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# Cross-Border Arbitration: A Beneficial Alternative to Resolving International Commercial Disputes

What conventions govern such disputes?

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Like domestic arbitration, international arbitration is a private form of binding dispute resolution before a neutral decision maker or tribunal predicated on party agreement. In light of the globalization of commerce, trade, and investment, arbitration of international financial disputes should be considered as a beneficial alternative to litigation in resolving cross-border and international commercial disputes.

**Advantages and Disadvantages of International Arbitration**

One of the most significant advantages of using arbitration to resolve an international commercial dispute is the greater ease for parties to enforce the award. Arbitral conventions enable this process. The most noteworthy such convention is the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the New York Convention and codified in the United States at 9 U.S.C.S. §§ 201 et seq. (known as the Convention Act)). The New York Convention requires the courts of the signatory nations to enforce arbitral awards rendered in other signatory nations, subject to limited grounds of refusal. Over 150 countries, or about three-quarters of countries recognized by the United Nations, are parties to it. No similar convention exists for the enforcement of foreign judicial judgments.

The Convention Act in the United States establishes a strong presumption in favor of the arbitration of international commercial disputes. *See, e.g.*, *Escobar v. Celebration Cruise Operator, Inc., 805 F.3d 1279, 1285 (11th Cir. 2015), cert. denied, 136 S. Ct. 1158 (2016); Ministry of Def. & Support v. Cubic Def. Sys.*, 665 F.3d 1091, 1095 (9th Cir. 2011). Thus, whether a dispute crosses the United States border or spans multiple countries across the globe, enforcing an arbitration award is generally much easier than with litigation.

Other advantages of international arbitration derive from the nature of arbitration itself. As an initial matter, parties may select or have substantial input into the arbitrator or panel who will decide their dispute. This is especially beneficial for cases involving technical or industry-specific issues. Parties may select an arbitrator with particular knowledge and experience that bear on their dispute. This contrasts with litigation, in which judges are randomly assigned. As a result, parties in litigation may find that the presiding judge, though sophisticated and

conscientious, lacks familiarity with the specific, perhaps highly technical, issues involved. In contrast, with an arbitrator already deeply versed in the matters at hand, parties and their counsel may feel less of a need to "educate" the arbitrator and feel less concern about a potential adverse result.

As in domestic arbitration, parties also have greater control over the arbitration process than the litigation process, which allows for more flexibility. Parties may therefore streamline proceedings to suit their needs or the nature of their dispute. For example, they may agree to limit or disregard aspects of discovery, motion practice, or the merits hearing itself (such as oral testimony). *See* *Indus. Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH*, 141 F.3d 1434, 1444 (11th Cir. 1998) (observing that arbitration rules "allow arbitrators to resolve disputes without the many procedural requirements of litigation"); *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 929 (2d Cir. 1983) (commenting that "[i]nternational merchants often prefer arbitration over litigation because it is faster, less expensive and more flexible" than litigation); *Al Maya Trading Establishment v. Glob. Exp. Mktg. Co.*, No. 16-CF-2140 (RA) (S.D.N.Y. Mar. 17, 2017) (commenting that parties can choose limited or, conversely, more expansive discovery, while arbitrators are authorized to conduct proceedings in the manner they deem most appropriate). Arbitration tribunals typically offer "fast-track" or "expedited" procedures. These procedures are extremely helpful for resolving disputes with discrete issues.

Arbitration offers other valuable advantages that parties often desire. It provides greater confidentiality, which may be of obvious importance to your client. Although parties to a litigation may certainly enter into confidentiality agreements, litigation is still public by its nature. Court filings, unless sealed, are publicly available. The impartial nature of the arbitral institution is another benefit. This eliminates the concern of having a dispute adjudicated by a court in another country that may favor perceived interests of the forum country. Even if it is ultimately not the case, the concern itself of such a possibility should not be minimized, especially when your client is involved in an extremely high-dollar-value or "bet the company" dispute.

Other aspects of arbitration may be advantages or disadvantages, depending on the nature of the dispute at issue and a party's needs. For example, arbitration generally involves narrower discovery. Yet, a party may seek broader discovery coincident with that available in litigation, given the complexity and scope of the issues involved. Parties must be mindful, however, that, while they may seek broader discovery, the ultimate scope of discovery in the arbitration may nonetheless still be constrained, either by other parties' resistance or by the arbitrator's goal of efficient management of the proceedings in accord with the overall nature and purposes of arbitration.

Whether arbitration is less expensive than litigation is not subject to an easy answer. Legal fees typically account for the majority of the cost to resolve a commercial dispute, whether in an arbitration or in litigation. The streamlined nature of arbitration may result in lower legal fees and costs overall. However, unlike litigation, parties in arbitration must pay the administrative fees of the arbitral institution and the compensation of the arbitrator or panel of arbitrators. To minimize such costs, parties may select certain procedures, such as using a single arbitrator for all or pre-merits hearing matters. As noted, parties may also use "fast-track" procedures available through arbitral institutions or agree to limit or waive aspects of the proceedings.

Parties also should balance the limited appellate rights arbitration allows against the greater certainty and ease of enforcement of the award. Generally speaking, an arbitrator is not bound by legal precedent as a court is. Under the New York Convention, as under domestic federal law, arbitrators "have completely free rein to decide the law as well as the facts and are not subject to appellate review." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 149 (1968). *See also Baxter Int'l, Inc. v. Abbott Labs.*, 315 F.3d 829, 831 (7th Cir. 2003) (stating that "legal error" is not a basis to vacate an award under the New York Convention); *187 Concourse Assocs. v. Fishman*, 399 F.3d 524, 526 (2d Cir. 2005) (noting that an arbitration award with any "colorable justification" must be upheld).

The New York Convention lists specific grounds to oppose the enforcement of an award. *See* Art. V. *See also Industrial Risk*, 141 F.3d at 1146; *M & C Corp. v. Erwin Behr GmbH & Co., KG*, 87 F.3d 844, 850 (6th Cir. 1996). These defenses are construed narrowly. One ground, that enforcement would be contrary to public policy, applies only if enforcement "would violate the forum state's [country's] most basic notions of morality and justice." *Cubic Defense Systems*, 665 F.3d at 1096 (quoting *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974)). Certain courts have held the grounds to be exclusive. *See, e.g.*, *Industrial Risk*, 141 F.3d at 1446. Others have held the Federal Arbitration Act's defenses may additionally apply if there is no conflict. *See Immersion Corp. v. Sony Comput. Entm't Am. LLC*, 188 F. Supp. 3d 960, 965 (N.D. Cal. 2016). *See also First Inv. Corp. v. Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 748 (5th Cir. 2012). A party, nonetheless, will not likely be able to oppose enforcement on the grounds the award is irrational, arbitrary and capricious, miscalculates fact, or is in manifest disregard of law. *See, e.g.*, *Industrial Risk*, 141 F.3d at 1446; *M & C Corp*., 87 F.3d at 850.

A party should weigh all of the above considerations before it determines to bind itself to arbitration in connection with an international contract.

**International Arbitration Institutions**

Many arbitral institutions that administer international arbitrations exist worldwide, two of which are based in the United States. The International Centre for Dispute Resolution (ICDR) is the international division of the American Arbitration Association (AAA) and is known as the leading provider of dispute resolution services to businesses in matters involving cross-border transactions with the United States.

The ICDR offers a worldwide panel of hundreds of independent arbitrators with subject matter expertise and dispute resolution services for specific industries. For example, it has a panel of arbitrators highly experienced in complex, high-value domestic or international disputes related to aerospace, aviation, defense, cyber, and security. *See* ICDR, The AAA-ICDR Panel for Aerospace, Aviation, and National Security Claims. It has a panel with expertise in the energy industry, including oil and gas, electricity, and alternative energy projects. *See* ICDR, ICDR Energy Dispute Resolution Services. Hearings for the ICDR's Energy Dispute Resolution Services are held in the ICDR's Houston office but can be organized worldwide as needed by parties. The ICDR also offers a Manufacturer/Supplier Online Dispute Resolution Protocol for manufacturers and suppliers to resolve billing and invoicing disputes. The ICDR administers international arbitration pursuant to its international arbitration rules. *See* ICDR, International Dispute Resolution Procedures (June 1, 2014). The ICDR's rules allow for expedited procedures and resolution of disputes based on written submissions.

JAMS, the second arbitral institution based in the United States, serves both as an international arbitration institution and as a provider of international arbitrators to other arbitral bodies. Like the AAA, JAMS has its own rules, which, among other things, notably incorporate emergency relief procedures, summary disposition, and expedited options that limit discovery. *See* JAMS, International Commercial Arbitration.

There are other arbitral institutions worldwide. The International Court of Arbitration of the International Chamber of Commerce is based in Paris. The London Court of International Arbitration is based in London. The Hong Kong International Arbitration Centre, based in Hong Kong, is one of most well-known international arbitration institutions in Asia.

Arbitrations conducted under the supervision of an arbitral institution are subject to that institution's arbitration rules. Each differs in the degree of administration, procedures, and fee structures.

**Arbitration Agreements and Arbitrability**

As is well known, arbitration is a creature of contract. Parties to an international commercial agreement who decide to use arbitration to resolve their disputes should include a provision in

their contract that sets forth their arbitration agreement. However, even if they failed to do so in advance, they may execute an arbitration agreement after a dispute has already arisen.

Arbitration provisions may be very short, but brevity may leave important issues unaddressed. The sample arbitration clause provided by the ICDR states: "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules." *See* AAA-ICDR Clause Drafting. Within their arbitration clause or agreement, parties may select the substantive law that will govern a dispute. As with any choice-of-law clause, this renders conflicts-of-laws analysis moot.

Deciding questions as to arbitrability is at times a thorny issue. The general rule is that a court is to address issues concerning arbitrability unless the parties "clearly and unmistakably provide otherwise." *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 83 (2002). Ambiguity or participation in a litigation may result in a waiver of the right to arbitration. *See Goldgroup Res., Inc. v. DynaResource de Mexico, S.A. de C.V.*, No. 16-cv-02547-RM-KMT (D. Colo. Feb. 13, 2018). Therefore, clarity as to both the arbitration agreement and delegation of questions of arbitrability is key. Incorporating into the arbitration provision specific arbitration rules that empower the arbitrator to decide questions concerning arbitrability is "clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator." *Contec Corp. v. Remote Sol. Co.*, 398 F.3d 205, 208 (2d Cir. 2005). *See T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 345 (2d Cir. 2010) (quoting the ICDR rule that empowers the arbitrator to decide questions of arbitrability by extending to the arbitrator "the power to rule on [his] own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement").

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