



Arbitration—Preferred Dispute Resolution Method for International Disputes

Max B. Chester
Foley & Lardner LLP
414-297-5573
mchester@foley.com



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Agenda

- Part I: Why Arbitration
- Part II: Comparisons of International Arbitral Organizations
- Part III: Enforcing / Vacating Arbitration Awards in the US

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Why Arbitration?



■ Part I: Why Arbitration

- » Other options are not palatable to parties to an international commercial transaction
 - foreign companies do not want to be in litigation in US Courts
 - US companies fear bias when litigating abroad
- » Ease of enforcement
 - the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, aka the New York Convention
 - 150 countries subscribe; check if counter-party is from a jurisdiction that ratified the New York Convention
 - Difficult to overturn an award

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Why Arbitration? (cont.)



■ Part I: Why Arbitration

- » More predictable and less subject to train wrecks
 - Experienced arbitrators (not juries)
- » Confidentiality
 - Default condition in most arbitrations
 - Exception ICSID
- » Flexibility
 - Arbitration is a creature of contract, so can devise parameters for each situation
- » Cost, speed
 - Not necessarily

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Why Arbitration? (cont.)

- Clear federal policy favoring arbitrations, both domestic and international; courts are less inclined to get involved in the arbitral process
- If a party opposes arbitration, has choices to
 - (a) boycott arbitration;
 - Rare; likely will proceed to ex parte award; no challenge to merits
 - (b) challenge jurisdiction with the institution;
 - No agreement to arbitrate, no agreement to arbitrate claims; wrong institution
 - Standard to proceed is low.
 - (c) challenge with the panel;
 - Most common
 - Preserves issue for subsequent court review
 - (d) challenge in court after arbitration commenced;
 - Risk of adverse decision
 - (e) proceed with arbitration and challenge after award is issued
 - need to preserve challenge

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Why Arbitration? (cont.)

- International Arbitration provides subject matter jurisdiction to a federal court. Arbitration at issue must be

1. “commercial”; and

2. Involve either:

- a. At least one party that is not a U.S. entity; or
- b. Property that is located outside the United States; or
- c. Provision for enforcement outside the United States; or
- d. “Some other reasonable relationship with one or more foreign states.”

See 9 U.S.C. § 202; *Lander Co. v. MMP Investments, Inc.*, 107 F.3d 476 (7th Cir. 1997), cert. denied, 522 U.S. 811 (1998) (Convention and implementing legislation permit application of Convention to arbitral award in the United States between two U.S. companies).

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Why Arbitration? (cont.)

■ Need to establish personal jurisdiction to be in federal court

- » First, Second, Sixth, Ninth and D.C. Circuits have held that a forum selection clause, or agreement to arbitrate in a forum, is sufficient to confer personal jurisdiction. See, e.g., *Management Recruiters Int'l, Inc. v. Bloor*, 129 F.3d 851, 854 (6th Cir. 1997) (“When parties have agreed to arbitrate in a particular forum, only a district court in that forum has jurisdiction to compel arbitration. . . .”); *Petrol Shipping Corp. v. Kingdom of Greece, Ministry of Commerce*, 360 F.2d 103, 107 (2d Cir. 1966) (“[B]y agreeing to arbitrate in New York a party makes himself as amenable to suit as if he were physically present in New York.”).

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Why Arbitration? (cont.)

■ Grounds for challenge

- » Is there an agreement to arbitrate
 - “null and void, inoperative or incapable of being performed”
 - Narrowly construed exception (fraud, mistake, duress, waiver, against public policy)
 - Arbitration clause is separate
 - Non-signatories may be compelled to arbitrate
 - Arbitration agreement is incorporated by reference to subsequent agreement
 - Assumption of the rights
 - Agency relationship
 - Veil piercing, alter ego
 - Equitable estoppel
- » Is subject matter commercial
- » Is the dispute international in scope
- » Is the claim covered

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Why Arbitration? (cont.)

■ Who decides arbitrability

- » Arbitral organizations' rules provide that arbitrators, rather than courts, make the final determination
- » US courts ask "what did the parties agree to?"
 - Issue of arbitrability is referred to the panel only where there is clear and unmistakable evidence from the arbitration agreement that the question is to be decided by the panel. See *First Options v. Kaplan*, 514 U.S. 938, 944 (1995)

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Recent SCOTUS Arbitration Decisions

Case	Holding
<i>Am. Express Co. v. Italian Colors Restaurant</i> , 133 S. Ct. 2304 (2013)	The Court held that the prohibitively high cost of arbitration is not a sufficient reason for a court to invalidate an arbitration clause that forbids class action suits.
<i>Oxford Health Plans LLC v. Sutter</i> , 133 S. Ct. 2064 (2013)	When an arbitrator determines that the parties to an arbitration intended to authorize class-wide arbitration, that determination survives judicial review under § 10(a)(4) of the Federal Arbitration Act.
<i>CompuCredit Corp. v. Greenwood</i> , 132 S. Ct. 665 (2012)	Because the Credit Repair Organizations Act is silent on whether claims can proceed in an arbitration forum, the Federal Arbitration Act requires the arbitration agreement to be enforced according to its terms.

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Recent SCOTUS Decisions

Case Name	Holding
<i>Nitro-Lift Techs., LLC v. Howard</i> , 133 S. Ct. 500 (2012)	The Oklahoma Supreme Court was wrong in preventing arbitration of a dispute over the scope of non-competition agreements in employment contracts.
<i>Marmet Health Care Ctr., Inc. v. Brown</i> , 132 S. Ct. 1201 (2012)	West Virginia's categorical prohibition of pre-dispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is contrary to the terms and coverage of the FAA.
<i>AT&T Mobility LLC v. Concepcion</i> , 131 S. Ct. 1740 (2011)	California state contract law, which deems class-action waivers in arbitration agreements unenforceable when certain criteria are met, is preempted by the Federal Arbitration Act because it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

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BG Group PLC v. Republic of Argentina, 572 U.S. __ (2014)

- **Facts:** U.K. company invested in the Argentine natural gas industry. Argentine regulatory changes subsequently undermined the investment and limited foreign parties' access to Argentine courts. The bilateral investment treaty between Argentina and the U.K. required foreign investors to bring claims first in Argentine courts and wait 18 months before arbitration. BG Group commenced arbitration in Washington, D.C. The arbitration tribunal ruled that it had jurisdiction and awarded BG Group \$185.3 million.

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BG Group PLC v. Republic of Argentina (cont.)



- **Lower Courts' Decisions:** The district court deferred to the arbitration tribunal's determination that the Argentine court filing precondition was excused. The D.C. Circuit reversed, holding that there was no "clear and unmistakable" evidence that the parties' intended for such issues to be determined by the arbitrators.

- **Issue Presented for Certiorari:** Who decides whether preconditions in an international arbitration agreement have been satisfied – an arbitration tribunal or a court?

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BG Group PLC v. Republic of Argentina (cont.)



- **Arguments before SCOTUS:**
 - » BG Group's position is that the requirement to bring a claim before Argentine courts before seeking arbitration is a procedural matter to be decided by the arbitration tribunal.

 - » Argentina and the United States' (as amici curiae) position is that the requirement is a precondition to the Argentine government's consent to arbitration at all, and thus the issue should be decided by a government court. This argument flows from the view that without consent to arbitration the tribunal has no jurisdiction to decide even procedural matters.

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BG Group PLC v. Republic of Argentina (cont.)

■ SCOTUS Holding

- » Courts decide threshold issues of whether parties agreed to arbitrate
- » Arbitrators decide procedural preconditions for the use of arbitration, including claims of waiver, delay or similar defenses to arbitrability
- » Provision at issue is of the procedural variety; hence arbitrators had jurisdiction to decide if the filing in court had to be made.
- » That the provision was in a UK-Argentina treaty, and not in a contract, does not change the above.

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Part II

Comparing Arbitration Organizations

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Ten Comparisons

- The following slides compare 6 arbitration organizations across 10 issues

Organizations (Headquarters)	Issues
ICC – Paris	1) Administrative Fees
ICDR – New York City	2) Number of Arbitrators
LCIA - London	3) Selection of Arbitrators
HKIAC – Hong Kong	4) Determination of Jurisdiction
UNCITRAL (UN Comm'n on Int'l Trade Law) (ad hoc rules)	5) Discovery
	6) Interim Remedies
	7) Hearing Procedures
	8) Production of a Reasoned Award
	9) Expert Testimony
	10) Recovery of Costs

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Latest Developments

- ICC
 - » Guide for in-House Counsel
- ICDR
 - » New Rules effective May, 2014
 - Expedited procedures
 - Efficiency
- LCIA
 - » New Rules effective June, 2014
 - Speed
 - Emergency arbitrator

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Administrative Fees

Organization	Administrative Fees
ICC	Claimant must provide a \$3000 initial advance on administrative costs upon filing; total administrative fees determined according to amount in controversy (0 to \$50k = \$3000; \$50k - \$100k = 4.73%; \$100k - \$200k = 2.53%; etc)
ICDR	Choice between 2 or 3 stage payment process; 3 stage option offers lower initial fees, but potentially greater total fees. Depending on amount in controversy, total fees for 2 stage option range from \$975 to \$18,800 + .01% of amount in controversy above \$10MM. Total fees for 3 stage option range from \$1075 to \$14,800 + .01% of amount in controversy above \$10MM.
LCIA	£1,750 (~2800 USD); hourly fees for time spent by administrative staff ranging from £100 - £225 per hour.
HKIAC	Filing fee of 8000 HKD (~ 1000 USD); additional administrative fees determined according to total amount in controversy (0 - 400,000HKD = 14,800HKD; 400,001HKD - 800,000HKD = 14,800HKD + .8% of amount above 400,000HKD, etc.).
UNCITRAL	None

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Number of Arbitrators

Organization	Number of Arbitrators
ICC	Default is 1; ICC retains discretion to order 3.
ICDR	Default is 1; ICDR administrator retains discretion to order 3.
LCIA	Default is 1; LCIA retains discretion to order 3.
HKIAC	If parties do not agree on the number of arbitrators, HKIAC retains discretion to order either 1 or 3.
UNCITRAL	Default is 3

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Selecting Arbitrators

Organization	Procedures for Selecting Arbitrators / Neutrality
ICC	Sole arbitrator: if no agreement, then ICC appoints. Three arbitrators: each party appoints one arbitrator and ICC appoints the third (who serves as tribunal president). Arbitrators are required to remain impartial and independent; no exception for party agreement.
ICDR	If parties cannot agree, then any party may request ICDR to appoint the arbitrators. Arbitrators are prohibited from having ex parte communications with any party.
LCIA	LCIA alone has power to appoint arbitrators (but will consider methods or criteria agreed upon by parties). Arbitrators are prohibited from advising any party on the merits or outcome of a case and the LCIA may refuse to appoint an arbitrator for a lack of impartiality or independence.
HKIAC	Sole arbitrator: if no agreement, then HKIAC appoints. Three arbitrators: each party designates an arbitrator and the appointed arbitrators elect the third. Arbitrators are required to sign a statement confirming their independence and impartiality; there is no exception for party-appointed arbitrators.
UNCITRAL	If one, then joint appointment within 30 days of submission; otherwise by appointing authority. If three, each party appoints, chair is appointed by other 2.

Jurisdiction

Organization	Who determines jurisdiction?
ICC	Arbitrators, unless the ICC Secretary General decides to refer the matter to the ICC Court (general overseeing body).
ICDR	Arbitrators; rules expressly include authority over the existence, scope, or validity of the arbitration agreement.
LCIA	Arbitrators; rules expressly include authority over the existence, scope, or effectiveness of the arbitration agreement.
HKIAC	Arbitrators; rules expressly include authority over the existence, scope, or validity of the arbitration agreement.
UNCITRAL	Arbitrators. Arbitration clause is treated as a separate agreement.

Discovery

Organization	Discovery
ICC	Arbitrators may require parties to produce documentary evidence, entertain requests for production, and choose to limit the scope of production. Practical experience: limited discovery.
ICDR	"At any time during the proceedings, the tribunal may order parties to produce other documents, exhibits, or other evidence it deems necessary or appropriate." Practical experience: limited discovery.
LCIA	Unless the parties agree otherwise in writing, the arbitrators have the power to order the production and inspection of relevant documents. Practical experience: limited discovery.
HKIAC	Arbitrators "may allow or require a party to produce documents, exhibits, or other evidence" deemed relevant. Practical experience: limited discovery.
UNCITRAL	Arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such time a period of time as the arbitral tribunal shall determine.

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IBA Rules on the Taking of Evidence

- These rules have not been formalized as standard protocol by any arbitration organization, but parties may adopt them into their arbitration agreement.
- They represent an effort to balance US-style discovery with the traditionally limited discovery in international commercial arbitration.
- Provides detailed procedures for document requests that are broader than typical international arbitration practice (but requests still must be "specific").
- Directs arbitrators to apply the governing law's privilege and ethical rules.

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Interim Remedies

Organization	Availability of Interim Remedies
ICC	Available unless parties have agreed otherwise; arbitrators may take whatever interim or conservatory measures they deem appropriate.
ICDR	Available; arbitrators may take whatever measure they deem necessary; arbitrators are expressly authorized to issue injunctive relief and measures to protect property.
LCIA	Available unless parties have agreed otherwise; arbitrators may order any provisional measure that they could order in a final award .
HKIAC	Available; arbitrators may order any interim measures they deem necessary or appropriate.
UNCITRAL	Available measures include, without limitation, maintenance or restoration of status quo, preservation of assets, evidence, prohibition on taking steps that are likely to cause harm or prejudice to the process

Hearing Procedures

Organization	Hearing Procedures
ICC	Proceedings can be bifurcated; certain issues may be decided solely on documents; no reference in the ICC's rules to privilege; arbitrators may make orders regarding confidentiality.
ICDR	Any manner the arbitrators' choose, so long as the parties are treated with equality and have a chance to present their case; arbitrators directed to "take into account" legal rules of privilege.
LCIA	Arbitrators have the "widest discretion" allowable under law to determine proceedings; parties may agree on a documents-only arbitration.
HKIAC	Arbitrator decides whether to hold an oral or documents-only hearing; arbitrator decides whether to apply "strict rules of evidence."
UNCITRAL	Witnesses, including experts, may be heard under the conditions and examined in the matter set by the arbitral panel.

Reasoned Award

Organization	Reasoned Award
ICC	Yes; no exceptions listed
ICDR	Yes, unless agreed otherwise; award made public only with the consent of all of the parties or as is required by law
LCIA	Yes, unless all parties agree otherwise in writing
HKIAC	Yes, unless agreed otherwise; the HKIAC itself is not required to give reasons for any of its decisions
UNCITRAL	Yes, unless the parties have agreed that no reasons are to be given.

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Expert Testimony

Organization	Expert Witness Testimony
ICC	Experts only allowed to testify with the express permission of the arbitrators; parties have the right to cross-examine experts; arbitrators may appoint their own expert.
ICDR	Experts only allowed to testify with permission of the arbitrators; arbitrators may appoint their own independent experts.
LCIA	Experts only allowed to testify with permission of the arbitrators; arbitrators may appoint their own experts on specific issues.
HKIAC	Permitted; party must give notice to the arbitrators and other parties; arbitrators may appoint their own independent experts.
UNCITRAL	Permitted. Panel may appoint one or more independent experts, after consultation with the parties.

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Recovery of Costs

Organization	Prevailing Party Recovery of Costs
ICC	Yes, costs may be assigned to one party or apportioned between the parties. Arbitrators are entitled to take into account a party's conduct during an arbitration in awarding costs. Reasonable legal costs may be recovered.
ICDR	Yes, the final award may apportion costs between the parties according to the circumstances of the case. Arbitrators may include the costs of a successful party's legal representation.
LCIA	Yes, general principle is that costs should reflect the parties' relative success on the merits.
HKIAC	Yes, arbitrators may apportion all or part of the costs of the arbitration between the parties.
UNCITRAL	In principle, costs are to be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines the apportionment is reasonable.

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Part III

Enforcing/Vacating an Award Rendered in the U.S.

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Enforcing/Vacating an Award Rendered in the U.S.

- An international arbitration award creates an automatic subject matter jurisdiction (federal question) for enforcement in federal court.
 - » Depending on the court, a party may also need to establish personal jurisdiction over the arbitration award debtor. There is a circuit split on the issue.
 - » Statute of Limitations
 - International arbitrations: 3 year statute

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Enforcing/Vacating an Award Rendered in the U.S. (cont.)

- **Motions to Confirm an Award**
 - » Used to transform an arbitration award into a civil judgment that can be enforced through normal procedures.
 - » Potential grounds for non-enforcement
 - Listed in Article V of the New York Convention:
 - a) Party incapacity,
 - b) Lack of proper notice,
 - c) Dispute outside the scope of the arbitration agreement,
 - d) Arbitration procedures violated the agreement, or
 - e) The award has not yet become binding on the parties or has been set aside
 - f) Subject matter is not capable of settlement by arbitration under the law of the country where enforcement is sought
 - g) Enforcement would be contrary to explicit public policy.

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Enforcing/Vacating an Award Rendered in the U.S. (cont.)

■ Motions to Vacate an Award

- » According to the New York Convention, such motions must be filed in the country that was the seat of the arbitration.
 - Therefore, U.S. courts can only entertain motions to vacate regarding arbitrations that took place in the U.S.
- » Standards
 - Circuit Split regarding international arbitrations seated in the U.S.
 - Seventh and Eleventh Circuits: non-enforcement grounds under the New York Convention are exclusive for vacatur.
 - Second Circuit: the New York Convention places no limits on the grounds upon which vacatur can be granted, and parties may rely on domestic legal principles to set aside arbitration awards, including Section 10 of the FAA.

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Enforcing/Vacating an Award Rendered in the U.S. (cont.)

- Section 10 of the FAA
 - Grounds for vacatur under the FAA include:
 - 1) Award procured through corruption, fraud, or undue means;
 - 2) Evident partiality or corruption in the arbitrators;
 - 3) Arbitrators were guilty of misconduct
 - 4) Arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award was not made.
 - Some circuits consider “Manifest disregard of the law” as a separate ground

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Enforcing/Vacating an Award Rendered Abroad



■ Motion to Enforce a Foreign Award Outside the US

- » If the losing party is unwilling to abide by the arbitration award, the winning party must consider where to go in order to enforce its award.
 - This is typically where the losing party has assets that a court can seize to satisfy the award.
- » The New York Convention provides that all signatories shall recognize and enforce arbitration awards rendered in other countries (may be limited to the awards rendered by other signatories).
- » Under the Convention, there is a strong presumption in favor of enforcement.
 - Only the grounds listed in Article V can be used to oppose the enforcement of an award.
 - The grounds listed in section 10 of the FAA are definitively inapplicable.

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Enforcing/Vacating an Award Rendered Abroad (cont.)



■ Seeking enforcement in the United States:

- » Same procedure as enforcing a domestic award (except that there is a longer statute of limitations).

■ Seeking enforcement in the U.K.:

- » U.K. Arbitration Award: With leave of the court, enforceable to the same extent as a U.K. court judgment.
- » Non-U.K. Arbitration Award: There are a couple additional grounds for non-enforcement (i.e. violates public policy, non-arbitrable subject matter).

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Enforcing/Vacating an Award Rendered Abroad (cont.)

■ Seeking enforcement in France:

- » All Arbitration Awards: Enforcing party must present the arbitration agreement and the award translated into French. At such point, enforcement is quasi-automatic if the award does not violate international public policy.

■ Seeking enforcement in Hong Kong:

- » All Arbitration Awards: Enforcing party must present the arbitration agreement, a certified copy of the arbitration award, and any necessary translations.
 - With leave of the court, enforceable to the same extent as a Hong Kong court judgment.

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Top 5 Issues to Consider When Drafting an Arbitration Agreement

- | | |
|---|---|
| 1) Institutional or Ad Hoc Arbitration? | An arbitration organization can help organize hearings, handle communications, and assist in selecting arbitrators, but this comes at a price. An ad hoc arbitration typically loses its cost-effectiveness if a minimum level of cooperation between the parties does not exist. |
| 2) Scope of Disputes | There must be clear, unambiguous and mandatory submission of disputes to arbitration. Avoid permissive language (e.g. "the parties may refer disputes to arbitration") in favor of mandatory language (e.g. "the parties agree to submit all disputes relating to this contract to arbitration"). |
| 3) Seat of the Arbitration | Is the country a common or civil law jurisdiction?
How supportive of arbitration are the local state courts? Has the country signed the New York Convention? |
| 4) Governing Law | What substantive law will the arbitrator apply? How developed is the governing law in an applicable area? How many arbitrators are familiar with a given body of law? |
| 5) Adopting Rules and/or Procedures | Consider adopting rules and/or procedures that will override any default rules provided by a selected arbitration organization. Areas to consider include language of the proceedings, arbitrator selection, discovery, evidentiary privileges, confidentiality, and assignment of costs. |

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Contact Information

Organization	Contact Info
ICC	Website: http://www.iccwbo.org/ Phone: +33 (0) 1.4953.2905
ICDR	Website: www.icdr.org Phone: 212.484.4181
LCIA	Website: www.lcia.org Phone: +44 (0) 20.7936.6200
HKIAC	Website: www.hkiac.org Phone: (852) 2525-2381

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Contact Information

Max B. Chester
Foley & Lardner LLP
Milwaukee, WI
(414) 297-5573
mchester@foley.com

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