III. Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Resolution Processes

Winston Stromberg

Recommended Citation
Available at: http://digitalcommons.lmu.edu/llr/vol40/iss4/3
III. AVOIDING THE FULL COURT PRESS: INTERNATIONAL COMMERCIAL ARBITRATION AND OTHER GLOBAL ALTERNATIVE DISPUTE RESOLUTION PROCESSES

Winston Stromberg*

A. Introduction ................................................................. 1338

B. A Primer on the Framework of International Commercial Arbitration .............................................. 1341
   1. The Evolution of International Commercial Arbitration ............................................................ 1343
   2. Institutional Arbitration .......................................................... 1349
      a. International Chamber of Commerce .......................................................... 1352
      b. American Arbitration Association .......................................................... 1353
      c. London Court of International Arbitration .................................................... 1355
      d. China International Economic and Trade Arbitration Commission .................. 1356
      e. Hong Kong International Arbitration Centre ..................................................... 1357
   3. Ad Hoc Arbitration ............................................................. 1358

C. Procedural Issues in International Commercial Arbitration ................................................................. 1360
   1. Limited Discovery ................................................................. 1363
   2. Limited Examination of Witnesses .......................................................... 1366
   3. Multi-Party Disputes: Issues with Joinder and Consolidation .................................................. 1368

* J.D. Candidate, May 2008, Loyola Law School, Los Angeles; B.A., Film and Video Studies, May 1997, University of Michigan. Special thanks go to Noam Glick for his editorial insight and wisdom and to Emily Madueno for coralling the troops and making my article look good. I also want to thank Professor Georgene Vairo and all of the editors and staff of the Loyola of Los Angeles Law Review. Finally, I thank my fabulous parents for their endless support throughout the years; "I'm fine," but I could not do it without you both.

1337
A. Introduction

International business is booming. In fact, some say the pace of globalization is faster and more comprehensive than at any time in world history. While many of the top 500 largest corporations in the

1. See CHRISTIAN BÜHRING-UHLE ET AL., ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS 5-6 (2d ed. 2006).
world remain headquartered in the United States, over fifty percent are spread across over two dozen other countries. In addition, with rapid technological advances, the twenty-first century international business sector is no longer reserved for major, multi-national corporations; small and medium-sized businesses are now global players too. Because recent decades have seen a marked increase in the size and complexity of international commercial transactions, the potential for transnational business disputes is perhaps greater now than ever before.

Fortunately, when such disputes arise, there exists an abundance of fora for their resolution and/or settlement. One such forum is the public court system where the business or its foreign trade partner is located. However, litigating in national courts involves considerable drawbacks, such as the potential for simultaneous litigation in multiple jurisdictions or the uncertainty that a judgment will be enforced outside of the jurisdiction where it is obtained. Thus, with the rise of the global economy, private dispute resolution processes,

---

3. See Danielle Walker et al., Doing Business Internationally: The Guide to Cross-Cultural Success 11 (2d ed. 2003). Major international firms are headquartered primarily in the United States, Japan, Great Britain, France, and Germany, “but this concentration is clearly changing as multi-nationals emerge mainly from the Asia-Pacific and Latin American regions, particularly from countries like Korea, Taiwan, Mexico, and Brazil.” Id.


5. Bühring-Uhle et al., supra note 1, at 6. International business transactions have become quite sophisticated and often involve multiple parties and government entities. Id. Examples include “closely integrated distributorships, long-term ‘take or pay’ supply arrangements, manufacturing joint ventures, high-technology licensing agreements, [and] natural resource development projects,” among others. Id.


including international arbitration and other alternative dispute resolution ("ADR") mechanisms, have quickly become a vital component of international business relationships. A recent study on corporate attitudes towards such topics as international arbitration and cross-border litigation reveals an overwhelming preference for international arbitration over litigation in national courts. And, while arbitration may be the current preferred method for resolving international business disputes, the past decade has seen an upsurge in the use of non-arbitral ADR processes, most notably mediation and conciliation.

Commentators have recognized that the overall demand for arbitration has increased significantly and that American lawyers have vigorously infiltrated the realm of international dispute resolution. Consequently, much has recently been written on the advantages and disadvantages of international commercial arbitration and related ADR methods. This article synthesizes these commentaries in order to provide a sufficient overview of international arbitration and other ADR processes for practitioners who may be involved in an international business dispute.

Considering that arbitration is presently the favored method of international dispute resolution, it commands much of the focus of this article. The remainder is devoted to increasingly popular non-arbitral ADR mechanisms. Accordingly, Part B discusses the

9. See New Study Reports Multinational Corporations Prefer International Arbitration to Litigation, DISP. RESOL. J., May-July 2006, at 12, 12 [hereinafter New Study]. This study, sponsored by PricewaterhouseCoopers, was based on research by the School of International Arbitration at Queen Mary, University of London. In-house attorneys from 143 international companies with revenues greater than $500 million were the study's subjects. Id.
13. See, e.g., Roger P. Alford, The American Influence on International Arbitration, 19 OHIO ST. J. ON DISP. RESOL. 69, 80-82 (2003) ("Just as the United States has been and will be the dominant force in economic globalization, our law firms will be the dominant force in international arbitration."). See generally Michael Goldhaber, The Court that Came in from the Cold, AM. LAW., May 2001, at 98 (examining the world of international arbitration and the creeping Americanization against the backdrop of the dispute between Deutsche Telekom and France Telecom).
general history and current framework of international commercial arbitration, including a discussion of the various private institutions that offer this service. Part C delves into common procedural issues that arise during international arbitration proceedings. Part D explores a wide range of post-award annulment and enforcement topics. Part E briefly examines the effect of legislation in many U.S. states to encourage international arbitration. Finally, Part F addresses non-arbitral ADR devices, including mediation and conciliation, and lesser known but increasingly utilized processes.14

B. A Primer on the Framework of International Commercial Arbitration

International commercial arbitration is a private, nongovernmental process, fashioned by contract,15 which provides for the binding resolution of a dispute through the decision of one or more private individuals selected by the disputants.16 Historically lauded as a confidential, cost-efficient method of dispute resolution17 that avoids the pitfalls of litigating in national courts,18 its contractual nature provides the parties flexibility to customize its processes.19 Unlike litigation, parties can (and do) predetermine the arbitration’s procedural rules and applicable substantive law.20 In addition, arbitration provides greater predictability and certainty than transnational litigation through time-honored enforcement

14. This article focuses solely on international business disputes. Fora such as the World Bank’s International Centre for Settlement of Investment Disputes (ICSID), which govern investor-state arbitration, NAFTA and CAFTA related arbitration, and International Trade Commission investigations, are outside its scope.


16. BÜHRING-UHLE ET AL., supra note 1, at 31.

17. Franck, supra note 10, at 500.


mechanisms established by international treaties.\textsuperscript{21} Though still the favored form of international dispute resolution, the rising costs and sluggish pace of arbitration have led some companies to shy away from this method in recent years.\textsuperscript{22} Even so, with globalization increasing at a breakneck pace, one can anticipate that the future will see more businesses joining the international stream of commerce for the first time. Seeking to minimize the uncertainty that comes with navigating in foreign terrain, it is likely that the bulk of these businesses will include arbitration clauses in their contracts to limit risk and protect investment.\textsuperscript{23}

Such a conclusion is supported by reports that over the past decade, there has been a dramatic increase in the use of arbitration to resolve international commercial disputes.\textsuperscript{24} In fact, empirical research reveals that approximately 90 percent of international

\textsuperscript{21} The two most prominent international commercial arbitration treaties are the New York Convention, supra note 7, discussed infra, and the Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 14 I.L.M. 336 [hereinafter Panama Convention], also discussed infra.

\textsuperscript{22} See Dunham, supra note 18, at 345–46 ("International arbitration typically lasts over four years and costs a substantial amount of money."); cf. New Study, supra note 9, at 12 (noting that "international arbitration is at least as expensive as transnational litigation for medium and small cases, but it may be a 'better value' for larger, more complex cases"). Another criticism of international commercial arbitration is that it has become increasingly "judicialized" or "Americanized," meaning both that arbitrations tend to be conducted with litigation-style formality and that they are more often subject to judicial intervention. See generally INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS "JUDICIALIZATION" AND UNIFORMITY? (Richard B. Lillich & Charles N. Brower eds., 1993) (containing commentaries on the judicialization of arbitration). Some commentators note that the American legal tradition has an influence on international commercial arbitration, but have doubts as to whether the system has become "judicialized" or "Americanized." See Dunham, supra note 18, at 345–47. See generally Helmer, supra note 4 (examining several ways in which international commercial arbitration might be considered Americanized, but concluding that the significant American influence falls short of Americanization). But see generally Alford, supra note 13 (arguing that international arbitration is becoming Americanized, though acknowledging that several other countries influence international arbitration).

\textsuperscript{23} See William S. Fiske, Comment, Should Small and Medium-Size American Businesses "Going Global" Use International Commercial Arbitration?, 18 TRANSNAT'L L. 455, 459 (2005) ("Ensuring the enforceability of arbitration clauses and awards through treaties provides the lifeblood for international commercial contracts."). However, there are circumstances where litigation may be a better choice than arbitration. Id. at 481. For example, litigation may be more efficient than arbitration when "simple manufactured goods are traded between two common law countries." Id. at 484.

\textsuperscript{24} See TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH 341 app. 1 (Christopher R. Drahozal & Richard W. Naimark eds., 2005) [hereinafter TOWARDS A SCIENCE] (demonstrating that between 1993 and 2003, there was nearly a 100 percent increase in the number of international arbitration proceedings administered by leading institutions).
economic contracts include an arbitration clause.25 Similarly, recent years have seen an increase in the number of arbitration institutions worldwide.26 With billions of dollars at stake in many worldwide disputes, international commercial arbitration is here to stay.27

1. The Evolution of International Commercial Arbitration

The origins of commercial arbitration date back to 13th century England, when merchants sat as private judges in “piepowder courts” and on tribunals of guilds and trading companies.28 The modern era saw commercial arbitration develop in the eighteenth and nineteenth centuries through such vehicles as trade associations, shipping and stock exchanges, and chambers of commerce.29 The concept of international arbitration dates back to the days of ancient Greece.30 Its modern roots can be found in the Jay Treaty of 1794,31 which created commissions enabling British creditors to arbitrate claims against U.S. nationals.32 Many of the arbitral rules and procedures established in the Jay Treaty are similar to those utilized in proceedings today.33 International arbitration made additional strides during the modern era with the post-American-Civil-War Alabama cases, in which arbitral tribunals administered proceedings involving allegations that England violated its promise of neutrality during the war by destroying U.S. commercial vessels.34 In the modern era, international arbitration also advanced with the establishment of the Permanent Court of Arbitration at the dawn of the twentieth century.35

However, the first truly international commercial arbitration system began operating in 1923, when the International Chamber of
Commerce ("ICC")\textsuperscript{36} established its International Court of Arbitration.\textsuperscript{37} During the first twenty years of its existence, most of the cases administered by the ICC were resolved through conciliation.\textsuperscript{38} During this time dissatisfaction with international arbitration was rampant. The 1927 Geneva Convention,\textsuperscript{39} which set the framework for the enforcement of international arbitral awards, proved to be inadequate and full of shortcomings.\textsuperscript{40} Most discomfiting to parties was the Geneva Convention’s requirement of "double exequatur," whereby an arbitral award had to be confirmed in the country in which it was rendered before the courts of another country could enforce the award.\textsuperscript{41}

Thus, in 1953, the ICC proposed that the United Nations adopt a new system to replace the 1927 Geneva Convention.\textsuperscript{42} What resulted was the 1958 adoption of a groundbreaking international treaty, formally titled the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").\textsuperscript{43} This new treaty vastly improved upon the Geneva Convention by providing a set of rules for the recognition and enforcement of international arbitral awards.\textsuperscript{44} The United States acceded to the New York


\textsuperscript{37} See ICC International Court of Arbitration – Introduction, http://www.iccwbo.org/court/english/intro_court/introduction.asp (last visited Mar. 1, 2007). Other international arbitration institutions, such as the London Court of International Arbitration (LCIA) and the Stockholm Chamber of Commerce (SCC), were in existence before 1923. See JACK J. COE, JR., INTERNATIONAL COMMERCIAL ARBITRATION: AMERICAN PRINCIPLES AND PRACTICE IN A GLOBAL CONTEXT 213–15 (1997). However, the ICC Court is credited as being the first institution with global reach. BÖHRING-UHLE ET AL., supra note 1, at 32.

\textsuperscript{38} BÖHRING-UHLE ET AL., supra note 1, at 32. Conciliation, an ADR process similar to mediation, is discussed infra Part F.


\textsuperscript{40} See Davis, supra note 20, at 54–55.

\textsuperscript{41} Id. at 45.

\textsuperscript{42} See Gélinas, supra note 6, at 117.

\textsuperscript{43} New York Convention, supra note 7.

\textsuperscript{44} See Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974) ("The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries."); see also Slate, Institutions, supra note 30, at 44 ("The New York Convention provides for mutual recognition and enforcement of arbitral awards by contracting states, and limits the defenses that may be raised in opposition to
Convention in 1970, and legislation implementing the Convention can be found in chapter two of the Federal Arbitration Act ("FAA").

A country that ratifies or accedes to the New York Convention must recognize and enforce arbitral awards entered in foreign territories or "not considered as domestic . . . in the State where their recognition and enforcement are sought." Furthermore, the Convention requires the participating country to recognize arbitral awards as binding and to enforce them in conformity with its laws, subject to a few narrow exceptions. The New York Convention has a jurisdictional component as well, obliging national courts to recognize the validity of arbitration agreements and referring parties to arbitration when they have entered into a valid agreement to arbitrate and one of the parties has requested arbitration.

The New York Convention applies to all foreign arbitration agreements, regardless of the subject matter of the dispute and the citizenship of the parties. However, countries can limit application of its enforcement requirements, on the basis of reciprocity, to awards rendered in other contracting states. Under the New York Convention, reciprocity refers to the place where the arbitration is conducted and the award is rendered, not to the parties' nationalities. The United States and many other Convention

the confirmation of an award, in an attempt to eliminate duplicative litigation following an arbitration.


46. New York Convention, supra note 7, art. I(1), 21 U.S.T. at 2519, 330 U.N.T.S. at 38; see also GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 21 n.102 (2d ed. 2001) ("Recognition' of an arbitral award refers to giving preclusive effect to the award, usually to bar relitigation of the claims that were arbitrated; 'enforcement' refers to the invocation of coercive judicial remedies to fulfil [sic] the arbitral award."). A more detailed discussion of the New York Convention’s enforcement scheme is set forth infra Part D.1.

47. New York Convention, supra note 7, arts. III, V, 21 U.S.T. at 2519–20, 330 U.N.T.S. at 40, 42. For a discussion of these exceptions, see infra Part D.1.


49. Id.


51. See E.A.S.T., Inc. v. M/V Alaia, 876 F.2d 1168, 1172 (5th Cir. 1989) ("The principle of reciprocity is thus concerned with the forum in which the arbitration will occur and whether that forum state is a signatory to the Convention—not whether both parties to the dispute are nationals of signatory states."); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 487 cmt. b (1987) (noting that for states that adhere to the New York Convention subject to reciprocity, "the critical element is the place of the award").
signatories have made this reservation. Moreover, in accordance with the Convention, many ratifying states have limited its application to legal relationships regarded as “commercial” by the laws of the respective state. The United States’ commercial reservation provides that “[a]n arbitration agreement or arbitral award arising out of a legal relationship . . . which is considered as commercial, including a transaction, contract, or agreement described in section 2 of [the FAA], falls under the Convention.”

As one of the most successful mechanisms in place to promote international trade, the New York Convention has been a resounding success story. However, its scope is limited, as it primarily focuses on creating a uniform standard for recognition and enforcement of the arbitration agreement and award, rather than the conduct of the proceedings. Similarly, the New York Convention does not include uniform rules for the procedure of enforcement, leaving that standard to national arbitration laws. While the text of the Convention might be improved by introducing uniform procedural rules, it is highly

52. At the time this Article was written, 138 countries were contracting parties to the New York Convention, the most recent signatory being the United Arab Emirates. For a list of the member countries, including those that have made reciprocity reservations, see UNCITRAL, Status 1958-Convention on the Recognition and Enforcement of Foreign Arbitral Awards, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Oct. 20, 2006) [hereinafter Status]. The U.S. reservation provides, in relevant part, that the United States “will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State.” New York Convention, supra note 7, 21 U.S.T. at 2566.

53. New York Convention, supra note 7, art. I(3), 21 U.S.T. at 2519, 330 U.N.T.S. at 38. For a list of the member countries that have declared the commercial reservation, see Status, supra note 52.

54. 9 U.S.C. § 202 (2000). Section 2 of the FAA, as described in the commercial reservation, refers to “any maritime transaction or a contract evidencing a transaction involving commerce.” Id. § 2. Thus, even matters such as consumer and employment arbitration can be construed as falling within the scope of the New York Convention in the United States. See Christopher R. Drahozal, New Experiences of International Arbitration in the United States, 54 AM. J. COMP. L. 233, 253–55 (2006).

55. Gélinas, supra note 6, at 117.


unrealistic that consensus could be reached by all of the contracting states. 58

Concerned with the limited scope of the New York Convention, Latin American countries and the United States sought to harmonize both arbitral processes and the enforcement of foreign arbitral awards on a regional level. The result was the Inter-American Convention on International Commercial Arbitration ("Panama Convention"). 59 While the Panama Convention is similar to the New York Convention, there are some notable differences. Because the drafters of the Panama Convention sought to promote uniformity of arbitral procedure, 60 if parties do not agree to specific procedural rules to govern the arbitration, the rules of the Inter-American Commercial Arbitration Commission ("IACAC Rules") will apply. 61 In addition, the Panama Convention does not offer a reciprocity reservation like the New York Convention 62 and only applies to arbitration agreements as to commercial transactions. 63 Although the Panama Convention has nowhere near the same global effect as the New York Convention, it nevertheless plays a vital role in promoting international trade in the Western Hemisphere. 64 Seventeen Western Hemisphere countries have ratified the Panama Convention since its adoption, 65 including the United States. 66

58. Id. An additional protocol for procedural rules that may be adopted by some, but not all, contracting states should be avoided, as it "would create a situation of two categories of New York Convention States." Id.

59. See Bowman, supra note 56, at 5–7; supra note 21. The Panama Convention also sought to quell long-running hostility and suspicion towards international arbitration in Latin American countries. See Bowman, supra note 56, at 13–15.

60. See Bowman, supra note 56, at 11.

61. Panama Convention, supra note 21, art. 3, at 337.

62. See Bowman, supra note 56, at 42–43.

63. Panama Convention, supra note 21, art. 1, at 336. For a detailed summary of all of the differences between the Panama Convention and the New York Convention, see Bowman, supra note 56, at 24–69.

64. See Bowman, supra note 56, at 179–81. In fact, under U.S. implementing legislation, when the majority of the parties to an arbitration agreement are citizens of a state or states that have (1) ratified or acceded to the Panama Convention and (2) are member states of the Organization of American States, the Panama Convention shall take priority over the New York Convention. 9 U.S.C. § 305(1) (2000).


In the interest of international comity, the United States government has taken a supportive stance toward international commercial arbitration. Not only has Congress passed legislation implementing the New York and Panama Conventions, the Supreme Court has consistently championed international arbitration since its decision in *Scherk v. Alberto-Culver Co.*\(^6\) In enforcing an arbitration agreement between two parties to an international commercial contract, Justice Stewart wrote:

A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.

A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages.\(^6\)

Judicial support for international commercial arbitration has endured since *Scherk*, as the Supreme Court has continually recognized that arbitration plays a necessary role in promoting international trade.\(^6\)

Although international commercial arbitration has its roots in Western Europe and the United States, it is hardly a regional phenomenon anymore. Asia, particularly China, has become the world’s leading site, in terms of the number of new cases filed each year, for parties to conduct international commercial arbitrations.\(^7\)

Even regions of the world with long-standing distrust and hostility

---

68. Id. at 516–17 (footnote omitted).
69. See, e.g., Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 539 (1995) ("If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements."); see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629–31 (1985).
towards arbitration have begun to embrace its benefits. Most notably, with the help of increased governmental support for arbitration, parties from Central and Eastern Europe and Latin America are no longer the exception and have joined the mainstream.

2. Institutional Arbitration

Institutional arbitration, as its name suggests, “is that which is administered by any one of the existing specialist arbitral institutions under its own rules of arbitration.” To obtain the services of an arbitral institution, the parties must agree to do so specifically. Not surprisingly, the agreement to utilize an arbitral institution most often takes the form of a forum selection clause in the original contract between the parties. However, parties can also agree to use an institution by entering into a specific submission agreement at the time a dispute arises. The fact that the majority of large multinational corporations engaged in international arbitration employ established institutions to administer their arbitrations suggests that there are certain advantages to institutional arbitration. For the most part, this assumption is true. Although there can be disadvantages to using an institution, such as costly administrative fees and procedural delays, there are many benefits.

71. See Alford, supra note 13, at 78–79.

72. See id.

73. Slate, Institutions, supra note 30, at 47.

74. See INT’L TRADE CTR., ARBITRATION AND ALTERNATIVE DISPUTE RESOLUTION: HOW TO SETTLE INTERNATIONAL BUSINESS DISPUTES 57 (2001). A typical forum selection clause for parties engaging in institutional arbitration might look as follows:

All disputes arising in connection with the present contract or in relation thereto as well as any other agreement signed or to be entered into in relation with the present contract shall be finally settled under the Arbitration Rules of . . . . [name of the institution chosen] by one or more arbitrators appointed in accordance with the said rules.

The arbitration shall take place in [mention the place], [mention the country].

The language(s) of the arbitration shall be . . . .

Id. at 153 (alterations in original) (emphasis omitted). For examples of standard clauses recommended by arbitral institutions, see id. at 157–63.

75. Id. at 57.

76. See New Study, supra note 9, at 12 (noting that “over 75% of the companies that use international arbitration use administered arbitration under the auspices of an established arbitration institution” and that “[t]he most often cited reasons for this are reputation of the institution, convenience, familiarity with proceedings, [and] an understanding of the costs and fees”).

77. See BÖHRING-UHLE ET AL., supra note 1, at 36.
First, and perhaps most importantly, institutional arbitration provides the parties with “convenience, security and administrative effectiveness”\(^7\)\(^8\) while reducing the risk of “procedural breakdowns.”\(^7\)\(^9\) As one author notes:

Before a dispute has arisen, it is generally very difficult to ascertain what the exact nature of the dispute will be, what kind of procedure will be most appropriate, what contingencies will have to be taken into account and whether both sides will cooperate to get the matter resolved. Negotiating and drafting an arbitration clause that covers all these considerations is a difficult, time-consuming and costly exercise. The use of recognized model arbitration rules ensures that the process will take place, that it will be reasonably fair and efficient, that it will lead to a decision, and that this decision will be enforceable.\(^8\)\(^0\)

Thus, institutional arbitration allows parties to take advantage of well designed systems administered by impartial professionals.

A second important advantage is that institutions can assist in selecting and appointing a neutral arbitrator. This is critical to the fairness and legitimacy of the entire arbitration process.\(^8\)\(^1\) Institutions may be called upon to review challenges to an appointed arbitrator or assist parties when they fail to agree on the arbitrator to be appointed.\(^8\)\(^2\) Without an institution to help resolve such issues, parties may find it difficult to resolve the issues themselves.\(^8\)\(^3\)

A third advantage of institutional arbitration is that the prestige of the institution can strengthen the credibility of an award, thus facilitating voluntary compliance and enforcement.\(^8\)\(^4\) If the losing party does not attempt annulment proceedings and complies with the award, the winning party will likely not have to resort to the court

\(^7\) Id. (emphasis omitted).
\(^8\) BORN, supra note 46, at 12.
\(^9\) BÜHRING-UHLE ET AL., supra note 1, at 36.
\(^10\) Slate, Institutions, supra note 30, at 56.
\(^12\) Id. at 57.
\(^13\) BÜHRING-UHLE ET AL., supra note 1, at 36; see also BORN, supra note 46, at 12 (noting that “the institution lends its standing to any award that is rendered, which may enhance the likelihood of voluntary compliance and judicial enforcement”).
system to enforce the award, ultimately resulting in lower transaction costs for both sides of the dispute. 85

Each arbitral institution independently has developed rules establishing a basic framework for the process and timetable of the arbitration. 86 While each institution has its own set of rules, most rules are quite similar. As mentioned above, it is common for such rules to empower the institution to select arbitrators in certain disputes and to resolve challenges to arbitrators. 87 Furthermore, typical rules authorize the institution to designate the place of arbitration and set or influence the arbitrators’ fees. 88 While many institutions give the parties freedom to select any arbitrator(s), some require them to choose the arbitrator(s) from a provided list. 89 Thus, attorneys should research an institution’s arbitrator selection rules before finalizing a forum selection clause in an international commercial contract. In addition, when choosing an appropriate institution, parties should determine in advance whether a particular arbitral institution has experience in the relevant commercial sector. 90

The leading international arbitration institutions are the ICC, through its International Court of Arbitration (“ICC Court”), the American Arbitration Administration (“AAA”), and the London Court of International Arbitration (“LCIA”). 91 However, with arbitration’s expansion throughout the globe, it is imperative for practitioners to be familiar with other notable institutions that have seen tremendous growth in recent years, such as the China International Economic and Trade Arbitration Commission.

85. There are many other advantages to institutional arbitration, from the availability of physical facilities and support services for the proceedings to institutional assistance in encouraging reluctant parties to proceed. See KATHRYN HELNE NICKERSON, INTERNATIONAL ARBITRATION pt. I.E.1.a (2005), http://www.osec.doc.gov/ogc/occic/arb-98.html; see also Slate, Institutions, supra note 30, at 52–59. It is not the objective of this article to discuss these advantages in detail. Suffice it to say that there are many compelling reasons why major, multi-national corporations prefer to use arbitral institutions to administer their international commercial dispute.

86. BORN, supra note 46, at 11.

87. Id.

88. Id.

89. INT’L TRADE CTR., supra note 74, at 59.

90. Id. at 58–59.

91. BÜHRING-UHLE ET AL., supra note 1, at 35. For a comprehensive list of arbitration institutions, see id. app. 2.
The remainder of this section provides an overview of these leading arbitral institutions. All of these institutions have easily accessible websites which make available their procedural rules and thoroughly explain all the services they provide. Thus, since this information is readily available, what follows is not an exhaustive comparison of competing institutions and all of their procedural rules, but rather a brief survey to identify their central characteristics.

a. International Chamber of Commerce

The ICC Court is considered the world’s leading international commercial arbitration institution. The ICC is located in Paris, yet administers arbitrations throughout the world. In recent years, the majority of parties to arbitrations administered by the ICC have been from countries outside of Western Europe, demonstrating that there is widespread confidence in the institution’s ability to administer fair and efficient proceedings.

The ICC’s Rules of Arbitration (“ICC Rules”) govern all international arbitrations administered by the institution, and were most recently revised in 1998. Under these rules, the ICC is

---

92. Other notable international commercial arbitration institutions are the Arbitration Institute of the Stockholm Chamber of Commerce, the Singapore International Arbitration Centre, and The Korean Commercial Arbitration Board.

93. See infra notes 95, 107, 118, 128, 136.

94. BORN, supra note 46, at 13. The more significant arbitrations between truly international (non-American) parties still take place outside of the United States, mostly in Europe. See Helmer, supra note 4, at 42. These cases involve the largest amounts of money and high political stakes. Id.

95. See COE, supra note 37, at 208. Until recently, the ICC required arbitrations to take place at its Paris facilities, but it has now expanded to other parts of the world. Dunham, supra note 18, at 332. The most common sites for ICC arbitrations are France, Switzerland, England, other Western European states, and the United States. See Thomas H. Webster, Evolving Principles in Enforcing Awards Subject to Annulment Proceedings, 23 J. INT’L ARB. 201, 205 (2006). In addition, ICC arbitrations are held in such regions as Asia and the Middle East. Dunham, supra note 18, at 332. Over the past five years, the ICC has averaged approximately 564 arbitration filings per year, most of which are international. See BORN, supra note 46, at 13 (noting that most cases filed with the ICC are international disputes, and that many involve large sums of money); Hong Kong International Arbitration Centre, http://www.hkiac.org/HKIAC/HKIAC_English/main.html (follow “Statistics” hyperlink) (last visited Mar. 11, 2007) [hereinafter HKIAC Institutional Arbitration Comparison Chart].

96. BORN, supra note 46, at 13.

intimately involved in the administration of individual arbitrations and is responsible for such things as service of the Request for Arbitration and other submissions on the parties, appointing arbitrators if the parties cannot agree upon them, considering challenges to the independence of arbitrators, reviewing "Terms of Reference," which describe the issues and procedures for arbitrations, and most notably, reviewing arbitral awards for defects in form and possible substantive errors. The ICC Court, which is not really a "court" but an administrative body, plays a supervisory role under the ICC Rules. This quality-control system sets the ICC apart from other arbitration institutions, and, as one commentator has suggested, "may explain the infrequency with which national courts have set aside ICC awards."  

b. American Arbitration Association

Founded in 1926, the AAA is the leading arbitration institution in the United States and is headquartered in New York. The AAA established the International Centre for Dispute Resolution ("ICDR"), its international division, in 1996, and later opened a European office in Dublin, Ireland to promote and expand its arbitration services on a global scale. "The ICDR's international..."
system is premised on its ability to move matters forward, facilitate communications, ensure that qualified arbitrators and mediators are appointed, control costs, understand cultural sensitivities, resolve procedural impasses, and properly interpret and apply its International Arbitration and Mediation Rules.”

The ICDR maintains its own International Dispute Resolution Procedures, which include International Arbitration Rules (“AAA Rules”) designed specifically for all international arbitrations. If the parties’ arbitration agreement provides for dispute resolution by the ICDR but fails to designate specific rules, the AAA Rules apply by default. However, the AAA will administer cases pursuant to rules other than its own, such as the United Nations Commission on International Trade Law (“UNCITRAL”) Arbitration Rules (“UNCITRAL Rules”) or the IACAC Rules, provided that the parties agree to these rules in their arbitration agreement. Furthermore, while the AAA Rules are generally applicable to international business disputes, parties can also contract for arbitration under other rules promulgated by the AAA, such as its Construction Industry Dispute Resolution Procedures, Wireless Industry Arbitration Rules, and Patent Arbitration Rules.

Unlike the ICC Rules, the AAA Rules entail less administrative involvement in the arbitration process. In addition, while the AAA recently eclipsed the ICC with respect to the amount of international arbitration filings, most of its cases involve an American party.
The fact that the minority of the AAA's international cases are between non-U.S. parties may be a result of the possibility that such parties "are often reluctant to agree to arbitration under AAA rules, fearing parochial predisposition and unfamiliarity with international practice." Considering, however, that the AAA's foray into the international field is a relatively recent development, its recent expansion to Europe is not going unnoticed by the international business community.

c. London Court of International Arbitration

Founded in 1892, the LCIA is the oldest of the major arbitration institutions, and, while London-based, administers arbitrations throughout the world. Like the ICC Court, the LCIA is not an adjudicative court in the traditional sense; instead, it is primarily administrative and supervisory in nature. The LCIA is no longer considered an exclusively English organization, and now more than 70 percent of the cases filed with the LCIA involve non-U.K. parties.

Unlike other institutional rules, the LCIA's rules for arbitration ("LCIA Rules") set forth the powers of an LCIA arbitral tribunal in detail. Some prominent powers given to arbitrators include the ability to order discovery and security for legal costs. Moreover, under the LCIA Rules, although parties can nominate arbitrators who are not on the LCIA's roster, the LCIA has the sole ability to appoint

---

averaged approximately 630 international arbitration filings per year. See HKIAC Institutional Arbitration Comparison Chart, supra note 95.
115. Born, supra note 46, at 17.
116. Cf. Slate, 2004 President's Letter, supra note 107, at 6-7 (discussing several factors contributing to increased activity in the AAA's international operations).
117. COE, supra note 37, at 213.
118. London Court of International Arbitration, Frequently Asked Questions, http://www.lcia.org (follow "FAQ" hyperlink) (last visited Mar. 6, 2007) [hereinafter LCIA FAQ]. Over the past five years, the LCIA has averaged approximately 94 international arbitration filings per year. See HKIAC Institutional Arbitration Comparison Chart, supra note 95. This number includes domestic arbitration filings. Id.
120. LONDON COURT OF INT'L ARB. RULES arts. 22.1(d)–(e).
121. Id. art. 25.2. An example of security for legal costs is "a deposit or bank guarantee securing the estimated amounts which an unsuccessful claimant would be liable to reimburse to a successful respondent for its costs of legal representation." Born, supra note 46, at 15.
arbitrators for the proceedings. In addition, in contrast to the ICC Rules, the LCIA Rules do not allow for the institution to scrutinize arbitral awards and only permit parties to request correction of computational, clerical, or typographical errors in awards. However, while these rules might appear somewhat more detailed and less flexible than those of other institutions, the LCIA permits the parties to arbitrate under its rules or pursuant to the UNCITRAL Rules.

d. China International Economic and Trade Arbitration Commission

Established in the 1950s to settle disputes between foreign companies and Chinese firms, the CIETAC has emerged in the past decade as the top international commercial arbitration institution with respect to annual number of filings, and administers the majority of arbitrations in China in which foreigners participate. Headquartered in Beijing with two sub-commissions in Shanghai and Shenzhen, the CIETAC is independent of any governmental agencies in China and has “19 liaison offices in different regions and specific business sectors to provide parties with handy arbitration advice.” However, unlike the leading institutions, CIETAC arbitrations are administered only in China.

In order to offer the parties increased autonomy while resembling other leading international arbitration practices, the CIETAC Arbitration Rules (“CIETAC Rules”) have been revised six

122. LONDON COURT OF INT’L ARB. RULES art. 5.5; see also London Court of International Arbitration, About the LCIA, http://www.lcia.org/ (follow “LCIA” hyperlink; then follow “Arbitrators” hyperlink) (last visited Mar. 6, 2007).
123. See LONDON COURT OF INT’L ARB. RULES art. 27.1.
124. See LCIA FAQ, supra note 118.
125. INT’L TRADE CTR., supra note 74, at 62.
126. Jingzhou Tao, Arbitration in China, in INTERNATIONAL COMMERCIAL ARBITRATION IN ASIA, supra note 70, at 1, 18–19 [hereinafter Tao, Arbitration in China]. Over the past five years, CIETAC has averaged approximately 791 filings per year. See HKIAC Institutional Arbitration Comparison Chart, supra note 95. This number includes domestic arbitration filings. Id.
127. See Slate, Institutions, supra note 30, at 49–50.
times over the past fifty years. Before the most recent revisions in 2005, the CIETAC Rules prevented parties from selecting arbitrators from outside of the panel maintained by the CIETAC. The current rules allow parties to nominate and appoint arbitrators from outside of the CIETAC’s panel, provided the appointment is confirmed by the Chairman of the CIETAC and in accordance with Chinese arbitration law. The major difference between the other leading institutions and the CIETAC is that arbitrations at the CIETAC allow for a unique combination of arbitration and conciliation, which can ultimately lead to a renewal of positive relations between the disputing parties. Considering that the rapid pace of foreign investment and economic development in China will invariably result in an increase in disputes, the CIETAC has potential to eventually garner a reputation on the same level as the ICC, AAA, and LCIA.

**e. Hong Kong International Arbitration Centre**

A non-profit company, the HKIAC began operations in 1985 and has since grown to become one of the busiest arbitration institutions in the world. The HKIAC and a progressive legal regime have helped create a vibrant community for international arbitration in Hong Kong. The HKIAC recommends parties utilize its Procedures for the Administration of International Arbitration, which incorporates the UNCITRAL Rules by reference. However,
parties are free to agree on other rules to govern their international arbitration with the HKIAC, including the rules of any other arbitral institution. Finally, while most international arbitrations administered by the HKIAC take place in Hong Kong, the HKIAC allows for an arbitration to take place in a different location, so long as the parties bear the costs of the off-site administration. Overall, the HKIAC provides parties ample flexibility and autonomy, with only minor administrative interference.

3. Ad Hoc Arbitration

If parties do not use an institution to administer their dispute, and instead stipulate to other rules of procedure, by default they engage in “ad hoc” arbitration. As arbitration is a matter of contract, parties who do not choose the supervision of an institution are permitted to define any and all of the procedural rules to be applied in the proceeding. Often, parties in an ad hoc arbitration will agree to proceed under the UNCITRAL Rules, adopted by the U.N. General Assembly in 1976 to develop harmonious international economic relations between “countries with different legal, social and economic systems.” The UNCITRAL Rules were principally designed to facilitate ad hoc arbitration on a global scale. Should the parties’ arbitration agreement fail to provide for any applicable rules whatsoever for conducting the arbitration, the parties generally

138. See HONG KONG INT’L ARB. CTR. PROCEDURES FOR THE ADMIN. OF INT’L ARB. art. I(5).
139. See BÜHRING-UHLE ET AL., supra note 1, at 35 (“Historically, the parties used to spell out the procedures in the arbitration agreement, and when the dispute arises jointly select the arbitrator(s) and work out the details of the procedure together with the tribunal which under most laws is empowered to devise its own procedure.”); INT’L TRADE CTR., supra note 74, at 65.
are bound by the arbitration and procedural rules of the country where the arbitration takes place.143

In ad hoc arbitrations, parties often pre-select the arbitrator(s), who must then resolve the dispute without the help of an institutional administration.144 As noted above, parties who disagree on the appointment of the arbitrator(s) are left in more of a bind than those utilizing institutions. Fortunately, the UNCITRAL Rules address this problem by allowing parties to agree upon an “appointing authority” to choose the arbitrator(s).145 Parties usually will designate an appointing authority in the arbitration agreement, whether or not the UNCITRAL Rules are to apply.146 If the parties fail to do so, arbitration laws in many countries permit national courts to appoint arbitrators.147

Though it may not provide as much certainty and security as institutional arbitration, ad hoc arbitration can provide tangible benefits to parties engaged in international commercial arbitration. Typically, ad hoc arbitration is more flexible, less expensive, and more confidential than institutional arbitration.148 Ad hoc arbitration may be a worthwhile consideration when the arbitration agreement is made after the dispute arises, as the parties will have a clearer vision of how to tailor the process to the specific nature of the dispute.149 However, drafting an arbitration agreement after a dispute rears its head requires a certain amount of cooperation between the parties,

---

143. INT’L TRADE CTR., supra note 74, at 67. When parties fail to agree on the arbitral situs, the arbitrators must determine the proper situs. BORN, supra note 46, at 579–80.
144. BORN, supra note 46, at 12.
145. See U.N. COMM’N ON INT’L TRADE LAW (UNCITRAL) ARB. RULES art. 6. If parties cannot agree on an appointing authority, the UNCITRAL Rules allow either party to request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate one. Id. art. 6(2).
146. BORN, supra note 46, at 12. For a fee, most of the leading arbitration institutions (including the ICC, the AAA, and the LCIA) will act as an appointing authority in ad hoc arbitrations, and “will usually deal with the matter of the constitution of the arbitral tribunal just as rapidly as it would have done if the case had been managed under its own arbitration rules.” INT’L TRADE CTR., supra note 74, at 67.
147. BORN, supra note 46, at 12. For example, in actions subject to the New York Convention in the United States, 9 U.S.C. § 206 provides that “[a] court having jurisdiction under this chapter... may also appoint arbitrators in accordance with the provisions of the agreement.” 9 U.S.C. § 206 (2000). Selecting the location of an ad hoc arbitration is of vital importance, because the national law of the place of arbitration determines any obstacles that arise during the arbitral process. INT’L TRADE CTR., supra note 74, at 65.
148. BORN, supra note 46, at 12.
149. See BÜHRING-UHLE ET AL., supra note 1, at 38.
which can be difficult to achieve. Ultimately, unless parties already have extensive experience and familiarity with the nuances of international commercial arbitration, institutional arbitration may be worth the additional expense.

C. Procedural Issues in International Commercial Arbitration

Considering that the "personality" of international commercial arbitration differs from that of transnational litigation, attorneys making their first strides into this realm should be familiar with many of the procedural characteristics of the typical international arbitration. As a global creature of contract, international commercial arbitration does not function under a uniform body of procedural rules. Instead, as stated above, an arbitration can be administered through a multitude of procedural possibilities, including specific provisions agreed to by the parties in the arbitration clause, procedural law governing the conduct of the arbitration in the forum state, procedures promulgated by private arbitral institutions, the UNCITRAL Rules, and case-specific procedural rules determined by arbitrators when procedural standards are not pre-specified. An in-depth analysis of each procedural facet of a standard international commercial arbitration could be the exclusive subject of multiple and voluminous articles. Hence, what follows in this section is a discussion of the general nature of international commercial arbitration procedures, with emphasis on several important and distinctive qualities.

International arbitration proceedings are subject to certain legal standards, and in most cases, the governing procedural law will be that of the arbitral situs. The applicable procedural law may control various procedural issues in an international arbitration, such as the parties' autonomy to agree on substantive and procedural

150. Id. at 38–39.
151. Rau & Sherman, supra note 15, at 90 & n.2.
152. Born, supra note 46, at 413. The arbitral situs is "the place where the arbitration proceedings will usually be conducted, the place whose law the parties intended to govern their proceedings, and the place where any arbitral award will be made." Id. In rare cases, choice of law issues may arise relating to the applicable procedural law. Id. In addition, many national legal systems permit the parties to select the procedural law governing the arbitration. Id. at 427 n.2; see, e.g., Naviera Amazonica Peruana S.A. v. Compania Internacional de Seguros del Peru, [1988] 1 Lloyd's Rep. 116, 120 (Eng.) ("There is . . . no reason in theory which precludes parties to agree that an arbitration shall be held at a place or in country X but subject to the procedural laws of Y.").
issues, pleading rules, evidentiary rules, and the conduct of hearings. However, strict requirements are rare, as most national arbitration laws do not prescribe specific procedures and only cover what occurs before and after the arbitration and how much courts may support or interfere with the proceedings. Most often, parties have autonomy to agree upon the procedures to govern the arbitration, subject only to any mandatory requirements of the applicable procedural law. Developed states, where international arbitrations often take place, do not place burdensome mandatory limitations on the nature of the proceedings. Most jurisdictions simply require that the arbitral proceedings satisfy some minimal standards of due process, such as the right of the parties to be treated equally.

Though parties have wide freedom to agree in advance to detailed procedural rules, usually they do not do so. Even if parties agree to arbitrate pursuant to institutional rules, those rules do not describe the actual proceedings in much detail and primarily are concerned with ensuring that the process actually occurs and leads to a decision. Thus, the adoption of explicit procedures for an international commercial arbitration is left to the parties or, when they fail to agree, the arbitrators. Under most national arbitration laws and institutional arbitration rules, the international arbitral tribunal has flexibility to tailor the procedures to the nature of the dispute. This is of vital importance, considering that parties to an arbitration tend to disagree on at least some of the procedural issues

153. See Born, supra note 46, at 412.
154. Bühring-Uhle et al., supra note 1, at 70.
156. Id. at 436.
157. Id. at 436–37; Bühring-Uhle et al., supra note 1, at 70.
158. Born, supra note 46, at 437.
159. Bühring-Uhle et al., supra note 1, at 70.
160. Id.
161. See Born, supra note 46, at 437. For example, the ICC Rules give the arbitral tribunal wide discretion to develop procedures for the arbitration:

The proceedings before the Arbitral Tribunal shall be governed by these Rules and, where these Rules are silent, by any rules which the parties or, failing them, the Arbitral Tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.

ICC Rules of Arb. art. 15(1) (1998); see also id. art. 20 (providing the tribunal discretion in establishing the facts of the case).
in front of them. Furthermore, to assist parties and arbitrators with developing fair procedures for the arbitration, UNCITRAL has published a document that lists and briefly describes “questions on which appropriately timed decisions on organizing arbitral proceedings may be useful.”

Given the lack of a uniform procedural standard in an international commercial arbitration, the exact nature of the process will depend on the legal traditions of the arbitrator(s) and the parties’ counsel, which often results in a blend of civil and common law elements. Civil law elements, including the preference for written over oral testimony, limited discovery and cross-examination of witnesses, and efforts to minimize hearing time, dominate the process in most cases. In addition, like judges under the civil law inquisitorial system, arbitrators take a more active role in questioning than do common law judges. This is not to suggest that common law elements are a rarity. In fact, when the parties and/or arbitrator(s) come from a common law background, discovery, depositions, challenges to arbitrators, and other tactical maneuvers can be commonplace in an international arbitration. While there is always potential for conflicting styles in international arbitration, differences in approach may be mitigated through compromise between the parties. And, despite differences in legal backgrounds, “[t]he typical international [commercial] arbitration, whether influenced by the civil law or common law tradition, is conducted in a formal, adversary hearing unadulterated by techniques associated with conciliation or ‘alternative dispute resolution.”

162. BORN, supra note 46, at 438.
164. BÜHRING-UHLE ET AL., supra note 1, at 71.
165. See id. at 71–72; see also Rau & Sherman, supra note 15, at 92, 102–03.
166. Rau & Sherman, supra note 15, at 91–92, 92 n.12. This questioning is usually for clarification purposes. Id. at 97.
167. See Helmer, supra note 4, at 46.
168. COE, supra note 37, at 227.
169. Rau & Sherman, supra note 15, at 91. In the standard hearing, the parties, their attorneys, and the arbitrators are simply seated around a table. Id. at 95. The hearing goes through several stages including brief opening remarks by counsel; testimony from fact witnesses
The remainder of this section examines the distinctive manner in which international arbitration treats three procedural components vital to the administration of justice: discovery, witness examination, and joinder and consolidation.

1. Limited Discovery

International arbitration is a melting pot of various procedural traditions. When it comes to discovery, however, civil law traditions generally frown upon the typical mass discovery routines of American-style litigation. As opposed to "discovery," attorneys with civil law backgrounds are used to "disclosure," wherein the lawyers for each side simply produce the pertinent documents that support their claim or defense. The dearth of discovery in international arbitration has traditionally been seen as an advantage over litigation, as it reduces costs, speeds up the overall process, and reduces the risk of the disclosure of business secrets. However, curtailing discovery reduces the ability of the parties to fully comprehend all the relevant facts.

To that end, in recent years, American-style discovery has gained adherents in the realm of international arbitration. They argue that discovery is "essential to prevent unfair surprise and to inform the parties of the factual and legal issues before the
arbitration begins so that the hearing can proceed efficiently.'\textsuperscript{175} Thus, in recognizing its benefits, many civil lawyers and arbitrators have begun to accept limited means of discovery in international commercial arbitration.\textsuperscript{176} In doing so, limited discovery blends the common law approach, which seeks the production of categories of relevant documents, and individual documents, with the civil law approach, which demands that the documents be identified with reasonable specificity.\textsuperscript{177} Along these lines, international arbitrators often order discovery of critical documents, but usually will refuse broad requests.\textsuperscript{178}

Recognizing that procedures for pre-hearing discovery are only outlined in general terms in both institutional rules and the UNCITRAL Rules,\textsuperscript{179} in June 1999, the International Bar Association ("IBA") adopted new Rules on the Taking of Evidence in International Commercial Arbitration ("IBA Rules").\textsuperscript{180} The IBA intended the Rules to be used in conjunction with institutional or ad hoc rules or procedures governing international commercial arbitrations.\textsuperscript{181} In addition, the IBA Rules were designed to reflect the procedures of many different legal systems and serve as a resource to parties and arbitrators from different legal cultures.\textsuperscript{182} Article 3 of the IBA Rules reflects the growing acceptance of limited discovery in international commercial arbitration.\textsuperscript{183} Under Article 3, a party may submit to the arbitral tribunal a "Request to Produce" documents,\textsuperscript{184} which shall contain:

(a) (i) a description of a requested document sufficient to identify it, or (ii) a description in sufficient detail (including

\textsuperscript{175} Id.
\textsuperscript{176} Helmer, supra note 4, at 50.
\textsuperscript{177} Id. at 51 (citation omitted).
\textsuperscript{178} Rau & Sherman, supra note 15, at 103.
\textsuperscript{179} See Bennett, supra note 170.
\textsuperscript{181} David W. Rivkin, Foreword to IBA RULES ON THE TAKING OF EVID. IN INT'L COMMERCIAL ARB. (1999).
\textsuperscript{182} Id.
\textsuperscript{183} Helmer, supra note 4, at 50–51.
\textsuperscript{184} IBA RULES ON THE TAKING OF EVID. IN INT'L COMMERCIAL ARB. art. 3.2.
subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist;
(b) a description of how the documents requested are relevant and material to the outcome of the case; and
(c) a statement that the documents requested are not in the possession, custody or control of the requesting Party, and of the reason why that Party assumes the documents requested to be in the possession, custody or control of the other Party. \(185\)

In requiring the proponent of the discovery request to make these showings, Article 3 of the IBA Rules recognizes that arbitration proceedings must be efficient and expeditious. The IBA Rules also provide specific rules for fact witnesses, expert witnesses, on site inspections, evidentiary hearings, and the admissibility of evidence. \(186\) By adopting these rules in the arbitration clause, parties to international commercial arbitrations can expect a higher degree of procedural certainty and overall fairness.

Despite the rise in documentary discovery in international commercial arbitration, other mechanisms of American-style discovery, such as interrogatories and depositions, have not infiltrated international arbitration. \(187\) Arbitrators rarely order pre-hearing depositions, a principle that follows from arbitration's emphasis on writing. \(188\) Instead, parties and counsel have to rely on the opponent's witnesses to submit written statements or affidavits in order to learn the details of their testimony. \(189\) This is a fundamental difference between the civil law tradition and typical American common law practice. \(190\)

Ultimately, it is critical to remember that any and all discovery features of a typical international commercial arbitration can be expanded via contract. \(191\) Thus, if parties want American-style

---

185. Id. art. 3.3.
186. See id. arts. 4–9.
187. Helmer, supra note 4, at 51.
188. Bennett, supra note 170.
190. Id. Moreover, even though England operates under a common law system, discovery methods in typical international commercial arbitrations held in that country resemble the civil law tradition. See, e.g., Jeff Dasteel & Richard Jacobs, American Werewolves in London, 18 ARB. INT'L 165, 173–74, 176–78 (2002).
191. See Helmer, supra note 4, at 51.
discovery methods to govern their dispute, that option is available, so long as they can agree upon it.

2. Limited Examination of Witnesses

In the common law trial system, due to the presence of the jury, oral presentation of evidence, examination of witnesses, and cross-examination of witnesses are vital. However, because most international commercial arbitrations are rooted in civil law traditions, arbitrators typically bestow more weight on documentary evidence than on witness testimony. As noted above, pre-hearing depositions are quite rare. Witness statements or affidavits are submitted to the arbitral tribunal along with the parties’ pre-hearing written submissions, which outline their legal and factual positions in detail.

International commercial arbitrations frequently hinge on issues of contractual interpretation, for which written documents often are the most reliable evidence. Still, oral testimony and witness credibility can be vital during the hearing phase. Attorneys with civil law backgrounds have come to recognize that examining witnesses, especially through cross-examination, has many benefits. For example, “cross-examination can reveal a lying witness, weakness in logic, or inaccuracy as to facts that may not surface when the only means of challenging veracity is by an affidavit or testimony from another witness.” Even so, examination of witnesses during the arbitration hearing is quite different from that of a common law trial. Direct examination is usually limited to points which summarize written witness

---

192. Id. at 52.
193. See id. at 52–53.
194. See supra note 188 and accompanying text.
195. BÜHRING-UHLE ET AL., supra note 1, at 79.
197. Id.
198. Helmer, supra note 4, at 53; see also Rau & Sherman, supra note 15, at 101 (stating that cross-examination in international arbitration “provide[s] some opportunity for opposing counsel to test the witness”).
200. See Helmer, supra note 4, at 53.
Both counsel and the arbitrators may ask questions, and typically counsel conducts examination (and cross-examination) first, before the tribunal asks their own questions. Accordingly, examination-in-chief and cross-examination are not separated into two distinct phases. Even though this differs greatly from common law traditions, it nonetheless provides an opportunity for opposing counsel to challenge witnesses in a less hostile atmosphere.

In international commercial arbitration, the scope of cross-examination is usually determined by the arbitrators, who, in their discretion, can devise the means of testing witness accuracy or credibility. Unlike practices in American courts, where cross-examination is normally limited to the scope of direct examination, cross-examination in international arbitration can cover all of the issues presented by the witness in her written statement, whether or not discussed during direct. And, whereas testimony is recorded in literal transcripts in common law proceedings, civil law influenced international arbitration instead relies on testimonial summaries prepared by the presiding arbitrator and presented to the witness for approval and signature. These condensed summaries, which can be compared to similar processes followed in American administrative law practice and bench trials, promote certainty and common understanding in the witnesses' testimony by reconciling inconsistencies and adding to the quality of the arbitrator's decision-making.

201. Id.; see also BÜHRING-UHLE ET AL., supra note 1, at 83 (noting that during the hearing, witnesses just give a brief summary of their written statements before being questioned through limited cross-examination and by the tribunal).


203. Helmer, supra note 4, at 53.


205. Id. at 102. By limiting the conduct of cross-examination, the tribunal will ensure that counsel with civil law backgrounds will not be placed at a disadvantage. BÜHRING-UHLE ET AL., supra note 1, at 83.

206. See, e.g., FED. R. EVID. 611(b) (“Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.”).

207. Helmer, supra note 4, at 53.

208. BÜHRING-UHLE ET AL., supra note 1, at 83.

209. Rau & Sherman, supra note 15, at 98; see also Andreas F. Lowenfeld, The Two-Way Mirror: International Arbitration as Comparative Procedure, 7 MICH. Y.B. INT'L LEGAL STUD. 163, 169 (1985) (“[W]hereas the witnesses had stammered or mumbled, occasionally contradicted
3. Multi-Party Disputes: Issues with Joinder and Consolidation

Complex international business transactions often involve both multiple contracts and multiple parties. When multi-party lawsuits arise, most legal systems have developed an assortment of procedural devices that authorize national courts to permit the joinder of parties in a judicial proceeding or the consolidation of separate claims between different parties into a single proceeding. Such a framework does not exist in international arbitration, however, and it is rare for the parties’ arbitration agreement(s) to specifically contemplate multi-party arbitration and include provisions dealing with consolidation and joinder.

Should parties in an international commercial arbitration agree to joinder of additional parties or to consolidation of separate claims, international arbitral tribunals and appointing authorities will allow it. Conversely, when there is disagreement among the parties as to joinder or consolidation, institutional rules generally do not permit it. However, even when multi-party arbitration is

---

210. See, e.g., FED. R. CIV. P. 13–14, 19–21, 24. For purposes of this article, third-party intervention is treated as a subspecies of joinder.
211. See, e.g., id. 42(a).
212. BORN, supra note 46, at 673; see also Irene M. Ten Cate, Multi-Party and Multi-Contract Arbitrations: Procedural Mechanisms and Interpretation of Arbitration Agreements Under U.S. Law, 15 AM. REV. INT’L ARB. 133, 135–36 (2004) (noting that “it has been suggested that litigation in national court-systems may be better suited than arbitration to deal with disputes involving multiple parties or contracts,” which is “unfortunate, because a substantial proportion of disputes submitted to arbitration involve more than one contract or more than two parties”).
213. Consolidated arbitration occurs when “[t]wo or more separately commenced arbitrations are consolidated and thereafter proceed before a single tribunal as an unified multi-party arbitration.” BÖHRING-UHLE ET AL., supra note 1, at 102 n.320.
214. Id. 673.
215. The LCIA Rules do allow for third-party joinder, under limited circumstances: Unless the parties at any time agree otherwise in writing, the Arbitral Tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a reasonable opportunity to state their views: . . .
(h) to allow, only upon the application of a party, one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented thereto in writing, and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration . . . .

administered, a potential risk can arise—adding parties to a proceeding can interfere with the original parties’ agreement regarding the selection procedure for the arbitral tribunal. To mitigate this risk, some institutions address the composition of the tribunal in multi-party arbitrations. For example, Article 10 of the ICC Rules obliges “the multiple Claimants, jointly, and the multiple Respondents, jointly [to] nominate an arbitrator for confirmation.” When the parties cannot agree on a joint nomination or a different method for selecting the tribunal, the ICC Court will appoint the panel.

Even so, it has been suggested that because a consolidated proceeding modifies the procedure by which the arbitral tribunal is appointed, it may be impossible to enforce resulting awards under the New York Convention. Thus, “parties requesting joinder or consolidation and tribunals granting such orders should be aware of the risks that this course of conduct may present when enforcement of the resulting award is sought.” This risk is greatest when there is a lack of legislative authorization under the procedural law of the arbitral situs, and when the order is based on an arbitration agreement that does not clearly permit joinder or consolidation.

In the absence of clear agreement or applicable institutional rules, decisions on consolidation and joinder in international commercial arbitration are left to both arbitral tribunals and national courts, as most countries’ national arbitration statutes are silent on the topic. In the United States, the Supreme Court has taken the position that arbitral tribunals, rather than courts, should make these procedural determinations. In other countries, such as the

216. Ten Cate, supra note 212, at 143.
218. Id. art. 10(2).
219. Ten Cate, supra note 212, at 145. “Article V(1)(d) of the [New York] Convention allows for refusal of recognition and enforcement of arbitral awards where ‘[t]he composition of the arbitral authority, or the arbitral procedure was not in accordance with the agreement of the parties . . . .’” Id. (quoting New York Convention, supra note 7, art. V(1)(d), 21 U.S.T. at 2520, 330 U.N.T.S. at 42); see infra Part D.1.
220. Ten Cate, supra note 212, at 146.
221. Id. at 146. Some commentators have suggested that if consolidation is based on the parties’ implied consent, then Article V(1)(d) would likely not be offended. BORN, supra note 46, at 695.
222. See BORN, supra note 46, at 695.
223. See Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84 (2002) (holding that “‘procedural’ questions which grow out of the dispute and bear on its final disposition” are presumed to be for the arbitrator, rather than the judge, to decide (citing John Wiley & Sons, Inc.
Netherlands, courts retain the power to order consolidation of separate arbitrations. Arbitral tribunals that are faced with the decision of whether to order consolidation or joinder under these circumstances will have to use contract interpretation tools to determine whether it is "more likely than not[ ] that the parties intended consolidation." Ultimately, to avoid some of these issues, parties entering into complex international business transactions with multiple partners should consider including clear and detailed consolidation and joinder provisions in their arbitration agreements.

D. Post-Award Annulment and Enforcement Issues in International Arbitration

"[T]he ultimate test of any arbitration proceeding is its ability to render an award which, if necessary, will be recognized and enforced in relevant national courts." The majority of international arbitral awards do not require either judicial confirmation or enforcement, as losing parties tend to comply with the terms of awards against them or settle soon after the award is rendered. However, when the

---

v. Livingston, 376 U.S. 543, 557 (1964)). While not technically binding precedent, the Supreme Court's plurality opinion Green Tree Financial Corp. v. Bazzle expresses a similar viewpoint:

"[T]he relevant question here is what kind of arbitration proceeding the parties agreed to[, and this] concerns contract interpretation and arbitration procedures. Arbitrators are well situated to answer that question. Given these considerations... this matter of contract interpretation should be for the arbitrator, not the courts, to decide.


224. See Netherlands Arbitration Act art. 1046 (1986), reprinted in BORN, supra note 46, at 680-81 (allowing "any of the parties" to request the court to order consolidation of separate arbitrations "unless the parties have agreed otherwise").

225. Ten Cate, supra note 212, at 154 (quoting Conn. Gen. Life Ins. Co. v. Sun Life Assurance Co. of Can., 210 F.3d 771, 774 (7th Cir. 2000)). The arbitral tribunal should make this factual determination on a case-by-case basis, and in doing so, should consider several factors, including the language of the arbitration provisions, the purpose of the agreements and considerations of efficiency, and the consequences of consolidated proceedings for the constitution of the tribunal. Id.

226. Of course, parties may not prefer consolidation or joinder in many circumstances, given its potential to increase the length and cost of the arbitration. See Rau & Sherman, supra note 15, at 109. Parties who are wary of multi-party international arbitration can include provisions in their arbitration agreements strictly forbidding joinder or consolidation.

227. BORN, supra note 46, at 704.

losing party in an international arbitration believes the award has been made in error, they may commence proceedings in the national courts of the arbitral situs to vacate or annul the award.\textsuperscript{229}

While the New York Convention prescribes standards for the recognition and enforcement of international arbitral awards, it does not address the grounds on which a court in the arbitral situs may vacate or annul an award.\textsuperscript{230} The legal principles for vacating international arbitration awards are expressed in the national laws of the territory where the award is made.\textsuperscript{231} As national arbitration laws set forth varying grounds on which arbitration awards can be annulled, attorneys need to be familiar with different approaches across the globe. Thus, this section explores several national standards for annulment proceedings.

Furthermore, the enforcement mechanisms of the New York Convention have been implemented by contracting states through national legislation. While the goal of the New York Convention drafters was global uniformity in enforcement of awards, not all the parties to the Convention have interpreted it in an identical fashion.\textsuperscript{232} Thus, this section also addresses some of the issues that arise when the winning party institutes enforcement proceedings under the New York Convention.\textsuperscript{233}

1. The Scope of the New York Convention

The New York Convention requires the courts of contracting states to recognize and enforce arbitral awards entered in another state, as well as those awards that a contracting state considers “non-

\textsuperscript{229} See BORN, supra note 46, at 704.


\textsuperscript{231} New York Convention, supra note 7, art. V(1)(e), 21 U.S.T. at 2520, 330 U.N.T.S. at 42 (permitting awards to be vacated by courts of the nation “under the law of which [the] award was made”); Drahozal, An Economic Approach, supra note 230, at 455.

\textsuperscript{232} See BORN, supra note 46, at 796 (noting that “some national arbitration statutes permit more expansive judicial review in [enforcement] actions” and others authorize local courts to review de novo both the substantive and procedural aspects of the arbitrators’ decisions).

\textsuperscript{233} The Panama Convention does not have the same global reach of the New York Convention and many of the contracting parties to the New York Convention are also parties to the Panama Convention. Thus, this article focuses solely on enforcement issues under the New York Convention.
In addition, Article III of the New York Convention instructs contracting states to enforce foreign arbitral awards according to the rules of procedure in the territory in which the award is sought to be enforced. Article III also prohibits a contracting state from imposing substantially more onerous conditions or higher fees than are imposed on domestic awards. Thus, an arbitral award subject to the New York Convention may be presumptively valid.

To obtain the recognition and enforcement of an award, the winning party must supply the following two documents to the national court where enforcement is sought: (a) the authenticated original award or a certified copy, and (b) the original arbitration agreement or a certified copy, which must be "signed by the parties or contained in an exchange of letters or telegrams." Upon providing these documents, the burden shifts to the party resisting enforcement to prove one of the several defenses to the validity of an award.

Subsection 1 of Article V of the New York Convention allows national courts to refuse to recognize or enforce an arbitral award only if the losing party can prove one of the following defenses: (a) the arbitration agreement is invalid; (b) the party was denied procedural fairness or due process in the arbitral proceedings; (c)

\[\text{234. New York Convention, supra note 7, art. I, 21 U.S.T. at 2519, 330 U.N.T.S. at 38; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 487 cmt. g (1987) (noting several situations where awards are subject to the New York Convention). Non-domestic awards subject to the Convention are discussed infra.}
\[\text{235. New York Convention, supra note 7, art. III, 21 U.S.T. at 2519, 330 U.N.T.S. at 40.}
\[\text{236. Id.}
\[\text{237. Id. arts. II, IV, 21 U.S.T. at 2519–20, 330 U.N.T.S. at 38, 40.}
\[\text{238. E.g., Parsons & Whittemore Overseas Co. v. Societe Generale de L’Industrie du Papier (RAKTA), 508 F.2d 969, 973 (2d Cir. 1974) (“While the Geneva Convention placed the burden of proof on the party seeking enforcement of a foreign arbitral award and did not circumscribe the range of available defenses to those enumerated in the Convention, the 1958 Convention clearly shifted the burden of proof to the party defending against enforcement and limited his defenses to seven set forth in Article V.”).}
\[\text{239. New York Convention, supra note 7, art. V(1)(a), 21 U.S.T. at 2520, 330 U.N.T.S. at 40 (“The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.”).}
\[\text{240. Id. art. V(1)(b), 21 U.S.T. at 2520, 330 U.N.T.S. at 42 (“The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.”); BORN, supra note 46, at 832–33.}
the arbitrators exceeded their authority;\textsuperscript{241} (d) the arbitral procedures deviated materially from the parties’ agreement or the applicable procedural law;\textsuperscript{242} or (e) the award is not yet binding or “has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.”\textsuperscript{243} In addition, even if not raised by the party opposing enforcement, subsection 2 of Article V permits national courts to refuse to recognize or enforce awards subject to the New York Convention if they find: (a) the subject matter of the dispute cannot be settled by arbitration under the law of that country;\textsuperscript{244} or (b) “[t]he recognition or enforcement of the award would be contrary to the public policy of that country.”\textsuperscript{245}

The first four grounds contained in Article V(1)(a)–(d) and the grounds set forth in Article V(2)(a) do not involve questions of error in applying the substantive law and facts associated with the merits of a party’s claims.\textsuperscript{246} Thus, these five grounds do not provide the party resisting enforcement with any means to obtain relief from substantive errors made by the arbitrators.\textsuperscript{247} The two additional Article V defenses provide only narrow means for a party aggrieved by substantive errors may avoid enforcement of the award.\textsuperscript{248}

2. Annulment of Arbitral Awards

Under Article V(1)(e) of the New York Convention, a national court may refuse enforcement of a foreign arbitral award that “has been set aside or suspended by a competent authority of the country

\textsuperscript{241} New York Convention, supra note 7, art. V(1)(c), 21 U.S.T. at 2520, 330 U.N.T.S. at 42 (“The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.”).

\textsuperscript{242} Id. art. V(1)(d), 21 U.S.T. at 2520, 330 U.N.T.S. at 42 (“The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.”); BORN, supra note 46, at 833–34.

\textsuperscript{243} New York Convention, supra note 7, art. V(1)(e), 21 U.S.T. at 2520, 330 U.N.T.S. at 42.

\textsuperscript{244} Id. art. V(2)(a), 21 U.S.T. at 2520, 330 U.N.T.S. at 42.

\textsuperscript{245} Id. art. V(2)(b), 21 U.S.T. at 2520, 330 U.N.T.S. at 42.


\textsuperscript{247} Id.

\textsuperscript{248} Id.
Courts and commentators have interpreted the language of this provision to mean that the only place the parties may file a motion to set aside or vacate an award is in the country whose domestic law applied to the arbitration proceedings. In other words, the place of arbitration is given exclusive or "primary" jurisdiction to annul arbitral awards. The result is that the standards for vacating an award are determined by the arbitral procedural law that governed the arbitration rather than the applicable substantive law. In reality, the procedural law governing the arbitration is almost always the law of the situs of the arbitration. While the contracting parties are free to agree to a procedural law other than that of the situs, this practice is very rare.

Accordingly, under the New York Convention, the procedural law of the location for arbitration specified in an arbitration agreement is presumed to apply to the arbitration. While the

250. Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 287 (5th Cir. 2004) (stating that the country with primary jurisdiction over an arbitration award is the country where the award was made or the country under whose arbitration laws the award was made (citing Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 357, 364 (5th Cir. 2003))); Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 23 (2d Cir. 1997); M & C Corp. v. Erwin Behr GmbH & Co., 1996 FED App. 0195P at 5–6 (6th Cir.); Empresa Colombiana de Vías Férreas (Ferrovias) v. Drummond Ltd., 29 Y.B. COM. ARB. (Int'l Council for Com. Arb.) 643, 653–54 (2004); S. A. Mines, Minerais et Métaux v. Mechena Ltd., 7 Y.B. COM. ARB. (Int'l Council for Com. Arb.) 316, 317 (1982); Jan Paulsson, The Role of Swedish Courts in Transnational Commercial Arbitration, 21 VA. J. INT'L L. 211, 242 (1981) ("[T]he fact is that setting aside awards under the New York Convention can take place only in the country in which the award was made."); Rubins, Indonesia, supra note 228, at 389 ("[T]he only courts that are competent to hear a motion to vacate a foreign arbitral award are those in the country in which the arbitration took place, or the courts of any country whose procedural law is specifically invoked in the contract.").
251. Karaha Bodas, 364 F.3d at 287 (citing Karaha Bodas,335 F.3d at 364).
253. Gaitis, supra note 246, at 54.
254. Id.; see also Karaha Bodas, 364 F.3d at 291 ("Authorities on international arbitration describe an agreement providing that one country will be the site of the arbitration but the proceedings will be held under the arbitration law of another country by terms such as 'exceptional'; 'almost unknown'; a 'purely academic invention'; 'almost never used in practice'; a possibility 'more theoretical than real'; and a 'once-in-a-blue-moon set of circumstances.'")(footnotes omitted).
255. Karaha Bodas, 364 F.3d at 291. Likewise, the place of arbitration can be seen as independent of the place of hearings. Webster, supra note 95, at 211. In Karaha Bodas, ("[t]he arbitration proceeding ... physically occurred in Paris, but the Award was 'made in' Geneva, the
language of Article V(1)(e) suggests the possibility that more than one country may be eligible for primary jurisdiction, the predominant view is that the Convention permits only one in any given case. Ultimately, under the New York Convention, the power and authority of the national courts in the rendering state have vital importance. Countries may devise whatever rules they wish regarding the grounds on which their courts can invalidate an award rendered in their territory.

a. Annulment of arbitral awards in the United States

Under the standards discussed above, the United States has primary jurisdiction to annul arbitral awards that are rendered in its territory. Thus, for purely domestic arbitrations, annulment standards are governed by section 10 of chapter 1 of the FAA, which provides limited grounds for vacating an arbitral award. However, do the same annulment standards apply when an arbitration involving foreign parties results in an award rendered in the United States? What about when two American parties arbitrate a dispute in the United States over a contract that envisions performance abroad? Even though more than 35 years have passed since the United States ratified the New York Convention, the answers to such questions remains somewhat unclear.

place of the arbitration in the legal sense and the presumptive source of the applicable procedural law.” 364 F.3d at 292.
256. Karaha Bodas, 364 F.3d at 308.
257. Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys “R” Us, Inc., 126 F.3d 15, 22 (2d Cir. 1997); see W. Laurence Craig, Some Trends and Developments in the Laws and Practice of International Commercial Arbitration, 30 TEX. INT’L L.J. 1, 11 (1995) (“What the Convention did not do . . . was provide any international mechanism to insure the validity of the award where rendered. This was left to the provisions of local law. The Convention provides no restraint whatsoever on the control functions of local courts at the seat of arbitration.”).
259. 9 U.S.C. § 10(a) sets forth four grounds for vacating an arbitration award rendered in the United States:

(1) where the award was procured by corruption, fraud, or undue means;
(2) where there was evident partiality or corruption in the arbitrators, or either of them;
(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced; or
(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

The New York Convention applies to "arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought," yet fails to define what such "non-domestic" awards are. Courts in the United States have maintained that section 202 of the FAA provides the definition of a "non-domestic" award under the Convention. Accordingly, "any commercial arbitral agreement, unless it is between two United States citizens, involves property located in the United States, and has no reasonable relationship with one or more foreign states, falls under the Convention."

Notwithstanding the general recognition of this broad definition of "non-domestic" awards under the New York Convention's implementing legislation, standards for the annulment of awards remain inconsistent because few federal courts have addressed the issue. Relying on the notion that Article V(1)(e) of the Convention permits courts to apply domestic arbitral law to a motion to vacate a "non-domestic" arbitral award entered into in the United States, some courts have held that the grounds set forth in section 10 of the FAA apply to vacate these "non-domestic" awards. In contrast, other courts have come to the opposite conclusion. Instead of

---


An [arbitration] agreement or award arising out of [a commercial] relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.


263. Jain v. de Méré, 51 F.3d 686, 689 (7th Cir. 1995) (emphasis added); see also Indus. Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH, 141 F.3d 1434, 1441 (11th Cir. 1998) (holding that an arbitral award made in the United States and under U.S. law is "non-domestic" under section 202 "when one of the parties to the arbitration is domiciled or has its principal place of business outside of the United States").

264. Alghanim & Sons, 126 F.3d at 21, 23; see also Jacada, 401 F.3d at 709–12; Lander Co. v. MMP Invs., Inc., 107 F.3d 476, 478 (7th Cir. 1997) (noting that the Convention "contemplates the possibility of the award's being set aside in a proceeding under local law").
applying section 10's grounds to a motion to vacate a "non-domestic" award, these courts have held that the proper vacatur standards for such an award are actually the seven Article V defenses against recognition and enforcement.\textsuperscript{265}

While there are minor differences in the language of section 10 and Article V, a comparison of the standards reveals that they are "broadly similar (but not identical)."\textsuperscript{266} Ultimately, holding that section 10 of the FAA applies to vacatur proceedings of "non-domestic" awards is the more sensible approach.\textsuperscript{267} It conforms to the general supposition that an action to set aside an international arbitral award is controlled by the domestic law of the rendering state. In addition, it "corresponds to the will of the parties, who choose the arbitral seat not only for commodity and neutrality purposes but also, and perhaps especially today, for applicable provisions on the challenge of awards."\textsuperscript{268} However, confusion may result when the losing party attempts to vacate the award at the same time that the winning party attempts to enforce it, as not entirely consistent statutory regimes would govern the validity of the same award.\textsuperscript{269} While such an occurrence may be rare and involves limited risks, the differences could be critical in certain instances.\textsuperscript{270}

i. Manifest disregard of the law

Courts holding that the annulment grounds set forth in the domestic FAA govern motions to vacate "non-domestic" awards rendered in the United States may also consider various substantive common law grounds for annulment.\textsuperscript{271} Of these various non-
statutory grounds, the most widely recognized basis is "manifest disregard of the law" by the arbitrator(s). This standard was introduced by the Supreme Court as dicta in Wilko v. Swan, and since has been adopted, in slightly varying definitions, by all of the federal circuit courts. The most common formulation of the doctrine is that it requires the record to show that the arbitrator(s) knew the law yet explicitly disregarded it, which requires more than a showing of error or a misunderstanding about the law.

Some commentators believe that applying the manifest disregard standard to the vacatur of "non-domestic" arbitral awards could have a chilling effect on the integrity of international commercial arbitration in the United States. However, use of the manifest disregard standard is severely limited and requires an extremely strong showing on behalf of the losing party. Nevertheless, commentators have suggested that Congress should consider revising the FAA to draw a clearer distinction between domestic and international arbitral awards and to harmonize the grounds for annulment of "non-domestic" awards with the enforcement defenses in Article V of the New York Convention. Indeed, doing so would...

---

Disregard]. These non-statutory grounds include manifest disregard of the law, conflict with public policy, an arbitrary and capricious award, complete irrationality of the award, and the award’s failure to draw its essence from the underlying contract: Id. at 365 n.12 (citing Gabriel M. Wilner, 1 DOMKE ON COMMERCIAL ARBITRATION § 34:07 (1984)).

272. Id. at 366; e.g., Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys “R” Us, Inc., 126 F.3d 15, 23–24 (2d Cir. 1997).


274. See Rubins, Manifest Disregard, supra note 271, at 366, 368–70 (describing circuit court cases that have enunciated the "manifest disregard" formulation).


277. For example, the Second Circuit has stated:

Our reluctance over the years to find manifest disregard is a reflection of the fact that it is a doctrine of last resort—its use is limited only to those exceedingly rare instances where some egregious impropriety on the part of the arbitrators is apparent, but where none of the provisions of the FAA apply. It should be remembered that arbitrators are hired by parties to reach a result that conforms to industry norms and to the arbitrator's [sic] notions of fairness. To interfere with this process would frustrate the intent of the parties, and thwart the usefulness of arbitration ....


278. See, e.g., Park, The Case for FAA Reform, supra note 276, at 1248–49; Rubins, Manifest Disregard, supra note 271, at 372.
promote certainty and consistency in the standards for annulment of "non-domestic" arbitral awards.

ii. Contracting for heightened judicial review

One oft-cited benefit of arbitration is finality. When an award is rendered, the losing party who believes the award is in error must resort to judicial annulment proceedings. Not only does an international system for appellate review of arbitral awards not exist, but the rules of many arbitration institutions provide that the arbitration award shall be final and binding upon the parties. In recent years, parties have become increasingly concerned with arbitration's limited scope of review. Because many parties are wary of unpredictable or potentially biased decision-making on the part of arbitrators, some parties have begun to include clauses in their arbitration agreements that attempt to expand the scope of judicial


281. See, e.g., Am. Arb. Ass'n Int'l Arb. Rules art. 27(1) (Am. Arb. Ass'n 2006) ("Awards shall be made in writing, promptly by the tribunal, and shall be final and binding on the parties."); ICC Rules of Arb. art. 28(6) (1998) ("Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made."); London Court of Int'l Arb. Rules art. 26.9 (1998) ("All awards shall be final and binding on the parties. By agreeing to arbitration under these Rules, the parties undertake to carry out any award immediately and without any delay . . . and . . . also waive irrevocably their right to any form of appeal, review or recourse to any state court or other judicial authority, insofar as such waiver may be validly made.").

review.283 Most of these clauses call for vacatur of awards for errors of law, errors of fact, or both.284

In the United States, the legal status of clauses expanding the scope of judicial review is uncertain. The Supreme Court has not taken up the issue, despite a split among circuit courts that have addressed it.285 The circuits that have allowed parties to contract for heightened judicial review of arbitral awards have done so primarily on the rationale that arbitration provides parties with freedom of contract.286 In contrast, the circuits that have rejected heightened judicial review of arbitral awards have done so by noting that such review would "interfere with the judicial process"287 and that "private parties lack the power to dictate a broad standard of review when Congress has specifically prescribed a narrower standard [in the FAA].288 Furthermore, state courts have routinely rejected contractually expanded judicial review of arbitral awards.289

283. Id. at 173.
284. Knell & Rubins, supra note 280, at 545. An arbitration agreement may attempt to order a district court to vacate an award which is not supported by "substantial evidence" or which contains erroneous "conclusions of law." Blankley, supra note 279, at 394.
286. E.g., Gateway Techs., 64 F.3d at 996–97.
287. Bowen, 254 F.3d at 934. The Bowen court also noted that contracting for expanded judicial review was contrary to the purposes of the FAA. Id. at 935.
288. Kyocera Corp., 341 F.3d at 1000.
Commentators also have disagreed as to which standard is appropriate. On balance, however, the better reasoned approach is to reject contractually expanded judicial review. Although arbitration's contractual nature gives parties great freedom to customize its processes, it should not allow them to dictate how courts do their jobs. There is nothing in the Constitution or in Supreme Court precedent that suggests such a relationship between the parties and the courts. As noted by the Ninth Circuit, "[e]ven when Congress is silent on the matter, private parties lack the power to dictate how the federal courts conduct the business of resolving disputes." Despite the freedom of contract available in arbitration, such freedom should not disrupt the independence of the judiciary. Instead, parties who seek expanded review of awards should consider contracting for an appellate arbitration panel to review the arbitrator's award.

b. Annulment standards in foreign countries

Outside of the United States, the national laws of many countries retain the principle that courts at the place of arbitration have primary jurisdiction to annul arbitral awards. In fact, this notion has been adopted by most States, including England, France, Germany, Greece, Hungary, India, Lebanon, Mexico, the Netherlands, Russia, Scotland, Spain, and Ukraine. However, some States have broken from the norm and have developed annulment standards that flout the well-respected principle of primary jurisdiction. For example, several States,

290. Goldman, supra note 282, at 173 & n.15 (citing articles in favor of, and against, heightened judicial review). In contrast to these binary approaches, Goldman argues that heightened judicial review "should be enforced in large, individually negotiated contracts between commercial entities, but rejected in standard form contracts for small consumer goods between parties of unequal bargaining power." Id. at 179–80.


292. Id.

293. Kyocera Corp., 341 F.3d at 1000; see also Worth v. Tyer, 276 F.3d 249, 263 n.4 (7th Cir. 2001) ("However, the court, not the parties, must determine the standard of review . . ."); United States v. Vontsteen, 950 F.2d 1086, 1091 (5th Cir. 1992) (noting that "no party has the power to control our standard of review"); Chi. Typographical Union No. 16 v. Chi. Sun-Times, Inc., 935 F.2d 1501, 1505 (7th Cir. 1991) ("[Parties] cannot contract for judicial review of [an arbitral] award; federal jurisdiction cannot be created by contract.").

294. Chi. Typographical Union, 935 F.2d at 1505.

295. Gharavi, supra note 268, at 12.

296. Id. at 12–15.
through court decisions or positive law, have adopted an “extra-territorial jurisdictional rule” whereby national courts can exercise jurisdiction over the annulment of arbitral awards rendered outside of their territory.\textsuperscript{297} By giving their national courts such jurisdictional discretion, these countries, including Pakistan, Brazil, Saudi Arabia, and Indonesia, have the potential to create a legally unstable climate and insecurity in international business.\textsuperscript{298} In addition, some States retain the power to actually deprive their courts of jurisdiction over the vacatur of awards rendered within their territory.\textsuperscript{299} For instance, in Switzerland, Belgium, Sweden, and Tunisia, parties in certain disputes can waive their right to annul arbitral awards rendered in the territory.\textsuperscript{300} Some commentators speculate that these “opt-out” regulations may have been enacted in order to compete for international arbitration business.\textsuperscript{301} Nevertheless, such waivers are hardly ever exercised in practice.\textsuperscript{302}

The legal framework of countries that allow for “extra-territorial jurisdiction” over arbitral awards or the exclusion of jurisdiction over awards rendered in the State’s territory is troublesome. Not only does such a framework increase the risk of doing business internationally, but it can enable national courts “to hold—through doubtful reasoning—that they have jurisdiction over the annulment of an award rendered abroad that is unfavorable to their nationals.”\textsuperscript{303}

In fashioning standards for the annulment of arbitral awards in their national arbitration laws, many countries have taken inspiration from the 1985 UNCITRAL Model Law on International Commercial Arbitration (“UNCITRAL Model Law”),\textsuperscript{304} which was “designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs

\begin{itemize}
\item \textsuperscript{297} Id. at 17.
\item \textsuperscript{298} Id. at 18–22.
\item \textsuperscript{299} Id. at 23.
\item \textsuperscript{300} Id. at 23–24. Usually, these arbitrations must involve parties who are neither domiciled nor reside in the State’s territory. See id. Malaysia takes a more draconian approach, excluding from the scope of its laws the application of any arbitration held under the UNCITRAL Rules and the Rules of the Regional Centre for Arbitration at Kuala Lumpur. Id. at 27–28.
\item \textsuperscript{301} See, e.g., Drahozal, An Economic Approach, supra note 230, at 458.
\item \textsuperscript{302} Gharavi, supra note 268, at 24.
\item \textsuperscript{303} Id. at 29 (footnote omitted).
\end{itemize}
of international commercial arbitration.\textsuperscript{305} Article 34 of the UNCITRAL Model Law, entitled "Application for Setting Aside as Exclusive Recourse Against Arbitral Award," contains exhaustive annulment grounds.\textsuperscript{306} These track the list of grounds for non-enforcement of awards contained in Article V of the New York Convention.\textsuperscript{307} Approximately fifty countries have adopted the Model Law as part of their national arbitration legislation.\textsuperscript{308} However, only a third of these countries whose arbitration laws have been inspired by the Model Law have faithfully adopted Article 34's annulment grounds.\textsuperscript{309} Some countries, including England and Australia, actually provide for a significant opportunity to obtain judicial review of the substantive reasoning of a non-domestic award.\textsuperscript{310} Furthermore, national laws in such countries as Brazil, England, China, South Africa, and Egypt contain additional grounds on which awards can be vacated.\textsuperscript{311} On the other hand, laws in such countries as France, Belgium, and Sweden contain less rigorous annulment grounds than that of the Model Law.\textsuperscript{312} These divergent approaches limit uniformity and reduce certainty in international commercial arbitration. While international business might benefit from a new convention that would cover global annulment standards and complement the New York Convention,\textsuperscript{313} it remains uncertain whether there is enough support for such an endeavor.

\textsuperscript{306} UNCITRAL MODEL LAW ON INT’L COMMERCIAL ARB. art. 34; Gharavi, supra note 268, at 30–31.
\textsuperscript{307} See supra Part D.1.
\textsuperscript{309} Gharavi, supra note 268, at 32–33. The counties that have faithfully adopted Article 34's provisions include Bahrain, Belarus, Bermuda, Bulgaria, Canada, Hungary, Germany, Mexico, Nepal, Peru, Russia, Scotland, and Ukraine. \textit{Id}.
\textsuperscript{310} \textit{Id}. at 33–35; see also Gaitis, supra note 246, at 62.
\textsuperscript{311} Gharavi, supra note 268, at 36–39.
\textsuperscript{312} Id. at 41–42.
\textsuperscript{313} See U.N. COMM’N ON INT’L TRADE LAW (UNCITRAL), supra note 57, at 45.
3. Enforcement of Arbitral Awards in the United States

Chapter 2 of the FAA implements the New York Convention in U.S. courts.\(^{314}\) The implementing legislation was enacted to encourage arbitration of disputes arising out of transactions by American business in foreign countries\(^{315}\) and to unify standards by which agreements to arbitrate are observed and arbitral awards are enforced.\(^{316}\) Section 203 of the FAA grants U.S. district courts subject matter jurisdiction in any action "falling under the Convention"\(^{317}\) and section 205 provides for removal to federal court where the "subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention."\(^{318}\) In addition, for venue purposes, section 204 provides that an action to enforce an award falling under the Convention can be brought in any U.S. district court where the parties' dispute could originally have been litigated or where the parties agreed that arbitration could occur.\(^{319}\) Section 204 appears to strip venue from enforcement actions for arbitrations conducted abroad where the underlying dispute would not have been subject to U.S. jurisdiction.\(^{320}\) However, the general rule that FAA venue provisions are to be interpreted as permissive, not mandatory,\(^{321}\) permits reliance in enforcement actions on other venue statutes, such as the Alien Venue Act, the Foreign Sovereign Immunities Act, and 28 U.S.C. § 1391(a)-(c), the general venue statute.\(^{322}\)

Section 207 of the FAA governs the enforcement and recognition in U.S. courts of arbitral awards which satisfy the jurisdictional requirements of the New York Convention. This section provides:


\(^{319}\) Id. § 204.

\(^{320}\) BORN, supra note 46, at 884.


\(^{322}\) BORN, supra note 46, at 884 (citing 28 U.S.C. § 1391).
Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

Thus, section 207 imposes an obligation to enforce arbitral awards, subject to the limited defenses set forth in Article V of the New York Convention, and forbids application of any other, non-Convention bases for non-enforcement. In addition, under Article VI of the New York Convention, U.S. courts can refuse to enforce a Convention award when it is simultaneously subject to annulment proceedings.

a. Potential procedural issues with enforcement in U.S. courts

i. Personal jurisdiction

Courts in the United States have generally been highly receptive to the enforcement of foreign arbitral awards under the New York Convention. The grounds set forth in Article V of the Convention have been held to be exclusive defenses to enforcement. Despite this fact, recent court decisions have declined to enforce awards

323. 9 U.S.C. § 207 (emphasis added).
325. New York Convention, supra note 7, art. VI, 21 U.S.T. at 2520, 330 U.N.T.S. at 42 (“If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.”).
based on lack of personal jurisdiction. Courts that have addressed
the issue have held that in order for an arbitral award to be enforced,
the Due Process Clause requires the enforcing court to have either
personal jurisdiction over the award debtor or quasi in rem
jurisdiction over his property. The Fourth and Ninth Circuits have
expressed differing views over the showing required to establish
quasi in rem jurisdiction based on the award debtor’s property. In
Base Metal Trading, Ltd. v. OJSC “Novokuznetsky Aluminum
Factory,” the Fourth Circuit held that “when the property which
serves as the basis for jurisdiction is completely unrelated to the
plaintiff’s cause of action, the presence of property alone will not
support jurisdiction.” Conversely, in Glencore Grain Rotterdam
B.V. v. Shivnath Rai Harnarain Co., the Ninth Circuit stated, albeit
in dictum, that quasi in rem jurisdiction is proper over an award
debtor’s property in the forum, regardless of whether the property is
related to the controversy. The Ninth Circuit correctly recognized that “(1) neither the
Convention nor its implementing legislation expressly requires
personal jurisdiction . . . and (2) lack of personal jurisdiction over the
defendant in the state where enforcement is sought is not among the
Convention’s seven defenses to recognition and enforcement of a
foreign arbitration award.” Nevertheless, the Convention did not
abrogate the Due Process requirement that the court obtain personal
jurisdiction over the defendant or quasi in rem jurisdiction over his
property. At first blush, it would seem that the Fourth Circuit’s
approach to quasi in rem jurisdiction in the enforcement of a foreign

328. E.g., Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114,
1128 (9th Cir. 2002); Base Metal Trading, Ltd. v. OJSC “Novokuznetsky Aluminum Factory,”
283 F.3d 208, 211 (4th Cir. 2002).
329. U.S. CONST. amend. V.
330. See, e.g., Glencore Grain, 284 F.3d at 1122; Base Metal Trading, 283 F.3d at 212–13;
331. 283 F.3d at 213.
332. 284 F.3d at 1127.
333. Id. at 1121.
334. Id. at 1121–22; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE
UNITED STATES § 487 cmt. c (1987) (“An arbitral award is ordinarily enforced by confirmation in
a judgment . . . . As in respect to judgments . . . an action to enforce a foreign arbitral award
requires jurisdiction over the award debtor or his property.”).
arbitral award conforms more closely to the Supreme Court’s seminal decision in *Shaffer v. Heitner.* In *Shaffer*, the Supreme Court extended the Due Process requirement that a “defendant . . . have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’” to in rem and quasi in rem actions. Relying on *Shaffer*, the Fourth Circuit declined to exercise quasi in rem jurisdiction in an action to enforce a foreign arbitral award where property in the forum did not satisfy the minimum contacts standards. This holding conforms to the requirement of a connection between the award debtor, or his property, and the place of enforcement in actions to enforce foreign arbitral awards in many other countries, including China, Japan, England, and Switzerland.

Nonetheless, while a goal of the New York Convention is global uniformity in enforcing awards, the Fourth Circuit overlooked a crucial distinction noted by the Supreme Court between actions on the merits and enforcement proceedings in the United States. In a footnote, the *Shaffer* Court indicated that there may be an exception to the minimum contacts requirement in enforcement actions:

> Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter.

Though this footnote touched on the enforcement of sister state judgments under the Full Faith and Credit Clause of the Constitution, there is a valid argument that this rationale should apply with equal force to arbitral awards and judgments rendered in foreign

---

countries. Until the issue is flushed out by other courts, however, there appears to be a split in authority.

ii. Forum non conveniens

Unlike jurisdiction, a convenient forum is not a requirement under the Due Process Clause of the Constitution. Nevertheless, in *Monegasque de Reassurances S.A.M. v. NAK Naftogaz of Ukraine*, the Second Circuit affirmed the district court’s dismissal of an action to confirm and enforce a foreign arbitral award on the grounds of forum non conveniens. In this case, the claimant filed a petition in the United States District Court for the Southern District of New York seeking enforcement of a multi-million dollar arbitration award rendered in Moscow. In the petition, claimant also sought confirmation and judgment against the State of Ukraine, contending that the country was liable as an “alter ego” of the pipeline company respondent. Rejecting the claimant’s contention that forum non conveniens did not apply because it was not among the exclusive defenses enumerated in Article V of the New York Convention, the Second Circuit relied on Article III of the Convention, which requires contracting states to “recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the

---

341. *Defenses to Enforcement, supra* note 326, at 418.
342. In *Dardana Ltd. v. A.O. Juganskneftegaz*, a case dealing with the same quasi in rem jurisdiction issues raised in *Glencore Grain and Base Metal Trading*, the Second Circuit remanded the case to the district court to consider “whether a party seeking to enforce a foreign arbitral award under the [New York] Convention must establish a basis for exercising personal jurisdiction over the other party, or the property of that party, against whom enforcement is sought;” and whether “the presence of property alone can supply the jurisdictional basis in an action to enforce arbitral awards under the Convention or under state law.” 317 F.3d 202, 206, 208 (2d Cir. 2003) (footnote omitted). Some commentators have suggested that this remand was a tacit acceptance that the presence of the debtor’s property, without anything more, could be sufficient to exercise jurisdiction over the debtor in an action to enforce a foreign award. *Defenses to Enforcement, supra* note 326, at 418 n.44. However, the case settled before the district court could make any determination. *Id.* at 409 n.9.
343. *Defenses to Enforcement, supra* note 326, at 427.
344. 311 F.3d 488 (2d Cir. 2002).
345. *Id.* at 501.
346. *Id.* at 491–92.
347. *Id.* at 492.
348. *Id.* at 496–97.
territory where the award is relied upon, under the conditions laid down in the following articles.349

The Second Circuit’s reasoning, however, is flawed. First, without any analysis, the court quickly concluded that Article V’s exclusive defenses to enforcement are substantive, rather than procedural.350 This interpretation permitted the court to find that there were no procedural restrictions in the text of the Convention that prevented the procedural doctrine of forum non conveniens from being applied in Convention cases.351 However, without analyzing each of the defenses, this seems like a hasty decision. While some of the grounds for non-enforcement in Article V may have substantive components, most are purely procedural in nature,352 and none of them allow for a substantive review on the merits. In addition, the court’s holding that Article V does not set forth the only grounds for refusing to enforce a foreign arbitral award is inconsistent with the language of section 207 of the FAA.353 Finally, applying the doctrine of forum non conveniens flouts the central purpose of the New York Convention: “to unify the standards by which . . . arbitral awards are enforced in the signatory countries.”354 While forum non conveniens may have been correctly applied to the dismissal of the State of Ukraine in that it was a non-party to the original arbitration, the Second Circuit’s approval of its use in Convention enforcement actions is misguided.355 Courts should refrain from using this doctrine in future enforcement actions subject to the New York Convention.

b. Enforcement of vacated arbitral awards

Over the past several years, a handful of enforcement actions in federal courts have raised a controversial question: when, if ever,
should a U.S. court enforce an international arbitral award that has been vacated in the arbitral situs? The few courts that have addressed the issue have not uniformly clarified the extent to which annulment abroad supports a refusal to recognize or enforce a foreign arbitral award.

In Chromalloy Aeroservices v. Arab Republic of Egypt, the most widely discussed and notorious of these decisions, the U.S. District Court for the District of Columbia enforced an arbitral award that had been rendered and subsequently vacated in Egypt. Focusing on the language of Article V(1)(e) of the New York Convention, the court determined that it had discretion to enforce an annulled award. In enforcing the award, the court relied on Article VII of the Convention, which notes that the Convention "shall not . . . deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law . . . of the country where such award is sought to be relied upon." The court interpreted this language to mean that chapter 1 of the FAA gave Chromalloy a means to enforce the award and, therefore, enforcement could only be refused if the court determined that one of the exceptions in 9 U.S.C. § 10(a) applied or that there was evidence of "manifest disregard of the law" on the part of the arbitrators. Finally, the court noted that even though the arbitration clause in the contract between the parties stated that any award "cannot be made subject to any appeal or other recourse," an


358. 939 F. Supp. 907.

359. Id. at 911.

360. Id. at 909. Article V(1)(e) states that "Recognition and enforcement of the award may be refused . . . [upon] proof that . . . [the award has . . . been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." New York Convention, supra note 7, arts. V(1), V(1)(e), 21 U.S.T. at 2520, 330 U.N.T.S. at 40, 42 (emphasis added).


Egyptian court still took jurisdiction over the annulment proceedings and vacated the award.\textsuperscript{364} Remarking that there was strong U.S. public policy to recognize binding arbitration clauses, the court stated that recognizing the decision of the Egyptian court would violate this policy.\textsuperscript{365}

Other U.S. courts that have considered the issue have distinguished \textit{Chromalloy}, but have left unanswered whether enforcement of annulled awards remains discretionary or forbidden in U.S. courts. In \textit{Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.},\textsuperscript{366} the Second Circuit rejected the conclusion reached in \textit{Chromalloy} that Article VII allows domestic law to govern enforcement proceedings of awards vacated in other countries.\textsuperscript{367} However, citing \textit{Chromalloy}, the \textit{Baker Marine} court suggested that the enforcing court has discretionary power to enforce annulled awards upon the showing of an "adequate reason."\textsuperscript{368} In \textit{Spier v. Calzaturificio Tecnica, S.p.A.},\textsuperscript{369} the Southern District of New York also distinguished \textit{Chromalloy}, but noted that there was no "adequate reason" for refusing to recognize the award, which was rendered in Italy.\textsuperscript{370} Even more recently, in the same forum where \textit{Chromalloy} was decided, the District Court for the District of Columbia was even more direct, stating that "a rule that a U.S. court \textit{must} dismiss a case because a foreign court nullified an arbitral award would violate the New York Convention provision [in Article V(1)(e)]."\textsuperscript{371}

\begin{footnotes}
\textsuperscript{364} \textit{Id.} at 912.
\textsuperscript{365} \textit{Id.} at 913.
\textsuperscript{366} 191 F.3d 194 (2d Cir. 1999).
\textsuperscript{367} \textit{Id.} at 196–97. In a footnote, the court stated:

Furthermore, as a practical matter, mechanical application of domestic arbitral law to foreign awards under the Convention would seriously undermine finality and regularly produce conflicting judgments. If a party whose arbitration award has been vacated at the site of the award can automatically obtain enforcement of the awards under the domestic laws of other nations, a losing party will have every reason to pursue its adversary "with enforcement actions from country to country until a court is found, if any, which grants the enforcement."

\textit{Id.} at 197 n.2 (quoting ALBERT JAN VAN DEN BERG, \textsc{The New York Convention of 1958: Towards a Uniform Judicial Interpretation} 355 (1981)).
\textsuperscript{368} \textit{Id.} at 197 & n.3.
\textsuperscript{369} 71 F. Supp. 2d 279 (S.D.N.Y. 1999).
\textsuperscript{370} \textit{Id.} at 287–88.
\end{footnotes}
Commentators have clashed over whether U.S. courts should be able to enforce arbitral awards annulled in foreign territories.\textsuperscript{372} The United States is one of only a few countries whose courts have enforced annulled arbitral awards.\textsuperscript{373} While the seemingly permissive language of Article V of the New York Convention does suggest the possibility of enforcing annulled awards, international comity would best be served by limiting such enforcement to rare occurrences. For example, if the courts in the arbitral situs annul an award based on grounds analogous to those in Article V(1)(a)-(d) of the New York Convention, this should be given great weight by courts of the place of enforcement.\textsuperscript{374} United States courts should only consider enforcement of vacated awards when the annulment is either based on a very minor procedural technicality that fails to rise to the standards of annulment under U.S. law\textsuperscript{375} or is the product of bias, corruption, a denial of due process, or a violation of public policy that jeopardizes a vital public interest.\textsuperscript{376} To hold otherwise and expand the scope of this delicate issue could lead to such consequences as a lack of international coordination and

\textsuperscript{372} For example, Christopher Drahozal supports an “economic approach” to the enforcement of vacated awards that would permit parties to resolve the question with a contractual clause, such as, “The arbitral award may be enforced even if set aside by a competent authority in the country in which the award was made.” Drahozal, An Economic Approach, supra note 230, at 478. William Park suggests that a court should decline to enforce a vacated award unless the vacating court decision was “procedurally unfair or contrary to fundamental notions of justice.” William W. Park, Duty and Discretion in International Arbitration, 93 Am. J. Int’l L. 805, 813 (1999). Jan Paulsson suggests that courts should only enforce an annulled award if the basis for annulment was not one recognized in international practice or was based on “an intolerable criterion.” U.N. Comm’n on Int’l Trade Law (UNCITRAL), supra note 57, at 25. Conversely, Hamid Gharavi notes that while the practice of enforcing annulled awards may have some validity, its negative consequences are drastic, “generat[ing] an instability prejudicial to international commercial arbitration and deal[ing] a serious blow to the reputation and development of this international dispute settlement mechanism.” Gharavi, supra note 268, at 119, 138.

\textsuperscript{373} Gharavi, supra note 268, at 77. Courts in France, Belgium, and Austria have also enforced annulled awards. See id. at 78–92. It is well established that “[a]n arbitration award vacated by the arbitral situs can nonetheless be enforced in France if it satisfies French standards for enforcing awards.” Drahozal, An Economic Approach, supra note 230, at 462.

\textsuperscript{374} Webster, supra note 95, at 225.

\textsuperscript{375} See id.

\textsuperscript{376} Davis, supra note 20, at 85. While the Chromalloy court recognized enforcing arbitration agreements as a significant policy interest, 939 F. Supp. 907, 913 (D.D.C. 1996), in reality, “the policy to enforce arbitration agreements and awards does not implicate such vital national concerns that it should trump a foreign annulment judgment.” Davis, supra note 20, at 85.
harmonization, the emergence of biased enforcement decisions, or a violation of the will of the parties.\textsuperscript{377}

4. Enforcement of Arbitral Awards in Foreign Courts

The drafters of the New York Convention intended for the defenses to recognition and enforcement of arbitral awards to be applied restrictively.\textsuperscript{378} Article 36 of the UNCITRAL Model Law, containing the same defenses to enforcement as Article V of the Convention, recognizes the drafters' intent.\textsuperscript{379} Most national courts have recognized that the grounds for refusal for enforcement must be construed narrowly.\textsuperscript{380} However, while there may be a "pro-enforcement bias" in the United States and most developed countries, courts in some states "play the game less fairly than others," by interpreting the "public policy" exception of Article V(2)(b) broadly and by remaining suspicious of international arbitration.\textsuperscript{381}

National courts in England are very reluctant to refuse to enforce a foreign arbitral award on the grounds of public policy, although there are rare exceptions.\textsuperscript{382} Likewise, national courts in such countries as Switzerland, Luxembourg, South Korea, Malaysia, Singapore, Italy, and Germany have taken a narrow approach to the public policy exception to deny recognition to an international arbitral award.\textsuperscript{383} In contrast, courts in Russia and Turkey have allowed the public policy defense in circumstances which seem unjustified.\textsuperscript{384} In China, the public policy defense may be used to protect what some may regard as purely local interests.\textsuperscript{385}

\begin{thebibliography}{9}
\bibitem{377} Gharavi, supra note 268, at 119.
\bibitem{379} UNCITRAL Model Law on Int'l Commercial Arb. art. 36 (1985).
\bibitem{380} Redfern et al., supra note 378, at 445 & n.69.
\bibitem{381} Id. at 445-46.
\bibitem{382} Id. at 456 (citing Soleimany v. Soleimany, [1999] Q.B. 785, 800).
\bibitem{383} Born, supra note 46, at 824-25. There are a few instances where courts of developed nations have refused enforcement based on public policy, but usually they do so on due process grounds. Id. at 825-26.
\bibitem{384} See Redfern et al., supra note 378, at 459; William A. Isaacson, Enforcement Difficulties Are Increasing, Nat'l L.J., Oct. 7, 2002, at B9. In Russia, for example, one judge refused to enforce an award against a Russian defendant because a portion of the money was expected to come from the public purse. Id.
\bibitem{385} Redfern et al., supra note 378, at 459; see also Tao, Arbitration in China, supra note 126, at 49 ("Foreign perceptions of the enforcement of arbitration awards in the PRC are often filled with frustration and cynicism if not downright hopelessness. The institutional weaknesses
Furthermore, legislation in Pakistan allows its national courts to deem arbitral awards rendered in foreign territories as domestic, if the substantive law applied was that of Pakistan. This directly conflicts with the purpose of the New York Convention. Ultimately, when the losing party has assets located in different countries, differing interpretations of the New York Convention's enforcement regime may lead to forum shopping.

While this is not necessarily a major drawback, the interests of the international business sector would best be served by global uniformity of enforcement standards. Until developing nations begin to have greater faith in the arbitral system and less bias in favor of their nationals (especially when they are the losing party), international businesses should "take every precaution to mitigate risk associated with an uncertain . . . legal environment."

E. State International Arbitration Statutes

Over the past two decades, many states have enacted international arbitration statutes as an attempt to bring international commercial arbitration business to their territory. Several of these states, including California, Texas, Connecticut, North Carolina, Ohio, and Oregon, have modeled their statutes after the UNCITRAL Model Law, under the (perhaps mistaken) assumption that foreign parties will be familiar with its application. In addition, other
states, such as Maryland, Georgia, and Colorado, do not go so far and have merely added provisions governing international arbitrations to their domestic state arbitration statutes. In fact, Maryland has simply incorporated the FAA to serve as the legal framework governing international arbitrations within its territory. Finally, Florida and Hawaii have each taken an ad hoc approach to legislation regarding international arbitration, drawing on diverse and unique sources.

Commentators have noted that state laws governing international arbitrations could suffer from preemption at the hands of the FAA. While their analysis has differed, there has been some agreement among these commentators that state international arbitration statutes might be given special weight when the parties’ arbitration agreement contains a choice of law clause. Based on the U.S. Supreme Court’s decisions in Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University and Mastrobuono v. Shearson Lehman Hutton, Inc., commentators have suggested that parties who are interested in having a state

It is the policy of the Legislative Assembly to encourage the use of arbitration and conciliation to resolve disputes arising out of international relationships and to assure access to the courts of this state for legal proceedings ancillary to or otherwise in aid of such arbitration and conciliation and to encourage the participation and use of Oregon facilities and resources to carry out the purposes of [the Oregon International Commercial Arbitration Act].

OR. REV. STAT. § 36.452(1).

392. Purcell, supra note 390, at 530; see, e.g., COLO. REV. STAT. §§ 13-22-501 to -507 (2006); GA. CODE ANN. §§ 9-9-1 to -43 (1982); MD. CODE ANN.,CTS. & JUD. PROC. §§ 3-2B-01 to -09 (LexisNexis 2006).

393. MD. CODE ANN.,CTS. & JUD. PROC. § 3-2B-03(a) (“In all matters relating to the process and enforcement of international commercial arbitration and awards, the laws of Maryland shall be the arbitration statutes and laws of the United States.”).

394. Purcell, supra note 390, at 531; see, e.g., FLA. STAT. §§ 684.01–.35 (2006); HAW. REV. STAT. §§ 658-D-1 to -9 (1993).


396. Besson, supra note 395, at 241–42; Zeft, supra note 395, at 790–92; Purcell, supra note 390, at 540–41.


international arbitration law govern their dispute should include a choice of law clause that expressly reveals their intentions to have such a state law provision apply instead of the FAA.\textsuperscript{399}

Ultimately, though, these state laws have had little effect on the international arbitration community. Because of the “well-established national interest to speak with one voice on the international scene,” international arbitration in the United States would best be served through FAA reform.\textsuperscript{400} The time has come for Congress to implement a comprehensive national scheme for international arbitration, beyond the simple legislation implementing the enforcement of awards under the New York and Panama Conventions.\textsuperscript{401} This would eliminate any ongoing confusion regarding preemption issues with the FAA and state international arbitration statutes and provide foreign parties with a better understanding in advance what legal regime will govern their arbitration in the United States.\textsuperscript{402}

\textbf{F. Alternatives to International Commercial Arbitration: Mediation, Conciliation, and Other Mechanisms}

Arbitration may be the mechanism of choice for the resolution of international business disputes, but in recent years, alternative methods of dispute resolution have begun to gain prominence.\textsuperscript{403} Still, while ADR techniques such as mediation are thoroughly established and accepted within the United States,\textsuperscript{404} they are relatively new phenomena for resolving international commercial

\textsuperscript{399} Zeft, supra note 395, at 791–92. In order to conform with the requirements of \textit{Mastrobuono}, the choice of law clause must be clear and unequivocal that state arbitration law applies. Besson, supra note 395, at 242.

\textsuperscript{400} Besson, supra note 395, at 225 (internal quotation marks omitted) (quoting \textit{BORN}, supra note 46, at 227–28); cf. United States v. Belmont, 301 U.S. 324, 331 (1937) (“In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear.”).

\textsuperscript{401} For a comprehensive analysis on how the FAA might be reformed, see Park, \textit{The Case for FAA Reform}, supra note 276.

\textsuperscript{402} Besson, supra note 395, at 245.

\textsuperscript{403} \textit{BOHRING-UHLE ET AL.}, supra note 1, at 169. In certain regions of the world, some forms of ADR have been part of the culture for generations. \textit{Id.} In particular, many Asian countries, most notably China, have a longstanding tradition of using conciliation to resolve disputes. \textit{Id.} at 169–70. This is deeply rooted in Confucian philosophy and its emphasis on social harmony. \textit{Id.} at 178.

This could be due to the fact that many lawyers from civil law jurisdictions in continental Europe lack familiarity with ADR.\textsuperscript{406}

However, the European community has begun to recognize the vital importance that ADR can have on international business relations. In October 2004, the European Commission ("EC") released the "Proposal for a Directive of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters"\textsuperscript{407} ("Proposed EU Directive") in an attempt to establish common rules throughout the European Union ("EU") for mediation and its relationship with judicial proceedings.\textsuperscript{408} The Proposed EU Directive gives member states until September 2007 to enact domestic laws that comply with its terms.\textsuperscript{409} Thus, should member states adopt the Proposed EU Directive through implementing legislation, what will result is a uniform, predictable framework for recourse to mediation in Europe.\textsuperscript{410} This will likely raise the profile of mediation in continental Europe, which could lead to its increased use, as well as the proliferation of other ADR processes in international business disputes.\textsuperscript{411}

While mediation and conciliation are the most commonly used forms of ADR globally, there are a variety of alternative techniques appropriate for international commercial disputes, including Med-Arb and mini-trial. And, despite differences in form and structure, ADR mechanisms share common advantages and disadvantages. One major advantage of ADR over international arbitration is its inherently low transaction costs.\textsuperscript{412} ADR procedures are not only much shorter in duration than arbitration, but they are significantly

\textsuperscript{405} BÜHRING-UHLE ET AL., supra note 1, at 169.

\textsuperscript{406} Cairns, supra note 404, at 64.


\textsuperscript{408} Cairns, supra note 404, at 64.

\textsuperscript{409} Proposed EU Directive, supra note 407, art. 9, at 12.

\textsuperscript{410} Cairns, supra note 404, at 66.

\textsuperscript{411} See id. at 64.

\textsuperscript{412} BÜHRING-UHLE ET AL., supra note 1, at 206.
less expensive. In addition, ADR methods provide parties with considerable autonomy to tailor the processes to the dispute, thus allowing for a less adversarial atmosphere and the potential to devise creative remedies. To this end, due to the voluntary nature of these processes, if the parties do not agree on a decision, none will be imposed. Furthermore, the settlement-based nature of ADR lends itself to confidentiality; indeed, in most ADR sessions, the parties will stipulate to rules of confidentiality before discussing anything substantive.

The most significant advantages of non-arbitral ADR techniques are in the results, as they can lead to more effective solutions to disputes and preserve relationships between antagonistic parties. For instance, negotiated settlements have a much greater potential to accurately reflect the specific interests of the parties, as opposed to judge- or arbitrator-rendered awards. Moreover, since ADR procedures are often best utilized at the beginning of a dispute, they can prevent the dispute from “taking on a life of its own” and can lead to amicable solutions that actually improve relations between the parties.

Though ADR is premised on voluntary participation and party autonomy, it does have disadvantages. One weakness is that ADR mechanisms lack a coherent legal framework for ensuring the enforceability of results. There is no analogue to the New York Convention for mediation and other ADR processes. Thus, “alternative procedures are subject to the full range of legal problems arising out of the multiplicity of legal systems that affect international trade.”

413. Id. For example, “a typical business mediation will last between one and three days, compared to an average duration of international arbitration proceedings of more than two years.” Id.
414. See id. at 174–75; see also Barker, supra note 8, at 9–10 (noting several advantages of international commercial mediation).
416. Id.
417. BÜHRING-UHLE ET AL., supra note 1, at 206–07.
418. Id. at 206.
419. Id. at 207.
420. Id.
421. Id. at 224. If the Proposed EU Directive turns out to be a success, it could be the step in the right direction towards unifying international ADR standards.
an impasse and antagonistic feelings worsen, getting the parties to even participate in ADR can be difficult. Nevertheless, in today’s international legal climate, where costs can be exorbitant and protracted litigation can put a damper on the growth of international trade, the benefits of ADR greatly outweigh any drawbacks.

1. International Mediation and Conciliation

Mediation and conciliation are very similar, yet somewhat distinguishable mechanisms. While there is no universally accepted definition of mediation, it can faithfully be described as a process whereby a neutral third party mediator helps disputing parties negotiate a settlement agreement “by employing various techniques designed to elicit essential facts, to ascertain the respective positions and concerns of the disputants, and to fashion a basis upon which the parties may continue their relationship to mutual advantage.” In this informal setting, the mediator provides an impartial viewpoint to facilitate communications between the parties, and does not herself make a decision or impose an award. By contrast, conciliation is a more formal and structured process, whereby a neutral third party conciliator may even hear evidence, discuss settlement options with the parties, and prepare written recommendations. In addition, a conciliator in an international dispute may also engage in preliminary fact-finding, something not done by a mediator. Despite these relatively minor differences between mediation and conciliation, the remainder of this article will refer to the terms synonymously.

Over the past decade, mediation has become a major force in resolving international commercial disputes. However, while many international commercial contracts have multi-tiered dispute resolution clauses, most of these clauses provide for a period of “friendly consultation” or “good faith negotiation” prior to

422. Id. at 229. It is unsettled whether an obligation to participate in ADR is enforceable, as few courts have dealt with the issue. Id. at 230.
423. COE, supra note 37, at 35.
424. Barker, supra note 8, at 10–11; Dress, supra note 415, at 573.
426. Dress, supra note 415, at 574.
arbitration, rather than mediation. Nevertheless, international arbitration institutions throughout the world recognize that mediation is a vital component of international dispute resolution and have developed rules in an attempt to attract parties to utilize their ADR services. Thus, like international arbitration, international mediation can be conducted on an institutional or ad hoc basis.

Each of the three major arbitration institutions have promulgated specific rules governing international ADR. In 2001, the ICC issued its ADR Rules, which "offer a framework for the amicable settlement of commercial disputes with the assistance of a neutral." The ICC's ADR Rules permit parties to agree upon whatever settlement technique they feel is appropriate to resolve their dispute. In the absence of an agreement, mediation is the default method of resolution. Like the ICC, both the AAA and the LCIA also administer international mediation. However, as opposed to the ICC, their rules are expressly limited to mediation services.

Unlike institutional mediation, in ad hoc mediation, the parties define the organization and structure of the proceedings. Many parties choose to utilize International Conciliation Rules promulgated by UNCITRAL in 1980 in conducting their non-administered mediation or conciliation. The UNCITRAL Conciliation Rules have served as a model for many institutional rules and have greatly influenced modern international conciliation and mediation procedures. Noticing the increased use of mediation to resolve international business disputes, in 2002, UNCITRAL

---

428. See TOWARDS A SCIENCE, supra note 24, at 59–60.
429. Helmer, supra note 4, at 48.
431. Id.
434. INT’L TRADE CTR., supra note 74, at 39.
436. See Slate et al., UNCITRAL, supra note 142, at 94.
437. Id.
drafted a Model Law on International Commercial Conciliation ("Model Conciliation Law")\(^{438}\) to serve as a template for lawmakers in national governments to consider adopting as part of their domestic legislation.\(^{439}\) Since the Model Conciliation Law was drafted, however, only Canada, Croatia, Hungary, and Nicaragua have enacted legislation based upon it.\(^{440}\) In addition, Illinois, Iowa, Nebraska, New Jersey, Ohio, and Washington have incorporated legislation based on the Model Conciliation Law into their respective codes.\(^{441}\) Ultimately, in order for international mediation and conciliation to begin to reach the level of acceptance and familiarity that international arbitration has attained, more countries need to adopt legislation based on the Model Conciliation Law. One author notes:

As the burgeoning Internet world continues to expand, and countries' borders continue to become less significant obstacles to effective international commercial transactions, the implementation of an International Model [Conciliation] Law to guide the settlement of disputes will reassure the disputing parties and might ultimately reaffirm their confidence in participating within the sphere of international trade.\(^{442}\)

The typical international mediation begins with the introduction of the mediator and the parties, during which the mediator will explain the goals and structure of the mediation and discuss the role of confidentiality in the proceeding.\(^{443}\) Thereafter, each party makes an opening statement which may include, among other things, pertinent facts, legal theories, and assessments of liability and damages.\(^{444}\) Next, the mediator often provides a summary of the essential points raised by the parties and then helps the parties


\(^{439}\) Slate et al., UNCITRAL, supra note 142, at 95.


\(^{441}\) Id.

\(^{442}\) Slate et al., UNCITRAL, supra note 142, at 96–97.

\(^{443}\) Barker, supra note 8, at 13.

\(^{444}\) Id.
develop an agenda for the mediation.\textsuperscript{445} The negotiation process usually begins with an open session including both parties, but if this becomes unproductive, the mediator will adjourn to hold private "caucuses" with each party individually.\textsuperscript{446} Caucuses allow parties to be candid with the mediator. Thus, the mediator gains a more coherent perspective of the dispute and the parties' realistic goals and expectations.\textsuperscript{447} Caucuses often result in a settlement between the parties, but if no agreement can be reached, the entire process likely will have provided guidelines and expectations for future negotiations.\textsuperscript{448}

In international mediation, parties likely come from different cultural backgrounds. Therefore, a strong potential for miscommunications during the mediation may exist due to major cross-cultural differences.\textsuperscript{449} Miscommunications of this variety are often the leading reason why international negotiations fail.\textsuperscript{450} Thus, both the parties and the mediator need to be sensitive to cultural differences and their effect on the communication process during the mediation. One key to minimizing miscommunications is to hire excellent interpreters for the mediation.\textsuperscript{451} Likewise, mediators should consider "put[ting] the cultural card on the table" during the introduction and opening statements, pointing out to the parties that they should be conscious of cultural differences in their approaches to problems.\textsuperscript{452} Alternatively, mediators should consider other techniques, such as keeping the cultural issues in mind and bringing them up as a method of breaking a "log-jam" between the parties, or using the culture factor as an "ice-breaker" that each side can laugh about, so to help ease tension between the parties and build rapport.\textsuperscript{453}

\begin{itemize}
\item \textsuperscript{445} Id.
\item \textsuperscript{446} Id. at 13–14.
\item \textsuperscript{447} Id.
\item \textsuperscript{448} Id. at 14–15.
\item \textsuperscript{449} Id. at 18. "Cross-cultural miscommunication occurs when an individual from one culture misinterprets the message that an individual from another culture intended." Id.
\item \textsuperscript{450} Id. at 19.
\item \textsuperscript{451} Posin, supra note 427, at 471.
\item \textsuperscript{452} Id.
\item \textsuperscript{453} Id. at 472.
\end{itemize}
2. Other Methods of ADR

Beyond mediation and conciliation, other non-arbitral ADR mechanisms have developed as effective means of settling disputes between parties. While there are many methods that may be utilized in the international setting, this section will focus on two noteworthy techniques: mini-trial and med-arb.

a. Mini-trial

A mini-trial is not really a trial in the adjudicative sense, but is rather a "predictive process designed to narrow the differences between the parties' perceptions of their chances in litigation and to bring high-level decisionmakers together for constructive settlement negotiations."454 In this procedure, the parties' counsel first exchange legal memoranda and exhibits, and then argue their case before a panel of the parties' executives, who carry authority to resolve and settle the dispute.455 These representatives may be assisted by a third party "neutral advisor."456 After presentations have been made, the executives, and potentially the third party, will meet for private negotiations, in the hopes of working out a settlement.457

Because of the confidential nature of ADR, it is impossible to know how many international mini-trials have been conducted, but it appears that the concept is slowly gaining acceptance in the international business community.458 This conclusion is supported by the fact that the ICC’s ADR Rules now allow parties to choose mini-trial as a settlement technique to be administered by the institution.459 Ultimately, considering that large international business disputes can produce an enormous volume of documentary evidence, the "condensed and structured information exchange [in a mini-trial] can . . . offer an excellent basis for settlement negotiations between high-level executives."460

454. BÜHRING-UHLE ET AL., supra note 1, at 195.
455. INT'L TRADE CTR., supra note 74, at 42; see also BÜHRING-UHLE ET AL., supra note 1, at 195.
456. INT'L TRADE CTR., supra note 74, at 42.
457. BÜHRING-UHLE ET AL., supra note 1, at 195.
458. Id. at 196.
459. ICC ADR Services, supra note 430.
460. BÜHRING-UHLE ET AL., supra note 1, at 197.
b. Med-arb

Med-arb is an abbreviated term for mediation combined with arbitration.\textsuperscript{461} It is a two-stage process "wherein mediation precedes arbitration," and arbitration is only necessary when mediation fails.\textsuperscript{462} This ADR process is intended to allow disputants to profit from advantages of both mediation and arbitration.\textsuperscript{463} While med-arb has not become a commonplace practice in the international context, it does have adherents in certain regions of the world, such as China and Hong Kong.\textsuperscript{464}

The typical procedure is as follows: first, a third-party neutral uses mediation techniques to try to bring the parties towards resolution.\textsuperscript{465} If unsuccessful, the neutral (or the "med-arbitrator") switches roles and becomes an arbitrator for the next stage of the procedure.\textsuperscript{466} There has been ample criticism of med-arb because it allows the same person to conduct both the mediation and the arbitration.\textsuperscript{467} Due to the confidential nature of mediation and the fact that non-legal (i.e. emotional or private) information may be provided to the mediator during the caucuses, many feel that this system could foster impartiality in the med-arbitrator.\textsuperscript{468}

In recent years, to combat this potential drawback of med-arb, alternative formats of the process have been developed. For example, in "Med-Arb-Opt-Out," each party is entitled to independently call for a different person to be appointed for the arbitration portion of the proceedings after mediation is completed.\textsuperscript{469} Another modified method of med-arb is MEDALOA, short for

\textsuperscript{461} James T. Peter, Med-Arb in International Arbitration, 8 AM. REV. INT'L ARB. 83, 83 (1997).

\textsuperscript{462} COE, supra note 37, at 46.

\textsuperscript{463} Peter, supra note 461, at 88.

\textsuperscript{464} See id. at 106–09.

\textsuperscript{465} Id. at 90 (describing the "original med-arb" process).

\textsuperscript{466} Id.

\textsuperscript{467} See id. at 91. The ICC ADR Rules permits a person who has served as a mediator or conciliator to be appointed as an arbitrator only if all the parties consent in writing. See ICC ADR RULES art. 7.3 (2001). On the other hand, the UNCITRAL Conciliation Rules state that "[t]he parties and the conciliator undertake that the conciliator will not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings." U.N. COMM'N ON INT'L TRADE LAW (UNCITRAL) CONCILIATION RULES art. 19 (1980) (amended 2002).

\textsuperscript{468} See Peter, supra note 461, at 91–94.

\textsuperscript{469} Id. at 98.
Mediation and Last Offer Arbitration.\textsuperscript{470} In this procedure, "[i]f the parties do not settle through agreement, each party \ldots submits a 'final offer' to the med-arbitrator," who, in choosing between one of them, renders a binding arbitration award.\textsuperscript{471}

\textbf{G. Conclusion}

As globalization takes center stage in the current information age, the old adage "all business is local" may no longer have the same bite it once had. With each passing day, more and more businesses are hopping on the gravy train that is international commerce. To that end, the twenty-first century legal community must be poised to address a veritable explosion in the realm of global alternative dispute resolution practices. Hopefully, such economic growth will foster better international relations and lead to an increased level of consistency and faith in these vital problem solving methods.

\textsuperscript{470} Id. at 100.
\textsuperscript{471} Id.