SUMMARY REMARKS ON
THE PRACTICAL ASPECTS OF ARBITRATION

The use of arbitration as an international dispute resolution process in the place and stead of litigation has grown dramatically in recent years. The engine that drives such growth is the increased use of arbitration clauses within the body of international commercial contracts. In effect, the arbitration clause constitutes a grant of jurisdiction to the arbitrator functioning under a designated body of arbitration rules to determine legal responsibility and award damages. In other words, jurisdiction is consensual, the arbitrator acts in the manner of a judge and the designated arbitration rules are the Code of Civil Procedure which control the process. As a species of jurisprudence, consensual jurisdiction/arbitration of disputes has become universally accepted and arbitration awards are routinely entered as judgments in national courts.

Given the finality of the arbitral decision; often awarding large sums of money, it is surprising to observe the casual and simplistic manner in which some attorneys who write international contracts will obligate their clients to the arbitration process. They do so by utilizing model arbitration clauses recommended by the national and international bodies which promulgate the regulations which govern the arbitral decision-making process. The consequence is a surrender of control of the process to the arbitrator and resultant exposure of the client to uncertainty.

Let us, for purposes of this commentary, consider the model arbitration clause promulgated by the United Nations Convention on International Trade Law (UNCITRAL) as part of its UNCITRAL Arbitration Rules. Thus:

> "All disputes, controversies or claims resulting from this contract, or relative to this contract, its non-performance, resolution or nullity shall be resolved by arbitration of the contract under UNCITRAL Rules of Arbitration then applicable."

The model arbitration clause of the American Arbitration Association is similar. The clause reads as follows:

> "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof"

The lawyer who inserts the model arbitration clause of the sort above into his contract will have serious problems if a dispute occurs.

Let us, for purposes of discussion, pose a contract between a company in the State of New York, United States of America, and a company in Baja California, United Mexican States, for the manufacture of electronic goods under license. A serious disagreement explodes and the Mexican company is owed $100,000 USD which the New York company refuses to pay. The director of the Mexican company instructs his attorney to file an arbitration demand because, under Mexican law, the company is entitled to immediate payment. The embarrassed attorney must then inform his client that he does not know what corpus of law will govern the arbitration. He does not know because he chose to insert the UNCITRAL model arbitration clause which is silent as to the law governing the dispute. Rather, the Mexican company must look to the rules of arbitration selected by the model clause. In such circumstances, i.e., where the attorney preparing the contract did not specify which law governs, Article 33, Section 1, of the UNCITRAL Rules will resolve the problem. It will do so by vesting the discretion to select the governing law in the arbitrator. In other words, the arbitrator decides. The lawyer has, in effect, surrendered control of a vital aspect of the matter and it begins to dawn upon the client that his dispute may be treated under the law of the State of New York.

Having suffered the shock of discovering that his $100,000 USD may be controlled by a jurisprudence neither the attorney nor the client understands, the attorney must now disclose to the client that he is not certain in which language the arbitration will be presented in because the lawyer, as with the law, failed to specify in what language the arbitration should be conducted in. In such circumstances, as with choice of law, one must turn to the UNCITRAL Rules; specifically Article 17, Section 1 thereof which mandates that, where the parties have not designated the idiom, the arbitration will do so. In brief, the arbitrator decides.

The client, now thoroughly apprehensive, tries to comfort himself with the statement that the arbitration will at least be held in Baja California. Such however, may not be the case because, like the law and the language, the model arbitration clauses do not define the place of arbitration. Rather, for purposes of our example, resort must be had to UNCITRAL Rule Article 16, Section 1 which states that if the parties have not

agreed upon the place of arbitration, the arbitrator will make the determination. The client, who does not know what law governs his disputed contract, what language the arbitration will be held in or even what country will host the event, does understand one think. He understands, that his attorney has failed in his professional responsibility.

At bottom, the fundamental issue is one of control. The standard model arbitration clause represents a surrender of control to an arbitrator who (1) is unknown when the contract is prepared and (2) has unappealable discretion over the entire arbitration process. The solution is, of course, to take advantage of the fact that arbitral jurisdiction is consensual, i.e., that the contract of consent which is the arbitration clause can define the terms of jurisdiction. The attorney can therefore remove discretion from the arbitrator by making specific provisions in the arbitration clause. The attorney can:

a) Specify the governing corpus of law;
b) Specify the idiom of the arbitration;
c) Specify the place of arbitration;
d) Specify, for example, the admission of oral testimony, formality of documents as proofs and other important matters relevant to the type of contract.

For the convenience of the reader I have attached an English language and a Spanish language arbitration clause; both of which contain the elements necessary to remove discretion from the arbitrator and place control where it belongs – in the hands of my client.