



International Arbitration: Why Cut and Paste Will Cost You

**Catharine B. Arrowood
Katherine H. Graham
February 14, 2018**

Two Types of International Arbitration

- **Private Commercial Arbitration**
 - Between **private companies**, some state-owned
 - Created through a **contractual obligation**
 - Our main focus today
- **Investment Treaty Arbitration**
 - May be **bilateral or multilateral**
 - Bilateral: between two countries
 - Multilateral: NAFTA, for example

Why Choose Arbitration: Pros

- **Freedom and Flexibility:** Enables you to avoid litigating in non-US courts using a process you help to shape
- **Neutrality:** Places you before neutral, experienced decision maker(s) in a stable, known process
- **Enforcement:** Increases chance of recovery and enforcement
- **Confidentiality:** Especially useful if the dispute involves proprietary information or your company is publicly traded.



Example: China



- China is **not party** to a convention permitting enforcement of US court judgments, leaving only the possibility of enforcement based on **reciprocity**
- China is **not party** to any **bilateral treaty** with the US
- China is **party** to the **New York Convention**, providing for enforcement of arbitral awards
- As of 2016, one report showed that **68%** of foreign arbitral awards presented to Chinese courts were **enforced** (v. collected)
- First enforcement of US judgment by Chinese court was in 2015; based on doctrine of reciprocity

Liu Li v. Tao Li and Tong Wu (2015) E Wuhan Zhong Minshang Waichuzi No. 25

- The Wuhan Intermediate Court in China enforced a Los Angeles Superior Court monetary judgment
- The Court cited its awareness that an LA court had enforced a Chinese court judgment
- Enforcement based on **reciprocity**- is the first known enforcement of a US court judgment by a Chinese court
- Despite this encouraging development, arbitration and the NY Convention continue to be your best bet for collecting from a Chinese counterparty
- Challenges remain with the Chinese arbitral provider, CIETAC

Three Key Elements For Enforceability of Arbitration Clause

1. Clearly state that arbitration is the **mandatory means** for dispute resolution
2. Clearly describe **what disputes are covered**- torts, contracts, etc.
3. Identify **governing rules/law**- both procedural and substantive

Examples of Standard Clauses

- **ICDR:** 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.
- **ICC:** All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

Much More Needed for Best Results

- Select **place or site** of arbitration
- Select **provider** and address gaps in provider rules
- Decide **scope of disputes covered**
- Choose **applicable law**
- Specify **language** of arbitration
- Consider type of **confidentiality** needed
- Authorize **remedies**; interim relief; currency of award
- Provide for recovery of **costs and fees**
- Include provisions to facilitate **enforcement**

Place of Arbitration

- Arbitrate in country that is party to one of the **enforcement conventions**, such as the New York Convention
- Courts sitting in the country where the **arbitration takes place** or under the law of which the **award was** made will have the power to set aside or vacate the award (NY Convention, Article V(1)(e))
- Courts **must confirm** arbitral award “unless it finds one of the grounds for refusal ... specified in the [New York] Convention” (9 USC § 207)
- Over **155** countries are party to NY Convention, including US and China



DIMITRI OTIS IMAGES

Place of Arbitration

- You want to be in a country where **courts do not interfere** improperly in arbitration and are **familiar** with the process
- **Procedural disputes** may be resolved by the court where **arbitration is occurring**
- Jurisdictions where courts are independent and respect the arbitral process: **US, UK, Switzerland, Sweden, Singapore**
- Check **databases**, including US State Department website, that show both party and country arbitration track record

Place: Other Considerations

- What is the **location** of likely witnesses and evidence?
- Who will be your **adverse party(ies)**?
- If adverse party is sovereign-owned or is a large foreign-owned entity consider **neutral territory**
- Consider your preference for **provider** and the **location** of its offices
- What are the costs of location? How hard is it to get there? What are the likely **logistics** of a hearing? What is the **location** of your probable preferred counsel; are they a non-national? Can they appear?

Chromalloy Aeroservices v. Arab Republic of Egypt - 1996

- Outlier decision
- Egyptian court vacated \$17 million Egyptian-seated arbitral award
- U.S. court nonetheless enforced award because Egyptian court **disregarded arbitration clause** which prohibited appeals
- Subsequent U.S. court decisions have not followed *Chromalloy*

Baker Marine Ltd. v. Chevron Ltd. - 1999

- Nigerian court vacated large award won by Baker Marine in Nigerian arbitration
- U.S. Second Circuit refused to disturb Nigerian court ruling, even though outcome in US would have been different
- Prevailing party in arbitration had **no recourse** when Nigerian courts vacated award on plainly erroneous grounds

Termorio S.A. v. Electranta - 2007

- *Termorio* contracted with public utility owned by Colombian government
- Parties agreed to arbitrate disputes in Colombia under ICC rules
- After prolonged arbitration, panel of arbitrators sitting in Colombia awarded *Termorio* \$60 million
- Colombia high court vacated award on dubious ground that Colombian law did not expressly permit arbitration under ICC rules
- D.C. Circuit refused to disturb Colombian court order vacating award
- **US courts typically will not enforce award vacated by court of arbitral seat**

Int'l Trading and Indus. Invest. v. DynCorp Aerospace Tech. - 2011

- Parties agreed to arbitrate in Paris under ICC rules, applying Qatari substantive law
- Arbitrator in Paris awarded \$1.1 million against DynCorp
- Qatari court vacated French-seated award on petition of one party
- In the meantime French courts confirmed the same award
- U.S. court enforced award – Qatar was not “country in which, or under the law of which, that award was made” so its order vacating award was ineffective

© Parker Poe Adams & Bernstein LLP 2018

Provider

- Leading international commercial arbitration institutions include:
 - International Centre for Dispute Resolution (**ICDR**)
 - International Chamber of Commerce (**ICC**)
 - London Court of International Arbitration (**LCIA**)
- Regional centers include:
 - Swiss Chambers' Court of Arbitration and Mediation (**SCCAM**)
 - Singapore International Arbitration Centre (**SIAC**)
 - Hong Kong International Arbitration Centre (**HKIAC**)

Provider

- Trade associations often offer arbitral services
- **Ad hoc** is an option; choose rules only and proceed with no provider administering; not recommended
- See Rules for Non-Administered International Arbitration developed by UN Commission on International Trade Law (**UNCITRAL**) or the Institute for Conflict Prevention and Resolution (**CPR**)



Provider

- Each provider has **variations in rules, fee structure, panel of arbitrators**
- Provider approaches diverge on one of two bases:
 - 1. Geography** (N.A. v. Europe v. Asia)
 - 2. Common law v. Civil law**
- Gaps and differences include approach to discovery; witness preparation; argument; communication with Tribunal; confidentiality; ethics /conflicts; privilege
- Most provider rules do not specify how the hearing is to be conducted; in discretion of Tribunal/Panel; ethics and conflicts not addressed
- You can **address areas of difference and gaps in your agreement**

Provider Gaps

- International Bar Association (**IBA**) has rules that address gaps in provider rules and differences in practices and ethics, including:
 - Guidelines on Taking of Evidence (Rev. 2010)
 - Guidelines on Party Representation (2013)
 - Guidelines on Conflicts of Interest (2014)
- IBA guidance typically reflects compromise between common law and civil law approaches
- For example, the Guidelines on Taking of Evidence:
 - Permit exchange of documents via requests to produce
 - Permit consultation with witnesses
 - Permit Tribunal to ask questions of any person

Scope of Disputes Covered

- Create a **broad clause** if you are likely to need to assert non-contract claims relating to your contract (e.g., fraud in the inducement, statutory claims)
- Consider requiring that your clause be included in any contract the **counterparty** may enter relating to your deal; what about guarantors?
- Include provision permitting single panel to address claims by **multiple parties**; think about **waiver of sovereign immunity**

Applicable Law

- In disputes seated in the US, the **Federal Arbitration Act** should apply; include clarifying language in event of uncertainty of international nature of disputes
- Carefully **choose applicable substantive law**; does not have to be same as location of hearing; consider use of arbitrators familiar with that law
- If a sales contract, deal with the UN Convention on Contracts for the International Sales of Goods (**CISG**)
- Exclude **conflicts of law principles** if appropriate
- Consider including **time limitations** on asserting claims, to the exclusion of statutory or other limitations

Language

- Specify **language of hearing and award**
- Address burden and cost of **translation** if documents and witness statements may be in multiple languages
- Specify use of arbitrators fluent in English or other **common language**
- Address how translation will be handled if witnesses, counsel or arbitrators are not fluent



Confidentiality of Proceeding

- Difference between the **privacy** of the hearings (i.e., not open to the public) and **absolute confidentiality**
- Include provision for absolute confidentiality if you do not want the award or the details of your arbitration (such as transcript excerpts) published
- Limit who can attend the hearing and who has access to the arbitral record



Remedies

- **Specify remedies**, types of damages; declaratory relief, injunctive relief
- ICDR, ICC and others now have rules permitting **provisional/interim relief** (e.g., preliminary injunctions)
- Consider if you prefer a **carve out** for a court to act on interim relief
- **Punitive/exemplary damages** commonly **excluded** in international arbitration
- **Choice of law, site and arbitrators** may have effect on available remedies

Remedies

- Specify **Pre/Post Award Interest**: most Rules are silent or leave the decision to the arbitrators (ICDR Article 28(4) (arbitrators may award interest))
- **Form** of decision and award
- **Currency**: Most Rules are silent or leave the decision to the arbitrators. See ICDR Article 28(4) (award to be in currency of the contract unless arbitrators consider another more appropriate currency)

Fees and Costs

- Typically the **losing party** pays attorneys' fees and costs and tribunal fees and costs (ICDR International Arbitration Rules Article 31; ICC Rules Article 31)
- Define costs; consider including expert fees, database costs, costs of copying and demonstratives, costs of mooted case in addition to travel, hotel etc.
- Specify that fees and costs must be reasonable or such as would be incurred in location of arbitration; without some standard, you could end up paying for fancy cigars at the Ritz



Enforcement

- Include contract provision with consent to jurisdiction and venue in any countries where **assets** are located
- Include agreed to method of **service of process** to facilitate award enforcement; appoint agent(s) in US or other country where assets may be located for purposes of enforcing the award and specify **method for acceptance** of service
- **NY Convention** gives vehicle for **enforcement** if award arises out of commercial agreement between parties from two countries that have adopted it

Enforcement

- Foreign arbitral awards are “presumed to be confirmable;” burden of proof on party resisting enforcement
- Under NY Convention, vacatur of award may take place only at **seat of arbitration** or in country whose **procedural rules** were used (See case on p. 15)
- NY Convention has only 7 enumerated **defenses** to enforcement of award and these are construed **strictly**
- Parties may **waive** these limited defenses by failing to raise them during the arbitration

Research & Development v. EP International and Worldwide Vision LLC, 2016 WL 1688768 (EDVa April 26, 2016)

- Russian lender sought to collect from Virginia borrowers who were involved in Russian natural gas power plant project
- Several arbitrations, settlements, and bankruptcies preceded this arbitration before the Russian arbitral authority
- Virginia borrowers **failed to appear and lost**; Virginia court **enforced** the awards
- Court **rejected defense** of inability to participate and found that Virginia borrowers waived the right to raise a public policy defense and failed to show basis of such a defense

Sample Clause (ICDR)

(a) Any controversy or claim arising out of, relating to or in connection with this Agreement, or the breach thereof (Claims), shall be determined by a panel of three arbitrators in an arbitration administered by the International Centre for Dispute Resolution (ICDR) in accordance with its International Arbitration Rules in effect at the time the arbitration is initiated.

(b) The arbitration shall take place at the offices of ICDR in New York, NY and shall be conducted in the English language. The International Bar Association (IBA) Guidelines for the Taking of Evidence in effect at the time the arbitration is initiated shall apply.

ICDR

(c) Any monetary award shall be in U.S. dollars. The arbitrators shall be empowered to award declaratory and interim relief. The prevailing party shall be entitled to recover its reasonable attorneys' fees, expenses and costs as determined in the discretion of the arbitrators. The prevailing party shall also be entitled to recover interest at the rate of [CHOICE OF RATE] on any compensatory damages that may be awarded starting from the date of breach.

(d) Judgment on any award rendered pursuant to this provision may be entered by any court having jurisdiction thereof or having jurisdiction over the relevant party or its assets. The parties expressly consent to jurisdiction and venue in any court sitting in New York, including the federal courts.

ICDR

(e) The parties irrevocably appoint and empower the following as their respective agent for service of any notice, summons or any form of legal process associated with the action or proceeding in any jurisdiction relating to this provision, including but not limited to proceedings to enforce any award under this provision. [INSERT SERVICE DETAILS]. Each party further irrevocably consents to service by registered or certified mail [SPECIFY COUNTRY OR EXPRESS DELIVERY SERVICE]. Each party agrees that the failure of the agent identified herein to notify it of any service of such process shall not impair or otherwise affect the validity of such service.

(f) All Claims arising under, relating to or in connection with this Agreement, including questions about the enforceability of this provision, shall be resolved in accordance with the laws of the State of New York, excluding its conflicts of laws rules.

ICDR

(g) All Claims will become time-barred unless asserted through the initiation of an arbitration pursuant to the rules of the [PROVIDER NAME] within one year after the complaining party knew or should have known of the basis for the Claim.

(h) This Agreement and any arbitration conducted pursuant to its terms shall be governed by the Federal Arbitration Act (9 USC § 1-307).

Investment Treaty Arbitration

© Parker Poe Adams & Bernstein LLP
2015

Consider Availability of Investment Treaty Arbitration

- If your contract involves a **major investment** there may be applicable arbitration clauses in a **bilateral or multilateral treaty**
- 3300 bilateral investment treaties (**BITs**) establishing the terms and conditions for private investment by nationals and companies of one country in the other (host) country
- Once you know the country where the **project will take place**, determine what countries have the **most favorable** bilateral treaties with that country
- Get advice about this; you may want to consider **setting up an entity** in a particular country to ensure the availability of remedies via a bilateral treaty

BITs (cont.)

- Consider setting up a **contracting entity** in state with most favorable BIT with host state
- Consider choosing for your contract the **arbitral provider designated in the treaty**
- **Harmonize** arbitration provision in private agreement with that in BIT



Final Observations

- International arbitration **nearly always better** than taking a chance on foreign courts
- Get **outside advice** on best standard clause for your most common transactions; **establish guidelines** requiring outside review of clauses in other transactions
- Select **dispute counsel** carefully
- Regardless of who is lead counsel, always engage **experienced counsel on the ground in the arbitral seat**; keep a direct line of communication with them
- **KEY**: be sure you are heavily involved in the selection of the Tribunal or arbitral panel



Catharine B. Arrowood

Parker Poe Adams & Bernstein LLP

PNC Plaza

301 Fayetteville Street, Suite 1400

Raleigh, NC 27601

T 919.890.4142

F 919.834.4564

cbarrowood@parkerpoe.com

Katherine H. Graham

Parker Poe Adams & Bernstein LLP

Three Wells Fargo Center

401 S. Tryon Street, Suite 3000

Charlotte, NC 28202

T 704.335.9893

F 704.334.4706

katherinegraham@parkerpoe.com

www.parkerpoe.com