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CHAPTER 23: **INTERNATIONAL ADR**

http://www.cidra.org/chapt22.htm

I. [23.1] Scope of Chapter

While it is important to note the scope of this chapter, it is equally important to indicate what it is not. This chapter assumes that the reader has a working knowledge of domestic (one country) ADR from reading the other chapters of this book. Accordingly, this chapter deals with domestic categories of arbitration and mediation only in comparison to their international counterparts. In that regard, while domestic ADR is readily accepted as a convenient and economical alternative to litigation, particularly in the United States, many observers see it as essential in the international setting. Sophisticated business people are usually apprehensive about submitting their commercial disputes to the particular procedures of unfamiliar court systems. International companies tend to favor a consensual process in which, at least until the submission of the matter to an arbitral forum or ad hoc panel, they have the ability to resolve the dispute themselves or with the assistance of negotiation, mediation or conciliation, unfettered by rules of an institutionalized national court system. There are, of course, exceptions to the benefits of international ADR; there are occasions when resort to courts, even of other nations, is preferable. All of these approaches and only theses approaches are treated in this Chapter.

II. [23.2] What is an "International Arbitration"

What makes a dispute "international" in nature? Simplistically:

a. The dispute involves nationals of two or more countries.

b. The subject matter of the dispute renders it international.

c. The parties agree that the matter is international in nature.

The United Nations Commission on International Trade (UNICTRAL) Model Law (Model Law) definition, recently codified in the Illinois International Commercial Arbitration Act, 710 ILCS 30/1-1, *et seq.* offers a more precise, but no more exacting definition of "international":

(c) An arbitration is international if:

1) the parties to the agreement have, at the time of the conclusion of execution of that agreement, their places of business in different countries; or

2) one of the following places is situated outside the country or countries in which the parties have their places of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) the place where the predominant part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is mostly closely connected; or

3) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

(d) For the purposes of subsection (c) of this Section:

1) If a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement.

2) **If a party does not have a place of business, reference is to be made to his or her habitual residence.** 710 ILCS 30/1-5

The inclusion of "habitual residence" in § 1-5(d)(2) of the IICAA is only one example of the efforts amongst the drafters of the Model Law to find a compromise between countries whose legal systems are based on either common law or the Napoleonic Code. See *International Shoe Co. v. State of Washington*, *Office of Employment Compensation & Placement* 326 U.S.310, 90 L. Ed. 2d 95, 66 S.Ct.154 (1945), illustrating the convergence between the notion of "minimum contacts" and the continental construct of defendants being haled into court only in jurisdictions where their headquarters or branch office is located. The Model Law has also been adopted in some form in Illinois and nine other U.S. jurisdictions regardless of governing law. It must be pointed out that the adoption of more and more state laws has caused some controversy on the part of the text writers as to whether these "Little Model Laws" undercut the salutary effect of the Federal Arbitration Act (FAA) 9 U.S.C. §1, *et. seq*. because of their varying provisions and court interpretations surrounding them.

Accordingly, it is quite a simple matter for the smallest business client and its lawyer to become involved in an "international arbitration," arising from any sort of "international" commercial dealing as defined above. Of course, since all of ADR is to some degree consensual, it is necessary to provide for it by agreement of the parties. Obviously, it is preferable to decide that arbitration, rather than resort to court, is desirable when crafting the deal. Practitioners should think through and plan for all the possible issues to be encountered in the arbitration process, despite all of the parties initially agreeing that the transactions will never give rise to a dispute. Such pre-transaction work, needless to say, is seldom done. Even if the contracting parties agree that arbitration or some other form of ADR is preferable to court proceedings and are willing to spend the time and money to negotiate an all encompassing clause in that regard, they may find that certain issues elude them.

Some examples of items of importance for inclusion in an agreement to arbitrate a dispute, as reflected by the Appendices to P. Friedland's excellent book, ARBITRATION CLAUSES FOR INTERNATIONAL CONTRACTS (2000) are:

a. affiliates
b. arbitrators, method of selection and number of arbitrators
c. specific qualifications of arbitrators
d. choice of law
e. confidentiality
f. costs and fees
g. currency of award
h. damages (consequential or punitive)
i. discovery
j. entry of judgment
k. general purpose institutional clause
l. governing arbitration law
m. institutional model clauses
n. interest
o. intergovernmental organizations

p. judicial forum (asymmetrical or sole option)

q. judicial forum for enforcement of arbitration agreement

r. judicial forum (exclusive or non-exclusive)

s. judicial review (excluded or expanded)

t. jurisdictional defenses (including waiver)

u. jury waiver

v. language

w. limitations periods

x. mediation-as-a-first step provision

y. multi-party contracts

z. narrow scope

aa. negotiation-as-a-first step provision

bb. non-administered arbitration (without designated set of rules)

cc. offsets

dd. place of arbitration

ee. preliminary adjudication of threshold issues

ff. provisional relief

gg. related contracts

hh. service of process

ii. sole option arbitration clauses

jj. sovereign agreements for existing disputes

kk. UNCITRAL Model Clause

ll. witness statements

III. Drafting the International Arbitration Agreement

A. [23.3] Affiliates

When there are questions about joining the the proper parties in an arbitration, the careful practitioner must investigate the relationships between and among incorporated and unincorporated entities. After doing so, those parties should either should be expressly joined or excluded with appropriate language within the arbitration clause or submission agreement, unless doing so would hinder the commencement or prosecution of the arbitration or the enforcement of any award entered. Otherwise, without such explicit reference, questions may arise about jurisdiction over parties and the enforceability of the arbitral award on the parties. *See, Hellicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U. S. 408, 80 L.Ed.2d 404, 104 S.Ct.1868, (1984) (jurisdictional questions). *See also Dow Chemical et al. v. Istover-Saint Gobain*, 110 J. DU DROIT INT'L 899 (1983) (more specific jurisdictional questions raised by proposed joinder of non-signatories (to arbitration agreement.)).

B. [23.4] Arbitrators

The qualifications that are required for arbitrators of any given matter should be considered carefully before their selection. While this point may seem obvious, its offshoot may escape many practitioners: A way to solve jurisdictional problems is to select an institution to administer the arbitration in a particular locale. Another approach is to apply those rules to an ad hoc arbitration and require its seat to be within that organization's borders. Within the method of appointment, especially in an ad hoc case, care should be taken to specify the composition of the arbitral panel *e.g.,* the number of arbitrators, whether two of them are to be to be party-appointed, The question always arises as to whether the arbitrator(s) should have a legal background. etc. The common answer is yes. There may very well be matters, however, in which the arbitration concerns matters in large-scale construction projects, or discrete areas of financing vehicles In these instances, the inclusion of one or more industry experts along with one lawyer on a three-member panel is salutary. If the proceeding is conducted by only one arbitrator, then the consensus is that the arbitrator should be a lawyer, or as is now becoming more prevalent, a former judge.

C. [23.5] Choice of Law

As has been pointed out aptly by Jan Paulsson, a noted text writer and practitioner in the ADR field,

> [A]t least five different systems of law may become relevant during the course of an international arbitration:
>
> the law that determines the capacity of the parties,
>
> the law that determines the validity of the arbitration agreement,
>
> the law governing the arbitration itself and in particular the procedure,
>
> the law applicable to the substance of the dispute,
>
> and
>
> if there is a conflict of applicable substantive laws, the law under which that conflict is to be resolved
>
> In general, the parties cannot make a choice of the law applicable to capacity, except (for instance) by incorporating a company in a particular country. The parties generally need not make an express choice in relation either to the law governing the validity of the arbitration agreement of the law governing the procedure of the arbitration itself. This will usually follow naturally from the circumstances; the proper law of the arbitration is generally that of the contract of which it is a part, and the law governing the conduct of the arbitration is generally that of the place of arbitration. Parties wishing to make explicit exceptions in either respect should seek expert advice before doing so.
>
> *J. Paulsson, Ch. 22:12 of R. Smith, ADR FOR FINANCIAL INSTITUTIONS (1995).*

There are very important consequences that can arise from choice-of-law issues. Accordingly, the practitioner should not only formulate the substantive issues carefully, but should also consider the enforcement regime. *See e.g., National Thermal Power Corp. v Singer Co.* (3 Supreme Court Cases 91992) 551-573, XVIII Yearbook Commercial Arbitration 403 (1993). (The Indian Courts could enjoin

the enforcement of the award outside of India anywhere even if the place of the arbitration was outside India. This means that effectively an action to set aside the award could be brought in India, hobbling the notion of deference to international arbitration awards that courts normally show them.)

While most arbitration rules require consideration of not only the terms of the agreement, but also trade usages with a view to honoring the parties' intent at the time of contracting, there has been an increasing development of a modern-day international law merchant or lex mercatoria The concept of an international law merchant would be used in these sorts of matters in order to avoid the particularities of any given country's.

Another approach is to designate no national law at all and base the award on "general principles of law." This is quite a convenient starting place to develop "concurrent laws" in which one party to a contract is a state or state agency. These general principles, or "public international law" are joined with national law in the case. Such a pluralistic approach assures that the national law meets a minimum international standard. When one party is a nation or national agency, it can be particularly helpful for the other party to insist in the contract that the national law will not be changed to that party's detriment with respect to the venture or any arbitration arising in that country after the date of the execution of the contract.

Finally, in an attempt to assure that the parties will receive the method of resolution they chose by selecting arbitration, the parties should consider enabling the arbitral tribunal to act as amiable compositeurs, and render a decision not by reference to any specific national or other regime of rules, but rather ex aequo et bono or in equity and good conscience. This method is particularly beneficial when the parties hope to continue their business relationship.

D. [23.6] Confidentiality, Costs and Fees and Currency of Award

Often overlooked in drafting an arbitration clause or submission agreement, these items are of critical importance. Confidentiality, in and of itself, is the very reason that some parties choose arbitration rather than resort to court; a choice that has been held by some courts to enforce arbitral awards attacked on due process grounds. Courts have reasoned that the parties chose arbitration for its speed, etc. and in doing so contracted away certain of the rights they would otherwise have had in court.

E. [23.7] Damages, Consequential or Punitive

While punitive damage awards by arbitral tribunals have been upheld in the United States (*Mostrobuono v. Shearson Lehman Hutton, Inc., et. al*., 514 U.S. 52, 131 L.Ed.2d 76, 115 S.Ct. 1212, (1995)), there is considerable reluctance to the imposition of such awards in continental countries. In those nations, there is a doctrine allowing for "moral damages" under certain circumstances. It is wiser, however, for the parties to provide in the contract for the sorts of damages that the panel will be allowed to impose, *i.e*., compensatory, consequential and/or punitive, so the award will not be subject to attack as lying outside the scope of the power given to the arbitrators in the clause or submission agreement.

F. [23.8] Discovery

In virtually every matter in which they are involved, common law lawyers accept the discovery process as a given. The opposite is true in continental countries, however, where discovery in noncriminal actions is unknown and lawyers often must ask the court to pose a question to a witness at the trial. While there has been movement in harmonizing these differences in international arbitration, (*e.g*. the

International Bar Association (IBA) pamphlet, *Rules of Evidence* (1986)), it is best to provide for discovery or to waive it explicitly in the clause or submission agreement.

G. [23.9] Entry of Judgment and General Purpose Institutional Clause

These provisions indicate which court may enforce the arbitral award and suggest language for inclusion in a clause or submission agreement allowing for the appointment of an institution to conduct the arbitration.

H. [23.10] Interest

The seemingly simple question of interest is actually a very important one. For example, if the arbitration will occur or the award is intended to be enforced in a Moslem country, any amount denominated as interest will cause the award's rejection as against the public policy of that nation.

I. [23.11] Intergovernmental Organizations

This provision in a clause or submission agreement deals principally with arbitration that involves United Nations entities. Accordingly, the reader is referred to the Permanent Court of Arbitration (PCA) booklet entitled BASIC DOCUMENTS OF THE PERMANENT COURT OF ARBITRATION (1998) in the event he or she becomes involved in such an arbitration.

J. [23.12] Judicial Forum - Asymmetrical or Sole Option

Sections 23.13 – 23.16 all deal with selection of the appropriate judicial forum for an ancillary proceeding or for the enforcement of the arbitral award. The terms very closely mirror their titles. Accordingly, the asymmetrical or sole option allows one party, usually the one with more bargaining power, to establish the courts of one jurisdiction alone to hear any dispute arising from the contract at hand. Alternatively, the party with the greater bargaining power might prefer to have the other accept jurisdiction over it in the first party's jurisdiction and so construct the clause in that way.

1. [23.13] Exclusive Judicial Forum

The parties may establish that there is one exclusive court to which to apply for enforcement of the arbitration clause itself, while retaining nonexclusive resort to courts to enforce the arbitral award. One of the parties may insist that there be only one court for resort for all matters concerning the arbitration proceeding itself. Further, that party may require the other to waive any objections to that forum for such purposes.

2. [23.14] Nonexclusive Judicial Forum

The "non-exclusive" judicial forum language raises some very interesting issues for the drafter. If it is the intention of the parties that all matters shall be referred to arbitration, then there is no need for terms allowing to resort to court for determination of any dispute arising out of or related to the contract; however, if certain subjects are not meant for arbitral resolution, then those issues should be excluded and plainly made the subject of judicial action.

3. [23.15] Excluded Judicial Review

The determination of which subjects should be excluded from agreements to arbitrate leads to a very short discussion of a very complicated matter: Who should decide the jurisdiction of the arbitration panel to hear a matter, if a challenge is brought? This question is settled law in the U. S. *See e.g., Mostrobuono v. Shearson Lehman Hutton, Inc., et. al*., 514 U.S. 52, 131 L.Ed.2d 76, 115 S.Ct. 1212, (1995) and *Mitsubishi Motor Corp. v. Solar Chrysler-Plymouth, Inc*., 473 U.S. 614, 87 L.Ed.2d 444, 105 S.Ct. 3346, (1985). Further, in the United States, it has long been settled law that arbitration provisions within contracts are separable from the rest of the contract and only challenges that the arbitration clause itself, not the entire contract, was induced by fraud. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 18 L.Ed.2d 1270, 87 S.Ct. 1801 (1967). This "American" doctrine seems vaguely familiar to the continental notion of "kompetenz-kompetenz" or double competence: the power of the arbitrators to decide their own power.

The concept of excluding all judicial review—also known as the "exclusionary clause"—makes the arbitral award self-executing and immune from any form of judicial challenge or necessity for enforcement, as the parties have committed themselves to abide by the arbitral award as final and binding.

4. [23.16] Expanded Judicial Review

The "expanded judicial review clause" is the opposite of the exclusionary clause and allows more far-ranging and broader court review, amounting to review, modification or correction due to improper reasoning or mistakes on the part of the arbitrators. An expanded judicial review clause amounts to a "clearly erroneous" review standard.

K. [23.17] Jurisdictional Defenses, Waiver, Jury Waiver

These provisions amount to an irrevocable nonexclusive submission to the jurisdiction of a certain court and the waiver of a jury trial on a money claim.

L. [23.18] Language

This seemingly tautological provision reminds the drafter to include the language in which the arbitration is to take place, regardless of its geographical seat.

M. [23.19] Limitations Periods

It may be useful to the parties to know that, after a certain period of time has passed, any claim regarding the contract is time-barred. If the element of time is important to the relationship between the parties, the agreement should include such a time-related provision.

N. [23.20] Mediation as a First Step

This is the first "tiered" ADR provision mentioned in this short chapter on alternative dispute resolution methods. However, it is perhaps the most important. Since all these methods are consensual,

the parties must feel, prior to arbitration, that they still have the ability to control, that they still have control over a potential resolution with which they can live and perhaps even continue their business relationship. At the same time, the parties must know that if they cannot resolve their dispute through intercession of a third-party facilitator, conciliator or mediator, they can move very quickly to arbitration.

As international arbitration has increased in cost and length, the procedure has actually been separated in the minds and vocabulary of the parties and practitioners from other forms of dispute resolution such as mediation, conciliation and mini-trials. There has been a stead increase in the use of these modalities and the skills of the neutrals who practice them. It must be pointed out that the skills of the most well-respected arbitrator may not work well at all in a mediation, in which it is necessary to communicate with the ultimate decision makers in a way that allows those authority figures to hear the weaknesses as well as the strengths of their respective positions. The most effective mediation provides the parties with the perspective to evaluate, for instance, their own "best alternatives to a negotiated agreement" (BATNA), if they do not resolve their dispute and allows the parties to craft a new agreement with which each can live. Not only does mediation provide a joint-session format, as always occurs in arbitration whenever the arbitrators meet with parties to listen to their presentations, but a good mediation also provides "caucuses" in which neutrals meet separately with each party, sharing only that information that the mediators have been told is allowable by the parties. In mediation, unlike arbitration, "cross-talk" is encouraged to some extent to allow the parties to vent their frustration with the problem that has arisen and then move toward possible solutions. Since much of this book is given over to mediation in only one country, it is necessary to say only that in the international mediation arena, it is even more important to notice and respect cultural differences in this sort of ADR.

O. [23.21] Multi-Party Contracts

This clause provision should be utilized in situations involving more than two contracting parties so as to allow proper provisions for jurisdiction, inclusion of all the parties' claims and to determine all matters in one arbitration, if possible. The use of multi-party contracts can make the process economical in terms of both time and money.

P. [23.22] Narrow Scope

This clause is the opposite of the broad clause and shows the parties' intent not to submit all the matters contained in the contract to arbitration.

Q. [23.23] Negotiation as a First Step

This is clause is a more exhaustive "mediation-as-a-first-step" clause that treats all aspects of ADR and suggests a tolling of any limitations period to allow meaningful negotiations to continue as long as necessary. Such a provision encourages good-faith efforts to resolve the dispute before turning to assistance from neutrals.

R. [23.24] Non-Administered Arbitration (without designated set of rules)

Most of this discussion has so far envisioned an ad hoc arbitration. This provision addresses a full clause for such a "non-administered" arbitrations. Obviously, if the parties choose to use an arbitral institution and to adopt its rules, these various clauses become moot.

Three of the best-known arbitration institutions are the International Chamber of Commerce Court of Arbitration, the London Court of International Arbitration, and the American Arbitration Association. Each has its own rules. An excellent and detailed comparison of these three organizations as well as many others worldwide is made in A. Redfern & M. Hunter, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION (3d ed. 1999).

Additionally, we in Illinois are fortunate to have in force The Illinois International Commercial Arbitration Act, *See §23.2*. We are also fortunate to have here in Chicago an international arbitral institution, The Chicago International Dispute Resolution Association (CIDRA). CIDRA's website, www.cidra.org, contains its arbitration and mediation rules, its fees and a roster of its neutrals with biographical sketches. It is now possible to resolve international disputes cheaply and expeditiously with "top flight" neutrals without leaving town.

S. [23.25] Offsets

In an abundance of caution the parties may include the determination of any "offset" which the losing party seeks to interpose for not paying the full amount of the arbitral award within the one arbitration proceeding itself.

T. [23.26] Place of Arbitration

This item allows the parties to designate the seat of the arbitration. This is a very short but important part of the clause. Designating a place of arbitration is the most effective way to insure, as far as possible, that an arbitral award is to utilize the procedure adopted by the New York Convention of 1958 (Convention). The number of signatory nations is still growing. At present there are approximately 126 countries that have ratified the Convention, usually with the two reservations permitted: 1) awards must relate to "commercial relationships" and 2) awards must be rendered in a country which is also a signatory to the Convention.

If these reservations are met, the signers have pledged 1) to defer to the arbitral jurisdiction whenever an action is brought under a contract containing an arbitration clause and 2) to enforce the arbitral award without reviewing the merits of arbitrators' decision.

U. [23.27] Preliminary Adjudication of Threshold Issues and Provisional Relief

The parties may, by this portion of the clause, provide for either the arbitrators or a court to make preliminary adjudication of issues and award provisional relief.

V. [23.28] Related Contracts

Particularly useful in large scale construction disputes, the AAA has suggested this provision if the parties want to have all the disputes among all the subcontractors, suppliers etc. resolved in one arbitration proceeding. Such provisions require that all of the interested parties agree that all subcontracts pertaining to the project have incorporated the prime contract and its arbitration provisions.

W. [23.29] Service of Process

The parties should designate the manner of acceptable service of process and delivery of notices in plain language in the arbitration clause.

X. [23.30] Sole Option Arbitration Clauses

A sole option is another form of asymmetrical clause. Such clauses not only make arbitration the default dispute resolution mechanism, but also allow one of the parties to resort to court. It is useful in an uneven bargaining power situation where the more powerful bargainer believes that he or she will do better in court than in arbitration.

Y. [23.31] Sovereign Immunity - Waiver as to Enforcement

This sort of provision is important in the private party versus state or state agency context to ensure that enforcement of the award will be possible at the end of the day.

Z. [23.32] Submission Agreements for Existing Disputes

In the event that the parties to a contract have not included an arbitration clause in their contract and a dispute arises, they may still utilize arbitration through a submission agreement. That agreement may be as particularized as the parties desire, including as many of the elements discussed here in any form that they choose.

AA. [23.33] Initiating an International Arbitration Proceeding

An international arbitration proceeding may be initiated with the filing and service of either a Notice of Claim and Demand for Arbitration to be followed later by a Statement of Claim or by filing and service of a Joint Notice and Statement of Claim, in the manner provided in the arbitration clause or submission agreement.

BB. [23.34] Time Limits and Fast-Tracking

In order to keep the arbitration from bogging down and potentially having no end, the parties may provide that it commence and conclude with the award within a certain period of time.

CC. [23.35] UNCITRAL Model Clause

Contained below is the UNCITRAL Model Clause, mandating that parties arbitrate a particular dispute:

> Any dispute, controversy, or claim arising out of or relating to this contract, or the breach, termination, or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules in effect on the date of this contract.
>
> The appointing authority shall be ____.

The number of arbitrators shall be ___ (one or three).

The place of arbitration shall be [city/state].

The language to be used in the arbitral proceedings shall be ____.

DD. [23.36] Witness Statements

The parties may agree that direct testimony may or must be in the form of witness statements.

IV. [23.37] Conclusion

It is the author's hope that this chapter will serve as a friendly introduction into the world of International Dispute Resolution. Even in the area of commercial affairs, the more practitioners do to prevent dissension and discord while serving their clients' needs, the greater salutary effect their efforts have on the world as a whole.