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A PRACTITIONER'S GUIDE: AN OVERVIEW OF THE MAJOR INTERNATIONAL ARBITRATION TRIBUNALS

*Stefania Bondurant**

INTRODUCTION

This article surveys the major international arbitration tribunals and highlights some of their important features. The objective is to show the similarities and differences among these bodies in dealing with important issues pertaining to business decisions, specifically those on electing whether and where to arbitrate.

This article is divided into two parts. The first part briefly introduces and outlines the major features of international commercial arbitration in order to establish and highlight the issues that will be dealt with in greater detail in subsequent sections. The second part explores six of the major international arbitration tribunals: the ICC, AAA, LCIA, SCC, CIETAC and the ICSID. Their main advantages and disadvantages are discussed, which, in turn, will evidence the factors considered by parties when deciding which forum to elect.

I. BRIEF INTRODUCTION TO INTERNATIONAL COMMERCIAL ARBITRATION

As business becomes more globalized, a greater need for faster dispute resolution arises. Historically, the main problems with alternative dispute resolution concerned transnational recognition of foreign arbitral awards and their enforcement.¹ For this reason, an

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¹ Charles R. Norberg, *Arbitration and the Licensing Process*, 4 N.W. J. INT'L L. & BUS. 352, 353 (1982) (Book Review) ("[a] principal difficulty, however, was the lack of uniformity in international arbitrations for enforcement of the arbitral clause and the ensuing arbitral award.").

increasing number of countries have signed conventions governing international commercial arbitration.²

A. Meaning and Features of International Commercial Arbitration

Rene' David provides a useful definition of Arbitration:

Arbitration is a device whereby the settlement of a question, which is of interest for two or more persons, is entrusted to one or more other persons—the arbitrator or arbitrators—who derive their powers from a private agreement, not from the authorities of a state, and who are to proceed and decide the case on the basis of such an agreement.³

The main advantages of arbitration over national judicial systems are that it is fast, cheap, and confidential.

Arbitrations are governed by rules that ensure hearings proceed as fast as possible, keeping costs fairly low.⁴ For instance, arbitral awards cannot be appealed (for reasons other than those specifically listed in treaties, national arbitration acts, or contracts signed by the parties), are binding between the parties, and are immediately enforceable,⁵ which ensure low cost and speedy proceedings. Businesses prefer this definite character of arbitration because it provides a more efficient resolution of disputes compared to that of national judicial systems.⁶ Furthermore, businesses should prefer

² *Id.* at 354.

³ RENE' DAVID, *ARBITRATION IN INTERNATIONAL TRADE*, 5 (Kluwer Publ. 1985).

⁴ *Id.* at 11.

⁵ *Id.* at 18.

⁶ See, e.g., Bernard E. Le Sage, *Department: Practice Tips: Seeing The Sites: The Choice of an International Arbitration Forum: Contracting Parties Can Avoid The Uncertainty of Foreign Tribunals*, 21 LOS ANGELES LAWYER 19, 20 (1998) (stating that "Like the ICC, the Stockholm Chamber of Commerce (SCC) allows for significant party autonomy in selecting the applicable procedural rules to be followed by the arbitrators. However, certain Swedish laws cannot be excluded by the parties from arbitrations conducted in Sweden. For example, if the parties have not clearly agreed on the choice of law, the SCC arbitrators must apply Swedish rules on conflicts of law. Also, if there is a dispute over the enforceability of a contract that includes an arbitration provision, the challenge may be handled by a Swedish national court as well as the arbitrators. Swedish national courts resolve a variety of other prearbitration procedures, such as writs of attachment, which means that

arbitration because it allows them to foresee the type of expenses they will face if they bring the dispute before an arbitral tribunal.

Also, businesses particularly like the fact that they can decide whether the award should be disclosed.⁷ Indeed, parties can request the hearing be kept confidential.⁸ This desire has stemmed from the fact that negative media exposure and public view of hearings can often lead to a company's loss of business.⁹ Finally, no jurisdictional or procedural system, whether it is from a common law or a civil law system, prevails over the other.¹⁰ This provides yet another incentive for businesses to prefer arbitration.

Parties often decide to arbitrate because they fear that using one party's national judicial system could prove prejudicial to their own interests. Parties perceive arbitration as a neutral solution to their dispute,¹¹ which is evident in the fact that arbitrators are chosen on the basis of their proven independence, neutrality, and non-affiliation with any specific national system.¹² In addition, arbitrating a dispute can solve the delicate problem associated with determining jurisdiction.¹³

However, parties are not always able to choose all applicable rules. Sometimes the arbitrators will rely on certain national rules and supplement those with rules set out in the parties' arbitration agreement.¹⁴ Arbitrators have the discretion to decide which rules apply when an arbitral agreement is silent on the issue.¹⁵ It does

Swedish national courts could potentially play a larger role in arbitrations conducted within its borders." (footnotes omitted)).

⁷ DAVID, *supra* note 3, at 12.

⁸ *Id.*

⁹ *Id.*

¹⁰ See PIERO BERNARDINI, *L'ARBITRATO COMMERCIALE INTERNAZIONALE*, 12 (Dott.A. Giuffrè ed., Giuffrè Editore 2000). All translations for this article are by the author.

¹¹ See ICC, Introducing ICC Dispute Resolution Services, available at http://www.iccwbo.org/court/english/intro_court/introduction.asp (last visited on Oct. 21, 2006).

¹² BERNARDINI, *supra* note 10.

¹³ *Id.*

¹⁴ *Id.* at 10.

¹⁵ ICC – International Dispute Resolution Services, Arbitration Process, available at <http://www.iccwbo.org/court/english/arbitration/process.asp> (last visited on Mar. 6, 2006) ("[i]n the absence of an agreement between the parties as to the applicable rules of law, the Arbitral Tribunal applies the rules of law which it determines to be appropriate. In all cases the Arbitral Tribunal takes account of the provisions of the contract and the relevant trade

follow, as a general rule, that the parties' will prevails and the arbitrators can only reasonably supplement it.¹⁶ Indeed, the principal source for arbitration is the parties' will and what they have agreed upon in their arbitral agreement.¹⁷

B. Limits of International Commercial Arbitration

As a general rule, an arbitral award in one country may be enforced in another country only if the two countries have signed a treaty mandating recognition and enforcement of an award. Only in such a case are the signing countries mandated to recognize and enforce an award that has been rendered in that country or in any other signatory country.

If there is no bilateral treaty or international convention between the country where the award was rendered and the country where enforcement is sought, the winning party may be unable to recover. In fact, when one party wishes to have its award enforced in a certain country, the party may have to rely on that country's national judicial system.¹⁸ At that point, the court analyzes whether the award is valid, whether it can be enforced according to the national laws applicable to the case, and whether it violated any other applicable laws.¹⁹

usages. If the parties have agreed to give it such powers, the Arbitral Tribunal may act as *amiable compositeur* or decide *ex aequo et bono*.").

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ BERNARDINI, *supra* note 10, at 19.

¹⁹ See, e.g., The U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V, July 6, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter "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

In most legal systems, once one of the parties appears before a national court to have its arbitral award enforced, the parties lose the confidentiality that they tried to preserve by arbitrating. In fact, judicial hearings are generally open to the public.

C. Sources of International Commercial Arbitration

There are three main sources of international arbitration: national systems, international conventions, and the parties' will.²⁰ Precedents cannot be included as a source since they are not binding.²¹ Parties are usually free to choose the rules they wish to apply to the resolution of their dispute.²² However, when parties fail to include certain provisions necessary to carry on the arbitration, the arbitrators are free to apply the law they deem appropriate.²³

Sometimes parties agree on applying the UNCITRAL Model Law – a set of rules dealing with international arbitration. The United Nations promotes the use of UNCITRAL Rules to encourage uniformity in international commercial arbitrations.²⁴ These rules are intended to harmonize domestic laws and cover "all stages of the

submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised 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.").

²⁰ BERNARDINI, *supra* note 10, at 24.

²¹ Clifford Larsen, ASIL Insights International Commercial Arbitration, 1 available at <http://www.asil.org/insights/insight97041.pdf> (last visited on Mar. 6, 2006); see also BERNARDINI, *supra* note 10, at 24.

²² See ICC, *supra* note 11.

²³ BERNARDINI, *supra* note 10, at 10.

²⁴ See International Commercial Arbitration, Uncitral Secretariat Explanation of Model Law, available at <http://faculty.smu.edu/pwinship/arb-24.htm> (last visited on Mar. 6, 2006).

arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award and reflect[] a worldwide consensus on the principles and important issues of international arbitration practice."²⁵ Due to their neutrality, these rules are "acceptable to States of all regions and the different legal or economic systems of the world."²⁶

Other sources of international commercial arbitration include conventions. Two noteworthy conventions include the Washington Convention of 1965 on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter the Washington Convention) and the New York Convention of 1958 on Recognition and Enforcement of International Arbitration Awards (hereinafter the New York Convention). The goal of the Washington Convention is to ensure the effective resolution of disputes arising out of private investments in developing countries.²⁷ The drafters intended to conciliate private investors' interest in stability and profit-making when investing in developing countries with developing countries' interest in attracting more capital and technologies without compromising their national sovereignty.²⁸

Before the enactment of the Washington Convention, few remedies were available to investors. The resolution of most disputes was left to diplomatic channels and negotiated on the basis of principles of international law regarding the treatment of foreigners.²⁹ The Convention created an autonomous and independent system of dispute resolution administered by the International Center for Settlement of Investment Disputes (ICSID).³⁰ Requirements for the application of the Convention arise from its provision requiring parties to consent to arbitrate through the ICSD, and prohibiting the withdrawal of consent once the parties agree.³¹ This provision is crucial since the dispute can be resolved in default, and one party's absence does not prevent the recognition or the enforcement of the arbitral award. If the party not

²⁵ *Id.*

²⁶ *Id.*

²⁷ BERNARDINI, *supra* note 10, at 242.

²⁸ *Id.*

²⁹ *Id.* at 245.

³⁰ *Id.* at 247.

³¹ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, August 27, 1965, art. 25(1), 17 U.S.T. 1270 [hereinafter "The Washington Convention"].

taking part in the dispute resolution is a state, then it will be considered to have waived any argument in favor of its immunity.³²

On the other hand, the New York Convention has been commonly used, and its rules and principles apply widely because of the high number of signatory states.³³ The New York Convention applies only to foreign awards, which are considered such based on the location where the award was issued.³⁴ The parties' nationality or the internationality of the subject-matter does not constitute valid grounds for the determination of whether an award is considered "foreign."³⁵

The New York Convention requires every signing state to recognize and enforce arbitral awards rendered from other signing states.³⁶ However, Article V states that recognition or enforcement of an arbitral award may be refused where the latter violates a country's public policy, where the party against which enforcement is sought was

³² BERNARDINI, *supra* note 5, at 248.

³³ Afghanistan, Albania, Algeria, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Cambodia, Cameroon, Canada, Central African Republic, Chile, China, Colombia, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Finland, France, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Haiti, Holy See, Honduras, Hungary, Iceland, India, Indonesia, Iran, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Lao People's Democratic Republic, Latvia, Lebanon, Lesotho, Liberia, Lithuania, Luxembourg, Madagascar, Malaysia, Mali, Malta, Mauritania, Mauritius, Mexico, Monaco, Mongolia, Morocco, Mozambique, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Saint Vincent and the Grenadines, San Marino, Saudi Arabia, Senegal, Serbia and Montenegro, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, Thailand, The Former Yugoslav Republic of Macedonia, Trinidad and Tobago, Tunisia, Turkey, Uganda, Ukraine, United Kingdom, United Republic of Tanzania, United States of America, Uruguay, Uzbekistan, Venezuela, Viet Nam, Zambia, Zimbabwe. List available at <http://arbitrator.wipo.int/arbitration/ny-convention/parties.html> (last visited on Mar. 2, 2006).

³⁴ ALBERT JAN VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958—TOWARDS A UNIFORM JUDICIAL INTERPRETATION*, 384 (Kluwer Publ. 1983).

³⁵ *Id.*

³⁶ See *The New York Convention*, *supra* note 19, at art. III.

not given proper notice, or where the composition of the panel was not in accordance with the arbitration agreement, just to cite some of the non-enforcement grounds.³⁷

II. PRINCIPAL INTERNATIONAL ARBITRATIONAL TRIBUNALS

A. International Chamber of Commerce (ICC)

The ICC was founded in 1919 and is headquartered in Paris, France.³⁸ The original private businesses involved with the ICC were from Belgium, Britain, France, Italy, and the United States.³⁹ Today, the ICC involves businesses from 130 countries all over the world.⁴⁰

According to its own website, the ICC International Court of Arbitration is "the world's leading body for resolving international commercial disputes by arbitration."⁴¹ More than 590 cases were heard in 2002, and the average in past years has far exceeded 200 international cases per year.⁴² These numbers are significant when compared with the American Arbitration Association, which reached only 120 cases per year.⁴³ In addition, governmental institutions, public and quasi-public entities, and private parties use the ICC arbitration system.⁴⁴

1. Main Entities Involved with the ICC Arbitration Process

The ICC International Court of Arbitration. "The dispute resolution mechanisms developed by ICC have been conceived

³⁷ See The New York Convention, *supra* note 19, at art. 2(a), 1(b), and 1(d).

³⁸ ICC, International Dispute Resolution Services, *available at* <http://www.iccwbo.org/court/english/arbitration/contacts.asp> (last visited on Mar. 6, 2006).

³⁹ ICC, History of the International Chamber of Commerce (Sept. 25, 2005) *available at* http://www.iccwbo.org/home/menu_what_is_icc.asp.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ See W. Michael Reisman, *A Note to Our Readers: International Chamber of Commerce Arbitration*, 80 AM. J. INT'L L. 268, 269 (1986) (Book Review).

⁴⁴ *Id.* at 269.

specifically for business disputes in an international context."⁴⁵ The Tribunal is the "world's most widely representative dispute resolution institution" with members from eighty countries on every continent.⁴⁶ The ICC Tribunal applies the Rules of Arbitration of the International Chamber of Commerce.⁴⁷

The Secretariat of the ICC Tribunal. A Secretariat located in Paris assists the tribunal.⁴⁸ The Secretariat provides support and counseling in almost every language through an international staff of jurists.⁴⁹ The Secretariat consists of seven teams headed by a Counsel. A team closely monitors each case with the assistance of an advanced-technology retrieval system.⁵⁰

2. Advantages of ICC Arbitration

Binding Awards that can be Challenged only on Limited Grounds. ICC arbitral awards are definitive and not generally subject to appeal. However, they may be challenged on limited grounds either in the country where the arbitral award is delivered or in the country where enforcement of the award is sought.⁵¹ The difficulty of appeals confers a *de facto* legal finality to ICC arbitral awards.

International Recognition and Enforcement of Arbitral Awards in any Jurisdiction that is part of a Multilateral or Bilateral Convention. ICC arbitral awards usually present fewer problems than other arbitral awards regarding issues of recognition and enforcement in foreign countries. In fact, its awards can be enforced in all signatory countries to the New York Convention, as well as in many other countries that have chosen to recognize the ICC Tribunal.⁵²

Subjective and Objective Neutrality of Arbitrators. The requirement of absolute independence on the part of arbitrators is one of the strongest features of the ICC's arbitration process. Other

⁴⁵ ICC, Introducing ICC Dispute Resolution Services, available at http://www.iccwbo.org/court/english/intro_court/introduction.asp (last visited on Mar. 15, 2006).

⁴⁶ ICC, Introduction to Arbitration, available at <http://www.iccwbo.org/court/english/arbitration/introduction.asp> (last visited on Mar. 6, 2006).

⁴⁷ ICC, International Dispute Resolution Services Arbitration Process, *supra* note 15.

⁴⁸ ICC, Introduction to Arbitration, *supra* note 46.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

international arbitration tribunals have taken the same approach, although the AAA "still maintains certain reservations on this matter."⁵³

Regarding the issue of independence, no distinction exists between arbitrators nominated by the parties or arbitrators nominated by the Court—all of them must be independent.⁵⁴ When an independence issue arises, the parties are automatically notified so they can act on it prior to the Tribunal's decision.⁵⁵ As stated in Article 2(8) of the ICC Rules, these notifications cannot be used as the basis for a challenge to the arbitration award.⁵⁶

These notifications generate from the "Arbitrator's Statement of Independence." Pursuant to Article 7(2) paragraph 2 of the ICC Rules, "[b]efore appointment or confirmation, a prospective arbitrator shall sign a statement of independence and disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties."⁵⁷ Thus, once an arbitrator discloses certain potential conflicts, the parties will be notified personally and will then decide how to proceed.

The disclosure statement has created concerns in countries such as Switzerland and Belgium where the legal communities are very small and many lawyers, jurists, and legal professionals have relationships with one another.⁵⁸ These countries do not perceive their personal or professional relationships as a threat to their independence.⁵⁹ Additionally, it comes as no surprise that the members of the legal community in small countries know each other in one form

⁵³See Stephen R. Bond, *Current Issues in International Commercial Arbitration: The International Arbitrator: From the Perspective of the ICC International Tribunal of Arbitration*, 12 Nw. J. INT'L L. & BUS. 1, 5 ("[e]xcept for a decreasing number of arbitral institutions with a closed list of arbitrators who have the nationality of the country where the institution is located, parties are generally free to choose an arbitrator of any nationality whatsoever. The ICC does not even have a 'list' of arbitrators.").

⁵⁴ *Id.* at 12.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ ICC Rules, art. 7(2), available at <http://www.iccwbo.org/court/english/arbitration/rules.asp>.

⁵⁸ Bond, *supra* note 53, at 14.

⁵⁹ *Id.*

or another. In any event, the mere disclosure of a conflict is not dispositive as to the appointment of the arbitrators.⁶⁰

It simply means that while confirming an independent status, the prospective arbitrator has set down points which might, in the eyes of a party, call into question his or her independence. The disclosure thus serves to provide the parties with an opportunity to raise, sooner rather than later, any concerns they might have regarding the prospective arbitrator's independence.⁶¹

Wide Variety of Commercial Disputes and Diversity in the Nature of the Parties. Both private parties and governmental institutions may arbitrate disputes at the ICC.⁶² There are no limits as to the private or public nature of the parties or the type of controversies that can be brought in the forum.⁶³

Location. Although the ICC is located in Paris, the parties can agree to arbitrate elsewhere.⁶⁴

Availability of Ad Interim Protective Measures. Article 23(1) of the ICC Rules provides:

[u]nless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The Arbitral Tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving the reason, or of an award, as the Arbitral Tribunal considers appropriate.⁶⁵

This provision shows that parties can petition the Arbitral Tribunal to have some protective measures implemented in order to preserve certain rights during the pendency of the arbitration.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See BERNARDINI, *supra* note 10, at 122.

⁶³ *Id.*

⁶⁴ See, e.g., ICC, International Dispute Resolution Services, Arbitration Process, *supra* note 15 ("[i]n the vast majority of ICC cases, the place of arbitration is agreed upon by the parties. When this place has not been agreed, it is fixed by the Court, normally in a 'neutral' country, that is, neither the Claimant's nor the Respondent's country.").

⁶⁵ ICC Rules, *supra* note 57, at art. 23(1).

Such ad interim measures are not limited to those provided by the procedural rules of the jurisdiction where the arbitration is taking place or where the award will be enforced.⁶⁶ However, it should be taken into account that it will be easier to enforce a remedial measure that is "recognized" in that specific jurisdiction, or put differently, it would be extremely hard to enforce a measure that is unknown in that jurisdiction.⁶⁷ In addition, as previously mentioned, "arbitrators and tribunals must comply with rules of public policy governed by the law of the seat of arbitration, or by the law of the place where the interim measure is to be enforced."⁶⁸

Examples of ICC ad interim measures include those that aim to preserve evidence, maintain the status quo, prevent the transfer or dissipation of assets, measure the quality of a perishable product that is the subject of the dispute, and protect confidentiality by ordering the party to refrain from publicizing the dispute.⁶⁹

3. Special Features of the ICC Arbitration System

Two-Tier System for Appointment of Arbitrators. Pursuant to the ICC Rules, the Arbitral Tribunal may be composed of one or three arbitrators.⁷⁰ The parties have the freedom to choose only one arbitrator, but in such cases where the parties cannot otherwise agree, the ICC will appoint one.⁷¹ If the parties choose three arbitrators, each party can nominate one arbitrator, leaving the nomination of the third arbitrator to their mutual agreement or to the Tribunal.⁷²

If the parties cannot agree on the number of arbitrators, the ICC Rules provide that the Tribunal shall appoint a sole arbitrator "where it appears to the Tribunal that the dispute is such as to warrant the appointment of three arbitrators."⁷³ As a general rule, if the case involves complex questions of law or fact, a panel of three arbitrators is used.⁷⁴

⁶⁶ See Gregoire Marchac, Note and Comment: *Interim Measures in International Commercial Arbitration Under the ICC., AAA, LCIA and UNCITRAL Rules*, 10 AM. REV. INT'L ARB. 123, 127-28 (1999).

⁶⁷ *Id.* at 128.

⁶⁸ *Id.*

⁶⁹ *Id.* at 132.

⁷⁰ See ICC Rules, *supra* note 57, at art. 8(1).

⁷¹ ICC, Introduction to Arbitration, *supra* note 46.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Bond, *supra* note 53, at 5.

Continuous Monitoring of the Arbitration Process. The ICC Tribunal monitors the entire arbitration process and has the authority to intervene or take necessary measures to ensure the arbitration proceeds as fast and as smoothly as possible.⁷⁵ ICC scrutiny of awards is intended to substantially reduce the chances of awards being annulled by national courts.⁷⁶ The ICC finds this authority in Article 27 of the ICC Arbitration Rules (1998) which states:

Before signing any Award, the Arbitral Tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the Award and, without affecting the Arbitral Tribunal's liberty of decision, may also draw its attention to points of substance. No Award shall be rendered by the Arbitral Tribunal until it has been approved by the Court as to its form.⁷⁷

The ICC's extensive review of awards, while warranted by the desire to avoid grounds for future appeals, should be limited only to the form of the award and not to its substance. For example, in a contractual dispute between a Swedish shipyard and the Libyan General Maritime Transport, one issue was whether the Secretary General of the ICC had exceeded his authority under Article 27 in deleting part of the award.⁷⁸ In scrutinizing the award, the Secretary General found part of the award contained ambiguous language. He stated, "[t]he court considered that paragraph 1 of the decision contained an apparent contradiction. If the defendant was entitled to reject the ship, how can he now be obliged to accept it with a price reduction for the faults?"⁷⁹ At this objection, one of the arbitrators refused to sign the award as modified on the ground that:

[I]n [his] view the Court of Arbitration [had] absolutely exceeded its authority as laid down by Article [27] of the rules and interfered in the substance of the draft by deletions and modifications in the decisions of the Arbitrators . . . [by doing so] it is clear that the Court [had] not limited itself to the form of the award but interfered in

⁷⁵ ICC, Introduction to Arbitration, *supra* note 46.

⁷⁶ *Id.*

⁷⁷ ICC Rules, *supra* note 57, at art. 27.

⁷⁸ Award made in cases Nos. 2977, 2978 and 3033 in 1978 published in J. GILLIS WETTER, THE INTERNATIONAL ARBITRAL PROCESS (Dobbs Ferry, 1979) Vol. II 178-98 [hereinafter Award].

⁷⁹ SIGVARD JARVIN ET AL., COLLECTION OF ICC ARBITRAL AWARDS 1974-1985 65 (Kluwer Publ. 1990).

the substance which [rendered] the Award legally unsound.⁸⁰

He went on to state that "[t]he Court [had] clearly derogated from the authority of the Arbitrators by modifying the draft of the Award to what the Court of Arbitration deems fit ... the Court is authorized to make modification only in the form of the draft and not in the substance."⁸¹

The inclusion of Article 27 in the ICC Rules can be perceived as beneficial to limit the possibility of error, appealability, and apparent contradictions. However, as noted by the arbitrator in the case above,⁸² such intrusion in the substance of the award can be viewed as a derogation of authority from the legitimately elected panel of the ICC.

Enhanced Independence Based on the System of Fixing the Arbitrators' Remuneration. The ICC Tribunal determines arbitrators' fees as provided by the ICC Rules.⁸³ The basis of the amount of the controversy, the diligence of the arbitrators, and the speed with which the arbitration was handled all factor into the determination of arbitrators' fees.⁸⁴ Those grounds are based on a scale published and attached to the ICC Rules.⁸⁵ This system has the objective of ensuring quality, speed, and neutrality of the arbitration itself.⁸⁶ For example, basing the fees on the sum in dispute discourages the presentment of frivolous claims and counter-claims, which could raise the overall cost of the arbitration.⁸⁷

Possibility of Choice Between Ad Hoc or Institutional Arbitration. Parties using arbitration can choose either to designate an institution to administer it or to proceed ad hoc.⁸⁸ In ad hoc cases, the arbitration is "administered by the arbitrators themselves."⁸⁹ However, in such ad hoc cases, the parties may need the assistance of a state court or the ICC to solve problems that may arise. Thus, institutional

⁸⁰ *Id.* at 66-67.

⁸¹ *Id.*

⁸² Award, *supra* note 78.

⁸³ ICC, Introduction to Arbitration, *supra* note 46.

⁸⁴ ICC, International Dispute Resolution Services, Costs of Arbitration, available at <http://www.iccwbo.org/court/english/arbitration/costs.asp> (last visited on Mar. 15, 2006).

⁸⁵ ICC, Introduction to Arbitration, *supra* note 46.

⁸⁶ ICC, Costs of Arbitration, *supra* note 84.

⁸⁷ ICC, Introduction to Arbitration, *supra* note 46.

⁸⁸ *Id.*

⁸⁹ *Id.*

arbitration would be necessary and would require the payment of a fee.⁹⁰

Prima Facie Assessment and Applicable Law. The ICC Tribunal will make a *prima facie* assessment to determine whether there is a valid agreement to arbitrate, whether the arbitrators have followed and applied the ICC Rules, and whether the arbitration will take place in another country in case the parties have not agreed to a location.⁹¹ In addition, the Tribunal will rule on whether to recuse one or more arbitrators, decide whether to grant postponements, determine the arbitrators' fees and expenses, and scrutinize the arbitral awards and proceedings.⁹²

Arbitrators have the discretion to supplement the arbitral agreement by applying certain rules necessary to the resolution of the dispute. In case of non-agreement on the applicable law, it is interesting to see how ICC arbitrators have ordinarily resolved the issue and elected the best applicable law. For instance, in an ICC arbitration case from 1995, an arbitration agreement between a Swiss buyer and an Austrian seller failed to contemplate what law would be applied.⁹³ The ICC arbitrators used different factors to conclude that they would apply the United Nations Convention on Contracts for the International Sale of Goods (CISG). The Tribunal looked at the different applicable laws: Austrian law and Swiss law as national laws of the parties and because the ICC designated Switzerland as the forum of the arbitration; German law since the parties both nominated a German arbitrator; and Ukrainian law because the buyer was required to send the goods to Ukraine under the instruction of the seller, who was using a Ukrainian supplier to meet its duties under the contract.⁹⁴ Because all the previously-mentioned countries were "signatories of the CISG Convention on Contracts for the International Sale of Goods,"⁹⁵ the Tribunal found the CISG the most suitable applicable law for the resolution of that dispute.⁹⁶

The same methodology was used in the ICC Arbitration Case No. 7531 of 1994 where the Tribunal's application of the CISG was due to the fact that the both the Chinese seller and the Austrian buyer

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ Pace Law School, CISG Database (2005) available at <http://cisgw3.law.pace.edu/cases/958128i1.html>.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

resided in signatory countries.⁹⁷ They too failed to provide for the applicable law, and thus, the sole arbitrator that formed the panel decided to apply the CISG.⁹⁸ Therefore, the uniformity in the determination of the applicable law on the part of different arbitrators and the preference for the CISG when compared to national rules becomes clear.

Confidentiality. The ICC Rules do not address a general duty to keep the arbitration confidential. For instance, Article 21.3 (1998) of the ICC rules states that "[s]ave with the approval of the Arbitral Tribunal and the parties, persons not involved in the proceedings shall not be admitted."⁹⁹ The article does not mention a duty of confidentiality. The only article where the word "confidential" can be found is Article 20.7 (1998), which states that "[t]he Arbitral Tribunal may take measures for protecting trade secrets and confidential information."¹⁰⁰ Indeed, the drafters of the ICC could not reach an agreement to impose a general duty of confidentiality upon all the parties involved in the arbitration, but they agreed that it should be restricted only to trade secrets and confidential business information.¹⁰¹

The only other article that is directed to preserve some form of confidentiality is Article 28.2 (1998), which establishes that only the parties can request a copy of the award certified by the Secretary General.¹⁰² It should be noted that while the ICC does publish its awards, it does not release the identity of the parties.¹⁰³

B. American Arbitration Association (AAA)

In 1996, the AAA created the International Centre for Dispute Resolution (ICDR), a separate entity that will hear arbitration cases in international matters.¹⁰⁴ The reason behind establishing a separate entity to deal exclusively with international arbitral disputes resides in the fact that both the international community and international businesses wanted forum that was truly international, specialized in this

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ ICC Rules, *supra* note 57, at art. 21.3.

¹⁰⁰ ICC Rules, *supra* note 57, at art. 20.7.

¹⁰¹ Cindy G. Buys, *The Tensions between Confidentiality and Transparency in International Arbitration*, 14 AM. REV. INT'L ARB. 121, 125 (2003).

¹⁰² ICC Rules, *supra* note 57, at art. 28.2.

¹⁰³ Buys, *supra* note 101.

¹⁰⁴ BERNARDINI, *supra* note 10, at 124.

sort of dispute, and that issued awards that could be easily enforced internationally.¹⁰⁵

The staff, arbitrators, and all other members and employees have international backgrounds, and the ICDR has offices around the world to facilitate dispute resolutions in a globalized setting.¹⁰⁶ Furthermore, both attorneys and arbitrators are multilingual, making it easier for the parties to start the process and gather information concerning their proceeding.¹⁰⁷

The ICDR has its own Rules of Procedure, which the parties often choose to apply in the resolution of their dispute.¹⁰⁸ The advantage of using these rules is that a higher likelihood exists that the award will be enforced in a foreign country.¹⁰⁹

Main Features of the ICDR System

The International Dispute Resolution Procedures of the ICDR are rules that usually apply in international cases arbitrated by the ICDR. Their main features are:

- parties may control the process,
- arbitrators are neutral,
- proceedings are fast, and
- decisions may include their reasoning.¹¹⁰

Furthermore, the AAA's policy on confidentiality is worth noting. Because businesses are often interested in keeping matters confidential, the AAA provides that the awards should not be disclosed to the public unless the parties consent to such disclosure or the disclosure is required by law.¹¹¹

Definition of International Arbitration. The definition used to determine whether a dispute is "international" is determined by the location of the arbitration. The fact that performance of the agreement must take place abroad, or that the parties to the agreement belong to

¹⁰⁵ AMERICAN ARBITRATION ASS'N, A GUIDE TO MEDIATION AND ARBITRATION FOR BUSINESS PEOPLE (2003) available at <http://www.adr.org/sp.asp?id=22017>.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Buys, *supra* note 101, at 127-28.

two or more different countries can be dispositive.¹¹² Indeed, the "ICDR administration is designed for parties that have differing languages, legal systems and cultural backgrounds."¹¹³

Nomination of Arbitrators. The parties can choose the procedures for appointing arbitrators. However, if they cannot reach an agreement or they remain silent as to the matter in their contract, the ICDR will appoint the arbitrators.¹¹⁴ This solution will save the parties the inconvenience of petitioning a court.¹¹⁵

The ICDR will nominate the arbitrators after having consulted the AAA's National Roster of Neutrals.¹¹⁶ The ICDR carefully screens such arbitrators for their qualifications and reputation.¹¹⁷ For instance, they require arbitrators to have at least eight to ten years of experience in their field and possess strong characteristics of ethical behavior, patience, and propensity for impartiality.¹¹⁸

Parties can advise the AAA as to their preferred method of selection.¹¹⁹ If such request is not made, a list of ten or twenty arbitrators is sent to the parties, who must strike the names of those

¹¹² See Steve Andersen, *Understanding Common Myths About The AAA And International Arbitration*, 21 INT'L. LITIG. Q. 22 (2005) ("As previously mentioned, the ICDR has experienced phenomenal growth in case numbers over the past few years. In 2003, ICDR cases involved participants from all over the world. Parties from European nations filed most frequently, aside from those from North America. One of every six cases involved a party from Latin America. Reacting to our large international caseload, some have inquired about our definition of an international case. The ICDR's definition of an international case includes the definition contained within Article 1 of the UNCITRAL (United Nations Commission on International Trade Law) Model Law. If the parties to an arbitration agreement are from different countries, the arbitration is international. If there is any place different from another country where the subject matter is to be performed or that the subject matter is closely connected to, or if the place of arbitration is from another country, it will be considered international. The ICDR's administrative facilities are separate from the AAA's domestic operations. Many institutions don't offer separate facilities, definitions or staff to distinguish their domestic caseloads from their international caseloads. By both definition and practice the ICDR administers international commercial arbitration and mediation cases.").

¹¹³ AMERICAN ARBITRATION ASS'N, *supra* note 105.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ AMERICAN ARBITRATION ASS'N, *supra* note 105.

arbitrators they think would be in conflict with resolving the dispute.¹²⁰ The parties will then rank the remaining names in the order they prefer.¹²¹ The list is then sent back to the AAA, which will match the lists and select the arbitrators to serve on the panel for that dispute.¹²² If the parties cannot agree, the AAA will make an administrative appointment. However, the AAA may not appoint an arbitrator that has been stricken by one or both parties.¹²³

Procedural Rules and Treatment of Evidence. The AAA's case manager serves as the bridge between the parties and the arbitrators. In fact, the case manager conducts all administrative procedures to ensure the complete independence of the arbitrators.¹²⁴ This procedure avoids the risk that one party may influence one or more arbitrators at the expense of the other party. As such, the first contact that will occur between the parties and the arbitrators will be at the pre-arbitration hearing.¹²⁵

Since arbitration proceedings are not formal court-like hearings, the rules of evidence do not apply, and inadmissible trial evidence will more than likely be admitted in this setting.¹²⁶ In addition, arbitrators autonomously decide the weight attributable to each piece of evidence.¹²⁷ Further, the "burden of proof" is placed on both sides to convince the arbitrators to rule in their favor.¹²⁸ There is no standard of proof that determines whether the panel should rule in favor of one party or the other.¹²⁹

Award and Reasoning. The most important feature is that the arbitration award is binding upon the parties and final.¹³⁰ Arbitrators are not required to provide clarification of the decision for the reason that this would provide the losing party with ideas for ways to try to challenge the award.¹³¹ In case both parties desire to have an

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ LUDWIK KOS-RABCEWICZ-ZUBKOWSKI & PAUL J. DAVIDSON, COMMERCIAL ARBITRATION INSTITUTIONS: AN INTERNATIONAL DIRECTORY AND GUIDE 176-77 (1986).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ KOS-RABCEWICZ-ZUBKOWSKI & DAVIDSON, *supra* note 123.

¹³⁰ AMERICAN ARBITRATION ASS'N, *supra* note 105.

¹³¹ *Id.*

explanation, either may obtain one by submitting a written request to the AAA.¹³²

Emergency Measures of Protection. Article 21 of the AAA Rules provides:

1. At the request of any party, the tribunal may take whatever interim measures it deems necessary, including injunctive relief and measures for the protection or conservation of property.
2. Such interim measures may take the form of an interim award, and the tribunal may require security for costs of such measures . . .
4. The tribunal may in its discretion apportion costs associated with applications for interim relief in any interim award or in the final award.¹³³

These measures are optional; therefore, the parties must have previously agreed on them.¹³⁴ The interested party must file a petition with the AAA, which in turn will appoint an ad interim arbitrator to deal with those measures.¹³⁵ The panel will promptly examine the grounds for granting those measures and will issue an award, which can be modified only on the basis of changed circumstances.¹³⁶ The panel will end its task upon issuance of the emergency measure award.¹³⁷

In any event and at any time, the parties can petition a court to request ad interim measures as provided by article 21(3) of the AAA Rules.¹³⁸ Article 21 (3) states that "a request for interim measures

¹³² *Id.*

¹³³ Marchac, *supra* note 66, at 126.

¹³⁴ AMERICAN ARBITRATION ASS'N, *supra* note 105.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Marchac, *supra* note 66 at 134- 35 ("Under the four sets of rules, a party may request a measure from the competent court at the place of arbitration, but also from any other court, in particular if the property in dispute is located in the hands of third parties in another jurisdiction. The ICC, AAA and UNCITRAL Rules clearly stress that recourse to local courts or interim measures is not deemed to be an infringement of the agreement to arbitrate or a waiver of the right to arbitrate. The parties may apply at any time to local courts for interim measures. The AAA and UNCITRAL Rules set no conditions, whereas under the ICC Rules, parties may only apply to local courts in 'appropriate circumstances,' before or after the file has been transmitted to the arbitral tribunal.").

addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate."¹³⁹

Confidentiality. The requisite of confidentiality should be mentioned despite its similarity to ones provided by other major international arbitral bodies. Article 27.4 (2003) states that "[u]nless otherwise agreed by the parties, the administrator may publish or otherwise make publicly available selected awards, decisions and rulings that have been edited to conceal the names of the parties and other identifying details or that have been made publicly available in the course of enforcement or otherwise."¹⁴⁰ This means that an award will not be disclosed unless the parties have previously agreed upon it. However, the rules do not "address the parties' duty of confidentiality."¹⁴¹ Therefore, unless the parties have agreed otherwise, either one of them may publish an award.

C. London Court of International Arbitration (LCIA)

The LCIA was founded in 1892 and is located in London.¹⁴² It is considered one of the most prominent venues for international insurance and maritime dispute resolutions.¹⁴³

Features of LCIA Arbitration

The LCIA arbitration rules represent a perfect combination of civil and common law rules, which makes it highly desirable to the parties.¹⁴⁴ In fact, the LCIA lists the following favorable features:

- maximum flexibility for parties and tribunals to agree on procedural matters
- speed and efficiency in the appointment of arbitrators, including expedited procedures
- means of reducing delays and counteracting delaying tactics
- tribunals' power to decide on their own jurisdiction
- a range of interim and conservatory measures

¹³⁹ *Id.*

¹⁴⁰ Buys, *supra* note 101, at 128.

¹⁴¹ *Id.*

¹⁴² THE LONDON COURT OF INTERNATIONAL ARBITRATION, THE LCIA DISPUTE RESOLUTION SERVICES (2005), available at <http://www.lcia-arbitration.com/>.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

- tribunals' power to order security for claims and for costs
- special powers for joinder of third parties
- fast-track option
- waiver of right of appeal
- costs computed without regard to the amounts in dispute
- staged deposits – parties are not required to pay for the whole arbitration in advance ¹⁴⁵

Flexibility of Procedures and Freedom of Choice. Parties are free to choose what law should apply to their dispute, the venue where the arbitration will take place, the language that will be used during the arbitration, and the procedural rules that will apply.¹⁴⁶ Three types of arbitration procedures are available: the institutional rules like the LCIA's, the stand-alone procedures like the UNCITRAL Rules,¹⁴⁷ or the ad hoc rules chosen by the parties.¹⁴⁸

If the parties agree to apply the LCIA Rules, they can also decide in which forum they want the arbitration to take place.¹⁴⁹ In fact, the parties can decide to arbitrate their disputes according to the LCIA Rules in any place they choose.¹⁵⁰ London will be considered a default venue when the parties fail to come to an agreement.¹⁵¹

The LCIA does not oblige parties to use its list of names; therefore, the parties can decide to appoint their arbitrators by using the LCIA's database or by nominating arbitrators whose names are not included on that list.¹⁵² Parties can either agree beforehand on how to nominate their arbitrators in their contract or may agree subsequently whenever a dispute arises.¹⁵³ Usually each side nominates one arbitrator, and the third arbitrator will be appointed through agreement of the parties or by the LCIA.¹⁵⁴ It is important to note that although the parties may nominate their own arbitrator, this does not mean that

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, available at <http://uncitral.org/pdf/English/texts/arbitration/arb-rules/arb-rules.pdf>.

¹⁴⁸ LONDON COURT OF INTERNATIONAL ARBITRATION, *supra* note 142.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ LONDON COURT OF INTERNATIONAL ARBITRATION, ARBITRATION AND MEDIATION—THE BASICS (2005) at <http://www.lcia-arbitration.com>.

the arbitrators are representatives of the party appointing them.¹⁵⁵ Arbitrators must remain independent and should not be subjected to any duty of loyalty to the parties.¹⁵⁶

The parties can also decide to have the UNCITRAL Arbitration Rules applied to the resolution of their disputes under the LCIA's management and administration.¹⁵⁷ There is no obligation to use the LCIA to administer the arbitration under the UNCITRAL Rules; however, it is proven that parties prefer having an institution administer their dispute.¹⁵⁸ Although the UNCITRAL Arbitration Rules may be used in arbitrations not administered by an institution, many parties opting for the UNCITRAL Rules prefer to have a professional institution administer the proceedings.¹⁵⁹ Accordingly, the LCIA frequently undertakes this role.¹⁶⁰

Enforcement of Arbitration Awards. The arbitration awards can be enforced under the New York Convention.¹⁶¹ However, the parties should choose one of the contracting states as a forum for the arbitration in order to make sure that the award will be enforced without particular problems. In addition, it would be advisable to arbitrate in a contracting state where the parties have assets. Indeed, it is easier to have an award recognized and enforced in the same country where the party holds assets and where the arbitration took place.

Enforcement in other countries remains doubtful. If they are not signatories of the Convention or they do not have a bilateral treaty with the country where the LCIA arbitration took place, it will be significantly more difficult to enforce that award.

Privacy and Confidentiality. There are two articles that deal with privacy and confidentiality. Article 19 states that "all meetings and hearings shall be private unless the parties agree and the Tribunal directs otherwise"¹⁶² and Article 30 establishes, "a presumption of confidentiality for both parties and arbitrators with respect to any documents or other evidence used in the proceedings and with respect to the award."¹⁶³

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ LONDON COURT OF INTERNATIONAL ARBITRATION, *supra* note 142.

¹⁶⁰ *Id.*

¹⁶¹ The New York Convention, *supra* note 19.

¹⁶² Buys, *supra* note 101, at 126.

¹⁶³ *Id.* at 126-27.

The primary confidentiality provisions are contained in Articles 30.1, 30.2 and 30.3. Article 30.1 provides:

Unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards in their arbitration, together with all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain—save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority.¹⁶⁴

Article 30.2 states that the deliberations are confidential as to the members,¹⁶⁵ while Article 30.3 provides that "[t]he LCIA Tribunal does not publish any award or any part of an award without the prior written consent of all parties and the Arbitral Tribunal."¹⁶⁶ This contrasts with the ICC's policy "which does publish its decisions, albeit with identifying information deleted."¹⁶⁷

Ad interim and Conservatory Measures. Article 25 of the LCIA Rules sets forth the interim and conservatory measures:

The Arbitral Tribunal shall have the power, unless otherwise agreed by the parties in writing, on the application of any party:

(a) to order any respondent party to a claim or counterclaim to provide security for all or part of the amount in dispute, by a way of deposit or bank guarantee or any other manner and upon such terms as the Arbitral Tribunal considers appropriate. Such terms may include the provision by the claiming or counterclaiming party of a cross-indemnity, itself secured in such manner as the

¹⁶⁴ London Court of International Arbitration Rules, art. 30.1, *available at* <http://www.lcia-arbitration.com/> [hereinafter LCIA Rules].

¹⁶⁵ *See id.*, at art. 30.2; *see also* Alexis C. Brown, *Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, 16 AM. U. INT'L L. REV. 969, 994 (2001).

¹⁶⁶ LCIA Rules, *supra* note 164, at art. 30.3; *see also* Brown, *supra* note 165.

¹⁶⁷ JEFFREY W. SARLES, SOLVING THE ARBITRAL CONFIDENTIALITY CONUNDRUM IN INTERNATIONAL ARBITRATION 5 n.26 (2005), *available at* <http://www.mayerbrownrowe.com/publications/article.asp?id=1006&nid=6>.

Arbitral Tribunal considers appropriate, for any costs or losses incurred by such respondent in providing security. The amount of any losses payable under such cross-indemnity may be determined by the Arbitral Tribunal in one or more awards;

(b) to order the preservation, storage, sale or other disposal of any property or thing under the control of any party and relating to the subject matter of the arbitration; and

(c) to order on a provisional basis, subject to final determination in an award, any relief which the Arbitral Tribunal would have power to grant in an award, including a provisional order for the payment of money or the disposition of property as between any parties.¹⁶⁸

The LCIA Rules grant broad powers to the arbitrators by giving the arbitrators the discretion to secure the amount in dispute "in any manner the Arbitral Tribunal considers appropriate."¹⁶⁹ What can be secured by the arbitrators is a broad category and includes "the preservation, storage, sale or other disposal of any property or thing under the control of any party."¹⁷⁰ The only limitation imposed by the LCIA Rules is that the security measures have to be related to "the subject matter of the arbitration."¹⁷¹

However, the tribunal cannot order interim measures¹⁷² before it is constituted. This limitation can pose a potential problem since it may

¹⁶⁸ LCIA Rules, *supra* note 164, at art. 25; *see also* Marchac, *supra* note 66, at 127.

¹⁶⁹ Marchac, *supra* note 66, at 129.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*; *see also* William Wang, Note: *International Arbitration: The Need for Uniform Interim Measures of Relief*, 28 BROOK. J. INT'L L. 1059, 1077 (2003) ("[i]n LCIA arbitration, the arbitrator can order the preservation, storage, or sale or other disposal of any property or thing under the control of any of the parties. In addition, the parties in LCIA arbitration are free to request pre-award conservatory measures from a competent public tribunal. The LCIA Rules grant arbitrators authority to order a party to provide 'security for legal or other costs' and 'upon such terms as the Arbitral Tribunal considers appropriate,' including the provision of a cross-indemnity. Arbitrators may order sanctions against a party that fails to comply with an order to provide security, by staying or dismissing that party's claims or counterclaims in an award. Another provision indicates that the arbitral tribunal has exclusive jurisdiction to order security for legal and other costs.").

¹⁷² *See* Richard Allan Horning, *Report: Interim Measures of Protection; Security for Claims and Costs; and Commentary on the WIPO Emergency*

take several months before the panel will be elected. The only solution would be to request an expedited formation of the arbitral tribunal.¹⁷³ Unfortunately, an average of sixteen weeks usually elapses between the request and the actual constitution of the panel.¹⁷⁴

Rules of Evidence and Testimony. The LCIA Rules provide that "unless the parties agree otherwise, the Tribunal shall have the power 'to decide whether or not to apply any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material tendered by a party on any matter of fact or expert opinion.'"¹⁷⁵

This flexibility can also be seen in the treatment of witnesses. For instance, the LCIA Rules provide that anyone can be heard as a witness during an arbitration proceeding regardless of whether the witness is a party in the proceeding or is related to the parties in any way.¹⁷⁶

Administered Arbitration. Parties are free to adopt LCIA Rules or they may use good stand-alone procedures like the UNCITRAL Rules.¹⁷⁷ The LCIA has given a list of reasons why parties should choose an administered arbitration governed by their rules versus others.¹⁷⁸ For instance, if the parties agree on an ad hoc arbitration, drafting the clauses related to the arbitration can be a difficult task due to the complexity of the subject matter and its administration.¹⁷⁹ Therefore, it is better for the parties to provide for a provision in their contract incorporating the entire LCIA Rules.¹⁸⁰ In this way, the parties have the advantage of including a comprehensive institutional set of rules without going through the hurdles of drafting rules that may not be effective in the long-term or that may raise problems the parties did

Relief Rules (in Toto): Article 46, 9 AM. REV. INT'L ARB. 155, 160 (1998) ("[u]nder the 1985 LCIA Rules the arbitration tribunal had the exclusive power to order 'the posting of security for costs, order disproportionate interim payments for the costs of arbitration, require the preservation, storage or sale of property, and compel the inspection and production of property and documents.'" (footnotes omitted)).

¹⁷³ Marchac, *supra* note 66, at 135-36.

¹⁷⁴ Toby Landau, *Composition and Establishment of the Tribunal*, 9 AM. REV. INT'L ARB. 45, 46-47 (1998).

¹⁷⁵ Kathleen Paisley, *Commencement of the Arbitration and Conduct of the Arbitration: Articles 6 to 13; Articles 37 and 38; Articles 41 to 45; Articles 47 to 51; Articles 53 to 58*, 9 AM. REV. INT'L ARB. 107, 136 (1998) (referring to LCIA Rules, art. 22).

¹⁷⁶ *Id.* at 147.

¹⁷⁷ LONDON COURT OF INTERNATIONAL ARBITRATION, *supra* note 142.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

not foresee.¹⁸¹ Indeed, this institutional set of rules usually encompasses the fundamental rules avoiding any need of recourse to the Courts.¹⁸²

Furthermore, choosing to have an administered arbitration has the advantage of reducing the risk of non-enforcement of the award. Courts typically have greater respect for administered arbitration rather than ad hoc arbitration.¹⁸³

Finally, the LCIA will ensure that the proceedings are as expeditious as possible. In general, the LCIA will not interfere with the dispute resolution; conversely, it will offer assistance to the parties and the arbitrators in case of need.¹⁸⁴ The LCIA tends to intervene less often than other international tribunals, such as the ICC.¹⁸⁵

D. Arbitration Institute of the Stockholm Chamber of Commerce (SCC)

The SCC was established in 1917 in Stockholm, Sweden and, "is a separate entity within the Stockholm Chamber of Commerce."¹⁸⁶ The main purpose behind its creation was to establish an international commercial arbitral tribunal that would function as a bridge between companies from the East and companies from the West.¹⁸⁷ It became operative in the 1970s when it was used by the United States and Russia as a forum to arbitrate their trade disputes.¹⁸⁸

Today the SCC has been recognized as one of the best arbitration venues in the world due to its rules and the fact that it is still used as a bridge between eastern and western businesses.¹⁸⁹ Due to this particular feature, the SCC has been used widely by forty countries.¹⁹⁰

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ BERNARDINI, *supra* note 10, at 125.

¹⁸⁶ Arbitration Institute of the Stockholm Chamber of Commerce, The SCC Institute, <http://www.sccinstitute.com/uk/About/> (last visited on Mar. 10, 2006) [hereinafter SCC Institute].

¹⁸⁷ Ulf Franke, *Introduction to Arbitration* (2005), available at http://www.sccinstitute.com/_upload/shared_files/artikelarkiv/introduction_to_arbitration.pdf.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*; see also Deborah L. Holland, Comment, *Drafting a Dispute Resolution Provision in International Commercial Contracts*, 7 TULSA J. COMP. & INT'L L. 451, 464 (2000).

The SCC is still very active in resolving disputes between companies from different countries. The simplicity of its rules and their similarities to the UNCITRAL rules make the SCC a desirable venue for commercial arbitration.¹⁹¹ In addition to its own set of rules, the SCC provides ad hoc Rules for Expedited Arbitrations, Insurance Arbitration Rules, Procedures, and Services under the UNCITRAL Arbitration Rules and Mediation Rules.¹⁹²

Main Features of the SCC Arbitration

Election of Arbitrators. Like other international arbitration fora, the SCC leaves the parties free to choose their own arbitrators.¹⁹³ Usually the panel consists of three members:¹⁹⁴ each party nominates one arbitrator, and the SCC will appoint a third only when the parties can not agree on a third arbitrator.¹⁹⁵ The SCC does not have a list of arbitrators; therefore, the parties can nominate any arbitrator they desire so long as is the arbitrator is impartial and independent.¹⁹⁶

If a party feels that one or more arbitrators are not independent, it can challenge them pursuant to Article 18 of the SCC Rules, which prescribes that such a challenge should be brought within fifteen days from the discovery of the alleged conflict.¹⁹⁷ If the party fails to meet this deadline, the Tribunal will presume the party waived its right to challenge the arbitrators.¹⁹⁸ Usual reasons for such a challenge are, *inter alia*:

co-operation difficulties; the arbitrator is from the same geographic area or has the same nationality as a party; the arbitrator has been the arbitrator in another case where one of the parties was involved; a person associated with the arbitrator may have expected a benefit as a result of the

¹⁹¹ Franke, *supra* note 187.

¹⁹² SCC Institute, *supra* note 186.

¹⁹³ Arbitration Institute of the Stockholm Chamber of Commerce, The SCC Procedure, http://www.sccinstitute.com/uk/About/The_SCC_Procedure/ (last visited Mar. 7, 2006) [hereinafter SCC Procedure].

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ Arbitration Institute of the Stockholm Chamber of Commerce, SCC Rules, art. 18, available at http://www.sccinstitute.com/_upload/shared_files/regler/new_scc_rules_070101.pdf (last visited Mar. 10, 2006) [hereinafter SCC Rules].

¹⁹⁸ *Id.*

outcome of the dispute; or the arbitrator may have worked with a colleague of the party's counsel.¹⁹⁹

Freedom as to the Location of the Arbitration. As previously stated, parties can, as a general rule, decide which location for arbitration, which laws are applicable to their case, and which language should be used.²⁰⁰ It follows that the will of the parties controls.

¹⁹⁹ See Marie Öhrström, *Decisions By The SCC Institute Regarding Challenge of Arbitrators*, 35, 36 (2005) available at http://www.sccinstitute.com/_upload/shared_files/artikelarkiv/marie_sar_2002_1.pdf ("[a]ccording to the Swedish Arbitration Act of 1999 (the Act), any person who possesses full legal capacity in regard to his actions and his property may act as an arbitrator.

Furthermore, the Act states that an arbitrator shall be impartial. If a party so requests, an arbitrator shall be discharged if there exists any circumstance which may diminish confidence in the arbitrator's impartiality. Such a circumstance shall always be deemed to exist:

- where the arbitrator or a person closely associated to him is a party, or otherwise may expect benefit or detriment worth attention, as a result of the outcome of the dispute;
- where the arbitrator or a person closely associated to him is the director of a company or any other association which is a party, or otherwise represents a party or any other person who may expect benefit or detriment worth attention as a result of the outcome of the dispute;
- where the arbitrator has taken a position in the dispute, as an expert or otherwise, or has assisted a party in the preparation or conduct of his case in the dispute; or
- where the arbitrator has received or demanded compensation in violation of section 39, second paragraph.

It is important to note that the above-quoted section is not exhaustive, but merely illustrative of when an arbitrator is disqualified. Thus, an arbitrator may be considered not impartial because of circumstances other than the ones specified. The section, however, serves as a vital guideline with respect to different situations that may give rise to justifiable doubts.").

²⁰⁰ See, e.g., Holland, *supra* note 190, at 471-72 ("[a]t first glance, choosing a language may not seem important. However, language differences can cause problems in selecting an arbitrator, in electing counsel, in communication between the parties and/or the arbitrator, or by causing considerable translation costs. Therefore, if the parties speak differing languages, the arbitration provision should specify the language of the proceedings. Even if the parties share a common language, it would still be advisable to include a language clause since the forum could be in a country with a differing language. Such a clause also helps to ensure the selection of a capable arbitrator. If the parties do not select a language, arbitral institution rules usually provide for the application of a language. The ICC, SCC and

However, certain Swedish laws that the parties do not intend and cannot exclude may apply to the arbitration.²⁰¹ For example, if the parties have not agreed which law should apply to their case, the SCC arbitrators must apply the Swedish rules on conflicts of law.²⁰² Also, "if there is a dispute over the enforceability of a contract that includes an arbitration provision, the challenge may be handled by a Swedish national court as well as the arbitrators."²⁰³ Indeed, Swedish courts can hear a number of pre-arbitration procedural questions with the consequence that "Swedish national courts could potentially play a larger role in arbitrations conducted within its borders."²⁰⁴

Enforcement of International Awards in Sweden. The Supreme Court of Sweden has adopted a policy of fully recognizing and enforcing foreign awards based on Section 54 of the Swedish Arbitration Act, which proclaims that an international award should be honored unless the losing party proves the award should not be enforced.²⁰⁵ The Supreme Court found its authority in the new Swedish Arbitration Act, which was revised in 1999 to fit the New York Convention.²⁰⁶ The two texts are substantially similar and "[i]n the new 1999 Act, the grounds for refusal of recognition and enforcement in Sections 54 and 55 are practically the same as those enumerated in Article V of the New York Convention."²⁰⁷ Also, "[t]he grounds for refusing recognition and enforcement [of an international award] are closely modelled[sic] on the New York Convention [and] are applied by the Court of Appeal[sic] and the Supreme Court in a rather restrictive manner which is in line with the general arbitration-friendly line followed by Swedish courts."²⁰⁸ This is something that parties should keep in mind since it is usually difficult to enforce awards in foreign countries.

UNCITRAL Rules provide for the arbitrator to choose the language, while the AAA and LCIA stipulate that the language of the arbitration agreement will be used in the proceedings.").

²⁰¹ Le Sage, *supra* note 6, at 20.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ HANS DANIELIUS, THE APPLICATION OF THE NEW YORK CONVENTION IN SWEDISH TRIBUNALS 1, 2 (2005), *available at* http://www.sccinstitute.com/_upload/shared_files/artikelarkiv/danielius_new_york_conv_eng.pdf.

²⁰⁶ *Id.* at 1.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 2.

E. China International Economic and Trade Arbitration Commission (CIETAC)

The CIETAC is headquartered in Beijing, China.²⁰⁹ It is one of the two institutions that have jurisdiction over international disputes in China.²¹⁰ The other institution is the China Maritime Arbitration Commission (CMAC).²¹¹ The difference between the two arbitral institutions is that the CIETAC handles trade and investment disputes whereas the CMAC handles maritime disputes.²¹²

The CIETAC's website indicates that it carries one of the heaviest caseloads in the world.²¹³ The globalization of manufacturing and employment markets has augmented the need for alternative dispute resolutions. In order to compete, China needed to assure that it was able to provide a fair venue to settle any dispute.²¹⁴ Accordingly, despite some difficulties that still persist, the CIETAC has improved tremendously over the years, and its caseload has increased exponentially.²¹⁵

Main Features of the CIETAC Arbitration

Types of International Arbitration Awards. It is interesting to note that Chinese law recognizes three types of arbitral awards: domestic awards, awards rendered by the CIETAC or the CMAC (also called awards with a "foreign element"), and foreign or international awards rendered outside the territory of China.²¹⁶

²⁰⁹ China International Economic and Trade Arbitration Commission [hereinafter CIETAC], Introduction, http://www.cietac.org.cn/english/introduction/intro_1.htm (last visited on Mar. 7, 2006).

²¹⁰ See Xiaowen Qiu, Note and Comment, *Enforcing Arbitral Awards Involving Foreign Parties: A Comparison of the United States and China*, 11 AM. REV. INT'L ARB. 607, 607-08 (2000).

²¹¹ *Id.*

²¹² *Id.*

²¹³ CIETAC, *supra* note 209.

²¹⁴ See Mark S. Hamilton, *Sailing in a Sea of Obscurity: The Growing Importance of China's Maritime Arbitration Commission*, 3 ASIAN-PAC. L. & POL'Y J. 10 (2002); see also CIETAC, *supra* note 209.

²¹⁵ Hamilton, *supra* note 214.

²¹⁶ See Qiu, *supra* note 210, at 608. See also Randall Preenboom, *Seek Truth From Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC*, 49 AM. J. COMP. L. 249, 327 n.9 (2001) ("[t]here are three main types of arbitral awards: foreign, foreign-related, and domestic. Foreign arbitral awards refer to any awards made outside of China. Foreign awards include both Convention awards and non-Convention awards. Convention awards are

Arbitration has a "foreign element" when one or both parties are foreign companies.²¹⁷ On the other hand, international arbitral awards are those that are rendered outside the territory of China.²¹⁸ This distinction carries with it different treatment of the various awards with respect to recognition and enforcement.²¹⁹ Therefore, understanding this distinction is important to understanding fully the issues related to these awards.

Supervision of the Case. CIETAC offers other services, such as close supervision of cases, the possibility of combining arbitration, and conciliation at a fairly low cost.²²⁰ The Commission supervises the awards to ensure the impartiality of the proceedings, as well as the panel's independence.²²¹ The combination of arbitration and conciliation not only is a peculiarity of the Chinese system, but it also improves the chances of settlement before arbitration.²²²

Choice of Applicable Law. The CIETAC also offers the alternative to choose between the application of the CIETAC Rules or the rules of another arbitral institution.²²³ It is interesting to note how this alternative has evolved over the years. Historically, Article 7 of the CIETAC Rules provided that once the parties chose CIETAC as their arbitral venue, they implicitly agreed that the CIETAC Rules applied.²²⁴ Reform was necessary as this provision repelled arbitration proceedings with foreign elements.²²⁵ The new version of Article 7 provides that *unless the parties have otherwise agreed*, the CIETAC Rules will apply.²²⁶ This revision has not eliminated all potential problems related to departure from the CIETAC Rules. When drafting their arbitration agreement, the parties should be aware that if they

enforceable under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ... [New York Convention]. Non-Convention awards refer to foreign awards that are not enforceable under the Convention. Foreign-related awards are awards by CIETAC, ... CMAC, or local arbitration commissions that involve a foreign element. Domestic awards are awards by local arbitration commissions that do not involve a foreign element.").

²¹⁷ Qiu, *supra* note 210, at 608.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ CIETAC, *supra* note 209.

²²¹ *Id.*

²²² *Id.*

²²³ See Sam Blay, *Party Autonomy in Chinese International Arbitration: A Comment on Recent Developments*, 8 AM. REV. INT'L ARB. 331, 335 (1997).

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

choose procedural rules from another arbitral institution, the agreement will have to be submitted for the approval of the CIETAC itself.²²⁷

In addition, according to Chinese law, CIETAC's approval is required to ensure that the arbitration agreement is not void under Chinese law.²²⁸ For instance, to be valid an arbitration agreement must bear the name of the arbitral tribunal where the parties wish to arbitrate and list the matters that will be subject to arbitration.²²⁹ Both parties must have the legal capacity to make such a decision and sign the arbitration agreement—all of which must be in accordance with Chinese law.²³⁰ This approval requirement is not distinctive only to China and is widely accepted and adopted by other international arbitration tribunals.²³¹ Thus, parties are free to choose the rules they prefer, but this freedom is limited by the CIETAC's approval.

Despite this downside, the CIETAC has tried to attract more businesses by improving its independence. Presently, the Commission holds a worldwide reputation for independence.²³² Conversely, domestic courts hold their proceedings only in Chinese, and their rules are not as "fair" to foreign investors as the CIETAC's rules.²³³ In order to ensure that cases are handled promptly, the CIETAC's rules require arbitral awards be paid within nine months for the foreign-related arbitration cases and six months for domestic cases.²³⁴

Problems with the Enforcement of Arbitral Awards. China has ratified the New York Convention;²³⁵ therefore, as a general rule any arbitral award rendered in a signatory country shall be enforced in China.²³⁶ Conversely, any arbitral award rendered by CIETAC will be enforced in other signatory countries.²³⁷

China allows *only* institutional arbitration,²³⁸ and like other arbitral institutions, the CIETAC has no authority to enforce arbitral

²²⁷ *Id.* at 337.

²²⁸ *Id.*

²²⁹ CIETAC, The Arbitration Commission, *supra* note 209.

²³⁰ *Id.*

²³¹ Blay, *supra* note 223, at 336.

²³² CIETAC, The Arbitration Commission, *supra* note 209.

²³³ See Hamilton, *supra* note 214, at 12-13. See also Blay, *supra* note 223.

²³⁴ CIETAC, *supra* note 209, at Ordinary Procedure.

²³⁵ CIETAC, *supra* note 209, at Enforcement of an Award.

²³⁶ See The New York Convention, *supra* note 19, at art. 2.

²³⁷ *Id.*

²³⁸ See Hamilton, *supra* note 214, at 12-13.

awards.²³⁹ Arbitral awards can only be enforced in situations where Article 195 of the Chinese Civil Code applies:

When one party concerned fails to implement the ruling made by the PRC foreign affairs arbitration organ, the other party concerned may request that the ruling be carried out in accordance with this law by the Intermediate People's Tribunal of the place where the arbitration organ is located, or where the property is located.²⁴⁰

Therefore, in order to enforce an arbitral agreement, the parties must petition the courts.²⁴¹ This procedural rule was created in 1982 after the ratification of the New York Convention²⁴² and has seemed to resolve the enforcement issue.²⁴³ However, even when Article 195 applies, the enforcement of the arbitral award is "problematic."²⁴⁴ For example, in a famous international incident, the Shanghai Intermediate Tribunal decided not to enforce an SCC arbitral award in China.²⁴⁵ Only the intervention of the Supreme People's Court put an end to the dispute. However from that point on, the enforcement of arbitral awards has been deferred to the strict scrutiny of the Supreme People's Court.²⁴⁶

²³⁹ *Id.*

²⁴⁰ CODE OF CIVIL PROCEDURE OF THE PEOPLE'S REPUBLIC OF CHINA [CPC] art. 195 (adopted by the Fourth Session of the Standing Committee of the Seventh National People's Congress, Apr. 9, 1991).

²⁴¹ That is, the Chinese judicial courts.

²⁴² See Qiu, *supra* note 210, at 609-611.

²⁴³ CIETAC, Works of CIETAC, *available at*, http://www.cietac.org.cn/english/introduction/intro_2.htm (last visited on Mar. 7, 2006) ("[h]owever, it is true that a few cases have been refused enforcement due to the procedural questions existed and it is equally true that a small number of local People's Court have improperly refused enforcement of the arbitral awards.").

²⁴⁴ See Hamilton, *supra* note 214; see also Randall Peerenboom, *The Evolving Regulatory Framework for Enforcement of Arbitral Awards in the PRC*, *available at* <http://www.hawaii.edu/aplpj/pdfs/12-peerenboom.pdf> (last visited on November 5, 2006) ("China's record with respect to the enforcement of arbitral awards leaves much to be desired. Recognizing that the failure to enforce awards has damaged its image as an attractive destination for foreign investment and hurt domestic enterprises as well, China has attempted to legislate its way out of trouble. In recent years, China's law-making bodies and the Supreme People's Tribunal (SPC) have unleashed a flurry of laws, regulations, notices, and interpretations addressing enforcement issues more generally and the enforcement of arbitral awards specifically.").

²⁴⁵ Hamilton, *supra* note 214.

²⁴⁶ *Id.*

Revpower, a U.S. company in the business of producing batteries, applied for arbitration with the Arbitration Institute of the Stockholm Chamber of Commerce, which awarded Revpower \$9 million against a Shanghai factory. It took six years for Revpower to get a Shanghai court to accept its application for enforcement.²⁴⁷ In that case, the court held the award unenforceable because the losing party did not hold any assets in China.²⁴⁸ After the winning party's attorney enlisted the support of a Chinese political party, the court "reconsidered" the question, and Revpower was able to show the court that the shareholders of the company to which the losing party transferred all its assets were the same as that of the losing party's company.²⁴⁹ Only after this reconsideration and this finding did the court enforce the award.²⁵⁰

Usually Chinese courts use the public policy exception to deny enforcement. This exception can be found in Article 260 of the Act which provides:

six conditions under which Chinese tribunals can refuse to enforce an award: (1) there is no agreement; (2) the arbitration is beyond the scope of the agreement or the arbitration institution has no jurisdiction; (3) the composition of the arbitral body or the arbitration procedures violate statutory procedure; (4) evidence is concealed resulting in an unfair hearing; (5) an arbitrator seeks or accepts a bribe, misbehaves, or bends the law; or (6) the award violates public policy.²⁵¹

In addition to these rules, many awards are not enforced due to the notorious antagonism between the CIETAC and the national courts.²⁵² One likely reason for such animosity is that for years members of the CIETAC rehashed the superiority of their arbitral tribunal over the national courts.²⁵³ They denounced the corruption and

²⁴⁷ See Hamilton, *supra* note 214, at 10 n.105 (citing Xian Chu Zhang, *Chinese Law: The Agreement between Mainland China and the Hong Kong SAR on Mutual Enforcement of Arbitral Awards: Problems and Prospects*, HONG KONG L.J. 463, 468 (1999)).

²⁴⁸ Preenboom, *supra* note 216, at 286-87.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ See Hamilton, *supra* note 214, at 10 n.103 (quoting Jane L. Volz & Roger S. Haydock, *Foreign Arbitral Awards: Enforcing the Award Against the Recalcitrant Loser*, 21 WM. MITCHELL L. REV. 867, at 879-80 (1996)).

²⁵² Preenboom, *supra* note 216, at 258-59.

²⁵³ *Id.*

protectionism typical of national courts, as well as the judges' incompetence in solving transnational disputes.²⁵⁴ Therefore, it is no surprise that judges and arbitrators are not used to cooperating with each other.

Confidentiality. Chinese judges, lawyers, and arbitrators are bound by strict confidentiality requirements. For example, Article 33 of the CIETAC Rules states that "[h]earings shall be held in camera."²⁵⁵ Only the enforcement proceedings are open to the public. However, details of settlements or proposals for settlements are usually not released to the public.²⁵⁶ Article 33 of the Chinese arbitration rules provides:

When a case is heard in camera, the parties, their representatives, witnesses, interpreters, arbitrators, experts consulted by the arbitral tribunal and appraisers appointed by the arbitration tribunal and the relevant staff-members of the Secretariat of the CIETAC shall not disclose to any outsiders the substantive or procedural matters of the case.²⁵⁷

This protection of confidentiality is strong, and may provide an incentive to arbitrate with CIETAC.²⁵⁸

Ad interim and Conservation Measures. Pursuant to the CIETAC Rules, arbitrators can issue ad interim and conservation measures aimed at the preservation of property and evidence relevant to the cases.²⁵⁹ The petition for such measures should be presented to the Commission for a first review in accordance with the law, but the actual decision to seize the property is remitted to the Chinese courts.²⁶⁰ The usual requirements the courts look at to determine whether the measure should be taken are: (1) whether the property belongs to or is registered in the name of the party against which the preservative measure is sought, (2) whether the parties involved in the protective measures are the same as those involved in the arbitration,

²⁵⁴ *Id.*

²⁵⁵ CIETAC Arbitration Rules, art. 33, available at <http://cietac.org.cn/English/rules/rules.htm>.

²⁵⁶ Preenboom, *supra* note 216, at 259.

²⁵⁷ CIETAC Arbitration Rules, *supra* note 255, at art. 33.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

and (3) whether the value of the property in question exceeds the value of the dispute.²⁶¹

The same is true for protective measures as to evidence related to the case. The petition is received by the Commission but the decision comes from the Chinese courts.²⁶²

Again, Chinese courts play a deeper role in the arbitration process than other national courts. It seems that the two systems do not operate independently, or at least, their interaction is reduced to a bare minimum.

In conclusion, the CIETAC's importance is increasing in dispute resolution in the global market. Through revisions of its rules, the CIETAC is striving for broadened independence and reliability, especially regarding the enforcement of arbitral awards. However, it is advisable to be cautious in drafting arbitration agreements, and more weight should be given to the likelihood of success in enforcing an award there.

F. International Center for Settlement of Investment Dispute (ICSID)

The ICSID was established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States in 1966.²⁶³ ICSID is located in Washington D.C. and is closely connected with the World Bank.²⁶⁴ In fact, the World Bank's President is also a member of the ICSID Administrative Council.²⁶⁵ In addition, "[a]ll of ICSID's members are also members of the Bank

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ The Washington Convention, *supra* note 31.

²⁶⁴ See Vincent O. Orlu Nmehielle, *Enforcing Arbitration Awards Under the International Convention for the Settlement of Investment Disputes (ICSID Convention)*, 7 ANN. SURV. INT'L COMP. L. 21 (2001) ("[t]he importance that the international community attaches to this sector of international economic relations has led to the promulgation of the International Convention for the Settlement of Investment Disputes ('ICSID Convention' or 'the Convention') under the aegis of the World Bank, to cover the settlement of investment disputes between investors and host states. The ICSID Convention, in turn, established the International Center for the Settlement of Investment Dispute ('the Center') which implements the provisions of the ICSID Convention.").

[and] [u]nless a government makes a contrary designation, its Governor for the Bank sits ex officio on ICSID's Administrative Council."²⁶⁶

The ICSID was designed to be a center for the resolution of transnational investment disputes that would have the beneficial effect of augmenting foreign investments in countries that ratified the Convention.²⁶⁷ "The key purpose in establishing ICSID was to assure foreign investors of protection under international law from unilateral actions of host countries which could jeopardize their investments . . . [and to assure] a neutral dispute resolution mechanism that shields them from the economic manipulations of developed countries."²⁶⁸ Furthermore, the ICSID was thought to be a "self-contained machinery functioning in total independence from domestic legal systems."²⁶⁹ The drafters' goal was to form an alternative dispute resolution institution promoting the "free flow of investment resources from one country to another."²⁷⁰

Main Features of the ICSID Arbitration

Ad-hoc Arbitration and Special Features. Parties are free to choose whether to arbitrate their dispute at ICSID. However, once they make that choice, they cannot unilaterally withdraw their consent.²⁷¹ Moreover, *all* contracting states are obliged to recognize an ICSID award.²⁷²

The parties can choose whether they want the ICSID Rules applied to their case or whether they want an ad hoc arbitration; however, ordinarily parties tend to choose the UNCITRAL Rules.²⁷³ The parties may also choose the venue of arbitration and the law that

²⁶⁵ ICSID, ABOUT ICSID (2005) available at <http://www.worldbank.org/icsid/about/about.htm>.

²⁶⁶ *Id.*

²⁶⁷ Nmehielle, *supra* note 264, at 23.

²⁶⁸ *Id.* at 23.

²⁶⁹ See Georges R. Delaume, *ICSID Arbitration and The Tribunals*, 77 AM. J. INT'L L. 784, 784 (1983).

²⁷⁰ Nmehielle, *supra* note 264, at 36. See also David R. Sedlak, *ICSID's Resurgence in International Investment Arbitration: Can the Momentum Hold?*, 23 PENN. ST. INT'L L. REV. 147, 148-49 (2004) ("[t]he Convention allowed private investors of States that have signed the Convention to invest freely in foreign States that have also signed the Convention, particularly in developing countries, without the fear of losing the investment due to issues such as sovereign immunity from suit if a dispute were to occur.").

²⁷¹ The Washington Convention, *supra* note 31, at preamble.

²⁷² *Id.*

should apply for the resolution of their dispute.²⁷⁴ If the parties fail to select a governing law, the tribunal will apply the law of the host state, in addition to those international law rules that may be applicable to the specific case.²⁷⁵

Even when the parties choose the ICSID, the tribunal still must make a *prima facie* assessment of its jurisdiction over the case.²⁷⁶ The ICSID will only hear the case if the following three requirements have been met: (1) the dispute arose out of an investment, (2) the parties are a contracting state or a national of another contracting state, and (3) the arbitration agreement is in writing.²⁷⁷

The Convention has never explicitly defined the term "investment," in keeping with its objective of giving more flexibility to the tribunal.²⁷⁸ In fact, "joint ventures . . . capital contributions, loans, 'associations between States and foreign investors, such as profit sharing, service and management contracts, turn-key contracts, international leasing arrangements and agreements for the transfer of know-how and technology'" can all easily be included.²⁷⁹

Certain characteristics are peculiar only to the ICSID and have been addressed to show a certain "Americanization" of this international alternative commercial dispute institution. For example, one of its main features is the possibility of cross-examination by both

²⁷³ Nmechille, *supra* note 264, at 28-29.

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 24; *see also* The Washington Convention, *supra* note 31, at art. 42(1).

²⁷⁶ *Id.* at 26.

²⁷⁷ *Id.* *See also* The Washington Convention, *supra* note 31, at art. 25(1) ("[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.").

²⁷⁸ Sedlak, *supra* note 270, at 156 ("the drafters of the Convention consciously did not define the term investment. In drafting the Convention, there was much debate over whether the limitation to disputes of investments should even exist, let alone how that term should be defined. The chief architect of ICSID, the General Counsel of the World Bank in 1961, actually advised against defining the term investment, seeing any definition as an unnecessary limitation on the scope of potential ICSID authority. However, many of the national delegates wanted such a limitation.").

²⁷⁹ Nmechille, *supra* note 264, at 26 (*quoting* GEORGE DELAUME, LAW AND PRACTICE OF TRANSNATIONAL CONTRACTS 351, 353 (1988)).

parties and the tribunal.²⁸⁰ An additional feature concerns document production. More specifically, either party may petition the tribunal to have certain documents produced, or the tribunal on its own accord can direct either party to produce certain evidence that it deems necessary.²⁸¹ Finally, parties and parties' witnesses have been allowed to testify before the tribunal.²⁸²

Recognition and Enforcement of Arbitral Awards. Article 54(1) of the ICSID Convention reads:

Each contracting State shall *recognize* an award rendered pursuant to this convention as binding and *enforce* the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such award ... as if it were a final judgment of the courts of a constituent state (emphasis added).²⁸³

Examples of controversies that dealt with issues related to the enforcement of ICSID awards can be found in France, where some cases brought before the Court of First Instance made it to the Court of Cassation.²⁸⁴ The seminal case is *SOABI (SEUTIN) v. Senegal*.²⁸⁵ In that case, the winning party wanted to have its ICSID award against the State of Senegal recognized in France.²⁸⁶ The dispute arose out of the termination of an agreement to build low-income housing in Dakar, and the arbitral tribunal found for SOABI, holding that the state of Senegal unreasonably and unilaterally terminated the above-mentioned agreement.²⁸⁷ SOABI brought the recognition issue before the Court of First Instance, which granted the motion.²⁸⁸ The Court of Appeals

²⁸⁰ Susan L. Karamanian, *Overstating the "Americanization" of International Arbitration: Lessons from ICSID*, 19 OHIO ST. J. DISP. RESOL. 5, 25 (2003).

²⁸¹ *Id.* at 25-26.

²⁸² *Id.* at 26.

²⁸³ The Washington Convention, *supra* note 31, at art. 27.

²⁸⁴ The Tribunal of Cassation is "the highest tribunal of ordinary jurisdiction" in France. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al.eds., 18th ed., 2005).

²⁸⁵ France: Court of Cassation Decision in *SOABI v. Senegal* (Recognition and Enforcement of Award in the Context of the ICSID Convention), June 11, 1991, 30 I.L.M. 1167 [hereinafter *SOABI*].

²⁸⁶ See Keith Highet et al., *France—Recognition of ICSID Awards—Sovereign Immunity*, 86 A.J.I.L. 138, 140 (1992).

²⁸⁷ *Id.*

²⁸⁸ *Id.*

reversed the previous Court's decision on the ground that "SOABI had not proven the commercial nature of the Senegalese assets that might be subject to execution following recognition [and such recognition] would violate Senegal's immunity from execution and contravene public policy."²⁸⁹

Criticism followed from this decision on the ground that this ruling clearly conflicted with Article 54 of the ICSID Convention, which as stated above, mandates all contracting states *recognize* an ICSID award and "enforce the pecuniary obligations imposed by that award as if it were a final judgment of a court in the recognizing state."²⁹⁰ On this ground the Court of Cassation reversed the Court of Appeals's decision because the Washington Convention provided a simple and mandatory system for the recognition of its awards binding on contracting states.²⁹¹

Despite a court's decision to recognize an ICSID award, the parties may experience difficulties with enforcement. In the case *Benvenuti & Bonfant Co. v. Government of the People's Republic of Congo*, Benvenuti, an Italian company and winning party, had its award recognized in France.²⁹² However, at the time for enforcement, the French court denied its motion on the ground that "the award creditor sought execution not against the assets of the People's Republic of the Congo but, rather, against those of a bank that was allegedly controlled by the Congolese Government but had a separate legal personality. . . ."²⁹³ The court further held that "under the circumstances, the separate identity of the bank meant that the bank's assets were beyond the reach of Benvenuti & Bonfant and that the attachment should be vacated."²⁹⁴

Other countries that have not entertained the recognition issue still refuse enforcement of ICSID awards on the grounds that their national rules on immunity supersede the award and preclude enforcement.²⁹⁵ This immunity exception is officially recognized by the Convention itself in Article 54(3), which states that "execution of the award shall be governed by the laws concerning the execution of

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 138-39.

²⁹¹ SOABI, *supra* note 285, at 1170.

²⁹² Hight, *supra* note 286, at 141.

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ Nmehielle, *supra* note 264, at 30-31.

judgments in force in the state in whose territories such execution is sought."²⁹⁶

This provision has the unfair consequence that a private party may not be able to recover against a state. This situation clearly constitutes a violation of the international principle of *pacta sunt servanda* (Latin for "pacts must be respected") and defeats the purpose of international conventions on arbitration, in particular the Washington Convention.²⁹⁷ However, despite the fact that such immunity could validly constitute a violation of the Washington Convention, "[t]he principle of restrictive immunity, according to which States are immune from suits in respect of matters which are exercises of its public authority (*acta jure imperii*) but not in respect of commercial transactions which it has entered (*acta jure gestionis*), is generally accepted."²⁹⁸

Contracting parties with such internal provisions have declared, by signing and ratifying the Convention, that they wish to be bound by the decision of such tribunals, but at the same time, they have enacted provisions that allow them to avoid liability.²⁹⁹ This situation risks undermining the benefits of the system, and national courts have the difficult task of finding a way to enforce the ICSID's arbitral awards without setting aside the state's immunity *in toto*.³⁰⁰

To prevent this, the parties can agree, when drafting the arbitration agreement, that the contracting state will waive its immunity.³⁰¹ The likelihood of success will depend on the amount of the investment; the more expensive the investment, the more likely that the state may accept such a provision.³⁰²

An alternative solution is to locate a more "friendly" forum should the winning party try to enforce its award. However, this

²⁹⁶ The Washington Convention, *supra* note 31, at art. 54(3).

²⁹⁷ Nmehille, *supra* note 264, at 35.

²⁹⁸ Sedlak, *supra* note 270, at 166 (quoting JOHN COLLIER & VAUGHAN LOWE, *THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW: INSTITUTIONS AND PROCEDURES* 271 (1999)).

²⁹⁹ Nmehille, *supra* note 264, at 36.

³⁰⁰ *Id.*

³⁰¹ See, e.g., Sedlak, *supra* note 270, at 169 ("[s]imply including a waiver of immunity in a contract, however, does not guarantee that immunity has been waived: waivers of immunity are still subject to local law. Additionally, when consent to ICSID jurisdiction occurs through a BIT, rather than a private contract, States may be unwilling, or unable, to alter any of the conditions of the treaty.").

³⁰² Nmehielle, *supra* note 264, at 40.

solution legitimizes forum shopping. In addition, most contracting states have adopted a regime of absolute immunity.³⁰³ Probably, the best solution would be to amend the Convention and erase the endorsement of such absolute immunity all together.³⁰⁴

Provisional Measures. Rule 39 of the Convention Rules regulates provisional measures. It provides that the parties are allowed to petition the tribunal *during* the proceeding to request any provisional measure that they deem necessary to protect their rights or interests.³⁰⁵ The request must "specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures."³⁰⁶

The same principle applies when the Tribunal adopts provisional measures aimed at preserving the parties' rights and interests.³⁰⁷ The Tribunal, though, may at any time revoke these measures.³⁰⁸ It should be noted that Rule 39 specifies that such provisional measures can be invoked *only during* the proceeding.³⁰⁹ It follows that it may not be possible for the parties to invoke some provisional measures *before* starting the proceeding.

Confidentiality. Rule 32(2) of the ICSID Rules of Procedure for Arbitration Proceedings states that

Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and Officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.³¹⁰

It seems to imply the Tribunal has some discretion over the matter, but only with the parties' approval. In sum, although "the ICSID

³⁰³ *Id.* at 47.

³⁰⁴ *Id.* at 47-48.

³⁰⁵ ICSID, Arbitration Rules, Rule 39, available at <http://worldbank.org/icsid/basicdoc/basicdoc.htm>.

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 39(1).

³¹⁰ *Id.* at 32(2).

Convention prohibits the publication of the awards without the consent of the parties,"³¹¹ there is no general duty of confidentiality.

Conclusion. Despite some disadvantages regarding the enforcement of awards, the ICSID has been widely utilized in the past ten years, leading more states to sign the Convention.³¹² Parties should be aware of the problems in arbitrating in this venue and find solutions to possible hurdles that may arise.

III. HYPOTHETICAL OF BREACH OF CONTRACT AS COMPARISON CHART AMONG THE VARIOUS ARBITRAL TRIBUNALS

This section analyzes how much a party would spend in costs and fees to have a hypothetical breach of contract dispute arbitrated in each of the above mentioned arbitral tribunals. The hypothetical will involve the case of a breach of contract in the amount of U.S. \$50,000.

ICC. The ICC provides a cost-calculating mechanism available online which can be easily used by inserting the parameters specific to the hypothetical.³¹³

- Amount in Dispute: \$ 50,000
- Number of Arbitrators: 3
- Arbitrators' Fees Minimum: \$ 2,500
 - Average: \$ 2,500
 - Maximum: \$ 2,500
- Advance on costs (without arbitrators' expenses)
- Average fees multiplied by 3 arbitrators: \$ 16,500
- Administrative expenses: \$ 2,500
- TOTAL: \$ 19,000

AAA. Neither the AAA nor the ICDR provides guidelines to calculate the costs. They only provide on their website a vague guideline for arbitrators.³¹⁴

LCIA. The LCIA does not provide a cost-calculating mechanism on its website. It only provides a list of fees that may be applicable to

³¹¹ Buys, *supra* note 101, at 133-34.

³¹² Sedlak, *supra* note 270, at 149.

³¹³ ICC, Arbitration Cost Calculator, available at http://www.iccwbo.org/court/english/cost_calculator/cost_calculator.asp (last visited on Mar. 7, 2006).

³¹⁴ American Arbitration Association, available at <http://www.adr.org/> (last visited on Mar. 7, 2006); International Center for Dispute Resolution available at <http://www.adr.org/sp.asp?id=21890> (last visited on Mar. 7, 2006).

the case at bar.³¹⁵ Only the applicable ones were extracted for the purpose of this analysis. Due to the provision of hourly fees, it is not possible to reach a grand total of expenses.

- Registration Fee: £1,500
- Other fees
 - Registrar and his/her deputy: £200 per hour
 - Secretariat: £100 per hour
 - A sum equivalent to 5% of the fees of the Tribunal (excluding expenses) in respect of the LCIA's general overhead.
 - Expenses incurred by the Secretariat in connection with the arbitration (such as postage, telephone, facsimile, travel etc.), and additional arbitration support services, whether provided by the Secretariat from its own resources or otherwise: *at applicable hourly rates or at cost (range of £150 to £350 per hour)*

SCC. The SCC provides the same mechanism offered by the ICC;³¹⁶ therefore, the total costs could be easily calculated. By inserting the information regarding the amount in dispute and the number of arbitrators, the following is the list of costs and the grand total that appears online.

- Amount in Dispute: €50. 000³¹⁷
- Number of Arbitrators: 3
- Chairman's fee:
 - Minimum €3.000
 - Median € 6.000
 - Maximum € 9.000
- Fee based on median
 - Chairman € 6.000
 - Co-arbitrator € 3.600
 - Co-arbitrator € 3.600
- Advance on costs (without any VAT)
 - The Arbitral Tribunal's fee: €13.200
 - Administrative fee to the SCC Institute: € 2.500
- TOTAL: € 15.700

³¹⁵ LCIA, Schedule of Arbitration Fees and Costs, *available at* <http://www.lcia-arbitration.com/> (last visited on Mar. 7, 2006).

³¹⁶ SCC, Arbitration and Mediation Costs- Calculator, *available at* <http://www.sccinstitute.com/uk/Calculator/> (last visited on Mar. 7, 2006).

³¹⁷ For the sake of simplicity I assumed that €50.000 equal \$50,000.

CIETAC. The CIETAC only provides the following chart:³¹⁸

Amount of claim	Amount of fee
1,000,000 Yuan or less	3.5% of claimed amount or 10,000 min.
1,000,000-5,000,000	35,000 + 2.5% of the amount above 1,000,000
5,000,000-10,000,000	135,000 +1.5% of the amount above 5,000,000
10,000,000-50,000,000	210,000 + 1% of the amount above 10,000,000
50,000,000 or more	610,000 + 0.5% of the amount above 50,000,000

By applying the today's exchange rate on \$50,000, the grand total should be \$17,500. In addition, parties should pay ¥ 10,000 in advance as a registration fee. But does it include all the applicable fees? The website says "CIETAC or its Sub-commission may collect other extra, reasonable and actual expenses pursuant to the relevant provisions of the Arbitration Rules."³¹⁹ Is this total the same whether the parties chose one or three arbitrators? The website does not provide answers as to these questions.

ICSID. The ICSID does not have a cost-calculating system, however it provides an easy-to-read memorandum³²⁰ that can be summarized as follows:

- Fee for Lodging Requests: \$25,000
- Fees and Expenses of Conciliators, Arbitrators and *ad hoc* Committee Members: \$3,000 per day + reimbursement of expenses
- Administrative charges: \$10,000
- Appointment of arbitrators: \$10,000

CONCLUSION

Choosing a friendly forum to resolve international commercial disputes involves multiple considerations: procedural rules of the tribunal, possible application of domestic laws, enforcement of the

³¹⁸ CIETAC, Fee Schedule, available at <http://www.cietac.org.cn/english/fee/fee.htm> (last visited on Mar. 7, 2006).

³¹⁹ *Id.*

³²⁰ See ICSID, Schedule of Fees, available at <http://www.worldbank.org/icsid/schedule/fees.pdf> (last visited on Mar. 7, 2006).

arbitral award, and application of ad interim measures. Indeed, various national laws of the country where the arbitral tribunal sits may govern the dispute despite the meticulous drafting of the contract and the arbitration clause itself.

Therefore, lawyers should be careful in choosing the forum where to arbitrate their client's disputes against their international counterparts. The fundamental question should not be whether a careful drafting of the contract may further the client's needs, but rather whether that particular forum will best protect the client from undesired outcomes. For instance, if the client needs immediate relief or an immediate injunction, it would be better to arbitrate before a tribunal that provides this sort of remedy. On the other hand, if the client is more concerned about confidentiality, then a better forum would be a tribunal that does not publish its awards.

Therefore, knowing in advance how a specific tribunal works, how it has worked in the past and what kind of features and services it offers is the key to a successful arbitration.

