College of Commercial Arbitrators

INTERNATIONAL COMMERCIAL ARBITRATION

By Paul Klaas

By treaty, a commercial arbitration award issued in the United States is enforceable in 171 other countries, and an arbitration award issued in those 171 countries is enforceable in the United States. There is no similar treaty offering reciprocal recognition and enforcement of court judgments.

The global enforceability of commercial arbitration awards secured by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly referred to as "the New York Convention of 1958") is an enormous advantage enjoyed by arbitration over litigation in disputes arising between nationals of different countries. That advantage has not gone unnoticed by the many businesses now engaged in the global economy. Indeed, although no precise data exist, the most common estimate is that 90% of all modern international commercial contracts contain arbitration agreements.

Industries Involved in International Commercial Arbitration

International commercial arbitration is consensual. That is, the parties must choose arbitration; it cannot be thrust upon them. Arbitration is overwhelmingly chosen to resolve the disputes that arise from global commerce in essentially all industries.

Industries that are particularly active in international commercial arbitration include aviation and aerospace; energy; pharmaceuticals; banking; financial services; insurance; consumer products; mining; oil and gas; agriculture; construction and engineering; culture, media, and sports; health care; shipping; telecommunications; commodities; and professional services.

Characteristics of International Commercial Arbitration

International arbitration offers businesses in these industries all of the well-known arbitration advantages of efficiency, speed, cost-effectiveness, confidentiality, finality, enforceability, expertise, neutrality, and flexibility. In an international context, neutrality and flexibility are particularly important.

Neutrality

By opting for international commercial arbitration, no party has to concede "home court" advantage to another, for there is no need to resort to any nation's domestic courts for decisions on the merits of transnational disputes. Instead, disputes are resolved by impartial arbitrators, independent of any government.

International commercial arbitrators of many nationalities are available, and typically all serve as neutrals. Parties are regularly involved in selecting arbitrators, but even the party-nominated

arbitrators are sworn to impartiality. (The party-advocate arbitrator, sometimes permitted in US labor arbitration, is essentially unknown in international commercial arbitration.)

Whether a party-nominated arbitrator can, in fact, maintain impartiality is the subject of ongoing debate, but impartiality is certainly the rule, the expectation, and (in the experience of most active participants in international commercial arbitration) the reality.

Flexibility

Arbitration's flexibility is doubly important in international matters – doubly important, because the dispute resolution processes that parties from different countries are used to and expect can be so inconsistent, even contradictory.

Pre-Hearing "Discovery"

US lawyers, for example, are used to and expect broad discovery, with expansive pre-hearing document production, depositions, interrogatories, and requests for admission. That is almost never permitted in international commercial arbitration. In fact, Article 24 (10) of the 2021 International Arbitration Rules of the International Centre for Dispute Resolution ("ICDR") (the international division of the American Arbitration Association) explicitly provides that "[d]epositions, interrogatories, and requests to admit as developed for use in U.S. court procedures generally are not appropriate procedures for obtaining information under these Rules."

Even document requests, under ICDR and most other international arbitral rules, are limited to "specific documents or classes of documents" accompanied by an explanation as to their relevance and materiality.

Hearing

A typical international arbitration hearing – to the extent there is such a thing –tends to have more written presentations of evidence and argument, where a US lawyer might be used to and expecting oral presentations.

Written statements from fact witnesses and extensive written reports from expert witnesses are commonplace in international commercial arbitration.

Factual witness statements are usually exchanged between the parties and provided to the arbitrators before the hearing. Those written statements may not just presage direct examination; they may replace it. Many times, the live testimony of witnesses appearing in international commercial arbitration hearings is limited to cross-examination.

Written reports are almost always required from expert witnesses. Their reports too are exchanged between the parties and submitted to the arbitrators before the hearing. Many times, the arbitrators will direct opposing experts to consult with each other before the hearing and submit to the arbitrators a list of issues on which they agree and a list of issues on which they disagree. As to those issues on which they disagree, the experts can be either cross-examined separately or

questioned together. "Witness conferencing" (examining witnesses testifying about the same issue at the same time) -- colloquially referred to as "hot tubbing" – is more commonly used with expert witnesses, but it can be used with factual witnesses as well.

International arbitrators themselves question witnesses directly, and they may even lead the questioning when witness conferencing is used. Most international arbitrators will allow counsel to conduct their examinations first, with only occasional interjections, but some international arbitrators take over earlier and at will.

At the end of a hearing, oral final argument from counsel may be permitted, but oral arguments are sometimes replaced by post-hearing written submissions.

Award

International commercial arbitration awards are "reasoned" awards.

There is nothing like AAA Commercial Arbitration Rule 46(b) ("The arbitrator need not render a reasoned award unless the parties request such an award prior to appointment of the arbitrator or the arbitrator determines that a reasoned award is appropriate.") in international commercial arbitration rules or practice.

"Costs"

"Costs" (a term that, in international parlance, includes attorneys' fees) "follow the event" in most national legal systems – that is, generally the "loser pays" not only its own attorneys' fees but also the winner's attorneys' fees. The "American rule" (each side bears its own attorneys' fees) is applied in very few national legal systems outside of the United States. In most international commercial arbitrations, the "loser pays."

Special Challenges of International Commercial Arbitration

International commercial transactions can be especially challenging. Different languages may be spoken; different legal and business cultures may have to be understood; even different ethics may have to be accommodated. Those challenges also arise in arbitrating disputes that arise from international commercial transactions.

Different Languages

The parties and the witnesses frequently speak different languages, and, of course, write their documents in different languages. Even if the parties specify which language is to be used in the arbitration (as they should), translation of the oral and written evidence to that language can be cumbersome and expensive.

English has become the dominant language of global commerce, and English is the most common language in which international commercial arbitrations are conducted, but international commercial arbitrations can be conducted in any language.

Different Legal Philosophies

The parties may well come from different legal cultures. Accommodating the expectations of a party from a common law country and the contrary expectations of a party from a civil law country is a routine challenge in international commercial arbitration.

Most common law countries, including the United States, were once part of the British Empire. Most civil law countries were once part of the Roman Empire, or part of the empires of countries that themselves were once part of the Roman Empire (*e.g.*, France, Germany, Spain, Portugal, the Netherlands). There are far fewer common law countries than civil law countries, and, for whatever reason, most countries that have modernized their legal systems within the past century or so (*e.g.*, China, Japan) have adopted a civil law model.

To oversimplify, the common law is fundamentally inductive (general principles of law arise from decisions in specific cases) while the civil law is fundamentally deductive (specific cases are decided by applying general principles of law). Common law dispute resolution is adversarial – the truth, it is thought, emerges from the clash of opposing positions presented by counsel before neutral, mostly passive, decision-makers. Civil law dispute resolution is inquisitorial – the truth, it is thought, can be determined by active neutrals who both investigate and decide. Common law countries, particularly the United States, usually permit pre-hearing disclosure or "discovery" – forced production of relevant documents, even "depositions" (pre-hearing interrogations of the opposing party's witnesses), while civil law countries usually permit little or nothing of the kind. A typical common law hearing features witness testimony, cross-examination, and oral argument; civil law dispute resolution relies more on contemporaneous documents and written presentations.

These fundamental differences between the common law and civil law cultures surface in practical questions that arise throughout international commercial arbitrations: How detailed should the pleadings be? How much "discovery"/disclosure should be required or allowed, if any? Should the arbitrators be active investigators and interrogators? Will there be an oral hearing? If so, will the arbitrators allow witnesses to testify and be cross-examined, and will the arbitrators allow the lawyers to argue?

Different Contractual Construction

Most international commercial arbitrations arise from contracts. Americans, particularly American lawyers, are sometimes surprised by how differently contractual obligations are viewed around the world.

One of the tenets of American business and law is that a contract is enforced as written – if the words are unambiguous, evidence of the actual intent of the parties is not just unimportant… it's inadmissible.

That tenet is not universally shared. In Norway, for example, even an unambiguous provision in an agreement may be set aside or amended by the court (or the arbitrator, if Norwegian law controls) whenever it would be unreasonable or contrary to generally accepted business practice to invoke that provision. And, in some Latin American and Asian countries, the calumny and, to

a lesser extent, the reality are that a written contract is just another phase of an ongoing negotiation.

The substantive law applicable to an arbitration is – or, at least, should be – specified by the contract. If New York law is specified, it will be – or, at least, should be – applied, and unambiguous contracts should be enforced as written. It is difficult, though, to dislodge the fundamental cultural differences that arbitrators can bring with them. Sometimes, it is necessary to emphasize a legal or business tenet that might otherwise be thought a given.

Different Legal Ethics

The advocates in international commercial arbitrations are normally lawyers from the party's country. The opposing parties' legal teams, therefore, may be bound by very different ethical rules.

It is safe to assume that lawyers appearing in international commercial arbitrations are not allowed to suborn perjury or try to change a witness's testimony. But, the extent to which those lawyers may prepare their witnesses varies widely.

In the US, for example, it is routine for lawyers to prepare witnesses by meeting with them before they testify; going over the documents that the witness wrote or read; discussing the witness's recollection of the key events; organizing the witness's direct examination; predicting the witness's cross examination; and role-playing both the direct and the cross.

In many countries, what US lawyers do would be considered unethical. In some countries, a lawyer is not allowed to speak with testifying witnesses at all before they testify. Even in England – the home of the common law – barristers are not allowed to role-play the case with witnesses.

But, what US lawyers do usually strengthens the witnesses, and helps them withstand even withering cross-examination. In an international commercial arbitration between a US party and (for example) an Italian party, is it fair to permit the US lawyers to prepare their witnesses meticulously, while the Italian lawyers prepare their witnesses not at all, in compliance with their respective ethical rules and usual practices? That question – and many others that arise from the mingling of different cultures in international commercial arbitration – are frequently raised by skilled counsel and answered by experienced tribunals very early in the arbitral proceedings. The best practice is to "level the playing field" throughout, not just react to tilts.

Meeting the Special Challenges of International Arbitration

Many of the special challenges of international commercial arbitration can be met by the arbitration agreement itself; by the procedural rules selected for the arbitral process; and by "soft law" (guidelines, recommendations, and "best practices" published in aid of international commercial arbitration by various non-governmental organizations). Indeed, many businesses have found it useful to incorporate selected procedural rules and "soft law" into the arbitration agreement itself, transforming them into contractual commitments. Even when combined, though, the arbitration agreement, the procedural rules, and "soft law" still leave a broad swath of issues to resolve through party agreements or arbitrator discretion.

One article of faith among international arbitrators is party autonomy. Arbitrators have broad discretion, but they will usually defer to party agreements. So, for example, if the arbitration agreement itself specifies that depositions shall be permitted, even civil-law arbitrators who detest depositions will permit them.

Arbitration Agreement

The arbitration clause of a cross-border transaction typically does not rivet the dealmakers; instead, many times the arbitration clause from some former deal will be dredged up from somebody's laptop, adapted only as necessary, and then inserted into the current deal amongst the boilerplate, forlorn and quickly forgotten. That inattention can be a costly error, or, at least, a missed opportunity.

International arbitration agreements should specify the core features of the dispute resolution model the parties desire, including the scope of matters to be arbitrated; the language in which the arbitration will be conducted; the substantive law that will control; the "seat" (the legal place of the arbitration); the administering institution, if any; and the arbitral rules. International arbitration clauses can also specify the number of arbitrators, the timeline, and whatever arbitral process the parties choose.

Many experienced and wise practitioners recommend short, simple arbitration agreements, leaving much to the discretion of the eventually-appointed arbitrators. Other equally experienced and wise practitioners recommend that the parties specify particulars of the arbitration process they desire, or it will be left to the discretion of persons as yet unknown who may choose a process that one or both parties find unsatisfactory. All experienced and wise practitioners agree, though, that great care should be taken in drafting the arbitration agreement, for all have encountered clauses that are so flawed that the parties' agreement to arbitrate fails. The risk of creating a so-called "toxic" or "pathological" clause rises with the number of matters specified in the arbitration agreement, but many think the reward of maintaining some party control justifies the risk of being specific.

Institutions and Institutional Rules

A dizzying array of institutions, headquartered all over the world, administer international commercial arbitrations. Most of them are known by their acronyms, *e.g.*, ACICA, CANACO, CIETAC, CPR, DIS, HKIAC, ICC, ICDR, JCAA, KLRCA, LCIA, MARC, NAI, SCA, SCC, SIAC, WIPO. Essentially all of these institutions offer sets of procedural rules that parties can incorporate into their arbitration agreements, and most of them will administer arbitrations under other compatible rules, including the more generic international arbitration rules published by the United Nations Commission on International Trade Law ("UNCITRAL") and the International Institute for Conflict Prevention and Resolution ("CPR") .

There are important variations among the institutional rule sets, but, in general, they all set forth how the arbitration is to be commenced; what pleadings will be required; how the tribunal will be appointed; how the proceedings will be conducted; whether and what information will be exchanged before the hearing; whether interim measures can be imposed (under some rules, by

specially-appointed "emergency arbitrators"); how the hearing should be run; the form of the award; and how costs will be assessed.

The institutions themselves do not decide the cases, nor do they interfere substantively in the decision. The institutions provide administrative support, usually for a reasonable fee. But, it is entirely possible to conduct an international commercial arbitration without any institution being involved. For such non-institutional ("*ad hoc*") arbitrations, it is advisable to specify in the arbitration agreement which arbitral rules are to be used, and the UNCITRAL or CPR rules are usually good choices.

The institutional rules and the UNCITRAL rules, however, are sparse – compared to the Federal Rules of Civil Procedure, they are skeletal. Many parties find it useful to incorporate some "soft law" in their arbitration clauses, or even to adopt some "soft law" after a dispute has arisen, to supplement the procedural rules.

"Soft Law"

A number of other entities – not governments, and not international arbitration administering organizations – have published sets of rules, guidelines, or "best practices" that can be incorporated into arbitration agreements or adopted for international commercial arbitration proceedings. These publications, known as "soft law" (a term that is not always used admiringly), can be used to fill many of the gaps in the institutional rules with more detailed prescriptions.

The Chartered Institute of Arbitrators ("CIArb"), for example, issues practice guidelines that are intended "give guidance to arbitrators on the conduct of arbitration from cradle to grave – from the first interview of a prospective arbitration to the drafting of the final award… [T]hey do not favour any particular jurisdiction and they attempt to give guidance from a truly international perspective. They are not 'rules.' They are intended to help arbitrators in difficult situations, to work out what they could and should be thinking of, and guide them as to how they should get to making a decision on the issue in front of them…" Betancourt JC *et al*., *"International Arbitration Guidelines: Safe Ports for Arbitral Storms*" (2016) 82(2) *Arbitration* 169 at 172.

Perhaps the most successful and widely-used "soft law" is the International Bar Association's Rules on the Taking of Evidence in International Commercial Arbitration, adopted in 1999 and most recently revised in 2020. The IBA Rules, according to their Preamble, are "designed to supplement the legal provisions and the institutional, *ad hoc* or other rules that apply to the conduct of the arbitration." When applied, the IBA Rules provide some structure for document production, fact witnesses, expert witnesses, on-site inspections, evidentiary hearings, and the admissibility and assessment of evidence. The structure tends to "split the difference" between common law and civil law practices.

The IBA has also published "soft law" that addresses recurring ethical issues that arise in international commercial arbitration, for both arbitrators and advocates.

The IBA's Guidelines on Conflicts of Interest in International Arbitration are addressed principally to arbitrators. They describe generally what relationships, experience, or knowledge create

conflicts of interest, and they provide examples of situations that are conflicts of interest ("Red List"), situations that may be conflicts and should be disclosed to the parties before accepting appointment ("Orange List"), and situations that are not conflicts and need not be disclosed ("Green List").

The IBA's Guidelines on Party Representation in International Arbitration are addressed principally to advocates. They describe proper communications with arbitrators, submissions to the arbitrators, duties arising from information exchanges and disclosure, proper handling of witnesses, and remedies for misconduct. These Guidelines too were intended to "split the difference" between common law and civil law practices, though many civil lawyers think that they tilt more toward common law practices and are, in any event, unnecessary.

Many welcome the proliferation of international arbitration "soft law" as a means of educating less-experienced practitioners, particularly in parts of the world without a long or strong tradition of arbitration; to help combat "guerrilla tactics"; and to level the playing field among wildly-different legal and business cultures. Others believe that "soft law" has become a "pandemic" of "legislitis" that makes the field resemble a "teenager's bedroom." See Dasser F., "A Critical Analysis of the IBA Guidelines on Party Representation," in *Association Suisse de l'Arbitrage Special Series No. 37* (2015).

Skilled Counsel and Experienced Arbitrators

The proliferation of "soft law," whether welcome or unwelcome, is a symptom of one striking characteristic of international commercial arbitration – it is not rule-bound.

Even combining an elaborate arbitration agreement, the most detailed institutional rules, and a passel of "soft law" does not bring international arbitration close to the level of pre-ordained processes typically prescribed by the detailed rules of national courts. Much is left to the parties' counsel to work out, or to the arbitrators' discretion. As a result, every international commercial arbitration is bespoke, with the parties designing significant parts of their dispute resolution process collaboratively or the arbitrators designing those processes for them.

International commercial arbitration's flexibility is attractive, but it can also be dangerous, in the wrong hands. Inept counsel or arbitrators can turn the international commercial arbitration process into a "teenager's bedroom." However, skilled counsel and competent arbitrators – particularly those who have experience managing the culture clash inherent in international arbitration -- can resolve cross-border disputes efficiently and speedily, fairly and finally.

Conclusion

International commercial arbitration is chosen by most businesses in virtually all industries for resolution of cross-border disputes. A neutral forum and flexible process leading to an award enforceable essentially everywhere are advantages that litigation does not offer. However, international arbitration – like international business itself – presents unique challenges, for the parties may speak different languages, come from different business and legal cultures, and even

have different ethics. Those challenges are being met by arbitration agreements, arbitral institutions and institutional rules, "soft law," skilled counsel, and experienced arbitrators.

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