

JAMS
INTERNATIONAL COMMERCIAL ARBITRATION
Training Workshop

I. Introduction and Overview

Impact of a globalizing economy on international commercial disputes and the expanding role of international commercial arbitration in that context.

International commercial arbitration as the preferred, perhaps the only realistic, alternative for resolution of commercial disputes arising from cross-border transactions.

II. Reasons why parties to international contracts choose arbitration over other available methods of dispute resolution.

- A. Neutrality vs. actual or perceived bias of national courts
- B. Ease of enforcement of arbitration awards internationally in contrast to difficulty of enforcing court judgments internationally
- C. Commonly understood advantages of arbitration over litigation
 - 1. Party autonomy
 - a. Choice of decision maker – qualifications and expertise
 - b. Place of arbitration
 - c. Choice of governing substantive and sometimes procedural law (*See, Volt Information Sciences, Inc. v. Board of Trustees, etc.* 489 U.S. 468 (1989))
 - d. Selection of preferred institution and its arbitration rules
 - 2. Speed
 - 3. Expense
 - 4. Convenience (or mutually agreeable inconvenience)
 - 5. Final and binding decisions that courts in other jurisdictions will recognize and enforce

III. Fundamental aspects of international arbitration

- A. The arbitration agreement
 - 1. Fundamental importance of the arbitration agreement
 - a. Determines jurisdiction of the arbitrator
 - b. Underlies enforceability of the award

2. Important considerations in the international arbitration agreement

- a. Clear expression of intention to arbitrate; need for a signed writing
- b. Specification of matters subject to arbitration/Scope of the arbitration clause/ arbitrability generally
- c. Designation of arbitral institution (essential in some jurisdictions, *e.g.* the PRC) or *ad hoc*
- d. Place, *i.e.* “juridical seat” of the arbitration
- e. Language of the proceedings
- f. Governing substantive law

3. Core concepts of the arbitration agreement

- a. The independence and “separability” of the arbitration agreement (“Kompetenz-Kompetenz”)
- b. Arbitrability of the dispute, *ie.* Is it a dispute capable of settlement by arbitration? (*e.g.* labor claims, antitrust or other statutory claims, etc.)

B. The arbitration Law

- 1. Treaties and Conventions (New York and Panama Conventions, ICSID, CISG)
- 2. National Laws (the UNCITRAL Model Law, the U.S. Federal Arbitration Act)
- 3. General Principles of International Law (UNIDROIT; the Rome Convention; *Lex Mercatoria*—the influence of the Iran-U.S. Claims Tribunal; Commentators and Scholars)
- 4. Distinguished from party-agreement for arbitrators to act “*ex aequo et bono*” or as *amiable compositeurs* (now largely displaced by mediation)
- 5. Role of trade usage and custom in the trade
- 6. Significance of the place (the “juridical seat”) of arbitration
 - a. Governs procedural law applicable to the arbitration
 - b. Effect on the availability of interim relief
 - c. Place where application to vacate must be brought under the New York Convention

C. The arbitration rules

1. Most used institutions and rules

- a. UNCITRAL
- b. JAMS International
- c. ICDR (AAA)
- d. ICC (Paris)
- e. LCIA (London)
- f. Continental Europe (Swedish Arbitration Institute; Swiss Chambers; Netherlands Arbitration Institute)
- g. Asia (CIETAC, HKIAC, SIAC)
- h. Middle East (Dubai International Arbitration Centre)
- i. Other regional players (Japan Commercial Arbitration Ass'n, KLRCA, Shanghai, Beijing Arbitration Institute)

2. *Ad hoc* arbitration (usually under the UNCITRAL Rules)

D. Arbitration Procedures

1. Arbitrator Selection

2. Pleadings

3. Pre-hearing and Scheduling Orders; ICC Terms of Reference

4. Disclosure (IBA Rules of the Taking of Evidence, often used as guidelines; JAMS International Arbitration Discovery Protocols)

5. Pre-hearing Memorials and written Witness Statements; Pre-hearing Procedural Orders

6. Hearing procedures

- a. Witnesses, fact and expert; compelling attendance
- b. Written exhibits—"core bundle"
- c. Administering Oaths
- d. Availability of cross-examination
- e. Expert witnesses; need for written reports. Alternative methods of examination—"hot tubbing"
- f. Issues of privilege (IBA Rules; influence of local law, chosen substantive law and bar rules)

7. Post-hearing procedures; Post-hearing Memorials; Oral argument options

8. Awards—always reasoned; general outline
 - a. Impact of the award on recognition and enforcement (confirmation)
 - b. Grounds for denial of recognition and enforcement (vacatur)
9. Post-award procedures
10. Other common provisions in provider rules
 - a. Obligation to decide in accordance with rules of law
 - b. Confidentiality
 - c. Multi-party proceedings (consolidation and joinder)
11. Ethics Issues (disclosures, challenges, conduct during the proceedings)
12. Arbitrator compensation schemes

IV. Practice Hints

- A. Management of proceedings
- B. Appropriate conduct as a party-appointed arbitrator
- C. Pre-appointment discussions with appointing counsel
- D. Use of Secretaries or Clerks (ICC Policy)
- E. Performing Independent Research