Towards Procedural Harmony in International Commercial Arbitration

The Roles and Implications of Arbitral Institutions

In the course of international commercial business relationships most companies find it advantageous to include an arbitration clause in their agreements.\(^1\) The agreements are done in the hopes that should a dispute arise the parties can seek a faster, more cost efficient resolution to their dispute without the difficulties of resorting to national courts.\(^2\)

In an effort to simplify arbitration clauses, and provide consistency and support to international businesses many different institutions have emerged to meet the growing needs and demands of different businesses engaged in international commerce.\(^3\)

While these different arbitration organizations offer very similar services they differ in some very important regards.\(^4\) The procedural rules of these organizations vary because of internal policies and as a result of the laws of the countries they are situated in.\(^5\)

Is it possible to use the procedural differences between these institutions to predict the future of procedural harmonization in international commercial arbitration? Furthermore is it possible to use the recent increase in arbitrations of any of these particular institutions to evidence a preference businesses have for particular procedural rules? Finally and most importantly what businesses choose particular arbitral institutions and why do they choose them?

In order to answer these questions about the procedural future of international

\(^2\) *Id.*
\(^3\) *Id.*
\(^4\) *Id.* at 36.
\(^5\) *Id.* at 38-40.
commercial arbitration this paper will examine three of the largest and most well known providers of international arbitration services including the the London Court of International Arbitration (LCIA), the International Chamber of Commerce (ICC), and the American Association of Arbitration's arbitration arm the International Center for Dispute Resolution (ICDR).6

In effort to answer these questions this paper will compare the differences in philosophies, procedural rules, administrative support, and costs between the LCIA, ICC, and the ICDR, in an effort to determine whether or not the rules these institutions have developed for their arbitrations have converged in similarity over time or whether their procedural differences have contributed to their successes or failures to attract new businesses to their services. The end goal of this paper is to determine whether businesses can take advantage of the particular procedural rules of each of these institutions or whether the differences between these institutions are converging and no longer of significant consequence.

The important differences between these three arbitral institutions are their approaches to the selection of the arbitral tribunal; the flexibility and willingness of the institutions to changes of their institutional rules; the desire of theses institutions to scrutinize the final reward issued by the tribunal, the necessity of terms of reference; the default seat of the arbitration; and finally how the costs of using the particular institutions are calculated.7 This list of differences is in no means meant to be exhaustive, but rather a sampling of key differences amongst the institutions that businesses can, and should consider when selecting an arbitral institution to include within an arbitration clause.

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6 There are many other institutions that offer international institutional arbitration. For a list of the most significant institutions see e.g. http://www.kluwerarbitration.com/organizations.aspx.
7 Lew, Mistelis, Kröll supra n. 1, at 36.
The first part of this paper will address the different approaches that each of these institutions takes to these elements of arbitration. The second part of this paper will address how and whether these components effect the arbitral process and how different businesses may use the differences between these institutions to their benefit. Finally, are these insitutional rules likely to converge over time or maintain their independence as a means to attract particular types of businesses.

Part I.

Key Differences amongst the Institutions

Formation of the Arbitral Tribunal

One of the most important aspects of arbitration is determining who will arbitrate the dispute between the parties. The ICDR the ICC and the LCIA all have default rules that appoint a single arbitrator to a dispute however, in all of the institutions, if the dispute is deemed to be large or complex a panel consisting of three arbitrators is used. The ICC, the ICDR and the LCIA all have different procedures for determining what arbitrators can be selected to a single or three arbitrator tribunal, and the method in which they are selected.

The ICC process for creating an arbitral panel is detailed in Articles 8 and 9 of the ICC Rules of Arbitration. According to Article 8 in an arbitration involving three arbitrators each party will have 15 days to nominate an arbitrator for confirmation. The final appointments of the arbitrators is made and approved by the ICC court. The selection of the third, and final arbitrator is done by the ICC court.

8 Id. at 223.
9 Id.
11 Id.
In selecting the final arbitrator the court is directed by Article 9 to consider the “prospective arbitrator’s nationality, residence and other relationships with the countries of which the parties or the other arbitrators are nationals.” Article 9 also provides that when a party to an arbitration fails to select an arbitrator that the ICC will make a proposal to the national committee of the country to which that party is a national.

The ICDR's method for selecting arbitrators is detailed in Article 6 of the ICDR International Arbitration Rules. The process detailed in Article 6 provides that the parties have 45 days to agree upon the arbitrators for their dispute or a process for selecting the arbitrators. If, during the 45 day time frame, the parties are unable to agree upon arbitrators, or a process for selecting them the administrator from the ICDR will takeover the selection process. If the parties have created a procedure to select the arbitrators, but have not completed the selection process, the administrator will follow this procedure and appoint the arbitrators. If a procedure has not been developed or finalized by the parties the administrator will consult with both parties and ultimately select the arbitrators to the tribunal. Article 6 makes no reference to the nationalities or the allegiances of prospective arbitrators.

The LCIA Arbitration Rules outlines the selection of arbitrators in Articles 5, 6 and 7. In section 5.5 the LCIA explicitly states that it alone is empowered to select the arbitrators to the final tribunal. Furthermore, in Article 5.6 the LCIA specifies that in the event of a three

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12 Id. at Article 9.
13 Id.
15 Id.
16 Id.
17 Id.
18 Id.
member tribunal that it will appoint the chairman of the tribunal. The LCIA requires that the selection of the arbitral tribunal begin 30 days after a response is made by the respondent to the dispute.

In Article 7.1 The LCIA again makes it clear that it has final discretion over the selection of the ultimate arbitrators on the tribunal. This section states that any agreement by the parties to self-select arbitrators will be treated as nominees and still subject to the ultimate review of the LCIA pursuant to the qualifications outlined in section 5.3.

Article 6 discusses the nationality of the arbitrators and the issue of determining the nationality of the parties to the arbitration. It states that the neutral arbitrator will not be of the same nationality as either of the arbitrators nominated by the parties. The nationality of the parties is understood to be where the location of the majority of its shareholders reside. A person that is a national of more than one state is to be treated as a national of each state.

The Seat of Arbitration

The seat of the arbitration is the next area in which differences amongst the institutions has a potential to effect the outcome of an arbitration. The seat of the arbitration is the legal jurisdiction to which the arbitration will be tied. The seat of the arbitration determines the procedural rules the arbitral tribunal will use while conducting the arbitration.

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20 Id. at Article 5.6.
21 Id. at Article 5.4.
22 Id. at Article 7.1.
23 Id. at Article 5.3.
24 Id. at Article 6.
25 Id. at Article 6.1.
26 Id. at Article 6.3.
27 Lew, Mistelis, Kröll supra n. 1, at 172.
28 Id.
29 Id.
procedures include how witnesses will testify, how discovery will be conducted, and how
pleadings and motions will be introduced.\textsuperscript{30} The procedural rules that a tribunal follows can have
particular relevancy in international arbitrations because a party's familiarity or unfamiliarity
with the particular procedural rules of a country may have substantial advantages for one party
versus the other.\textsuperscript{31} The seat of the arbitration also has importance in determining which courts
can exercise supervisory and supportive powers in relation to the arbitration.\textsuperscript{32} Finally, the seat
of the arbitration determines the nationality of the award which is relevant for the enforcement of
the award.\textsuperscript{33}

The seat, or procedural rules that will govern an arbitration under the supervision of the
ICC are described in Article 14.\textsuperscript{34} These rules provide that in the absence of an explicit
agreement between the parties that specifies the seat of arbitration and procedural rules that the
ICC will make these determinations for the parties.\textsuperscript{35}

The ICDR, in Article 13.1, also allows the parties to make a contractual determination of
the seat of the arbitration.\textsuperscript{36} In the absence of an agreement between the parties the case
administrator will make the initial determination of the seat.\textsuperscript{37} Ultimately, the tribunal that is
appointed to the dispute will make the final determination of the seat of arbitration and the
procedural rules that will govern the parties in the dispute.

The LCIA has similar rules to the ICC and ICDR that allow parties to contract for the seat

\textsuperscript{30} Id.
\textsuperscript{31} Id.
\textsuperscript{32} Id.
\textsuperscript{33} Id.
\textsuperscript{34} ICC Rules of Arbitration, supra. n. 9 at Article 14.
\textsuperscript{35} Id. at Article 14.3.
\textsuperscript{36} ICDR International Arbitration Rules, supra n 14 at Article 13.1.
\textsuperscript{37} Id.
of arbitration.\textsuperscript{38} In contrast with the ICC and ICDR the default seat of arbitration in the LCIA is London, the location and home of the LCIA.\textsuperscript{39} However, if the LCIA finds that a different location is more appropriate for the seat of arbitration it reserves the right to make the necessary change.\textsuperscript{40}

\textbf{Defining the Dispute}

At the beginning of an arbitration the tribunal often meets with the parties involved to determine the issues in dispute and to fix a timetable, format, and schedule for the proceedings.\textsuperscript{41} The agreements that are reached between the parties at this stage often include such issues as specific evidentiary rules, document disclosure, and other interim procedural rules.\textsuperscript{42} These agreements are then compiled by the tribunal and collectively referred to by tribunals as the terms of reference. These terms are then used by the tribunal to guide the parties through the arbitration process.\textsuperscript{43}

Arbitrations proceeding under ICC rules require the mandatory completion of these terms of reference in addition to a provisional timetable prior to the start of the arbitration procedure.\textsuperscript{44} Article 18 of the ICC rules require that once the tribunal is appointed it will create these terms of reference outlining the dispute and its particularities.\textsuperscript{45} These terms must then be agreed upon and signed by the parties to the dispute and before the arbitration can begin.\textsuperscript{46}

The ICDR and the LCIA rules do not include provisions that require parties to a dispute
to create terms of reference prior to the commencement of the arbitration. This makes the formation of specific terms of reference more open to the discretion of the tribunal and does not require the parties to come to any specific agreements prior to the beginning of the arbitral process.

Awards

Arbitrations normally end with the tribunal issuing a final and binding decision that is generally not subject to the review of outside parties or courts. Arbitration has become a highly respected method of international dispute resolution and the awards issued by arbitral tribunals are seldom reviewed substantively by the domestic courts that enforce them or by the tribunals or institutions that issue them.

The ICC differs from the LCIA and the ICDR in this regard by requiring any award issued by the arbitral tribunal to be reviewed by the ICC in accordance with rule Article 27 of the ICC rules. The ICC reviews every award issued by a tribunal to correct obvious clerical, typographical or computational errors in the award or to correct any clear errors or ambiguity.

Neither the LCIA nor the ICDR provide any mechanism for the review of the arbitral tribunal's final decision through any internal institutional mechanisms. The LCIA and the ICDR offer a 30 day window for parties to ask the tribunal to correct any imperfections in the award.

The institutions also differ in the types of awards they permit the arbitral panels to issue.

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47 See LCIA Arbitration Rules, supra n. 19; ICDR International Arbitration Rules, supra n, 13.
48 Id.
49 Lew, Mistelis, Kröll supra n. 1, at 628.
50 Id.
51 ICC Rules of Arbitration, supra. n. 9 at Article 27.
52 Id.
53 See LCIA Arbitration Rules, supra n. 19; ICDR International Arbitration Rules, supra n, 14.
54 Id.
at the conclusion of the hearings. The ICDR specifically prohibits the tribunal from awarding punitive or exemplary damages when issuing awards unless this rule is waived by the parties in the arbitral clause of their contract.\textsuperscript{55} The ICC and LCIA are silent on this issue and have no corresponding rules that address the possibility of punitive damages.\textsuperscript{56}

\section*{Calculating Costs}

Cost is another important consideration when choosing an arbitral institution. Arbitration is often seen as a lower cost alternative to national judicial systems for the parties to a dispute.\textsuperscript{57} As a result the parties will want to carefully select an institution that allows for the realization of this goal. Each of the institutions has a different method of calculating and paying the administrative costs of arbitration that are outlined in their respective rules.

The ICC details its fee structure in Article 31 and with further specificity in Appendix III.\textsuperscript{58} Article 31 provides that the costs of the arbitration include the fees and the expenses of the arbitrators along with the administrative expenses of the ICC court.\textsuperscript{59}

These administrative costs are to be determined in accordance with the scale provided in Appendix III at the commencement of the arbitral proceedings.\textsuperscript{60} This scale determines the amount of the administrative fees on a schedule that is proportional to the amount in dispute.\textsuperscript{61} Thus, as the amount of the dispute increases the relative administrative costs of ICC increase as well. For example, for a claim involving 50,000 USD or less the administrative fee is 2,500

\begin{footnotesize}
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\item \textsuperscript{55} \textit{LCIA Arbitration Rules}, supra n. 19 at Article 28.5.
\item \textsuperscript{56} See \textit{LCIA Arbitration Rules}, supra n. 19; \textit{ICC Rules of Arbitration}, supra. n. 9,
\item \textsuperscript{57} Lew, Mistelis, Kröll supra n. 1, at 9.
\item \textsuperscript{58} \textit{ICC Rules of Arbitration}, supra. n. 9 at Article 31, Appendix III.
\item \textsuperscript{59} Id. at Article 31.
\item \textsuperscript{60} Id. at Appendix III.
\item \textsuperscript{61} Id.
\end{itemize}
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USD. The administrative fee is capped at 88,800 USD for disputes over 100 million dollars. The ICDR's approach to administrative fee structure is relatively similar to the ICC. The ICDR begins its incremental fee structure at a lower amount than the ICC and separates its fee structure into filing fees and case service fees. Both the filing cost and the service fees increase in cost as the amount in dispute raises. The ICDR caps the initial filing fee at 65,000 USD. The case service fee is incurred for all disputes that proceed to their first hearing. This fee is refundable and will be returned to the parties if no hearings occur during the case. Claims from 0 to 10,000USD cost 775 USD to file with an additional cost of 200 USD in service fees. The ICDR also offers a refund schedule which also parties to recoup a percentage of their filing fees after the dispute has been submitted to the ICDR but before any arbitrators have been appointed to the case.

The LCIA differs from the ICC and the ICDR and does not calculate its administrative fees in reference to the amount in dispute. Under the LCIA the initial registration fee is 1500£ or approximately 2,300 USD. After this initial registration fee the charges for the administration are calculated at an hourly rate. This rate is currently 200£, or roughly 300 USD per hour for the registrar, and an additional 100£, or 150 USD per hour, for the secretariat and other support personnel.

62 Id.
63 Id.
64 ICDR International Arbitration Rules, supra n 14 at Administrative Fees.
65 Id.
66 Id.
67 Id.
68 Id.
69 Id.
70 Id.
71 LCIA Arbitration Rules, supra n. 19 at Schedule of Arbitration Costs.
72 Id.
73 Id.
Part II

Selecting an Institution

Larger businesses and corporations that have been dealing in international commerce for extended amounts of time have very particularized arbitral agreements that allow them to carefully tailor their arbitration experience in any institution. Experience with previous arbitrations and longstanding relationships with other businesses give these companies a high degree of familiarity with the institutions, arbitrators and the overall experience. This gives these companies the confidence to tailor proceedings in any arbitral institution to meet their respective needs.

In contrast, businesses that are just developing their international commercial contacts do not have the same levels of experience. This makes it more difficult for them to draft arbitral agreements that are as detailed or specific as larger corporations. In order for these companies to take advantage of the perceived benefits of international arbitration selecting an arbitral institution may be very important.

The perceived benefits of international arbitration as opposed to international arbitration are that the proceedings are faster and more efficient, that they are less costly, and offer a higher degree of fairness for both parties than in either parties home judicial system. In order for these benefits to be realized the companies entering into a contract containing an arbitration clause must choose an institution that allows them to capture each of these goals.

Do the procedural and administrative differences previously outlined between the ICDR, ICC and LCIA make a serious difference in determining which institution best suits a business?
Speed and Efficiency

The speed and efficiency of the arbitration process is of particular importance to businesses drafting arbitration contracts. If a business is to gain an advantage over the traditional national litigation process the arbitral institution they choose must have systems in place that allow the dispute to be resolved in a timely fashion. The level of oversight and administration that an institution provides during the formation of the arbitral tribunal, the definition of the claim and the issuance of the award may have implications on the speed and efficiency of the arbitration. Institutions with high levels of administration are generally characterized as slower and more time consuming for the parties and therefore more costly. However, the added administrative steps required by institutions with high levels of administration can in fact save costs and time by clearly outlining the disputes and reviewing the ultimate decisions of the tribunal.

Selection of the Tribunal

The selection of the arbitral tribunal that will preside over a particular dispute is another key area that can have a substantial bearing on the time it takes to complete and arbitration proceeding. The importance of selecting arbitrators and creating the tribunal is of the utmost importance. Many commentators on international arbitration consider the ability to select arbitrators to the tribunal that will be determining a case the single most important part of beginning an arbitral proceeding. It has often been said that the quality of the arbitration cannot be any better than the arbitrators that are appointed to conduct it. Therefore, the guidance and involvement that institutions have in selecting and approving arbitrators can have a direct effect

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74 Lew, Mistelis, Kröll supra n. 1, at 223.
75 Id.
on the quality of the arbitral process.

The LCIA and the ICC both exercise a great deal of control over the formation of the arbitral tribunal from the outset of its selection. They both state that arbitrators selected by the parties are nominations for consideration and must be approved of by the institution. The direct control that these institutions exercise over the selection of the tribunal has several benefits. The selection of arbitrators can be difficult for parties to agree upon and the direct involvement of the LCIA and ICC in during the selection and approval process can make the creation of the tribunal faster and more efficient.

In addition, both the LCIA and ICC consider the nationality of the potential members of the tribunal to ensure fairness in the proceedings thereby decreasing the likelihood of later challenges to the award. The ICC takes the additional step of consulting the national committees it assigns to different countries for advice and suggestions of arbitrators when approving and selecting a tribunal. This step can increase the time of the selection process but this safeguard is often believed to increase the fairness of the process.

The LCIA does not have national committees but clearly states that the nationality of the final arbitrator must be from a country that has no involvement in the current dispute. This safeguard also helps to reduce the potential for national bias and increase the perception of fairness to the parties.

The ICDR does not exercise as much control over the selection of arbitrators as the LCIA or ICC. The parties are in fact free to select arbitrators to their dispute without the involvement of the ICDR administration. The rules of the ICDR give more credence to the methods and process of the contracting parties to the arbitration. The ICDR only intervenes if the parties
cannot come to an agreement on the formation of the tribunal. Even at this stage of the intervention the ICDR appears more willing to seek out the guidance of the parties and fulfill the parties selections according to their wishes. Honoring the selection methods of the contracting parties does seem to increase the perception of fairness, however, it is likely to take more time for the parties to achieve a consensus than the more rigid structures of the ICC and LCIA.

Supervision of the Process

The ICC is considered an institution that provides a high level of supervision and administrative support. From the very beginning the process the ICC requires the parties to specifically outline the issues that are disputed by creating terms of reference. In addition the parties are also required to create a The terms of reference serve as a guide for the arbitrators and the parties and are designed to ensure all of the claims are resolved in a single proceeding.

The terms of reference can potentially have both positive and negative effects on the speed of the arbitration process. They can slow the speed of the arbitration because they require both parties to define and agree upon the specific dispute they wish the tribunal to resolve. It is often very difficult for parties who are already in conflict to come to agreements about the exact nature of their dispute. Therefore, agreeing on terms of reference may take a longer time and cause undue delays in beginning the actual arbitral process.

Terms of reference may also have the opposite effect and speed the arbitral process. When two parties in dispute can articulate the nature of their dispute it makes it easier for the arbitral tribunal to resolve. Terms of reference also have the benefit of making sure that all of the

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parties issues with regard to the dispute are resolved in a single arbitration thus avoiding the possibility that the tribunal will not rule on all of the issues important to both parties.

The ICDR and the LCIA do not have a process for developing terms of reference prior to the beginning of an arbitration and are generally considered to be less active in the arbitration process after the initial selection of arbitrators and subsequent challenges have been made. Many commentators have suggested that these institutions have been perceived as faster because of the difficulty in getting parties in a dispute to agree on the particulars of the dispute prior to the commencement of the proceedings.77

While terms of reference could possibly be a tool to speed proceedings between parties with minor disputes or between parties to a more amicable dispute it is more likely that they cause further delays and thus further costs to parties. Parties in dispute are unlikely to agree on either the source or the exact elements of their disputes prior to approaching the tribunal and forcing parties to define their dispute is likely to extend the time of preparation and thus the costs of arbitration to the parties engaged in the dispute.

Review of the Award

The ICC's high level of administration continues throughout the arbitration process and even after the initial issuance of an award by the tribunal. The ICC court reviews every award for minor problems and mathematical errors in an effort to avoid problems with enforcement and ensure accuracy. This has the effect of making awards from the ICC very likely to be enforced in a large number of jurisdictions because every award comes with the direct approval of the ICC

77 Id.
court. The review of awards requires parties to wait extra time for the award however, the review of the award for errors and clerical mistakes can actually make the arbitration process shorter. Under the ICDR and LCIA in order to change these simple mistakes it requires the institutions and parties to reconvene the arbitral tribunal. Reconvening the tribunal requires the parties to pay additional fees to the arbitrators, to their own litigation teams and to the arbitral institutions. Thus, the extra time that it takes to make the limited review of the tribunal's awards in the ICC process has the potential to drastically reduce the time and cost of minor errors in an award.

The high level of administrative involvement of the ICC in the arbitrations have led some detractors to suggest that it is a slower and possibly less efficient institution than the LCIA or ICDR. In contrast, over time, this high level of administrative involvement by the ICC may in fact save time and increase efficiency. Requiring terms of reference and timetables at the beginning of the process ensures that the necessary problems that both parties have will be resolved in a single dispute. Furthermore, the review of the award decreases the possibility that minor errors in the computation of damages will require the tribunal to be recalled and increases the legitimacy of the award. Over the long term however none of the institutions seems to possess a definitive advantage in terms of speed an efficiency in relation to their administrative involvement. The increase in time required by the ICC’s increased involvement will likely balance out with the LCIA and ICDR even if there are only a few instances when clerical errors occur after the issuance of the award because of the dramatic costs of reconstructing the tribunal.

The increased legitimacy of awards issued by the ICC is also unlikely to be a major factor in all but the fewest of situations. The LCIA and the ICDR are also institutions that command

78 Lew, Mistelis, Kröll supra n. 1, at 628-629.
the highest levels of respect in international circles. Since ICC only provides review for clerical and other minor errors and not for substantive issues contained in the award there is not a drastic tradeoff in the benefits of selecting the ICC versus the ICDR or the LCIA.

The default rules of the ICDR prohibit the award of exemplary or punitive damages in awards given by tribunals. Prohibiting these types of awards increases the perception of fairness and potentially lowers the cost of arbitration to the parties by limiting their liability. The ICC and LCIA are silent about the issue of punitive damages but their silence should not be construed as acceptance. The ICDR is a US institution and the clause is meant to allay the concerns of foreign parties arbitrating in the United States who fear the possibility of damages outside of the contractual relationship of the parties.

**Seat of Arbitration**

In the ICDR and the ICC the institutions or appointed tribunals make the selection of the seat of arbitration in the absence of an agreement between the parties. In contrast if the parties to an LCIA arbitration have not agreed upon a seat of arbitration the seat is fixed in London. The default rule of the LCIA in the selection of the seat may allow parties to speed up the arbitration process since it does not require more decision making on the part of the institution. However, parties that are from jurisdictions unfamiliar with the procedural rules of London may be at a significant disadvantage and the lack of understanding may cause delays.

The selection of the seat is unlikely to cause significant additional costs or undue delay but the LCIA default location of London adds a level of consistency that both parties to an arbitration can rely upon if the seat of arbitration is absent or ambiguous. This consistency and
predictability would allow for quick adjustments by the parties and potentially save costs.

Cost Considerations

Arbitration is intended to be a less expensive alternative for parties than resorting to national courts. This makes it incredibly important for a business to consider the costs of the institution they wish to include in an arbitral clause. The similarities in the administrative rules between the institutions and the ability of parties to contract around may of the default rules that differentiate the institutions leaves the cost of arbitration as one of the most determinative factors. Of particular importance when considering these costs is at what stage of the the payments must be made, and how the institutions calculate their administrative fees.

The payment schedule is important for a business choosing an arbitration institution. Depending on the available resources of a business there can be benefits to knowing the upfront costs of the arbitration. The ICC and the ICDR both charge administrative fees based on the amount of money in dispute. Determining the administrative fees in this manner gives parties a high degree of predictability of the potential additional costs to them should a dispute arise during the course of the contract. This allows a contracting party to more accurately budget for each contract they draft. The ability to estimate the further costs of a contract could prove especially useful to parties with low capital in hand or companies that operate in cyclical industries. Forecasting costs in advance by using an institution that basis fees on the amount in dispute would allow these businesses greater security and enable them to budget for disputes in advance.

Determining administrative fees based solely on the amount in dispute does have its
disadvantages. The complexity and length of time it takes a tribunal to resolve a case is not always directly proportional to the amount of money disputed between the parties. Hypothetically a relatively simple case that happens to involve multi-million dollar equipment could cost dramatically more than a very complex case requiring extended discovery and the application of unfamiliar law where only a few hundred thousand dollars was at state.

A particular perceived disadvantage of the ICC dispute fee structuring is that the payment of the fees is required in full to begin the proceedings. Paying the entire fee for the arbitration immediately can be difficult for the claimant if the respondent is unable or unwilling to contribute. If this situation arises it forces the claimant to produce the funds for the entire arbitration before it has even begun.

This upfront pricing scheme could prove particularly difficult and unattractive to smaller businesses and businesses with low cash on hand. However, the high initial cost of the arbitration is not without its advantages. Parties that have signed arbitration agreements using the ICC as the institution may be reluctant to default back to the arbitration clause as the very result of the high entry cost. As a practical matter a business may actually save money because the prohibitively high cost of arbitration and use this as a tool to encourage the opposing party into settlement negotiations.

The ICDR does not require the payment for the entire arbitration to be made up front and includes a refund schedule. The ICDR refund schedule is a unique feature of the ICDR that may prove especially useful in encouraging settlement. The refund schedule returns a portion of the initial filing fee if the case is settled before the tribunal is established. For example 100% of the initial filing fee is returned if the case is settled within five days of receipt of the complaint, 50%
if between 5 and 30 days and 25% between 31 and 60 days. The real usefulness of this refund schedule from a business perspective is that it allows a party to a dispute a greater leverage to encourage settlement prior to arbitration. This refund schedule allows a party to continue settlement talks while demonstrating their ultimate intent to proceed with arbitration without risking large amounts of money.

In contrast with the ICDR and the ICC the LCIA charges customers based on an hourly rate. This system may not initially seem as initially predictable as the claim based systems but most businesses are fairly accustomed to paying for legal services in an hourly fashion. This system also eliminates any need to pay all of the arbitration fees at once since the length of time the arbitration continues will dictate its ultimate cost. In addition the hourly system bases the total cost of the arbitration on the complexity of the dispute rather than simply the amount claimed in the dispute. This could be advantageous for businesses with claims that have higher values but less complex underlying facts.

The difference in fee structures between these institutions is likely a function of the difference in administrative levels between them. The ICC with its relatively high administrative levels has a higher cost of arbitration because it provides more supervision and services to the parties in dispute.

Conclusion

The Right Institution

The differences between the arbitral rules of the ICC, LCIA and ICDR are relatively minor however, the subtle differences in speed and cost at the different stages of the different institutions does make them slightly more attractive to different types businesses.
The high level of administrative involvement of the ICC makes it well suited for businesses from very different judicial and procedural backgrounds with large monetary disputes. For these types of businesses the higher initial costs are offset by the careful supervision of the process by the ICC administration to ensure fairness and give constant guidance throughout the proceedings. The higher level of administration, especially the terms of reference are likely to harmonize the different legal backgrounds of the participants and minimize the potential of misunderstandings.

The fee structure of the LCIA makes it more appropriate for businesses more familiar with the process of international arbitration, parties that have longstanding relationships, and those with more amicable disputes. Administratively the LCIA fits between the very high level of administration provided by the ICC and the more hands off approach of the ICDR. This allows parties with similar procedural backgrounds that still need some administrative support to save costs while potentially accelerating the speed of their arbitration. Additionally, the hourly fee structure of the LCIA requires a much lower initial investment of capital than the ICC and allows sophisticated parties a higher level of control over their costs. This makes it suitable for companies with cyclical business cycles who may not always be able to front the initial costs of ICC arbitration.

The ICDR has the lowest levels of administrative support and also the lowest costs to resolve the dispute. The benefits of the lower costs of this arbitration can best be realized by businesses with similar national procedural rules and judicial backgrounds. The shared background of the parties eliminates the need for the administrative supervision of the ICC of LCIA since the parties will likely agree on many of the minor procedural issues. In addition the
low cost of arbitration at the ICDR makes it suitable for companies that need to know the upfront

costs of their arbitration process unlike the LCIA but cannot afford to pay the costs all at once at
the onset of arbitration.

Towards Harmony?

In the long term differences between the ICC, ICDR and LCIA are very minor and
through a few contractual agreements between the parties most of the default rules can be
quickly modified to suit the needs of a party wishing to arbitrate in any of the institutions. This
makes it unlikely that the administrative rules between these three major institutions are likely to
converge over time. Despite only having minor differences between them these institutions do
cater to slightly different styles of businesses and party dynamics such that they capture different
types of clients. It is actually likely over time that as the market for international arbitration
services increases that these institutions will further differentiate their services to capitalize on
particular types of businesses and to avoid direct competition.
Appendix I
Brief Comparison of the Institutions

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<thead>
<tr>
<th>Appointment of Tribunal</th>
<th>ICC</th>
<th>LCIA</th>
<th>ICDR</th>
</tr>
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<tbody>
<tr>
<td>Appointment of Tribunal</td>
<td>Very involved, must approve the tribunal.</td>
<td>Very involved, must approve the tribunal.</td>
<td>Deference to the method of the parties.</td>
</tr>
<tr>
<td>Seat of Arbitration (default)</td>
<td>Most appropriate location chosen by ICC Court.</td>
<td>London</td>
<td>Initially determined by case administrator, ultimately determined by tribunal.</td>
</tr>
<tr>
<td>Awards</td>
<td>Every award Reviewed by ICC court for clerical errors.</td>
<td>30 days for the Tribunal to make corrections.</td>
<td>30 days for the Tribunal to make corrections.</td>
</tr>
<tr>
<td>Cost</td>
<td>Determined in proportion to the amount claimed in the dispute. Must be paid in full prior to the start of the arbitriation.</td>
<td>Based on an hourly rate.</td>
<td>Determined in proportion to the amount claimed in the dispute. Refund schedule for claims that are resolved before a tribunal is appointed.</td>
</tr>
<tr>
<td>Terms of Reference</td>
<td>Must be completed and signed by both parties prior to the beginning of the arbitration.</td>
<td>No terms required</td>
<td>No terms required</td>
</tr>
<tr>
<td>Best Business Fit</td>
<td>High cost disputes, Parties from very different judicial and procedural backgrounds.</td>
<td>Sophisticated business with longer standing relationships. Need high levels of support but unable to pay upfront.</td>
<td>Businesses with similar procedural and judicial backgrounds with limited need for administrative support.</td>
</tr>
</tbody>
</table>