



# Alternative Dispute Resolution (ADR) in International Business Transactions

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Alternative dispute resolution (ADR) is a procedure for settling a dispute by means other than litigation, such as arbitration, mediation, or mini-trial. Although arbitration and mediation are both considered forms of ADR, they are fundamentally different. Arbitration is a procedure that is intended to lead to a legally enforceable remedy resulting from a dispute between two or more parties, whereas mediation is a form of facilitated negotiation that looks beyond rights and allows the parties to focus on their underlying interests. Arbitration leads to a binding determination whereas mediation results in a binding determination only if the parties agree to settle their dispute on mutually satisfactory terms. In the last 30 years, ADR has become a standard part of commercial dispute resolution. It includes arbitration and mediation and other dispute resolution mechanisms, which will not be addressed in this article. To properly serve companies in international commerce, it is incumbent upon in-house counsel and staff to become familiar with arbitration and mediation in the international setting. (For information on the other types of dispute resolution mechanisms, see Hon. George W. Adams, **Mediating Justice: Legal Dispute Negotiations** (CCH Canadian Limited 2003).

## I International Arbitration vs. Litigation

Resolving disputes in existing court systems have their advantages. Judges are mostly independent, filing fees are much less than arbitration fees, and one has the right to appeal. Notwithstanding these and other positive attributes, obtaining a court judgment takes time and requires legal expertise in the jurisdiction where the litigation is filed. In addition, businesses find it increasingly difficult to maintain their working relationships in the midst of a public legal battle. In contrast, the confidential nature of arbitration may take some of the sting out of a public business conflict. The ability to fashion procedural and substantive flexibility such as the selection of the arbitrator(s), the language of the proceedings, and the place of hearings make international arbitration an appealing alternative to litigation, especially where complicated rules of procedure and evidence can be modified or excluded. In addition, the speed of resolution makes arbitration more attractive than using the courts of most, if not all, nations. The extent of the award or type of damages may be contemplated beforehand, which allows parties to draft appropriate arbitration clauses. Carefully drafted arbitration clauses will also likely result in significant control over the way a dispute is decided and how much it will cost to achieve resolution. Finally, enforcing an arbitration award is typically easier than enforcing a civil judgment obtained in another country, which may be the greatest strength of international arbitration. For these and other reasons, investors and corporations have increasingly turned to international commercial arbitration as the preferred international business disputes resolution method.<sup>1</sup>

**Relevant Treaties and Conventions.** No effective international treaty facilitates the

enforcement of foreign court judgments whereas the same is not true with respect to arbitral awards. The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention has been described as “the single most important pillar on which the edifice of international arbitration rests.”<sup>2</sup> Since 142 countries out of the 192 current United Nations member states have adopted this Convention, the majority of international arbitration agreements are within its application.<sup>3</sup> Under the New York Convention, if an arbitration award is issued in any country that is a party to the Convention, every other party to the Convention is legally obligated to enforce the award. Increasing numbers of bilateral investment treaties negotiated between foreign states often include arbitration as a means to resolve disputes between foreign states and private overseas investors.<sup>4</sup>

Article V of the New York Convention lists seven exceptions to the enforcement of an arbitral award. They are:

- (1) one or more of the parties lacked the capacity to enter into the arbitration agreement, or the agreement is not valid under the law of the country where the award was made;
- (2) the party against whom the award is invoked was not given proper notice of the proceeding, the appointment of the arbitrator(s), or was otherwise unable to present its case;
- (3) the award exceeded the scope of the arbitration agreement;
- (4) the composition of the tribunal or its procedure was not in accordance with the agreement of the parties, or in accordance with the law of the country where the arbitration took place;

- (5) the award is not binding on the parties, or has been set aside by a competent authority of the country under the law of which the award was made;
- (6) the laws of the jurisdiction where recognition and enforcement is sought prohibits arbitration involving the subject matter at issue;
- (7) recognition or enforcement of the award would be contrary to the public policy of the country where enforcement is sought.

Although the New York Convention creates for signatory countries a full faith and credit obligation towards foreign arbitral awards, there have been instances where arbitration awards have been disregarded or where local courts have denied enforcement. For example, several US courts, have recognized the common law doctrine of “manifest disregard of the law” as an implied ground for vacating an award. This can occur where US law recognizes common law grounds for challenging an award, which may conflict with the laws of statutory law based countries [See *A Misstep in US Arbitral Law: A Call For Change In The Enforcement Of Nondomestic Arbitral Awards*, by Kristina Morrison, Tort Trial & Insurance Practice Law Journal, Spring – Summer, 2011 (46:3&4)]. Still, the U.S. Supreme Court’s March 2008 decision in *Hall Street Associates LLC v. Mattel, Inc.*<sup>5</sup> held that the Federal Arbitration Act, 9 U.S.C. Sec. 1-16, exclusively determines the scope of judicial review of an arbitral award. The decision effectively nullifies any contractual provision that expands or narrows judicial review of arbitral awards under Title 9.<sup>6</sup> However, it is unclear whether courts are subject to the same limitations as the parties to a contract.

In addition, several Asian jurisdictions have construed the Convention’s “public policy” exception broadly in refusing to enforce a foreign arbitral award. New York Convention signers such as Indonesia, Vietnam, India and Mainland China may be more inclined to refuse enforcement in the face of challenges where local protectionism is at issue. [Enforcement of Foreign Arbitral Awards in Asia, by Dalila Hoover, International Law News, Spring 2012]. Therefore, one may want to carefully consider the jurisdiction responsible for issuing an arbitral award.

In support of the New York Convention, which gives full faith and credit to arbitration awards issued by signatory countries, the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules offers an additional tool to jurisdictions promoting international arbitration. It is a set of rules that is not part of an administrative institution, but rather can be considered as a model code and adopted as is or modified by countries seeking to adopt arbitration rules. The UNCITRAL rules offer a uniform set of procedures that can be adopted as a format upon which parties may agree to conduct arbitral proceedings. They can be used in ad hoc as well as administered arbitrations (many arbitral institutions allow the proceedings to be governed by the UNCITRAL Arbitration Rules). The rules cover all aspects of the arbitral process, including the appointment of arbitrators, conduct of arbitral proceedings, and effect of any award.<sup>7</sup> With the UNCITRAL Arbitration Rules having been adopted in more than 60 countries, in varying degrees, a uniform system of judicial review of awards is developing.<sup>8</sup>

## International Arbitral Institutions

When entering into an arbitration arrangement, one is advised to weigh the options of pursuing an *Ad hoc* arbitration by agreeing to a customized set of arbitration rules and procedures, but without relying on an institution to administer those rules or enforce a decision. Alternatively, one may opt to go through an arbitral institution. In a 2006 survey of general counsels of companies around the world, conducted by Queen Mary University of London and sponsored by Price Waterhouse, 75 %, of the participants responded that they would prefer to arbitrate through an arbitral institution as opposed to an *Ad hoc* arbitration. Among the reasons for this is that institutional arbitration firms offer convenience in overseeing administrative procedures, provide a large pool of qualified neutral arbitrators and offer credibility in the enforcement of judgments.<sup>9</sup>

Arbitral institutions oversee the management of the arbitration proceedings. Services may include the oversight of the arbitrator selection

process, the forum for the hearing, the collection of applicable fees and awards, along with oversight of the proceeding as between the parties or between the parties and the arbitrator(s). Currently, there are three principal global arbitral organizations. They are:

- the International Court of Arbitration affiliated with the International Chamber of Commerce (ICC) at [www.iccwbo.org/court/](http://www.iccwbo.org/court/), with a principal office in Paris France;
- the London Court of International Arbitration (LCIA) at [www.lcia.org/](http://www.lcia.org/), headquartered in London, England;
- and the American Arbitration Association, International Center For Dispute Resolution (ICDR) at [www.adr.org/icdr](http://www.adr.org/icdr), based in New York. [Jan Paulsson, Nigel Rawding, Lucy Reed & Eric Schwartz, *The Freshfields Guide To Arbitration and ADR*, 52 (2d Revised Ed. 1999)]. All three organizations are international in scope and have affiliated offices around the globe.

In addition to the three principal organizations, there are number of regional arbitral institutions, including: the Commercial Arbitration and Mediation Center for the Americas (CAMCA) at [www.adr.org](http://www.adr.org), which is an affiliation of US, Canadian and Mexican arbitration organizations; the Hong Kong International Arbitration Centre (HKIAC) at [www.hkiac.org](http://www.hkiac.org); the Japan Commercial Arbitration Association (JCAA) at [www.jcaa.or.jp/e/index.html](http://www.jcaa.or.jp/e/index.html); the British Columbia International Commercial Arbitration Centre (BCICAC) [bcicac.com](http://bcicac.com), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) at [www.jurisint.org](http://www.jurisint.org), and the China International Economic and Trade Arbitration Commission (CIETAC) at [www.cietac.org](http://www.cietac.org).

There are also other arbitral organizations which service specific trade groups and circumstances. For example, the International Centre For The Settlement of Investment Disputes (ICSID) at [icsid.worldbank.org](http://icsid.worldbank.org), based in Washington DC, and affiliated with the World Bank, provides a forum for the settlement of investment disputes between national governments that are members of the organization and nationals of member countries. The World Intellectual

Property Organization (WIPO) – Arbitration and Mediation Center at [www.wipo.int/amc/en/index.html](http://www.wipo.int/amc/en/index.html), based in Geneva, Switzerland provides alternative dispute resolution services to private parties involved in international intellectual property disputes. Further, the Permanent Court of Arbitration, PCA at [www.pca-cpa.org](http://www.pca-cpa.org), located in The Hague provides a forum for the settlement of disputes among states.

Recently, there has been a significant increase in new arbitration venues, legal regiments and new courts established to enforce arbitral judgments around the world. For example, as of 2010, new arbitration laws were enacted in France, Ireland, Hong Kong, Scotland, and Ghana. Also, Australia, India and Ireland all created courts to oversee international arbitration matters. Further, jurisdictions such as France, the United Kingdom, Switzerland, Sweden and China have all established courts to hear challenges of and petitions to enforce arbitration awards. [New York State Bar Association Task Force on new York Law, *Final Report, International Matters 4* (June 25, 2011)]. On July 28, 2011, the New York State Bar Association's House of Delegates approved a resolution adopting the "Final Report of the New York State Bar Association's Task Force on New York Law, International Matters," which among other recommendations, called for a "dedicated Center for International Arbitration in New York," in order to stay competitive with such jurisdictions as London, France, and Hong Kong [Open Letter from Vincent E. Doyle III, President, New York State Bar Association to (July 28, 2011)].

The leading institution in terms of its international scope, in its absolute number of arbitrations, and its global perspective is the ICC Court. It was founded in 1923 and, since its inception, it administered over 15,000 arbitrations. In 2009 alone it received 817 filings. [Nigel Rawding & Lucy Reed, *The Freshfields Guide to Arbitration Clauses in International Contracts*, 63 (3d ed. 2011)]. Although it is located in Paris, it administers arbitrations throughout the world. [Winston Stromberg, *Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Processes*, 40 Loy. L.A. L. Rev. 1337, 1352 (2007)]. The ICC Court, which performs an administrative and oversight role, provides

quality control over rulings issued by ICC arbitration panels. It gives decisions issued by the ICC added scrutiny over other arbitration institutions, which helps to insure that its awards are rarely set aside (Ibid, page 1353).

The LCIA is the oldest of the principal global institutions. It was founded in 1892 and, like the ICC, it has a global presence. However, unlike the ICC it gives arbitrators expanded powers to order the production of evidence, such as experts, and to award security for legal costs. Conversely, it does not generally scrutinize its arbitration panels' awards, other than with respect to typographical or computational clerical errors. (Ibid page 1356). In 2009, 272 new Requests for Arbitration were filed with the LCIA, which represented a 50 % increase in the Requests filed. (Nigel Rawding & Lucy Reed, *The Freshfields Guide to Arbitration Clauses in International Contracts*, 64 (3d ed. 2011)).

The ICDR, the international division of the American Arbitration Association, was established in 1996. The ICDR has cooperative agreements with 62 arbitral institutions in 43 countries. These agreements enable arbitration cases to be filed and heard in any of these 43 nations. Once a case is filed, case managers serve as the court clerks and keep parties apprised on the progress of their case. The ICDR maintains a panel of more than 400 independent arbitrators and mediators around the globe. Its institutional philosophy is to move matters forward expeditiously, while controlling costs. Its procedures call for less administrative involvement than either the ICC or the LCIA. [Winston Stromberg, *Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Processes*, 40 Loy. L.A. L. Rev. 1337, 1353 (2007)]. Its constituents often involve at least one American party and over the last several years, it has had more Notice of Arbitrations filed than the ICC. [Nigel Rawding & Lucy Reed, *The Freshfields Guide to Arbitration Clauses in International Contracts*, 65 (3d ed. 2011)].

In addition to the above, several regional arbitral institutions are worth special mention. The HKIAC, the CIETAC and the SCC are among the more active and successful regional institutions. The CIETAC was established in 1954 as the Foreign Trade Arbitration Commission and was renamed in 1989. It

operates under the China Council for the Promotion of International Trade. Since 2000, the CIETAC has also been referred to as the Arbitration Court of the China Chamber of International Commerce. The CIETAC headquarters is located in Beijing with two sub-commissions in Shanghai and Shenzhen. The CIETAC also has 19 liaison offices located in different regions throughout China. In recent years, the CIETAC has had the most Notices filed, per annum. In 2009 alone it had 1482 Notices (Ibid, page 12). It administers arbitrations only in China and its rules are restrictive in allowing arbitrators from outside of China. Unlike the global institutions listed above, CIETAC allows for a unique combination of arbitration and conciliation in the same proceedings. [Winston Stromberg, *Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Processes*, 40 Loy. L.A. L. Rev. 1337, 1357 (2007)].

The HKIAC was established in 1985 and is considered one of the busiest arbitration institutions in the world. It is very flexible in its procedures and operates with minimum interference from the administrative body. The HKIAC recommends that parties adopt its procedures, which incorporate the UNCITRAL rules, but the parties have the liberty to adopt any other procedural regime which suits their needs. In addition, although HKIAC arbitrations generally take place in Hong Kong, parties may arbitrate claims in other locations, provided that they assume any off site administrative costs. In recent years, the HKIAC has lost ground to both Singapore and the CIETAC in the number of Notices filed. [Winston Stromberg, *Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Processes*, 40 Loy. L.A. L. Rev. 1337, 1357-1358 (2007)].

The SCC generally deals with arbitrating trade disputes between Western and Eastern countries, especially countries that were part of the former Soviet Union or the Peoples Republic of China. Despite the breakup of the Soviet Union and Eastern Block, the SCC is still an active institution. In 2009, there were 215 new SCC cases filed, of which 96 involved non-Swedish parties. (Nigel Rawding & Lucy Reed, *The Freshfields Guide to Arbitration Clauses in International Contracts*, 65 (3d ed. 2011)).

Commencing Arbitral Proceedings. Arbitral proceedings through the ICC, under Article 4, of the Rules of Arbitration; the LCIA, under Article 1, of the LCIA Arbitration Rules; the ICDR, under Article 2, of the International Dispute Resolution Procedures, and various regional institutions, are commenced when a claimant delivers a Notice or Request for Arbitration to the respondent(s) and the institution.<sup>10</sup> The Notice or Request for Arbitration must include the names and addresses of the parties to the dispute; a reference to the arbitration clauses or separate arbitration agreements relied upon; a reference to the contract to which a dispute has arisen; the general nature of the claim and an estimate of the value of the dispute; the relief or remedy sought; and the preferred number of arbitrators, if not already agreed upon. Additionally, a commencement fee must typically accompany the Notice or Request for Arbitration, which in certain instances is nonrefundable.<sup>11</sup>

Although the manner in which arbitration is commenced under the principal and regional arbitral rules such as the CIETAC's and BCICAC's are similar, there are significant differences. For example, the CIETAC request for arbitration does not require a reference to the contract out of which the dispute arose, an estimated value of the dispute, the relief or remedy sought, or the preferred number of arbitrators. A CIETAC request for arbitration must include a statement of the main issues in dispute, facts and grounds upon which the claim is based, and relevant evidence supporting the facts upon which the claim is based.<sup>12</sup> The applicable Rules of Arbitration should be carefully studied, in advance of filing a Notice or Request.

**Number of Arbitrators.** The rules of the ICC and LCIA both provide that where the arbitration agreement is silent as to the number of arbitrators to use, the organization will assign a single arbitrator unless circumstances require the appointment of more arbitrators. [ICC Rules of Arbitration Art. 8 *Number of Arbitrators* (effective as of Jan. 1, 1998)]; ICC Rules of Arbitration Art. 5.4 *Formation of the Arbitral Panel* (January 1, 1998). Under the ICDR, although the parties may mutually agree upon any number of arbitrators, the general presumption is that one will be

appointed if the parties fail to reach a consensus.<sup>13</sup> Still, the administrator may determine that three arbitrators are appropriate due to the size, complexity, or other circumstances of the case.<sup>14</sup>

Other institutions such as the SCC and the ICAC provide that three arbitrators be appointed, unless the parties agree on an alternative number of arbitrators, or the institution determines otherwise.<sup>15</sup> Where three arbitrators are to be appointed, each party is to name one arbitrator, and the two arbitrators appoint the remaining arbitrator, who is to act as the presiding arbitrator.<sup>16</sup> If a party fails to name an arbitrator, the other party can generally request the arbitral institution to appoint an arbitrator.<sup>17</sup> Under circumstances where an institution is to select an arbitrator, it will heed any qualifications required of the arbitrator as agreed to by the parties.<sup>18</sup> Under the CIETAC's Commercial Arbitration Rules, the arbitration tribunal may be composed of one or three arbitrators, as agreed upon by the parties.<sup>19</sup> If the parties fail to agree or if the rules provide otherwise, the tribunal will be composed of three arbitrators.<sup>20</sup> The claimant and respondent each have 15 days from the date of receipt of the notice of arbitration to appoint one arbitrator. If a party fails to appoint or entrusts the CIETAC chairman to appoint an arbitrator on the party's behalf, then the chairman will automatically appoint an arbitrator.<sup>21</sup>

**Representation, Witness Testimony, and Experts.** Parties may be represented or assisted by any person during arbitral proceedings according to Articles 12 of both the ICC's and the ICDR's Rules. Under Article 18 of the LCIA's Rules, a "legal practitioner" may represent any party. The ICC, LCIA and the ICDR all have relatively flexible rules for the introduction of written evidence. ICC, LCIA and ICDR tribunals all have the authority to employ independent experts and the parties have a right to question the expert at a hearing.<sup>22</sup> Evidence of witnesses in an ICDR proceeding may also be presented in the form of signed written statements in addition to live testimony.<sup>23</sup> A CIETAC tribunal may appoint experts or appraisers to advise the tribunal with respect to any necessary issues. Findings are reported in an expert or appraiser's report. Additionally, after the submission of findings, at the request of either party and with

the approval of the tribunal, the expert and appraiser may be requested to provide explanations of their reports at an oral hearing.<sup>24</sup>

**Apportionment of Costs.** The rules of the ICC, LCIA and ICDR all allow arbitration panels the discretion to award legal and administrative costs but is significantly impacted by the terms of the arbitration agreement and the applicable jurisdictional law. (Nigel Rawding & Lucy Reed, *The Freshfields Guide to Arbitration Clauses in International Contracts*, 10 (3d ed. 2011)). An ICDR tribunal will apportion costs among the parties if it determines such apportionment to be reasonable.<sup>25</sup> These costs may also include the reasonable fees for the successful party. Similar to the above institutions, the presumption in CIETAC arbitrations is that the arbitral tribunal will determine the allocation of the arbitration costs. Contrary to the above, the presumption of the LCIA is that the losing party bears the burden of paying the prevailing party's legal costs, administrative costs and any expert witness fees incurred. (Article 28.4, "Arbitration and Legal Costs" LCIA Arbitration Rules, effective January 1, 1998).<sup>26</sup>

**Language of the Proceedings and Applicable Substantive Law.** The UNCITRAL Arbitration Rules give wide discretion to the parties to determine the language to be used in the proceedings. In ICDR proceedings, the language shall be that of the documents containing the arbitration agreement unless the tribunal determines otherwise.<sup>27</sup> The LCIA also gives the parties wide discretion to decide on the language to be used in the arbitration proceedings but provides that where the arbitration agreement is written in more than one language, the tribunal will decide on the initial language to be used (LCIA Rules, art. 17.3). This is contrasted with the CIETAC, which provides that the determination of the language to be used in the proceedings is based on the submissions of the parties and the language of the arbitration agreement. However, absent such agreement, the Chinese language shall be used in CIETAC proceedings.<sup>28</sup>

Article 17 of the ICC Rules and Article 28 of the ICDR's rules provides that the substantive law to be applied is the rule of law it considers



to be appropriate given all the circumstances. Article 16.3 of the LCIA Rules provides the applicable law shall be the "... *arbitration law of the seat of the arbitration.*" In contrast, the CIETAC arbitration rules are formulated in accordance with the Arbitration Law of the People's Republic of China and the "provisions of other relevant laws. . . ." <sup>29</sup> In addition, Article 4 of the CIETAC rules provides that "[w]here the parties have agreed on the application of other rules, or any modification of these Rules, the parties' agreement shall prevail except where such agreement is inoperative or in conflict with a mandatory provision of the law of the place of arbitration." Article 145 of the People's Republic of China General Principles of Civil Law provides: "The parties to a contract involving foreign interests may choose the law applicable to settlement of their contractual disputes, except as otherwise stipulated by law. If the parties to a contract involving foreign interests have not made a choice, the law of the country to which the contract is most closely connected shall be applied." <sup>30</sup> In the absence of any express choice of law by the parties to a foreign-related arbitration, the tribunal will apply such law as it determines appropriate.

## Mediation

Mediation refers to a method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution. As opposed to an arbitrator, a mediator does not render a decision, except on an advisory basis. Rather, the mediator helps the parties perceive each other's position more accurately than would otherwise be possible without the assistance of a neutral third party. Effective mediators are able to identify the strengths and weaknesses in each party's respective case, as well as the potential consequences of not settling the matter. The Honourable George V. Adams, QCCCH Canadian Limited 2003, page 155). Many international arbitral institutions also provide mediation services, including the ICC, the LCIA, and the ICDR.

Established nearly three decades ago, JAMS (Judicial Arbitration and Mediation Service) at [www.jamsinternational.com/](http://www.jamsinternational.com/) is America's largest mediation service and has more than 200 full-time "neutrals," mostly former judges,

attorneys, or law professors. It handles about 10,000 cases a year worldwide and now has its own set of international mediation rules.<sup>31</sup>

The International Institute for Conflict Prevention and Resolution (CPR) at [cpradr.org/Home.aspx](http://cpradr.org/Home.aspx), was founded in 1979 as a resource for general counsels of large corporations to devise and implement alternative dispute resolution strategies to help reduce the high cost of complex litigation. Although JAMS is larger in terms of its panel of "Neutrals" and the number of cases it mediates in the US, CPR appears to offer more resources to resolve litigation outside of the US and has significant resources in the Asia Pacific Region, including China. It also has an impressive list of Directors on its Board and Executive Advisory Committee members.

The City Disputes Panel (CDP) at [www.citydisputespanel.org/](http://www.citydisputespanel.org/) was founded in the City of London in 1994 with the intended purpose of resolving complex commercial disputes among parties affiliated with the financial service industry. Several preeminent London institutions including the Bank of England, the City of London Corporation, the Financial Services Authority, and Lloyd's of London sponsor it.

The CPR International Reinsurance Industry Dispute Resolution Protocol is an initiative developed with the support of Lloyd's of London. It provided a four-step method in which the parties are to:

- (1) identify and give early notice of dispute arising from a reinsurance agreement;
- (2) exchange information and documents that are public and/or not protected by any claims of confidentiality, and are intended to obtain a commercially reasonable assessment of the dispute at issue;
- (3) directly negotiate with each other to resolve the dispute;
- (4) and if necessary, allow for a skilled, neutral mediator to facilitate the negotiations. (International Institute for Conflict Prevention & Resolution, CPR International Reinsurance Industry Dispute Resolution Protocol (2006)).

This protocol offers a simple, fast, inexpensive and confidential initial platform for the resolution of commercial disputes by giving the parties a preliminary look at the opposition's case through an open exchange of non-privileged relevant information and a brief period of time to evaluate the consequences of taking a case to arbitration or trial. It has specific deadlines for delivering the Notice of Negotiation (30 days); and Notice of Response (30 days), Direct Meeting (15 Days from last delivered Notice of Response), and Mediation if the Direct Meeting proves unsuccessful (14 days). The protocol also provides for, with the added stipulation that these proceedings will be without prejudice.

(F. Peter Phillips, *New Protocol For Reinsurance Coverage Disputes*, Risk Management Magazine, April 2007, at 12.) (Vincent Vitkowsky, *The CPR International Reinsurance Industry Dispute Resolution Protocol*, Reinsurance: Mealey's Litigation Report, February 1, 2007, at 12).

**Drafting Mediation Provisions.** When drafting a mediation provision, one should be sure to

- (1) set forth a clear requirement to mediate before using other dispute resolution alternatives,
- (2) decide whether the mediator should also function as the arbitrator if mediation fails to resolve the entire dispute,
- (3) consider using the rules of one of the international institutions, and
- (4) set forth what steps are to be taken if mediation fails.<sup>32</sup> It is strongly recommended that the mediator be different from the arbitrator since a different mediator promotes open and frank discussions that are more likely to lead to an agreed upon settlement.

## Conclusion

The international business community requires the quick and efficient resolution of commercial disputes. Attorneys involved in international commercial disputes should properly advise their clients on the availability

and attractiveness of international ADR, whether it is in the form of arbitration or mediation. Whatever type or combination of ADR is chosen, parties should be sensitive to the differences in understanding of the ADR process often held by opposing parties to an international commercial dispute. Up-front planning and communication on this subject, before the dispute arises, will go a long way toward controlling costs and will likely lead to a more satisfactory dispute resolution process. Also, a thorough understanding of the applicable arbitral institution or other ADR rules of procedure is essential.

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<sup>1</sup> Press Release, PricewaterhouseCoopers and Queen Mary University of London, International Arbitration: Corporate Attitudes and Practices (2006), [www.pwc.com/extweb/pwcpublications.nsf/docid/B6C01BC8008DD57680257171003177F0](http://www.pwc.com/extweb/pwcpublications.nsf/docid/B6C01BC8008DD57680257171003177F0) (last visited Jan. 4, 2012).

<sup>2</sup> J. Gillis Wetter, *The Present Status of the International Court of Arbitration of the ICC: An Appraisal*, 1 AM. REV. INT'L ARB. 91, 93 (1990).

<sup>3</sup> See 1958—Convention on the Recognition and Enforcement of Foreign Arbitral Awards, [www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html).

<sup>4</sup> See Press Release, UNCTAD, Analysis of Bilateral Investment Treaties Finds Growth in Agreements, New Areas of Focus, Apr. 12, 2007, [www.unctad.org/Templates/webflyer.asp?docid=8270&intitemID=4431&lang=1](http://www.unctad.org/Templates/webflyer.asp?docid=8270&intitemID=4431&lang=1).

<sup>5</sup> Hall Street Associates v. Mattel, Inc. 128 S. Ct. 1396 (2008).

<sup>6</sup> *Id.* at 1406.

<sup>7</sup> United Nations Commission on International Trade Law, UNCITRAL Arbitration Rules (1976) available at [www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1976Arbitration\\_rules.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html) (last visited Jan. 4, 2012).

<sup>8</sup> See United Nations Commission on International Trade Law, FAQ - Origin, Mandate, and Composition of UNCITRAL available at [www.uncitral.org/uncitral/en/about/origin\\_fa.html](http://www.uncitral.org/uncitral/en/about/origin_fa.html) (last visited Jan. 4, 2012).

<sup>9</sup> Nigel Rawding & Lucy Reed, *The Freshfields Guide to Arbitration Clauses in International Contracts* at 10, 58 (3d ed. 2011); Winston Stromberg, *Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Processes*, 40 Loy. L.A. L. Rev. 1337, 1337 (2007).

<sup>10</sup> British Columbia International Commercial Arbitration Centre (BCICAC) *International Commercial Arbitration Rules of Procedure* [hereinafter *BCICAC Rules*], Article 17 (2000), <http://bcicac.com/arbitration/rules-of-procedure/international-commercial-arbitration-rules-of-procedure/> (last visited Jan. 3, 2012).

<sup>11</sup> *Id.*, Art. 40.

<sup>12</sup> China International Economic and Trade Arbitration Commission (CIETAC) *Arbitration Rules* [hereinafter *CIETAC Rules*], Article 10 (2005), <http://www.cietac.org/index/rules/47607adcb68427f001.cms> (last visited Jan. 3, 2012).

<sup>13</sup> American Arbitration Association, International Centre for Dispute Resolution (ICDR), *International Dispute Resolution Procedures* [hereinafter *ICDR Rules*], Article 5 (2009), [www.adr.org/sp.asp?id=33994#5](http://www.adr.org/sp.asp?id=33994#5).

<sup>14</sup> *Id.*

<sup>15</sup> *BCICAC Rules*, *supra* Art. 5.

<sup>16</sup> *BCICAC Rules*, *supra* Art. 7.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*, Art. 8.

<sup>19</sup> *CIETAC Rules*, *supra* Art. 20.

<sup>20</sup> *Id.*

<sup>21</sup> *CIETAC Rules*, *supra* Art. 22.

<sup>22</sup> International Chamber of Commerce, Rules of Arbitration [hereinafter *ICC Rules*] art. 20.4 [FOR RULES THRU '11 – NOT THE 2012 RULES]; London Court of International Arbitration, Arbitration Rules [hereinafter *LCIA Rules*] art. 21.1.; American Arbitration Association, International Centre for Dispute Resolution, International Arbitration Rules [hereinafter *ICDR Rules*], art. 22.

<sup>23</sup> *ICDR Rules*, *supra* art. 20.

<sup>24</sup> *CIETAC Rules*, *supra* art. 38.

<sup>25</sup> *ICDR Rules*, *supra* art. 31.

<sup>26</sup> *CIETAC RULES*, *supra* art. 46.

<sup>27</sup> *ICDR RULES*, *supra* art. 14.

<sup>28</sup> *CIETAC RULES*, *supra* art. 67.

<sup>29</sup> *CIETAC RULES*, *supra* art. 1.

<sup>30</sup> General Principles of the Civil Law of the People's Republic of China, art. 145, <http://en.chinacourt.org/public/detail.php?id=2696> (last visited Jan. 4, 2012).

<sup>31</sup> Both sets of rules can be found at <http://www.jamsinternational.com/rules-procedures/mediation-rules>.

<sup>32</sup> Deborah L. Holland, *supra* note 18, at 459-61 (2000).

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