603 Doing Business Abroad but Resolving Disputes on Neutral Turf: A Practical Guide to International Arbitration

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Prior to joining Halliburton, Mr. Bullock had been an attorney in private practice and had been an assistant general counsel of a major financial institution. Throughout his legal career, Mr. Bullock's practice has been limited to the conduct and management of contentious dispute resolution through litigation and arbitration, primarily in the area of complex business disputes.
Mr. Bullock is a member of the Oklahoma Bar Association, the State Bar of Texas, and the American Bar Association. He donates his time to community theatre groups and to civic and charitable organizations supporting women's health and women's rights. In addition to that work, he is active in various arts organizations.
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International Arbitration

American companies and their counterparts around the world have seen enormous growth in recent years in the business they conduct outside their own borders. The growth in international trade has brought with it an explosion of international arbitration. Statistics from the world's leading arbitral organizations demonstrate that arbitration has become the preferred method of resolving international business disputes. The American Arbitration Association's international case load more than doubled from 320 cases in 1997 to 672 in 2002. In the first fifty years of its existence, from 1923 to 1973, the International Chamber of Commerce's International Court of Arbitration received roughly 3,000 requests for arbitration. In the thirty years that followed, nearly 20,000 cases were filed with the ICC.

The AAA and the ICC now average more than 600 new case filings a year. There are reports that the China International Economic and Trade Arbitration Commission is now running at over 700 new case filings. Hundreds of other cases are filed annually with the many other organizations specialized in handling international arbitrations including the Stockholm Chamber of Commerce, the London Court of International Arbitration, the Netherlands Arbitration Institute, the International Centre for the Settlement of Investment Disputes, the Singapore International Arbitration Centre, and the Swiss Chambers of Commerce, among others.

Whether they focus on transactions, intellectual property, or litigation, in-house lawyers for companies doing business internationally need skills in all aspects of international arbitration, including counseling, contracting and the arbitral process. These skills require a different knowledge than that required for domestic dispute resolution. The international arbitration process involves procedures unfamiliar to most U.S. lawyers. What works at home does not necessarily travel. The court selection and arbitration clauses that are effective for domestic transactions do not work well in international deals. There are other important considerations, including drafting an appropriate arbitration clause, picking the right place to hold the arbitration, and picking the right arbitrators. There may be a hidden right to arbitration even absent a contractual provision if there is an applicable bilateral investment treaty.

This program is an international arbitration primer. We explain the fundamental considerations that drive the international arbitration process. We provide practical instructions on drafting an arbitration clause. We conclude with an overview of the international arbitral process.

I. WHAT DRIVES INTERNATIONAL ARBITRATION

A. The main driver is the **1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards** (the "New York Convention") (9 U.S.C. § 201, et seq.). (See Tab 1 for a copy of the Convention.)

1. The New York Convention provides that signatory states will enforce international arbitral agreements and, more importantly, awards.

2. The United States and 133 other countries are signatories. These include all of the industrialized countries and all the major trading partners of the United States. The treaty signatories include Canada, U.K., France, Germany, Canada, China, Russian Federation, Mexico, Brazil and Argentina. (See Tab 2 for a list of the member countries to the Convention.)

3. The number of countries which have acceded to the New York Convention is a remarkable achievement when one considers that the total number of countries in the world is 193 (including the Vatican and Taiwan).

4. The United States is not a party to any similar treaty for *court* judgments.

5. Many of the European countries are parties to judgment enforcement treaties. The European Union member states are parties to the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968.[1] The European Union member states and the European Free Trade Area states are parties to the Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 1988. The Lugano Convention extends the jurisdictional rules of the Brussels Convention to the EFTA member states.[2]

6. A number of Latin American countries have entered into a judgment enforcement treaty called the Inter-American Convention on Extra-

[1] The European member states are Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom.

[2] The EFTA member states are Switzerland, Iceland, Norway and Liechtenstein.

Territorial Validity of Foreign Judgments and Arbitral Awards of 1979 (the "Montevideo Convention").[3]

7. Hence, the New York Convention puts international arbitral awards on a higher level than court judgments. An arbitral award governed by the Convention is more readily enforceable around the world than a U.S. court judgment. There is no similar assurance of enforceability for court judgments, even in the courts of England and Canada, or those of America's other close trading partners.

8. The New York Convention provides for very limited grounds for the challenge of an award. None are mandatory; even if one of these grounds exists, it does not automatically result in the setting aside of the award:

   - Incapacity of the parties.
   - Invalidity of the arbitration agreement under the law that governs it.
   - Lack of notice of the arbitration.
   - Lack of opportunity to present one's case.
   - The award deals with matters the parties did not agree to arbitrate.
   - The composition of the arbitral tribunal was not in accord with the parties' agreement or the law of the country where the arbitration took place.
   - The award is non-final or defective under the law of the country where the award was made.
   - The subject matter of the arbitration is not capable of settlement by arbitration in the country where enforcement is sought.
   - The recognition or enforcement of the award would be contrary to the public policy of the country where recognition or enforcement is sought.
   - Some federal courts have set aside awards under the Federal Arbitration Act for manifest disregard of law or evidence. *See, e.g., Halligan v. Piper Jaffray, Inc., et al.*, 148 F.3d 197 (2d Cir. 1998), *cert. denied* 526 U.S. 1034 (1999) (reversing confirmation of arbitral award based on the finding that the arbitrators "ignored the law or the evidence or both").
   - Federal courts have articulated additional federal common law grounds for setting aside an award, including if the award is "arbitrary and capricious" or "[fails] to draw its essence from the underlying contract." *See, e.g., Williams v. Cigna Fin. Advisors Inc.*, 197 F.3d 752, 758 (5th Cir. 1999), cert. denied 529 U.S. 1099 (2000).

9. There is original jurisdiction in the federal courts (and the right to remove thereto) for an action or proceeding to enforce an arbitral agreement or award (or to dispute same) under the Convention. (9 U.S.C. §§ 203, 205.)

10. The provisions of the domestic Federal Arbitration Act govern New York Convention actions and proceedings to the extent they are not in conflict with the Convention.

B. The Inter-American Convention on International Commercial Arbitration of 1975 (the "Panama Convention) (9 U.S.C. § 301, et seq.) also has importance in disputes between nationals of certain countries in North and South America. In cases where both the New York Convention and the Panama Convention apply, the Panama Convention governs if a majority of the parties to the arbitration agreement are citizens of Panama Convention countries, and are members of the Organization of American States. (See Tab 3 for the Panama Convention, a list of its signing and ratifying countries, and a list of the OAS countries.)

C. Other considerations also drive the use of international arbitration, including:

   1. The difficulty in reaching an agreement on whose court to use in international transactions.

   2. U.S. companies are not normally willing to litigate in a foreign court because they do not wish to incur the risks of:

      - The added expense of litigating in a foreign jurisdiction.
      - The danger of being "home-towned".

[3] Argentina, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay, and Venezuela have signed and ratified the Montevideo Convention. Bolivia, Brazil, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Haiti, Honduras, and Panama have signed, but not ratified the Convention.

- Being subject to unfamiliar procedures.
- Being subject to proceedings in another language.
- The lengthy appeals process in many other jurisdictions (most civil code court systems provide for a trial *de novo* on appeal).
- Unpredictability of outcome.
- Inability to be represented by regular counsel.
- Corruption in some foreign courts.

3. Even when a foreign party agrees to litigate in America, problems can arise:
   - No automatic enforcement of U.S. judgments abroad.
   - The U.S. not being a party to any court judgment enforcement treaties.
   - No automatic enforcement even of forum selection clause in most U.S. jurisdictions (courts will examine connection between jurisdiction and transaction).
   - Possibility of a lawsuit abroad challenging the forum selection clause.
4. International arbitration gives the parties the freedom to choose a neutral forum. There is no "home court advantage" for either side.
5. There is no language-related disadvantage for Americans; the vast majority of international arbitrations are conducted in English.
6. The parties have, within certain limits, the freedom to choose a judge, including one with appropriate expertise and of a certain nationality.
   - All the major international arbitral institutions require that party-appointed arbitrators be independent of the party appointing them and act as "neutrals." The "arbitrator as advocate" concept familiar in some domestic arbitration is not accepted in international arbitration.
   - Some jurisdictions impose requirements on the arbitrators. For example, some countries require either the arbitrators or the parties' counsel to be qualified to practice law there. It is important to choose an arbitration-friendly venue at the contracting stage.
7. Only one bite of the apple: no appeals.
8. There is generally no restriction on representation; you may have your regular counsel represent you, even if the case is in a foreign country. (Note that there are some exceptions to this, notably Japan).
9. Privacy. Assuming parties agree, arbitral proceedings and award are beyond the scrutiny of competitors, customers and others.
10. Freedom to mold process to suit case. For example, the parties can agree to limit or eliminate witness hearings, or can hold hearings where witnesses are located.

D. Disadvantages of international arbitration.

1. Cost can be just as high, if not higher, than court litigation.
2. Generally arbitrators follow English rule and award fees and costs to the winner. However, this can be excluded in the contract.
3. It is not necessarily quicker. There are opportunities to tie up the process in many signatory countries. For example, in a case we handled in India, the defendant obtained an injunction prohibiting the arbitrators from issuing their award.
4. Process involves procedures unfamiliar to U.S. lawyers and business people; it is a hybrid of civil code and common law procedures.
5. Awards often involve compromise between arbitrators.

II. DRAFTING THE INTERNATIONAL ARBITRATION CLAUSE

A. Checklist

1. Avoid an ad hoc arbitration clause, i.e., a clause calling for arbitration that is not administered by one of the established arbitral organizations.

2. Provide that the arbitration will be administered by and conducted under the rules of one of the major organizations, all of which have well-established and respected rules, procedures, and lists of arbitrators.

3. The leading organizations are:

   - International Chamber of Commerce, International Court of Arbitration (See Tab 4).
   - American Arbitration Association's International Centre for Dispute Resolution (See Tab 5).
   - Stockholm Chamber of Commerce (See Tab 6).
   - London Court of International Arbitration (See Tab 7).
   - Netherlands Arbitration Institute (See Tab 8).
   - China International Economic and Trade Arbitration Commission (See Tab 9: Arbitration Rules and Financial Disputes Arbitration Rules).
   - International Centre for the Settlement of Investment Disputes (See Tab 10).
   - Singapore International Arbitration Centre (See Tab 11).
   - World Intellectual Property Organization (See Tab 12).
   - Swiss Chambers of Commerce (See Tab 13).

4. Consideration can also be given to using the UNCITRAL Arbitration Rules, which are commercial arbitration rules developed by the United Nations Commission on International Trade Law. (See Tab 14.) However, it is best to provide that any such arbitration will be administered by an established organization. The AAA and the NAI, among others, will administer arbitrations under the UNCITRAL Rules.

5. Place of arbitration. Provide that the place of arbitration will be in a country that has signed the New York Convention and that is arbitration friendly. Arbitration friendly countries include, but are not limited to, the United States, the United Kingdom, the Netherlands, Switzerland, Germany, France, Sweden, Canada, Singapore and Australia.

6. Language of arbitration. Provide that any arbitration will be conducted in English.

7. Number of arbitrators. It is generally advisable to have three.

8. Do not establish pre-qualification for arbitrators. This can serve as a basis for confusion, delay, and potential challenge of proceedings and award.

9. Availability of provisional relief (e.g., access to courts for injunction, attachment, etc., if necessary.) Most rules and procedural law provide for provisional relief, but it is advisable to cover it explicitly. (There is an issue, for example, in New York with respect to availability of attachment where the parties have agreed to international arbitration.)

10. Preclude arbitrators from deciding the case "*ex aqueo et bono*" or as "*amiable compositeur*."

11. Avoid setting time limit for award. Time limits can raise the issue of arbitrators exceeding their jurisdiction if they miss deadline (thereby introducing the possibility of a "do over.") Most of the major institutions now ensure that awards are issued within a reasonable time.

12. Specify whether costs and attorneys fees go to victor.

13. Entry and enforcement of judgment.

14. Confidentiality provision. Most international arbitral rules do not provide for this.

15. Choice of law.

16. Form of award – i.e., reasoned or summary.

17. Multi-party disputes.

18. Mediation of other non-binding pre-arbitration ADR. It is best to avoid this, as it can provide grounds for a recalcitrant party to tie up case.

19. Currency. It may be useful to provide what currency the award must be in. Complexity can arise when the contract has several currencies or is silent on currency.

B. Sample AAA International Arbitration Clause

Any controversy or claim arising out of or relating to this contract will be determined by arbitration in accordance with the International Arbitration Rules of the American Arbitration Association.

There will be three arbitrators who will be appointed as follows: The Claimant will appoint an arbitrator in its notice of arbitration and the Respondent will appoint an arbitrator in its statement of defense. The party-appointed arbitrators will nominate a chairman within thirty (30) days of the American Arbitration Association's notification to the parties of the filing of the statement of defense with the American Arbitration Association. If the party-appointed arbitrators fail to nominate a chairman within thirty (30) days of the filing of the statement of defense, the American Arbitration Association will nominate a chairman. If any party fails to appoint an arbitrator as provided above, the American Arbitration Association will appoint such arbitrator. Upon the request of any party, the chairman of the arbitral tribunal will be of a nationality different than that of the parties.

1. The place of arbitration will be [choose an arbitration friendly, New York Convention country, plus city].

2. The language of the arbitration will be English.

3. The decision of the arbitral tribunal will be final and may not be appealed.

4. The arbitral tribunal shall not act as *amiables compositeurs* or *ex aequo et bono*.

5. Judgment on the arbitral award may be entered by any court or courts of competent jurisdiction including, but not limited to, any court that has jurisdiction over either of the parties or any of their assets.

6. The arbitral tribunal may, in its discretion, award fees and costs as part of its award.

C. Sample ICC Clause

All disputes arising out of or in connection with this agreement shall be finally settled by arbitration under the Rules of Arbitration of the International Chamber of Commerce by three (3) arbitrators appointed as follows.

Each party will appoint one arbitrator. The Claimant will do so in its Request for Arbitration and the Respondent will do so in its Answer. The party-appointed arbitrators will attempt to agree on a chairman. If, within thirty (30) days after the confirmation of the last party-appointed arbitrator, such appointed arbitrators have not agreed on a chairman, then the chairman will be appointed by the International Court of Arbitration of the International Chamber of Commerce. If any party fails to appoint an arbitrator as provided above, the International Court of Arbitration of the International Chamber of Commerce will appoint such arbitrator. Upon the request of any party, the chairman of the arbitral tribunal will be of a nationality different than that of the parties.

1. The place of arbitration will be [choose an arbitration friendly, New York Convention country, plus city].

2. The language of the arbitration will be English.

3. The decision of the arbitral tribunal will be final and may not be appealed.

4. The arbitral tribunal will not act as *amiables compositeurs* or *ex aequo et bono*.

5. Judgment on the arbitral award may be entered by any court or courts of competent jurisdiction including, but not limited to, any court that has jurisdiction over either of the parties or any of their assets.

6. The arbitral tribunal may, in its discretion, award fees and costs as part of its award.

D. Sample Netherlands Arbitration Institute Clause

All disputes arising in connection with the present contract, or further contracts resulting therefrom, shall be finally settled in accordance with the Arbitration Rules of the Netherlands Arbitration Institute (Nederlands Arbitrage Instituut) by three (3) arbitrators appointed as follows.

Each party shall appoint one arbitrator. The claimant will do so in its Request for Arbitration and the Respondent will do so in its Short Answer. The party appointed arbitrators shall attempt to agree on a chairman. If, within thirty (30) days after the confirmation of the last party-appointed arbitrator, such appointed arbitrators have not

agreed on a chairman, then the chairman will be appointed by the Netherlands Arbitration Institute. If any party fails to appoint an arbitrator as provided above, the Netherlands Arbitration Institute will appoint such arbitrator. Upon the request of any party, the chairman of the arbitral tribunal will be of a nationality different than that of the parties.

1. The place of arbitration will be [choose an arbitration friendly, New York Convention country, plus city].
2. The language of the arbitration will be English.
3. The decision of the arbitral tribunal will be final and may not be appealed.
4. The arbitral tribunal will not act as amiables compositeurs or ex aequo et bono.
5. Judgment on the arbitral award may be entered by any court or courts of competent jurisdiction including, but not limited to, any court that has jurisdiction over either of the parties or any of their assets.
6. The arbitral tribunal may, in its discretion, award fees and costs as part of its award.

E. Sample London Court of International Arbitration

Any dispute arising out of or in connection with this agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the London Court of International Arbitration Rules, which Rules are deemed to be incorporated by reference into this clause.

The number of arbitrators shall be three (3) arbitrators appointed as follows.

Each party will appoint one arbitrator. The Claimant will do so in its Request for Arbitration and the Respondent will do so in its Response to the Request for Arbitration. The party- appointed arbitrators will attempt to agree on a chairman. If, within thirty (30) days after the appointment by the LCIA Court of the last party-appointed arbitrator, such appointed arbitrators have not agreed on a chairman, then the chairman will be appointed by the LCIA Court of Arbitration of the International Chamber of Commerce. If any party fails to appoint an arbitrator as provided above, such party consents to the appointment of such arbitrator by the LCIA Court.

1. The place of arbitration will be [choose an arbitration friendly, New York Convention country, plus city].
2. The language of the arbitration will be English.
3. The decision of the arbitral tribunal will be final and may not be appealed.
4. Judgment on the arbitral award may be entered by any court or courts of competent jurisdiction including, but not limited to, any court that has jurisdiction over either of the parties or any of their assets.
5. The arbitral tribunal may, in its discretion, award fees and costs as part of its award.

F. Other Clauses: We are happy to provide other sample clauses on request.

III. THE INTERNATIONAL ARBITRATION PROCESS

A. Significant differences exist between procedure in international arbitration and that of U.S. litigation.

1. Differences prevail regardless of institution; at the same time, procedure does not vary significantly between various institutions (i.e., procedure in an ICC arbitration is similar to an LCIA arbitration and both are different from that prevailing in domestic arbitrations). An exception seems to be where all three arbitrators are U.S. lawyers (a rare occurrence in international arbitration), then certain key aspects of procedure (e.g., discovery, witness testimony) can be similar to aspects of U.S. litigation.

2. Putting aside selection process and nationality of tribunal, differences mainly center around:

- Pleading: Fact, not Notice.
- Proof:
  - (i) Emphasis on documentary evidence and presumptions.
  - (ii) Much less emphasis on witness testimony, particularly party testimony.
  - (iii) Direct testimony affidavits are increasingly common, particularly where English lawyers are on the tribunal.
- Significantly less discovery:
  - (i) Focus is on voluntary disclosure, not mandatory discovery.
  - (ii) Arbitrators have very limited power to enforce discovery.
  - (iii) Many non-American arbitrators have cultural bias against discovery.
  - (iv) Depositions are extremely rare.
  - (v) Document requests are generally limited (except where English, American, or other common law practitioners are on tribunal).
  - (vi) No appeal: Only limited right to attack the award on the grounds of fraud, etc. (extremely rare, except for in the developing world and the U.S.).

B. Prior to Starting a Case

1. Check the Rules: If you have selected a standard set of arbitral rules in your contract (and you should always do so) this is where the answers on procedural questions will be found.

2. Check the arbitration law for the jurisdiction in which the arbitration is to take place; this is usually statutory and typically available in the English language.

3. Most jurisdictions will apply their own arbitral law to an arbitration taking place within their borders, even where the parties' agreement provides otherwise (so-called "home on home" clause).

4. Arbitration law will not generally tell you how to serve your notice or demand, but will tell you what to do if other side resists.

C. The Notice of Arbitration

1. International arbitration is typically commenced by interposition of short pleading called a Notice, Demand, or Request for Arbitration (rules will tell you what label to use).

2. Typically filed by claimant with arbitral institution designated in contract in first instance; arbitral institution then sends it to other side.

3. The Notice of Arbitration will generally contain following:

- Names and addresses of parties.
- Name of claimant's representative (usually the claimant's law firm or in-house counsel, but there is no general requirement that you be represented by counsel, unless a local rule or law requires it).
- Short statement of claim and facts supporting claim.
- Designation of claimant's selected arbitrator, together with arbitrator's contact information. This is done if arbitration agreement or rules provide for party-selected arbitrators. This differs from AAA arbitration, which typically uses list

procedure. International arbitration almost always employs the party appointment method.

- Key documents, including agreement containing arbitration clause, select key correspondence.
- If arbitration clause does not specify the place of arbitration, designation of claimant's choice of forum (not determinative).
- If agreement does not specify substantive law applicable to dispute, designation of claimant's choice of law (not determinative).
- Short statement of relief requested. It is advisable to include some form of reservation of right to amend request for relief in accord with the proof.
- Recitation of the arbitral clause.

4. Request for arbitration is a notice pleading (but generally one of only two notice pleadings in the case – the other is the respondent's initial answer). However, one must make more of an effort to get the facts right than is often the case in U.S. litigations. Unlike judges, the arbitrators will read, remember and refer to initial pleadings.

D. Short Answer/Statement of Response

1. Most international arbitration rules provide for service and filing by respondent of short statement of response to request for arbitration.
   - Essential elements are same as request for arbitration (e.g., notice pleading, short statement of facts supporting defenses, request for relief, designation of representative, designation of arbitrator, designation of forum, designation of law, etc.).

E. Selecting the Arbitrators

1. Party appointment method is standard; rarely is U.S.-style list procedure employed.
2. The Claimant and Respondent each select one arbitrator. The two party-appointed arbitrators then confer and attempt to name a chairman. If they fail to do so within the time designated in the applicable rules (extensions are generally freely granted by institutions), the institution selects the chairman.
3. Most international arbitration rules provide that, once selected, party-appointed arbitrators act as neutrals, not advocates.
   - This differs from U.S. domestic arbitration, where, unless agreed otherwise, party-appointed arbitrators are not neutral.
4. Generally, once the tribunal is impaneled, no *ex parte* communication with one's arbitrator may be had.
5. It is customary for a party to communicate with its arbitrator before designating him or her. Never appoint someone as arbitrator prior to securing their agreement to serve (need to ensure that there are no client or schedule conflicts, etc.)
6. In initial discussions, only give your arbitrator a brief, neutral overview of facts and claims. Do not argue your case. Keep in mind that your appointed arbitrator is required to act as a neutral. If you advocate during selection process, she or he may feel disqualified, or be subject to challenge.
7. It is customary for a party to communicate with its appointed arbitrator during the arbitrator's discussions with the opposing side's arbitrator as to chairman selection. This is driven by the need to determine whether there are conflicts with the client. You have the right to exercise peremptory and cause challenges.
8. The international arbitrator "club" mainly consists of lawyers.
9. Unlike U.S. domestic arbitration, it is rare to have business people, engineers, and other non-lawyers serve on tribunals.
10. Members of the club were traditionally European civil code, academic lawyers (e.g., a Dutch lawyer was the main drafter of the New York Convention).
11. English barristers and solicitors and U.S. lawyers are now making inroads.
12. Members of the club know each other. It is very political; traps for the unwary exist.
13. Give serious consideration to appointing a "club member" as your arbitrator.
14. You want your arbitrator to have influence with other members of the tribunal.

15. Other members of the tribunal are likely to be club members.

16. It is helpful to have a club member in the chairman selection process.

17. What law applies? Consider picking an arbitrator familiar with substantive law (this is helpful, but not essential).

18. Where is the arbitration venued? It is helpful to have an arbitrator familiar with local arbitration law and local practice.

19. What approach does your case require?

- Enforcing plain terms of the contract – consider common law lawyer.
- Need a more equitable approach – consider civil code lawyer.
- Need discovery – consider common law lawyer.
- Relying heavily on oral testimony – consider common law lawyer.

F. Pleading and Proof

1. Fact, not notice, pleading prevails in international arbitration.
2. Pleadings are lengthy documents prepared by the lawyers.
3. Detailed discussion of relevant facts.
4. All documents viewed as relevant are usually submitted as exhibits.
5. Detailed discussion of substantive law.
6. Generally include reports of independent legal and technical experts.

G. Main Pleadings

1. Statement of Claim: detailed statement of claimant's case.
2. Statement of Defense: detailed discussion of defendant's case.
3. Claimant's Reply: detailed response to defendant's case.
4. Defendant's Reply: detailed response to claimant's reply.

H. Proof

1. Focus is on documentary proof submitted by parties with pleadings. Statements by lawyers in pleadings are considered to be proof.
2. All documents supporting claims or defenses should be submitted with pleadings. Key contentions of fact should, where at all possible, be supported by documents.
3. Written reports by independent technical experts should be seriously considered, even in cases where, if being litigated in the U.S., you would not use an expert.
   - Outside of U.S., there is bias against party testimony; civil code lawyers assume that parties are not credible.
   - Hence, third party testimony key.
4. Legal support should be submitted.
   - Copies of cases and statutes relied upon.
   - Consider using an independent legal expert to prove law if legal issues are key.
5. Written statements of fact witnesses.
   - Where all arbitrators are civil code lawyers, submitting written witness statements in advance of hearings is rare. The typical procedure is to require parties to submit summaries of proposed witness testimony in advance of hearings, so as to put the opposing side on notice.
   - Where common law lawyers are on the tribunal, it is becoming increasingly common to have direct testimony affidavits, and to limit hearings to cross and re-direct.
6. It is customary to have witness hearings. The right of parties to request hearings is enshrined in all major international arbitration rules. However, there are differences between international arbitration hearings and U.S. trials.
   - Limited time.
   - Arbitrators, in consultation with the parties, will fix a time for hearings.

- More than one week of hearings is rare.
- Time is divided equally between the parties, and arbitrators will keep track of time down to the minute.
- Confrontational U.S. cross-examination style is frowned upon.
- Civil code arbitrators do not have cross-examination (or even direct examination of witnesses by lawyers) in their system. Hence, you must be careful not to offend their cultural sensibilities.
- No lengthy examinations. There simply will not be time.
- Hearings should not be viewed as an opportunity to prove your case. Hearings are an opportunity to bring your case in focus for the arbitrators. Use witnesses to emphasize key facts, or to show that key assertions are contradicted by documents.
- Independent expert testimony is key and will be viewed very seriously by arbitrators. U.S. bias against paid experts is not as pronounced.

IV. POST-HEARINGS

1. It is typical to have some form of Post Hearing Memorials.
2. Post Hearing Memorials are limited to commenting on evidence reviewed at hearings and putting it in the broader context of your case.
3. Re-argument of the case and new theories, causes of action, claims or damages are not permitted.

V. BILATERAL INVESTMENT TREATY ARBITRATION

A. There are presently over 2,000 Bilateral Investment Treaties ("BITs") in place among governments around the world. (See Tab 15.)

1. BITs may be significant with respect to international business dispute resolution if disputes involve foreign state conduct.

2. BITs generally provide that disputes may be resolved by international arbitration, rather than through recourse to the foreign state's courts.

3. BITs may be expansive enough to cover disputes arising out of contracts with foreign states.

B. BITs govern resolution of certain disputes between investors and foreign states:

1. Breach of Treaty Obligations.

2. Breach of Contract Obligations.

C. Is there an applicable BIT?

D. Is there a covered party?

1. Investor of a state – direct or indirect control.

2. Foreign state or state subdivision.

E. Is there a covered case?

1. Treaty obligation –

- "Fair and equitable" treatment;
- "Full protection and security;"
- "Most favoured nation" treatment;
- No expropriation without compensation.

2. Contract obligation – does it fall within scope of BIT?

F. Is there an investment that falls within the scope of the BIT?

G. Arbitration options

1. ICSID: International Centre for Settlement of Investment Disputes; available if countries of both parties are signatories to the ICSID Convention. Arbitration by consent – contract or treaty.

2. UNCITRAL: Ad hoc arbitration – when signatories are non-ICSID countries.