

## **EMERGING ISSUES AND TRENDS IN INTERNATIONAL ARBITRATION**

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### **I. INTRODUCTION**

Over the past few years, international arbitration has grown to become one of the preferred dispute resolution mechanisms for international contracts and investments. In particular, international arbitration has been used to resolve an increasing number of technology and intellectual property (IP) disputes. In order to keep up with the explosion of technology investments overseas, corporations have spent considerable time and money selecting and crafting arbitration clauses to protect the confidentiality and proprietary nature of the technology and IP they share with foreign partners, manufacturers, and distributors.

Because arbitration is generally a voluntary and consensual process, it is important to understand the key factors that underlie corporate decisions and choices when contemplating international arbitration. The key factors include the following: (1) the choice of law governing the substance of the dispute; (2) the choice of the seat of arbitration; (3) the choice of the arbitration institution; (4) the appointment of arbitrators; (5) the confidentiality of proceedings; (6) the overall cost and delay; and (7) the flexibility offered by international arbitration.

This essay explores some of the recent trends, developments, and opportunities related to these key factors. Part I provides a brief introduction, listing the key factors that business entities consider in

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choosing arbitration. Part II will generally discuss the current developments in the industry. Part III will discuss trends in the expectations of the parties. Part IV will discuss trends in various arbitration institutions. Part V will discuss regional trends, particularly focusing on the People's Republic of China ("China"), India, and Latin America. Part VI will discuss trends in online access. Part VII will discuss business opportunities related to the aforementioned trends.

## II. CURRENT DEVELOPMENTS

Financial market pressures are forcing corporations to rely more heavily on alternative dispute resolution (ADR) in an attempt to limit litigation exposure while expanding business interests globally. Corporations have necessarily become more sophisticated in utilizing international arbitration, particularly in emerging markets. This additional corporate sophistication has provided a suitable ground for accelerated competition among various arbitration institutions.<sup>1</sup> In turn, the accelerated competition has led to the development of a variety of driving trends in international arbitration, including new expectations of parties to arbitrations and new competition-driven features offered by international arbitration institutions.<sup>2</sup>

According to a recent survey by the World Intellectual Property Organization (WIPO), ninety-one percent of approximately 400 survey participants entered into technology-related agreements with parties from jurisdictions different from their own.<sup>3</sup> In addition, approximately a quarter of the respondents indicated that at least sixty percent of their contracts include parties from other jurisdictions while only nine percent of the respondents contracted exclusively within

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1. See QUEEN MARY UNIV. OF LONDON SCH. OF INT'L ARBITRATION, 2010 INTERNATIONAL ARBITRATION SURVEY: CHOICES IN INTERNATIONAL ARBITRATION [hereinafter SCH. OF INT'L ARBITRATION], available at [http://www.whitecase.com/files/upload/fileRepository/2010International\\_Arbitration\\_Survey\\_Choices\\_in\\_International\\_Arbitration.pdf](http://www.whitecase.com/files/upload/fileRepository/2010International_Arbitration_Survey_Choices_in_International_Arbitration.pdf).

2. *Id.*

3. *International Survey on Dispute Resolution in Technology Transactions: Preliminary Results*, WIPO (Nov. 8, 2011) [hereinafter *International Survey*], available at [http://www.ficpi.org/library/11RomeOTHER/OTHER-WIPO-1\(revised\).pdf](http://www.ficpi.org/library/11RomeOTHER/OTHER-WIPO-1(revised).pdf).

their own jurisdiction.<sup>4</sup> Further, more than eighty percent of the respondents entered into agreements relating to technology protected by patents in multiple countries, while less than twenty percent entered into agreements relating to technology protected by patents in a single country.<sup>5</sup> Thus, the exploitation of IP and IP-related technology is rapidly becoming a business that requires access to effective international dispute resolution mechanisms.

Companies choose international arbitration over pursuing judgment in domestic courts for a variety of reasons such as the elimination of perceived bias by domestic courts. However, a primary and perhaps underappreciated advantage is the flexibility offered by international arbitration.<sup>6</sup> Parties can choose the applicable law, the seat of arbitration, the arbitration institution, the arbitrators, the jurisdictional scope, and the general procedure and conduct of the arbitration, all of which can provide efficiency advantages over domestic courts as well as important legal and tactical advantages customized to the subject matter of the dispute.<sup>7</sup>

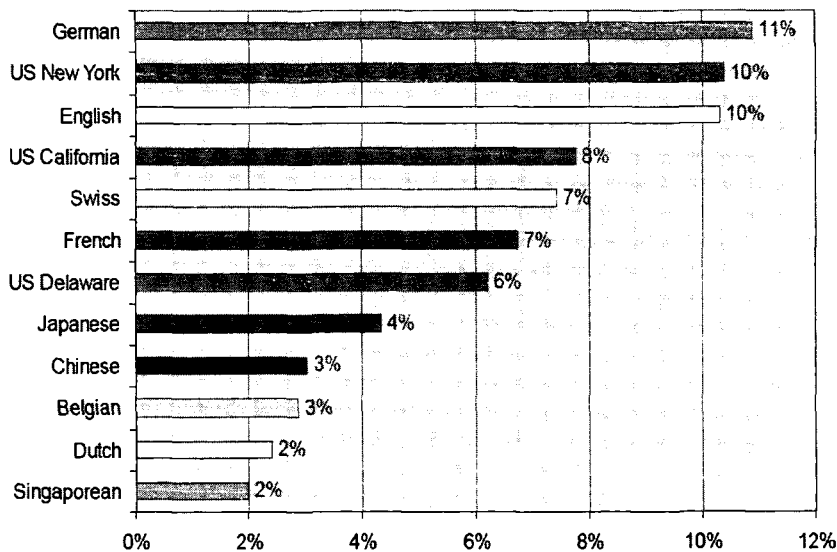


Figure 1: Choice of Applicable Law in Technology Disputes

4. *Id.* at 20. It should be noted that their contractual partners might contract themselves internationally.

5. *Id.*

6. SCH. OF INT'L ARBITRATION, *supra* note 1, at 2.

7. *Id.*

Figure 1 illustrates the distribution of the choice of law in technology disputes as reported by respondents of the WIPO survey.<sup>8</sup> Choice of governing law is mostly influenced by the perceived neutrality and impartiality of the legal system, the subject matter of the dispute, and the parties' familiarity with the law.<sup>9</sup> As described in Figure 1, parties in technology disputes have a wide variety of systems of law they can choose from. In fact, Asian law is increasingly applied as investment in technology and IP increases in Asia, particularly in Singapore and China. As this trend continues, businesses with technology and IP assets would be well served by learning the intricacies of Asian law.

A majority of parties who have been involved in international arbitration in the past, however, believe that any negative impact of choosing a particular governing law can be limited by carefully drafting either the original contract or a subsequent agreement to enter into arbitration.<sup>10</sup> With this in mind, businesses can draft an arbitration clause that allows for negotiation of the choice of law provision in order to gain contractual advantages elsewhere in a particular agreement. This flexibility, therefore, increases stability and predictability when resolving disputes internationally.

Choice of the arbitration seat is largely influenced by the "'formal legal infrastructure' at the seat," the choice of law, and the convenience of the parties.<sup>11</sup> Businesses are wary about choosing certain locales for the seat of arbitration because those locales have not properly adhered to common precepts of the rule of law, confidentiality, and bias, and they have not had the technical ability or infrastructure to efficiently conduct a proceeding confronting electronic discovery and other more modern evidentiary issues. The WIPO has a well-established ability to take advantage of modern electronic filing procedures, and it has recently opened an office in Singapore specifically to deal with technology and IP disputes in Asia.

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8. *International Survey*, *supra* note 3, at 25.

9. SCH. OF INT'L ARBITRATION, *supra* note 1, at 11.

10. *Id.* at 16.

11. *Id.* at 17.

Furthermore, Singapore and arbitration institutions based in Singapore, such as the Singapore International Arbitration Centre, (SIAC) have since 2006 emerged as regional leaders in Asia with respect to providing capable seats for international arbitration.<sup>12</sup> The particular phenomenon reinforces the general trend that technology and IP-related businesses are developing higher confidence in the international arbitration infrastructures available in Asia as investment in those areas increases. This increased flexibility in the choice of seat for international arbitration allows parties to balance general convenience against potential advantages provided by a legal infrastructure associated with a particular arbitration seat.

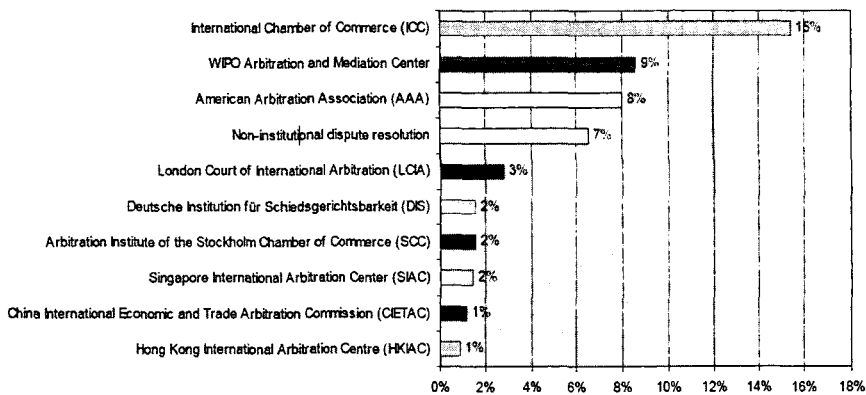


Figure 2: Choice of Arbitration Institution in Technology Disputes

Figure 2 illustrates the distribution of the choice of international arbitration institution as reported by respondents of the WIPO survey.<sup>13</sup> Choice of arbitration institution is influenced by its perceived neutrality and reputation, and the efficacy of its awards.<sup>14</sup> As described in Figure 2, parties in technology disputes predominately choose traditional arbitration institutions such as the International Chamber of Commerce (ICC), the American Arbitration Association, and the London Court of International Arbitration (LCIA). However, the WIPO, a relative newcomer to international arbitration, and the more regional arbitration institutions such as the SIAC, the China

12. *See id.* at 20.

13. *International Survey*, *supra* note 3, at 24.

14. SCH. OF INT'L ARBITRATION, *supra* note 1, at 21.

International Economic and Trade Arbitration Commission (CIETAC), and the Hong Kong International Arbitration Centre (HKIAC), are increasingly used as they institute measures to compete more effectively with the larger arbitration institutions.<sup>15</sup> The additional flexibility in the choice of institution allows parties to choose an arbitration institution precisely suited for the dispute at hand. Moreover, it increases competition among the international arbitration institutions, which serves to reduce the overall cost.

When sophisticated parties select arbitrators, they evaluate different attributes, such as open-mindedness, fairness, prior experience, quality of awards, availability, knowledge of applicable law, and reputation.<sup>16</sup> Because arbitrators typically offer their services exclusively to a single arbitration institution, the selection of an arbitration institution often includes an evaluation of the pool of arbitrators available to the particular arbitration institution. According to a recent survey of businesses that have previously been a party to an international arbitration, many have been disappointed with the performance of their arbitration panel.<sup>17</sup> They have expressed a desire for greater transparency with respect to the past performance of arbitrators.<sup>18</sup>

Accordingly, arbitration institutions, particularly more regional arbitration institutions with less well-known pools of arbitrators, have recognized this area as a ground for competition and are evaluating amendments to their rules and administrative guidelines to address the desire for increased transparency.<sup>19</sup> Additional transparency with respect to the administration of arbitration institutions allows parties to comfortably select arbitrators and arbitration institutions from a larger pool. This, in turn, increases the flexibility provided by arbitration proceedings where parties can choose their panel according to the subject matter of the dispute, which is of particular concern in technology and IP disputes.

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15. *See id.* at 22.

16. *Id.* at 25.

17. *Id.* at 26.

18. *Id.* at 27.

19. *See, e.g.,* Peter Ashford, *Rule Changes Affecting the International Arbitration Community*, 22 AM. REV. INT'L ARB. 87, 115 (2011).

In addition, parties to international arbitration proceedings may choose a variety of different procedures addressing their desired levels of confidentiality. With respect to international arbitration generally, “confidentiality is [an] important . . . but . . . not the essential reason [to choose] arbitration” over other dispute resolution mechanisms.<sup>20</sup> However, with respect to technology and IP disputes, continuing confidentiality of the subject matter of the dispute is often of paramount importance. Thus, a flexible approach is desired to balance litigation costs against potential losses due to unwanted disclosures.

One related aspect of international arbitration proceedings that has been found lacking in the past is access to interim measures, such as evidentiary holds and restraining orders related to confidential subject matter that are issued early in the dispute resolution process.<sup>21</sup> To address this, many international arbitration institutions have recently amended their rules and guidelines to include procedures that provide interim measures as early in the process as possible.<sup>22</sup> These new measures add flexibility to international arbitration that is particularly important to technology and IP businesses because these businesses would otherwise have to resort to domestic courts to protect their interests and possibly be forced to forgo arbitration as a result.

Finally, parties to international arbitration proceedings have an increasing number of options to choose from with respect to the expected cost and delay in resolving a dispute. In the past few years, many international arbitration institutions have provided access to expedited arbitration proceedings, typically of limited monetary jurisdiction, that include fixed or limited fee schedules.<sup>23</sup> In addition, many international arbitration institutions have amended their rules and guidelines to streamline the creation of tribunals and allow for additional choices in the manner of providing evidence, including expert testimony. Each of these changes addresses an aspect of arbitration that has been specifically viewed as a significant contribution to the overall delay.<sup>24</sup> As a result, the additional

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20. SCH. OF INT'L ARBITRATION, *supra* note 1, at 29.

21. *See* Ashford, *supra* note 19, at 88.

22. *See, e.g., id.* at 113-15.

23. *See, e.g., Schedule of Fees and Costs Arbitration / Expedited Arbitration*, WIPO, <http://www.wipo.int/amc/en/arbitration/fees/index.html> (last visited July 11, 2012).

24. SCH. OF INT'L ARBITRATION, *supra* note 1, at 32; *see also* Timothy Martin,

flexibility provided by the access to alternative procedures adjusting costs and delays increased stability and predictability when resolving disputes internationally.

### III. TRENDS IN THE EXPECTATIONS OF THE PARTIES

Globally invested business entities now feel less compelled to mandate particular mainstream international arbitration institutions to resolve their conflicts. Instead, the entities are willing to negotiate for the use of non-traditional regional arbitration institutions in order to gain contractual advantages elsewhere in an agreement. This trend has only become stronger as more regional arbitration institutions have streamlined their procedures and adopted rules and statutory infrastructure adhering to principles followed by the mainstream international arbitration institutions. Some regional arbitration institutions, such as the SIAC and the CIETAC, have gone to great lengths (e.g., by amending their rules and/or promoting their services) to increase the perceived neutrality and impartiality of their procedures and the legal systems associated with their seats of arbitration.<sup>25</sup> It has become clear that many regional arbitration institutions, including the CIETAC, are seeing success in developing better reputations among international parties.<sup>26</sup>

Parties to international disputes and their representatives understandably want timely access to information about arbitrators' availability and past performance.<sup>27</sup> Also, most parties that have been involved in an international arbitration have expressed a wish for some formal means or procedure to access arbitrators' performances, at least in a way that is available to other parties committed to utilizing the same arbitration institution. Ideally, the procedure should

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*Dispute Resolution in the International Energy Sector: An Overview*, 4 J. WORLD ENERGY L. & BUS. 332, 360 (2011). The terms "disclosure of documents," "written submissions," and "hearings/proceedings," seem to include expert testimony.

25. See Ashford, *supra* note 19, at 116-17; see also Ashley M. Howlett, *CIETAC Issues New Arbitration Rules: Interim Measures and Consolidation Among the Highlights*, AM. INTELL. PROP. L. ASS'N (Jones Day, China), Apr. 5, 2012, available at <http://www.lexology.com/library/detail.aspx?g=1bd523a3-b888-4382-abcb-fe6e3e84fc79>.

26. See Howlett, *supra* note 25 ("CIETAC . . . is becoming more established and recognized as an international arbitration institution.").

27. See SCH. OF INT'L ARBITRATION, *supra* note 1, at 27-28.



also allow parties that have not yet committed to a particular arbitration institution to access arbitrators' past performances. In addition to procedural and performance transparency, parties seek procedures that can ensure confidentiality of the substance of the arbitrations when the parties so desire.

#### IV. INSTITUTIONAL TRENDS

As noted above, one main trend over the past few years is a general realignment of international arbitration rules to combat the perception of the increasing time and cost of international arbitration. This realignment, therefore, provides a competitive advantage to one institution over another in order for it to attract more business. In particular, many international arbitration institutions have provided specific incentives, such as procedural ease and/or technological expertise, to attract more complex issues, including technology and IP issues.<sup>28</sup> This push to become a reliable venue for technology and IP disputes follows a recent increase in IP-related disputes and international arbitrations globally.<sup>29</sup>

In addition, there is a trend towards a greater adoption of international arbitration in regions experiencing increased investments in manufacturing and technology-related businesses, which may be related to the recent rule amendments that are specifically designed to provide inexpensive access to international arbitration.<sup>30</sup> Finally,

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28. Jesse S. Bennett, *Saving Time and Money by Using Alternative Dispute Resolution for Intellectual Property Disputes—WIPO to the Rescue*, 79 REV. JUR. U.P.R. 389, 401 (2010); see also Sophie Lamb & Alejandro Garcia, *Arbitration of Intellectual Property Disputes*, AM. INTELL. PROP. L. ASS'N (Bird & Bird, U.K.), Dec. 18, 2007, available at <http://www.lexology.com/library/detail.aspx?g=84d24e56-270a-4892-a580-da042d0787a4> (explaining the various benefits of arbitration, including procedural ease and technological expertise).

29. Bennett, *supra* note 28, at 400; Lamb & Garcia, *supra* note 28; Jason Clapham, *Recent Decisions: Arbitrability and Patents*, KING & WOOD MALLESONS, (May 11, 2011), <http://www.mallesons.com/publications/marketAlerts/2011/Pages/default.aspx> (follow "May" link).

30. Jonathan C. Hamilton & Michael Roche, *Survey of Trends in Latin American Arbitration*, AM. INTELL. PROP. L. ASS'N (White & Case LLP, Cent. & S. Am.), June 19, 2009, available at [http://www.whitecase.com/idq/summer\\_2009\\_1a](http://www.whitecase.com/idq/summer_2009_1a); FULBRIGHT & JAWORSKI, 2012 INTERNATIONAL ARBITRATION REPORT NO. 1, 20 (2010), available at <http://www.fulbright.com/Images/publications/2012InternationalArbitrationReportIssue1.pdf>.

there is a general increase in online access to, and the online prosecution of, international arbitration matters; this increase has been promoted as a significant time and cost-cutting measure.<sup>31</sup>

Within these trends are opportunities for small, medium, and large businesses to take advantage of the increased access to international arbitration if the parties are aware of general caveats in choosing one institution over another. For example, perhaps just as important as the cost of arbitration is the likelihood that an eventual award from a particular international arbitration institution can be enforced within the jurisdictions of the contracting parties.<sup>32</sup> Some jurisdictions, such as South Korea, willingly enforce arbitration awards granted by mainstream international arbitration institutions but may impose arbitrary roadblocks to awards granted by domestic or regional arbitration institutions.<sup>33</sup> It is also important to have access to arbitrators and arbitration administrative staff who have experience and demonstrated consistency in the subject matter of the contracted business relationship.<sup>34</sup> A limited pool of arbitration experts can present a problem with perceived bias, and international arbitration expertise can be just as important, if not more so, than technological expertise when expedient resolution is a priority.<sup>35</sup> Choice of a

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31. Mireze Philippe, *Now Where Do We Stand with Online Dispute Resolution (ODR)?*, 2010 INT'L BUS. L.J. 563, 564 (2010); Bruce L. Mann, *Smoothing Some Wrinkles in Online Dispute Resolution*, 17 INT'L J.L. & INFO. TECH. 83 (2009); *WIPO Prepares for Launch of New gTLDs While Cybersquatting Cases Continued to Rise*, WIPO (Mar. 6, 2012) [hereinafter *New gTLDs*], available at [http://www.wipo.int/pressroom/en/articles/2012/article\\_0002.html](http://www.wipo.int/pressroom/en/articles/2012/article_0002.html); *WIPO Launches Paperless UDRP Proceedings*, WIPO (Dec. 11, 2009) [hereinafter *UDRP Proceedings*], available at [http://www.wipo.int/pressroom/en/articles/2009/article\\_0057.html](http://www.wipo.int/pressroom/en/articles/2009/article_0057.html).

32. *Global Trends in International Arbitration*, OUTSIDE PERSP. (Wilmer Cutler Pickering Hale & Dorr LLP, London, U.K) [hereinafter *OUTSIDE PERSP.*], available at [http://www.wilmerhale.com/files/Publication/3eadc21b-4cad-4ea8-bf29-012226df50b5/Presentation/PublicationAttachment/bb9cd3fd-f046-4489-b2a9-086a72f6d24d/GlobalTrends\\_InternationalArbitration.pdf](http://www.wilmerhale.com/files/Publication/3eadc21b-4cad-4ea8-bf29-012226df50b5/Presentation/PublicationAttachment/bb9cd3fd-f046-4489-b2a9-086a72f6d24d/GlobalTrends_InternationalArbitration.pdf).

33. Jin Seok Lim, *Understanding Alternative Dispute Resolution in Korea*, U.S.-KOR. L.J. (July 2012) (on file with author).

34. *OUTSIDE PERSP.*, *supra* note 32; *Experts Identify ADR Trends and Best Practices*, METROPOLITAN CORP. COUNS., Jan. 2006, at 22, available at <http://www.metrocorpocounsel.com/articles/6326/experts-identify-adr-trends-and-best-practices>.

35. Sarah Walker & Alejandro Garcia, *Highly-Specialized International*

particular international arbitration institution can harmonize global business risks and lower the cost of entry into the global marketplace, as compared to reliance on court systems subject to the rules of a myriad of unique jurisdictions.<sup>36</sup> By combining these business interests with the above trends in international arbitration, businesses can enter into rebounding global markets with a distinct competitive advantage.

### A. *Change of the Rules*

Arbitration institutions have lately felt competitive pressures to simplify their procedures and increase their market share. These institutions have responded by enacting procedures that encourage businesses to globalize their interests by relying on international arbitration, particularly with regard to resolving IP disputes. For example, since 2010, the International Bar Association (IBA), the United Nations Commission on International Trade Law (UNCITRAL), the SIAC, and the CIETAC have already revised or are currently revising their arbitration guidelines and rules to address the increasing perception that international arbitration presents the same level of cost or delay as that of typical court systems.<sup>37</sup>

#### 1. IBA

In May 2010, the IBA instituted a variety of revisions to its guidelines to reduce cost and delay, streamline evidence production,

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*Arbitration—How Many Arbitrators are Really At Large?*, AM. INTELL. PROP. L. ASS'N (Birth & Bird, U.S.), May 23, 2008, available at <http://www.lexology.com/library/detail.aspx?g=1aec7b94-98a3-4611-b9f6-5b537f883d4a>.

36. *Policy Commissions*, INT'L CHAMBER COM., [http://www.iccwbo.org/uploadedFiles/ICC/policy/intellectual\\_property/pages/IP%20Roadmap%202012\\_English\\_web.pdf](http://www.iccwbo.org/uploadedFiles/ICC/policy/intellectual_property/pages/IP%20Roadmap%202012_English_web.pdf) (last visited Sept. 19, 2012); OUTSIDE PERSP., *supra* note 32; *New gTLDs*, *supra* note 31; *Technology Transactions: Managing Risks Arising From Disputes*, WIPO MAG. (Sept. 2011), [http://www.wipo.int/wipo\\_magazine/en/2011/05/article\\_0010.html](http://www.wipo.int/wipo_magazine/en/2011/05/article_0010.html); *Efficient Alternative Dispute Resolution in Intellectual Property*, WIPO MAG. (June 2009), available at [http://www.wipo.int/wipo\\_magazine/en/2009/03/article\\_0008.html](http://www.wipo.int/wipo_magazine/en/2009/03/article_0008.html).

37. OUTSIDE PERSP., *supra* note 32 (“In reality, both international arbitration and international litigation can involve significant expense and delay.”); see Ashford, *supra* note 19, at 87.

increase confidentiality, and simplify overall procedures.<sup>38</sup> These revisions address conferencing of evidentiary procedures, modernized electronic discovery, statements by witnesses, expert testimony, oral testimony, privilege claims, and the concept of good faith.

*a. Conferencing of Evidentiary Procedures*

The revised rules impose an obligation on the arbitral tribunal to consult the parties at the earliest appropriate time to determine an “efficient, economical and fair process” for introducing evidence.<sup>39</sup> The revisions also provide helpful suggestions as to the issues an early conferencing should address, such as the confidentiality protections applicable to introduced evidence and the procedures that the tribunal and the parties should use to safeguard against an overly expensive evidentiary process (e.g., procedure and formatting for production of documents, preparation of witness statements and expert reports, and taking of oral testimony).<sup>40</sup>

The timely determination, or at least identification, of the issues surrounding the introduction of evidence, particularly with regard to procedures addressed differently by the parties’ jurisdictions, serves to streamline the rest of the arbitration process and minimize any future conflict from misconceptions as to the handling of evidence. Moreover, an early conferencing allows broader confidentiality protections and follows the current general trends of increasing confidentiality, particularly with regard to arbitral awards.<sup>41</sup>

*b. E-Discovery*

The revised rules also provide modernized e-discovery procedures designed to reduce the overall time and cost associated with the discovery process.<sup>42</sup> Under the revised rules, a proper e-discovery

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38. Ashford, *supra* note 19, at 88.

39. *Id.*

40. *Id.*

41. Lynn Hawkins, *Emerging Trends in Sealing Arbitration Awards*, AM. INTEL. PROP. L. ASS’N (Jordan Burt LLP, U.S.), Mar. 11, 2009, available at <http://www.lexology.com/library/detail.aspx?g=84d24e56-270a-4892-a580-da042d0787a4>.

42. Ashford, *supra* note 19, at 89-101.

request may simply identify specific files, search terms, individuals, or other specific means of searching for electronic documents if the identified procedure is efficient and economical.<sup>43</sup> Electronic document responses to such a request are produced in the most convenient or economical form to the producing party if the production is reasonably usable by the recipients and there is no compelling need for a different form of access. The revised rules provide an example of procedures (e.g., keyword search filtering) that are deemed sensible, cost-effective, and proportional approaches to e-discovery.<sup>44</sup> Objections to production requests may include arguments and evidence regarding “procedural economy and proportionality.”<sup>45</sup> For expediency, a tribunal may direct parties to meet and confer to resolve discovery disputes. It may also, on its own discretion, request one party produce documents for another party, or it may request the parties coordinate non-party production themselves.

Although the above revisions usher the IBA into the modern era of e-discovery and streamline some of the procedures addressing e-discovery and discovery generally, the revisions introduce a few new problems. First, the revised rules appear to be more permissively written with respect to e-discovery as compared to conventional discovery of hardcopy or paper documents. While it is true that some electronic documents can be searched more cost-effectively than paper documents, the current rules may lead to unwarranted broadening of the scope of discovery, not just volume. Therefore, this may not encourage parties to resolve disputes using arbitration until the revised rules are clarified or amended. Second, the rules do not expressly define proportionality with respect to e-discovery requests and objections to requests, which may lead to delays in resolution and inconsistent tribunal decisions.

### *c. Statements by Witnesses*

The revised rules clarify a long-standing ambiguity on witness statements. Under the revised rules, it is now clear that discussing a witness’s prospective testimony with the witness is proper. This

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43. *Id.* at 89, 101.

44. *Id.* at 89-101.

45. *Id.* at 99.

clarification is welcomed because some jurisdictions consider it an ethical breach to speak to a witness outside the tribunal while others consider it professional negligence not to do so.<sup>46</sup> The clarification also allows the tribunal to identify and rectify potential issues regarding fairness and access to witnesses early in the case, which typically allows the tribunal to reach a final decision more quickly.

Additionally, the revised rules unambiguously establish that a lack of witness cross-examination is not to be construed as admitting the truth of the witness's testimony.<sup>47</sup> This relieves parties from unnecessary and costly cross-examination merely to deny the witness's statements. However, the revised rules do create a potential procedural trap. For example, it can be unclear whether the revised rules or the old rules are applicable during the current rule transition. If a party mistakenly believes the revised rules to be in effect, the party may unwittingly admit the truth of a witness's testimony by choosing not to cross-examine the witness simply to reduce costs. Therefore, it is best for parties to stipulate to the revised rules on the record at the beginning of the arbitration to ensure the application of the revised rules.

#### *d. Expert Testimony*

The revised rules require that an expert be independent and impartial.<sup>48</sup> Also, the rules require an expert's report to contain a statement of independence from the parties, their legal advisors, and the tribunal.<sup>49</sup> These revisions help to increase the reliability and fairness of dispute resolution through arbitration. However, they also provide new grounds for challenging expert reports, which can increase costs and delay resolution, particularly if they are used to challenge evidence near the end of an evidentiary hearing.

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46. See, e.g., RESTATEMENT (THIRD) OF LAW: LAW GOVERNING LAWYERS, § 116, ch. 7, topic 4, cmt. n.a (2000).

47. Ashford, *supra* note 19, at 102.

48. *Id.*

49. *Id.* at 103.

*e. Oral Testimony*

The revised rules simplify and modernize the oral testimony procedures through two new provisions. The first provision requires oral testimony only if requested by a party or a tribunal. The second provision explicitly allows video conferencing and other new technologies to support oral testimony.<sup>50</sup>

*f. Privilege Claims*

The revised rules provide a more flexible framework and specific guidance for tribunals to evaluate legal impediments and privilege claims.<sup>51</sup> For example, the revisions encourage tribunals to determine a customized set of privilege doctrines that would apply equally to both sides while considering the professional rules that limit the activities of the parties and their representatives. This helps avoid inequalities and unfairness due to conflicting legal or ethical rules, and increases the perception of arbitration as an effective dispute resolution mechanism.

*g. Conceptualizing Good Faith*

The revised rules introduce the concept of “good faith” to the evidentiary process in international arbitration.<sup>52</sup> Unfortunately, the concept is undefined within the revised rules, and courts interpret it in significantly different ways depending on the context and jurisdiction.<sup>53</sup> According to the revised rules, the failure to act in “good faith” during discovery (e.g., abusing the discovery process) is one factor a tribunal may consider when it assigns costs of an international arbitration.<sup>54</sup> While the application of the new standard may encourage inexpensive and concise discovery, the ambiguity of the standard may increase the time needed for tribunals to reach final decisions. Also, it may provide a way for parties to challenge and slow down both the evidentiary process and arbitration as a whole.

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50. *Id.* at 104.

51. *Id.* at 105.

52. *Id.* at 101.

53. *See id.* at 101-02.

54. *Id.* at 113.

The above revisions are not perfect, but they generally endeavor to modernize and simplify practices under the IBA by addressing practical developments of international conflict resolution and by, where possible, harmonizing common law and civil law procedures. These revisions also provide the first framework for competitive rulemaking in the international arbitration marketplace.

## 2. UNCITRAL

In August 2010, the UNCITRAL enacted a variety of revisions to harmonize its procedures with other modern institutions and to become more flexible with respect to circumstances commonly addressed by modern institutions. The UNCITRAL has also recognized and attempted to address the need for transparency rules particularly with regard to the arbitrator's effectiveness and assessment.<sup>55</sup> The most important revised rules address: statements of the parties' cases, interim measures, choice of law, review and correction of arbitrators' fees, multi-party arbitration, tribunal-appointed experts, and transparency.

### *a. Statements of the Parties' Cases*

The revised rules now require the statements of claim and defense to set out the legal arguments and be accompanied by all supporting documents and other evidence relied upon.<sup>56</sup> This requirement helps streamline an early resolution of the case.

### *b. Interim Measures*

The revised rules provide additional details regarding the award of interim measures to provide uniformity in the application of interim measures in arbitration.<sup>57</sup> This should increase requests for, and

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55. *Id.* at 114-15.

56. *See* UNCITRAL Arbitration Rules, G.A. Res.62/22, U.N. GAOR, 57th Sess., arts. 20 & 21, U.N. Doc. A/65/465, at 14-15 (Dec. 6, 2010), available at [http://www.uncitral.org/uncitral/uncitral\\_texts/arbitration/2010Arbitration\\_rules.html](http://www.uncitral.org/uncitral/uncitral_texts/arbitration/2010Arbitration_rules.html) (follow "Text" link).

57. *See id.* art. 27.



awards of, interim measures, which may create an additional market share by shifting some court actions to arbitration.

*c. Choice of Law*

The revised rules include provisions that mirror other modern international arbitral rules.<sup>58</sup> Under the revised rule, a tribunal applies the substantive law it deems the most appropriate without regard to conflicts of law rules, provided that there is no express choice of law by the parties.<sup>59</sup> This simplifies the procedural beginnings of the case and potentially reduces the time and cost related to disputes over choice of law.

*d. Review and Correction of Arbitrators' Fees*

The revised rules provide for a right to external review and correction of fees charged by arbitrators.<sup>60</sup> These provisions enhance the perception of an overall fair and consistent arbitration process.

*e. Multi-party Arbitration*

The revised rules now include provisions permitting multi-party arbitration (i.e., greater than two parties), which increase the utility of the arbitration system and harmonize its procedures with other modern arbitral rules.<sup>61</sup>

*f. Tribunal-Appointed Experts*

The revised rules now include procedures to object to experts appointed by the tribunal.<sup>62</sup> As with the other new provisions, these revisions are designed to increase the efficacy of the overall system and modernize its procedures.

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58. Ashford, *supra* note 19, at 114.

59. See UNCITRAL Arbitration Rules, *supra* note 56, art. 35.

60. See *id.* art. 41.

61. Ashford, *supra* note 19, at 115.

62. *Id.*

*g. Transparency*

The UNCITRAL is in the process of drafting new rules directed at increasing transparency, particularly with respect to selection, payment, availability, and past performance of arbitrators. However, the revised rules have yet to address these aspects of transparency.

As previously described, the revisions attempt to modernize practices under the UNCITRAL, particularly where the modernization makes it more competitive with other arbitration institutions. These revisions also increase the effectiveness of international arbitration under the UNCITRAL and provide another framework for competitive rulemaking in the international arbitration marketplace.

3. SIAC

In July 2010, the SIAC enacted new rules designed to make itself more competitive in terms of cost and delay compared to the mainstream arbitration institutions.<sup>63</sup> The revised rules address: expedited procedures, emergency interim procedures, speed and efficiency, new powers of the tribunal, and memorandum of issues.<sup>64</sup>

*a. Expedited Procedures*

The revised rules establish new expedited arbitration procedures with limited jurisdiction.<sup>65</sup> To qualify for the expedited procedures, a dispute must be extremely urgent. The urgency of a dispute must be recognized by the SIAC Chairman, and the dispute must involve damages of less than \$5 million SGD.<sup>66</sup> If a dispute qualifies for the expedited procedures, the arbitration should conclude within six months.<sup>67</sup> The expedited procedures, therefore, provide a strong and competitive incentive to designate the SIAC as the applicable arbitration institution.

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63. *Id.* at 115-17.

64. *Id.* at 116-17.

65. *Id.* at 116.

66. *SGD-Singapore Dollar*, XE (Oct. 28, 2012), <http://www.xe.com/currency/sgd-singapore-dollar?r=1> (“The currency code for [the Singapore] Dollar is SGD.”).

67. Ashford, *supra* note 19, at 116.

*b. Emergency Interim Procedures*

The revised rules also institute a new procedure to award emergency interim measures.<sup>68</sup> Under the revised rules, when an application is filed, the SIAC Chairman will appoint an emergency arbitrator within one business day.<sup>69</sup> The emergency arbitrator must establish a schedule within two business days from the date he or she was appointed to consider the application.<sup>70</sup> Therefore, access to interim measures also provides another strong competitive incentive to designate the SIAC as the applicable arbitration institution.

*c. Speed and Efficiency*

The revised rules also institute a variety of provisions expressly directed at shortening procedural time, including a thirty percent reduction in time to appoint tri-member tribunals.<sup>71</sup> These new expediency rules emphasize the SIAC's commitment to reduce time and costs of international arbitrations instituted under the SIAC.

*d. New Powers of the Tribunal*

The revised rules shift some powers from the SIAC Registrar, a potential bottleneck, to the arbitration tribunal.<sup>72</sup> These rules empower tribunals to initiate hearings to determine the seat of arbitration when the parties do not agree, and the production of evidence on the tribunals' initiative.<sup>73</sup> These new rules serve to expedite resolution of the case.

*e. Memorandum of Issues*

The revised rules remove the requirement for a "memorandum of issues" defining the issues of a case.<sup>74</sup> This may reduce delay in the

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68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 117.

72. *Id.*

73. *Id.*

74. *Id.*

process by eliminating the wait for a memorandum to be delivered to the tribunal.

The SIAC revisions are almost exclusively directed at reducing the time and relative cost of committing to arbitration under the SIAC rather than other more mainstream arbitration institutions and rules. These revisions, therefore, provide a particularly informative framework for competitive rulemaking in the international arbitration marketplace through a regional arbitration institution.

#### 4. CIETAC

In May 2012, the CIETAC instituted new rules designed to make itself more competitive in the international arbitration marketplace, particularly with respect to the ICC.<sup>75</sup> These revised rules address: access to interim measures, consolidation, arbitrators appointment, arbitration suspension, mediation (conciliation), choice of law, expedited procedure, and designating the language of the arbitration.

##### a. Access to Interim Measures

The revised rules allow a tribunal to order any interim measures that are deemed necessary or proper under the applicable law.<sup>76</sup> However, there is no supporting legislation providing a legal basis for a Chinese court to enforce interim measures ordered by a CIETAC tribunal.<sup>77</sup> Therefore, these provisions do not yet provide an incentive to designate the CIETAC as the arbitration institution.

##### b. Consolidation

The revised rules allow a CIETAC tribunal to consolidate two or more pending arbitration proceedings into a single proceeding where (a) either a party requests or the CIETAC believes it necessary, and

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75. Howlett, *supra* note 25.

76. *See id.*

77. *CIETAC Allows Interim Measures*, CHINA L. & PRAC., Feb. 29, 2012, available at <http://www.chinalawandpractice.com/Article/2986897/Search/CIETAC-allows-interim-measures.html>.

(b) all parties agree.<sup>78</sup> These new provisions modernize the CIETAC procedures compared to most major arbitration institutions.

*c. Arbitrators Appointment*

The revised rules require the CIETAC Chairman to consider a number of fairness factors when appointing arbitrators, but the revised rules do not require that a sole or a presiding arbitrator be of a nationality different from those of the parties.<sup>79</sup> While the fairness requirements increase the perceived impartiality and consistency of the CIETAC, the lack of an arbitrator nationality requirement would likely discourage parties from designating the CIETAC as the arbitration institution for international disputes.

*d. Arbitration Suspension*

The revised rules include new provisions allowing an arbitration to be suspended upon request by the parties, such as when the parties formally enter into settlement negotiations.<sup>80</sup> These new provisions modernize the CIETAC procedures compared to most major arbitration institutions.

*e. Mediation (Conciliation)*

In the past, parties to arbitration could request mediation of their dispute (conciliation), but the CIETAC required that the arbitrators assigned to a tribunal serve as the mediators.<sup>81</sup> This created a perception of ineffectiveness because the parties were less likely to fully commit to the process due to the fear that the arbitrators would later use statements in the mediation against them in a resumed arbitration process.<sup>82</sup> The revised rules help alleviate this concern by providing for a conciliation process in which the mediators are separate from the arbitration tribunal. These new provisions are an

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78. See Howlett, *supra* note 25.

79. *Id.*

80. *Id.*

81. *Id.*

82. *See id.*

important way to harmonize with international law and the expectations of parties foreign to China.

*f. Choice of Law*

The revised rules now allow an arbitration tribunal to determine the applicable law when an agreement about the applicable law is in conflict with a mandatory provision of “the law,” which often equates to “Chinese law” when one of the parties to the dispute is a Chinese entity.<sup>83</sup> This is important because there are a number of circumstances in which Chinese law is mandatory, and an arbitration agreement choosing non-Chinese law in one of the circumstances would render the entire agreement invalid. This would also make any resulting award unenforceable in China. These new provisions, however, allow the tribunal to make a determination as to the applicable law as part of the award, thereby validating the arbitration process and reducing the risk of obtaining an unenforceable award. As such, the new provisions provide increased consistency with respect to arbitration in China.

*g. Expedited Procedure*

The revised rules also make changes to the CIETAC’s limited-jurisdiction expedited arbitration procedure. Currently, the dispute must involve damages less than 2 million RMB,<sup>84</sup> increased from 500,000 RMB.<sup>85</sup> Additional access to this fast-track procedure provides a strong incentive to designate the CIETAC as the arbitration institution.

*h. Designated Language of the Arbitration*

The revised rules allow the CIETAC, in the absence of party agreement, to designate any language to be used in the arbitration based on the circumstances of the case, whereas the old rule required

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83. *Id.*

84. “The Chinese currency is ... abbreviated as RMB.” *What is Renminbi (RMB) and How to Change Foreign Currency for RMB in China?*, CHINA.ORG.CN (June 12, 2002), <http://www.china.org.cn/english/LivinginChina/184832.htm>.

85. Howlett, *supra* note 25.

the default language to be Chinese.<sup>86</sup> This should serve as an additional incentive to designate the CIETAC as the arbitration institution, particularly for international parties.

The above revisions attempt to modernize practices under the CIETAC, particularly where the modernizations make it more competitive against the mainstream international arbitration institutions. The CIETAC revisions are predominately directed at harmonizing its rules with international legal doctrines and international arbitration rules in order to make the CIETAC substantially more attractive to foreign parties. As such, the above revisions provide an important framework for competitive rulemaking in the international arbitration marketplace in the context of a regional arbitration institution.

## V. REGIONAL TRENDS

As noted above, there is a general trend towards a greater adoption of international arbitration, particularly in regions experiencing increased investments in manufacturing and tech-related businesses.<sup>87</sup> Also, other regions and industries have increased their utilization of international arbitration as they have become more cost-sensitive.

### A. People's Republic of China

International arbitration institutions regionally based in China are subject to a variety of perceived impediments, which deter the adoption of arbitration institutions by foreign parties, such as onerous arbitration clause requirements and foreign-element requirements.<sup>88</sup> For example, under Chinese Arbitration Law, an arbitration clause has to specify the arbitration institution administering the arbitration

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86. *Id.*

87. *See, e.g.*, Hamilton & Roche, *supra* note 30; FULBRIGHT & JAWORSKI, *supra* note 30, at 3.

88. Helena H.C. Chen, *China: Surprise to the Parties—Unanticipated Application of PRC Law in the Determination of the Effectiveness of an Arbitration Clause*, 13 INT'L ARB. L. REV. 42, 42-43 (2010); FULBRIGHT & JAWORSKI, *supra* note 30, at 2.

proceedings or the clause is invalid.<sup>89</sup> Additionally, a contract may invoke Chinese law regardless of a general choice of law clause in the contract, and a Chinese court may render an arbitration clause ineffective if the governing law of the arbitration clause is not specifically set forth.<sup>90</sup> Thus, it can be difficult to invoke arbitration and enforce arbitral awards within China.

Despite the difficulty, China has seen a steady increase in the use of arbitration over the past four to six years. For example, China has seen a strong shift in trademark dispute resolution from courts to arbitration tribunals and mediation since 2007.<sup>91</sup> Furthermore, the HKIAC, the SIAC, and the CIETAC are increasingly used by both foreign and national entities seeking dispute resolution outside the Chinese court system.<sup>92</sup> Both the HKIAC and the SIAC are considered credible alternatives to European arbitration institutions and have had increasing workloads as parties adopt their arbitration rules in China-related contracts.<sup>93</sup> The CIETAC is still overcoming the perception of bias towards domestic parties involved in international arbitration. However, it is still preferable to more local arbitration commissions and is making strong headway against the perception of bias through the adoption of the new rules described above.

At the same time, China has taken steps to encourage development of domestically seated arbitration institutions to keep pace with the expectations of both national and foreign entities. For example, in January 2010, the Intellectual Property Office of Singapore and the WIPO opened a joint center for dispute resolution in Singapore, and the ICC has recently opened a branch in Hong Kong.<sup>94</sup> The WIPO has committed to the joint effort through

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89. Chen, *supra* note 88.

90. *Id.*

91. Nathan W. Snyder, *Putting Numbers to Feelings: Intellectual Property Rights Enforcement in China's Courts—Evidence from Zhejiang Province Trademark Infringement Cases 2004-2009*, 10 NW. J. TECH. & INTELL. PROP. 349, 349 (2012), available at <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1171&context=njtip>.

92. FULBRIGHT & JAWORSKI, *supra* note 30, at 4.

93. *Id.*

94. *New gTLDs*, *supra* note 31; Press Release, Intellectual Prop. Office of Sing., The Intellectual Property Office of Singapore and the World Intellectual



worldwide promotion of the new center and by providing guidance and training to parties of arbitrations as well as arbitrators. These newly opened offices are in direct competition with the regional arbitration institutions and appear to be an attempt to capitalize on a developing domestic preference to choose non-U.S. based arbitration institutions and seats.<sup>95</sup>

### B. Japan

Undeniably, Japan is experiencing significant contraction due to the global financial downturns and residual effects from the 2011 Tohoku earthquake and the related backlash towards nuclear electricity production. Perhaps due to these additional pressures, Japanese businesses are increasingly relying on international arbitration rather than court proceedings to resolve business disputes. Between 1998 and 2008, Japanese parties to arbitrations increasingly used the LCIA as their arbitration institution of choice.<sup>96</sup> However, there is some indication that the perceived cost of LCIA arbitration has compelled Japanese businesses to look to Latin America, particularly ICC tribunals in Brazil, to meet their international investment and arbitration needs.<sup>97</sup>

### C. India

India has also recently taken substantial steps to form political partnerships across Asia in order to foster investment in their manufacturing and service industries. India has signed trade treaties with other Asian countries such as Korea. Furthermore, India's courts have adopted precedents that appear to make it easier for foreign and

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Property Organization Collaborate on the Resolution of International Disputes in Singapore (Sept. 28, 2011), available at <http://www.ipos.gov.sg/News/ReadNews/tabid/873/articleid/3/category/Press%20Releases/parentId/80/year/2011/Default.aspx>; FULBRIGHT & JAWORSKI, *supra* note 30, at 4.

95. FULBRIGHT & JAWORSKI, *supra* note 30, at 4-5.

96. Peter Godwin, Dominic Roughton & David Gilmore, *LCIA Arbitration: The Arbitration Process*, AM. INTELL. PROP. L. ASS'N (Herbert Smith LLP, U.K.), Apr. 16, 2008, available at <http://www.lexology.com/library/detail.aspx?g=aae1e7de-d651-4aba-a2ed-18aa7495308d>.

97. Hamilton & Roche, *supra* note 30.

domestic entities to rely on the enforcement of offshore arbitration decisions and arbitral awards.<sup>98</sup>

For example, in 2002, the Indian Supreme Court interpreted the Indian Arbitration and Conciliation Act of 1996 as allowing Indian courts to capriciously intervene in foreign arbitration procedures and awards that involved Indian parties.<sup>99</sup> As a result, the decision caused uncertainty in the international community, and the community ceased to rely on arbitration to resolve business disputes in India. However, in September 2011, the Indian Supreme Court limited the 2002 decision by ruling that simple nomination of a non-Indian seat of arbitration is sufficient to exclude application of the Act.<sup>100</sup> The decision renewed the perception of reliability on India-based international arbitration proceedings, and such result should encourage both capital investment and development of a viable arbitration institution marketplace in India. Furthermore, lower-cost regional arbitration institutions, such as those in China,<sup>101</sup> may see additional requests for arbitration from parties that have contractual ties to India.

#### *D. Latin America*

Finally, Latin America has seen rapid growth in the use of international arbitration to resolve investment, commercial, and IP disputes.<sup>102</sup> This growth is mainly concomitant with an increase in ICC-based arbitrations, which ballooned 75-145% between 1995-2001 and 2002-2007 among Argentina, Brazil, and Chile.<sup>103</sup> In particular, Brazil has garnered increasing international respect for its international arbitration infrastructure. Brazil continues to promote its arbitration seats as attractive alternatives to England, France, and Switzerland for parties all across the Pacific Rim.<sup>104</sup>

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98. Lim, *supra* note 33; see also FULBRIGHT & JAWORSKI, *supra* note 30, at 6.

99. See *Bhatia International v. Bulk Trading S. A. & Anr.* (2002) 4 S.C.C. 105 (India), available at <http://indiankanoon.org/doc/110552>; see also FULBRIGHT & JAWORSKI, *supra* note 30, at 5.

100. FULBRIGHT & JAWORSKI, *supra* note 30, at 6.

101. *Id.*

102. Hamilton & Roche, *supra* note 30.

103. *Id.*

104. *Id.* at 4; FULBRIGHT & JAWORSKI, *supra* note 30, at 7-8.

## VI. ONLINE ACCESS

Personal appearances and physical production of documents are some of the most expensive aspects of any international dispute process.<sup>105</sup> Accordingly, the means to reduce or eliminate these costs have become an important and competitive recent trend, particularly as technological infrastructures in emerging markets have developed to the point where almost any business entity has ready access to the internet and standardized digital document handling software.<sup>106</sup> Thus, there is a general trend towards increasing online access to, and online prosecution of, international arbitration matters.<sup>107</sup>

In addition to the amendments and additions discussed above, the UNCITRAL has recently provided some useful standards for eliminating or at least streamlining the appearance process. For example, the UNCITRAL added rules that eliminate unnecessary appearances and provide standards for teleconferencing and videoconferencing.<sup>108</sup> Furthermore, the UNCITRAL has recently spent considerable effort developing a working framework for centralized electronic access to proceedings for parties and promoting their system for use in international matters.<sup>109</sup> This direct access carries with it some caveats such as perceived unequal access to parties that are less sophisticated with the technological means. To address these issues, the UNCITRAL is proposing guidelines instructing tribunals to take issues regarding unequal access to technology into consideration as well as general efficiency concerns when resolving disputes.<sup>110</sup>

Particularly with respect to IP matters, the WIPO has recently instituted both the electronic case facility for technology arbitrations and the well-known paperless Uniform Domain Name Dispute Resolution Policy Proceedings.<sup>111</sup> Both serve to streamline the

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105. See OUTSIDE PERSP., *supra* note 32, under "Cost and Speed."

106. See generally Philippe, *supra* note 31, at 564.

107. See Philippe, *supra* note 31, at 563-64; Mann, *supra* note 31; *New gTLDs*, *supra* note 31; *UDRP Proceedings*, *supra* note 31.

108. Philippe, *supra* note 31, at 571.

109. See *id.* at 563-64.

110. *Id.*; see Mann, *supra* note 31.

111. *New gTLDs*, *supra* note 31; *UDRP Proceedings*, *supra* note 31.

process and reduce or eliminate the need for travel and other expenses related to personal appearances.

## VII. OPPORTUNITIES

Common themes may be extracted from these revised rules, regional trends, and increased online access to international arbitration proceedings. These trends can be used to craft business relationships that can benefit from the changing international arbitration marketplace and the global investment marketplace. Also, these trends provide a contemporary checklist of features a potential party to international arbitration should investigate before designating a particular arbitration institution and tribunal seat.

- Interim Measures

The general trend towards arbitration tribunals' access to interim measures should provide an additional incentive for international parties in IP disputes to look to international arbitration institutions as an attractive and inexpensive means to address their concerns. Many IP disputes involve technologies primarily valued according to a first-to-market business model, and access to interim measures is of paramount importance to protect the value of the underlying subject matter. Confidentiality continues to be an important concern for parties in international arbitrations.<sup>112</sup> Interim measures are a vital tool that can be used to increase the confidential nature of international arbitration disputes generally.

In addition to the subject matter of their disputes, international businesses should carefully consider access to interim measures both when choosing an international arbitration institution and when choosing which business relationships (and their corresponding jurisdictions) to form. An international contract for the supply of basic manufacturing materials may not require access to interim measures to adequately protect the interests of the parties; therefore, a less expensive arbitration institution may be designated in that context. However, an international services contract for the development of software or other IP-related technologies would inadequately protect the parties' interests if it designated an arbitration institution that does not provide access to preliminary injunctive relief,

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112. SCH. OF INT'L ARBITRATION, *supra* note 1, at 29.

electronic evidence holds, and other common interim measures available to most court systems.

- Expedited Arbitration

As noted above, there is a strong trend towards instituting and increasing access to expedited arbitration procedures. Similar to access to interim measures, expedited arbitration procedures are a particular boon to IP disputes where disagreements must be resolved quickly in order for the parties to retain and fully exploit the value of their IP. Access to expedited arbitration is not necessary in all international contracts. Rather, it may be inconvenient for parties without the ability to respond timely to an expedited arbitration procedure. However, expedited arbitration can address one aspect of international arbitration proceedings that parties view as the main contribution to the inefficiencies and length of proceedings: disclosure of documents by the parties.<sup>113</sup>

- Streamlined Arbitration Procedures

Another strong trend is revisions to arbitration rules that are intended to streamline administrative arbitration procedures. In particular, these rules address the delays early in the arbitration process caused by slow party responses and/or inefficient initiating procedures. For example, a tribunal instituted under the IBA is now required to consult parties very early in the process about evidentiary procedures, rather than waiting until the arbitration has progressed further and created the potential for wasted effort.<sup>114</sup> A CIETAC tribunal now has the power to make early and fair determinations on the issues of ambiguous or absent choice of law, seat of arbitration, and language provisions instead of having to resort to a court intervention or inefficient translation procedures.<sup>115</sup> A UNCITRAL tribunal now must require a relatively extensive statement of the case from all parties as early in the case as possible instead of allowing parties to delay the proceedings in the initial stages of an arbitration through partial and/or delayed submissions.<sup>116</sup> These and other streamlining trends should be considered when a business with

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113. *Id.* at 32.

114. Ashford, *supra* note 19, at 88.

115. *See* Howlett, *supra* note 25.

116. *See* UNCITRAL Arbitration Rules, *supra* note 56.

international interests designates a particular international arbitration institution to oversee its IP disputes.

- Conciliation Separation

Not all international arbitration institutions follow the general trend to separate arbitrators from a related mediation process.<sup>117</sup> This can result in an unnecessarily expensive dispute resolution process because allowing mediators to be arbitrators and/or judges in the same dispute often leads to ineffective mediation results due to the fear that statements made in mediation will be held against the party later in the arbitration (e.g., if the mediation fails). Ineffective mediation procedures foreclose the potential for a quick and relatively inexpensive exit from arbitration. Thus, parties contemplating an international arbitration should investigate the details of the dispute resolution mechanisms available to them.

- Evidentiary Procedures

International businesses should investigate which arbitration institutions have streamlined and modernized their evidentiary procedures, such as instituting procedures and guidelines for e-discovery and following general evidentiary concepts common to international legal doctrine. These and other modern procedures, such as allowing a tribunal to proffer its own document requests, can reduce the overall time and cost of the arbitration process.

- Region Locality

The apparent competition between international arbitration institutions in terms of cost, delay, and locality, offers a particular advantage for businesses and parties seeking to expand their interests internationally. For example, the number of viable regional arbitration institutions in China, in addition to the new offices opened by the more mainstream arbitration institutions, should help develop a large pool of sophisticated arbitrators as more arbitrators become experienced in international arbitration. This should lead to more consistent decisions not only within institutions, but also across the international arbitration community. This is already manifested in the recent survey results, where parties to international arbitration have indicated that the choice of arbitration institution, the choice of law, and the choice of arbitration seat are less likely to be the deal-breaker

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117. See Howlett, *supra* note 25.

when negotiating an international contract.<sup>118</sup> Instead, parties view the various arbitration institutions, including the regional arbitration institutions, as somewhat interchangeable or more homogenous than they did in the past, and they use those terms in their arbitration clauses as negotiable points to gain advantages elsewhere in the contract.<sup>119</sup>

The recent developments in Latin America and India are particularly notable. Both countries appear to be trailing behind China with respect to the expansion of regional arbitration institutions.<sup>120</sup> However, the growth of arbitration in Brazil and the recent positive case law in India indicate they are likely to see increasing growth while the Chinese international arbitration community continues to expand.<sup>121</sup> Therefore, they may become suitable alternatives for parties that desire some geographical distance from disputes arising in China but not the complete geographical separation that arbitration in Europe entails.

To take advantage of the current regional trends, international businesses should investigate the progress of the various regional arbitration institutions in their efforts to conform to, and compete with, the larger mainstream international arbitration institutions. Although Brazil and India are not traditional, neutral arbitration seats for disputes arising along the Pacific Rim, these countries should be considered as viable alternatives to Europe.

- Online Access

Although online access is not common among many arbitration institutions, it exemplifies the strong trends towards streamlining general and evidentiary procedures to reduce the overall cost and delay in international arbitration. The WIPO and the UNCITRAL are particularly far along in developing standards and procedures facilitating equal access to online dispute resolution.<sup>122</sup> They continue to provide an example that other international arbitration institutions

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118. *Id.*

119. *Id.*

120. See SCH. OF INT'L ARBITRATION, *supra* note 1, at 22; Hamilton & Roche, *supra* note 30.

121. See Hamilton & Roche, *supra* note 30, at 4; see also FULBRIGHT & JAWORSKI, *supra* note 30, at 5-8.

122. See Philippe, *supra* note 31, at 563-64, 568-69; *UDRP Proceedings*, *supra* note 31.

may follow in the near future. International businesses should consider online access as a significant cost-saving feature. Also, even if parties do not designate an arbitration institution that provides online access, they may want to include provisions modeled after the UNCITRAL guidelines in their arbitration clauses that provide some of the same cost-saving features outlined previously.

#### VIII. CONCLUSION

The international arbitration marketplace is moving towards a more homogenous distribution of arbitration institutions as the competition between traditional arbitration institutions and regional arbitration institutions increases with regard to cost, delay, sophistication, reliability, consistency, and efficacy. In particular, the regional arbitration institutions in China are attempting to serve the increased number of international investments in China by amending their rules and guidelines to closely match the expectations of international parties. However, traditional arbitration institutions are competing against regional arbitration institutions by opening up new offices in China and surrounding locales, and by encouraging international arbitration globally through their own amended rules, guidelines, and new online access features. The current trends in international arbitration are at least partly driven by global financial pressures and more specifically by increased investments in China, Latin America, and IP generally. Corporations and other potential parties to international arbitration can use a precise understanding of these trends to more effectively pursue their global interests.