How to Arbitrate in Armenia[1]

INTRODUCTION

On December 25, 2006 Armenia adopted a new Law on Commercial Arbitration (RA Law No. HO-55-N, herein sometimes also referred to as the "Armenian Arbitration Act", or the "Armenian Act"). The law is a modern law, conforming to accepted international standards. It provides a sound framework for the conduct of both domestic and international commercial arbitration in Armenia and for the enforcement in Armenian courts of arbitration awards made in other countries.

Armenia's new law is based on the Model Law on International Commercial Arbitration, which was promulgated over 20 years ago by the United Nations Commission on International Trade Law (UNCITRAL). At least 50 countries, in addition to Armenia, have now adopted national arbitration laws based on the UNCITRAL Model Law.

The new law is designed to eliminate certain difficulties and uncertainties that arose under previous law. If wisely used and implemented, the new law can provide the basis for a busy, effective and efficient system for the resolution of commercial disputes in Armenia.

This booklet explains the new arbitration law, and describes how people in Armenia can take advantage of the law to resolve commercial disputes efficiently and fairly--and without going to court. A concluding section of the booklet describes how, under existing law, commercial disputes may be resolved through mediation and other forms of alternative dispute resolution—again, outside of court.

Copies of key statutes, treaties and rules that establish the basic legal framework for of arbitration are included in Appendices. The new Armenian Arbitration Law is in Appendix A-1.

ARBITRATION

1.1. How Arbitration Works: Basic Principles

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Arbitration is a process that enables parties, by agreement, to submit disputes to one or more neutral third persons—not a court—for final and binding resolution. Arbitration is consensual. That is, parties arbitrate only if they have agreed to do so. Under the Armenian Act, and the arbitration laws of most other countries, once parties have agreed in writing to arbitrate an existing dispute, or a dispute that may arise in the future, they may not bring an action in court to resolve that dispute.

Generally, arbitrators are required to decide cases on the basis of the evidence and the applicable law, just as a court would do. It is possible for parties to agree that arbitrators may base their awards not on the law, but only on considerations of fairness and equity *(ex aequo et bono).* This is done only rarely, however.

Under the Armenian Act, and under most national arbitration statutes, an arbitrator's award is final and binding, and enforceable by the court designated under the Armenian Act, Art. 6 (henceforth, "court designated by law"). So long as the arbitrator has acted fairly and has not gone beyond the powers that the parties have granted him or her, and so long as there has been no other fundamental flaw proscribed in the arbitration statute, the award may be enforced in a court of law.

1.2. How Arbitration Works: The Legal Framework for Arbitration

Arbitration in Armenia takes place within a six-part legal framework. The same framework applies in all developed arbitration systems.

1. The arbitration agreement. The parties must agree to arbitrate or there can be no arbitration. The Armenian Act requires that the agreement to arbitrate be in writing.

2. The arbitration statute of the place of arbitration. For arbitrations in Armenia, this is the Armenian Arbitration Act. The statute provides, in general, that arbitration agreements are binding and irrevocable and that arbitration awards are binding and enforceable.

3. Courts. The Armenian Act assigns essential roles to the courts in Armenia. It is the obligation of the courts, applying standards set forth in the Act, to enforce or set aside awards and to assist and oversee arbitrations that take place in Armenia.

4. International Conventions. These establish obligations that apply to Armenian courts when they consider issues involving arbitrations that take place in another country. The principal international convention to which Armenia is a party is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("1958 New York Convention"), to which a total of 142 parties have now subscribed. Under the Convention the courts of Armenia must (1) enforce arbitration agreements made in other countries, and (2) recognize and enforce arbitral awards rendered in the territories of other countries. The Convention is set out in

Appendix A-2. The requirements of the 1958 New York Convention discussed above have been incorporated into the Armenian Act (Armenian Act, Arts. 8, 35).

5. Arbitration Rules. Rules frequently used in commercial arbitrations include the rules of the International Chamber of Commerce ("ICC") (Appendix A-3), the London Court of International Arbitration ("LCIA") (Appendix A-4), the American Arbitration Association ("AAA") (Appendix A-5), and the United Nations Commission on International Trade Law ("UNCITRAL") (Appendix A-6). The rules fill in details that may not be covered by the applicable arbitration statutes which typically set out only basic minimum standards for arbitration procedures.

6. Arbitral Institutions. The parties may elect to have their arbitrations administered by the ICC, the AAA, the LCIA or another institution. These institutions assist with the logistics of arbitration. They also perform the important functions of appointing arbitrators if the parties have not otherwise provided for their appointment, and of hearing challenges to arbitrators based on alleged bias or interest. The institutions charge fees for their services, some on the basis of time devoted to a proceeding, some on the basis of the amount in dispute. These fees can be substantial. The parties may also choose "ad hoc" arbitration, in which the arbitrators and the parties handle administrative tasks without the aid of an arbitral institution. The UNCITRAL rules are frequently used for such arbitrations.

For a more complete description of the legal framework for arbitration, see "International Arbitration: The Fundamentals,"[*] Annex B-1.

1.3. How Arbitration Works: The Process of Arbitration

The arbitration process is a flexible one. Within broad limits, it may be as simple or as complex as the parties choose to make it. The parties' agreement to arbitrate will generally include provisions regarding arbitration procedures. If the parties have left questions of procedure open in their arbitration agreement, the governing arbitration rules chosen by the parties may answer these questions. If they do not, experienced arbitrators will usually take pains to make the arbitrations that they conduct as simple and expeditious as possible.

Although procedures will differ somewhat under different sets of arbitral rules, the stages in a typical arbitration proceeding are:

1. Pleadings. One party (the claimant) files a written claim and request for arbitration. The claim will be filed as the chosen rules of arbitration provide--either with an arbitration institution or directly with the other party. The other party (the respondent) files a written answer and, if the respondent chooses to do so, a counterclaim.

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2. Appointment of arbitrators. One or three arbitrators will be appointed by the parties or by an arbitration institution, as the parties have agreed, or as the chosen rules provide. A well drafted arbitration clause will specify the number of arbitrators and their method of appointment.

3. Discovery of documents. Each party may ask the other to provide from its files documents likely to be useful as evidence in the case. Document exchanges may be agreed by the parties or, depending on the circumstances and the arbitral rules chosen, may be ordered by arbitrators or a court.

4. Hearing. Unless the parties have otherwise agreed, each party is entitled to present its case to an arbitral tribunal at hearing. At the hearing each party presents documentary evidence, and witnesses testify. Parties wishing to expedite the process may agree, however, that their disputes will be decided by the arbitrators on the basis of documents alone, without the testimony of witnesses.

5. Briefing. If complicated issues of law or fact are involved, the parties may agree to file written briefs (also called memorials), or the arbitrators may order that briefs be filed.

6. Award. Typically, arbitrators will render their awards in writing and will state the reasons for their decisions.

Although the arbitrations of similar cases tend in practice to follow similar patterns, no one form fits all. The parties are free, within wide limits, to fashion and agree to any arbitration procedure that they choose. If they plan well, the procedures that they design will permit each party to make a full and fair presentation of its case and to receive a final and enforceable award, with reasonable speed and at reasonable cost.

1.4. How Arbitration Works: The Role of the Armenian Courts

The Armenian arbitration statute (Appendix A-1), like those of most other states with modern arbitration laws, reserves to the national courts certain powers and duties that are essential to the success of the national arbitration system. These include the powers to:

1. Enforce agreements to arbitrate. If a party sues in court with respect to a dispute covered by a valid arbitration agreement, the court, on application of the other party, must refer the parties to arbitration. If a party has agreed to arbitrate but then decides to sue, the court may not hear the case. It must enforce the parties' arbitration agreement, and refer the dispute to arbitration. Under the law, the court has no discretion in the matter, Armenian Act, Art. 8. See also RA Code of Civil Procedure ("Code of Civil Procedure"), Arts. 91, 92, 103**.** In addition, Code of Civil Procedure, Art. 18, authorizes courts, with the consent of the parties, to refer property disputes to arbitration before making a verdict.

2. Enforce arbitration awards. The Armenian Act provides that, unless certain exceptions to enforcement, specified in the Act, are present, the Armenian courts must enforce arbitration awards, whether the awards are made in Armenia or in any other member state of the 1958 New York Convention, Armenian Act, Art. 35. With respect to foreign awards, the Act implements Article III of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Appendix A-2). In addition, Code of Civil Procedure, Arts. 247.6, 247.7, provide that the Armenian courts must recognize an award made in a foreign country if the award fulfills the requirements of applicable international agreements.

3. Set aside domestic arbitration awards (awards made in the country where the court sits), or decline to recognize or enforce foreign awards, if the awards and the proceedings that produced them fail to meet national or international legal standards, Armenian Act, Arts. 34, 36. The grounds stated in Article 36 are identical to those set forth in Article V of the 1958 New York Convention .

4. Decide challenges to the jurisdiction of arbitral tribunals. On the application of a party, a court may hold that no valid arbitration agreement exists with respect to a given dispute—either because a purported agreement was not validly made, or because the agreement does not cover the dispute or the parties involved in the dispute. If a dispute is pending before an arbitral tribunal, a challenge to the tribunal's jurisdiction must be made first to the arbitral tribunal itself, and then, if the tribunal rejects the challenge, it may be appealed to the court designated by law, Armenian Act, Art. 16. After an arbitral award has been rendered, an application to set the award aside on the ground that the tribunal lacked jurisdiction may be made to the court designated by law, Armenian Act, Arts. 34(2)(1)(c) and 34(2)(2)(a). If the winning party in an arbitration seeks to have the tribunal's award enforced, the losing party, if it has made a timely objection to the tribunal's jurisdiction, may assert the tribunal's lack of jurisdiction as a defense in the court where the enforcement action is brought, Armenian Act, Art. 36(1)(1)(c) and 36(1)(2)(a).

5. Appoint arbitrators. If the parties have agreed to arbitrate but have provided no effective means for appointing members of an arbitral tribunal, the courts have the power to make the appointments, Armenian Act, Arts. 11(3)-(5). Typically, however, the arbitration rules chosen by the parties will provide for the appointment in such cases by an arbitration institution.

6. Remove arbitrators for interest or bias. Under the Armenian Act, only the court designated by law is given this power, Armenian Act, Art. 13(3). Typically, courts exercise this power only if an arbitration institution chosen by the parties fails to act.

7. Grant interim relief to preserve the status quo before an arbitration is commenced or while an arbitration is pending. See Armenian Act, Art. 9, Code of Civil Procedure, Art. 97(1). Such relief may include temporary injunctions, or orders for the attachment or sequestration of property that is in dispute while an arbitration is

pending. If arbitrators issue an order for interim relief, their order may be enforced by the court designated by law, Armenian Act, Art. 17(3).

8. Order parties to produce evidence or witnesses in connection with an arbitration. The court to which the request may be made is the court designated by law, Armenian Act, Art. 27.

For a more detailed analysis of the judicial role, see the article in Annex B-2, "The Essential Judge."[*]

1.5. How Arbitration Works: Application of the "Pro Arbitration Bias"

The role of the courts, under the Armenian Act and other modern laws, is an important role, but it is also a limited role. Thus the Armenian Act states, in Article 5, 'In matters governed by this Law, no court shall intervene except where so provided in this Law."

As noted above, courts have no power to vacate an award, or to decline to recognize or enforce it, on any grounds other than the limited number set out in the statute, Armenian Act, Arts. 34(2), 36(1). They may not set an award aside for errors of law or on the ground that the evidence does not support an arbitrator's findings of fact.

Furthermore, even where the statute expressly gives courts certain powers to vacate awards or to decline to recognize and enforce them, the courts generally construe these powers narrowly. This certainly is the practice of courts in other countries that have adopted modern arbitration laws. When asked to review or to recognize or enforce an arbitration award, or to construe an arbitration clause, these courts apply what many of them call a "pro-arbitration bias." In questions of doubt, the courts lean strongly toward enforcing awards and finding that arbitration clauses are valid. This bias is consistent with the history and intent of the UNCITRAL Model Law, on which the Armenian statute is based, and of the 1958 New York Convention, of which Armenia is a member-state.

A judicial bias in favor of enforcing arbitration awards and agreements is also clearly in keeping with the objectives of parties who have agreed to arbitrate. They are interested in a proceeding that produces a result as quickly and efficiently as possible. They want an award to be final and to end their dispute once and for all. If the price of the benefits of arbitration is the risk that in a case or two the result may not be what a trial court or a court of appeal would have come up with, they choose, as a matter of sound business judgment, to take that risk.

The "pro-arbitration bias" applies with special force with respect to foreign arbitrations and foreign awards. Under the Armenian Act, as under the laws of most other countries that have ratified the 1958 New York Convention, the courts must recognize and enforce an award made in another country, unless it finds that one of a

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limited number of grounds for not doing so, specified in the 1958 New York Convention and in the arbitration statute, exist, Armenian Act, Art. 36(1). The language of this Article is taken verbatim from Article V of the 1958 New York Convention.

Armenia has joined the universe of states that have ratified the 1958 New York Convention and that base their arbitration laws on the UNCITRAL Model Law. In interpreting the terms of the Convention and the terms in the Armenian statute taken from the Model Law, the Armenian courts can be expected to take into account the decisions of the courts in the other nations that have construed the same terms. These courts, almost invariably, have applied a "pro arbitration bias" in interpreting the Convention and their national arbitration statutes.

2. Advantages and Disadvantages of Arbitration as Opposed to Litigation

2.1 Advantages

1. Arbitration is flexible. The parties and the arbitrators have wide discretion in shaping procedures.

2. When parties agree to arbitrate, they are able to determine in advance where the arbitration will be held, as well as the rules of arbitration that will apply.

3. Arbitration, if it is well designed and well administered, is relatively speedy.

4. Arbitration is relatively inexpensive. Note, however, that in a large and complex case, the expenses will likely be significant. There may be counsel, arbitrators and an administering institution to be paid. By designing their arbitration carefully, parties may keep these costs to a minimum.

5. Arbitration is private. Hearings are not open to the public, and awards and other documents are generally maintained in confidence.

6. The parties control the appointment of arbitrators. If they choose well, they will have a good chance of presenting their cases to arbitrators who are well qualified to handle their disputes.

7. The Armenian Act, Art. 35(1), provides that arbitral awards are final and binding, and that they may not be set aside by a court except upon the limited grounds specified by law.

2.2. Disadvantages. The disadvantages of arbitration are the other side of the coin from the advantages.

1. Because procedures in arbitration tend to be simpler and more flexible than those in litigation, evidence may be admitted that would not be admissible in litigation.

2. Because opportunities for the discovery of evidence may be more limited in arbitration, arbitrating parties may not be as able to make as comprehensive an investigation of the facts as if they were in litigation. Furthermore, only a court may compel third parties, as well as parties, to provide evidence. Although under some arbitration rules and statutes, arbitrators may issue orders to non-parties, ordering them to produce documents or to appear as witnesses, only a court can compel a non-party to comply with such an order, Code of Civil Procedure, Arts. 49, 65. In practice, however, discovery in arbitration is likely to be roughly equivalent to discovery in litigation. Some arbitrators, in fact, may be more willing than many judges to compel the production of documents.

3. The fact that arbitral awards are generally final may mean that errors of law and mistakes regarding the sufficiency of the evidence will go uncorrected. One of the principal reasons that parties choose arbitration, however, is that it promises to resolve disputes quickly and finally. This benefit is more important to many than the possibility of correcting errors of law or fact through a time consuming appeal process.

4. Because awards are considered private, they lack the value as precedent that court decisions have.

5. Finally, the success of an arbitration depends to a large extent on the skill of the arbitrator or arbitrators. If the arbitration is in the hands of an arbitrator who is not skillful or diligent, the parties may find it harder to know how to prepare and present their cases and the proceedings may take a long time to complete. The same comment may be applied, however, to court proceedings in some cases.

3. Drafting an Arbitration Clause

At a minimum, a well drafted arbitration clause will provide for the following: (1) what arbitral rules will apply; (2) how many arbitrators there will be; (3) how the arbitrators will be appointed; and – of critical importance – (4) where the arbitration will be held. It may also be advisable to state (5) the language in which the arbitration will be held.

The clause need not be a long one. Some of the five critical points noted above, such as the number of arbitrators and how they are appointed, are likely to be covered by provisions in the arbitration rules that the parties have chosen. Sometimes, however, parties may wish to vary the provisions of the rules on certain points. Generally, they are free to do so.

All major sets of arbitration rules include suggested arbitration clauses. See the clauses set out in the rules included in Appendices A-3, A-4.1, A-5, A-6. In most cases, if the parties simply adopt such a suggested clause as part of the agreement between them, they will have succeeded in establishing a satisfactory set of arbitration procedures.

Careful drafters will likely go further. As they draft an arbitration clause for a particular contract, they will make informed decisions on how the standard clauses might be supplemented or modified to meet the circumstances of the transaction at hand and to serve the needs of the parties. For a further discussion of this process, see Appendix B-3, "Drafting an Arbitration Clause."[*]

It is generally wise also to provide a "governing law" clause in a contract, either in the arbitration clause or in a separate clause. Such a clause establishes what law will govern in determining the substantive rights of the parties, for example the rights and duties each has under a disputed sales or investment agreement.

The governing substantive law need not be the law of the country where an arbitration takes place. For example, it would be quite possible for parties who have chosen Armenia as the place of arbitration (so that the arbitration procedures would be subject to the Armenian Arbitration Act) to agree to the law of England as the governing substantive law; or for parties to agree to arbitrate in England under the English Arbitration Act and also agree that the parties' rights were to be determined under Armenian substantive law.

4. Questions and Answers on Arbitration

4.1. At what stage in a transaction should the parties enter into an arbitration agreement?

Most arbitration agreements are incorporated as clauses in the basic contract governing a transaction and are agreed to at the outset of a venture. It is possible for the parties that do not have an arbitration clause in their basic agreement to agree after a dispute has arisen that they will submit their dispute to arbitration. This could prove difficult as a practical matter, however. It is quite possible at that stage that one of the parties—the one most likely to be found to be in the wrong—will not be nearly as interested in agreeing to an expeditious procedure as that party would have been at the outset of the transaction, when neither party could predict what disputes might arise or which party might be the claimant.

4.2. How will disputes under a contact be resolved if the parties have said nothing in the contract about dispute resolution?

If the parties say nothing in a contract about where or how disputes under the contract are to be resolved, they have in effect made an election of dispute resolution

procedures. They have chosen litigation to resolve any and all disputes that cannot be settled by negotiation. They may not know, however, where and in what court the litigation will take place. Probably the dispute will be heard by the courts most likely to favor the more aggressive disputant—often a court in his or her home jurisdiction. Nobody likes to be sued in a court of an unfamiliar and possibly hostile jurisdiction, particularly if that court is in a foreign country. This is one reason why most major international contracts today include clauses providing for the arbitration of disputes in a neutral forum.

4.3. What if the parties agree to arbitrate, and then one of them decides it wants to go to court instead?

The party that wishes to arbitrate (the claimant) may simply commence an arbitration by filing a claim in arbitration with the other party or with an arbitration institution, in the manner provided in the arbitration rules to which the parties have agreed. If one party commences an action in court, the other party may file a motion in the court where the action is brought, and, if the parties have validly agreed to arbitrate, the court must dismiss the court proceeding and refer the case to arbitration, Armenian Act, Art. 8. A form of a motion to dismiss appears in Annex C.

4.4. Do I need a lawyer to help me draft an arbitration clause or to assist in an arbitration?

Perhaps not in a small or uncomplicated matter. If the parties can agree on the use of an arbitration clause selected from one of the major sets of arbitration rules, such a clause will suffice in most cases. When a dispute arises, the chosen rules will tell the parties how to get their arbitration under way. If the arbitration is to be administered by an institution, that institution will provide further assistance. Once an arbitration—either an institutional or an ad hoc arbitration—is in the hands of a skilled arbitrator, the arbitrator can provide guidance on how to proceed.

In matters of significance, however, most parties will deem the services of a lawyer important or essential. The lawyer can advise on the drafting of an arbitration clause designed to serve the interests of his or her client, and, should an arbitration take place, can take the leading role in gathering evidence, presenting witnesses, arguing points of law and submitting briefs, all of which steps are common in major arbitrations.

It has been frequently noted that the role of counsel has become increasingly important in major arbitrations in recent years, and that there is a tendency for big cases to take on many of the characteristics of major litigations. The wise lawyer and the wise client will take care in the design of an arbitration procedure and the drafting of an arbitration clause to keep complexities to the minimum necessary under the circumstances, so as to foster the goals of efficiency and economy.

4.5. Which arbitration rules are the best?

Rules of arbitration have been published by all the major arbitration institutions. These include the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), and the International Center for Dispute Resolution of the American Arbitration Association (AAA). Another set of widely used rules has been promulgated by the United Nations Commission on International Trade Law (UNCITRAL).

All of the rules referred to are well tested and serviceable. Those promulgated by the AAA, ICC, LCIA and most other arbitration institutions call for the administration of the arbitrations by the institution whose rules have been chosen. The administrative services provided in administered or "institutional" arbitrations can prove very helpful, but one must remember that the institutions, which are private, non-profit organizations, charge for their services. Arbitrations under the UNCITRAL rules are "ad hoc" arbitrations, which means that they are not administered by an institution but by the arbitrators themselves. In arbitrations under the UNCITRAL rules, there are no fees to be paid to an arbitral institution.

The arbitration rules mentioned in this section, including the current schedules of fees of the institutions mentioned, are in Appendices A-3 through A-6 and A-4.2 (LCIA Schedule of Fees).

It is important that the parties in drafting their arbitration agreement to choose carefully which rules will apply. The parties are generally free in their arbitration agreement to amend the rules in any ways that they think appropriate. It is noteworthy, however, that the rules of the ICC include certain basic procedures that the parties, if they elect to use the ICC rules, are not permitted to vary. The ICC rules give the ICC powers to oversee and assist the arbitration process that are more extensive than those of the other major arbitration institutions—and these powers may not be varied by parties that choose the ICC rules to govern their arbitrations.

4.6. Must an arbitration be administered by an arbitration institution?

No. It is possible for the parties to agree to "ad hoc" or non-administered arbitration. Arbitration institutions (such as the AAA, ICC, LCIA or an institution established in Armenia) can provide useful services in support of arbitration. However, many parties to both large and small arbitrations choose to leave the administration of their arbitrations to the arbitrators themselves, generally with satisfactory results. An arbitration clause calling for non-administered arbitration is the Model Clause appearing at page 4 of the UNCITRAL Rules of Arbitration, Annex A-6. The clause requires that arbitrations be carried out under the UNCITRAL Rules, which are detailed, complete and well tested rules for ad hoc arbitration. See Appendix D for information on logistics of arbitral panel engagement for ad hoc arbitration.

If one adopts the Model Clause in the UNCITRAL Rules, it is important to designate an "appointing authority" in the space provided in the Model Clause. If the parties' agreed procedure for appointing arbitrators fails, or if a party challenges an arbitrator

on the ground of partiality or bias, the UNCITRAL Rules provide that the appointment will be made or the challenge decided by an "appointing authority," whom the parties are free to name. One must be certain before naming an appointing authority that the person or institution named is willing to serve in that capacity. As of this writing, the Court of Arbitration of the Chamber of Commerce of Armenia, the Defender or Rights Union and the President of the Chamber of Advocates have indicated willingness to serve as appointing authority, to act, if the need arises, in support of non-administered arbitrations.

4.7. Can an arbitration clause be unenforceable? On what grounds?

A claim that an arbitration clause is unenforceable is in essence a claim that an arbitral tribunal has no jurisdiction over the case. Either a court or an arbitral tribunal may hold that an arbitral tribunal lacks jurisdiction on the ground that the arbitration agreement relied on by the claimant is unenforceable.

An arbitration clause may be held unenforceable if, properly construed, the agreement does not cover the parties to the dispute or the subject matter of the dispute; or if the arbitration agreement was not made in conformity with the requirements of the arbitration statute (if, for example, the agreement was not in a writing signed or adopted by both parties); or if under ordinary principles of contract law the arbitration agreement was not a valid contract (because, for example, one of the apparent parties was not legally competent to make the contract, or because the agreement to arbitrate was the product of fraud or overreaching).

If a party wishes to assert that an arbitral tribunal lacks jurisdiction, because an arbitration clause is unenforceable or for any other reason, it must do so promptly. The Armenian Act, Art. 4, and most arbitration rules provide that if a party knows that an arbitration clause is unenforceable, but nevertheless goes forward with an arbitration proceeding without objecting to the validity of such clause, or without asserting on any other ground that the arbitral tribunal lacks jurisdiction, that party is deemed to have waived its objection and to have agreed to arbitrate under the clause.

If a party makes a timely objection to the jurisdiction of an arbitral institution, the arbitrators may either note the objection and reserve their decision on their jurisdiction until they have decided the merits of the case, or they may rule on their jurisdiction as a preliminary matter. If they issue a preliminary award stating that they have jurisdiction, the party challenging jurisdiction may, within 30 days, move the court designated by law to hold that the tribunal lacks jurisdiction. The arbitrators, in their discretion, may then continue or suspend the arbitral proceedings while the matter is before the court, Armenian Act, Art. 16(3).

4.8. Can a party obtain a court order to cure the flaws in an arbitration clause (e.g., choice of language, choice of law, choice of rules, place, statute of limitations or other time limits)? Can the arbitral tribunal cure those flaws?

Neither the courts nor the arbitral tribunal can rewrite the parties' arbitration agreement. Even if the parties have drafted their agreement unwisely, it is the duty of courts and arbitrators to enforce that agreement.

In performing this duty, however, both the arbitrators and the courts will act with a "pro-arbitration bias." To the extent consistent with the terms agreed by the parties, they will construe the arbitration agreement in ways calculated to render the agreement valid and the arbitration under it efficient and effective.

Furthermore, so long as the parties have validly agreed to arbitrate a dispute, the failure of their agreement to address such issues as language, place of arbitration or number of arbitrators need not be fatal. If the parties have agreed on a specific set of arbitral rules, those rules will permit the arbitrators to fill such gaps. Similarly, the arbitrators will have the power to decide what statute of limitations or other time limit, if any, applies.

The failure of parties to agree in their arbitration clause on a specific set of rules of arbitration could create different, more serious, problems. Having no rules or arbitral institution to turn to, the claimant would have to move a court to compel arbitration and to appoint an arbitrator or abitrators. The court designated by law, and no other court, has this power under the Armenian Act (Armenian Act, Arts. 11(3)(1), 11(4)). Once an arbitrator has been appointed, he or she may decide (generally after hearing the parties) on how any gaps in their agreement that remain should be filled.

4.9. Why is it important that the parties agree on the place of arbitration?

The arbitration laws of the country where an arbitration is held will govern the question of whether the parties have entered into a valid arbitration clause and will establish the basic procedural requirements for the arbitration. The national arbitration law will determine the role of the national courts in overseeing and assisting the arbitration process, and will determine their powers and duties to review, set aside or enforce the arbitration award.

Parties should take advantage of their right to choose the place of arbitration. This is particularly important with regard to international transactions. The practices and procedures of the courts of one party's home nation, and the languages used in those courts, may well be unfamiliar to the other party.

If the parties do not agree on the place of arbitration, the arbitrators (or in certain cases an arbitral institution) will choose the place of arbitration.

4.10. What law or laws apply in an arbitration?

Two types of law apply.

The first is the governing substantive law—the law governing the rights and obligations of the parties to a contract. The governing substantive law is the law chosen by agreement of the parties in their arbitration agreement, or, if they have not agreed, chosen by the arbitrators as most appropriate under the circumstances.

Second is the governing procedural law (or, to be more technically correct, the *lex arbitri*). This is nearly always the law of the jurisdiction where the arbitration takes place, as spelled out in the national arbitration statute and elucidated by the national courts. These authorities will govern not only the minimum procedural standards that apply to an arbitration within that jurisdiction, but also such matters as the enforceability of an arbitration agreement or arbitration award and the role of the national courts in regard to arbitrations. In the case of an arbitration in Armenia, all of these matters are governed by the new Armenian arbitration statute.

It should be noted that certain mandatory laws, such as laws regulating competition, intellectual property or security transactions, may apply in a given arbitration in addition to the governing substantive and procedural laws. The parties may not by agreement abrogate the effect of mandatory regulatory laws.

Arbitrations governed by treaties, rather than national law, are a special case. Arbitrations between an investor from one state and the government of another state under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention") represent an important category of arbitrations of this sort. The ICSID Convention provides that an investor and the host government may agree that investment disputes will be settled in special arbitral tribunals set up under that Convention. In such arbitrations the controlling arbitration law (the *lex arbitri)* is not a national arbitration law but the ICSID Convention itself, and the only role that the Convention provides for national courts is the role of entering judgments enforcing ICSID arbitral awards.

4.11. <u>How does one find a good arbitrator?</u>

The power of a party in arbitration to participate in the selection of an arbitrator can be one of the significant advantages of arbitration. If there is to be a single arbitrator, the parties may agree on who that arbitrator will be. If there are to be three arbitrators, the major arbitration rules permit each party on its own to appoint or nominate one of the three.

Under all major arbitration rules, and under the Armenian Act and other modern arbitration laws, all arbitrators must be neutral – even arbitrators who are selected or nominated by just one party, Armenian Act, Art. 12. An arbitrator must be impartial, that is, he or she must have no views in advance on how a particular arbitration should be decided. The arbitrator must be independent, that is, he or she may have no significant financial, familial or other interest that might make him or her dependent on a party or the party's counsel. These basic principles, which are

widely accepted internationally, are set out in the Rules of Ethics for International Arbitrators of the International Bar Association, Appendix A-7[*].

Arbitrators are almost always appointed to resolve a particular dispute only after the dispute has arisen and after a claim and response have been filed. At that time, if and when a party has an opportunity to name a neutral arbitrator, the party should take care to name an arbitrator who is not only skilled and knowledgeable in the conduct of arbitrations and in the subject matter of the dispute, but also a person whose background and training make it likely that he or she will understand the arguments of the party that appointed him or her and be generally sympathetic to the point of view of that party.

Most arbitration institutions maintain rosters of arbitrators. Most of the arbitrators on these lists have had at least some training as arbitrators, and some have been certified as qualified. If asked, these institutions will provide names of arbitrators, with biographical information about them. Institutions in Armenia that maintain rosters of arbitrators include the Defender of Rights Union, which has 35 arbitrators and the RA Chamber of Commerce and Industry of RA, which has 12 arbitrators.

4.12. What if the parties cannot agree on the appointment of an arbitrator?

The rules of arbitration that the parties have chosen will provide an appointment procedure. If the parties have chosen institutional arbitration (*e.g.*, under the rules of the ICC, AAA or LCIA), the institution whose rules have been chosen will make the appointment, usually after consultation with the parties. If the parties have not agreed on the governing arbitration rules, they may move a court to make the appointment. Under the Armenian Act, Arts. 11(3)(1), 11(4), the court to hear such a motion is the court designated by law.

4.13. What if one of the parties believes an arbitrator is biased?

As noted above, the Armenian Act, Art. 12, and all major arbitration statutes and rules, require that an arbitrator must be impartial and independent. Under these statutes and rules, a party having reason to believe that an arbitrator or proposed arbitrator lacks the necessary impartiality and independence, it must promptly object or lose its right to do so. Under the Armenian Act, Art. 13(2), the challenge must be made within 15 days after the challenging party knows that grounds for challenge exist.

[*] In 2004 the International Bar Association published *Guidelines on Conflicts of Interest in International Arbitration.* The IBA Rules of Ethics for International Arbitrators, which were published in 1987, cover more topics than the 2004 Guidelines, and the Rules remain in effect as to subjects that are not discussed in the Guidelines. By their terms, however, the Guidelines purport to "supersede" the Rules of Ethics as to the matters treated here.

If the objection is made early in an arbitral proceeding, the challenge will be considered first by the challenged arbitrator. If he or she refuses to withdraw, and if the parties have agreed on a set of rules to govern their arbitration, the challenge may be made to the appointing authority established under the chosen arbitration rules. If the appointing authority declines to disqualify the arbitrator, or if the parties have not agreed on rules providing for an appointing authority, the complaining party may move a court (in Armenia, the court designated by law) to disqualify the arbitrator, Armenian Act, Art. 13(3).

If the grounds for challenge are not discovered until after an award has been made, the losing party, if it acts in a timely fashion, may move a court to set the award aside or to refuse to recognize or enforce it, Armenian Act, Arts. 34, 36.

If an arbitrator is disqualified, his or her replacement will typically be named in the same manner that the disqualified arbitrator was named. See Armenian Act, Art. 15(1).

4.14. What if an arbitrator is incompetent or unreasonably slow to act?

There is no easy answer to this one. As a practical matter, the complaining party's best hope may lie in an informal complaint to the arbitration institution administering the arbitration. These institutions take pride in overseeing the arbitrations they administer to see that they proceed expeditiously. A tactful remonstrance by a party to the arbitral tribunal may also prompt faster action.

The Armenian statute provides that a party may move the court designated by law to remove an arbitrator who proves to be incompetent or dilatory, Armenian Act, Art. 14(1). However, the process is likely to be time consuming, and the courts are likely to require strong evidence before they are persuaded to act.

Clearly the best way to protect against the risk of an incompetent or dilatory arbitrator is to use great care in the process of appointing the arbitrator.

4.15. What if there are multiple, related disputes involving more than two parties? May they be consolidated?

Because arbitration is the creature of the agreement of parties, consolidation is possible only if all concerned parties—the parties to all the contracts under which related disputes arise—have agreed to it. Although the courts of Armenia have yet to address this issue, this has been the position of the large majority of courts in other nations.

If the parties can foresee the need to consolidate related arbitrations arising under more than one contract, they must draft arbitration clauses for each of these contracts that make consolidation possible. For a discussion of the points to be taken into

consideration in the drafting of provisions for consolidation, see Appendix B-3 "Drafting an Arbitration Clause,"* at page 11.

4.16. Is pre-award relief available?

Yes, in appropriate cases.

Most rules of arbitration authorize arbitrators to issue orders of interim relief. Among the kinds of interim relief that may be available in appropriate circumstances are, for example, temporary restraining orders, and attachments or sequestration of assets. Under those rules, such orders may be issued only to parties to the arbitration and not to third parties. (The reason: the third parties are not bound by an arbitration agreement to which they have not agreed, and therefore they are not bound by the orders of arbitrators exercising powers provided under the arbitration agreement.) If a party refuses to obey the interim order of a tribunal, the requesting party may go to court, in Armenia the court designated by law, for an order granting the requested relief, Armenian Act, Art. 17(3).

In addition, a party seeking interim relief may go at any time—even before an arbitration has commenced and before an arbitral tribunal has been constituted—to an RA court, Code of Civil Procedure, Art. 97. Model requests for and orders granting interim relief are in Annex C. The court's order may reach third parties, as well as the parties to the arbitration, Armenian Act, Art. 17(3). A marshal has the power to impose civil penalties on a person that fails to comply with its order directing interim relief, RA Law on Compulsory Enforcement of Judicial Acts, Art. 72(1).

4.17. How does a party obtain evidence from the other party or third parties?

Often parties to an arbitration can agree to exchange relevant documents. Sometimes third parties will also consent to provide documents. Typically, however, these voluntary arrangements must be supplemented through requests made to arbitral tribunals or courts. In a typical arbitration, the parties will agree at an early conference with the arbitrator to exchange documents, and the arbitrator will issue an order confirming this agreement and making it mandatory.

If a party refuses to comply with an arbitrator's discovery order, the arbitrator may draw an adverse inference from that failure. He or she will infer that documents within a party's possession that the party refuses to produce contain information harmful to that party's position. In addition, a party seeking documents in the possession of an adverse party or a third party may request a court, in Armenia the court designated by law, to compel that person to produce the documents. The court has the power to enforce discovery orders against third parties, as well as the parties to an arbitration, Armenian Act, Art. 27. Typically, a party will seek court assistance only after the party in possession of the requested documents has refused to comply with an arbitrator's discovery order.

A request for discovery that is overbroad will be denied. In arbitrations, parties may not turn discovery into "fishing expeditions." Under generally accepted standards, the documents sought must be identified with reasonable particularity and must be relevant and arguably admissible as evidence. An excellent summary of accepted international practice in this regard is in the Rules of Evidence of the International Bar Association, Appendix A-8.

Arbitrators have wide discretion in determining whether to issue discovery orders. Nevertheless, they are bound by law to give each party a fair opportunity to present its case. The failure to order discovery of documents that are clearly available, and clearly material and important to the proof of a party's case could be a ground for setting aside the arbitrator's award or denying recognition or enforcement of the award, Armenian Act, Arts. 34(2)(1)(b), 36(1)(1)(b).

Document discovery orders may also be obtained through RA courts under the Armenian Code of Civil Procedure. A model request for such an order and a form of order are in Annex C. The courts will follow the same procedures for ordering discovery from persons who are in Armenia or who are otherwise subject to the jurisdiction of the Armenian courts that they follow with respect to the discovery of documents for litigation in Armenia. See Code of Civil Procedure, Art. 65.

Documents in the possession or control of a party not subject to the jurisdiction of the Armenian courts may be compelled only through international procedures that exist under the Hague Evidence Convention, Appendix A-9, or that exist under the laws of the country where the person controlling the documents is located. For example, a majority of U.S. courts (but not all U.S. courts) hold that party to an arbitration in Armenia may petition a court in the United States for an order directing a U.S. resident to produce papers for use in the Armenian arbitration. The U.S. courts find authority for this under the U.S. Code of Civil Procedure, 28 U.S.C. Sec.1781 et seq.

4.18. <u>What about compelling the attendance of witnesses?</u>

Requests for the attendance of witnesses at arbitration hearings in Armenia follow much the same pattern. A party's first line of approach should be to seek voluntary attendance. Next, most arbitration rules give arbitrators the power to order parties and persons under their control to appear. Finally, a party may move court to compel persons under the court's jurisdiction to appear in court. Under the Armenian Act, Art. 27, orders to compel a witness's attendance may be issued by the court designated to oversee arbitration pursuant to the provisions of the Code of Civil Procedure, Art. 44(2). A model request for such an order and a form of order are in Annex C.

It is difficult, and in most cases impossible, for a party to compel the attendance of a witness who is not subject to the jurisdiction of the courts of the nation where an arbitration takes place.

4.19. What if arbitrators in Armenia render an award and then the losing party refuses to comply with the award?

The winning party may move any court with jurisdiction over the other party to enter a judgment enforcing the award (this requirement also applies to awards made outside Armenia), Armenian Act, Art. 35. Unless one of the limited grounds provided in the Armenian Act, Art. 34, for setting the award aside exists, the court must do so. If an award is rendered in Armenia and the losing party commences an action in Armenia to re-litigate a matter settled by an arbitrator's award, the court must dismiss the action, Code of Civil Procedure, Art. 91(1)(4). Forms for a request to a court for enforcement of an award and for a court judgment enforcing the award are in Annex C.

4.20. What if the award was rendered outside Armenia?

If the award was rendered outside Armenia, the process is essentially the same. The winning party may move any court with jurisdiction over the other party to enter a judgment enforcing the award. Unless one of the limited grounds provided in the Armenian Act for denying recognition and enforcement exists, the court must enter a judgment enforcing the award, Armenian Act, Arts. 35, 36. For forms, see Annex C, which may be used for both domestic and foreign awards.

If an award is rendered outside Armenia and the losing party commences an action in Armenia to re-litigate a matter settled by an arbitrator's award, the court must (unless one of the statutory grounds for non-recognition is present) recognize the valid and binding nature of the award, and must dismiss the action, Code of Civil Procedure, Art. 91(1)(4). The cited provisions of the Armenian Act implement Articles III of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Appendix A-2.

4.21. What, specifically, are the grounds on which an Armenian court may set aside an Armenian award or fail to recognize and enforce a foreign award?

An arbitral award may be set aside only by the court specified in Art. 6 of the Armenian Act (the court designated by law), and only if one or more of six grounds exist (Armenian Act, Art. 34):

1. A party to the arbitration agreement was under some incapacity; or the agreement is not valid under the law that governs it.

2. A party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case.

3. The award contains decisions on matters beyond the scope of the arbitration agreement.

4. The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties.

5. The subject matter of the dispute is not subject to settlement by arbitration under the laws of Armenia.

6. The award is in conflict with the public policy of Armenia.

Note that the above is a summary of the provisions of Article 34. For a complete statement of the six grounds, see Armenian Act, Art. 34 itself (Appendix A-1).

4.22. What is the meaning of "public policy" in Articles 34 and 36 of the new Armenian Act?

It will be the responsibility of the Armenian courts to interpret this phrase and give it content in cases that will arise under the new law. Quite clearly, however, the history and context of the Armenian Act suggest that the phrase must be given a narrow interpretation.

The phrase is taken verbatim from the UNCITRAL Model Law and the 1958 New York Convention. Courts in many nations have given the phrase a narrow reading. One would expect that Armenian courts, construing the phrase "public policy" as it appears in the new Armenian Act, will ascribe the same narrow meaning to the term as the courts in other counties. It stands to reason that a term in a Convention binding many countries, and adopted in the arbitration laws of many countries, should mean the same in every country.

The basic purposes underlying the Armenian Arbitration Act were, first, to bring Armenian arbitration up to an international standard--to conform the law and practice of arbitration in Armenia to the standards of countries with well developed arbitration systems; and, second, to provide the basis for a more efficient and effective dispute resolution mechanism operating outside the courts. It is incumbent on the Armenian courts, therefore, to support arbitration, to interpret their powers to intervene narrowly, and, in the specific case of the meaning of the "public policy" standard of review, to limit interventions to those clearly necessary to uphold the public order of the Republic of Armenia, which is a high standard.

4.23. If a party receives an arbitral award and a court issues a judgment enforcing the award, what can the winner do to get paid if the loser refuses to do so?

The procedures for obtaining execution on a court judgment enforcing an arbitration award are the same as the procedures for obtaining execution on any other court judgment, under the Law on Compulsory Execution of Court Judgments, Arts. 18, 19, 30. Under this law, once a court judgment is received, if the party to whom the judgment applies fails to comply, the party seeking enforcement of the court

judgment may apply to the court for a Compulsory Enforcement Order. The Compulsory Enforcement Order is presented to the Compulsory Enforcement Service (Marshal Service), which takes the necessary police action to enforce the court order.

4.24. What if there is a dispute over the meaning of the Armenian Arbitration Act?

An important responsibility of the Armenian courts in coming years will be to interpret and apply the new Armenian Act, and to do so in ways that further the purposes of the Act. In this task they will have useful precedent to turn to. There are official commentaries, scholarly writings and the decisions of courts in other countries on the UNCITRAL Model law, on which the Armenian Act is based. These can provide guidance on interpretation. A purpose of the drafters of the Act, and of the Parliament that enacted it was to bring international best practice to Armenia. Idiosyncratic interpretations by the Armenian courts could defeat this purpose and jeopardize Armenia's place in the world of international arbitration.

MEDIATION

In mediation (or, as the Europeans frequently refer to it, "conciliation") an impartial mediator (or conciliator) serves as a trusted go-between to assist the parties to reach agreement. Mediation differs fundamentally from arbitration. In arbitration, a neutral arbitrator issues a final and binding resolution of a dispute that the parties have not been able to resolve by agreement. In mediation the neutral mediator works to help the parties resolve their dispute by agreement. If the mediation fails, the dispute continues.

1. The process of mediation

Mediations are informal. The course followed in a given mediation will depend on the kinds of people—parties, counsel and mediators—who may be involved, and on the nature of the dispute. Typically, however, a mediator engages in a kind of shuttle diplomacy, meeting separately with each party, exploring each party's true needs and objectives, and then communicating each party's position to the other. This process tends to narrow the differences in the positions of the parties until ultimately the parties can agree on a common ground. The process can also lead to "global settlements"—agreements that go beyond the narrow issues that brought the parties into the mediation in the first place, and that deal with broader issues and long-term relationships.

There are different styles of mediation. Some mediators see themselves essentially as brokers whose job it is to communicate the position of each party clearly to the other until the parties themselves find a solution to their dispute. Other mediators, probably the majority, also play an evaluative, truth-telling role. In separate private sessions with each party, the mediator probes that party's positions to convey a sense of how the strengths and weaknesses of those positions will look to a judge or arbitrator if the

parties do not settle the dispute. Sometimes, if the parties ask for it or agree to it, the mediator will offer his or her own evaluation of the case.

The success or failure of a mediation depends not only on the good will of the parties, but also, to a large extent on the energy and skills of the mediator. The mediator must be able to gain the trust of the parties and to adapt his or her style to the needs of the mediation. Once parties have agreed to mediate, their selection of the mediator is perhaps the most important step they will take in resolving their dispute.

Mediations are entirely voluntary. They are solely the product of agreements between the parties. Once they have agreed to mediate, however, they are obliged to pursue the mediation in good faith until agreement is reached, or until it becomes clear that no agreement will be possible. The parties' agreement to mediation, which ought to be in writing, will spell out any procedures that the parties wish to follow, including how they will jointly choose a mediator, and will include any instructions they wish to give the mediator. A well drafted mediation agreement will provide that the mediation proceeding is confidential.

If a mediation does not succeed and the parties fail to reach agreement, the parties are put back to where they were before the mediation commenced. The parties must resolve their dispute by negotiation, by litigation or by arbitration. So long as the parties have provided for confidentiality in their mediation agreement, statements made, documents revealed or positions taken in mediation are without prejudice. The parties may not disclose them, and a judge in a subsequent litigation or an arbitrator in a subsequent arbitration may not consider any facts adduced, documents submitted, settlement offers made in the mediation, or anything else that went on in the mediation.

2. Rules and statutes governing mediation

A number of institutions—among them the International Chamber of Commerce (ICC) and the International Dispute Resolution Center of the American Arbitration Association (AAA)—have promulgated rules of procedure for mediation. The mediation or conciliation rules of the ICC and AAA are at Appendices A-3.1 and A-5.1. These rules tend to be simple and fairly general in nature. They give the institution a role in administering the mediation and, if the parties do not agree on a mediator, in the appointment of the mediator. The parties need not use any of these rules. It is quite common for parties and mediators to fashion their mediation procedures on a case by case basis, without reference to institutional rules.

No special law is required to support mediation. Many nations have enacted mediation or conciliation statutes. Armenia has not done so, nor have many of the nations where mediation is widely practiced. Many mediations have been successfully conducted in countries that have not enacted mediation or conciliation laws, as well as in countries that have such statutes. Generally courts can be expected to enforce settlements reached through mediation under general principles of contract

law, and to respect the parties' agreement that mediation proceedings are confidential. Armenian courts encourage the parties to reach negotiated settlements and sometimes the court uses its good offices to provide informal mediation of the dispute or refers the case to a mediator. However, this is not a formal part of the court system as of 2007.

This is not to say that meditation statutes may not play a useful purpose. For one thing, the fact that a country has enacted a statute on mediation is a signal to disputants and courts alike that mediation is a recognized way of resolving disputes with finality. Second, mediation statutes generally provide that confidentiality agreements entered into for purposes of mediation are binding on the courts as well as the parties. Without such a statutory provision, the position of the courts may not be as clear. An example of a useful mediation statute is the UNCITRAL Model Law on International Conciliation, set out in Appendix A-6.1.

3. Advantages and disadvantages of mediation as compared with arbitration and/or litigation

3.1. Advantages

1. Mediation is far quicker and far cheaper.

2. Mediation is private and generally non-confrontational.

3. Mediation can help establish or rehabilitate working relationships.

Mediation is more forward-looking and goes beyond the resolution of a single dispute that arose in the past to repairing relationships. In arbitration and litigation the issues addressed and resolved are limited to those arising out of a particular dispute. In mediation, a skilled mediator can help parties resolve all differences between them, whether or not they were part of the dispute that brought them first into mediation. The mediator can help the parties to a "global" settlement that takes into account, and brings into balance, all of the interests of both parties.

3.2. Disadvantages

1. Mediation it is not designed to produce the same legally correct assessment of the rights of the parties as are litigation and arbitration, and generally does not do so. Instead it tends only to produce a result, generally a compromise result, that the parties can live with.

2. Although a settlement agreement reached in mediation is generally legally enforceable, it is not as easily enforced as an arbitration award or a court judgment. If one party refuses to abide by a settlement agreement reached through mediation, the other party must bring a court action for breach of contract and seek a court order awarding damages or requiring specific performance of the settlement agreement.

3. The mediation may fail to produce a settlement. If this occurs, the parties have to a certain extent wasted their efforts. In a real sense, however, the work they have done in the preparation for and conduct of an unsuccessful mediation is also useful as preparation for any litigation or arbitration that may follow.

4. Questions and answers on mediation

4.1 At what stage in a transaction should an agreement to mediate be made?

Typically, parties wait until a dispute has arisen before they agree to mediate. Often, in fact, they do not agree to mediate until after a litigation or arbitration has been commenced, and perhaps not until that proceeding has been going on for some time. By waiting, the parties, when they come to consider mediation, are able to shape a mediation procedure well designed to meet the circumstances at hand. Once they have begun to experience the demands that litigation or arbitration will impose on them, they may be highly motivated to try the simpler alternative of mediation. Frequently, however, parties will agree at the beginning of a transaction, in the basic contract governing the transaction, that, if a dispute arises, the parties must attempt to mediate their dispute. Their agreement will include the provision that neither may sue nor commence an arbitration until a good faith effort at mediation has been made. This sort of pre-dispute agreement is well calculated to get the parties into mediation quickly, and with a minimum of unnecessary effort, if and when a dispute arises.

4.2. What terms should the agreement to mediate include?

The agreement can be quite simple. The parties should agree to proceed with the mediation in good faith, and to keep all aspects of the mediation confidential. If they wish to go into more detail on mediation procedures, they should consider adopting the mediation or conciliation rules of institutions such as the ICC or the AAA, or the conciliation rules of the United Nations Commission on International Trade Law (UNCITRAL). The parties should agree on who the mediator will be. If they cannot agree, they may turn to the ICC, the AAA or another institution for nominations. If none of the nominees can be agreed on, the parties may ask the institution to name a mediator. The mediation and conciliation rules of the ICC, AAA and UNCITRAL are in Appendices A-3.1, A-5.1 and A-6.2.

4.3. How does one find a qualified mediator?

A number of attorneys and retired judges have experience and have received training in mediation. While no specific institutional accreditation exists as of 2007 for mediators, there is significant interest and Armenia is likely to follow the model of other countries with established mediation practice, including institutional qualification for mediators. In the meantime, the court and/or litigators would be a good place to seek advice on how to find a qualified mediator.

4.4. Do I need a lawyer's help in fashioning or conducting a mediation?

Lawyers play a less central role in mediation than in litigation or arbitration. In relatively simple disputes or disputes where not a lot of money is at issue, parties may choose to proceed without counsel, aided only by the guidance of the institution whose mediation rules they have chosen to use, and, most importantly, by the guidance of the mediator whom they have selected. In an unusually significant or difficult transaction or dispute, however, most parties find it helpful to have the assistance of a lawyer in the design of a mediation procedure, the drafting of a mediation agreement, and the conduct of the mediation. In a mediation under a skilled mediator, the role of the lawyer may become progressively less important as the mediation proceeds and as the mediator turns more and more to the parties themselves to define their goals and to consider where they are willing to make compromises.

5. Other forms of ADR

In addition to mediations of the kind outlined above, there are other Alternative Dispute Resolution mechanisms available to disputing parties. As in the mediations described above, all are mechanisms designed to assist the parties to resolve their disputes by agreement. Some of these mechanisms are:

5.1. Mini-trials. Under procedures agreed by the parties and their counsel, counsel present their best cases, in summary form, to a three-member panel consisting of a senior management official from each of the parties and a neutral advisor who acts as chair. Each presentation takes only a short time—a day or less—and consists largely of statements of counsel, sometimes augmented by brief appearances of key witnesses, designed to demonstrate forcefully the case that each side would present if the matter went to trial or to an arbitration hearing. Following these presentations, the management officials, assisted by the neutral advisor, attempt to negotiate a settlement, taking into account what they have heard.

5.2. Neutral fact finding. The parties agree to submit difficult technical questions to a neutral expert for a decision. The decision can be expected to assist the parties to negotiate a settlement of their dispute. Whether the expert's decision is binding or non-binding, and whether it may be introduced as evidence in a subsequent litigation or arbitration, will depend on what the parties have agreed. Most arbitral institutions are prepared to assist parties in finding qualified experts, and to oversee the fact finding process. See, for example, ICC Rules for Expertise, Appendix A-3.2.

5.3. Negotiation. Negotiations directly between the disputing parties themselves, with or without the assistance of counsel, is the oldest and most often used form of ADR.

5.4. Other ADR procedure. For a brief discussion of other forms of ADR, with a further explanation of the agreement-seeking forms of ADR discussed above, see Appendix B-4, "ADR in International Transactions."[*]

CONCLUSION

The advance of Alternative Dispute Resolution is a global movement. An increasing number of commercial contracts being entered into in the world today provide for the resolution of disputes by ADR--generally by mediation or arbitration or a combination of the two. Most significant international contracts written today, and many commercial contracts between parties from the same country, contain arbitration clauses.

Parties to commercial contracts increasingly choose arbitration or mediation to resolve disputes under these contracts because they have determined it serves their commercial interests to do so. It is good business to have such disputes resolved efficiently, and to permit business people to get on with business with as little disruption as possible.

Judges support Alternative Dispute Resolution because they find that, in doing so, they advance both commercial justice and the efficiency of a nation's dispute resolution procedures, including the procedures of the courts. They advance the cause of justice by supporting simplified procedures for the resolution of commercial disputes and, in their oversight of these procedures, by ensuring that these procedures are fair and efficient. They advance the cause of judicial efficiency by supporting ADR procedures that permit courts to reduce case backlogs that would otherwise impede their ability to resolve cases in a timely fashion.

With its new Arbitration Act now on the books, Armenia—its business people, its lawyers and its courts—are now in a position to participate in this global movement.
