

ARBITRATION

Many contracts with which ship owners and their masters are concerned, such as bills of lading, charter-parties, salvage agreements, and marine insurance policies, nowadays provide for various litigious matters to be referred to arbitration. Some of the terms used in connection with this method of settling disputes, together with the main advantages and disadvantages of arbitration, the various methods of referring to arbitration, and so on, form the subject matter of this section.

Arbitration Clauses in contracts of Carriage by Sea

Bills of lading and charter-parties frequently contain clauses to that effect that the parties agree to refer to arbitration disputes arising under the contract. Such clauses are perfectly valid, but what constitutes a "dispute arising under the contract" is a matter deserving of some consideration. If, for instance, one party contends against the other that the contract has never been entered into at all, that is a dispute which cannot go to arbitration under the clause, for the party who denies that he entered into the contract is at the same time denying that he joined in the submission. On similar grounds, if a party alleges that the contract is void, that cannot be a matter for arbitration under the clause, for on the view that the whole contract is void the part (i.e., the submission) must be seen to be void as well.

An arbitration clause may provide that if the claimant fails to appoint an arbitrator within a stipulated time the claim shall be barred absolutely. Generally, this provision is effective, but there are some exceptions. For instance, by the Arbitration Act, 1950, the court may grant an extension of time if of the opinion that undue hardship would otherwise be caused.

No dispute arises within the meaning of the clause where a charterer admits a shipowner's claim for freight but fails to satisfy it. Where a shipowner claimed freight and the charterer, having admitted the claim, sought to set off the amount due against his counter-claim the Court held that failure to appoint an arbitrator within the prescribed time barred the counter-claim but not the claim which was never in issue.

The question may arise as to whether an arbitration clause in a charter-party is imported into a bill of lading when the latter contains an incorporating clause such as "Freight and all other terms, conditions and exceptions, including the negligence clause, as per charter-party". It would seem that it is not, but as between a shipowner and a charterer who is also the shipper and who, in his capacity as shipper, has obtained a bill of lading, the arbitration clause in the charter-party remains effective even though the charter party contains a cesser clause, and even after the bill of lading has been assigned to a third party.

It appears that a merchant has no right to arrest a ship in respect of a dispute arising under a contract, which contains an arbitration clause.

International Arbitration

International arbitration is a means by which international disputes can be definitively resolved, pursuant to the parties' agreement, by independent, non-governmental decision-makers. There are almost as many other definitions of international arbitration as there are commentators on the subject. Commercial arbitration is common in both international and domestic contexts. Arbitration has several defining characteristics, they are as follows:

1. Arbitration is generally consensual in most cases, the parties must agree to arbitrate their differences.
2. Non-governmental decision-makers resolve arbitrations, arbitrators do not act as state judges or government agents, but are private persons ordinarily selected by the parties.

3. Arbitration produces a binding award, which is capable of enforcement through national courts, but not a mediator's or conciliators non-binding recommendation.

4. Arbitration is comparatively flexible, as contrasted to most court procedures.

In many circumstances, national law permits parties to agree upon the arbitral procedures that will govern the resolution of their dispute. As a consequence, the procedural conduct of arbitrations can vary dramatically across industrial sectors, arbitral institutions, geographic regions, and categories of disputes. In particular fields, or individual cases, parties may agree upon procedural rules that are tailor-made for their individual needs. Apart from specialized fields, commercial arbitration often bears broad resemblances to commercial litigation in national courts. Arbitration will frequently involve the submission of written pleadings and legal argument (often by lawyers), the presentation of documentary evidence and oral testimony, the application of "law" (in the form of judicial precedents and statutes), and the rendition of a reasoned, binding award. Nevertheless, in practice, arbitral procedures are usually less formal than litigation, particularly on issues such as pleadings and evidence. Arbitration often lacks various characteristics that are common in national court litigation, including broad discovery, summary disposition procedures, and appellate review. In smaller matters, domestic arbitrations are frequently conducted without the participation of legal advisers, before a lay-arbitrator, according to highly informal procedures.

International commercial arbitration is similar to domestic arbitration. As in domestic matters, international arbitration is a consensual means of dispute resolution, by a non-governmental decision-maker, that produces a legally binding and enforceable ruling. In addition, however, international arbitration has several characteristics that distinguish it from domestic arbitration. Most importantly, international arbitration is designed and accepted particularly to

assure parties from different jurisdictions that their disputes will be resolved neutrally. Among other things, the parties usually seek an independent decision-maker, detached from the courts, governmental institutions, and cultural biases of either party. They also ordinarily contemplate the arbitrator's application of internationally neutral procedural rules, rather than a particular national legal regime.

In addition, international arbitration is frequently regarded as a means of mitigating the peculiar uncertainties of transnational litigation. These uncertainties can include protracted jurisdictional disputes, expensive parallel proceedings, and choice-of-law debates. International arbitration seeks to avoid these uncertainties by designating a single, exclusive dispute resolution mechanism for settling the parties' disagreements. Moreover, international arbitration awards are often more readily enforceable in jurisdictions other than their place of origin than national court judgments.

Although international arbitration is a consensual means of dispute resolution, it has binding effect only by virtue of a complex framework of national and international law. As we discuss below, international conventions, national arbitration legislation, and institutional arbitration rules provide a specialized legal regime for most international arbitrations. This legal regime enhances the enforceability of both arbitration agreements and arbitral awards, and seeks to insulate the arbitral process from interference by national courts or other governmental authorities.

On the most universal level, the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") has been ratified by more than 120 nations, including all significant trading states and most major developing states. The Convention obliges member states to recognize and enforce both international commercial arbitration agreements and awards, subject to limited exceptions. Other international conventions impose comparable obligations on member states with respect to

particular categories of disputes or with respect to particular bilateral or regional relationships.

In addition, most developed trading states have enacted national arbitration legislation that provides for the enforcement of international arbitration agreements and awards, that limits judicial interference in the arbitration process, and that authorises specified judicial support for the arbitral process. National arbitration legislation typically affirms the capacity of parties to enter into valid and binding agreements to arbitrate future commercial disputes, provides mechanisms for the enforcement of such arbitration agreements (through orders to stay litigation or (less frequently) to compel arbitration), and requires the recognition and enforcement of arbitration awards. In addition, most modern arbitration legislation narrowly limits the power of national courts to interfere in the arbitration process, either when arbitral proceedings are pending or in reviewing ultimate arbitration awards. In many cases, national arbitration statutes also authorize limited judicial assistance to the arbitral process. This assistance can include selecting arbitrators or arbitral sities, enforcing a tribunal's orders with respect to evidence taking or discovery, and granting provisional relief in aid of arbitration.

In recent years, there have been a number of efforts to harmonise national laws relating to international arbitration. The UNCITRAL Model Law on International Commercial Arbitration is the leading example. About twenty nations except the United States, have adopted the Model Law to date, and others are considering it. Similarly, national and international bar associations have produced rules or codes of conduct dealing with various arbitration-related subjects, such as evidence taking in arbitration, organizing arbitral proceedings, and the ethics of arbitrators.

International commercial arbitration frequently occurs pursuant to institutional arbitration rules, which are often incorporated by reference into parties' arbitration agreements. The leading international arbitration

institutions include the International Chamber of Commerce, the London Court of International Arbitration, London Maritime Arbitrators Association and the American Arbitration Association, each of which has adopted its own set of rules governing the procedural aspects of arbitration. These institutions, as well as another several dozen or so less widely known bodies, supervise international arbitrations when parties agree to dispute resolution under their auspices. In addition, the UNCITRAL Commercial Arbitration Rules are widely used in so-called ad hoc (or non-institutional) arbitrations.

Advantages and Disadvantages of International Arbitration

The popularity of arbitration as a means for resolving international commercial disputes has grown tremendously over the past several decades. This popularity reflects important advantages provided by international arbitration as a means of resolving international commercial disputes. Despite these advantages, however, international arbitration also has significant disadvantages. These advantages and disadvantages can be summarised as follows:

1. International arbitration is often perceived as ensuring a genuinely neutral decision-maker in disputes between parties from different countries. International disputes inevitably involve the risk of litigation before a national court of one of the parties, which may be biased, parochial, or unattractive for some other reason. Moreover, outside an unfortunately limited number of industrialized nations, local court systems simply lack the competence, experience, resources, and traditions of even-handedness satisfactorily to resolve many international commercial disputes.

International arbitration offers a theoretically competent decision-maker satisfactory to the parties, who are, in principle, independent of either party or any national or international governmental authority. On the other hand, private arbitrators can have financial, personal, or

professional relations with one party (or its counsel). In the eyes of some observers, this poses the risk of even greater partiality than the favoritism or parochialism of local courts.

2. A carefully-drafted arbitration clause generally permits the resolution of disputes between the parties in a single forum pursuant to an agreement that most national courts are bound by international treaty to enforce. This mitigates the expense and uncertainty of multiple judicial proceedings in different national courts.

On the other hand, incomplete or otherwise defective arbitration clauses can result in judicial and arbitral proceedings where the scope or enforceability of the provision, as well as the merits of the parties' dispute, must be litigated. Moreover, even well drafted arbitration agreements cannot entirely exclude the expense and delay of a litigant determined to confound the arbitral process.

3. Arbitration agreements and arbitral awards are generally (but not always) more easily and reliably enforced in foreign states than forum selection clauses or foreign court judgments. As described, some 120 nations have acceded to the New York Convention, which obliges contracting states to enforce arbitration agreements and awards (subject to specified, limited exceptions). In contrast, there are no worldwide treaties relating to either forum selection agreements or judicial judgments. The perceived ease of enforceability of arbitral awards has contributed to fairly substantial voluntary compliance with arbitral awards, although there is little empirical data comparing such compliance with that applicable to judicial judgments.

In some developing and other countries, there has been a perception that international commercial arbitration was developed by, and was biased in favor of, Western commercial interests. As a consequence, national law in many countries was historically hostile towards

international arbitration. In some states, this remains the case today. Hostile or simply archaic national law can therefore still pose significant obstacles to the effective enforcement of international arbitration agreements and awards. In general, this hostility has waned somewhat over the past decade, with many states acceding to the New York Convention and enacting "pro-arbitration" legislation.

4. Arbitration tends to be procedurally less formal and rigid than litigation in national courts. As a result, parties have greater freedom to agree on neutral and appropriate procedural rules, set realistic timetables, select technically expert and neutral decision-makers, involve corporate management in dispute-resolution, and the like. On the other hand, the lack of a detailed procedural code or decision-maker with direct coercive authority may permit party misconduct or create opportunities for an even greater range of procedural disputes between the parties.

5. International arbitration typically involves less extensive discovery than is common in litigation in some national courts (particularly common law jurisdictions). This is generally attractive to international businesses because of the attendant reduction in expense, delay, and disclosure of business secrets.

6. International arbitration is usually more confidential than judicial proceedings - as to submissions, evidentiary hearings, and final awards. This protects business and commercial confidences and can facilitate settlement by reducing opportunities and incentives for public posturing. On the other hand, few arbitrations are entirely confidential, with disclosures often occurring by means of judicial enforcement actions, unilateral party action, regulatory inquiries, or otherwise.

7. The existence of an arbitration clause, a workable arbitral procedure, and an experienced arbitral tribunal may create incentives for

settlement or amicable conciliation. The cooperative elements that are required to constitute a tribunal and agree upon a procedural framework can sometimes help foster a climate conducive to settlement. Indeed, parties sometimes agree to conciliation (rather than, or in addition to, binding arbitration) or to arbitration *ex aequo et bono* (not based on the strict application of law) in a deliberate effort to foster settlement. On the other hand, where relations are irrevocably soured, the need for some measure of cooperation between the parties in conducting the arbitration can permit party misconduct greatly to impede dispute resolution.

8. Arbitration is often lauded as a prompt, inexpensive means of dispute resolution. That can sometimes be the case, but international arbitration is also frequently criticized as both slow and expensive. The difficulties in scheduling hearing dates (with busy arbitrators, lawyers, and clients in different countries), the need to agree upon various procedural steps, and other factors often gives international arbitrations a fairly stately pace. Nonetheless, national court proceedings are also often slow, and the existence of appellate review (and possible re-trials) introduces additional delays not ordinarily encountered in arbitration.

Although sometimes advertised on grounds of economy, even its proponents rightly acknowledge that "international arbitration is an expensive process." Both private arbitrators (unlike judges) and arbitral institutions (unlike most courts) must be paid by the parties. And there is a perception that some institutional fees, charged for "administrative" services, are unnecessarily high. Nonetheless, these expenses generally will be less than the legal fees and other costs required for lengthy appellate proceedings or (in some jurisdictions) discovery. Given this background, it is not difficult to find enthusiastic proponents of the arbitral process:

In the realm of international commercial transactions, arbitration has become the preferred method of dispute resolution. Arbitration is preferred over judicial methods of dispute resolution because the parties have considerable freedom and flexibility with regard to choice of arbitrators, location of the arbitration, procedural rules for the arbitration, and the substantive law that will govern the relationship and rights of the parties.

Equally vigorous are some critics, including those who regard arbitration as "the slower, more expensive alternative," or conclude that "arbitration sometimes involves perils that even surpass the 'perils of the seas.'" In fact, the truth is less clear-cut, and lies somewhere between these extremes: "The more enthusiastic of sponsors have thought of arbitration as a universal panacea. We doubt whether it will cure corns or bring general beatitude. Few panaceas work as well as advertised." At bottom, if generalizations must be made, international arbitration is much like democracy; it is nowhere close to ideal, but it is generally better than the existing alternatives. To those who have experienced it, litigation of complex international disputes in national courts is often distinctly unappealing. Despite the daunting procedural complexities and other uncertainties, arbitration often offers the least ineffective way to finally settle the contentious disputes that arise when international transactions go awry.

Institutional and AD hoc Arbitration International Arbitration

International arbitration can be either "institutional" or "ad hoc." There are important differences between these alternatives. A number of international organisations and institutions, located in different countries, provide institutional arbitration services. The best-known international arbitration institutions are the International Chamber of Commerce ("ICC"), the American Arbitration Association ("AAA"), and the London Court of International Arbitration ("LCIA"), apart from this international organisations like the World Intellectual Property Organisation ("WIPO"), International

Center for Settlement of Disputes ("ICSID"), World Trade Organisation and like provide for international arbitration.

These arbitral institutions have promulgated sets of procedural rules that apply where parties have agreed to arbitration pursuant to such rules. Among other things, institutional rules set out the basic procedural framework and timetable for the arbitration process. Institutional rules also typically authorize the host arbitral institution to select arbitrators in particular disputes (that is, to serve as "appointing authority"), to resolve challenges to arbitrators, to designate the place of arbitration, to fix or influence the fees payable to the arbitrators, and to review the arbitrator's awards to reduce the risk of unenforceability on formal grounds. Each arbitral institution has a staff (with the size varying significantly from one institution to another) and a decision-making body. Of course, arbitral institutions charge an administrative fee, which can sometimes be substantial, for rendering these various services. This fee is in addition to compensation paid by the parties to the arbitrators.

It is fundamental that arbitral institutions do not themselves arbitrate the merits of the parties' dispute. This is the responsibility of the particular individuals selected as arbitrators. Arbitrators are virtually never employees of the arbitral institution, but instead are private persons selected by the parties. If parties cannot agree upon an arbitrator, most institutional rules provide that the host institution will act as an "appointing authority," which chooses the arbitrators in the absence of the parties' agreement.

Ad hoc arbitrations are not conducted under the auspices or supervision of an arbitral institution. Instead, parties simply agree to arbitrate, without designating any institution to administer their arbitration. Ad hoc arbitration agreements will often choose an arbitrator or arbitrators, who is to resolve the dispute without institutional supervision or assistance. The parties will sometimes also select a preexisting set of procedural rules designed to govern

ad hoc arbitrations. For international commercial disputes, the United Nations Commission on International Trade Law ("UNCITRAL") has published a commonly used set of such rules. Where ad hoc arbitration is chosen, parties usually will designate an "appointing authority," that will select the arbitrators if the parties cannot agree. If the parties fail to select an appointing authority, then the national arbitration statutes of many nations permit national courts to appoint arbitrators.

Both institutional and ad hoc arbitration have their strengths as well as weaknesses. Institutional arbitration is conducted according to a standing set of procedural rules and supervised, to a greater or lesser extent, by a professional staff. This reduces the risks of procedural breakdowns, particularly at the beginning of the arbitral process, and of technical defects in the arbitral award. The institution's involvement can be particularly constructive on issues relating to the appointment of arbitrators, the resolution of challenges to arbitrators, and the arbitrators' fees. Less directly, the institution lends its standing to any award that is rendered, which may enhance the likelihood of voluntary compliance and judicial enforcement

On the other hand, ad hoc arbitration is typically more flexible, less expensive (since it avoids sometimes substantial institutional fees), and more confidential than institutional arbitration. Moreover, the growing size and sophistication of the international arbitration bar, and the efficacy of the international legal framework for commercial arbitration, have partially reduced the relative advantages of institutional arbitration. Nonetheless, many experienced international practitioners prefer the more structured, predictable character of institutional arbitration, at least in the absence of unusual circumstances arguing for an ad hoc approach.

Overview of International Arbitral Institutions & Laws

Introduction to Institutional Arbitration

Different arbitral institutions offer somewhat different products. As noted above, the ICC, the LCIA, and the AAA are presently the leading international arbitral institutions. Each of these institutions, as well as several other important international arbitral institutions, are briefly described below as follows

1. The ICC's International Court of Arbitration: It was established in Paris in 1923. The ICC remains the world's leading international commercial arbitration institution, and has less of a national character than any other arbitral institution. Its annual caseload was well above 300 cases per year during the 1980s and early 1990s, and it now exceeds 500 cases per year. Most of these cases are international disputes, many involving very substantial sums. The ICC's caseload involves parties from around the world, with Western European parties being involved in less than 50% of all ICC cases in many recent years.

The ICC has promulgated the ICC Rules of Arbitration ("ICC Rules"), which were most recently revised in 2000, as well as the ICC Rules of Optional Conciliation. Under the ICC Rules, the ICC is extensively involved in the administration of individual arbitrations. Among other things, the ICC is responsible for service of the Request for Arbitration and other preliminary submissions on the parties, fixing and receiving payment of advances on costs by the parties at the outset of an arbitration confirming the parties' nominations of arbitrators, appointing arbitrators if a party defaults or if the parties are unable to agree upon a presiding arbitrator or sole arbitrator, considering challenges to the independence of arbitrators, in certain cases, reviewing so-called "Terms of Reference," which define the issues and

procedures for the arbitration, reviewing a tribunal's award for formal defects, and fixing the arbitrator's compensation.

The ICC's International Court of Arbitration ("ICC Court") is responsible for most significant administrative decisions in ICC arbitrations. The ICC Court is not, in fact, a "court," and does not itself decide substantive legal disputes or act as an arbitrator. Rather, the ICC Court acts in a supervisory and appointing capacity under the ICC Rules. The ICC Court is supported by a sizeable legal and administrative staff of some twenty persons, of more than ten nationalities, organized as a Secretariat. The Secretariat is substantially involved in the day-to-day management of arbitrations.

In appointing and confirming arbitrators, the ICC Court considers "the prospective arbitrator's nationality, residence and other relationships with the countries of which the parties or the other arbitrators are nationals and the prospective arbitrator's availability and ability to conduct the arbitration". The ICC Court's appointments of arbitrators are generally based upon recommendations made by a neutral "national committee," which is usually a business or similar organization in a specific country. Currently, more than 60 countries have ICC National Committees.

ICC arbitrations can be sited almost anywhere in the world. In 1997, for example, ICC arbitrations were conducted in more than different countries. By far the most common situses for ICC arbitrations are France, Switzerland, England, other Western European states, and the United States. The ICC Rules set out schedules of administrative costs and arbitrators' fees. Both are based upon the amount in dispute, with the arbitrators' fees being fixed by the ICC Court, within a prescribed range, in light of the difficulty of the case, the expedition of proceeding, the amount in dispute, and other factors. The ICC Rules

also provide for "advances on costs" to be paid by the parties at the outset of the arbitral proceedings, designed to secure payment of future administrative costs and arbitrators' fees.

The ICC's Rules have sometimes been criticised as expensive and cumbersome. The 1998 amendments to the Rules reflected a concerted and promising effort to meet these charges. Despite criticism, the ICC clearly remains the institution of last resort for most sophisticated commercial users.

2. London Court of International Arbitration (LCIA): The LCIA is, by some accounts, the second most popular European arbitration institution. Its annual caseload, which is increasing, has reached about 50 disputes per year. Founded in 1892, the LCIA has made a determined and generally successful effort in recent years to overcome perceptions that it is an exclusively English organization. Among other things, it has appointed two successive non-English presidents, and its vice-presidents include non-English practitioners.

The LCIA administers a set of arbitration rules, the London Court of International Arbitration Rules ("LCIA Rules"), which were extensively revised in 1998. Although identifiably English in drafting style and procedural approach, the LCIA Rules generally provide a sound, neutral basis for international dispute resolution. Broadly speaking, LCIA arbitrations are administered in a less comprehensive fashion than ICC cases. Among other things, the LCIA Rules contain no Terms of Reference procedure and do not provide for administrative review of draft awards.

In contrast to most other institutional rules, the LCIA Rules set out the powers of an LCIA arbitral tribunal in some detail. The powers to order discovery and security for legal costs (i.e., a deposit or bank guarantee securing the estimated amounts which an unsuccessful

claimant would be liable to reimburse to a successful respondent for its costs of legal representation) are prominently included among the arbitrators' powers.

The LCIA's appointments of arbitrators are drawn largely from the English bar and retired judiciary, particularly in cases governed by English law. The LCIA fixes the arbitrators' fees according to the time expended by the arbitrators at the hourly rate agreed by the arbitrators with the parties. The LCIA provides a scale of customary fees for arbitrators, to assist in fixing rates. The LCIA's administrative fees are calculated based upon the time spent by LCIA personnel.

Most LCIA arbitrations are sited in London. In the absence of agreement by the parties to the contrary, London will ordinarily be selected by the LCIA as the arbitral situs.

3. American Arbitration Association (AAA): The AAA was founded in 1926 (three years after the ICC) and is based in New York, with nearly 40 regional offices throughout the United States. The AAA is the leading U.S. arbitral institution, and handles what it describes as the largest number of arbitral disputes in the world. It administers more than 60,000 arbitrations or other forms of alternative dispute resolution each year, with specialized rules for numerous different industries. Nonetheless, only a few of these disputes are "international." Although its methods for identifying "international" disputes are sometimes questioned, the AAA claims a caseload of some 400 international disputes per year.

The primary arbitration rules promulgated by the AAA are the AAA Commercial Arbitration Rules. These rules are widely used in domestic arbitrations between businesses in the United States. In 1991, the AAA promulgated the AAA International Arbitration Rules designed specifically for international arbitrations. The rules are based principally

on the UNCITRAL Arbitration Rules, and were intended to permit a maximum of flexibility and a minimum of administrative supervision. They were most recently revised in April 1997. Numerous other sets of AAA arbitration rules also exist, including rules for specialized types of disputes, and can be selected in the parties' arbitration agreement.

The 1997 version, of the AAA International Arbitration Rules provide the applicable set of AAA arbitration rules in "international" disputes (except where the parties have otherwise agreed). This alters the pre-1997 position, in which the primarily domestic AAA Commercial Arbitration Rules provided the fallback rules when parties to international agreements had agreed to AAA arbitration without designating a particular set of rules.

Under all versions of AAA rules, the AAA administrative staff plays a less significant supervisory role than does the ICC Secretariat. Among other things, the AAA does not receive or serve initial notices or requests for arbitration; does not require or review a Terms of Reference; does not review draft awards; and plays a less significant role in setting the arbitrators' fees. The AAA's appointments of arbitrators are generally based on a list procedure, whereby names drawn from the AAA's files are presented to the parties for expressions of preference. Although the AAA's lists are heavily domestic in character, it increasingly seeks to appoint arbitrators with international experience in appropriate cases. To that end, the AAA reports that it has enhanced the quality of its international panel of arbitrators.

The AAA's administrative charges are based on the amount in dispute. With respect to the arbitrators' fees, the AAA case administrator will initially attempt to broker an agreement between the proposed arbitrators and the parties on a basis for compensation. Failing such agreement, the AAA will fix the arbitrators' fees after considering the

arbitrators' hourly rates, the amount in dispute, and the complexity of the dispute.

Non-U.S. parties are often reluctant to agree to arbitration under AAA rules, fearing parochial predisposition and unfamiliarity with international practice. The AAA is working to overcome this image. In addition to upgrading its approach to selecting arbitrators, the AAA has concentrated the handling of all international cases in an "International Center" in New York, staffed by specialized attorneys with language skills. It remains to be seen how these efforts will be received.

4. International Center for Settlement of Investment Disputes (ICSID): The International Center for the Settlement of Investment Disputes ("ICSID") administers arbitrations conducted pursuant to the ICSID Convention. ICSID is located in Washington, D.C., where it operates under World Bank auspices.

As discussed below, the ICSID Convention provides a specialized arbitration regime for certain "investment disputes" between states and foreign investors. Before adopting an ICSID arbitration clause or commencing an ICSID arbitration, care should be taken to ensure that the Convention's jurisdictional limits are satisfied (e.g., that the relevant foreign state has ratified the ICSID Convention and that an "investment dispute" would be involved). If these limits are satisfied, parties must consider whether ICSID arbitration is suitable for their needs.

Sophisticated users have been reluctant to embrace ICSID arbitration because of uncertainties about jurisdictional limits, appointment procedures for arbitrators, and the risk of internal review. With respect to the final point, the annulment of two ICSID awards by appellate panels has provoked concerns among foreign investors.

5. Stockholm Chamber of Commerce Arbitration Institute (SCC): The Arbitration Institute was founded in Stockholm in 1917, the Stockholm Chamber of Commerce Arbitration Institute ("SCC") developed into a substantial forum for disputes involving parties from the USSR and China during the 1970s and 1980s. The SCC typically appoints members of the Swedish bar, with international experience, or former Swedish judges, as arbitrators. SCC arbitrations are usually sited in Sweden, although other sities can be chosen.

6. Singapore International Arbitration Center (SIAC): The SIAC was established in 1990, principally for disputes arising out of construction, shipping, banking, and insurance. The SIAC Rules are based largely on the UNCITRAL Arbitration Rules. The SIAC has not yet won broad favor among sophisticated users, in part because of historic perceptions of an interventionist attitude of local courts. There are signs that this disfavor is waning, especially in conjunction with concerns about Hong Kong as an arbitral situs.

7. Hong Kong International Arbitration Center (HKIAC): The Hong Kong International Arbitration Center ("HKIAC") was established in 1985 and had developed into Asia's leading international arbitration institution prior to departure of the British administration. The HKIAC's Rules are based on the UNCITRAL Arbitration Rules, although parties are free to agree upon alternative procedural regimes. The HKIAC still enjoys a substantial case-load (approximately 200 disputes annually in recent years), but many users are now reluctant to designate it in new agreements. Concerns about future stability and judicial independence in Hong Kong are typically cited.

8. World Intellectual Property Organisation (WIPO): The Arbitral Center of WIPO was established in Geneva, Switzerland in 1994. WIPO and the WIPO Arbitration Rules are designed particularly for

intellectual property disputes, although other types of controversies are not excluded from their facilities. WIPO's Arbitration Rules contain detailed provisions dealing with issues that are of particular importance in intellectual property disputes. These include provisions relating to discovery, disclosure and protection of trade secrets, and confidentiality of arbitral proceedings. As yet, WIPO has had insufficient opportunity to establish a track record with respect to its selection of arbitrators and/or administration of arbitral proceedings.

9. German Institution of Arbitration: The German Institution of Arbitration ("Deutsche Institution für Schiedsgerichtsbarkeit" or "DIS") was originally founded in 1920. It has since 1992 incorporated the arbitration institutions of the former German Democratic Republic, and provides nationwide arbitration services in Germany. The DIS Arbitration Rules (published in English translation as well as an authoritative German text) are intended for both national and international arbitrations. A majority of the DIS's caseload consists of domestic disputes, although Germany's recent enactment of the UNCITRAL Model Law is expected to attract greater international usage.

International Conventions and National Laws on International Commercial Arbitration

International businesses and industrialized trading nations have long sought to establish a stable, predictable legal environment in which international commercial arbitrations can be conducted. Because national arbitration laws have historically varied considerably from state to state, substantial uncertainties often attend the enforcement of international arbitral agreements and awards. To reduce these uncertainties, major trading nations have entered into international treaties and conventions designed to facilitate the transnational enforcement of arbitration awards and agreements.

International agreements concerning commercial arbitration originally took the form of bilateral treaties. Later, multilateral conventions sought to facilitate international arbitration by encouraging the recognition of arbitration agreements and awards. The first such arrangement in the contemporary era was the Montevideo Convention, signed in 1889 by various Latin American states. Like other early efforts in the field, the Montevideo Convention attracted few signatories and had little practical impact. Following are the conventions dealing with International Arbitration :

1. Geneva Protocol of 1923 and Geneva Convention of 1927: In the early 1920s, at the behest of the International Chamber of Commerce, the Geneva Protocol of 1923 was negotiated and adopted under the auspices of the League of Nations. The Protocol was ultimately ratified by the United Kingdom, Germany, France, Japan, India, Brazil, and about a dozen other nations. Although the United States did not ratify the Protocol, the nations that did so represented a very significant portion of the international trading community at the time.

The Geneva Protocol's primary focus was to require the enforcement of arbitration agreements (with respect to both existing and future disputes). In addition, the Protocol also sought to facilitate the enforceability of arbitral awards, although it addressed only the enforcement of awards within the state where they were made.

The Protocol was augmented by the Geneva Convention for the Execution of Foreign Arbitral Awards of 1927. The Geneva Convention expanded the enforceability of arbitration awards rendered pursuant to arbitration agreements subject to the Geneva Protocol. It did so by requiring the enforcement of such awards within any contracting state (rather than only within the state where they were made).

The Geneva Protocol and Convention were major early steps towards an effective international framework for commercial arbitration. Nevertheless, both agreements were subject to significant limitations on their scope and were not widely ratified. More important, because of a relative dearth of international commercial arbitrations at the time, neither agreement received frequent application nor had extensive practical effect.

2. The New York Convention: The successor to the Geneva Protocol and the Geneva Convention was the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Often referred to as the "New York Convention," the treaty is by far the most significant contemporary international agreement relating to commercial arbitration.

The Convention was signed in 1958 in New York after lengthy negotiations under U.N. auspices. The Convention is widely regarded as "the cornerstone of current international commercial arbitration." In the apt words of Judge Stephen Schwebel, former President of the International Court of Justice, "It works."

The Convention was designed to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory nations." In broad outline, the Convention is as follows:

1. It requires national courts to recognize and enforce foreign arbitral awards, subject to specified exceptions.
2. It requires national courts to recognize the validity of arbitration agreements, subject to specified exceptions.

3. It requires national courts to refer parties to arbitration when they have entered into a valid agreement to arbitrate that is subject to the Convention.

The New York Convention made significant improvements in the regime of the Geneva Protocol and Geneva Convention of 1927. Particularly important was the New York Convention's shifting of the burden of proving the validity or invalidity of arbitral awards to the party resisting enforcement and its recognition of substantial party autonomy with respect to choice of arbitral procedures and applicable law. In the words of the President of the U.N. Conference on the Convention:

"It was already apparent that the document represented an improvement on the Geneva Convention of 1927. It gave a wider definition of the awards to which the Convention applied, it reduced and simplified the requirements with which the party seeking recognition or enforcement of an award would have to comply; it placed the burden of proof on the party against whom recognition or enforcement was invoked. It gave the parties greater freedom in the choice of the arbitral authority and of the arbitration procedures. It gave the authority before which the award was sought to be relied upon the right to order the party opposing the enforcement to give suitable security."

It became available in the 1960s and 1970s, as world trade and investment began significantly to expand. With this expansion came substantially greater numbers of international commercial disputes and arbitrations, which gave practical utility to the Convention. Despite its contemporary significance, the New York Convention initially attracted relatively few signatories. The Convention was drafted at the United Nations Conference on Commercial Arbitration held in New York in 1958. Twenty-six of the forty-five countries participating in the Conference ratified the Convention. Many other nations, including the United Kingdom, Sweden, and most Latin American and African states, failed to ratify the Convention for some time thereafter. The

United States also did not initially ratify the Convention, nor did it do so for some time.

Over time, states from all regions of the globe reconsidered their position and today some 120 nations have ratified the Convention. The Convention's parties include all major trading states and many Latin American, African, Asian, Middle Eastern, and former socialist states. During the past decade, numerous states (including a number in the Middle East and Latin America) have departed from long traditions of distrust of international arbitration, and ratified the Convention. In ratifying the Convention, many states have attached reservations that can have significant consequences in private disputes.

Art. VII(1) of the New York Convention specifically provides that the Convention does not affect the validity of any bilateral or other multilateral arrangements concerning the recognition and enforcement of foreign arbitral awards (except the Geneva Protocol and Geneva Convention). That has been interpreted by many national courts in a "pro-enforcement" fashion, to permit agreements and awards to be enforced under either the Convention or another treaty.

In virtually all countries, the New York Convention has been implemented through national legislation. The practical effect of the Convention is therefore dependent on both the content of such national legislation and the interpretation given by national courts to the Convention and national implementing legislation.

An important aim of the Convention's drafters was uniformity; they sought to establish a single, stable set of international legal rules for the enforcement of arbitral agreements and awards. The fulfillment of that aim is dependent upon the willingness of national legislatures and courts, in different signatory states, to adopt uniform interpretations of the Convention. In general, however, national courts have performed adequately, but no better, in arriving at

uniform interpretations of the Convention.

3. The Inter-American Convention on International Commercial Arbitration: After the pioneering Montevideo Convention in 1889, much of South America effectively turned its back on international commercial arbitration. Only Brazil ratified the Geneva Protocol of 1923, and even it did not adopt the Geneva Convention. South American states were very reluctant to ratify the New York Convention, for the most part only beginning to do so in the 1980s.

Nevertheless, in 1975 the United States and most South American nations negotiated the Inter-American Convention on International Commercial Arbitration, also known as the "Panama Convention." The United States ratified the Convention in 1990; other parties include Mexico, Venezuela, Columbia, Chile, Ecuador, Peru, Costa Rica, El Salvador, Guatemala, Honduras, Panama, Paraguay, and Uruguay. The Inter-American Convention is similar to the New York Convention in many respects. Among other things, it provides for the general enforceability of arbitration agreements and arbitral awards, subject to specified exceptions similar to those in the New York Convention.

The Inter-American Convention introduces a significant innovation, not present in the New York Convention, by providing that, where the parties have not expressly agreed to any institutional or other arbitration rules, the rules of the "Inter-American Commercial Arbitration Commission" ("IACAC") will govern. In turn, the Commission has adopted rules that are almost identical to the UNCITRAL Arbitration Rules. Less desirably, the Panama Convention also departs from the New York Convention by omitting provisions dealing expressly with judicial proceedings brought in national courts in breach of an arbitration agreement.

4. The ICSID Convention: The International Center for the Settlement of Investment Disputes ("ICSID") is a specialized arbitration institution, established pursuant to the so-called "Washington Convention" of 1965. ICSID was established at the initiative of the International Bank for Reconstruction and Development and is based at the World Bank's Washington headquarters.

The ICSID Convention is designed to facilitate the settlement of a limited range of "investment disputes" that the parties have specifically agreed to submit to ICSID. Investment disputes are defined as controversies that arise out of an "investment" and involve a signatory state or designated state entity (but not merely a private entity headquartered or based in a signatory state) and a national of another signatory state. As to such disputes, the Convention provides both conciliation and arbitration procedures.

The Convention contains a number of unusual provisions relating to international arbitration.

1. The Convention provides that, absent agreement by the parties, ICSID arbitrations are governed by the law of the state that is party to the dispute (including its conflicts rules) "and such rules of international law as may be applicable." In contrast, neither the New York nor Panama Conventions contains comparable substantive choice of law provisions.

2. ICSID awards are theoretically directly enforceable in signatory states, without any method of review in national courts. There has thus far been very little experience with judicial enforcement of ICSID awards.

3. When a party challenges an ICSID award, the Convention empowers the Chairman of the Administrative Council of ICSID to appoint an ad

hoc committee to review, and possibly annul awards; if an award is annulled it may be resubmitted to a new arbitral tribunal. The ICSID annulment mechanism has been vigorously criticised, on the grounds that it permits politicised appellate review.

Nearly 100 countries, from all geographical regions of the world, have ratified the ICSID Convention. Until relatively recently, however, relatively few cases had been brought under the Convention. ICSID's caseload is gradually increasing, particularly as a consequence of arbitrations brought pursuant to bilateral investment treaties or investment protection legislation.

Unfortunately, the prospects for greatly-increased usage of the ICSID Convention have been threatened by the annulment of several ICSID awards by ad hoc panels assigned to review awards. In addition, uncertainty as to the jurisdictional scope of the Convention and the Convention's appointment mechanism for arbitrators have led many to question ICSID's usefulness as a means of dispute resolution.

5. Iran-United States Claims Tribunal: The Iran-United States Claims Tribunal is one of the most ambitious international claims commissions. The Tribunal was established pursuant to the so-called Algiers Accords, which resolved some of the legal disputes arising from the Iranian seizure of U.S. hostages during President Carter's administration. Pursuant to the Accords, litigation in national courts concerning defined claims between U.S. and Iranian entities was suspended. A nine-person tribunal was established in the Hague, with defined jurisdiction over claims arising from U.S.- Iran hostilities; three tribunal members were appointed by the United States, three by Iran, and three from other states. The tribunal adopted the UNCITRAL Arbitration Rules and has issued a substantial number of decisions.

6. Bilateral Investment Treaties or Investment Protection Agreements: Bilateral investment treaties ("BITs") or investment protection agreements ("IPAs") became common during the 1980s and 1990s, as a means of encouraging capital investment in developing markets. Capital-exporting states (including the United States, most Western European states, and Japan) have entered into numerous BITs or IPAs with countries in developing regions. A recent tally indicated that more than 1,300 BITs are presently operative.

Many BITs contain provisions dealing with the enforceability of international arbitration agreements and awards. In addition, some BITs contain provisions, which permit foreign investors to require international arbitration of certain categories of disputes including in the absence of an arbitration agreement in the contract(s) giving rise to the dispute. The possibility of "arbitration without privity" is an important option in some international commercial disputes, which counsels careful attention to applicable BITs.

7. Bilateral Friendship, Commerce and Navigation Treaties: A number of nations have entered into bilateral treaties dealing principally with commercial relations and incidentally with international arbitration. These treaties generally provide for the reciprocal recognition of arbitral awards made in the territory of the contracting states. For example, the United States has included an article relating to arbitration in many of its bilateral Friendship, Commerce and Navigation treaties. U.S. and other FCN provisions regarding arbitration are often drafted along the following lines:

"Contracts entered into between nationals or companies of either party and nationals or companies of the other party that provide for settlement by arbitration of controversies shall not be deemed unenforceable within the territories of such other party merely on the

grounds that the place designated for arbitration proceedings is outside such territories or that the nationality of one or more of the arbitrators is not that of such other party. Awards duly rendered pursuant to any such contracts which are final and enforceable under the laws of the place where rendered shall be deemed conclusive in enforcement proceedings brought before the courts of competent jurisdiction of either party, and shall be entitled to be declared enforceable by such courts, except where found contrary to public policy." Such provisions have been interpreted liberally by national courts.

Many nations historically regarded international commercial arbitration with a mixture of suspicion and hostility. That was particularly true of various parts of Latin America and the Middle East, as well as developing countries elsewhere. This hostility arose from reluctance to compromise principles of national sovereignty and from perceptions concerning the fairness, neutrality, and efficacy of contemporary international commercial arbitration. Although historic distrust for international arbitration has waned, it continues to influence legislation, judicial decisions, and other actions in many states.

Against this background, contemporary arbitration legislation in many foreign states does not provide effective enforcement of arbitration agreements; such provisions are either revocable at will or unenforceable in broad categories of disputes. Similarly, in a number of states, international arbitral awards are subject to either de novo judicial review or to similarly rigorous scrutiny on other grounds. Finally, some national courts have been prepared to interfere in the international arbitral process for example, by purporting to remove arbitrators, to resolve "preliminary" issues, to bar foreign lawyers from appearing, or to enjoin arbitrations.

During the last decade, a number of states, which historically distrusted international arbitration, have ratified the New York Convention and/or enacted legislation supportive of the arbitral process. These include Russia, India, China, Saudi Arabia, Argentina, Algeria, Bahrain, Tunisia, Nigeria, Peru, and Venezuela. Although there is often little practical experience with the application of arbitration statutes in such states, these statutes have the potential for providing a more stable, predictable framework for international arbitration. Unfortunately, even where national law is superficially supportive of the international arbitral process, many national courts have displayed a readiness to hold arbitration agreements or awards invalid, particularly when requested to do so by local individuals, companies, or state entities.

Despite the hostility to international arbitration in some parts of the world, most states in Europe, North America, and parts of Asia have adopted legislation that provides effective and stable support for the arbitral process. In particular, England, Switzerland, the United States, Canada, France, Sweden, Belgium, the Netherlands, Austria, Germany, and Italy have enacted arbitration statutes that ensure the basic enforceability of arbitration agreements and awards with minimal judicial interference in the arbitral process.

Choice of Arbitration Law and Procedural Rules

Parties frequently agree to arbitration to avoid the jurisdictional and choice of law uncertainties that arise when international disputes are litigated in national courts. Unfortunately, international arbitration can produce its own set of complex, often unpredictable choice of law issues. Choice of law issues play an important role in international commercial arbitration. It is necessary at the outset to distinguish between four separate choices of law issues that can arise in connection with an international arbitration:

1. The substantive law governing the merits of the parties' underlying contract and other claims.
2. The substantive law governing the parties' arbitration agreement.
3. The procedural law applicable to the arbitration proceedings (also called the "curial law" or the "lex arbitri").
4. The conflict of law rules applicable to select each of the foregoing laws. Although not common, it is possible for each of these four issues to be governed by a different national (or other) law.

Each of the foregoing choice of law issues can have a vital influence on international arbitral proceedings. Different national laws provide different sometimes dramatically different rules applicable at different stages of the arbitral process. Understanding which national rules will potentially be applicable can therefore be critical. The parties' underlying dispute will ordinarily be resolved under the rules of substantive law of a particular national legal system. In the first instance, it will usually be the arbitrators who determine the substantive law applicable to the parties' dispute. International arbitrators typically give effect to the parties' agreements concerning applicable substantive law ("choice-of-law clauses"). The principal exception is where mandatory national laws or public policies purport to override private contractual arrangements.

Where the parties have not agreed upon the substantive law governing their dispute, the arbitral tribunal must select such a law. In so doing, the tribunal will usually refer to some set of national conflict of laws rules. Although the historical practice was to apply the national conflict of laws rules of the arbitral situs, more recent practice is diverse. Some tribunals and commentators adhere to the traditional approach, while others look to the conflicts rules of all states having a connection with the dispute. Additionally, some authorities appear to be moving towards recognition of an international

body of conflict of laws rules. There is also authority supporting an arbitral tribunal's "direct" application of substantive rules of law, purportedly without prior recourse to any set of conflict of laws rules. The development of bodies of international substantive rules dealing with commercial matters has facilitated this development.

Arbitration agreements are regarded under most national laws and institutional arbitration rules as "separable" from the underlying contract in which they appear. One consequence of this is that the parties' arbitration agreement may be governed by a different national law than that applicable to the underlying contract. This can occur either by the parties' express choice of law or by the application of conflict of laws rules i.e. theoretically different substantive laws may be applied for the parties' arbitration agreement and their underlying contract.

The following four alternatives of law governing an arbitration agreement are of particular importance, they are as follows:

1. The law chosen by the parties to govern the arbitration agreement itself.
2. The law of the arbitral situs.
3. The law governing the parties' underlying contract.
4. The law of the forum in which judicial enforcement of the agreement is sought (for example, the FAA in a U.S. court and the IACA in India). In the absence of a choice by the parties, arbitral tribunals and national courts tend to apply the law of the arbitral situs.

The arbitration proceedings themselves are also subject to legal rules. The law governing the arbitral proceedings is variously referred to as the procedural law of the arbitration, the curial law, the *lex arbitri*, or the *loi de l'arbitrage*.

Among other things, the procedural law applicable to an arbitration typically deals with such issues as the appointment and qualifications of arbitrators, the qualifications and professional responsibilities of parties' legal representatives, the extent of judicial intervention in the arbitral process, the procedural conduct of the arbitration, and the form of any award. Different national laws take significantly different approaches to these various issues. In some countries, national law imposes significant limits or requirements on the conduct of the arbitration and local courts have broad powers to supervise arbitral proceedings. Elsewhere, and in most developed jurisdictions, local law affords international arbitrators virtually unfettered freedom to conduct the arbitral process subject only to basic requirements of procedural regularity ("due process" or "natural justice").

In most cases, the procedural law applicable to the arbitral proceedings will be the law of the arbitral situs, the place where the parties have agreed that the arbitration will be seated and that arbitral hearings are conducted. Parties nonetheless have the power, under many developed legal systems, to agree to the application of a different procedural law than that of the arbitral situs. This seldom occurs in practice, and the effects of such an agreement are uncertain.

Selecting each of the bodies of law identified above, the laws applicable to the merits of the underlying dispute, to the arbitration agreement, and to the arbitration proceedings, ordinarily requires application of conflict of laws rules. In order to select the substantive law governing the parties' dispute, for example, the arbitral tribunal must often apply a conflict of laws system. And, just as different states have different rules of substantive law, they also have different conflict of laws rules. An international arbitral tribunal must therefore decide at the outset what set of conflicts rules to apply. The actual practice of arbitral tribunals in selecting the law applicable to each of the foregoing issues varies significantly. It includes the following approaches

1. Application of the arbitral situs' conflict of laws rules.
2. Application of the "international" conflict of laws rules.
3. Successive application of the conflict of laws rules of all interested states.
4. Direct application of substantive law without any express conflicts analysis.

Following are the procedural laws dealing with International Arbitration:

1. UNCITRAL Model Law on International Commercial Arbitration: A leading effort towards harmonization in the field of international commercial arbitration is the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration. The UNCITRAL Model Law was adopted by a resolution of UNCITRAL in Vienna in 1985 and by a U.N. General Assembly resolution later the same year. The Model Law is designed to be implemented by national legislatures, with the objective of further harmonizing the treatment of international commercial arbitration in different countries.

2. UNCITRAL Arbitration Rules: As significant to the development of the international arbitral regime as the UNCITRAL Model Law are the UNCITRAL Arbitration Rules. The UNCITRAL Rules were promulgated by Resolution 31/98, adopted by the General Assembly of the United Nations on December 15, 1976. The UNCITRAL Arbitration Rules were designed for use in ad hoc international arbitrations. When they were adopted in 1976, the UNCITRAL Rules were the only set of rules available specifically for that purpose,

although alternatives now exist. Under the Rules, the Secretary General of the Permanent Court of Arbitration serves as appointing authority, unless the parties agree to the contrary.

The objective of the UNCITRAL Rules was to create a relatively predictable and stable procedural framework for international arbitrations without stifling the informal and flexible character of such dispute resolution mechanisms. The Rules aimed to satisfy common law, civil law, and other jurisdictions, as well as capital-importing and capital-exporting interests. Foreign states, which generally will have supported the Rules in the United Nations debates, often find it difficult to object to their use in an arbitration agreement or arbitral proceeding.

The UNCITRAL Rules have contributed significantly to the harmonization of international arbitration procedures. That is reflected in part by the readiness of the AAA and the IACAC to base the AAA International Rules and IACAC Rules substantially on the UNCITRAL Rules. Other institutional rules, including the LCIA Rules, have also drawn on the UNCITRAL Rules.

3. IBA Rules on the Taking of Evidence in International Commercial Arbitration: In 1983, the International Bar Association adopted the "Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration." The Rules attempted to provide a blend of civil law and common law approaches to the subjects of discovery and evidentiary presentations in arbitration. The Rules were revised in 1999, and re-titled the IBA "Rules on the Taking of Evidence in International Commercial Arbitration." The Rules are intended principally for contractual incorporation into parties' arbitration agreements, but they are also sometimes the basis for an arbitral tribunal's procedural rulings.

4. ABA/AAA Code of Ethics and IBA Ethics in International Arbitration: In 1980, a joint committee of the American Bar Association and American Arbitration Association adopted the ABA/AAA Code of Ethics. The Code sought to provide ethical guidelines, focusing particularly on issues of bias and partiality, for arbitrators. Consistent with historic practice in the United States, the Code set different ethical standards for party-appointed and "neutral" arbitrators.

In 1990, however, the American Bar Association recommended amendment of the Code of Ethics to provide for the neutrality and impartiality of all members of the arbitral panel (unless otherwise agreed). The American Bar Association is presently considering revisions to the Code of Ethics. In 1987, the International Bar Association adopted "Ethics for International Arbitration," derived in substantial part from the ABA/AAA Code, the IBA effort sought to establish uniform ethical standards for application to international arbitrators. Unlike the original ABA/AAA Code, the IBA Ethics applied the same standards to party-appointed and neutral arbitrators. The IBA Ethics are influential guidelines in international arbitration practice.

5. UNCITRAL Notes on Organizing Arbitral Proceedings: In 1996, UNCITRAL published the "UNCITRAL Notes on Organizing Arbitral Proceedings." The UNCITRAL Notes are non-binding guidelines for arbitrators and parties designed to identify issues that frequently arise in the course of international arbitrations. Among other things, the UNCITRAL Notes briefly discuss procedural rules, communications, written submissions, evidence, witnesses, and hearings.

Fundamental importance of an arbitration agreement

Introduction to Arbitration Agreements

The foundation for almost every international arbitration is an international arbitration agreement. In the absence of a valid agreement to arbitrate, there is generally no basis for requiring arbitration or for enforcing an arbitral award against a party. International arbitration agreements can be drafted in countless different ways. Typically, an arbitration agreement will be a provision in an underlying commercial contract, calling for arbitration of any future disputes relating to the contract. Such a provision can be either short and standardised or longer and tailor-made for a particular transaction. As a model of brevity, if not prudence, European commentators cite a clause that provided "English law arbitration, in London according ICC Rules." A U.S. counterpart read: "Arbitration, if required in New York City."

At the opposite end of the spectrum are multi-paragraph arbitration provisions, recommended by assiduous practitioners for inclusion in commercial contracts, or specially-drafted for a particular transaction. It is also possible for entire agreements to be devoted exclusively to the arbitration of disputes under a related commercial contract or series of contracts. In between these extremes are model clauses promulgated by the ICC, LCIA, AAA, and other international arbitration institutions. Whatever form they may take, international arbitration agreements are vitally important to the international arbitral process. Properly drafted, they can pave the way for a relatively smooth and efficient arbitration; less carefully drafted they can give rise to a host of legal and practical issues.

Separability of the Arbitration Agreement

In the international context, arbitration clauses are generally deemed to be presumptively "separable" or "severable" from the underlying contract within

which they are found. The "separability doctrine" is specifically provided for by leading institutional arbitration rules, and by national arbitration legislation or judicial decisions from many jurisdictions, including the United States and India.

The separability doctrine provides that an arbitration agreement, even though included in and related closely to an underlying commercial contract, is a separate and autonomous agreement. According to a leading international arbitral award: "The principle ... of the autonomy or the independence of the arbitration clause ... has been upheld by several decisions of international case law." The analytical rationale for the separability doctrine is that the parties' agreement to arbitrate consists of promises that are distinct and independent from the underlying contract: "the mutual promise to arbitrate form the quid pro quo of one another and constitute a separable and enforceable part of the agreement."

The separability doctrine is regarded as having important consequences for the arbitral process: "Acceptance of autonomy of the international arbitration clause is a conceptual cornerstone of international arbitration." Among other things, the separability doctrine is generally understood as implying the continued validity of an arbitration clause (notwithstanding defects in the parties' underlying contract), and as permitting the application of different substantive laws to the parties' arbitration agreement and underlying contract.

The UNCITRAL Model Law, the Swiss Law on Private International Law, the English Arbitration Act, 1996, the Indian Arbitration and Conciliation Act, 1996 and the Federal Arbitration Act ("FAA"), as well as provisions from the UNCITRAL, ICC, and LCIA arbitration rules introduce the separability doctrine.

A Soviet arbitral tribunal in *All-Union Export-Import Association v. JOC Oil Ltd*, by its award dealt rigorously with the separability doctrine and other related issues. *Sojuznefteexport* (the "Association" or "SNE") was a foreign

trade organization established under the laws of the former Union of Soviet Socialist Republics ("USSR"). In 1976, SNE entered into various agreements to sell quantities of oil to JOC Oil Limited ("JOC"), a Bermuda company.

The purchase agreements incorporated SNE's standard conditions, which contained the following arbitration clause:

"All disputes or differences which may arise out of this contract or in connection with it are to be settled, without recourse to the general Courts of law, in the Commission of the U.S.S.R. Chamber of Commerce and Industry in Moscow ["FTAC"], in conformity with the rules of procedure of the above Commission."

JOC took delivery of 33 oil shipments (worth approximately \$100 million) without paying for them. Following JOC's non-payment, SNE initiated arbitration under the arbitration clause set forth above. JOC replied, in part, by claiming that the purchase agreement had not been executed by two authorised representatives of SNE and accordingly was void under Soviet law. JOC also alleged that, as a consequence, the arbitral tribunal lacked competence to adjudicate the dispute because the arbitration clause was void. SNE claimed that the sales agreement was not void and that, even if it were, the arbitration clause was separable and the law applicable to that agreement did not require two signatures to be valid.

As a result the arbitral tribunal held that "the Commission has recognized that an arbitration agreement (arbitration clause) is a procedural contract, independent from the material-legal contract and that therefore the question as to the validity or invalidity of this contract does not affect the agreement of the parties about the submission of the existing dispute to the jurisdiction of the FTAC. The Commission has come to the conclusion that the arbitration clause contained in the contract is valid and therefore in accordance with the right assigned to it has recognized itself as competent to hear the dispute as to its essence and to rule upon it. The arbitral tribunal further held that, although

the underlying sales contract was void, Soviet principles of restitution applied. Under these principles, the tribunal awarded SNE the value of the oil shipped to JOC Oil, at the then-prevailing international oil prices. It also awarded SNE lost profits realized by JOC Oil (in an amount equal to market interest rates. This produced an award of approximately \$200 million in SNE's favour.

After the arbitral award was made against JOC Oil, Sojuznefteexport sought to enforce it in Bermuda. The first instance court denied recognition on various grounds, including that the arbitral tribunal lacked jurisdiction. The court held that "based on the Tribunal's finding that the underlying contract was invalid ab initio, then under both Soviet and English law there never was any contract between the parties from the very onset as such there never was an arbitration clause or agreement which could be submitted to arbitration." This judgment was reversed on appeal.

Finally, the U.S. Supreme Court's decision in *Prima Paint Co. v. Conklin Mfg Co.*, is one of the cases of seminal treatment of the separability doctrine by a national court, Justice FORTAS said "This case presents the question whether the federal court or an arbitrator is to resolve a claim of "fraud in the inducement," under a contract governed by the Federal Arbitration Act, 1925, where there is no evidence that the contracting parties intended to withhold that issue from arbitration...."

Flood & Conklin Manufacturing Company ("F&C") entered into a Consulting Agreement with Prima Paint Corporation ("Prima Paint"); at about the same time, Prima Paint also purchased F&C's paint business. The Consulting Agreement obligated F&C to assist Prima Paint's exploitation of the paint business, and forbid it from competing with that business.

The agreement contained what the Court termed "a broad arbitration clause," which provided:

"Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in the City of New York, in accordance with the rules then obtaining of the American Arbitration Association ..."

One week after the Consulting Agreement was executed, F&C filed a bankruptcy petition. Prima Paint thereafter withheld amounts payable under the agreement and notified F&C that it had breached the contract by fraudulently representing that it was solvent. F&C then served a notice of intention to arbitrate. Prima Paint responded by filing suit in federal district court, seeking to rescind the Consulting Agreement on grounds of fraudulent inducement. F&C moved to stay the judicial action pending arbitration.

The District Court granted F&C's motion to stay the action pending arbitration, holding that a charge of fraud in the inducement of a contract containing an arbitration clause as broad as this one was a question for the arbitrators and not for the court. For this proposition it relied on *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*¹²⁰. The Court of Appeals for the Second Circuit dismissed Prima Paint's appeal. It held that the contract in question evidenced a transaction involving interstate commerce; that under the controlling *Robert Lawrence Co.* decision a claim of fraud in the inducement of the contract generally as opposed to the arbitration clause itself, is for the arbitrators and not for the courts and that this rule of "national substantive law" governs even in the face of a contrary state rule. We agree, albeit for somewhat different reasons, and affirm the decision of the District Court.

Interpretation and Enforceability of International Arbitration Agreements:

Related to the separability doctrine is the allocation of authority between arbitrators and national courts to decide disputes over the interpretation and

enforceability of arbitration agreements. That is, "who decides" disputes over the formation, validity or interpretation of arbitration agreements.

Disputes over the enforceability or interpretation of an arbitration agreement can arise in a variety of different circumstances.

1. When an adverse party attempts to commence arbitration, a party may refuse by inaction to honour the arbitration clause, simply by not participating in the arbitral process. If this occurs, the meaning or enforceability of the clause may be raised by the party pursuing arbitration in a judicial action seeking an order to compel arbitration. Alternatively, the arbitral tribunal may proceed to a final default award (either expressly or impliedly confirming its own jurisdiction). The meaning and enforceability of the parties' arbitration agreement may thereafter be raised by the losing party in either a defense to judicial enforcement of the award brought by the prevailing party or in a judicial action to vacate or annul the award.

2. One party may commence litigation concerning the parties' underlying dispute in national courts in derogation of the arbitration agreement. It may do so either concurrently with the other party's effort to initiate arbitration or before any effort to invoke arbitration has occurred. In either event, the meaning or enforceability of the parties' arbitration agreement is likely to arise in a motion to suspend or stay judicial proceedings pending arbitration. The interpretation or validity of the parties' arbitration agreement may also be simultaneously presented to the arbitral tribunal, if one has been constituted.

3. Both parties may participate in the arbitration process and forego litigation in national courts. Nevertheless, one party may choose to argue to the arbitral tribunal that it lacks jurisdiction over some or all of

the claims before it. The tribunal will generally hear argument on that issue and render an interim jurisdictional award. Assuming that the tribunal upholds its jurisdiction, the unsuccessful party can then seek to vacate or annul the jurisdictional award (or a final award, dealing *inter alia* with jurisdiction) in a national court.

4. The parties can arbitrate the merits of their dispute, with one party attempting to reserve its rights as to jurisdiction. Once a final arbitral award is rendered, the losing party may seek to vacate or annul the award; alternatively, it may refuse to honor the award and the prevailing party will be required to seek judicial enforcement. Subject to claims that jurisdictional objections have been waived, the proceedings to vacate or enforce the final award may raise issues relating to the enforceability of the underlying arbitration agreement.

In *First Options of Chicago, Inc. v. Kaplan*, the case concerns several related disputes between, on one side, First Options of Chicago, Inc., a firm that clears stock trades on the Philadelphia Stock Exchange, and, on the other side, three parties: Manuel Kaplan; his wife Carol Kaplan; and his wholly owned investment company, MK Investments, Inc. (MKI), whose trading account First Options cleared. The disputes center around a "workout" agreement, embodied in four separate documents, which governs the "working out" of debts to First Options that MKI and the Kaplans incurred.

In 1989, after entering into the agreement, MKI lost an additional \$1.5 million. First Options then took control of, and liquidated, certain MKI assets; demanded immediate payment of the entire MKI debt; and insisted that the Kaplans personally pay any deficiency. When its demands went unsatisfied, First Options sought arbitration. MKI, having signed the only workout document (out of four) that contained an arbitration clause, accepted arbitration. The Kaplans, however, who had not personally signed that

document, denied that their disagreement with First Options was arbitrable and filed written objections to that effect with the arbitration panel. The arbitrators decided that they had the power to rule on the merits of the parties' dispute, and did so in favour of First Options.

The Kaplans then asked the Federal District Court to vacate the arbitration award and First Options requested its confirmation. The court confirmed the award. Nonetheless, on appeal the Court of Appeals for the Third Circuit agreed with the Kaplans that their dispute was not arbitrable; and it reversed the District Court's confirmation of the award against them. The Court of Appeals for the Third Circuit further held that "a party who has not agreed to arbitrate will normally have a right to a courts decision about the merits of its dispute (say, as here, its obligation under a contract). But, where the party has agreed to arbitrate, he or she, in effect, has relinquished much of that right's practical value. The party still can ask a court to review the arbitrators' decision, but the court will set that decision aside only in very unusual circumstances."

In *AT&T Technologies, Inc, v. Communications Workers and Steelworkers v. Warrior & Gulf Navigation Co* it was well settled that the parties may agree to arbitrate arbitrability. That is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances. This Court has added an important qualification, applicable when courts decide whether a party has agreed that arbitrators should decide arbitrability: Courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clear and unmistakable" evidence that they did so.

The law treats silence or ambiguity about the question "who primarily should decide arbitrability" differently from the way it treats silence or ambiguity about the question "whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement" incase of the

latter question the law reverses the presumption. Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.

In *Christopher Brown Ltd v. Genossenschaft Osterreichisher Waldbesitzer Holzwirtschaftsbetriebe*, it was held that "Despite the arbitrators' power to rule on jurisdictional challenges, either party to the arbitration would be free to seek either immediate or subsequent judicial resolution of the jurisdictional challenge. (In the event of concurrent arbitral and judicial proceedings, each decision-maker (i.e., arbitrator and court) could consider the desirability of staying its own proceedings.) In the event of an arbitral award on the subject of jurisdiction (either interim or final), the arbitrator's ruling would be subject to judicial review under otherwise-applicable standards of review."

Law Applicable to International Arbitration Agreements.

Identifying the law applicable to an international arbitration agreement is a complex, but critically important subject. The topic has given rise to extensive commentary, and even more extensive confusion. This confusion does not comport with the ideals of international commercial arbitration, which seeks to simplify, expedite, and rationalize dispute resolution. Nonetheless, the intricacies of contemporary conflicts of law doctrine must be understood.

The law applicable to the parties' arbitration agreement may be different from both the law applicable to the substance of the parties' underlying contract and to the arbitral proceedings. There are four possible alternatives for the law governing an arbitration agreement, they are as follows:

1. The law expressly or impliedly chosen by the parties to govern the arbitration agreement itself.
2. The law of the arbitral situs.
3. The law governing the parties' underlying contract.

4. The law of the forum in which judicial enforcement of the agreement is sought (for example, the FAA in a U.S. court and the IACA in India). There is little uniformity among either arbitral tribunals or national courts in choosing between these alternatives.

The choice of law applicable to international arbitration agreements is affected by both the New York Convention and national law. Both sources arguably provide choice of law rules and/or substantive rules applicable to the formation, validity, and interpretation of international arbitration agreements. Determining the interplay between the Convention's choice of law and substantive rules, and those of national law, can be complex. The New York Convention, the Inter-American Convention, and the 1961 European Convention. And the provisions of the UNCITRAL Model Law, the Swiss Law on Private International Law, the FAA, and the IACA deal with the choice of law applicable to international arbitration agreements.

In *Ledee v. Ceramiche Ragno*, the defendants-appellees are Italian corporations that make and market ceramic tiles. The plaintiffs-appellants are two Puerto Rico corporations and an individual citizen of the Commonwealth. In 1964 the parties entered into a distributorship agreement giving the appellants exclusive rights to sell and distribute the appellees' ceramic tiles in the Antilles. The agreement contained the following paragraph 9:

"Any dispute related to the interpretation and application of this contract will be submitted to an Arbiter selected by the President of the Tribunal of Modena, Italy, who will judge as last resort and without procedural formalities".

In March, 1981, the appellants brought suit in the Superior Court of Puerto Rico, alleging that the appellees had breached the contract by unjustifiably terminating their distributorship. The complaint sought damages in accord with the provisions of the Puerto Rico Dealers Act. The appellees removed

the case to the United States District Court for the District of Puerto Rico. The district court ordered arbitration in accord with paragraph 9 and dismissed the complaint. This appeal ensued. Appellants contend first that, under the laws of the Commonwealth of Puerto Rico, paragraph 9 is void and unenforceable. They invoke the general principle that contracting parties may not agree to clauses or conditions "in contravention of law, morals, or public order." And to show that paragraph 9 is contrary to the public order, they direct attention to the Dealers Act, as amended. The Dealers Act was enacted to help protect Puerto Rico distributors from the allegedly exploitative practices of certain foreign suppliers. Substantively, it prohibited termination of dealership contracts except "for just cause." Moreover, it declared that its provisions were of a public order and that the dealers' rights under it could not be waived. It reads as follows

"Any stipulation that obligates a dealer to adjust, arbitrate or litigate any controversy that comes up regarding his dealer's contract outside of Puerto Rico, or under foreign law or rule of law, shall be likewise considered as violating the public policy set forth by this chapter and is therefore null and void".

Nothing in the record suggests that the arbitration agreement was "null and void, inoperative or incapable of being performed" within the terms of Art. II (3) of the Convention.

In *Rhone Mediterranee Compagnia Francese di Assicurazioni e Riassicurazioni v. Achille Lauro*, Rhone Mediterranee Compagnia Francese di Assicurazioni E Riassicurazioni ("Rhone"), a casualty insurer, appeals from an order of the District Court of the Virgin Islands staying Rhone's action pending arbitration. The action results from a fire loss, which occurred when the vessel *Angelina Lauro* burned at the dock of the East Indian Co. Ltd in Charlotte Amalie, St. Thomas. At the time of the fire the vessel was under time charter to Costa Armatori SpA ("Costa"), an Italian Corporation. Rhone

insured Costa, and reimbursed it for property and fuel losses totaling over one million dollars. Rhone, as subrogee of Costa, sued the owner of the vessel, Achille Lauro, ("Lauro") and its master, Antonio Scotto di Carlo, alleging breach of the Lauro-Costa time charter, unseaworthiness, and negligence of the crew.

The district court granted defendants' motion for a stay of the action pending arbitration, and Rhone appeals. As subrogee, Rhone stands in place of its insured, the time charterer Costa. In the time charter contract there is a clause:

"23. Arbitration. Any dispute arising under the Charter to be referred to arbitration in London (or such other place as may be agreed according to box 24) one arbitrator to be nominated by the Owners and the other by the Charterers, and in case the Arbitrators shall not agree then to the decision of an Umpire to be appointed by them, the award of the Arbitrators or the Umpire to be final and binding upon both parties. Box 24 Place of arbitration (only to be filled in if place other than London agreed (cl. 23) NAPOLI.

All the parties to the time charter agreement and the lawsuit are Italian. Italy and the United States are parties to the New York Convention. The FAA, implements the United States' accession on September 1, 1970 to the Convention by providing that it "shall be enforced in United States courts in accordance with this chapter." Rhone does not dispute that the Convention is applicable. What Rhone does contend is that under the terms of the Convention the arbitration clause in issue is unenforceable. Rhone's argument proceeds from a somewhat ambiguous provision in Art. II (3) of the Convention.

Rhone contends that when the arbitration clause refers to a place of arbitration, here Naples, Italy, the law of that place is determinative. It then relies on the affidavit of an expert on Italian law, which states that in Italy an arbitration clause calling for an even number of arbitrators is null and void,

even if, as in this case there is a provision for their designation of a tie breaker.

The ambiguity in Art. II (3) of the Convention with respect to governing law contrasts with Art. V, dealing with enforcement of awards. Art. V (1)(a) permits refusal of recognition and enforcement of an award if the "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." Art. V (1)(e) permits refusal of recognition and enforcement if "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." Art. V (1)(d) permits refusal of enforcement if "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." Thus Art. V unambiguously refers the forum in which enforcement of an award is sought to the law chosen by the parties, or the law of the place of the award.

Rhone and the defendants suggest different conclusions that should be drawn from the differences between Art. II and Art. V. Rhone suggests that the choice of law rule of Art. V should be read into Art. II. The defendants urge that in the absence of a specific reference Art. II should be read so as to permit the forum, when asked to refer a dispute to arbitration, to apply its own law respecting validity of the arbitration clause. However, we conclude that the meaning of Art. II(3) which is most consistent with the overall purposes of the Convention is that an agreement to arbitrate is "null and void" only when

1. It is subject to an internationally recognized defense such as duress, mistake, fraud, or waiver.
2. It contravenes fundamental policies of the forum state.

The court therefore held that "an action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States." Since no federal law imposes an odd number of arbitrators rule - the only defect relied upon by Rhone, the district court did not err in staying the suit for breach of the time charter agreement pending arbitration...."

In ICC Case No. 6149 (names of the parties not disclosed due to confidentiality), A Korean manufacturer entered into three contracts to supply an Iraqi buyer with various goods. The goods were to be delivered in Iraq. The contracts contained the following arbitration clause:

"Any dispute with regards to this contract will be solved cordially; otherwise by two arbitrators appointed by each side. In an eventual non agreement it will be governed by the laws and regulations of the International Chamber of Commerce in Paris whose ruling should be final."

Disputes arose under the contract, which led to various revisions to the parties' original contracts. These revisions failed to preserve relations. In due course, the Korean seller commenced an arbitration under ICC Rules. The Iraqi purchaser raised jurisdictional objections to the tribunal's jurisdiction, citing Sect. 2 of Jordanian Law No. 35 of 1983.

The tribunal rendered the following interim award:

"Sect. 2 of the Jordanian Law No. 35 of 1983 called "Amendment Law to the Merchandise Maritime Law" is not applicable to the arbitration agreements contained in the three contracts of sale. The arbitration agreements therefore have not been voided by said Sect. 2. But they are still valid and binding upon the parties thus being susceptible of serving as a legitimate basis for the exercise of the arbitral tribunal's jurisdiction over the subject-matter of this arbitration...."

Applicability of International Conventions and National Legislation

An important preliminary issue in disputes over the enforcement or interpretation of international arbitration agreements is determining the applicability of the New York Convention (or other international arbitration conventions or treaties) and national arbitration legislation to a particular agreement. Both international arbitration conventions and national arbitration statutes contain "jurisdictional requirements" which define what arbitration agreements are (and are not) subject to those instruments' substantive rules. These jurisdictional requirements can have important practical consequences, because the substantive terms of the Convention and most contemporary international arbitration statutes (such as the UNCITRAL Model Law) are "pro-arbitration."

Despite its importance, there are numerous international arbitration agreements to which the New York Convention does not apply: "there is a vast area not covered by the Convention. " Defining precisely those arbitration agreements that are subject to the New York Convention is not always straightforward. In contrast to Art. I's definition of the arbitral awards which are subject to the Convention, nothing in Art. II (or otherwise) details which arbitration agreements fall within Art. II's "recognition" requirement. In the words of one commentator, "the Convention does not give a definition as to which arbitration agreements fall under" Art. II. Five jurisdictional requirements of the New York Convention warrant attention (and parallel similar requirements under the Inter-American Convention). They are as follows:

1. Art. II(1) limits the Convention's coverage to "agreements in writing."
2. The Convention is applicable in many national courts only on the basis of reciprocity (i.e., *vis-À-f* -vis other nations that also have ratified the Convention).

3. The Convention only applies to agreements concerning "foreign" or "non-domestic" awards.
4. The Convention is generally applicable only to differences arising out of "commercial" relationships.
5. Again pursuant to Art. II (1), the parties' agreement must provide for arbitration of "differences which have arisen or which may arise ... in respect of a defined legal relationship, whether contractual or not."

Like the New York Convention, contemporary international arbitration statutes in most states contain either express or implied jurisdictional limitations. These jurisdictional requirements have substantial practical importance, because they determine when the generally "pro-arbitration" substantive provisions of contemporary arbitration legislation apply. The jurisdictional requirements of national arbitration statutes vary from state to state. In general, however, these jurisdictional limits are broadly similar to those contained in the New York Convention:

1. A "writing" requirement.
2. A possible reciprocity requirement.
3. A "foreign" or "international" connection requirement.
4. A "commercial relationship" requirement.
5. A "defined relationship" requirement.

The New York Convention and most contemporary national arbitration statutes that regulate international arbitration apply only to arbitration agreements that have some sort of "foreign" or "international" connection. This is consistent with the purpose of both types of instruments, which is to facilitate the international arbitral process, without disturbing local legal rules

for domestic arbitration matters. The New York Convention is applicable only to arbitral awards:

1. That are "made" in a state other than the one where recognition or enforcement is sought, or
2. That are "not considered as domestic awards" under the law of the enforcing state.

These provisions have generally been held applicable by analogy to arbitration agreements (as well as awards), extending the Convention only to those agreements that have a "foreign" or "international" connection. Similarly, the Inter-American Convention is applicable (according to its title and preamble) to "international commercial arbitration." The Conventions' limitation to international arbitration agreements is paralleled by similar jurisdictional requirements in many national arbitration statutes. For example, Art 1(1) of the UNCITRAL Model Law provides that the Law applies only to "international commercial arbitration," as defined in Art 1(3). Similarly, Art 176 of the Swiss Law on Private International Law provides that the Act's international arbitration provisions are limited to cases where, "when the arbitration agreement was concluded, at least one of the parties had neither its domicile nor its habitual residence in Switzerland." These jurisdictional limits serve the general purpose of permitting separate legal regimes for international and domestic arbitration agreements (in light of the differing policies implicated in each case).

In *Brier v. Northstar Marine Inc*, on or about October 21, 1990, plaintiff John H. Brier, Jr., the owner of the vessel and three other individuals were traveling from Connecticut to Maryland aboard a fifty-three (53) foot yacht titled the *M/Y Joanie Bee*.... As plaintiff was entering the Hereford Inlet in New Jersey, the vessel ran aground.... Plaintiff (contacted defendant) Northstar Marine, Inc. to ascertain whether the company could provide the necessary assistance to plaintiff in refloating his vessel. Captain Risko, the owner and operator of

Northstar Marine, Inc. informed plaintiff that he could provide the necessary assistance.... Captain Risko informed Mr. Brier that he would be conducting a salvage operation. He then read from a document known as the "Miranda Act for Salvors" which basically states that the Lloyd's of London Form will be used. This form also states that the terms are "No Cure, No Pay," which allows the company to conduct the salvage operation without a prearranged price and at the completion of the operation the company will submit a claim. If the master or his insured do not agree with the claim, it must be arbitrated by the Lloyd's of London Arbitration Panel.

Somewhere between 8:25 a.m. and 9:00 am on October 22, 1990, Mr. Cassidy, the owner and operator of the Cape May Marine Services, arrived at plaintiff's motel room with an initial set of documents for plaintiff to sign prior to defendants attempting to refloat the boat. Among the documents was the Lloyd's Standard Form of Salvage Agreement (hereinafter, "LOF Agreement"), which was approximately three pages long. Mr. Cassidy then proceeded to scan the document with the plaintiff, highlighting each paragraph. The document provided that all disputes between the parties be arbitrated at Lloyd's of London in England and that English law will govern the resolution of the dispute.

Plaintiff signed the documentation including the LOF Agreement and his vessel was thereafter refloated and towed to the Canyon Club Marina in New Jersey.... On or about October 24, 1990, plaintiff was informed that the costs of the refloating and towing his vessel amounted to \$38,250.00. Plaintiff refused to pay this amount and on February 11, 1991 instituted the instant action, for a declaratory judgment that the LOF Agreement was an invalid adhesion contract. The defendants invoked the arbitration clause and the New York Convention. Plaintiff replied that the Convention did not apply. ...

It is plaintiff's contention that the provisions of the Lloyd's Standard Form of Salvage Agreement requiring the contractor and the owner to arbitrate their dispute concerning compensation in London pursuant to English law, when both are U.S. citizens and their relationship is not reasonably related to England, falls outside the New York Convention as enacted in the United States and therefore this court is precluded from requiring arbitration in accordance with the agreement.

In the present case the parties are in agreement that all are citizens of the United States.... However, my inquiry cannot end here since 202 ... carves out certain exceptions even where all parties to the relationship are citizens of United States.... The legislative history of 202 makes it clear that where the matter is solely between citizens of the United States it will fall outside the Convention unless there is a reasonable relation with a foreign state.

Therefore, unless the facts allow this case to fit within one of the four jurisdictional requirements noted above, it will fall outside the Convention and render the arbitral agreement between these parties unenforceable. The only property involved in the case at bar is the vessel, the M/Y Joanie Bee, which is registered in the State of Connecticut and at all times material hereto has been located off the Coast of New Jersey. The performance in the instant case involved the refloating of the vessel and the towing of it to Canyon Club Marina, in New Jersey. All performance, which occurred in this case, occurred within the coastal waters of New Jersey. The Defendants argue that the LOF Agreement clearly satisfies the third condition in that the language of the contract envisions that English law would apply to the arbitration, and more importantly, the arbitration and any appeal there from, would be before the Committee of Lloyd's in London, England.

The Defendants relied on *Fuller Co. v. Compagne Des Bauxites De Guinea*, to support their assertion that the present case is the type of enforcement Congress envisioned when it carved out the exceptions found in Title 9,

United States Cide. Sect 202. However, Fuller is easily distinguishable from the case at bar. While it is true that both parties were considered United States citizens in Fuller, the court in Fuller found the "reasonable relationship" to exist under the performance exception not the enforcement exception. In Fuller, the contract envisaged that plaintiff would provide extensive technical services in Guinea. An affidavit submitted to the court stated that the total cost of Fuller's technical representatives in Guinea was \$269,562.08. Consequently, the court held that the case fell within the exception due to the "substantial amount of performance of this contract in Guinea." As stated above performance of the contract in dispute was performed solely in New Jersey.

In contrast, plaintiff asserts that the enforcement of this agreement bears no reasonable relation to London, England. The fact that the parties are currently before this court to determine the enforceability of the arbitration agreement is of itself significant. Moreover, plaintiff asserts that the vessel upon which the contractor claimed a maritime lien was located in New Jersey and therefore the security posted to obtain the release of the vessel would have remained in this district subject to enforcement of a subsequent arbitration award. I agree. Accordingly, I find this district to be the proper place to enforce an arbitral award, not London, England. Additionally, unlike the facts in Fuller, where the contract provided for the design, manufacture and sale of equipment to be used at the buyer's plant in Guinea and for extensive technical services to be provided in Guinea, in the instant case, the only visible tie with the foreign nation is found in the language of the LOF Agreement itself

Defendants argue that the current facts set forth a reasonable relation with the foreign nation. Their contention is that the parties willingly entered into the LOF Agreement, which clearly compelled arbitration in London, England, and that the Committee of Lloyd's is the only internationally recognized body, which deals with salvage arbitrations, and no other body is so recognised.

Furthermore, defendants assert that it is undisputed that Lloyd's sits in London, England and that English law controls their arbitrations and any appeal thereof. Consequently, defendants contend that the situs and law found in the LOF Agreement was selected with care and that of itself encompasses the reasonable relation with London, England.

Defendants' argument however, is circular. If I were to agree with defendants' analysis that the reasonable relation with the foreign forum is created by the document itself, I would be allowing "the exception to swallow the rule." The only avenue, which would bring this particular issue before the court, is where a document has been signed by the parties, compelling foreign arbitration, and all the parties are United States citizens. Consequently, following defendants reasoning, in every case the parties would fall within the fourth jurisdictional exception, since the document itself would always name a foreign nation for arbitration.

Taking into consideration the purpose of the agreement and the motivation for the exception created by Congress I find based on the narrow facts before me that this case falls outside the Convention.

International arbitration proceedings

Procedural Issues in International Arbitration

The heart of most international arbitrations are the arbitral proceedings themselves. In international matters, arbitral proceedings can take a wide variety of forms, depending on a host of legal, practical, commercial, cultural, and other considerations. Many parties agree to international arbitration, in substantial part, because of the procedural flexibility, neutrality, and expertise, which it promises. In many cases, this promise is realized, with the arbitrators adopting efficient, fair, and transparent procedures, without rigidly adhering to any particular domestic approach to national court litigation. In some cases, however, a combination of obstructionist parties and inexperienced

arbitrators can produce chaotic, arbitrary, or inappropriately parochial arbitral proceedings.

The arbitration proceedings themselves, as distinguished from the parties' underlying contract or arbitration agreement, are subject to a set (or sets) of legal rules. The law governing the arbitration proceedings is variously referred to as the "curial law," "lex arbitri," "procedural law," or "loi de l'arbitrage." The concept of the procedural law governing the arbitral proceedings plays a vital role in international arbitration.

The procedural law that applies to an international arbitration has a potentially significant impact on the procedures used in the arbitration. In particular, the procedural law may either require that certain arbitral procedures be adopted or forbid arbitrators from taking other procedural steps. The procedural law also has important consequences for actions to vacate or enforce an arbitral award.

Firstly, the procedural law of an arbitration may directly govern various procedural issues that arise in the arbitral proceedings. The issues that are governed by the procedural law of an arbitration are defined differently in different states. The issues potentially governed by the procedural law include matters such as:

1. The parties' autonomy to agree on substantive and procedural issues in the arbitration.
2. The arbitrators' liability, ethical standards, appointment, and removal.
3. The extent of judicial supervision of, or interference in, the arbitration proceedings (such as reviewing the arbitrator's rulings and ordering provisional relief or discovery in aid of arbitration).

4. The rights of lawyers to appear, and their ethical obligations, in the arbitration; pleading rules.
5. Evidentiary rules.
6. The permissibility and administration of oaths.
7. The conduct of hearings.
8. Disclosure, "discovery," and related issues.
9. The arbitrators' remedial powers, including to grant provisional measures.
10. The form and making of the award.

In addition, and less clearly, the procedural law sometimes governs:

1. Interpretation and enforceability of the parties' arbitration agreement (including issues of non-arbitrability).
2. Conflict of laws rules applicable to the substance of the dispute.
3. Quasi-substantive issues, such as rules concerning interest and costs of legal representation.

Secondly, the procedural law governing the arbitration also has a decisive effect on the nation in which an action to vacate an arbitral award can properly be brought under the New York Convention. Arts V(1)(e) and VI of the Convention permit awards to be vacated by courts of the nation "under the law of which the award was made." Most commentators and courts generally agree that this reference is to the procedural law of the arbitration.

Finally, several of the exceptions to enforceability of arbitral awards under Art. V of the Convention require determination and application of the procedural law. That is, the standards set forth in the nation's law, which provides the procedural law of an arbitration must be ascertained and applied to decide whether an arbitral award can be denied recognition.

In most cases, the procedural law governing an international arbitration will be that of the arbitral seat or situs. That is the place where the arbitration proceedings will usually be conducted, the place whose law the parties intended to govern their proceedings, and the place where any arbitral award will be made. In the overwhelming majority of cases, this intention will prevail often. Nevertheless, in some cases, choice of law complexities relating to the applicable procedural law in an arbitration may arise. One party may argue that some law other than that of the arbitral situs must be applied as the applicable procedural law. In most such cases, the law governing the parties' arbitration agreement or underlying contract will be said to provide the procedural law of the arbitration. Alternatively, the arbitral tribunal may hold hearings in more than one country, provoking disputes over what the applicable procedural law is.

In *Sapphire International Petroleum Limited v. National Iranian Oil Company*, Art 39 of the parties' agreement provides that ... the only way of settling any difference concerning the interpretation or performance of the agreement is arbitration of the kind set out in Art. 41 of the agreement. The parties have thus unequivocally shown their mutual desire to use arbitration in order to obtain a decision which will settle once and for all their possible differences concerning the interpretation and performance of the agreement, including claims for damages.

Among other things, the parties' arbitration clause provides for the determination of a seat for the arbitration, which is a necessary element in the activity of any judicial authority. The judicial authority thus conferred upon

the arbitrator necessarily implies that the arbitration should be governed by a law of procedure and that it should be subject to the supervision of a State authority, such as the judicial sovereignty of a State.

Authority is to be found, in doctrine and case law, which gives the parties the right to make a free choice of the law of procedure to be applied to the arbitration, as for example, the State to whose judicial sovereignty the arbitration is submitted, or in other words "the location" of the arbitration. In the present case the parties agreed to leave the arbitrator free to determine the seat of the arbitration, if they failed to agree it themselves. Thus by agreeing beforehand to whatever seat was fixed by the arbitrator, who would make his choice under express delegation from the parties, they committed themselves to accept the law of procedure, which results from his choice. In this case it is the law of the Swiss canton of Vaud, since the seat of the arbitration has been fixed at Lausanne located in Vaud.

Even if this interpretation of the parties' intention is wrong, the rule is that, in default of agreement by the parties, the arbitration is submitted to the judicial sovereignty of the seat of the arbitration at the place where the case is heard. Resolution of the Institute of International Law, Arts 8, 9, 10, 12; Geneva Protocol concerning Arbitral Clauses of September 24, 1923, Art. 2. Thus, in the present case, Lausanne is at the same time the headquarters of the judicial authority, which has jurisdiction to appoint the arbitrator, the seat of the arbitration, the domicile of the sole arbitrator, and the place where all the arbitration procedure up to and including judgment has taken place.

The present arbitration, then, is governed by the law of procedure of Vaud and is subject to the judicial sovereignty of Vaud. Therefore, as far as procedure is concerned, it is subject to the binding rules of the Code of Civil Procedure of Vaud of November 20, 1911, and in particular to the 8th Title of this Code. The case has been heard in accordance with the rules prescribed by the Order of June 13, 1961, in which the arbitrator laid down the arbitral

procedure, as he was entitled to do under Art. 41, para. 7, of the agreement if the parties failed to agree upon the procedure to follow, and in accordance with Art. 511 of the Code of Civil Procedure of Vaud. Art. I of the above Order laid down that the Federal Law of Civil Procedure of December 4, 1947, was applicable where there was no contrary provision in the Order. The defendant NIOC has refused to co-operate in the procedure and has deliberately made default. Art. 41, para. 8, of the agreement lays down that the absence or default of one party should not be an obstacle to the arbitral proceedings in any of their stages. Accordingly, despite the default of the defendant, the arbitrator has proceeded to hear the case and to give judgment on the merits.

According to Art. 15 of the arbitrator's Order, which is in accordance with Art. 12 of the Federal Law of Civil Procedure, the default of one party and the omission of a procedural step simply means that the case proceeds without the step, which had been omitted. By virtue of Art. 3 of the Federal Law of Civil Procedure, the judge cannot base his judgment on facts other than those, which have been alleged during the case. As a result, the present award is based upon the facts pleaded by the plaintiff, who alone has taken part in the procedure. But in applying these rules, the arbitrator has accepted only those facts, which have been satisfactorily proved to him during the procedure ...

In ICC Case No. 5029, two French companies entered into a joint venture with two Egyptian companies. The joint venture thereafter entered into a contract to construct certain civil works in Egypt. Art. 5 (1)(b) of the Contract provided: "The Contract shall be deemed to be an Egyptian Contract and shall be governed by and construed according to the laws in force in Egypt." Art. 67 of the agreement contained an arbitration clause, providing for arbitration under ICC Rules. The agreement did not specify an arbitral situs. Disputes arose and the French companies filed a request for arbitration under the ICC Arbitration Rules against the Egyptian employer. Pursuant to Art. 12

of the ICC Arbitration Rules, the ICC International Court of Arbitration selected the Netherlands as the arbitral forum.

The defendant argued that Egyptian law of civil procedure governed the arbitration proceedings. It reasoned that the choice-of-law clause in Art. 5 covered both substantive and procedural subjects, including issues relating to the arbitration. According to defendant, the text of Art. 67 of the agreement "clearly expressed the intention of the parties that the arbitration is a local arbitration and not international" and "that it is internal and not external."

The claimant agreed with the defendant that Egyptian law rules of interpretation should be applied to the parties' contract, but distinguished between substantive and procedural law. According to the claimant substantive law is governed by the law chosen by the parties (i.e., Egyptian law), but procedural law is governed by the mandatory provisions of the place of arbitration (i.e. Dutch arbitration law).]

The choice-of-law clause contained in Art. 5(1)(b) of the Contract must be interpreted in accordance with the rules of contract interpretation of Egyptian law, in particular Arts 150 et seq. of the Egyptian Civil Code. The Arbitral Tribunal will follow these rules of interpretation in respect of all the jurisdictional issues. The Arbitral Tribunal holds that the law governing the arbitration is the arbitration law of the Netherlands. The Arbitral Tribunal notes at the outset that the Contract is a truly international contract involving parties of different nationalities (i.e. French and Egyptian), the movement of equipment and services across national frontiers, and the payment in different currencies (i.e., Egyptian Pounds and U.S. Dollars).

The international character of the Contract is inconsistent with the defendant's allegation that the parties intended to provide for domestic, internal (i.e. Egyptian) arbitration. Such intent cannot be derived from the choice-of-law clause contained in Art. 5(1)(b) of the Contract, providing for the applicability of Egyptian law, whilst Art. 67, providing for arbitration

under the Rules of the ICC, clearly expresses the contrary. As it is recognized in virtually all legal systems around the world, a basic distinction must be made between the law governing the substance and the law governing the procedure. That distinction is also recognized in Egyptian conflict of laws; whereas Art. 19 of the Egyptian Civil Code provides for the law governing the substance of the dispute, Art. 22 is concerned with the law governing the procedure. Accordingly, if the parties had wished that the arbitration be governed by Egyptian procedural law, they should have made a specific agreement thereon. Art. 5(1)(b) of the Contract is not such a provision as it does not mention specifically that arbitration is governed by Egyptian law. Failing such agreement, the arbitration law of the place governs the arbitration. This principle is in accordance with Art. V(1)(a), (d) and (e) of the New York Convention of 1958 to which Egypt and the Netherlands have adhered.

The agreement of the parties in arbitration under the Rules of the International Chamber of Commerce in Clause 67 meant that, failing their agreement on the place of arbitration, they gave, under Art. 12 of the Rules, a mandate to the Court of Arbitration to fix the place of arbitration on their behalf. It is to be noted that defendant itself proposed in the alternative The Hague as the place of arbitration. The prevailing interpretation of the Rules of the ICC nowadays, is also that the mandatory provisions of the arbitration law of the place of arbitration govern the arbitration, irrespective of the law governing the substance. Whereas Art. 13(3) of the Rules contains the contractual conflict of laws rules for determining the law governing the substance of the dispute, Art. 11 is concerned with the rules governing the proceedings and specifically requires observance of the mandatory procedural requirements of the situs.

The Arbitral Tribunal emphasizes that the applicability of Dutch arbitration law in the present case by no means implies that the Dutch rules concerning proceeding before Dutch State Courts are applicable. According to Dutch

arbitration law, parties are free to agree on the rules of procedure and, failing such agreement, the arbitrator determines the conduct of the proceedings, subject to a few necessary mandatory provisions.

In *Union of India v. Mc Donnell Douglas Corporation*, by a written agreement dated July 30, 1987 the plaintiffs contracted with the defendants for the latter to undertake services for the former in and about the launch of a space satellite. Art. 11 of the agreement provided that the agreement was to be governed by, interpreted and construed in accordance with the laws of India. The agreement also contained an arbitration clause (Art. 8) in the following terms:

In the event of a dispute or difference arising out of or in connection with this Agreement, which cannot be resolved by amicable settlement, the same shall be referred to an Arbitration Tribunal consisting of three members. Either Party shall give notice to the other regarding its decision to refer the matter to arbitration. Within 30 days of such notice, one Arbitrator shall be nominated by each Party and the third Arbitrator shall be nominated by agreement between the Parties to this Agreement. If no such agreement is reached within 60 days of the mentioned notice, the President of the International Chamber of Commerce shall be requested to nominate the third Arbitrator.

The third Arbitrator shall not be a citizen of the country of either Party to this Agreement. The arbitration shall be conducted in accordance with the procedure provided in the Indian Arbitration Act of 1940 or any reenactment or modification thereof. The arbitration shall be conducted in the English language. The award of the Arbitrators shall be made by majority decision and shall be final and binding on the Parties hereto. The seat of the arbitration proceedings shall be London, United Kingdom. Each Party shall bear its own cost of preparing and presenting cases. The cost of arbitration including the

fees payable to Arbitrators, shall be shared equally by the Parties to this Agreement....

The parties' dispute or difference has been referred to arbitration under the provisions of art. 8. The hearing before the arbitrators is presently fixed to begin in London on Jan. 11, 1993. The question before me is as to the law governing the arbitration proceedings. The parties are, as I understand it, agreed that this Court should decide this question, and should do so on the basis that there is no difference on this issue between English and Indian law.

In essence the plaintiffs contend that the words: "The arbitration shall be conducted in accordance with the procedure provided in the Indian Arbitration Act 1940" make clear that the parties have chosen Indian law, or at least those parts of Indian law found in the 1940 Act, to govern any arbitration proceedings arising under Art. 8. The defendants, on the other hand, contend that by stipulating London as the "seat" of any arbitration proceedings under Art. 8, the parties have made clear not merely that any arbitration will take place in London, but that English law will govern the arbitration proceedings.

An arbitration clause in a commercial contract like the present one is an agreement inside an agreement. The parties make their commercial bargain, i.e. exchange promises in relation to the subject matter of the transaction, but in addition agree on a private tribunal to resolve any issues that may arise between them. The parties may make an express choice of the law to govern their commercial bargain and that choice may also be made of the law to govern their agreement to arbitrate. In the present case it is my view that by Art. 11 the parties have chosen the law of India not only to govern the rights and obligations arising out of their agreement to arbitrate.

In legal terms, therefore, the proper law of both the commercial bargain and the arbitration agreement is the law of India. The fact that the law of India is the proper law of the arbitration agreement does not, however, necessarily entail that the law governing the arbitration proceedings themselves is also the law of India, unless there is in that agreement some effective express or implied term to that effect. In other words, it is, subject to one proviso, open to the parties to agree that their agreement to arbitrate disputes will be governed by one law, but that the procedures to be adopted in any arbitration under that agreement will be governed by another law.

The U.S. Supreme Court in *Scherk v. Alberto-Culver Company*, "stated that uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Absent such agreements, one enters the dicey atmosphere of ... a legal no-man's-land, which would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.

Place of Arbitration (Arbitration Situs)

The location of the arbitral situs is a critical issue in any international arbitration. The location of the arbitral situs can have profound legal and tactical consequences, and can materially alter the course of dispute resolution. The significance of the arbitral situs includes relatively mundane issues of convenience and cost. Although such factors are often given undue weight, they can be important to the conduct and outcome of an arbitration. An expensive arbitral forum can effectively preclude some parties from pursuing their claims, while an inconvenient forum without a developed local legal system or infrastructure can impact on the viability of the arbitration

process. Moreover, factors such as visa requirements, availability of air or other transportation, hotel and meeting room accommodations, support staff (such as interpreters, stenographers, secretaries), and the like can bear heavily on the smooth progress of an arbitration. Much more significant than convenience is the effect of the local law of the arbitral situs on the arbitration. This requirement encompasses a number of distinct factors.

First, national courts in the arbitral situs have the potential to interfere in the ongoing arbitral proceedings. Examples of such interference include mandatory requirements for interlocutory judicial resolution of issues of law or possibilities for judicial intervention in matters such as procedural rules or selection of arbitral situs. The possibility of judicial interference may create an incentive for dilatory tactics and expensive, confusing procedural disputes.

Second, some courts, while not interfering in arbitral proceedings, will nonetheless be prepared to assist if necessary in local arbitral proceedings. Examples of desirable judicial assistance can include enforcing discovery orders made by the tribunal and enforcing orders for provisional relief, such as prejudgment attachment.

Third, the location of the arbitral situs affects the law applicable to the arbitration agreement. Arts II(3) and V(1)(a) of the New York Convention contemplate that the validity of the parties' arbitration agreement will be determined 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." National law requirements on subjects such as arbitrability, number or qualifications of arbitrators, contract formation, validity and illegality, and the like vary significantly.

Fourth, the national courts in the arbitral situs are usually competent (and exclusively competent) to entertain actions to vacate or set aside the arbitral award. The scope of judicial review of an arbitral award is a matter of national law that varies from country to country. Under many developed national laws, an arbitral award is subject to little or no review of the merits of the tribunal's decision; other states permit no review of the merits of arbitral awards, and little or no review of the arbitral process. Some nations, however, permit more thorough-going review of the merits of arbitral awards, which can result in costly appellate proceedings and duplicative litigation.

Fifth, some nations restrict the right of non-nationals to appear as counsel in international arbitration proceedings conducted on local territory. If a company wishes to have its regular outside international arbitration counsel participate in the arbitral proceedings, selecting such nations as an arbitral situs should be avoided. Other nations impose restrictions on the nationality of arbitrators.

Sixth, the arbitral situs is usually (but not always) the place where the arbitral award will be "made" for purposes of the New York Convention. This has significant legal consequences for the enforceability of arbitral awards outside the country where they are rendered. The best general indicator of the enforceability of a nation's arbitral awards is whether or not the country is a party to the New York Convention or, to a lesser extent, certain other international arbitration conventions. If a state is party to the New York Convention, awards made within its territory will generally be subject to the Convention's pro-enforcement rules in other Convention parties; conversely, if a state is not party to the Convention, its awards often will not enjoy the benefits of the Convention. Before selecting an arbitral forum, counsel should examine U.S. law (and the law of other

forums where enforcement would likely be required) to ensure that an award rendered in that forum can be enforced.

Finally, the location of the arbitral situs can both directly and indirectly affect the identity of the arbitrators (absent other agreement by the parties). That is because many institutional appointing authorities will be inclined to select an arbitrator qualified to practice law in the arbitral situs. Moreover, local procedural rules and practices may influence the tribunal's procedural decisions, and local conflicts rules may be applied with respect to choice of law issues.

Despite the wisdom of selecting an arbitral situs, parties not infrequently fail to designate either the arbitral situs or a means of selecting a situs in their arbitration agreement. Worse, they may enter into agreements that are ambiguous or internally contradictory as to the situs of the arbitration. If no unambiguous prior agreement exists regarding an arbitral situs, or its means of selection, parties will often be unable to settle on an arbitral forum after disputes have arisen. Alternatively, even where an agreement as to arbitral situs exists, one party occasionally may regret its decision and seek to arbitrate in a different place. In either case, national courts can be drawn into disputes over the appropriate arbitral situs, with one or both parties seeking injunctive or declaratory relief designating the arbitral situs.

In *Econo-Car International, Inc. v. Antilles Car Rentals, Inc.*, the controversy prompting this appeal centers upon a franchise agreement between Econo-Car International, Inc., the franchisor, and Antilles Car Rentals, Inc., the franchisee. On February 25, 1972, Antilles notified Econo-Car that it intended to terminate the franchise agreement... Econo-Car advised Antilles that it desired to submit the parties' various disagreements to the process of arbitral resolution pursuant to paragraph 15 of the franchise agreement. Antilles refused to submit the disputes to arbitration, and Econo-Car

thereupon filed petition in the district court for the Virgin Islands to compel arbitration.