries to prohibit corrupt practices, financial and other inducements are often an established part of the process of obtaining contracts. Arbitrators have adopted several views in cases where a party seeks to enforce a contract for the payment of bribes, which are often part of a commission.

In 1963, a famous arbitrator held that contracts for the payment of bribes are invalid because they violate international public policy and as a result disputes relating to such contracts are not arbitrable. In 1983, an ICC arbitral tribunal held that where an agent claimed a commission, it had jurisdiction but the contract was illegal.

DETERMINING CAPACITY

The parties must have the legal capacity to enter into the contract. For example, does a sales representative have authority to sign an arbitration clause on behalf of the seller? If the minister of public works signs a construction contract stating 'approved and signed', does this represent simply an administrative authorization to go ahead or does it mean that the country or the ministry will be bound by the contract?

If either or both of the parties lack the capacity to enter into the contract, the contract is invalid. The rules determining the capacity of a party are not uniform and may differ among countries and legal systems. Arbitrators should take these differences into consideration when determining an issue relating to capacity.

For a natural person, capacity relates mainly to the age at which a person can be bound and this will primarily depend on national laws. For a company, capacity is determined by the law of the country where the company is incorporated.

The rules determining whether a party may enter into an arbitration clause will be the same as those that determine whether a party has capacity to enter in any form of contract. This normally excludes minors, bankrupts and persons of unsound mind, as these individuals are incapable of entering into a contract.

If a party lacks capacity to enter into an arbitration agreement, the recognition and enforcement of the arbitral award may be refused at the request of the party against whom enforcement is sought. Article V (1) (a) of the New York Convention states that recognition and enforcement of the award may be refused at the request of the party against whom it is invoked only if that party furnishes proof that:

'[T]he parties to the agreement ... were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.'

The issue of capacity to make an arbitration agreement is often raised with respect to states or state entities that have signed a contract providing for arbitration. In many countries there is no restriction on the state or its agencies to enter into an arbitration agreement. However, there are some countries where the state or its agencies are prohibited from entering into an arbitration agreement in domestic matters, or where they can only enter into an arbitration agreement after having been given special authorization. Arbitral awards tend to uphold the principle that a state that signs an arbitral agreement is barred from alleging that it lacked the capacity to do so.

The principle that legal persons have the right to conclude valid arbitration agreements in international contracts is no longer contested in most of European countries since this principle was established in Article II.1 of the 1961 European Convention on International Commercial Arbitration.

CONTENT OF THE ARBITRATION AGREEMENT

Avoid vaguely drafted or incomplete arbitration clauses. While there are many model arbitration clauses, a drafter should ensure that a model clause is appropriate to the particular contract or modify it to fit the particular circumstances. Model clauses provided and recommended by established arbitration institutions may be found on all continents. An arbitration clause does not need to be long and detailed to be enforceable. Two principles that should guide drafting a dispute resolution clause are simplicity and precision. Consider two arbitration clauses:

- 'English law – arbitration, if any, in London according to ICC Rules.'
- 'The arbitrators appointed by the parties shall be called in the first place to attempt to amicably settle the dispute. Should they not succeed in this attempt they shall choose a third arbitrator who shall be a lawyer, specialized in patents, national of a third country and shall be fluent in the Italian, German and English languages.'

Although the first clause may appear simplistic, English courts held this to be a valid arbitration agreement providing for the arbitration of any dispute in London in accordance with International Chamber of Commerce Rules with English law governing the contract.

The second clause is from an arbitration clause entered into between Italian and German firms. As far as the method of appointment of arbitrators is concerned, a wording that is too precise may paralyze the proceedings at the stage of the constitution of the tribunal. It is doubtful whether the two appointed arbitrators could easily find the third arbitrator, who must be a very exceptional person meeting the qualifications set out in the clause. This is an example of requirements that are too precise or sophisticated that could result in longer and more costly proceedings than the parties anticipated.

SCOPE OF THE CLAUSE – DESCRIPTION OF THE TYPES OF DISPUTES

It is wise to be precise in drafting the elements of the arbitration clause. However, there is one exception. It is wise to be vague when describing the types of disputes to be settled by arbitration. The description should be as broad as possible to cover all types of disputes that may arise from the contract.

A long list is not necessary to achieve this breadth. For example, to provide arbitration 'for all disputes or differences arising out of the conclusion, interpretation and/or the performance of the contract', creates uncertainty about the arbitrators' powers to settle the issue of termination of the contract. Upon a party's objection an arbitral tribunal might decide that it has no jurisdiction to determine the issue of the contract's termination under such a clause.

In practice, when the parties strive to describe precisely the types of disputes to be submitted to arbitration, which limits the scope of the power of an arbitral tribunal, the arbitration clause does not encompass all categories of disputes. This often leads to parallel litigation before a court that may be called upon to examine the jurisdiction of the arbitral tribunal to settle the dispute. Depending on the language chosen and the bias of the court hearing the matter, this may negatively affect the outcome of the arbitration.

It is advisable to draft the clause as broadly as possible to cover issues related to the performance of the contract as well those regarding its existence, validity, breach, termination and financial consequences.

A good way to draft a broad arbitration clause is: 'All disputes, differences, controversies or claims arising in connection with the present contract or in relation thereto ...' To this wording the following could be added: '... as well as any other agreement signed or to be entered into in relation with the present contract.'

This language would cover any other agreement, amendment, rider, implementing or replacement contract the parties may enter into simultaneously or later on in relation to the transaction. When a party signs a rider to a contract with an arbitration clause in the original contract, a dispute could arise out of the rider. The other party may raise a plea for lack of jurisdiction on the grounds that the arbitration clause does not cover disputes arising under the rider. This additional language overcomes this difficulty. In addition, the rider itself could state that the arbitration clause in the original contract also applies to the rider.

AD HOC OR INSTITUTIONAL ARBITRATION?

There are two types of arbitration: institutional arbitration and ad hoc arbitration.

Institutional arbitration is conducted under the arbitration rules of a chosen institution, such as the American Arbitration Association, the International Chamber of Commerce, the Kuala Lumpur Regional Centre for Arbitration or the London Court of International Arbitration. In ad hoc arbitration proceedings the parties themselves specify the rules governing the proceedings.

Institutional arbitration is recommended. It presents significant advantages because parties may rely on both the institution's rules and its support staff. The choice of an arbitration institution depends on criteria such as the nationality of the parties, the nature of the transaction, enforcement issues, and regional and political factors, as well as the need for administration and supervision of the file.

The services offered by arbitration institutions vary significantly. Most arbitration institutions limit their intervention to receiving requests for arbitration and notifying the other party, assisting the parties in constituting the arbitral tribunal or intervening when a party defaults in this respect.

Certain institutions notify the award to the parties; others monitor and fix the costs of the arbitration. Other institutions exercise full administration and supervision such as the ICC International Court of Arbitration, which supervises all stages of the proceedings from the constitution of the arbitral tribunal to scrutiny of awards submitted by arbitrators in draft form.

When parties agree on ad hoc arbitration, the UNCITRAL Arbitration Rules are recommended. They contain the necessary rules for the good conduct of arbitral proceedings and are respected in international commercial circles.

CONSTITUTING THE ARBITRAL TRIBUNAL

The parties should determine the method for constituting the arbitral tribunal. In institutional arbitration, the institution's rules govern the process of constituting the tribunal. Often they also provide the mechanism of acknowledgement and transmission of the request for arbitration and answer to the request.

The drafting is very simple and is usually provided by the institution. For example: '[A]ll disputes shall be finally settled under the Arbitration Rules of ... [cite the rules chosen].

In ad hoc arbitration, the parties must provide the mechanism for constituting the tribunal. It is advisable to determine the number of arbitrators and state provisions concerning their designation.

NUMBER OF ARBITRATORS

Many national arbitration laws require that there be an odd number of arbitrators. As a result, an arbitration clause providing for an even number of arbitrators may be considered as void in those countries. Generally, tribunals

in international commercial arbitrations have either one or three arbitrators. In ad hoc arbitration, the parties may agree on one or three arbitrators. In UNCITRAL arbitration, unless the parties agree to one arbitrator, three arbitrators will be appointed.

In institutional arbitration, the number of arbitrators may be left open until the dispute arises. Most institutional arbitration rules provide that tribunals are constituted of one or three members. In case of disagreement between the parties over the number of arbitrators, the arbitral institution will decide the matter taking into consideration the circumstances and the importance of the case.

An institutional arbitration clause may provide the following: 'All disputes arising in connection with the present contract or in relation thereof shall be finally settled under the Arbitration Rules of ... as at present in force by one or more arbitrators appointed in accordance with the said rules.'

The number of arbitrators impacts the costs of the arbitration. Three arbitrators cost three times as much as one. The proceedings can also last longer because it may be more difficult to schedule meetings with three arbitrators rather than with one.

Generally, the determining criteria for deciding on the number of arbitrators are the importance and complexity of the dispute. It is sometimes difficult to make this evaluation before a dispute occurs. Therefore, at least in the case of an institutional arbitration, it may be prudent to keep the issue open until a dispute arises.

Trust is the fundamental issue. A tribunal will perform best when the parties have full confidence in the arbitrators. This may be the case either because parties have succeeded in jointly appointing a sole arbitrator or because each party has had the opportunity to appoint an arbitrator and the two-party appointed arbitrators have chosen the chair of the tribunal.

ONE ARBITRATOR

If a tribunal is to have only one arbitrator, two options are possible: the parties appoint the arbitrator in advance or when a dispute arises.

Parties rarely appoint an arbitrator in advance because they cannot know whether an arbitrator may be available when a dispute arises.

Typically, the sole arbitrator is appointed when a dispute arises. The parties should agree how the arbitrator will be appointed. Parties may agree on appointment by joint proposal. If a joint appointment cannot be made, the parties should designate a third party such as a judicial authority or an arbitration institution to make the appointment.

What appointing authority should be chosen? An arbitration institution rather than a court is recommended because

the institution has the appropriate means for making an appointment, including arbitrators' lists and expertise in arbitration.

In ad hoc arbitration, it is advisable to link the constitution of the arbitral tribunal with the commencement of the arbitration itself by stipulating the method of notification of the request for arbitration and of the respondent's answer, in the absence of a reference to any arbitration rules.

The drafting proposed is the following:

'The dispute shall be finally settled by a sole arbitrator. The claimant party shall notify its request for arbitration in writing and by registered mail or courier service to the respondent party. The latter shall answer in writing and by registered mail or courier service within 30 days from the receipt of the request of arbitration.

The parties shall attempt to appoint jointly the sole arbitrator within 30 days from the receipt of the answer, failing which the sole arbitrator shall be appointed by [mention the name of the arbitration institution], acting as appointing authority, upon the request of any of the parties.'

MORE THAN ONE ARBITRATOR

The remarks made with respect to the appointment of a sole arbitrator in ad hoc arbitration remain valid for constituting an arbitral tribunal with more than one member. The usual number of multiple arbitrators is three. Each party appoints its arbitrator and the two party-appointed arbitrators appoint the third arbitrator who chairs the arbitral tribunal. In case of default of appointment of any of the arbitrators, an appointing authority should be designated as described above. Such a clause could provide:

'The arbitration shall be finally settled by three arbitrators. The claimant party shall notify its request for arbitration in writing and by registered mail or courier service to the respondent party and simultaneously appoint an arbitrator. The respondent party shall answer in writing and by registered mail or courier service within 30 days from receipt of the request for arbitration, and in the answer appoint an arbitrator.

The two arbitrators so appointed shall attempt to appoint jointly within 30 days a third arbitrator who shall chair the arbitral tribunal. Any arbitrator not appointed within the time limit set out above shall be appointed by [mention the name of the arbitration institution], acting in capacity of appointing authority, upon the request of any of the parties or of the arbitrators appointed.'

NATIONALITY AND QUALIFICATIONS OF ARBITRATORS

Parties should refrain from detailing their requests regarding the arbitrators' qualifications to avoid impossible choices. The choice of nationality is generally made on the basis of the nationalities of the parties, the number of arbitrators, the place of arbitration, the applicable law and the wishes of the parties. There is no need to include specific provisions in the arbitration clause. Generally, the chair of a three-member arbitral tribunal and a sole arbitrator will have a nationality different from that of the parties.

Regarding the arbitrators' qualifications, one principle unanimously agreed upon is the requirement that the arbitrator be independent and impartial. In certain arbitration rules, the lack of independence or impartiality of an arbitrator may lead to his or her authority being challenged or to annulling the proceedings. Some arbitration rules make appointments of arbitrators contingent upon written confirmation of their independence and proof that the arbitrators have the qualifications and the time necessary for the arbitration.

UNITED NATIONS COMMISSION FOR INTERNATIONAL TRADE LAW ARBITRATION

In 1976, UNCITRAL adopted ad hoc arbitration rules recommended for resolving international commercial disputes. The 1976 UNCITRAL Rules were thoroughly revised in 2010 and in 2013. The UNCITRAL Rules allow parties to arbitrate disputes without resort to the rules of an arbitral institution.

Emphasizing the usefulness of UNCITRAL Rules, some commentators have observed: 'In an ad hoc arbitration, the appointment of the arbitral tribunal is a fault line, because there is no arbitral institution to oversee the process and step in to make an appointment where one or more parties are in default.'

UNCITRAL Rules provide that when the parties have not reached agreement on the method of appointing arbitrators, have not referred to an appointing authority or if the appointing authority has refused to appoint an arbitrator any party may call upon the Secretary General of the Permanent Court of Arbitration in The Hague to designate an appointing authority. The Secretary General can directly act as appointing authority. The appointing authority will also decide on related issues such as the challenge and replacement of arbitrators, and the determination of arbitrator fees.

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

UNCITRAL recommends that users of this model clause name the appointing authority (name of institution or person), the number of arbitrators (one or three), the place of arbitration (city and country) and the language(s) to be used in the arbitral proceedings.

PLACE OF ARBITRATION

Choosing the place of arbitration can be left open until a dispute arises, thereby avoiding heated discussions on this issue when drafting the clause. However, the place of arbitration is important.

In ad hoc arbitration, parties may want to agree that the arbitrator(s) will fix the place of arbitration. In institutional arbitration, in case the parties have not agreed, the place of arbitration will be either the place of the institution or a place determined by the institution.

As mandatory rules applicable at the place of arbitration may adversely affect the arbitration, uncertainty may arise when the place of arbitration has not been determined in advance. In ad hoc arbitration, once the dispute has arisen, each party will have a tendency to choose a place that it perceives as more favourable to it. In institutional arbitration, the will of the parties usually prevails. But in absence of agreement between the parties, the arbitration takes place in the country of the institution or at a venue determined in accordance with the applicable arbitration rules, preferably in a country where the law and courts will be supportive.

Practical considerations should be taken into account, including easy transportation access; efficient telecommunications systems, including lines allowing video conferences and rapid access to Internet; good infrastructure and logistics, such as hotel facilities and meetings rooms; and the political stability of the country. However, more important are laws of the place of arbitration that will define the scope and role of the courts in connection with arbitration procedures.

A legal environment supportive of arbitration is preferable. The civil procedure codes and arbitration laws of some countries are very supportive of arbitration, others less so and some not at all. However, the general trend is to recognize arbitration as a valid method for international dispute resolution.

An arbitration may be paralyzed if it takes place in a country that is hostile to arbitration. Some national laws that mandate the intervention of courts are burdensome. For example, in one country, for each hearing the arbitral tribunal must appear before a local civil court to advise the court of the status of the arbitral proceedings.

The national law of the place of arbitration may provide the losing party with the ability to challenge an arbitral award. It is necessary to examine whether and under what conditions the law of the place of arbitration allows annulment of an

arbitral award before deciding on the place of arbitration. National laws favourable to arbitration limit the means of recourse against an arbitral award. Other nations' laws may be more flexible and may undermine the efforts undertaken by an arbitral tribunal to resolve a dispute. Some countries' laws relating to international commercial arbitration allow the parties to agree to limit the means of recourse against an arbitral award.

Another reason why the place of arbitration is important relates to enforcement of an award. Parties should verify whether or not the country considered for the place of arbitration has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. An arbitral award rendered in a country that has ratified the Convention will be recognized and enforced in another ratifying according to the conditions of the Convention. The list of countries can be found at www.uncitral.org or www.legacarta.net.

Parties should pay attention to mandatory procedural provisions applicable at the place of arbitration. These provisions may hamper, delay or paralyze the arbitral process. Some examples include requirements to use male arbitrators and local lawyers and to register the arbitral award with the courts of the place of arbitration.

The arbitration clause should contain the following sentence: 'The arbitration shall take place in [mention the city and country].'

LAW APPLICABLE TO THE SUBSTANCE OF THE DISPUTE

The applicable law determines the parties' obligations and helps to fill gaps in contractual provisions. The applicable law should be agreed upon and specified in the contract. Failure to choose the applicable law can lead to unwanted uncertainty.

The question of what law is applicable to the contract does not only arise in the event of a dispute. It arises when the contract is being concluded and sometimes before as the applicable law will determine the validity of the parties' rights and obligations. In performing the contract, the parties need to know what law is applicable because the contractual provisions will not always spell out the full range of their respective rights and obligations.

The absence of agreement on the applicable law in the contract complicates the settlement of disputes and may also cause disputes. Even acting in good faith, the parties may be tempted to perform the contract by reference to their own national laws. Hence, the parties may no longer be performing the same contract, which increases the risk of a dispute. A party acting in bad faith may take advantage of the uncertainty of the applicable law to convince itself that it is free to comply with the law that best serves its own interests.

Failure at the outset to choose the law applicable to the contract does not favour dispute resolution. National laws can differ. For example, in common law countries the issue of time bar, also referred to as statute of limitations – the time period in which a party has to assert a claim – is procedural. In civil law countries this issue is substantive. As a result, in common law countries, the defense of time bar can be waived by a party's failure to raise it. In civil law countries, it cannot be waived.

Questions may arise as to how to draft a request for arbitration or an answer to a request when the applicable law is unknown in advance. Considerable time may be spent convincing an arbitral tribunal to apply the law of one nation rather than another. This uncertainty can delay the proceedings and increase costs. The absence of a choice of applicable law does not facilitate the constitution of the arbitral tribunal, especially when only one arbitrator or the chair of the tribunal is to be chosen. This is why most arbitrators will be conversant with one or perhaps two national laws.

Most legal systems recognize the parties' right to choose the law governing their international commercial contracts. International commercial arbitration rules often set out principles for determining the applicable law. For example, the arbitral tribunal may be given the power to choose the applicable national law or it may be directed to apply the appropriate conflict of law rules.

CHOOSING THE APPLICABLE LAW

The law applicable to the contract should be chosen carefully to avoid unpleasant surprises and should be agreed during contract negotiations. There should be a separate paragraph for the choice of law clause applicable to the entire contract. This clause should not be inserted in the arbitration clause.

Parties may wish to see the contract being governed by their national law because it is familiar and may be more favourable. However, a party's national law may be favourable to it in certain areas but not in others. For example, French law does not allow the theory of unforeseen circumstances, which enables the contractual provisions to be adapted in the event major changes occur after the contract was signed. Disallowance of the theory of unforeseen circumstances may go against the seller's interest if the price of the goods is not falling but rising. As a result, a French seller may be inclined to accept the law of the buyer's country.

Having recourse to another country's law is not an easy matter, especially for a company that achieves most of its turnover on the domestic market. To submit export contracts to one or more different legal systems is complicated and sometimes can be unduly burdensome for SMEs. Wanting to have recourse to a party's national law is understandable. However, if each party insists that its national law should apply, the contract will not be concluded.

Either one of the two parties has to give way or both of them must agree to choose a neutral law. The factors discussed below should be taken into account when deciding on the choice of law.

CRITERIA FOR CHOOSING APPLICABLE LAW

The law governing a contract should be accessible without undue effort by usual means including published codes, case law and treaties available in law libraries, bookstores, via Internet or through local law firms. Accessibility requires that the parties understand the language in which the law is stated.

The chosen law should be appropriate to the particular economic and commercial operations foreseen by the parties. An exporting company likely should opt to apply one single foreign law for its international contracts. This will facilitate managing and enforcing its contracts.

If the law of a third country is chosen, to the extent possible, it should belong to the same type of legal system as one's own national law – for example, civil law, common law or Islamic law – to avoid too great a disparity. For example, as India uses the common law system, an Indian company dealing with an Indonesian company will probably feel comfortable with the choice of Australian law, a common law system, while the Indonesian company, whose civil law system is based on Dutch law, may have hesitations.

Swiss law is often chosen as neutral in international commercial dealings. This is because it is typical of the civil law tradition in the countries of continental Europe, Latin America, North Africa, French-speaking sub-Saharan Africa and Indonesia. Swiss law is organized in a systematic manner and easily accessible in German, French and Italian, and often translated into English. French law, to a lesser extent, also corresponds to these criteria, although its use is less widespread because it is generally not translated into other languages. As for the common law countries, English law may be preferred, for example, in maritime and insurance contracts, but not necessarily in other areas.

A company specializing in commercial relations with a given country should develop knowledge of its law and should agree to apply that law to contracts if it cannot or does not wish to apply its national law.

OTHER SOLUTIONS

More sophisticated solutions may be adopted regarding the law applicable to the contract. The parties may reserve the application of a national law to questions not dealt with by the contract. For example: 'For all questions not settled in the contract, the law of country X shall be applicable.'

While this provision can be useful, even without such wording, in most countries the law will only be applied after considering the contract (the law of the parties). The law designated by the parties will intervene only in case of a gap or absence of any provision in the contract on a given issue. This situation will generally not occur when the contract has been negotiated in detail.

Another solution is *dépeçage*, which makes the contract subject to an assemblage of different laws. It generally corresponds to the desire of one of the parties to keep the core of all the contracts it concludes within the sphere of one single national law, while agreeing that another law may apply to a particular question. *Dépeçage* is unwieldy and is more likely to give rise to disputes relating, among other things, to the question as to which law applies to the particular problem.

The parties may also make their contract subject to non-national rules, such as the trade usages of international commerce, the *lex mercatoria* or UNIDROIT principles. Modern legislation acknowledges this possibility, such as the French New Code on Civil Procedure, the Swiss Act on Private International Law and UNCITRAL Model Law. These rules must be handled with caution because they are not always clearly set out and may be a source of confusion, unenforceability and unpredictability.

LANGUAGE OF THE ARBITRATION

Frequently, business transactions, including drafting contracts and communications, are carried out in more than one language. Sometimes the parties erroneously believe that the language of the contract dictates the choice of the language of the arbitration proceedings. However, the other party may disagree. The question may also arise when the contract is drafted in the different languages of the parties. Parties should also anticipate how the proceedings would be conducted, whether written or oral, with the submission of few or many documents, with or without witnesses, and how much translation and interpretation would cost in time and money.

When a dispute arises it may be difficult for the parties to agree on the language of the arbitration because each party may perceive a tactical advantage in using its own or preferred language. The arbitration clause should stipulate the language(s) to be used in the arbitral process. The choice of language will also impact the choice of arbitrators.

In institutional arbitration, the institution's rules generally contain provisions that deal with the language of the arbitration where the parties have not agreed on a language. Some institutions require arbitrations to be conducted in the national language of the institution. Most often, the language of the contract will determine the language of the arbitration. However, some freedom is granted to arbitral tribunals to

take into account all pertinent circumstances when deciding on the issue.

The arbitration clause should contain this provision: 'The language(s) of the arbitration shall be [mention the language(s) to be used].'

How should the language be chosen? Most national arbitration laws and institutional arbitration rules recognize the freedom of the parties to choose the language of the arbitration. Parties should be guided by common sense. The language used in the arbitration should be the language used by the parties. Generally this is the language used during the negotiation and performance of the contract. Parties should try to choose a language in which both of them are fluent.

The parties are generally free in the choice and number of languages to be used. However, some arbitration rules limit the number of languages that may be used. There will be cost implications for translation and interpretation. Practical and economical reasons often lead to the use of one language. Some compromise may be found at the beginning or in the course of the proceedings regarding the submission of documents, exhibits or oral evidence in another language.

NEGOTIATION, CONCILIATION OR MEDIATION BEFORE ARBITRATION?

ADR processes have been described earlier in this handbook. ADR processes are contingent upon the good will of the parties. Unlike an arbitration award, the settlement agreements that may be obtained through these processes, when binding on the parties, are not enforceable internationally but they can be enforced by courts.

Is it appropriate to require recourse to ADR processes in an arbitration agreement as a precondition to invoking arbitration? Two decades ago, the authors of this handbook would have answered no, especially for international cases, considering the negative side effects that such clauses could have, especially as a delaying tactic. Making ADR a precondition to arbitration may create additional procedural difficulties and can result in futile negotiations.

For example, a party not acting in good faith could challenge a request for arbitration on the grounds that mediation was not attempted despite the fact that the party may have no intention of moving towards a settlement. However, if the parties wish to mediate, they can make an attempt with or without a mediation clause.

The benefits of mediation are progressively informing the legal community. These benefits are so well accepted that most international arbitration institutions offer model clauses combining mediation and arbitration. The settlement rate of administered mediations under

these combined clauses, when available, is impressive at between 50–85%.

The drafting process of standard combined clauses, sometimes referred as ‘step-clauses’, has been refined, often by providing time limits on each step, which responds to the legitimate concern over delaying tactics. Alternatives are also provided, such as allowing parties to request arbitration without recourse to mediation or permitting mediation and arbitration to proceed concurrently. The International Centre for Dispute Resolution of the American Arbitration Association provides the following combined clauses:

- Negotiation-arbitration clause
- Mediation-arbitration clause
- Negotiation-mediation-arbitration clause
- Concurrent arbitration-mediation clause

The International Centre for Dispute Resolution of the American Arbitration Association’s model step-clause for mediation-arbitration provides:

‘In the event of any controversy or claim arising out of or relating to this contract, or a breach thereof, the parties hereto agree first to try and settle the dispute by mediation, administered by the International Centre for Dispute Resolution under its Mediation Rules. If settlement is not reached within 60 days after service of a written demand for mediation, any unresolved controversy or claim arising out of or relating to this contract shall be settled by arbitration in accordance with the International Arbitration Rules of the International Centre for Dispute Resolution.’

To this clause, the parties should consider adding the number of arbitrators and the place of arbitration.

LAW APPLICABLE TO THE PROCEDURE

The law governing the arbitral process, *lex arbitri*, is not necessarily the same as the law applicable to the contract. Subject to the mandatory provisions of the law of the place of arbitration, the parties have great freedom of choice in determining the rules applicable to the arbitration proceedings.

It is useful to determine the law applicable to the procedure when the place of arbitration has not been agreed upon in the arbitration clause, especially in ad hoc arbitrations. This is less important in institutional arbitration because the procedure is governed by the arbitration rules of the institution. However, agreeing on the law applicable to the procedure allows gaps to be filled and procedural points to be specified when the arbitration rules of the institution are silent.

Parties have the following options, especially in ad hoc arbitrations:

- Adopt the rules of procedure of the place of arbitration. This is the easiest solution. It should be verified beforehand that this is adequate and, above all, that this provides favourable answers for the conduct of an international commercial arbitration.
- Adopt the rules of procedure of another country. This approach is dangerous because the rules chosen may conflict with the mandatory rules of the place of arbitration.
- Adopt model rules of procedure, such as UNCITRAL Arbitration Rules.
- Create specific rules of procedure. This presumes that the parties and their lawyers have experience in the conduct of arbitration.

LAW APPLICABLE TO THE ARBITRATION CLAUSE

As noted, an arbitration clause is distinct and independent from the contract in which it is contained. As a result, the law that governs the clause, especially the law that determines its validity in form and substance, may be different from the law that governs the remaining part of the contract. However, in practice it is rare for an arbitration clause to be governed by a law different from the law applicable to the contract.

When a party wishes that the law applicable to the arbitration clause be different from the law applicable to the contract, the arbitration clause should expressly state this requirement. This may be the case when a law not favourable to arbitration comes into play.

AMIABLE COMPOSITEUR OR EX AEQUO ET BONO?

An arbitral tribunal will only decide as *amiable compositeur* (amiable composition) or *ex aequo et bono* (in equity) if such powers have been expressly granted to it. This should be spelled out in the arbitration clause. These powers are recognized by several national legislations and institutional arbitration rules.

The principle of amiable composition is not known in certain legal systems. If the parties wish to grant such power to arbitrators, they should verify that it is compatible with the law applicable to the procedure and the contract.

Amiable composition has French law origins. It is the power given to arbitrators to disregard provisions of a given law that are not mandatory if the arbitrators consider that the strict application of such provisions would result in an unjust outcome. It is preferable that such power be granted to the arbitral tribunal only if the applicable law has been determined in the contract in advance. Conferring the powers of *amiable compositeur* on the tribunal should be given by the parties and should be written in the arbitration clause or in another document.

A contract is normally upheld and enforced by the legal system no matter how 'unfair' it may prove to be. But a case to be decided *ex aequo et bono* overrides the strict rule of law and requires instead a decision based on what is fair and just given the circumstances. Even if the arbitral tribunal has been given the power to decide as *amiable compositeur* or *ex aequo et bono* it remains bound by the provisions of the contract and by international public policy principles.

Amiable composition has the advantage of allowing arbitrators to ignore rules that appear to operate formalistically, harshly or unfairly in the case before them. In amiable composition, arbitrators are granted some flexibility and may render a decision more in line with the parties' will, while not undertaking to rewrite the contract by creating new obligations.

PROVISIONAL OR CONSERVATORY MEASURES

In certain cases measures may be needed to keep or preserve the subject matter of the dispute pending conclusion of the arbitration. Contracts for the sale of goods or construction contracts are examples. The arbitrator's power to order provisional or interim measures is acknowledged by most arbitration laws and rules in international commercial arbitration. An ad hoc arbitration clause should provide for such power to avoid disputes regarding the arbitrator's power to order such measures.

However, these measures may have a limited effect because the arbitral tribunal has no power to compel a party to comply with them. The other party will need to ask a competent court to order enforcement. In practice, the party against whom the measures are directed will often comply voluntarily so as not to lose credibility with the tribunal.

WAIVER OF SOVEREIGN IMMUNITY

An arbitration clause is sufficiently binding so that it is unnecessary to draft a provision providing that a state party to the contract waives its sovereignty immunity. In practice it is rare for a state party to arbitration to raise a plea of immunity from jurisdiction. When a state is party to an arbitration clause, it is more important for its partner to ensure:

- The state has capacity to enter into an arbitration clause according to its own law.
- The state's representatives are authorized to enter into an arbitration clause on its behalf.
- The dispute is arbitrable, which means the dispute is not within the exclusive competence of the courts of the state.

MULTI-PARTY ARBITRATION

Arbitrations involving more than one claimant or respondent are commonly called multi-party arbitrations. Care must be taken regarding the mechanism of the constitution of the arbitral tribunal, especially in ad hoc arbitrations. This issue will be examined in more detail below.

With the diversity of multi-party situations, it is difficult to propose a model clause dealing with this issue. The parties should avoid having a large number of arbitrators that would make it impossible for the arbitral tribunal to function well. For example, there is no point in having an arbitral tribunal of five arbitrators just because there are five parties. In case of disagreement regarding the constitution of the arbitral tribunal in a multi-party situation the solution could be to call upon an agreed appointing authority to appoint all three arbitrators or the single arbitrator.

Whatever method is adopted, it is necessary to ensure that the method does not violate mandatory law prevailing at the place of arbitration regarding constitution of the arbitral tribunal, and that the mechanism chosen will not paralyze possible enforcement proceedings.

APPORTIONMENT OF ARBITRATION COSTS IN ADVANCE

The issue of which party will finally bear the costs of the arbitration, irrespective of the fact that both parties may have paid the advances on costs, is dealt with in institutional arbitration by the institution's rules. As a result, it is not necessary for the arbitration clause to deal with the issue.

It may be useful in ad hoc arbitration to insert a provision in the arbitration clause concerning costs, bearing in mind that in commercial arbitration arbitrators have wide discretion to determine the apportionment of arbitration costs.

WAIVER OF APPEAL

One advantage of international arbitration is that once the award is rendered, in principle it cannot be subject to appeal. The use of the word 'finally' in an arbitration clause is useful insofar as it invokes this principle.

The law of the place where the award is rendered often provides the possibility of setting aside an arbitral award on limited grounds that generally relate to the existence, validity and scope of the arbitration clause, as well as the proper constitution of the arbitral tribunal. Such laws are usually considered compulsory and cannot be waived.

The laws of certain countries allow parties to exclude any recourse against an arbitral award. This waiver requires an express stipulation. For example, Article 192(1) of the Swiss Private International Law Act provides that:

'Where none of the parties have their domicile, habitual residence or business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, waive fully the action for setting aside or they may limit it to one or several of the grounds listed in Article 190(2).'

By excluding annulment proceedings where they are permitted, parties will save time and costs. However, the wisdom of such an exclusion is questionable.

ARBITRATION CLAUSES TO AVOID

Following are examples of clauses that are cumbersome or difficult to handle.

THE 'ONE-OFF' CLAUSE

- 'All disputes arising out of the present contract shall be settled by way of arbitration.'

Such a clause may be difficult to apply in practice, especially regarding the constitution of the arbitral tribunal, because it does not contain any provision for the appointment of arbitrators or any mention of the authority that may be called upon for the appointment of arbitrators in case of default of any of the parties. The clause does not identify the place of arbitration, which may be a needed reference to a competent court for the appointment of arbitrators.

IMPRECISE OR FALSE DESIGNATION OF THE ARBITRAL INSTITUTION

Here are some examples:

- 'Any dispute or contravention to the present contract shall be submitted to the French Chamber of Commerce of Sao Paulo.'
- 'In case of dispute which concerns only the shipper or the ship owner, the Tribunal of the Chamber of Commerce of Paris shall have exclusive jurisdiction.'
- 'In case of no amicable settlement, all disputes that may arise shall be settled pursuant to the arbitration rules of the International Chamber of Commerce of Zurich.'

These three clauses are defective because they do not properly designate the arbitral institution. The first clause deals with a non-existent body, while the two other clauses are ambiguous. The second clause is ambiguous because it is not clear whether it refers to the Commercial Court of Paris or arbitration before the Chamber of Commerce and Industry of Paris. The third

clause is unclear because the International Chamber of Commerce has its seat in Paris, not in Zurich. The question arises whether the parties simply wanted to resort to International Chamber of Commerce Arbitration with Zurich, Switzerland, as the place for arbitration, or whether they were referring to the Zurich Chamber of Commerce's arbitration rules.

Seeking the true intent of the parties may resolve these difficulties. This presumes that when the arbitration clause is set in motion, the parties act in good faith. But ambiguous clauses provide opportunities to raise issues about deficiencies in the wording, argue that the clause is without effect or indulge in delaying tactics.

COMBINING ARBITRATION WITH COURT LITIGATION

This may be illustrated as follows:

- 'Any controversy arising out of the performance of the present contract shall necessarily be submitted to arbitration under the rules of the Vietnam International Arbitration Court; in case of disagreement between the arbitrators chosen by the parties, it is agreed that the dispute shall be submitted to state courts.'

This clause raises the question of the nature of the mechanism of dispute resolution chosen. Is it recourse to an arbitral tribunal or to a court? Or does it mean recourse to conciliation prior to the intervention of a competent court? This agreement shows that the parties must define the method of settling their disputes in a clear and simple manner, without mixing up both institutions.

DISASTROUS COMPROMISES

This is illustrated by the following clause:

- 'All disputes in relation to the present contract shall be carried out by arbitrators appointed by the International Chamber of Commerce sitting in Geneva, in accordance with the arbitration procedure set forth in the Civil Code of France and the Civil Code of Venezuela, with due regard for the law of the place of arbitration.'

This ad hoc arbitration clause, which involves French and Venezuelan parties, suggests they want to involve their own national laws with reference to a third law, the law of the place of arbitration, Switzerland. Insofar as these laws converge on a particular point, no problem should result. However, the resulting arbitral award might be attacked on the ground that the procedure applied failed to conform to the agreement of the parties. ICC is involved only as appointing authority, which weakens the arbitral award to be rendered.

RECOMMENDED DRAFTING FOR ARBITRATION AGREEMENTS

INSTITUTIONAL ARBITRATION

If the parties agree to institutional arbitration, they should draft a clause that is as close as possible to the recommended standard clause provided by the selected institution. The parties should consult the selected arbitral institution's website and select one of its standard clauses. Most arbitral institutions offer several options in their standard clauses such as arbitration, mediation followed by arbitration or expedited arbitration. The parties could also use the following clause:

'All disputes arising in connection with the present contract or in relation thereto as well as any other agreement signed or to be entered into in relation with the present contract shall be finally settled under the Arbitration Rules of [name of the institution chosen] by one or more arbitrators appointed in accordance with the said rules. The arbitration shall take place in [selected city and country]. The language(s) of the arbitration shall be [select language(s)].'

AD HOC ARBITRATION

If the parties choose ad hoc arbitration, they should consider using the UNCITRAL Arbitration Rules and should refer to the recommended UNCITRAL arbitration clause. They should also specify an appointing authority in the clause.

Parties could also consider drafting a tailor-made ad hoc clause. However, there are some dangers in attempting to do this.

Here is an example of an ad hoc arbitration clause for a sole arbitrator:

'All disputes arising in connection with the present contract or in relation thereto shall be finally settled by a sole arbitrator.

The claimant party shall notify its request for arbitration in writing and by registered mail or courier to the respondent party; the latter shall answer in writing and by registered mail or courier within 30 days from the receipt of the request of arbitration.

The parties shall attempt to appoint jointly the sole arbitrator within 30 days from the receipt of the answer, failing which the sole arbitrator shall be appointed by [mention the name of the institution], acting in capacity of appointing authority, upon the request of any of the parties.

The arbitration shall take place in [select the city and country]. The language(s) of the arbitration shall be [select language(s)].'

Here is an example of an ad hoc arbitration clause with three arbitrators:

'All disputes arising in connection with the present contract or in relation thereto shall be finally settled by three arbitrators.

The claimant party shall notify its request for arbitration in writing and by registered mail or courier to the respondent party and simultaneously appoint an arbitrator. The respondent party shall answer in writing and by registered mail or courier within 30 days from receipt of the request for arbitration, and in the answer appoint an arbitrator.

The two arbitrators so appointed shall attempt within 30 days to appoint jointly a third arbitrator who shall chair the arbitral tribunal. Any arbitrator not appointed within the time limit set out above shall be appointed by [mention the name of the institution], acting in capacity of appointing authority, upon the request of any of the parties or of the arbitrators appointed.

The arbitration shall take place in [mention the city and country]. The language(s) of the arbitration shall be [mention the language(s)].'

CONSTITUTING THE ARBITRAL TRIBUNAL

The constitution or appointment of an arbitral tribunal is typically the first step in an arbitration procedure. It is usually set in motion through the request for or notice of arbitration from the claimant to the respondent or to an arbitration institution. Depending on the applicable rules, the setting up of the tribunal may be handled by an arbitration institution, by the parties themselves or by a court.

This process, along with the typically required payment of a partial advance on costs before the proceedings can start, may take only a few weeks in accelerated proceedings where parties cooperate. In most international arbitrations this process will take one-to-four months.

INSTITUTIONAL ARBITRATION

WHO APPOINTS THE ARBITRATOR(S)?

The constitution of the arbitral tribunal could differ among arbitral institutions. Some institutions give full autonomy to the parties to designate the arbitrator(s) of their choice. Other institutions restrict the parties' choices to a list of arbitrators kept by the institution.

Even if the parties are given the freedom to propose the arbitrator(s) of their choice, the arbitral institution will generally supervise the appointment process. Supervision by the arbitral institution often implies that the appointment of the arbitrator(s), including party-appointed arbitrators, is made by the institution.

INDEPENDENCE AND IMPARTIALITY

The arbitral institution will typically draw the attention of the arbitrator(s) to the requirements of independence and impartiality in relation to the parties. Most institutions will require the arbitrator(s) to confirm in writing that they are and will remain independent and that they must disclose any fact or circumstance that might raise doubts regarding their impartiality in the eyes of the parties.

Potential arbitrator(s) in an ICC proceeding must disclose any relationship they have or may have had with the parties. Arbitrators should also disclose any relationship they have or have had with the lawyers acting for the parties. Some

institutions will ask arbitrators to confirm that they have sufficient time to conduct the arbitration diligently.

Supervision generally implies that the arbitral institution may refuse to appoint an arbitrator or to confirm the choice of an arbitrator proposed by a party, if it considers that the arbitrator is not independent in relation to the parties. Before deciding not to appoint or confirm an arbitrator, the arbitral institution generally gives those concerned the opportunity to express their views.

CHALLENGING THE ARBITRATOR(S)

If doubts are raised concerning the independence or impartiality of an arbitrator, the arbitral institution generally decides any challenge raised by the parties. The decisions of arbitral institutions regarding the constitution of an arbitral tribunal and an arbitrator's replacement are administrative. A party may file a recourse against the decision of the arbitral institution before a competent court. However, these recourses are not very effective because courts in most jurisdictions will not issue orders interrupting arbitral proceedings pending their own decision on the challenge.

These recourses are unusual because they go against the spirit and the letter of the arbitration agreement, in which the parties have conferred the arbitral institution with the necessary powers to administer the procedure.

AD HOC ARBITRATION

If parties have not provided for an arbitral institution to administer the procedure, they will have to deal with the constitution of the arbitral tribunal themselves or bring the matter before a court.

Parties have a great deal of freedom in ad hoc arbitration to organize the constitution of the arbitral tribunal. However, they should bear in mind that the constitution process may encounter difficulties if one party is unwilling to participate at the time the dispute arises. A party, usually the respondent, in an ad hoc arbitration may refuse or fail to select an arbitrator in cases where a three-member arbitral tribunal must be constituted. A party could refuse to participate in the selection of the sole arbitrator or refuse to participate in the selection of the chair of the arbitral tribunal.

Box 17: Model statement of independence in ad hoc arbitration

This statement is pursuant to Article 11 of UNCITRAL Arbitration Rules.

No circumstances to disclose

'I am impartial and independent of each of the parties and intend to remain so. To the best of my knowledge, there are no circumstances, past or present, likely to give rise to justifiable doubts as to my impartiality or independence. I shall promptly notify the parties and the other arbitrators of any such circumstances that may subsequently come to my attention during this arbitration.'

Circumstances to disclose

'I am impartial and independent of each of the parties and intend to remain so. Attached is a statement made pursuant to Article 11 of UNCITRAL Arbitration Rules of (a) my past

and present professional, business and other relationships with the parties and (b) any other relevant circumstances. [Include statement.]

I confirm that those circumstances do not affect my independence and impartiality.

I shall promptly notify the parties and the other arbitrators of any such further relationships or circumstances that may subsequently come to my attention during this arbitration.

Any party may consider requesting from the arbitrator the following addition to the statement of independence: "I confirm, on the basis of the information presently available to me, that I can devote the time necessary to conduct this arbitration diligently, efficiently and in accordance with the time limits in the Rules."

In these circumstances, the other party, usually the claimant will need to ask a court to make the necessary appointment. Calling upon a court for the appointment of an arbitrator will likely take more time than if an arbitral institution was designated to decide the matter. As a result, in some ad hoc arbitration agreements parties provide that an arbitral institution will act as appointing authority. The arbitral institution will be called upon to appoint one or more arbitrators or to make the appointment on behalf of a defaulting party. The costs for appointments vary greatly depending on the institution.

Most arbitral institutions offer services for appointing arbitrators in ad hoc arbitrations. There are no international standard fees for such appointments. The following figures were valid in July 2014 and are subject to change.

The Arbitral Institute of the Stockholm Chamber of Commerce, for its services as appointing authority under UNCITRAL Rules, charges the requesting party a fixed amount of EUR 1,500. This covers appointment of a sole or presiding arbitrator, appointment of a second arbitrator in cases with three arbitrators, and appointment of substitute arbitrators. For decisions on challenges of arbitrators, the Institute charges a fixed amount of EUR 3,000.

At the Hong Kong International Arbitration Centre, the fee for filing an application for the appointment of an arbitrator is HK\$ 8,000.

The American Arbitration Association's fees for services in cases under UNCITRAL Rules are based on the amount of the claim or counterclaim. A non-refundable fee is payable in full by a filing party. For example, if the amount in claim is above US\$ 10,000 to US\$ 75,000, the initial filing fee is US\$ 750 and there is no case service fee. If the amount in

claim is above US\$ 500,000, the initial filing fee is US\$ 6,000 and the case service fee is US\$ 2,000.

For its services as appointing authority under UNCITRAL Rules or for ad hoc arbitrations, ICC charges the requesting party a fixed amount of US\$ 3,000 for each request. The fee covers any additional services such as challenges and appointment of a substitute arbitrator.

MULTI-PARTY ARBITRATION

Particular problems arise with the constitution of arbitral tribunals in proceedings involving multiple claimants and/or multiple respondents. Multi-party arbitrations have become fairly frequent in the international context. For example, construction disputes could involve a client, a general contractor and various subcontractors. ICC statistics show there are at least three parties in around 30% of ICC arbitration cases.

In most instances, there are no problems with the constitution of the arbitral tribunal when all parties agree with the commencement of a multi-party arbitration. However, some of these cases may raise difficulties. The parties should ensure that all the parties they wish to involve in the multi-party arbitration either have signed the same arbitration agreement prior to the dispute, or that parties that have not yet signed the arbitration agreement consent when the dispute arises. If one of the parties is not bound by an arbitration agreement or has not consented to arbitration with the other parties, such party generally cannot be included in the arbitration.

If all the parties have signed an arbitration agreement, but are not all willing to participate in the arbitration procedure,

Box 18: Appointment of arbitrators in a multi-party dispute

This Box examines the French Supreme Court (Cour de Cassation), 7 January 1992 case involving 1. Siemens AG (Germany) and 2. BKMI Industrieanlagen GmbH (Germany) v. Dutco Construction Company (Dubai).

Siemens, BKMI and Dutco entered into a consortium agreement for the construction of a cement plant in Oman. The agreement contained an arbitration clause requiring disputes to be settled under ICC Arbitration Rules by three arbitrators.

In 1986, Dutco filed a single request for arbitration against its two partners regarding separate credits concerning the two firms. Siemens and BKMI each sought to appoint an arbitrator. However, in accordance with the then ICC Arbitration Rules the ICC Court ordered the two parties

to jointly nominate one co-arbitrator. Siemens and BKMI had differing interests and therefore contested the order. While reserving their objections, they jointly appointed one co-arbitrator. In a partial award, the tribunal affirmed that it had been validly constituted and that it could continue as a multi-party arbitration.

Siemens and BKMI sought to set aside the partial arbitral award before the Paris Court of Appeals. The court rejected their application.

In 1992 the French Supreme Court annulled the decision of the Paris Court of Appeal. It held that the principle of equality of the parties in appointing the arbitrators is a matter of public policy that can be waived only after a dispute has arisen.

or in case they have conflicting interests, a difficulty will arise with respect to the appointment of a co-arbitrator on behalf of a plurality of parties on one side.

Typically this difficulty will arise if there are multiple respondent parties. For instance, assume a contract involving two parties on each side. If the four contracting parties have agreed to submit their dispute to an arbitral tribunal with three members with the idea that the claimant(s) and the respondent(s) will each be able to appoint an arbitrator, there would be an imbalance where two parties on claimant's side appoint a co-arbitrator while the two respondents cannot agree on the appointment of a co-arbitrator.

It is usually unfeasible to appoint more than three arbitrators. If the respondents, although not able to agree on jointly appointing a co-arbitrator, be compelled to appoint one, they may later raise a plea regarding their rights of defense and their rights to participate in the constitution of the arbitral tribunal on an equal footing with the claimants.

In institutional arbitration the institution might appoint a co-arbitrator on behalf of the defaulting respondents jointly, depending on the applicable rules. However, such appointment of a co-arbitrator by the arbitral institution, in a situation where the other side has been able to designate its co-arbitrator, may create a lack of equality between the parties in the constitution of the arbitral tribunal. Since the Dutco case (Box 18), leading arbitral institutions have modified their rules so that in multi-party cases they may directly appoint all members of the tribunal when parties disagree on the constitution of the tribunal.

ARBITRAL TRIBUNAL POWERS, DUTIES AND JURISDICTION

POWERS AND LIMITATIONS

The powers of an arbitral tribunal are those that the parties have given it. These powers can be explicitly granted in the arbitration agreement or implicitly through the reference to institutional or other rules, such as UNCITRAL Arbitration Rules. These powers are conferred within the limits of the applicable law, which is generally the law of the place of arbitration or the law applicable to the arbitration agreement.

GENERAL POWERS OF ARBITRAL TRIBUNALS

Arbitral tribunals generally have the following powers, unless the parties have agreed otherwise:

- Fix the place of arbitration, unless the place has been agreed by the parties or decided by an arbitral institution;
- Determine the language(s) of the arbitration, unless the parties have agreed;
- Fix the procedural schedule, including setting and extending time limits for the filing of submissions by the parties;
- Organize hearings and site visits;
- Hear witnesses;
- Appoint experts;
- Determine the law applicable to the procedure and the merits of the dispute.

Parties may also confer the powers of *amiable compositeur* to the arbitral tribunal. These powers authorize the tribunal, when applying a specific law, to derogate from a strict application of the law if it considers that strict application would lead to an unjust result.

CONSERVATORY MEASURES

In response to a request of a party, arbitral tribunals may order interim measures of protection before issuing an award. These measures may include:

- Orders requiring a party to allow inspection of goods, property or documents;

- Measures to avoid loss or damage, such as an order to a contractor to continue construction despite its claim that it is entitled to suspend the works;
- Measures to facilitate later enforcement of the award, such as attachments of physical property or bank accounts, or orders for depositing in a joint bank account the amount in dispute.

DUTIES OF AN ARBITRAL TRIBUNAL

The duties of an arbitral tribunal flow from the parties' agreement, the applicable law and/or the applicable institutional or ad hoc arbitration rules. The tribunal's primary duty is to render an enforceable award that resolves the parties' dispute.

DUE PROCESS

An arbitral tribunal must respect due process of law. The tribunal must treat all parties equally, act impartially and ensure that the parties have been given sufficient opportunities to submit and defend their positions and respond to the positions of the other parties. Some institutions provide a code of conduct or code of ethics for arbitrators.

TERMS OF REFERENCE

Some institutional rules provide that the arbitral tribunal must establish terms of reference. The terms of reference is a procedural document that contains the names and addresses of the parties and the arbitrators, a summary of the elements of the case, the claims of the parties, the issues to be determined, the applicable law (if agreed), and all relevant particulars relating to the procedure.

REASONED AWARD

Parties or applicable laws and rules may require that the award must specify the reasons on which it is based, and that the award must be rendered within a specific time limit. General practice in international arbitrations requires awards that are reasoned.

NOTIFICATION OF AWARD

Some national laws impose additional duties on arbitrators such as notification and filing of the arbitral award with the courts.

JURISDICTION

When parties agree to arbitration, they confer on the arbitral tribunal jurisdiction to determine the dispute. Courts lack jurisdiction to decide the dispute unless the arbitration clause is null and void or unless the parties agree to revoke the arbitration agreement.

The jurisdiction given to the arbitral tribunal to determine the dispute does not exclude the power of courts to take certain actions prior to the arbitration proceedings, or even during the arbitral process, for example through conservatory or provisional measures. Asking courts for such measures is not a waiver of the arbitration clause.

KOMPETENZ-KOMPETENZ

A party may contest the jurisdiction of the tribunal, challenging the validity of the arbitration agreement. However, under the principle known as *Kompetenz-Kompetenz* (competence-competence) the arbitral tribunal has the power to decide on its own jurisdiction. The tribunal's decision on its jurisdiction is made in an interim or the final award.

Even if an arbitral tribunal decides that the contract in which the arbitration agreement is contained is non-existent or null and void, this does not mean the arbitration agreement becomes non-existent or null and void.

EMERGENCY ARBITRATORS

An emergency arbitrator is a process, set out in arbitration rules of several arbitration institutions around the world, by which parties can obtain in a matter of days emergency relief before an arbitral tribunal has been formed. The process appears to be effective.

The functions of emergency arbitrators are as follows:

- Emergency arbitrators apply by default to parties that have chosen an arbitration institution with rules providing for this service, unless the parties have opted out of the emergency arbitrator process.
- Emergency arbitrators cannot give orders against third parties that are non-signatories to an arbitration agreement.
- Emergency arbitrators will make orders only in established emergency situations, where a party cannot wait for the constitution of an arbitral tribunal.
- The responding party is protected in various ways, including by the rule that the applicant must file a request for arbitration within a short period (approximately 10 days). If not the proceedings will be terminated.
- The emergency arbitrator does not prevent any party to seek conservatory measures from a court.

The emergency arbitrator's decision takes the form of an order. The parties undertake to comply with the order. However, once obtaining jurisdiction of the case, the arbitral tribunal is not bound by the emergency arbitrator's order. The tribunal can modify, terminate or annul the order. The arbitral tribunal has the power to decide any party's claims relating to the proceedings, including the reallocation of the costs of the proceedings and any claims arising out of or in connection with the compliance or non-compliance with the order.

The advance on costs for an emergency arbitrator is borne by the party requesting the process. Emergency arbitrators are mainly used in important cases. For example, according

Box 19: The 'negative effect' of an arbitration agreement on court jurisdiction

A party that has signed an arbitration agreement cannot bring its case before a court. This is the 'negative effect' of an arbitration agreement. Article II of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards states:

Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not, concerning a subject matter capable of settlement by arbitration.

The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article shall at the request of one of the parties, refer the parties to arbitration unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Box 20: Emergency arbitrator in action

A dispute arose between a Chinese company and an Indonesian company over the quality of a coal shipment. The Indonesian shipper wanted to sell the cargo of coal pending the resolution of the dispute because the cargo was rapidly deteriorating.

The applicant (the Indonesian company) contacted the Singapore International Arbitration Centre on a Monday morning, advising that it intended to make an emergency arbitrator application. The applicant filed the request at 14:00 that same day. By 17:00 an experienced

Singaporean shipping lawyer was appointed as emergency arbitrator.

The emergency arbitrator gave his preliminary directions that evening. The next day, after a hearing, the emergency arbitrator issued an order permitting the sale and directing the respondent to cooperate so that the cargo could leave the port.

Source: Emergency Arbitration Procedures: A Comparative Analysis, by Raja Bose and Ian Meredith, International Arbitration Law Review, Issue 5, 2012

to ICC provisions the applicant must pay US\$ 40,000, consisting of US\$ 10,000 for ICC administrative expenses and US\$ 30,000 for the emergency arbitrator's fees and expenses.

As emergency arbitrators are a recent addition to the arbitration landscape, the attitude of courts when requested to enforce an emergency arbitrator's order is unclear. However, in the United States courts have rejected parties' attempts to resist enforcement.

ARBITRATION PROCEEDINGS

GENERAL PRINCIPLE – PARTY AUTONOMY

An essential feature of arbitration is flexibility as compared to court procedures. In arbitration proceedings, parties are free to tailor the proceedings according to their wishes and needs, within the limits of the relevant applicable laws. For example, in one case the parties agreed to have arbitration on a cruise ship, so no party could walk away.

The arbitral tribunal must take into account the agreements and wishes of the parties in the conduct of the procedure. However, it also must pay attention to the mandatory provisions and public policy requirements of the place of arbitration, which must not be violated. Violation of such provisions may jeopardize enforcement and recognition of the arbitral award.

Parties may agree on the law applicable on the substance of the dispute and on the arbitration procedure. They are free to determine the language(s) in which the arbitration will be conducted, the language(s) in which documents may be submitted, the methods of taking of evidence and the schedule for the procedure.

PROCEDURES DECIDED BY THE TRIBUNAL

Failing an agreement of the parties, the arbitral tribunal will decide on the following, while duly considering the wishes of the parties and after giving them an opportunity to express their views.

LANGUAGE(S)

If the parties have not agreed, in what language(s) will the arbitration be conducted? The arbitral tribunal will generally take into account the language of the contract to determine in what language the arbitration will be conducted. If parties have used other languages in their correspondence prior or subsequent to signing the contract, the tribunal may find a basis for accepting documents in other languages.

TIMING

How much time do the parties have to file submissions in the arbitration? Before fixing a procedural schedule, the

arbitral tribunal should consult the parties regarding the time they may need to file their submissions and consider their wish to file rejoinders in a second or third round of submissions.

The calendar for the submissions is fixed as early as possible in the procedure and sets the pace of the procedure. The arbitral tribunal must ensure that the parties respect the schedule. The tribunal maintains the right to refuse submissions that are filed late.

HEARINGS AND EVIDENCE

Are the parties entitled to a hearing? Will the award be based only on written submissions? What evidence may the parties submit in support of their cases? Who decides whether a particular witness should be heard?

If the parties are from different legal traditions and have different views regarding the taking evidence and the weight given to the evidence, the arbitral tribunal should decide these matters after consulting the parties. The tribunal should not use methods of taking evidence with which the parties are unfamiliar or methods that do not guarantee equal treatment and the right of defence.

Generally, if a party wishes to be heard, the tribunal should conduct an oral hearing. Courts may consider a tribunal's refusal to hold a hearing as a violation of due process and the right to be heard and may refuse to recognize or enforce the arbitral award. Article V (1) (b) of the New York Convention states that a court may refuse to recognize an arbitral award if 'the party against whom the award is invoked was ... unable to present his case'.

HEARINGS

If none of the parties asks for an oral hearing, the tribunal still may organize a hearing if it believes a hearing would be helpful. It may determine the issues only on the documents submitted by the parties if it considers these documents sufficient.

When it organizes a hearing, the arbitral tribunal will allow sufficient time for each of the parties to present its case. The tribunal may pose questions to the parties to clarify certain points.

Box 21: Case management techniques

Appropriate control of time and cost is important in all cases. In cases of low complexity and low value, it is particularly important to ensure that time and costs are proportionate to what is at stake in the dispute. Following are some case management techniques to control time and cost.

Bifurcate the proceedings or render one or more partial awards on key issues, when doing so may result in faster, more efficient resolution of the case.

Identify issues that can be resolved by agreement between the parties or their experts.

Identify issues to be decided solely on the basis of documents rather than through oral evidence or legal argument at a hearing.

Control production of documentary evidence by:

- Requiring the parties to produce with their submissions the documents on which they rely;
- Avoiding requests for document production when unnecessary to resolve the dispute;
- Limiting requests for documents to those relevant and material to the outcome of the case;
- Establishing reasonable time limits for the production of documents;
- Using a schedule of document production to facilitate the resolution of issues in relation to the production of documents.

Additional techniques are described in the ICC publication, 'Techniques for Controlling Time and Costs in Arbitration'. Available at: www.iccwbo.org

Limit the length and scope of written submissions and written and oral witness evidence (both fact witnesses and experts) so as to avoid repetition and maintain a focus on key issues.

Use telephone or video conferencing for procedural and other hearings where attendance in person is not necessary and use information technology that enables online communication among the parties, the arbitral tribunal and the arbitral institution.

Organize a pre-hearing conference with the arbitral tribunal where arrangements for a hearing can be discussed and agreed and the tribunal can indicate to the parties issues on which it would like the parties to focus at the hearing.

Encourage settlement by:

- Informing the parties that they are free to settle all or part of the dispute either by negotiation or through any form of amicable dispute resolution methods such as mediation.
- Where agreed between the parties and the arbitral tribunal, the tribunal may take steps to facilitate settlement of the dispute, provided that every effort is made to ensure that any subsequent award is enforceable at law.

Box 22: Taking evidence when parties are from different legal cultures

In international arbitration, parties and their lawyers may come from different legal backgrounds and systems. These differences can lead to disputes as to how evidence should be presented. In common law countries, parties and their counsel are familiar with requesting and submitting many pages of documents to support their positions, interrogating their own witnesses and cross-examining the other side's witnesses during oral hearings. This may take several days.

In civil law countries there is no such tradition. As a result, civil law lawyers may encounter difficulties when presenting a case against lawyers from common law countries that are used to cross-examination. Disputes may arise regarding the rules and the way evidence may be taken.

The International Bar Association (IBA) publishes Rules on the Taking of Evidence in International Commercial Arbitration as

a resource for conducting the evidence phase of international arbitration proceedings. The IBA Rules provide mechanisms for presenting documents, fact witnesses, expert witnesses and inspections, as well as the conduct of evidentiary hearings. The IBA Rules are designed for use with institutional or ad hoc rules in international commercial arbitrations. They reflect procedures used in different legal systems and may be particularly useful when the parties come from different legal cultures.

If the parties wish to adopt IBA Rules in their arbitration clause, they should include this language: 'In addition to the [institutional or ad hoc rules chosen by the parties], the parties agree that the arbitration shall be conducted according to the IBA Rules of Evidence.' The IBA Rules are accessible at: www.ibanet.org.

WITNESSES AND VERBATIM TRANSCRIPTS

An arbitral tribunal may decide to hear witnesses, either on its own motion or at the request of a party. A tribunal may organize a visit to familiarize itself with the site where relevant facts occurred, either on its own motion or at the request of a party.

When it hears witnesses, the arbitral tribunal is generally free to choose the proper method. It may interrogate the witnesses. It may allow the parties or their lawyers to examine and cross-examine witnesses. In complicated matters, parties may ask for verbatim transcripts of the oral testimony. Verbatim transcripts require using a recording device or a competent stenographer, and can be cumbersome and expensive.

One way to save time and preserve testimony is to submit witnesses' direct testimony in writing before the hearing, leaving only cross-examination and redirect examination for oral presentation at the hearing.

EXPERTS

An arbitral tribunal may, on its own motion or at the request of a party, appoint an expert to prepare a report on specific technical points. If the tribunal orders an expert report, the parties should be given the opportunity to provide guidance to the expert and to respond to the expert's report.

As a general rule, the final decision regarding the issue to be determined will be made by the arbitral tribunal, not by the expert. However, the expert's findings can help the tribunal on technical points.

APPLICABLE LAW

LAW APPLICABLE TO THE MERITS OF THE DISPUTE

WHY STIPULATE THE APPLICABLE LAW?

It is important to agree in advance on the law applicable to the contract. The absence of choice of applicable law may not only complicate the settlement of disputes, but may also result in new disputes over the applicable law.

When a dispute is brought before an arbitral tribunal, parties must convince the tribunal what law they consider applicable before they can present the merits of their cases. Disputes over applicable law can lead to increased costs and delays.

Parties that do not reach agreement on the applicable law may be tempted to stipulate that disputes will be settled by general principles of law or *lex mercatoria*, which is customary European mercantile law. The dangers with such provisions are that they leave much uncertainty. This is why the arbitration community is sceptical with regard to *lex mercatoria*.

The UNIDROIT Principles of International Commercial Contracts (www.unidroit.org) offer several legal provisions, including hardship, force majeure and currency of payment. The parties can agree that these principles will govern the substantive issues of their contract.

THE ARBITRAL TRIBUNAL AND THE LAW CHOSEN BY THE PARTIES

If the parties have agreed upon the law applicable to the contract, the arbitral tribunal is bound by their choice. However, even if the parties have agreed, the tribunal still must consider whether there are limits to the application of such law. In this respect, the issues of capacity and the power of a party to act are generally determined by the law applicable to the status of that entity, and not by the law applicable to the contract. The effects of a party's insolvency will have to be determined under the law by which the party is governed. The arbitral tribunal also may be required to follow the mandatory public policy of another legal system with which the contract has a relationship.

Tort claims generally will be dealt with under the same law as the law applicable to the contract, in particular if tortious conduct occurred during the performance of the contract.

However, this is not always the case. Because it is not possible to say in general which rules of private international law (conflict of law rules) an arbitrator may apply, the arbitrator may have to apply the *lex loci delicti*, that is, the law of the place where the loss or damage occurred.

POWERS OF AMIABLE COMPOSITEUR

If the parties have conferred the powers of *amiable compositeur* on the tribunal, the tribunal may depart from strict application of the law if this would lead to an unjust result. Consequently, the arbitral tribunal will have the power to decide the dispute *ex aequo et bono* or in equity and may be dispensed from motivating its arbitral award in law, if the law that governs the arbitration procedure allows.

However, *amiabiles compositeurs* are still obliged to respect public policy rules in their conduct of the arbitration and when rendering their award. Arbitrators may decide as *amiabiles compositeurs* only if the parties have expressly given them this power.

DETERMINATION OF APPLICABLE LAW

If the parties have not agreed on the applicable law, the arbitral tribunal must determine the rules applicable to the substance of the dispute. Since arbitrators, unlike judges, do not have the authority of the country where they are sitting, arbitrators have no *lex fori* (law of the forum). If the parties have not stipulated the application of this substantive law to their dispute the tribunal is not obliged to apply the substantive law of the country where the arbitration takes place and is not obliged to apply the conflict of law rules applicable in the place of arbitration.

Published arbitral awards confirm the great variety of methods used by international arbitrators in determining the applicable rules of law. Most often, the arbitrators determine the applicable rules of law in accordance with one of the three following methods.

Connection with the dispute

According to this principle, the arbitral tribunal examines each of the conflict of law rules of the countries having a connection with the dispute, for example the countries of where the parties are located and countries where the contract was signed or performed. The advantage of this method is that it promotes predictability. However, the

method serves little purpose if the conflict of law rules do not adhere to the same applicable law rules.

General principles of private international law

Pursuant to this method, arbitrators often use principles such as the ‘centre of gravity’ and the ‘closest connection’. This method involves a risk of over simplification. This may explain why some arbitral tribunals, to motivate their choice, rely upon international conventions such as the Vienna Convention of 19 June 1980 on the Law Applicable to Contractual Obligations, the Convention on the Law Applicable to International Sales of Goods of 15 June 1955 or the Convention on the Law Applicable to Contracts for the International Sales of Goods of 22 December 1986. For the full text of these conventions, see: <http://www.legacarta.net>.

The direct way

Using the direct way (*la voie directe*) means that the arbitral tribunal resolves the dispute without raising the question of the applicable conflict of laws rules. The arbitral tribunal establishes a connecting factor that it considers decisive or significant between the contract and the law that it decides to apply. This may concern the place of the characteristic performance.

For example, in a case involving international sales, this will be the country of the seller, who must deliver goods, while the buyer simply has to pay. It could also concern the centre of gravity of the contract, the place of its performance and the place of residence of the vendor. However, this method may be questionable if the dispute concerns the validity of the contract or the time bar of the arbitration proceedings.

APPLICATION OF A NON-NATIONAL LAW TO THE SUBSTANCE OF THE DISPUTE

Arbitral tribunals have often based their awards not on a single national law, but on the basis of trade usages, *lex mercatoria* or general principles of law.

Trade usages

Some international conventions, such as UNCITRAL Model Law, provide that arbitrators will generally take into account trade usages, even if they apply a national law.

Reference to trade usages may fill gaps in the applicable law because usages in international commerce may develop more rapidly than the law. Arbitrators may not, however, derogate from the law chosen by the parties.

When parties have not chosen an applicable law, arbitrators sometimes rely on trade usages. In doing so, arbitrators base their choice on international conventions and/or arbitration rules that allow arbitrators to take into account trade usages.

Lex mercatoria and general principles of law

Trade usages are referred to in international conventions and arbitration rules. This is not the case with respect to either *lex mercatoria* or general principles of law. There is no uniformly accepted definition of *lex mercatoria*. Arbitrators often make no distinction between trade usages and *lex mercatoria*.

Few arbitral awards have been based exclusively on *lex mercatoria* without also applying some national law. Motions for annulment have been filed against some of these awards. English and French courts have rejected such motions, holding that arbitral tribunals may base decisions on internationally accepted principles of law governing contractual relations or *lex mercatoria*.

These precedents demonstrate that it is acceptable for parties to submit a dispute to *lex mercatoria* rather than a specific national legislation. This consideration is supported by the reference to ‘rules of law’ both in UNCITRAL Model Law (Article 28) and many national arbitration laws, and also by various arbitration rules.

When determining the rules of *lex mercatoria* or of general principles of law with respect to the international sale of goods, arbitrators frequently rely on the United Nations Convention on Contracts for International Sales of Goods of 10 April 1980. For the full text of this convention, see www.uncitral.org or www.legacarta.net.

LAW APPLICABLE TO THE ARBITRATION PROCEDURE

LEX ARBITRI

In international commercial arbitration, the law applicable to procedure, referred to as *lex arbitri*, often differs from the law applicable to the contract or to the arbitration agreement.

A tribunal sitting in Singapore, for instance, may be required to apply the laws of China or Brazil to the merits of the dispute. Its own proceedings, however, will not be governed by Chinese or Brazilian law but by the arbitration law of Singapore.

The applicable procedural law not only regulates internal procedures of the arbitral process, such as rules for disclosure of documents and the evidence of witnesses. It also provides directives for the conduct of the arbitration proceedings. It provides rules for the constitution of the arbitral tribunal and the removal of the arbitrators, at least where the parties have not submitted their dispute to the rules of an arbitral institution. Finally, it provides rules concerning when an arbitral award may be recognized and enforced, or annulled.

By agreeing to submit their dispute to the rules of an arbitration institution, the parties agree to follow the rules of that institution. These rules differ from one institution to

Box 23: UNIDROIT Principles of International Commercial Contracts

In 1994, a working group under the International Institute for the Unification of Private Law published the UNIDROIT Principles of International Commercial Contracts. New provisions were added to the UNIDROIT Principles in 2004 and 2010. For the full text, see www.unidroit.org. These principles provide 211 general rules for international contracts. The Preamble to the UNIDROIT Principles states:

'These principles set forth general rules for international commercial contracts. They shall be applied when the

parties have agreed that their contract be governed by them. They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like. They may be applied when the parties have not chosen any law to govern their contract. They may be used to interpret or supplement international uniform law instruments. They may be used to interpret or supplement domestic law. They may serve as a model for national and international legislators.'

another. Some institutional rules contain few provisions other than those relating to the appointment of arbitrators. Other arbitration rules, such as ICC Rules, go much further, including the organization and supervision of the whole procedure starting from the filing of the request for arbitration through notification of the arbitral award.

By referring to the rules of an arbitration institution, the parties waive the rules of the arbitration law that are applicable at the place of arbitration, except for the mandatory provisions from which they cannot derogate. It is important for parties to focus on the arbitration law of the place of arbitration. They should verify what mandatory provisions exist and what court interventions are possible at the place of arbitration.

Parties should choose a place of arbitration in a country adhering to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the most important international convention in the field of arbitration. As of December 2015, 156 countries had adopted the New York Convention. For the list of countries having ratified the Convention, see: www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

The fact that many countries have ratified the New York Convention does not mean that the arbitration legislation of all these countries is identical. Since the 1980s, many countries have modified their arbitration laws. These modifications were not primarily enacted with the purpose of harmonization with other countries' laws. Rather, the purpose has often been to make their laws more attractive for arbitrations. Parties negotiating a site for arbitration should be aware of these differences.

In addition to the worldwide New York Convention there are other multilateral regional conventions and many bilateral conventions. The United Nations Conference on Trade and Development actively monitors bilateral investment treaties. The number of bilateral investment treaties increased dramatically in the last two decades, from 385 in 1989 to 2,923 in 2015. They involve practically every country. These treaties provide a mechanism by which foreign investors can arbitrate claims against a host state without a traditional arbitration agreement. For a list

of Bilateral Investment Treaties between countries, see: <http://investmentpolicyhub.unctad.org/IIA/CountryBits/>

MANDATORY PROVISIONS

Parties have fairly great liberty to choose the applicable procedural rules. However, this liberty is limited by mandatory procedural rules of the place of arbitration.

The impact of a violation of procedural laws under the New York Convention is that enforcement of an award may be refused in accordance with Article V (1) (e), if: 'The award has not yet become binding on the parties, or has been set aside or has been suspended by a competent authority of the country in which, or under the law of which, that award was made.'

Accordingly, parties should consider these rules when negotiating their arbitration clause. For example, some countries will not allow foreign lawyers to represent a company in an arbitration.

In some countries, an arbitral submission must be made between the parties after the dispute has arisen, notwithstanding that they have previously signed an arbitral clause.

In some Latin American countries an arbitral agreement in a contract is not operative until a *compromiso* has been signed after a specific dispute has arisen. If any of the parties refuses to sign the *compromiso*, or if no agreement is reached on any of the points to be covered by it (including the designation of the arbitrators), a party may have to ask a court to approve the *compromiso* on behalf of the reluctant party.

CONSOLIDATION

In some countries the courts have authority to consolidate more than one arbitral proceedings into one single procedure. For example, in the Netherlands this authority is given to the Court of Amsterdam, pursuant to Article 1046 of the Dutch Code of

Civil procedure, unless the parties have agreed otherwise. Therefore, if the parties have not excluded this possibility of consolidation for an arbitration in the Netherlands, parties may see their case consolidated with a connected case involving other parties, although this was not anticipated at the time of entering into the arbitration agreement.

STATUTE OF LIMITATIONS

The issue of whether a claim is barred by the statute of limitations is deemed procedural, and thus waivable, in common law countries. In civil law countries it is considered substantive and not waivable. This difference should be considered when selecting the venue for arbitration.

LANGUAGE

The laws of certain countries require that arbitrations held in the country must use the language of the country. This was the case in Saudi Arabia until 2012. Article 29 of Saudi Arabia's new Arbitration Law, although more flexible, provides that: 'The arbitration shall be made in Arabic unless the arbitral tribunal decides, or the arbitration parties agree, on another language or languages'. This is also the case for arbitrations in Kuwait and the United Arab Emirates, where the language will be Arabic unless otherwise agreed. The parties should explicitly choose the language of the arbitration if Arabic is not desired.

REGISTRATION OF THE AWARD

Some countries' laws require that the award be deposited with a local court within a very short time after rendering, failing which the award may be annulled. For example, under Kuwaiti Law, the original of the award must be deposited with the Registry of the High Court within 10 days following the delivery of the award. If the deposit does not take place, the award, upon the application of either party, may be nullified.

EXTENT OF COURT INTERVENTION

Procedural law determines the extent of court intervention in arbitration. Even if parties wish to avoid having their dispute brought before a court by agreeing to arbitration, they cannot exclude the possibility that some aspects of their dispute may be brought before a court. Court intervention could occur after the arbitral award has been rendered at the enforcement stage or in *exequatur* (execution) proceedings. Court intervention could also occur during the course of an arbitration.

Parties may wish assistance of a court despite an arbitration clause, or notwithstanding that arbitration has already started. This may occur for various reasons. In some cases parties may seek to block or delay the arbitration procedure.

In other cases they may seek assistance that they cannot obtain from the arbitral tribunal.

Under the category of delaying or disrupting tactics the following situations should be considered:

- In a court, a party may contest the validity of the arbitration clause or the arbitrability of the dispute when it becomes aware that its contracting partner has started an arbitration procedure.
- Another common delaying tactic is for a party to challenge an arbitrator in a court after a challenge under agreed arbitration rules was unsuccessful.
- A respondent party may seek to delay or interrupt the arbitration by asking a court to require a foreign claimant to provide security for costs.

There are cases where a party seeks to strengthen its position or to protect its rights through recourse to a court. For example:

- A party may request judicial assistance for the taking of evidence or for conservatory or interim measures that may not be available from the arbitral tribunal.
- A party may need court intervention to unblock an arbitration procedure, for example when in a non-institutional arbitration one party refuses to appoint a co-arbitrator, or to protect its fundamental rights when the party believes they are not being adequately respected in the arbitration.

A last category involves laws requiring the intervention of courts during the course of arbitration proceedings. For example, in Latin-American countries, recourse to courts will be necessary to compel a recalcitrant party that refuses to execute the *compromiso*, which may be required in those countries notwithstanding the arbitration clause.

These court interventions differ among countries both as to the types of interventions available and the speed at which the interventions can be obtained. Some countries' judicial systems are very slow and some are corrupt. Parties should be aware of possible court interventions in arbitration under various national laws. They should consider the law of a forum before deciding on the venue for their arbitration. The laws in various countries allow, limit or exclude certain court interventions.

COURT INTERVENTIONS AFTER THE FINAL AWARD

Two court interventions are possible:

- When the winning party seeks to enforce the arbitral award, known as an *exequatur* (enforcement) against the losing party that has not honoured the terms of the arbitral award; and

- When the losing party seeks to appeal from or set aside the award against it.

International conventions, such as the New York Convention (Article V), provide for the limited circumstances under which courts may refuse recognition and enforcement of a foreign award. In some legal systems a motion for setting aside an award is excluded for certain situations or can be excluded by agreement of the parties. This is the law in Belgium, Switzerland, Sweden and Tunisia in cases where none of the parties involved in the arbitration have their domicile or main place of business in those countries. In France all parties may exclude a motion for setting aside against an arbitral award, even if the parties have their domicile or place of business in the country.

ARBITRAL AWARDS

FINAL AWARD

A final award settles all issues submitted to the arbitral tribunal. It has *res judicata* effect between the parties, meaning that it is binding and enforceable. Because an appeal on the substance of the award is generally excluded in arbitration proceedings, except for domestic matters in some countries, the final award generally ends the dispute between the parties.

Sometimes, an award has a computational or clerical error that makes the award unclear. For instance, the dispositive part of an award may require a party to pay an amount of US\$ 10 million, while in the body of the award the sum mentioned is US\$ 1 million. Which amount must the respondent pay? Sometimes a tribunal has failed to decide a specific issue or its decision is unclear. For instance, the arbitral tribunal has accepted a claim for the payment of a specific sum of money, but has not dealt with the claim relating to interest on that amount. Or, the arbitral tribunal has granted interest, without indicating from what date the interest runs.

Depending on the applicable laws or rules, the tribunal may be requested to correct the error, complete the award, or explain its unclear areas. The relevant laws or arbitration rules, if they allow such requests, generally will provide that they need to be filed within a specified time limit. Any request filed after the expiration of such time limit will not be considered.

PARTIAL AND INTERIM AWARDS

If circumstances require, the arbitral tribunal may render a partial or interim award to determine one or more issues prior to the final award. The terms partial award and interim award basically mean the same thing.

Early resolution of some issues can often lead to early settlement. Partial or interim awards may be useful to determine issues, if contested, such as:

- Jurisdiction of the arbitral tribunal;
- Validity of the arbitration agreement;
- The law applicable on substance;
- Contractual liability, before deciding the amount of damages.

Arbitral tribunals are not required to render partial or interim awards. They may decide all issues in one final award. The decision whether or not to render a partial or interim award

should be based on whether such awards would promote the effective and efficient conduct of the arbitration, and the expectations of the parties. Arbitral tribunals may make a partial or interim award to provide finality on a particular issue. A partial or interim award can create a decision with *res judicata* effect between the parties. Every award rendered, including a partial or interim award, may be challenged in court by a dissatisfied party. This may have an impact on the further conduct of the pending arbitration proceedings. Certain types of decisions need not be taken in an arbitral award, and may be taken by a procedural order of the arbitral tribunal, e.g. the appointment of an expert, the ordering if a deposit needs to be paid.

AWARD BY CONSENT

If parties reach a settlement agreement during the arbitration they may ask the arbitral tribunal to record the terms in an award by consent. An award by consent confirms the settlement terms in a document enforceable in court.

If parties reach settlement during the arbitration, they can decide to withdraw their claims and ask the arbitral institution or tribunal to take note of the withdrawal. By such withdrawal, however, the parties will not have a binding and enforceable commitment that the terms of the settlement agreement will be respected. An award by consent provides a binding and enforceable agreement.

RECOGNITION AND ENFORCEMENT

If the losing party does not voluntarily comply with the terms of the arbitral award, the winning party will have to seek enforcement of the award in a court with jurisdiction. Most awards are complied with voluntarily. However, in a minority of cases the winning party will need to pursue a court action requesting an enforceable judgement (*exequatur*) so that the award can be enforced in the same way as a court judgement.

INTERNATIONAL CONVENTIONS

The international enforcement of arbitral awards is covered by various international conventions and is generally easier than the international enforcement of court judgements. Most important is the New York Convention, adopted by the United Nations in New York in 1958. As of December 2015, 156 countries had ratified the New York Convention.

Box 24: Article V of the New York Convention

The limited grounds on which recognition of a foreign award may be refused are listed in Article V of the New York Convention.

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
 - a) the parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
 - b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
 - c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
 - d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
 - e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
 - a) the subject-matter of the difference is not capable of settlement by arbitration under the law of that country; or
 - b) the recognition or enforcement of the award would be contrary to the public policy of that country.¹

Other important conventions include:

- The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 1965). This convention, known as the ICSID convention, establishes the International Centre for the Settlement of Investment Disputes, a World Bank institution, to facilitate the resolution of international investment disputes.
- The Inter-American Convention on International Commercial Arbitration (Panama, 1975).
- The European Convention on International Commercial Arbitration (Geneva, 1961).
- The Arab Convention on Commercial Arbitration (Amman, 1987).
- The Treaty on the Organization for the Harmonization of Business Law in Africa (Port-Louis, 1993).

The full texts, ratification lists and summary description of these conventions can be found at www.legacarta.net.

RECOGNITION AND ENFORCEMENT UNDER THE NEW YORK CONVENTION

In the countries that have ratified the New York Convention, courts must enforce foreign arbitral awards in accordance with the standards set out in Articles IV and V.

Article IV of the New York Convention provides that a party seeking enforcement must submit the duly authenticated original award, or a duly certified copy thereof; and the original arbitration agreement, or a duly certified copy. Both documents must be submitted in the language of the country where enforcement is sought. Certified copies of the arbitral award can be delivered by the arbitral institution or, if there is no institution, by the arbitral tribunal.

Under the New York Convention, courts are not allowed to examine the merits of an award. As soon as the necessary documents have been supplied, a court must grant recognition and enforcement unless one or more of the limited grounds for refusal, listed in Article V of the Convention, are demonstrated.

Under the New York Convention there are very few judicial decisions that refuse enforcement of an international arbitral award.

Some countries have chosen to apply the New York Convention only on the basis of reciprocity, that is with respect to awards rendered in another contracting state. Some countries have chosen to apply the New York Convention only with respect to awards rendered in commercial matters. These two restrictive reservations, however, have not had

Box 25: UNCITRAL Model Law on International Commercial Arbitration

In 1985, the United Nations General Assembly approved the Model Law on International Commercial Arbitration, prepared by UNCITRAL, which was expected 'to contribute significantly to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations'. The General Assembly 'recommended that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability

of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice'.

The Model Law, amended in 2006, is designed for use worldwide. As of December 2015, legislation based on UNCITRAL Model Law has been enacted in 70 States in a total of 100 jurisdictions. See www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html

a great impact on the success of the Convention and the enforcement of arbitral awards internationally.

CHALLENGE OF ARBITRAL AWARDS

A dissatisfied party may file a motion to set aside (annul) the arbitral award. A motion for annulment must be filed in the courts of the country where the award was rendered and be based on a violation of the laws of that country. National arbitration laws allowing motions for setting aside an award may differ. Parties should verify the reasons on which an award might be annulled before they decide to locate their arbitration in one country rather than in another.

Over the last 15 years, many countries have modified their arbitration laws to harmonize and limit the bases for challenging arbitral awards. Many countries have chosen to incorporate UNCITRAL Model Law in their national legislation.

The grounds to set aside an arbitral award under the Model Law (Article 34) are largely the same as those in Article V of the New York Convention.

If an award is set aside in the country where it was rendered, it is invalid and unenforceable in that country. Under the New York Convention, the award will normally also become unenforceable in any country that has ratified the Convention.

The 1961 European Convention on International Commercial Arbitration, signed by various European countries, is more restrictive than the New York Convention with respect to the grounds upon which an award may be set aside. An arbitral award that has been set aside in the country of the place of arbitration for another reason than the four listed in Article IX, Paragraph 1 of the European Convention may still be

recognized and enforced in the contracting States of the European Convention.

In practice, few motions for setting aside awards are filed and very few such motions are granted. Some studies indicate that about 98% of all international arbitral awards are enforced.

ARBITRATION COST

The costs of arbitration proceedings involve various elements, including the expenses and fees of the arbitrators, experts and the parties' counsels. In institutional arbitration there are the institution's administrative costs. Additional costs may include translation, copying and travel. Particularly in international commercial arbitration, the costs may be substantial. Transnational law issues sometimes require that lawyers from more than one country participate in the proceedings.

An arbitration institution typically will fix an advance on costs at the outset of the arbitration, which should cover the fees and expenses of the arbitrators and the administrative expenses until the end of the arbitration. This advance on costs, which is either fixed by reference to the amount in dispute and based on fee scales, or on an hourly or daily basis, will normally have to be paid in equal shares by the parties.

If one of the parties fails to advance its share of the amount, the other party will have to pay the balance of the advance on costs. The advance on costs will have to be paid in full before the rendering of a final award. In its final award, the arbitral tribunal decides which of the parties will pay the costs. In most arbitrations, the winning party recovers its costs from the losing party.

Box 26: Examples of arbitration costs

The following examples are based on ICC fees as of 2015 and are given for illustrative purposes only. The costs of international ad hoc arbitrations are often comparable to those set out below.

Example 1

In ICC administered arbitration between Lebanese and French companies, the amount of claims and counter-claims is US\$ 50,000. Parties agreed to a sole arbitrator. The place of arbitration is Tunisia and the sole arbitrator is from Morocco. The advance on costs might be fixed as follows:

Administrative expenses	US\$ 3,000
Estimated arbitrator's fees	US\$ 6,005 minimum US\$ 3,000 maximum US\$ 9,010
Expenses (travel, hotel, meeting rooms, etc.)	US\$ 4,795
TOTAL	US\$ 13,800

For an estimate of the overall costs for each party, the lawyers' fees and travel costs and expenses, and each party's own travel costs and expenses, including that of witnesses, should be added.

Example 2

A dispute between a Russian seller and a Canadian buyer, referred to ICC arbitration, is to be settled by three arbitrators in Geneva. The arbitrators are from Moscow, Montreal and Geneva. The total amount of claims and counter-claims is US\$ 1 million. The advance on costs might be fixed as follows:

Administrative expenses	US\$ 21,715
Estimated arbitrators fees	US\$ 118,135 The minimum/maximum range for one arbitrator is US\$ 14,627/US\$ 64,130, the average being US\$ 39,378. This average amount is multiplied by three for three arbitrators.
Expenses (travel, hotel, meeting rooms, etc.)	US\$ 15,150
TOTAL	US\$ 155,000

For an estimate of the overall costs for each party, the lawyers' fees, witness fees, travel costs and expenses should be added.

REFERENCES

USEFUL TOOLS

LegaCarta: International Commercial Treaties Database and Treaties Maps, available at www.legacarta.net

ITC International Commercial Model Contracts for Small Firms, available at www.intracen.org/model-contracts-for-small-firms/

BASIC DOCUMENTS

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) available at www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html

UNCITRAL Model Law on International Commercial Arbitration (1985, amended 2006) available at www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf

UNCITRAL Arbitration Rules (2010, amended 2013) available at www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010_Arbitration_rules.html

UNCITRAL Conciliation Rules (1980) available at www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1980_Conciliation_rules.html

Rules of Arbitration of the International Chamber of Commerce (2012) available at www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/ICC-Rules-of-Arbitration/

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