

International Commercial Arbitration Practice: 21st Century Perspectives

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CHAPTER 25

International Arbitration—Construction: Outside and In-House Counsel Perspectives*

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§ 25.01INT'L ARBITRATION: 21ST CENTURY PERSPECTIVES**25-2****[5] Presentation of Evidence****§ 25.01 General Editor's Introduction: International Arbitration Practice in the Construction Sector**

Arbitration has been a longtime favorite of the construction industry in the United States, with the American Arbitration Association (AAA) Construction Arbitration Rules leading the way in the field. As construction projects have gone global and involved owners, contractors and subcontractors from many different countries and legal systems working on the same mega-construction project, the traditional challenge of “matching” the business and legal provisions of the main construction contract with all subcontracts has grown exponentially. This need to match contractual provisions—including the dispute resolution clauses—is one feature that places the construction industry apart from many others.

Another feature unique to the construction industry is the use of “real time” dispute resolution mechanisms to keep the project moving along on schedule, such as Dispute Review Boards (DRBs) which have enjoyed tremendous success.

This chapter covers international construction arbitration beginning with some general premises which apply to arbitration across the board, then proceeds to the more specific aspects which make international arbitration and real time dispute resolution mechanisms so well tailored to the construction industry.

§ 25.02 Growth of International Arbitration in Construction Industry

Arbitration has become the favored choice of dispute resolution procedures in construction contracts. As the construction industry continues to grow, not just within the United States, but globally, arbitration clauses have gone “international,” trending away from the oft-used American Arbitration Association's Construction Industry Arbitration Rules. Such international arbitration clauses have essentially become a necessity for construction companies that span the globe—and the differing cultures, personalities and expectations that are encountered—in order to avoid costly and time-consuming litigation in foreign courts.

International arbitration in the construction industry differs from other types of international commercial arbitration because of the complexity of construction disputes.¹ Multiple parties—such as owners, contractors, subcontractors, and even sureties, insurers and guarantors—are involved, with multiple contracts, and multiple breaches of those contracts are possible at every phase of a project. International construction projects are characterized by millions of documents, located in various countries, with terabytes of data scattered throughout various databases.² Additionally, not only do practitioners need to concern themselves with the conventions, laws and rules applicable to international arbitration, they also need to be aware of the construction-related laws, regulations and industry standards that are “often quite extensive and diverse, involving statutory and regulatory schemes, and international,

¹ John W. Hinchey and Troy L. Harris, *International Construction Arbitration Handbook*, at 2 (2008).

² *Id.*, at 3.

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state, and local building codes of one or a combination of different countries, provinces, municipalities, and local governments, often coupled with great discretion and latitude for interpretation of those laws and codes by government officials.”³

Because of the complexity of such disputes on international construction projects, great care needs to be taken in deciding how those disputes should be resolved. As stated above, international arbitration has become the favored choice. However, with this choice comes the necessity of having to make several other decisions regarding how the arbitration will be conducted, such as the seat of the arbitration, the qualifications of the arbitrators, the arbitration rules and procedures, and the discovery process.

§ 25.03 *Ad Hoc* Versus Institutional Arbitration**[1] Selecting *Ad Hoc* Versus Institutional Arbitration**

International arbitration obviously opens the door to a world of choices regarding rules and procedures, languages and locations. One of the first decisions to be made is whether the international arbitration should be governed by an established arbitral institution that has control of the process (“institutional arbitration”) or whether the parties intend to administer the arbitration themselves (“*ad hoc* arbitration”). Institutional arbitrations are also described as “administered” or “supervised” arbitrations because the arbitral institution makes the rules and presides over the arbitration. The most popular institutional rules are the Rules of Arbitration of the International Chamber of Commerce, effective as of January 1, 1998 (“ICC Rules”). Alternatively, if the parties elect *ad hoc* arbitration, they have the opportunity to create their own rules and govern the proceedings. However, because rule drafting can be expensive, time-consuming and risky, the parties generally agree to adopt rules of procedure specifically formulated for *ad hoc* arbitrations. The most popular of these *ad hoc* rules are: (i) the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration; and (ii) the Inter-American Convention on International Commercial Arbitration.

[2] Benefits of Institutional Arbitration

Institutional arbitration has a number of benefits, especially in the construction industry where time is of the essence, and the parties do not want to spend the time to develop their own unique arbitration proceeding. With institutional arbitration, everything related to the arbitration is well-established. For example, the arbitral institution supervises the conduct of the arbitration process, can assist by appointing arbitrators or by providing a list of arbitrators, makes available hearing rooms and support facilities, assists in negotiating fees and collecting them, and ensures that time limits are respected and that the arbitration remains on track.⁴ Furthermore, the parties can benefit by the greater predictability offered by established rules. Finally, awards

³ *Id.*

⁴ Martin Hunter et al., *The Freshfields Guide to Arbitration and ADR*, Clauses in International Contracts 2-4, (Kluwer Law and Taxation Publishers, 1993).

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issued pursuant to institutional arbitration are less likely to be open to challenge because the procedures adopted by the institution are more likely to be acceptable, and the arbitration organization can make sure that the award is in the proper form and error-free.⁵

[3] Benefits of *Ad Hoc* Arbitration

The main benefit to *ad hoc* arbitration is that it can be less expensive because there is no administrative fee for the arbitration organization. The *ad hoc* arbitration process can be flexible and fast; however, this is true only if the parties are willing to cooperate, and the parties have experience administering their own obligations.

Where parties are unable to cooperate, refuse to comply with procedural rules, or fail to play their parts in the proceedings, any benefits of *ad hoc* arbitration are quickly diminished.⁶ *Ad hoc* arbitration costs can also skyrocket where the inexperience of the parties results in additional time and effort to administer the arbitration. Accordingly, *ad hoc* arbitration should only be used by sophisticated parties who have experience in administering the arbitration process. Finally, it bears note that the ICC may serve as an arbitrator-appointing authority when using any *ad hoc* arbitration rules.⁷

§ 25.04 Geographic Hot Spots for International Arbitration in Construction Industry

In conjunction with the decision as to whether the international arbitration should be *ad hoc* or institutional, the decision must be made regarding the “seat” or place of international arbitration. This selection will influence the procedural regime of the arbitration; the extent to which the courts of the place of the arbitration may uphold or interfere with the procedural direction of the arbitral tribunal, make supportive orders, and have jurisdiction to hear applications to annul or set aside the arbitral award; and the enforceability of the arbitration award.⁸ There are several tried and true seats of arbitration, such as London and New York. Along with those seats, parties usually specify that the rules of the London Court of International Arbitration (LCIA) or the American Arbitration Association (AAA) rules govern. Practitioners can take comfort in a known forum with tested procedures and expertise. Lawyers who draft international arbitration clauses and the clients who use them appreciate the lack of surprise during arbitration and are wary of venturing out into the unknown.

Nevertheless, as construction projects continue to expand into new regions—the “hot spots”—the choices of seats of international arbitration also expand. Emerging hot spots for international arbitration in the construction industry logically follow where the emerging hot spots are for new projects. As stated above, practitioners must make the decision regarding the seat of the arbitration at the same time as the decision

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Michael Black QC, Wendy Kennedy Venoit, and George J. Pierson, *Arbitration of Cross-Border Disputes*, Construction Lawyer, Vol. 27, No. 2, at 7 (Spring 2007).

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regarding the procedural rules of the arbitration because different countries have different requirements regarding international arbitration. For example, China is as huge a potential market as ever, but construction firms must be wary of merely stating that China will be the seat of an international arbitration related to the construction project. China prohibits *ad hoc* arbitration in its territory and requires that a particular arbitration institution be specified in the arbitration agreement; otherwise, the arbitration agreement is invalid. Thus, parties who intend to arbitrate in China should specify that the rules of the China International Economic and Trade Arbitration Commission (CIETAC) apply.⁹

Increasingly, the construction industry is finding itself booming in the Middle East. In fact, countries in the Middle East have become the worldwide leaders in attracting construction projects for the last decade. Often, owners even have difficulty in obtaining interest from general contractors to build projects in this area for less than \$50 million. Following this trend, contracts for these projects have specified international arbitration in this region in accordance with institutions such as that of the Dubai International Arbitration Centre (DIAC).

Two major developments in the United Arab Emirates (U.A.E.) have made international arbitration in this region much more attractive. Following its recent joining as a party to the New York Convention, the U.A.E. federal government has recently released a draft arbitration law, which will soon be enacted. The U.A.E. federal government released a draft Law on Arbitration and the Enforcement of Arbitration Awards, which represents a comprehensive statutory vehicle for the governance of international arbitrations seated in the U.A.E. and provides for the enforcement of foreign awards pursuant to the New York Convention.¹⁰ This law “is intended to change the perception that the U.A.E. is an unreliable arbitration forum, with inadequate statutory provisions applied by judges unfamiliar with arbitration.”¹¹

Additionally, on September 8, 2008, the U.A.E. enacted the DIFC Arbitration Law 2008. This law, which took effect upon enactment, opened up the Dubai International Financial Centre (DIFC) as a possible seat of arbitration to all parties who wish to have their seat of arbitration in the Middle East, even those parties who have no connection to the DIFC. This law enables the DIFC to host a complete set of dispute resolution services in a neutral and English-speaking forum. It is also comparable to the UNCITRAL arbitration model, which is well-accepted in the international arbitration arena.

Recently, South American countries, and especially Brazil, have become a hot spot for construction projects. With the ever-expanding population, these countries are in need of infrastructure and energy. Contracts for projects in these countries can specify

⁹ Jingzhou Tao, *Chinese Legal Environment for International Arbitration*, Dispute Resolution International, Vol. 2, No. 2, at 296 (September 2008).

¹⁰ Reza Mohtashami, *Recent Arbitration-related Developments in the UAE*, Journal of International Arbitration 25(5): 631-639, 2008.

¹¹ *Id.*

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international arbitration with the American Arbitration Association in accordance with the rules of the Inter-American Convention on International Commercial Arbitration.

§ 25.05 Advantages and Disadvantages of Arbitration for Construction Industry Disputes**[1] Advantages of Arbitration**

As noted above, the construction industry has wholeheartedly adopted arbitration and, increasingly, international arbitration. As is true of most industries, the construction industry perceives international arbitration as a more timely, flexible, cost-effective and confidential alternative to litigation. Compared with litigation in the United States court system, international arbitration can be extremely efficient because the amount of pre-hearing discovery can be severely limited. The ICC and the AAA/ICDR claim that in the majority of their cases, an award is rendered within 18 months from filing a request for arbitration.¹² Additionally, in construction cases, where the parties, counsel and witnesses are usually in different locations, the convenience associated with the flexible procedure of international arbitration is invaluable. Communication can be accomplished through telephone conferences, e-mail and overnight mail. The parties can agree to hold the hearings at any convenient location and can agree on dates for hearings.¹³

Although cost-effectiveness is touted as one of the advantages of international construction arbitration, arbitration can actually be more expensive than traditional litigation. Choosing an expert in the construction industry as one's decision-maker can come with a hefty price tag. However, having a panel of experienced and expert arbitrators, limited pre-hearing discovery, flexible procedures and limited opportunity to challenge an arbitration award can most certainly counteract the added expense of a private proceeding and will generally be less expensive than litigation.¹⁴

International arbitration can also help to preserve important business relationships that may be sacrificed during the litigation process, which are sometimes needed for follow-up construction projects for the same clients. It often enables businesses to effectively resolve even the most complex of disputes, cutting across languages, legal systems and cultures. A major reason for the preservation of business relationships is the privacy and confidentiality that international arbitration brings. The typical international arbitration proceeding is private, with such a concept being the "hallmark of most arbitral institutions and institutional rules."¹⁵ Privacy is also ranked highly by users of international arbitration and is considered an effective way to keep business practices out of the public eye.¹⁶

¹² PriceWaterhouseCoopers survey, *International Arbitration: Corporate Attitudes and Practices—2006*, § 2.2.

¹³ Hinchey, *above* note 1, at 62–63.

¹⁴ Hinchey, *above* note 1, at 64.

¹⁵ *Id.* at 66.

¹⁶ *Id.*

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One of the biggest advantages of international arbitration perceived by the construction industry is the ability to designate the expertise of the arbitrator or arbitrators. Having an arbitrator with construction industry experience, who is able to understand issues such as concurrent delay and critical path analyses, rather than a judge or a jury, can make all the difference in resolving a dispute in a manner in which both parties are satisfied with the process. However, the parties should be careful not to overreach on a potential arbitrator's qualifications. Finding an arbitrator who is an English-speaking Italian with ten years of experience in Middle East construction projects may be far-fetched.

[2] Disadvantages of Arbitration

Although the construction industry has jumped feet first into the international arbitration arena, a common problem has arisen due to the many different contracts used on an international construction project, a factor which differentiates construction from many other business sectors. The owner of a project may be a German company, which has contracted with an Italian general contractor to build a power plant in Chile. The Italian general contractor may have to contract with suppliers in any number of countries and also comply with the local labor and customs laws of Chile. One of the keys to successful management of this entire project is to have consistent dispute resolution procedures in every contract.

If the contract between the owner and the general contractor specifies that a dispute will be resolved in accordance with the rules of the ICC, applying German law, and taking place in Munich, and the contract between the general contractor and a supplier specifies that a dispute will be resolved in the local courts of Chile applying Chilean law, complications and expenditures of large amounts of time and money are imminent. Multiply those complications and expenditures by the number of different contracts the general contractor has with different suppliers with different dispute resolution provisions. A general contractor who is trying to manage its contract with the owner and manage its contracts with suppliers will have a difficult time, to say the least, in attempting to mitigate its risk while complying with different laws and doing battle in different countries with different rules.

Such complications and expenditures can be avoided by specifying one type of dispute resolution procedure in every contract related to a project, from top to bottom. Joinder clauses can also be used, which will enable a party to a contract to join other parties who are not in privity in a single international arbitration proceeding. Consistency in dispute resolution procedures throughout a company's contracts for a single project is vital to a smooth international arbitration. Consistency, however, is not always possible when dealing with companies from all parts of the world and is thus one of the major hurdles a construction company faces when crossing borders.

In fact, it is becoming increasingly difficult to flow down consistent arbitration provisions. While parties in many developing countries, especially sovereign entities in the Middle East, are increasingly insisting on arbitration using their own national arbitral system with hearings to be held within the borders of their own country, subcontractors based in the United States and elsewhere are naturally reluctant to being forced into arbitration in a foreign country under an arbitration system that they

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have no familiarity with at all. In Brazil for example, the new Public-Private Partnership (“PPP”) Law governing joint infrastructure projects requires arbitration of related disputes to be held in Brazil in the Portuguese language.

One solution is to provide a neutral location for the arbitration proceedings and to use an established institution to govern the arbitration but, as noted, this is becoming increasingly difficult as foreign jurisdictions develop their own arbitration systems and insist on these systems being used.

§ 25.06 Suggested Improvements to Arbitration Process for Construction Industry**[1] Use of Multi-Tiered Dispute Resolution Procedures**

Due to the concerns of increasing cost and time for international arbitration of complex construction cases, construction companies are mindful of finding alternative methods to resolve disputes, rather than proceeding with international arbitration as the first step. Indeed, a survey of corporate counsel reported that 44% of those in-house counsel who prefer to use international arbitration, use it with a combination of Alternative Dispute Resolution mechanisms in a multi-tiered dispute resolution process.¹⁷ Thus, the construction industry should prepare itself for conciliation efforts before arbitration, such as negotiation and mediation.

Although multi-tiered dispute resolution clauses appear to be a growing trend, practitioners must confirm that the governing law chosen by the parties will enforce a multi-tiered alternative dispute resolution clause “in principle.” While courts (and tribunals) in the United States, England and Europe have enforced such clauses in the past, there are substantial differences in their approach. Parties would, therefore, be well advised to consider carefully the choice of governing law and venue in drafting multi-tiered clauses, using local counsel as necessary. The courts in the United States typically enforce such multi-tiered clauses.¹⁸

In England, courts (and/or tribunals) take a “case by case” approach. They generally look to the contractual wording of the clause to determine whether it is enforceable. A recent case on point, *Cable & Wireless v. IBM*, [2002] All ER (Comm) 1041, appears to implement a policy of favoring the enforceability of such clauses, provided that they

¹⁷ PriceWaterhouseCoopers survey, International Arbitration: Corporate Attitudes and Practices—2006.

¹⁸ See, e.g., *Ziarno v. Gardner Carton & Douglas, LLP*, 2004 U.S. Dist. LEXIS 7030 (E.D. Pa. April 8, 2004) (the court dismissed the plaintiff’s claim because the parties had failed to submit their dispute to contractually required mediation and arbitration pursuant to a multi-tiered dispute resolution clause); *Design Benefit Plans, Inc. v. Enright*, 940 F. Supp. 200 (N.D. Ill. 1996) (the court granted motion to compel mediation/arbitration of counterclaim and stayed proceedings under the Federal Arbitration Act). Courts in the United States also typically enforce alternative dispute resolution agreements that call for mediation or non-binding arbitration before a party may commence a lawsuit. See, e.g., *Fisher v. GE Medical Systems*, 276 F. Supp. 2d 891 (M.D. Tenn. 2003); *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205 (9th Cir. 1998); *DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*, 811 F.2d 326 (7th Cir. 1987).

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are sufficiently “clear and mandatory.”¹⁹

In *Cable & Wireless*, the relevant arbitration clause set forth a procedure to be followed prior to arbitration.²⁰ The court found that the procedure constituted a “sufficiently defined mutual obligation” so that there could be “no serious difficulty in determining whether a party has complied with such requirements.” The court held that the reference to ADR was enforceable, and adjourned the court hearing until after the parties referred all of their outstanding disputes to ADR.²¹

In the rest of Europe, practitioners must assess the nuances of the relevant local law. For example, in Sweden, arbitral tribunals (not the courts) generally look to the terms of the contract to determine the enforceability of any conditions precedent to arbitration, and whether the non-fulfillment of such preliminary requirements constitutes a bar to arbitration or substantive issues to be tried by the arbitrators.²²

[2] Real-Time Decision Making Procedures

Perhaps unique to the construction industry, there is also likely to be a growing emphasis on Dispute Review Boards (“DRBs”) due to the almost 100% success rate of DRBs. This type of dispute resolution procedure is referred to as a real-time procedure, for it often is structured to provide decisions on an interim basis with arbitration or litigation available as a final option. Most agree that DRBs got their start in tunneling or underground construction projects such as the English Channel Tunnel, but their great success in avoiding disputes has led to their expansion into most major infrastructure projects around the world. DRBs have been used with exceptional success in connection with the development of the Boston Central/Artery Project (the Big Dig, where forty nine different, and specialized, DRBs were used), the Hong Kong Airport and the Athens Airport among hundreds, if not thousands, of other projects. In fact, the World Bank requires a DRB on all World Bank financed construction projects.

The DRB is established at the outset of the project through the contract documents and is generally comprised of a three-person panel of neutrals, often with the owner

¹⁹ The piecemeal approach of the English courts makes it difficult to describe definitively the position with respect to any single multi-tiered dispute resolution clause (particularly, a “non-standard” clause), and many commentators consider that the decision in *Cable & Wireless* is by no means the “last word” on the issue. A 2002 article by Tanya Melnyk outlines the relevant cases and the specific factors taken into account by the English courts prior to *Cable & Wireless* and provides a useful overview of the subject. “The Enforceability of Multi-Tiered Dispute Resolution Clauses: The English Law Position” Int. A.L.R. 2002, 5(4), 113-118.

²⁰ The clause provided that the parties should “attempt in good faith to resolve the dispute or claim through an Alternative Dispute Resolution (ADR) Procedure as recommended . . . by the Centre for Dispute Resolution.” Per Coleman J. at p. 1045.

²¹ See also *Channel Tunnel Group v. Balfour Beatty Construction Ltd*, [1993] A.C. 334 (H.L.) (enforcing a stay for arbitration pursuant to a multi-tiered jurisdiction clause. Lord Mustill, in the reasoning of the decision, specifically stated that “those who make agreements for the resolution of disputes must show good reasons for departing from them.”)

²² The noted Swedish commentator, Professor Lars Heumman, outlines the Swedish approach in his text “Arbitration Law of Sweden: Practice and Procedure” (Juris Publishing, 2003), pp. 76-77.

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and the contractor each appointing one person, and then those two selecting a third. If properly structured and operated, they very much become a part of the project team. The DRB attends periodic project review meetings, reviews documents and, in its informal role of counseling, identifies and suggests resolution of issues before they become disputes.

If a matter is not resolved as a result of the informal counseling provided by the DRB before an issue has become a dispute, the dispute is presented to a DRB at a hearing, with the DRB's decision usually presented as a recommendation or as a non-binding decision. These decisions have significant impact as, if the DRB is properly set up, they are admissible in subsequent arbitration or litigation if the dispute remains unresolved after the DRB's recommendation. The idea is that the parties will be inclined to accept the guidance of the board members because the parties themselves have appointed the board members and will most likely have chosen experts in the particular field, the board members should have developed knowledge and familiarity with the project, and the parties know that the opinions of these expert board members will be admissible at arbitration or litigation and will undoubtedly have significant impact in the arbitration or litigation. It would be hard for an arbitration panel or a court to substitute its judgment for that of an informed, knowledgeable panel with expertise in the project and the issue.

Since the establishment of the DRB Manual in 1996, by the American Society of Civil Engineers, several institutions have followed suit and adopted their own DRB rules. DRBs have been embraced by the Institute of Civil Engineers in its new engineering contract system, which calls for the appointment on every project of an adjudicator to promptly rule on disputes. The ICC also published its own "Dispute Board Documents" in May of 2004. The AAA published its model documents in 2000.

The International Federation of Consulting Engineers (FIDIC) forms for construction contracts call for a phased dispute resolution process culminating in arbitration by three arbitrators under the ICC procedures. The first step is for the contractor to give notice of its claim. The second step is for the owner to make a determination. If the contractor is dissatisfied with the determination, the dispute may be referred to a dispute adjudication board. A DAB, which, distinguished from a DRB, makes decisions which are binding on the parties until it is resolved by the parties or overturned in arbitration. Either party may give notice of dissatisfaction with the decision of the board. There is then a period of time for settlement, after which arbitration may be commenced.

[3] Post-Dispute Resolution Processes

Some commentators have envisioned the design of dispute resolution processes after the dispute arises. Such post-dispute resolution process would overcome the inherent obstacle in any pre-dispute resolution provision: that the procedures are decided upon and incorporated into the contract well before the nature and quality of the disputes are known.²³ Robert Hunt opined:

²³ Hinchey, *above* note 1, at 76-77.

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It is similarly open to parties that have agreed on a particular dispute resolution procedure in their contract, to subsequently agree on some modification of that procedure after the dispute arises, so as to achieve a mechanism which is better suited to efficient resolution of that particular dispute. The multi-faceted approach involves the arbitrator or mediator being pro-active in identifying where some modification of the agreed procedure would be beneficial for the prompt and cost-effective resolution of the particular dispute, and then endeavoring to persuade the parties and their legal advisors to adopt that course. Success will, of course, partly depend on the knowledge and professionalism of the parties' respective legal advisors in agreeing on a proposal which should be to the mutual advantage of their clients.²⁴

This post-dispute design of optimal resolution procedures is somewhat reflected in the ICC Dispute Board Rules; whereby a Combined Dispute Board would determine, after the dispute is known, whether the Board will function as a DRB, with a non-binding recommendation, or as a DAB, authorized to make an interim binding decision.²⁵ "This is a good development because parties to construction disputes come with a variety of appetites and needs. The focus of the attention should not be so much on a search for the 'best' or 'preferred' dispute resolution process in a generic sense, but having a willingness to select the best process for the particular problem at hand."²⁶

This concept is intriguing but, as Mr. Hunt stated, will depend on the parties' and their legal counsel's cooperation. After a dispute arises, it is often difficult for the parties to agree on anything, much less the vehicle by which their dispute will be resolved. Nevertheless, the concept is one that should be strongly considered as it is a means for the construction industry to resolve its disputes in a way that prevents delay to the completion of the projects at issue.

§ 25.07 Sample Arbitration Clauses and Drafting Tips for Construction Related Contracts**[1] Selecting an International Arbitration Clause**

Important to keep in mind for construction companies opting for international arbitration is that international arbitration is by agreement. Therefore, the parties can agree before any dispute arises how they wish to resolve conflicts. They can construct the most simple or the most complicated international arbitration provisions, but it is all up to them. Types of issues that can be resolved upfront include not only the designation of the expertise of the arbitrators as discussed above, but also the limits of permissible discovery, the number of arbitrators, and how evidence will be presented at a hearing.

Construction companies faced with an international project and deciding on an international arbitration clause generally rely upon the known institutions such as the ICC and the LCIA. However, even when using these institutions, the contract must

²⁴ *Id.* at 77 (quoting Hunt, *Cost-Effective Resolution of Construction Disputes: Wishful Thinking or Emerging Reality?*, International Construction (June 2001), pp. 17, 20-21, published by the IBA Section on Business Law).

²⁵ Hinchey, *above* note 1, at 77.

²⁶ *Id.* at 77-78.

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include a well-drafted international arbitration clause that covers all of the key factors of international arbitration.

[2] The Four Functions of an International Arbitration Clause

An international arbitration clause provides four essential functions. First, it produces mandatory consequences for the parties. In other words, the clause must provide for the end result that the parties will be bound by the arbitration award. Second, the clause empowers the arbitrator to settle the disputes likely to arise between the parties. Third, the clause allows for the most efficient and rapid procedure leading to an award that is judicially enforceable. Finally, an arbitration clause excludes the intervention of courts in the settlement of the conflict, at least before an award is issued.

Using a model clause is a good choice, especially if the construction company is new to international arbitration. A model clause will have been tested through prior disputes and should produce consistent results. Although one size does not necessarily fit all, a construction company should be careful about making even the smallest change to a model clause without researching what the consequences of such a change will be. It does not make sense to negate the benefits of international arbitration by making variations to a model clause that may result in additional disputes, increased costs, delays and difficulties with enforcement.

[3] The Essential Elements of an International Arbitration Clause

The clause must include certain elements. Because arbitration is consensual, the clause must state clearly that the parties agree to arbitrate. The clause must define the scope of the arbitration and provide that the award of the arbitrator is final and binding.²⁷ The AAA, ICC and LCIA rules all contain broad arbitration clauses that can apply to any dispute arising out of a construction contract, including performance, existence, validity and breach.²⁸

Another key element is the seat or place of arbitration. The choice of seat is of vital importance because it determines the national law governing the proceedings.²⁹ A construction company should seriously consider how those laws will treat arbitration and the enforcement of arbitral awards. Furthermore, if the arbitration fails for any reason, the seat will govern the legal system and courts that the parties will utilize to settle any dispute.³⁰

The clause must designate the number of arbitrators, usually one or three. It may also provide for the process of selection and appointment of the arbitrators and any

²⁷ Lucy F. Reed, *Drafting Arbitration Clauses*, Practising Law Institute Litigation and Administrative Practice Course Handbook Series, 670 PLI/Lit 553, 563 (2002).

²⁸ Oliver Dillez, *Drafting International Commercial Arbitration Clauses*, 21 Suffolk Transnat'l L. Rev. 221, 224 (1998).

²⁹ See Dillez, *above*, note 28, at 228.

³⁰ See Reed, *above* note 27, at 566.

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required qualifications.³¹ Another important element is the designation of the language of the arbitration—what language the arbitrators will speak, in what language the hearings will be conducted, and in what language the request for arbitration and other pleadings will be written.

It is advisable to use one of the model clauses provided by the designated arbitration institution. However, the following sample multi-purpose clause contains the key elements of a good arbitration clause for a construction contract and could be used in conjunction with most institutional rules:

The parties to this Contract agree that any dispute, controversy or claim arising out of or in conjunction with this Contract, including any question regarding its existence, validity or termination, shall be finally resolved by arbitration under the Rules of [name of institution] in force at [the date hereof/the date of the request for arbitration], which Rules are deemed to be incorporated by reference into this clause.

The substantive law to be applied is the law of [country/state].

The tribunal shall consist of [a sole/three] arbitrator(s).

The place of the arbitration shall be [city].

The language of the arbitration shall be [language.]³²

[4] Discovery and Production of Evidence

Other aspects of the international arbitration proceeding can also be addressed in the contract clause, such as discovery and production of evidence. Contrary to litigation in the United States, construction companies can expect a significant decrease in the amount of discovery each party is allowed in an international arbitration. Although all of the major arbitral institutions contain provisions allowing some degree of pre-hearing discovery, most of these rules on discovery are vague and the manner in which discovery is carried out is frequently left up to the discretion of the arbitral tribunal.³³ Under these vague rules, document production and exchange in international arbitration is significantly more limited than discovery in U.S. litigation.

For example, sweeping discovery requests characteristic of United States proceedings that seek “any and all documents that relate or refer to” are not usually allowed in international arbitration proceedings.³⁴ Depositions, which can form the core of the discovery process, are not typically taken and may not be permitted at all during the course of the proceeding.³⁵ It is more common for a witness to present his or her testimony in the form of a prepared, written witness statement that is tested through cross-examination at a hearing.

International arbitration rules likewise fail to offer direction as to whether a party

³¹ *Id.*

³² *Id.* at 564.

³³ John W. Hinchey et al., *Discovery in International Arbitration*, Center for International Legal Studies Salzburg Conference, 2 (2000).

³⁴ Claudia T. Salomon and Matthews Saunders, *How to Arbitrate Internationally*, New York Law Journal (June 26, 2006).

³⁵ *Id.*

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can compel document production from his opposition, or what standard of review the court should apply to such request. Additionally, in contrast to a court, an arbitral tribunal generally lacks the power to compel discovery from a third party. As a result, the power to take third party depositions or to obtain documents from third parties may be significantly limited.

If a construction company wants to be able to obtain documents and conduct depositions in an international arbitration proceeding, it should include an express discovery clause in the arbitration agreement that defines the scope and methods of discovery.³⁶ The construction company should keep in mind the differences in the legal systems of various countries in drafting the discovery clause as well as in conferring the power to the arbitrator to order discovery. For instance, parties and counsel outside of the United States may find the expansive discovery process used in the United States to be unnecessarily comprehensive, an affront to the expectations of privacy and overly burdensome.³⁷ In contrast, parties and counsel used to litigating in the United States may find the discovery process of other countries too limited, not permitting discovery of all the documents necessary to arbitrate effectively. Additionally, the construction company must be conscious as to who benefits from broader discovery rights, as an opponent with greater assets may decide to expend significant resources engaging in onerous discovery to the detriment of the smaller party.³⁸

In the absence of a discovery clause or other discovery agreement, parties may address the issue in a pre-hearing conference. The arbitrators can help the parties to define the terms of reference in the discovery clause, determine the schedule for discovery, or even draft a discovery clause from scratch. The pre-hearing conference may also be used to address all discovery issues, such as the scope of document discovery, the authenticity of documents or the handling of interrogatories and depositions.

[5] Presentation of Evidence

Parties can also agree in an arbitration clause how evidence will be presented. In the absence of a contrary agreement, the institutional rules will apply. Typically, prior to the hearing, parties will commonly exchange two sets of written memorials and will produce testimonial evidence in the form of witness statements.³⁹ These written witness statements stand as evidence in chief. At the hearing, the generally accepted practice is that the opposing party may request the opportunity to conduct oral cross-examination of some or all of the witnesses who have provided written direct testimonies for the other side. After cross-examination is concluded, the party

³⁶ Hinchey, *above* note 33, at 3.

³⁷ Javier H. Rubinstein, *International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions*, 5 Chi. J. Int'l L. 303, 304 (2004).

³⁸ Arthur W. Rovine, *The Scope of Discovery in International Arbitral Proceedings*, 5 Tul. J. Int'l & Comp. L. 401, 404 (1997).

³⁹ Laurent Levy and Lucy Reed, *Managing Fact Evidence in International Arbitration*, 756 PLI/LIT 239 at 244 (2007).

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sponsoring the witness is usually permitted to conduct limited re-direct examination. It is generally accepted that witnesses who do not provide written witness statements will not be permitted to testify at the hearing.⁴⁰ The use of expert witnesses is common in international arbitration, and following the pre-hearing submission of expert reports, expert witnesses may be called by either party or by the tribunal itself.

As with the overall discovery process, parties are free to agree in the contract as to the details of evidence and oral testimony. There are several elements a construction company may wish to consider including, such as time limits, the number of witnesses, preliminary issues, pre-hearing submission of documents, and the pre-hearing submission of expert witness reports. However, practically speaking, a construction company should remember the following points in drafting an evidentiary process different than the one stated in the institution's rules:

1. **Freedom**—An arbitration tribunal is not necessarily bound by the rules of evidence at the place of arbitration, and rules pertaining to domestic procedures in domestic courts do not apply to international arbitrations. The parties can choose by express provisions in the arbitration agreement or submission agreement the rules of evidence that will apply to the arbitration. The prudent party, however, will check that more audacious rules do not offend public policy at the seat of the arbitration.
2. **Confidentiality**—A party might want to limit the evidence submission to preserve business confidentiality. There are numerous ways to preserve confidentiality of documents produced for evidence. For example, parties can insist upon redaction of documents or that such documents are inspected in situ or at an independent party's office; or that such documents are indeed produced to the tribunal, any experts and counsel, but all will agree to preserve the secrets and confidences contained in the documents.
3. **Cost**—A comprehensive discovery process without limitation can be costly. A party might want to reduce the discovery process to such a level that is appropriate to the size and complexity of the dispute; conversely, extensive discovery can be mandated by an appropriate agreement where the cost of such "contractual discovery" is warranted.
4. **Time**—The arbitrator can be given the power to manage or limit the process for document production as appropriate by defining issues that require evidence substantiation before the arbitration or during the proceedings.
5. **Court's Role**—It is important to note that parties usually cannot compel discovery or extend discovery though the courts when they have agreed upon a particular mode of discovery, or if the arbitrator has the power to conduct the discovery process, without the arbitrator's consent. However, recourse to courts would be available if there is a need for evidence from third parties, providing the arbitrator thinks it appropriate for such an application and he

⁴⁰ *Id.*

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has the power to give such directions. Most modern arbitration laws also provide for court assistance where it might be necessary to compel the attendance of witnesses or to obtain material evidence.

6. **Arbitrator's Role**—The arbitrators are given wide powers to conduct the proceedings so that they can investigate a dispute thoroughly. The arbitrators can order the parties to present evidence they think necessary and can draw negative inferences from the non-compliance of such orders. These powers should be sufficient to prevent delay tactics in the discovery process.
7. **Place**—Most national arbitration laws and modern rules allow the tribunal to hold an arbitration proceeding where evidence or witnesses may be located.

Any business that desires to protect its rights, interests and investments in the global economy will gain from an increased awareness of international arbitration practices and procedures. This is particularly true for companies that are involved in international construction projects.