International Arbitration:

What It Is and How It Works

Written by | Diana Isyanova

Law Insider

Introduction

The rising popularity of international arbitration is undeniable. Thanks to the internet, businesses are no longer restricted by their physical location. Even the tiniest startup working out of the solopreneurs' garage has a potential to offer its goods and services across the globe.

Yet, conflicts still happen, and they still must be resolved. The arbitration provision is becoming a standard in commercial contracts. But, international arbitration is far from being a novel practice.

Arbitration as a procedure existed since prehistoric times. During his reign in 970 to 931 B.C., the King Solomon was solving disputes by arbitration as illustrated in the well-known story of "splitting the baby". An early example of international arbitration appears in the records from around 600 B.C. when Athens and Megara contested ownership of Salamis Island. Almost every great culture has similar stories to tell.

INTRODUCTION

In the U.S. today, arbitration is the most commonly used method of alternative dispute resolution (ADR).

In fact, international arbitration procedure is already nearly standard for international contracts governing cross-border transactions.

Why is international arbitration so popular? The reasons are many: arbitration is almost always faster, procedurally simpler, more efficient, flexible, and private. It also reduces opportunities for escalating conflict.

International arbitration is unique in that it removes hindrances caused by differences in legal systems, languages, and cultures, while providing neutral grounds to resolve the dispute.

Moreover, the process is simplified by subtracting the formalities of the procedural rules of the parties' respective legal systems.

The central focus of this e-book is international arbitration practices across the globe. It aims to provide readers with valuable, current, and practical information on this subject highlighting some of the most important features of this exceptionally useful and practical legal mechanism.

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The Author's Note

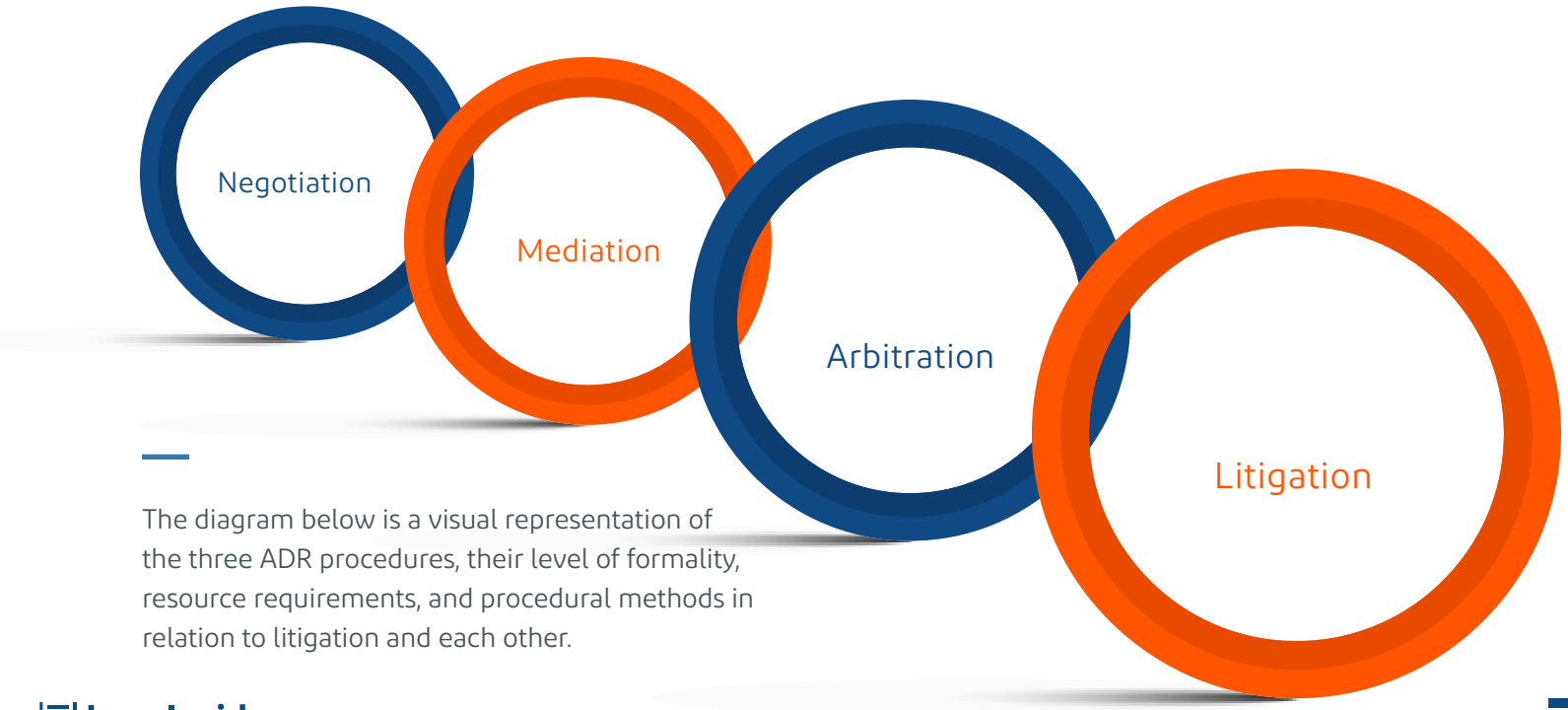
Inadequately drafted contracts leave contracting parties vulnerable.

To increase client protection, precise drafting of a contract is always essential. Clearly stating the intention of the contracting parties is by far the most practical (and cheapest!) way to limit rights and obligations for the parties to the agreement. The last thing anyone wants is to leave it for courts to interpret. It is the learned art of skilled attorneys to draft concise yet comprehensive contractual provisions that effectively serve the clients' needs.

Mediation vs. Arbitration

There are three basic types of ADR – negotiation, mediation, and arbitration. The first, negotiation is the most straightforward: conflicting parties attempt to settle their dispute through direct communication with each other. In the second, mediation, the dispute between the parties is managed or mediated, through a neutral party: a mediator. Mediator does not make decisions for either or both parties but, instead, skillfully guides the parties to arrive at a mutually acceptable solution in an efficient and effective manner. Notably, because mediators act largely as facilitators of amicable resolution, they do not have to address conflicts from any specific or legal perspective under national or international law. So, a bachelor's degree in a mediator's field of expertise often proves sufficient.

Although the ultimate goal of both, mediation and arbitration, is similar – dispute resolution without costly and lengthy litigation – their methods and procedures differ vastly. Arbitration is more like a younger sibling of litigation. It is much less formal and requires less time, money, and (the aspect that is often not taken into consideration) mental stamina. Unlike mediators, arbitrators, at least in most states, are required to hold a graduate degree, typically in law or conflict resolution. To be well-versed in law and exercise excellent judgment is essential for the job. Great people skills, too – like patience, good listening, strong communication, and excellent reasoning – are essential, the arbitrator's decision is final and binding, unless the arbitrating parties have agreed to a non-binding arbitration.



The diagram below is a visual representation of the three ADR procedures, their level of formality, resource requirements, and procedural methods in relation to litigation and each other.

Major Players in the Arbitral World

A conversation about international arbitration would not be complete without addressing the world's major arbitral organizations. The pivotal point in its development occurred in 1958 when the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the "New York Convention."

About 160 nations ratified the treaty agreeing to recognize and enforce international arbitration awards as legally binding.

The next major development followed in 1969 when The United Nations Commission on International Trade Law (UNCITRAL) created a core legal body with an ambition to modernize and harmonize the rules on international business. In 1985, UNCITRAL wrote the UNCITRAL Model Law on International Commercial Arbitration (amended in 2006), another major stepping stone in the history of international arbitration. Those steps have led to greater use and acceptance. According to a statistics report by the Business Dispute Register, over 90% of international arbitration is conducted by 13 organizations scattered all around the world. (Figure 2)

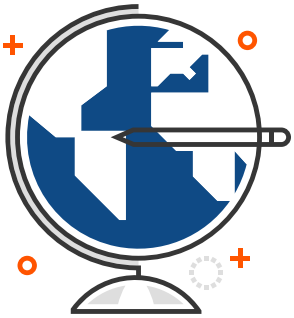


Figure 2. Major International Arbitral Institutions Table

ACRONYM	INSTITUTION NAME	BRIEF DESCRIPTION
LMAA	The London Maritime Arbitrators Association	Exclusively oversees Maritime Disputes. As stated on their website, "The LMAA's members have a wide range of experience and expertise, together covering almost anything which floats or is fixed to the seabed."
ICDR (AAA)	The International Centre for Dispute Resolution	The U.S. based ICDR is an arbitral division of the well-known American Arbitration Association (AAA) and mainly focuses on franchise-related disputes.
ICC	International Chamber of Commerce	Paris based. "Founded by the Merchant of Peace," ICC has been helping businesses to resolve disputes for over 100 years.
CIETAC	China International Economic and Trade Arbitration Commission	One of the major arbitral organizations in the world that handled over 3,500ongoing cases in 2020 alone.
SIAC	Singapore International Arbitration Centre	One of the most preferred arbitral institution in Asia-Pacific that provides cost-competitive and efficient case management services.
LCIA	London Court of International Arbitration	LCIA administers commercial disagreements and over 80% of the parties in its cases are not of English nationality.
HKIAC	The Hong Kong International Arbitration Centre	HKIAC rapidly growing organization that takes pride in for being financially self-sufficient and independent from any type of outside influence or control.
DIS	The German Arbitration Institute	Headquartered in Cologne DIS that specializes in Sport disputes.
DIAC	Dubai International Arbitration Centre	DIAC is a non-profit arbitral organization that is independent in its operations from both the Government of Dubai and the Dubai Chamber if Commerce and Industry.
SCC	The Arbitration Institute of the Stockholm Chamber of Commerce	The world's second largest institution for investment disputes. Its organizational mission is to facilitate trade and business.
SCAI	Swiss Chambers' Arbitration Institution	SCAI offers its services for any dispute, regardless of its nature, the nationality of the parties, the place of arbitration and the applicable law.
VIAC	Vienna International Arbitral Centre	VIAC is said to be a focal point for the settlement of commercial disputes in the regional and international communities.
ICSID	International Centre for Settlement of Investment Disputes	ICSID is devoted to settling international investment dispute and claims to be have administered the majority of all international investment cases.
ICAC (or MKAS)	The International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation	Located in Moscow, Russia, ICAC is the leading arbitration institution in Russia and East Europe that oversees resolution of international disputes.

Key Benefits of International Arbitration

Enforceability. Thanks to The New York Convention, international arbitration awards are widely (and readily!) enforceable worldwide. In fact, they are easier to enforce than court judgments from a different jurisdiction.

Forum Neutrality. One party no longer must submit to the jurisdiction of another; instead, they may now accept a neutral forum acceptable to both.

Faster Resolution. Arbitration procedures are faster to conclude than those of litigation. Arbitration takes 3-9 months for easier matters, and 12-18 months for complex cases, whereas litigation averages from 18 months to 3 years. The parties also have an option to choose "expedited" or "fast-track" arbitration, though this option is often reserved for smaller value disputes (ICC's threshold is $2 million and HKIAC's is $3 million, for example). These procedures may conclude as soon as within 75-100 days of the case commencement date.

Confidentiality. In most circumstances, an express provision in the parties' agreement affords parties the privilege of privacy and confidentiality of the proceedings and award(s). Though, if the awarded party must later seek enforcement of the award, the privilege may be lost, and the degree of confidentiality may also vary by jurisdiction.

Arbitrators with Technical Knowledge. *Selecting an arbitrator with technical expertise can be of great value to some businesses, especially those in highly specialized industries.*

Simplified Procedurally. While not a casual walk in the park, the international arbitration rules are designed to streamline the process and are greatly simplified, in comparison to the procedures under most nations' civil law.

KEY BENEFITS OF INTERNATIONAL ARBITRATION

Flexibility. Parties have the flexibility to tailor the dispute resolution process to fit their specific needs. *Not only can they define by mutual agreement the neutral location of the proceedings but also the governing law, the structure of the arbitration process, whether the decision is final, and which arbitrator, an individual or panel, is to hear their dispute.*

Cost. Unfortunately, the attractively low cost of arbitration is now history. The good news is that most of the costs (about 80%) are still under the control of each individual party. That portion is each party's cost for legal representation, witnesses, and experts, etc. The remaining 20% is the cost of the arbitrator: fees and expenses for administration and logistics. Arguably, this portion is still within the parties' control as they get to choose the organization.

No Criminal Charges. Arbitrators cannot impose criminal sanctions. Period. Additionally, nearly all matters that involve criminal law, family law, and immigration law cannot be arbitrated.

KEY BENEFITS OF INTERNATIONAL ARBITRATION

No Punitive Damages. Arbitrators cannot award punitive damages. As a side note, a few common-law countries allow punitive damages but only in modest amounts and limited circumstances. Awards of massive punitive damages remain a peculiarity of the U.S. legal system.

Limited Discovery. While discovery requests for legitimate documentary needs are always granted, wasteful fishing expeditions are curtailed.

No Joinder of Third Parties. Although there is some precedent in the arbitral world allowing joinder of parties (forcing other parties to arbitrate) or joinder of related disputes, it is very uncommon.

Reduced Logistics. Like the whole world in 2020, international arbitrations were forced to go virtual. Though technology has been widely used in international adjudications for some time (videoconferencing, virtual hearings, etc.), in the last year the use of technology increased tremendously. And it is here to stay. A 2021 empirical survey on international arbitration by Queen Mary University of London reports 79% of respondents prefer to attend their scheduled hearings even if held virtual; whereas, only 16% would choose to postpone to be heard in-person, and just 4% would proceed with a documents-only award.

Provided so many benefits, it begs the question of whether everyone should choose to arbitrate. The answer is no. While arbitration holds lots of advantages, there are downsides. To name a few, limited recourse – final decisions are, well, final (except for limited circumstances described above); lack of transparency – most decisions are not reviewable by court or public, so the process is more susceptible to biases, unreasonableness, favoritism, and the worst kinds of backroom deals.

Besides, some businesses, albeit fearing jury trial, should still proceed through a traditional legal system, especially to establish precedent. A skillful litigator can turn that business-hostile, emotional, and layman jury to the benefit of the client.

Framework of Typical Procedure

Each organization has its rules and procedures. But, the parties can choose to agree in advance to a method of their own, like choosing to resolve the discord through written submission, thus eliminating the need for a hearing altogether. However, the typical and highly simplified arbitration structure common across the board is outlined below.

Filing of the petition which typically includes at least a summary of the claims. This is followed by an answer, possible counterclaims, and then the claims response to the asserted counterclaims.

Arbitrations are typically conducted by either a single arbitrator or a panel consisting of three. This is decided by the parties in their agreement or by the institution selected.

This is the discovery part during which the parties disclose to each other the documents, witness statements, and experts' reports.

Unless it is to be resolved by document submission, the parties must meet face-to-face, in person or virtually, before their arbitrator(s).

The final stage.

When May an Award Be Appealed?

There are very limited bases for the losing party to challenge the award.

Invalidity of the agreement

Incapacity of the parties will provide valid grounds for a challenge.

Improper Notice

When the losing party does not receive proper and/or timely notice of the proceedings or the selection of the arbitrator.

Excess of Arbitrator's Authority

If the issue in the award was not submitted to arbitration or was beyond the arbitrator's authority to decide.

Procedural Error

The use of arbitral procedure does not comply with the parties' arbitration agreement or applicable prevailing law would also provide valid grounds for challenging the award.

Non-Binding Awards

These cannot be enforced because they are not meant to be enforceable in the first place.

Not Arbitrable

Certain subject matters are off limits altogether. For example, subjects that are reserved for resolution by domestic courts notwithstanding an arbitration agreement between the parties, are not arbitrable. Notably, according to the New York Convention arbitrability is to be evaluated under the law of the country where recognition or enforcement of the award is sought. (New York Convention, Article V(2)(a)).

Helpful Tips

As mentioned above, the rising costs of arbitration proceedings is worrisome. Here are suggestions of ways to control how much you have to shell out.

Be mindful of the organization's fee system when choosing your forum.

To save on costs, know how the arbitration institution will charge before you choose it.

The majority of international arbitration institutions use two mechanisms to determine their administrative and tribunal fees: a predetermined scale proportionally based on the value of the dispute (ad valorem), and an hourly fee. For instance, the ICC, ICDR, and SIAC use ad valorem for their calculations, but LCIA is calculating its fee on hourly basis. Interestingly, HKIAC offers the parties to the dispute a choice between ad valorem or hourly. Knowing which the organization uses will help avoid unpleasant surprises.

Write cost apportionment into your contractual arbitration agreement. If the parties do not explicitly address cost apportionment in their contract, the arbitral tribunal will apportion costs according to applicable law or its own rules and regulations. For arbitrations subject to the ICSID Convention, discretion on allocation of costs will be deferred to a tribunal. Yet, some arbitration laws are simply silent on cost allocation. For example, the UNCITRAL Model Law on International Arbitration, used in a significant number of jurisdictions, does not address the issue. Remember: writing cost apportionment into your agreement is a great way to reduce risk in the equation.

Also, as a piece of information for temperamental arbitral participants to take on board: it is quite common to allow the tribunal to consider parties' conduct in deciding on cost allocation. Moreover, although costs are normally included in the final award, parties can request an interim measure: an order or a partial award issued prior to the final award.

HELPFUL TIPS

Do Request Pre-emptive Measures if Circumstances Warrant. Institutional rules are often silent as to standards and principles for the granting of provisional measures, but arbitrators can be given authority, either by the parties or applicable laws, to afford preliminary relief. If, for example, the evidence may be destroyed or lost, it would be appropriate to apply for an interim measure.

Choose the Language of the Proceedings Wisely. Given the multinational nature of international disputes, it is important to think through in what language the arbitration to be held. Ideally, the parties' preference is already plainly stated in their contract. If uncertain what language to choose, select the one in which the underlying contract and most documents are written. That way, everyone is spared from dealing with translation of documents and certifications of translations.

Conclusion

Frank D. Emerson, author of "History of Arbitration Practice and Law," elegantly characterized arbitration as "a dynamic institution for the peaceful settlement of discord, differences, and disputes". (Frank D. Emerson, History of Arbitration Practice and Law, 19 Clev. St. L. Rev. 155 (1970) available at https://engagedscholarship.csuohio.edu/clevstlrev/vol19/iss1/19). Indeed, it is dynamic with inherent structural flexibility, and it is agreeable: the resolutions are achieved in a peaceful manner, compare to more confrontational, formal litigation.

The globalization of trade provided businesses opportunities to reach farther. Businesses worldwide with various languages and cultural heritages now collaborate in building a thriving global economy. But mistakes and misunderstandings still happen. It is no surprise that international arbitration became increasingly popular during this global economic expansion. Its efficient, flexible, speedy approach resonates with solo entrepreneurs and mega corporations alike. Though not without faults, it provides an incredible mechanism to resolve disagreements among an immense collection of very eclectic players. The progress we, as a global legal community, have made developing ADR procedures is remarkable.

We are closer than ever to having a legal scheme that unifies, systemizes, and standardizes international arbitration – an admirable feat benefiting us all.

ABOUT

Diana Isyanova

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Diana Isyanova is a business transactions attorney in Newport Beach, California.

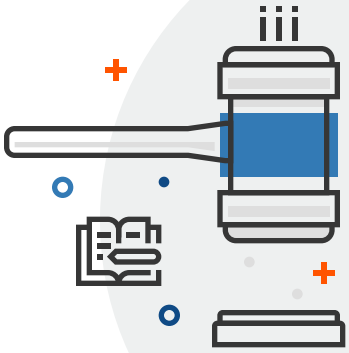
Diana obtained her Bachelor of Arts in Business Economics from the University of California, Irvine, graduating magna cum laude. Her innate passion for learning and relentless drive to achieve led her to law school. In 2018, she received her Juris Doctor from Chapman University Dale E. Fowler School of Law. There, she was a recipient of academic merit scholarship and earned CALI awards (highest grade in class) in Negotiations, Legal and Equitable Remedies, Practice Foundation Transactions, Commercial Leasing, and Estate Planning courses.

During law school, Diana participated in the Tax Appeal Assistance Program with the Board of Equalization, published an article in the student-run scholarly publication, and served as a legal extern for a solo-practitioner assisting him with drafting estate plan, delving in business formation issues, and preparing for arbitration of financial disputes. After receiving her attorney license, Diana joined a large, multinational firm where she practiced complex civil litigation with a focus on the automotive industry. There, she dealt with reviewing and production of ESI, researching and analyzing automotive regulatory and safety-related issues, and drafting responses to inquiries from NHTSA.

Diana's exceptional ability to think outside the box and convert opportunities into workable realities, naturally lead her into the entrepreneurial world. Diana enjoys tremendously helping small businesses and solopreneurs – the main focus of her practice. She believes that a path to rising to the highest level of greatness lies through strong work ethics and rational optimism. Diana is also fluent in Russian. When she is not working, Diana loves spending time with her husband, three young daughters, a cat, and a dog.

Diana is admitted to practice law in the State of California and to the United States District Court, Central District of California. She is also a member of the Orange County Bar Association and the OCBA Young Lawyers Division.

Instagram: @Isyanovalaw
Website: www.isyanovalaw.com
e-mail: diana@isyanovalaw.com



ABOUT

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