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Drafting the International Arbitration Clause

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International commercial arbitration is often complex, frustrating and expensive.[1] The complexity, frustration and expense are compounded when, despite a long, expensive, and perhaps bitter proceeding, the losing party does not voluntarily pay the award and further is able to deny or delay the award's enforcement by raising all manner of objections and exploiting any confusion or uncertainties in the arbitral award itself.

Many of the problems which typically complicate and delay an arbitration proceeding and the eventual enforcement of the arbitral award can, however, be removed or significantly diminished by a carefully drafted arbitration clause. Such a clause, a model of which is provided later in this article, will inevitably be longer than the "standard" arbitration clause found in most international contracts and thus may not be appropriate for short-form or simple agreements. The potential rights and benefits at stake for the parties are, however, very significant, particularly when the nature, circumstances or parties to the contract might lead one to believe that an eventual arbitration is more than a remote possibility. Indeed, many project contracts go into great detail to cover factual eventualities which are, regretably, far less likely than an arbitration and a consequent enforcement proceeding for an arbitral award. Moreover, a tightly drafted arbitration clause that provides detailed mechanisms for the resolution of disputes and the enforcement of an award permits the parties to have a clearer awareness of the nature and consequences of an arbitration and therefore to evaluate them with greater precision. Finally, many of the

* The author practices law in Paris. The author would like to thank Wesley R. Johnson, Esq., who reviewed portions of this article and made a number of helpful suggestions.

1. It has, of course, been criticized on all these bases. *See e.g.*, Layton, *Is International Arbitration a Viable Remedy for Disputes in the Middle East?*, MIDDLE EAST EXECUTIVE REPORTS, June 1983 at 14 [hereinafter Layton].

provisions that are likely to make an arbitral award easier and quicker to enforce are also likely to diminish the time and costs of the proceeding itself.[2]

I. Institutional or Ad Hoc Arbitration?

There have been many discussions and articles on the comparative merits of so-called "institutional" arbitrations, administered by an existing arbitral body or institution such as the International Chamber of Commerce or the American Arbitration Association, and "ad hoc" arbitration tribunals established and organized by the parties and their appointed arbitrators.[3] Most of these discussions bear on the relative costs and efficiency of institutional as opposed to ad hoc arbitration. But the issue also has some bearing on enforcement of the award and, in turn, dictates the manner in which the arbitration clause will be written.

A. Institutional Arbitration

The majority of international contracts (particularly those in Europe or the Middle East) that provide for arbitration provide for it to be carried out pursuant to the rules, and under the direction, of the International Chamber of Commerce (ICC).[4] Indeed, a vast number of contracts merely recite the ICC's model arbitration clause[5] with perhaps the addition of a choice-of-law or place-of-arbitration provision. As discussed below, the model ICC clause, while succinct and widely recognized, may fail to include many elements that would enhance the efficiency of the arbitration proceeding and the possibility of enforcing the award rapidly.

2. *See, e.g.*, Branson & Tupman, *Selecting an Arbitral Forum: a Guide to Cost Effective International Arbitration*, 24 Va. J. Int'l Law 917 (1984) [hereinafter Branson and Tupman], in which the authors, after examining several alternatives, propose a detailed model arbitration clause for *ad hoc* arbitration as being the most cost effective.

3. *See, e.g., id.* at 918-924; *but cf.* Craig, Park and Paulsson, International Chamber of Commerce Arbitration, para 4.03, at 2-3 (1984) [hereinafter Craig, Park and Paulsson] (institutional arbitration clauses generally to be favored); *see also* Goekjian, *Conducting an ICC Arbitration Proceeding*, Middle East Executive Reports, February 1980 at 1-2. [hereinafter Goekjian].

4. ICC arbitrations filed in the three-year period from 1980-82 involved 875 parties from Western Europe, 163 parties from North America, and 155 parties from the Middle East. Craig, Park and Paulsson, *supra* note 3, Appendix I at 11-13. The three nationalities most frequently represented during that period were France (255 parties), West Germany (157 parties) and the United States (120 parties). *Id.* at 14.

5. The ICC's model arbitration clause reads:

> All disputes arising in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

The selection of institutional arbitration by the ICC does, however, result in two potential advantages as to enforcement. The first is that the ICC is the best known international arbitration body and one which is widely respected. Thus the fact that an award bears the ICC's "cachet" may give it greater international currency and engender confidence in the judge (particularly in Europe) from whom the exequatur or enforcement is requested.

The second, and related, advantage is that all ICC awards, whether final or partial, must be submitted for prior review by the ICC's "Court of Arbitration."[6] The Court may modify the form of the award and draw the arbitrator's attention to points of substance which may have been overlooked or inadequately treated.[7] There is, accordingly, a certain consistency in ICC awards and a somewhat greater assurance that the award will be coherent in substance and consistent in form. In at least one case the Court of Arbitration apparently sent the draft final award back to the arbitrators, all of whom were engineers, for clarification and rework three times before it permitted the award to be signed and hence final.[8]

The ICC's supervision of, and imprimatur on, an award may therefore be a helpful factor in enforcing an award. The ICC Secretariat has apparently reported that over 90 percent of ICC awards have been voluntarily complied with by the losing party.[9] The exact basis of this estimate is not clear, and it does not appear to have been broken down by regions or types of disputes. One should not, accordingly, assume that an ICC award will necessarily result in rapid payment or easy enforcement.[10]

There are numerous other institutional bodies which supervise international arbitration, notably the Stockholm Chamber of Commerce and

6. Article 21 of the Rules of the ICC Court of Arbitration [hereinafter ICC Rules]; *see also* Craig, Park and Paulsson, *supra* note 3, at paras. 20.01–20.05. The "Court" of Arbitration is, in fact, a committee made up of members nominated by the ICC National Committee which generally meets in full session once a month. *See id.* para 2.03 at 20.

7. ICC Rules, *supra* note 6, art. 21.

8. Based on the author's informal communications with members of the ICC staff, it appears that the award is, as a practical matter, not returned to the arbitrators for modification more than three times. As the Court cannot force the arbitrators to accept the Court's suggestions and the arbitrators cannot force the Court to accept their award the theoretical possibility of a deadlock exists, but this does not occur in practice. *See* Craig, Park and Paulsson, *supra* note 3, para 20.01 at 118. An interesting description of the modifications to the draft award which were suggested by the Court (and accepted by the majority of the arbitrators) in the case of *AB Gatoverken v. GNMTC* is set forth in VI YEARBOOK COMMERCIAL ARBITRATION 140 (1981).

9. Craig, Park and Paulsson, *supra* note 3, para. 107 at 12 and para. 22.04 at 138.

10. Indeed, this author has recently been involved in the enforcement of two final, and theoretically no longer appealable, ICC arbitral awards, both of which arose from contracts in the Middle East. Enforcement was in both cases ultimately obtained against the losing parties' assets in Europe, but only after long and expensive court battles in several jurisdictions in which the losing parties raised all manner of opposition and objections.

the American Arbitration Association. None of these bodies, however, handles the large volume of international commercial arbitrations that the ICC does (although the Stockholm Chamber of Commerce is reasonably prominent in the arbitration of East-West disputes).

One arbitral institution worthy of particular note is the International Centre for Settlement of Investment Disputes (ICSID) which is affiliated with the World Bank and which was established by multilateral convention.[11] One of the significant advantages of ICSID arbitration is that the ICSID Convention provides its own mechanism for appealing and enforcing the award.[12] The award may only be challenged by means of a timely internal appeal pursuant to procedure provided in the ICSID Convention.[13] In addition, state parties to the ICSID Convention must recognize a final ICSID award "as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."[14] The major drawback to the use of ICSID arbitration, however, is the narrow jurisdiction conferred by the ICSID Convention. Cases under the ICSID Convention are essentially limited to international "investment disputes" between private and state parties both of whom are from countries that have ratified the ICSID Convention.[15] Despite active promotion of ICSID by its staff, there have been relatively few ICSID arbitrations to date.

But while an institutional award may provide certain advantages as to enforceability, these advantages ordinarily would not, in and of themselves, justify the choice of institutional arbitration, particularly in light of the significant costs charged by some arbitration institutions.[16] The ultimate decision as to whether to provide for institutional or *ad hoc* arbitration should focus on whether one or both of the parties perceives

11. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, done Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 475 U.N.T.S. 195 [hereinafter the ICSID Convention].

12. *See generally,* Branson and Tupman, *supra* note 2, at 935-36.

13. ICSID Convention, *supra* note 9, art. 52; *see also* ICSID Rules of Procedures for Arbitration Proceedings, Rules 51-52 [hereinafter ICSID Rules].

14. ICSID Convention, *supra* note 9, art. 54(1); *see also* Societe Ltd. Benvenutti et Bonfant v. Gouvennement de la Republique Populaire du Congo, June 26, 1981 (cour d'appel de Paris, 1st chambre suppl.) excerpted in VII YEARBOOK COMMERCIAL ARBITRATION 159-61 (1982) (Article 54 of the ICSID Convention limits the power of the judge to examine the authenticity of a certified ICSID award).

15. ICSID Convention, *supra* note 9, art. 25(1); *see also* Branson and Tupman, *supra* note 2 at 923; Delaume, *Arbitration with Governments: "Domestic" v. "International" Awards,* 17 INT'L LAWYER 687, 964-96 (1983).

16. The ICC, in particular, is often criticized as charging unduly high fees. *See e.g.,* Layton *supra,* note 1 at 15. ICC fees are based on a sliding scale percentage of the total amount (generally including both claims and counterclaims) in dispute. *See* ICC Rules, *supra* note 6, Appendix III and Schedule of Conciliation and Arbitration Costs, art. 5.

that it may be in need of the administrative support, supervision and, perhaps, prodding which the arbitral institution can provide. In this connection a number of commentators feel that *ad hoc* arbitration is ineffective and ultimately more expensive than institutional arbitration in cases involving complex commercial matters or contracts between industrialized and developing countries.[17]

When a party has, in light of the above factors, significant doubts as to whether *ad hoc* arbitration is appropriate, it would appear prudent to opt for an arbitration clause providing for institutional arbitration. This is because the parties, once a dispute arises, can agree to amend their original agreement by providing for a presumably less expensive *ad hoc* arbitration on agreed terms. If the parties cannot agree on the terms for an *ad hoc* arbitration,[18] then either party can commence institutional arbitration pursuant to the contract's arbitration clause. This process is unlikely to work in reverse, as it must be assumed that the party wishing to delay or, perhaps, confuse arbitration would not agree to replacing an *ad hoc* arbitration by one involving institutional supervision.

B. Ad hoc Arbitration

When *ad hoc* arbitration is chosen, however, the parties are free to select the rules to be applied in the arbitration. Of particular note in this regard are the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL),[19] which are increasingly popular as a basis for proceeding to *ad hoc* arbitration.[20] The UNCITRAL rules have gained wide acceptance both in the West and in developing countries and were, with some modifications, selected as the rules for the Iran-United States Claims Tribunal in The Hague.

As *ad hoc* arbitration proceeds without the supervision or review of any institution, the selection of competent arbitrators for the case is par-

17. *See e.g.* Craig, Park and Paulsson, *supra* note 3, para. 404 at 2-3; *but c.f.* Goekjian, *supra* note 3, at 2 (ICC arbitration still to be favored over *ad hoc* arbitration, but high cost of ICC and availability of UNCITRAL and other non-institutional rules may result in reevaluation).

18. The party contemplating amending an agreed-upon institutional arbitration clause to provide for *ad hoc* arbitration would be well advised to ensure that the essential terms and conditions of the *ad hoc* proceeding, including the choice of arbitral rules and, if possible, of the arbitrators are agreed upon before giving up its right to request institutional arbitration. *See infra* text accompanying notes 18-20.

19. G.A. Res. 31/98, 31 U.N. GAOR Supp. (No. 39) U.N. Doc. A/31/39 (1976) [hereinafter UNCITRAL Rules].

20. It is at least theoretically possible to use the UNCITRAL Rules in an institutional arbitration as well; the AAA has stated that it is prepared to provide services as an administrator in arbitrations held under the UNCITRAL Rules. *See American Arbitration Procedures for Cases under the UNCITRAL Arbitration Rules*, reprinted in VIII Yearbook Commercial Arbitration 196-99 (1983).

ticularly crucial. It is important not only that they be capable of writing a clear and enforceable award, but they, or at least the chairman of the arbitration panel, be good administrators as well. One essential point to be kept in mind in *ad hoc* arbitration is to provide an effective and efficient "appointing authority" for the selection of the arbitral chairman or other arbitrators in the event the case becomes deadlocked on this point.[21] The appointing authority can be the ICC,[22] the president of a court or any other appropriate neutral authority in whom the parties have confidence.

But whether *ad hoc* or institutional arbitration is ultimately agreed upon, a number of further provisions in the arbitration clause can serve to increase the ease of enforcing an eventual award and reduce uncertainty in doing so.

II. A Global Final Award

Parties desiring *all* their disputes arising in connection with the contract finally to be resolved by arbitration should ensure that their arbitration clause specifically states that intention. The standard ICC clause[23] is generally satisfactory for this purpose as it contains what knowledgeable commentators have termed the three "key expressions" (*i.e.*, "all disputes . . . in connection with . . . finally settled").[24] Perhaps more importantly, these same commentators go on to point out that the ICC clause has stood the test of time and is generally understood to intend a comprehensive reference to the ICC mechanism and that one must thus be careful to ensure that any modifications to the clause cannot be construed as indicating a different intent.[25] Accordingly, it is probably unnecessary

21. *See* UNCITRAL Rules, *supra* note 19, art. 6. If the appointing authority has not been designated by the parties or if the authority fails to act, the Secretary-General of the Permanent Court of Arbitration in the Hague may be requested to designate the appointing authority. *Id.* art. 7(2)(b).

22. The ICC now has an established procedure for so doing. *See* ICC AS APPOINTING AUTHORITY UNDER THE UNCITRAL RULES (ICC pamphlet 1984). The cost of using the ICC for this service is $1,000 for each request made. *Id.* art. 6. *See also* GUIDE TO ARBITRATION (ICC publication 382, October 1983) at 54-55. Several other arbitration institutions, including the London Court of Arbitration and the Netherlands Arbitration Institute, have established procedures for acting as the appointing authority under the UNCITRAL Rules. *See UNCITRAL Arbitration Rules,* IX YEARBOOK COMMERCIAL ARBITRATION 174-77 (1984).

23. *See supra* note 5.

24. Craig, Park and Paulsson, *supra* note 3, para 6.03 at 46.

25. *Id.* Unfortunately the rendering of an ICC award does not preclude a party from filing a Request for Arbitration claiming that a final ICC award failed to make certain deductions (due to advance payments and the like) from the amount awarded, and getting the Request before the arbitrators. This author was involved in just such a case. The defendant in the second arbitration filed a strong and detailed motion to the ICC Court of Arbitration asking that the Request for Arbitration be summarily rejected, as it was merely a disguised appeal, and hence precluded, by the article 24 of the ICC Rules. The Court of Arbitration, however,

to modify the opening of the ICC clause or to expand its three "key" expressions. In other cases, however, it is important that the clause not only refer controversies related to the performance of the contract and resulting damages to arbitration, but that it also ensure that controversies relating to the existence, validity and breach of the contract are arbitrated. In this respect the parties would be well served by having the arbitration clause recite:

> Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or validity thereof shall be finally settled in accordance with the. . .[26]

A party also has a strong interest in further tailoring the arbitration clause such that the eventual award is defined as including the entire controversy between the parties, payable without deduction or offset. This can be done by adding language such as the following:

> The parties agree that the award of the arbitrator(s): shall be the sole and exclusive remedy between them regarding any claims, counterclaims, issues or accountings presented or pled to the arbitrator(s); that it shall be made and promptly payable in [*currency*][27] free of any tax, deduction or offset. . .

The purpose of the above provisions is, of course, to minimize the possibility of a party relitigating, or seeking to relitigate, matters which have already been presented to the tribunal.[28] It should be noted that such provisions may operate to cut off relitigation of any issue or claim *whether or not* it is explicitly discussed or ruled on in the award, provided it has been "presented or pled" to the Tribunal. It is also important to note that the award is to be final not only as to claims and counterclaims, but also as to "issues or accountings." Closing off further litigation on these points may well enhance the finality of the award as many matters forming the basis of later disputes are not always the subject of formal claims, but often involve subsidiary issues related to offsets, retention monies, or the like.[29]

Parties selecting ICC arbitration may consider such provisions unnecessary as ICC Rule 24 states that submission to ICC arbitration is deemed

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determined that there was "prima facie" jurisdiction to proceed under article 8(3) of the Rules and that the defendant's motion would therefore have to be determined by the arbitrators constituted to hear the case. The case was ultimately settled before the arbitrators ruled on the defendant's motion.

26. This is, in fact, an increasingly standard formulation for reference to UNCITRAL arbitration and is, with the addition of the word "finally," the wording recommended by the ICC when a party wishes to use the ICC as the appointing authority under the UNCITRAL Rules. *See* ICC AS APPOINTING AUTHORITY UNDER THE UNCITRAL RULES (ICC Pamphlet 1984).

27. *See supra* text accompanying notes 45-47.

28. *Accord,* Branson and Tupman *supra* note 2, at 937 n. 106.

29. *See, e.g., supra* note 25.

to be an undertaking to carry out the resulting award without delay and a waiver of any right to appear insofar as such waiver can validly be made.[30] Counsel may, however, find Article 24 difficult to assert in an enforcement proceeding, and it does not, by its terms, cut off claims for offsets, post award accountings and the like.[31]

While provisions, such as those quoted above, emphasizing the final and global nature of the award, cannot guarantee that an eventual award enforcement proceeding will be free of burdensome, and perhaps abusive, opposition, they can limit the opportunities for such opposition, and lessen the risk of having to relitigate issues decided in the award.[32]

III. Law and Place of Arbitration

It is relatively rare to encounter a major international contract without a choice of *substantive* law clauses.[33] Most arbitration clauses do not,

30. ICC Rules, *supra* note 6, art. 24. In the *Gotaverken v. GNMTC* case the Supreme Court of Sweden ruled that article 24 of the ICC Rules caused an ICC award rendered in Paris to be binding and enforceable despite a subsequent challenge of the award in the French courts. *See generally* Craig, Park and Paulsson, *supra* note 3, para. 22.03 at 137; *see also* J. Paulsson, *The Role of Swedish Courts in Transnational Commercial Arbitration*, VA. J. INT'L L. 211, 236 (1981) (includes English translation of *Gotaverken* decision); *but cf.* Arab Republic of Egypt v. SPP Ltd. and SPP (Middle East) Ltd. (Hong Kong), Cour d'Appel de Paris, July 12, 1984 (reproduced in X YEARBOOK COMMERCIAL ARBITRATION 113 (1985) (waiver of appeal under article 24 of ICC Rules recognized but award nullified on other grounds).

31. *See* Island Territory of Curacao v. Solotron Devices, 356 F. Supp. 1 (S.D.N.Y. 1973.) There the court rejected the defendants' "so-called counterclaim" on the basis that the arbitrators had given the defendant credit for the equipment which was the subject of the counterclaim. *Id.* at 14. The court had, however, examined the arbitral award and proceeding in great detail concluding that "the award gives every indication of able, careful, and impartial work by the arbitrators." *Id.* at 10. The judge decided largely on the basis of local procedural rules applying to offsets. Although a result under other conditions cannot be predicted with certainty, it appears clear that the enforcing party would have been significantly abetted by an explicit waiver of offsets.

In a recent enforcement case experienced by the author, for instance, the defendant admitted the final and binding nature of an ICC award rendered against it, but asserted that its payment was subject to certain offsets arising from payments under the contract and uncredited expenses which the arbitrators had not taken into account. The judge ultimately rejected the defendant's offset claims as improper, but only after extensive evidentiary hearings on the matter.

32. The omission of a finality provision in the arbitration clause would not, of course, preclude a party from seeking to insert such a provision in the terms of reference once an arbitration had arisen.

33. It sometimes happens that there are overlapping, and perhaps contradictory, choice of law clauses. In one bulky contract for a large scale turnkey construction project in a Middle Eastern country, X, the arbitration clause stated: "The arbitrators shall make their decision in accordance with the principles of equity, law, good faith, the Parties' performance of this Contract and the laws of X." The contract also contained a separate choice of law clause which laconically stated: "The Laws of X shall govern this Contract." Evidently the foreign party to the contract had sought to temper the potentially harsh effect of local law

however, specify the *procedural* law to apply to the arbitration, and many do not even specify the place of arbitration. Such definition is important. The procedural law to be applied may be critical to the parties' rights and, in particular, to the enforcement of the award. Moreover, the definite determination of the place and the procedural law of the arbitration can often save much time and expense during the arbitration proceeding itself.

The arbitral award is generally considered an award of the place where it is *issued,* not of the place where the contract is to be performed or of the country whose substantive law applies to the contract. Accordingly, in designating the place of arbitration one should be careful to select a country which has adhered to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the "New York Convention,"[34] so that the award can benefit from the reciprocal enforcement provisions in the over fifty nations who are signatories to that Convention.[35] One should also, however, be careful to select a jurisdiction whose procedural law is well adapted to international arbitration and whose courts will not permit undue court interference with the arbitration. In this connection, France[36] and those Swiss cantons having adopted the Intercantonal Concordat on Arbitration[37] have been particularly favored as having "modern" international arbitration provisions. It appears, however, that such disparate New York Convention signatories as, for ex-

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by having the arbitrators' decision also reflect other and more universal concepts. *See also infra* note 37. When the contract came to be arbitrated the parties ultimately agreed on terms of reference which, essentially, incorporated both of these provisions. The case was ultimately settled, and a judgment on agreed terms was rendered, before the arbitral tribunal came to any decision which would have required the arbitrators to rule on the applicable law or legal principles.

34. Done June 10, 1958, 21 U.S.T. 2517, TIAS No. 6997, 330 U.N.T.S. 38; *see generally,* VAN DEN BERG, THE NEW YORK ARBITRAL CONVENTION OF 1958 (1981) [hereinafter van den Berg].

35. van den Berg, *supra* note 34 at 410 (Annex B).

36. *See* N.C. P. Civ. arts. 1492-1507; *see also* Derains, *France,* VI YEARBOOK COMMERCIAL ARBITRATION 1-23 (1981); Derains, *France,* VII YEARBOOK COMMERCIAL ARBITRATION 3-15 (1982); Craig, Park and Paulsson, *French Codification of a Legal Framework for International Commercial Arbitration: the Decree of May 12, 1981,* 13 LAW OF POL'Y IN INT'L BUS. 727 (1981).

37. *See* Lalive, *Switzerland,* ARBITRATION LAW IN EUROPE 43-80 (1981). The majority of Swiss cantons have adhered to the Concordat. *Id.* at 46, *see also,* P. JOLIDON, COMMENTAIRE DU CONCORDAT SUISSE SUR L'ARBITRAGE (1984).

The attractiveness of Switzerland as a venue for an international arbitration may, however, be diminished by developments in the Geneva-based arbitration, Westland Helicopters United v. Arab Organization for Industrialization. In that case the losing party on an interim decision as to jurisdiction by the arbitral tribunal obtained annulment of the decision from the Geneva Courts and, after extensive further litigation, ultimately succeeded in disqualifying the tribunal that rendered the decision, on the basis that they would henceforth be prejudiced against them by virtue of their having gotten the tribunal's decision reversed!

ample, Kuwait[38] and Sweden[39] also allow international arbitrations a fairly free hand in their territories and restrict appeal of the arbitral award to their courts to quite narrow grounds.

On the other hand, a good example of a country in which to avoid arbitration is Saudi Arabia. The newly issued Saudi Arabian Regulation on Arbitration leaves a number of issues unclear, and there is virtually no practical experience which resolves these uncertainties. The Regulation provides for a large degree of supervision by the Saudi courts, but there are no clear rules on the scope of court review upon attempted enforcement of arbitral awards. Finally, Saudi Arabia is not a signatory to the New York Convention, and thus enforcement of a Saudi arbitration award in signatory countries is problematic.[40]

In other countries international arbitration free of court interference may be contingent upon specific waivers by the parties. Contractual parties specifying international arbitration in England, for example, should have their arbitration clause recite the so-called "exclusion agreement" if they wish to ensure the ouster of court jurisdiction to review the substance of the award.[41]

An arbitration clause should, therefore, always specify the "place" of the arbitration[42] and recite any particular wording or waivers required or desirable pursuant to the rules of that jurisdiction. Further, to remove any possible ambiguity the clause should also state that "the law appli-

38. *See* Chaudhri and Sifri, *Arbitration in Kuwait: Procedures and Options*, MIDDLE EAST EXECUTIVE REPORTS, September 1985 at 14-17.

39. *See generally* Dworen, *Sweden*, ARBITRATION LAW IN EUROPE 327-42 (1981).

40. Chaudri and Clodfelter, *Commercial Arbitration in the Kingdom*, MIDDLE EAST EXECUTIVE REPORTS, July 1985 at 9,20. Faced with this set of circumstances it is little wonder that private foreign parties contracting together in Saudi Arabia frequently discreetly provide for their disputes to be settled by arbitration outside that Kingdom, despite the fact that such provisions are not permitted in any contract which must be registered with the Saudi authorities. *Id.* at 9.

41. The "exclusion agreement" clause recommended by the London Court of Arbitration in the 1981 edition of its International Arbitration Rules reads as follows:

> The parties agree to exclude any right of application or appeal to the English Courts in connection with any question of law arising in the course of the arbitration or with respect to any award made.

It should be noted that exclusion agreements apply to international commercial arbitration and that predispute exclusion agreements are void for so-called "special category" contracts in the areas of maritime, insurance, or commodity agreements. *See* 1979 Arbitration Act. Section 4 (a). Although article 24 of the ICC Rules contains an explicit waiver of appeal, it appears, for the time being at least, that parties providing for ICC arbitration in England should, nevertheless, include an explicit "Exclusion" provision in the arbitration clause. *See* Craig, Park and Paulsson, *supra* note 3, para. 8.13 at 82 (Release 84-1, June 1984); *but see*, Arab Energy Corporation Ltd. v. Olieprodukten Nederland B.V., (High Court, Queens Bench Division, Commercial Court); 2 Lloyd's L. Rep. 419 (1983).

42. Which does not generally preclude hearings being held in another place if it becomes convenient or necessary.

cable to the arbitration procedure shall be determined by referring to the law of the place of arbitration."

IV. Provisions on Notice, Satisfaction and Sovereign Immunity

A. Notice

At the time of signing a contract, notice provisions between the parties generally seem a rather perfunctory matter: the parties are in contact and have a common interest in communication. The situation is often quite different when relations have deteriorated to the point that one party invokes arbitration. This is particularly the case when there has been a change of management or ownership in a private party, or when there has been a revolution or other political change in a state party. The issue of proper notice was, for example, frequently pled by the government of the Islamic Republic of Iran in the disputes which followed the 1979 revolution in that country. The issue is particularly likely to arise when an arbitration claimant, in the absence of any appearance or answer from its opponent, obtains an arbitration award in a default proceeding and the losing party then tries to set aside or resist enforcement of the award on the basis that it was not given proper notice to appear.[43] This issue may be further complicated in an institutional arbitration, because an administrative body is also involved.[44]

Many of these problems can be diminished, and potential delay and confusion avoided, by having a notice provision in the arbitration clause itself. This notice provision need not be identical with the notice provision for other communications under the contract and may provide for service on a different or supplementary party representative. For example, a state party may wish that a request for arbitration be served on its Ministry of Justice; a private party may wish service, or duplicate service, on its general counsel or attorneys.

B. Currency of the Award

The enforcement of an international arbitration award is likely to be simpler, and give rise to fewer accounting disputes, if the award is made

43. *See* Maritime International Nominees Establishment v. Republic of Guinea, 693 F.2d 1094 (D.C. Cir. 1983).

44. In the case of one ICC arbitration award involving a default judgment against a Middle Eastern government ministry, the losing party argued that enforcement should not be allowed because the ICC had not sent a copy of an important notice to the country's embassy at the place of arbitration. This argument was ultimately rejected, largely due to the fact that the defendant in the enforcement proceeding had signed the terms of reference and could not therefore convincingly plead ignorance of the arbitration. The result might well have been different for a default award in which the defendant had never appeared in the proceeding.

in one currency; this requirement can be specified in the arbitration clause. Such a requirement does not mean that all pleadings and accountings must be stated in that currency, rather it directs the arbitrators to convert, to the extent necessary, their final award into the stipulated currency. It may, of course, be difficult for one party to accept the principle of an award in a single, (possibly foreign) currency; particularly when for a number of reasons the contract price may involve two or more currencies.[45] However, when it can be negotiated, a specification of the currency of an award will render the award cheaper and easier to enforce.

U.S. dollars are often a particularly desirable currency for the award, because the exchange rate for the dollar is readily ascertainable and many arbitral institutions, notably the ICC, calculate and charge costs in U.S. dollars.[46] Furthermore, some or all of a party's seizable assets, wherever located, are frequently denominated in U.S. dollars, thereby making enforcement simpler and eliminating or at least reducing currency fluctuation risks.[47] An award in any other readily convertible or "hard" currency should, however, also be acceptable, and the circumstances, including the probable country of enforcement, may dictate the choice of a particular currency for the award.

C. Interest and Costs

Parties routinely request that the award bear interest, and often also claim so-called "prejudgment" interest, or interest on damages from the date they were incurred. Not infrequently the party's right to interest, and the applicable rate of interest, become a heavily pled and debated issue in the arbitration proceeding. Arbitration awards, nevertheless, do not always specify interest, or else may grant it at a rate considerably lower than the commercial rate.[48] Where no interest is specified in the

45. When one party perceives the exchange risk not to be in its favor agreement as to the currency may be similarly difficult to reach.

46. *See* ICC Rules, *supra* note 6, Appendix III, "Schedule of Conciliation and Arbitration Costs." These costs may be applied in turn, to part of the eventual award. *Id.* Art. 20.

47. In one enforcement of an ICC award in which this author was involved the assets of the losing party, which were located in Europe, consisted of payments due from a European utility for oil and gas shipments from the Middle East. These sums were all denominated in U.S. dollars, and it was therefore dollars which were effectively seized. Unfortunately, other than the allocated portion of the ICC's costs, the award was denominated in Sterling. This ultimately resulted in a complicated conversion from dollars into local currency and an ultimate reconversion into Sterling. Furthermore, the defendant succeeded in blocking the transfer of the seized assets for approximately three months, during which time the value of the Pound rose against the Dollar, and the executing party therefore incurred a significant exchange loss in Sterling.

48. *See, e.g.*, AGIP Company S.p.A. v. Government of the Popular Republic of the Congo, reprinted in VII Yearbook Commercial Arbitration 133, 142-43 (1983) (interest rate

award, the issue is generally determined by the local law (either the law of the place of arbitration or the place where enforcement is sought), a situation that is likely to lead to further disagreement and, possibly, additional litigation. Moreover, where interest does not clearly run on the award, or runs at a low rate, the party against whom enforcement is sought may well perceive it to be in its financial interest to delay enforcement as long as possible.

These problems can be addressed in the arbitration clause. The clause may specify that the award shall include interest from the date of any damages arising from the breach or other violation of the contract (so-called "prejudgment interest") and that the award itself shall bear interest until paid in full. The inclusion of a prejudgment interest provision in the arbitration clause is, admittedly, unusual and makes the clause, and the rendering of the award, somewhat more complicated.[49] Parties concerned about the complexity or acceptability of a prejudgment interest provision may opt for a simpler clause providing only that the award shall bear post-judgment interest. The omission of a prejudgment interest requirement in the arbitration clause would not, of course, preclude a party from claiming for it in the arbitration proceeding itself.

In either event an interest provision in an arbitration clause should specify that interest be at a commercial rate not lower than some readily identifiable index such as LIBOR or the "prime rate" of a designated U.S. bank. While obviously not a required element in an arbitration clause, the interest provision will both make enforcement of the award with interest simpler and render it less advantageous for the losing party to resist or delay enforcement.

It is also worthwhile to provide that costs of enforcement will, to the maximum extent possible, be charged to the party resisting enforcement. The "costs" of enforcement should normally include any court costs, judgment registration fees, or taxes. In certain jurisdictions such fees can be substantial. In Belgium, for instance, the exequatur of an arbitral award entails the payment of a judgment registration tax[50] presently equal to 2.5% of the face amount of the award. Moreover, this sum must be paid

calculated at "lowest rates in effect during the relevant periods on the markets concerned"); *see also Arbitral Award of July 23, 1981*, extract reprinted in VII YEARBOOK COMMERCIAL ARBITRATION 89, 94 (1983) (arbitrators fix rate of interest halfway between rate claimed and that offered by defendant.)

49. However, the Second Circuit has ruled that the presumption in favor of prejudgment interest applies to arbitral award enforcement under the New York Convention. *See* Waterside Ocean Navigation Co., Inc. v. Internation Navigation Ltd., 737 F. 2d 150, 154 (2nd Cir. 1984); *see also* Note, *Post-Award Interest under the New York Convention: the Laurentian Forest*, I ARBITRATION INTERNATIONAL 190 (1985).

50. Codes des Droits d'Enregistrement, art. 148.

in advance by the enforcing party in order to have an exequatur order issued.[51] While local procedural rules typically assign such costs to the losing party, a party opposing the award is, logically, also going to oppose paying costs of enforcement. Consequently, the party seeking enforcement will be abetted by a clear stipulation that "all costs, fees, or taxes incident to enforcing the award shall, to the maximum extent permitted by law, be charged against the party resisting such enforcement."

D. Sovereign Immunity

Where a state, state agency, or other possibly sovereign party enters into the contract, the private party should insist that the arbitration clause contain not only an explicit waiver of immunity from jurisdiction but also a waiver of immunity as to the execution of the award. This is necessary because in various major jurisdictions, including the United States,[52] the fact that a state or state agency enters into a commercial contract containing an arbitration clause generally is not considered to constitute a waiver of sovereign immunity from execution and related proceedings. While the availability of enforcement in a given jurisdiction will still depend upon the statutory or common-law provisions and policies of the enforcement jurisdiction, on the nature of the seized assets, and on the identity of the governmental entity against whom enforcement is sought, an explicit and detailed waiver of sovereign immunity nevertheless will, at the very least, greatly circumscribe the arguments of a state party in resisting enforcement.

V. Conclusion: Model Clauses

Based on the points discussed above a model clause for ICC arbitration could provide as follows:

51. *Id.* at art. 142 and art. 302 quater.

52. The recently introduced Mathias Amendment to the Foreign Sovereign Immunities Act seeks to address precisely this problem by providing that "(a)n agreement to arbitrate shall be deemed to constitute consent to proceedings to recognize, confirm, or enforce by levy, attachment or otherwise any arbitral award made pursuant to such agreement . . . and neither the Federal Act of State doctrine nor the doctrine of sovereign immunity shall constitute grounds or be the basis for refusal or deferral of recognition, confirmation, or enforcement. . . ." S. 1395, 99th Congress, 1st Sess. (1985). *Cf.* Pavlis, *International Arbitration and the Inapplicability of the Act of State Doctrine*, 14 N.Y.U. J. Int'l L. & Pol'y 65 (1981) (comprehensive discussion concluding that U.S. Act of State Doctrine should not be defense to enforcement of an arbitral award under New York Convention). This problem has already largely been addressed by statute in the United Kingdom. *See* State Immunity Act, 1978, Ch. 33, § 9. *See generally* Crawford, *Les Etats et l'execution des sentences Arbitrales dans les Droits Américains et Anglais*, Revue De l'arbitrage 689–702 (1985).

All disputes arising in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce as presently in force,[53] by one or more arbitrators appointed in accordance with said Rules.[54]

The place of arbitration shall be _____, and the law applicable to the arbitration procedure shall be determined by referring to the law of the place of arbitration. The arbitrator(s) shall determine the matters in dispute in accordance with the law of _____.[55] The _____language shall be used throughout the arbitral proceedings.

The parties agree that the award of the arbitrator(s): shall be the sole and exclusive remedy between them regarding any claims, counterclaims, issues or accountings presented or pled to the arbitrator(s); that it shall be made and shall promptly be payable in U.S. dollars free of any tax, deduction or offset; and that any costs, fees or taxes incident to enforcing the award shall, to the maximum extent permitted by law, be charged against the party resisting such enforcement.

The award shall include interest from the date of any damages incurred for breach or other violation of the contract, and from the date of the award until paid in full, at a rate to be fixed by the arbitrator(s), but in no event less than the London Interbank Offering Rate (LIBOR) per annum quoted for the corresponding period by _____[56] in the London Interbank Market of United States Dollars for immediately available funds.

All notices by one party to the other in connection with the arbitration shall be in writing and shall be deemed to have been duly given or made if delivered or mailed by registered air mail, return receipt requested, or by telex, to the following addresses: [addresses of the parties].

The above clause can be readily adapted for *ad hoc* arbitration or arbitration with another arbitration institution. Where the parties opt for *ad hoc* arbitration under the UNCITRAL rules, for instance, the first paragraph, above, could be replaced by the following:

53. Parties willing to accept future changes or evolutions in the ICC Rules may wish to omit the words "presently in force." *See generally,* Craig, Park and Paulsson, *supra* note 3, para 6.03 at 46.

54. Where the parties know that they desire a sole arbitrator or a three-arbitrator panel they may so specify. Where the parties have specific requirements as to the arbitrators background, nationality (*eg.*, that the Chairman be of a different nationality than the parties), or qualifications, these also can and should be specified.

55. Where the parties are particularly concerned about changes which may occur in the applicable law they may add the words ". . . as in force and effect on the date of this agreement." The effect of local law may, where agreed, be somewhat attenuated by adding language such as ". . . and such [customary rules] or [rules of international law] as may apply." *But cf. supra* note 33 (overlapping choice of law clauses).

56. One or more stable reference banks should be inserted here. Should the parties wish to use the U.S. "prime rate" they could incorporate the following clause:

". . . in no event less than the prime commercial lending rate announced by [name(s) of bank(s)] at their principal office(s) in [location] for 90-day loans for responsible and substantial commercial borrowers."

See, Branson and Tupman *supra,* note 2 at 937.

> Any dispute, controversy, or claim arising out of or relating to this contract or the breach, interpretation, termination, or validity thereof shall be settled by final and binding arbitration in accordance with the UNCITRAL Arbitration Rules as currently in force. The appointing authority shall be [name of arbitral institution, court or other authority].

Where the contract in question is with a sovereign state or state agency, the private party would be well advised to add a detailed waiver of sovereign immunity:[57]

> The government of ———[58] hereby irrevocably waives any claim to immunity in regard to any proceedings in connection with an arbitration or arbitral award pursuant to this Agreement, including, without limitation, immunity from service of process, immunity from pre- or post-judgment attachment, immunity from jurisdiction of any court, and immunity of any of its property from execution.[59]

The clauses suggested above have been drafted with particular regard to enhancing the ease and speed of enforcing an arbitral award and minimizing the costs thereof. The clauses are, however, also likely to result in the arbitration proceeding itself being speedier and more cost-effective.[60] This is because numerous matters which can, and often do, result in delay and argument, such as the selection of arbitrators, language, place of arbitration, applicable procedural rules, interest and currency, are already provided for in significant detail.

The suggested clauses will enhance the efficiency of an international arbitration proceeding and render avoidance and delay in paying the award more difficult. The clauses should not, however, be considered as favoring arbitration itself, much less one or the other party to the contract (at the time of signing the contract it is not at all clear who is more likely to be the eventual claimant or that the claimant will be able to overcome any counterclaims). Rather, the clauses should be viewed as eliminating much of the uncertainty in dispute resolution and thereby as generally reducing costs and delays for both parties. Indeed, the parties, by knowing in detail the nature and consequences of arbitration, will be better positioned to resolve their differences without having to resort to it.

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57. *See generally* Crawford and Johnson, *Arbitrating with Foreign Governments and Their Instrumentalities*, INT'L FIN. L. REV. (April 1986).

58. Where appropriate, the name of the specific governmental entity signing the contract should be filled in here.

59. The suggested waiver of sovereign immunity may appear both overly broad and detailed and may therefore be difficult for a governmental party to accept. Private parties to contracts with sovereign entities should, however, take note that claims of sovereign immunity are, in many jurisdictions, very difficult to overcome and that their chances of so doing will be enhanced by a specific and detailed waiver.

60. *See generally* discussion and model clause proposed in Branson and Tupman, *supra* note 2.