


Lecture 18



INTERNATIONAL COMMERCIAL ARBITRATION

A Lawyer's Practice

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STRUCTURE OF PRESENTATION

Overview of international arbitration proceedings

- Designing the arbitration
- Litigating the merits
- Enforcing the arbitral award

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DISPUTE RESOLUTION



What is international arbitration?

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DISPUTE RESOLUTION



Why do parties use international arbitration?

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DESIGNING THE ARBITRATION: ARBITRATION AGREEMENT

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ARBITRATION AGREEMENT



Contents of an arbitration agreement:

- Clear statement that the parties agree to submit disputes to arbitration
- *Ad hoc* or institutional arbitration
- The “seat” of the arbitration
- The number of arbitrators
- The language of the arbitration

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INSTITUTIONAL ARBITRATION



What services do arbitral institutions offer?

- Arbitration rules
- Assistance in appointing arbitrators
- Determination of arbitrators' compensation

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INSTITUTIONAL ARBITRATION



Institutions preferred by corporate counsel:

- ICC (50%)
- LCIA (14%)
- AAA (ICDR) (8%)
- SIAC (5%)

*2010 International Arbitration Survey, Choices in International Arbitration,
Queen Mary / White & Case*

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AD HOC ARBITRATION



What is *ad hoc* arbitration?



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AD HOC ARBITRATION



Who “administers” an *ad hoc* arbitration?

- What is the source of the rules?
- Who appoints the arbitrators?
- Who determines arbitrator compensation?

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ARBITRATION AGREEMENT



What is the “seat,” and why is it relevant?



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SEAT OF ARBITRATION



The seat determines the law that applies to some aspects of the arbitration procedure.

The law of the seat may cover challenges to awards.

Parties can have hearings at another location.

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SEAT OF ARBITRATION



Seats preferred by corporate counsel:

London (30%)

Geneva (9%)

Tokyo (7%)

Paris (7%)

Singapore (7%)

*2010 International Arbitration Survey, Choices in International Arbitration,
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GOVERNING LAW



What law governs the arbitration?



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GOVERNING LAW



This law applies to the contract and governs rights and responsibilities of the parties.

Example: *force majeure*

GOVERNING LAW



Governing law most frequently used by corporations:

- English (40%)
- New York (17%)
- Swiss (8%)
- French (6%)

2010 International Arbitration Survey, Choices in International Arbitration, Queen Mary / White & Case



DESIGNING THE ARBITRATION: ARBITRAL TRIBUNAL

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ESTABLISHMENT OF THE ARBITRAL TRIBUNAL



Normally one or three arbitrators

If three arbitrators are chosen, the normal constitution procedure is the following:

- Each party normally chooses an arbitrator
- The parties or arbitrators agree on the third, presiding arbitrator
- Failing agreement, the presiding arbitrator is chosen by an institution (or court)

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SELECTION OF ARBITRAL TRIBUNAL



What factors are relevant to picking an arbitrator?



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CHALLENGING ARBITRATORS



What if you think that the arbitrator chosen by your opponent is biased?



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HIGHLIGHTS OF PART 1

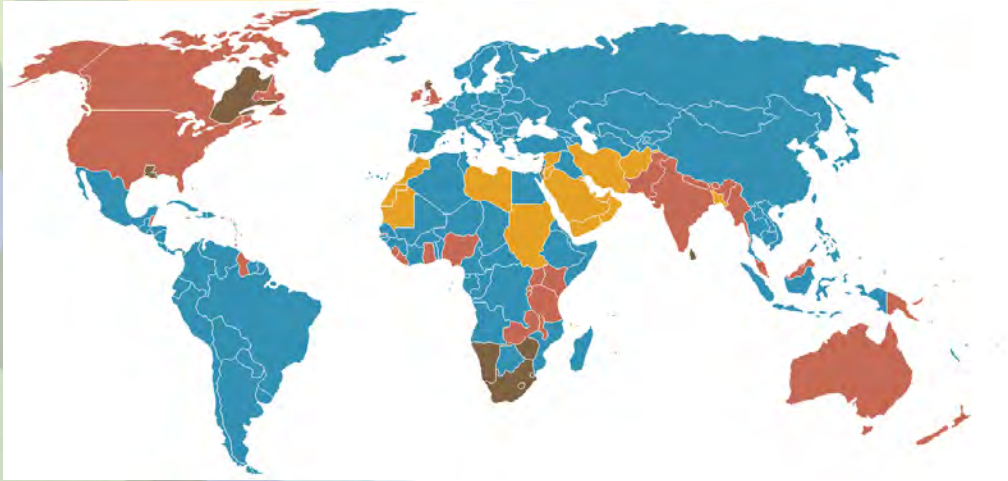


- A valid arbitration agreement must contain statement that the parties agree to submit disputes to arbitration
- The selection of the arbitral tribunal is among the most important decisions that the parties make in an arbitration
- A party may challenge the arbitrator chosen by its opponent



LITIGATING THE MERITS: EVIDENCE

LEGAL SYSTEMS OF THE WORLD



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INTERNATIONAL ARBITRATION



There are few procedural rules. This lack of rules is problematic when the parties come from different cultures.

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IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION



Provides procedural guidelines for international arbitration

Compromise between civil law and common law procedures

- Inspired by civil law regarding documentary evidence
- Inspired by common law systems regarding witnesses of fact



EVIDENCE: WITNESSES

WITNESSES



What is a “witness?”



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WITNESSES



Article 4.1 of the IBA Rules:

“Within the time ordered by the Arbitral Tribunal, each Party shall identify the witnesses on whose testimony it relies and the subject matter of that testimony.”

The parties are free to choose their witnesses.

The selection of witnesses is a very important and strategic phase of the procedure.

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WITNESSES



Article 4.2 of the IBA Rules:

“Any person may present evidence as a witness, including a party or a Party’s officer, employee or other representative.”

It is frequent that party employees are heard as witnesses.

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WITNESSES



Should a lawyer be permitted to “prepare” a witnesses?



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WITNESSES



Article 4.3 of the IBA Rules:

“It shall not be improper for a Party, its officers, employees, legal advisers or other representatives to interview its witnesses or potential witnesses.”

WITNESSES HEARING



WITNESS EXAMINATION



Article 8(3)(b) of the IBA Rules:

“With respect to oral testimony at an Evidentiary Hearing:

... following direct testimony, any other Party may question such witness, in an order to be determined by the Arbitral Tribunal.”

HIGHLIGHTS OF PART 2



–The IBA Rules on the Taking of Evidence in International Arbitration are commonly followed in international arbitrations.

–These rules are intended to be a compromise between the common and civil law systems.



ENFORCEMENT OF THE ARBITRAL AWARD

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HOW CAN A PARTY ENFORCE AN AWARD?

“The Convention on the Recognition and Enforcement of Foreign Arbitral Awards” (New York Convention)

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CHALLENGING THE AWARD AT THE SEAT



An award may be challenged where it is issued

The grounds for challenge are determined by national law

Three broad categories include:

- Jurisdiction
- Procedure
- Substance (rare)

RESIST ENFORCEMENT OF THE AWARD



Grounds for challenge under the New York Convention:

- The award deals with matters outside the scope of the arbitration agreement
- Irregular procedure or composition of the tribunal
- The award is not yet binding

RESIST ENFORCEMENT OF THE AWARD



Grounds for challenge under the New York Convention:

- The subject matter cannot be settled by arbitration under the laws of that country
- Recognition or enforcement would violate the public policy of that country

HIGHLIGHTS OF PART 3



- The reason that international arbitration is successful is that awards can be enforced/recognized under the New York Convention.
- Parties generally cannot appeal awards.
- A losing party can challenge an award at the seat of arbitration.
- A losing party can resist enforcement of the award.



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