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“Ich Bin Ein Arbitrator!”: Unique Issues in Arbitrating International Cases

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“Ich Bin Ein Arbitrator!”: Unique Issues in Arbitrating International Cases

I. Introduction¹

International arbitration is becoming an increasingly popular method for resolving private disputes between franchisors and franchisees. Indeed, a disproportionately large percentage of international franchise disputes end up in arbitration due to its made-to-order flexibility and purported efficiency and cost saving. This article will attempt to provide an overview of the moving parts of the international arbitration process.

Section I will compare and contrast the advantages and disadvantages of the two most prevalent alternative dispute resolution mechanisms, mediation and arbitration. Section II will explore some of the unique issues in international arbitration, including the selection of institutional arbitration, the various laws and rules governing arbitration proceedings, and the treatment of master franchise agreements in the arbitration process. Section III will discuss the procedural aspects of an arbitration proceeding, from the filing requirements, the availability and scope of discovery, to the various procedural vehicles such as defaults and summary dispositions. Section IV will focus on the recognition and enforcement of arbitration awards, including a juxtaposition between the ideals and the realities of enforcing an award in a foreign jurisdiction. Finally, Section V will provide a few drafting guidelines for franchisors' consideration on the essential provisions in an international arbitration agreement.

A. Mediation v. Arbitration

Mediation and arbitration are popular alternatives to traditional litigation and should always be considered by the parties to an international franchise dispute, either prior to the filing of an arbitration proceeding or at some point prior to the hearing. This subsection will discuss the key advantages and disadvantages of each mechanism in the international context.

a. Mediation: The Non-Binding Option

Mediation is “an informal negotiation assisted by an impartial third party (the mediator) that encourages disputing parties to craft their own solutions,” which “enhances the likelihood of continuing the business relationship.”² It is frequently a pre-

¹ The authors would like to thank Tiffany Li of Quarles & Brady for her invaluable contribution to this paper. The views and opinions expressed in this article are solely those of the authors and do not necessarily reflect those of their employers.

² *What We Do*, AM. ARB. ASS'N, <https://www.adr.org/Mediation> (last visited Mar. 7, 2019).

cursor or prerequisite to arbitration or litigation,³ and it is well-suited for international commercial disputes because of its informal, non-binding, and confidential nature.

Mediation is often informal because it focuses on relationship building. There is no judicial officer or jury involved to determine whether one side or the other is in the wrong.⁴ Rather, it is a cooperative process designed to give parties control over the outcome and to help them achieve a mutually acceptable solution that is “not circumscribed by preexisting legal theories or remedies.”⁵ As such, parties are often free to set their own rules and procedures in mediation or forego them altogether.⁶ And, for the most part, the decision to continue or terminate the mediation process is left entirely to the parties.⁷

Mediation is also non-binding in the sense that the mediator does not have authority to issue a decision on the merits of the dispute that would affect the parties’ rights or obligations.⁸ In fact, unless the parties consent, any kind of findings or rulings by the mediator is inappropriate.⁹ Accordingly, parties have the flexibility to choose to settle, proceed with arbitration or litigation as the next step in their dispute resolution process, or walk away and do nothing further about the dispute.¹⁰

In addition, mediation is also known for its privacy, at least with respect to what happens during the meeting itself. Since the goal of mediation is to reach a resolution of the dispute, parties to a mediation may share with the mediator their “bottom line”¹¹ for settling the dispute, their assessment of the strengths and weaknesses of their case, as well as other sensitive information that could affect the parties’ willingness to settle.¹² A mediator is required by a general code of ethics to maintain confidentiality of all information obtained in mediation.¹³ Moreover, various statutes and institutional rules also impose strict confidentiality on all aspects of mediation.

³ In re Atl. Pipe Corp., 304 F.3d 135, 141 (1st Cir. 2002) (under the Alternative Dispute Resolution Act of 1998, district courts have the discretion to order mandatory non-binding mediation without the litigants’ consent).

⁴ Kenneth R. Feinberg, *Mediation - A Preferred Method of Dispute Resolution*, 16 PEPP. L. REV. 5, 6 (1989).

⁵ *Id.* at 7.

⁶ *Id.* at 8.

⁷ *Id.* at 7.

⁸ Jeffrey A. Brimer et al., *Using Negotiation and Mediation to Resolve International Franchise Disputes*, 11 INT’L J. FRANCHISING L. 3, 6 (2013).

⁹ Lopez v. Admin. Office of Courts, 719 F.3d 1178, 1181 n. 2 (10th Cir. 2013) (stating that a mediator is “a role in which making any kind of findings or rulings is inappropriate.”).

¹⁰ Roger Schmidt & Joyce Mazero, *Legal Enforcement of International Franchise Relationships: What Makes Sense or the Business*, FRANCHISING WORLD (Feb. 6, 2019, 10:27 PM), <https://www.franchise.org/legal-enforcement-of-international-franchise-relationships-what-makes-sense-for-the-business>.

¹¹ Brimer, *supra* note 8, at 4.

¹² *Id.*

¹³ See generally, *Model Standards of Conduct for Mediators*, AM. BAR ASS’N (Feb. 20, 2018), https://www.americanbar.org/groups/dispute_resolution/policy_standards/.

In the United States, mediation is primarily governed by the Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651–658, which “provides for the confidentiality of the alternative dispute resolution processes and prohibits disclosure of confidential dispute resolution communications.”¹⁴ On the international front, many dispute resolution centers also have their own sets of rules prescribing confidentiality in mediation. For example, the International Centre for Dispute Resolution Mediation Rules provide that “confidential information disclosed to a mediator by the parties or by other participants (witnesses) in the course of the mediation shall not be divulged by the mediator.”¹⁵ The International Chamber of Commerce Mediation Rules similarly prohibit the disclosure of any documents, statements, or communications submitted by a party or by the mediator in the proceedings, including any admissions made or views expressed by a party, “in any judicial, arbitral or similar proceedings.”¹⁶ Given the various safeguards surrounding confidentiality, mediation is a safe choice for franchisors who wish to resolve their disputes amicably, outside of the constraints of a courtroom, while still preserving their confidential and proprietary information.

Finally, many franchise agreement dispute resolution clauses require mediation before the parties are allowed to proceed to arbitration or litigation. Thus, mediation offers an early opportunity for the parties to air the issues between them, receive impartial feedback from the mediator regarding the strengths and weaknesses of their case, and potentially resolve the dispute before incurring significant costs or inflicting additional damage to the relationship between franchisor and franchisee.

b. Arbitration: The Binding Option

While mediation has the distinct benefits of informality and confidentiality, arbitration is often the preferred choice for franchisors who seek a binding result outside of the judicial realm in the international context.¹⁷ In essence, arbitration is the process of resolving private disputes based on the parties’ expressed agreement.¹⁸ As a creature of contract, arbitration provides parties with the autonomy to tailor the dispute resolution process best suited for their unique conflict.¹⁹

¹⁴ 28 U.S.C.A. § 652(d).

¹⁵ International Centre for Dispute Resolution (ICDR), International Mediation Rules, Art. 10(1), available at https://www.icdr.org/sites/default/files/document_repository/ICDR_Rules.pdf.

¹⁶ ICC, Mediation Rules, Art. 9, available at https://iccwbo.org/dispute-resolution-services/mediation/mediation-rules/#Article_9.

¹⁷ Paul Friedland & Stavros Brekoulakis, *2018 International Arbitration Survey: The Evolution of International Arbitration*, QUEEN MARY UNIVERSITY OF LONDON 4 (2018) (finding that “97% of respondents indicate that international arbitration is their preferred method of dispute resolution, either on a stand-alone basis (48%) or in conjunction with ADR (49%)”).

¹⁸ *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (“[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes-but only those disputes-that the parties have agreed to submit to arbitration.”) (internal citation omitted); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (“[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.”).

¹⁹ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (“The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute.”).

a) Arbitration and Its Endless Possibilities for Neutrality, Confidentiality, Finality—and Peril.

Most domestic franchisors opt to include a mandatory arbitration provision in their international franchise agreements or similar contracts. The underlying concern that fuels this choice is to remove the potential influence of nationalism and other uncertainties of litigating in foreign courts, both in terms of law and procedure. Franchisees can also find this reassuring with respect to receiving a fair and just treatment outside of their “home” jurisdictions.²⁰ To put these priorities in place, the parties can choose a particular arbitral body, such as the American Arbitration Association (AAA) or Judicial Arbitration and Mediation Services (JAMS), to administer their disputes based on those organizations’ “neutrality, ‘internationalism’, reputation, and widespread recognition.”²¹ Similarly, arbitration provisions usually designate a “seat”, *i.e.*, the legal (but not necessarily the physical) place where the arbitration will take place. The choice of seat is crucial because it determines which country’s arbitration legislation will apply to the proceedings and the national courts that will have jurisdiction over any challenges to the arbitration.²² In this way, the parties can assure themselves that they will be proceeding with their dispute in a location in which the arbitration award will be recognized and enforced.²³ Some arbitration provisions also go so far as to specify the nationality of the arbitrators in an effort to remove the possibility of any perceived cultural or national biases. Last, but certainly not least, arbitration provisions frequently select the choice of law governing both the procedural and the legal merits of the dispute, neither of which need to be those of the arbitration seat.²⁴

Like mediation, arbitration proceedings are “confidential” in that the proceedings themselves are not open to the public as they would be if the dispute was being tried in open court. However, the parties are not required to keep confidential either existence of the arbitration or its results unless the arbitration provision in the franchise agreement specifically provides for that or they have reached an agreement with each other during the course of the arbitration to keep them confidential. For example, the AAA’s International Dispute Resolution Procedures only places confidentiality restrictions on the arbitrator (not the parties), and allows—but does not require—the arbitrator to issue

²⁰ See Sonal Sharma, *Neutrality v. Nationality*, KLUWER ARB. BLOG (Apr. 8, 2014), <http://arbitrationblog.kluwerarbitration.com/2014/04/08/neutrality-v-nationality/> (stating that neutrality is one of the quintessential elements of international arbitration, and requiring an arbitrator to be of neutral nationality is one way to combat nationalism).

²¹ David Earnest et al., *Four Ways to Sharpen the Sword of Efficiency in International Arbitration*, YOUNG ICCA (2013), https://www.arbitration-icca.org/media/0/13630881906410/four_ways_to_sharpen_the_sword_of_efficiency_yicca_group_paper.pdf.

²² David Hesse, *The Seat of Arbitration is Important. It’s That Simple*, KLUWER ARB. BLOG (June 10, 2018) <http://arbitrationblog.kluwerarbitration.com/2018/06/10/seat-arbitration-important-simple>.

²³ Friedland, *supra* note 17, at 9.

²⁴ Markus A. Petsche, *Choice of Law in International Commercial Arbitration*, PRIVATE INT’L LAW 34 (2017) (noting that neutrality may be compromised where a tribunal is required to apply a particular domestic law).

orders concerning confidentiality.²⁵ Thus, the reality is that arbitrations are not ordinarily confidential unless the parties agree to keep them private. Finally, franchisors should exercise caution in reaching such confidentiality agreements to retain the ability to disclose an arbitration in an FDD, securities law filing, and the like.

In addition, arbitration allows for the possibility of the appointment of an arbitrator who—if not an expert—at least has some knowledge or experience in the industry or area of the law at issue in the dispute. This is especially valuable in the area of franchising given the relative lack of knowledge about this area of the law in the wider legal community. Nevertheless, there is no guaranty that the arbitrator selection process will actually result in the choosing of an arbitrator with any prior exposure to franchising or franchise law.

However, the main advantages of arbitration, especially in the international context, are that (1) the litigation process is similar to what an U.S. company is used to and (2) the parties have a greater chance of enforcing an award.

b) Major Drawbacks of Arbitration

Although arbitration boasts many advantages, it also has its drawbacks. Three major drawbacks of arbitration are: (i) lack of meaningful appeals, (ii) it is often just as costly as court litigation, (iii) arbitrators may not be as willing to grant dispositive motions or motions to limit evidence, and (iv) limited suitability for multiparty disputes.

Appeal rights. Arbitration awards are notoriously difficult to overturn on appeal.²⁶ Finality may be a desirable attribute for the winning party, but the lack of meaningful appellate rights could be disastrous for the losing party. For example, the Federal Arbitration Act allows a court to vacate an award only where the award was procured by “corruption,” “fraud,” or “undue means,” and where the arbitrators were “guilty of misconduct,” or “exceeded their powers.” 9 U.S.C. § 10. And a court is only allowed to modify or correct an arbitration award where there has been an “evident material miscalculation,” “evident material mistake,” and “imperfect[ions] in [a] matter of form not affecting the merits.” 9 U.S.C. § 11. While some commentators tout this as a virtue (based on the fact that the dispute will end earlier because parties will be dissuaded from an appeal), the reality is that legal decision makers can make mistakes and the lack of appellate review can make arbitration a much riskier proposition. Under the auspices of the AAA, ICDR, and JAMS, parties are permitted to an optional appeal

²⁵ AAA, Commercial Arbitration Rules, Articles 37.1 and 37.2, available at: https://www.adr.org/sites/default/files/CommercialRules_Web.pdf [hereafter “AAA Rules”]; see also, Marlon Meza-Salas, *Confidentiality in International Commercial Arbitration: Truth or Fiction*, KLUWER ARB. BLOG (Sept. 23, 2018) <http://arbitrationblog.kluwerarbitration.com/2018/09/23/confidentiality-in-international-commercial-arbitration-truth-or-fiction>.

²⁶ Perhaps most tragically illustrated by the Second Circuit’s decision three years ago to confirm an arbitration award in a labor dispute over the suspension of a legendary athlete because he was wrongly accused of altering game equipment. *NFL Management Council v. NFL Players Ass’n*, 820 F.3d 527, 532 (2d Cir. 2016).

of the arbitral award if they agreed to such right in advance.²⁷ However, without such an agreement, under the rules of most arbitral institutions, arbitration awards are final and parties irrevocably waive their rights to any form of appeal, review, or recourse.²⁸

The second drawback of arbitration is cost. The commonly held belief in legal circles and elsewhere that arbitration is a “cheaper and faster” alternative to litigation may now be nothing more than wishful thinking.²⁹ As a U.S. district court judge in Boston bluntly commented in a recent decision:

Cheaper? Arbitration is expensive. Arbitration which . . . contemplates pre-hearing discovery is markedly more expensive. . . . Arbitration before a panel of three arbitrators is more expensive still. Indeed, it's as expensive as the full panoply of federal court litigation. . . . Faster? On this factor, the federal courts in Massachusetts win hands down.³⁰

Among these costs include the initial filing fee which could be in the upwards of thousands of dollars depending on the amount at issue in the dispute.³¹

Another major drawback of arbitrations is the seeming reluctance of arbitrators to grant dispositive motions, such as motions to dismiss or motions for summary

²⁷ AAA, Optional Appellate Arbitration Rules, Art. A-1, available at <https://www.adr.org/sites/default/files/AAA%20ICDR%20Optional%20Appellate%20Arbitration%20Rules.pdf> [hereafter AAA Appellate Rules] (“Whenever, by stipulation or in their contract, the parties have provided for the appeal of an arbitration award [] rendered under the auspices of the [AAA], or the ICDR, or have otherwise provided for these Appellate Arbitration Rules, they shall be deemed to have made these Rules, . . . a part of their agreement.”); ICDR, Appellate Rules, Art. 10(1) (same as the AAA Appellate Rules); See generally, JAMS, Optional Arbitration Appeal Procedures, available at https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Optional_Appeal_Procedures-2003.pdf [Hereafter JAMS Appellate Rules].

²⁸ London Court of International Arbitration, Arbitration Rules, Art. 29.2, available at https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx [hereafter LCIA Rules]; World Intellectual Property Organization, Arbitration Rules, Art. 66(a), available at <https://www.wipo.int/amc/en/arbitration/rules/> [hereafter WIPO Rules]; Hong Kong International Arbitration Centre, Administrated Arbitration Rules, Art. 2.2, available at http://hkciac.org/sites/default/files/ck_filebrowser/PDF/arbitration/2018_hkiac_rules.pdf [hereafter HKIAC Rules]; Singapore International Arbitration Centre, Arbitration Rules, Art. 32.11, available at <http://www.siac.org.sg/our-rules/rules/siac-rules-2016> [hereafter SIAC Rules]; Chinese International Economic and Trade Arbitration Commission, Arbitration Rules, Art. 49.9, available at <http://www.cietac.org/index.php?m=Page&a=index&id=42&l=en> [hereafter CIETAC Rules].

²⁹ CellInfo, LLC v. Am. Tower Corp., No. CV 18-11250-WGY, 2018 WL 6682798, at *7 (D. Mass. Dec. 19, 2018); Caroline Simson, *Arbitration Could Benefit from Litigation Rules: Ex-Judge*, LAW360 (Sept. 24, 2018, 6:41 PM), <https://www.law360.com/articles/1085668/arbitration-could-benefit-from-litigation-rules-ex-judge> (while arbitration is often touted as the quicker and cheaper alternative to litigation, in reality, it is becoming just as lengthy and expensive as litigation).

³⁰ CellInfo, 2018 WL 6682798, at *7 (stating that “the initial costs of finding, selecting, and launching a three-person arbitration panel outstrip the costs of filing a complaint in the federal district court. So, even before accounting for the real costs—discovery—which comes later, parties have already spent more by choosing arbitration.” Moreover, the court noted, because federal courts are supported by the public, incidental costs of the proceedings are also lower.)

³¹ For example, under the AAA fee schedule, cases with three or more arbitrators are subject to a minimum initial filing fee of \$4,000 and a final fee of \$3,850.

judgments, which parties can use to great effect in court-based litigation to eliminate claims or even win cases outright before trial. In addition, arbitrators are also typically reluctant to grant motions in limine to exclude evidence that can be introduced at the hearing, usually opting to consider the materials and testimony and give it whatever weight is warranted. Thus, arbitration hearings can end up being less streamlined than the same matter would be if it were being decided by a judge.

A final drawback of arbitration is its lack of suitability for multiparty disputes because of its contractual nature.³² Whereas bilateral arbitration might be “cheaper and faster” in some circumstances,³³ multiparty disputes often involve complex claims asserted on multiple fronts frequently create a “procedural morass” in the arbitral forum.³⁴ Thus, in exceptional circumstances, arbitrators may ascertain implied consent to join another party from a litany of “legal theories for non-signatories such as agency, assignment, third-party beneficiary, incorporation by reference, alter ego or equitable or arbitral estoppel,”³⁵ but those are the rare exceptions rather than the norm.

Despite the aforementioned drawbacks, arbitration remains a primary dispute resolution vehicle for many franchisors, as the benefits often outweigh its limitations. However, to fully take advantage of the benefits of international arbitration, franchisors must have a holistic understanding of this unique dispute resolution mechanism.

II. International Arbitration: Unique Issues

International arbitration typically comes in two forms: ad hoc and institutional. Ad hoc arbitration is one in which the parties must determine all aspects of the arbitration without recourse to an institution.³⁶ Whereas an institutional arbitration is a “legal

³² Nat'l Broad. Co. v. Bear Stearns & Co., 165 F.3d 184, 186 (2d Cir. 1999) (“Ordinarily, because commercial arbitration is a creature of contract, only the parties to the arbitration contract are bound to participate.”); Thomas J. Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 IOWA L. REV. 473, 480 (1987) (“The presence of a contractual arbitration agreement may only magnify the complexities inherent in disputes implicating multiple parties and multiple relationships.”); William W. Park, *Non-signatories and International Contracts: an Arbitrator's Dilemma*, MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION, Oxford University Press (2009), ¶ 1.09 (“For arbitrators, motions to join non-signatories create a tension between two principles: maintaining arbitration's consensual nature, and maximizing an award's practical effectiveness by binding related persons.”).

³³ *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010) (“In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized dispute.”).

³⁴ *Concepcion*, 563 U.S. at 348 (discussing the drawbacks of switching from bilateral to class arbitration, although a similar argument could be made for a non-class multiparty arbitration).

³⁵ Stavros Brekoulakis & Ahmed El Far, *Subcontracts and Multiparty Arbitration in Construction Disputes*, GLOB. ARB. REV. (February 16, 2019, 1:22 PM), <https://globalarbitrationreview.com/chapter/1145204/subcontracts-and-multiparty-arbitration-in-construction-disputes>.

³⁶ Edlira Aliaj, *Dispute Resolution Through Ad Hoc and Institutional Arbitration*, 2 ACAD. J. BUS., ADMIN., L. AND SOC. SCI. 241, 247 (2016), available at <http://iipcc.org/wp-content/uploads/2016/07/241-250.pdf>

process” administered by an arbitral organization “based on a set of rules and fixed fee schedule”³⁷ and participants agree to be bound by the rules of the institution. This article will focus on institutional arbitration, as it is the more popular choice in franchise disputes.

A. Institutional Arbitration

In an institutional arbitration, the institution will assist in matters such as the initiation of the arbitration, the formation and appointment of the tribunal, and the general administration of the proceedings. However, arbitral institutions differ widely in terms of procedures, specializations, and costs. Therefore, it is important to examine the different types of institutions around the world.

a. American Arbitration Association (AAA) and The International Centre for Dispute Resolution (ICDR)

The AAA was founded in 1926 upon Congress’ enactment of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*. Its purpose is to implement arbitration as a viable out-of-court method of resolving disputes.³⁸ The AAA has established several sets of arbitration rules, the most pertinent of which are (i) the Commercial Arbitration Rules,³⁹ and (ii) the International Arbitration Rules (IAR) based on the UNCITRAL Rules (see detailed discussion in Subsection B). The AAA offers a broad range of dispute resolution services for a variety of types of claims, including franchising, employment, and construction.⁴⁰ Finally, in June 1996, the AAA also established an international division, known as the ICDR, a self-contained organizational unit created in response to increasing demands for international proceedings. Today, the ICDR is the second largest arbitral institution in the world after the ICC.⁴¹

b. International Chamber of Commerce (ICC)

The ICC is a private, non-profit, and non-governmental organization that was established in 1919. The purpose of the ICC is to promote open international trade and investment around the world. The ICC is not solely or principally devoted to alternative dispute resolution, but it is nevertheless the leading dispute resolution center in the field of international commercial arbitration.⁴²

The phrase “ICC arbitration” refers to disputes which are administered by the International Court of Arbitration (ICA). The ICA is a division within the ICC and does not itself settle disputes. Rather, the ICA oversees the application of the ICC Rules of

³⁷ *Id.*

³⁸ See Stephanie Reed Traband in: *Institutional Arbitration – Tasks and Powers of different Arbitration Institutions* 29 (2009).

³⁹ See generally, AAA Rules.

⁴⁰ See *Practice Areas*, AM. ARB. ASS’N, <https://www.adr.org/Commercial> (last visited Feb. 27, 2019).

⁴¹ Roderich Thümmel in: Schütze (ed.) – *Institutional Arbitration*, ICDR-IAR, p. 733, recital 3 (2013).

⁴² Gary Born, *International Commercial Arbitration* 157 (2009).

Arbitration.⁴³ In particular, the ICA is responsible for making certain key administrative decisions, such as determining whether an arbitration agreement exists, fixing the seat of the arbitration in the absence of any choice by the parties, appointing the arbitrators, resolving challenges to arbitrators, and scrutinizing draft awards before they become final.⁴⁴ The ICA is assisted by the Secretariat, the person responsible for the day-to-day running of the file and has direct contact with the parties.

The ICC, as the world's largest arbitral institution, with its robust infrastructure and comprehensive rules, is well-equipped to provide sophisticated services for any kind of disputes, including multi-party and multi-contract disputes, without any substantive or geographical constraints.⁴⁵

c. London Court of International Arbitration (LCIA)

The LCIA is one of the oldest arbitral institutions in the world. It was founded in 1892 as a concrete and pragmatic response to the perceived needs for an efficient alternative to litigation.⁴⁶

The LCIA is based in London, with affiliated offices in Dubai (DIFC-LCIA) and Mauritius (LCIA-MIAC). The LCIA is a favorite among parties located in the United Kingdom and those who are comfortable with hearings in the Middle East. The LCIA is particularly well known for its (i) specializations in insurance, banking, and finance matters, (ii) Arbitration Rules,⁴⁷ and (iii) administrative services offered in ad-hoc arbitrations.

The LCIA operates under a three-tier structure, comprising the Company, the Arbitration Court, and the Secretariat.⁴⁸ At the top is the Company, which is ultimately responsible for managing the institution as a whole. The Arbitration Court, which has no judicial function, determines how the LCIA Arbitration Rules should be applied. Finally, the Secretariat is responsible for administering cases and the day-to-day running of the LCIA.⁴⁹

The LCIA distinguishes itself from other institutions in the following ways: First, it balances party autonomy over procedure and arbitral appointments, with institutional control over arbitral fees and expenses, and confidentiality of its awards.⁵⁰ Second, its Arbitration Court provides authority and acceptance over aspects of the procedure not available to a secretariat. Finally, the LCIA awards are rendered more promptly due to

⁴³ Michael Bühler & Thomas Webster, *Handbook of ICC Arbitration*, para. 34-1, p. 481 (2014).

⁴⁴ Laurence Shore et al. in: *Arbitration World*, Jurisdictional Comparisons (2d ed. 2006), ICC p. xlix.

⁴⁵ Andreas Reiner & Christian Aschauer in Schütze (ed.): *Institutional Arbitration*, ICC p. 27 (2013).

⁴⁶ IX Law Quarterly Review 86, 1893.

⁴⁷ See LCIA Rules.

⁴⁸ *Organisation*, LONDON CT. OF INT'L ARB., <https://www.lcia.org/LCIA/organisation.aspx> (last visited on Feb. 20, 2019).

⁴⁹ *Id.*

⁵⁰ Sabine Konrad & Robert Hunter in: Schütze (ed.), *Institutional Arbitration*, LCIA, p. 427 recital 66 (2013).

a lower degree of involvement of the Arbitration Court in the conduct of proceedings, particularly by the absence of a mandatory “Terms of Reference” and the later “scrutiny” of the award.⁵¹

d. Hong Kong International Arbitration Centre (HKIAC)

Founded in 1985, the HKIAC is a well-respected institution, often chosen for China-related dispute resolution. It is one of the most obvious choices for matters involving Asia.⁵² The HKIAC is a one-stop shop that handles arbitration, mediation, adjudication, and domain name cases. The HKIAC also plays a leading role in developing innovative arbitration practices, and its practices have received numerous “Global Arbitration Review” awards for best innovation. For example, HKIAC was one of the trailblazers⁵³ in providing arbitrators with broader powers on joinder because Asian investments are often spread over several contracts. This innovative practice with consideration to regional elements enabled arbitrators to organize and centralize disparate cases with ease.

The HKIAC is also known for its proven track record (two decades of experience), a fine set of rules, and a minimalistic approach to case administration. It is also affordable, even in a city as expensive as Hong Kong. In addition, the HKIAC was the first institution to give parties a choice in how they pay arbitrators (by value of case or hourly rate). The HKIAC has gone even further recently on arbitrator costs.⁵⁴

e. German Institution of Arbitration (DIS)

The German Institution of Arbitration (Deutsche Institution für Schiedsgerichtsbarkeit e.V., DIS) is the most important institution for industry-independent arbitration in Germany. It is especially well known for its sports arbitration court and for resolving anti-doping disputes.

The DIS is a registered non-profit association based in Berlin, whose founding roots date back to 1920. In its present form, the DIS emerged from a merger of the German Committee for Arbitration and the German Institute for Arbitration.⁵⁵ The primary responsibilities of the DIS and its predecessors include: (i) providing an administrative framework for arbitral tribunals, and (ii) introducing rules governing arbitral proceedings⁵⁶ and other proceedings of alternative dispute resolution.

⁵¹ Compare Laurence Craig, *The LCIA and ICC Rules: The 1998 Revisions Compared*, in: *International Commercial Arbitration – Practical Perspectives* 82 (2001).

⁵² See *2018 Administered Arbitration Rules*, H.K. INT’L ARB. CTR., available at <http://www.hkiac.org/arbitration/rules-practice-notes/hkiac-administered-2018> (last visited Feb. 27, 2019).

⁵³ *Id.*

⁵⁴ See *Global Arbitration Review, Guide to Regional Arbitration* (vol.6 – 2018).

⁵⁵ See *About the DIS*, GER. ARB. INST., available at: <http://www.disarb.org/en/57/content/ueber-die-dis-id46> (last visited on Feb. 19, 2019).

⁵⁶ German Arbitration Institute, *Arbitration Rules*, Article 2.1, available at: <http://www.disarb.org/em/16/rules/-id38> [hereafter DIS Rules].

f. China International Economic Trade Arbitration Commission (CIETAC)

As a result of increasing inbound and outbound investments as well as cross border commercial agreements between Chinese and foreign companies, more disputes arise. Consequently, many Chinese parties will insist on arbitration of disputes in China. Such arbitration proceedings are dealt by the CIETAC, as ad-hoc arbitrations are not permitted.

The CIETAC operates under a two-tier structure. At the top tier is the Arbitration Commission, which includes the Chairman and several deputy chairs. Its seat is in Beijing, but it maintains sub-commissions in Shanghai, Shenzhen, and Chongqing, to name a few.⁵⁷ The Commission and the sub-commissions are responsible for managing the arbitration proceedings in accordance with the Arbitration Rules.⁵⁸ However, like the ICA, the Commission does not itself decide any disputes.⁵⁹ At the lower tier is the Secretariat, who carries out the day-to-day affairs.

The CIETAC Arbitration Commission has jurisdictions over (1) “international or foreign related disputes,” (ii) “domestic disputes,” and (iii) any disputes related to Hong Kong, Macao, and Taiwan.⁶⁰ Franchisors interested in arbitrating their disputes in China should be aware of the following peculiarities:

- There is an obligation to select arbitrators from a certain panel of arbitrators unless the parties have explicitly contracted out of such obligation;
- Most cases are decided after 1 or 2 oral hearings;
- CIETAC puts greater emphasis on the clarification of facts compared to the application of law; and
- Arbitral awards are reviewed by the Arbitration Commission before they are finalized.⁶¹

B. Model Law and Arbitration Rules

a. United Nations Commission on International Trade Law (UNCITRAL)

UNCITRAL was established on December 17, 1966, upon the initiative of Hungary and after a long debate to promote the harmonization and unification of

⁵⁷ *Organization, CHINA INT’L ECON. TRADE ARB. COMM’N*, available at <http://www.cietac.org/index.php?m=Page&a=index&id=35&l=en> (last visited on Feb. 20, 2019).

⁵⁸ See generally, CIETAC Rules.

⁵⁹ Sabine Stricker-Kellerer & Michael J. Moser in: Schütze (ed.), *Institutional Arbitration*, CIETAC, p. 579 recital 35 (2013).

⁶⁰ CIETAC Rules, Art. 3(2).

⁶¹ Rolf Schütze, *Arbitration Court and Arbitration Proceeding*, p. 30 recital 88 (2016).

international commercial law.⁶² It is not an arbitral institution and does not settle any disputes directly.⁶³ Rather, it is a subsidiary body of the General Assembly of the United Nations. UNCITRAL has prepared a variety of conventions, model laws, and instruments dealing with the substantive law governing trade transactions and business law. UNCITRAL texts are formulated by a body of 60 elected member States, as well as observer states, intergovernmental organizations, and non-governmental organizations.⁶⁴ The Secretariat of UNCITRAL is the International Trade Law Division of the Office of Legal Affairs of the United Nations Secretariat.⁶⁵

Since its establishment, UNCITRAL has played an important role in improving the legal framework for international trade. Its legislative texts in areas such as international sale of goods, commercial dispute resolution, insolvency, and security interests have been used by States in modernizing the law of international trade. Its non-legislative texts including rules for conduct of arbitration have been utilized by commercial parties in negotiating transactions.

b. The UNCITRAL Model Law on International Commercial Arbitration

The UNCITRAL Model Law was adopted by UNCITRAL on June 21, 1985, at the end of the eighteenth session of the Commission. The General Assembly, in its resolution 40/72 of December 11, 1985, recommended “that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice.” The Model Law was amended on July 7, 2006, at the thirty-ninth session of the Commission.⁶⁶

The Model Law was developed to address the considerable disparities in national laws on arbitration. The need for improvement and harmonization was based on findings that national laws were often inappropriate for international cases. The Model Law covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award, and reflects a worldwide consensus on the principles and important issues of international arbitration practice. It is acceptable to States of all regions and the different legal or economic systems of the world. Since its adoption, the Model Law has come to represent the accepted international legislative standard for a modern arbitration law and a significant number

⁶² UNCITRAL Yearbook vol. I, 1968-1970, 65 *et seq*; The UNCITRAL Guide – Basic Facts about the United Nations Commission on International Trade Law, 2007, 1.

⁶³ Pieter Sanders, *The Work of UNCITRAL on Arbitration and Conciliation 1* (2d ed. 2004).

⁶⁴ FAQ-Origin, Mandate and Composition of UNCITRAL, available at: http://www.uncitral.org/uncitral/en/about/origin_faq.html (last visited on Feb. 19, 2019).

⁶⁵ *Id.*

⁶⁶ See UNCITRAL Model Law on international Commercial Arbitration 1985 with amendments as adopted in 2006, Part Two: *Explanatory Note By The UNCITRAL Secretariat on the Model Law on International Commercial Arbitration*, p.23.

of jurisdictions (80 states/countries in a total of 111 jurisdictions⁶⁷) have enacted arbitration legislation based on the Model Law.

c. The UNCITRAL Arbitration Rules

Like the Model Law, the UNCITRAL Arbitration Rules have also received worldwide acceptance.⁶⁸ These Rules are geared toward ad hoc arbitration, and parties tend to use the Rules to avoid the involvement of state courts and as a guide for an ad hoc proceeding. The Rules deal with arbitration proceedings in an autonomous and comprehensive manner, and parties may basically complement or forfeit provisions as they see fit. This is one distinct advantage⁶⁹ over institutional arbitration, where the parties are not allowed to derogate from those provisions.⁷⁰ However, the UNCITRAL Rules cannot do entirely without an institutional reserve. In the event that a party refuses to participate in the constitution of the arbitral tribunal, an “appointing authority” must fulfill such auxiliary functions.⁷¹

C. Venue/Seat of Arbitration

In international franchise arbitration, the choice of venue is of high importance. “Venue” as used here refers to the “seat of the arbitration,” *i.e.*, the country or city whose procedural law regarding arbitration is likely to govern (see further discussion in Section V(C)). The general rule about the seat is that the legal place of the arbitration will be where the parties have agreed in advance, or will be where the court/tribunal decides. Predictably, a number of the organizations designate that their home territory will be the seat of arbitration.⁷²

The place of arbitration is the physical location of the hearings. Usually, the seat and place of arbitration coincide, but not always. Selection in drafting or filing of the seat should take into account the conduct of the arbitration and the enforceability of the ultimate award. Indeed, much of the perceived value of arbitration as an international dispute resolution mechanism is based on the relative ease of enforcement of international arbitration awards provided by the New York Convention,⁷³ the

⁶⁷ See *Status Report UNCITRAL Model Law*, available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (last visited on Feb.19, 2019).

⁶⁸ Menno Aden, *Internationale Handelsschiedsgerichtsbarkeit: Commentary on the Arbitration Rules of ICC – DIS – VIAC – UNCITRAL – LCIA* 573 para. 1 (2d ed. 2003).

⁶⁹ Paolo Michele Patocchi & Tilman Niedermaier in: Schütze (ed.) *Institutional Arbitration*, UNCITRAL p. 1016 recital 17 (2013).

⁷⁰ Richard Kreindler et al., *Schiedsgerichtsbarkeit – Kompendium für die Praxis*, 4th chapter, p. 84 recital 278 (2006).

⁷¹ Reinhold Geimer & Rolf Schütze, *International Legal Relations in Civil and Commercial Matters*, 5th book, preliminary note (2018).

⁷² See e.g., HKIAC Rules, Art.14.1 (the seat will be Hong Kong absent the parties’ expressed agreement); LCIA Rules, Art. 16.2 (unless the parties agree otherwise, the default seat shall be London, England).

⁷³ Convention on Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2519, T.I.A.S. No. 6997 [hereafter New York Convention].

applicability of which can depend on where the award was entered (See Section IV for further discussion on the New York Convention).

D. Master Franchising

The use of arbitration as a mechanism for dispute resolution in commercial agreements is increasing around the world. Area development agreements, master franchise agreements, and unit level franchise contracts are no exception to this trend. In master franchise agreements, an arbitration clause can serve as a useful provision for allocating risk to the mutual benefit of franchisors and franchisees.⁷⁴

a. Basic Principles of Master Franchising

When expanding internationally, most franchisors utilize master franchise agreements to establish a number of franchise outlets, simultaneously or successively, within a substantial geographic area during a defined period of time. Depending on the size of territory and whether exclusivity is provided, the responsibility for developing the system in the new territory, including distribution networks and training programs, rests with the master franchisee, rather than the franchisor. In this way, the franchisor is able to commit fewer financial and management resources without sacrificing local presence. Master franchising also permits a rapid market penetration and system growth. However, it is important to note that the success of a master franchise depends heavily on the quality of the master franchisee. In the event of a master franchise loss of control and revenue, difficulties in enforcement⁷⁵ as well as termination problems may occur.

b. Challenges With Terminating a Master Franchise Agreement

One of the biggest challenges franchisors face when dealing with master franchise agreement is termination or non-renewal. These problems can arise where the franchisor wants to efficiently enforce the termination or take over the local partner's operations within the territory. The existence of the master franchisee, as an additional layer between the franchisor and the unit franchise operator, can make it much harder for the franchisor to control the system closely. This could result in a lack of control and privity. The long distances involved—often halfway across the world—further complicate such issues.

For example, it may be the case that the master franchisee has negotiated a long period of notice of termination. During that time, the master franchisee may continue to enter into new franchise agreements that compete with other subfranchisees' operation. The master franchisee may collect royalties and other fees without reporting them to the

⁷⁴ See William L. Killion, *An Informal Study of Arbitration Clauses Reveals Surprising Results*, 22 FRANCHISE L.J. 79 (2002).

⁷⁵ See Steve Vandegrift, *Considerations for International Franchising* 3 (2014), available at: <https://www.fransource.com/considerations-for-international-franchising/> (last visited Apr. 4, 2019).

franchisor or send a termination notice to subfranchisees without the franchisor's knowledge or approval. Moreover, a disgruntled ex-master franchisee may smear the franchisor's reputation by notify the media that the franchisor is unethical and that the franchise would be a bad investment, or announce false statements to subfranchisees about price increases. This list of possible challenges is not exhaustive, but it provides a picture of the possible damages that might occur when terminating a master franchise agreement. Therefore, when entering into international franchise deals with local partners in an agreed territory, a franchisor should clearly provide for its right to terminate the relationship and the grounds for termination, because planning for the end of a franchise relationship is just as important as planning for the operational issues in the opening.⁷⁶ For practical tips on how to avoid the myriad of concerns associated with master franchise agreements, see drafting consideration under Section V(H) .

III. Arbitration Proceedings

A. Filing Requirements

In order to conduct and initiate arbitration proceedings, parties must have agreed to arbitration in their contract. This is often done through a standard arbitration clause. In the case of an institutional arbitration, the procedural rules of the institution will supersede the largely dispositive provisions of state arbitration law and close any loopholes. The central tasks of the arbitral institution are to administer the proceedings, to assist in the appointment of the arbitrators, and to provide a scale of fees, as stated above. Of course, the rules of those institutions differ, understanding these differences is essential to determining which institution may be ideal in terms of how to initiate an arbitration and other important procedural issues like fees or arbitrator selection.

a. Request for Arbitration

Generally, initiating an arbitration requires a notice of arbitration and a statement of claim. The notice must be given to both the arbitration administrator and the opposing party.⁷⁷ A typical request include:

- (i) the names and addresses of the parties;
- (ii) the names and addresses of any designated counsel representing the claimant in the arbitration;
- (iii) a statement of the specific relief sought;
- (iv) the amount of any quantified claims and an estimate of the monetary value of any unquantified claims;
- (v) a description of the facts and circumstances on which the claims are based;
- (vi) the arbitration agreement(s) on which the claimant relies;

⁷⁶ See Carl Zwisler & Beata Krakus, *Avoiding Common Mistakes in International Franchising*, 48TH IFA ANNUAL LEGAL SYMPOSIUM 51 (2015).

⁷⁷ International Centre for Dispute Resolution, Arbitration Rules, Art. 2(1), available at https://www.icdr.org/sites/default/files/document_repository/ICDR_Rules.pdf [hereafter ICDR Rules].

- (vii) the nomination of an arbitrator if required under the institutional rules;
and
- (viii) any particulars regarding the seat of the arbitration, the language of the arbitration, and the rules of law applicable to the merits.⁷⁸

Under the DIS Rules, arbitration shall commence on the date on which the Request for Arbitration is filed with the DIS, provided that it includes items (i), (iii), (v) and (vi) of the aforementioned list.⁷⁹ Further, a Request for Arbitration must be sent to the DIS in paper form as well as in electronic form and must comply with the following requirements:

- (i) paper form: one copy of the Request for Arbitration for each party, as well as any attachments thereto, and one copy for the DIS without attachments; and
- (ii) electronic form: one copy of the Request for Arbitration for each party and for the DIS, as well as any attachments thereto.⁸⁰

The DIS may at any time request further copies of the Request for Arbitration as well as any attachments thereto. Not all arbitration rules make allowance for electronic filing. It is important to note that the arbitration institution may have its own required number of copies to submit and may allow a limited time in which to pay the filing fee, so claimant should carefully examine these requirements, or risk the closing of the arbitration without prejudice. However, parties are not prevented from amending or adapting the Rules of Arbitration, because the arbitration agreement between the parties also only applies in the rank of a contractual provision. Thus, parties may even agree on the application of the Rules of Procedure without the further participation of the arbitral institution (“wild cat arbitration”). In such a case, the institution is free to continue to administer.⁸¹ Equally important for the initiation of the proceedings is the payment of arbitration fees.

b. Payment of Fees

Since fee schedules vary between institutions, examples of the most important ones are provided below:

a) AAA

The AAA offers parties two options for the payment of administrative fees: (i) standard and (ii) flexible.

⁷⁸ *E.g.*, DIS Rules, Art. 5.2; ICDR Rules, Art. 2(3).

⁷⁹ DIS Rules, Art. 6.1.

⁸⁰ DIS Rules, Art. 4.2

⁸¹ Kreindler, *supra* note 70, at 118 recital 391.

- Standard Fee Schedule: A two-payment schedule that provides for somewhat higher initial filing fees but lower overall administrative fees for cases that proceed to a hearing.
- Flexible Fee Schedule: A three-payment schedule that provides for lower initial filing fees and then spreads subsequent payments out over the course of the arbitration. Total administrative fees will be somewhat higher for cases that proceed to a hearing.

Standard Fee Schedule			Flexible Fee Schedule			
Amount of Claim	Initial Filing Fee	Final Fee	Amount of Claim	Initial Filing Fee	Proceed Fee	Final Fee
Less than \$75,000	\$925	\$800	Less than \$75,000	Only available for claims \$150,000 and above		
\$75,000 to less than \$150,000	\$1,925	\$1,375	\$75,000 to less than \$150,000			
\$150,000 to less than \$300,000	\$2,900	\$2,200	\$150,000 to less than \$300,000	\$1,825	\$1,875	\$2,200
\$300,000 to less than \$500,000	\$4,400	\$3,850	\$300,000 to less than \$500,000	\$2,200	\$3,300	\$3,850
\$500,000 to less than \$1,000,000	\$5,500	\$6,825	\$500,000 to less than \$1,000,000	\$2,750	\$4,725	\$6,825
\$1,000,000 to less than \$10,000,000	\$7,700	\$8,475	\$1,000,000 to less than \$10,000,000	\$3,850	\$6,275	\$8,475
\$10,000,000 and above	\$11,000 plus .01% of the claim amount above \$10,000,000 up to \$65,000	\$13,750	\$10,000,000 and above	\$5,500	\$10,000 plus .01% of the claim amount above \$10,000,000 up to \$65,000	\$13,750
Undetermined Monetary Claims	\$7,700	\$8,475	Undetermined Monetary Claims	\$3,850	\$6,275	\$8,475
Nonmonetary Claims*	\$3,500	\$2,750	Nonmonetary Claims*	\$2,200	\$2,475	\$2,750
Deficient Filing Fee	\$500		Deficient Filing Fee	\$500		
Additional Party Fees	If there are more than two separately represented parties in the arbitration, an additional 10% of each fee contained in these fee schedules will be charged for each additional separately represented party. However, Additional Party Fees will not exceed 50% of the base fees contained in these fee schedules unless there are more than 10 separately represented parties. See below for additional details.		Additional Party Fees	If there are more than two separately represented parties in the arbitration, an additional 10% of each fee contained in these fee schedules will be charged for each additional separately represented party. However, Additional Party Fees will not exceed 50% of the base fees contained in these fee schedules unless there are more than 10 separately represented parties. See below for additional details.		

1 | adr.org

For both schedules, administrative fees are based on the amount of the claim or counterclaim and are to be paid by the party bringing the claim or counterclaim at the time the demand or claim is filed. Arbitrator compensation is not included in either schedule, and unless the parties' agreement provides otherwise, arbitrator compensation and administrative fees are subject to allocation by the tribunal in an award.⁸²

b) ICC

The costs of an ICC arbitration are set forth in Articles 37 and 38 of the ICC Rules. The costs include (i) the fees and expenses of the arbitrators, (ii) the ICC administrative costs fixed by the ICA in accordance with the costs scales in force, and (iii) the fees and expenses of any experts appointed by the arbitral tribunal.

The arbitrators' fees are managed by the ICA and fixed on the basis of the relevant scale found in Appendix III of the ICC Rules. The ICA will take into consideration whether the procedure is expedited or not, the diligence of the arbitrators, time spent, rapidity of the proceedings and complexity of the dispute.⁸³ Based on the

⁸² Administrative Fee Schedules, AM. ARB. ASS'N, https://www.adr.org/sites/default/files/Commercial_Arbitration_Fee_Schedule_1.pdf (last visited on Feb. 20, 2019).

⁸³ International Chamber of Commerce, Arbitration Rules, Appendix III, Art. 2, available at <https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf.pdf> [hereafter ICC Rules].

amount in dispute, the scale provides a minimum and a maximum for each arbitrator. This fee is then multiplied by the number of arbitrators on the case. In exceptional circumstances, the ICA may fix the fees of the arbitrators at a figure higher or lower than that which would result from the application of the relevant scale.

The administrative expenses represent the fee charged by ICC for administering a case. Each Request for Arbitration must be accompanied by at least a \$5,000 nonrefundable advance payment on administrative expenses. The ICA fixes the administrative expenses on the basis of the scales set out in Appendix III, or, where the sum in dispute is not stated, at its discretion. The ICA may fix the administrative expenses at a lower or higher figure than that which would result from the application of the scales, but not to exceed the maximum amount of the scale *i.e.*, \$150,000.⁸⁴

AMOUNT IN DISPUTE (in US Dollars)	A. ADMINISTRATIVE EXPENSES (*) (in US Dollars)		B. ARBITRATOR'S FEES (**) (in US Dollars)			
	Minimum	Maximum	Minimum		Maximum	
up to 50,000	5,000	3,000	18.0200% of amount in dispute			
from 50,001 to 100,000	5,000 +1.53% of amt. over 50,000	3,000 + 2.6500% of amt. over 50,000	9,010	+13.5680% of amt. over 50,000		
from 100,001 to 200,000	5,765 +2.72% of amt. over 100,000	4,325 + 1.4310% of amt. over 100,000	15,794	+7.6850% of amt. over 100,000		
from 200,001 to 500,000	8,485 +2.25% of amt. over 200,000	5,756 + 1.3670% of amt. over 200,000	23,479	+6.8370% of amt. over 200,000		
from 500,001 to 1,000,000	15,235 +1.62% of amt. over 500,000	9,857 + 0.9540% of amt. over 500,000	43,990	+4.0280% of amt. over 500,000		
from 1,000,001 to 2,000,000	23,335 +0.788% of amt. over 1,000,000	14,627 + 0.6890% of amt. over 1,000,000	64,130	+3.6040% of amt. over 1,000,000		
from 2,000,001 to 5,000,000	31,215 +0.46% of amt. over 2,000,000	21,517 + 0.3750% of amt. over 2,000,000	100,170	+1.3910% of amt. over 2,000,000		
from 5,000,001 to 10,000,000	45,015 +0.25% of amt. over 5,000,000	32,767 + 0.1280% of amt. over 5,000,000	141,900	+0.9100% of amt. over 5,000,000		
from 10,000,001 to 30,000,000	57,515 +0.10% of amt. over 10,000,000	39,167 + 0.0640% of amt. over 10,000,000	187,400	+0.2410% of amt. over 10,000,000		
from 30,000,001 to 50,000,000	77,515 +0.09% of amt. over 30,000,000	51,967 + 0.0590% of amt. over 30,000,000	235,600	+0.2280% of amt. over 30,000,000		
from 50,000,001 to 80,000,000	95,515 +0.01% of amt. over 50,000,000	63,767 + 0.0330% of amt. over 50,000,000	281,200	+0.1570% of amt. over 50,000,000		
from 80,000,001 to 100,000,000	98,515 +0.0123% of amt. over 80,000,000	73,667 + 0.0210% of amt. over 80,000,000	328,300	+0.1150% of amt. over 80,000,000		
from 100,000,001 to 500,000,000	100,975 +0.0123% of amt. over 100,000,000	77,867 + 0.0110% of amt. over 100,000,000	351,300	+0.0580% of amt. over 100,000,000		
over 500,000,000	150,000	121,867 + 0.0100% of amt. over 500,000,000	583,300	+0.0400% of amt. over 500,000,000		

In cases where experts are needed, the ICC will determine the fees and expenses of the experts. This cost is not covered by the nonrefundable advance payment discussed prior.⁸⁵

c) DIS

The cost of a DIS arbitration are set forth in Paragraphs 2 and 3 of Annex 2 to the 2018 DIS Arbitration Rules.

- Arbitrator's fees, para. 2.1 Annex 2 DIS Rules in extracts:

⁸⁴ *Costs and Payments*, INT'L CHAMBER COM., <https://iccwbo.org/dispute-resolution-services/arbitration/costs-and-payments/#paymentdetail> (last visited on Feb. 20, 2019).

⁸⁵ *Id.*

2.1

The arbitrators' fees shall be calculated on the basis of the amount in dispute pursuant to the following table:

Amount in Dispute	Fee for each Co-Arbitrator	Fees for President / Sole Arbitrator
Up to 5.000 €	770 €	1.000 €
From 5.000,01 € to 20.000 €	1.150 €	1.500 €
From 20.000,01 € to 2.300 € 50.000 €		3.000 €
From 50.000,01 € to 3.000 € 70.000 €		4.000 €
From 70.000,01 € to 3.800 € 100.000 €		5.000 €
From 100.000,01 € to 500.000 €	4.450 € plus 2 % of the amount exceeding 100.000 €	Fee of a co-arbitrator plus 30 %

- Administrative fees, para. 3.1 Annex 2 DIS Rules:

3.1

The Administrative Fees of the DIS for the filing of a Request shall amount to:

Amount in Dispute	Administrative Fees of the DIS
up to 50.000 €	2 % of the amount in dispute, minimum 750 €
from 50.000,01 € to 1.000.000 €	1.000 € plus 1 % of the amount exceeding 50.000 €
above 1.000.000 €	10.500 € plus 0,5 % of the amount exceeding 1.000.000, maximum 40.000 €

As demonstrated above, the arbitrators' fees and the administrative fees are calculated on the basis of the amount in dispute. If the amount in dispute is not quantified or not estimated, the DIS will set a time limit for the parties to do so. If the parties fail to do so within the allotted time, the DIS will determine the amount at its own discretion.⁸⁶

It is important to note that in cases where more than two parties are involved, the DIS administrative fees listed in Paragraph 3.1 shall be increased by 10% for each additional party, not to exceed a maximum of €20,000.⁸⁷ If the proceedings are terminated prior to the constitution of the arbitral tribunal, the DIS may reduce its administrative fees by up to 50%.⁸⁸

d) JAMS

⁸⁶ See DIS Rules, Annex 2, Art. 2.3 and 3.3.

⁸⁷ *Id.* at Art. 3.4.

⁸⁸ *Id.* at Art. 3.5.

Unlike the other institutions, JAMS offers a flat filing fee of \$1,500 (two parties) or \$2,000 (three or more parties).⁸⁹ In addition, a 12% case management fee is added to the final costs for time spent on hearings and award preparations.⁹⁰ Because JAMS' filing fee does not depend on the amount of the claim, it is one of the more affordable options.

c. Statement of Defense and Reply

In an arbitration proceeding, the claimant may file a Statement of Case referencing evidence and the defendant (respondent) can file a responding Statement of Defense objecting to claimant's statements of facts. Generally, a Statement of Defense shall contain: (i) a statement of the facts supporting the claim; (2) the points at issue; (3) the relief or remedy sought; and (4) the legal grounds or arguments supporting the claim.⁹¹ If the respondent disputes the conclusion or validity of the arbitration agreement *i.e.*, challenge the jurisdiction of the arbitral tribunal, he may not enter into the main proceedings without filing a Statement of Defense. Failure to file a Statement of Defense may lead to the tacit conclusion of an arbitration agreement. Therefore, a Statement of Defense should not be taken lightly.

The first exchange of the Statement of Claim and the Statement of Defense is meant to clarify the issues of the case at an early stage. In most cases, a respondent may file a counterclaim with its Statement of Defense. Certain arbitration institutions provide different approaches concerning these statements.

For example, under the AAA Rules, a respondent may file an answering statement within 14 calendar days of the notice of the filing of the arbitration demand.⁹² If no answering statement is filed within this time, the respondent will be deemed to deny the claim. Failure to file an answering statement will not delay the arbitration.⁹³ In addition, the respondent may file counterclaims at any time after receiving the notice of the filing of the arbitration demand.⁹⁴

According to the LCIA Rules⁹⁵ a respondent have 28 days upon receipt of the Statement of Case to deliver to the tribunal and all other parties: "(i) its written election to have its Response treated as its Statement of Defence and (if applicable) Cross-claim complying with this Article 15.3; or (ii) its written Statement of Defence and (if applicable) Statement of Cross-claim setting out in sufficient detail the relevant facts and legal submissions on which it relies, together with the relief claimed against all other

⁸⁹ International Arbitration Schedule of Fees and Costs, JUD. ARB. MEDIATION SERV., available at <https://www.jamsadr.com/international-arbitration-fees> (last visited Apr. 1, 2019).

⁹⁰ *Id.*

⁹¹ United Nations Commission on International Trade Law, Arbitration Rules, Art. 21(2), available at <https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf> [hereafter UNCITRAL Rules].

⁹² AAA Rules, Art. R-5(a); *see also* ICDR Rules, Art. 3.

⁹³ AAA Rules, Art. R-5(a).

⁹⁴ *Id.* at Art. R-5(b)

⁹⁵ LCIA Rules Art. 15(3).

parties, and all essential documents.” A party may also supplement, modify, or amend any claim, defense and reply with the tribunal’s permission.⁹⁶

d. Request for Hearing

On request and by agreement of the parties, the tribunal may administer oral hearings in order to gather evidence from the parties, the witnesses, or the experts.

a) Preliminary Hearing Under The AAA Rules

Under the AAA Rules, a preliminary hearing is required. The purpose of a preliminary hearing is “help the parties and the arbitrator organize the proceedings in a manner that will maximize efficiency and economy, and will provide each party a fair opportunity to present its case.”⁹⁷ Rule R-21 provides that, at the discretion of the arbitrator, and depending on the size and complexity of the arbitration, a preliminary hearing should be scheduled as soon as possible. The parties, together with their representatives, should be invited to participate. The preliminary hearing may be held in person or by telephone.⁹⁸

During the preliminary hearing, the parties and the arbitrator should be prepared to discuss and determine the course of the proceedings. The course of the proceedings should be planned in such a way as to lead to an efficient, fair, and economic resolution of the dispute.⁹⁹ The arbitrator will issue a written order commemorating the agreements/rulings reached after the preliminary hearing.

b) Oral Hearings

If and to the extent that an oral hearing takes place, Article E-8 of the Expedited Procedures of AAA Rules¹⁰⁰ provides that such hearing shall generally not exceed one day. During the hearing, each party shall have the same opportunity to present its evidence and to finally discuss its view of the case. The arbitrator will determine the order of the hearing, schedule additional hearings, or request production of further documents within two working days of the hearing. While the AAA does not record the proceedings at the hearing, either party may arrange for its own stenographer to be represent at the hearing.

According to the LCIA Rules, each party shall have the right to negotiate orally before the arbitral tribunal, unless a purely documentary arbitration procedure has been agreed.¹⁰¹ The tribunal may hold several partial hearings, and has unfettered authority

⁹⁶ *Id.* at Art. 22.1(i).

⁹⁷ See AAA Rules, P-2 Preliminary Hearing Procedures, for a detailed checklist concerning relevant subjects for discussion.

⁹⁸ AAA Rules, Art. R-21(a).

⁹⁹ *Id.* at Art. R-21(b).

¹⁰⁰ AAA Rules, Expedited Procedures, Art. E-8.

¹⁰¹ LCIA Rules, Art. 19.1.

to determine the conduct of the oral hearing date, form (telephone, video conference, personal), content, procedure, time limits, and place.¹⁰² While oral hearings are not mandatory under the LCIA, where a party requests such a hearing, it must be held. In the absence of such a request, the tribunal may decide, *sua sponte*, to hear the parties or elect to conduct the arbitration on documents only.¹⁰³

Unlike the LCIA, oral hearings are mandatory under the CEITAC Rules. The tribunal may examine the case on the basis of documents only if the parties so agree and the tribunal consents or if the tribunal deems that oral hearings are unnecessary and the parties agree.¹⁰⁴ Further, the arbitral tribunal may adopt an inquisitorial or adversarial approach when hearing the case.¹⁰⁵

An oral hearing under the auspices of the CEITAC must take place in Beijing or at one of its sub-commissions.¹⁰⁶ If parties wish to have the oral hearing elsewhere, they must cover the costs associated with travel and accommodation in advance.¹⁰⁷ The date of the first oral hearing must be communicated to the parties at least 20 days in advance. A party may postpone the hearing for legitimate reasons and must do so within five days of receipt of the written notice from the arbitral tribunal. If a party has legitimate reasons for failure to timely request a postponement, the tribunal shall decide whether or not it would have granted the request.¹⁰⁸

Finally, to commence an ICC hearing, the arbitral tribunal must first provide written notice to the parties, and summon the parties to appear before the tribunal on the day and at the place set forth in the notice.¹⁰⁹ Parties may appear in person or through counsel. If any of the parties, although duly summoned, fails to appear without valid excuse, the tribunal shall have the power to proceed with the hearing.¹¹⁰

As demonstrated above, the tribunal has a lot of power and discretion in shaping the course of the proceedings. Thus, another crucial aspect in arbitration is the selection of the arbitrator(s) to ensure a fair and impartial tribunal.

e. Arbitrator Selection

Typically, an international arbitration tribunal consists of either one or three arbitrators to avoid deadlocks. It is generally up to the parties to decide the number of arbitrators suitable for their case (see a detailed discussion on the pros and cons of a single arbitrator v. a panel of three arbitrators in Section V(E)(1)). This freedom of choice is one of the key advantages of arbitration.

¹⁰² *Id.* at Art. 19.2.

¹⁰³ *See id.* at Art. 19.

¹⁰⁴ CIETAC Rules, Art. 35(2).

¹⁰⁵ *Id.* at Art. 35(3).

¹⁰⁶ *Id.* at Art. 36(2).

¹⁰⁷ *Id.* at Art. 82 (3).

¹⁰⁸ *Id.* at Art. 37(1), (2).

¹⁰⁹ ICC Rules, Art. 26.1.

¹¹⁰ *Id.* at Art. 26.2.

With that said, most cases tend to involve three arbitrators. Generally, one arbitrator is selected by the claimant, one by the respondent, and a third (chairman/presiding arbitrator) is appointed either by the two arbitrators selected, or by the parties,¹¹¹ or by a neutral body.¹¹²

If the parties agreed on institutional arbitration but failed to specify the number of the arbitrators, the institutional rules will dictate the size of the tribunal in one of two ways: provide for a fixed number of arbitrators,¹¹³ or decide on a case-by-case basis,¹¹⁴ based on the size, complexity, or other circumstances of the case.¹¹⁵

In addition, under certain circumstances, the institution may override the arbitrator selection made by the parties.¹¹⁶ For example, it is possible there could be a situation where the parties have agreed to a particular arbitrator at the time of contract, but this arbitrator is ultimately found incompetent and thus would not be appointed because of lack of knowledge in the specific field.

Just as the parties are free to choose their arbitrators, they are also allowed to challenge such choices. Because impartiality and independence of the arbitrator are of paramount concern in arbitration, there is almost a universal set of procedures requiring disclosure about the potential arbitrator and a great deal of coherence among the different institutions in this particular area.

According to ICC Rules, a challenge must be in writing, and must set forth the facts and circumstances on which the challenge is based.¹¹⁷ For a challenge to be admissible, it must be submitted within 30 days of the notification of the appointment or confirmation of the arbitrator, or within 30 days of the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based, if such date is subsequent to the receipt of such notification.¹¹⁸ The ICA shall decide the admissibility and the merits of the challenge after all relevant parties have been given an opportunity to comment, in writing, within a suitable period of time.¹¹⁹

Unless the parties agree otherwise, after the appointment of a substitute arbitrator, the tribunal shall have sole discretion to determine whether all or part of the case should be repeated.¹²⁰

¹¹¹ *Id.* at Art. 12(2); ICDR Rules, Art. 12(1); LCIA Rules, Art. 5.8.

¹¹² Kreindler, *supra* note 70, at 121 recital 399; DIS Rules, Art. 12.3.

¹¹³ *E.g.*, DIS Rules, Art. 10.2; CIETAC Rules, Art. 25(2); *also* UNCITRAL Rules, Art. 7.1 for ad-hoc arbitration.

¹¹⁴ *E.g.*, ICC Rules, Art. 12(2); ICDR Rules, Art. 11; LCIA Rules, Art. 5(8).

¹¹⁵ *See* HKIAC Rules, Art.6.1.

¹¹⁶ *See* LCIA Rules, Art. 5.7.

¹¹⁷ ICC Rules, Art. 14(1).

¹¹⁸ *Id.* at Art. 14(2).

¹¹⁹ *Id.* at Art. 14(3); other institutions' timeframe for challenging an arbitrator is shorter, *see* DIS Rules, Art. 15.2 (within 14 days); ICDR Rules, Art.14 (1) (within 15 days).

¹²⁰ *E.g.*, ICDR Rules, Art. 15(2); ICC Rules, Art. 15(4).

B. Discovery

Discovery is a formal evidence proceeding primarily reserved for litigation. It is not available in every arbitral jurisdiction, because it can promote litigiousness, which in turn prolongs the proceeding and increases its cost, thus defeating the key selling points of arbitration. As such, if parties to an international franchise agreement want to make sure certain forms of discovery are available when it comes time to arbitrate their disputes, they should say so expressly in their arbitration provision.

a. Availability of Discovery

Regarding the procedure for how or when a party can require production of documents in terms of evidence request, inconsistency exists in the rules of the institutions. Some institutions allow the arbitrator to request production at any time, while others envision a schedule for production¹²¹ or make no mention of the ability to object to a discovery request at all.¹²² However, parties to an international franchise agreement should be aware that arbitrators from civil law countries are likely to be less experienced and less comfortable with the broad discovery that is typically available in the United States and other common law countries. Accordingly, if the opportunity to take depositions is contemplated, both the right to do so and any limitation on that right should be expressly set out in the arbitration agreement.

It is important to note that certain aspects of the discovery proceeding can differ between civil law and common law jurisdictions. In order to bridge these differences, a best practice has recently emerged for international arbitration proceedings in many areas independent of state law, which combines procedural elements of common law and civil law, even if a slight predominance in favor of common law is discernible.¹²³ Often, this best practice is embodied in private rules drawn up by international arbitral institutions or professional associations, such as the International Bar Association (IBA), with the participation of experienced arbitrators from both common and civil law jurisdictions. Not only are civil procedural mechanisms of state procedural rights coordinated, but they are also always adapted to the special needs of international arbitration proceedings for the resolution of cross-border disputes.

b. Scope of Discovery

Shortly after appointment of the arbitrator in a commercial dispute, the arbitrator typically convenes a conference with the parties for the purpose of planning the entire case. This conference is the single most important event in an arbitration, and it can serve as the foundation for a limited, cost-effective discovery program. Following the

¹²¹ Compare ICC Rules, Appendix IV(d)(iv) (giving the arbitrator the power to “establis[h] reasonable time limits for the production of documents”) with JAMS Rules, Art. 25.2 (allowing the tribunal to order an exchange of evidence “[a]t any time during the proceedings.”).

¹²² See UNCITRAL Rules, Art. 27.

¹²³ Martin Illmer, *Schiedsverfahren, internationales*, Handwörterbuch, Europäisches Privatrecht 2009, Max-Planck-Institution for National and International Private Law, No.4.

conference, the arbitrator typically drafts and circulates a procedural order that sets forth dates for everything that needs to be done between the conference and the hearing on the merits and establishes the dates for the actual hearing. Equally as important, the procedural order will, in most cases, set forth rules and guidelines for the cost-effective conduct of discovery.

Often the parties to an arbitration will have agreed that a certain set of institutional rules will apply to their dispute, but such rules tend to shy away from being overly prescriptive as to the precise procedure for gathering evidence. This leaves the parties and the tribunal with a gap to fill when determining the precise procedures to be followed on evidentiary matters. As a result, several rules on taking of evidence have emerged to provide guidance on this procedural gap.

c. International Bar Association's Rules On The Taking of Evidence in International Commercial Arbitration

Of the utmost importance are the IBA Rules on the Taking of Evidence. The IBA Rules are intended to provide an efficient, economical, and fair process for the taking of evidence in international arbitrations, particularly between parties from different legal traditions.¹²⁴

The IBA Rules are a prime example of transnational, private law-making, which is able to reconcile common law and civil law approaches. This is the reason for their wide acceptance in international arbitration proceedings. In the field of document submission, the IBA Rules provide for a middle-way solution that goes beyond narrow regulations such as Sect. 142 German code of civil procedure,¹²⁵ but does not go as far as the American discovery (cf. Art. 3(2) and (3)). For the hearing of witnesses, the IBA Rules follow the common law approach of written witness statements followed by direct and cross examination by the parties. On this basis, the IBA Rules develop modern solutions in order to avoid the identified weaknesses, such as witness and expert conferencing (Art. 5 (3) and 8 (2)). When using experts, the IBA Rules pursue the common law model of party experts (Art. 5) and the civil law model of the expert appointed by the arbitral tribunal (Art. 6) in parallel.

Although the IBA Rules retain many of the characteristics of the common law system, they still embrace some aspects of the civil law system, such as the emphasis on the arbitral tribunal's complete control over hearings. However, the system is evolving more in a common law direction.¹²⁶

¹²⁴ IBA Rules on the Taking of Evidence in International Arbitration, INT'L BAR ASS'N, Preamble 1, available at: <http://www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49-4106-46BF-A1C6-A8F0880444DC> [hereafter IBA Rules].

¹²⁵ See Code of Civil Procedure, BUNDESMINISTERIUM DER JUSTIZ UND FÜR VERBRAUCHERSCHUTZ, available at https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html (last visited on Feb. 21, 2019).

¹²⁶ Javier Rubinstein, *Reflections at the Crossroads of the Common Law and Civil Law Traditions*, 5 CHI. J. INT'L L. 303, 303 (2004).

The IBA Rules are designed to be used in conjunction with institutional or ad hoc rules or procedures. Therefore, franchisors who wish to take advantage of the IBA Rules should add a corresponding language in their arbitration agreements, which will enable them to select the IBA Rules in addition to other arbitration rules provided therein.

d. The Prague Rule on Taking of Evidence in International Arbitration

As an alternative to the IBA Rules, the Prague Rules were officially launched on December 14, 2018, with the desire to empower a tribunal to take greater control of proceedings leading to a determination in the most expeditious and cost-effective way.¹²⁷ The Prague Rules are rooted in civil law jurisdictions, which tend to adopt an “inquisitorial” approach where the arbitrator is vested with a more proactive role in managing the disputes with limited or no disclosure exercise.¹²⁸ This contrasts with the so called “adversarial” approach adopted in many common law jurisdictions, where the parties tend to take the lead in the proceedings.

Furthermore, the Prague Rules provide alternative techniques to enhance efficiency and embrace flexibility, while bestowing arbitrators with strong case management powers to heal due process paranoia.¹²⁹ For example, Articles 3 and 4 of the Prague Rules provide a tribunal with the power to request parties to produce documentary evidence, and to set the scope of the discovery, including any form of e-discovery.¹³⁰ A party may also ask the tribunal to order another party to produce specific documents. In contrast, Article 3 of the IBA Rules specifies that any party may serve a request for production directly to the other party. If the other party has an objection, then the arbitral tribunal will resolve that dispute.

With respect to fact witnesses, Article 5 of the Prague Rules states that arbitral tribunal has the power to decide which witnesses are to be called for examination, or to forego witness examination altogether. Moreover, the tribunal also has control over the scope of the cross-examination. On the contrary, Article 4 of the IBA rules requires fact witnesses to appear for testimony at the evidence hearing unless there is a valid reason for their absence. Otherwise, such witness’s statement will be discarded.

¹²⁷ Rober Javin-Fisher & Erika Saluzzo, *Prague Rules on Evidence in International Arbitration: A Viable Alternative to the IBA Rules?*, PRAGUE RULES 2 (Jan. 25 2019), <https://praguerules.com/upload/iblock/587/5872685539bddee7618083c020f6ff93.pdf>.

¹²⁸ See Rules on the Efficient Conduct of Proceedings in International Arbitration, Art. 2, available at: <https://praguerules.com/upload/medialibrary/9dc/9dc31ba7799e26473d92961d926948c9.pdf> [hereafter the Prague Rules].

¹²⁹ See Andrey Panov, *Why the Prague Rules May be Needed?*, PRAC. L. ARB. BLOG (Oct. 11, 2018), <http://arbitrationblog.practicallaw.com/why-the-prague-rules-may-be-needed/>.

¹³⁰ See Guilherme Rizzo Amaral, *Prague Rules v. IBA Rules and the Taking of Evidence in International Arbitration: Tilting at Windmills Part II*, KLUWER ARB. BLOG (July 6, 2018), <http://arbitrationblog.kluwerarbitration.com/2018/07/06/prague-rules-v-iba-rules-taking-evidence-international-arbitration-tilting-windmills-part-ii/>.

Finally, with regard to hearings, Article 8 of the Prague Rules encourages the arbitral tribunal to resolve the dispute on a document-only basis and to organize hearings in the most cost-efficient manner possible.

The differences between the Prague Rules and the IBA Rules extend beyond competition between the common law and civil law system, or the inquisitorial and adversarial approach. These differences also present a balance between party autonomy and the arbitral tribunal's power to enhance the efficiency of international arbitration. This efficiency issue depends on how the arbitrators choose to apply the above rules and how they otherwise conduct the proceedings.¹³¹

e. Institute for Conflicts Prevention & Resolution International Arbitration Rules (CPR)

Established in 1977, CPR is an independent nonprofit organization that helps global businesses prevent and resolve commercial disputes effectively and efficiently. CPR was founded as an effort to bring together corporate counsel and their law firms to find a way to lower the cost of litigation. CPR provides both administered and non-administered arbitration services¹³² by way of fast track or accelerated procedures. Unlike the AAA, CPR does not receive a portion of the fees paid to its arbitrators. However, arbitrators do pay a nominal fee to be on the panel. Moreover, CPR does not charge a filing fee. As such, it is arguably a cheaper option than using other institutions. CPR's mission to redefine winning includes saving everyone's time and money, and keeping business relationships intact. CPR strongly supports party autonomy over dispute resolution. Therefore, either party may propose settlement negotiations at any time.¹³³ The tribunal may also encourage the parties to explore settlement when appropriate.

In terms of the procedure and taking of evidence, the CPR Rules give both the parties and the arbitrators' broad discretion. Promptly after its constitution, the tribunal is required to hold an initial pre-hearing conference with the parties for the planning and scheduling of the proceedings.¹³⁴ The tribunal will consider all elements of the arbitration as well as the mode, manner, and order for presenting evidence during the pre-hearing conference.

Pursuant to Articles 11 and 12 of the CPR Rules, discovery is limited to the exchange of documents. Nevertheless, the tribunal may require and facilitate

¹³¹ Michael McIlwrath, *The Prague Rules: The Real Cultural War Isn't Over Civil vs Common Law*, KLUWER ARB. BLOG (Dec. 12, 2018), <http://arbitrationblog.kluwerarbitration.com/2018/12/12/the-prague-rules-the-real-cultural-war-isnt-over-civil-vs-common-law/>.

¹³² See International Institute for Conflict Prevention & Resolution, Global Rules for Accelerated Commercial Arbitration, available at: <https://www.cpradr.org/resource-center/rules/international-other/arbitration/global-rules-for-accelerated-commercial-arbitration> [hereafter CPR Accelerated Rules].

¹³³ International Institute for Conflict Prevention & Resolution, Rules for Administered Arbitration, Art. 21.1, available at <https://www.cpradr.org/resource-center/rules/international-other/arbitration/2019-international-administered-arbitration-rules> [hereafter CPR Rules].

¹³⁴ *Id.* at Art. 9.3.

disclosures as it deems appropriate under the circumstances. Disclosure can reduce the need for discovery or narrow its scope. Clearly, the model is one based on early and full disclosure first, followed by consideration of discovery only after disclosure has been made and the arbitrators are in a position to judge the materiality and importance of any requested documents or other information not made available during disclosure.¹³⁵ Following disclosure, the parties are required to file with each Claim or Defense detailed information about supporting evidence.¹³⁶ Furthermore, on a date established by the arbitrator, both parties will serve on the other all non-privileged hardcopy and electronic documents that they reasonably believe are relevant to any issue to be resolved in arbitration, as well as exchange of witness statements and a privilege log with a sufficient description so that the assertion of privilege can be appropriately evaluated by the non-producing party and the arbitrator. In addition, each party may serve a list of particular categories of documents needed with respect to the dispute.

To prepare for the arbitration hearing pursuant to Article 13 of the CPR Rules, parties should assemble all documents that are likely necessary at the hearing. A party's witnesses should be interviewed and, where permissible, briefed on the issues on which they are likely to be cross-examined. Witnesses from the other side who are candidates for cross-examination should be identified. Determine early on which witnesses to cross-examine. The tribunal's powers concerning subpoenas are determined by applicable law and are not covered by the Rules. Furthermore, the tribunal determines whether testimony is presented in written or oral form. The tribunal is not required to apply the rules of evidence used in judicial proceedings, and determines the applicability of any privilege or immunity and the admissibility, relevance, materiality and weight of the evidence offered.

C. Procedural Advantages Such As Summary Judgment, Default, and Motion to Dismiss

Parties to litigation have long enjoyed some of the procedural advantages such as motion to dismiss, motion to strike, or motion for summary judgement.¹³⁷ These motion practices, however, do not transfer neatly in an arbitration context. There is fear that a meritorious claim might be rejected before the tribunal has a chance to develop a full appreciation of all material elements of the case. Additionally, these motions have been seen as contributing to the delay in final adjudication of claims and as such, being obstacles to efficient arbitration.¹³⁸ The most important dispositive motions in arbitration are discussed below.

¹³⁵ Ben Tennille et al., *Recent Developments in International Arbitration*, The Sedona Conference, p. 10 (2011).

¹³⁶ See CPR Accelerated Rules, Art. 7.

¹³⁷ Marc J. Goldstein, *Efficiency With Dignity: Early Dispositions and the Beleaguered Arbitrator 1* (May 16, 2018) (unpublished manuscript) (on file with Toronto Commercial Arbitration Society), available at <http://torontocommercialarbitrationsociety.com/wp-content/uploads/2017/06/Preliminary-Issues-Article.pdf>.

¹³⁸ *Id.* at 2.

a. Motion for Summary Disposition of a Particular Claim or Issue

There is some debate about the propriety of dispositive motions, such as motion to dismiss or motion for summary judgment. Although dispositive motions are increasingly granted in arbitration, summary disposition is generally only available in limited circumstances. The crux of the debate lies in the balance between the competing objectives of allowing a party a reasonable opportunity to present its case, and avoiding unnecessary delay or expense. For example, summary judgment is often only appropriate for statute of limitations defenses, simple loan defaults, and other instances where it is unnecessary to conduct a full evidentiary hearing.¹³⁹

The conventional wisdom was that tribunals feared that granting dispositive motions would tempt courts to vacate awards. Case law, however, holds otherwise.¹⁴⁰ Dispositive motions are now explicitly available in many modern rules. For example, Article 33 of the AAA Rules allows the filing of and ruling upon a dispositive motion only when the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case.¹⁴¹

JAMS Comprehensive Arbitration Rule 18(a) explicitly authorizes early disposition, as do the Stockholm Chamber of Commerce (SCC) Rules, which provide for summary procedures. As Article 39(1)¹⁴² of the SCC Rules states that a “party may request that the Arbitral Tribunal decide one or more issues of fact or law by way of summary procedure, without undertaking every procedural step that might otherwise be adopted for the arbitration.”

Indeed, of the commonly used rules, only the FINRA¹⁴³ Rules prohibit early disposition, with certain enumerated exceptions.

Other institutional rules, such as those of the CPR, ICDR, ICC and LCIA, do not expressly authorize early disposition, but have the flexibility to permit it. This becomes especially clear due to the CPR Guidelines on Early Disposition of Issues in Arbitration.¹⁴⁴ Moreover, Article 2 of the IBA Rules provides that “the Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, any issues [...] for which a preliminary determination may be appropriate.” Certain case law

¹³⁹ See Philip Chong & Blake Primrose, *Summary Judgment in International Arbitrations Seated in England*, 33 *ARB. INT’L* 63, 68 (2017).

¹⁴⁰ See generally, Edna Sussman & Solomon Ebere, *Reflections on the Use of Dispositive Motions in Arbitration*, 4 *NYSBA DISP. RESOL. LAW.* 28 (2011).

¹⁴¹ AAA Rules, Art. 33.

¹⁴² See Arbitration Institute of the Stockholm Chamber of Commerce, Arbitration Rules, Art. 39(1), available at <https://sccinstitute.com/dispute-resolution/rules/> [hereafter SCC Rules].

¹⁴³ Financial Industry Regulatory Authority, <http://www.finra.org/>.

¹⁴⁴ *Guidelines on Early Disposition of Issues in Arbitration*, INT’L INST. CONFLICT PREVENTION & RESOL., <https://www.cpradr.org/resource-center/protocols-guidelines/guidelines-on-early-disposition-of-issues-in-arbitration> (last visited Feb. 27, 2019).

in particular reveals that arbitrators have the implicit authority to rule on dispositive motions even if there is no explicit power for them to do so.¹⁴⁵

Finally, a dispositive motion is proper for any improperly raised claims or defenses. And, given tribunals' overall inclination to make arbitration more efficient, such motions will likely be granted,¹⁴⁶ because such motions help streamline the efficiency and speed of arbitrated disputes by providing fair remedies without unnecessary proceedings.

b. Default

The tradition of arbitration is to decide cases on the merits rather than on procedural grounds. Obtaining an award against a party that fails to appear in an arbitration may prove more costly and time-consuming than appearing in court.¹⁴⁷ In traditional litigation, a court may issue a default judgment if a party does not timely appear or otherwise fails to defend itself, often simply by demonstrating effective service on the defaulting party, and providing a minimal showing of the basis of its claim. By contrast, most arbitration institutions require the arbitrator to continue the proceeding in the absence of the defaulting party. Further, major institutions also require the non-defaulting party to prove its case on the merits, regardless of participations by the defaulting party. Hence, while default judgments are available in arbitration, the threshold requirements to grant such awards are high.

a) CIETAC

Under the CIETAC Rules, if a claimant fails to appear at an oral hearing without showing sufficient cause, or withdraws from an on-going oral hearing without the permission of the arbitral tribunal, the claimant may be deemed to have withdrawn its application for arbitration. In such a case, if the respondent has filed a counterclaim, the tribunal would proceed with the hearing of the counterclaim and make a default award.¹⁴⁸

b) AAA

Under the AAA Rules,¹⁴⁹ “the arbitration may proceed in the absence of any party or representative, [unless the law provides to the contrary]” and “an award shall

¹⁴⁵ *Compare* S. City Motors, Inc. v. Auto. Indus. Pension Tr.Fund, No. 17-cv-04475-JST, 2018 U.S. Dist. LEXIS 88452, at *14-15 (N.D. Cal. May 25, 2018) (the Northern District of California affirmed a summary disposition, citing a long line of precedent in stating that “[t]he purpose of arbitration is to permit parties to agree to a more expedited and less costly means to resolve disputes than litigation in the courts. Summary judgment by an arbitrator is consistent with that purpose.”).

¹⁴⁶ Mercy McBrayer et al., *Motions Practice in Arbitration – A Guide for Counsel 2* (2016).

¹⁴⁷ Casey D. Laffey et al., *Simplifying the Default Process in Arbitration*, REED SMITH (July 14, 2017), <https://www.reedsmith.com/en/perspectives/2017/07/simplifying-the-default-process-in-arbitration>.

¹⁴⁸ CIETAC Rules, Art. 39.

¹⁴⁹ AAA Rules, Art. R-31.

not be made solely on the default of a party.” Additionally, the non-defaulting party must submit “such evidence as the arbitrator may require for the making of an award.”

c) ICDR

Pursuant to the ICDR Rules, where a party fails to respond or appear at a hearing without sufficient cause, “the arbitral tribunal may proceed with the arbitration.”¹⁵⁰ However, the arbitrator needs to “make the award on the evidence before it.”¹⁵¹

d) DIS

The DIS Rules¹⁵² provide that “[i]n the event of a default of a Respondent, the arbitral tribunal shall proceed with the arbitration. The factual allegations of the Claimant shall not be considered as having been admitted by the Respondent as a result of its default.”

e) UNCITRAL

Finally, under the UNCITRAL Rules, the legal consequences of the default depend on the circumstances of the default. In cases where “[t]he claimant has failed to communicate its statement of claim, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings, unless there are remaining matters that may need to be decided and the arbitral tribunal considers it appropriate to do so; [or] [t]he respondent has failed to communicate its response to the notice of arbitration or its statement of defence, the arbitral tribunal shall order that the proceedings continue, without treating such failure in itself as an admission of the claimant’s allegations.”¹⁵³

Furthermore, if a party fails to appear at a hearing without good cause, “the arbitral tribunal may proceed with the arbitration.” And, “if a party, duly invited by the arbitral tribunal to produce documents, exhibits or other evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.”¹⁵⁴

Given most institutions’ reluctance to grant default judgment merely based on a party’s failure to appear or failure to submit evidence, the non-defaulting party must prove its case to receive an award. This means that an arbitration is unlikely to conclude early even with a default.

¹⁵⁰ ICDR Rules, Art. 26(1).

¹⁵¹ *Id.* at Art. 26(3).

¹⁵² DIS Rules, Art. 30.

¹⁵³ UNCITRAL Rules, Art. 30(1).

¹⁵⁴ *Id.* at Art. 30 (2)-(3).

c. Motion to Dismiss

A motion to dismiss is a legal document that asks the court to reject a case. Such motion usually concerns procedural issues, such as proper venue or the court's jurisdiction over the case. Other possible bases for a motion to dismiss include: (1) improper service, or (2) failure to join the indispensable parties.¹⁵⁵ While a motion to dismiss is primarily a vehicle used in litigation, it is gaining traction in arbitration, particularly with respect to forum non conveniens.

In *Palmco Corp v. JSC Techsnabexport*,¹⁵⁶ a party, who sought to litigate notwithstanding an agreement to arbitrate in another forum, was met with a motion to dismiss on the basis of forum non conveniens. The dispute, between a US company and a Russian Federation owned entity, concerned contracts which provided for arbitration in Sweden applying Swedish law. Arbitration was underway at the time the US claimant initiated proceedings in California for interim injunctive relief, arguing that the arbitral panel did not have the power to issue binding orders of this type. The Russian respondent's motion to dismiss the action on forum non conveniens grounds was successful. As a general rule, claimant's choice of forum was to be given great deference, that respondent had the onus of proving that the alternative forum was adequate and that the balance of public and private interest factors favored dismissal. Sweden was an adequate forum. It was significant here that both parties, who were sophisticated and had a longstanding agreement to arbitrate any disputes in Sweden arising from their continuing contractual relationship, had a valid and binding arbitration clause which was mandatory. The clause was a "speciali[z]ed kind of forum-selection clause".¹⁵⁷ Judge Carter observed that courts outside the circuit "have held that mandatory forum selection clauses designating a forum different than that chosen by the plaintiff eliminates the traditional presumption favoring the plaintiff's choice of forum in forum non conveniens cases."¹⁵⁸

As *Palmco* demonstrated, a clause mandating arbitration in a specified forum was seen as deserving the same weight as one mandating litigation.¹⁵⁹ Accordingly, if parties had opted for arbitration, then a forum non conveniens dismissal would preserve this choice of adjudication.

IV. Enforceability

A. Scope of the Award

¹⁵⁵ Fed. R. Civ. P. 12(b).

¹⁵⁶ *Palmco Corp. v. JSC Techsnabexport*, 448 F. Supp. 2d 1194 (C.D. Cal. 2006).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 1199 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974)).

¹⁵⁹ See Peter Gillies, *Forum Non Conveniences In the Context of International Commercial Arbitration*, in *ARBITRATION*, 74 INT'L J. ARB. MEDIATION DISP. MGMT.46, 55 (2008).

International arbitration generally concludes with the publication and transmittal of a final decision by the tribunal, known as an arbitration award. In cases involving a panel of arbitrators, a majority of the tribunal must sign off on the award.¹⁶⁰ Arbitrators are often empowered to grant any monetary and equitable relief within the scope of the parties' agreement,¹⁶¹ including declaratory awards.¹⁶² However, the AAA is one of the very few arbitral institutions to explicitly name specific performance as an available remedy.¹⁶³ Punitive and exemplary relief are also thorny subjects in international arbitration, as many institutional rules are either silent on such reliefs,¹⁶⁴ or explicitly bar them notwithstanding applicable laws.¹⁶⁵

B. Interim and Emergency Relief

In addition to a final award, many tribunals are empowered to grant temporary or conservatory relief throughout the proceedings. Common temporary relief includes emergency awards and interim awards. A handful of arbitral institutions use these terms interchangeably to represent any conservatory measures ordered by a tribunal before the dispute is decided.¹⁶⁶ Other institutions treat emergency relief and interim relief as two distinct and separate remedies.

One difference between an emergency relief and an interim relief is timing. An emergency relief is proper prior to the constitution of the arbitral panel.¹⁶⁷ Once the arbitrator(s) have been appointed, the tribunal takes over and the emergency arbitrator no longer has power to act, unless the parties nominate the emergency arbitrator as an arbitrator in the case.¹⁶⁸

Another difference between emergency relief and interim relief is the speed of review. Unlike an interim award rendered by a regular tribunal, an emergency award is subject to a much stringent turnaround time. Under the arbitration rules of the AAA, ICDR, JAMS, and SCC, an emergency arbitrator may be appointed within 24 hours of a

¹⁶⁰ E.g., HKIAC Rules, Art. 33.1; AAA Rules, Art. R-46(a).

¹⁶¹ E.g., AAA Rules, Art. R-47(a); ICDR, Art. 31(3).

¹⁶² Michael E. Schneider, *Non-Monetary Relief in International Arbitration: Principles and Arbitration Practice*, ASA PERFORMANCE AS A REMEDY 17 (2011).

¹⁶³ AAA Rules, Art. R-47(a); Schneider, *supra* note 162, at 17.

¹⁶⁴ See e.g., Vienna International Arbitration Centre, Rules of Arbitration, Art. 33, available at <https://www.viac.eu/en/arbitration-rules> [hereafter VIAC Rules], WIPO Rules, Swiss Chambers' Arbitration Institute, Rules of International Arbitration, available at <https://www.swissarbitration.org/Arbitration/Arbitration-Rules-and-Laws> [hereafter SRIA Rules].

¹⁶⁵ E.g., ICDR Rules, Art. 31(5); Judicial Arbitration and Mediation Services, Arbitration Rules, Art. 31.2, available at <https://www.jamsadr.com/rules-comprehensive-arbitration/> [hereafter JAMS Rules].

¹⁶⁶ See e.g., HKIAC Rules, Art. 23; DIS Rules, Art. 25; VIAC Rules, Art. 33.

¹⁶⁷ E.g., AAA Rules, Art. R-38(b), CIETAC Rules, Art. 77(2); ICC Rules, Art. 29(1); ICDR Rules, Art. 6(1); JAMS Rules, Art. 3; LCIA Rules, Art. 9.4; SCC Rules, Appendix II, Art. 1(1); SIAC Art. 30.2; SRIA Rules, Art. 43(1); WIPO Rules, Art. 49(b).

¹⁶⁸ E.g., AAA Rules, Art. R-38(f); CIETAC Rules, Art 5(3).

party's application for emergency relief.¹⁶⁹ In many cases, a decision in writing is required within mere days of the emergency arbitrator's appointment.¹⁷⁰

Emergency relief and interim relief, however, share more similarities than differences. First, emergency arbitrators are vested with the full authority granted to regular tribunals. Emergency arbitrators may enter whatever measures deemed necessary, including injunctive relief, security for costs, and other measures for the protection and conservation of a party's property.¹⁷¹ Second, emergency awards, like interim awards, are also binding and enforceable on the parties.¹⁷² However, unlike an interim award, emergency awards often have an expiration date, after which point they cease to be binding if the parties fail to commence formal arbitration within a specified timeframe.¹⁷³ Third, emergency awards and interim awards may both be modified, terminated, or annulled upon changed circumstances.¹⁷⁴ Finally, under most institutional rules, a party may seek any emergency or interim relief with a judicial authority without waiving its right to arbitration.¹⁷⁵

C. Confirmation of the Award

Once an arbitral tribunal renders an award, it must be confirmed by a court in order to be enforceable, because arbitration awards are not self-executing.¹⁷⁶ The process of confirmation generally begins with the filing of a petition to confirm. In the United States, the prevailing party may file a petition to confirm an international award "in any court in which the underlying disputes could have been initiated absent the

¹⁶⁹ AAA Rules, Art. R-38(c); ICDR Rules, Art. 6(2); JAMS Rules, Art. 3.1; SCC Rules, Art. 4(1).

¹⁷⁰ *E.g.*, SCC Rules, Art. 8(1) (requiring an emergency decision to be made within 5 days from the date of the application for emergency relief); CEITAC Rules, Art. 6(2)(an emergency decision must be made within 15 days from the emergency arbitrator's appointment); LCIA Rules, Art. 9.8 (the emergency arbitrator must decide the claim for emergency relief no longer than 14 days from the date of appointment); ICC Rules, Appendix II, Art. 6.4 (an order shall be made within 15 days from the date the file is transmitted to the emergency arbitrator).

¹⁷¹ *E.g.*, AAA Rules, Art. R-38(d); CEITAC Rules, Art. 6(1); LCIA Rules, Art. 9.8; WIPO Rules, Art. 49(f).

¹⁷² *E.g.*, SCC Rules, Appendix II, Art. 9(1); HKIAC Rules, Schedule 4, Art. 16.

¹⁷³ *E.g.*, CIETA Rules, Art. 6.6(e) (an emergency arbitrator's decision ceases to be binding if the arbitral tribunal is not formed within 90 days of the decision); SCC Rules, Art. 9(4)(iii-iv) (an emergency decision ceases to be binding if the arbitration is not commenced within 30 days of the decision or if the case has not been referred to a tribunal within 90 days).

¹⁷⁴ *E.g.*, HKIAC Rules, Art. 23.5; AAA Rules, Art. R-38(F); WIPO Rules, Art. 49(i); VIAC Rules, Art. 33(1); SRIA Rules, Art. 26.1; ICDR Rules, Art. 6.4; CIETAC Rules Art. 6.4; JAMS Rules, Art. 3.4; LCIA Rules, Art. 9.11; SCC Rules, Appendix II, Art. 9(2); SIAC Rules, Schedule I, Art. 8.

¹⁷⁵ HKIAC Art. 23.9; AAA Art. R-37(c); DIS Art. 25.3; ICDR Art. 6.7; JAMS Art. 32.3; SIAC Art. 30.3; SRIA Art. 26.5; VIAC Art. 33(5); and WIPO Art. 48(d). It is important to note that the CIETAC Rules do not expressly address whether a request for interim relief with competent court constitutes a waiver, however it simply states that if a party applies for conservatory measures under the law of China, then the CIETAC shall forward the party's application to the competent court designated by the parties; SCC and LCIA rules are silent on waiver with respect to seeking interim relief with a judicial authority.

¹⁷⁶ *What Happens After the Arbitrator Issues an Award*, AM. ARB. ASS'N, https://www.adr.org/sites/default/files/document_repository/AAA229_After_Award_Issued.pdf (stating that arbitrator and the sitting institution do not have the legal authority to force a party to comply with the award. If a party does not do what the award says, the prevailing party's remedy is to seek judicial redress to confirm the award).

agreement to arbitrate, or in the location designated in the arbitration agreement if that location is within the United States.”¹⁷⁷ Since winning an award is only half the battle, this is where the New York Convention comes into play.¹⁷⁸

D. The New York Convention

The New York Convention is a multinational treaty that provides the “legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards.”¹⁷⁹ There are currently 159 contracting states or territories (signatories) to the New York Convention,¹⁸⁰ and each signatory consents to be bound by the agreement of the Convention.¹⁸¹ There are several key provisions to note under the Convention.

Article III of the New York Convention requires each signatory to recognize arbitral awards as binding and enforceable.¹⁸² Article IV provides the procedural requirements for enforcement, such as the filing of (i) an authenticated award and (ii) the parties’ original agreement.¹⁸³ If the award or arbitration agreement is not in the official language of the country where enforcement is sought, then Section IV states that the party seeking enforcement must also provide any applicable translation certified by an official translator or by a diplomatic agent.¹⁸⁴ Finally, Article V enumerates the limited circumstances in which recognition and enforcement of an arbitral award may be refused.¹⁸⁵ To have legal effect, the New York Convention is codified under each signatory’s national laws to provide a legal framework for its national courts.

¹⁷⁷ Matthew H. Kirtland, *You Won the Arbitration. Now What?* AM. BAR ASS’N (2016), https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/newsletter/may2016/Kirtland_Arbitration_Enforcement.authcheckdam.pdf.

¹⁷⁸ See Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

¹⁷⁹ See generally, New York Convention, *supra* note 73.

¹⁸⁰ See Convention, *supra* note 178.

¹⁸¹ New York Convention, *supra* note 73, at art. III.

¹⁸² *Id.*

¹⁸³ *Id.* at. IV, §§ 1(a)-(b).

¹⁸⁴ *Id.* at art. IV, §2.

¹⁸⁵ *Id.* at art V (section (1) provides that (a) “[t]he parties[’] . . . agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration . . . ; or (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made”; and Section 2 provides that “(a) [t]he subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country.”).

a. Benefits of the New York Convention

While the New York Convention has its flaws (as noted below), the pros significantly outweigh the cons. As such, the New York Convention has been dubbed “the single most important pillar on which the edifice of international arbitration rests,”¹⁸⁶ for two reasons. First, the New York Convention has an extensive coverage. With 159 countries and territories ratifying the Convention, this enforcement mechanism is available to parties around the world, making enforcement less laborious than enforcing a judgment issued by a foreign court.¹⁸⁷ Second, the enforcement requirement is fairly minimal *i.e.*, the prevailing party only needs to supply an authenticated award plus the parties’ original agreement, as mentioned previously. These two documents together are sufficient to establish the *prima facie* evidence required for the prevailing party to obtain enforcement of the award.¹⁸⁸ Thereafter, it is up to the losing party to prove why enforcement should be refused on the enumerated and exclusive grounds under Article V.¹⁸⁹ However, the burden to overturn an arbitral award is substantial, as courts construe these defenses very narrowly.¹⁹⁰ Accordingly, enforcement of arbitral awards under the New York Convention is more practicable on foreign soil.

b. Enforcement Challenges Under the New York Convention

With that said, the New York Convention is not perfect. In theory, each signatory to the New York Convention is required to recognize arbitral awards as valid and enforceable. Nonetheless, there are obstacles that the prevailing party must overcome to obtain enforcement. For starter, some signatories are subject to a “reciprocity reservation” *i.e.*, these signatories will only enforce awards made by a party to the Convention.¹⁹¹ The United States is one of the contracting states with a reciprocity reservation. Thus, if a party obtains an award in a country that is outside of the Convention, and attempts to enforce the award in a U.S. court, the award will be refused.

¹⁸⁶ Chrispas Nyombi & Konstantinos Siliadis, *Rationalizing the Defences to Enforcement under the New York Convention 1958*, 17 ASPER REV. INT’L BUS. & TRADE L. 111, 112 (2017).

¹⁸⁷ *Enforcement of Arbitral Awards Outside of the New York Convention Regime*, LEXOLOGY (Sept. 2, 2008), <https://www.lexology.com/library/detail.aspx?g=3a59bee4-e84f-4fbb-9f45-fcebe5b2b6b8>.

¹⁸⁸ Albert Jan van den Berg, *The New York Convention of 1958: An Overview*, YEARBOOK: COMMERCIAL ARBITRATION 12-13, https://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf.

¹⁸⁹ *Id.* at 13.

¹⁹⁰ *Admart AG v. Stephen & Mary Birch Found., Inc.*, 457 F.3d 302, 308 (3d Cir. 2006), *as amended on reh’g* (Sept. 28, 2006) (“To carry out the policy favoring enforcement of foreign arbitral awards, courts have strictly applied the Article V defenses and generally view them narrowly.”); *Parsons & Whittemore Overseas Co. v. Societe Generale De L’Industrie Du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974) (“Convention’s public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state’s most basic notions of morality and justice.”).

¹⁹¹ Signatories with reciprocity reservation: Antigua, Barbuda, Argentina, Barbados, Bhutan, Bosnia, Herzegovina, Brunei Darussalam, Central Africa Republic, China, Cyprus, Ecuador, France, Guatemala, Holy See, Indonesia, Iran, Jamaica, Lebanon, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malaysia, Monaco, Mongolia, Mozambique, Nepal, New Zealand, Nigeria, Philippines, Republic of Moldova, Romania, Saudi Arabia, Singapore, Turkey, United States, and Vietnam.

In addition, because the New York Convention is codified in each signatory's national law, interference from these domestic laws may pose a challenge to enforcement.¹⁹² The first type of interference is procedural in nature. To illustrate, the New York Convention proscribes each signatory from imposing “substantially more onerous conditions”¹⁹³ on the enforcement of arbitral awards. However, to enforce an arbitral award in the United States, which is governed by Chapter 2 of the Federal Arbitration Act (“FAA”), the prevailing party must jump through numerous procedural hoops. To confirm an international award under the FAA, a petition to confirm must be filed within 3 years from the date the award was made.¹⁹⁴ Further, the party seeking enforcement must establish proper venue, personal jurisdiction, and subject matter jurisdiction of the court.¹⁹⁵ Additionally, the prevailing party must show that the arbitration agreement is commercial in nature.¹⁹⁶ Finally, to confirm an arbitration award, the FAA also requires that one of the parties to the arbitration be a foreign national, or is affiliated with more than one countries.¹⁹⁷ Failing to comply with any of these procedural requirements imposed by domestic law will result in the refusal of the award.

The second type of interference is substantive in nature, particularly with respect to public policy. Under Article V(2)(b), courts are authorized to deny enforcement of an arbitral award if enforcement would be contrary to public policy.¹⁹⁸ Since the New York Convention does not define “public policy,” this creates uncertainty in the enforcement of a foreign award as the term “public policy” differs from signatory to signatory and is subject to open interpretation by the courts.¹⁹⁹ As one author noted, “[t]he traces of ambiguity, subjectivity (at the hands of the courts in terms of interpretation of the concept) and unpredictability associated with the concept of public policy have at times significantly thwarted the effectiveness and efficiency of international commercial

¹⁹² Nyombi, *supra* note 186, at 113-114.

¹⁹³ New York Convention, *supra* note 73, at art. III.

¹⁹⁴ 9 U.S.C.A. § 207.

¹⁹⁵ 9 U.S.C. § 204; *First Inv. Corp. of Marshall Islands v. Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 749 (5th Cir. 2012), as revised (Jan. 17, 2013) (citing *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999) (affirming the district court's decision to deny confirmation of a foreign award for lack of personal jurisdiction, stating that “[p]ersonal jurisdiction is not listed as a ground on which confirmation may be denied. Nevertheless, the fact that a treaty and its implementing legislation do not specify that a petition may be dismissed for lack of personal jurisdiction is not dispositive . . . personal jurisdiction ‘is “an essential element of the jurisdiction of a district . . . court,’ without which the court is ‘powerless to proceed to an adjudication.’”).

¹⁹⁶ 9 U.S. Code § 202 (requiring an arbitration agreement or arbitral award to be arising out of a legal/commercial relationship, whether contractual or not).

¹⁹⁷ *Bamberger Rosenheim, Ltd., v. OA Dev., Inc.*, 862 F.3d 1284, 1287 (11th Cir. 2017), cert. denied sub nom. *Bamberger Rosenheim, Ltd. v. OA Dev., Inc.*, 138 S. Ct. 654 (2018) (arbitral awards are considered non-domestic under the FAA “when one of the parties to the arbitration is domiciled or has its principal place of business outside of the United States.”).

¹⁹⁸ New York Convention, *supra* note 73, at art V(2)(b).

¹⁹⁹ Nyombi, *supra* note 186, at 123 (stating that the term “public policy” have been interpreted among the contracting states to cover anything from social interests to property rights); Ronald A. Giller et al., *Enforcing Arbitration Awards in International Franchising*, 34 *FRANCHISE L.J.* 351, 357-358 (2015).

arbitration.”²⁰⁰ For example, Russian courts have denied enforcement of arbitral awards on public policy ground when the amount awarded exceeded a franchisor’s actual damages because “the concept of liquidated damages does not exist in Russian law.”²⁰¹ Saudi courts have denied awards involving monetary interest, citing violations of public policy.²⁰² Finally, Indian courts have denied foreign awards that infringed on local courts’ jurisdiction, such as the determination of trademark validity under India law, as against public policy.²⁰³ As a result of the fluidity of public policy, enforcement of awards can be very challenging at times.

E. Enforcement of Awards Outside of the New York Convention

In spite of the shortcomings of the New York Convention, it is nonetheless a great platform for enforcing foreign awards, as the alternatives are far less predictable. On the off chance that an award must be enforced in a territory or country that is outside of the Convention,²⁰⁴ franchisors should use the following workarounds to their advantages whenever possible.

The first option is to seek enforcement under a multilateral treaty. Some popular treaties include the Panama Convention, which provides for enforcement of arbitration agreements and awards in Latin America,²⁰⁵ and the Geneva Convention of 1961, otherwise known as the European Convention on International Commercial Arbitration, which sets forth procedural rules for arbitrations among European nations.²⁰⁶

A second option is to enforce an arbitral award under a bilateral investment treaty. There are close to 3,000 bilateral investment treaties in the world today.²⁰⁷ The impetus behind bilateral investment treaties is “to create a stable international legal framework” that will ensure fair and equitable treatment of investors in developing countries.²⁰⁸ Most bilateral investment treaties provide for dispute resolution mechanisms, such as institutional arbitration.²⁰⁹ By agreeing to be bound by a bilateral

²⁰⁰ Wasiq Abass Dar, *Understanding Public Policy as an Exception to the Enforcement of Foreign Arbitral Awards*, 2 EUR. J. COMP. L. & GOVERNANCE 316, 318 (2015).

²⁰¹ Giller, *supra* note 199, at 358.

²⁰² Nyombi, *supra* note 186, at 124.

²⁰³ Giller, *supra* note 199, at 362.

²⁰⁴ Countries and territories that are not part of the New York Convention: Belize, Cape Verde, Chad, Republic of the Congo, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Grenada, Guinea-Bissau, Iraq, Kiribati, North Korea, Libya, Malawi, Maldives, Federated States of Micronesia, Namibia, Nauru, Niue, Palau, Papua New Guinea, Saint Kitts and Nevis, Saint Lucia, Samoa, Seychelles, Sierra Leone, Solomon Islands, Somalia, South Sudan, and Sudan.

²⁰⁵ Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 9 U.S.C. §§ 301–307, available at http://www.oas.org/en/sla/dil/inter_american_treaties_B-35_international_commercial_arbitration.asp.

²⁰⁶ Geneva Convention of 1961, Apr. 18, 1961, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&clang=en.

²⁰⁷ World Investment Report, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT 105 (2018), available at https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf.

²⁰⁸ Jeswald W. Salacuse & Nicholas P. Sullivan, *Do Bits Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT’L L.J. 67, 75 (2005).

²⁰⁹ *Id.* at 87–88.

investment treaty, “the host state essentially consents to the jurisdiction of the arbitral body, and the investor is free to bring an arbitration in any of the arbitral fora mentioned in the treaty.”²¹⁰ For example, Taiwan is not a contracting state to the New York Convention. However, Taiwan boasts bilateral investment agreements with more than 30 countries.²¹¹ Thus, a franchisor seeking to enforce an arbitration award in Taiwan could rely on one of these bilateral investment agreements to alleviate some of the obstacles associated with enforcement.

F. The Losing Party’s Remedy

a. Institutional Appeal

As noted previously, one of the major drawbacks of arbitration is its lack of appellate rights. In international arbitration, parties do not get to appeal their arbitral awards as a matter of right. In fact, many institutional rules explicitly provide for the finality and immediacy of the award.²¹² To date, only the AAA, ICDR, and JAMS permit optional appeal of arbitral awards.²¹³ However, like all things in arbitration, such appellate rights require both parties’ consent, and a party cannot unilaterally seek an institutional appeal. Therefore, to fully realize the benefits of an optional appeal, it is crucial for franchisors to (1) require a detailed decision (known as a reasoned award) by the initial tribunal (see discussion in Section V, Subsection G); (2) define the issues that can be reviewed on appeal in their arbitration agreement; (3) note what constitutes the record on appeal; (4) determine whether oral argument should be allowed; and (5) specify the evidentiary standards on appeal.²¹⁴

b. Judicial Vacatur

In the absence of an expressed consent for an optional appeal, the losing party can always go to the courts to overturn an arbitral award. This is known as a “vacatur.”

²¹⁰ Peter Sherwin et al., *Major International Treaties on Arbitration*, PROSKAUER ON INTERNATIONAL LITIGATION AND ARBITRATION, MANAGING, RESOLVING, AND AVOIDING CROSS-BORDER BUSINESS OR REGULATORY DISPUTES (2007), available at <https://www.proskauerguide.com/arbitration/19/IV>.

²¹¹ Helena H.C. Chen, *Taiwan Arbitration*, GETTING THROUGH THE DEALS (Jan. 25, 2019), <https://gettingthedealthrough.com/area/3/jurisdiction/45/arbitration-taiwan/>.

²¹² E.g., WIPO Rules, Art. 66 (“By agreeing to arbitration under these Rules, the parties undertake to carry out the award without delay, and waive their right to any form of appeal or recourse to a court of law or other judicial authority, insofar as such waiver may validly be made under the applicable law.”); HKIAC Rules, Art. 2.2 (“[A]ll decisions made by HKIAC under these Rules are final and, to the extent permitted by any applicable law, not subject to appeal.”); CIETAC Rules, Art. 49.9 (“The arbitral award is final and binding upon both parties. Neither party may bring a lawsuit before a court or make a request to any other organization for revision of the award.”); SIAC Rules, Art. 32.11 (“[T]he parties agree that any Award shall be final and binding on the parties from the date it is made, and undertake to carry out the Award immediately and without delay. The parties also irrevocably waive their rights to any form of appeal, review or recourse to any State court or other judicial authority with respect to such Award insofar as such waiver may be validly made.”).

²¹³ AAA Appellate Rules, Art. A-1; see generally, JAMS Appellate Rules.

²¹⁴ JAMS Optional Arbitration Appeal Procedures, JAMS, <https://www.jamsadr.com/appeal/> (last visited Feb. 24, 2019).

However, “[a]rbitral awards are nearly impervious to judicial oversight”²¹⁵ and vacatur are extremely rare.²¹⁶ In the United States, courts must affirm an arbitration award “unless it is vacated, modified, or corrected,”²¹⁷ and the losing party may overturn an award on statutory grounds or on common law grounds.

Section 10(a) of the FAA lists the limited statutory grounds for vacatur, such as:

(1) Where the award was procured by corruption, fraud, or undue means;

(2) Where there was evident partiality or corruption in the arbitrators, or either of them;

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.²¹⁸

Section 10(a)(1) - (3) focus on the “overall fairness and impartiality of the arbitral process itself,” while Section 10(a)(4) addresses correctness of the award.²¹⁹ Section 10(a) provides an exhaustive statutory list for vacatur of arbitration awards in the United States.²²⁰ Federal courts have repeatedly held that the standard for vacatur under Section 10(a) is “exceedingly narrow”²²¹ and must be supported by “clear and convincing” evidence.²²²

In addition to the statutory grounds for vacatur provided by the FAA, some U.S. courts have vacated arbitral awards on the common law ground of “manifest disregard

²¹⁵ Teamsters Local Union No. 42 v. Supervalu, Inc., 212 F.3d 59, 61 (1st Cir. 2000).

²¹⁶ Raymond James Fin. Servs., Inc. v. Bishop, 596 F.3d 183, 184 (4th Cir. 2010) (although the court ultimately vacated an award in this case, the court repeatedly acknowledged that the standard of review for vacating an arbitration award is among “the narrowest known at law.”); Teamsters Local Union No. 42 v. Supervalu, Inc., 212 F.3d at 61 (“[D]isputes that are committed by contract to the arbitral process almost always are won or lost before the arbitrator. Successful court challenges are few and far between.”).

²¹⁷ 9 U.S.C.A. § 9.

²¹⁸ 9 U.S.C.A. § 10(a).

²¹⁹ Katherine A. Helm, *The Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?* 61 DISPUTE RESOLUTION J. 4, 1-2 (2006-2007).

²²⁰ Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 594 (2008).

²²¹ Bull HN Info. Sys., Inc. v. Hutson, 229 F.3d 321, 330 (1st Cir. 2000) (citing Wheelabrator Envirotech Operating Services Inc. v. Massachusetts Laborers Dist. Council Local 1144, 88 F.3d 40, 43 (1st Cir.1996)).

²²² Nat’l Football League, 820 F.3d at 548 (citing Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr., 729 F.3d 99, 106 (2d Cir.2013)).

of the law.”²²³ To vacate an arbitral award under the “manifest disregard of law” standard, the arbitrator’s decision “must fly in the face of clearly established legal precedent” and that “no judge or group of judges could conceivably come to the same determination as the arbitrators.”²²⁴ Circuit split exists as to whether the Supreme Court’s decision in *Hall St. Assocs., L.L.C. v. Mattel, Inc.* has abrogated the “manifest disregard of law” doctrine,²²⁵ but the Supreme Court has not spoken on this very issue.²²⁶ The same deference to arbitral awards also permeates other foreign courts, demonstrating that vacatur of an arbitral award is really an exception rather than the norm.²²⁷

V. Franchise Agreements: Drafting Considerations

As discussed at the outset of this article, arbitration is a matter of contract. Therefore, it is largely within franchisors’ control. A clearly and precisely drafted arbitration agreement will maximize the benefits of arbitration and minimize franchisors’ risks. To achieve this goal, franchisors must “consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract.”²²⁸ Accordingly, the remainder of this article will discuss a few drafting tips on the key provisions of an arbitration agreement for franchisors’ consideration.

A. Defining the Scope of Arbitration

²²³ *Cardell Fin. Corp. v. Suchodolski Assocs., Inc.*, 409 F. App’x 458, 459 (2d Cir. 2011) (“In order to find manifest disregard of the law: (1) we first ‘consider whether the law that was allegedly ignored was clear, and in fact explicitly applicable to the matter before the arbitrators’; (2) we must then find that ‘the law was in fact improperly applied [by the Arbitrator], leading to an erroneous outcome’; and finally (3) we determine whether ‘the arbitrator must have known of [the applicable law’s] existence, and its applicability to the problem before him.’”) (Internal citation omitted).

²²⁴ *Physicians Ins. Capital v. Praesidium All. Grp.*, 562 F. App’x 421, 423 (6th Cir. 2014).

²²⁵ *E.g., Citigroup Glob. Markets, Inc. v. Bacon*, 562 F.3d 349, 350 (5th Cir. 2009) (concluding that manifest disregard of the law is no longer an independent ground for vacating arbitration awards under the FAA post-Hall); *Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 124 (1st Cir. 2008) (acknowledging that the manifest disregard of the law doctrine is no longer a valid ground for vacating or modifying an arbitral award in cases brought under the FAA); *Frazier v. CitiFinancial Corp., LLC*, 604 F.3d 1313, 1324 (11th Cir. 2010) (“We hold that our judicially-created bases for vacatur are no longer valid in light of Hall Street. In so holding, we agree with the Fifth Circuit that the categorical language of Hall Street compels such a conclusion.”). *Cf. Wachovia Sec., LLC v. Brand*, 671 F.3d 472, 480 (4th Cir. 2012) (finding that manifest disregard did survive Hall Street as an independent ground for vacatur); *Johnson v. Wells Fargo Home Mortg., Inc.*, 635 F.3d 401, 415 (9th Cir. 2011) (“[I]n this Circuit the ‘manifest disregard’ standard has survived Hall Street intact, and so we are bound to apply it.”); *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App’x 415, 419 (6th Cir. 2008) (stating that the Court will continue to employ the “manifest disregard” standard because “it would be imprudent to cease employing such a universally recognized principle”).

²²⁶ *Stolt-Nielsen*, 559 U.S. at 672 n. 3 (“We do not decide whether ‘manifest disregard’ survives our decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.* (internal citation omitted), as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10”).

²²⁷ See the limited grounds for refusal and vacatur under Article V of the New York Convention.

²²⁸ *Dickey’s Barbecue Restaurants, Inc. v. Mathieu*, No. 3:12-CV-5119-G, 2013 WL 5268976, at *4 (N.D. Tex. Sept. 18, 2013).

The scope of arbitration defines what issues will be subject to arbitration (arbitrability). Franchisors who wish to pursue a variety of disputes in arbitration should adopt a broad arbitration clause in their franchise agreement. Broad arbitration clauses are those encompass “every dispute between the parties having a significant relationship’ to the contract.”²²⁹ If a clause is broad, courts are more likely to send the claims to arbitration when one party opposes its enforcement.²³⁰ Conversely, if the scope is narrow, the arbitrability issue may need to be litigated.²³¹

According to the Eleventh Circuit, the term “arising out of” is broad but not all encompassing, because it “requires the existence of some direct relationship between the dispute and the performance of duties specified by the contract.”²³² Likewise, the terms “related to” and “connected with” are also broad constructions that connote limitation, because they “mark[] a boundary by indicating some direct relationship.”²³³ In contrast, arbitration clauses with the “arising under” language have been treated as narrow in scope.²³⁴ As such, franchisors who wish to resolve most of their franchise disputes in arbitration should opt for language that incorporate broad terms for maximum coverage, by requiring “[a]ny controversy or claim arising out of or relating to this Agreement . . . shall be submitted to final and binding arbitration.”²³⁵

a. Delegation Clause

Once franchisors determine the scope of their arbitration clause, they should consider whether a delegation clause is desirable. Delegation clauses allow arbitrators to decide certain threshold issues related to arbitration. For instance, certain “gateway” issues such as “enforceability, scope, applicability, and interpretation of the arbitration

²²⁹ Great Am. Ins. Co. v. Hinkle Contracting Corp., 497 F. App’x 348, 354 (4th Cir. 2012).

²³⁰ Parm v. Bluestem Brands, Inc., 898 F.3d 869, 874 (8th Cir. 2018) (“If the clause is broad, the liberal federal policy favoring arbitration agreements requires that a district court send a claim to arbitration ... as long as the underlying factual allegations simply touch matters covered by the arbitration provision.”); Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (U.S. 1983) (“[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.”).

²³¹ Fleet Tire Serv. of N. Little Rock v. Oliver Rubber Co., 118 F.3d 619, 621 (8th Cir. 1997) (If the clause is narrow, courts must determine whether the dispute is collateral to the agreement containing the arbitration clause).

²³² Doe v. Princess Cruise Lines, Ltd., 657 F.3d 1204, 1218 (11th Cir. 2011).

²³³ Princess Cruise, 657 F.3d at 1218-19.

²³⁴ Mediterranean Enterprises, Inc. v. Ssangyong Corp., 708 F.2d 1458, 1464 (9th Cir. 1983); Cape Flattery Ltd. v. Titan Mar., LLC, 647 F.3d 914, 917 (9th Cir. 2011) (“[T]he ‘arising under’ language in the Agreement signifies a narrow arbitration agreement.”); Great Am. Ins. Co. v. Hinkle Contracting Corp., 497 F. App’x 348, 354 (4th Cir. 2012) (stating that narrow arbitration clauses only embrace claims “arising under” a contract).

²³⁵ Sharju Ltd. P’ship v. Choice Hotels Int’l, Inc., No. CIV.A.3:01-CV-2605-X, 2002 WL 107171, at *2 (N.D. Tex. Jan. 22, 2002) (finding that the clause cited is broad enough to embrace the parties’ dispute in this case).

agreement” are typically decided by courts.²³⁶ However, because arbitration is a creation of contract, franchisors can delegate these gateway issues to the arbitrator in their arbitration agreement, thus bypassing judicial involvement altogether.²³⁷ To be effective and enforceable, a delegation clause must be explicit and must manifest the parties’ “clear and unmistakable” intent to arbitrate gateway issues.²³⁸ The following language has survived the muster of the “clear and unmistakable” test:

“[T]he Arbitrator, and not any federal, state, or local court or agency, shall have authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement, including but not limited to any claim that all or any part of this Agreement is void or voidable.”²³⁹

b. Judicial Carve Out

Just as franchisors can delegate arbitrability issues to be decided by the arbitrator(s), franchisors can also reserve certain thorny issues in the arbitration agreement to be adjudicated by the courts. This is known as a judicial carve out. Judicial carve outs include, but are not limited to, injunctive relief, enforcements of non-competes, disputes involving a franchisor’s proprietary marks, and antitrust issues.²⁴⁰ Disputes that require a compulsory discovery process are also good issues for courts to decide.²⁴¹ Judicial carve outs are enforceable as long as there is a “modicum of bilaterality,”²⁴² meaning that the terms of the judicial carve outs must allow both franchisors and franchisees to seek judicial resolution of specified claims in court.

B. Designating the “Right” Substantive Laws

A choice of law provision is arguably one of the most outcome-deterministic provisions in an arbitration agreement.²⁴³ A choice of law provision may include (i) the substantive laws governing the merits of the dispute (commonly referred to as the

²³⁶ Jones v. Waffle House, Inc., 866 F.3d 1257, 1264 (11th Cir. 2017); AT & T Techs., Inc. v. Commc’ns Workers of Am., 475 U.S. 643, 649 (1986) (arbitrability deals with whether or not a company is bound to arbitrate, as well as what issues it must arbitrate).

²³⁷ Waffle House, 866 F.3d at 1264 (where the arbitration agreement contains a delegation provision, courts will only get involved if there is a challenge to the delegation provision).

²³⁸ *Id.* at 1267.

²³⁹ *Id.*

²⁴⁰; Stuart Hershman and Andrew A. Caffey, *Structuring a Unit Franchise Relationship, in Fundamentals of Franchising*, ABA FORUM ON FRANCHISING 92 (1997), available at http://apps.americanbar.org/abastore/products/books/abstracts/5620126chapter2_abs.pdf.

²⁴¹ UNIDROIT, *Guide to International Master Franchise Agreements* 214 (2d ed. 2007) [hereinafter UNIDROIT Guide], available at <http://www.unidroit.org/instruments/franchising/guide/second-edition-2007> (stating that national courts would be better suited for handling claims that require a compulsory discovery process, such as fraud).

²⁴² Capili v. Finish Line, Inc., 699 F. App’x 620, 622 (9th Cir. 2017).

²⁴³ Craig M. Gertz, *The Selection of Choice of Law Provisions in International Commercial Arbitration: A Case for Contractual, Depeqage*, 12 NW. J. INT’L L. & BUS. 163, 165 (1991-1992).

“applicable law”),²⁴⁴ (ii) the procedural laws²⁴⁵ governing the arbitral proceedings, and (iii) any conflicts of law rules that the parties deem desirable.

Substantive laws govern all aspects of the contract between the parties,²⁴⁶ and in most legal systems, parties are free to select any substantive laws to govern their disputes, as long as “the parties have a connection to (or a bona fide interest in) the country whose law is chosen.”²⁴⁷ As a result, most franchisors like to specify that the laws of their home country will govern the merits of the franchise disputes.²⁴⁸ This choice is obviously advantageous to the franchisors, because it promotes “uniformity and predictability in their legal relationships with franchisees,” and franchisors are likely to be more familiar with the law of their domicile.²⁴⁹ Since a clearly stipulated choice of law provision is valid and “overrides any other consideration of what the proper law might be,”²⁵⁰ even if the chosen law substantially favors one party over another, franchisors should not miss this opportunity to designate a law that could significantly improve their position in arbitration.

In the absence of any governing law selected by the parties, arbitral tribunals must ascertain the applicable law by applying conflicts of law rules. However, there is no guaranty which conflicts of law rules the arbitrator will apply, and the mere application of such analysis can be time consuming and difficult.²⁵¹ Therefore, by choosing a substantive law and specifically provides that the “governing law of the contract shall be the ‘substantive’ law of a particular country,”²⁵² franchisors can effectively prevent the arbitrators from engaging in a conflicts of law analysis, and further remove uncertainties, risks, and costs associated with international arbitration.

For a discussion on procedural laws, see Subsection C.

C. Selecting a Favorable Seat

²⁴⁴ Yeap Yee Lin et al., *Lex Arbitri, Choice of Procedural Law on International Commercial Arbitration in Malaysia*, 2017 ALSA 190, 191 (2017).

²⁴⁵ Vitek Danilowicz, *The Choice of Applicable Law in International Arbitration*, 9 HASTINGS INT’L & COMP. L.REV. 235, 239 n. 7 (1986) (noting that procedural laws generally govern “[t]he arbitrator’s general authority over the proceedings, the service of process, the method each party may use to present its case, the rebuttal rights of each party, the basic rules governing the reception of evidence, the use of subpoenas, the close of hearings, the times for submitting briefs and announcing the final award, and the form the award must take.”).

²⁴⁶ See Hague Conference on Private International Law, *Principles on Choice of Law in International Commercial Contracts* (2015), Art. 9(I), available at <https://assets.hcch.net/docs/5da3ed47-f54d-4c43-aaef-5eafc7c1f2a1.pdf>.

²⁴⁷ Wolfgang Kuhn, *Choice of Substantive Law in the Practice of International Arbitration*, 25 INT’L BUS. LAW. 148, 149 (1997).

²⁴⁸ John Verhey, *Basic Track: Franchise Litigation*, 50th IFA ANNUAL LEGAL SYMPOSIUM 14-15 (2017).

²⁴⁹ *Id.*

²⁵⁰ Kuhn, *supra* note 247, at 149.

²⁵¹ Gertz, *supra* note 243, at 173.

²⁵² Kuhn, *supra* note 247, at 149.

As discussed above, franchisors have the ability to choose the procedural laws governing the arbitration proceedings in their choice of law provision. In most circumstances, “the procedural law will be the domestic law of the seat of arbitration.”²⁵³ Therefore, it is important for franchisors to understand this distinct and convoluted concept of a “seat.”

The seat is the legal jurisdiction “where an international arbitration has its legal domicile or juridical home,”²⁵⁴ and it has many practical implications. For example, the seat determines the procedure or rules governing the arbitration. The seat of arbitration also determines the level of judicial intervention during the arbitration.²⁵⁵ Further, the seat of arbitration can affect the degree to which an arbitral award may be challenged.²⁵⁶ The seat can also provide “certainty as to the jurisdiction that may annul or vacate” an arbitral award.²⁵⁷ As such, a favorable seat can add certainty and improve a franchisor’s position in an arbitration, while a wrong seat can “severely delay the arbitration, increase the risk of parallel court proceedings and allow the award to be challenged on broad grounds in local courts, which may not be reliable or may be in a jurisdiction where the counterparty is very well-connected, posing evident risks.”²⁵⁸

Accordingly, it is imperative that franchisors designate their seat in a country (i) with an arbitration friendly legal regime and (ii) is a signatory to the New York Convention. Some good options include London, Paris, Singapore, Hong Kong, and Geneva.²⁵⁹ These seats have been consistently recognized for their reputation, neutrality and impartiality of their legal system, good formal legal infrastructure, and solid track record in enforcing arbitration agreements and awards.²⁶⁰

²⁵³ Lin, *supra* note 244, at 193.

²⁵⁴ Alastair Henderson, *Lex Arbitri, Procedural Law and the Seat of Arbitration*, 26 SA LJ 886, 892 (2014) (citing Gary Born, a preeminent authority in international commercial arbitration); Jonathan Hill, *Determining the Seat of an International Arbitration: Party Autonomy and the Interpretation of Arbitration Agreements*, 63 INT’L & COMP. L.Q. 517, 522-523 (2014) (it is important to note the difference between a seat and a venue, as the terms are not synonymous in the context of arbitration. Unlike a seat, which is a legal construct, venue is the designated location where hearings and meetings must be conducted).

²⁵⁵ *Why the Seat is Important?* IRISH ARB ASS’N (Mar. 8, 2019, 10:14 PM), <https://www.arbitrationireland.com/why-the-seat-is-important/>; Phillip Capper, *When is the Venue of an Arbitration Its Seat?*, KLUWER ARB. BLOG (Nov. 25, 2009), <http://arbitrationblog.kluwerarbitration.com/2009/11/25/when-is-the-venue-of-an-arbitration-its-seat/> (the seat of arbitration determines the courts with supervisory jurisdiction over the arbitration); Kerry L. Bundy et al., *Choice of Law, Venue and Jurisdiction, Arbitration v. Litigation*, 10 INT’L J. FRANCHISING L. 3, 17 (2012) (stating that if the rules of the seat require the parties to make a request to the local court to decide certain issues, arbitrators must comply with such mandatory rules irrespective of the procedural rules of the institution).

²⁵⁶ *Why the Seat is Important?*, *supra* note 255.

²⁵⁷ William R. Graefe et al., *Basic Track: Expanding International - The Importance of Realistic Expectations and Proper Due Diligence in Navigating International Waters*, 47th IFA ANNUAL LEGAL SYMPOSIUM 50 (2014).

²⁵⁸ William Kirtley, *The Importance of the Seat of Arbitration*, INT’L ARB. INFO. (Mar. 3, 2014), <https://www.international-arbitration-attorney.com/importance-seat-arbitration/>.

²⁵⁹ *Id.*

²⁶⁰ Friedland, *supra* note 17, at 9.

D. Providing for the Allocation of Arbitration Costs

As discussed in the beginning of this article, international arbitration can be expensive. Therefore, it is important for franchisors to anticipate their arbitration costs and find possible ways to control their expenses. It is even more critical for franchisors to stipulate a method to allocate arbitration costs in the arbitration agreement, because there is no uniformity in the treatment of costs and arbitrators' discretion is remarkably divergent in this area.²⁶¹

On a fundamental level, the cost of international arbitration can be broken down into two major categories: (1) proceeding costs and (2) parties' costs.²⁶² The first category covers a multitude of expenses ranging from administrative fees of the arbitral institution, to arbitrator fees and incidental expenses. The second category generally includes the parties' attorneys' fees and costs, as well as any expenses incurred during the preparation of the arbitration.²⁶³

Despite a lack of uniformity, there are three common approaches to cost allocation in international arbitration, namely, (i) the English rule, (ii) proportional allocation, and (iii) the American rule. The English rule is the most popular approach on this list. It is rooted in the litigation principle of loser pays all. This approach focuses on "(1) punishing the losing party, (2) indemnifying the winning party, and (3) deterring frivolous and bad faith litigation."²⁶⁴ Proportional allocation is a subset of the English rule and it is gaining popularity.²⁶⁵ Rather than letting the losing party shoulder all of the costs of the prevailing party, this method allocates costs on a "sliding scale" proportional to each party's relative success.²⁶⁶ Proportional allocation helps promote accuracy by "forcing the parties to be more realistic with the value of their claims and the amount of their offers as to avoid undesirable allocations on costs."²⁶⁷ Finally, the American rule provides "each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise."²⁶⁸ The aim of the American rule is to promote fairness by ensuring that parties are not "unjustly discouraged from instituting actions to vindicate their rights."²⁶⁹

²⁶¹ See John Y. Gotanda, *Awarding Costs and Attorneys' Fees in International Commercial Arbitrations*, 21 MICH. J. INT'L L. 1, 3-4 (1999) (stating that in the absence of the parties' express agreement, arbitrators may allocate costs based on applicable substantive law, procedural law, the arbitration rules of the institution, or on principles of equity).

²⁶² *Id.* at 9.

²⁶³ *Id.*

²⁶⁴ *Id.* at 5.

²⁶⁵ See Micha Bühler, *Awarding Costs in International Commercial Arbitration: an Overview*, 22 ASA BULLETIN 249, 262 (2004), available at <https://www.walderwyss.com/publications/85.pdf>.

²⁶⁶ *Id.* ("[I]f a claimant is awarded less than claimed, this difference constitutes a success from the respondent's perspective.")

²⁶⁷ *Id.* at 262-263.

²⁶⁸ *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2164 (2015).

²⁶⁹ *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967) ("In support of the American rule, it has been argued that since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from

To avoid the application of an undesirable allocation method at the end of the arbitral proceedings, franchisors should include a provision on cost by (i) defining the costs of the arbitration, (ii) specifying that the unsuccessful party shall bear the entire costs of the prevailing party, and (iii) empowering the tribunal with the authority to allocate costs.²⁷⁰

E. Choosing the Best Arbitrators and Their Respective Qualifications

a. Sole Arbitrator v. a Panel of Three Arbitrators

As noted earlier, a dispute in arbitration is resolved by a single arbitrator or a panel of three arbitrators. There are advantages and disadvantages to each.

A single arbitrator is cheaper and ideal for smaller cases, whereas a panel of three arbitrators makes better economic sense for larger, more complex cases. Additionally, a sole arbitrator may arrive at a decision faster as there are less conflicts and administrative hurdles to jump through with respect to scheduling and conducting hearings. Another perceived benefit of having a sole arbitrator over a panel of arbitrators is the elimination of partisan party-appointed arbitrators,²⁷¹ as the appointment of sole arbitrators often requires the parties' joint designation.²⁷²

On the other hand, a panel of three arbitrators is more likely to render a better decision because the arbitrators are able to explore different viewpoints through dialogue.²⁷³ In addition, a "properly non-partisan party-appointed arbitrator may [] be well-equipped to understanding the thinking of 'his' party, its cultural background, with all matters that are normally left unsaid in local practice."²⁷⁴ This viewpoint, however, is highly debated, as one of the common concerns for having a panel of arbitrator is a greater likelihood of impropriety and partiality.²⁷⁵

instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel.").

²⁷⁰ Gotanda, *supra* note 261, at 27.

²⁷¹ See generally, Pierre A. Karrer, *One or Three Arbitrators*, 1 Y.B. ON INT'L ARB. 91, 94 (2010).

²⁷² E.g., HKIAC Rules, Art. 7.2 (if the parties failed to jointly designate a sole arbitrator, HKIAC will appoint the arbitrator); DIS Rules, Art. 10.2 (absent the parties' joint nomination, the appointment committee of DIS will select the sole arbitrator).

²⁷³ Karrer, *supra* note 271, at 93.

²⁷⁴ *Id.* at 94; Andreas F. Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, 30 TEX. INT'L L. J. 59, 65 (1995) (stating that party-appointed arbitrator can provide "translation of legal culture").

²⁷⁵ See Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STAN. J. INT'L L. 53, 56 (2005) (noting that the safeguards used to ensure judicial impartiality are either missing or flouted in the arbitral process, as evidenced by the fact that parties may each select an arbitrator in a panel setting who are "presumably disposed toward their case."); Peter Halprin & Stephen Wah, *Ethics in International Arbitration*, 2018 J. DISP. RESOL. 87, 88 (2018) (despite the widespread popularity of international arbitration, there are no mandatory international code of ethics governing the conduct of arbitrators).

Given the potential issues lurking in the formation of the tribunal, franchisors should specify three arbitrators in their arbitration agreement for high stake claims and use a sole arbitrator for low value claims. If the value of future claims cannot be ascertained in advance, franchisors should be aware of the default options adopted by each arbitral institution to determine whether their contract should be silent on the number of arbitrators.²⁷⁶

b. Choices of Arbitrator Selection Criteria

Additionally, franchisors should consider whether to include any qualifications in the selection of the arbitrator(s). Like all other decisions in international arbitration, the choices here are endless. Some general considerations include the candidate's familiarity with the governing law, legal education, industry experience, past decisions, awards, and the general reputation of the individual. While many arbitrators already possess a wealth of education and professional experience,²⁷⁷ franchisors are still free to stipulate additional qualifications such as nationality and language proficiency. If a case is highly technical in nature, franchisors may request that the arbitrators have certain requisite educational backgrounds or specialized expertise such as experience in franchising. Such selection criteria will improve the chance that the arbitrators resolve the dispute expeditiously and correctly. However, because "there is a relatively small cadre of experienced arbitrators who are chosen for the bulk of international arbitration tribunals,"²⁷⁸ franchisors should be strategic with their wish list of qualifications, as additional criteria will undoubtedly narrow the candidate pool, making the selection process more burdensome and time-consuming.

F. Specifying the Language and Any Translation Requirements

When dealing with international players, language barrier is often a key concern. This issue is further magnified in international arbitration, where the arbitrators and the disputing parties are often of different nationalities and speak different languages.²⁷⁹ As a result, "the choice of the (proper) procedural language in the arbitration agreement can [] have a significant role in the efficiency of the proceedings."²⁸⁰

²⁷⁶ *E.g.*, HKIAC Rules, Art. 6 (the institution would decide whether to refer the case to a sole arbitrator or panel of arbitrators absent the parties' agreement); CIETAC Rules, Art. 25(2) (the default is a panel of three arbitrators); VIAC Rules, Art. 17(2) (absent the parties' agreement, the VIAC board shall determine the number of the arbitrators by taking into consideration "the complexity of the case, the amount in dispute, and the parties' interest in an expeditious and cost-effect decision."); WIPO Rules, Art. 14(b) (where the parties have not agreed on the number of arbitrators, the tribunal shall consist of a sole arbitrator).

²⁷⁷ George Ruttinger, *Where Common Law Litigation and International Arbitration Divide*, LAW360, (Dec. 7, 2015), <https://www.law360.com/articles/729335>.

²⁷⁸ *Id.*

²⁷⁹ Valentina Faienza, *The Choice of the Language of the Proceedings: An Underestimated Aspect of the Arbitration?* KLUWER ARB. BLOG (May 6, 2014), <http://arbitrationblog.kluwerarbitration.com/2014/05/06/the-choice-of-the-language-of-the-proceedings-an-underestimated-aspect-of-the-arbitration/>.

²⁸⁰ *Id.*

First, specifying a procedural language in the arbitration agreement will add certainty, as the treatment of the language of the proceedings differ by institutions, which may lead to divergent results. To demonstrate, the rules of the WIPO, the LCIA, and the ICDR provide that the default language of the arbitral proceedings shall be the language of the arbitration agreement.²⁸¹ Whereas under the auspices of the CIETAC and the HKIAC, proceedings will be conducted in Chinese unless the parties agreed otherwise.²⁸²

Second, choosing a procedural language in the arbitration agreement will reduce costs and mistakes. When parties fail to designate a proper procedural language, it “would result in arbitral proceedings mainly conducted through translation and interpretation, which would definitely affect both costs and duration of the arbitration.”²⁸³ Moreover, translation and interpretation are likely to contain mistakes, thus further complicating the proceedings.²⁸⁴ Accordingly, savvy franchisors who wish to eliminate unnecessary expenditures and potential translation errors should include a clause on the selection of language and the method of translation in their arbitration agreement.

G. Defining the Boundaries of Confidentiality

Confidentiality is one of the hallmarks of arbitration. However, arbitration is not confidential by default.²⁸⁵ Depending on the arbitral institution, the degree of treatment of confidentiality differ substantially. Consequently, it would be worthwhile for franchisors to understand the different institutional rules concerning confidentiality, especially when trade secrets and other invaluable information are at stake.

To illustrate, some arbitral institutions only prescribe that communication relating to the award, but not the arbitration proceedings, be kept confidential.²⁸⁶ Some institutions only impose the rule of confidentiality on the proceedings but not the facts of the case.²⁸⁷ Only the most stringent rules guarantee total secrecy with respect to all matters relating to the proceedings and the award.²⁸⁸ Thus, to ensure full confidentiality at the proceeding level, franchisors should consider “(i) keeping all submission and evidence confidential, [and] (ii) limiting public statements about the facts of the dispute . . .”²⁸⁹

²⁸¹ WIPO Rules, Art. 39; LCIA Rules, Art. 17.1; ICDR Rules, Art. 18.

²⁸² CIETAC Rules, Art 81; HIKAC Rules, Art. 15.1 (requiring the parties to communication in Chinese or English prior to the tribunal’s determination of the language of the arbitration).

²⁸³ Faienza, *supra* note 279.

²⁸⁴ *Id.*

²⁸⁵ Graefe, *supra* note 257, at 51

²⁸⁶ *E.g.*, JAMS Rules, Art. 17.2.

²⁸⁷ *E.g.*, ICC Rules, Art. 9(1)(a).

²⁸⁸ *E.g.*, SIAC Rules, Art. 39.1 (requiring the arbitrators and the disputing parties “at all times treat all matters relating to the proceedings and the Award as confidential”); HKIAC Rules, Art. 45.1 (stating that “no party or party representative may publish, disclose, or communicate any information relating to the arbitration and the award”); LCIA Rules, Art. 30.1 (mandating that the parties “keep confidential all awards in the arbitration, together with all materials in the arbitration created for the purpose of the arbitration and all other documents produced by another party in the proceedings”).

²⁸⁹ Graefe, *supra* note 257, at 51.

Even if the arbitration proceedings and all party submissions are kept confidential, the enforcement of the award in a national court may not be. Thus, to maintain confidentiality even during the enforcement stage, franchisors should specify that the confirmation of an award is to be confidential, *i.e.*, that the enforcement proceeding be under seal.²⁹⁰

Another area for increased protection of confidential information relates to the award itself. Arbitration awards come in two major forms: (1) standard and (2) reasoned.²⁹¹ To maximize franchisors' desire for confidentiality, franchisors could opt for a standard award. A standard award simply states the result of the arbitration.²⁹² This type of award ensures that franchisors' confidential information are kept out of the public spotlight. However, a major drawback for such bare-boned awards is a lack of a complete record, thus creating "tremendous obstacle" for the party seeking judicial vacatur or arbitral appeal.²⁹³

On the other hand, a reasoned award provides sufficient details to justify the tribunal's decision, without the rigor required for findings of facts and conclusions of law.²⁹⁴ A reasoned award is the most popular form of award for many tribunals.²⁹⁵ "A reasoned award is the quintessential dispositive document. Whatever it contains may be published and made available for appeal or judicial review."²⁹⁶ As such, to protect confidential information in a reasoned award, franchisors should request that confidential information be excluded from the tribunal's reasoning.

Lastly, it is worth noting that when disputes are handled privately and in confidence, franchisors and franchisees have a better chance at salvage their business relationship.²⁹⁷ A downside to this secrecy is that it removes any deterrence effects otherwise associated with a highly publicized litigation or arbitration. To that end, if franchisors' main purpose for arbitrating their claims is to send a message to their

²⁹⁰ See generally, *Baxter Int'l Inc. v. Abbott Labs.*, 297 F.3d 544, 547 (7th Cir. 2002) (holding that the parties' secrecy agreements did not bind the court or warrant maintaining of secrecy).

²⁹¹ A finding of facts and conclusions of law is more like a subset of a reasoned award rather than its own category as suggested by the court in *Tully Const. Co. v. Canam Steel Corp.*, No. 13 CIV. 3037 PGG, 2015 WL 906128, at *4 (S.D.N.Y. Mar. 2, 2015), thus it will not be discussed separately in this article.

²⁹² *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 844 (11th Cir. 2011).

²⁹³ *Physicians Ins. Capital v. Praesidium All. Grp.*, 562 F. App'x 421, 424 (6th Cir. 2014) (the court declined to vacate an award when the moving party failed to provide the court with a transcript of the arbitration proceedings or a reasoned award. Many arbitral institutes allow parties to have a transcript of the arbitration proceedings made, which could be a workaround for a bare award while still preserving a record for appeal. But in this case, the moving party waived its right to have a transcript made).

²⁹⁴ *Schurtenberger*, 646 F.3d at 844; *Tully Const.*, 2015 WL 906128, at *14 ("[A] reasoned award need not discuss every single fact, just the key findings will suffice.").

²⁹⁵ *E.g.*, DIS, JAMS, LCIA, SCC, SIAC, SRIA, UNCITRAL, VIAC, WIPO, ICC.

²⁹⁶ Laura Kaster, *Choosing Between a Bare Award and a Reasoned Award in Arbitration*, ADR TIMES (Feb. 20, 2019), available at <https://www.adrtimes.com/library/choosing-between-a-bare-award-and-a-reasoned-award-in-arbitration>.

²⁹⁷ Blaire A. Rebane & Eric C. Little, *Arbitration of Franchise Disputes*, 4 C.L.A.R. 1, 2-3 (2015).

franchisees that transgression will not be tolerated, having a cloak of confidentiality over the arbitration process will surely defeat that purpose.²⁹⁸

H. Mastering the Art of Arbitration in Master Franchise Agreements

Finally, due to the popularity of master franchising in the international space,²⁹⁹ this article will conclude with a brief discussion on how franchisors can maneuver through the intricacies of arbitrating sub-franchisee agreements.

In a traditional master franchise setup, franchisors grant the franchising right to master franchisees, which allows master franchisees to sub-franchise individual operating units in a foreign territory.³⁰⁰ Master franchisees essentially assume the role of the franchisor in their exclusive jurisdictions.³⁰¹ This unique business arrangement creates two sets of agreements: one international agreement between franchisors and their master franchisees, and one domestic agreement between master franchisees and their sub-franchisees.³⁰² As a result, there is no privity between franchisors and the sub-franchisees.³⁰³ Absent special language in the arbitration agreement linking the parties, it may be difficult for franchisors to compel arbitration of the sub-franchisees due to a lack of consent—a defining characteristic of arbitration.³⁰⁴ This is one example demonstrating arbitration's limited suitability with respect to multiparty disputes, as discussed in the beginning of this article.

To overcome the issue of privity, franchisors should insist on two things in the sub-franchisee agreements. First, franchisors should insist that the agreements between the master franchisees and the sub-franchisees clearly and unequivocally identify the franchisor by name as the intended third-party beneficiary.³⁰⁵ Second, franchisors should further insist that the application of the sub-franchisee agreements not be limited to the signatories.³⁰⁶ Avoid using generic terms such as “between the parties” in the subfranchisee agreements, as “courts will likely not recognize a would-be third-party beneficiary if the contract’s application is limited specifically to the signatories.”³⁰⁷

If either of the above options fails, as an alternative, franchisors can also insist on an automatic assignment provision to be added to the master franchise agreements and

²⁹⁸ *Id.* at 3.

²⁹⁹ See generally, UNIDROIT Guide, *supra* note 241.

³⁰⁰ *Id.* at 2.

³⁰¹ *Id.*

³⁰² *Id.* at 3.

³⁰³ *Id.*

³⁰⁴ *Id.* at 206 (in the context of an international master franchising transaction, “[i]f dispute resolution is not dealt with in the agreement, then one of the parties may find that there is no effective way to resolve a dispute when a problem subsequently arises.”).

³⁰⁵ Kirk W. Reilly, *Franchisors as Third-Party Beneficiaries of Master Franchise Agreements - A Matter of Intent*, 26 FRANCHISE L.J. 199, 202 (2007).

³⁰⁶ *Id.*

³⁰⁷ *Id.*

the sub-franchisee agreements, so that upon default or termination of the master franchisees, the sub-franchisee agreements are automatically assigned to the franchisors.³⁰⁸ This will create the missing link between the otherwise unrelated parties.

As discussed in Section II(D)(b), control is another issue surrounding master franchise agreements. To increase control at both the master franchisee and the sub-franchisee levels, a franchisor should set a very short notice of termination period in the master franchise agreement, just within the scope of the law. If possible, such notices should be delivered without an opportunity to cure, unless required by law. Additionally, franchisor should specify the form of the subfranchisee agreement. Doing so provides the franchisor with control and consistency in the deployment of its franchise model across jurisdictions.

Regardless of which provisions franchisors choose to adopt and incorporate in their arbitration agreements for added protection, the bottom line is clear—in international arbitration, name your option or be prepared to pay the price.

³⁰⁸ *Id.* at 200.