

# GLOBAL TRENDS IN INTERNATIONAL ARBITRATION

*By Gary Born and Wendy Miles at Wilmer Cutler Pickering Hale and Dorr LLP*

One of the most significant global trends in arbitration has been its increasing popularity as the preferred means of resolving international commercial disputes, and the corresponding increase in the support of arbitration by courts in most states. There has continued to be sporadic resistance to the use of arbitration, particularly by states eager to shield their actions from international scrutiny, but this stance has become increasingly isolated and difficult to defend in recent years.

Arbitration has been an enduringly popular choice for parties, in both state-to-state and commercial dispute resolution, since the beginning of recorded history. The attractions of arbitration have remained largely constant since antiquity: parties choose to arbitrate in order to avoid the expense, delays, and rigidities of litigation in state courts, as well as the peculiar uncertainties of international litigation (including jurisdictional, choice-of-law and enforcement disputes). Rather, they seek neutral, expert dispute resolution in a tribunal of their choosing and a single, centralized forum.

The current legal framework for international arbitration was initiated by the Geneva Protocol in 1923 and Geneva Convention in 1927 and culminated in the signing of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1958 ("New York Convention"), the promulgation of the UNCITRAL Arbitration Rules in 1976, the adoption of the UNCITRAL Model Law in 1985 and the enactment of "modern" arbitration statutes in many developed jurisdictions from 1980 to the present day. This framework evolved in direct response to the needs of the business community and, over time, has ensured that the international legal system and leading national legal systems have become firmly pro-arbitration in bias.

There are now more than 135 state parties to the New York Convention. The Convention is almost 50 years old, yet it remains the foundation of international arbitration globally. In the first six years of the 21st century, a total of 19 new states ratified the Convention,

evidencing the continuing acceptance of international arbitration globally. Its reach is impressive: since 1999, several important Middle Eastern states have ratified, including the United Arab Emirates (2006), Qatar (2002), Iran (2001) and Oman (1999).

After the New York Convention, the Model Law is likely the single most significant instrument in establishing the contemporary, supportive international legal framework for international commercial arbitration. Legislation based on the UNCITRAL Model Law has now been enacted by some 50 jurisdictions (as of mid-2007). Of those, 10 enacted such legislation since 2000, including Turkey in 2001, Norway in 2004, Austria, Denmark, Nicaragua and Poland in 2005, and Cambodia in 2006. At the same time, leading arbitral institutions have revised their institutional rules repeatedly over the past decades, in order to make dispute resolution more efficient and predictable, while the arbitration community has developed practical "best practices" in areas such as the taking of evidence and disclosure (the IBA's Rules on the Taking of Evidence in International Commercial Arbitration) and arbitrator conflicts (the IBA's Guidelines on Conflicts of Interest in International Arbitration).

The continuing development of a global legislative framework that supports and promotes international arbitration is matched by the steadily increasing case-loads at leading arbitral institutions, with the number of reported cases increasing between three and five-fold in the past 25 years. For example, the International Chamber of Commerce's International Court of Arbitration received 32 new requests for arbitration in 1956, 210 requests in 1976, 337 in 1992, 452 in 1997, 529 in 1999, and 593 in 2006 - a 20-fold increase over the past 50 years. Similarly, in 1980 the American Arbitration Association administered 101 international arbitrations, increasing to 226 in 1991 and approximately 400 by 1997. A total of 1,356 claims in excess of \$1 million were filed with the American Arbitration Association's international dispute resolution facility (the International Centre for Dispute Resolution) in 2006.



**Wendy Miles at  
Wilmer Cutler Pickering  
Hale and Dorr LLP  
in London**

In order to understand why the international business community has consistently preferred arbitration, and why the international legal system and leading national legal systems have responded so strongly in support of that preference, it is useful to reflect upon the enduring advantages of arbitration for parties. Simply put, arbitration is the preferred means of resolving international commercial disputes because the process provides a neutral, speedy and expert dispute resolution process, in a single centralized forum, with enforceable dispute resolution agreements and final decisions. These objectives are the fundamental basis for the arbitral process globally.

#### **NEUTRALITY OF THE FORUM**

One of the central objectives of international arbitration agreements is to provide a neutral forum for dispute resolution, detached from either of the parties or their respective home state governments. This objective of neutrality is cited by contemporary users of international arbitration, and by commentators, and is reflected in the history of both state-to-state and commercial arbitration.

Parties often begin to negotiate dispute resolution mechanisms with the objective of ensuring that disputes are resolved in the most favourable forum, from the party's own individual perspective, rather than the most neutral one. In many cases that means choosing the local courts in the party's principal place of business. These courts will be convenient and familiar to the home-town party, and to its regular outside counsel; they will also probably be somewhat inconvenient and unfamiliar to the counter-party. This is especially true where differences in language, culture, and legal traditions are present. Yet the characteristics that make one party's local courts attractive to it will often make them unacceptable to counter-parties. Therefore, the almost universal reaction is to seek agreement on a suitable neutral forum, which does not favour either party and will afford each party the opportunity to fully and fairly present its case. Arbitration provides that forum.



**Gary Born at  
Wilmer Cutler Pickering  
Hale and Dorr LLP  
in London**

International arbitration further permits parties to choose a sole or presiding arbitrator whose nationality is different from that of the parties involved (thus reducing the risks of partiality or parochial prejudice). Indeed, virtually all leading institutional arbitration rules or practice require that the sole arbitrator or presiding arbitrator may not be of the same nationality as the parties. That prohibition is aimed at ensuring that the arbitral tribunal is neutral, not favouring either party in terms of nationality.

In addition, parties agree to submit their disputes to arbitration in order to obtain internationally-neutral procedures and rules, based upon the international and national legislative framework discussed above. National courts apply local procedural rules, which are often designed for particular judicial frameworks (e.g., a U.S. jury trial or a civil law system that does not provide for discovery, witness testimony or cross-examination) and which therefore are usually unfamiliar to, and ill-suited for, parties from different legal traditions.

#### **CENTRALIZED DISPUTE RESOLUTION FORUM**

Another attraction of international arbitration is its ability to avoid the widespread jurisdictional and choice-of-law difficulties attending international litigation. One of the central objectives of international arbitration agreements is to avoid multiple proceedings. International arbitration offers the promise of a single, centralized dispute resolution mechanism in one contractual forum. To that end, arbitration agreements are generally both drafted and interpreted expansively, to encompass as wide a range of potential disputes between two parties as possible.

Equally, international arbitration agreements (and awards) are typically given broad effect, including to preclude the parallel litigation of the same or similar claims in national courts. For the most part, this enables international arbitration to achieve its objective of centralizing the parties' disputes in a single forum, rather than permitting or rewarding parallel or multiple litigation proceedings or re-litigation of disputes in different proceedings around the world.

### **ENFORCEABLE AGREEMENTS AND AWARDS**

Related to the benefits of a centralized forum are the advantages of enforceability provided by international arbitration agreements and awards. The international and national legal regime governing arbitration agreements and awards generally enables international arbitration to produce more enforceable and final results than court proceedings. Thus, international arbitration agreements are more readily enforced and more broadly interpreted, in most national courts, than forum selection clauses. This is largely because of the New York Convention, to which more than 135 countries are party, and national arbitration legislation (often based on the UNCITRAL Model Law) which facilitate the enforceability of international arbitration agreements.

Like agreements to arbitrate, international arbitral awards enjoy the protection of the New York Convention, as well as favourable national arbitration legislation in many countries. These instruments provide a "pro-enforcement" regime, with only limited grounds for denying recognition to an arbitral award. Particularly in developed trading states, there is substantial, successful experience with the enforcement of international arbitral awards.

In contrast, there are only a few regional arrangements for the mutual enforcement of foreign judgments (in particular, Council Regulation 44/2001 in Europe), and there is no global counterpart to the New York Convention for foreign judgments. Many major trading states, including the United States, are still not party to any bilateral or multilateral agreement on the enforceability of foreign judgments. In this respect, international litigation is not a reasonable alternative to international arbitration.

### **COMPETENCE AND EXPERTISE**

Another essential objective of international arbitration is providing a competent, expertise dispute resolution process. In some states, local courts have little experience with international transactions or disputes; moreover, judges are arbitrarily assigned to cases, without regard to expertise or experience. Even where such experience exists, the need to translate evidentiary materials or legal authorities into the language of the forum will often create practical problems and jeopardize a tribunal's comprehension of the case. In many states, basic standards of judicial integrity, independence and/or competence are lacking, particularly in cases involving local or regional litigants and a fair, objective proceeding is unlikely.

In contrast, parties are free to select "their" arbitral tribunal in international arbitrations, including the right to select co-arbitrators and a chairman with appropriate experience, expertise and availability. Where the parties are unable to agree directly upon the choice of a sole or presiding arbitrator, the choice will typically be made by an arbitral institution. The leading international arbitral

institutions (the International Chamber of Commerce, the American Arbitration Association, the LCIA, and the International Centre for the Settlement of Investment Disputes) have considerable experience in making such selections and, in most cases, make sensible choices, well-suited to the parties' particular dispute.

### **FINALITY OF DECISION**

Another salient feature of international commercial arbitration is the absence, in most cases, of appellate review of arbitral awards. Judicial review of awards in most developed countries is confined to issues of procedural fairness, jurisdiction, and public policy. Any judicial scrutiny of the arbitrators' substantive decisions is ordinarily highly deferential.

There are both advantages and disadvantages to the lack of appellate review mechanisms. Dispensing with appellate review obviously reduces both litigation costs and delays (particularly when a case must be retried in the first instance court, with the possibility of yet further appeals). On the other hand, it also means that a wildly eccentric, or simply wrong, arbitral decision cannot be corrected. On balance, anecdotal evidence and empirical research indicate that business users generally consider the efficiency and finality of arbitral procedures favourably, even at the expense of foregoing appellate rights.

### **COST AND SPEED**

It has long been said that arbitration offers a cheaper, quicker means of dispute resolution than national court proceedings. In reality, both international arbitration and international litigation can involve significant expense and delay.

International commercial arbitration is seldom cheap, at least in substantial cases. The parties are required (subject to later allocation of arbitration costs by the tribunal) to pay the fees of the arbitrator(s) and, usually, an arbitral institution. The parties will also have to pay the logistical expenses of renting hearing rooms, travel to the arbitral situs, lodging, and the like. This entails expenses that do not exist in national court litigation. Nonetheless, the additional expenses of arbitration will usually pale in comparison with the costs of legal representation if there are parallel or multiple proceedings in national courts.

Equally, international commercial arbitration is not always fast. Disputes often require between 18 and 36 months to reach a final award, with only limited possibilities for earlier summary dispositions. Nonetheless, international arbitral institutions are responding to parties' concerns as to speed and promote "fast-track" procedures where possible. And in many jurisdictions, national court proceedings are subject to at least equally significant delays. Arbitration however, typically does not involve appellate review,

## Arbitration remains a popular choice for parties because it is effective and, in the international context, capable of overcoming many of the problems inherent in other dispute resolution alternatives.

thereby avoiding the delay inherent in appellate proceedings and reducing the risk that new trial proceedings will be required (in the event of appellate reversal of an initial trial court decision).

### CONFIDENTIALITY OF DISPUTE RESOLUTION PROCEEDINGS

A potentially important consideration in designing dispute resolution provisions is the extent to which proceedings will be confidential. Broadly speaking, international arbitration is substantially more likely than national court litigation to produce a private, confidential dispute resolution process, but there are seldom any guarantees of confidentiality. This imposes significant obligations on the parties, their counsel and the arbitrators - to respect the confidentiality of the arbitral process, including even as to announcements as to the existence of disputes and the parties thereto.

Arbitral hearings are virtually always closed to the press and public, and in practice both submissions and awards often remain confidential; in a number of jurisdictions, confidentiality obligations are implied into international arbitration agreements as a matter of law, while some institutional arbitration rules impose such duties expressly. The contrast with open public dockets in court proceedings is significant. Nonetheless, there is no clear duty of confidentiality in some jurisdictions and, even where such obligations exist, arbitral awards are sometimes made public, either in enforcement actions or otherwise. It is possible to reduce these risks of disclosure by a counter-party, through appropriately drafted confidentiality provisions.

### CONCLUSION

The consistent growth in the number and size of international arbitrations is paralleled by the increased activity in the field by members of the legal community in most leading national jurisdictions, including in the UK, Europe, the US, the Middle East and Asia. But unlike many other legal trends, the sustained growth of

international arbitration is driven not by lawyers or the legislature but by parties. Arbitration remains a popular choice for parties because it is effective and, in the international context, capable of overcoming many of the problems inherent in other dispute resolution alternatives. Provided those involved in international arbitration continue to be mindful of the objectives of the parties, and ensure that international arbitration continues to meet their needs, its growth in popularity is set to continue for many years to come. The principal remaining resistance to international arbitration originates in quarters where efficient, objective and enforceable dispute resolution is not welcomed, but feared; that stance may provide short-term resistance, but is hardly the basis for long-term threats to the arbitral process. ■

### About the authors:

Gary Born is one of the world's leading authorities in the fields of international arbitration and litigation. He has handled disputes under all leading arbitral regimes, including ICC, LCIA, UNCITRAL, AAA, ICSID, and Stockholm Arbitration Institute rules. He has particular experience in joint venture, technology licensing and transfer, M&A, construction, oil and gas, intellectual property and insurance matters. Mr. Born is the author of *International Commercial Arbitration* (2d ed. 1996), the third edition of which is forthcoming in late 2007, and *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (2d ed. 2005) and *International Civil Litigation in United States Courts* (4th ed. 2006).

[gary.born@wilmerhale.com](mailto:gary.born@wilmerhale.com)

Wendy Miles is a partner in WilmerHale's international dispute resolution practice, based in the London office. She acts as both counsel and arbitrator and is experienced in dealing with all major arbitral institutions, including the ICC, LCIA and ICDR, as well as ad hoc proceedings. She specialises in oil and gas, joint venture, pharmaceutical and manufacturing disputes.

[wendy.miles@wilmerhale.com](mailto:wendy.miles@wilmerhale.com)



Wilmer Cutler Pickering Hale and Dorr LLP  
4 Carlton Gardens  
London SW1Y 5AA, UK  
Tel: +44 (0) 207 872 1000  
Fax: +44 (0) 207 839 3537  
[www.wilmerhale.com](http://www.wilmerhale.com)