



WINSTON & STRAWN'S
POCKET GUIDE TO

International Arbitration

WINSTON
& STRAWN
LLP

Preface

When drafting the terms of a dispute resolution clause, parties to cross-border transactions are well advised to select international arbitration. International arbitration offers several advantages over foreign litigation, including the right to a single, neutral forum and to receive an award that is readily enforceable in most any jurisdiction.

This guide is designed to describe the basics of international commercial arbitration for those who do not specialize in this area. In particular, this guide describes: (i) the reasons for selecting international arbitration over foreign litigation; (ii) a checklist for drafting an effective arbitration clause; (iii) how a typical arbitration proceeding unfolds; (iv) challenges and enforcement of awards; and (v) the costs of arbitration.

For those parties that may face disputes against foreign governments, this guide also describes the rights such parties may have under investment treaties, including the right to bring foreign governments to arbitration instead of such arbitration being confined to foreign courts.

This guide is not intended to serve as a substitute for legal advice, and you should consult with your contact at Winston & Strawn for specific advice on your international transaction or international arbitration dispute.



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International Arbitration



International Arbitration

When crafting the terms of an international corporate transaction, the parties will need to decide upon the contents of the dispute resolution clause, and a choice will need to be made between international arbitration and some other form of dispute resolution such as litigation in a foreign jurisdiction. Below are key features of international arbitration that should be kept in mind when making this determination.

Although each of these is important, by far the two most important reasons for choosing international arbitration are: (1) its ability to ensure that there is a single, neutral forum to resolve an international dispute, as opposed to two or more judicial systems that could claim jurisdiction over the dispute; and (2) the ability for arbitration to produce an award that is enforceable in nearly every country in the world, as opposed to court judgments, which typically can be difficult to enforce outside of the jurisdiction of their issue.

KEY FEATURES – WHY CHOOSE INTERNATIONAL COMMERCIAL ARBITRATION?

A SINGLE, NEUTRAL FORUM

International arbitration offers a single, neutral forum. Unlike a purely domestic dispute, a dispute that crosses international boundaries is potentially subject to court jurisdiction in more than one jurisdiction. For example, the events that led to a dispute may have taken place in one country, whereas the transaction involves citizens or corporations incorporated in another country, giving potential rise to competing claims of jurisdiction by the courts of both countries. While in certain jurisdictions and trading blocs this issue can be addressed by choice-of-jurisdiction clauses, there is no universally accepted multilateral treaty in place that gives effect to such a clause.

In contrast, a clause that submits a dispute to international arbitration is enforceable pursuant to a multilateral treaty known as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also known as the “New York Convention”). This Convention has been ratified in over 160 countries, ensuring that almost every country will enforce an international arbitration clause and award. This Convention virtually guarantees that the dispute will be heard in only one forum. Furthermore, international arbitration has the added advantage of providing a neutral forum for the resolution of a cross-border dispute. This neutrality is particularly important for a party that wishes to avoid foreign jurisdictions where the judicial system may provide an adversary with “home court” advantage.

Freedom to Select Parameters of How Your International Dispute Will Be Resolved

Parties to an arbitration agreement may customize their dispute resolution procedure by jointly determining:

- the applicable substantive law
- the arbitral rules
- the legal seat of the arbitration
- the language of the proceedings
- the scope of document disclosure
- the class of damages available
- the number of arbitrators and their qualifications
- the way the tribunal is selected
- the venue where the hearings will be conducted

“ Furthermore, international arbitration has the **added advantage of providing a neutral forum for the resolution of a cross-border dispute.** ”

AVOIDING UNCERTAINTIES ASSOCIATED WITH FOREIGN COURTS

The prospect of litigating a dispute in a foreign judicial system can be daunting. The method of civil justice in jurisdictions around the world can be quite different than one’s home jurisdiction, with differences ranging from: (a) the source of law (e.g., prior judicial decisions or a civil code supplemented by legal doctrine); (b) the presence of broad pretrial discovery, such as in the United States, or the lack of such provisions in most civil law jurisdictions; (c) the type and amount of damages that can be awarded, which can range from very expansive in jurisdictions like the United States to typically far less expansive elsewhere; and (d) procedural rules that may limit the way in which you can present your case (many civil law jurisdictions do not permit significant cross-examination of witnesses, for example). The nuances and pitfalls of a foreign judicial system, and the implications they may have for the resolution of your case, can be avoided through international arbitration.

PARTY PARTICIPATION IN THE SELECTION OF ARBITRATORS

International disputes frequently involve specialized legal or technical concerns, including antitrust, intellectual property, or construction issues. International arbitration permits the parties to appoint arbitrators with the background and qualifications that the parties believe will be beneficial to achieving a just result.

“International arbitration provides each party ample opportunity to present its respective case.”

AMPLE OPPORTUNITY TO PRESENT YOUR CASE

Some foreign judicial systems have significant limitations on the ability to present your case and to test your adversary’s case. Many civil law jurisdictions, for example, offer no or very limited opportunity to cross-examine adverse witnesses. In contrast, international arbitration provides each party ample opportunity to present its respective case. Typically, the parties will exchange multiple written pleadings setting out the factual and legal basis of their claims and defenses, supported by documentary evidence, witness statements, and expert reports. Generally, international arbitrations conclude with a formal hearing during which counsel will present oral argument and cross-examine fact and expert witnesses. Parties also may present oral closing arguments or may opt to submit post-hearing briefs instead.

INTERIM MEASURES

Even when the dispute is subject to arbitration, parties may still seek preliminary injunctive relief from courts in aid of arbitration. Such relief can be important in order, for example, to preserve the status quo between the parties pending resolution of the dispute or to prevent spoliation of evidence. In addition, many international arbitration institutional rules provide for emergency arbitrators to hear applications for preliminary relief should that be desired.

CONFIDENTIALITY

The filing of an international arbitration, and the rulings made by an arbitral tribunal, are generally not open to the public but are communicated only to the parties involved. Further, most international arbitration institutional rules provide for some form of confidentiality to be maintained by the parties and the arbitrators. The institutional rules vary in this respect, and the parties often choose to request additional confidentiality measures from the arbitral tribunal.

LIMITED PRETRIAL DISCOVERY OR DISCLOSURE RULES

International arbitration avoids expansive and expensive pretrial discovery that is prevalent in certain jurisdictions. While the parties to an arbitration dispute may jointly determine the scope of discovery, in a typical international arbitration, parties normally are allowed to request documents from the opposing side only insofar as the documents are specifically identified and are relevant and material to the outcome of the dispute. There is virtually no ability to demand deposition testimony or submit interrogatories. In addition, it is generally very difficult to obtain documents or other discovery from third parties.

“ International arbitration avoids expansive and expensive pretrial discovery that is prevalent in certain jurisdictions. ”

EFFICIENT RESOLUTION

International arbitration offers a quicker means of dispute resolution than litigation in many jurisdictions, particularly when court appeals are factored into the equation. Even well-respected foreign judicial systems can take several years to resolve a litigation.

FINALITY

Once an arbitral tribunal has issued a final award, the dispute between the parties is normally brought to a definitive end. Generally, a challenge to an arbitral award can only be filed before the courts of the seat of arbitration on very limited grounds. These grounds involve fundamental procedural deficiencies in the arbitral process, such as: (a) irregularities in the constitution of the tribunal, (b) lack of jurisdiction, (c) lack of due process, and (d) incompatibility with public policy. Challenges based on allegations that the arbitrators made incorrect findings of fact or determinations of law are normally not grounds for challenging an award.

ENFORCEABLE AWARDS

Often a party learns too late that the court judgment it spent substantial time and funds to obtain is not summarily enforceable in a jurisdiction where the losing party has assets. Similar to issues of jurisdiction, there exists no multilateral agreement among countries by which civil courts will summarily enforce each other's court judgments save for judgments issued within certain trading blocs such as the EU.

In contrast, if a losing party fails to honor an international arbitral award, the prevailing party has an effective means of enforcement. International arbitration awards are readily and summarily enforceable in most jurisdictions where the losing party has assets because of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral

Awards. International awards can be expeditiously registered and enforced as local court judgments in all countries that are parties to this Convention. More than 160 countries are parties to this Convention.

REMEDIES AND RECOVERY OF COSTS

Parties in international arbitration proceedings are generally able to seek the same form of relief as they would in court litigation, with the most common form of relief being compensatory damages with interest. Parties in international arbitration proceedings also are often awarded reimbursement of their attorneys' fees and other arbitration costs. While the amount of reimbursement is typically left to the discretion of the arbitral tribunal, a general guideline is that the recovery of costs and fees follows the award in that if a party prevails on the merits of its claim or defense, it will recover its costs and fees in a similar percentage to its recovery/avoidance of damage.

MULTIPARTY AND MULTICONTRACT DISPUTES

International arbitration is the product of mutual consent and cannot be imposed on nonsignatories to the arbitral agreement except in limited circumstances (*e.g.*, through the application of agency principles, the group of companies' doctrine, the piercing of the corporate veil, and equitable principles). This makes the joinder of (and the obtaining of any information from) nonsignatories potentially difficult.

Accordingly, when transactions involve multiple related contracts and parties, care must be taken in drafting the arbitration clauses to ensure all necessary parties have consented to resolve a dispute in a single arbitration, unless it is strategically advantageous to keep the proceedings and parties' disputes separate.

Summary of Advantages of Arbitration

MAIN ADVANTAGES

- Single, neutral forum
- Ease of enforcement, particularly when compared to court-issued judgments
- Flexible procedures
- Party participation in selection of decision-makers
- Arbitrators with relevant expertise can be appointed
- Privacy and confidentiality
- Interim measures available
- Binding outcome
- Often faster than civil court litigation
- Often less expensive than civil court litigation
- Scope of pretrial discovery rules can be tailored to particular dispute
- Fees and costs can be recovered

MAIN DISADVANTAGES

- Awards not appealable absent serious procedural defect (although this feature will be an advantage if you are the prevailing party)
- Must pay fees of arbitrators
- Summary dismissal is generally not possible
- Joinder and discovery of nonparties are difficult

Similarly, the consolidation of separate yet related disputes into one arbitration (for example, disputes arising under a group of project contracts or multiple franchise agreements) may not always be possible unless one has ensured in one's contracts that all such parties have consented to resolve their dispute in a single consolidated arbitration.

DRAFTING THE IDEAL INTERNATIONAL ARBITRATION CLAUSE

The content of an arbitration clause varies depending on several factors. Nonetheless, the ideal arbitration clause should contain the following essential elements:

ESSENTIAL ELEMENTS

The International Arbitration Clause Must Be in Writing

To be enforceable, most jurisdictions require the arbitration agreement to be in writing (see, e.g., New York Convention Article II (1)).

International Arbitration Must Be Mandatory

The arbitration clause must make clear that if a dispute arises, it must be arbitrated. Permissive language suggesting arbitration is optional, such as “any dispute **may** be referred to arbitration,” in certain jurisdictions may provide an argument for a non-cooperating party to try to avoid arbitration when a dispute arises.

Some parties (in particular, lenders) may prefer unilateral option clauses, allowing one party the option to choose between arbitration and court proceedings in the event of dispute. These clauses are not enforceable in all jurisdictions and should be carefully considered before being included.

Seat

The choice of arbitral seat determines the country whose courts will have supervisory jurisdiction over the arbitration. Courts at the seat will have the authority to address certain matters that concern the arbitration, such as ruling on: (i) preliminary injunctions in aid of the arbitration; and (ii) any challenges to the arbitral award. Thus, it is highly advisable to select a seat in a country with modern, arbitration-friendly laws in place, with courts that are familiar with principles of international arbitration.

The selection of a seat should not be confused with the venue for the arbitration. The arbitral seat is distinct from, and does not need to correspond with, the venue where hearings physically take place.

Scope of Clause – Which Disputes Are to Be Arbitrated?

In most cases, if the parties have chosen international arbitration to resolve their commercial dispute, then they will want to ensure the scope of the arbitration clause is broadly drafted to ensure that all disputes arising out of, or in connection with, their contract are submitted to arbitration, regardless of the type of claims asserted (e.g., contract breach, a business tort claim, or other delict).

In some cases, the parties may prefer to draft an arbitration clause that deliberately excludes certain claims from arbitration, such as claims for the infringement of intellectual property (IP) rights, which a party may prefer to leave for a court of competent jurisdiction.

Similarly, depending on the seat of arbitration or enforcement jurisdiction, some very discrete matters are not referable to arbitration even if the parties so agree, such as criminal law or family law matters. Mandatory law in many jurisdictions requires that such matters be resolved by the competent courts.

Applicable Law

If not addressed elsewhere within the relevant contract, the parties' dispute resolution clause should specify the substantive law that shall apply to the rights and obligations arising under the contract. The substantive law selected by the parties can be any law and does not need to bear a relation to the seat of the arbitration.

Arbitral Rules

In most instances, the parties wish to have their dispute administered by an international arbitral institution, such as the International Chamber of Commerce. In such circumstance, the arbitration clause should refer to the desired arbitral institution and the institutional rules. For a discussion on the advantages of institutional, as opposed to ad hoc, arbitration refer to the section below on "The Role of Arbitral Institutions."

The Language of the Proceedings

The parties should specify the working language of the arbitral proceedings.

ARBITRATION CLAUSES – OPTIONAL CONTENT

Arbitration clauses can be further tailored if the parties agree. Below are some examples of issues that can be addressed within an arbitration clause.

Number of Arbitrators

The parties can specify in their arbitration clause the number of arbitrators to rule on future disputes. Usually, in any sizable dispute, the parties specify a tribunal of three arbitrators, with only relatively small disputes

to be heard by a sole arbitrator. Either way, it is advisable to specify the number of arbitrators in the arbitration agreement.

The Method of Constituting a Tribunal

The parties also may agree on a method by which the tribunal will be constituted. Most institutional rules already provide for a method of selecting the arbitrators. The institutional rules may be incorporated by reference, or they can be adjusted by the parties. In the case of contracts among more than two parties, it is advisable to select institutional rules that are specifically tailored to address how a tribunal should be constituted when there are more than two parties to the arbitration dispute (such as the ICC Rules).

Confidentiality

While some institutional rules provide for confidentiality, parties may wish to specify the precise parameters of confidentiality.

Cost Allocation

Parties may leave the allocation of costs to the tribunal's discretion. However, the parties also may specify in the arbitration clause how the costs shall be allocated at the end of the arbitration—for instance, to determine that the losing party shall bear all costs. Parties will wish to know whether such pre-determined cost allocations are permitted under the law of the seat of the arbitration.

Additional Issues

There are other provisions that the parties may wish to consider, including provisions that address the following issues:

- Mandatory pre-arbitration negotiations and/or mediation;
- For multiparty or multicontract disputes, consider provisions that address issues of consolidation or joinder;
- Any specifics as to the document disclosure mechanisms to be utilized within the arbitration;
- Any special qualifications required to be an arbitrator;
- The powers of the tribunal to order specific performance;
- Waiver of the right to challenge the award, to the extent permitted under the law of the seat; and
- Express submission to specified national courts for the purposes of interim relief.

THE ROLE OF ARBITRAL INSTITUTIONS

International arbitrations can be either ad hoc or conducted pursuant to institutional rules.

International arbitral institutions offer a general procedural framework by which the arbitration will be conducted, as well as administrative services to ensure that arbitration proceedings run smoothly. Each arbitral institution has its own set of rules that supplement the terms included in the arbitration clause. For example, institutional rules will typically provide the manner by which arbitrators should be selected, the basis for challenging arbitrators, the confidentiality regime that will apply, and provisions for interim or emergency relief.

“ One of the most important components of a dispute can be the ability to obtain preliminary injunctive relief to maintain the status quo pending full determination of the dispute by the relevant court or tribunal. ”

When the rules of an institution are specified, that institution also acts as the appointing authority for arbitrators, unless otherwise provided. In this manner, the arbitral institution can possess important powers for selecting arbitrators in the event one party fails to appoint an arbitrator, an arbitrator needs to be replaced, or an arbitrator cannot be otherwise agreed upon by the parties.

International arbitrations also can proceed in an ad hoc manner, where the parties and the tribunal determine the procedures to apply to the proceedings once the arbitration begins. This can mean that, instead of an arbitral institution, the parties must resort to the courts of the seat of the arbitration for any necessary help, such as to resolve any impasse in the appointment of arbitrators, to replace an arbitrator, or to determine any challenge of an arbitrator. The parties can also select stand-alone arbitration rules such as the UNCITRAL rules.

The leading institutions by number of cases and amount in dispute are the International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), AAA International Centre for Dispute Resolution

(ICDR), Hong Kong International Arbitration Center (HKIAC), Singapore International Arbitration Center (SIAC), Stockholm Chamber of Commerce (SCC), and Dubai International Financial Centre-LCIA (DIFC-LCIA).

These institutions are headquartered in Paris, London, New York, Hong Kong, Singapore, and Stockholm, respectively, but administer cases that have legal seats anywhere in the world.

INTERIM RELIEF: POWERS OF ARBITRATORS AND THE SUPPORTIVE ROLE OF COURTS

One of the most important components of a dispute can be the ability to obtain preliminary injunctive relief to maintain the status quo pending full determination of the dispute by the relevant court or tribunal.

In the case of international arbitration, there is a potential time gap between the time a dispute arises and the constitution of an arbitral tribunal. During that period of time, parties to arbitrations have options for obtaining urgent injunctive relief.

The first option is to apply to a court of competent jurisdiction for preliminary injunctive relief in aid of the arbitration. For example, U.S. and English courts have the power to issue preliminary injunctive relief pursuant to the U.S. Federal Arbitration Act and the English Arbitration Act of 1996, respectively, for arbitrations seated in those respective jurisdictions.

As an alternative to applying to a court of competent jurisdiction, some arbitral institutions offer emergency arbitrator relief. This is a process whereby an “emergency arbitrator” is appointed to determine any urgent application for relief prior to the full appointment of the arbitral tribunal. This emergency arbitrator will often be someone who will not sit on the arbitral tribunal, and who is appointed and renders a decision in a matter of days. This is a relatively recent phenomenon, introduced by only certain

arbitral institutions in response to requests from arbitration-users for this type of interim relief. Naturally, once constituted, the regular arbitrators also may issue interim relief until the final award is issued.

OVERVIEW OF ARBITRATION PROCEEDINGS

International commercial arbitration proceedings generally include the following stages.

1. THE REQUEST FOR ARBITRATION

International arbitration proceedings are commenced with an initial pleading called the Request for Arbitration or Notice of Arbitration.

This pleading is typically a relatively short document (15 to 25 pages, even in high-value, complex disputes) that sets out procedural information (e.g., the names of parties, their addresses and contact details, and their counsel), a brief summary of the background of the case, and the relief sought. Assuming three arbitrators will preside over the arbitration, this document also will often contain the nomination of the Claimant's appointed arbitrator.

2. THE ANSWER TO THE REQUEST

Depending on the institutional or procedural rules, the Respondent files an Answer to the Request for Arbitration, which is once again a brief and largely procedural document. This is also the first opportunity for the Respondent to set out any counterclaims and to nominate the Respondent's appointed arbitrator.

3. THE CONSTITUTION OF THE TRIBUNAL

Following these initial pleadings, the constitution of the tribunal will be completed. In the case of a three-member tribunal, the two party-nominated arbitrators will be vetted for independence and impartiality and then confirmed by the relevant arbitral institution, and the third member or president of the tribunal will be selected according to the procedure selected by the parties or set out in the institutional rules. Following any challenges to arbitrators or any other issues that arise in the appointment process, an arbitral tribunal will then be formally constituted and the proceedings will move forward.

4. THE PROCEDURAL HEARING

This procedural hearing will happen shortly after the constitution of the arbitral tribunal and will be the first opportunity for the parties to interact directly with the arbitral tribunal. In the case of international arbitrations with parties and counsel situated in different locations worldwide, the first procedural hearing will often be held by telephone or videoconference.

The arbitral tribunal will set out the timetable for the remainder of the proceedings at this first procedural hearing or shortly thereafter.

5. THE EXCHANGE OF FURTHER, MORE DETAILED PLEADINGS

The next step is typically the exchange of further, more detailed written pleadings, together with any supporting documentary evidence, witness statements, expert reports, legal argument, and legal authorities. These pleadings will be much more detailed than the Request for Arbitration or Answer to the Request, and they are intended to set out each side's case in full. The arbitral tribunal is likely to allow for a second round of pleadings if requested by the parties.

6. DOCUMENT PRODUCTION

Document requests and document production often follow the first exchange of detailed pleadings. Arbitral tribunals will generally order production of documents only if a party has propounded a targeted request for documents and can demonstrate that these documents are both relevant and material to the outcome of the dispute. The arbitral tribunal will determine what is relevant and material to a dispute. A set of disclosure guidelines that is frequently adopted by the parties and tribunals in international arbitrations is published by the International Bar Association and is titled “Rules on the Taking of Evidence in International Arbitration (2010).”

7. WITNESS STATEMENTS AND EXPERT REPORTS

Depending on the particular dispute and the decision of the arbitral tribunal after consultation with the parties, fact and expert witness evidence often accompanies the detailed pleadings.

Alternatively, fact and expert witness evidence can follow the exchange of pleadings and the document disclosure process. This alternative method often can focus more keenly on the factual issues at the core of a dispute as at this point in time, the detailed pleadings will have likely distilled the areas of difference between the parties.

8. HEARING

After the final detailed pleadings and evidence are filed, the matter will then typically proceed to a formal hearing. International arbitration hearings tend to be short in duration. Even for complex and high-value cases, it is relatively rare that an arbitration hearing will take longer than 10 working days. Most international arbitration hearings are scheduled to last no more than five days.

The hearing normally begins with opening oral arguments by each side. Witness statements are typically treated as direct examinations, and thus opening statements are typically followed by the cross-examination of the fact witnesses and experts. Oral closing arguments are often permitted, although written post-hearing briefs are frequently requested by the parties or arbitral tribunal in lieu of oral closing arguments.

9. THE POST-HEARING BRIEF

Often after the conclusion of the witness hearing, the tribunal will allow the parties to submit post-hearing briefs in lieu of oral closing arguments. Post-hearing briefs afford the parties an opportunity to reiterate their claims and defenses, as supported by all the evidence submitted in the course of the proceedings, with an emphasis on the testimony adduced at the hearing.

10. THE AWARD

Following the close of proceedings and deliberations of the arbitrators, the arbitral tribunal will issue a written, reasoned award. This award will be signed, dated, and distributed to the parties.

In most international arbitrations, there are very limited grounds for any further action with the arbitral tribunal following the issuance of its final award. For example, clerical errors in the award can be corrected within a limited time after the issuance of the award.

SAMPLE MODEL CLAUSES

Many international arbitral institutions provide standard arbitration clauses, which the parties may use with or without modification. Often these clauses are generic, and parties should tailor them to ensure that the clauses are suited for their particular dispute. See section above titled, “Drafting the Ideal International Arbitration Clause.” Below are just a few examples of standard arbitration clauses prepared by some of the leading arbitral institutions.

INTERNATIONAL CHAMBER OF COMMERCE (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.”

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (ICDR) OF THE AMERICAN ARBITRATION ASSOCIATION (AAA)

“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.”

LONDON COURT OF INTERNATIONAL ARBITRATION (LCIA)

“Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.

The number of arbitrators shall be [one/three].

The seat, or legal place, of arbitration shall be [City and/or Country].

The language to be used in the arbitral proceedings shall be [...].

The governing law of the contract shall be the substantive law of [...].”

STOCKHOLM CHAMBER OF COMMERCE (SCC)

“Any dispute, controversy or claim arising out of or in connection with this contract, or the breach, termination or invalidity thereof, shall be finally settled by arbitration in accordance with the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

The arbitral tribunal shall be composed of three arbitrators/a sole arbitrator.

The seat of arbitration shall be [...].

The language to be used in the arbitral proceedings shall be [...].

This contract shall be governed by the substantive law of [...].”

HONG KONG INTERNATIONAL ARBITRATION CENTRE (HKIAC)

“Any dispute, controversy, difference or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof[,] or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted.

The law of this arbitration clause shall be ... [Hong Kong law].

The seat of arbitration shall be ... [Hong Kong].

The number of arbitrators shall be ... [one or three]. The arbitration proceedings shall be conducted in ... [insert language].”

SINGAPORE INTERNATIONAL ARBITRATION CENTRE (SIAC)

“Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre (“SIAC”) in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (“SIAC Rules”) for the time being in force, which rules are deemed to be incorporated by reference in this clause.

The seat of the arbitration shall be [Singapore].

The Tribunal shall consist of _____ arbitrator(s).

The language of the arbitration shall be _____.”

CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION (CIETAC)

“Any dispute arising from or in connection with this Contract shall be submitted to China International Economic and Trade Arbitration Commission (CIETAC) for arbitration which shall be conducted in accordance with the CIETAC’s arbitration rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties.”

INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION (CPR)

“Any dispute arising out of or relating to this contract, including the breach, termination or validity thereof, shall be finally resolved by arbitration in accordance with the International Institute for Conflict Prevention and Resolution (“CPR”) Rules for Administered Arbitration (the “Administered Rules” or “Rules”) by (a sole arbitrator) (three arbitrators, of whom each party shall designate one, with the third arbitrator to be appointed by CPR) (three arbitrators, of whom each party shall designate one, with the third arbitrator to be designated by the two party-appointed arbitrators) (three arbitrators, of whom each party shall designate one in accordance with the screened appointment procedure provided in Rule 5.4) (three arbitrators, none of whom shall be designated by either party). [The arbitrator(s), and not the court, shall have primary responsibility to hear and determine challenges to the jurisdiction of the arbitrator(s). OR The court, and not the arbitrator(s), shall have primary responsibility to hear and determine challenges to the jurisdiction of the arbitrator(s).] The arbitration shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq., and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. The place of the arbitration shall be (city, state).”



Challenge, Recognition,
and Enforcement of
Arbitral Awards



Challenge, Recognition, and Enforcement of Arbitral Awards

LIMITED GROUNDS FOR APPEAL OR CHALLENGE

International arbitration awards can be set aside in the courts of the seat of the arbitration. Challenges to arbitral awards are governed by the domestic law of the seat of the arbitration, which law is typically consistent with the provisions of the New York Convention if the country is a signatory to it.

Most countries have adopted a restrictive standard for the review of a final award by their courts and will not allow for a *de novo* review of the evidence. For example, many countries have adopted the UNCITRAL Model Law, or some variant thereof, which provides for a limited basis to challenge an award. Other countries, including the United States, have adopted set-aside provisions that mirror the New York Convention grounds for refusing enforcement of an international award.

The limited grounds that are typically used by many jurisdictions to set aside an award are usually those associated with serious procedural deficiencies, such as irregularities in the constitution of the tribunal, lack of jurisdiction, lack of due process, and incompatibility of the award with public policy.

RECOGNITION AND ENFORCEMENT

Although most losing parties will comply with arbitral awards, should they fail to do so, the prevailing party can bring an action to seek judicial recognition and enforcement in any country in which the losing party has assets needed to satisfy the award. Enforcement of international commercial arbitration awards (and investor-State arbitration awards, which are discussed below) is most often determined by the New York Convention for those countries that are signatory to it.

The New York Convention is the key treaty governing recognition and enforcement of commercial arbitration awards. At present, more than 160 countries are signatory to the New York Convention.



Investor Arbitrations Against Foreign States



Investor Arbitrations Against Foreign States

WHAT IS INVESTOR-STATE ARBITRATION?

Investor-State arbitration arises from international investment treaties that contain arbitration clauses. Qualifying investors can initiate arbitration to demand compensatory damages from a foreign State that has harmed the investor's investment in that foreign jurisdiction.

Unlike international commercial arbitration, the arbitration clause is typically not contained in the investor's contract. Rather, the offer to arbitrate is contained in the text of the treaty, and the investor can accept this offer and invoke the arbitration agreement therein if certain threshold jurisdictional requirements are met, as discussed below.

THE PURPOSE OF INVESTMENT ARBITRATION AGREEMENTS

Assume an investor has made an investment in a foreign country, and later a dispute with the government of that foreign country erupts because the government has caused harm to the investor's investment. Before the advent of investment treaties, the investor could only assert claims against the government in the courts of that country under that country's domestic law. Such actions were often an unappealing option for the investor. Investment treaties have leveled the playing field by allowing qualifying investors to bring their claims against the foreign State before a neutral panel of international arbitrators who determine the claims in accordance with international law.

Today, there are more than 2,500 bilateral investment treaties (“BITs”) between States. These BITs offer important substantive rights to investors and their investments. Investors can enforce these rights through international arbitration against a foreign State. There are also multilateral investment treaties (some of which contain trade components) such as NAFTA and the Energy Charter Treaty that offer similar legal protection under international law.

WHEN CAN A PARTY BRING AN INVESTMENT ARBITRATION CLAIM?

Investment

One jurisdictional element that an investor must generally satisfy to bring a claim under a BIT is that it must have made an “investment” in the territory of the foreign State. Many treaties define the term “investment” very broadly, so most assets or rights existing in the foreign State that are owned or controlled by the investor will qualify as an “investment”. For example, many BITs define an “investment” to include shareholdings in local companies, intellectual property rights, concession contracts, claims to money associated with the investment, rights conferred by local law, and more.

Investor

A party must also be deemed an “investor,” as that term is defined in the relevant BIT. Many treaties define “investor” broadly to encompass both individual citizens and companies that are incorporated in the home State.

The investor must have the relevant nexus to the investment to qualify under the applicable treaty to bring an arbitral claim. For example, the investor must generally own or control the investment made in the host State, and often this ownership or control can be direct or indirect.

Adverse Measure by a Foreign State, Which Caused Damage to the Investment

Foreign investors with qualifying investments that are adversely affected by a host State's measure may bring a claim against the State. The adverse measure must be attributable to the host State, and it must have caused damage to the protected investment. It can be any measure taken by the host State's executive, legislative, or judicial branch at the federal or municipal level.

RIGHTS AVAILABLE TO QUALIFYING PARTIES

Right to Seek Recourse Through Arbitration

Most investment treaties provide an aggrieved investor with the right to file a request for arbitration in the event that the host State breaches the treaty. The dispute settlement clause may impose certain conditions on the claimant—for instance, by specifying a particular arbitral institution to which claims may be brought. It may also provide for a specific procedure that must be followed prior to bringing a claim, such as an obligation to attempt negotiations with the State for three to six months before the arbitration can be initiated.

Substantive Protections

Most investment treaties contain substantive protections governed by international law.

For example, many BITs prohibit the host State from harming investments through conduct that is deemed arbitrary, disproportionate, unfair, and inequitable, or that constitutes a direct or indirect expropriation of the investment without prompt and adequate compensation.

Types of conduct held to violate BITs include: (i) unfair revocations of licenses, (ii) undue interference with contracts, (iii) the imposition of new regulations, laws, or taxes that dramatically upset the investment regime that existed at the time the investment was made, (iv) new laws that have a discriminatory intent or effect to favor local investors, and (v) even judgments by local courts that were the product of a denial of justice.

These substantive treaty provisions can also protect the investment from harm caused by inaction on the part of the State (e.g., failing to protect the investment during demonstrations or from violence).

The State's compliance with its own local law is not a defense to such breaches as the substantive rights provided to investors are protected under international law.

Remedies

Under international law, the remedies available are wide-ranging. In practice, claimants most often receive compensatory damages, plus interest and costs. Provisional measures to maintain the status quo pending the issuance of a final award are also available.

TREATY PLANNING

Before investing in a foreign jurisdiction, an investor should consider if there is an available investment treaty that offers that investor protection from unlawful conduct by the foreign State. In fact, investors can structure how they hold their foreign investments to ensure they benefit from investment treaty protection.¹ It is best to do so at the time that the investor

1. For example, if the investor's home State does not have a treaty with the country where the investment is being made, it is recommended that the investment be structured through a holding company or subsidiary

first makes the investment, or at a minimum before a dispute with the foreign State arises. Restructuring after a dispute has already arisen with the foreign State has been held to disqualify a claimant from being able to assert a claim against that State.

INVESTOR-STATE ARBITRATION INSTITUTIONS

Most investment treaties provide for arbitration to be conducted under the rules of one or more of the following institutions:

- International Centre for Settlement of Investment Disputes (ICSID);
- International Chamber of Commerce (ICC); and
- Stockholm Chamber of Commerce (SCC).

Additionally, ad hoc arbitrations under the UNCITRAL rules are frequently used for investor-State arbitrations.

Each set of rules has its own advantages and potential disadvantages depending on the particular dispute and on the nationality of the parties involved.

Since ICSID is specifically designed to resolve investor-State disputes, it has several unique features, particularly with respect to (i) registration of the request for arbitration, (ii) establishing jurisdiction under ICSID, and (iii) the procedures by which to challenge and enforce awards.

Publicly available statistics indicate that sovereigns typically comply with awards issued against them without the need for enforcement

in a country that does have an investment treaty with the country in which the investment will be made.

proceedings. International political pressure and the continued desire for foreign direct investment encourage foreign States to satisfy their awards.



Costs of Arbitration



Costs of Arbitration

Costs during arbitration proceedings include the fees and expenses of external legal counsel, experts, and witnesses and also the fees and expenses of the tribunal and the arbitration institution. Fees of external legal counsel usually make up the bulk of the arbitration costs incurred by a party in pursuing or defending against claims.

ADVANCE ON COSTS UNDER INSTITUTIONAL ARBITRATION

Depending on the institutional rules, the parties typically will be asked to pay at least a significant portion of the fees and expenses of the tribunal and the arbitration institution in advance.

For example, in the case of ICC arbitration proceedings, the advance on costs will typically be requested at an early stage of the proceeding and is generally fixed in accordance with the amount in dispute. If a party refuses to pay its share, the other party can pay in substitution as the arbitration will not proceed without full payment of this advance on costs.

COSTS AWARDS

At the end of the proceedings, arbitrators are empowered to determine the total costs and apportion the costs between the parties as they see fit in an award.

In the case of commercial arbitration, many tribunals favor the “costs follow the event” rule as a starting point, under which the successful party is entitled to recover its reasonable costs. Tribunals may then adjust the

costs award with reference to factors such as reasonableness of the costs incurred by the parties, relative success and failure of the parties, and the parties' conduct in the proceedings.

In investor-State arbitration, there has been more of a mixed approach as to costs allocation. Some investment tribunals have followed the “costs follow the event” approach, while others have favored each side paying its own costs.

THIRD-PARTY FUNDING

Third-party funding is a financing arrangement that has become increasingly popular for international arbitration in recent years. Under this arrangement, a third party agrees to fund part or all of a party's arbitration costs and expenses in exchange for a share of any damages should they be awarded. Parties may approach an external funder for many reasons, whether it is because they lack the necessary funds to pursue their claims or because they want to manage the risk and spread the cost of an expensive arbitration. Winston & Strawn regularly works with third-party funders worldwide and can assist in securing such funding.



Winston & Strawn's
International
Arbitration Group



Winston & Strawn's International Arbitration Group

Winston & Strawn's International Arbitration group delivers start-to-end advice on the full range of commercial and governmental disputes worldwide. We assist our clients at every stage of the arbitration process, from drafting arbitration clauses, to avoiding or resolving a dispute through negotiation, to vigorously pursuing our clients' claims in international commercial arbitration or investment treaty arbitrations. Our deep bench allows us to handle the most complex cases and bring them to trial successfully. We routinely handle some of the most critical disputes faced by companies, individuals, and sovereigns.

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Top Arbitration Firm

THE AMERICAN LAWYER'S "ARBITRATION SCORECARD"

A field of many flags on tall poles, including the Union Jack and the American flag, under a warm, orange-toned sky. The flags are waving in the wind, and the overall scene is bathed in a golden light, suggesting a sunset or sunrise. The text "Our Experience" is overlaid in the center in a white, serif font.

Our Experience



Our Experience

Over its long history, Winston & Strawn’s International Arbitration Practice has handled virtually every type of international commercial arbitration, in a variety of industry sectors, including: utility projects, infrastructure and construction; banking and financial services; manufacturing; energy, oil and gas, renewable energy, and power; mining, metals, and commodities; technology and telecommunications; international sales; pharmaceuticals, life sciences and medical devices; and aircraft, automotive, and transportation. These arbitrations have involved some of the highest-value disputes in the world.

We also have a well-established investment treaty arbitration practice, representing a diverse mix of clients, including both investors and specific sovereigns. We assist our clients through every step of an investment dispute and advise them on how to structure their investments overseas to ensure maximum treaty protection

We also have a wealth of experience in helping our clients to secure third-party funding to help them prosecute their claims.

“The group has ‘comprehensive sector expertise’ and has ‘recently acted on cases involving the energy, mining and technology sectors’ ”

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Our team has handled arbitrations across the globe in every continent and under all the major international arbitration rules, including the ICC, LCIA, ICSID, SCC, ICDR/AAA, HKIAC, SIAC, CIETAC, CAS-TAS, Swiss Chambers, and UNCITRAL rules.

Additionally, our practitioners are qualified in multiple jurisdictions and are able to work under almost any type of legal system, including civil law, common law, and international law. Our team includes native or fluent speakers of numerous languages, including Arabic, Cantonese, English, Farsi, French, German, Hindi, Hungarian, Kurdish, Mandarin, Portuguese, Russian, Spanish, and Ukrainian.

Recognized as a Leading Arbitration Practice in GAR 100 survey

GLOBAL ARBITRATION REVIEW 2020

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