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International Arbitration: Doctrinal Foundation and Practical Applications
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Introduction to International Arbitration

Richard A. Eastman, FCI Arb, Chartered Arbitrator

What I Will Talk About

What is Arbitration?

History of Arbitration

International Commercial Arbitration

New York Convention

Administered vs. Ad Hoc

Modern Arbitration Laws

Conclusion

What is Arbitration?

- The word is sometimes loosely used for various forms of dispute resolution in or outside the courts, including non-binding procedures, BUT
- For our purposes arbitration means
 - There is a *legally binding* agreement to resolve disputes current or future by arbitration.
 - One or more arbitrators (“arbitral tribunal”) consider the parties’ submissions and enter an “award” deciding the issues between the parties.
 - The award is *legally binding* and may be enforced in the courts.

History

- Ancient, though distinctions from litigation, conciliation and mediation often blurred.
- Arbitration as we now know it gradually took its modern shape starting in the 18th Century and continuing till, in the early 20th Century, it approached the criteria I suggested in the prior slide.
 - For instance, New York State enacted the first arbitration law in the United States in 1920 and the Federal Arbitration Act was enacted by the United States Congress in 1925.
- Over the past 100 years, arbitration has become prevalent in B2B commercial agreements, both domestic and international.

International Commercial Arbitration

When is an arbitration international? Commercial?

You may think you will know an international commercial arbitration when you see one; however it is important to apply legal definitions to insure the award will be enforceable under the New York Convention, or where the arbitration seat (e.g. California) has different laws governing domestic and international arbitrations.

“International” arbitrations are defined differently in the New York Convention as contrasted with the UNCITRAL Model Law.

The Convention is not limited to commercial arbitrations and has no definition of “commercial.” The Model Law, which *is* limited to commercial arbitrations, likewise has no definition, but UNCITRAL urges an inclusive interpretation in a footnote to Art. 1(1).

New York Convention

This Convention shall apply to the recognition and enforcement of **arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal.** It shall also apply to **arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.** (Article 1)

Model Law (Article 1 (3))

An arbitration is international if:

- (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
- (b) one of the following places is situated outside the State in which the parties have their places of business:(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
- (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

Status of International Commercial Arbitration

International commercial arbitration today is extremely active. Latest complete statistics are for 2019: 7,200 cases initiated at some of the world's leading arbitral institutions:

	<u>2019 cases</u>	<u>2020 cases</u>
CIETAC:	3,333	3,615
HKIAC:	308	318
ICC:	869	946
ICDR	882	N/A
KCAB:	443	N/A
SIAC:	479	1,005 (thru October)
Ad Hoc:	?	?

New York Convention of 1958

- One of the most successful of multilateral treaties.
- The Convention places two important obligations on the courts of member states :
 - (i) to give effect to private agreements to arbitrate.
 - (ii) to recognize and enforce arbitration awards made in other member states.

New York Convention (continued)

- Member countries must also enforce awards made in non-member countries, but allows states when adhering to the Convention to require reciprocity, so that awards from non-party countries cannot take advantage of the Convention to enforce such an award in the contracting states. Many states parties to the Convention have opted to make such a reservation.
- Certain member states have not always met their obligations under it to enforce foreign awards, but overall compliance has been very good.
- The Convention deserves a symposium of its own!

Arbitral Institutions

- Role in international commercial arbitration is enormously important.
- Services of arbitral institutions:
 - initial vetting of whether there is a binding arbitration agreement;
 - appointment of arbitrators;
 - application of well-thought-out rules of the relevant institution;
 - custody and control over funds paid by the parties to cover the costs of arbitration;
 - rules controlling compensation of arbitrators;
 - quality control over arbitrators' handling of the case, e.g. review of the draft award.
- Leading institutions include:
 - International Court of Arbitration of the International Chamber of Commerce (ICC)
 - China International Economic and Trade Commission (CIETAC)
 - International Centre for Dispute Resolution of the American Arbitration Association (ICDR)
 - London Court of International Arbitration (LCIA)
 - Hong Kong International Arbitration Centre (HKIAC)
 - Singapore International Arbitration Centre (SIAC)

Ad Hoc Arbitration

Ad hoc arbitration is a term referring to arbitrations which are not administered, or only partially administered, by an arbitral institution.

Ad hoc arbitrations in some environments are common.

- In England, for instance, ad hoc arbitration is common and popular.
- Likewise ad hoc maritime arbitration in London flourishes under the aegis of the London Maritime Arbitrators Association.
- Complete statistics are not available, but it is known that a significant number of ad hoc international commercial arbitrations occur annually.

WATCH OUT: For the inexperienced or unwary, ad hoc arbitration may be perilous. It is key to draft the arbitration clause very carefully to avoid some pitfalls of ad hoc arbitration not found in institutional arbitrations.

Institutional Arbitration vs. Ad Hoc Arbitration

In “ad hoc” arbitrations, for instance, If not otherwise provided in the arbitration clause:

- The arbitration may not be subject to any body of rules.
- The parties may have to ask a court to appoint the arbitral tribunal.
- Any funds to be paid to cover expenses, including arbitrator compensation, must be paid directly to the arbitral tribunal.
- It is imperative to have agreed in advance with the arbitral tribunal on their compensation.

Modern Arbitration Laws

There are many arbitration laws. Today I will mention a few representative examples.

In the Table of Sources you will find citations to additional laws and texts discussing them. Also, later in this Panel Yoshi Takatori discuss modern Japanese arbitration law.

The cutting-edge standard is the UNCITRAL Model Law.

Basic principles:

- *Party autonomy*: arbitration procedures are set by party agreement.
- *Limited, clearly defined role of courts*.
- *Competence-competence*: arbitral tribunal has power to decide its own jurisdiction.

Modern Arbitration Laws (continued)

The Model Law has been adopted or served as the basis for modern arbitration laws in 117 jurisdictions.

England's 1996 Arbitration Act consciously departs from the Model Law in form and in certain areas of substance, particularly in preserving more role for the courts, such as ruling on points of law and entertaining appeals.

France's arbitration provisions likewise differ in form and substance from the Model Law, for instance applying French court jurisdiction to *any* arbitration if "one of the parties is exposed to a risk of a denial of justice."

The United States Federal Arbitration Act adopted in 1925 is much shorter and simpler in form than the Model Law or most other modern arbitration laws. The US states all have their own arbitration laws, which are preempted by the FAA where they conflict with it.

We're almost done!!!

We have only skimmed the surface of the subjects I have mentioned.

Please look at the documents and list of sources in the symposium materials.

Questions?