Troutman Pepper's

International Arbitration Handbook

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I. Introduction

Globalization increasingly fosters complex cross-border transactions and other international business relationships. These transactions and business dealings often give rise to disputes that are commonly resolved through **international arbitration**.

International arbitration is a private dispute resolution process that largely resides outside of the courts of a particular jurisdiction. Most often, parties to cross-border transactions agree to international arbitration because it provides a neutral forum and renders an award that is enforceable in most jurisdictions across the globe. At the same time, international arbitration protects due process rights, allows procedural flexibility, and ensures that sensitive information remains confidential.

This guide provides an overview of international arbitration: how it works; when you should select it as the dispute resolution procedure; and key considerations when drafting an international arbitration agreement. This guide also briefly introduces a species of international arbitration known as investment arbitration or investor-state arbitration.

While this guide is not a substitute for specialized legal advice, it offers practical guidance on some of the most salient features of international arbitration. Should you need further support with cross-border transactions or disputes, Troutman Pepper's International Dispute Resolution team has the requisite experience to meet your legal needs.

II. What is International Arbitration?

International arbitration is a consensual and largely private dispute resolution process where parties from different countries agree to have their disputes decided by one or more arbitrators, without the involvement of the courts of a particular country.

International arbitration procedures can vary dramatically depending on the backgrounds of the parties, arbitrators, and counsel. However, at its core, international arbitration reflects a distinct dispute resolution process that does not follow traditional litigation norms used by the courts of individual jurisdictions or even the norms followed in many domestic arbitration proceedings. Instead, international arbitration prodedures represent a blend of legal traditions that, in many ways, bridge the gap between common law and civil law norms.

In the case of cross-border transactions, international arbitration has become the dominant form of dispute resolution because the process affords parties access to a flexible, effective, and neutral dispute resolution forum that avoids the challenges of litigating within a foreign court system. Most importantly, however, international arbitration awards (*i.e.*, the final judgment of an arbitral tribunal) are readily enforceable in countries around the world. The same is not necessarily true for court judgments. For example, it is generally more difficult to enforce a U.S. court judgment in France than it is to enforce an international arbitration award.

This unique feature of international arbitration is the product of international conventions, the most important of which is the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). In basic terms, according to the New York Convention, the courts of member states must enforce foreign international arbitration awards unless a party can satisfy one of a relatively few narrow grounds to avoid enforcement.

III. Role of the Courts

While international arbitration proceedings take place outside the purview of national court systems, courts still play a critical role in supporting the arbitration process. How courts interact with arbitration proceedings varies depending on the jurisdiction and court system involved; however, national court systems most commonly address three critical issues:

- **Interpreting/Enforcing Arbitration Agreements**

  National courts are commonly called on to enforce the terms of an arbitration agreement or interpret a dispute resolution provision. This typically occurs in one of two scenarios: (1) if a party refuses to participate in arbitration despite the existence of a valid arbitration agreement; or (2) if a party files a lawsuit in a national court in contravention of an agreement to arbitrate. Although variability exists among jurisdictions around the world, local courts' consistent enforcement of

arbitration agreements is among the bedrocks of the international arbitration system and ensures that parties can confidently enter into arbitration agreements without the risk that they could be forced to adjudicate their dispute in a different forum.

- **Injunctive Relief**

  National courts may, subject to the law of the local jurisdiction, be asked to grant provisional or injunctive relief in support of a pending arbitration. In these cases, even if the parties have an enforceable arbitration agreement, parties may still avail themselves to the local courts to preserve the status quo during the pendency of a dispute, freeze assets, preclude dissemination of protected information, or prevent the spoliation of evidence.[1]

- **Award Enforcement**

  Under the New York Convention, international arbitration awards are regularly recognized and enforced as judgments by national courts in more than 160 countries.[2] Thus, while procedures can vary depending on the applicable jurisdictions, should a losing party fail to honor an award, the prevailing party may generally enforce the award in any country that is a signatory to the New York Convention.

[1] The availability of preliminary relief is not, however, confined to the national courts. Many international arbitration institutions provide emergency arbitration procedures, which allow parties to seek expedited relief prior to a fulsome arbitration proceeding.

[2] For a complete list of participating states, *see*: **https://www.newyorkconvention.org/countries**.

IV. Role of Arbitral Institutions

International arbitration institutions are independent bodies responsible for, among other things, (1) promulgating general procedural rules that parties may select as part of their arbitration agreement to govern the arbitration proceedings, and (2) providing administrative services to facilitate the arbitration process, including the appointment of the presiding arbitrator(s), for a fee. While each set of institutional rules may vary in subtle ways, the most common rules implement similar procedures related to the management of an international arbitration. For example, institutional rules identify the requirements to initiate an international arbitration, the guidelines for arbitrator appointment, the authority of the arbitrators to control the proceedings, and the timeline and format of any eventual award.

Some of the most common arbitral institutions used in connection with international arbitration proceedings are:

- International Chamber of Commerce (ICC)
- International Center for Dispute Resolution (ICDR)
- London Court of International Arbitration (LCIA)
- Hong Kong International Arbitration Center (HKIAC)
- Singapore International Arbitration Center (SIAC)
- Stockholm Chamber of Commerce (SCC)
- Dubai International Arbitration Centre (DIAC)
- China International Economic and Trade Arbitration Commission (CIETAC)

Alternatively, parties can elect not to utilize the rules or services provided by an arbitral institution in favor of what is known as *ad hoc* arbitration. The principal advantage of *ad hoc* arbitration is that it enables parties to avoid the fees charged by many arbitral institutions for administrative services. When opting for *ad hoc* arbitration, parties frequently adopt an existing set of *ad hoc* arbitration rules, such as the United Nations Commission in International Trade Law rules (UNCITRAL rules). *Ad hoc* arbitrations are theoretically more flexible, but sometimes risk becoming more costly and time-consuming, as parties may be drawn into national court litigation to resolve procedural issues, such as the appointment of a replacement arbitrator.

V. Key Features – Why Choose International Commercial Arbitration?

A. When Parties Must Use International Arbitration

Parties select international arbitration for two principal reasons.

First, international arbitration ensures that the prevailing party will receive an award that can be enforced in nearly any jurisdiction in the world, as a result of the New York Convention (as well as other similar international conventions). As explained above, the same is not necessarily true for court judgments. As a result, parties to cross-border transactions — particularly those located in different jurisdictions — almost always

utilize international arbitration because court judgments cannot be as widely enforced to collect payment from the losing party.

Second, international arbitration affords the parties a neutral forum for resolution of disputes and avoids the risk that one party may have a "home-court advantage" against their adversaries in a foreign jurisdiction. Indeed, the appointment of neutral arbitrators theoretically diminishes the risk that a local court may be biased against a foreign litigant. Relatedly, international arbitration norms and procedures are intended to be relatively universal in nature and avoid the procedural challenges and barriers that many national court systems may impose. This theoretically levels the playing field for international parties who may not have experience litigating in foreign jurisdictions.

B. When Parties May Prefer International Arbitration

Additionally, international arbitration has become a preferred means of dispute resolution for parties for many other reasons:

- **Arbitrator Selection**

  International arbitration provides parties with greater freedom to select the adjudicator(s) of their dispute. This includes not only the identity of the arbitrators themselves, but also the number of arbitrators who will oversee the dispute. While there are many methods for the appointment of arbitrators, the parties' ability to control who ultimately decides the dispute is commonly viewed as one of the most significant advantages of international arbitration. This is particularly

true for technically complex or industry-specific cases, where an arbitrator's specialized background in the subject matter of the dispute can greatly improve the efficiency of proceedings and credibility of the outcome.

- **Streamlined and Flexible Procedures**

  Most rules governing international arbitration proceedings impose relatively flexible procedures as compared to the stiff rules of civil procedure and evidence found in local courts. The parties can readily develop schedule, procedures, and submissions requirements (with the tribunal's approval) to create a tailored process that fits the needs of their case. While international arbitration proceedings can still be lengthy, this flexibility commonly enables parties to resolve complex disputes in a more timely and cost-effective manner when compared to litigation before the courts of many jurisdictions.

- **Due Process Protections**

  The flexibility and efficiency of arbitration is not at the expense of necessary due process safeguards. For example, arbitration procedures permit multiple rounds of pleadings, a formal hearing, oral argument, and cross-examination. These procedures give the parties sufficient opportunity to present and argue their case, thus minimizing the risk that a party could be hauled into an arbitration proceeding without the ability to fairly mount a defense.

- **Confidentiality**

  International arbitrations are, in most instances, confidential proceedings. This can be an important advantage in cases of particularly sensitive disputes or possible reputational harm. Importantly, however, confidentiality in arbitration is not absolute. Parties can be required to disclose information gathered during the proceedings if ordered to do so by a court, otherwise required by law, or if a party is required to enforce the award in a local court.

- **Narrow Discovery**

  Unlike litigation, which (at least in the United States) often involves expansive (and expensive) pre-trial discovery, discovery in international arbitration is limited. For example, international arbitrations do not commonly involve typical U.S. discovery devices, such as depositions, interrogatories, or requests to admit. Moreover, while document exchange is relatively common (often referred to as "disclosure"), it is far more narrow and restricted than the practice seen in the United States.

- **Finality**

  After an award is issued by the tribunal, it is typically final. Parties can challenge the award only on very narrow grounds, such as fundamental procedural deficiencies. As a result, the parties can avoid prolonged debates in appellate courts that typically follow a court judgment. Moreover, given the limited grounds for appeal, the parties do not spend substantial time or effort preserving issues for appeal during the hearing. Relinquishing the right to appeal is a

significant concession, but often allows for a more streamlined, efficient, and economical dispute resolution process.

- **Cost Shifting**

  As a default, most international arbitration procedures permit cost shifting and allow the "prevailing party" to recover its costs and attorneys' fees. This is in contrast to the default rule of the United States, where cost shifting is not the norm unless permitted by statute or agreed by the parties.

C. How Parties Use Arbitration in Special Circumstances

In addition to the features described above, most institutional international arbitration rules contain provisions that afford parties additional procedures to streamline the proceedings:

- **Emergency Arbitrations**

  Most institutional arbitration rules afford parties the right to initiate emergency arbitrations to secure some form of preliminary or injunctive relief. This process is usually an alternative to seeking interim or injunctive relief from the local courts. While procedures can vary, emergency arbitrations typically consist of a very short proceeding, during which a sole arbitrator renders a determination on a matter that cannot await the formal appointment of an arbitral tribunal.

- **Expedited Arbitrations**

  If the amount in controversy falls below a specific threshold, most arbitration rules will call for the parties to proceed according to

expedited arbitration rules. According to these rules, the arbitration will proceed on a truncated timeline and set of procedures that aim to reduce the cost and time required to render an award. In doing so, expedited arbitration theoretically allows parties to resolve lower-value claims in a more cost-effective manner. Expedited arbitration rules typically apply as a default if the amount in controversy does not exceed a certain threshold, so if parties wish to opt out of expedited arbitration, they usually must do so in their arbitration agreement.

- **Multiparty Issues – Joinder and Consolidation**

  Many international arbitration rules permit the joinder of parties to arbitration proceedings, or the consolidation of parallel arbitrations, provided that an agreement to arbitrate is in place. The joinder of third parties and consolidation of disputes can avoid duplicative/parallel proceedings and further reduce costs.

VI. Costs and Time of International Arbitration

The costs and time required to resolve a dispute vary dramatically depending on the complexity of the case and applicable rules. Although often difficult to predict, when selecting an arbitral institution or *ad hoc* rules, clients should consider the following factors that can drive the costs and time for the arbitration.

A. Costs

The costs a party may incur in connection with an international arbitration typically include some combination of attorney's fees, expert fees, arbitrator fees, and administrative fees charged by the arbitral institution (in addition to ancillary expenses).

Attorney's fees and expert fees depend heavily on the underlying substance of the dispute and are difficult to estimate without a deeper understanding of the case. Parties should carefully work with counsel to gather information concerning anticipated legal and expert fees.

Arbitral institutions, however, typically regulate arbitrator costs and administrative fees. Arbitrator fees represent the fees paid to the arbitrators to oversee the dispute. Administrative fees represent the fees paid to the arbitral institution (if applicable) to administer the case. Parties typically pay a portion of the arbitrator's fees and institutional administrative fees in advance of the proceedings. These fees can vary across arbitral institutions, which often provide fee calculators or fee schedules that parties can use to calculate the total fees based on the amount in controversy.[3]

For example, according to the ICC, a $10 million dispute before a panel of three

[3] *See, e.g.*, AAA-ICDR Calculator at **https://apps.adr.org/feecalculator/faces/FeeCalcHome.jsf?_ga=2.136565744.1513262727.1653492063-1269678485.1653492063**; *see also* ICC Cost Calculator at **https://iccwbo.org/dispute-resolution-services/arbitration/costs-and-payments/cost-calculator/**.

arbitrators would cost approximately $400,000 in estimated arbitrator and administrative fees. Similarly, in the case of a SIAC arbitration, a $10 million dispute before a panel of three arbitrators would cost approximately $300,000 in estimated arbitrator and administrative fees. Both the ICC and SIAC compensate their arbitrators according to a fixed-fee schedule governed by the amount in controversy. By contrast, other institutions like the ICDR or LCIA compensate their arbitrators based on the individual arbitrators' rates and the amount of time the arbitrators dedicate to a particular matter.

Critically, as discussed above, cost shifting is the norm in international arbitration. As a result, an arbitrator can shift a party's costs (including attorney's fees, expert fees, arbitrator fees, administrative fees, and ancillary expenses) to their adversary based on the outcome of the matter.

Further, parties should be aware that third-party funding is becoming increasingly common in international arbitration. While third-party funding structures vary, third-party funders commonly pay for all or part of a party's attorneys' fees, arbitration costs, and expenses in return for a specified share of any damages awarded.

B. Time

The time required to complete an international arbitration will depend on the facts of the case and how the parties organize the proceedings. Indeed, with greater control over the procedures, disclosures,

and submissions, the parties can generally influence the length of their arbitration to suit the claims at issue.

However, institutional arbitration rules also play a significant role in influencing the timeline of an arbitration. Indeed, some arbitral rules implement unique procedures that can shorten (through expedited procedures) or lengthen the period required to obtain a final award — although these procedures are commonly implemented for good reason. While international arbitral institutions have dedicated significant effort to reducing the time required to complete an international arbitration, anecdotal evidence shows that a significant number (though not all) of international arbitration proceedings last between approximately 12 and 18 months.[4]

VII. How to Draft an International Arbitration Clause

Because arbitration is a creature of contract, if parties wish to arbitrate their disputes they must agree to do so in writing. Parties often set forth these agreements at the beginning of their relationship in the dispute resolution procedures contained in their contract.

[4] *See, e.g.*, "AAA Arbitration Report: Time and Cost: Considering the Impact of Settling International Arbitrations," **https://www.icdr.org/sites/default/files/document_repository/AAA241_ICDR_Time_and_Cost_Study.pdf?utm_source=linkedin&utm_medium=social&utm_campaign=icdr_time_and_cost**.

For an agreement to arbitrate to be enforceable, it must be clear. Ambiguities can render an agreement to arbitrate unenforceable, or at a minimum, delay the ultimate resolution of a dispute.

To prevent such an outcome, arbitral institutions and *ad hoc* rules provide sample arbitration clauses. For example, the ICDR's clause states:

> *Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules.*

Similarly, the ICC's standard clause states:

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

Best practices suggest that parties should generally rely on an institution's or *ad hoc* rules' model arbitration clause and carefully modify that clause depending on the needs of the parties. However, many parties prefer to draft their own unique, specially tailored dispute resolution procedure. Regardless of whether the parties to a contract rely on standard clauses or craft their own, they should pay special attention to several essential elements of every arbitration clause:

- The clause should state that resolution of disputes via international arbitration is mandatory.

- The parties should set forth the specific rules of arbitration they intend to follow. In connection with this decision, parties should consider whether the rules they select are for *ad hoc* or administered/institutional arbitration.

- The parties should specify the seat or place of the arbitration. The seat/place determines which country's arbitration law governs the arbitration. The seat or place of arbitration is also the default location of the arbitration hearings. However, parties can agree to host the hearings in a different location in the arbitration agreement itself or during an arbitration.

- The parties should define the scope of the arbitration clause, clearly specifying any types of disputes that are exempt from arbitration. Generally, parties should draft their arbitration clause broadly to provide for arbitration of a wide variety of disputes.

- The parties should specify the substantive law that will govern the dispute. This does not necessarily have to be the law of the jurisdiction in which the arbitration is seated.

- The parties should identify the language to be used during their proceedings.

- The parties should typically spell out that the arbitral tribunal — and not a court — shall decide any questions of jurisdiction in the first instance.

The parties can specify several optional elements as well. These elements further define the contours of the arbitration and what the parties should expect from their dispute resolution procedure:

- Number of arbitrators (typically one or three).
- Method of selecting arbitrator(s).
- Arbitrator qualifications.
- Any additional confidentiality or non-disclosure rules.
- Fee shifting (if the parties wish to deviate from the typical prevailing party rule).
- Pre-arbitration negotiations/mediation.
- Joinder or consolidation provisions that consent to the joinder of third parties or consolidation of arbitrations involving related disputes.
- Document exchange or other discovery-related procedures.
- Express waiver of the right to challenge an award.

Importantly, while the elements discussed above are common features of most international arbitration agreements, the precise terms and requirements may vary depending on facts and circumstances of a particular matter. As a result, parties should carefully work with counsel to ensure their international arbitration agreements are appropriate for the transaction at issue.

VIII. Typical Steps for International Arbitration

While the exact procedure of any arbitration will depend on several factors and can be tailored by the parties' agreement, the following steps are common among international arbitration proceedings.

A. Claimant's Request for Arbitration

To initiate an arbitration, the claimant must first file a "Request for Arbitration" or "Arbitration Demand" with the relevant institution and/or provide the opposing party a copy. The length of and detail included in a request/demand can vary, but usually must include information concerning: (1) the parties and their representatives; (2) a basic summary of the claimant's position and relief requested; and (3) any procedural items for discussion, such as claimant's nomination of potential arbitrators (if applicable).

B. Respondent's Answer

Upon receipt of a request/demand, the respondent has roughly 30 days to file an answer, depending on the applicable rules. According to most arbitration rules, an answer is not strictly required and if a respondent declines to submit an answer, the respondent will be deemed to have denied the allegations in the request/demand. Similar to the request/demand, answers vary in length and contain general denials of the claim, a brief rebuttal telling respondent's side of the story, a description of any counterclaims, and any other procedural items, such as the respondent's arbitrator selection (if applicable).

C. Appointment of the Tribunal

Once the initial pleadings have been filed, the institution will proceed to confirm the arbitral tribunal (whether a sole arbitrator or three-member arbitrator tribunal). While the methods of appointment vary depending on the rules and parties' arbitration agreement, most often the parties will have the option

to nominate and/or agree upon the tribunal members in the first instance (to be confirmed by the institution), with the institution intervening in the event of any impasse. Sometimes, however, the clause provides for selection of the arbitrator(s) by the institution straight away. The arbitrator appointment stage will require the nominated arbitrators to disclose any potential conflicts and allow the parties to object to an arbitrator's appointment if either party believes the conflict raises concerns regarding impartiality.

D. Procedural Hearing and Procedural Order

Once the arbitration panel is constituted, a meeting is held with the parties to discuss the procedural schedule going forward. Following the procedural hearing, the arbitral tribunal will typically issue a procedural order outlining the arbitration schedule and the procedures that the parties must follow during the arbitration.

E. Written Submissions – Round One

Following the release of the tribunal's scheduling order, the parties are expected to exchange detailed written submissions describing their claims and citing evidence in support thereof. While there are several different approaches, two common methods of structuring legal submissions in an international arbitration are known as the: (1) memorial approach; and (2) pleadings approach.

Memorial submissions, derived from civil law traditions, typically require the parties to set out their claims or defenses as part of one large omnibus submission. This means that a memorial submission will not only include a

detailed legal submission concerning a party's claims and defenses, but also all relevant exhibits, written witness statements,[5] and expert reports.

Alternatively, under the pleadings approach, derived from common law traditions, the parties exchange their factual (and sometimes legal) positions in preliminary written submissions. Once the parties have both had an opportunity to set out their claims and defenses in writing, the parties then proceed through a series of stages where they exchange documents, witness statements, expert reports, and sometimes pre-hearing submissions.

F. Document Disclosure

Following the initial round of written submissions, the parties engage in a process referred to as document disclosure or document exchange. Critically, document disclosure in international arbitration ***is not*** U.S.-styled discovery. Indeed, in some instances, arbitral tribunals will elect not to permit document disclosure at all.

If document exchange is permitted, it is far more constrained than normal discovery practices in the United States and most commonly abides by standards described in guidelines, such as the IBA Rules on the Taking of Evidence in International Arbitration. In general terms, parties are only permitted to request

[5] A unique feature of international arbitration proceedings is that direct witness testimony is more often introduced in written form through submissions known as "**witness statements**." The witness statement is intended to serve as a substitute for the oral direct testimony of a fact witness at the arbitration hearing.

documents (or narrow sets of documents) that are relevant and material to the dispute. The document exchange process in international arbitration most often lasts approximately one month and involves three to four rounds of requests and objections. Most commonly, the process unfolds using a table known as a Redfern Schedule. At the outset of the document exchange process, each party sets out their document requests in the first column of the Redfern Schedule (with one request per row in the table). Thereafter, the responding party sets out any objections in the next column, followed by a reply by the requesting party in the next column, and often a sur-reply by the responding party in the following column. When all of the columns for each request have been filled in, the tribunal will resolve any disagreements between the parties and will decide whether the responding party must provide the requested documents or not.

G. Written Submissions – Round Two

After document exchange is complete, the parties often (though not always) exchange a second round of submissions. In the case of the memorial approach, the claimant will submit a reply memorial that often includes any new information collected during document disclosure, followed by the respondent's sur-reply memorial. In the case of the pleadings approach, as described above, the second round of submissions typically involves written witness statements (including initial and reply witness statements), expert reports (including initial expert reports and reply expert reports), and pre-hearing submissions.

H. Hearing

After the parties have submitted all pleadings, a formal hearing is held in front of the tribunal. The precise procedures used during a hearing will depend in large part on the preferences of the arbitral tribunal; however, most international arbitration hearings follow a similar structure: (1) opening statements; (2) fact witness examination; (3) expert witness examination; and (4) closing statements (if necessary).

Much like U.S. domestic arbitration hearings and litigation trials, the bulk of an international arbitration hearing focuses on fact and expert witness testimony. However, because witnesses and experts have already introduced their direct testimony through written witness statements, the majority of hearing time is devoted to cross-examination. Indeed, a party's ability to introduce new oral direct testimony is curtailed in international arbitration proceedings to limit opportunities for unfair surprises. In some cases, however, tribunals may permit a witness to provide limited oral direct examination at the hearing to provide an introduction or to address issues that the witness could not have previously raised in his or her prior written statements. In other instances, tribunals prefer to have the experts provide limited direct presentations to provide a high-level summary of their findings.

That lack of robust oral direct testimony, combined with substantial pre-hearing submissions, can help shorten international arbitration hearings. However, the length of the proceedings will often depend on the complexity of the dispute, the arbitral tribunal's preferences, and parties' time management practices.

I. Post-Hearing Submissions

Following the conclusion of hearings, each party may (if the arbitral tribunal finds it appropriate) submit post-hearing briefs, outlining their entire position of the case. In many instances, though not all, parties submit two rounds of post-hearing briefs, providing each party an opportunity to reply. The length of the post-hearing submission phase of an international arbitration can vary dramatically depending on several factors, but commonly lasts around 30 to 60 days.

J. Award

Following the conclusion of the hearing and post-hearing submissions, the tribunal will formally close the proceedings to prevent the introduction of additional evidence into the record. Thereafter, the tribunal will enter deliberations and formally draft the final award. The time required to draft an award can vary greatly, depending on the size and complexity of the dispute; however, many arbitral rules impose strict time limits on when the tribunal must release its final award. Once completed, the award itself is often a very detailed summary of the case, including the procedural history, facts, parties' positions, and ultimately the tribunal's decision.

K. Cost Submissions and Cost Awards

As explained above, cost shifting is a common practice in international arbitration. A cost award may be part of the final award on the merits, or the tribunal may ask the parties to issue cost submissions explaining why each party believes that costs should be

shifted to the other side. In many instances, these rules will depend on the tribunal's determination of, among other things, which party prevailed in the dispute, whether a party engaged in dilatory or inefficient tactics during the arbitration, and whether a party's fees in the case were reasonable. Following a review of the parties' submissions, the tribunal will issue a separate cost award allocating the parties' costs.

IX. Enforcement and Appeal of Arbitral Awards

A. Broad Enforcement

As discussed above, one of the key benefits of international arbitration is the enforceability of an award. Should a losing party fail to comply with an award, the prevailing party will generally be able to bring an action to seek judicial recognition and enforcement of the award in most jurisdictions, including in any of the 160+ countries that are signatories to the New York Convention. Naturally, the prevailing party will choose a country where the losing party has assets that can be used to satisfy an award. In the event that a losing party does not have sufficient assets in any one country, the prevailing party can seek judicial recognition in multiple locations.

There are very limited grounds for challenging an award. Under the New York Convention — the general standard around the globe — an award may only be challenged if a party

furnishes proof that:[6]

- A party to the arbitration agreement was under some form of incapacity or the arbitration agreement was invalid;
- The arbitration proceeding was subject to severe procedural unfairness, such that one side was unable to present its case;
- The award addressed matters outside the scope of the arbitration proceeding;
- The composition of the arbitral tribunal or the arbitration procedure was not in accordance with the parties' arbitration agreement or mandatory arbitral law;
- The arbitration award is not binding on the parties, or was set aside in the country in which, or under the law of which, that award was made;
- The subject matter of the dispute was not capable of settlement by arbitration under the laws of the enforcing jurisdiction; and
- The recognition or enforcement of the award would be contrary to the public policy of the enforcing jurisdiction.

While practices may differ from country to country, courts around the world tend to narrowly apply these grounds for nonenforcement.[7] For example, even if an award is set aside by national courts of the "seat" or "place" of the arbitration, the award may sometimes be enforced in the jurisdiction where the assets are found.

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[6] New York Convention, Article V(1).

[7] Parties should be aware that arbitration awards rendered in the United States may be subject to challenge based on a separate series of similar but distinct legal grounds set forth in the Federal Arbitration Act.

X. Investor-State Arbitration

While the bulk of this guide focuses on practices related to international commercial arbitration disputes, parties should also be aware of a separate species of international arbitration known as "investor-state arbitration" or "investment arbitration."

Investor-state arbitration is designed to resolve disputes between investors (either individuals or corporations) and a sovereign government. Unlike the international commercial arbitration, investment arbitrations do not typically arise out of the parties' contractual agreements. Rather, investor-state arbitration is most often a product of international investment treaties, the most common of which are bilateral investment treaties (BITs) between two sovereign nations.

There are currently more than 2,800[8] BITs in existence. These treaties were put into place to promote global investment and afford basic protections to investors engaging in foreign direct investment. In broad strokes, by signing these treaties, a host nation promises not to discriminate, unfairly prejudice, or unlawfully expropriate the investing party's business opportunities.[9] In return, the host nation hopes to realize benefits from increased investment. The most common sectors impacted by BITs include

[8] *See* **https://investmentpolicy.unctad.org/international-investment-agreements**.

[9] Commonly, this includes protections from: unfair or unequitable treatment; undue interference; expropriation without just compensation; limitation of transfer of capital; and discriminatory laws against the investor.

construction, agriculture, mining, manufacturing, financial institutions, and infrastructure.

Before investing in a foreign state, corporations should carefully review the applicable treaties to determine if they are able to avail themselves of treaty protections in the future. If not, the investor may wish to consider restructuring its investment vehicle — before a dispute arises — to ensure it retains the appropriate treaty safeguards.

In addition to affording investors basic protections, investment treaties grant investors the right to pursue claims against the host state through a number of dispute resolution methods (most importantly arbitration) if a host state violates one or more of the treaty protections. In other words, by entering into an investment treaty, the host state agrees to submit to the jurisdiction of an investment arbitration tribunal to resolve any disputes associated with a breach of those treaty protections. This allows foreign parties to avoid: (1) issues of sovereign immunity; and (2) the challenges of litigating in unfamiliar local courts, which may be unsympathetic to foreign investors' claims against their own government.

Some of the most common arbitral bodies that administer or promulgate rules related to investor-state arbitrations are:

a) International Centre for the Settlement of Investment Disputes (ICSID)

b) Arbitration Institute of the Stockholm Chamber of Commerce (SCC)

c) International Court of Arbitration of the International Chamber of Commerce (ICC)

d) London Court of International Arbitration (LCIA)

e) *Ad hoc* Arbitration UNCITRAL Arbitration (Note: UNCITRAL does not administer these arbitrations, but publishes a set of procedural rules used in *ad hoc* arbitrations).

While there are numerous complexities to investor-state arbitrations, the key takeaways that parties should consider are as follows:

- Consider what treaties are in effect with the host state (and potentially re-structure the investment vehicle) *before* making an investment to identify the applicable protections.
- Understand what substantive rights these treaties confer and how that may affect the investment risk.
- In the event a dispute arises, understand that investment arbitration may be a potential avenue to protect the underlying investment and follow all applicable procedures set forth in the investment treaty.

XI. Troutman Pepper's International Dispute Resolution Group

Our advocates understand international arbitration, from the drafting of the arbitration clause all the way through the hearing, including cross-examination and written and oral submissions. We are well-connected to

the relatively small community of high-quality practitioners, and therefore have particular insights into the selection of appropriate arbitrators for each matter. We understand cultural and legal differences in the common law and civil law traditions that can signal the difference between victory and defeat, and have unique industry experience that our clients rely on when in need.

XII. Representative Experience*

- Received a multi-million dollar award in an international arbitration conducted pursuant to the China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules on behalf of a major medical device client.
- Represented a U.S.-based general contractor in an ICDR arbitration against its joint venture partner arising out of a military construction project in Guantanamo Bay, Cuba.
- Represented a South American state-owned oil company in connection with a multimillion-dollar ICC international arbitration seated in the Hague concerning the execution of an oil refinery expansion project.
- Represented a multinational consortium of construction contractors in an ICC international arbitration concerning the execution of a multibillion-dollar airport project in the Middle East.
- Represented a state-owned project development entity in connection with

multiple disputes over a series of road, water treatment, and other infrastructure projects in northern Mozambique.

- Obtained and collected a $76 million quantum award following lengthy liability hearings in Delhi, India, and two-week quantum hearing in London, pursuant to the rules of the London Court of International Arbitration (LCIA).
- Obtained a worldwide freezing order in the Dubai International Financial Center (DIFC). Successfully coordinated efforts in High Court of Mumbai, High Court of Delhi, and the Supreme Court of India to uphold and collect the award. Handled related proceedings in Mauritius, Canada, London, Isle of Man, and Singapore.
- Represented a German global research institution against Italian telecommunications company in a four-day International Chamber of Commerce (ICC) arbitration in Paris under Belgian law concerning IP rights arising from a European Union consortium agreement.
- Represented a U.S. specialty machine manufacturer before CIETAC.
- Represented a client in an arbitration against the Jordanian government before the World Bank's Centre for the Settlement of Investment Disputes (ICSID); obtained issue of first impression under ICSID rules.
- Represented an Indonesian conglomerate in an UNCITRAL arbitration concerning dispute over joint venture retail operations.
- Represented the U.S. subsidiary of a Mexican construction supply manufacturer against a French engineering firm in an ICDR arbitration concerning a series of disputes over the

multimillion-dollar refurbishment of a cement production facility.

- Defended a Bermuda excess insurer in a London arbitration involving complex insurance coverage claims relating to significant environmental losses.
- Represented a U.S. railcar manufacturer in an *ad hoc* arbitration located in London under the Indian Arbitration and Conciliation Act (and in related English and Indian court proceedings to enforce the parties' arbitration agreement), arising out of the dissolution of a joint venture with an Indian railcar manufacturer.
- Represented an international electric power holding company in its effort to enforce an ICSID arbitration award against the Republic of Peru; defeated Peru's motion to dismiss and obtained judgment.
- Represented an investment company in an action to recognize an ICSID arbitration award rendered against the Republic of Argentina, defeating Argentina's motion to dismiss, and then argued and prevailed on Argentina's appeal to the Second Circuit.
- Successfully defeated enforcement of a $25 million international arbitration award in the United States on behalf of a foreign government entity.

* *Representative engagements may include experience by attorneys before they joined Troutman Pepper.*

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