



# International Dispute Resolution

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Cincinnati Bar Association

International Law Committee

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## Presentation Team

### **Richard D. Porotsky, Jr.**

Partner | Dinsmore & Shohl LLP

**P:** (513) 977-8256

[richard.porotsky@dinsmore.com](mailto:richard.porotsky@dinsmore.com)

### **John B. Pinney**

Attorney | Graydon Head &

Ritchey LLP

**P:** (513) 639-2730

[jpinney@graydon.law](mailto:jpinney@graydon.law)

### **Harvey Jay Cohen**

Partner | Dinsmore & Shohl LLP

**P:** (513) 977-8144

[harvey.cohen@dinsmore.com](mailto:harvey.cohen@dinsmore.com)

## I. International Litigation – fights about forum

When an international business dispute arises, where should it be heard?

- » Home of the injured party?
- » Home of the breaching party?
- » Case example – US Parts Mfr v. German Tooling Co (GTCO)

US Parts Mfr ordered tooling from GTCO; delivered in Germany

It did not work; sued GTCO in the N.D. Ohio

GTCO said: no office in US, no advertising here, no jurisdiction

No agreed forum, wasted legal efforts

## II. Internat'l Arbitration – agreed forum & rules

Where arbitration is agreed, parties can agree to:

- » the entity to administer the arbitration
- » location of the arbitration
- » choice of law
- » other details for arbitration, such as size of the tribunal
- » **a version of the Rules of Civil Procedure**
- » **a version of the Rules of Evidence**

This all can and should appear in the parties' initial arbitration agreement (in their business agreement)

## II. Internat'l Arbitration – agreed forum & rules

### Standard clause invoking ICC civil procedure

All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

## II. Internat'l Arbitration – agreed forum & rules

### Standard clause invoking IBA Rules of Evidence

In addition to the institutional, ad hoc or other rules chosen by the parties, the parties agree that the arbitration shall be conducted according to the IBA Rules of Evidence as current on the date of [this agreement/the commencement of the arbitration].

### III. Details on ICC Civil Procedure

Rules of Arbitration of the Internat'l Chamber of Commerce ("ICC")

» Article I: the International Court of Arbitration

Court does not itself resolve disputes.

It administers the resolution of disputes by arbitral tribunals under these rules

### III. Details on ICC Civil Procedure

#### Article 4: request for arbitration [Complaint]

- » a party seeking arbitration under the Rules shall submit its Request for Arbitration (the “Request”) to the Secretariat of the Court
  - » Claims, circumstances, relief sought
  - » Relevant agreements including the arbitration agreement
  - » Proposed location and language
  - » Filing fee (per the ICC schedule)

#### Article 5, 7, 8, 9: Answer / Counterclaims + joining others

- » 30 days to answer



## III. Details on ICC Civil Procedure

### Article 6: Effect of the Arbitration Agreement

- » submission to these rules and procedures
- » questions of jurisdiction shall be decided by the tribunal [unless referred to the ICC Court]
- » shall proceed even if a party refuses to participate
  - even if the contract is deemed null and void

### III. Details on ICC Civil Procedure

#### Article 11 – 14: Arbitrator independence, selection, challenge

- » Each arbitrator signs a statement of impartiality and raises any related issues of conflict for consideration
- » Number of arbitrators may be 1 or 3
  - If 1 and no agreement on selection, Court appoints
  - If 3, each party appoints 1, and Court appoints 3rd
    - » Unless another procedure is agreed
- » Court considers nationality and relationships of arbitrators
- » Parties may challenge the appointment within 30 days

### III. Details on ICC Civil Procedure

Article 18 – 21: location, language, law, rules

- » Look first for agreements on these points
- » If no agreement

the Court fixes the location

the tribunal selects the language + the law

for special issues on which the ICC rules are silent, the tribunal decides

### III. Details on ICC Civil Procedure

Article 23-24, + 30: terms of reference + case management conference and schedule

- » Confer with the parties on procedural schedule
  - In person, by phone, or video conference
  - Adopt a procedural timetable
  - Resolution within 6 months, absent ICC Court extension**
- » Draw up terms of reference for signature by the parties
  - summary of the claims / relief, issues to be determined
  - place of arbitration
  - Contact information for party representatives + arbitrators
- » If not signed, then the Court can review and adopt them

### III. Details on ICC Civil Procedure

#### Article 25-26 : establishing facts and holding hearings

- » Written submissions and documents
- » Hold hearing, and call witnesses, if requested by any party or tribunal
- » The case may be decided on documents absent objection

### III. Details on ICC Civil Procedure

#### Article 28-29: conservatory and interim measures

- » May be ordered by the tribunal,
- » or the parties may (without waiving arbitration) apply for such measures to a competent judicial authority
- » an emergency arbitrator can be requested, which will not bind the standard panel which is being assembled

### III. Details on ICC Civil Procedure

#### Article 33: scrutiny of the award by ICC Court

- » Before signing any award, the arbitral tribunal shall submit it in draft form to the Court.
- » The Court may lay down **modifications as to the form**
- » And, without affecting the arbitral tribunal's liberty of decision, **may also draw its attention to points of substance.**
- » No award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form

### III. Details on ICC Civil Procedure

Article 34 & 39: the award + waiver as to recourse

- » award is made, provided the parties have paid their deposits
- » every **award shall be binding** on the parties.

By submitting the dispute to arbitration under the Rules, the parties have waived their right to any form of recourse insofar as such waiver can validly be made.

Lack of objection indicates waiver



### III. Details on ICC Civil Procedure

#### Article 35: Correction and Interpretation of the Award

- » On its own initiative, the arbitral tribunal may correct a clerical, computational, or typographical error (or similar errors) . . . within 30 days of award.
- » Any **application of a party for the correction** of such an error, or for interpretation of an award, must be made to the Secretariat within 30 days . . .
  - the other party may respond in 30 days
  - the Tribunal shall decide within 30 days
- » The Court may fix an advance for additional fees and expenses

### III. Details on ICC Civil Procedure

#### Article 36: advances to cover costs

- » The Court shall fix the amount, and each side shall pay its share
- » When a request for an advance has not been complied with, the Secretary General may (in consultation with the Tribunal) suspend work, and set a time limit, after which the relevant claims shall be considered as withdrawn.

### III. Details on ICC Civil Procedure

#### Article 37: decisions as to costs

- » The final award shall
  - fix the costs of the arbitration
  - decide which of the parties shall bear them or in what proportion
  - may take into account the extent to which each party operated in an expeditious and cost-effective manner

## IV. Details on IBA Rules of Evidence

### IBA Rules of evidence – background

- » prepared by a Working Party of the Arbitration Committee of the IBA
- » adopted by resolution of the IBA counsel on 29 May 2010
- » reflect procedures in use in many different legal systems
- » Preamble: “intended to provide an efficient, economical and fair process for the taking of evidence”

## IV. Details on IBA Rules of Evidence

### Article 2: Consultation with the parties on Evidentiary Issues

- » Discussion should address
  - (1) submission of Witness Statements and Expert Reports;
  - (2) oral testimony at any Evidentiary Hearing;
  - (3) the requirements / procedure for document production;
  - (4) the level of confidentiality protection; and
  - (5) the promotion of efficiency, economy and conservation of resources

## IV. Details on IBA Rules of Evidence

### Article 3: Documents and production

- » Set date for submission of all documents on which a Parties relies, and
- » Set date for submission of Requests to Produce
  - For electronic items the requesting Party may identify specific files, search terms or other means
  - The request shall explain the relevance
  - The producing party may object, stating the reasons
- » The Tribunal may invite the parties to consult; if not resolved the Tribunal shall rule, or may appoint an independent expert

## IV. Details on IBA Rules of Evidence

### Article 3: More regarding documents

- » If third party documents are needed, leave and assistance may be requested from the Tribunal to take the necessary legal steps
- » Translations of documents shall be submitted with the originals
- » Non-public documents shall be kept confidential for use only in the arbitration

## IV. Details on IBA Rules of Evidence

### Article 4 – witnesses of fact

- » Set a date to identify witnesses, and provide Witness Statements
  - statements to be signed, and contain the facts and the source of information relied, as well as noting the statement's original language
- » May submit revised or additional witness statements to respond
- » Statements are disregarded if witness is requested to appear at the hearing and does not (absent exceptional circumstances)
- » If a witness will not voluntarily appear: leave and assistance may be requested from the Tribunal to take the necessary legal steps



## IV. Details on IBA Rules of Evidence

### Article 5 – party appointed experts

- » Set a date to identify the expert and subject matter
- » Set a date to provide a signed report, providing the opinions and conclusions, including the methods, evidence & information used
- » The Tribunal may order the experts to meet and confer in attempt to reach agreement on some or all issues
- » if requested to appear at hearing, and fails to appear, the report shall be disregarded

## IV. Details on IBA Rules of Evidence

### Article 6 – Tribunal appointed experts

- » The Tribunal may appoint independent experts, subject to objection by the parties.

The expert may request information from the Parties

- » Fees and expenses of the expert shall be part of the costs of the arbitration

## IV. Details on IBA Rules of Evidence

### Article 8 – Evidentiary Hearing (and cross examination)

- » Set a time for parties to request the appearance of witnesses at the hearing.
- » Witnesses who have provided a statement shall first affirm the statement.

tribunal may order that the statement serve as the direct testimony

- » Other parties, or the Tribunal, may then question the witness.
- » Redirect to follow

## IV. Details on IBA Rules of Evidence

### Article 9 Admissibility and Assessment of Evidence

- » Factors include relevance, confidentiality, fairness, or other considerations
  - Account for confidentiality with respect to obtain legal advice
  - Account for confidentiality as to settlement negotiations
  - Make orders to protect confidentiality
- » Adverse inference if a party fails to provide evidence that has been ordered, or requested with no objection

## V. Case study: ICC Arbitration -- *Brazilian Distrib'r v. U.S. Manufacturer*

- » Each side picked an arbitrator, who jointly selected a third
- » Hearing in Sao Paulo, Brazil
- » Language: English, but Portuguese for some witnesses + translations
- » Procedure:
  - written briefs, witness statements, documents, experts
  - requested document production (not smooth)
  - motions regarding documents, witnesses
  - hearing, decision, errors

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