Recent Developments in International Arbitration

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> It must be generally admitted that hitherto our legal tribunals have been altogether inadequate to speedily investigate and promptly decide upon purely commercial and business disputes.
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> I but express the general feeling of business men when I say that, in the controversies which arise among them, they desire above all things that these controversies be rapidly as well as equitably decided. In the vast majority of cases, promptness of decision by a competent and disinterested arbitrator is their ideal of justice. Procrastination is the thief, not only of their time, but of their energies. Prolonged law-suits are the tumors and cancers of business men, eating into the very substance of their life.

Remarks of Elliott C. Cowdin before the State Legislature of New York in support of creation of a Court of Arbitration on February 10, ***1875***. [2]

It seems that the more things change, the more they stay the same. Just as the need for commercial arbitration was so plainly evident in 1875, the need for fair and effective international arbitration is equally evident today. International arbitration, coupled with widespread acceptance of treaties recognizing it, provides a critical component facilitating transnational commercial ventures. It does so by reducing commercial and political risk for investors. This paper will examine the respective benefits and disadvantages of litigation and arbitration in commercial disputes. It will then use that analysis to explore the recent changes that have taken place in the landscape of international arbitration as institutions and governments compete for dispute resolution business in the global marketplace. Four concepts should be kept firmly in mind as we proceed. First, arbitration is a creature of contract, not law. The parties to a transaction have virtually unlimited freedom to design their dispute resolution procedures if they choose to do so. Second, arbitration is deeply rooted in different cultures and thus subject to significant variations from industry to industry and country to country. For example, attitudes toward discovery vary widely depending on the legal system of the country where the arbitration is seated. Arbitration in construction may be different from arbitration of financial disputes. No one-size-fits-all rules work. Third, the predominance of digitally created and electronically stored information (ESI) has created enormous new problems for every form of dispute resolution. Fourth, global business competition has created both a global marketplace for commercial dispute resolution and a greater need for fair, efficient, and cost-effective ADR. Institutions providing ADR services have addressed the challenges created by globalization and ESI and made significant changes in their procedures and rules in order to remain competitive. Those changes are designed to address the perceived disadvantages of arbitration, as opposed to litigation, and

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[2] As reported in the NY Times on February 11, 1875.

provide solutions for problems that exist in many court systems. Let us begin with a look at the pros and cons of both dispute resolution options, keeping in mind that the choice of a dispute resolution process is, at its heart, a decision about risk management.

I. LITIGATION

A. PROS

Litigation is free in the sense that government provides the facilities and personnel to resolve the dispute. The parties only pay for their own counsel.

Court proceedings in most countries are public. That transparency insures public knowledge of issues that may have an impact beyond the parties to the dispute.

The performance of the decision makers is public, providing for at least some review of and knowledge about their performance. The public nature of the proceedings is believed to be a check on corruption.

Most importantly, the public resolution provides for creation of a body of knowledge that provides some certainty to the attorneys and counselors who must advise clients on the risks involved in a particular transaction, whether in a common law or civil code jurisdiction.

There is generally an appeal process that provides for some form of review of the initial proceedings. Errors can be corrected.

The rules of evidence and procedures, generally clear and well known in advance, are applied.

American-style litigation, at the least, includes the right to cross-examine witnesses with little constraint.

Each side gets to present its story in the way it chooses.

Parties can discover all relevant information, thus gaining far wider access to the opposing side's records and information.

There is more immediate access, providing for predisposition injunctive or other relief in circumstances where it is warranted.

Courts may have broader powers to protect or secure assets for a claimant.

Courts may have broader powers to enforce confidentiality agreements and trade secrets.

Courts implementing discovery may not only become more conversant with issues involving electronically stored information but also have specific rules, regulations, and case law to guide them. They are in a better position to handle technically difficult e-discovery issues.

Courts have off ramps for settlement negotiations or mediation. In the U.S., few cases actually get tried; most are settled.

B. CONS

Litigation is a public process. Disputes which the parties want to remain private do not belong in court systems.

The prevalence of ESI combined with liberal discovery rules makes litigation more costly. We will cover more on that later.

Parties do not get to pick their decision maker.

Decision makers may not have any expertise in the industry or issues coming before them. There are some exceptions in business and commercial courts in the U.S., the United Kingdom, and Europe, but many judges will be general jurisdiction judges.

In jurisdictions such as the U.S., where there are civil jury trials, the threat of a runaway jury verdict exists.

Litigation has a reputation of taking too long. Again, there may be exceptions with business courts and "rocket dockets" in parts of the U.S., but those are exceptions. Courts around the world have limited resources and time. They are therefore perceived as less efficient. State courts in the U.S. have been particularly hard hit with budget cuts and loss of personnel. The longer it takes to get to trial, the more expensive the process. Five to eight year delays in some countries may result in the denial of justice.

Parties operate on the court's schedule, not their own. The court's schedule is usually fixed well in advance.

There is little flexibility in the system. One size fits all, making custom tailored processes and procedures impossible.

There may be a fear of "prejudice" or "bias" in local courts.

Absent effective treaties, it may be more difficult to enforce or collect on a local judgment in a foreign jurisdiction. That factor may be especially evident in new and rapidly developing countries.

II. ARBITRATION

A. PROS

The first and foremost reason for choosing arbitration over litigation is confidentiality. Arbitration is not a public proceeding. Business disputes can be resolved without competitors, other customers, creditors, or suppliers knowing about the dispute or the outcome. That confidentiality remains true only to the extent that one of the parties does not have to resort to the courts to enforce the award. Thus the confidential nature of arbitration is a risk management tool that helps eliminate exposure to additional litigation resulting from public proceedings. It also serves to keep confidential business information private.

By choosing arbitration, parties can select their decision maker or the group from which the decisions makers will be drawn. With careful drafting, the parties ensure that the decision makers in their disputes will have expertise in the area of law or commercial practice in which the dispute arises. Arbitrators with expertise and knowledge of the particular industry should produce faster, fairer results. No time is wasted educating them as might occur in litigation.

Arbitration is a creature of contract. Therefore the parties can dictate the pre-hearing process, the hearing process, the place of arbitration, and the applicable laws or rules and regulations. They can even provide a time limit for the entire process. This degree of control is dependent on the lawyers drafting the arbitration provisions. Unfortunately, arbitration provisions are frequently addressed last in the negotiation process, and no party wants the deal to fall through over the arbitration provisions. The provisions are drafted by transaction lawyers, not experienced arbitrators. The parties miss an ideal opportunity for risk management when the arbitration provisions are not given the serious consideration warranted.

Arbitration should be quicker to conclusion than litigation. I say *should be* because, as will be discussed below, one of the current criticisms of arbitration is that it has been slowed by an increase in the use of discovery. Still, when compared to long delays in some local courts, arbitration is swift -- a significant factor where an early answer is critical or the country experiences rapid inflation. Arbitration can be slowed when difficulties arise in finding suitable dates for all three members of a panel consisting of experienced, in-demand arbitrators. The speed of arbitration, however, can be controlled by proper drafting.

In international transactions, the ability to specify the language of the arbitration by contract often adds another element of control and proves to be a significant advantage by reducing costs and time expended.

There is also a perception that there is a greater chance of neutrality in the decision makers in arbitration. International arbitrators, in particular, are selected by the parties and depend upon their reputation for selection. Any demonstration of bias or prejudice

could result in loss of reputation and work. Local judges, on the other hand, may be subject to local pressures.

Cost is a fairly neutral factor. Arbitration can be expensive, and the parties are paying the full bill. Only when arbitrators manage the process effectively to shorten the procedures and make them more effective will cost savings occur. Good management and use of disclosure rather than discovery can result in significant savings over the U.S. litigation system. Where arbitrators use extensive pre-hearing disclosure and new techniques such as collective witness testimony and subject matter organization of witnesses, especially with experts, cost savings can occur.

Ease of enforcement or collection can be a positive factor. If the parties are careful in their drafting process they can select seats of arbitration and procedures which make it easier to enforce and collect foreign arbitral awards in local courts. If the parties have selected a seat of arbitration in a country that is a signatory to the New York Convention, enforceability should be straightforward and not difficult.

Finality is a double-edged sword. Typically there is no appeal from an arbitral award, and challenging awards in local courts is difficult. That finality can be both a blessing and a curse. In assessing risks, one factor that must be considered is the finality of the process and the limited availability of appeal if the arbitrators make a mistake as to law or fact.

Technology will offer a greater opportunity for cost savings in arbitration than it will in litigation. Videoconferencing, e-filing, and other uses of technology are more adaptable in the arbitration context.

In summary, arbitration offers parties far greater control over the process and procedures of dispute resolution ***if*** they draft their arbitration provisions carefully and comprehensively. Those provisions are not always addressed.

B. CONS

The difficulty in challenging an arbitration award is a risk factor parties must consider. When you arbitrate you get the finality you ask for whether it is correct or what you wanted. There is generally no appeal to correct errors as would be available in litigation. Likewise, judges, particularly U.S. judges, are extremely reluctant to intervene in the arbitration process for any reason.

Cost can be the same or greater. The decision to use arbitration should not be made on a cost basis unless the parties have negotiated detailed specific procedures designed to limit the time and expense of arbitration.

There are no defined rules or processes for discovery of electronically stored information. The U.S. Federal Rules of Civil Procedure and many state court rules now provide significant guidance in resolving e-discovery issues. Such issues pose material

costs and create troublesome business problems such as data retention. The absence of clear guidelines for e-discovery in arbitration can be a significant drawback, and arbitrators may not be sufficiently sophisticated in dealing with the complex issues involved. Virtually all information is created electronically today, making e-discovery a risk factor to be considered in decision-making.

Arbitrators are not judges, and their decisions do not have the force of judicial decisions. As will be discussed more fully at this conference, some courts may be reluctant to honor discovery ordered by an arbitrator if that order conflicts with data privacy laws in the particular jurisdiction.

The need for interim relief is something parties should consider carefully. Historically, arbitration has not easily provided interim relief. Technology licensing provides a good example. Where a licensee has violated an agreement by improperly disclosing the licensor's trade secrets, monetary damage may not be the best remedy for the licensor. In that instance, the licensor would want access to a court that could swiftly enter an injunction providing the necessary relief. Unless the parties have provided for interim relief or adopted rules that permit it, arbitration may not be their best choice. In today's rapidly changing, highly technical world, interim relief may become a bigger issue to be considered in drafting arbitration provisions or making decisions about whether to arbitrate.

Similarly, while the arbitration process is confidential, arbitrators have no jurisdiction over third parties who might get access to confidential business information through the arbitration process. That lack of power is a negative factor to be considered and addressed.

There are few off-ramps in arbitration. Most arbitration clauses do not provide for other forms of ADR such as mediation. Few cases go to trial in the U.S. They get settled. Arbitration does not always offer a settlement opportunity, thus resulting in more hearings.

For the adversarial system purist, the arbitration system does not provide the optimum opportunity to ascertain the truth. Discovery is limited. There is no access to "all relevant information" and no opportunity to rummage through the other side's documents in hopes of finding the "smoking gun" email. There are few depositions and no opportunity to see the other side's witnesses ahead of the hearing. Cross-examination will be limited and controlled. The lawyer may not get to present his or her case in the preferred order or fashion. There might not even be direct testimony by his or her witnesses. Almost all evidence comes in with the understanding that the arbitrator will know what is critical. There are no rules of evidence. There may be serious restrictions on accessibility to third-party information. The typical U.S. litigator will find the system frustrating and "less fair." Perhaps that is the reason some fear that arbitration has become the new form of litigation (a subject to be discussed below).

The contractual nature of arbitration dictates that its effectiveness will be determined by the ability of the lawyers drafting the arbitration provisions to meet the needs of their clients in the event a dispute occurs. Those needs will vary widely depending on the citizenship of the parties, the industry they are in, the nature of the transaction, the location in which disputes may arise, and the risk aversion of management.

C. RECENT CRITICISM

In recent years, the level of dissatisfaction with arbitration, particularly in the U.S., has markedly increased. The problems are well documented in Thomas Stipanowich's excellent article entitled "Arbitration: The 'New Litigation." Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. Ill. L. Rev. 1 (2010). In summary, his article suggests that the current dissatisfaction with arbitration is due to the increased costs and delays resulting from the adoption of broad discovery and motion practice, coupled with the absence of an appeal. In the view of many corporate counsel, their companies were being subjected to the same costs and delay as litigation without the benefit of the appeal litigation provided. Stipanowich states:

> Despite repeated evidence that business lawyers tend to view arbitration more favorably than litigation in key categories (fairness, speed to resolution, and cost) the literature frequently focuses on various perceived shortcomings, including unqualified arbitrators, uneven administration, difficulties with arbitrator compromise, and limited appeal. There are, moreover, frequent complaints regarding delay, and high cost. In spite of efforts by national institutions to enhance arbitrator quality and provide guidance for improved practice, it appears that discontent with commercial arbitration has never been more palpable if not more widespread.

Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. Ill. L. Rev. 1, 5 (2010).

Many of the problems associated with cost, delay, and motion practice can be attributed to the nature of and problems associated with ESI and discovery in general. They mirror problems found in court systems.

D. LEARNING FROM LITIGATION

The dissatisfaction with the American legal system was and still is pronounced. It resulted in attention being devoted to improvement of that system. The most far-reaching approach was advocated in the Final Report on the Joint Project of The American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System. http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4053. March 11, 2009, revised April 15, 2009. The major themes of that study were instructive for arbitration. The study found that existing rules and

procedures did not lead to early identification of contested issues, resulting in a lack of focus in discovery. The study recommended that judges have a more active role at the beginning of a case in designing the scope of discovery. In addition, the study found that different types of cases need different kinds of rules. It emphasized that the primary goal of its discovery recommendations was to "change the default from unlimited discovery to limited discovery," recognizing that all facts are not necessarily subject to discovery. The study endorsed the importance of proportionality in electronic discovery. It recommended assignment of each case to a single judicial officer. It endorsed setting early initial conferences and setting realistic trial dates that do not shift. It suggested off-ramps for mediation or other ADR procedures. It also tacitly recognized the competitive market for dispute resolution in an Appendix that summarized the significant changes made by England, Scotland, Spain, Germany, Canada, and New Zealand in an effort to improve litigation in those countries.

E. ARBITRATION INSTITUTIONS REACT

If the problems which were causing much of the criticism of arbitration were imported from the litigation system, then the fixes for the litigation system suggested above constituted guideposts for the improvement of arbitration as well. In the competitive market place for dispute resolution, if arbitration could provide the solutions to the problems existing in the litigation system, it could restore confidence in the arbitration system. Beginning in 2009 many institutions providing arbitration services, especially international arbitration services, began revising their rules and procedures to address the dissatisfaction with arbitration and the problems created by electronically stored information. The last two years have seen significant improvement in rules and procedures, some increasing uniformity of general concepts concerning discovery, a blending of the American and European approach and, somewhat surprisingly, some court systems taking an increasing interest in providing arbitration services. Steve Bennett's paper details the new AAA and JAMS rules and some changes in international rules. Those changes will not be repeated here. In the last two years alone, changes in rules and protocols have been made by AAA, CPR, CCA, and the IBA. The relatively new IBA Rules on the Taking of Evidence in International Commercial Arbitration may be the most significant development. ICC has a Task Force looking at amendments to its rules. France has adopted sweeping new rules on arbitration; the Delaware Chancery Court, and The Commercial Courts and Technology and Construction Courts in the United Kingdom, all have seen renewed interest in their judges acting as arbitrators in certain circumstances. The reader may find the following links useful in comparing different rules and procedures and studying the differences in institutional approaches.

United Nations Commission on International Trade Laws (UNCITRAL) Rules of Arbitration
http://www.jus.uio.no/lm/un.arbitration.rules.1976/

International Chamber of Commerce (ICC) Rules of Arbitration
http://www.iccwbo.org/court/english/arbitration/rules.asp

ICDR Rules of Arbitration (American Arbitration Association)
http://www.adr.org/sp.asp?id=33994

London Court of International Arbitration (LCIA) Rules of Arbitration
http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx

International Bar Association (IBA) Rules on the Taking of Evidence in International Commercial Arbitration
http://www.ibanet.org/images/downloads/IBA%20rules%20on%2020the%20taking%20of%20Evidence.pdf

College of Commercial Arbitrators Protocols for Expeditious, Cost-Effective Commercial Arbitration
http://www.thecca.net/CCA_Protocols.pdf

International Institute for Conflict Prevention and Resolution (CPR), Global Rules for Accelerated Commercial Arbitration
http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/608/Global-Rules-for-Accelerated-Commercial-Arbitration.aspx

CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration
http://cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/614/CPR-Protocol-on-Disclosure-of-Documents-and-Presentation-of-Witnesses-in-Commercial-Arbitration.aspx

A rule-by-rule or protocol-by-protocol comparison is beyond the scope of this paper. The new rules and protocols adopted by the various institutions have clearly addressed the perceived shortcomings of arbitration and begun the process of dealing with the place and scope of "discovery" in international arbitration. Certain themes are consistent in the new rules and recommendations. Those themes provide insight into the future of international arbitration.

The new initiatives do nothing to limit the power of arbitrators. They all recognize that the flexibility and control afforded arbitrators is key to achieving the promises of arbitration for faster, cost-effective procedures.

Delay has been addressed by setting specific deadlines in some rules or encouraging parties to place deadlines in their agreements. Fast-track or accelerated procedures such as the CPR Global Rules for Accelerated Commercial Arbitration are

recommended. The CCA Protocols directly address the use of deadlines. *See,* for example, College of Commercial Arbitrators, *Protocols for Expeditious, Cost Effective Commercial Arbitration* (Thomas J. Stipanowich et al. eds., 2010) at 4; http://www.thecca.net/CCA_Protocols.pdf.

Cost containment is addressed in most rules by making the use of one arbitrator the default rule unless the parties contract otherwise. Arbitrators have the authority to restrict motion practice and are strongly encouraged to do so in order to contain costs and prevent delay.

There is a renewed emphasis on management starting with the initial conference. *See*, for example, International Institute for Conflict Prevention and Resolution, Global Rules for Accelerated Commercial Arbitration Rule 10, 2007 CPR Rules for Non-Administered Arbitration of International Disputes (effective November 1, 2007). The focus on management mirrors the recommendations with respect to litigation made by the ACTL/IAALS Joint Project. Arbitration offers far more flexibility in management than litigation. Arbitrators have complete control over the process and are not as constrained by rules of procedure.

A significant aspect of management is the emphasis on early disclosure. Early disclosure promotes identification of key issues for the parties and the arbitrators. That identification can help the arbitrator focus the process on resolving the key issues without wasting time and money on peripheral disputes. Disclosure reduces the need for discovery or can at least narrow its scope.

Clearly, the model which is evolving 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. Disclosure generally involves producing with a claim or defense the documents upon which the party will rely, and disclosure of witness, as well as the subject matter and content of their testimony. *See,* for example, LCIA Rules, Art. 15.6. Under the CPR Accelerated Rule 7, the parties are required to file with each Claim or Defense the following: a detailed statement of the claim, including a description of the testimonial and documentary evidence supporting the claim; a statement of the relief and damages sought; names and addresses of fact witnesses; expert witness identification; and "copies of documents that support each element of Claimant's claim." With such broad disclosure, "discovery" should be eliminated or significantly reduced.

Attached in Appendix A are Articles 3 and 9 of the IBA Rules and Rule 11 of the CPR Accelerated Rules covering document production. They represent the current and future approach to discovery after full disclosure. There are key generalizations that can be made about both. The party moving for discovery will have the burdens of establishing need, justifying or bearing the costs, demonstrating materiality, and avoiding delay. It will be a high burden. The new rules essentially reject a "one-size-fits-all" approach and a "no-stone-left-unturned" philosophy. While the term *relevance*

appears in both, the key word is *material*. It is undefined, but the thrust of the rules and their philosophy indicate that material will be defined as "outcome determinative" or "critical to ascertainment of the truth of a fact at issue" or some variation thereof. The underlying premise appears to be that there is a recognition that, even after full disclosure, justice may require discovery in limited circumstances, but there must be a demonstrable need, not just a desire, to have the requested information. The burden is placed upon the requesting party to be specific about the requested information, including defining search terms where necessary. Concepts familiar to The Sedona Conference abound in the rules, including assessment of cost and burden, impact of delay, proportionality, cost allocation, and the use of independent experts. There is no place in either rule for broad generalized discovery requests. The high bar set for requesting parties is built upon the requirements of specificity, necessity and materiality, coupled with the avoidance of undue cost and delay.

Privilege will be recognized. Privilege has not historically been an issue in international arbitration because there was no discovery. No party or counsel had to worry about inadvertent production of ESI that contained attorney-client or attorney-work product information. The parties produced only the documents upon which they relied. With the concept of some discovery creeping into the process, the privilege issue had to be addressed by the new rules. Both sets of rules recognize the power of the tribunal to exclude evidence or prevent discovery of information on the grounds of legal impediment or privilege under the legal or ethical rules determined by the tribunal to be applicable. *See* International Institute for Conflict Prevention and Resolution, Global Rules for Accelerated Commercial Arbitration, Rule 11 and IBA Rule, Art. 9; *see also* ICDR Rules, Art. 20 for Non-Administered Arbitration of International Disputes (effective November 1, 2007).

Privacy concerns are not ignored. The new sets of rules also authorize the tribunal to deal with privacy issues arising in connection with national privacy protection laws. The rules permit the tribunal to deny discovery or admissibility of evidence where security concerns or privacy rights of a party or witness outweigh the need of another party to the proceeding to have access to the evidence. *See* IBA Rules, Article 9 (2) (b) and (f) and CPR Acc. Rule 11.4(h).

The idea of using mediation off-ramps is starting to appear. *See,* for example, CCA Protocol, page 14 and CPR Acc. Rule 19.1.

There is little doubt that arbitration institutions have heard the criticisms and responded with an effort to create the " New Arbitration," in contrast to arbitration becoming the "New Litigation." Competition will insure that the race is to the top from a quality standpoint, not a race to the bottom.

F. GOVERNMENTAL RESPONSE

Governments have recognized the competitive ADR market.

The most striking example is the recent reform of arbitration law in France pursuant to a decree of 13 January 2011. The new law took effect on 1 May 2011. This first refresh of arbitration law in thirty years makes significant changes, especially to international arbitration. Under the decree, international agreements to arbitrate no longer are subject to conditions of form. Arbitration clauses cannot be nullified for failure to conform to statutory requirements.

The law created a new judicial officer, the *juge d'appui,* or support judge. Parties may apply to the *juge d'appui* for interim or protective measure so long as the tribunal has not been constituted. The grounds must still be urgent. For international arbitration, the new degree concentrates jurisdiction in the chief judge of the *tribunal de grande instance* of Paris. Many provisions are aimed at speeding up the process, and the *juge d'appui* is given powers to resolve issues of the appointment of arbitrators as well as their independence and impartiality in order to do so.

The decree makes time of the essence for arbitrators and parties, creates a statutory duty of confidentiality, confirms that the tribunal alone has authority to decide challenges to its jurisdiction, and recognizes the doctrine of estoppel. It establishes tribunal authority to issue interim and protective orders. It creates a new process for obtaining third party documents and testimony and contains many provisions designed to streamline the arbitration process and expedite the final decision.

In the United States, the premier business court, the Delaware Court of Chancery, has adopted new rules providing that its Chancellor and Vice Chancellors may serve as arbitrators under certain circumstances. Under the rules, parties may voluntarily agree to arbitrate before a chancery judge if one party is a business entity formed under Delaware law and the amount in controversy exceeds one million dollars. If the parties agree, the arbitral decision may be appealed to the Delaware Supreme Court.

It is worthy of note that in the United Kingdom, judges of the Commercial Court and the Technology and Construction Court may also act as arbitrators.

In The Hague a new arbitration institution is being created specifically to provide dispute resolution services to parties to disputes involving complex international financial agreements such as derivatives and credit default swaps. PRIME Finance, anagram for the Panel of Recognised International Market Experts in Finance, will also undertake an education program for judges and regulators. For more information contact Ms. Camilla Perera at c.perera@worldlegalforum.org.

III. CONCLUSION

Arbitration institutions, arbitrators, and lawyers have faced escalating criticism of the arbitration process, both in the United States and internationally. Many of the complaints derived from increasing costs and delays that were attributable to the creeping use of discovery, especially discovery of ESI in arbitration proceedings. The response has

been a concerted effort to design a new arbitration rather than have arbitration become the new litigation. The result is a blending of practices in Europe and the United States and the United Kingdom. Procedures have been designed to streamline the process, cut costs, expand disclosure and limit discovery to critical needs.

Globalization has complicated risk management and increased the need for cost effective, prompt, and fair dispute resolution provided by experts. It has created a new marketplace for dispute resolution in which the focus is on providing better service at less risk. There are risks associated with both litigation and arbitration that will never disappear. It is important that both courts and arbitral panels operate as efficiently and transparently as possible so that business managers can make intelligent risk management decisions concerning dispute resolution. The historical benefit of arbitration has been the ability of businesses and industries to design by contract custom-tailored processes which reduced their risks. That goal can still be met. It requires effort on the part of business managers who focus on what their risks are and design processes that address those problems. It requires lawyers who understand both the business problems and arbitration procedures resulting in the right arbitration provisions being included in the contract. It requires arbitration institutions with streamlined procedures. No rules are adequate if not enforced by well trained arbitrators with experience in the field and the ability and willingness to manage the arbitration process.

APPENDIX A

I. IBA Rules on the Taking of Evidence in International Arbitration Adopted by a resolution of the IBA Council 29 May 2010 International Bar Association

Article 3 Documents

1. Within the time ordered by the Arbitral Tribunal, each Party shall submit to the Arbitral Tribunal and to the other Parties all Documents available to it on which it relies, including public Documents and those in the public domain, except for any Documents that have already been submitted by another Party.

2. Within the time ordered by the Arbitral Tribunal, any Party may submit to the Arbitral Tribunal and to the other Parties a Request to Produce.

3. A Request to Produce shall contain:
(a) (i) a description of each requested Document
sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner;
(b) a statement as to how the Documents requested are relevant to the case and material to its outcome; and
(c) (i) a statement that the Documents requested are not in the possession, custody or control of the requesting Party or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such Documents, and
(ii) a statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party.

4. Within the time ordered by the Arbitral Tribunal, the Party to whom the Request to Produce is addressed shall produce to the other Parties and, if the Arbitral Tribunal so orders, to it, all the Documents requested in its possession, custody or control as to which it makes no objection.

5. If the Party to whom the Request to Produce is addressed has an objection to some or all of the documents requested, it shall state the objection in writing to the Arbitral Tribunal and the other Parties within the time ordered by the Arbitral Tribunal. The reasons for such objection shall be any of those set forth in Article 9.2 or a failure to satisfy any of the requirements of Article 3.3.

6. Upon receipt of any such objection, the Arbitral Tribunal may invite the relevant Parties to consult with each other with a view to resolving the objection.

7. Either Party may, within the time ordered by the Arbitral Tribunal, request the

Arbitral Tribunal to rule on the objection. The Arbitral Tribunal shall then, in consultation with the Parties and in timely fashion, consider the Request to Produce and the objection. The Arbitral Tribunal may order the Party to whom such Request is addressed to produce any requested Document in its possession, custody or control as to which the Arbitral Tribunal determines that (i) the issues that the requesting Party wishes to prove are relevant to the case and material to its outcome; (ii) none of the reasons for objection set forth in Article 9.2 applies; and (iii) the requirements of Article 3.3 have been satisfied. Any such Document shall be produced to the other Parties and, if the Arbitral Tribunal so orders, to it.

8. In exceptional circumstances, if the propriety of an objection can be determined only by review of the Document, the Arbitral Tribunal may determine that it should not review the Document. In that event, the Arbitral Tribunal may, after consultation with the Parties, appoint an independent and impartial expert, bound to confidentiality, to review any such Document and to report on the objection. To the extent that the objection is upheld by the Arbitral Tribunal, the expert shall not disclose to the Arbitral Tribunal and to the other Parties the contents of the Document reviewed.

9. If a Party wishes to obtain the production of Documents from a person or organisation who is not a Party to the arbitration and from whom the Party cannot obtain the Documents on its own, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the requested Documents, or seek leave from the Arbitral Tribunal to take such steps itself. The Party shall submit such request to the Arbitral Tribunal and to the other Parties in writing, and the request shall contain the particulars set forth in Article 3.3, as applicable. The Arbitral Tribunal shall decide on this request and shall take, authorize the requesting Party to take, or order any other Party to take, such steps as the Arbitral Tribunal considers appropriate if, in its discretion, it determines that (i) the Documents would be relevant to the case and material to its outcome, (ii) the requirements of Article 3.3, as applicable, have been satisfied and (iii) none of the reasons for objection set forth in Article 9.2 applies.

10. At any time before the arbitration is concluded, the Arbitral Tribunal may (i) request any Party to produce Documents, (ii) request any Party to use its best efforts to take or (iii) itself take, any step that it considers appropriate to obtain Documents from any person or organisation. A Party to whom such a request for Documents is addressed may object to the request for any of the reasons set forth in Article 9.2. In such cases, Article 3.4 to Article 3.8 shall apply correspondingly.

11. Within the time ordered by the Arbitral Tribunal, the Parties may submit to the Arbitral Tribunal and to the other Parties any additional Documents on which they intend to rely or which they believe have become relevant to the case and material to its outcome as a consequence of the issues raised in Documents, Witness Statements or Expert Reports submitted or produced, or in other submissions of the Parties.

12. With respect to the form of submission or production of Documents:
(a) copies of Documents shall conform to the originals and, at the request of the Arbitral

Tribunal, any original shall be presented for inspection;
(b) Documents that a Party maintains in electronic form shall be submitted or produced in the form most convenient or economical to it that is reasonably usable by the recipients, unless the Parties agree otherwise or, in the absence of such agreement, the Arbitral Tribunal decides other wise;
(c) a Party is not obligated to produce multiple copies of Documents which are essentially identical unless the Arbitral Tribunal decides otherwise; and
(d) translations of Documents shall be submitted together with the originals and marked as translations with the original language identified.

13. Any Document submitted or produced by a Party or non-Party in the arbitration and not otherwise in the public domain shall be kept confidential by the Arbitral Tribunal and the other Parties, and shall be used only in connection with the arbitration. This requirement shall apply except and to the extent that disclosure may be required of a Party to fulfil a legal duty, protect or pursue a legal right, or enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority. The Arbitral Tribunal may issue orders to set forth the terms of this confidentiality. This requirement shall be without prejudice to all other obligations of confidentiality in the arbitration.

14. If the arbitration is organised into separate issues or phases (such as jurisdiction, preliminary determinations, liability or damages), the Arbitral Tribunal may, after consultation with the Parties, schedule the submission of Documents and Requests to Produce separately for each issue or phase.

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Article 9 Admissibility and Assessment of Evidence

1. The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.

2. The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons:
(a) lack of sufficient relevance to the case or materiality to its outcome;
(b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;
(c) unreasonable burden to produce the requested evidence;
(d) loss or destruction of the Document that has been shown with reasonable likelihood to have occurred;
(e) grounds of commercial or technical confiden- tiality that the Arbitral Tribunal determines to be compelling;
(f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or
(g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.

3. In considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account:
(a) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice;
(b) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of settlement negotiations;
(c) the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen; (d) any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise; and
(e) the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules.

4. The Arbitral Tribunal may, where appropriate, make necessary arrangements to permit evidence to be presented or considered subject to suitable confidentiality protection.

5. If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.

6. If a Party fails without satisfactory explanation to make available any other relevant evidence, including testimony, sought by one Party to which the Party to whom the request was addressed has not objected in due time or fails to make available any evidence, including testimony, ordered by the Arbitral Tribunal to be produced, the Arbitral Tribunal may infer that such evidence would be adverse to the interests of that Party.

7. If the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may, in addition to any other measures available under these Rules, take such failure into account in its assignment of the costs of the arbitration, including costs arising out of or in connection with the taking of evidence.

II. INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION AND RESOLUTION: Global Rules for Accelerated Commercial Arbitration (the "Accelerated Rules")

ACCELERATED RULE 11: DISCLOSURE OF DOCUMENTS

11.1 Each party shall serve on the opposing party, within the time ordered by the Arbitral Tribunal, all the documents which it may use in the arbitration. A party need not re-serve documents served with either the Statement of Claim, Statement of Defense, Counterclaim or any Reply thereto.

11.2 Any party may request the Arbitral Tribunal to order the production of additional specific documents that are essential to a matter of import in the proceeding for which a party can demonstrate a substantial need. In determining substantial need, the Arbitral Tribunal should consider the likely value and significance of the documents requested against the cost and burdens, both financial and temporal, of the production. The request for production should ordinarily be denied where the production would delay the hearing date, the production is likely to result in cumulative evidence, or where the cost and burden of production would be substantial, especially in view of the amount in dispute. In determining any request for production, the Arbitral Tribunal shall have the power to condition the granting of any such request upon the payment by the requesting party of the reasonable costs of production by the producing party which costs may include reasonable charges for labor incurred in gathering and preparing the documents for production or otherwise limit the obligation to produce, such as by limiting the amount of time to be spent by each party locating or producing documents. The Arbitral Tribunal may appoint a neutral expert to be paid for by the parties as a cost of the proceeding to expedite disclosure. □□

11.3 At any time before the arbitration is concluded, the Arbitral Tribunal may, upon its own initiative, direct any participant in the arbitration to produce to the Tribunal and to the other parties any documents that the Arbitral Tribunal believes to be relevant and material to the outcome of the case. □□

11.4 The Arbitral Tribunal may exclude from disclosure documents for any of the following reasons:

a. Lack of sufficient relevance or materiality;□□b. Legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;
c. Unreasonable burden (including financial burden to the producing party) to produce the requested evidence; □□d. Loss or destruction of the document that has been reasonably shown to have occurred; □□e. Grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling; □□f. Grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; □□g. Considerations of fairness or equality of the parties that the Arbitral Tribunal determines to be compelling; or □□h. Security concerns or privacy rights of a party or witness that outweigh the need of another party to the proceeding to have access to the evidence.

11.5 In case of the failure of a party to produce a document as required by the Accelerated Rules or as ordered by the Arbitral Tribunal, the Arbitral Tribunal may draw adverse inferences and/or the Arbitral Tribunal may take into consideration such failure in awarding the costs of the arbitration proceeding.