The "Business Case" For and Against International Arbitration

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INTRODUCTION

A 2013 survey conducted by PricewaterhouseCoopers and Queen Mary, University of London found that corporations across all sectors refer as many disputes to international arbitration (47%) as they do to litigation (47%).[2] These survey results indicate that while international arbitration is a popular method for resolving disputes, corporations must regularly make the choice between international arbitration and litigation, and the two methods are equally important.

In the case of complex cross-border transactions, the choice between international arbitration and litigation is a complex one requiring consideration of a number of factors. The following table sets out some well-known pros and cons of international arbitration and of litigation with the caveat that no list is perfect, and views vary on what is an advantage and disadvantage:

	International Arbitration	Litigation
Pros	Neutrality (tribunal, procedure, place, language)	Procedural certainty
	Right to choose arbitrators	Summary disposition
	Arbitral institutions	Coercive powers
	Procedural flexibility	May be more effective when a party is recalcitrant
	Privacy	Right to appeal
	Finality	
	International enforceability of awards	
Cons	Can be difficult when recalcitrant party	Lack of neutrality
	Risk of jurisdictional disputes	Expensive discovery process in common law countries
	Multi-party and multi-contract challenges	Can be lengthy
	Arbitrator's lack of coercive powers	Lack of privacy
	Difficulty to have summary proceedings	Judges and juries lack technical expertise
	Costly compared to litigation in civil law countries	Lack of finality
	Awards cannot be appealed	Limits on international enforceability

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[2] 2013 International Arbitration Survey by PricewaterhouseCoopers and Queen Mary, University of London, entitled "*Corporate Choices in International Arbitration: Industry Perspectives*", p. 7, available at: www.pwc.com/arbitrationstudy.

This paper will consider these pros and cons in assessing the "business case" for and against international arbitration. Specifically, this paper will consider whether international arbitration can help manage six business risks common in cross-border transactions. The six business risks examined in this paper are the risks of:

(1) Operating in a given country

(2) Commercially sensitive or technical disputes

(3) Lengthy or costly proceedings

(4) Multiple contracts

(5) Multiple parties

(6) Enforceability

Many of the pros and cons listed in the table above are relevant to each of these business risks. This paper does not aim to present an exhaustive analysis of each of the factors on this list. Rather, the aim of this paper is to identify and assess the effectiveness of some of the tools that can be used manage each of these risks.

I. OPERATING IN A GIVEN COUNTRY

A. WHAT ARE THE BUSINESS RISKS?

Cross-border transactions by definition involve multiple jurisdictions. Frequently, the subject of the investment or transaction will be located in a country other than a corporation's home country. The degree of risk posed by operating in a given host-country varies. The degree of risk is likely to be lesser in stable or so-called developed countries such as those in North America and Western Europe and is likely to greater in unstable or so-called developing countries such as Algeria, the Congo, Venezuela, China or Kazakhstan. The risks of operating in a given country can be categorized as follows:

- Political and legislative risks
- Industry risks
- Judicial risks

Political and legislative risks are caused by government acts or other events including expropriations, the imposition of exchange controls, revolutions and other civil disturbances that may have an adverse impact on transactions or investments.[3] An example of a government act falling into this category is Argentina's decision in April 2012 to

[3] See e.g., Mirian Kene Kachikwu, "*The Changing Face of Political Risk in the Energy Industry*," 9(1) Transnational Dispute Management 87, at 88-89 (2012).

renationalize Repsol's 57% shareholding in the oil company YPF SA.[4] An example of an event is the "Arab Spring", which may adversely impact international projects in the Middle East and Africa.

Industry risks result from a given government's tendency to exert control over domestic natural resources. This tendency, also referred to as resource nationalism, can be triggered by a variety of events such as increased demand for energy, prolonged conflicts, international embargos, or concerns about energy security.[5] Governments can exert control over natural resources by limiting foreign investment, changing the terms of existing contracts to maximize revenue, or by engaging in other forms of economic coercion.[6] Two recent examples of resource nationalism include a 2001 Hydrocarbon Law in Venezuela prohibiting investors from owning more than 50% of upstream oil activities in the Orinoco Oil Belt[7] and a 2008 Strategic Investment Law in Russia which places various limits on foreign ownership.[8]

Judicial risks result because the justice system in a given country has a poor reputation for neutrality and impartiality or may be corrupt. Judicial risks may arise where there is a possibility that the State will interfere with the judicial proceedings. State interference may be likely where the subject of the dispute is a government act or one of the parties to the dispute is a State-controlled entity. Judicial risks may also arise when decisions in the justice system in a country can be "bought". Transparency International's Corruption Perceptions Index, which ranks countries on how corrupt the public sector is perceived to be, is one measure of the judicial risk in a given country.[9] The 2012 Corruption Perceptions Index found that 70% of countries scored less than 50 out of 100.[10]

B. CAN INTERNATIONAL ARBITRATION HELP MANAGE THE BUSINESS RISKS?

International arbitration is an effective way to mitigate the risks of operating in a given country. This is because it is possible for the forum for dispute resolution to be somewhere other than that country. Parties can select a seat or place of arbitration anywhere in the world. The seat does not have to be connected to the nationality of the parties, the location of the investment, or even the substantive law of contract. As such, the parties are free to agree on a neutral location free from perceived or actual bias and corruption. The ability to select a location other than the given country in which one is operating may be particularly advantageous where States or State-owned entities are involved.

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4 "*YPF Repsol: Spain says Argentina shot itself in foot*" BBC News, 17 April 2012, available at: http://www.bbc.co.uk/news/world-europe-17739204.

5 Prof. A. F.M. Maniruzzaman, "*The Issue of Resource Nationalism: Risk Engineering and Dispute Management in the Oil and Gas Industry*" 10(3) Oil, Gas & Energy Law Intelligence (OGEL) 79, at 81 (2012).

6 *Id.* at 82.

7 *Id.* at 84.

8 Federal Law No. 57-FZ, "*Procedures for Foreigh [sic] Investments in the Business Entities of Strategic Important for Russian National Defense and State Security*" (2008), available at: http://en.fas.gov.ru/legislation/legislation_50486.html.

9 Transparency International, "*Corruption Perceptions Index: Overview*", available at: http://www.transparency.org/research/cpi/overview.

10 Transparency International, "*Corruption Perceptions Index 2012"*, p. 4 (2012), available at: http://cpi.transparency.org/cpi2012/in_detail/, click on "Download Brochure".

In addition, parties to an international arbitration can further mitigate the business risks of operating in a given country by electing to use an international arbitral institution to administer their arbitration. Generally, international arbitral institutions are neutral and independent bodies that provide services aimed at facilitating the dispute resolution process. Services provided include assistance appointing the arbitral tribunal, assistance facilitating the resolution of urgent disputes, assisting with the logistics of the arbitration, fixing arbitrator remuneration, and stepping in to address possible complications with the commencement of the arbitration proceedings such as arbitrator or jurisdictional challenges. It should be noted that not all arbitral institutions are neutral and independent of the country they are located in. With the proliferation of arbitral institutions around the world, parties should choose their arbitral institution carefully to ensure that the one used is truly neutral and independent.

In sum, the selection of a neutral place of arbitration and the use of a well-established international arbitral institution can be effective ways to manage the business risks of operating in a given country. By way of comparison, it is more difficult to manage business risks of this nature with litigation. In general, jurisdiction over a given dispute and a given contracting party will likely only be found in the courts of the parties' to the dispute. Thus, at least one party is likely to feel that they are at a disadvantage because the other side has a "home court" advantage. In addition, the services offered by international arbitral institutions are not typically offered by courts and can help to ensure that the proceedings are neutral, fair and effective.

II. COMMERCIALLY SENSITIVE OR TECHNICAL DISPUTES

A. WHAT ARE THE BUSINESS RISKS?

Almost invariably, disputes arising in connection with cross-border transactions present the business risk that commercially sensitive information will become public. Disclosing the existence of the dispute itself may reveal sensitive information. Consider, for example, a dispute arising in connection with a tender, the existence of which is not public. A party may also need to disclose sensitive information in order to defend its position in the dispute. For instance, in order to determine the amount of damages owed a party may need to disclose the estimated value of a reserve, the amount spent on research and development or valuable commercial know-how.

Disputes arising in connection with cross-border transactions are also often of a technical nature involving complex contractual structures and specialized subject matters. For instance, a dispute arising in connection with the construction of an LNG plant by a consortium of companies in a third country may concern specialized equipment or building techniques. Two different types of risks arise in connection with such disputes. The first is that the applicable procedure will not be well suited to deciding complex or technical cases. The second is that the decision maker will not have experience with large complex disputes.

B. CAN INTERNATIONAL ARBITRATION HELP MANAGE THE BUSINESS RISKS?

1. Commercial sensitivity

Unlike court proceedings in many jurisdictions, arbitration proceedings are private and not open to the general public. Privacy of international arbitration is provided for in the rules of most major international arbitral institutions. For example, Article 19(4) of the London Court of International Arbitration ("**LCIA**") Rules, entitled "Hearings", provides that "[a]ll meetings and hearings shall be in private unless the parties agree otherwise in writing or the Arbitral Tribunal directs otherwise."[11] Similarly, the International Centre for Settlement of Investment Disputes ("**ICSID**") Arbitration Rules provide that third parties cannot attend the proceedings without the consent of the parties.[12]

While international arbitration proceedings are private, they are not necessarily confidential. The rules of most international arbitral institutions and the laws of most countries do not prohibit a party from disclosing to non-parties the existence, nature or other facts about an arbitration. By way of an example, neither the International Chamber of Commerce ("**ICC**") Rules nor the ICSID Arbitration Rules contain confidentiality obligations.

It follows that if confidentiality is important, the parties should expressly provide for it. Indeed, this is commonplace in international arbitration today. Parties can agree to keep the existence and nature of the facts about an arbitration confidential by including a confidentiality provision in the arbitration agreement,[13] by designating a set of arbitration rules that provides for confidentiality,[14] by selecting a seat of arbitration in which the *lex arbitri* provides for confidentiality,[15] or by agreeing with the arbitral tribunal once constituted (for example, established in the Terms of Reference or the arbitral tribunal's first procedural order).

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11 London Court of International Arbitration Rules 1998 (the "**LCIA Rules**"), Art. 19(4).

12 International Centre for Settlement of Investment Disputes Arbitration Rules 2006 (the "**ICSID Arbitration Rules**"), Rule 32(2) ("Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of propriety or privileged information.").

13 For more information see e.g., Paul Friedland, *Arbitration Clauses for International Contracts* Juris Publishing (2nd ed. 2007), pp. 76-78.

14 The LCIA Rules are an exception to the general rule that most leading arbitral institutions do not provide for confidentiality. Article 30.1 of the LCIA Rules provides: "Unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards in their arbitration, together with all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain - save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority." Further protections are provided in Article 30.2, which provides that the deliberations of the arbitral tribunal are confidential, and Article 30.3, which provides that that LCIA will not publish an award without the consent of the parties.

15 Although not expressly provided for in the Arbitration Act 1996, under English law the parties to an arbitration may be subject to an implied duty of confidentiality. See e.g., Ali Shipping Corporation v. Shipyard Trogir, [1999] 1 W.L.R. 314 (C.A.).

In sum, the risks posed by commercially sensitive disputes can be managed by international arbitration as it is private and provides several mechanisms pursuant to which the parties can agree to confidentiality. Although arbitration proceedings are not necessarily confidential in nature, confidential information is still more likely to remain private than it would in litigation proceedings. This is because, to promote transparency, the judicial proceedings in many countries are open or accessible to the public in different ways.

2. Disputes of a technical nature

International arbitration provides two tools helpful to managing the business risks posed by disputes of a technical nature. These risks are that the decision maker will lack the necessary experience and that the procedure is not well suited to the resolving a particularly technical dispute.

The first tool is being able to select the decision-maker, in other words appropriate arbitrators to resolve the dispute. The following factors should be considered when selecting an arbitrator:

- Experience
- Background, including nationality, language, education and age
- Approach that the arbitrator is likely to take (literal v. purposive)
- Reputation
- Impartiality
- Independence
- Managerial abilities

Depending on the precise nature of the dispute, an arbitrator experienced in arbitration procedure may be preferable to one with a highly technical background.

The second tool useful in mitigating the business risks posed by particularly technical disputes is to make use of experts. Experts generally play an important role in international arbitration. This is confirmed by a 2012 White & Case LLP / Queen Mary, University of London Survey, which found that expert witnesses were involved in two-thirds of arbitrations.[16]

A variety of experts are used in international arbitration including technical, industry, legal and quantum experts. The use of a variety of experts (even in a given proceeding) allows the users of international arbitration to ensure that the arbitral tribunal has available to it sufficient information to make an informed decision on any number of issues. Moreover, as experts may be appointed by the arbitral tribunal itself, the parties or both, there is a better likelihood that an arbitral tribunal will have access to the information it needs to make decisions of a technical nature.

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[16] 2012 International Arbitration Survey by White & Case LLP and Queen Mary, University of London, entitled "*Current and Preferred Practices in the Arbitral Process*" p. 29, available at: http://arbitrationpractices.whitecase.com/.

As international arbitration generally does not make use of extensive discovery procedures typical in common law jurisdictions, generally parties need not be concerned that their communications with the experts they have chosen will be disclosable in the proceedings. Parties can therefore have free and open discussions with experts about all of the possible issues in dispute and can work with them directly without generally having to worry that everything they share with the experts is subject to being disclosed to the other side.

In sum, the business risks posed by disputes of a technical nature can be managed through the selection of appropriate arbitrators and the use of experts.

III. LENGTHY OR COSTLY PROCEEDINGS

A. WHAT ARE THE BUSINESS RISKS?

Lengthy or costly dispute resolution proceedings may cause different kinds of uncertainty. There is a risk of business uncertainty because lengthy or costly proceedings have the potential to adversely impact commercial relations, the allocation of resources, or exploitation rights. Lengthy or costly disputes also create the risk of financial uncertainty. An extended period of time without knowing the outcome or costly proceedings may have a negative impact on finances, share prices, and future business opportunities. Finally, lengthy disputes may impact a party's reputation. Allegations of bad faith, fraud, corruption, termination or similar that are neither proven nor disproven for an extended period of time may become public or known in the industry and cause harm to a company's reputation.

B. CAN INTERNATIONAL ARBITRATION HELP MANAGE THESE BUSINESS RISKS?

Assessing whether the length and cost of proceedings can be managed through the use of international arbitration is not a straightforward task. Several conflicting factors need to be considered.

International arbitration is final. The result of an international arbitration proceeding is to create a binding and enforceable award (as between or among the parties) that is generally subject to no rights of appeal on the merits. This is provided for in the rules of most major international arbitral institutions.[17] International arbitral awards are subject to challenge, but

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[17] See e.g., LCIA Rules, Art. 26.9 ("All awards shall be final and binding on the parties. By agreeing to arbitration under these Rules, the parties undertake to carry any award immediately and without delay (subject only to Article 27); and the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other judicial authority, insofar as such waiver may be validly made."); International Chamber of Commerce Rules 2012 (the "**ICC Rules**"), Art. 34(6) ("Every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can be validly made."); Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (the "**ICSID Convention**"), Art. 53(1) ("The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.").

only on narrow and limited procedural, due process or public policy-type grounds.[18] Further, as discussed in greater detail below, arbitral awards are relatively easy to recognize and enforce around the world according to the terms of (a) the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**New York Convention**") and (b) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "**ICSID Convention**").

It follows that, in theory, arbitration proceedings should be less lengthy and less costly than court proceedings, which generally give parties a right of appeal on the merits. In practice, however, the length of arbitration proceedings varies greatly depending on which jurisdiction's court proceedings they are compared to as well as on the nature of the dispute, the conduct of the opposing party and its counsel and the conduct of the arbitrators.

Indeed, an arbitration proceeding may end up being as lengthy or as costly as a first instance court proceeding in some jurisdictions. For example, in some countries like France, a relatively simple commercial court case may take less time and cost less than an international arbitration. Even compared to other jurisdictions, it is not uncommon for the written phase of the arbitration including negotiation of the timetable and submission of written legal briefs, witness statements, and expert reports to take as long as the pre-trial phase of a court proceeding.

There are also a number of particular circumstances in which arbitration proceedings may end up being longer than court proceedings. This may occur when, for example, the dispute could have been decided on a preliminary or summary basis. This is because preliminary determinations are not commonly used in international arbitrations.[19] Alternatively, arbitration proceedings may be lengthy where a recalcitrant party takes steps to delay the proceedings, such as by refusing to appoint an arbitrator, bringing a jurisdictional challenge or refusing to participate in the proceedings altogether. An arbitral tribunal can do little to prevent the delays caused by a recalcitrant party because, unlike judges in national courts, arbitrators have limited coercive powers.[20]

However, parties can take advantage of the procedural flexibility in international arbitration to manage the length or cost of arbitral proceedings. Steps that a party may consider taking include:

- Appointing an arbitral institution to help manage the proceedings
- Attempting to name or agree on arbitrators (particularly a chair or sole arbitrator) known to conduct efficient proceedings

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[18] For an example of the limited grounds upon which an arbitral award can be challenged, see United Nations Commission on International Trade Law Model Law on International Commercial Arbitration 1985 (the "**UNCITRAL Model Law**"), Art. 34.

[19] See e.g., D, Brian King and Jeffrey P. Commission, "*Summary Judgment in International Arbitration: The 'Nay' Case*" 2010 ABA International Law Spring 2010 Meeting, p.1 at 1, available at: http://apps.americanbar.org/intlaw/spring2010/materials/Common%20Law%20Summary%20Judgment%20in%20International%20Arbitration/King%20-%20Commission.pdf ("[N]one of the major international arbitration rules contemplates summary judgment, at least expressly, and there is little empirical evidence of use of such a mechanism in the practice of arbitral tribunals.").

[20] N. Blackaby and C. Partasides, *Redfern and Hunter on International Arbitration*, Oxford University Press (5th ed. 2009), para. 1.104, p. 35.

- Negotiating a short procedural timetable
- Seeking to bifurcate the proceedings such that key issues which may resolve the dispute or lead to an early settlement are decided first
- Agreeing to place limits on the number and length of submissions and on any discovery

An alternative way to limit the length and cost of the proceedings is to use multi-tiered dispute resolution. The goal of multi-tiered dispute resolution is to make arbitration a last resort to be used only after more amicable and less expensive dispute resolution mechanisms have failed. The tiers used should be adapted to the scope and size of the dispute and may include negotiation, assisted negotiation, mediation, expert determination or dispute boards. Multi-tiered dispute resolution is not always effective in practice. It will not work where any one of the parties fails to engage in the process in good faith. Negotiations and mediation are doomed to failure if one of the parties is not engaged in the process in a good faith attempt to settle the dispute. If this is the case, such tiers to the dispute resolution mechanism can actually add to the length and cost of the dispute where they are conditions precedent to arbitration, which can be the case depending on the terms of the dispute resolution clause and the applicable law.

In sum, while arbitration proceedings have the potential to be shorter or less costly than judicial proceedings, this is not necessarily the case in practice. As such, parties seeking to limit the length and cost of proceedings should consider adapting the arbitral procedure in this regard as soon as possible in the arbitration, beginning with the drafting of the arbitration agreement and the selection of the arbitral tribunal.

IV. MULTIPLE CONTRACTS

A. WHAT ARE THE BUSINESS RISKS?

Complex business transactions often involve multiple related contracts, which may be between the same or between different parties. In the case of multiple contracts, two distinct problems may arise in connection with a dispute.

First, there is a risk that a particular dispute will not be covered by the scope of the preferred dispute resolution clause. Consider for example a large construction project governed by three related agreements, Contract A, Contract B, and Contract C. Contract C is the only one of the three contracts that contains an arbitration clause. If a dispute arises as a result of Contract A or Contract B, there is a risk that it will not be covered by the scope of the arbitration clause in Contract C and thus not be subject to arbitration as the method of dispute resolution.

Second, multiple contracts create the risk that a single dispute will result in several different dispute resolution proceedings. This risk may arise in connection with a large construction project involving the owner, the main contractor, several suppliers, and several subcontractors, each operating under a different contract. A dispute over a damaged piece of equipment supplied by one of the suppliers and installed by one of the subcontractors may result in litigation or arbitration between the main contractor and the subcontractor, between the subcontractor and the supplier, and between the owner and the main contractor.

B. CAN INTERNATIONAL ARBITRATION HELP MANAGE THESE BUSINESS RISKS?

As arbitration is based on consent and, as a result, arbitrators' lack coercive powers, the general rule is that an arbitration clause only extends to the contract that it is contained within. The existence of this general rule makes it difficult to manage the business risks posed by multiple contracts.

Before a dispute has arisen, a party can ensure that an arbitration clause will extend to all disputes arising in connection with a given project by accounting for the existence of multiple related contracts in the arbitration agreement. This can be done by inserting the same arbitration clause in all related agreements or explicitly providing that the parties agree to have related disputes heard in the same arbitration. Alternatively, the parties to the project could agree to enter into a standalone dispute resolution protocol (also known as an umbrella arbitration agreement) covering all related contracts.

After a dispute has arisen, it may not be possible to rely on an arbitration clause in a related agreement. This is because the exceptions to the general rule that an arbitration clause only extends to the contract that it is contained within are limited. Generally, exceptions will only be found where the multiple contracts (a) relate to the same economic transaction and (b) do not contain distinct arbitration agreements or forum selection clauses.[21]

After a dispute has arisen, it also may not be possible to mitigate the risk of multiple proceedings. Joining two or more separate arbitrations into a single arbitration where a single tribunal will render a single award is commonly referred to as "consolidation". In general, consolidation is only permissible where the parties have explicitly or implicitly consented to such consolidation. By way of example, Section 35 of the English Arbitration Act 1996 provides:

> "(1) The parties are free to agree:
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> a. that the arbitral proceedings shall be consolidated with other arbitral proceedings, or
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> b. that concurrent hearings shall be held, on such terms as may be agreed.
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> (2) Unless the parties agree to confer such power on the tribunal, the tribunal has no power to order consolidation of proceedings or concurrent hearings."[22]

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21 B. Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions*, Kluwer Law International (2006), pp. 107-117.

22 English Arbitration Act 1996, S. 35.

Absent consolidation, the adverse effects of multiple proceedings can be minimized by appointing the same tribunal across arbitrations or by adapting the briefing schedule in related arbitrations.

In sum, unless accounted for in the arbitration agreement before the dispute has arisen or unless consent is forthcoming from all of the parties concerned after the dispute has arisen (which is usually not the case when the parties are in dispute), international arbitration can do little to manage the business risks posed by multiple contracts.

V. MULTIPLE PARTIES

A. WHAT ARE THE BUSINESS RISKS?

The business risks posed when a single project involves multiple parties are similar to those posed by multiple contracts.

First, there is a risk that not all of the parties necessary to resolve the dispute are obliged to participate in the arbitration. This scenario may arise when an entity related to the contracting party causes the damage rather than the contracting party itself. It also may arise in the scenario where the contracting entity is or has become a shell company and has no assets of its own, making it "judgment proof".

Second, multiple parties pose the risk of multiple arbitrations, each of which may involve different parties. For example, in an energy project there may be a dispute between the State and the contractor it has hired to develop the project regarding additional time and cost incurred by the contractor, and there may at the same time be a dispute between the contractor and one or more of its subcontractors regarding the underlying events that are related to the contractor's dispute with the State. These disputes may result in parallel proceedings that could lead to different conclusions about the same facts.

B. CAN INTERNATIONAL ARBITRATION HELP MANAGE THESE BUSINESS RISKS?

In general, when deciding on the proper parties to an arbitration, the arbitral tribunal will look to the relevant arbitration clause.

Thus, the simplest and most effective way to account for the business risks posed by multiple parties is to account for them in the arbitration agreement. To be effective, a multi-party arbitration clause should provide that each party consents to arbitration against every other party, ensure that every party is given notice of the arbitration proceedings, and provide a mechanism for appointing the arbitrators. Providing a mechanism for the appointment of the arbitral tribunal is particularly important because the traditional appointment method whereby each side selects an arbitrator and then those two parties or their two party-named arbitrators select the chair is ill-suited.

Accounting for multiple parties in the arbitration agreement is, of course, only possible when the existence of multiple relevant parties is known at the outset. This is often not the case in practice as parties sometimes only later learn of the existence of or need to involve a related entity.

As with multiple contracts, after a dispute arises, it is not certain that the business risks posed by multiple parties can be managed. In theory, additional related parties can be added to an existing arbitration even where they have not signed the arbitration agreement. Joinder means adding an additional party to an existing arbitration at the request of an existing party and intervention means adding an additional party to an existing arbitration at the request of that party. Whether and under what circumstances an arbitral tribunal will permit an additional party to be added to an existing arbitration is an extremely complex area of arbitration law and practice that has given rise to divergent opinions and decisions and falls outside the scope of this paper. What is important for the purposes of this paper is that joinder and intervention will only be permitted where the party to the arbitration has consented (either explicitly or implicitly) to be bound or under an alter ego, corporate veil-piercing or agency theory.

In sum, unless accounted for in the arbitration agreement before the dispute has arisen, international arbitration can do little to manage these business risks posed by multiple parties.

VI. ENFORCEABILITY

A. WHAT ARE THE BUSINESS RISKS?

Even if a party wins a dispute and obtains a favourable decision, there is the business risk that the losing party will not voluntarily comply with the decision. If the losing party fails to comply, the successful party will need to commence a separate legal proceeding in order to enforce its favourable decision. In general, enforcement or recognition proceedings are brought before the local courts of a country in which the debtor has assets that can be realized in satisfaction of the decision. Depending on the nature of the contractual counterparty, it may difficult to find such a jurisdiction or necessary to bring enforcement actions in more than one jurisdiction. Separate local enforcement proceedings pose their own risks including, most notably, the possibility that the action will not succeed.

B. CAN INTERNATIONAL ARBITRATION HELP MANAGE THESE BUSINESS RISKS?

One of the principle advantages of international arbitration as compared to court litigation is the greater international enforceability of arbitral awards.

As a threshold matter, the risk that the losing party will not comply with an international arbitral award is relatively small according to some statistical studies. For instance, a 2008 survey conducted jointly by PricewaterhouseCoopers and Queen Mary, University of London found that only 3% of respondents reported that the non-prevailing party had failed to comply with the award.[23] Equally, 84% of respondents indicated that the losing party had paid the award in full in more than 76% of cases.[24] This is consistent with an informal internal study

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[23] 2008 International Arbitration Survey by PricewaterhouseCoopers and Queen Mary, University of London, entitled "*International Arbitration: Corporate Attitudes and Practices*", p. 8, available at: http://www.pwc.co.uk/forensic-services/publications/international-arbitration-2008.jhtml.

[24] *Id.*

conducted in the authors' law firm some years ago where it was found that some three quarters of arbitral awards were complied with.

International arbitral awards are more readily enforceable than national court judgments due to the existence of two widely-adopted international legal instruments. The first is the New York Convention, which has 149 State parties[25] and provides a mechanism for the recognition and enforcement of arbitral awards. No such international instrument exists at present for national court judgments. Article V of the New York Convention provides that State parties must recognize and enforce foreign arbitral awards unless the losing party can establish that one of the specified exceptions is met.[26] The specified exceptions, which are also listed in Article V, are narrow and limited grounds that do not include an appeal of the award on the merits.[27] Similarly, the ICSID Convention, which also has 149 State parties,[28] obligates State parties to enforce ICSID arbitral awards as if they were final judgments of local courts.[29]

However, even with the New York and ICSID Conventions, practical difficulties can arise when seeking to enforce an international arbitral award. Initially, it may be difficult to locate the assets of the contractual counterparty. Once those assets are located, it may be difficult to commence a proceeding in the local courts of that country. Procedural and jurisdictional requirements differ across countries and may be difficult to meet in the country in which the assets are located. The likelihood of success may also differ depending on whether the jurisdiction in which the assets are located is arbitration friendly and whether the judiciary is independent, impartial and free from corruption.

Due to the practical difficulties enforcing arbitral awards, it is prudent to develop an enforcement strategy at the beginning of the arbitration proceedings. An effective enforcement strategy should consider where the assets and potential assets are located, the requirements for bringing an enforcement action in the country or countries where assets are or might be located, and any potential bars to enforcement in those jurisdictions.

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25 At the time of writing. See UNCITRAL website, "*Status – 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards*," available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

26 Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "**New York Convention**"), Art. V.

27 New York Convention, Art. V. The specified grounds are: incapacity of a party or invalid agreement, unable to present a defense, award includes issues outside the scope of the tribunal's authority, the use of unlawful arbitral procedure, the award is not final and binding or has been annulled or suspended, the subject of dispute is not capable of settlement under the laws of the country in which the award is being enforced, and confirmation would violate public policy of the country in which the award is being enforced.

28 At the time of writing. See ICSID website, "*Member States*", available at: https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=MemberStates_Home.

29 ICSID Convention, Art. 54(1) ("Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.").

In sum, international arbitration is an effective way to manage the business risk that a contractual counter-party will not voluntarily comply with an arbitral award.

CONCLUSION

As shown in the following table summarizing the analysis above, international arbitration is a useful tool to manage some but not all of the business risks common in cross-border transactions:

	Business Risks	Ways to Manage Business Risk Through International Arbitration	General Assessment
I.	Operating in a given country	- Seat of arbitration - Institutional arbitration	✓
II.	Commercially sensitive or technical disputes	- Confidentiality / privacy - Arbitrator selection - Use of experts	✓
III.	Lengthy or costly proceedings	- Multi-tier dispute resolution clause - Procedural flexibility	✓ X
IV.	Multiple contracts	- Arbitration agreement - Consolidation	X
V.	Multiple parties	- Arbitration agreement - Joinder / intervention	X
VI.	Enforceability	- Enforcement strategy	✓

Where international arbitration is an effective business risk management tool, it will be most effective if the ways of doing so set out in the above table and in this paper are considered and evaluated before drafting an arbitration agreement, or if not before commencing an arbitration proceeding or at the very least before the constitution of the arbitral tribunal.