The Arbitration Clause in International Project Contracts

By
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INTRODUCTION

This article addresses the basic issues that should be taken into account when drafting a dispute resolution clause requiring arbitration in an international project contract. There are several ways in which to analyze the arbitration clause. One writer discusses the frequency with which various clauses are encountered in arbitrations administered by the International Chamber of Commerce (ICC).[1] One of the world's leading arbitration practitioners classifies arbitration clauses into a trinity of categories: basic clauses, general clauses and complex clauses.[2] An eminent Swiss arbitrator describes what are known as "pathological" clauses, these are clauses that are so hopelessly vague or ambiguous that no fruitful arbitration is possible.[3] My analysis evaluates the arbitration clause from the perspective of the end game – what the clause should contain at a minimum in order to ensure that your hard fought award is enforceable under what is known as the New York Convention.

I begin with a brief introduction to some of the distinct features of international commercial arbitration. Then after briefly summarizing the provisions of the New York Convention, we will review two examples of a model arbitration clause and discuss how the right language in your arbitration clause will assist you in achieving an enforceable award.

WHY ARBITRATE?

Absent unusual client requirements, most of us usually recommend that the A/E not agree to submit disputes in projects in the United States to binding arbitration for a variety of reasons. Although we gain some control over the selection of the decision maker, and the proceedings are usually private, the reality is that the effective loss of the right to appeal errors of law, the perception that many arbitrators simply "split the baby", a relaxed approach to the rules of evidence and law governing these claims, and the lack of any real cost savings make resolution of disputes by the court processes my preferred recommendation. And my experience in over 23 years of representing design professionals and dozens of jury trials is that when the clients just can't settle the dispute and want a third party to make the decision, I usually do much better with a jury of common folk.

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[1] Stephen R. Bond, *How to Draft an Arbitration Clause*, J. INT'L ARB., June 1989.

[2] R. Doak Bishop, *A Practical Guide for Drafting International Arbitration Clauses*, 1 INTERNATIONAL ENERGY LAW & TAXATION REVIEW 16 (2000).

[3] Pierre A. Karrer, *Pathological Arbitration Clauses: Malpractice, Diagnosis and Therapy*, THE INTERNATIONAL PRACTICE OF LAW – LIBER AMICORUN FOR THOMAS BÄR AND ROBERT KARRER, Kluwer Law International , The Hague: 109-128 (P. Vogt., ed. 1997).

All of that changes with international projects. Arbitration is my preferred and recommended forum for dispute resolution on international projects for essentially two reasons.

First, the parties gain control over the process, the selection of decision maker, and the location of hearings, and thereby increase the chances that the dispute will be determined in a neutral forum. In a general way, the world's legal systems derive from the common law and civil law traditions in which the role of the decision maker and counsel and the manner and method of proving up or defending a case may be very different. For example, in most countries outside the U.S. juries don't decide civil cases; and in some countries the "trial" consists only of written submissions with a very limited, if any, oral hearing. If the client is working in a country where English is not the first language, there should be some comfort in knowing in advance what the language of the proceedings will be in the event of a dispute that cannot be amicably resolved. This ability to control the process is especially valuable in those countries or regions where the rule of law or the independence of the judiciary are not well established.

International commercial arbitration is a venue in which the differences in practice and procedure from these diverse legal traditions are converging, and one where parties can avoid subjecting their fates to a relatively unknown process. The ability to control the arbitration process is known as "party autonomy"; it refers to the principle that in arbitration the parties choose how they want the dispute resolution to be conducted.[4] I submit that party autonomy may be the single most recognized and accepted guiding principle of international arbitration.

Second, unlike court judgments, arbitration awards are enforceable world wide in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Known as the "New York Convention", the United Nations General Assembly adopted it in 1958, and the United States acceded to it in 1970.[5] The New York Convention is now recognized in 138 countries, with the Convention's ratification and entry into force in the United Arab Emirates on November 16, 2006.[6] The U.S. Supreme Court acknowledged the Convention's role in international trade in *Scherk v. Alberto-Culver Co.*:[7]

> … the goal of the [New York] Convention, and the principle purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreement to arbitrate are observed and arbitral awards are enforced in the signatory countries.[8]

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[4] Hunter and Redfern, *Law and Practice of International Commercial Arbitration*, Sweet and Maxwell (4th ed. 2004) at 265.

[5] 9 U.S.C. §§ 201-208.

[6] A list of all States adopting the New York Convention is published at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html

[7] 417 U.S. 506 (1974).

[8] *Id.*, at 520 n. 15.

Generally speaking, the New York Convention permits a party to seek enforcement of an international arbitration award anywhere that assets can be located.[9] There is no similar mechanism for the international enforcement of domestic court judgments. In this increasingly global era of capital movement, the world wide enforcement of arbitral awards may be international arbitration's most attractive feature.

NEW YORK CONVENTION BASICS

The New York Convention is implemented in the United States by federal statute.[10] In the Americas, another similar treaty, the 1975 Inter-American Convention on International Commercial Arbitration, known as the "Panama Convention" provides for the enforcement of arbitration awards among most of the American countries.[11] What follows here are the basics of the New York Convention.

The New York Convention is a 5 page treaty in which the key elements are set forth in a mere 2 pages text and, as the great 20th Century architect Ludwig Mies van der Rohe once observed, less is truly more.

Article I provides that the Convention applies to the recognition and enforcement of arbitral awards made in another State party to the Convention.[12] The New York Convention permits States to agree to only two possible reservations upon ratification; these are, in essence, exceptions to its application: 1) a requirement of reciprocity and 2) that the Convention shall apply only to arbitrations arising from legal relationships "which are considered as commercial under the national law of the State making such declaration." Reciprocity is a logical condition – what's good for you is good for me – but whether the dispute arises from a "commercial relation" may be more esoteric. The commercial reservation has not caused practical problems as the courts have tended to interpret the scope of the term "commercial" broadly.[13] In one odd case, the Supreme Court of Tunisia refused to enforce an ICC award under a contract in which architects undertook to design an urbanization plan for a resort on the grounds that the contract was not by its nature "commercial" according to Tunisian law.[14]

Article II requires each Contracting State to recognize agreements in which the parties agreed to submit their disputes to arbitration, but the agreement must be in writing and signed by the parties or be contained in "an exchange of letters or telegrams." Whether an exchange of email which did not exist in 1958 is the equivalent of an exchange of letters or a telegram, seems like a logical but as yet un-established extension

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[9] Like many things international, U.S. law may make enforcement a bit more difficult without *in personam* jurisdiction. A full discussion of this issue by the International Commercial Disputes Resolution Committee of the Association of the Bar of the City of New York is available at http://www.nycbar.org/pdf/report/ForeignArbitral.pdf.

[10] 9 U.S.C. §§ 201-208.

[11] 9 U.S.C. §§ 300-307.

[12] State party refers to nation state.

[13] Albert Jan van den Berg, *Why Are Some Awards Not Enforceable?*, ICCA PROCEEDINGS, 17TH ICCA CONFERENCE, BEIJING, 16-18 MAY 2004, at 35.

[14] *Taie Haddad and Hans Barrett v. Societe d'Investissement Kal,* Cour de Cassation 10 November 1993, reported in YB COMM. ARB. XXIII (1998) pp. 770-773.

of the Convention criteria. And it requires domestic courts to refer a disputed matter to arbitration unless the court finds the "agreement is null and void, inoperative or incapable of being performed."

Article III requires Contracting States to recognize and enforce arbitral awards in accordance with local procedure and the Convention's criteria, but in no event can the terms or conditions for enforcement of an international award be more onerous than for the enforcement of domestic awards.

Article IV provides that to obtain recognition and enforcement, a party must file an authenticated original or certified copy of the award and the original or certified copy of the arbitration agreement, which has been translated into the language of the country where enforcement is sought.

Article V is the guts of the Convention; it sets forth the only grounds on which recognition and enforcement of an arbitral award may be refused. The validity of the award is presumed and the burden of proof seems to be on the party resisting enforcement.[15] The grounds for refusal under the Convention are:

> 1. The parties to the agreement were, under the law applicable to them, under some incapacity, or the agreement is not valid under the law to which the parties have subjected it or the law of the country where the award was made; or
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> 2. The party against whom the award is invoked was not given proper notice of the appointment of the arbitrators or the proceedings or was otherwise unable to present his case; or
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> 3. The award deals with matters not within the scope of the arbitration agreement, provided that if those matters can be separated, then partial enforcement of the award that is within the scope of the parties' agreement may occur; or
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> 4. The composition of the arbitral tribunal or its procedure was not in accordance with the agreement of the parties or, absent such agreement, not in accordance with the law of the country where the arbitration took place; or
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> 5. 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 the award was made; or
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> 6. The subject matter of the difference is not capable of settlement by arbitration under the law of the country where enforcement is sought; or
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> 7. Recognition or enforcement of the award would be contrary to the public policy of the country where enforcement is sought.

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[15] R. Doak Bishop and Elaine Martin, *Enforcement of Foreign Arbitral Awards*, available at http://kslaw.com/library/pdf/00000621.pdf.

As you might imagine, each of these grounds has provided fertile ground for litigation. Although a full discussion of each issue is beyond the scope of this paper, each of these grounds for refusing to enforce and arbitral award should be in the back of your mind in drafting the arbitration clause, and a brief discussion of the key issues follows.

Articles III and V of the New York Convention are implemented in the United States by Section 207 of the Federal Arbitration Act,[16] which provides that a court "shall confirm" awards subject to the Convention "unless it finds one of the grounds for refusal" specified in the Convention to exist. An application for confirmation of the award must be made within three years after the award is made, which means "decided" and not when it becomes "final".[17]

Article VI provides that an application for enforcement may be adjourned if an application to set aside the award is pending in the country where the award was made, and the Court may require the posting of suitable security in the event an enforcement proceeding is adjourned.

The remaining text of the Convention deals with implementing procedures that are not pertinent to this paper.

INTERNATIONAL ARBITRATION HAS AT LEAST FOUR DIMENSIONS.

International commercial arbitration usually implicates at least four separate legal regimes. First, the contract itself will be subject to one law, either that chosen by the parties or, if not chosen, then it will be determined by the arbitrators using choice of law principles.

Second, the arbitral law of the seat or place of arbitration, known as the *lex arbitri*, will in the first instance govern issues such as the interpretation, validity and enforcement of the arbitration agreement, interim relief, discovery and appeals of awards.[18] Many nations have adopted in whole or part the United Nations Commission on International Trade Law (UNCITRAL) Model Law that the UN General Assembly adopted in 1976. The UNCITRAL Model Law attempts to deal with many of these issues.

Third, if the parties have chosen an institution to administer their arbitration, then the institution's Rules of Arbitration will govern the procedures that are used in the arbitration.

Fourth, under the New York Convention, the law of the place where the award is sought to be enforced may determine the ultimate outcome.

In some cases none of these four legal dimensions will govern an issue and the parties and tribunal may look to what is known as *lex mercatoria*, which in a general way refers to legal principles of the law merchant believed to be common to international commercial relations and not dependent on a particular legal order.[19]

Arbitration of investment disputes with a State will implicate yet a sixth dimension of law: bilateral investment treaties (BIT) which usually incorporate rules

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[16] 9 U.S.C. § 207.

[17] *Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co. v. Nivimpex Centrala Navala*, 989 F.2d 572, 581 (2nd Cir. 1993).

[18] Hunter and Redfern, *Id.* at 81.

[19] *Id.,* at 110.

governing expropriation, fair and equitable treatment, and the minimum standards of treatment that investors should expect under principles of public international law.[20]

START WITH A MODEL CLAUSE.

I recommend that you start with a model clause and there are many institutions that have published recommended forms. The more commonly encountered institutions are the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) the rules of the American Arbitration Association's International Centre for Dispute Resolution (ICDR), the Hong Kong International Arbitration Centre (HKIAC), the Singapore International Arbitration Centre (SIAC), and the China International Economic and Trade Arbitration Commission (CIETAC). The UNCITRAL Model Law sets forth a model clause.

In addition, the Federation Internationale Des Ingenieurs-Conseils (FIDIC) General Conditions of Contract for Works of Civil Engineering Construction contains an arbitration clause. The FIDIC forms of agreement are approved and typically will be required for any project funded by the World Bank and other development banks.

Two examples of model clauses are set forth below: the clause recommended by the London Court of International Arbitration (LCIA) and the clause that appears in the FIDIC General Conditions.

> The LCIA recommended clause states:
>
> Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.
>
> The number of arbitrators shall be (one/three).
>
> The seat, or legal place, of arbitration shall be (city and/or country).
>
> The language to be used in the arbitral proceedings shall be (_____).
>
> The governing law of the contract shall be the substantive law of (____).
>
> The FIDIC arbitration clause states:
>
> Any dispute in respect of which:
>
> (a) the decision, if any, of the engineer has not become final and binding pursuant to Sub-Clause 67.1, and
>
> (b) amicable settlement has not been reached within the period stated in Sub-Clause 67.2,

[20] *Id.*, at 489-497.

> shall be finally settled, unless otherwise specified in the Contract, under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed under such Rules. The said arbitrator/s shall have full power to open up, review and revise any decision opinion, instruction, determination, certificate or valuation of the Engineer related to the dispute.
>
> Neither party shall be limited in the proceedings before such arbitrator/s to the evidence or arguments put before the Engineer for the purpose of obtaining his said decision pursuant to Sub-Clause 67.1. No such decision shall disqualify the Engineer from being called as a witness and giving evidence before the arbitrator/s on any matter whatsoever relevant o the dispute.
>
> Arbitration may be commenced prior to or after completion of the Works, provided that the obligations of the Employer, the Engineer and the Contractor shall not be altered by reason of the arbitration being conducted during the progress of the Works.[21]

The FIDIC clause for arbitration is one part of a comprehensive dispute resolution process in which at several stages decisions will be made as to entitlement and/or quantum, including a Dispute Resolution Board whose goal is to prevent the parties from engaging in an arbitration.

The rest of this presentation will work with the LCIA Model Clause. Using the grounds for refusing to enforce an arbitral award under the New York Convention, we will review the terms of the LCIA's Model Clause. These grounds can be summarized as follows: capacity of the parties and applicable law, notice, scope, procedure, finality, and arbitrability.

APPLICABLE LAW

The first ground for refusal to enforce an arbitral award under Article V of the New York Convention turns on the applicable law in three respects, 1) the law applicable to the parties in terms of their capacity to make the agreement, 2) the law they agreed would govern their contract and, 3) the law of the country where the award was made. Your arbitration clause should always identify the substantive law that will govern the contract.

The LCIA clause does not directly address the law applicable to the parties who made the agreement. For example, do certain contracts require corporate authorization or the signature of a corporate officer or two signatures or governmental approval or some other manifestation of authority? In civil law countries a power of attorney may be required for authorization to sign a contract.[22] A party can resist enforcement of an award made in connection with a contract that was made by someone who lacked

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[21] FIDIC General Conditions clause 67.3.

[22] R. Doak Bishop, *supra.*, n.2.

authority, which usually will depend on rules of agency or estoppel. It is not immediately apparent how one could assure capacity to contract in the arbitration clause; it goes to the contract negotiation as a whole.

The LCIA model clause does compel the contracting parties to consider the other two decisions that should be made when negotiating the arbitration clause. First, the parties should choose the substantive law that will govern their contract rights and remedies, and the last sentence of the recommended clause does just that. Second, the parties should choose the seat or legal place of the arbitration, which is where the award will be "made" and the recommended clause compels the drafter to make this choice.

The choice of seat is very important as it can greatly influence arbitral procedures and the enforceability of an arbitral award. Except in rare circumstances, the law of the "seat" of arbitration governs procedures — including such matters as the interpretation, validity and enforcement of arbitration agreements, interim judicial relief, discovery and appeals of awards. The seat may also be referred to as the "legal place" of arbitration, and should not be confused with the location of the hearings described below.

Good practice demands that the seat of arbitration be stated in the arbitration clause. The seat should be one whose laws are hospitable to arbitration, and one that your clients will accept. For example, if you choose Saudi Arabia as your seat because your client is designing a housing project in the Kingdom, be aware that under Saudi law the arbitrators must be male and Muslim.[23] In any event, in an international transaction, the seat of arbitration should a nation that has ratified the New York Convention or the comparable Inter-American Convention.

The arbitration hearings may be held at any location the parties designate before or after the arbitration commences, and it may or may not also be the seat of the arbitration.

NOTICE

The second ground for refusing to enforce an arbitral award under Article V of the New York Convention deals with due process issues. Did the party against whom enforcement of an award is sought get proper notice of the appointment of the arbitrators or the proceedings or was he otherwise unable to present his case? Each of these due process issues can be minimized by selecting an institution to administer the arbitration in accordance with its rules. Each of the institutions referenced above have rules that govern how one commences an arbitration, the notices that must be provided, the manner by which the arbitrators are to be selected, and the type of hearing that will be conducted. The first clause of the Model Clause selects the LCIA Rules which govern each of these due process issues.

The Due Process defense to enforcement under Article V (1) (b) sounds better than it may be in practice. Courts will defer by large margin to the arbitrators' judgment as to how they conduct the proceeding and how they reached their decisions. See, e.g. *Parsons & Whittemore Overseas Co. v. Societe General de L'Industrie du Papier*, 508 F.2d 969 (2nd Cir. 1974), *Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Co.*,

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[23] Phillip Punwar, *Arbitration in the Middle East*, MANAGING PARTNER MAGAZINE, Middle East Supplement, September 2006.

484 F. Supp. 1063 (N.D. Ga. 1980); but see *Aircraft Industries v. Avco Corp.*, 980 F.2d 141 (2nd Cir. 1992).

Of course, these institutions charge fees for these services. Parties who prefer to avoid paying these fees may proceed without the institutional services in what is known as *ad hoc* arbitration. But penny wise can be pound foolish if at enforcement time the loser claims he did not get proper notice or the tribunal was selected unfairly or he was for any reason unable to present his case. Awards in arbitrations that were administered by an arbitral institution and in accordance with its rules are more likely to survive a due process attack than awards in arbitrations that the parties arrange on their own.

SCOPE

The third and sixth grounds for refusing to enforce an arbitral award under Article V of the New York Convention deal with what are essentially the proper scope of the issues that will be determined in arbitration. The resisting party may complain that the arbitral award dealt with a matter outside the scope of the agreement to arbitrate or, the resisting party may argue that under the law where enforcement is sought, the subject matter of the difference is not capable of settlement by arbitration.

The first issue is derived from the principle of party autonomy: the parties are free to chose the scope of disputes that will be settled by their arbitration. In addition to breach of contract, do you want arbitration of tort claims related to the contract, fraud in the inducement, or claims for antitrust or copyright? At the drafting stage, you should think about whether the parties want the scope of arbitration to be as broad as possible or narrowly limited to contract claims. The expression “all disputes arising under this agreement” probably will be given a narrow construction that limits the scope of the arbitration to claims closely connected to the contract but not necessarily “arising out of it”.[24] A clause that requires arbitration of “all disputes arising out of, connected with or relating in any way to this agreement” is a broad form clause that would likely pick up fraud in the inducement claims.[25]

Nit picking over these alleged differences in language about the scope of the agreement to arbitrate has kept many lawyers and courts busy. The great debate about the distinction between “arising under” and “arising out of” was dealt a common sense setback recently in the English Courts. In a dispute that started with contracts to build and operate Russian merchant ships Justice Longmore of the English Court of Appeal said enough was enough:

> Ordinary business men would be surprised at the nice distinctions drawn in the cases and the time taken up by argument in debating whether a particular case falls within one set of words or another very similar set of words. If business men go to the trouble of agreeing that their disputes be heard in the courts of a particular country or by a tribunal of their choice they do not expect (at any rate when they are making the contract in the first place) that time and expense will be taken in lengthy argument about

[24] *Mediterranean Enterprises, Inc. v. Ssangyong Corp.*, 708 F.2d 1458 (9th Cir. 1983).
[25] *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

the nature of particular causes of action and whether any particular cause of action comes within the meaning of the particular phrase they have chosen in their arbitration clause.[26]

The LCIA's Model Clause is a broad form clause that requires arbitration of "any dispute arising out of or in connection with this contract" and would be given a wide scope to encompass any dispute that has a connection with the object of the contract. Using the broad form clause minimizes the potential that the party resisting enforcement could successfully contend that the award dealt with a matter outside the scope of their agreement.

The second issue is whether under the law of the place of enforcement the subject matter of the difference is capable of settlement by arbitration or whether enforcement of the award would be contrary to the public policy of the country where enforcement is sought. Because arbitration is a private proceeding with public consequences, some types of dispute are reserved for the national courts whose proceedings are generally in the public domain.[27] These might involve for example, patent, trademark or copyright disputes, antitrust and competition laws, or securities, although in the U. S. each of these areas is now subject to arbitration by the parties agreement.[28] Keeping your arbitration clause simple will minimize the enforcement issues later; for example, if your arbitration clause provides for the payment of interest the award would not be enforceable in Saudi Arabia or certain other Muslim countries.[29]

The governing law or the chosen arbitration rules may determine whether the scope of an arbitral award can include injunctions or interim relief, specific performance, punitive damages, or costs and attorney fees. Most national laws outside the U.S. prohibit punitive damages.

National procedural law and arbitral rules vary greatly on the availability of interim relief. Parties that want to be sure they can apply to the local courts for interim relief before and during arbitrations should consider one or more of the following: (1) provide in the arbitration clause that the parties consent to interim measures; (2) select arbitration rules that expressly authorize applications to the courts for interim judicial relief; and/or (3) avoid jurisdictions where the courts have shown themselves reluctant to grant interim relief.

As to costs, the general rule in international commercial arbitration is that costs, including attorney fees, "follow the event," so if you want to ensure that each side will be required to pay it own costs, you should so state in your contract.

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[26] *Fiona Trust & Holding Corporation & Ors vs. Yuri Privalov & Ors*, ([2007] EWCA Civ 20).

[27] Hunter and Redfern, *Id.*, at 138.

[28] *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614 (1985) (antitrust claim is arbitrable).

[29] Stephen Bond, *Id*, note 1.

ARBITRAL PROCEDURE

The fourth ground for refusal of an arbitral award under Article V of the New York Convention involves questions as to the arbitral procedure, which includes the means by which the arbitrators are selected and the procedures used to conduct the hearing and render an award. The loser may successfully resist enforcement of an award if these issues are not dealt with in accordance with the parties' agreement, or absent specific agreement as to procedure, then the law of the country of the seat of the arbitration.

Appointment of the arbitrators usually will be governed by the institutional rules that are selected. In international arbitrations the usual number is three. The governing rules will describe how arbitrators are to be chosen. All major rules, however, give the parties the right to vary the rules and to design their own procedures for choosing arbitrators. If there are three arbitrators, it is generally advantageous for each party to be able to name one member of the panel. Thus, under most rules, if there are to be three arbitrators and if the parties have not specified the method of their selection, each party is permitted to appoint one and the two party appointed arbitrators will confer about the appointment of the third arbitrator who frequently will chair the tribunal.

One advantage of using institutional arbitration is that if the two party appointed arbitrators are unable to agree on the chair, then the institution will make the appointment. The LCIA's Model Clause deals with the issues arising from the appointment of the arbitrators by implementing their own rules and by requiring the drafter to decide on the number of arbitrators.

Generally, the parties are permitted to prescribe qualifications for arbitrators. Sometimes parties will want arbitrators to have certain technical expertise. However, expertise as an arbitrator is generally the most important qualification; and be aware that excessively demanding or vague statements of qualifications may invite efforts to have arbitrators declared disqualified.

Under certain institutional rules, like the ICC, the fees are a fixed percentage of the amounts claimed. Other institutions, like the LCIA, permit the arbitrators to fix their own fees within a range of £150 to £350 per hour subject to LCIA review and approval. If the rules are silent, and if the parties do not otherwise agree, the arbitrators will fix their own fees.

Under most rules the arbitrators must be independent and impartial. In order to assist parties and potential arbitrators, the International Bar Association (IBA) has promulgated the IBA Guidelines on Conflict of Interest in International Arbitration. These guidelines describe the factors that should be considered as to disclosure of information about the relationship, if any, of a potential arbitrator to the parties, their counsel and other arbitrators on the tribunal.[30] The LCIA's recommended clause does not incorporate the IBA Guidelines.

Most institutional rules leave considerable discretion to the tribunal as to the manner and method of conducting the hearing and the extent of what we would call discovery before the hearing. It is at this point where the differences in the legal

[30] See, Michael J. Bond, *A Geography of International Arbitration*, ARBITRATION INTERNATIONAL, Volume 21:1, 99-112 (2005).

traditions may be most evident. The LCIA rules establish a right to oral hearing and a process by which the parties shall exchange statements of their contentions and the evidence on which they rely. If not resolved when the contract is drafted, your client's rights to discovery will depend principally on the governing procedural law and, to a lesser degree, on the chosen rules. The laws of the United States and England, like most Common Law countries, give arbitrating parties the right to discovery of relevant documents. In the United States, arbitrators, as well as the courts, may order discovery from non-parties as well as parties. Although practices are evolving, most Civil Law countries do not permit American style discovery and the parties are required only to produce the documents on which they rely in support of their case.

The International Bar Association has adopted Rules on the Taking of Evidence in International Commercial Arbitration that strike a balance between the almost unfettered discovery practices in the United States and the more limited practices in Civil Law jurisdictions. I recommend that counsel add to the model clause language stating: "The International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration shall apply."

The LCIA's model clause does ask the drafter to choose the language of the proceedings.

Consolidation of claims can be a very troublesome issue. Unless all of the parties have agreed to consolidation, the courts in nearly every major jurisdiction consider themselves to be without power to order consolidation of arbitrations that arise under separate contracts. The Netherlands, by statute, is an exception to this rule; Article 1046 of the Netherlands Arbitration Act does provide for consolidation of arbitrations with "connected" subject matters, as well as a mechanism (application to the President of the Amsterdam District Court) to effect same. The Stockholm Chamber of Commerce, a popular venue for commercial arbitrations, recently issued revised rules that also pave the way for the consolidation of multiple claims in certain narrow circumstances.[31]

Under the rules of the China International Economic and Trade Arbitration Commission (CIETAC), a claim and counterclaim arising from the same contract may be subject to two separate arbitrations over the objection of one party.[32] To avoid this outcome, the parties should state that any arbitrations under the CIETAC rules shall consolidate into one arbitration all claims and counterclaims arising from the same contract.

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[31] "Stockholm arbitration rules revised; no further transparency, but consolidation added", Investment Treaty News, January 17, 2006, http://www.iisd.org/pdf/2007/itn_jan17_2007.pdf).

[32] *China Nat. Metal Products Import/Export Co. v. Apex Digital, Inc.*, 379 F.3d 796 (9th Cir. 2004) (The court granted enforcement of the awards because the parties did not express a contrary intent.).

A party who is resisting enforcement of an award under the Article V grounds as to selection of the tribunal or the procedures that were used will have a much more difficult task if your arbitration clause identifies in advance the rules of procedure that will be used. The LCIA Model clause does just that.

FINALITY

The fifth ground for refusal to enforce an arbitral award under the New York Convention is that the award has not yet become binding on the parties or has been set aside under the law where the award was made.

The best way to ensure finality is to insert into the clause language indicating that the award will be "final and binding". In the U.S. "final and binding" means "that the issues joined and resolved in the arbitration may not be tried de novo in any court."[33] The LCIA's recommended clause provides that the dispute shall be "finally resolved by arbitration" and the rules themselves state: "All awards shall be final and binding on the parties." LCIA Rule 26.9. This language should assist the parties in achieving finality.

CONCLUSION

These are the basic issues that should be considered in drafting an arbitration clause for an international project. If you have the opportunity to review the contract before it is executed and take these basic considerations into account, and a dispute arises that cannot be settled, you should be well positioned to obtain an award that can be enforced world wide.

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[33] *M&C Corp. v. Erwin Behr, GmbH & Co.*, 87 F.3d 844 (6th Cir. 1996).