Alternative Dispute Resolution in International Business Transactions

By Randy J. Aliment

Alternative dispute resolution (ADR) is a procedure for settling a dispute by means other than litigation, such as arbitration, mediation, or minitrial. Although arbitration and mediation are both considered forms of ADR, they are fundamentally different. Arbitration is a determination of legal rights whereas mediation is a form of facilitated negotiation that looks beyond rights and allows the parties to focus on their underlying interests. Arbitration leads to a binding determination whereas mediation results in a binding determination only if the parties agree to settle their dispute on mutually satisfactory terms. In the last 30 years, ADR has become a standard part of commercial dispute resolution. To properly serve companies in international commerce, in-house counsel and staff need to become familiar with arbitration and mediation in the international setting.

This article opens with a discussion of the differences between international arbitration and international litigation. It then briefly addresses a comparison of international dispute resolution and U.S. arbitration. After this, it highlights the involvement of the United States in international arbitration. The subsequent section points out the importance of explicitly indicating the preferred method of dispute resolution in commercial contracts, even if the parties would rather litigate than engage in ADR. It then addresses drafting considerations for an arbitration clause. The article continues by providing specific information related to three international arbitral institutions. Finally, it ends with a brief consideration of the merits of mediation and a suggestion for a mediation clause.

International Arbitration versus Litigation

Resolving disputes in existing court systems has its advantages. Judges are mostly independent, filing fees are much less than arbitration fees, and one has the right to appeal. Notwithstanding these and other positive attributes, obtaining a court judgment takes time and requires legal expertise in the jurisdiction where the litigation is filed. In addition,

businesses find it increasingly difficult to maintain their working relationships in the midst of a public legal battle. In contrast, the confidential nature of arbitration may take at least some of the sting out of a public business conflict. The ability to select the arbitrator, the language of proceedings, and the place of hearings are other important reasons that favor commercial arbitration. In addition, complicated rules of procedure and evidence can be modified or excluded in arbitration but not in court proceedings. The extent of the award or type of damages may be contemplated beforehand, which allows parties to draft a proper arbitration clause and plan ahead with appropriate reserves. Perhaps the greatest strength of international arbitration is the ability to fashion procedural and substantive flexibility. Carefully drafted arbitration clauses will likely result in significant control over the way a dispute is decided and how much it will cost to achieve resolution. Finally, enforcing an arbitration award is typically easier than enforcing a civil judgment obtained in another country. For these and other reasons, an estimated 90 percent of international contracts include an arbitration clause.[1]

Investors and corporations have increasingly turned to international commercial arbitration as the preferred method of dispute resolution of international business disputes.[2]

Speed of resolution makes arbitration more attractive than using the courts of most, if not all, nations. Data collected by the U.S. federal court system show the median time to get to trial is over 23 months.[3] In the United States, the time from filing an arbitration claim to reaching a decision is, on average, 16.7 months.[4] According to the London-based Centre for Effective Dispute Resolution, of the 3,000 commercial disputes subjected to mediation in London each year, around 70 to 80 percent reach a settlement within one or two days, with a further 10 to15 percent settling a few weeks later.[5] The Korean Commercial Arbitration Board maintains that matters brought for international arbitration are, on average, processed in five months, whereas similar matters brought in the Korean court system can take two to three years.[6] Clearly, commercial arbitration offers distinct time-saving benefits.

The enforceability of a court judgment versus that of an arbitral award also favors using arbitration. No effective international treaty facilitates the enforcement of foreign judgments whereas the same is not true with respect to arbitral awards. June 2008 marked the 50th anniversary of the 1958 signing of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention. The New York Convention has been described as "the single most important pillar on which the edifice of international arbitration rests."[7] Since 142 countries out of the 192 current United Nations member states have adopted this Convention, the

Getty Images

majority of international arbitration agreements are within its application.[8] Under the New York Convention, if an arbitration award is issued in any country that is a party to the Convention, every other party to the Convention is legally obligated to enforce the award. Increasing numbers of bilateral investment treaties negotiated between foreign states often include arbitration as a means to resolve disputes between foreign states and private overseas investors.[9] This ease of enforcement is yet another reason why international arbitration continues to grow.

Article V of the New York Convention enumerates the procedural grounds that serve as the only means to prevent enforcement of an arbitral award:

- 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;
- 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 its case;
- 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;
- the composition of the 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;
- 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;
- the competent authority in the country where recognition and enforcement is sought finds that the subject matter of the difference is not capable of settlement by arbitration under the law of the country where enforcement is sought; or
- recognition or enforcement of the award would be contrary to the public policy of the country where enforcement is sought.

International versus U.S. Dispute Resolution

Domestic arbitrations often take on attributes of litigation, including the use of depositions, written discovery, and document production. In international arbitrations, significant surprises may arise for the parties and counsel, including whether witnesses will be permitted to testify, and if so, whether they will be subject to cross-examination. If witnesses can testify, rules govern whether they will be subject to examination by counsel and/or the arbitrator(s). Questions such as these make it extremely important to become familiar with the procedural rules of the arbitral institution before counsel drafts an arbitration clause that binds the parties to a specific venue to resolve a future dispute.

Besides different rules and language, there are other significant differences. The cultures, perceptions, and values of the participants, their counsel, and the arbitrator(s) are richly diverse. Legal procedures and traditions vary greatly across the globe. The civil law of continental Europe and the common law of the United Kingdom have basic differences in the style and content of pleadings, the role and probative value of documents and testimony, the examination of witnesses, the disclosure of information, the rules of evidence, and the relationship and roles of counsel and the arbitrator(s).

The common law prevails in the United Kingdom, United States, and most English-speaking countries. The main features of the common law approach to litigation and arbitration are:

- early definition of the claims and issues;
- equality of access to and full disclosure of relevant information;
- avoidance of surprise; and
- a gradual presentation with rigorous examination of the evidence at hearing (both documents and oral testimony), largely at the discretion and control of counsel.

The civil law prevails in Continental Europe, Asia, Africa, and South America. Key aspects of the civil law approach to litigation and arbitration include:

- an emphasis on privacy;
- the claimant carries the full burden of proving its claim, and one should not have to incriminate oneself or assist its adversary in the process;
- claims and issues evolve as

Randy J. Aliment *is a partner in the Seattle, Washington, office of Williams Kastner. His practice emphasizes commercial litigation, international law, and arbitration. Aliment has been involved in transactions in Europe, the Middle East, Canada, and China. He can be reached at raliment@williamskastner.com.* *He is grateful to Manish Borde and Samantha Noonan, who assisted with research for this article.*

proceedings progress;
- the evidence is presented in "dossiers" in advance of the hearing;
- counsel argue about the evidence and the law rather than introducing and questioning witnesses;
- documentary evidence is given great weight, whereas oral testimony is given much less weight;
- the judge or arbitrator(s) play an active role in questioning witnesses; and
- it is more of a consensual process in which the parties are expected and urged into agreement on procedural matters during the course of the proceeding.

U.S. Involvement in International Arbitration

International arbitration is not "American litigation." Further, in international business and legal communities, there is at least some distrust of American-style litigation and American lawyers**.** U.S. parties and their legal teams should therefore recognize and be sensitive to different values, comprehend different dynamics, adjust their expectations, and be flexible when litigating in international arbitration. Successful international counsel possess cultural sensitivity and an ability to appreciate and bridge cultural differences. Counsel should also be familiar with different legal traditions and be ready to adapt the presentation of evidence accordingly.

Evidence of American presence in international commercial arbitration comes from data published by the International Chamber of Commerce's (ICC) International Court of Arbitration. Dezalay and Garth describe the ICC as the "central institution" in international commercial arbitration.[10] Table 1 reports the number of American parties in ICC arbitrations from 1980 to 2004.

While the number of American parties to ICC arbitration has increased significantly from an average of 70.4 per year from 1980 to 1988 to an average of 189.0 per year from 2000 to 2004, so too has the number of ICC arbitrations. As a result, the relative share of American parties has remained largely flat, increasing only from 11.2 percent during 1980–88 to 12.1 percent during 2000–04. That said, America has been the nation most frequently involved in ICC arbitrations for every year since 1998.[11]

Controlling the Dispute Resolution Process

Dispute resolution must be considered in the overall risk assessment for the deal or project and is essential to determine before any contract is signed. Regardless of whether the contracting parties prefer arbitration, mediation, or litigation, the parties should identify their preferred method of dispute resolution in the contract. If the contract is silent on this subject, a party may be unable to engage in litigation in a preferred forum due to personal jurisdiction objections. Moreover, confusion, delay, and expense may be visited upon both parties in the event of parallel litigation in competing jurisdictions, with the possibility of conflicting judgments. As long as differences

TABLE 1
Number of American Parties to ICC Arbitrations, 1980–2004

	1980–88	1989–99	2000–04
Claimants	301	574	481
(Average per year)	(33.4)	(52.2)	(96.2)
Respondents	333	628	464
(Average per year)	(37.0)	(57.1)	(92.8)
Total American Parties	634	1,202	945
(Average per year)	(70.4)	(109.3)	(189.0)
Total Parties	5,676	11,143	7,778
Percent American	11.2	10.8	12.1

Sources: W. Laurence Craig et al., International Chamber of Commerce Arbitration 732, 734, tbl. 5 (3d ed. 2000); W. Laurence Craig et al., International Chamber of Commerce Arbitration app. 1-8, I-11, tbl. 5 (2d ed. 1990); and *2000–2004 Statistical Reports* 12(1)–16(1), ICC Int'l Ct. of Arb. Bull. (2001–2005).

Discovery of evidence from the adverse party in international arbitration is much more limited than in U.S. arbitration.

exist in procedure and types of damage awards across the world's courts, parties will have an incentive to file parallel proceedings.[12] Besides forum shopping for the best substantive law, parties will file according to any perceived problem with enforcement of a favorable judgment.[13] Thus, it is imperative that a preference for litigation also be explicitly recorded in the contract, specifically addressing choice of law and venue.

Drafting the Arbitration Provision

When a dispute arises between the parties, the arbitration provision suddenly becomes one of the most important terms of the contract. Counsel should not repeat the mistake of many who simply cut and paste ambiguous or flawed arbitration clauses into their contracts. In this context, the word "contract" is extremely important since arbitration rights and duties arise from the contract itself. When drafting the arbitration provision, special consideration must be given to the (1) choice of forum, (2) choice of law, (3) selection and number of arbitrators, (4) language of the proceedings, (5) discovery rights and obligations, (6) remedies, and (7) arbitration rules and/or the arbitral institution.

The location of the arbitration is extremely important. Parties should select a country that is party to the New York Convention to help guarantee enforcement of the arbitral award. In addition, the procedural rules of arbitration are usually governed by the laws of the place of the arbitration. Accordingly, a court in the country where the arbitration is held may overturn an arbitral award based upon local procedural law governing the arbitration.[14] Drafters should also contemplate any unique circumstances related to the transaction, including the likely location of any witnesses and evidence, travel expenses, accessibility to satisfactory facilities, and a cost-effective pool of available arbitrators.

Although the rules of arbitral institutions usually serve to guide the arbitrator in selecting what substantive law to apply, parties should take advantage of the fact that arbitrators must defer to agreed-upon choice of law provisions. Because an arbitral institution's default rules may point to application of a country's substantive law that is disadvantageous to both parties, the choice of law issue should be explicitly set forth in the arbitration provision.

Parties can have the agreed-upon arbitral institution select the arbitrator or they may do so themselves. Drafters who intend to select the arbitrator(s) should bear in mind any special qualifications they want the arbitrator(s) to have (e.g., educational background, experience, and perhaps substantive familiarity with the subject matter of the transaction). Although the selection of one arbitrator may save some costs and may speed up the dispute resolution process, drafters may want to opt for a panel of three to maximize the likelihood of receiving an even-handed award. Moreover, a panel may be deemed preferable where the dispute is complicated or centers on a large amount of money.

If the parties speak different languages, drafters should indicate the language of the proceedings. Not doing so may present difficulties with the arbitrator(s) selection process and unanticipated expense related to communication between the parties and with the arbitrator(s). Note that it is still beneficial to draft a language provision even if the contracting parties share a common language since the arbitration may take place in a country with a language that is unfamiliar to the parties and their witnesses. As discussed herein, the procedural rules of arbitral institutions usually address the language in which the arbitration will be conducted unless otherwise agreed upon by the parties.

Discovery of evidence from the adverse party in international arbitration is typically much more limited than what a contracting party may be accustomed to, particularly a party from the United Sates.[15] If contracting parties desire to broaden the scope of such discovery, drafters should explicitly set forth certain procedures (e.g., access to opposing party's hard and electronic documents and the timing and perhaps duration of depositions). However, the parties must take care not to draft a discovery

provision that is contradictory with the laws of the arbitral forum.[16]

With respect to remedies, the parties may want to limit exposure to only compensatory damages. Accordingly, drafters might want to include a clause that limits certain types of relief. On the other hand, if the drafters do not wish to limit an arbitrator's power to grant relief, they may include a provision that the arbitrator has "the power to adopt any appropriate remedy."

The United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules is an example of a set of arbitration rules that is not part of an administrative institution. The rules provide a basis upon which parties may agree to conduct arbitral proceedings and are used in ad hoc arbitrations as well as administered arbitrations (many arbitral institutions allow the proceedings to be governed by the UNCITRAL Arbitration Rules). The rules cover all aspects of the arbitral process, including the appointment of arbitrators, conduct of arbitral proceedings, and effect of any award.[17] With the UNCITRAL Arbitration Rules having been adopted in more than 60 countries, a uniform system of judicial review of awards is developing.[18]

International arbitral institutions act much like courts concerning the management of the arbitration proceedings. Services may include the oversight of the arbitrator selection process, the forum for the hearing, the collection of applicable fees and awards, and the interface between the parties or between the parties and the arbitrator. Parties can choose from a number of international arbitral institutions, including the International Chamber of Commerce, London Court of International Arbitration, Stockholm Chamber of Commerce, Commercial Arbitration and Mediation Center for the Americas, Hong Kong International Arbitration Centre, Japan Commercial Arbitration Association, American Arbitration Association's International Centre for Dispute Resolution, British Columbia International Commercial Arbitration Centre, and the China International Economic and Trade Arbitration Commission.

Model arbitration clauses. When contracting parties desire to have the UNCITRAL Arbitration Rules govern, the following provision is useful:

> 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. The appointing authority shall be [name of person or institution]. The number of arbitrators shall be [one/three]. The place of arbitration shall be [city and/or country]. The language to be used in the arbitral proceedings shall be [insert language].[19]

The following clauses are meant to serve as model arbitration clauses for arbitration in the American Arbitration Association's International Centre for Dispute Resolution. Drafters, however, should keep in mind any transaction-specific needs that should be further addressed.

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules. The number of arbitrators shall be [one or three]. The place of arbitration shall be [city and/or country]. The language of the arbitration shall be [insert language].[20]

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the American Arbitration Association in accordance with its International Arbitration Rules. The place of arbitration shall be [city and/or country]. The language of the arbitration shall be [insert language].[21]

Contracting parties that would like the China International Economic and Trade Arbitration Commission to govern any disputes should contemplate use of the following language in their contracts:

> Any dispute arising from or in connection with this Contract shall be submitted to the China International Economic and Trade Arbitration Commission for arbitration which shall be conducted in accordance with the Commission's arbitration rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties.[22]

International Arbitral Institutions

While there are a number of international arbitral institutions, I elaborate on the following solely for the purpose of providing examples: (1) the British Columbia International Commercial Arbitration Centre (BCICAC), at www.bcicac.com; (2) the China International Economic and Trade Arbitration Commission (CIETAC), at www.cietac.org.cn/index_english.asp; and (3) the American Arbitration

Association International Centre for Dispute Resolution (ICDR), at www.adr.org/sp.asp?id=28819. This section highlights a select number of the arbitration rules of each of these institutions.

The BCICAC, in Vancouver, British Columbia, is a not-for-profit organization that was established in 1986. It was founded with the support of the governments of British Columbia and Canada. Parties can petition the BCICAC to administer a mediation or arbitration. The BCICAC may assist with the selection of an appropriate and qualified mediator or arbitrator. The BCICAC's services also include rules of procedure and assistance in determining where and when proceedings are held.

The CIETAC was established in 1954 as the Foreign Trade Arbitration Commission and was renamed in 1989. It operates under the China Council for the Promotion of International Trade. Since 2000, the CIETAC has also been referred to as the Arbitration Court of the China Chamber of International Commerce. The CIETAC headquarters is located in Beijing with two subcommissions in Shanghai and Shenzhen. The CIETAC also has 19 liaison offices located in different regions throughout China.

The ICDR, the international division of the American Arbitration Association, was established in 1996. The ICDR has established cooperative agreements with 62 arbitral institutions in 43 countries. These agreements enable arbitration cases to be filed and heard in any of these 43 nations. Once a case is filed, case managers serve as the court clerk and keep parties apprised on the progress of their case. The ICDR maintains a panel of more than 400 independent arbitrators and mediators located across the globe.

Number of arbitrators. Unless the parties can agree on the number of arbitrators, the general rule under the BCICAC Rules of Procedure is for three arbitrators unless the BCICAC determines, in its discretion, that there shall be a sole arbitrator.[23] Where three arbitrators are to be appointed, each party is to name one arbitrator, and the two appointed arbitrators appoint the remaining arbitrator, who is to act as the presiding arbitrator.[24] If a party fails to name an arbitrator, the other party can request the BCICAC to appoint the arbitrator.[25] Under circumstances where the BCICAC is to select an arbitrator, it will heed any qualifications required of the arbitrator as agreed to by the parties.[26] Under the CIETAC's Commercial Arbitration Rules, the arbitration tribunal may be composed of one or three arbitrators, as agreed upon by the parties.[27] If the parties fail to agree and notify the CIETAC or if the rules provide otherwise, the tribunal will be composed of three arbitrators.[28] Where the arbitral tribunal is composed of three arbitrators, the claimant and respondent have 15 days from the date of receipt of the notice of arbitration to appoint one arbitrator. If a party fails to appoint or entrusts the CIETAC chairman to appoint an arbitrator on the party's behalf, then the chairman will automatically appoint an arbitrator.[29] Within 15 days of the respondent's receipt of the notice of arbitration, the presiding arbitrator will either be jointly appointed by the parties or appointed by the chairman upon the parties' joint authorization.[30]

With respect to the ICDR, though the parties may mutually agree upon any number of arbitrators, the general presumption is that only one will be appointed if the parties fail to reach a consensus.[31] Notwithstanding the foregoing, the administrator may determine that three arbitrators are appropriate because of the large size, complexity, or other circumstances of the case.[32]

Commencing arbitral proceedings. The requirements for commencing the arbitration under the ICDR largely mirror those of the BCICAC.[33] An arbitral proceeding at the BCICAC is commenced when a claimant delivers a notice of request for arbitration to the respondent(s) and BCICAC.[34] The notice of request for arbitration must include a request that the dispute be referred to arbitration; the names and addresses of the parties to the dispute; a reference to the arbitration clause or separate arbitration agreement relied upon; a reference to the contract out of or in relation to which the dispute has arisen; the general nature of the claim and an estimate of the value of the dispute; the relief or remedy sought; and the preferred number of arbitrators, if not already agreed upon. Additionally, the notice of request for arbitration must be accompanied by the required nonrefundable commencement fee per the fee schedule.[35]

Although the manner in which arbitration is commenced under the CIETAC's rules closely follows the process under the BCICAC's rules, there are differences. For example, the CIETAC request for arbitration does not require a reference to the contract out of or in relation to which the dispute has arisen, an estimated value of the dispute, the relief or remedy sought, or the preferred number of arbitrators. Rather, in addition to other BCICAC requirements, a CIETAC request for arbitration must include a statement of facts and main issues in dispute, facts and grounds upon which the claim is based, and relevant evidence supporting the facts upon which the claim is based.[36]

Representation, witness testimony, and experts. Parties may be represented or assisted by any person during arbitral proceedings at the BCICAC, CIETAC or ICDR. A BCICAC tribunal may allow the evidence of a witness to be presented in the form of a

written statement signed by the witness.[37] With regard to experts, a BCICAC tribunal may appoint one or more experts to report to it on specific issues to be determined by the panel and require a party to give the expert any relevant information or to produce any relevant documents or other property for inspection by the expert.[38] As is the practice in a proceeding before the BCICAC, evidence of witnesses in an ICDR proceeding may also be presented in the form of signed written statements.[39] If the ICDR tribunal elects to employ an independent expert, the parties have a right to question the expert at a hearing.[40] A CIETAC tribunal may appoint experts or appraisers to advise the tribunal with respect to any necessary issues. Findings are reported in an expert's or appraiser's report. Additionally, after the submission of findings, at the request of either party and with the approval of the tribunal, the expert and appraiser may be requested to provide explanations of their reports at an oral hearing.[41] Note that under the BCICAC Rules of Procedure, a tribunal may permit a party to examine an expert but the party is not necessarily entitled to do so.

Apportionment of costs. Under Article 38 of the BCICAC rules, the costs of the arbitration are to be borne by the unsuccessful party unless the tribunal determines that it is appropriate to apportion the costs between the parties.[42] The CIETAC differs from the BCICAC on this subject. Whereas the presumption in the BCICAC is that the losing party bears the burden of remuneration, the presumption in the CIETAC is that the arbitration tribunal will determine the allocation of the arbitration costs.[43] Similarly, the ICDR tribunal will apportion costs among the parties if it determines such apportionment to be reasonable.[44] These costs may also include the reasonable fees for the successful party.

Language of the proceedings and applicable substantive law. Determination of the language to be used in the proceedings is based on the submissions of the parties and the language of the arbitration agreement in both BCICAC and CIETAC proceedings. However, absent such agreement, the Chinese language shall be used in CIETAC proceedings.[45] In ICDR proceedings, the language shall be that of the documents containing the arbitration agreement unless the tribunal determines otherwise.[46]

The ICDR and BCICAC take similar positions with respect to ascertaining what substantive law applies to the dispute. Where there is no agreement, the BCICAC applies "the rules of law it considers to be appropriate given all the circumstances . . . ."[47] Article 28 of the ICDR's rules uses similar language. The CIETAC arbitration rules are formulated in accordance with the Arbitration Law of the People's Republic of China and the "provisions of other relevant laws. . . ."[48] In addition, Article 4 of the CIETAC rules provides that "[w]here the parties have agreed on the application of other rules, or any modification of these Rules, the parties' agreement shall prevail except where such agreement is inoperative or in conflict with a mandatory provision of the law of the place of arbitration." Article 145 of the People's Republic of China General Principles of Civil Law provides: "The parties to a contract involving foreign interests may choose the law applicable to settlement of their contractual disputes, except as otherwise stipulated by law. If the parties to a contract involving foreign interests have not made a choice, the law of the country to which the contract is most closely connected shall be applied."[49] In the absence of any express choice of law by the parties to a foreign-related arbitration, the tribunal will apply such law as it determines appropriate.

The newfound popularity of international arbitration is directly attributed to the growth in size and complexity of disputes.

Trends and Strategies

Commonly praised as a more effective and efficient alternative to international litigation, international arbitration has been scrutinized for shortfalls traditionally associated with litigation, including excessive costs and lengthy duration of proceedings. This criticism comes

concomitantly with an increased number of parties that have turned to international arbitration as their preferred method of dispute resolution.[50] The newfound popularity of international arbitration is directly attributed to the growth in size and complexity of disputes.[51]

To meet the expectations of international commerce and to preserve certain advantages over traditional forms of dispute resolution, arbitration proceedings must remain time and cost efficient. Strategies to best manage cost and duration of proceedings are currently being addressed by a number of developments in the international business, court, and arbitral communities. Examples of such developments include a prospective review of the New York Convention to ensure that the demands of modern arbitration are being met and an increased adoption of the UNCITRAL Arbitration Rules to further the development of a uniform system of judicial review of awards and the maintenance of the policy choice of limited review of awards. The U.S. Supreme Court's March 2008 decision in *Hall Street Associates LLC v. Mattel, Inc.*[52] held that the scope of judicial review of an arbitral award is exclusively determined by the Federal Arbitration Act.[53] The decision effectively nullifies any contractual provision that expands or narrows judicial review of arbitral awards under Title 9.[54]

Although every arbitration proceeding is different, counsel can and should plan for the appropriate level of complexity and associated costs required for the proceeding. The exercise of risk assessment and proper planning can assist parties to create a well-tailored strategy and approach to the arbitration. For example, parties may choose to take advantage of procedural flexibilities and elect to have one instead of three arbitrators, limit discovery and number of experts, and/or elect to change the site of the arbitration from a large, expensive metropolitan city to an alternate location more convenient for the parties and witnesses. This combination of small-scale and large developments in the international arbitration arena can help better meet the expectations of the international commercial community while avoiding the excessive costs and lengthy duration associated with litigation.

Mediation

Mediation refers to a method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution. As opposed to an arbitrator, a mediator does not render a decision but merely helps the parties identify the source(s) of the dispute. Many international arbitral institutions also provide mediation services, including the London Court of International Arbitration, the ICC, the ICDR, and the BCICAC.

The U.S. experience. In the United States, the use and acceptance of ADR is well established and is now an integral part of the legal system. Mediation is required by the federal rules in many districts.[55] Many states also have mediation and arbitration statutes. There is a Uniform Mediation Act[56] and most U.S. courts have some ADR requirement. The familiarity and relative regency of ADR in the United States have spawned a generation of lawyers accustomed to ADR who have begun second careers as mediators and arbitrators after distinguished legal and judicial careers.

Established nearly three decades ago, JAMS (Judicial Arbitration and Mediation Service) is America's largest arbitration and mediation service and has more than 200 full-time "neutrals," mostly former judges, attorneys, or law professors. It handles about 10,000 cases a year worldwide and now has its own set of international mediation and arbitration rules.[57] The impact arbitration and mediation has had on litigation in the courts has been significant. According to *The Economist*, conventional litigation is suffering, and some have described the process as "the vanishing trial."[58] It has been estimated that 11 percent of civil cases went to court in 1962. That number has now fallen to under 2 percent. The number of federal court tort cases that ended in a trial dropped by nearly four-fifths between 1985 and 2003.[59]

Mediation has not always been universally accepted in the United States. In the 1970s and '80s, before JAMS and other new ADR service businesses, mediation services were performed by the courts. The trial judge would assign mediation to another judge, the settlement judge. While this preserved the neutrality of the trial judge, was inexpensive, and the settlement judge was allowed to meet privately with each party, it was and is a less than satisfactory process. Busy trial court judges have little time to prepare for and conduct what can and often should be a daylong effort to resolve a dispute upon a facilitated mutual agreement.

Cultural differences with international mediation. Recognizing that cultural misunderstanding can occur from the differences between ADR in the United States and elsewhere is important. Even the terminology is different, with "mediation" used in common law jurisdictions and "conciliation" in some civil law jurisdictions, such as Spain. U.S. and foreign parties might think they are planning for the same process when U.S. mediation and international conciliation can be quite different.

When someone in the United States mentions mediation as part of a legal proceeding, most know exactly what is meant. There are important differences, however, between common and civil

law jurisdictions. Mechanisms to protect the confidentiality of statements and offers made in negotiations are more developed in common law countries. Common law judges tend to preserve neutrality by avoiding the settlement process. Some continental European legal systems, like the Swiss and German, have judge-led settlement efforts. U.S. attorneys tend to have more contact with the other parties' legal representative during discovery. The practice in continental Europe involves more written than oral communications and does not use the same discovery process used in the United States. U.S. lawyers regularly watch their clients speak at length because of the U.S. deposition process. Many international lawyers tend to use written presentations and are not so accustomed to watching clients speak in court or at mediation. Common witness preparation in the United States may even violate some professional ethics rules in other countries.

Litigation in the United States is thought to be more costly and disruptive than in civil law jurisdictions. The more reasonable cost of international justice has been cited as a reason for the slow acceptance of ADR in other countries.[60]

Drafting mediation provisions. When drafting a mediation provision, one should be sure to (1) set forth a clear requirement to mediate before using other dispute resolution alternatives, (2) decide whether the mediator should also function as the arbitrator if mediation fails to resolve the entire dispute, (3) consider using the rules of one of the international institutions, and (4) set forth what steps are to be taken if mediation fails.[61] I strongly recommend that the mediator be different from the arbitrator since a different mediator promotes open and frank discussions that are more likely to lead to an agreed upon settlement.

The following is a model mediation provision that parties may deem appropriate for their contract:

> If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the [preferred institution] under its [mediation rules of the preferred institution] before resorting to arbitration, litigation, or some other dispute resolution procedure.

Conclusion

The international business community requires the quick and efficient resolution of commercial disputes. Attorneys involved in international commercial disputes should properly advise their clients on the availability and attractiveness of international ADR, whether it be in the form of arbitration or mediation. Whatever type or combination of ADR is chosen, parties should be sensitive to the differences in understanding of the ADR process often held by opposing parties to an international commercial dispute. Up-front planning and communication on this subject, before the dispute arises, will go a long way toward controlling costs and will likely lead to a more satisfactory dispute resolution process. ■

Notes

1. Klaus Peter Berger, International Economic Arbitration 8 & n.62 (1993) (citing Albert Jan van den Berg et al., Arbitragerecht [Law on Arbitration] 134 (1988)); *see also* Towards a Science of International Arbitration: Collected Empirical Research 59 (Christopher R. Drahozal & Richard W. Naimark eds., 2005) (finding that 88.2 percent of a small sample of transnational joint venture contracts include arbitration clauses).

2. Press Release, Pricewaterhouse Coopers and Queen Mary University of London, International Arbitration: Corporate Attitudes and Practices (2006), www.pwc.com/extweb/pwcpublications.nsf/docid/B6C01BC8008DD57680257171003177F0.

3. *See* Federal Judicial Caseload Statistics, www.uscourts.gov/caseloadstatistics.html.

4. *Knocking Heads Together; Mediation. (No Need to Sue)*, Economist (U.S. ed.), Feb. 3, 2007, 60, 60.

5. *Id.*

6. Chul-Gyoo Park, *A Comparative Analysis of Arbitral Institutions and Their Achievements in the United States and Korea*, 15 Am. Rev. Int'l Arb. 475, 488–89 (2004).

7. J. Gillis Wetter, *The Present Status of the International Court of Arbitration of the ICC: An Appraisal*, 1 Am. Rev. Int'l Arb. 91, 93 (1990).

8. *See* 1958—Convention on the Recognition and Enforcement of Foreign Arbitral Awards, www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_ status.html.

9. *See* Press Release, UNCTAD, Analysis of Bilateral Investment Treaties Finds Growth in Agreements, New Areas of Focus, Apr. 12, 2007, www.unctad.org/Templates/webflyer.asp?docid=8270&intItemID=4431& lang=1.

10. Yves Dezalay & Bryant G. Garth, Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order 45 (1996).

11. *See 1998–2004 Statistical Reports* 10(1)–16(1), ICC Int'l Ct. of Arb. Bull. (1999–2005).

12. Louise Ellen Tietz, *Taking Multiple Bites of the Apple: A Proposal to Resolve Conflicts of Jurisdiction and Multiple Proceedings*, 26 Int'l Law. 21 (1992).

13. *Id.*

14. Alghanim & Sons v. Toys "R" Us, Inc, 126 F.3d 15, 23 (2d Cir. 1997).

15. Javier H. Rubinstein, *International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions*, 5 Chi J. Int'l L. 303 (2004).

16. Deborah L. Holland, Comment,

Drafting a Dispute Resolution Provision in International Commercial Contracts, 7 Tulsa J. Comp. & Int'l L. 451, 472 (2000) (citing Donald Francis Donovan & David W. Rivkin, *International Arbitration and Dispute Resolution*, 786 PLI/Comm. 143, 155 (1999)).

17. United Nations Commission on International Trade Law, UNCITRAL Arbitration Rules, www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html.

18. *See* United Nations Commission on International Trade Law, FAQ—Origin, Mandate, and Composition of UNCITRAL, www.uncitral.org/uncitral/en/about/origin_faq.html.

19. Holland, *supra* note 16, at 476 (citing Robert Donald Fischer & Roger S. Haydock, *International Commercial Disputes: Drafting an Enforceable Arbitration Agreement*, 21 Wm. Mitchell L. Rev. 941, 983 (1996)).

20. American Arbitration Association, International Dispute Resolution Procedures (2003) (pamphlet).

21. *Id.*

22. China International Economic and Trade Arbitration Commission Model Arbitration Clause, www.cietac.org.cn/english/model_clause/model_clause.htm.

23. British Columbia International Commercial Arbitration Centre, International Commercial Arbitration Rules of Procedure, art. 5 [hereinafter BCICAC Rules], www.bcicac.com/bcicac_ica_rules.php#FeeSchedule.

24. BCICAC Rules, art. 7.

25. *Id.*

26. *Id.*, art. 8.

27. China International Economic and Trade Arbitration Commission Arbitration Rules, art. 20 [hereinafter CIETAC Rules], www.cietac.org.cn/english/rules/htm.

28. *Id.*

29. *Id.*, art. 22.

30. *Id.*

31. American Arbitration Association, International Centre for Dispute Resolution, International Dispute Resolution Procedures, art. 5 [hereinafter ICDR Rules], www.adr.org/sp.asp?id=33994#5.

32. *Id.*

33. *Id.*, art. 2.

34. BCICAC Rules, art. 17.

35. *Id.* In addition, please see *id.*, art. 40.

36. CIETAC Rules, art. 10.

37. BCICAC Rules, art. 27.

38. *Id.*, art. 29.

39. ICDR Rules, art. 20.

40. *Id.*, art. 22

41. CIETAC Rules, art. 38.

42. BCICAC Rules, art. 38.

43. CIETAC Rules, art. 43.

44. ICDR Rules, art. 3.

45. CIETAC Rules, art. 67.

46. ICDR Rules, art. 14.

47. BCICAC Rules, art. 30.

48. CIETAC Rules, art. 1.

49. General Principles of the Civil Law of the People's Republic of China, art. 145, http://en.chinacourt.org/public/detail.php?id=2696.

50. Press Release, *supra* note 2.

51. Michael Goldhaber, *Sneak Peek, An Inside Look at More than 100 Major Disputes from the Secret World of Arbitration*, Am. Law., June 2005 (Supp.), at S22.

52. 128 S. Ct. 1396 (2008).

53. 9 U.S.C. §§ 1–16.

54. *Id.* at 1406.

55. Fed. R. Civ. Proc. 39(1).

56. Nat'l Conference of Comm'rs on Unif. State Laws, Uniform Mediation Act (amended 2003), www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.htm.

57. Both sets of rules can be found at www.jamsadr.com/rules/international_rules.asp.

58. *Knocking Heads Together; Mediation. (No Need to Sue)*, *supra* note 4.

59. *Id.*

60. Sergio Chiarloni, *Civil Justice and Its Paradoxes: An Italian Perspective* 263, *in* Civil Justice in Crisis: Comparative Perspectives of Civil Procedure (Adrian A. S. Zuckerman 1999); Peter Gottwald, *Civil Justice Reform: Access, Cost, and Expedition: The German Perspective* 207, *in* Civil Justice in Crisis: Comparative Perspectives of Civil Procedure (Adrian A. S. Zuckerman 1999).

61. Holland, *supra* note 16, at 459–61.