Comparative International Perspectives of Arbitration in the Franchising Context

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As franchises expand across borders, it is important to be aware of variations among national arbitration models and standards. This article gives an overview of some of the similarities and differences regarding arbitration in the authors’ four respective countries—Canada, the United States, the United Kingdom, and Mexico.

In this context, a franchise and any related dispute are international when the franchisor and franchisee are based in different national legal jurisdictions. It is increasingly common for a franchisor to be based in, for example, New York but dealing with a local franchisee in Vancouver, Cancun, or London. In such circumstances, the international aspect of arbitration takes on importance.

The usual question, when drafting or updating a franchise agreement, is whether to include a mandatory arbitration provision, and to ponder the relative advantages and disadvantages of arbitration and litigation as dispute resolution methods. This is an important and often difficult decision to make, the outcome of which may differ depending on the jurisdictions involved. This article contrasts the arbitration environments of Canada, the United States, the United Kingdom, and Mexico.

**CONTRACTUAL AND LEGISLATIVE BASIS**

There is no inherent right to arbitration. In each country, arbitration is a creature of contract and is governed by the law of the relevant jurisdiction. The governing law may be national/federal (as in Mexico) or state/provincial (as in Canada and the United States, although there are also federal regimes in these countries).

The legislation regarding arbitration usually covers a number of points, but often it simply opens the door for the parties to craft their own arrangement, or provides fallback rules in the absence of agreement by the parties, leaving it to the parties to establish their own idiosyncratic regime. Thus, the legislation generally comes into the forefront only where there are gaps in the arbitration clause or contract.

**United States**

The overriding legislation regarding arbitration within the United States is the Federal Arbitration Act (FAA). Enacted in 1925, the FAA establishes a basic foundation that is applicable at both the federal and state levels. The FAA provides the fundamental structure and approach to arbitration but does not delve extensively into the specifics of the process, leaving that to the parties. The United States has not expressly adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law on a federal level, although several states have individually patterned their state arbitration law on the UNCITRAL Model Law (notably for the franchise industry, California and Illinois).

In this relative absence of federal direction, the National Conference of Commissioners on Uniform State Laws created the Uniform Arbitration Act (UAA) to help flesh out some of the specifics. The UAA is a model form of arbitration legislation for the states. To date, thirty states and the District of Columbia have adopted the UAA in some form. Despite the influence of the UAA, arbitration laws still vary among states.

**Canada**

Canada is a federal state with fourteen different jurisdictions within its borders. Most of the fourteen jurisdictions have two parallel arbitration regimes. For example, British Columbia, like most of the other provinces and territories, has both a Commercial Arbitration Act and an International Commercial Arbitration Act. The Commercial Arbitration Act applies to purely domestic arbitrations, i.e., between parties.
that are both resident in Canada; the International Commercial Arbitration Act, by contrast, applies where at least one party is from outside Canada. For international arbitration, all common law Canadian jurisdictions have adopted the UNCITRAL Model Law, either by appending the UNCITRAL Model Law to the local legislation or by incorporating the essential terms of the UNCITRAL Model Law into the local legislation (with some local modifications).

**Mexico**

In Mexico, commercial law is a federal matter, so the Commerce Code, which is the governing law, applies to all states of the republic. Mexico has adopted the UNCITRAL Model Law by incorporating it as a complete section in the Commerce Code.

**England and Wales**

In England, the governing legislation is the Arbitration Act of 1996. England is not a signatory to the UNCITRAL Model Law; however, the Arbitration Act was enacted in part to take on the most favorable aspects of the UNCITRAL Model Law.

**Contractual Aspects**

The contract establishing arbitration between the parties may be executed as a stand-alone agreement or as part of the main franchise agreement. It may be entered into before any dispute has arisen, but it is also possible for parties to enter into an arbitration agreement after a dispute has arisen. Although uniformity is a hallmark of franchising, franchisors should not allow a desire for consistency to overshadow specific points that must be addressed for effective arbitration. As is apparent from the many points raised in this article, a boilerplate arbitration clause may be useless or even detrimental.

A problem may arise where the parties seek to incorporate the terms of one contract into another. For example, in England, general words of incorporation will not be effective to incorporate an arbitration clause. An arbitration clause is judged as having a special nature that makes it different from other contractual provisions. It may be necessary, or at least prudent, to refer expressly to the incorporation of the arbitration clause in such cases, or, if practical, to restate the identical arbitration clause in each contract ancillary to the franchise agreement, to avoid any possible conflict or confusion.

The doctrine of severability is key to arbitration law. Consequently, the arbitration clause may be valid and require the parties to submit to arbitration even if the franchise agreement is itself invalid for some reason. There may be instances where both the franchise agreement and the arbitration clause are invalid for the same reason (e.g., incapacity), but one must avoid the conceptual trap of thinking that if the franchise agreement is invalid, the arbitration clause automatically is invalid as well.

In Canada, the Ontario Court of Appeal recently considered a mandatory arbitration clause contained in the franchise agreement, where the franchisees argued that the franchise agreement was void ab initio because the franchisor failed to make appropriate disclosures in accordance with its franchise statute. The motions judge and the Ontario Court of Appeal found that the arbitration clause was nevertheless valid and the dispute fell within the scope of its terms.

**INTERNATIONAL VARIATIONS**

Because of the international aspect of modern commercial activity and franchises, other international conventions, such as the 1958 U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the Panama Convention, may be relevant for matters such as the recognition and enforcement of foreign arbitral awards.

Whether to include an arbitration clause in the international context requires an understanding of the similarities and distinctions between each jurisdiction. Each of these nuances may make arbitration either more or less attractive in a particular jurisdiction depending on the perceived advantages for the franchisor, while the franchisee is typically concerned only with its own jurisdiction.

The commonly perceived advantages of arbitration include (1) reduced costs; (2) faster decisions; (3) finality of decisions; (4) selection of decision makers with substantive knowledge; (5) limited discovery (often favored by franchisors); (6) a higher degree of confidentiality in the process and results; and (7) being less acrimonious than litigation, which helps preserve an ongoing franchisor/franchisee relationship. Conversely, the traditional perceived disadvantages of arbitration include (1) limited judicial review of decisions; (2) perceived tendency for arbitrators to "split the baby" and avoid seemingly harsh applications of the law; (3) (from the franchisee perspective) limited discovery into the franchisors’ treatment of other similarly situated franchisees; and (4) (from the franchisor perspective) being a less effective deterrent to a franchisee breach than legal proceedings.

Below is a discussion of how these potential advantages and disadvantages differ among the jurisdictions discussed in this article.

**Relationship Between Courts and Arbitration**

The UNCITRAL Model Law adopted in Mexico, the common law Canadian jurisdictions, and some U.S. states addresses the basic relationship between the courts and private arbitration proceedings. Generally, there will be a stay of court proceedings in favor of arbitration. This stay, though, does not preclude certain interim measures by the court, nor other judicial intervention as court assistance to the arbitration process. The same is generally true in the United States and in England. All powers are exercisable only to the extent that the arbitral tribunal has no power or is unable to act, primarily to enforce an arbitration clause, fill in procedural gaps, and aid in the enforcement of arbitration awards. The arbitration clause may also contain the option for the parties to request the intervention of a judicial authority in order to decree provisional measures.
Avoidance of Class Actions
In the United States, one compelling reason for franchisors to include an arbitration provision is as a potential means to avoid class actions. However, other countries, such as Canada, do not necessarily waive a class action simply because of an arbitration provision.

The recent U.S. Supreme Court case of AT&T Mobility LLC v. Concepcion, although not a franchise case, highlights the tension between federal and state law regarding arbitration, and announced an important shift towards federal preemption in this arena. In Concepcion, the plaintiffs were consumers living in California who purchased a mobile phone contract from AT&T Mobility. The plaintiffs sued in federal court in California, alleging that the company engaged in deceptive advertising by falsely claiming that its wireless plan included a free cell phone, while the company still charged consumers for the taxes on the retail value of the phones. The suit became a class action, which AT&T could not be compelled to arbitrate any disputes. The court declined to dismiss the case on the grounds that California law22 classified such limiting provisions as unconscionable, finding that AT&T had not shown that bilateral arbitration adequately substituted for the deterrent effects of class actions. The Ninth Circuit Court of Appeals affirmed, finding the provision unconscionable under California law and that the Federal Arbitration Act did not preempt California law on this point because the law simply refined the unconscionability analysis applicable to all contracts in California.

FAA Found to Preempt California Law
The U.S. Supreme Court disagreed. In a five-to-four decision, the Supreme Court held that the FAA preempted the California law because the state law “[stood] as an obstacle to the accomplishment of the FAA’s objectives.”23 The Court said the primary purpose of the FAA is to “[enforce] . . . arbitration agreements according to their terms so as to facilitate streamlined proceedings.”24 AT&T could not be compelled to conduct classwide arbitration contrary to the terms of the contract. The Court reasoned that “[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”25 The Court further stated that the California rule interferes with arbitration because, even though it did not require classwide arbitration, “it [allowed] any party to a consumer contract to demand classwide arbitration on ex post.”26

This decision may well be the death knell for class action arbitration, pending any congressional action to amend the FAA. In the near term, franchisors will likely be able to limit exposure to franchisee class arbitrations in the franchise agreement. As the recent conflicting decisions of federal courts in connection with the Quiznos systems demonstrate, the enforcement of judicial class action bars is uncertain (and likely to lead to forum shopping).27 Sophisticated potential franchisees may balk at accepting class action bars in franchise agreements and pursue other investments. Obviously, this is an important economic consideration for franchisors seeking qualified franchisees.

The U.S. view, then, favors arbitration where the parties have agreed to that process. However, in Canada, class actions are a means of providing for judicial economy and access to justice,28 and for that reason, class actions tend to persist even in the face of an arbitration clause. For example, in two cases, Seidel v. TELUS Communications Inc.29 and MacKinnon v. Instaloans Financial Solution Centres (Kelowna) Ltd.,30 class action proceedings were permitted to continue despite the presence of an arbitration clause. Neither are franchise cases, but both are highly instructive on this point of law.

In Seidel, the Supreme Court of Canada permitted a class action to go to certification despite an arbitration clause in the agreement (a standard form cell phone service contract). The court interpreted the British Columbia Consumer Protection Act, being consumer protection legislation, broadly in favor of consumers, with the result that the statute overrode the arbitration clause. The Act states that any contractual term waiving or releasing consumers’ rights is void (the statutory right was the right to sue in the trial court to enforce the Act’s consumer protection standards).31 In MacKinnon, the British Columbia Court of Appeal held that a proposed class action should be allowed to proceed to a certification hearing, despite an arbitration clause, even though certification would render the arbitration clause inoperative.

Confidentiality
Confidentiality is an often-cited advantage of arbitration, as hearings are usually held in private and there are no public filings. Many assume that, in the absence of disclosure laws, arbitrations are always confidential. This is not necessarily the case. In the United States, for example, there may be legal obligations that require disclosure of the existence of arbitration proceedings or the result of such proceedings in franchise materials.

The English view is that, unlike court proceedings, arbitral statements of judgments and orders from a proceeding will benefit from an implied duty of confidentiality, arising out of an arbitration’s private nature. By contrast, in Canada, where an arbitration award provides for civil liability or a penalty against a franchisor, franchisors typically must disclose that award to potential franchisees as a material fact.32 In addition, a franchisor’s policies regarding mediation or alternate dispute resolution must be disclosed in some Canadian provinces under local disclosure requirements.33

The confidentiality of the arbitration procedure or award is not dictated by Mexican law. Therefore, parties usually include an express confidentiality provision (in the arbitration clause or agreement) in order to avoid the publication of the award and to maintain privacy over the hearing, writ, and evidence. Furthermore, the rules of some Mexican arbitration institutions establish an obligation of confidentiality.34

In the United States and Canada, the advantage of the confidentiality of the details of arbitration proceedings may be significant even if the existence of such proceedings must
be disclosed. Courts in both countries have increasingly adopted electronic case filing systems, which provide easy and inexpensive public access to all new cases, including virtually all pleadings, court submissions, and orders. As a result, potential and current franchisees can readily find and follow legal proceedings against franchisors.

Finally, confidentiality also means that arbitral awards lack binding precedential value. This may leave a franchisor open to multiple arbitrations and possibly inconsistent results on the same issue. Conversely, a court judgment has precedential value, so that one unfavorable decision against a franchisor could result in a multiplicity of lawsuits by other disgruntled franchisees. Thus, the nature of anticipated disputes and the need for uniformity of results are important considerations in deciding between litigation and arbitration. If a franchisor requires final and binding interpretation of a standard form contract, the franchisor is likely to prefer litigation to arbitration.

**Appointment of Arbitrators**

The UNCITRAL Model Law sets forth general provisions for the arbitration tribunal. These include appointment of arbitrators; considerations in appointing arbitrators; challenges to proposed arbitrators; failure/impossibility to act; and termination/substitution. These provisions leave it open to the parties to choose their own rules for the dispute but provide a fallback position. The parties therefore have the right to appoint their own arbitrators, so that they can pick people familiar both with franchising generally and/or with the specific industry, rather than being assigned a judge who may have no expertise in this area whatsoever.

The English Arbitration Act contains similar provisions to the UNCITRAL Model Law. In England, as in other jurisdictions, the Arbitration Act requires arbitrators to act “fairly and impartially as between the parties.”35 Similar to other jurisdictions, either party can apply to the court to remove an arbitrator. Grounds include lack of impartiality, unsuitable qualifications, physical and mental incapacity, and refusal or failure to act.

In the United States, the FAA has some “gap filling” provisions, and leaves some discretion to the federal district court; many states have more explicit statutes to supplement a skeletal arbitration clause, and the rules of the commercial arbitration services do as well. However, all will defer to the arbitrator, arbitration service, or procedure for selecting an arbitrator if one is specified in the arbitration agreement.

**Scope of Discovery**

In North America and England, the discovery process in traditional litigation can be quite expensive. In the United States, for example, discovery of documents and information is very broad, and with the advent of electronic discovery, it can be the most expensive aspect of litigating a dispute. It may also be the most intrusive or disruptive aspect of a case, as parties may use depositions and written discovery requests tactically, and the costs of seeking active judicial intervention to protect against abusive discovery practices can be substantial and may have undesired strategic implications.

Arbitrators in the United States, England, and Canada have the ability strictly to limit and control the discovery that will be permitted, subject to any specific contractual direction or agreement of the parties.36 The situation is rather different in Mexico, where discovery is not conducted; in fact, the Mexican Constitution contains specific prohibitions against the practice.

**Attorney Fees and Cost Awards**

The parties are free to contract in advance for the allocation of the costs of arbitration (including attorney fees and other expenses). This can be done by explicit agreement in the arbitration clause/agreement, or by adopting a specific arbitration regulation to apply to the case (this latter method being preferred by parties in Mexico).

The American rule (followed by every state but Alaska) is that each party to a litigated or arbitrated matter is responsible for its own costs, expenses, and legal fees unless those expenses are allocated in advance by contract, court rule, or substantive statute that must be followed by an arbitrator or a judge.37 One of the few (and rarely applied) exceptions to this rule is where one of the parties has engaged in bad faith conduct, in which case attorney fees may be awarded to the nonoffending party.38 The FAA does not contain any specific provisions for awards of attorney fees to successful or prevailing parties.39 Certain state franchise statutes do, however, award fees to a prevailing party.40 Similarly, certain state consumer protection statutes or other statutes that frequently form the basis of a franchisee claim may contain a prevailing party attorney fee provision that may apply in addition to or in the absence of a franchise-specific statute.41

The issue of whether attorney fees, costs, and expenses of a dispute may be awarded pursuant to the specific language of a contract or statute is frequently itself the subject of contentious dispute, as is the question of whether this issue is within the jurisdiction of the arbitrator or the court.42 The questions of whether fees and costs to be awarded must be reasonable, and the definition of prevailing party, have been extensively litigated, with widely varying results across various U.S. jurisdictions as these tend to be highly fact specific.43 Thus, careful drafting of franchise documents and consideration of the selected and potential choice of law on this point is critical, so that all parties may have as much certainty as possible.

**Arbitrators in the United States, England, and Canada have the ability to control the discovery that will be permitted...**
In sharp contrast to the American process, in England and Canada, the general rule of attorney fees, costs, and expenses in litigation and in arbitration is that costs follow the event. In Mexico, England, and Canada, the costs must be assessed and be reasonable in light of all of the circumstances. Arbitration costs would typically be a matter for the arbitrator, although in Mexico the parties may also request the intervention of the judicial authority. In Canada, successful litigants will recover more of their actual legal expenses in arbitration than in litigation. Similarly, in Mexico, a prevailing party in arbitration will recover more of its legal fees than in a traditional judicial procedure because in the latter the successful litigant is subject to specific rules that dictate the amount of recovery based on the duration of the proceedings, the number of writs and hearings, and other factors.

In all four jurisdictions, the costs of an arbitration can be much higher than traditional litigation because the parties must compensate the arbitrators, who typically must be paid on an hourly basis, often at a premium hourly rate that is comparable to or greater than senior litigation counsel in the geographic base of the arbitrator. To some extent, however, the ability to select the arbitrator allows a degree of control over the amount charged. Arbitrating parties may also incur costs for a hearing room and for travel expenses of the arbitrators. By contrast, court fees for use of a courtroom are usually much less, and there is no need to provide for a judge’s travel, hotel, or food. Use of an arbitration service, such as the International Chamber of Commerce (or others as listed later), will often involve that service’s substantial administrative fees in addition to the fees paid to the arbitrators.

Termination or Settlement

As with litigation, or indeed any dispute mechanism, settlement is always an option. If the parties settle during the arbitration process, the arbitration comes to an end. The parties may be entitled to record the settlement as an arbitral award. Thus, in England, an arbitration settlement may be recorded as an award that may then be enforceable overseas under the New York Convention (unlike a settlement agreement reached outside of arbitration).

In the United States, parties are not required to record publicly the terms of a settlement agreement, and typically will not do so. In fact, settlement of franchise disputes is often driven by one party’s or both parties’ desire for confidentiality, although franchise laws may require the franchisor to disclose certain settlements. The parties may request that the arbitrator formally dismiss the proceedings and reference the existence of a confidential settlement agreement, which itself should specify the tribunal and means for enforcement.

In Mexico, the arbitrators will render a settlement agreement as an award only upon express request of the parties.

Finality of Arbitration Awards

In all four countries, there are few avenues to appeal an arbitration award. The entire effectiveness of arbitration is predicated on the idea that the arbitration award constitutes a final and binding agreement between the parties, and thus there are very limited circumstances in which a party may challenge an award.

In the United States, the right to appeal an arbitration award is extremely limited. Although there are variations between the FAA and the laws of the various states, some of which are based on the UNCITRAL Model Law, in general the grounds for vacating an arbitration award are limited to where the award was procured by corruption, fraud, or undue means; where there was evident partiality or corruption in the arbitrators; where the arbitrators were guilty of misconduct; or where the arbitrators exceeded their powers. The inquiry into any of these grounds—including whether an incorrect application of the law or manifest disregard for the law constitutes misconduct—is intensely fact specific and state case law varies widely, so this is one area in which the choice of a specific state’s (or country’s) law is important.

In those jurisdictions that follow the UNCITRAL Model Law, such as Canada and Mexico (and some U.S. states), the limited grounds for review are incapacity of a party, invalidity of the arbitration agreement, excess of jurisdiction by the arbitral panel, or procedural objection such as lack of notice or improper constitution of the panel. The court will not review the merits of the decision rendered by the panel or arbitrator. Under the UNCITRAL Model Law, there is no scope for appeal on a point of law, which is a key reason why it was not adopted by the English government. Thus, in England, a party may challenge an award to appeal a point of English law, but courts will dismiss any attempt to disguise an issue of fact as an error in law.

Enforcement

The UNCITRAL Model Law provides for the termination of arbitration. As one might expect, an arbitration terminates with the final award, but it may also terminate for other reasons, such as withdrawal of the claim by the claimant, agreement of the parties to terminate the arbitration, or a finding by the panel that the proceedings are unnecessary or impossible.

At the end of arbitration, the arbitrator or panel will issue an award, and the parties may enforce that award in the same way as a court order or judgment. Arbitration has the advantage of improved enforceability in other jurisdictions. Almost 150 countries are signatories to the New York Convention, with the result that arbitral awards are enforceable in many
countries throughout the world. In order to obtain recognition or enforcement of a New York Convention award, a party must produce the authenticated original award and the original arbitration agreement or certified copies.

Although an arbitral award under the New York Convention is enforceable in countries throughout the world, it still makes sense to include language in the arbitration clause indicating that the award can be enforced by having the judgment entered by any court of competent jurisdiction.

**DRAFTING CONSIDERATIONS**

All too often, the decision of whether to include an arbitration clause is given thoughtful consideration, but the clause itself is not given its due attention. There are many considerations that should go into drafting an arbitration clause in the context of international franchising.

**Scope of the Arbitration**

The scope of the disputes that will be referred to arbitration should be clear and expansive. If a dispute is not clearly within the scope, the arbitrator will have no power to act. If the scope is too narrowly defined, much of the value of the arbitration option will be lost. However, both parties—franchisor and franchisee—may want some ability to go directly to court to get injunctive relief pending an arbitration proceeding. A franchisor may need to protect its intellectual property and to enforce its noncompetition clauses; and a franchisee may need emergency protection against wrongful termination, eviction, or having its supply chain cut off. As noted above, the laws of each country provide for some judicial assistance pending or in support of arbitration.

In England, there is now limited room for debating the precise wording of the arbitration clause. In the absence of clear words to the contrary, there will be a presumption that the parties intended all disputes to be dealt with in one forum.47

In all four countries, the law anticipates that objections to the jurisdiction of the arbitration will equally be decided by arbitration.48

**Arbitration Rules and Procedure**

One way that franchisors may seek procedural uniformity is to obtain agreement from franchisees that arbitration proceedings will be conducted in accordance with the procedural rules of a specified commercial arbitration service, such as

- **England:** the London Court of International Arbitration (LCIA)49 or the International Chamber of Commerce (ICC).50
- **United States:** the American Arbitration Association (AAA),51 Judicial Arbitration or Mediation (JAMS),52 or the Institute for Conflict Prevention and Resolution (CPR).53
- **Canada:** the British Columbia International Commercial Arbitration Centre54 or the ADR Institute of Canada.55
- **Mexico:** the Centro de Arbitraje de México (CAM) (Arbitration Center of Mexico)56 or the Cámara Nacional de Comercio de la Ciudad de México (CANACO) (National Chamber of Commerce of Mexico City).57

Each arbitration organization has its own rules and procedures, and it is therefore important for the parties to consider which organization will be the most appropriate for the type of dispute likely to arise under their agreement. It is also possible for parties to draft their personal or ad hoc rules, although this is a project with its own set of challenges. In the absence of an explicit agreement by the parties as to arbitration procedure, the backup rules in the legislation are sparse and often are left to determination by the arbitral panel itself.

Where the parties choose to be governed by the rules of an arbitral service, the arbitration must be initiated by specifically following those rules. For example, a party initiates arbitration under the LCIA rules by serving a request for arbitration on the Registrar of the LCIA Court and the other parties to the dispute. The rules spell out the requirements as to notice and service of the arbitration request on the other party, the information that the request must contain, and the form and timing of any response (and consequences of nonresponse). In Mexico, the parties must establish, in the arbitration clause of the franchise agreement or in the arbitration agreement, the terms by which the notices will be performed and the address for delivering them. If the parties did not agree on such terms in the clause or the arbitration agreement, the general rules of the Commerce Code will apply. In certain cases, the regulations issued by arbitration institutions in Mexico establish that the timeline for the different stages of the arbitration procedure will be determined in an initial procedural calendar, which includes a detailed list of the specific dates for the steps during the process.

**The Three Ls: Language, Law, and Location**

Parties often give little or no explicit thought to language, governing law, and forum, but in the context of international franchising, they all deserve careful consideration. For instance, a U.S.-based franchisor contracting with a Mexico-based franchisee should consider seriously whether English or Spanish will be the language of the arbitration. So too, a London-based franchisor with an Ontario-based franchisee may need to consider whether English or Ontario law will govern. The place or seat of any arbitration is also an open question in this international context.

The more international the franchise system, the more important it is to include a language provision in the franchise agreement in relation to the arbitration proceedings. The parties are free to decide the language or languages for the arbitration procedure, which will include the writs of the parties, resolutions rendered by the panel or sole arbitrator, interrogatories, certificates of hearings, or any other communication between the parties or directed to the panel or arbitrator.

Where there are no explicit provisions as to language, it is important to examine the relevant rules. For example, the English Arbitration Act provides that, unless otherwise
agreed, the tribunal is empowered to determine the language of the proceedings. In some cases, the arbitration institution chosen by the parties will determine the language that will be used. For example, the LCIA rules provide that the initial language of the arbitration shall be the language used for the arbitration agreement itself.

The UNCITRAL Model Law allows the parties to designate the applicable governing law for the arbitration, and in the absence of that agreement, allows the arbitration panel itself to determine the applicable law, considering the characteristics and circumstances of the case. At least two different factors may affect the parties’ choice of law determination. First is the procedural concern, where the governing law is different from the law of the arbitration forum (e.g., New York law in a Mexico-based arbitration hearing). The parties may prefer to have the governing law and forum of the arbitration be the same; otherwise, the parties may be left to prove through expert evidence the governing law where the forum is different. Second is the substantive aspect, in that the laws of different local jurisdictions may be more or less favorable for franchisors or franchisees. Third, especially for franchisors, the desire for uniformity may make it desirable to use a common legal regime for all franchisees in a national region (e.g., use of British Columbia law for all Canadian locations, whether in British Columbia, Alberta, Ontario, or elsewhere).

If there is no designation of the forum, the panel will determine the place of arbitration, considering the particularities of the case and intending to take the most convenient decision for the parties. The parties’ choice of arbitration organization and rules may carry an implicit choice of location. For instance, where the parties have agreed to refer a dispute to LCIA arbitration, the seat of the arbitration will be London, unless the LCIA Court determines that another place is more appropriate. Choice of forum will carry implications for the parties and arbitrators. These can include consequences such as the need to engage local counsel, increased expenses, unavailability of desired arbitrators, and the extra complexity of an additional legal team.

Choice of Law and Forum Often Complex
In the United States, and in particular within franchising, the choice of applicable law and the choice of forum are vital, contentious, and heavily litigated issues—whether in arbitration or not—and these matters are no less complex when residents of multiple countries are involved. As a general proposition, judges and arbitrators will apply the choice of law selected by the parties if there is a rational basis for that choice and that choice is not otherwise prohibited by law. However, many states have passed antiwaiver laws (both franchise specific and general) that may undermine the parties’ contractual choice of law or choice of forum provisions.

In Concepcion, the Supreme Court underscored the FAA as “embodying a national policy favoring arbitration,” and most state courts also strongly support the enforcement of contractual arbitration. Thus, the governing law generally will not alter whether an arbitration clause itself will be enforced, but rather will govern the substantive issues. As noted above, however, there is sharp conflict between the states and certain federal circuits on important issues, such as whether a contractual bar or waiver of class actions will be enforced in courts (as opposed to arbitrations). Thus, it is important for drafters of franchise documents to consider carefully the most important features and goals for dispute resolution, and research the most appropriate and most likely to be applied state substantive law.

Confidentiality
As discussed above, parties should not assume that an arbitration will be confidential. If confidentiality is needed, the parties should include a specific clause to that effect. However, the confidentiality clause should include an exception allowing for disclosure where required by law, so that where the franchisor is required to disclose the arbitration in its disclosure documents, it can do so without breaching the contract.

Arbitration Award: Form and Content
Although an oral award may be less costly, it is usually desirable to make the arbitrator provide a written decision so that the parties can understand the rationale behind it. If the parties desire a written decision, it should be set out in the arbitration clause as a requirement.

In the United States and under the New York Convention, a written decision is necessary to invoke judicial assistance to confirm or enforce an award and should therefore be required. However, the parties are free to define whether the written decision will include the rationale/basis or simply state the arbitrators’ conclusions or monetary award. Under the FAA, the arbitrator is not obligated to state the basis for the decision, and this is the case for most state laws regarding arbitration.

In Mexico, it is obligatory that the arbitration panel or sole arbitrator render the award in writing and include the legal provisions that applied in order to reach its decision.

The currency of any monetary award should also be specified. This takes on particular significance in international franchise matters.

It is generally desirable to put a timeline for an arbitrator’s decision. Of course, the period of time needs to be reasonable and subject to adjustment by an agreement of the parties.

Finally, the scope of the remedies may also be spelled out, such as whether the arbitrator or panel can award injunctive relief, equitable remedies, or punitive and aggravated damages. In the United States, arbitrators may award any relief permitted by the underlying substantive federal or state laws at issue, unless the scope of the arbitrator’s jurisdiction is otherwise circumscribed by the arbitration agreement.

In fact, arbitrators may have much more latitude to do justice than a court. Under the English Arbitration Act, the tribunal will only have the power to grant interim relief where the parties have agreed to confer this power upon them. The Arbitration Act does not limit the scope of the remedies that the tribunal may grant; however, it is questionable whether the tribunal could be given the power to grant freezing injunctions. Under En-
English law, a tribunal has the power to make partial, provision-
al, and final awards. The parties may agree on any form of
award. If they do not agree on a form, then all final awards
must be made in writing, signed by all the arbitrators assent-
ting to the award, and they must specify the reasons for the
award.

In accordance with the Mexican Commerce Code, the
arbitrator or the panel may dictate a complementary clarifi-
cation to the award if a party requests a revision, but it
may not vary the decision of the award. Any party may chal-
lenge the award in court by requesting its nullity within three
months after the issuance of the award if legal requirements
have not been complied with, but the court will not revisit
the merits of the case.

In Mexico, the rules contained in the UNCITRAL Model
Law for the termination of arbitration and for correction and
interpretation of the award apply, so the legislation also pro-
vides for a thirty-day period (subject to agreement otherwise)
for corrections to the award or for interpretations of same.64
Further, unlike a court judgment, it is possible for the parties
to agree that no reasons are to be given. Canadian jurisdic-
tions, also based on the UNCITRAL Model Law, are similar.

In the United States, the FAA provides that notices of a
motion to vacate, modify, or correct an arbitration award
must be served upon the adverse party within three months
after the award is filed or delivered.65 State laws will vary
widely on this timeframe, as will the procedural rules of
commercial arbitration services, so it is important to make
these deadlines and all other post-award procedures clear to
all parties. Best practices suggest this be done in writing, at
the outset of the proceeding.

Conclusion
There are many international differences in arbitration
regimes. Some jurisdictions adopt the UNCITRAL Model
Law, to greater or lesser degrees, and other jurisdictions have
adopted their own regimes that may bear more or less resen-
bliance to that. The result is that one cannot assume that the
arbitration scheme in one country is the same as in another.
Coupled with the potentially wide variations that exist around
the world, this means that an already difficult decision is made
even harder when international considerations are relevant.
The issue is one that will be of more interest and significance
to franchisors, who will have franchisees in a myriad of juris-
dictions and who must therefore be mindful that a standard
franchise contract is fraught with hidden risks.

In short, international franchisors (and even local fran-
chises), when contemplating an arbitration clause, cannot
limit their analysis to the relative benefits and burdens of
arbitration versus litigation. They must also consider a fur-
ther dimension, the international variations of arbitration.

Endnotes
3. UNCITRAL Model Law on International Commercial Arbi-
5. Id.
6. Legal Info. Inst., Uniform Business and Financial Laws Loca-
html#arbit (last visited Jan. 8, 2012).
7. See Citations to State ADR Statutes with Links to Statute Texts
org/upload/Citations_and_links_for_State_ADR_statutes.pdf (last
updated Oct. 4, 2010).
8. There are ten provinces, three territories, and the federal juris-
diction. The provinces are British Columbia, Alberta, Saska-
thewan, Manitoba, Ontario, Quebec, New Brunswick, Nova Scotia,
Prince Edward Island, and Newfoundland and Labrador. The terri-
itories are Yukon Territory, Northwest Territories, and Nunavut. The
three most important provinces for franchising purposes are prob-
ably British Columbia, Alberta, and Ontario, as they are three of the
four most populated and urbanized provinces. Quebec, the second
most populated province, is governed by a civil law system. The rest
of the country operates under a common law system.
9. Quebec relies on its Code of Civil Procedure rather than a spe-
cific arbitration statute, and the Code deals with both domestic and
international arbitrations: Code of Civil Procedure, R.S.Q., c. C-25
(Can.). At the federal level, for matters within that sphere of com-
petence, there is a single statute: Commercial Arbitration Act, R.S.C.
1985, c. 17 (2d Supp.) (Can.).
counterparts elsewhere are Alberta: Arbitration Act, R.S.A. 2000,
1991, c. 17 (Can.); New Brunswick: Arbitration Act, S.N.B. 1992,
1999, c. 5 (Can.); Prince Edward Island: Arbitration Act, R.S.P.E.I.
1988, c. A-16 (Can.); Newfoundland and Labrador: Arbitration Act,
R.S.N.L. 1990, c. A-14 (Can.); Yukon Territory: Arbitration Act,
R.S.Y. 2002, c. 8 (Can.); Northwest Territories and Nunavut: Arbi-
(Can.). The counterparts elsewhere are Alberta: International Commer-
cial Arbitration Act, R.S.A. 2000, c. I-5 (Can.); Saskatchewan: Inter-
Manitoba: The International Commercial Arbitration Act, S.M. 1986,
c. 32 (C.C.S.M. c. C151) (Can.); Ontario: International Commercial
 Arbitration Act, R.S.O. 1990, c. I.9 (Can.); New Brunswick: Inter-
national Commercial Arbitration Act, R.S.N.B. 2011, c. 176 (Can.);
Nova Scotia: International Commercial Arbitration Act, R.S.N.S. 1989,
c. 234 (Can.); Prince Edward Island: International Commercial Arbi-
tration Act, R.S.P.E.I. 1988, c. I-5 (Can.); Newfoundland and Labra-
(Can.); Yukon Territory: International Commercial Arbitration Act,
R.S.Y. 2002, c. 123 (Can.); Northwest Territories and Nunavut: Inter-
national Commercial Arbitration Act, R.S.N.W.T. 1988, c. I-6 (Can.).
12. See International Commercial Arbitration Act, R.S.O. 1990,
c. I.9 (Can.) (Ontario).
c. 233 (Can.) (British Columbia).
14. The Mexican Commercial Code adopted the UNCITRAL
Model Law by including a complete section of arbitration (Articles 1415 to 1463). See Código de Comercio [CCo.] [Commercial Code], as amended, arts. 1415–63, Diario Oficial de la Federación [DO], 19 de Octubre de 2011 (Mex.).

15. Arbitration Act, 1996, c. 23 (Eng.).


17. Arthur Wishart Act (Franchise Disclosure), 2000, S.O. 2000, c. 3 (Can.).

18. Nazarinia Holdings Inc. v. 2049080 Ontario Inc., 2010 ONCA 739 (Can.).

19. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html [hereinafter New York Convention]. The New York Convention seeks to provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and nondomestic arbitral awards. The United States applies the New York Convention only to the extent that the award was made in another contracting jurisdiction, and, additionally, it will only apply the Convention as to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law.


23. Concepcion, 131 S. Ct. at 1748.

24. Id.

25. Id.

26. Id. at 1750.

27. For a more detailed discussion, see Leitner & Goode, supra note 21.

28. Quizno’s Can. Rest. Corp. v. 2038724 Ontario Ltd., 2010 ONCA 466, ¶ 62 (Can.) (“I am also of the view that a class proceeding in this case will satisfy at least two of the objectives of the Class Proceedings Act of judicial economy and access to justice. It seems to me that this case involving a dispute between a franchisor and several hundred franchisees is exactly the kind of case for a class proceeding.”).

29. 2011 SCC 15 (Can.).

30. 2004 BCCA 473 (Can.).

31. On the other hand, in another Supreme Court of Canada case, Rogers Wireless Inc. v. Muroff, 2007 SCC 35, a Quebec class action certification was stayed pending arbitration.


33. See Ontario Arthur Wishart Act (Franchise Disclosure), 2000,
discovery such as those promulgated by arbitration services for expedited or streamlined case management. It is here that the pendulum may be swinging back in favor of arbitration, as commercial clients increasingly realize that conducting extensive discovery in arbitration severely undercuts any financial advantages over judicial resolution. A strong arbitrator may and should limit discovery to that information strictly necessary to resolve the parties’ dispute, and avoid common abuses by both sides: fishing expeditions by franchisees or the burying of franchisees’ legal fees and disbursements (and hiding of relevant material) by voluminous document disclosures by franchisors.


38. See, e.g., Dollar Sys., Inc. v. Avar Leasing Sys., Inc., 890 F.2d 165, 175 (9th Cir. 1989).


40. See, e.g., Wash. Rev. Code § 19.100.190(3).

41. Id. § 19.86.090.


44. “Follow the event” means that the winner of the litigation also wins costs, which include legal fees and disbursements.

45. Arbitration awards in Canada generally allow for reimbursement of reasonable legal fees and expenses, whereas litigation costs (for a losing litigant to compensate the successful party for legal fees and disbursements incurred) are based on a tariff that reimburses only a portion of actual legal fees.


47. Fiona Trust & Holding Corp. v. Privalov, [2008] 1 Lloyd’s Rep. 254 (Eng.).

48. Based on statutory language such as “the arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement.”


64. Código de Comercio [CCo.] [Commercial Code], arts. 1450–51, Diario Oficial de la Federación [DO], 19 de Octubre de 2011 (Mex.).