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## A Survey of Arbitral Forums: Their Significance and Procedure

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# A Survey of Arbitral Forums: Their Significance and Procedure

## I. Introduction

There are essentially three means of redressing grievances where transnational disputes must be resolved: litigation, arbitration and diplomatic protection.<sup>1</sup> These three forms may, in turn, be divided into litigation in the host, home or a third country; ad hoc or institutional arbitration in the host, home or a third country; and diplomatic protection based on informal discussion and diplomatic protests or, where provided for in a bilateral or multilateral agreement between the states, recourse to an international arbitral commission or an international legal forum.<sup>2</sup>

Of the three dispute resolution mechanisms, diplomatic protection is generally considered a last chance avenue of approach. Except for the occasional informal discussions and good offices undertaken at the consular or embassy level, most countries would rather ignore the claims of their citizens against nationals of other countries than permit them to become possible sources of international tension. In short, diplomatic protection is a discretionary function of the government and cannot be relied on as a sure means of dispute settlement.

In choosing which of the two remaining forms is the best means of resolving a dispute, the potential claimant should consider the following: (1) which decisional forum is most accessible; (2) how much time and money the claimant has to spend; (3) whether there will be opportunity to compromise; (4) what kind of record the forum has in resolving disputes; (5) whether the claimant will have an opportunity to air the merits of his claim; and (6) whether there will be a reasonable probability of enforcement.<sup>3</sup> Litigation, despite the likelihood of a final award, is generally less effective than arbitration when measured in terms of these practical considerations. Moreover, forum non conveniens and general problems of excessive case loads among local claimants make litigation in a third country unattractive.

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<sup>1</sup> S. LAZARUS, J. BRAY, L. CARTER, K. COLLINS, B. GIEDT, R. HORTON, P. MATTHEWS, & G. WILLARD, *RESOLVING BUSINESS DISPUTES* 150-66 (1965) [hereinafter cited as S. LAZARUS].

<sup>2</sup> *Id.*

<sup>3</sup> See generally Schmidt, *Arbitration under the Auspices of the International Center for the Settlement of Investment Disputes, Implications of the Decision on Jurisdiction of Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica*, 17 HARV. INT'L L.J. 90 (1976).

Based upon the foregoing, arbitration appears the better avenue of approach, particularly if there is a desire to keep the contract alive. Arbitration is a creature of the contract, from whence it derives its powers. It can be tailored to suit the needs of the contract, large or small, on the basis of the bargaining power of the contracting parties.<sup>4</sup> Moreover, by agreement of the contract, arbitral decisions are usually final and are not automatically tied to a particular set of laws or conflict of laws rule.<sup>5</sup>

Other advantages offered by arbitration are privacy, neutrality and relative expertise of the chosen forum.<sup>6</sup> Awards are generally not published without the express consent of the parties; this practice obviously avoids the glare of the media and open public conflict, thereby permitting greater focus on dispute resolution by the forum. Most arbitral forums are also neutral in character and are usually speedier and less expensive than litigation. Finally, the chosen arbitral forum may have experts in the field of business, economics or engineering instead of law. Their expertise may provide a more technical and perhaps effective resolution to a dispute involving less than total abrogation of a treaty or breach of contract.

The choice of arbitral forum is either ad hoc or institutional. With regard to institutional forums the choice is quite diverse. This comment will briefly discuss the better known institutional arbitral forums available for resolution of transnational disputes. Their history and significance, the various rules for selecting the forum, and instructions on where to obtain more information about the forums will be included in the discussion. In addition, an overview of the UNCITRAL rules, which arbitrators may choose to govern their proceedings, is offered.

## II. American Arbitration Association

The American Arbitration Association (AAA) was founded in 1926 through the merger of two prior organizations, the Arbitration Society of America and the Arbitration Foundation.<sup>7</sup> The AAA, like many other arbitral forums, does not actually conduct arbitration hearings. Instead, it is an independent, non-governmental, non-profit organization that supervises independent arbitrators in all types of domestic and international disputes under its Rules of Commercial Arbitration.<sup>8</sup>

With well over 20,000 cases pending in any year, the AAA is by far the world's largest arbitral institution.<sup>9</sup> Traditionally, the vast majority

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<sup>4</sup> McClelland, *International Arbitration: A Practical Guide to the System for the Litigation of Transnational Commercial Disputes*, 17 VA. J. INT'L. L. 729, 732-33 (1977).

<sup>5</sup> *Id.* at 738, 742.

<sup>6</sup> *Id.* at 732.

<sup>7</sup> S. LAZARUS, *supra* note 1, at 23.

<sup>8</sup> AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES (1979) [hereinafter cited as AAA RULES] For copies of the AAA Rules and further information write to the American Arbitration Association, 140 West 51st Street, New York, N.Y. 10020.

<sup>9</sup> 2 J. WETTER, *THE INTERNATIONAL ARBITRATION PROCESS, PUBLIC AND PRIVATE* 120 (1979).

of these cases involved only American parties.<sup>10</sup> In the 1970s, however, the AAA began to arbitrate an increasing number of cases involving international contractual disputes. The AAA handled 104 international cases between 1972 and 1975,<sup>11</sup> and the number more than doubled to 233 cases between 1975 and 1978.<sup>12</sup> These cases involved a wide variety of commercial disputes between nationals of more than forty different countries.<sup>13</sup> Over fifty percent of the disputes involved contracts for the sale of goods.<sup>14</sup> The remainder of the cases involved the transfer of industrial property and know-how, agency contracts, and formation or dissolution of transnational corporations.<sup>15</sup>

Generally speaking, the amount of money at issue in these disputes was relatively small; approximately fifty percent involved less than \$200,000.<sup>16</sup> The relatively small amounts involved in the disputes may have contributed to the speed with which the AAA resolved the claims. One award was made in thirty days, and the average time period, from the filing of a demand for arbitration until the granting of a final award, was six months.<sup>17</sup> The longest case took 785 days,<sup>18</sup> about the same length of time as an average case arbitrated under the ICC Rules of Conciliation and Arbitration.<sup>19</sup>

International cases are administered by the AAA under the same Commercial Arbitration Rules as cases involving only U.S. parties.<sup>20</sup> These rules were carefully drafted in order to circumscribe the authority of the arbitrator while at the same time granting the arbitrator sufficient discretion to govern the arbitral proceeding effectively.<sup>21</sup>

Pleading under the AAA Rules of Arbitration is quite simple. Arbitration commences in one of two ways: submission<sup>22</sup> or demand.<sup>23</sup> Submission occurs when, despite the absence of a prior agreement to arbitrate, both parties to an existing dispute decide that they want the AAA to arbitrate their case. The parties submit their case by drafting an agreement to arbitrate under the AAA Rules and filing it in duplicate at the nearest AAA Regional Office.<sup>24</sup> The agreement to arbitrate should contain a statement of the matter in dispute, the amount of money in-

<sup>10</sup> *Id.*

<sup>11</sup> Holtzmann, *United States Arbitration: the American Arbitration Association*, in HANDBOOK OF INSTITUTIONAL ARBITRATION IN INTERNATIONAL TRADE 252 (1979).

<sup>12</sup> 2 J. WETTER, *supra* note 9, at 124.

<sup>13</sup> Compare Holtzmann, *supra* note 11, at 252 with 2 J. WETTER, *supra* note 9, at 125-26.

<sup>14</sup> 2 J. WETTER, *supra* note 9, at 124.

<sup>15</sup> Holtzmann, *supra* note 11, at 252.

<sup>16</sup> 2 J. WETTER, *supra* note 9, at 125.

<sup>17</sup> Holtzmann, *supra* note 11, at 253.

<sup>18</sup> *Id.*

<sup>19</sup> Thompson, *The Court of Arbitration of the International Chamber of Commerce*, in HANDBOOK OF INSTITUTIONAL ARBITRATION IN INTERNATIONAL TRADE 22 (1977).

<sup>20</sup> Holtzmann, *supra* note 11, at 252.

<sup>21</sup> McLaughlin, *Arbitration and Developing Countries*, 13 INT'L LAW. 211, 226 (1979).

<sup>22</sup> AAA RULES, *supra* note 8, § 9.

<sup>23</sup> *Id.* § 7.

<sup>24</sup> *Id.* § 9.

volved and the remedy sought.<sup>25</sup>

More commonly, AAA arbitration is initiated when a party who has previously agreed to arbitrate files a "demand."<sup>26</sup> The demand is a very simple document, normally only one or two sentences long.<sup>27</sup> It need only contain a reference to the general nature of the dispute, an estimate of the amount of money at issue and a statement of the remedy sought.<sup>28</sup> Arbitration formally begins once the party requesting arbitration files two copies of the demand in an AAA Regional Office.<sup>29</sup> No affidavits or supporting documents are required other than two copies of the arbitration provision of the contract that is in dispute.<sup>30</sup> It is vital, however, that the arbitration clause in the contract is a valid and binding agreement to arbitrate under the AAA Rules. To avoid any dispute as to the parties' intentions, the AAA suggests that the following provision be inserted in all commercial contracts:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the Rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrator(s) may be entered in any Court having jurisdiction thereof.<sup>31</sup>

The party against whom a demand is filed has seven days to file an answer.<sup>32</sup> The answer is not required to be in any special form, but all counterclaims must be affirmatively asserted in the same manner as the demand.<sup>33</sup> If the defendant fails to file an answer within seven days, it is assumed that the claims made in the demand are denied.<sup>34</sup> The arbitral process is never delayed because the defendant fails to file an answer.<sup>35</sup>

Immediately after a demand is filed, the process of selecting an arbitrator begins. If the parties have specified in their arbitral contract a particular method for selecting and appointing an arbitrator, the AAA will follow that method.<sup>36</sup> Also, if the parties desire to have three arbitrators hear their case, they should so specify in the arbitration clause of their contract. In the absence of a request for three arbitrators, the AAA strongly favors use of a single arbitrator.<sup>37</sup>

If the parties fail to specify any method for appointing an arbitrator, the AAA has an established selection procedure that gives the parties maximum input into the choice of an arbitrator. The AAA maintains a

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* § 7.

<sup>27</sup> Holtzmann, *supra* note 11, at 261.

<sup>28</sup> AAA RULES, *supra* note 8, § 7(a).

<sup>29</sup> *Id.* § 7(b).

<sup>30</sup> *Id.*

<sup>31</sup> Holtzmann, *supra* note 11, at 256.

<sup>32</sup> AAA RULES, *supra* note 8, § 7(b).

<sup>33</sup> Holtzmann, *supra* note 11, at 261.

<sup>34</sup> AAA RULES, *supra* note 8, § 7(b).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* § 13.

<sup>37</sup> *Id.* § 16.

National Panel of Arbitrators with backgrounds in a variety of different trades and professions.<sup>38</sup> From this panel the AAA selects a number of persons whose training and experience suggest an expertise in the area of the parties' dispute.<sup>39</sup> The AAA mails a list containing the names of these persons, along with relatively detailed biographical information, to each of the parties.<sup>40</sup> The parties have seven days<sup>41</sup> from the mailing of the list to examine it, cross off any names objected to, number the remaining names in order of preference and return the list to the AAA.<sup>42</sup> The AAA then compares the lists. It eliminates any person that either party has crossed off the list.<sup>43</sup> Next it calculates the person with the highest degree of preference by both parties and invites him or her to serve as arbitrator.<sup>44</sup>

In the event that no person on the list is acceptable to both parties, the AAA will usually send another list, and the same procedure is repeated.<sup>45</sup> If the parties are still unable to reach an agreement, or if one party is acting in bad faith, the AAA has the authority to appoint an arbitrator from its National Panel without sending further lists.<sup>46</sup> This arbitrator must be neutral,<sup>47</sup> that is, independent of both parties, and in no event will the arbitrator be a person whose name was previously crossed off the list by either party.<sup>48</sup> Furthermore, upon the request of either party, the AAA will select an arbitrator who is a national of a country other than that of the parties.<sup>49</sup>

Once an arbitrator has been selected, certain procedural matters must be resolved before the case can be heard on its merits. Generally, parties will specify beforehand where arbitration is to take place and what rules of laws will govern the proceedings. In the absence of such an agreement, the AAA Rules provide that the AAA, rather than the arbitrator, determines the place of arbitration.<sup>50</sup> A weakness of the AAA Rules, however, is that they make no mention of what substantive or procedural law should be applied in the absence of an agreement between the parties. This is a crucial omission because the rights of the parties under the contract vary radically according to the rules of law that are applied. For example, the AAA Rules provide that a party's ability to subpoena witnesses or obtain discovery of documents is depen-

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<sup>38</sup> *Id.* § 5.

<sup>39</sup> Holtzmann, *supra* note 11, at 258.

<sup>40</sup> AAA RULES, *supra* note 8, § 12.

<sup>41</sup> Because of delays in international mail delivery, this time period is ordinarily extended. See Holtzmann, *supra* note 11, at 258-59.

<sup>42</sup> AAA RULES, *supra* note 8, § 12.

<sup>43</sup> Holtzmann, *supra* note 11, at 258.

<sup>44</sup> AAA RULES, *supra* note 8, § 12.

<sup>45</sup> Holtzmann, *supra* note 11, at 258.

<sup>46</sup> AAA RULES, *supra* note 8, § 12.

<sup>47</sup> *Id.* §§ 14, 18.

<sup>48</sup> Holtzmann, *supra* note 11, at 258.

<sup>49</sup> AAA RULES, *supra* note 8, § 15.

<sup>50</sup> *Id.* § 10.

dent on whether such activity is "authorized by law."<sup>51</sup>

Although the AAA Rules contain no reference to substantive or procedural rules, they are quite specific with regard to evidentiary matters. The AAA Rules state that the arbitrator is the sole judge of what is relevant and admissible at the arbitration hearing.<sup>52</sup> The policy behind this rule is that the so-called "legal rules of evidence" were intended for jury trials and that an experienced arbitrator will not be unduly prejudiced by irrelevant facts.<sup>53</sup>

The arbitration itself is a straightforward process under the AAA Rules. The arbitrator begins the hearing by requesting each party to make a brief oral statement clarifying the issues in the case.<sup>54</sup> Unlike the International Chamber of Commerce Court of Arbitration, the AAA does not require the parties to submit "terms of reference" specifically defining the issue in the case.<sup>55</sup> The AAA rejects the use of terms of reference because the drafting of such terms needlessly duplicates the arbitration process, delays resolution of the case and increases animosity between the parties.<sup>56</sup>

After they have made their opening statements, the parties present their evidence much as they would in a common law trial. Thus, the AAA encourages parties to be represented by counsel and it permits a party to be represented by attorneys from foreign countries, even if they are not licensed to practice law in the forum state.<sup>57</sup> All witnesses are subject to cross-examination by both the arbitrator and the adverse party.<sup>58</sup> Furthermore, the arbitrator has the authority to inspect or investigate, on his own motion, any instrumentality connected with the dispute.<sup>59</sup> If he deems it necessary, the arbitrator may also issue whatever orders are required to maintain the status quo or to safeguard any property subject to the arbitration.<sup>60</sup>

When both parties have completed the presentation of their cases, the AAA Rules require the arbitrator to ask them "whether they have any further proofs to offer or witnesses to be heard."<sup>61</sup> If not, the hearing is closed. From this moment the arbitrator has thirty days to reach a

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<sup>51</sup> *Id.* § 30. It appears that many arbitrators apply the law of the local forum, at least for procedural matters, in the absence of a contrary agreement between the parties. This is not a particularly rational policy when the AAA, rather than the parties, selects the forum state. Other arbitrators apply traditional conflicts of laws principles. See Holtzmann, *supra* note 11, at 256.

<sup>52</sup> AAA RULES, *supra* note 8, § 30.

<sup>53</sup> Holtzmann, *supra* note 11, at 263.

<sup>54</sup> AAA RULES, *supra* note 8, § 28.

<sup>55</sup> See text accompanying notes 119-20 *infra*.

<sup>56</sup> Ehrenhaft, *Effective International Commercial Arbitration*, 9 LAW & POL'Y INT'L BUS. 1191, 1205 (1977).

<sup>57</sup> Holtzmann, *supra* note 11, at 260. See generally S. LAZARUS, *supra* note 1, at 92-124.

<sup>58</sup> AAA RULES, *supra* note 8, § 28.

<sup>59</sup> *Id.* § 32.

<sup>60</sup> *Id.* § 33.

<sup>61</sup> *Id.* § 34.

decision and render an award.<sup>62</sup> In the case of three arbitrators, the AAA Rules provide that a majority may render a decision,<sup>63</sup> but the thirty day time limit for granting the award cannot be extended.<sup>64</sup> Because the arbitrator has so little time in which to issue an award, there is no requirement that the award be accompanied by a written opinion and, in fact, the vast majority of AAA awards contain no such opinions.<sup>65</sup> All awards issued on the merits are final and cannot be appealed absent corruption, fraud or abuse of discretion.<sup>66</sup> The courts will not go behind the award to determine whether the arbitrator made errors either of fact or law.<sup>67</sup>

At present, the major drawback of AAA international arbitration is that it is dominated by American parties. U.S. parties filed over seventy-five percent of all demands for arbitration between 1975 and 1978,<sup>68</sup> and only a handful of demands were filed involving disputes in which neither party was an American.<sup>69</sup> The predominance of U.S. parties in the AAA apparently creates a feeling among some foreign businessmen that the AAA is biased against them. Latin Americans appear to be particularly suspicious of AAA arbitration, thus making it more difficult for U.S. businessmen to secure agreements to arbitrate in the AAA.<sup>70</sup>

Those U.S. businessmen who can convince their business partners to accept AAA arbitration, however, will find that it is an excellent arbitral forum. It is particularly attractive to small and medium-sized businessmen because its services are very reasonably priced. AAA arbitrators serve without pay<sup>71</sup> except in protracted cases,<sup>72</sup> where the parties often agree to compensate the arbitrator for the time he spends on the case. Thus the only cost a party incurs other than attorney and expert witness fees<sup>73</sup> is the standard AAA administrative fee. This fee is quite modest in comparison to other forums.<sup>74</sup> For example, the administrative fee on a \$200,000 dispute is \$1,850.<sup>75</sup> All fees in cases involving \$5,000,000 or more are privately negotiated with the AAA, but it is believed that the fee in a relatively complex \$5,000,000 case would be approximately

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<sup>62</sup> *Id.* § 40.

<sup>63</sup> *Id.* § 27.

<sup>64</sup> *Id.* § 38.

<sup>65</sup> Holtzmann, *supra* note 11, at 267.

<sup>66</sup> *Id.* at 266.

<sup>67</sup> *Id.*

<sup>68</sup> 2 J. WETTER, *supra* note 9, at 126.

<sup>69</sup> Holtzmann, *supra* note 11, at 252-53.

<sup>70</sup> Despite wide-ranging U.S. business interests in the nations of Central and South America, very few disputes involving nationals of these countries are arbitrated by the AAA. 2 J. WETTER, *supra* note 9, at 125-26.

<sup>71</sup> AAA RULES, *supra* note 8, § 50.

<sup>72</sup> *Id.* The parties usually pay the arbitrator if the arbitration hearing lasts more than two days. The fees range between \$100 and \$500 per day. 2 J. WETTER, *supra* note 9, at 129-30.

<sup>73</sup> AAA RULES, *supra* note 8, § 49.

<sup>74</sup> See text accompanying notes 115-17 *infra*.

<sup>75</sup> 2 J. WETTER, *supra* note 9, at 129.



\$13,850.<sup>76</sup>

In the long run, however, the single most attractive feature of AAA arbitration is the speed with which it resolves disputes. The AAA's average six month time period, from the start of arbitration to the granting of a final award, compares favorably with any other international arbitral forum. This factor, more than anything else, accounts for the increasing number of cases the AAA arbitrates each year.

### III. International Chamber of Commerce

The International Chamber of Commerce Court of Arbitration was created on July 24, 1922, to promote arbitration of all types of international commercial disputes.<sup>77</sup> The term "Court of Arbitration" is something of a misnomer because the court is not an arbitral body and does not actually arbitrate cases. Instead it is an administrative council within the general framework of the International Chamber of Commerce (ICC).<sup>78</sup> The Court of Arbitration issues Rules of Conciliation and Arbitration<sup>79</sup> and supervises the application of these rules by the arbitrators. The arbitrator or arbitrators, as the case may be, are selected by the parties to the dispute.<sup>80</sup> The Court of Arbitration only appoints arbitrators if the parties themselves fail to appoint or are unable to agree upon an arbitrator.<sup>81</sup>

The ICC Rules of Conciliation and Arbitration are widely used in the settlement of international commercial disputes. Between July 1972 and July 1975, 458 disputes from seventy-four countries were submitted to the court for arbitration.<sup>82</sup> The cases involved a wide variety of legal questions. Over fifty percent of the disputes involved breaches of contracts for the sale of goods or the supply of industrial services such as engineering and mechanical drawing.<sup>83</sup> The remainder of the cases submitted for arbitration involved breaches of agency contracts, disputes concerning the transfer of industrial property and licensing of secret know-how, and agreements to form or dissolve partnerships or corporations whose principals were of different nationalities.<sup>84</sup> It should be noted, however, that very few maritime disputes are submitted to the ICC for arbitration.<sup>85</sup>

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<sup>76</sup> *Id.*

<sup>77</sup> Thompson, *supra* note 19, at 19.

<sup>78</sup> Sacerdoti, *The New Arbitration Rules of ICC and UNCITRAL*, 11 J. WORLD TRADE L. 248, 250 (1977).

<sup>79</sup> INT'L CHAMBER OF COMMERCE, RULES OF CONCILIATION AND ARBITRATION (1975) [hereinafter cited as ICC RULES]. For copies of the ICC RULES and further information write to the International Chamber of Commerce, 1212 Avenue of the Americas, New York, N.Y. 10036.

<sup>80</sup> *Id.* art. 2.

<sup>81</sup> *Id.*

<sup>82</sup> Thompson, *supra* note 19, at 19.

<sup>83</sup> *Id.* at 20.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

The ICC Rules of Conciliation and Arbitration allow the parties to elect two forms of dispute resolution: conciliation and arbitration. Conciliation is an optional proceeding.<sup>86</sup> The parties may request conciliation even if they have previously agreed to arbitrate or they may by-pass it altogether. If the parties elect conciliation, they may later request arbitration without prejudice to their case.<sup>87</sup> Parties desiring to resolve their dispute through conciliation should petition the Secretary General of the ICC.<sup>88</sup> The petition should contain a statement of the case and be accompanied by documents relevant to the dispute.<sup>89</sup> The Secretary General then notifies the President of the ICC who appoints a "Conciliation Committee" composed of three members of the ICC Court of Arbitration.<sup>90</sup> To the extent possible, one of the conciliators will be of the petitioner's nationality and the other of the respondent's nationality.<sup>91</sup> The third conciliator serves as chairman and is of a nationality other than either the petitioner or the respondent.<sup>92</sup>

The Conciliation Committee meets, examines the documents, hears testimony, and suggests a settlement.<sup>93</sup> This is a quick and inexpensive procedure if the parties agree to the proposed settlement. The parties, however, are not required to accept the proposed settlement and, if the matter goes to arbitration, no member of the Conciliation Committee may sit as an arbitrator.<sup>94</sup>

A party wishing to have recourse to arbitration must file a petition stating the facts of his case and the existence of a valid agreement to arbitrate under the ICC Rules. To avoid any question as to whether the parties intended to arbitrate, the ICC recommends the inclusion of the following provision in all commercial contracts: "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."<sup>95</sup>

After a valid petition for arbitration is filed, the respondent has thirty days to file an answer or a counterclaim.<sup>96</sup> The parties may elect to have their dispute heard by either one or three arbitrators.<sup>97</sup> If the parties elect to have one arbitrator, they must decide upon a mutually acceptable person within thirty days or they lose all control over the

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<sup>86</sup> INT'L CHAMBER OF COMMERCE, RULES OF CONCILIATION AND ARBITRATION, OPTIONAL CONCILIATION (1975), reprinted in 1 INT'L COM. ARB. (Oceana) pt. IV .A, 12 (1979).

<sup>87</sup> *Id.* arts. 1, 5.

<sup>88</sup> *Id.* art. 2.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* art. 1.

<sup>91</sup> *Id.* art. 1(2).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* arts. 3-4.

<sup>94</sup> *Id.* art. 5.

<sup>95</sup> INT'L CHAMBER OF COMMERCE, STANDARD ICC ARBITRATION CLAUSE (1975).

<sup>96</sup> ICC RULES, *supra* note 79, arts. 4-5.

<sup>97</sup> *Id.* art. 2(3)-(4).

choice.<sup>98</sup> If the parties contract to have three arbitrators hear their case, each party is entitled to select an arbitrator of his choice.<sup>99</sup> The third arbitrator, who serves as chairman, can be selected by any process agreed to by the parties.<sup>100</sup>

In lieu of an agreement between the parties, the Court of Arbitration appoints an arbitrator.<sup>101</sup> The ICC Rules favor a sole arbitrator over a panel of three arbitrators; in the absence of a contrary agreement between the parties, three arbitrators will only be appointed in exceptional circumstances.<sup>102</sup> Furthermore, neither party has any input into the court's choice, and neither party can protest the court's selection unless it is shown that the arbitrator is not "independent"<sup>103</sup> of both parties.

Obviously, if the parties wish to choose their own arbitrator they must do so in their contract prior to arbitration. It is not enough to agree on the *process* for selecting an arbitrator because one party may subsequently refuse to follow this process. If this happens, the whole selection procedure is removed from the control of the parties. Thus, the parties should actually *name* an arbitrator in advance if they want to retain complete control over the selection process.

Once an arbitrator has been selected by the parties or appointed by the ICC Court of Arbitration, he decides on the "terms of reference" upon which the parties will submit their case for arbitration.<sup>104</sup> The "terms of reference" is a document designed to aid the arbitrator in defining the issue presented in the case. In this document the parties must specify the issue to be determined, the place of arbitration, and the procedural rules to be followed, including the substantive law to be applied by the arbitrator.<sup>105</sup> Should the parties fail to reach an agreement on the terms of reference, the ICC Rules grant the arbitrator sweeping authority to proceed to arbitration by applying whatever rules he deems appropriate.<sup>106</sup>

Once the terms of reference are agreed upon by the parties or stipulated by the arbitrator, the case proceeds to arbitration. After hearing all the evidence, the arbitrator grants a tentative award.<sup>107</sup> Although the ICC Rules do not require a written opinion, most awards are accompanied by a memorandum explaining the arbitrator's reasoning.<sup>108</sup> The

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<sup>98</sup> *Id.* art. 2(3). See text accompanying notes 122-24 *infra*.

<sup>99</sup> *Id.* art. 2(4).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* art. 2(5).

<sup>103</sup> The term "independent" is not defined in the ICC Rules. Some authorities suggest that while an employee of a party would not be independent, the party's lawyer would be independent under ICC case law. See Sacerdoti, *supra* note 78, at 253.

<sup>104</sup> ICC RULES, *supra* note 79, art. 13(1).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* arts. 11-13.

<sup>107</sup> *Id.* art. 21.

<sup>108</sup> Thompson, *supra* note 19, at 28-29.

tentative award is then sent to the Court of Arbitration for approval or modification, but an arbitrator's award is rarely disturbed.<sup>109</sup> In the case of three arbitrators, unanimity is not required. The rules provide for a decision by a majority of the arbitrators and, where no majority can be assembled, for a decision by the chairman of the arbitral panel.<sup>110</sup>

After the arbitrator's tentative decision is approved by the Court of Arbitration, the Secretariat of the court notifies the parties of the result, at which time the award is deemed to be final.<sup>111</sup> No appeal is permitted from a final award.<sup>112</sup> Because no appeal on the merits is permitted, publication of a final award is generally the conclusion of the ICC arbitration process. Well over ninety percent of the parties who submit to arbitration voluntarily comply with the arbitrator's award.<sup>113</sup> In those few cases where voluntary compliance is not forthcoming, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>114</sup> may be invoked to compel compliance.

Despite the fact that over ninety percent of all its final awards are voluntarily complied with, parties who are considering submitting an issue to the ICC for arbitration, or who are contemplating including a provision in their contract providing for arbitration by the ICC, should carefully consider alternative forums. No single arbitral forum is right for every party and the ICC Rules of Conciliation and Arbitration have a number of unattractive features. Generally speaking, ICC arbitration is more costly, more time-consuming and, to a large extent, less predictable than arbitration in other forums.

First, the cost of ICC arbitration, like litigation in many courts, can be prohibitive. Unlike some other arbitral forums, such as the American Arbitration Association (AAA), which base costs on the amount of work performed by the arbitrators, the ICC determines costs according to the amount of money involved in the dispute.<sup>115</sup> Thus, the larger the dollar amount of the dispute, the higher the cost of arbitration. In addition, the arbitrator's personal expenses, such as travel expenses and premiums to arbitrator's with special expertise in highly technical matters, may substantially increase the cost of arbitration.<sup>116</sup> It is estimated that a single arbitrator's fee could be as high as \$62,000 in a dispute involving \$5 million.<sup>117</sup> Moreover, this figure does not include costs a party incurs to

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<sup>109</sup> ICC RULES, *supra* note 79, art. 21.

<sup>110</sup> *Id.* art. 19.

<sup>111</sup> *Id.* art. 23.

<sup>112</sup> *Id.* art. 24.

<sup>113</sup> Thompson, *supra* note 19, at 22.

<sup>114</sup> 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3. For the U.S. implementing legislation, see 9 U.S.C. §§ 201-08 (1976).

<sup>115</sup> Young, *Commercial Arbitration before the International Chamber of Commerce*, 11 A.B.A.L. NOTES 57, 61 (1975).

<sup>116</sup> Thompson, *supra* note 19, at 22.

<sup>117</sup> McLaughlin, *supra* note 21, at 225.

prepare for arbitration such as retaining a lawyer to take depositions and affidavits.

Second, the duration of ICC arbitral proceedings is longer than a party might expect. One case, admittedly highly exceptional, continues to move slowly after more than ten years of arbitration.<sup>118</sup> Even an average ICC case, however, requires almost two years to resolve.<sup>119</sup> This time period is substantially longer than that taken by other arbitral forums to resolve similar cases. A major reason for this delay is the requirement that parties agree to "terms of reference" before the case goes to arbitration. Drafting the terms of reference can be an expensive and time-consuming process that often degenerates into a mini-arbitration proceeding.<sup>120</sup> Preparation of terms of reference needlessly duplicates subsequent arbitration by encouraging the parties to introduce massive documentary and testimonial evidence in order to have the case submitted to the arbitrator on the most favorable possible ground.

Finally, and perhaps most significantly, the vagueness of the ICC Rules promotes uncertainty in the arbitral process. Unlike other arbitral forums, the ICC Court of Arbitration does not closely circumscribe the authority of its arbitrators.<sup>121</sup> Instead, the ICC Rules grant arbitrators broad discretion to decide all questions not resolved by the parties in advance of arbitration. The ICC Rules merely state that, in the absence of a contrary agreement, the Court of Arbitration will determine the place of arbitration,<sup>122</sup> that the arbitrator will determine substantive law by applying accepted conflicts of laws principles,<sup>123</sup> and that the arbitrator may invoke whatever procedural rules he desires irrespective of the municipal law where the arbitration occurs.<sup>124</sup>

Because the ICC Rules are so vague, all possible points of contention regarding arbitral procedure should be resolved contractually before a dispute actually arises. If the parties neglect to agree on such matters in advance, and later find that they cannot agree on them in the midst of a heated dispute, they will lose all control over the arbitral process. Under the ICC Rules, decisions that could determine the outcome of the entire arbitration are left to the sole discretion of the arbitrator. He alone has absolute authority, subject only to judicial review for abuse of discretion, to determine such questions as the extent of discovery, if any; the right to present or cross-examine witnesses; which rules of evidence will be applied; and the right to have a written transcript made of the proceedings.<sup>125</sup>

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<sup>118</sup> Thompson, *supra* note 19, at 22.

<sup>119</sup> *Id.*

<sup>120</sup> McLaughlin, *supra* note 21, at 226.

<sup>121</sup> *Id.* at 225-26.

<sup>122</sup> ICC RULES, *supra* note 79, art. 12.

<sup>123</sup> *Id.* art. 13.

<sup>124</sup> *Id.* art. 11.

<sup>125</sup> McLaughlin, *supra* note 21, at 225.

Despite the vagueness of the Rules of Conciliation and Arbitration, the ICC Court of Arbitration is a good arbitral forum for certain types of disputes. Sophisticated parties will specify in their arbitration clauses where they want the arbitration to take place and what substantive and procedural laws they want applied. The expense of ICC arbitration is less likely to be a major concern for such parties because they are willing to pay for the kind of expertise that ICC arbitrators can provide. However, less sophisticated parties, especially those whose disputes involve smaller amounts of money, might be well advised to look to other arbitral forums.

#### IV. Foreign Trade Arbitration Commission (U.S.S.R.)

The Statute<sup>126</sup> of the Foreign Trade Arbitration Commission at the USSR Chamber of Commerce and Industry was approved by the Supreme Soviet on April 16, 1975.<sup>127</sup> That legislation restructured the Foreign Trade Arbitration Commission (FTAC), which had been functioning since June 17, 1932. The new statute was designed to increase the competence of the former FTAC in response to the intensive development of Soviet international trade. Accordingly, the Commission is now empowered to resolve "disputes which derive from contractual and other civil law relations arising between subjects of law of various countries when carrying out foreign trade and other international economic and scientific-technical ties."<sup>128</sup>

The FTAC is not part of the state judicial or administrative system, but is instead a non-governmental organization which offers arbitration facilities on the basis of a voluntary submission by the disputants.<sup>129</sup> The Commission has its offices at the USSR Chamber of Commerce and Industry.<sup>130</sup> Supplementing the FTAC statute are the Rules of Procedure, which were also revised effective August 1, 1975.<sup>131</sup>

Disputes referred to the FTAC are tried by persons who are listed as arbitrators by the Presidium of the Chamber<sup>132</sup> for four years.<sup>133</sup> Ini-

<sup>126</sup> USSR CHAMBER OF COMMERCE AND INDUSTRY, STATUTE OF THE FOREIGN TRADE ARBITRATION COMMISSION, *reprinted in* 14 INT'L LEGAL MATERIALS 1035 (1975) [hereinafter cited as STATUTE].

<sup>127</sup> Kotlarchuk, *Has the USSR Foreign Trade Arbitration Commission Reached the Age of Aquarius with its Newly Revised Arbitration Statute of 1975?*, 11 INT'L LAW. 467 (1977).

<sup>128</sup> STATUTE, *supra* note 126, art. 1.

<sup>129</sup> Lebedev, *Union of Soviet Socialist Republics: the Foreign Trade Arbitration Commission at the U.S.S.R. Chamber of Commerce and Industry*, in HANDBOOK OF INSTITUTIONAL ARBITRATION IN INTERNATIONAL TRADE 275 (1977).

<sup>130</sup> The Chamber of Commerce and Industry, by virtue of its Charter, is "[a] non-governmental organization contributing to the development and promotion of trade and economic relations of the U.S.S.R. with other countries." *Id.* at 275-76.

<sup>131</sup> U.S.S.R. CHAMBER OF COMMERCE AND INDUSTRY, RULES OF PROCEDURE IN THE FOREIGN TRADE ARBITRATION COMMISSION (1975), *reprinted in* 1 INT'L COM. ARB. (Oceana) pt. III, 99 (1979) [hereinafter cited as RULES OF PROCEDURE].

<sup>132</sup> According to the Rules of Procedure, the list of FTAC arbitrators shall include not less than fifteen persons. RULES OF PROCEDURE, *supra* note 131, § 4. There is no restriction as to

tially, each party is allowed to select an arbitrator<sup>134</sup> or to solicit the President of the Commission to make the appointment for them. If the defendant does not choose an arbitrator within thirty days after receipt of notification by the Commission of a claim against him, the President of the Commission shall appoint the arbitrator for the defendant.<sup>135</sup> The two arbitrators thus chosen or appointed elect the third arbitrator, who serves as chairman of the tribunal.<sup>136</sup> If the two arbitrators do not agree within ten days on the selection of a third, the Chairman is appointed by the President of the FTAC.<sup>137</sup> Costs of the arbitration are paid by the parties involved, through fees paid to the Commission.<sup>138</sup>

The jurisdiction<sup>139</sup> of the Soviet FTAC exists in two general contexts. First, valid agreement by the parties involved to have any dispute arbitrated will establish the jurisdiction of the FTAC.<sup>140</sup> Second, the new statute of the FTAC also recognizes the participation of the Soviet Union in several international treaties which mandate settlement by arbitration of disputes between signatory parties.<sup>141</sup> Where arbitration is compelled by such treaties, the jurisdiction of the FTAC may exist if, for instance, it is generally provided that the defendant's arbitral procedures will be invoked, and the Soviet party is the defendant. Once established, jurisdiction is exclusive of any judicial proceeding.

The question of the competence of the FTAC in a particular proceeding is resolved by the tribunal hearing the case.<sup>142</sup> Thus, where one of the parties challenges the jurisdiction of the Commission, such a challenge does not abate the FTAC proceeding. Rather, the arbitrators themselves resolve any jurisdictional objection. If jurisdiction is found, they then proceed with the hearing.<sup>143</sup>

Arbitration proceedings are instituted by filing a statement of claim with the FTAC. This statement identifies all parties, the plaintiff's demands and amount of claim, the legal and evidentiary bases of the claim, a statement of jurisdiction of the FTAC, the name of the plaintiff's pro-

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nationality, although the practice thus far has been to list only arbitrators who are Soviet citizens. Holtzmann, *Dispute Resolution Procedures in East-West Trade*, 13 INT'L LAW. 233, 235 (1979).

<sup>133</sup> Kotlarchuk, *supra* note 127, at 474.

<sup>134</sup> RULES OF PROCEDURE, *supra* note 131, §§ 14.2(c), 17.3.

<sup>135</sup> *Id.* § 18.2.

<sup>136</sup> *Id.* § 18.1.

<sup>137</sup> *Id.* § 18.2; Lebedev, *supra* note 129, at 279.

<sup>138</sup> RULES OF PROCEDURE, *supra* note 131, § 11.

<sup>139</sup> *See generally id.* § 1.

<sup>140</sup> Kotlarchuk, *supra* note 127, at 473.

<sup>141</sup> Under article 2, the Commission "shall also entertain disputes which the parties involved are bound to refer thereto by virtue of international treaties." An example of such a treaty is the Moscow Convention of 1972, which relates to practically all fields of economic, scientific and technical cooperation among member countries. It provides, as a general rule, for the submission of disputes to the institutional arbitration of the Chamber of Commerce in the respondent's country. Lebedev, *supra* note 129, at 283.

<sup>142</sup> RULES OF PROCEDURE, *supra* note 131, § 1.3.

<sup>143</sup> Lebedev, *supra* note 129, at 283-84.

posed arbitrator and proof of payment of the arbitration fee.<sup>144</sup> The requirement of presenting all written evidence simultaneously with the complaint saves the foreign party the inconvenience of discovery. In fact, no provision is made for discovery in the Rules of Procedure.<sup>145</sup> The statement is received by the Secretary of the FTAC, who notifies the respondent and invites him to file a written defense within thirty days.<sup>146</sup> At the end of the thirty day period the Commissioner may appoint the case for hearing, although this does not preclude the respondent from submitting a defense at a later stage.<sup>147</sup>

The seat of the FTAC and the place of its meetings is in Moscow. If necessary, a tribunal may hold a meeting elsewhere.<sup>148</sup> Generally the proceedings will be open to the public, although upon motion by the tribunal or either party they will be closed.<sup>149</sup> Each side must prove the facts which it is relying on in making its claim or defense.<sup>150</sup> Additionally, the arbitrators may collect evidence on their own initiative.<sup>151</sup> During the course of the hearing the parties are allowed to question experts and witnesses, as well as each other. In reaching their conclusion, the arbitrators are free to evaluate the evidence "according to their own inner convictions."<sup>152</sup>

According to the Rules of Procedure, the Commission resolves disputes as to applicable law, "being guided—if the dispute has arisen from contractual relations—by the provisions of the contract and having regard to trade usages."<sup>153</sup> The substantive law applicable to a particular dispute may be determined in several possible ways. First, it is a common principle of Soviet law that provisions of an international convention override any conflicting Soviet law.<sup>154</sup> Second, the FTAC has established a strong tradition of giving full recognition to choice of forum clauses.<sup>155</sup> Finally, in the absence of agreement as to applicable law, the conflicts rule of *lex loci contractus* will be referred to.<sup>156</sup> In such cases "the place of the making of a transaction shall be determined according to Soviet law."<sup>157</sup>

By virtue of article 9 of the Statute, awards of the FTAC are final and without appeal. Awards are to be settled by the parties voluntarily,

<sup>144</sup> RULES OF PROCEDURE, *supra* note 131, § 14.

<sup>145</sup> Comment, *The Case for FTAC Arbitration of Disputes between Soviet Enterprises and American Firms*, 14 COLUM. J. TRANSNAT'L L. 302, 325 (1975).

<sup>146</sup> RULES OF PROCEDURE, *supra* note 131, § 17.2.

<sup>147</sup> Lebedev, *supra* note 129, at 287.

<sup>148</sup> RULES OF PROCEDURE, *supra* note 131, § 6.

<sup>149</sup> *Id.* § 23.

<sup>150</sup> *Id.* § 27.

<sup>151</sup> Lebedev, *supra* note 129, at 288.

<sup>152</sup> RULES OF PROCEDURE, *supra* note 131, § 27.4.

<sup>153</sup> *Id.* § 12.

<sup>154</sup> Lebedev, *supra* note 129, at 289.

<sup>155</sup> Comment, *supra* note 145, at 330.

<sup>156</sup> *Id.* at 332.

<sup>157</sup> Lebedev, *supra* note 129, at 290.



within the period set by the Commission. If an award is not voluntarily executed within this period, it is enforced according to law and international treaties.<sup>158</sup> The Soviet Union has entered into bilateral treaties providing for mutual recognition of arbitral awards with more than twenty countries, and is also a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958.<sup>159</sup>

Since its inception in 1932, a primary criticism of the FTAC has been its attachment to the USSR Chamber of Commerce.<sup>160</sup> Despite concern as to the FTAC's impartiality, it is generally recognized that it has a nearly unblemished record for fairness.<sup>161</sup> There has even been some suggestion that the FTAC has been more than fair in order to foster confidence abroad.<sup>162</sup> Although the pre-eminence of the FTAC has recently been declining as Soviet enterprises have begun to agree to other forums and choices of law, the FTAC does remain a viable alternative for several reasons.

Initially, the dangers of failing to provide for any arbitration in a U.S.-Soviet contract should be considered.<sup>163</sup> Perhaps that is a risk an investor may choose to take, hoping that any dispute will be settled before the need for arbitration arises. But if settlement does not occur, the U.S. party will either have to create an ad hoc arbitral proceeding or find itself involved in a lawsuit governed by local Soviet law. Such litigation would be expensive and bothersome, and the inexperience of domestic courts in resolving trade disputes makes the inclusion of an arbitral agreement much more sensible.<sup>164</sup>

There remains the possibility of providing for arbitration in a third party forum, such as Sweden or Switzerland. This would allay fears of unfairness, but creates several problems in the process. Under the conflict of laws principles most likely in force in the forum, and absent a choice of law clause, Soviet substantive law would most likely be deemed applicable. There is, therefore, little reason to avoid the FTAC, which is at least more familiar with Soviet law.<sup>165</sup> If it is agreed that the law of a third party forum will apply, the proceedings become even more complicated and the results more difficult to predict. Finally, third party tribu-

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<sup>158</sup> *Id.* at 291.

<sup>159</sup> 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3.

<sup>160</sup> *See, e.g.,* Pissar, *The Communist System of Foreign-Trade Adjudication*, 72 HARV. L. REV. 1509, 1426 (1959).

<sup>161</sup> Comment, *supra* note 145, at 355.

<sup>162</sup> S. PISAR, COEXISTENCE AND COMMERCE 408 (1970). Pissar has stated: "Those nominated by the various communist Chambers of Commerce to serve as arbitrators are in general persons of considerable achievement and high professional and social standing. One cannot lightly assume that such individuals are devoid of intuitive feelings for justice and foul play. . . . To foster contractual discipline at home and confidence abroad, the tribunals may indeed be leaning backward to be harsh with their own." *Id.* at 408-09.

<sup>163</sup> Comment, *supra* note 145, at 353.

<sup>164</sup> *Id.* at 354.

<sup>165</sup> *Id.*

nals have had little experience in resolving disputes between socialist and capitalist countries, and their rules of procedure may be inadequate for the task.<sup>166</sup> On balance, given its strong record of fairness in its over forty years of existence and its general autonomy from the Soviet state system, there is no reason to avoid the FTAC for ideological reasons. In addition, since Soviet domestic law may well govern the arbitration proceeding regardless of its situs, the thorough knowledge of Soviet law and East-West economic relation of FTAC arbitrators may well be a desired plus.<sup>167</sup>

## V. Stockholm Chamber of Commerce

The Arbitration Institute of the Stockholm Chamber of Commerce (SCC Institute), officially organized in 1949, evolved from a committee for settling commercial disputes that the Stockholm Chamber of Commerce had created in 1917.<sup>168</sup> Although previously involved primarily with domestic disputes, in 1976 the SCC Institute revised its rules to accommodate non-Swedish parties seeking arbitration of international disputes.<sup>169</sup> For a variety of reasons, the SCC Institute has emerged since 1976 as a major international arbitration institute.<sup>170</sup>

Sweden's popularity as a place for arbitration is grounded on the difficulties inherent in choosing an arbitral forum when the disputants are of different nationalities.<sup>171</sup> Rather than arbitrate in either of the parties' home states, the parties can more easily agree to arbitration in a third country.<sup>172</sup> Such third country arbitration presumably ensures a more objective result.

Sweden qualifies as a desirable third country arbitration location for two reasons. First, the cornerstone of Sweden's foreign policy is nonalignment with either the East or West, or the developed or developing countries.<sup>173</sup> Second, Sweden is particularly familiar with and experienced in the arbitration process, having adopted the first Swedish Arbitration Act as early as 1887.<sup>174</sup>

Recognizing these advantages of the SCC Institute, the Chamber of Commerce and Industry of the U.S.S.R. and the American Arbitration Association drafted a model arbitration clause for optional use in U.S.-Soviet trade, providing for arbitration in Sweden under the UNCITRAL

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<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 356.

<sup>168</sup> Hjermer, *Sweden: the Stockholm Arbitration Institute*, in HANDBOOK OF INSTITUTIONAL ARBITRATION IN INTERNATIONAL TRADE 189 (1977).

<sup>169</sup> 2 J. WETTER, *supra* note 9, at 231.

<sup>170</sup> Wetter, *East Meets West in Sweden*, 13 INT'L LAW. 261 (1979).

<sup>171</sup> See McLaughlin, *Arbitration and Developing Countries*, 13 INT'L LAW. 211 (1979); Holtzmann, *Dispute Resolution Procedures in East-West Trade*, 13 INT'L LAW. 233 (1979).

<sup>172</sup> Holtzmann, *supra* note 171, at 235.

<sup>173</sup> The Swedish character is one of "a cool dispassionate attitude to the resolution of international disputes." Wetter, *supra* note 170, at 264.

<sup>174</sup> Holtzmann, *supra* note 171, at 240-41.

Rules,<sup>175</sup> with the Stockholm Chamber of Commerce<sup>176</sup> having authority to appoint the presiding arbitrator.<sup>177</sup> In their joint announcement of the model clause in 1977, the parties explained that the clause "is optional and that parties from both countries are free to utilize the clause, or such other form of arbitration as they may mutually prefer and agree best suits their particular needs."<sup>178</sup> In view of Eastern Europe's and the Soviet Union's decided preference for the arbitration method of resolution of contract disputes,<sup>179</sup> the existence of such a model clause is likely to further enhance the SCC Institute's position as a major international arbitration institute.<sup>180</sup>

The SCC Institute Rules state that the Swedish law of arbitration applies to procedure. Consequently, the Institute's rules of procedure closely resemble those in the Swedish Arbitration Act of 1929.<sup>181</sup> Swedish law, however, permits the parties to choose the specific set of arbitration procedures they wish to utilize in connection with the SCC Institute.<sup>182</sup> Thus a choice by the parties of the UNCITRAL procedural rules would not disrupt a concomitant choice of the SCC Institute as the administering body.<sup>183</sup>

Under the SCC Institute's 1976 Rules, the Institute appoints the chairman of the arbitral tribunal, or the sole arbitrator if the single arbitrator method is chosen, without participation by the parties.<sup>184</sup> Normally there will be three arbitrators, with each party appointing one.<sup>185</sup> In the event a party fails to appoint an arbitrator, the Institute is empowered to appoint that member of the tribunal.<sup>186</sup> Whether appointed by the Institute or by the parties, arbitrators are subject to challenge for cause before the Institute.<sup>187</sup>

The Swedish law of arbitration does not mandate a specific procedure. The arbitrators are given great discretion to determine how the proceedings should be conducted.<sup>188</sup> The rules do require that the par-

<sup>175</sup> See UNCITRAL discussion in text at notes 247-77 *infra*.

<sup>176</sup> When the appointment is to be made by the Chamber of Commerce itself rather than the SCC Institute, the "appointment will be made in consultation with the SCC Institute, and therefore in practice the result is likely to be the same as if reference had been made to the Institute." Hjermer, *supra* note 168, at 190.

<sup>177</sup> For text of the clause, see 3 J. WETTER, *supra* note 9, at 463-70.

<sup>178</sup> Holtzmann, *supra* note 171, at 245.

<sup>179</sup> *Id.* at 234-35.

<sup>180</sup> The influence of this model clause may be even greater. "The Chinese have told us that they are carefully studying Swedish arbitration law and practice. A delegation from the China Council for the Promotion of International Trade has visited the arbitration facilities at the Stockholm Chamber, and the director of the Stockholm Chamber has visited Peking for purposes of discussion on arbitration." *Id.* at 244.

<sup>181</sup> Hjermer, *supra* note 168, at 190.

<sup>182</sup> Holtzmann, *supra* note 171, at 242.

<sup>183</sup> See UNCITRAL discussion at notes 247-77 *infra*; 4 J. WETTER, *supra* note 9, at 30.

<sup>184</sup> McLaughlin, *supra* note 171, at 230.

<sup>185</sup> Hjermer, *supra* note 168, at 191.

<sup>186</sup> *Id.* at 189.

<sup>187</sup> *Id.* at 194; see 4 J. WETTER, *supra* note 9, at 23-40.

<sup>188</sup> McLaughlin, *supra* note 171, at 229.

ties submit to the arbitrators in writing a statement of the issues as well as a summary of the evidence to be offered by each party.<sup>189</sup> Although the arbitrators are granted the power to appoint experts on their own initiative, they are not empowered to require a witness' testimony or to require production of evidence by the parties.<sup>190</sup> Under the 1976 Rules, the arbitrator's decision must be accompanied by a statement of the reasons underlying the award.<sup>191</sup> The award is generally not made public.<sup>192</sup>

As regards the costs of SCC arbitration, the basic rule of Swedish law is that "the losing party shall pay the winning party all costs which are reasonably necessary for the conduct of the latter's case, inclusive of fees and costs to the arbitrators and costs for the party's attorney and even for the party's own work on the case."<sup>193</sup> The lack of either an arbitrator's fee schedule or a more definite explanation of cost determination in the Rules has made estimates of the ultimate cost of SCC arbitration uncertain.<sup>194</sup> The arbitrators are also permitted to apportion the expenses of arbitration among the parties.<sup>195</sup>

## VI. International Center for the Settlement of Investment Disputes

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States<sup>196</sup> entered into force on October 14, 1966,<sup>197</sup> one month after the twentieth country had deposited its instrument of ratification.<sup>198</sup> The Convention provides for conciliation and arbitration proceedings to be administered by the International Center for the Settlement of Investment Disputes (ICSID), an international institution associated with the World Bank and based in Washington, D.C. ICSID is governed by an Administrative Council composed of one representative from each member country to the Convention. The Administrative Council adopts the procedural rules which govern proceedings

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> Hjerner, *supra* note 168, at 199.

<sup>192</sup> *Id.* at 199-200.

<sup>193</sup> *Id.* at 200.

<sup>194</sup> McLaughlin, *supra* note 171, at 229; 2 J. WETTER, *supra* note 9, at 232.

<sup>195</sup> *Id.* For a more in depth treatment of the SCC Institute's procedures, the reader is referred to Dr. Gillis Wetter's book, *Arbitration in Sweden*, published in English by the Stockholm Chamber of Commerce, which has been noted as containing authoritative commentary on Swedish arbitration law and practice and translations of the relevant statutes. Copies of this book are available in the United States through the American Arbitration Association.

<sup>196</sup> 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159 [hereinafter cited as Convention]. The Convention was the result of efforts initiated by the World Bank to improve the climate of international investment. The World Bank realized that the creation of a mechanism for conciliation or arbitration wherein the host state and the investor were on equal terms would encourage investment. Intervention by the investor's home state was to be forbidden.

<sup>197</sup> Amerasinghe, *The International Center for the Settlement of Investment Disputes and Development through the Multinational Corporation*, 9 VAND. J. TRANSNAT'L L. 793 (1976).

<sup>198</sup> Broches, *The International Center for the Settlement of Investment Disputes*, in HANDBOOK OF INSTITUTIONAL ARBITRATION IN INTERNATIONAL TRADE 1 (1977).

unless the parties involved agree otherwise.<sup>199</sup>

ICSID itself does not conciliate or arbitrate. Those proceedings are conducted by conciliators or arbitrators appointed in accordance with the provisions of the Convention, or by the parties in their discretion. The discretion given the parties to determine the nature and rules of their own proceedings and to choose the arbitrators has been considered one of the strengths of the Convention.<sup>200</sup> Indeed, the Convention was carefully drawn so as to encourage participation in ICSID by both host nations and private parties.

The Convention contains rules for the resolution of disputes by either conciliation<sup>201</sup> or arbitration.<sup>202</sup> Conciliation, though not binding on the parties, offers greater flexibility than does arbitration.<sup>203</sup> The parties are free to determine by mutual agreement almost all of the procedural questions<sup>204</sup> and may even agree that conciliation will be binding.<sup>205</sup> Should the parties fail to agree on a procedural point, the Convention includes mechanisms for resolving any impasse. Consent to conciliation, once given, is irrevocable.<sup>206</sup> As a result, a conciliation proceeding properly begun will result in a determination regardless of the conduct or withdrawal of either of the parties.<sup>207</sup>

From the perspective of the host nation, resolution of a dispute by ICSID offers several advantages.<sup>208</sup> First, a host state that agrees to submit a controversy to ICSID is guaranteed that the investor's national state may not afford him diplomatic protection or bring an international claim on his behalf.<sup>209</sup> Second, a host state may require that local remedies be exhausted before consenting to the jurisdiction of the Center.<sup>210</sup> Third, absent agreement to the contrary, the applicable law in an arbitration is that of the host state.<sup>211</sup> Fourth, procedural rules are flexible in order to avoid compromising the traditionally special status of states involved in litigation with private persons.<sup>212</sup> Fifth, the host state is as-

<sup>199</sup> Amerasinghe, *supra* note 197, at 799.

<sup>200</sup> Szasz, *A Practical Guide to the Convention on the Settlement of Investment Disputes between States and Nationals of other States*, 1 CORNELL INT'L L.J. 1, 9 (1968).

<sup>201</sup> Convention, *supra* note 196, arts. 28-35.

<sup>202</sup> *Id.*, arts. 36-55.

<sup>203</sup> *Id.* art. 34. Parties to a conciliation proceeding must "give their most serious consideration to the Conciliation Commission's recommendations." Amerasinghe, *Dispute Settlement Machinery in Relations between States and Multinational Enterprises—with Particular Reference to the International Center for the Settlement of Investment Disputes*, 11 INT'L LAW. 45, 57 (1977).

<sup>204</sup> Parties cannot by agreement alter certain unwaivable requirements regarding the composition of the Commission, (arts. 29(2)(a), 31(2), 56(1) and (3), nor can the financial obligations of the parties to the Center be dispensed with by an agreement *inter se*. Convention, *supra* note 196, arts. 3, 29(2)(a), 31(2), 56(1).

<sup>205</sup> Amerasinghe, *supra* note 197, at 798.

<sup>206</sup> *Id.* at 800.

<sup>207</sup> Amerasinghe, *supra* note 203, at 57.

<sup>208</sup> *Id.* at 47.

<sup>209</sup> Convention, *supra* note 196, art. 27.

<sup>210</sup> *Id.* art. 26.

<sup>211</sup> *Id.* art. 42.

<sup>212</sup> Amerasinghe, *supra* note 197, at 802.

sured that any monetary award will be executed by the court of any member state as if it were a final judgment of a court in that state.<sup>213</sup> Finally, the ability of participating states to attract foreign investment is increased by the existence of an independent dispute resolution body not subject to unilateral changes of law by any individual forum.<sup>214</sup>

The Convention also offers several advantages to the private investor. Most significantly, the Convention provides persons and corporations the only institutionalized international forum for litigating with states. In addition to foreign states being subject to the jurisdiction of the Center, state organs and constituent subdivisions of the host state are also so subject, a significant enlargement of the class of potential parties. Both parties to a dispute brought before ICSID also benefit from the fact that the Convention is structured so as to insure that any proceeding properly instituted will actually be pursued, and will in due course result in a ruling, despite the failure of one of the parties to participate.<sup>215</sup> The Convention has specific provisions which provide a back-up system should the parties fail to agree on such things as the identity of the mediators<sup>216</sup> or the procedural rules the tribunal is to follow.<sup>217</sup> Under article 42(2) the arbitral body cannot make a finding of *non liquet* on the ground of silence or obscurity of the law.<sup>218</sup>

The subject matter jurisdiction of the Center is widely drawn, the only significant requirements being that a dispute, to be within the Center's jurisdiction, must be a dispute as to a legal right or obligation<sup>219</sup> and must arise out of an investment.<sup>220</sup> Neither term is defined in the Convention. It is possible that the Center may be used as a fact-finding body, provided the facts at issue will resolve a legal dispute.<sup>221</sup> Disagreements as to the legal obligations of the parties under either municipal or transnational law are also within the jurisdiction of the Center, absent an agreement to the contrary between the parties.<sup>222</sup> Finally, although jurisdiction of the Center is limited to legal disputes, specific provision is made for settlements *ex aequo et bono*,<sup>223</sup> and thus parties are not limited to seeking solely legal remedies.

Personal jurisdiction of the Center exists only when one party to the dispute is a contracting state or one of its constituent subdivisions or agencies<sup>224</sup> and the other party is a national of another contracting

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<sup>213</sup> Convention, *supra* note 196, art. 54.

<sup>214</sup> Amerasinghe, *supra* note 203, at 47.

<sup>215</sup> *Id.* at 48.

<sup>216</sup> *Id.*

<sup>217</sup> Convention, *supra* note 196, arts. 33, 34.

<sup>218</sup> A finding of *non liquet* indicates that the case is not clear enough for the judges to pronounce a verdict. See BLACK'S LAW DICTIONARY 951 (5th ed. 1979).

<sup>219</sup> Amerasinghe, *supra* note 203, at 49.

<sup>220</sup> Convention, *supra* note 196, art. 25(1).

<sup>221</sup> Amerasinghe, *supra* note 197, at 800; Convention, *supra* note 196, art. 25(1).

<sup>222</sup> Amerasinghe, *supra* note 203, at 50-51.

<sup>223</sup> Convention, *supra* note 196, art. 42(3).

<sup>224</sup> *Id.* art. 25(1).

state.<sup>225</sup> The parties must agree by written consent to the jurisdiction of ICSID.<sup>226</sup> This requirement is generally described as "the cornerstone of the jurisdiction of the Centre."<sup>227</sup> A request for arbitration or conciliation is formally submitted to the Center by filing it with the Secretary-General.<sup>228</sup> Importantly, there is no required form of consent. Consents may be found in instruments of completely diverse character which are not necessarily drawn to refer to the other party or to any dispute with it.<sup>229</sup> The host state may, for example, express its consent through a legislative act such as investment promotion legislation, while an investor's consent may be found in general form in a corporate charter or resolution.<sup>230</sup>

Choice of law questions under the Convention are left, in the first instance, to the parties involved in the arbitration. In the absence of any agreement, the Convention offers a fall-back provision to resolve the question.<sup>231</sup> The parties may also decide the rules of law the tribunal will apply. Absent agreement, the Convention provides that the law shall be "the law of the Contracting State party to the dispute (including its rules on conflict of laws) and such rules of international law as may be applicable."<sup>232</sup>

The creation of an arbitral body and the establishment of rules to assure that arbitration will continue even upon the default of one of the parties would be meaningless absent equally stringent enforcement provisions. Under the Convention, an arbitral award is binding on the parties and each party is required to abide by and comply with its terms.<sup>233</sup> A party is excused from this obligation only if execution of the award has been delayed pursuant to a request for interpretation,<sup>234</sup> revision,<sup>235</sup> or annulment<sup>236</sup> of the award, as provided for in the Convention.<sup>237</sup> Either

<sup>225</sup> *Id.* art. 25; Amerasinghe, *supra* note 197, at 800; Szasz, *supra* note 200, at 9.

<sup>226</sup> Convention, *supra* note 196, art. 25(1).

<sup>227</sup> Concurrent with their approval of the Convention, the Directors of the World Bank adopted a report on the Convention, which is appended to the Convention in the official publications of the Bank and the Center. The report was designed to provide an explication of the major provisions of the Convention, and was made available to all contracting state governments for their review prior to signing and ratifying the Convention. The report is published in Doc. ICSID/2. Szasz, *supra* note 200, at 8.

<sup>228</sup> Szasz, *supra* note 200, at 10.

<sup>229</sup> Amerasinghe, *supra* note 203, at 54. The Center has drafted model consent to jurisdiction clauses which are available for use in bilateral or multilateral agreements. Model Clauses Relating to the Convention on the Settlement of Investment Disputes; Designed for Bilateral Investment Treaties, Doc. ICSID/6.

<sup>230</sup> Amerasinghe, *supra* note 203, at 54.

<sup>231</sup> *Id.* This means that once consent has been given, partial or complete lack of agreement cannot prevent the rendering of a decision.

<sup>232</sup> Convention, *supra* note 196, art. 42(1).

<sup>233</sup> *Id.* art. 53(1).

<sup>234</sup> *Id.* art. 50.

<sup>235</sup> *Id.* art. 51.

<sup>236</sup> *Id.* art. 52.

<sup>237</sup> *Id.* This article of the Convention makes these three remedies the exclusive ones available.

party may make such requests. A request for interpretation is simply an inquiry addressed to the tribunal which made the award for an explanation of its scope or meaning. If the tribunal is unavailable, the request is directed to a new tribunal created pursuant to the general Convention rules.<sup>238</sup>

A request for revision is allowed "on the ground of discovery of some fact of such a nature as decisively to affect the award."<sup>239</sup> The fact may have been unknown to the tribunal and the applicant, although the applicant must not have been negligent in failing to discover the fact.<sup>240</sup> Application must be made within ninety days after discovery, subject to an absolute three year statute of limitations running from the time the award is rendered. Again, application is made to the tribunal which rendered the award. Where that tribunal is unavailable, a new one is appointed consistent with the provisions of the Convention.<sup>241</sup>

The most extreme challenge to an award is a request for annulment, which can be based on one or more of the following grounds: (a) the tribunal was not properly constituted, (b) the tribunal clearly exceeded its powers, (c) there was corruption by one of the members of the tribunal, (d) the tribunal made serious departures from the fundamental rules of procedure and (e) the award failed to state the reasons on which it was based.<sup>242</sup> The request for annulment is not submitted to the original tribunal, but rather to an ad hoc three-member committee appointed by the Chairman of the Administrative Council from the Panel of Arbitrators. This committee may annul the award in whole or part.<sup>243</sup>

Barring any attempt by either party to delay the enforcement of the award, article 53 establishes the binding force of an award on the international law level.<sup>244</sup> In addition, article 54 provides for enforcement by municipal courts. Each state which is a party to the Convention is required to recognize an award as if it were a final judgment of the court of that state, even if the state was not a party to the dispute.<sup>245</sup> In effect, the award is *res judicata* in every contracting state. Each state's courts must therefore enforce the pecuniary obligations created by an award if the prevailing party brings the award to that state for execution.<sup>246</sup> However, article 55 explicitly provides that such an award is not entitled to enforcement by any means which is inconsistent with local law. For instance, if domestic judgments would not be entitled to forced execu-

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<sup>238</sup> Amerasinghe, *supra* note 203, at 55.

<sup>239</sup> Convention, *supra* note 196, art. 51.

<sup>240</sup> Amerasinghe, *supra* note 203, at 55.

<sup>241</sup> Amerasinghe, *supra* note 197, at 813.

<sup>242</sup> Amerasinghe, *supra* note 203, at 55.

<sup>243</sup> *Id.* at 56.

<sup>244</sup> Amerasinghe, *supra* note 197, at 816.

<sup>245</sup> All that is required is presentation of a copy of the award, certified by the Secretary-General of the Center.

<sup>246</sup> Broches, *supra* note 198, at 13.



tion, judgments rendered through the Center would not be either. This is an important recognition of state sovereignty.

The temptation in measuring the effectiveness of ICSID is to consider the number of cases submitted as a suitable yardstick. Such a measure would not fully reflect the value of the Convention for two reasons. First, it is quite possible that many disputes are avoided or resolved by the mere presence of clearly established rules applicable to commercial disagreements. Second, and more important, there is no question that the existence of ICSID serves to improve the general climate of international investment, just as the drafters of the Convention at the World Bank intended.

## VII. UNCITRAL

When parties contract to arbitrate their potential differences, it is often advisable to specify in advance the procedural rules to be used in the arbitration proceedings.<sup>247</sup> Whether detailed in the contract or incorporated by reference, a variety of different sets of rules can be chosen. Complete procedural rules for arbitration have been established by many trade associations for general use within the industry, by the various institutional arbitration tribunals, and by statutes of some states.<sup>248</sup> There are significant variations between the various sets of rules.<sup>249</sup> These variations have become more significant as the increasing popularity of arbitration has caused the number of differing procedural rules to proliferate<sup>250</sup> because the parties' and arbitrators' familiarity with the rules contributes to the efficiency of a proceeding.<sup>251</sup> In an effort to provide uniform rules for conducting arbitration proceedings, the United Nations Commission on International Trade Law (UNCITRAL) has developed a comprehensive set of arbitration rules intended to be universally acceptable.<sup>252</sup> The UNCITRAL Rules<sup>253</sup> were adopted by the General Assembly of the United Nations on December 15, 1976.<sup>254</sup>

The UNCITRAL Rules can apply to both ad hoc and institutional arbitration if the parties to the contract have so agreed.<sup>255</sup> However application of the UNCITRAL Rules to an existing arbitral institution has been attacked by the better known arbitral institutions, which possess

<sup>247</sup> Ehrenhaft, *supra* note 56, at 1205.

<sup>248</sup> Thompson, *The UNCITRAL Arbitration Rules*, 17 HARV. INT'L L.J. 141, 142-43 (1976).

<sup>249</sup> Ehrenhaft, *supra* note 56, at 1205.

<sup>250</sup> McClelland, *supra* note 4, at 737.

<sup>251</sup> Thompson, *supra* note 248, at 142.

<sup>252</sup> *Id.* at 143.

<sup>253</sup> U.N. COMM'N ON INT'L TRADE LAW, ARBITRATION RULES (1976) reprinted in 15 INT'L LEGAL MATERIALS 701 (1976) [hereinafter cited as UNCITRAL RULES].

<sup>254</sup> UNCITRAL adopted its arbitration rules on April 28, 1976. UNCITRAL Report, 31 U.N. GAOR, Supp. (no. 17) 34, U.N. Doc. A/31/17 (1976).

<sup>255</sup> McLaughlin, *supra* note 21, at 228. Existing arbitral bodies are referred to in the Rules as "appointing authorities." UNCITRAL RULES, *supra* note 253, art. 1(1).

their own sets of familiar rules which they are understandably reluctant to set aside. Such arbitral institutions perceive that if they use the UNCITRAL Rules, they will lose an appreciable degree of control over the arbitral proceedings.<sup>256</sup> Thus, an arbitral institution chosen by the parties can decline to administer the proceedings even though the parties have also agreed that the UNCITRAL Rules would control.<sup>257</sup>

It is also important to note that the UNCITRAL Rules can be modified by the parties incorporating them into the contract,<sup>258</sup> so that the parties retain ultimate control over their initial ad hoc arbitration agreement.<sup>259</sup>

The UNCITRAL Rules are divided into three basic sections: composition of the arbitral tribunal (articles 5-14); arbitral proceedings (articles 15-30); and, the award (articles 31-41). Under the Rules, the arbitral tribunal will consist of three arbitrators unless the parties agree within fifteen days of the notice of arbitration that there will be a sole arbitrator.<sup>260</sup> If the parties are unable to agree upon the sole arbitrator's identity and no existing arbitral body has been chosen by the parties to administer the arbitration procedure, the Secretary-General of the Permanent Court of Arbitration at The Hague is permitted to designate an "appointing authority" who will subsequently name the arbitrator.<sup>261</sup> If three arbitrators are to be appointed, the standard party-arbitration system, whereby each party appoints an arbitrator and those two arbitrators choose the third,<sup>262</sup> is mandated.<sup>263</sup> If the two arbitrators are unable to agree on the third, the appointing authority method described above is utilized.<sup>264</sup>

Arbitrators named under the Rules are required to disclose "any circumstances likely to give rise to justifiable doubts as to [their] impartiality or independence."<sup>265</sup> A party may challenge a prospective arbitrator under article 10 of the UNCITRAL Rules. The efficacy of the challenge is determined by the decision of the appointing authority previously designated by either the parties or the Secretary-General.<sup>266</sup>

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<sup>256</sup> Thompson, *supra* note 245, at 145.

<sup>257</sup> But submissions declined by one institution will be accepted elsewhere, and the well-known institutions do not wish to be put in the position of either administering arbitration under rules other than their own or losing business. The smaller arbitral institutions, on the other hand, stand to benefit handsomely if they can advertise their services under a world-wide set of procedural rules. *Id.*

<sup>258</sup> UNCITRAL RULES, *supra* note 253, art. 1(2).

<sup>259</sup> Thompson, *supra* note 248, at 143-44.

<sup>260</sup> UNCITRAL RULES, *supra* note 253, art. 5.

<sup>261</sup> *Id.* art. 6(2). The Secretary-General is required to use a "list-procedure" to determine the parties' preferences for the appointing authority. McLaughlin, *supra* note 21, at 228-29.

<sup>262</sup> Thompson, *supra* note 248, at 147.

<sup>263</sup> UNCITRAL RULES, *supra* note 253, art. 7(1).

<sup>264</sup> *Id.* art. 7(3).

<sup>265</sup> *Id.* art. 9.

<sup>266</sup> *Id.* art. 12.

The rules of procedure in the UNCITRAL arbitral proceedings are flexible, as illustrated by article 15(1): "[T]he arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting its case." However, each party has the right to require a hearing for the presentation of evidence by witnesses and for oral argument.<sup>267</sup>

The tribunal also has the power to appoint experts to report to it on specific issues<sup>268</sup> and to require the parties to produce documents or other evidence.<sup>269</sup> Parties have the right to inspect the documents on which the tribunal's expert based his opinion<sup>270</sup> and to present their own expert witnesses.<sup>271</sup>

Pursuant to articles 18 and 19, the parties are allowed to frame the issues for the tribunal by submitting written statements of claim and defense. Submission of further written statements, however, is discretionary with the tribunal.<sup>272</sup>

Under the UNCITRAL Rules, any decision or award requires agreement of a majority of the arbitrators.<sup>273</sup> The award must be in writing and the reasons upon which the award is based must also be stated.<sup>274</sup> The award will be made public only with the consent of both parties.<sup>275</sup>

With regard to the costs of arbitration, article 39 states that "[t]he fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case." Such costs will generally be specified in the award.<sup>276</sup> Additional costs, such as travel expenses of witnesses, arbitrators and experts, legal expenses of the successful party, fees of the appointing authority and Secretary-General, may also be included in the award.<sup>277</sup> Although in most cases the costs of arbitration are to be assigned to the unsuccessful party,

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<sup>267</sup> *Id.* art. 15(2). This section also provides: "In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents or other materials." *Id.*

<sup>268</sup> *Id.* art. 27(1).

<sup>269</sup> *Id.* art. 24(3).

<sup>270</sup> *Id.* art. 27(3).

<sup>271</sup> *Id.* art. 27(4).

<sup>272</sup> *Id.* art. 22.

<sup>273</sup> *Id.* art. 31(1).

<sup>274</sup> *Id.* art. 32(2), (3).

<sup>275</sup> *Id.* art. 32(5).

<sup>276</sup> *Id.* art. 38.

<sup>277</sup> *Id.*

article 40 allows the tribunal to apportion the cost between the parties if such action is reasonable in the particular situation.

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—CARL DAN KILLIAN, JR.

—ISAAC NOYES NORTHUP, JR.

—JOHN JAY RANGE

