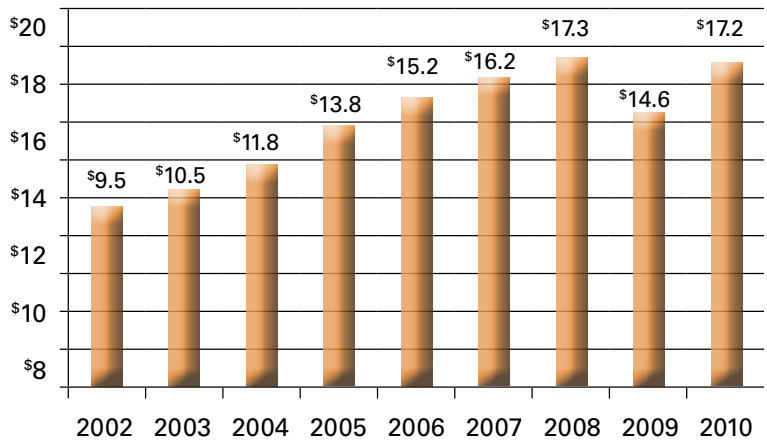
International Arbitration and the Globalization of Minnesota Business

By Alan M. Anderson

Growth in international trade has spawned a parallel increase in international business disputes involving companies worldwide, potentially including many in Minnesota. Where litigation of such disputes may prove inordinately complex or unsatisfying, international arbitration offers a well-established alternative.

FIGURE 1: Minnesota Manufactured Exports ($billions), 2002-2010[6]



To paraphrase Thomas L. Friedman, "The world is flat and getting flatter." Friedman argued in *The World is Flat* that what he described as "Globalization 3.0" was "shrinking the world from a size small to a size tiny and flattening the playing field at the same time."[1] Companies that want to survive and grow in the new global, flat economy need to adapt and change. Those companies "that recognize—faster than their competitors—everything new that the flattening of the world enables and everything new that it enjoins and are the first to develop strategies to exploit the new possibilities and to cope with the new requirements" are the ones that will succeed.[2] Similarly, a company's counsel must be able to adapt and change in light of the increasing "flattening of the world."

With increasing globalization come global problems. Although companies never enter into commercial relationships expecting a dispute to arise, one sometimes does. If a dispute arises between a Minnesota company and its Asian distributor, how and where should that dispute be resolved? If a buyer in Romania refuses to pay for products, claiming they are defective, how should a Minnesota seller attempt to collect? Would a judgment obtained in state or federal court in Minnesota in either of these scenarios be enforceable in another country? What if the foreign company obtains a judgment in its home court against the Minnesota company? More importantly, how should a company's counsel advise a global business in order to address these issues? As Friedman recognized, "The flatter the world gets, the more we are going to need a system of global governance that keeps up with all the new legal and illegal forms of collaboration."[3]

As will be shown, an effective "system of global governance" does exist in the form of international arbitration. Minnesota's economy is already engaged globally to the extent that Minnesota businesses need to be concerned about transnational dispute resolution; so also must any international business operation. Unfamiliar and unexpected problems await the company or counsel that relies on traditional legal means, *i.e.*, going to court, to resolve the dispute when an international transaction or commercial relationship fails. International arbitration offers an effective alternative method that is widely embraced by most companies based outside the United States. Counsel for companies engaged in international business should understand the special characteristics of this dispute resolution mechanism as they and their clients together adapt to the "flattening of the world."

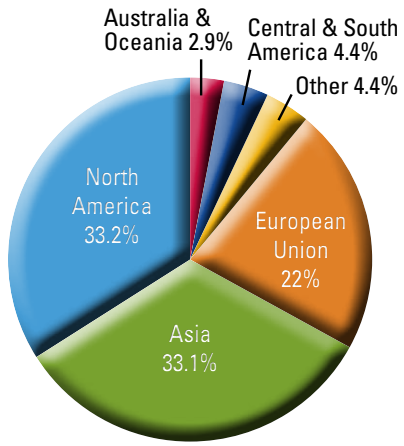
Minnesota's Global Business

Minnesota possesses a large global economy. In 2008, more than 8,000 Minnesota businesses exported goods and services around the world. For the past several years, Minnesota's exports have ranked as the 20th largest among all states. The top five product categories exported by Minnesota in 2009 were computers and related electronics, machinery, transportation equipment, medical products, and food.[4] Since 2002, the annual value of Minnesota's exports has nearly doubled, from $9.5 billion to $17.2 billion in 2010. Minnesota's exports have shown a remarkable resilience despite the recent Global Financial Crisis. (*See* Figure 1.)

Minnesota's businesses sell their products worldwide, from Australia to the United Arab Emirates. The top five countries for Minnesota's exports in the fourth quarter of 2010 were Canada, China, Japan, Mexico, and Germany.[6] Its top markets by region are North America (Canada), Asia, and the 27 member countries of the European Union. (*See* Figure 2.)

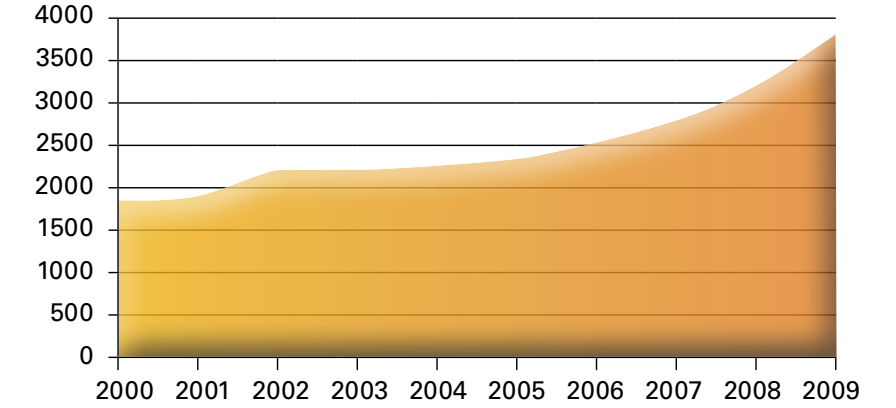
With all this global activity, it is natural that some international transactions inevitably result in disputes. And often,

FIGURE 2: Minnesota Exports by Region, Fourth Quarter 2010[8]



the parties turn to traditional methods—litigation in the courts—to resolve them. Such litigation may be filed in the United States or in a court in another country. While the Administrative Office of the United States Courts does not track or identify cases based on whether one of the parties to a civil action in a U.S. district court is a foreign (non-U.S.) company,[8] an informal review of new civil actions filed in the District of Minnesota reveals an increasing number of such cases as Minnesota's economy has internationalized. The same phenomenon generally is true in other federal courts. But if the litigation is in U.S. courts or in the courts of a foreign country, is the playing field level? Will a business in the Minnesota global economy likely obtain a satisfactory result in the form of a judgment that it can enforce and collect? What advice can its counsel provide in this regard?

FIGURE 3: Growth in International Arbitration at Four Leading Arbitral Institutions, 2000-2009[20]



Problem with Traditional Methods

No treaty or other compact exists between the United States and any other country that provides for the mutual recognition of judgments or court orders. No constitutional provision or statute requires U.S. courts to give recognition to foreign judgments. No federal legislation exists that even describes the factors to be considered in deciding whether to enforce a foreign judgment. Some guidance and direction, however, flows from a decision of the United States Supreme Court. More than 115 years ago, the Supreme Court in *Hilton v. Guyot* told U.S. courts they should enforce non-U.S. judgments against American citizens as a matter of international "comity."[9] The Court decided that comity required enforcement of judgments entered in another country in favor of a citizen or company of that country against a non-citizen on the basis of reciprocity. Since the decision in *Hilton v. Guyot*, however, most U.S. courts have rejected the reciprocity requirement. Instead, a U.S. court now normally will enforce a foreign judgment as long as it is convinced that the non-U.S. judgment complies with the U.S. concept of due process.[10]

But when a U.S. company seeks to enforce a U.S. judgment obtained against a foreign national or entity in that foreign national's home country, a different outcome often ensues. The U.S. national frequently will find that the foreign court will not enforce the U.S. judgment, no matter how much due process was followed in obtaining it. A number of obstacles may exist to obtaining enforcement of a U.S. judgment in a foreign court. For example, France traditionally would not enforce a judgment entered against one of its citizens or corporations unless a "clear indication" existed that the citizen intended to submit to the foreign court's jurisdiction.[11] Other countries may have special notice requirements that employ uncommon procedures. The Scandinavian countries typically will not enforce a foreign judgment unless a reciprocity treaty exists between the two nations involved.[12] And many countries simply will not enforce a U.S. judgment because of features of U.S. law with which they disagree, such as punitive damages, long-arm jurisdiction, and jury trials.[13] While the likelihood of obtaining enforcement of a U.S. judgment in another country has increased in recent years, actual success often will require further litigation in the foreign court.

Thus, a Minnesota company doing business internationally can easily find itself in an unfavorable situation. A judgment that the Minnesota company obtains in the United States against a foreign entity may not be enforced overseas, or if it is, only with difficulty. The Minnesota company may spend hundreds of thousands of dollars in legal fees only to find that the judgment obtained in a U.S. court is nothing more than expensive wallpaper. At the same time, if a Minnesota company is sued by a foreign customer in a foreign court it likely will have to defend itself under procedures and practices that may be far different from those in the United States. At least the perception (if not the reality) may be that inherent foreign national prejudices may exist against a U.S. corporation. And yet that foreign judgment is likely to be enforced in the United States should the Minnesota company lose. How should an attorney advise a Minnesota company engaged in transnational commercial relationships to reduce the risks inherent in international commerce, given these realities?

International Arbitration

Fortunately for attorneys advising companies, a viable alternative means of dispute resolution exists in the international arena. While no international treaty is available to enforce court-rendered judgments, an international treaty does exist with respect to the recognition and enforcement of international arbitral awards. On June 10, 1958, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards—commonly known as the "New York Convention"—entered into force. The New York Convention is perhaps the most successful international convention ever, having been adopted by more than 140 countries worldwide. Signatories to the New York Convention are required to give effect to an agreement to arbitrate and to recognize and enforce an arbitral award made in any signatory country, except in limited circumstances.[14] The United States and all of its major trading partners are signatories to the New York Convention. In fact, every major foreign nation with which Minnesota companies engage in business is a signatory.[15]

The fact that an international arbitral award nearly always will be enforced has resulted in international arbitration becoming the preferred method of resolving international disputes—at least among companies based outside the United States. As one leading text on international arbitration has stated:

> International arbitration has become the principal method of resolving disputes between States, individuals, and corporations in almost every aspect of international trade, commerce, and investment. The established centres of arbitration report increasing activity, year on year; new arbitration centres have been set up to catch this wave of new business; States have modernized their laws so as to be seen to be 'arbitration friendly'; firms of lawyers and accountants have established dedicated groups of arbitration specialists; conferences and seminars proliferate; and the distinctive law and practice of international arbitration has become a subject for study in universities and law schools alike.[16]

The major advantages of international arbitration often are identified as (1) being final and binding, (2) easy enforcement, (3) neutrality, (4) flexibility, (5) speed, (6) cost, and (7) confidentiality.[17]

The growth in the use of international

arbitration as a method of resolving transnational disputes has been truly impressive. Over the past ten years, the number of new arbitrations filed annually at four of the busiest arbitral institutions—the International Chamber of Commerce in Paris (ICC), the London Court of International Arbitration (LCIA), the American Arbitration Association's International Centre for Dispute Resolution (AAA/ICDR), and the China International Economic and Trade Arbitration Commission (CIETAC)—has nearly doubled. New filings at those four institutions have increased every year except for 2003. (See Figure 3.)

These trends have continued despite the Global Financial Crisis. CIETAC now is the busiest arbitral institution in the world, handling nearly 1,500 new cases in 2009, while second-place AAA/ICDR administered 836 new cases.[19] The expansion in the use of international arbitration becomes even more apparent when one looks at six major arbitration institutions: CIETAC, the Singapore International Arbitration Centre (SIAC), the Hong Kong International Arbitration Centre (HKIAC), the ICC, the LCIA, and AAA/ICDR. The growth in use of international arbitration as a means of resolving disputes involving entities in Asia is particularly apparent when one looks at the share of international arbitrations handled by CIETAC, SIAC, and HKIAC annually over the past five years. (See Figure 4.)

A recent survey of corporate attitudes toward international arbitration reveals that the ICC is the most preferred and utilized arbitral institution. Survey respondents used the ICC, LCIA and AAA/ICDR most frequently. English, New York, or Swiss law is adopted most frequently as the governing law for a dispute by corporations in international arbitration. In terms of the "seat" of the arbitration—where the arbitration at least nominally occurs—London, Paris, New York, and Geneva were used most frequently during the past five years. SIAC (Singapore) has emerged as the preferred location for international arbitrations in Asia.

It is clear that international arbitration is widely accepted among companies engaging in global commerce. A 2006 study revealed that 73 percent of global corporations surveyed preferred to use international arbitration rather than transnational litigation to resolve cross-border disputes.[21] Two years later, 86 percent of the corporations surveyed indicated that they were satisfied with international arbitration.[22]

Furthermore, in 2010, 68 percent of the corporations surveyed stated that they had a corporate policy regarding the dispute resolution methods to be incorporated into their contracts.[23] Forty percent of these polices *required* arbitration over litigation at all times while another 31 percent would allow deviation from the proarbitration policy if it was a "deal-breaker."[24] These corporate policies cover at least the most important aspects that must be determined when negotiating an international arbitration clause, including the seat of the arbitration, the applicable law, the preferred arbitral institution and rules, the language for the arbitration, and the extent and forms of discovery.[25]

These statistics and survey results establish that international arbitration is not just a widely accepted method of resolving transnational disputes; its use is expanding and preferred by a clear majority of companies that become involved in international disputes. Indeed, most corporations engaged in global business have policies governing the nature of international arbitration clauses. Businesses operating in Minnesota's global economy should follow suit. They—and their counsel—would do well to pay close attention to international arbitration as a means of resolving international disputes.

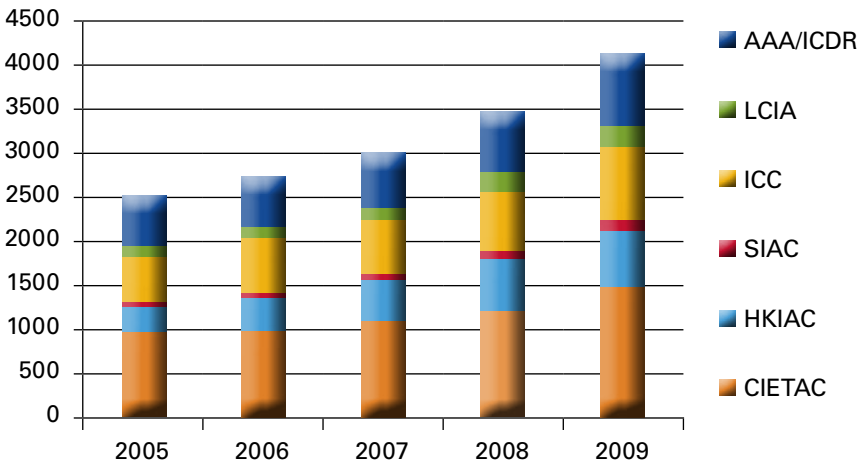
Features & Characteristics

International arbitration is a creature of contract. The parties usually agree to international arbitration as a method of dispute resolution *before* any dispute arises. Consequently, international arbitration has been defined as "a specially established mechanism for the final and binding determination of disputes, concerning a contractual or other relationship with an international element, by independent arbitrators, in accordance with procedures, structures and substantive legal or non-legal standards chosen directly or indirectly by the parties."[26]

The critical feature of international arbitration is party autonomy. "Party autonomy is the guiding principle in determining the procedure to be followed in an international commercial arbitration. It is a principle that has been endorsed not only in national laws, but by international arbitral institutions and organisations."[27] The UNCITRAL Model Law on International Commercial Arbitration, which has been enacted in more than 60 countries and 7 states in the United States in whole or in part,[28] provides that subject to its provisions, "the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings."[29]

Because international arbitration clauses usually are negotiated before any dispute arises, care and consideration must be given to their negotiation and preparation. Drafting such a clause should never be an 11th-hour exercise just before a final agreement is reached. And drafters should know the critical aspects and issues for such clauses. For example, deciding that "the laws of the United Kingdom" shall apply to an arbitral proceeding would result in a clause with no certain applicable law, because no such laws exist. Rather, a drafter must choose from the laws of England, *or* Scotland, *or* Wales. And important issues, such as the language of the arbitration, selection of arbitrators, the location for the arbitration, and the governing institution for the arbitration (if any; arbitrations also can proceed on an *ad hoc* basis), must be considered, negotiated, and finalized.

FIGURE 4: New Cases Filed at Six Major Arbitral Institutions, 2005-2009[23]



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Attorneys and Minnesota businesses embracing international arbitration must keep in mind that it is not like U.S.-based domestic arbitration, which frequently is subject to criticism on a variety of grounds, including high fees, inadequate due process safeguards, and arbitrator bias—especially toward "split the baby" outcomes.[30] Minnesota companies and their counsel must not be xenophobic or parochial when approaching international arbitration. It is, after all, *international* in scope. Insistence on familiar procedures or practices either likely will not be accepted by the other side or will defeat some or all of the benefits of international arbitration as a method of global dispute resolution. Attorneys must especially be willing to adapt to the very different procedures and policies inherent in international arbitration that provide its advantages over traditional dispute resolution methods.

In fact, international arbitration recently has come under fire for becoming too "Americanized" because American parties and U.S. counsel have demanded the use of traditional U.S. litigation methods, including far-reaching discovery, depositions, and longer proceedings.[31] The response in the international arbitral community has been to take steps to ensure the transnational character of international arbitration, one that spans both common law and civil law cultures. For example, the AAA/ICDR issued revised guidelines in 2008 for the exchange of information before the final hearing in an international arbitration. These guidelines explicitly state, "Depositions, interrogatories, and requests to admit, as developed in American court procedures, are generally not appropriate procedures for obtaining information in international arbitration."[32] Thus, an attorney who approaches international arbitration in the same way as traditional U.S.-based litigation will find substantial differences and surprises waiting in the international arbitral arena.

International arbitration has an extensive and expanding body of decisional law that may be accessed by arbitrators and parties and their counsel.[33] Rules and guidelines for international arbitration exist beyond those promulgated by each arbitral institution that may administer an arbitration. For example, the International Bar Association has promulgated widely accepted rules for discovery as well as transnational ethical guidelines for arbitrators.[34] Rules and guidelines have been adopted governing electronic disclosures or e-discovery.[35]

Attorneys must especially be willing to adapt to the very different procedures and policies inherent in international arbitration that provide its advantages over traditional dispute resolution methods.

Each arbitral institution that may be selected to administer an arbitration has its own rules. While these rules vary somewhat, in essence they are similar. International arbitrations begin with a demand for arbitration. Detailed written statements of claim and defense usually follow, which include copies of all documents that support the claims or defenses. Discovery is invariably limited to narrow requests for highly relevant documents. Most often, direct testimony of witnesses is submitted in written form. Consequently, only cross-examination of adverse witnesses typically occurs at the final evidentiary hearing.[36]

In addition, most arbitral institutions' rules provide that the arbitral tribunal may award the costs of the arbitration and attorney fees and expenses to the winning party. Thus, the traditional "American rule," that each side bears its own costs of the proceedings, does not apply unless the parties have otherwise agreed.[37] Minnesota companies must be aware of this key difference. Because international arbitration has its own processes and procedures, Minnesota companies embarking down the international arbitration path should confirm that their counsel has sufficient familiarity with those processes and procedures and will not commit cultural or legal missteps either during negotiations or if an arbitration proceeding arises.

Many other unique features and characteristics of international arbitration exist. For example, there are special rules and procedures for investor-state arbitrations.[38] Transnational intellectual property disputes raise other issues.[39] The ever-expanding global economy and the likelihood that international disputes will occur demands that Minnesota's companies and their counsel understand, be familiar with, and embrace international arbitration of transnational disputes.

Conclusion

Minnesota has a far-reaching international economy in which transnational disputes inevitably will arise. Minnesota companies and their counsel should carefully scrutinize their foreign business dealings in order to minimize the risks that may surface should an international commercial relationship or transaction go awry. In doing so, they should put aside parochial views that may initially cause them to believe that local courts are the best—or only—way to resolve an international dispute. Indeed, such views can result in the expenditure of substantial legal fees with little or nothing to show for them; perhaps a judgment that is of little or no value with no realistic means available for enforcing or collecting it. Instead, Minnesota corporations engaging in transnational relationships and attorneys advising them should understand that international arbitration often provides an efficient method of enforcing one's rights or defending against claims asserted by another party to such a relationship. International arbitration of commercial disputes is widely accepted and many companies have established policies regarding its use. International arbitration is not like traditional, U.S.-style litigation. Once engaged, Minnesota companies and their counsel must understand that different rules and procedures apply to the process. Advance planning normally is required to ensure that international arbitration is available and successful. But by embracing a method of dispute resolution that perhaps is unfamiliar, attorneys can help ensure that Minnesota companies can successfully continue to expand their transnational business operations, better meet the challenges of the ever-"flattening" world, and remain competitive in the global economy. ▲

Notes

[1] Thomas L. Friedman, *The World is Flat: A Brief History of the Twenty-first Century*, rev. ed. (2007) at 10.
[2] *Id.* at 442.
[3] *Id.* at 254.
[4] Minnesota Department of Employment and Economic Development (hereinafter "DEED"), *Export Data on Manufacturing Industries for 2009* (April 2010) at 1, 7, 11.
[5] *See* DEED, *Export Data on Manufacturing Industries for 2008* (May 2009) at 1; DEED, *Export Data on Manufacturing Industries for 2009* (April 2010) at 1; DEED, *Data on Manufacturing Industries for First Quarter 2010* (July 2010) at 1; DEED, *Data on Manufacturing Industries for Second Quarter 2010* (Sept. 2010) at 1; DEED, *Data on Manufacturing Industries for Third Quarter 2010* (Nov. 2010) at 1; DEED, *Data on Manufacturing Industries for Fourth Quarter 2010* (March 2011) at 1.
[6] DEED, *Data on Manufacturing Industries for Fourth Quarter 2010* (March 2011) at 1.
[7] *Id.*
[8] Author's conversation with the Administrative Office of the United States Courts, Washington, D.C., March 23, 2011.
[9] *Hilton v. Guyot*, 159 U.S. 113, 164, 202 (1895).
[10] *See, e.g., Int'l Transactions, Ltd. v. Embotelladora Agral Regiomontana, S.A.*, 347 F.3d 589 (5th Cir. 2003); *Ackerman v. Levine*, 788 F.2d 830 (2nd Cir. 1986); *Koster v. Automark Indus., Inc.*, 640 F.2d 77 (7th Cir. 1981); *Kohn v. American Metal Climax, Inc.*, 458 F. 2d 255 (3rd Cir.), *cert. denied*, 409 U.S. 874 (1972).
[11] Gilles Cuniberti, "The Liberalization of the French Law of Foreign Judgments," 56 *Int'l and Comp. L.Q.* 931 (2007).
[12] Samuel P. Baumgartner, "How Well Do U.S. Judgments Fair in Europe?" 40 *Geo. Wash. Int'l L. Rev.* 227-231 (2008).
[13] *See, e.g.*, the recent decision by the Cour de Cassation in *X. v. Fountaine Pajot* (12/01/10), in which the French Supreme Court refused to enforce a judgment for punitive damages that had been affirmed by the California Supreme Court on the ground that the amount of punitive damages awarded ($1.4 million) was contrary to international public policy.
[14] *See* United Nations Conference on International Commercial Arbitration, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Arts. II, III, V (1958).
[15] *See* United Nations Conference on International Commercial Arbitration, "Status: 1958 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards," available at *http://www.uncitral.org/*.
[16] Nigel Blackaby and Constantine Partasides with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration*, 5th ed. (2009) at 1.
[17] Julian D.M. Lew, Loukas A. Mistelis, and Stefan M. Kröll, *Comparative International Commercial Arbitration* (2003) at 3-9.
[18] *See* Hong Kong International Arbitration Centre, "Statistics, 1998-2003, 2004-2008, 2009," available at *http://www.hkiac.org/*.
[19] *See* Hong Kong International Arbitration Centre, "Statistics, 2009," available at *http://www.hkiac.org/*.
[20] *See* Hong Kong International Arbitration Centre, "Statistics, 2004-2008, 2009," available at *http://www.hkiac.org/*. *See also* Daniel Harris, "Rising in the East: International Arbitration in Asia Pacific," *The Resolver* (Feb. 2011) at 10-12.
[21] Queen Mary, University of London, "2006 International Arbitration Study: Corporate Attitudes and Practices," available at *http://www.arbitrationonline.org/*.
[22] Queen Mary, University of London, "Corporate Attitudes and Practices: Recognition and Enforcement of Foreign Awards, 2008" available at *http://www.arbitrationonline.org/*.
[23] Queen Mary, University of London, "2010 International Arbitration Survey: Choices in International Arbitration," available at *http://www.arbitrationonline.org/*.
[24] *Id.*.
[25] *Id.* at 5-9.
[26] *Id.* at 1.
[27] Blackaby and Partasides, *Redfern and Hunter on International Arbitration*, *supra* n. 16, at 315.
[28] *See* United Nations Commission on International Trade Law, "Status – UNCITRAL Model Law on International Commercial Arbitration," available at *http://www.uncitral.org/*.
[29] UNCITRAL Model Law on International Commercial Arbitration, Art. 19(1) (1985, as amended 2006), available at *http://www.uncitral.org/*.
[30] *See, e.g.*, Joshua T. Mandelbaum, "Stuck in a Bind: Can the Arbitration Fairness Act Solve the Problems of Mandatory Binding Arbitration in the Consumer Context?" 94 *Iowa L. Rev.* 1075, 1077 (2009).
[31] Steven Seidenberg, "International Arbitration Loses its Grip: Are U.S. Lawyers to Blame?" *ABA Journal* (April 2010).
[32] American Arbitration Association, International Centre for Dispute Resolution, "ICDR Guidelines for Arbitrators Concerning Exchanges of Information," (05/31/2008), available at *http://www.adr.org/*.
[33] *See generally* Blackaby and Partasides, *supra* n. 16; Lew, Mistelis, and Kröll, *supra* n. 17.
[34] International Bar Association, "IBA Guidelines on Conflicts of Interest in International Arbitration," (2004), available at *http://www.ibanet.org/*; International Bar Association, "IBA Guidelines on the Taking of Evidence in International Arbitration," (2010), available at *http://www.ibanet.org/*.
[35] *See, e.g.*, Chartered Institute of Arbitrators, "Protocol for E-Disclosure in Arbitration," (2008), available at *http://www.ciarb.org/*.
[36] *See, e.g.*, LCIA Arbitration Rules, available at *http://www.lcia.org/*; HKIAC Administered Arbitration Rules, available at *http://www.hkiac.org/*; ICC Rules of Arbitration, available at *http://www.iccwbo.org/*.
[37] *See, e.g.*, LCIA Arbitration Rules, *supra* n. 36, Art. 28; HKIAC Administered Arbitration Rules, *supra* n. 36, Art. 36; ICC Rules of Arbitration, *supra* n. 36, Art. 31.
[38] *See generally* International Centre for Settlement of Investment Disputes, "ICSID Convention, Regulations, and Rules," (2006), available at *http://icsid.worldbank.org*.
[39] *See* World Intellectual Property Organization, "WIPO Arbitration, Mediation, and Expert Determination Rules and Clauses," (2009), available at *http://www.wipo.int/*. *See also* Alan M. Anderson and Bobak Razavi, "The Globalization of Intellectual Property Rights: TRIPS, BITS, and the Search for Uniform Protection," 39 *Georgia J. Int'l & Comp. Law* 265-292 (2010).