

CHOICE OF LAW AND ALTERNATE DISPUTE RESOLUTION IN INTERNATIONAL CONTRACTS

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The international consensual contract is a very fascinating and challenging task both for the international lawyer and the client. Some contracts will be implemented pursuant to industrial development contracts, or on the basis of agreements with governments,¹ or as private contracts between private parties. The type and kind of contractual clauses included in a transactional contract will vary depending on the party and the nature of the business involved. Foresight and meticulous care must be used if a firm is to be adequately protected and irreparable harm to the firm is to be avoided. Lawyers must become familiar with a country's legal system, drafting, and thinking patterns, and work closely with local counsel to meet the needs of their clients. It is important that careful attention be paid to the constitutional and legal form required for validity in the foreign country. An estoppel clause certifying the validity of the agreement or a statement by a high government official to this effect is very useful.² The person signing the contract must have the authority to act. When dealing with the state, the signature of as high a government official as possible is desirable.

The contract must give a clear indication of the beneficial two-sided character of the contract. This will help both with future political issues that might arise, as well as aid in the interpretation of the agreement. This article will discuss the principal clauses of such agreements including choice of law provisions, arbitration clauses, and conciliation.

International arbitration is a substitute for litigation in national courts and is usually based on a predispute arbitration clause in the contract. This article will briefly address the subject of choice-of-law clauses in international commercial arbitration, as well as an alternative where the agreement may direct an arbitrator to apply different systems of law to different areas of the dispute.

I. ARBITRATION

Arbitration may be defined as a "conventional means to settle disputes by individuals chosen directly by the parties and to which the power to render decisions is given instead

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¹See, e.g., C.D.M. Wilde, Comment, *Promotion Certificates to Foreign Investors*, 10 AM. J. COMP. L. 99- 103 (1961) (Thailand Act for the Promotion of Industrial Investment).

² An example might be the following found in New York forms of State Bond Agreements: "The Republic certifies and declares that all acts, conditions and things required to be done and performed and to have happened precedent to and in the execution of this Agreement and in the creation and issue of the Bonds have been done and performed and have happened in due and strict compliance with the Constitution and Laws of the Republic." The government officials might be persons such as the Minister of Justice or the Attorney General. J. Gillie Wetter, *Salient Clauses in International Investment Contracts*, BUS. LAW., July 1962, at 967, 972.

of ordinary courts."³ Arbitration is a favored and frequently used mechanism of dispute resolution in international business.⁴ The global economy necessitates dispute settlement techniques which transcend both national and cross-cultural barriers. Arbitration has been a historic method of resolving disputes among merchants.⁵

There are numerous reasons why parties should opt for arbitration, which can achieve neutral adjudication, instead of litigation in the national courts of one of the parties.⁶ The advantages of arbitration are many and include less time to resolve a dispute,⁷ less expense, and the ability of having a neutral expert resolve the dispute.⁸ Arbitration can achieve a degree of secrecy which is often sought by parties in disputes, particularly where trade secrets and/or intellectual property rights are involved.¹¹ In situations where the arbitrator is an expert on the subject matter, it may avoid the need to appoint experts to give evidence.¹⁰ The usual limits on discovery and the lack of resort to costly expert witnesses to provide testimony may be considered both advantageous and disadvantageous, depending on the case.¹² The remedies available to the arbitrators are greater since remedies are not generally limited to damages because the arbitrator may determine the most appropriate form of relief.¹² Where there are multiple parties involved in a dispute, it may be an advantage of arbitration that all disputes referring to a certain relationship between the parties can be settled at once in front of one tribunal.¹³

However, absent the parties' agreement to consolidate separate arbitration proceedings that include common questions of fact and law, American courts will not permit a consolidation of separate arbitration contracts involving diverse parties into a single

3. Jean De Saugy, *Intellectual Property Rights and International Arbitration*, 3 ARTER & HADDEN REV 9 (1997).

4. There are a number of authoritative treaties and international periodicals devoted to international arbitration. See, e.g., W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION (2d ed. 1990); ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION (2d ed. 1991). The leading publications in English are *Arbitration International*, affiliated with the London Court of International Arbitration, *Journal of International Arbitration*, published in Switzerland, and *The American Review of International Arbitration*, affiliated with the Parker School of Foreign and Comparative Law at Columbia University. Even more specialized arbitration periodicals include *ICSID Review-Foreign Investment Law Journal* published by the International Center for Settlement of Investment Disputes, and *The ICC International Court of Arbitration Bulletin*.

⁵ Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 855 (1961). For a discussion of the history of arbitration see Comment, *Out With The Old, In With The New: The Mini-Trial Is The New Wave In Resolving International Disputes*, 1 J. DISP. RESOL. 111, 112-114 (1991).

⁶ The Supreme Court has commented, "[N]ot Surprisingly, foreign businessmen prefer as we do to have disputes resolved in their own courts, but if that choice is not available, then in a neutral forum with expertise in the subject matter." *The Bremen v. Zapata Off-Shore Co.* 407 U.S. 1, 11-12 (1972).

⁷ See Steven A. Meyerowitz, *The Arbitration Alternative*, 71 A.B.A.J. 78, 80 (Feb. 1985) (the American Arbitration Association estimates that settlement takes four to five months).

⁸ The relative informality and flexibility of the arbitration process, together with the advantages of expedition and expertise, usually provide a much more economical method of reaching a final disposition of differences than conventional litigation." *Id.* at 79.

⁹ De Saugy, *supra* note 3, at 9.

¹⁰ *Id.*

¹¹ "AAA Rules do not provide for pre-trial discovery." Meyerowitz, *supra* note 7, at 79

¹² *Id.* at 80.

¹³ De Saugy, *supra* note 3, at 9.

arbitration proceeding without the parties' explicit consent.¹⁴ Judicial authority to consolidate arbitration cases with common questions of fact or law may be found in the express terms of the agreement¹⁵ or based upon implied consent. The Second Circuit *In re Coastal Shipping v. Southern Petroleum Tankers, Ltd.*¹⁶ surmised that an agreement to consolidate may be implied by: (1) the language of the arbitration clause; (2) the amendments or addenda to the agreement; (3) the course of dealing between the parties; or (4) the incorporation of rules that permit consolidation.¹⁷ Courts have also used general equitable powers upon finding that one party had exclusive access to relevant information or upon determining that independent arbitrations were likely to cause unnecessary delay, unnecessary duplication, conflicting findings or awards, or prejudice to a party's rights.¹⁸

Arbitration may include costs that litigation does not have, including delays in the selection of arbitrators and scheduling of hearings and the expense of administering the proceedings.¹⁹ The practical costs include potentially substantial fees for the arbitrators and their housing and transportation expenses,²⁰ but are generally lower than the costs of litigation.²¹

The courts and legislatures of leading countries have enunciated strong public policy favoring the resolution of international commercial disputes by arbitration. The French enacted an arbitration law limiting judicial intervention by defining the grounds upon which a party may set aside any arbitrators' award in the French courts.²² The English Parliament enacted the 1979 Arbitration Act permitting the parties to an international arbitration to exclude the jurisdiction of the English courts to review the arbitrators' award on questions of law.²³ The United States Supreme Court has held that international securities disputes are arbitrable and that the federal courts do not have exclusive jurisdiction over such matters.²⁴ In a major affirmation of the international arbitration

¹⁴See *United Kingdom of Great Britain v. Boeing Co.*, 998 F. 2d 68 (2d Cir. 1993). In that case a helicopter was damaged and the United Kingdom filed demands independently for arbitration with the American Arbitration Association against both Boeing and Textron, pursuant to identical arbitration clauses in the contracts that the United Kingdom had negotiated independently with each company.

¹⁵*Id.* at 71-73.

¹⁶812 F. Supp. 396 (S.D.N.Y. 1993).

¹⁷*Id.* at 402.

¹⁸See, e.g., *Compania Española de Petroleos, S.A. v. Nereus Shippomg, S.A.*, 527 F. 2d 966, 974 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976); *Elmarina, Inc. v. Comexas, N.V.*, 679 F. Supp. 388, 391 (S.D.N.Y. 1988); Deborah Sprenger, Annotation, *Consolidation by Federal Court of Arbitration Proceedings Brought Under the Federal Arbitration Act* (9 U.S.C.4), 104 A.L.R. FED. 251, 256 (1991).

¹⁹Henry P. De Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 TUL. L. REV. 41, 61 (1982/83) (delays increase because of distance and difficulties of communication and language; expense is greater because of administration and arbitrator's fees; costs to the parties are higher because of the need for added counsel, translators, interpreters and transportation).

²⁰Michael Kerr, *International Arbitration in Litigation*, 1980 J. BUS. L. 164, ¶76 ("this may involve the parties in considerable air fares and the hotel expenses on numerous occasions").

²¹"However, if all direct and indirect costs, such as translation costs, experts costs and the costs of an appeal are considered arbitration is often less expensive than a case dealt with by ordinary courts." DeSauby, *supra* note 3, at 10.

²²See W. Laurence Craig, William W. Park & Jan Paulsson, *French Codification of a Legal Framework for International Commercial Arbitration: The Decree of May 12, 1981*, 13 LAW & POL'Y INT'L BUS. 727, 744-46 (1981).

²³Arbitration Act of 1979, ch. 42 §§ 1-8.

²⁴*Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

system, the United States Supreme Court held that antitrust claims embraced within a broad arbitration clause are arbitrable. The Court in *Mitsubishi Motor Corporation v. Soler Chrysler-Plymouth, Inc.*²⁵ stated that “concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the commercial system for predictability in the resolution of disputes require that we enforce the parties’ agreement.”²⁶ In the United States, the Arbitration Act²⁷ has applied to international agreements along with the provisions implementing the U.S. Convention on the Recognition and Enforcement of Foreign Arbitral Awards.²⁸ Recently several states have enacted laws governing international arbitration.²⁹ These statutes either supplement³⁰ or pre-empt³¹ the state’s intrastate statutes.

The contract of the parties must explicitly agree that any current or future disputes between them will be resolved through binding arbitration rather than litigation.³² The parties can in their contract define the rules and procedures by which the arbitration is to be conducted.³³ Arbitration clauses can be made very simple if the arbitration clause refers to an institutional arbitration agency and refers to their pre-existing rules.³⁴ An arbitration clause or agreement should contain a reference to governing law, and this choice of law can apply to the arbitration agreement itself as separate from the contract itself.³⁵ It is more important to refer to applicable law to see if the arbitration agreement would be enforceable because each country has its own procedures. For instance, the German Civil Code requires an arbitration agreement to be in writing and to contain no other agreement other than the separate arbitration procedure. This necessitates having a separate

25.473 U.S. 614(1985).

26.*Id.* at 629.

27. 9 U.S.C. § 1-208(1988).

28. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3. More than sixty countries have adopted the Convention. U.S. Dept. of State, Treaties in Force 274 (Jan 1, 1989).

29. *See, e.g.*, CAL. CIV. PROC. CODE §§ 1297, 11-1297,432 (West Supp. 1990); FLA. STAT. ANN. §§ 684.01- 684.35 (West Supp. 1990); GA. CODE ANN. §§9-9-30 to 9-9-43 (Supp. 1989); HAW. REV. STAT §658D-1 to 658D-9 (Supp. 1989); TEX. REV. CIV. STAT. ANN. art. 249 (West Supp. 1990).

30. *See* GA. CODE ANN. §9-9-30 (1989).

31. *See* CAL. CIV. PROC. CODE § 1297.17 (West Supp. 1990); FLA. STAT. ANN. §684.03(3) (West Supp. 1990). ^{FF}

32. *See* HOWARD M. HOLTZMAN & JOSEPH E. NEUBRAS, A GUIDE TO THE UNICITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 7 (1989).

33. *Id.* at 6.

34. *See, e.g.*, Arbitration Rules of the United Nations Commission on International Trade Law G.A. Res. 98

31 U.N. GAOR Supp. (No. 39), U.N. Doc A/31/39 (1976), reprinted in II Y.B. Comm Arb 161 (1977) [hereinafter UNICITRAL ARBITRATION RULES]; *International Center for the Settlement of Investment Disputes Rules of Procedure for Arbitration Proceedings*, reprinted in International Commercial Arbitration Doc 18 1

(Binder*) (C. Schmittoff ed. 1979) [hereinafter ICS ID RULES]; *Rules of Conciliation and Arbitration of the International Chamber of Commerce*, reprinted in Y.B. Comm. Arb. 157 (1977) [hereinafter ICC RULES]; *Inter-American Commercial Arbitration Commission Rules of Procedure*, reprinted in III Y B Comm Arb 231 (1978) [hereinafter ^-AMERICA COMMERCIAL ARBITRATION RULES]; *Permanent Court of Arbitration Rules of Arbitration and Conciliation for Settlement of International Disputes Between Two Parties of Which Only One is a State*, reprinted in International Commercial Arbitration Doc. 1.13 (Binder*) (C Schmittoff ed 1979) [hereinafter PERMANENT COURT OF ARBITRATION RULES].

35. *See* Vitek Danilowicz, *The Choice of Applicable Law in International Arbitration* 9 HASTINGS INT’L & COMP. L. REV. 235, 237 (1986).

arbitration agreement apart from and not included in the general contract.³⁶

While it is important to keep the arbitration clause simple so as to avoid litigation seeking a court's interpretation of the intention of the parties, it is also important to specify a city or location where the arbitration will take place. Needless to say, the parties will want a neutral, convenient and cost-effective location. The parties can by contract agree to limit discovery or specify what discovery they wish to provide for in the agreement. Even a simple clause such as "[Discovery shall occur as the parties may agree]" can work. The arbitrator usually has the power to grant injunctions at the request of a party to protect its rights.³⁷

The qualification, selection process, and payment of the arbitrator, as well as administrative and incidental costs, need to be addressed. Time periods for the various stages of mediation and arbitration should be provided. A time period should also be stated for the arbitrator to issue the award after the hearing.

There are many sources of alternative dispute resolution forms, including arbitration clauses, found in special volumes or journals.³⁸ It is essential to cover what matters are or are not arbitrable in the agreement. The agreement should also cover whether or not the arbitrators may award punitive damages, as well as any other limit on the arbitrator's award. A requirement that the arbitrator spell out in a writing the arbitrator's decision along with the reasoning and requirement to address the parties' argument is usually advisable. The payment of attorneys' fees is an issue that should be discussed, because the requirement that an arbitrator may award or be required to award attorneys' fees to the winning party may be an inducement to settle short of binding arbitration. A clause covering who should pay attorney fees and expenses when one party files a law suit to block or avoid the arbitration award should also be included. A lawsuit dealing with the matters involving arbitration should be prohibited, except to preserve the running of the statute of limitations or to allow a party facing irreparable harm to seek a restraining order or preliminary injunction. However, it would be wise to require that the party must agree to the stay of any further litigation pending resolution of the arbitration.

II. OTHER ALTERNATIVE DISPUTE RESOLUTION METHODS

Other techniques to resolve disputes include conciliation³⁹ and the use of the mini

³⁶See Craig Getz, Comment *The Selection of Choice of Law Provisions In International Arbitration: A Cate for Contractual Depepage*, 12Int'L. BUS. 163, 172(1991).

³⁷See, e.g., Corinne Cooper & Bruce E. Meyerson, Editors, *A Drafters Guide to Alternative Dispute Resolution* (ABA Committee on Dispute Resolution of the Business Law Section, 1991); Robert Coulson, *Resolving Disputes: The Arbitration Option*, AM. Law., Nov. 1991, at 45; Donald L. Carper, *Remedies in Business Arbitration*, AAA ARB. J., Sept. 1991, at 49; Marvin T. Fabanske., *How to Draft an Arbitration Agreement*, 17 THE FORUM 491 (1981).

³⁸De Saugy, *supra* note 3, at 12.

³⁹See Linda C. Reif, *Conciliation As a Mechanism For The Resolution of International Economic and Business Disputes*, 14 FORDHAM INT'L L.J. 578, 579 (1990-91)("Conciliation, using a third party to provide nonbinding recommendations to the disputants is an attempt to resolve the problem, are found in every stratum of the transnational business system.").

trial.⁴⁰ The mini-trial can reduce costs and be faster than arbitration. It also allows the disputants to focus on the merits of the dispute, rather than procedural issues. The minitrial can be especially useful in American-Japanese business disputes because of the Japanese aversion to the American adversarial system,⁴¹ and because it promotes a dialogue on the merits of the case rather than just dollar values, and connecting what has grown into a typical lawyers dispute back into a business man's problem by removing many of the collateral legal issues into the case."⁴³

An example of the specialized use of alternative dispute resolution is the World Intellectual Property Organization ("WIPO") which falls under the jurisdiction of the International Court of Justice and administers treaties dealing with intellectual property.⁴⁴ WIPO has created the WIPO Arbitration Center at its headquarters in Geneva and provides a structure for arbitration, mediation, expedited arbitration and combinations of mediation and arbitration for private parties with intellectual property disputes.⁴⁵ Parties may refer disputes to the Center through the use of contractual alternative dispute resolution provisions in contracts or through a submission agreement from opposing parties in an existing dispute.⁴⁶

Mediation at the WIPO Center is non-binding, and the parties may pull out of the settlement procedures at anytime before a settlement is signed.⁴⁷ When a dispute is not settled through mediation within a prearranged time frame, the dispute goes directly to arbitration.⁴⁸ Recent decisions seem to indicate a trend toward an increased use of mediation and arbitration in international intellectual property disputes. This trend is likely to continue to accommodate advances in technology and information transfer.⁴⁹

When direct dispute negotiations falter, the parties may turn to conciliation to help them reach a settlement. The parties may agree to conciliate when concluding their contracts before a dispute has arisen. Usually a single arbitrator familiar with the cultures of the parties is the most helpful model.⁵⁰ Conciliation rules do not specify a conciliator's duties in detail. For example, the International Chamber of Commerce Rules of Optional Conciliation provide only that "the conciliator shall conduct the conciliation process as he thinks fit, guided by the principles of impartiality, equity and justice."⁵¹ Since there is no

⁴⁰See James Danis & Lynne Omlie, *Mini-Trials: The Courtroom in the Boardroom*, 21 WILLAMETTE L. REV. 531 (1985).

⁴¹ Eric D. Green, *Growth of the Mini-Trials*, LRII G., Fall 1982, at 12 ("The mini-trial is a formal presentation of evidence and arguments to representatives of both parties").

⁴²Leo Kanowitz, *Using the Mini-Trial in the U.S.-Japan Business*, 39 MERCER L. REV. 641, 643 (1988).

⁴³Green, *supra* note 41, at 12.

⁴⁴The WIPO administers the Paris Convention, the Berne Convention, the Madrid Agreement and the Rome Convention. See Monique L. Cordray, *GATT-WIPO*, 76 J. PAT & TRADEMARK OFF. SOC'Y, 121, 122 (1994).

⁴⁵World Intellectual Property Organization, Press Release No. 93, Oct. 1, 1993 (on file with author).

⁴⁶WIPO, *The Services of the WIPO Arbitration Center*, Oct. 1994, at 9 (on file with author).

⁴⁷*Id.* at 23-28.

⁴⁸WIPO, *WIPO Mediation Rules-WIPO Expedition Arbitration Rules 74-75* (1994) [hereinafter *WIPO RULES*],

⁴⁹Jennifer Miller, *Alternative Dispute Resolution in International Intellectual Property Disputes*, 2 OHIO ST. J. DISPUTE RESOL. 39 (1996).

⁵⁰Steven J. Burton, *Considering Conciliation with Arbitration of International Commercial Disputes*, 18 HASTINGS INT'L & COMP. L. REV. 637,639 (1995).

⁵¹ICC Rules of Optional Conciliation, art. 5, reprinted in W. Lawrence Craig et al., *International Chamber of Commerce Arbitration* app. 3 (1994). See also CAL. CIV. PROC. CODE § 1297.343 (Deering 1994).

guarantee that conciliation will produce an agreed settlement, there is usually also an agreement to arbitrate. There are a number of options to the parties including: saying nothing in the contract about conciliation, or blending conciliation with arbitration where arbitrators employ both methods during a single proceeding, or creating a two-step sequence in which arbitration follows the conciliation. The parties can specify where the conciliation is to take place. They should choose a place where an agreement reached by conciliation is enforceable as an arbitral award, such as California.⁵²

Providing an advance agreement to arbitrate makes it more likely the parties will undertake a conciliation effort and will also help assure that disputes are managed on a friendly basis by negotiation and conciliation. The major disadvantage is that this may add a layer to the dispute settlement process and can cause a delay before arbitration. A prior agreement for conciliation may also be a basis to bring a legal action to enforce the obligation to conciliate or in an arbitration proceeding provide arguments that one of the parties breached the agreement to conciliate. Generally, an obligation to conciliate a dispute is enforceable under prevailing law.⁵³

Where the parties have provided for a blended procedure in which conciliation and arbitration go forward together in one proceeding, the conciliation effort may be impaired because effective conciliation requires an open and informal flow of information between the parties and the possibility of later arbitration may interfere with their information exchange. When the parties resort to arbitration only after conciliation concludes, the parties can employ different people to conciliate and arbitrate. The parties can provide that any admissions or positions taken during the conciliation cannot be introduced as evidence in any arbitral or judicial proceeding.

III. CHOICE OF LAW CLAUSES

In drafting an arbitration clause, it is essential to consider, among other things, the question of governing law. A significant advantage of a choice of law provision is that it prevents the application of conflict of laws rules. A nation's conflict of laws provisions can be very difficult, time consuming and expensive in either an arbitral or judicial setting. When the legal system and the remedies available have been established in advance, the parties may be inclined to negotiate a settlement and thereby avoid the costs of arbitration.⁵⁴ A typical choice of law clause may state, for example, that "[I]n the event of any dispute, claim of a controversy arising out of or related with this contract or any other agreements arising hereunder, the laws of [(the place of arbitration) or (some other country)] shall be applied and govern the said dispute, claim, or controversy."⁵⁵

⁵²CAL. CIV. PROC. CODE §1297.401 (Deering 1994).

⁵³See, e.g., *AMF Inc. v. Brunswick Corp.*, 621 F. Supp. 456 (E.D.N.Y. 1985) (Brunswick ordered to provide information agreed upon in conciliation agreement as enforceable under New York or federal law); *De Valk Lincoln Mercury Inc. v. Ford Motor Co.*, 811 F. 2d 326 (7th Cir. 1989) (compliance with the mediation clause was a condition precedent to bringing a lawsuit).

⁵⁴See Francis J. Higgins, William G. Brown & Patrick J. Roach, *Pitfalls in International Commercial Arbitration*, 35 BUS. LAW. 1035, 1041 (1980).

⁵⁵Shelly P. Battram & David V. Goldsweig, *Negotiating and Structuring International Commercial Transactions; Legal Analysis with Sample Agreement*, 1991 A.B.A. SEC. INT'L. & PRAC. 153-54.

A problem can exist where the chosen law is materially changed by a particular nation after the parties enter into the contract. A material law change provision can be incorporated into the agreement as a part of the choice of law provision.⁵⁶ It is important to include within the choice of law language that the domestic law of a particular country apply so as to prevent the application of international conflict of law rules.⁵⁷

Many states, including Ohio, provide for the enforcement of choice-of-law clauses in the forum state.⁵⁸ When there is no clear choice of law, but there is a choice of forum, the domestic conflict of laws in most of the European countries, including England, France, and Germany, is that the expressed choice of forum implies a choice of law. There is a possibility that a choice of law provision will not be followed although an express provision is usually followed.⁵⁹ Arbitrators generally apply the law that was selected by the parties, even where the choice of law lacked any connection with the legal system of the contracting parties.⁶⁰ Common sense, convenience, logic, simplicity and party autonomy should cause considerable respect to be accorded to a choice of law provision.⁶¹

The General Assembly of the United Nations adopted the Model Law on international commercial arbitration drafted by the United Nations Commission on International Trade (“UNCITRAL”). It provides that the arbitration tribunal shall decide the dispute in accordance with such rules of law as chosen by the parties, and which are applicable to the substance of the dispute.⁶²

Most transnational contracts include a choice of law provision that makes use of a single national system of law and choice of forum.⁶³ There are a number of advantages to such a choice of law clause, including an easier determination of rules, and the presence of a general body of law that provides answers to legal issues.⁶⁴ Care must be given when the parties have determined to use American law by choosing an appropriate state. For instance, in drafting an international trade agreement for a Japanese or Far Eastern client, Hawaiian law might be a convenient and preferable law because of its arbitration statute, predictable Uniform Commercial Code and arbitrators fluent in both Japanese and English Languages.⁶⁵

An agreement may direct the arbitrator to apply different systems of law to different disputed issues in the same case. This has often been referred to as contractual depepage.⁶⁶

⁵⁶*Id.* at 134-35.

⁵⁷*Id.* at 159.

⁵⁸See OHIO REV. CODE § 2307.39 (Anderson 1991).

⁵⁹Andreas F. Lowenfeld, *The Two-Way Mirror: International Arbitration as Comparative Procedure* 7 MICH. Y.B INT'L LEGAL STUD. 163, 178(1985).

⁶⁰PETER SARCEVIC, *ESSAYS ON INTERNATIONAL COMMERCIAL ARBITRATION* 134 (1989)

⁶¹JULIAN LEW, *APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION* 69-71 81 (1978)

⁶²HOLTZMAN & NEUBRAS, *supra* note 32, at 765.

⁶³ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL Commercial Arbitration* 76 (1986).

⁶⁴*Id.*

⁶⁵James Ready, *A Primer for Drafting ADR Contract Clauses*, COURSE OUTLINE OHIO ST BAR ASSOC 12th ANNUAL CONVENTION (May 1992) (on file with author).

⁶⁶Depepage can be defined broadly to cover all situations where the rules of different states are applied to GOVERN DIFFERENT ISSUES IN THE SAME CASE.” Willis F. Reese, *Depepage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58 (1973).

The United Nations UNCITRAL Model Law permits parties to chose parts of legal codes or part or all of sets of rules not in force anywhere. There are several disadvantages to this approach, including the time and expense of having comparative law skills which are scarce and expensive. Problems can also be created in the need to classify a given issue as procedural or substantive, thereby lessening predictability in the choice of law.⁶⁷ The greatest advantage is the ability to tailor the rules to the parties' greatest advantage, as well as having a neutral body of law.⁶⁸

A choice of law provision can be based on general principles of international law not linked to any particular state. This is referred to as the Law *Mercatoria*.⁶⁹ Since there is a scarcity of cases on which to base a decision, the arbitrator must use his common sense and creativity, along with a mixture of legal rules, to reach a result.⁷⁰ International treaties and conventions can be used in choice of law provisions, but they do not serve as adequate choices of law by themselves because of the broad discretion and lack of certainty when used in arbitration.

While choice of law provisions are generally given effect, if there is a lack of relationship to the transaction in the law selected, the clause may not be given effect. The Restatement (Second) of Conflict of Laws limits the parties' choice where the chosen state law has no substantial relationship to the parties or the transaction, and there is no other reasonable basis for the party's choice.⁷¹ The Restatement provides that a substantial relationship exists when one of the parties is domiciled or has its principal place of business in the chosen state, or the place of contracting, or where performance of one of the parties is to take place.⁷² Governments may limit the application of choice of law based on their right to legislate policy within the countries' borders.⁷³ International conventions may also place limitations on choice of law provisions.⁷⁴

IV. CONCLUSION

It is imperative that legal counsel exercise creative craftsmanship adapted to each particular fact and circumstance. The inclusion of arbitration and choice of law provisions can have a helpful effect on the resolution of conflicts arising in international agreements. An arbitration clause may name a set of various nations' substantive rules or a single national or international system of law. Parties can combine these various systems to make the arbitration as predictable, neutral, and complete as possible, while allowing parties to enjoy only the most advantageous aspects of the different systems of law. The International Chamber of Commerce claims that ninety percent of the awards rendered

⁶⁷EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAW 59 (1984).

⁶⁸Gertz, *supra* note 36, at 178-80.

⁶⁹Ole Lando, *The Law Applicable to the Merits of the Dispute*, 2 ARB. INT'L 104, 107 (1986); Keith Highet, *The Enigma of the Lex Mercatoria*, 63 TUL. L. REV. 613, 613 (1989).

⁷⁰See Samuel Asante, *Stability of Contractual Relations in the Transnational Investment Process*, 28 INT'L COMP. L.Q. 401,409 (1979).

⁷¹RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1989).

⁷²*Id.* at cmt. f (1989).

⁷³FREDRICK K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 55 (1983).

⁷⁴See, e.g., PETER SARCEVIC, INTERNATIONAL CONTRACTS AND CONFLICTS OF LAW 48(1990).

under arbitration are performed without the need for further proceedings.

Conciliation, mediation and mini-trials are useful to consider, as well as the more often used arbitration in resolving international contractual disputes. It is hoped that this article will be of assistance in drafting international agreements, and in causing careful choices to be made in the negotiation stage before conflicts arise.