

International Arbitration: Where and Under What System?

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A. What?

Arbitration is a means of dispute resolution in which parties to a contract select a neutral arbitrator (or a panel of arbitrators) to present their dispute for a legally binding ruling. The use of arbitration has increased along with the growth of international trade and commerce and the inevitable accompanying disputes.

B. Why?

1. Parties' Preference

- a. Arbitration is often selected for its confidentiality, speed, enforceability of awards, and to eliminate the uncertainties in the choice of arbitrator and forum. Arbitration is also thought to avoid dissatisfaction with specific features of the U.S. legal system such as excessive discovery, high litigation costs, adverse publicity, destruction of long term relationships between parties, punitive damages, and the unpredictability of jury verdicts
- b. Parties from different national origins may also be reluctant to accept national court litigation with the potential for national bias. Arbitration offers the parties some measure of control over how and where resolution proceedings will be conducted. The parties seldom have a right of appeal of an arbitration award, so the results are generally final and binding.
- c. If the parties have previously agreed to resolve their dispute through arbitration, that agreement is enforceable under the Federal Arbitration Act, 9 USC § 2 (A written agreement to arbitrate is "valid, enforceable and irrevocable" unless otherwise unenforceable) and under the laws of many states (e.g., California's General Arbitration Act, C.C.P. § 1280 et seq.)

2. By Order of Court

Moreover, rules and decisions in almost every state and federal court now require non-binding judicial arbitration and/or mediation. See, e.g., California Code of Civil Procedure § 1141.10 et seq., providing for mandatory non-binding arbitration of disputes with less than \$50,000 in controversy, per plaintiff. A party dissatisfied with the result at arbitration has 30 days to request a trial de novo. Cases in which equitable relief is requested are exempt.

C. Where?

1. Forum Selection Clauses

Because agreements to arbitrate are stipulated to by the parties, in many cases the ground rules for conducting the proceedings – including venue – are addressed in a written agreement. In those instances, the question of where to conduct the proceedings is decided in advance and is, at least in theory, not an issue. However, notwithstanding the parties' use of a forum selection clause, it is not uncommon for one of the parties to seek to invalidate or revise that agreement when a dispute arises.

E & J Gallo Winery v. Andina Licores S.A., 2005 WL 1554001 (E.D. Cal.) In the recent Gallo case, the defendant, a South American distributor, attempted to invalidate Gallo's forum selection clause on several grounds, alleging that the Gallo distribution agreement was an adhesion contract and was unconscionable, primarily because of the relative sizes of the parties' companies. The court rejected those arguments and noted that Gallo sells wine on every continent of the world except Antarctica and Africa and invalidating its forum selection clause would cause Gallo to have to litigate issues in its distributorship agreements in every corner of the world.

2. Significance of Venue

The choice of the arbitration site can be a very significant issue. Absent an agreement by the parties, it is likely to determine the applicable substantive law. Moreover, it may govern over procedural and substantive law chosen by the parties in such matters as choice of third arbitrator if two cannot agree, vacating an award contrary to the public policy of the arbitral country, even though not contrary to public policy of the governing substantive law chosen by the parties, whether the dispute is even arbitrable, whether there has been a waiver of the right to arbitrate, appeal of the award, etc. E.g. Alghanim & Sons v. Toys R Us, Inc., 126 F.3d 15 (2d Cir. 1997) cert. den., (U.S. law applies to vacating an award rendered in U.S. in arbitration between Kuwaiti claimant and U.S. respondent.

3. Resolution of Disputes Regarding Venue

When the parties' written agreement does not name a location and the parties cannot agree on the venue, but have committed to an arbitral institution, the institution will decide the venue issue after consideration of arguments from the parties. See e.g., CAMCA Arbitration Rules, Article 14, AAA Commercial Arbitration Rules, R-10. As a practical matter, the proceedings are likely to be conducted on the home turf of whichever party had the greatest leverage at the time of negotiating the parties' agreement.

D. Who?

1. Institutional or *Ad Hoc* Arbitration

In an *ad hoc* arbitration, the proceedings are not controlled by an arbitral institution. The parties agree on an arbitrator, location, applicable language, etc. The parties also decide which rules of procedure apply and often agree on rules of established organizations like the AAA, or UNCITRAL¹ even though the proceedings are not administered by those organizations. UNCITRAL rules can be accessed at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>.

In an Institutional arbitration, the proceedings are administered by an institution e.g., an international institution such as the International Court of Arbitration or a national institution such as the American Arbitration Association (AAA) or Judicial Arbitration and Mediation Service (JAMS), or the London Court of International Arbitration (LCIA), as agreed upon by the parties. The arbitral institution furnishes lists of arbitrators with relevant specialties and the parties choose the arbitrator(s). The institution provides the rules of procedure for the arbitration and performs supervisory and administrative functions such as keeping the proceedings on a timetable.

Although I have occasionally represented parties in the *ad hoc* context, I believe institutional arbitrations are much more common. One issue with institutional administration is that the parties often are responsible for payment of considerable fees shortly after the initial demand for arbitration. These fees are

¹ The United Nations Commission on International Trade Law (UNCITRAL) (established in 1966) is a subsidiary body of the General Assembly of the United Nations with the general mandate to further the progressive harmonization and unification of the law of international trade. UNCITRAL has prepared a wide range of conventions, model laws and other instruments dealing with the substantive law that governs trade transactions or other aspects of business law which have an impact on international trade. The UNCITRAL Arbitration Rules are widely used in *ad hoc* arbitration.

often partially or totally non-refundable, even if the dispute is resolved long before an actual arbitration.

2. Institutional Arbitration Administrators

Providing arbitration services is a lucrative business and there are many arbitral administrators to choose from. Here are a few of the better known providers:

a. **World Intellectual Property Organization Arbitration and Mediation Center** (<http://arbiter.wipo.int/center>)

Established in 1994 to help parties resolve international commercial disputes. Proceedings can be held anywhere in the world and in any language. WIPO is focused on IP-related cases. They handle the majority of Internet Domain name disputes but would also be a resource for international TM disputes. Procedural rules can be found at www.arbiter.wipo.int/arbitration/rules/index.html.

b. **The Commercial Arbitration and Mediation Center for the Americas (CAMCA) (www.adr.org)**

CAMCA is designed to provide commercial parties involved in the free trade area of NAFTA with an international forum for the resolution of private commercial disputes through ADR, as is encouraged under Article 2022 of NAFTA. CAMCA was created jointly by the American Arbitration Association, the British Columbia International Commercial Arbitration Centre, the Mexico City National Chamber of Commerce, and the Quebec National and International Commercial Arbitration Centre. Representatives from each of these institutions govern CAMCA and cases may be filed with any of their offices. A multi-national panel of arbitrators and mediators is available to serve under CAMCA's rules. Impartial committees, representative of the nationalities of the parties and chaired by a national of a country other than that of any of the parties, are available to resolve contested locale issues. Procedural rules available at http://www.adr.org/index2.1.jsp?JSPssid=15732&JSPsrc=upload\LIVESITE\FocusArea\international\camca_rules.html.

c. **European Court of Arbitration** (<http://cour-europe-arbitrage.org/europe.htm>)

The European Court of Arbitration is a private institution with its chief seat in Strasbourg and national and local departments throughout Europe.

d. **The Inter-American Commercial Arbitration Commission (IACAC)** (www.sice.oas.org/dispute/comarb/iacac/iacac2e.asp)

The IACAC established and administers a system for settlement, by arbitration or conciliation, of international commercial disputes in the Western Hemisphere. The IACAC is open for signature by the Members States of the Organization of American States and has been ratified by 19 Central American and South American countries, Mexico and the U.S. Procedural rules available at www.sice.oas.org/DISPUTE/comarb/iacac/rop_e.asp

e. **International Centre for the Settlement of Investment Disputes** (<http://www.worldbank.org/icsid/about/about.htm>)

Pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1966), ICSID provides facilities for the conciliation and arbitration of disputes between sovereign member countries and their official subdivisions and investors who qualify as nationals of other member countries. Procedural rules available at www.worldbank.org/icsid/basicdoc/basicdoc.htm

f. **International Court of Arbitration, International Chamber of Commerce (ICC)** (http://www.iccwbo.org/index_court.asp)

An international arbitral institution composed of members around the world. Established in 1923 as the arbitration body of ICC, the International Court of Arbitration has administered well over 13,000 international arbitration cases involving parties and arbitrators from more than 170 countries and territories. Procedural rules available at www.iccwbo.org/court/english/arbitration/rules.asp. Pre-arbitral Referee Rules (pertaining to interim, pre-arbitration relief) are available at [/www.iccwbo.org/court/english/pre_arbitral/all_topics.asp](http://www.iccwbo.org/court/english/pre_arbitral/all_topics.asp).

g. **Permanent Court of Arbitration** (<http://www.pca-cpa.org>)

The Permanent Court of Arbitration (PCA) is an international organization providing services for resolving disputes between States, including disputes between States and private parties and those involving intergovernmental organizations. The parties to the 1899 and/or 1907 Conventions for the Pacific Settlement of International Disputes comprise the members of the Permanent Court of Arbitration; currently 104 countries. Procedural rules vary depending on whether the parties are countries or private citizens or a combination of both and are available at www.pca-cpa.org/ENGLISH/BD/.

h. **International Centre for Dispute Resolution (ICDR)** (<http://www.adr.org/sp.asp?id=22090>)

The International Centre for Dispute Resolution (ICDR) is the international division of the American Arbitration Association (AAA) charged with the exclusive administration of all of the AAA's international matters using its International Arbitration Rules. The ICDR has cooperative agreements with arbitral institutions around the world for facilitating the administration of its international cases. Procedural rules are available at www.adr.org/index2.1.jsp?JSPssid=15732&JSPsrc=upload\LIVESITE\FocusArea\international\AAA175current.htm

i. **Judicial Arbitration & Mediation Service** (JAMS) (jamsadr.com)

JAMS neutrals are retired judges who practice ADR full time. JAMS asserts that it is the largest private dispute resolution provider in the U.S and that a large portion of its cases are international. Its international procedural rules are available at

http://www.jamsadr.com/rules/international_arbitration_rules.asp.

E. What Procedural Rules Apply?

The law of the place where the arbitral tribunal sits generally determines the procedural law of the arbitration, along with the procedural rules of the arbitral administrator. In most cases, the institutional arbitrators have drafted their own procedural rules, which tend to be fairly similar from one organization to another. Those rules are noted above. Parties to ad hoc arbitrations often specify the application of rules of an established institution, like those above, or the UNCITRAL Rules. Additionally, the International Bar Association has created some specific rules relating to the exchange of evidence (see, e.g., IBA - Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration (<http://www.asser.nl/ica/iba.htm>) and IBA Rules on Taking Evidence in International Commercial Arbitration (<http://www.ibanet.org/pdf/rules-of-evid-2.pdf>)). Parties may specify the application of these rules in addition to other procedural rules.

F. What Substantive Law Applies?

1. Stipulation of the Parties

The parties to an arbitration agreement often stipulate in advance what substantive law will govern the dispute resolution process.

2. Law of the Location of Arbitration

If not determined by stipulation, the law of the place of the proceedings is usually applied. See, e.g., WIPO Arbitration Rules, Article 59: "The law applicable to the

arbitration shall be the arbitration law of the place of arbitration, unless the parties have expressly agreed on the application of another arbitration law and such agreement is permitted by the law of the place of arbitration.”

3. United Nations Convention on Contracts for the International Sale of Goods (CISG)

In cases involving parties in member States, unless the parties have expressly rejected its application to their dispute, the United Nations Convention on Contracts for the International Sale of Goods (CISG) will apply. The CISG is similar to the United States’ Uniform Commercial Code (which also may be applicable) in that it attempts to anticipate the likely grounds for dispute in the sale of goods context and provide for a fair resolution. The CISG currently has 65 member States, including the U.S., Australia and many European nations.

G. Enforceability of Foreign Awards?

1. Treaties and Conventions

In the U.S., an international award is enforceable under the 1958 New York Convention (formally known as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958), and through the Federal Arbitration Act, section 201. More than 130 countries are signatories to the New York Convention.

An award can be vacated under Section 10 of the Federal Act only if the award was procured by corruption, fraud, undue means, misconduct, refusing to postpone a hearing for good cause, refusing to hear material evidence, misbehavior, exceeding powers or evident partiality. California Code of Civil Procedure § 1286.2 provides similar grounds for opposing enforcement of the award.

The United States also is a signatory to the Inter-American Convention on International Commercial Arbitration, effective in 1976, adopted by the U.S. in 1990 (commonly referred to as the “Panama Convention.”). (www.sice.oas.org/dispute/comarb/iacac/iacac2e.asp) Under the Panama Convention, non-appealable arbitral awards are given the same force as final judicial judgments.

The Panama convention applies to 19 South American and Central American countries, Mexico and the US. The U.S. ratified with the caveat that where the requirements for application of both the Panama and the New York Convention are met, if a majority of the parties are citizens of states that have ratified the Panama Convention, it will apply. In all other cases, the New York Convention will apply.

Numerous other conventions apply to countries in other parts of the world, e.g., The Hague Conventions of 1899 and 1907 (aka Convention for the Pacific Settlement of Disputes). The Hague Conventions established the Permanent Court of Arbitration in the Hague, Netherlands, and currently has 103 member nations. There also is a European Convention Providing a Uniform Law on Arbitration, intended to govern intra-European disputes, but Belgium is currently the only signatory.