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In spite of manifold expressions of enthusiasm for it, international arbitration is not universally accepted as a means of resolution of international commercial and investment disputes. According to a recent survey, there are as many businesses that mostly use transnational litigation as there are that mostly use international arbitration.[1] Many of these businesses may have encountered few disputes because of the way their commercial activities are conducted, and others may be able to resolve incipient disputes through negotiation, perhaps involving further commercial arrangements between the parties.[2] Businesses that frequently use arbitration have been increasingly critical of the fact that it has become more similar to litigation—particularly US-style litigation in United States courts—in large part because of increased procedural activity, including discovery. As arbitration becomes more formal and more complex, it becomes more expensive.

It is often said that there are business people who have been disappointed with arbitration, not always because of the results of the case in which they were involved but sometimes because the procedure by which the results were reached was different from what they expected. For example, an American company and a Japanese company may agree to have their disputes heard in arbitration in Switzerland (a frequently chosen neutral country) before three arbitrators, two of whom are chosen by the parties and the third by the parties together, or by the institution or appointing authority designated by the parties. The

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1. QUEEN MARY SCH. OF INT'L ARBITRATION, UNIV. OF LONDON AND PRICEWATERHOUSE COOPERS LLP, INTERNATIONAL ARBITRATION: CORPORATE ATTITUDES AND PRACTICES 5 (2008).

2. For example, in the author's experience, Japanese purchasers of coal in the 1980s would negotiate greater or lesser quantities of coal to be shipped to them by suppliers, depending on their needs from time to time. Price adjustments would also be made. The acceptability of such changed arrangements would, of course, depend on the needs and alternatives of the suppliers and the purchasers. How such adjustments are made is not the type of issue that lends itself to resolution in arbitration or courts.

American company has agreed to arbitration in Switzerland because the Japanese company has refused to have disputes under the contract heard in the courts of New York. Conversely, the American company has declined the invitation to litigate disputes in Japan.

When a dispute arises, the American company, accustomed to dispute resolution in United States courts, may expect that it will be able to obtain documents from the Japanese party relating to the issues in the case. The Japanese company, on the other hand, may believe that the arbitrators will order limited or no discovery. The parties may have given little or no thought as to how, for example, the hearings will be conducted—whether a court reporter will be used and the extent to which cross-examination will be allowed.

How the arbitration is actually conducted will largely depend on the arbitrators and their backgrounds, especially on the background of the person who is selected as the chairman.[3] Thus, an arbitrator from Switzerland (the country from which, in the example above, an institution may select the chairman) may have spent her formative professional years presenting cases in Swiss courts, where no discovery is permitted. She may therefore apply the Swiss no-discovery philosophy to the American company's requests for the production of documents from the Japanese party. Indeed, the Swiss arbitrator may surprise both sides by saying that she sees no need for verbatim transcripts; her notes (possibly made with the aid of a clerk) of the testimony and witnesses will suffice. Furthermore, as the case moves toward hearings, the chairman may announce that she is not interested in hearing certain witnesses offered by the claimant or respondent. She may also state that witnesses' testimony must be presented in writing and that cross-examination of these witnesses will be limited to an hour or less. One of the parties to the arbitration may like these arrangements and the other—the Americans—may well be horrified.

In contrast, the Japanese company may be upset at rulings made by a chairman from the United States, or an arbitrator of another nationality who is influenced by the American ways of conducting proceedings. The shock may be especially great when the arbitration grants requests for the production of internal documents that the Japanese party considers to be private and confidential and therefore not to be disclosed to the outside world. Not only will searching for documents be time-consuming and anxiety-provoking for the party obliged to produce, but such orders may lead to time-consuming collateral disputes as to compliance.

3. *See* Lawrence W. Newman & David Zaslowsky, *Chairperson's Role in International Arbitration is Often Misunderstood*, N.Y.L.J. (January 30, 2009).

However, the two party-appointed arbitrators should have something to say about the chairman's decisions, should they not? It is true that the chairman of an international arbitral tribunal can be overruled by the party-appointed arbitrators, but oftentimes they find it difficult to do so. One reason is the culture of international arbitration, under which procedural matters are generally delegated to the chairman. Moreover, under the frequently used Arbitration Rules of the International Chamber of Commerce,[4] the chairman may decide ultimate issues if there is no agreement on the part of the other two arbitrators, with the result that the chairman's procedural rulings may only be overcome by action taken by both of the other arbitrators, acting together—something that may well not happen. Thus, although the parties, or the arbitrators appointed by them, could rise up and protest such procedural rulings, ordinarily one party sees an advantage to it in a ruling and it is rare that the approach taken by the chairman is opposed by both parties.

Consequently, the chairman, as a practical matter, may, on her own, determine how arbitration proceedings will be conducted, and, in doing so, she will have considerable influence over such matters as time spent on the arbitration and, inevitably, the cost of the arbitration. But such procedural rulings – on such matters as the disclosure of documents, the hearing or not of witnesses, the scope given for cross-examination, and time limits for accomplishing certain steps in the proceedings—can, each of them, have an effect on the outcome of a case.

Is there a way to minimize the risk that the chairman of an arbitral panel will rule in a way that is unexpected by either or both of the parties? Answering this question requires reference to a basic principle. Arbitration is a creature of contract. If the parties did not enter into a commercial arrangement and include in their contract a clause pursuant to which they agreed to arbitrate disputes arising out of the contract, there would be no arbitration and no arbitrators to have an effect on the parties' commercial lives. This being so, should not the parties be able to agree to impose a measure of influence over the way in which the arbitrators, whom they appoint and whose services they pay for, conduct the arbitral proceedings? More specifically, may the parties, when fashioning their agreement to arbitrate, include language that will assure a greater measure of predictability in the process by which their disputes will be resolved?

4. *See* International Chamber of Commerce, International Court of Arbitration, Rules of Arbitration, Art. 25(1), http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf.

The problem with this suggestion is that the businessmen and lawyers who negotiate deals are, understandably, far more concerned with reaching agreement on the salient commercial terms, such as amounts to be paid or invested, arrangements for joint ventures (if applicable), delivery terms, and even price-adjustment clauses, than they are with dispute-resolution clauses. After all, there is no point in having discussions about possible dispute resolution unless and until these major business matters are determined. Therefore, it is often only at the end of the negotiation process that the business people and transactional lawyers turn their attention to how possible disputes will be resolved.

Negotiators recognize that failing to address the matter of dispute resolution in a contract permits either party to seek relief in its home court. Since neither side wishes to be a victim of such judicial "home cooking," there may well be a failure to agree on a court where disputes will be heard. Given the widespread and well known use of arbitration, the parties then turn their attention to arbitration clauses, and make contact, often for the first time, with lawyers experienced in international arbitration. Such lawyers may provide good drafting advice, but sometimes the negotiators venture out on their own, relying instead on clauses used in other contracts, often ones that were carelessly drawn and probably never actually used. These kinds of clauses have become known as "pathological" arbitration clauses—those that do not work properly to refer the parties to arbitration. An example of such a clause is one that the author once had to enforce, which called for disputes to be heard before the "Official Chamber of Commerce in Paris, France"—where there is no such chamber. To enforce this clause it was necessary to request that a Paris court cause the International Chamber of Commerce to take the case.

Sometimes negotiators are more concerned with arbitration provisions and take a different approach—constructing elaborate arbitration clauses that may include provisions for negotiation and mediation as well as, ultimately, arbitration. Although such clauses may include provisions that set deadlines and provide for the background and experience of the persons who may be appointed as arbitrators, they ordinarily do not deal specifically with how the arbitration proceedings will be conducted with respect to disclosure and witness testimony. Will the proceeding be carried out in what is often thought to be the Continental European way—with limited or no discovery and possibly restrictions on oral testimony? Or will the parties be given free rein to obtain documents from one another? As far as hearings are concerned, will the parties present their evidence through witness statements in writing in advance of the taking of testimony or will they present their

evidence entirely in oral testimony, as is the usual practice in US and other courts?

These questions point to different categories or ways in which arbitration proceedings can be conducted. What if parties, when negotiating a contract, spent a bit more time and agreed generally on how any arbitration between them might take place? The International Institute for Conflict Prevention and Resolution (CPR), through its Arbitration Committee,[5] recently published a "Protocol" which, in addition to presenting suggestions as to the best practices to be followed relating to document disclosure and witness testimony by arbitrators in administering arbitration proceedings, also sets forth options that can be adapted by parties when they enter into an agreement containing an arbitration clause.[6]

The Protocol contains three checklists of options—called "modes"—that can, when one of them is chosen, establish a regime that will be generally in accord with the parties' understanding and expectations as to how an arbitration proceeding between them will be conducted. Use of the checklists will permit the parties to make decisions, in advance of the existence of any dispute between them, with respect to three important procedural areas: (1) the scope of disclosure by one party to the other, (2) the scope of disclosure by the parties to one another of electronically stored information, and (3) the presentation of direct witness testimony in written statements and the possibility of the use of depositions for disclosure purposes. Thus, each of the checklists permits the parties to select one of three or four modes regarding the disclosure of documents and the presentation of oral testimony.

With respect to document disclosure from one party to the other, the four modes set forth in Schedule 1 of the Protocol are as follows:

> **Mode A.** No disclosure of documents other than the disclosure, prior to the hearing, of documents that each side will present in support of its case.

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5. The author is Chairman of the CPR Arbitration Committee (comprising some 175 practicing lawyers and corporate counsel from the United States and Europe) and presided over the drafting of the CPR Protocol described herein, particularly Section 1; dealing with the disclosure of documents, Ben H. Sheppard, Jr., Director of the Dispute Resolution Center of the University of Houston Law Center, headed the subcommittee responsible for the portion of the Protocol (Section 2) dealing with the presentation of oral evidence.

6. The modes refer only to disclosures between parties and not to the process by which documents might be obtained from third parties—through informal arrangements with willing parties or pursuant to subpoenas issued, where permitted, by the arbitral tribunal or by the parties themselves, through their counsel. *See, e.g.*, 9 U.S.C.S. § 7 (2008) (subpoenas by the tribunal) and N.Y. C.P.L.R. 2302(a) (2009) (by an attorney).

> **Mode B.** Disclosure provided for under Mode A together with pre-hearing disclosure of documents essential to a matter of import in the proceeding for which a party has demonstrated a substantial need.
>
> **Mode C.** Disclosure provided for under Mode B together with disclosure, prior to the hearing, of documents relating to issues in the case that are in the possession of persons who are noticed as witnesses by the party requested to provide disclosure.
>
> **Mode D.** Pre-hearing disclosure of documents regarding non-privileged matters that are relevant to any party's claim or defense, subject to limitations of reasonableness, duplication and undue burden.[7]

The parties may select one of these modes by including language in their agreement similar to the following:

> The parties agree that disclosure of documents shall be implemented by the tribunal consistently with Mode [ ] in Schedule 1 to the CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration.[8]

By selecting one of the four modes, the parties can make a choice, in advance of any dispute, with its inevitable lack of rapport and ability to agree, on whether they will want disclosure from the other side of extensive or limited documentation. The first mode, as can be seen, provides for a scope of disclosure at one end of the spectrum, providing for no documentary disclosure. At the other end of the spectrum, the parties can agree, by adopting Mode D in their agreement, to engage in mutual disclosure that is similar to that which would be permitted in a U.S. court. The parties' selection of one of these modes is, under the terms of the Protocol, binding on themselves and the arbitrators and changeable only upon agreement of the parties or, in extraordinary circumstances, upon application by one party to the arbitrator.[9] Should the parties not choose any modes, their arbitration would proceed as it otherwise would; there is no "default" mode.

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7. INT'L INST. FOR CONFLICT PREVENTION AND RESOLUTION, CPR PROTOCOL ON DISCLOSURE OF DOCUMENTS AND PRESENTATION OF WITNESSES IN COMMERCIAL ARBITRATION, § 1, Schedule 1 (2009).

8. *See id.* at § 1(c).

9. *See id.* Section 1(c) further provides that: "Any mode of disclosure so chosen by the parties shall be binding upon the parties and the tribunal and shall govern the proceedings, unless all parties thereafter agree on a different form of disclosure. Disclosure of documents different from that which is provided for in the mode of disclosure selected by the parties may be ordered by the tribunal if it determines that there is a compelling need for such disclosure."

The Protocol also provides, in Schedule 2, for various forms of electronically stored information. This type of disclosure is treated separately because it is so potentially vast and complex. The extent of electronic disclosure as set forth in the modes depends, to a great extent, on the number of users whose electronic information will be subject to production and the time period to be covered. These two variables must be separately addressed if the parties choose to select either of the two middle modes (Modes B and C). The four modes of disclosure of electronically stored evidence are set forth as follows:

> **Mode A.** No disclosure by the parties other than the provision of copies of print-outs of electronic documents to be presented in support of each party's case.
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> **Mode B.** (1) Disclosure, in reasonably usable form, by each party of electronic information maintained by no more than [specify number] of designated custodians. (2) Provision only of information created between the date of the signing of the agreement that is the subject of the dispute and the date of the filing of the request for arbitration. (3) Disclosure of information from primary storage facilities only; no information required to be disclosed from back-up servers or back-up tapes; no disclosure of information from cell phones, PDAs, voicemails, etc. (4) No disclosure required of information obtainable only through forensic methods.
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> **Mode C.** Same as Mode B, but covering a larger number of custodians [specify number] and a wider time period [to be specified]. The parties may also agree to permit documents to be obtained through forensic methods.
>
> **Mode D.** Disclosure of electronic information regarding non-privileged matters that are relevant to any party's claim or defense, subject to limitations of reasonableness, duplicativeness and undue burden.[10]

Schedule 2 also provides that, even when one of the three modes (B, C, or D) is selected providing for some measure of disclosure, the parties must meet and attempt to work out more specifically how they will go about sharing electronic information. Thus, Schedule 2 provides:

> Parties selecting Modes B, C, or D agree to meet and confer, prior to an initial scheduling conference with the tribunal, concerning the

10. *Id.* at § 1, Schedule 2.

> specific modalities and timetable for electronic information disclosure.[11]

The suggested language by which the parties may select one of the modes in Schedule 2 is similar to the provisions above with respect to Schedule 1. Should the parties not wish to agree on a mode for disclosure of electronically stored information pursuant to the schedules, it is anticipated that the less specific language regarding documentary disclosures will be applicable to electronic information, although without the specific guidance provided under Schedule 2.

The Protocol contains a third checklist (Schedule 3), which is concerned with the presentation of oral evidence at hearings and the preparation thereof. The modes in Schedule 3 enable the parties to decide whether or not they will present the direct testimony of their witnesses by means of written statements or through oral presentation. These modes further allow the parties to choose whether they will permit witnesses to have their testimony taken for discovery purposes, in depositions, outside the presence of the arbitrators.

These modes also deal with witness statements, written presentations that are frequently used in international arbitration, to take the place of direct testimony of witnesses. Such statements are not commonly used in domestic US arbitrations, but the Protocol suggests their use in the interest of speed and economy. On the other hand, it is virtually unheard of for an international tribunal sitting outside the United States to order depositions of witnesses for the sole purpose of permitting one party to learn more about the other side's case. In the United States, however, such depositions are often used in arbitrations. Thus, the expectation of parties with respect to the presentation of witnesses may vary. Confronting these differences by considering the application of one of the modes of Schedule 3 may well cause the parties to face, early on, how they want this aspect of their arbitration to be conducted. The modes of Schedule 3 are as follows:

> **Mode A.** Submission in advance of the hearing of a written statement from each witness on whose testimony a party relies, sufficient to serve as that witness's entire evidence, supplemented, at the option of the party presenting the witness, by short oral testimony by the witness before being cross-examined on matters not outside the written statement. No depositions of witnesses who have submitted statements.

11. *Id.*

> **Mode B.** No witness statements. Direct testimony presented orally at the hearing. No depositions of witnesses.
>
> **Mode C.** As in Mode B, except depositions as allowed by the tribunal or as agreed by the parties, but in either event subject to such limitations as the tribunal may deem appropriate.[12]

A mode may be selected in the arbitration agreement through the use of language in the Protocol that is similar to that by which the parties may select modes from Schedules 1 and 2.

The Protocol is also intended to be applicable after arbitral disputes arise, if the modes have not been previously selected. Although parties are often thought to be less likely to agree on matters once a dispute between them arises, experience shows that there exists the real possibility that they may, at or around the time of the commencement of the dispute, be willing to direct their attention to procedural matters the resolution of which may be in their mutual interest. It may well be that, even if parties cannot agree on the identity of the chairman—although they often do—they may, as they proceed toward arbitration, be willing to agree on such fundamental matters as those that are covered by the modes. Thus, the commencement of the arbitration presents a second opportunity for the parties to shape the general nature of the proceeding in which they will be involved.

There is a school of thought in international arbitration that is resistant to the policy underlying the Protocol and its modes. This is the position, often taken by many more experienced arbitrators, particularly in Europe, that there is no need for advanced determination as to the scope of the arbitration proceedings. Rather, they would say, experienced arbitrators and counsel can, working together, organize an arbitration that is suited to the circumstances of the particular case. Some would go further and say that there should be no encroachment by the parties on the latitude given, under arbitration rules and practice, to the arbitrators to organize the proceedings by which they will receive evidence. This way of thinking evidently has its roots in civil law court procedures under which the judges play a significant role in the obtaining of evidence and in the questioning of witnesses. Under this approach, taken to its extreme, the parties are subject to the total control of the arbitrators, even though the arbitrators obtain their authority through an agreement reached by the parties.

It is this paternalistic approach to arbitration that is at the core of the concerns of users of arbitration who are drawn to the limitations represented by the CPR Protocol, which are designed to keep the

12. *Id.* at § 2, Schedule 3.

arbitration under the control of those who created it—the parties—and to prevent unpleasant surprises when the arbitrators, by reason of their legal training, experience or otherwise, want to proceed differently from the way the parties do. Another reason that the approach of the Protocol is finding acceptance is the sense, among corporate parties, that once a dispute has arisen and litigation lawyers become involved, there is an impulse on the part of those lawyers to do everything they can to succeed in the arbitration. This attitude is seen as fostering a strategy of "leave no stone unturned" in preparing one's case—even if such preparation means increased disclosure and more prolonged hearings. Having the procedural scope of arbitration proceedings determined early on, before the parties see advantages in proceeding in a different way, can enable the parties to have any differences that arise between them heard in a procedural setting that is familiar to them—and, what is more important, is in accord with their expectations.