Introduction to international arbitration and its place in the Asia-Pacific

1 Introduction and definition of arbitration

Over the past 20–30 years, international arbitration has become by far the most popular mechanism for resolving international commercial disputes in the Asia-Pacific and globally. International arbitration is exceptionally effective because of its flexibility, neutrality, finality, and enforceability. It is flexible because parties are accorded enormous freedom to choose the manner in which their dispute is decided. They can, for example, agree on the seat of arbitration, the identity of the arbitrators, the applicable law, the number of written briefs (if any), the number of oral hearings or meetings (if any), and whether there will be expert or factual evidence. The neutrality of arbitration principally relates to separating the dispute resolution mechanism from any of the parties' countries and from any political interference. Parties can, for example, select a seat of arbitration, applicable law and arbitrators from a country that is neutral with respect to all parties. Arbitration is final because domestic legal systems generally do not permit any appeal from arbitrators' awards, and allow only very limited review of such awards on procedural grounds. Arbitration is enforceable thanks to its recognition in virtually all domestic laws and thanks to several international treaties. Arbitral awards may be enforced using the enforcement mechanisms of state courts in most countries throughout the world. As we will see, the study of international arbitration is exciting, innovative, creative, and yet sometimes complex.

In this chapter, after briefly defining arbitration in the introduction, we set out its historical evolution in Section 2. Section 3 summarises the characteristics of international arbitration as we know it today, including the sources of international arbitration law, thus introducing the concepts which are addressed in
much greater detail throughout the book. Finally, Section 4 explains the role, status and culture of international arbitration in the Asia-Pacific region. 1

1.3 A definition of arbitration can be found in any dictionary. A straightforward and accurate definition is that provided in Black’s Law Dictionary which defines arbitration as ‘[a] method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding’. 2 This identifies the core elements which are applicable even in the most advanced forms of international commercial arbitration. It states that arbitration:

(i) is a ‘method of dispute resolution’ (arbitration is simply a procedure or method for resolving disputes);

(ii) ‘involving one or more neutral third parties’ (the notion that all of the arbitrators be neutral, independent and impartial is an essential feature of arbitration);

(iii) ‘who are usually agreed to by the disputing parties’ (appointment of the arbitrator or arbitral tribunal by agreement of the parties, or by some agreed method, is one of the most important, defining features of arbitration; more generally, party consent is essential to all aspects of arbitration);

(iv) ‘whose decision is binding’ (there would be limited value in arbitration if a party to an arbitration agreement could subsequently refuse to comply with its obligation to arbitrate or could refuse to honour the arbitrator’s decision. The binding nature of arbitral decisions (called ‘awards’) has been facilitated by the law, which is comprised of both domestic laws and international treaties. The law provides a framework to ensure that arbitration agreements and arbitral awards are legally enforceable).

1.4 There are many different types of arbitration, and even different species of international commercial arbitration. The most common is sometimes called ‘New York Convention arbitration’ because the awards are enforced pursuant to the procedures set out in the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (‘New York Convention’). However, ‘New York Convention arbitration’ as a name is inaccurate because it omits a small number of private arbitrations in countries that are not signatories to the New York Convention. Some call this kind of arbitration simply ‘commercial arbitration’ but we prefer ‘international commercial arbitration’ to distinguish it from domestic arbitration.

1 This book focuses on the following Asia-Pacific jurisdictions: Australia, China (Mainland), Hong Kong, India, Indonesia, Japan, Korea (Republic of), Malaysia, New Zealand, the Philippines and Singapore. However, examples from other jurisdictions are mentioned from time to time.

2 Black’s Law Dictionary, 8th edn, Thomson West, 2004, p. 112. A similar definition can be found in any dictionary or in the various books on arbitration. See, e.g., the discussion of the definitions in J-P Peaudret and S Besse, Comparative Law of International Arbitration, 2nd edn, Thomson, 2007, paras 1–3, which conclude that arbitration is a contractual form of dispute resolution exercised by individuals, appointed directly or indirectly by the parties, and vested with the power to adjudicate the dispute in the place of state courts by rendering a decision having effects analogous to those of a judicial decision. Another useful definition is found in Section 3(6) of the Philippines Alternative Dispute Resolution Act 2008, which defines a voluntary dispute resolution process in which one or more arbitrators, appointed in accordance with the agreement of the parties, or rules promulgated pursuant to this Act, resolve a dispute by rendering an award.

1.5 International commercial arbitration may be contrasted with ICSID arbitration which is the most common type of ‘investment arbitration’. ICSID arbitrations arise under the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (‘ICSID Convention’). A distinctive feature of ICSID arbitration is that one party must be a state (i.e. government) or a state entity. States can also be parties to international commercial arbitrations. 3 Although ICSID arbitration differs from international commercial arbitration in several respects, especially concerning the applicable substantive law and recourse against and enforcement of awards, there are numerous similarities in terms of procedure and practice.

This book focuses principally on international commercial arbitration, which is the main form of international arbitration, but much of the book also applies to ICSID arbitration. The sections that are specific to ICSID arbitration are the brief history of ICSID at Section 2.3.2 below and the description of the main features of ICSID in Chapter 10.

2 A brief history of arbitration

2.1 Ancient history to the birth of modern international law

International arbitration has seen enormous growth in the last 40–50 years and has unquestionably become the preferred method for resolving international commercial disputes both in the Asia-Pacific and worldwide. However, the concept of parties referring to a neutral third party of their choice for the resolution of disputes between them is very much older and dates back to ancient times. Arbitration is said to have existed ‘long before law was established, or courts were organised, or judges had formulated principles of law’. 4

Recourse to arbitration indeed seems natural: when two people wish to resolve a difference between them, an instinctive reaction is to turn to a mutually respected third person, such as a tribal elder. It is therefore not surprising that arbitration was practised in ancient times in all corners of the globe.

Arbitration in China can be traced back to about 2100–1600 BC. 5 Mediation gained an even stronger foothold in China because of Confucianism. Confucius is

3 In fact, most arbitrations involving state parties are international commercial arbitrations rather than ICSID arbitrations. In 2009, for example, 78 of the ICC International Court of Arbitration’s 817 new cases involved a state or state entity. By comparison, ICSID’s total number of new cases for the year 2009 was 25. Moreover, arbitrations involving states are often entirely ad hoc, for example using the UNCITRAL Arbitration Rules, and/or partially administered by the Permanent Court of Arbitration in The Hague.


6 Ya Liang, ‘Mediation in China, A Multiple-National Perspective’, in Zhang Yuhua and Frank Delargy (eds), Successful Mediation: An International Perspective, 2004, p. 166; Cao Ming, ‘Mediation in China’, in McCormick, et al (eds), Mediation, 1997, p. 121. Chao states that since 1988, the Chinese have been using an alternative method of dispute resolution that is similar to mediatior, which is now used in civil cases, but is often combined with other forms of resolution.

7 Yu Zhongmin and Chao Qianli, ‘Alternative Dispute Resolution’, in Kroll, et al, Law in International Practice, 1997, p. 231. According to the Chinese, the system of alternative dispute resolution known as “alternative dispute resolution” is often used in civil cases. It is similar to mediation, but it is often combined with other forms of dispute resolution.
text for domestic jurisdictions to adopt as their own arbitration law. Any jurisdiction is free to use it as the basis for its national legislation, with or without any modifications it may desire.61

The Model Law has no independent force of law. If it is adopted by a state, it applies as law in that state only because the state has enacted it as part of its own domestic law. The fact that UNCITRAL prepared the Model Law does not give it the force of international law. It must therefore be contrasted with conventions like the New York and ICSID Conventions which constitute international treaty law applicable among the respective state parties. The Model Law is simply a recommended template that may be copied verbatim or adapted in drafting a country's domestic law.

The drafters of the Model Law gathered the most important principles that are necessary in an arbitration law and formulated one cohesive instrument. Many of these important principles were already reflected in arbitration laws worldwide, and/or were inspired by the New York Convention and to some extent the UNCITRAL Arbitration Rules. Two overarching principles behind the Model Law are (i) that it allows for a very significant degree of procedural flexibility – the parties to the arbitration can agree on virtually any procedure – and (ii) it greatly restricts the role of domestic courts in the arbitral process. The Model Law text 'is usually held up as the template signifying ideal balance between arbitral and curial authority'.62

After setting out the key features of the Model Law, the Indian Supreme Court in a decision of 2005 conveniently summarised UNCITRAL's purpose in creating a harmonised arbitration law:63

All these [features of the Model Law] aim at achieving the sole object to resolve the dispute as expeditiously as possible with the minimum intervention of a Court of law so that trade and commerce is not affected on account of litigations before a Court. [The] United Nations established [UNCITRAL] on account of the fact that the General Assembly recognised that disparities in national laws governing international trade created obstacles to the flow of trade. The General Assembly regarded [UNCITRAL] as a medium which could play a more active role in reducing or removing the obstacles. [UNCITRAL], therefore, was given a mandate for progressive harmonization and unification of the law of International Trade.

At the time of writing, more than 60 states, including most of the Asian jurisdictions that are the focus of this book, have based their arbitration laws on the


Model Law.64 The benefits of this for international companies and their legal advisors should be obvious. It has created a harmonised, consistent approach to domestic arbitration laws based on an excellent precedent developed by some of the world's experts on international commercial arbitration.

There are many economically important states which have not chosen to use the Model Law as their arbitration law. For example, certain European jurisdictions with a long, solid history of arbitration, like France and Switzerland, have not adopted it. The UK (except Scotland) and US (at the Federal level and all but a few states) are other notable exceptions. Notwithstanding that these countries have not adopted the Model Law, when one examines their arbitration laws, it is clear that many of the general principles enshrined in the Model Law can also be found in those laws.

The Model Law was revised by UNCITRAL's Working Group II in July 2006. Given its nature as a Model Law, this revision cannot affect the law applicable in those states that have already used the unrevISED Model Law as a basis for their laws. The new amendments only apply to the extent that an individual state specifically chooses to adopt them. New Zealand, Singapore and Australia are the only countries in this region which have adopted the 2006 revisions, but Hong Kong is likely to do so in the imminent amendments to its arbitration law. It would not be at all surprising if other Asia-Pacific jurisdictions follow in the near future.

The fact that harmonisation of arbitration laws is one of the major goals of the Model Law is reflected in Article 2A of the 2006 version of the Model Law. It provides:

1. In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.
2. Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

The Model Law is thus to be interpreted from an international standpoint, taking into account the principles behind it, rather than from a domestic standpoint. This is to encourage a consistent interpretation among different states.

3 CharacteristicS of arbitration

Arbitration was defined in Section 1 above. The present section first distinguishes arbitration from related dispute resolution mechanisms and distinguishes domestic from international arbitration (Sections 3.1–3.3). It then outlines the key features of arbitration (Section 3.4) which are developed in greater detail throughout this book.

64 A list of arbitration laws based on the Model Law is provided at Appendix 3.
3.1 Distinction between arbitration and litigation

Aside from arbitration, the other form of legally binding commercial dispute resolution is litigation in a domestic court. There are numerous differences between litigation and arbitration, including:

(i) International litigation takes place in a court that derives its competence from the application of sometimes cumbersome international jurisdiction rules. Commercial parties are accorded some freedom to choose the court, but that choice is restricted by the inconsistent rules of various courts. Furthermore, it is not uncommon that litigation relating to the same dispute is commenced in more than one domestic court that is competent to hear the case, thus creating a duplication or multiplicity of proceedings. Conversely, in international arbitration the seat or place of arbitration is chosen by the parties, without the restrictions that can apply to the choice of a court in international litigation proceedings. The parties can choose virtually any place in the world they wish as the seat of their arbitration. In practice they usually choose a seat that is neutral as concerns the parties and which has a legal framework that is conducive to arbitration.

(ii) In litigation, a judge is assigned to the case by the court. The parties therefore cannot select the judge who will determine their dispute. In arbitration, however, the parties are free to choose the arbitrator(s), enabling them to choose people with the appropriate expertise, cultural neutrality, or other desired skills or characteristics.

(iii) In litigation the procedure is fixed or otherwise determined by the rules of the particular court. In arbitration the parties have enormous flexibility to choose the kind of procedure that they wish to adopt for their arbitration. There are very few limits on that choice. The parties can, for example, agree on a procedure that is much cheaper and faster than litigation.

(iv) In litigation the proceedings are usually open to the public. International commercial arbitration is a matter concerning only the parties to the particular dispute. It is therefore possible for arbitrations to be kept confidential from outsiders. This is important for business disputes where the leaking of commercial information can be devastating. However, the confidential nature of arbitration is somewhat diluted when support from courts is needed, for example where parties seek curial support or seek to enforce arbitral awards. In many jurisdictions the pleadings and evidence submitted to a court, even if related to a confidential arbitral process, become part of the public record.

(v) In litigation the parties usually have one or more levels of appeal from the initial judgment if a party wishes to challenge that judgment.

3.2 Distinction between arbitration and ADR

ADR procedures, such as mediation and conciliation, are a friendlier means to resolve disputes. 'ADR' can stand for either 'alternative' or 'amicable' dispute resolution. We prefer the latter to distinguish the nature of these procedures from arbitration and litigation.

In ADR, parties work together with an experienced third person with the aim of reaching an amicable settlement or other solution. Often the parties' settlement will be recorded in the form of a written agreement. Because everyone has participated in forming the agreement, it is hoped that it will be complied with voluntarily. If not, the agreement may be enforceable as a matter of contract law. However, an agreement reached during an ADR procedure is not an arbitral award so it cannot be enforced under the New York Convention. Nevertheless, a settlement agreement reached in the course of arbitral proceedings can be drawn up in the form of an award by consent so that it can be enforced under the New York Convention.

The consensual nature of ADR processes must be distinguished from the binding procedures in arbitration and litigation. The key difference is that in the latter the outcome is decided by the arbitrator or judge rather than by agreement of the parties. Further, a judge's decision or arbitrator's award is final (subject to any rights of appeal) and binding. Also, parties can be forced to participate in arbitration or litigation proceedings at the risk of a binding decision against them if they do not. A party can to some extent be required to attempt an ADR procedure but it cannot be forced to accept a settled outcome – no decision can be imposed in ADR, it is rather proposed. In arbitration and litigation the decision of a third party is imposed, unless the parties reach a settlement agreement in the course of the arbitration, which quite often occurs.

65 Issues concerning the seat of arbitration are addressed in Chapter 2.
66 Issues concerning arbitrators are addressed in Chapter 6.
67 Process is dealt with in Chapter 7, which also explains the limits to party autonomy.
68 The confidentiality of arbitration is dealt with in Chapter 7. ICSID arbitration awards are generally public but the proceedings are confidential. ICSID is addressed in Chapter 10.
69 Setting aside of arbitral awards is dealt with in Chapter 9.
70 Enforcement of awards is dealt with in Chapter 9. See also footnote 43 above concerning The Hague Convention on Choice of Courts Agreements.
71 Arb-med is addressed in Chapter 7, Section 6.12. See also the articles by Wong Yau Lung, 'The use and Development of Mediation in Hong Kong' and M Dewdney, 'Party-Mediator and Lawyer-Driven problems in Mediation', Asian Dispute Review, at pp. 54 and 57 respectively.
72 Arbitration could be considered as an alternative to the courts but strictly speaking it is not a form of alternative dispute resolution.
73 See, e.g. ALCRA Rules Article 35.1; HKIAC Rules Article 32.1; SIAC Rules Articles 27.7; 1976 UNCITRAL Arbitration Rules Article 34.1; KCAB International Rules Article 34; ICA Rules, Rule 54.2; ICC Rules Article 26.
74 For example, from 2003-2008, an average of 47% of ICC arbitrations were withdrawn by the parties before the arbitral tribunal issued its final award. Approximately 65% of those withdrawals were in the early stages of the arbitrations, before the ICC Terms of Reference were finalised.
If ADR leads to a resolution of the dispute, it is generally much cheaper, faster and less disrupting for business than seeing through to conclusion a binding procedure such as arbitration or litigation. A successful ADR process also has the advantage of better preserving business relationships. For most kinds of commercial disputes, it is therefore well worth exploring ADR options both before launching arbitration or litigation proceedings, and even during such proceedings. At the end of the day, however, commercial parties need the protection of a fallback binding dispute resolution option. The best fallback option for international disputes is international arbitration.

3.3 Distinction between international arbitration and domestic arbitration

This book concerns international rather than domestic arbitration. Many jurisdictions in the Asia-Pacific have different laws that apply to domestic as opposed to international arbitrations, or at least different provisions of the same law that apply to each. Typically, laws on domestic arbitration:

(i) leave less room for the parties to determine the arbitral procedure and applicable laws;

(ii) provide more possibilities for recourse, such as appeal, from the resulting award; and

(iii) permit a greater degree of domestic court involvement.

Whether an arbitration is domestic or international depends on the definition provided in the law applicable to that question. Usually the relevant law is that of the seat of arbitration. If the seat of arbitration's law distinguishes between international and domestic arbitrations, then it should provide a definition of each. Thus an international or domestic arbitration is one that is defined as such by the law of the seat of arbitration.

A typical example of a definition of international arbitration is that found in the Model Law. Article 1(3) of the Model Law provides:

An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

Article 1(3)(c) of the Model Law is very broad indeed. It effectively allows parties to agree that their arbitration is international, thus opting into the law or provisions of law applicable to international arbitrations in the jurisdiction concerned. Parties should, however, check local requirements on the extent to which this provision will be effective in ousting domestic arbitration laws.

3.4 Key features and overview of arbitration

3.4.1 Arbitration agreement

Since party consent is the very essence of arbitration, an arbitration agreement is perhaps its most essential feature. Without an arbitration agreement there can be no arbitration. By entering into an arbitration agreement the parties principally do two things: first, they agree to oust (or at least significantly restrict) the jurisdiction of the domestic court(s) that would ordinarily be competent to decide their dispute; second, they agree to authorise an arbitral tribunal to decide that dispute instead. These are sometimes called, respectively, the negative and positive effects of an arbitration agreement. The extent of these two effects is determined by the language of the arbitration agreement itself because an arbitral tribunal's jurisdiction is limited to what the parties have granted it.

When parties agree to arbitrate, they typically do so in one of two ways. The most common is at the time of negotiating a contract. The parties can insert an arbitration clause into their contract which provides for the resolution of future disputes by arbitration. The other occasion is in the form of a submission agreement after a dispute has arisen. Here the parties refer their pre-existing dispute, or some part of it, to arbitration.

An arbitration agreement is a binding, contractual arrangement between the parties. It may at first seem futile to emphasise the word contractual but it is important. An arbitration agreement is a contract, the nature of which is much like any other contract. But a feature of an agreement to arbitrate is that it is, in effect, specifically enforceable. If a party refuses to participate in the arbitration, it will nonetheless be bound by the arbitrator's award. Furthermore, as noted above, by agreeing to arbitrate a party loses its right to litigate the merits of the dispute in court.

3.4.2 Arbitrators

Having highly professional, efficient and impartial arbitrators is essential to an efficient, satisfying international arbitration.

An underlying feature and key advantage of arbitration is that the parties can choose the arbitrator(s). This inspires confidence in the process and enables parties to choose people with appropriate expertise. It is often said that the very best arbitral tribunals are those where the parties have been able to agree on the

75 Arbitration agreements are dealt with in Chapter 4. ICCSD arbitration is sometimes described as 'arbitration without privy' because of the nature of establishing the consent to arbitrate. This is discussed in Chapter 10. 76 Given the importance of consent, there are frequently disputes about the extent of an arbitral tribunal's jurisdiction. Jurisdiction in arbitration is dealt with in Chapter 5. 77 Issues surrounding the appointment and removal of arbitrators are dealt with in Chapter 6.
identity of all of its members. Of course it often happens that, by the time a dispute arises, the parties cannot agree. That is why arbitration agreements, arbitration rules and arbitration laws provide a fallback or default appointment mechanism. Typically, if there are to be three arbitrators then each side nominates one and, if the parties cannot agree on the chairperson's identity, he or she is appointed by the default mechanism. If there is to be a single arbitrator, a similar default mechanism applies if the parties cannot agree on the arbitrator.

In general, there are no qualifications required in order to sit as an arbitrator. It is not necessary to have legal training or a legal qualification. Parties sometimes choose an engineer or other technical person whose expertise relates to the issues of the case. In practice though, most international arbitrators have a legal background or solid experience in the law.

The parties' choice of arbitrators is limited by mandatory legal requirements, particularly that all arbitrators be and remain impartial and independent from the parties. This requirement is reflected in virtually all arbitration rules and laws and applies as an internationally accepted overriding rule of international arbitration practice. Arbitrators who are not independent can be removed by the relevant supervising institution or court.

3.4.3 Seat of arbitration

The seat (or place) of arbitration is an important legal concept. The seat's law provides the supporting legal framework for the arbitration. Its courts may be called on to provide assistance during the arbitration. Its courts also have exclusive jurisdiction to hear an action to set aside the arbitral award.

The seat of arbitration is usually chosen by the parties. The parties can choose virtually any place they wish, and in practice they often choose a seat that is neutral vis-à-vis all parties. Thus, for example, for a contract involving one party from Hong Kong and another from India, the arbitration clause might select Singapore as the seat of arbitration because it is neutral, geographically convenient for both parties, has an excellent arbitration law, and has efficient courts in case protective measures are needed. Many other jurisdictions in the Asia-Pacific also have excellent arbitration laws and courts. Parties should ensure that the chosen seat of arbitration has a good law on arbitration and that it is a signatory to the New York Convention.

It is not necessary that any person involved in the arbitration actually lives or works at the seat of arbitration, or that anyone has had any connection with it or even visited it. Nor is it necessary that any part of the arbitration proceedings—such as the hearings and meetings—actually takes place there. The seat simply functions as the jurisdiction that provides the legal framework for the arbitration.

3.4.4 Party autonomy and procedure

It was noted above that consent is a fundamental aspect of international arbitration. Consent implies choice. International arbitration provides many choices to the parties, ranging from the seemingly trivial to the more fundamental.

The first choice the parties make is the choice to resolve their disputes by arbitration. The second might be the seat of arbitration, discussed above. Another is to choose the law that will apply.

Choice of law issues in international arbitration can be interesting. This is primarily because in international arbitration there is no lex fori (law of the forum). Although the law of the seat of arbitration provides the legal backbone of the arbitration, it does not generally provide the arbitration with a system of conflict of laws rules. Many different laws might be relevant in an international arbitration, applicable to various issues in the case. In international arbitration the parties can even choose that the arbitrators will apply general principles of international commercial law, or principles of fairness and equity (amicable composition) in resolving their dispute.

Another choice, and one of the major advantages of arbitration over litigation, relates to procedure. In litigation the procedure is fixed or otherwise determined by the rules of court. In arbitration there is enormous flexibility for the parties to choose the kind of procedure that they wish to adopt for their arbitration. There are very few limits on that choice. For example, the parties can and frequently do agree on a set of arbitration procedural rules, such as the rules of an arbitral institution. If so, those rules will apply somewhat contractually—as though they have been incorporated into the parties' contract by reference. Notwithstanding the choice of any rules, the parties can agree to any kind of procedure they wish, such as short and cheap or long and detailed; with expert assistance or without; with an oral hearing or without; with witnesses or not, etc.

3.4.5 Finality of outcomes

Finality is another major advantage of international arbitration over litigation. In general, and in all jurisdictions that are the focus of this book, there is no appeal from an award issued in an international arbitration. In most arbitration laws the only recourse against an international arbitral award is an application to set aside the award. This is clearly stipulated in Article 34 of the Model Law.

The bases for setting aside an award are narrow, relating for example to whether there was a valid arbitration agreement, whether the parties had capacity, whether the arbitrator was independent and impartial, and whether the
procedure was fair and equitable to all parties. An award can also be set aside where it breaches rules of international public policy.

The question of whether or not an appeal (in addition to a setting-aside procedure) is available is determined by the law of the seat of arbitration. The laws of some jurisdictions, notably England, do allow a limited form of appeal. The laws of several jurisdictions in the Asia-Pacific allow a limited form of appeal under their legislation applying to domestic but not international arbitrations.

If the law provides that an application for setting aside is the only form of recourse available, it is generally accepted that the parties are not permitted—even by express agreement—to authorise a more extensive appeal. This was confirmed recently by the US Supreme Court. It can therefore be said that finality is an underlying and perhaps even mandatory feature of international arbitration.

3.4.6 International enforcement of arbitration agreements and awards

Another key advantage of arbitration over international litigation is that it is generally much simpler to enforce an arbitral award abroad than it is to enforce a court judgment abroad. Enforcement is effective in arbitration principally due to the New York Convention, a brief history of which has been provided above. The New York Convention obliges contracting states, through their courts, to do two things: (i) enforce arbitration agreements and (ii) enforce foreign arbitral awards.

Enforcement of arbitration agreements means that if a party begins court proceedings in a New York Convention country and the opposing party contests that court’s jurisdiction on the basis of the arbitration agreement, the court must stay its own proceedings and refer the parties to arbitration unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. It does not matter where the chosen seat of arbitration is—it can be within the same country or abroad. This mechanism greatly reduces the chances of court proceedings taking place in parallel to arbitration proceedings.

Enforcement of awards means using the procedures and mechanisms of domestic courts to ensure compliance with the award if a party refuses to honour it voluntarily. Basically, any New York Convention party is obliged to recognise and enforce a foreign award without imposing procedures more onerous than those that apply to the enforcement of court judgments rendered in the enforcing country. There are very narrow grounds on which a court can refuse to enforce an award under the New York Convention. These are almost identical to those mentioned above for setting aside an arbitral award under the Model Law.

An arbitral award can be enforced in any country that is a party to the New York Convention where the losing party has assets. If the place where enforcement is sought is not one of the approximately 145 New York Convention signatory countries, enforcement is trickier. Enforcement may, however, be facilitated by another bilateral or regional enforcement treaty that is similar to the New York Convention. It might alternatively be facilitated by the jurisdiction’s own laws.

3.4.7 Arbitral institutions

An arbitral institution is an organisation that provides services in connection with arbitration proceedings. Certain leading arbitral institutions have in addition assumed a role of industry regulators, setting standards and developing soft law for arbitration. They may also organise conferences and training sessions for arbitrators and lawyers. Arbitral institutions have contributed significantly to the growth of international arbitration and their popularity is such that a discussion of the key features of arbitration would be incomplete without them.

When considering the sociological aspects of international commercial arbitration in 1982, Ottmar Gloszer said of the arbitral institution:

It is a matter of definition what the arbitration institution means. In any case, much depends on the organisation of the arbitration institution. There must be enough qualified persons to handle the matter and to deal with the task of administering arbitration proceedings, in short there must be a well equipped infrastructure, an experienced routine in the mechanics of handling the subjects and the individuals and of the legal appraisal of the cases. It is essential that they provide a smooth handling machinery, that they stay away from undue influence, that if such influence is exercised there is room for challenge of such practice and that arbitral awards which are the consequence of improper handling can be set aside. If these guarantees are granted, an arbitration institution can be valued on the same level as a law court.

The level of service offered by an arbitral institution depends entirely on the institution and can range from simple appointment of a default arbitrator to full supervision and monitoring from the beginning to the end of the proceedings. The services offered by institutions operating at the latter end of that spectrum may include:

(i) checking that there is a prima facie arbitration agreement (certain institutions only);
(ii) appointing arbitrators if a party fails to appoint one, or if the two party-appointed arbitrators (or the parties themselves) cannot agree on the chairperson (or sole arbitrator);

83 See Section 69 of the English Arbitration Act 1996.
84 Hall Street Associates, LLC v Mittal Inc, 128 S Ct 1396, 2008 (US Supreme Court).
85 Enforcement of awards is dealt with in Chapter 9. Concerning enforcement of foreign court judgments, see above footnote 43 regarding The Hague Convention on Choice of Courts Agreements.
86 Enforcement of arbitration agreements is dealt with in Chapter 4. The extent to which a court will consider the existence of an arbitration agreement in referring the parties to arbitration is dealt with in Chapter 5.
87 The New York Convention refusal grounds are dealt with in Chapter 9.
88 Enforcement of awards in non-New York Convention countries is dealt with in Chapter 9.
89 Information on Asia-Pacific and other arbitral institutions is provided in Appendix 1. Certain Asia-Pacific arbitral institutions are also discussed in Section 4 below.
removing and replacing an arbitrator who has become unable to complete his or her role for any reason;

(iv) deciding challenges as to the independence and/or impartiality of an arbitrator;

(v) keeping an up-to-date file on the arbitration proceedings;

(vi) scrutinising the arbitration award before it is finalised (certain institutions only); and

(vii) managing the administrative and financial aspects of the arbitration.

1.94 An institution's role in relation to financial aspects of the arbitration can be very valuable. The institution not only saves the arbitral tribunal time, as with several of the features listed above, but also acts as an intermediary between the arbitral tribunal and the parties, removing the need for them to deal with each other directly on the delicate issue of the arbitrators' fees.\(^{91}\)

The cost of the services provided by an arbitral institution and the manner in which they are calculated are important points of difference among arbitral institutions. Another important difference is the method used by each institution to determine arbitrators' fees. The institution's fees are commonly calculated as a percentage of the amount in dispute, but may alternatively be fixed as a lump sum irrespective of the amount in dispute (particularly where minimal service is provided) or based on an hourly rate. While there are significant differences in the fees charged by institutions, these must be assessed against the extent and quality of services offered. The key question is whether the institution offers value for money. If the institution charges high fees, then the parties should expect highly qualified, efficient staff offering excellent supervisory services.

1.96 The two most common approaches to determining arbitrators' fees are by hourly rate, either agreed with the parties or fixed by the institution, or by a fee calculated as a regressive percentage of the amount in dispute. Both these types of fees vary and depend on the approach adopted by each institution. Fees calculated on the amount in dispute have the advantage of predictability and proportionality. These fees can be estimated with reasonable certainty at the outset of the arbitration and will be proportionate to the value of the dispute. On the other hand, hourly rates have the advantage of certainty for the arbitrators since the value of a dispute does not necessarily provide a reliable indication of the amount of time required by the arbitrators to dispose of a case. In addition, parties choosing an institution which applies a fee scale based on the amount in dispute should ensure that the institution applies the scale with some degree of flexibility so that the arbitrators are not grossly overpaid or grossly underpaid. Similarly, parties choosing an institution applying an hourly rate should ensure that someone (either the institution or the parties) carefully checks the reasonableness of the hours claimed, as one should do when obtaining any service based on an hourly rate.

1.97 Parties should be very wary of fee structures which appear to provide low remuneration for arbitrators. Good international arbitrators are usually senior professionals accustomed to receiving fees at least equivalent to the upper end of the fees charged for their profession in their home jurisdiction. If the fee structure is too low, the parties are unlikely to be able to retain appropriately qualified arbitrators, or if they do, those arbitrators may not be willing to dedicate the amount of time required to deal with the case properly.

With the exception of arbitrations seated in mainland China, it is not mandatory in this region to engage an arbitral institution. The alternative to institutional arbitration is ad hoc arbitration, where no institutional administration is involved.\(^{92}\) In an ad hoc arbitration, some of the services otherwise provided by the institution are undertaken by the arbitral tribunal itself and/or the courts at the seat of arbitration.

Ad hoc arbitration works well when all parties (and their lawyers) are cooperative. However, by the time a dispute has reached the stage of arbitration it often transpires that at least one party no longer wants to cooperate. There are numerous examples of dilatory tactics which, if used in an ad hoc arbitration, could cause serious delays and costs. Well-established arbitral institutions can deal quickly and efficiently with many such tactics. As Thomas Carbonneau explains:\(^{93}\)

[Ad hoc arbitration] places a substantial burden upon the parties to cooperate in the circumstances of dispute. The expectation of cooperation is likely to be unrealistic. Moreover, arbitral institutions have a good professional track record and have significant experience in the administrative aspects of arbitrations. Unless the parties themselves have substantial expertise in the arbitration process, institutional arbitration becomes a virtual necessity. Also, an award rendered under the auspices of a recognized arbitral institution may have a greater likelihood of enforcement for reasons of institutional reputation. The real question involves choosing among the arbitral institutions.

As Carbonneau notes, if the arbitration was administered by an experienced, reputable institution, this will increase the overall chances of successful recognition and enforcement of a resulting award. The staff of the top institutions have the experience and training necessary to provide legal and administrative support. They can answer arbitrators' and parties' questions, thus increasing the chances that the procedure will not be subject to a valid challenge. Some institutions also scrutinize draft arbitral awards to ensure, so far as possible, that the award is enforceable. Arbitration under the auspices of an experienced arbitrator may be preferable to ad hoc arbitration.\(^{94}\)

91 In this sense see ICT Pty Ltd v Sea Containers Ltd [2002] NSWSC 77 (Supreme Court of New South Wales, Australia), and the discussion of the case in S Greenberg, 'Latest Developments in International Arbitration Down Under', (2003) 7(2) Vindobona Journal 287, at p. 294. In that case, an entire arbitral tribunal was removed for misconduct because the arbitrators tried to force the parties to agree to pay hearing cancellation fees.

92 The Permanent Court of Arbitration in The Hague provides some support for ad hoc arbitrations under the UNCITRAL Arbitration Rules, such as appointment of default arbitrators.

institution that scrutinises the award therefore provides the best chances of securing an enforceable outcome.

For all of the above reasons, it is not surprising that a study on the views of in-house counsel at leading multinational corporations published in 2008 found that “86% of awards that were rendered over the last ten years were under the rules of an arbitration institution, while 14% were under ad hoc arbitrations.” This confirms anecdotal evidence from arbitration practitioners that institutional arbitration is preferred over ad hoc arbitration. The same study showed that on a global level the ICC remained the preferred institution, with 45% of participating corporations preferring the ICC. This was followed by the AAA-ICDR (16%) and the LCIA (11%). In terms of case numbers, that study found that AAA-ICDR was the most frequently used arbitral institution. Asia-Pacific corporations participating in the study were found to prefer submitting their disputes to CIETAC, ICC or LCIA arbitration.

One very important point must be kept in mind in relation to arbitral institutions: like many aspects of arbitration procedure, an institution can only be utilised if the parties have specifically chosen to use it. It is not possible for an institution to administer an arbitration unless the parties have agreed. Since it is usually difficult for parties to agree after a dispute has arisen, institutions are normally chosen in advance, for example in an arbitration clause contained in a contract.

3.5 Sources of international arbitration procedural law and practice

International commercial arbitration procedural law arises from private (as opposed to public) international law so it always has some connection to one or various domestic legal systems. In that sense it is not truly international in the way that public international law operates between sovereign states. However, the practice and culture of international arbitration procedure has made it transnational. This is due to the nature of the sources of international arbitration procedural law, including the fact that various international conventions and widely adopted model laws are involved and that there are supranational practices.

95 PricewaterhouseCoopers and Queen Mary College, 2006, ibid., p. 15. Similar results were obtained in a prior version of that study: PricewaterhouseCoopers and Queen Mary College, 2006, ibid., p. 12.
96 Ibid. (2008 version of the study).
97 Ibid.
98 This section addresses the sources of international arbitration procedural law, rather than issues relating to the determination and application of the substantive law that the arbitrators will apply in deciding a case. The latter is the subject of Chapter 3 of this book.
100 B Oppetit, Théorie de l’arbitrage, PUF, 1998, p. 109. This English translation of Oppetit’s French text was made by Silva Romero (2008) ibid., p. 34.
101 Section 2.3.5.
102 A list of countries whose arbitration laws are based on the Model Law is provided at Appendix 3.
3.5.2 International legal sources

The Model Law is not an international law. It applies as national law only in the states that have adopted it. International conventions (also referred to as treaties) are different. An international convention attains the status of international law usually when it is ratified by the minimum number of states necessary for it to enter into force. Ordinarily, an international convention that has entered into force regulates the relations only between those state parties to it.

An international convention may also have domestic effect because individuals may be able to rely on the treaty provisions before domestic courts. To give a treaty domestic effect, the state party to the convention must usually implement the terms of the convention in its territory by enacting domestic legislation. As an example, in Australia the New York Convention has been implemented through the International Arbitration Act 1974. This domestic enactment enables Australian courts to entertain enforcement proceedings based on the New York Convention, which is an international law.

An important distinction between an international convention and a model law is that a state adopting a model law can decide to modify any term it chooses. International conventions cannot be modified by the country signing them, except to the extent that the convention permits modifications or reservations.

The most important international convention in relation to international commercial arbitration is the New York Convention. The Geneva Conventions of 1923 and 1927, although now almost obsolete, are also international legal sources of arbitration law. Regional conventions are also relevant. These include the 1961 European Convention on International Commercial Arbitration and the 1975 Inter-American Convention on International Commercial Arbitration, but they do not affect the Asia-Pacific region.

Other international sources that should be mentioned are free trade agreements and investment treaties. Examples include the 2003 Singapore-Australia Free Trade Agreement, the 2009 Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area and the 2005 Agreement Between the Government of the Republic of Singapore and the Government of the Republic of Indonesia on the Promotion and Protection of Investments. These become international law as between the parties to them. The breach of a free trade agreement or an investment treaty obligation may give rise to an international arbitration between a state party to that treaty and an investor that is a national of the other (or another) state party. Breach of treaty obligations where two states are involved might alternatively give rise to a case before the world's international court – the International Court of Justice.

All of the above international treaties or conventions are international legal sources of arbitration law.

3.5.3 Supranational and quasi-legal sources

To understand supranational and quasi-legal sources one needs to think much more broadly about the law than one does in domestic legal practice. Moreover, the notion and concept of supranational sources are understood more naturally by civil lawyers than common lawyers. Civil legal systems are generally more familiar with the concept of 'soft laws'. These include documents, texts, academic articles, working groups, studies, international practices etc. They all form an important part of the law and practice of international arbitration but are not strictly law at all.

The simplest example might be the rules of international arbitral institutions. These are not law. They will only apply if the parties have adopted them as part of their contract. Thus they apply as contractual provisions rather than law. However, the worldwide existence and use of these rules have created standards of practice which influence arbitration procedures even when the rules in question do not apply contractually in a given case. Thus a party or arbitrator might refer to a well-known provision of the UNCITRAL Arbitration Rules as reflecting a general principle of international commercial arbitration, even though the UNCITRAL Arbitration Rules do not directly apply as a matter of contract to the arbitration in question.

Similarly, although the Model Law only becomes law once it is adopted by a state, it is also a supranational source of arbitration law given that it was developed by a highly respected international organisation (UNCITRAL) and has been subsequently adopted by so many countries. This means that even if the Model Law is not applicable in a particular arbitration its provisions can, like the UNCITRAL Arbitration Rules example given above, be used as an expression of the general principles of international arbitration law. The Model Law is therefore a supranational source of international arbitration law both (i) because so many arbitration laws are based on it and (ii) because it is a reflection of general principles of international arbitration law.

Another important supranational source is comprised of journal articles, books and other publications by experts. Articles and books will often be cited by arbitral tribunals in their awards and by lawyers in their legal briefs. They might, for example, be cited as authority for a proposition in relation to arbitral practice to support a party's position as to what procedure an arbitral tribunal should adopt. A notable annual publication is the International Council for Commercial Arbitration's ('ICCA') Yearbook of Commercial Arbitration. It has been an important source of arbitral jurisprudence since it was first published in 1976. It reproduces extracts of arbitral awards, court decisions on arbitration, court decisions on multilateral arbitration conventions, commentary on court decisions on the New York Convention, and updates on developments in arbitration law and practice, including investment treaty arbitration.
Several supranational sources of arbitration law result from industry self-regulation. These include arbitral and other institutions (such as ICCA and the International Bar Association ('IBA')) which conduct conferences, organise working groups and committees, publish arbitration awards, and accordingly become a source of authority regarding the practice of international arbitration. These various associations, committees and working groups often produce documents which become important parts of arbitration practice. The 1999 IBA Rules on the Taking of Evidence in International Commercial Arbitration (which were updated in 2010) and the 2004 IBA Guidelines on Conflicts of Interest in International Arbitration are good examples of supranational sources of international arbitration law developed by IBA working groups. Similarly, the ICC Commission on Arbitration publishes the results of special studies on particular aspects of arbitration. An example is the ICC Report on Drafting Arbitral Awards. All of these rules, guidelines and publications are not law in the sense that they do not govern any international arbitration proceedings unless the parties specifically agree to adopt them. However, when a highly esteemed group of international lawyers have painstakingly formulated such guidelines or rules, arbitrators will be tempted to be guided by the practices set out in them even if they do not apply specifically in a given case.

The production of these guidelines and rules etc. is sometimes criticised as reducing the flexibility of arbitration and making it too formalistic and 'judicialised'. On the other hand, some consider that such documents are sufficiently flexible and provide invaluable guidance to those who have less experience in arbitration. Providing such guidance for parties, arbitrators and lawyers helps to maintain quality and equality in the arbitral process. It is akin to a right of access to the law.103

Seminal cases from national jurisdictions constitute another supranational source of arbitration law. Although these will not be binding on a foreign arbitral tribunal, they may be persuasive and have the effect of changing international arbitration practices. A seminal case may trigger working groups or studies such as those mentioned above, and/or the writing of academic articles. A few examples of well-known domestic court decisions on arbitration include the US Supreme Court decisions of Mitsubishi v Chrysler104 and Hall Street v Mattel,105 the English House of Lords decisions of Coppee-Lavalin v Ken-Ren106 and Premium Nafta v Fiona Trust,107 the French Cour de Cassation decisions of

104 Mitsubishi Motors v Soler Chrysler-Plymouth (1985) 105 Supreme Court Reports, 3346.
105 Hall Street Associates, LLC v Mattel Inc, 128 S Ct 1396, 2008 (US Supreme Court).
107 Premium Nafta Products Ltd v Fili Shipping Co Ltd [2007] 2 All ER (Comm) 1053 on appeal from Fiona Trust & Holding Corporation v Privav (2007) 4 All ER 951.
110 Siemens AG and BUMI Industriewagen GmbH v Duco Consortium Construction Co, Cour de Cassation (1ere Ch Civ) 7 January 1992.
113 [2004] 1 NZLR 95.
114 PT Garuda Indonesia v Birgen Air (2002) 1 SLR 393 (Singapore Court of Appeal).
115 SBP & Co v Patel Engineering 2005 8 SCC 618.
116 See generally Park, op. cit. in 103, p. 141 et seq.
117 See Section 2.1 above.
transnational economic climate in the late 18th and early 19th centuries. It also has a traditionally less confrontational approach to dispute resolution and less rigid approach to the interpretation of contractual obligations.\textsuperscript{118} These factors, among others, delayed the growth of international arbitration in this region. But as we will see below an 'arbitration craze'\textsuperscript{119} in the last 20–30 years has made up for that initially slow growth.

Asia did experience some international arbitrations in the early 19th century, particularly in its trade disputes with parties from Europe. It is interesting to note that the ICC Court administered its first case involving an Asian party in its inaugural year, 1923. The claimant was Thai, the respondents were from the US and Portugal, and the dispute related to the delivery of lanterns. In addition, as noted above, several states from this region were parties to the first international instrument facilitating international arbitration: the 1923 Geneva Protocol on Arbitration Clauses. Asia-Pacific signatories included then British colonies such as Sri Lanka (at that time called Ceylon), Myanmar (at the time called Burma), New Zealand and India, as well as Japan and Thailand. The parties to the 1927 Geneva Convention on the Execution of Foreign Arbitral awards were similar, excluding Japan. Some early examples of Asian arbitration institutions include those of Japan (1950)\textsuperscript{120}, China (1956), and India (1965).

The Asia-Pacific international arbitration climate has changed dramatically in the last 20–30 years. The region is now a major user of international arbitration, with at least 500 international arbitrations taking place here each year. The background to that growth should be considered alongside the Asian international economic climate and legal framework.

With Japan taking the lead, Asia started to gain international economic significance after World War Two, and saw particularly impressive economic growth in the last few decades, up until the 2008 financial crisis. Japan's success spread to South Korea, Malaysia, Singapore, Thailand, and Taiwan. China and India are now among the world's top economies. Cambodia is the latest country to become one of Asia's economic hotspots, attracting investment from neighbours such as China, Korea, Japan, Singapore and Malaysia. Cambodia's economy grew at an average rate of 9.8% from 2003–2008. Asia is also home to two of the world's principal commercial and financial centres: Singapore and Hong Kong, which have consequently become two of the world's most prominent and effective seats for international arbitrations.

Much of the regional growth in the last few decades has been connected to strong international trading, exports and inward investment to develop infrastructure. An obvious consequence of this kind of economic growth is increased international commercial transactions. These included simple international sales of goods and services transactions, construction of manufacturing facilities and technology transfers. Infrastructure projects have been particularly strong in the Asia-Pacific in the past 10–15 years. With these transactions came related commercial activities: international financing, cooperation mechanisms like joint ventures and shareholders' agreements, and mergers and acquisitions. International transactions sometimes lead to international commercial disputes; and that creates a need to resolve them in a manner that is commercially sensible and legally recognisable throughout the globe. As a result of this need, the Asia-Pacific was on its way to becoming an important international commercial arbitration region by the early 1990s; and since then it has blossomed. This can be seen in several ways.

First, numerous Asian legal systems are now 'arbitration-friendly' (i.e. providing a legal system that is supportive of arbitration), the courts and legislators being conscious of the need to keep abreast of international developments. Almost all are parties to the New York Convention.\textsuperscript{121} Concerning local international arbitration laws, there has been a raft of legislative changes based on the internationally recognised Model Law. Between 1990 and 2006, legislation based on the Model Law was adopted in Bangladesh, Cambodia, Hong Kong, Macau, India, Japan, Korea, Malaysia, The Philippines, Singapore, Sri Lanka, Thailand, Australia and New Zealand. New Zealand was the first country in the world to adopt the 2006 amendments to the Model Law. Hong Kong is expected to adopt the 2006 amendments in late 2010 or early 2011\textsuperscript{122} and both Singapore and Australia adopted some of these amendments in 2010.\textsuperscript{123} It is also anticipated that the individual states and territories of Australia will shortly adopt the Model Law as their arbitration laws, to replace rather outdated uniform State legislation. Vietnam passed a new, more modern arbitration law in mid 2010, which takes effect from January 2011. The law was inspired by the Model Law but does not reflect all of its provisions. India's law ministry in early 2010 released a consultation paper on proposed amendments to the arbitration law in India. Meanwhile Taiwan, while not adopting the Model Law, enacted an arbitration-friendly law in 1998. Similarly, several key principles in the 1994 Chinese arbitration law appear to have been inspired by the Model Law.

The widespread adoption of the Model Law was an essential ingredient for the growth of arbitration in this region. Morgan describes it as having been critical.\textsuperscript{124}

\textsuperscript{118} The influence of culture on the development of international arbitration in Asia is discussed below at Section 4.2.
\textsuperscript{120} It should be noted that the date given in Appendix 1 is for the JCCA, which was established in 1953.
\textsuperscript{121} Australia, Bangladesh, Brunei Darussalam, Cambodia, China, Hong Kong, India, Indonesia, Japan, Laos People's Democratic Republic, Malaysia, Nepal, New Zealand, Pakistan, Philippines, Republic of Korea, Singapore, Sri Lanka, Thailand and Vietnam.
\textsuperscript{122} The proposed amendments are summarised by L de Gerniny, 'Arbitration Law reform in Hong Kong: Furthering the UNCITRAL Model Law', (2008) July Asian Dispute Review 73. The second reading speech of the Bill is expected to take place in October 2010.
\textsuperscript{123} In Singapore the major changes relate to the definition of 'arbitration agreement', court-ordered interim measures and the designation of an officer of an arbitration institution to authenticate arbitration agreements and awards. In Australia, the International Arbitration Amendment Bill was passed by the Commonwealth Parliament. It modernises and corrects certain aspects of the Act to make Australian international arbitration law more arbitration-friendly including, like Singapore, the definition of arbitration agreements and interim measures.
INTERNATIONAL COMMERCIAL ARBITRATION

Being virtually a model law jurisdiction or having the UNCITRAL model law as a 'trademark' over territories' arbitration law, is critically important from the standpoint of attracting international arbitration business to an arbitration centre. This was a clear motivation to Hong Kong and Singapore.

The Asia-Pacific now stands out as the principal Model Law region of the world, with the highest concentration of Model Law countries. This shows its commitment, at a regional as well as national level, to developing a sound climate for efficient international dispute resolution, in turn facilitating healthy international trade.

As regards investor-state arbitration, the Asia-Pacific had an early start - one of the earliest ICSID awards concerned an Asian state.125 Thereafter, this type of arbitration was slow to take off in this region. Much like international commercial arbitration, there appears to be a lag in Asia-Pacific practice compared to Europe and the Americas. Most Asia-Pacific states have ratified the ICSID Convention, with the exceptions of Thailand and India. Many have, in addition, ratified a considerable number of bilateral investment treaties ('BITs'). Nonetheless, compared with other regions, ICSID arbitration claims against states from the Asia-Pacific have so far been relatively infrequent. Similarly, in comparison with other regions, there is a relative paucity of ICSID arbitration claims instituted by Asia-Pacific companies or nationals. Given the number of investment treaties signed in this region, it is to be expected that the Asia-Pacific will in due course follow the prodigious rise of investment arbitration around the globe.126

Singapore and Hong Kong are the leading arbitration jurisdictions in the Asia-Pacific, resulting from several factors including geographic convenience, prominence as global financial centres, English as the main business language, excellent international arbitration laws, and efficient, supportive, corruption-free courts. Both cities are unqualifiedly viewed as world-renowned seats for international arbitration and are regularly chosen as the seat even when they have no connection whatsoever to the dispute or any of the parties involved. Both cities are constantly looking for ways to keep these reputations, as can be seen from recent developments in each jurisdiction.

In April 2008, the Singapore Government announced two new developments intended to make the country even more attractive for international arbitration: a tax incentive for firms carrying out international arbitration work with hearings in Singapore and a work pass exemption for those entering Singapore for arbitration and mediation services. In mid-2009, a state-of-the-art, purpose-built arbitration hearing centre called Maxwell Chambers opened for business. It houses regional offices of international arbitration institutions such as the Singapore International Arbitration Centre ('SIAC'), the International Centre for Dispute Resolution ('ICDR'), the ICC Court, and the Permanent Court of Arbitration ('PCA') as well as arbitration bodies such as the Singapore Institute of Arbitrators. In mid-2009, the Singapore Government also announced that it would be revising Singapore's arbitration law to make it even more arbitration-friendly, and to include several of the 2006 amendments to the Model Law. The International Arbitration (Amendment) Act 2009 came into force on 1 January 2010. Hong Kong's importance was confirmed when the ICC Court decided in 2008 to open an office of its Secretariat there, fully integrating the ICC into the Asia-Pacific network of international arbitral institutions. It is the first time in the ICC Court's history (i.e. since 1923) that the Secretariat will have case administration staff based outside ICC Headquarters in Paris. Although Hong Kong is now a part of China, its laws and courts still operate according to the English legal system. After its handover to China in 1997, one arbitration-related problem arose because the New York Convention ceased to apply to the enforcement of Hong Kong awards in mainland China and vice versa. While this caused some initial concerns, it was resolved by the Memorandum of Understanding on the Arrangement Concerning the Mutual Enforcement of Arbitral Awards between mainland China and Hong Kong, signed on 20 June 1999. The arrangement confirmed the general enforceability of Hong Kong arbitral awards in mainland China and set out a detailed procedure (including time limits) for seeking enforcement. Mainland China and Macau subsequently signed a similar agreement called the Arrangement on Reciprocal Recognition and Enforcement of Arbitral Awards.127 Hong Kong is currently undertaking a major review of its arbitration laws and will likely adopt most of the 2006 Model Law amendments.128

A number of arbitration institutions have evolved or been rejuvenated in the Asia-Pacific over the last 20–30 years. Many have recently modernised their arbitration rules, adopting sound international standards. The Hong Kong International Arbitration Centre (HKIAC) amended its rules in 2008. The new HKIAC Administered Rules represent a comprehensive overhaul of its former version which incorporated the 1976 UNCITRAL Arbitration Rules. Other updates include the Japan Commercial Arbitration Centre ('JCCA') in 2008 (which also amended its rules for administering UNCITRAL arbitrations in 2009), SIAC in 2007 and again in 2010, Korean Commercial Arbitration Board ('KCAB') in 2007,129 Australian Centre for International Commercial Arbitration ('ACICA') in 2005 (which also released rules for expedited arbitration in 2008)130, Indonesian Arbitration Board ('BANI') in 2003, and Kuala Lumpur Regional Centre for Arbitration ('KLRC') in 2003 with a revision in 2008 and a further revision in 2010 adopting the 2010 UNCITRAL Arbitration Rules. In 2008, the Beijing Arbitration Commission ('BAC') modernised its 2001 rules so that parties can select

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128 The proposed amendments are summarised by de Germiny, op. cit. fn 122.
129 Under Article 41 of the Korean Arbitration Act, arbitration institutions must obtain the approval of the Chief Justice of the Korea Supreme Court to establish or amend arbitration rules.
 arbitrators who are not on BAC’s ordinary panel for international cases and can agree on increased remuneration for foreign arbitrators. The China International Economic and Trade Arbitration Commission (CIETAC) Rules were amended six times between 1989 and 2005, and now exist in English as well as Chinese. Finally, the LCIA set up a branch office in Delhi, India in early 2009, and released its special India arbitration rules in early 2010.

The Arbitrators and Mediators Institute of New Zealand (‘AMINZ’) established in 2007 an innovative private arbitration appeals tribunal (‘AAT’). It was given legislative enactment by the Arbitration Amendment Act 2007, which amended New Zealand’s Arbitration Act 1996. Parties can agree to allow appeals on questions of law to the AAT. The system is supervised by the AMINZ Court of Arbitration, which acts as an appointing authority. The parties’ agreement to use the AMINZ AAT system implies a waiver of the possibility of appeal to the New Zealand High Court in relation to both the original award and the award rendered by the AAT.131

Apart from arbitral administering institutions, related associations and organisations have grown up to accommodate and serve the exponentially growing arbitration industry in the Asia-Pacific. In our view, three of the most significant are the Asia-Pacific Regional Arbitration Group (APRAG), the Austrasian Forum for International Arbitration (‘AFIA’) and the Vis (East) Moot Competition, which are each explained below.

APRAG was established in 2004 as a regional federation of arbitration associations. Its membership consists of approximately 30 arbitral institutions and organisations. APRAG promotes an awareness of international arbitration and, in so doing, aims to improve professional standards and knowledge. It holds conferences related to arbitration and publishes a quarterly newsletter with information about developments in the region. It also has observer status at UNCITRAL Working Group II. More information about APRAG and copies of its newsletters can be found at www.aprag.org.

AFIA was also established in 2004 as a networking and educational forum for the next generation of Asia-Pacific arbitration practitioners. The object of AFIA is principally to introduce and promote international arbitration to younger practitioners in a non-intimidating manner. It holds three or four symposia each year, which have so far taken place in Hong Kong, Kuala Lumpur, Melbourne, Seoul, Shanghai, Singapore and Sydney. AFIA symposia are not like conferences and are conducted in an informal manner. More information can be found at www.afia.net.au.

Another sign of the Asia-Pacific’s prominence was the launch of the Willem C Vis (East) International Arbitration Moot Competition in 2002. Since its inception, it has been held every year in Hong Kong. It is a sister competition to the most prestigious and best attended international arbitration event for law students and their professors. To this day, the Vis Moot has been held only in Hong Kong and Vienna, Austria. In 2010, 75 law schools from 17 different countries around the globe competed in the Vis (East) Moot.

Apart from APRAG, AFIA and the Vis (East) Moot, there are numerous signs of this growth in arbitration support associations. The East Asian Branch of the Chartered Institute of Arbitrators, established in 1972, also plays a role in the education of arbitrators. Other examples include the ICC Court’s opening of a representative office in Asia in 1997132 (initially in Hong Kong but now in Singapore); the launch in 2002 of a large and active Intercollegiate Negotiation and Arbitration Competition held each December in Tokyo; the creation in 2003 of an Arbitration Council in Cambodia, followed by the decision in 2009 to establish Cambodia’s first arbitral institution, the National Arbitration Centre, which will be supported by the IFC, a member of the World Bank Group; the establishment in 2007 of the Karachi Centre for Dispute Resolution; and the creation in 2008 of an Asian Chapter of the ICC Young Arbitrators’ Forum.133 Finally, international arbitration has been added to the curricula of most leading universities in the Asia-Pacific in the last 10–15 years.

All this healthy activity has contributed to substantial growth in the number of cases submitted to Asia-Pacific arbitral institutions. For example, HKIAC had a humble nine cases in its inaugural year 1985; 273 international arbitrations in 2003; and 309 international arbitrations in 2009. In 1993, SIAC had 20 cases. In 2003 it received 41 new international arbitrations and 114 in 2009. CIETAC handled 37 cases in 1985, and in 1995 that figure was over 1000. CIETAC’s international case load has also increased. Between 2001 and 2008 it has steadily received between 422 and 562 new international cases each year, with 559 in 2009. The Beijing Arbitration Commission, with 11 international cases in 2000, received 72 in 2009. Between 2000 and 2008, KCAB received an average of 55 cases per year, with 78 international arbitrations in 2009.

The ICC’s statistics show marked growth in its arbitrations from this region. In 1980, only 22 parties to ICC arbitrations (or 4.7% of all parties to ICC arbitrations for that year) came from South and East Asia and Oceania.134 Ten years later, in 1990, that figure had increased by more than five times to 111 parties (or 11.2%); in 2000 it rose to 152 parties (or 11.6%). By 2009, the number of South and East

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132 It should be noted that this is a marketing office, and is to be distinguished from the Hong Kong office of the ICC Court’s Secretariat which opened in 2008, as mentioned above.

133 An active Regional Coordinating Committee was appointed for the Asian Chapter in October 2008. Its three members are based in Tokyo, Hong Kong and Mumbai. It is responsible for the development of ICC YAF in Asia and organises events and develops networks for younger lawyers and in-house counsel. More information can be found at www.icc-yaf.org.

134 In the ICC’s statistical system, South and East Asia includes Bangladesh, Brunei, Cambodia, China (People’s Republic)/Hong Kong, India, Indonesia, Japan, South Korea, North Korea, Lao, Malaysia, Maldives, Nepal, Pakistan, Philippines, Singapore, Sri Lanka, Taiwan ROC, Thailand and Vietnam. Oceania includes Australia, Cook Islands, Fiji, Marshall Islands, New Zealand, Northern Mariana Island, Papua New Guinea, Vanuatu and Western Samoa.
Asia and Oceania parties had reached 284 (or 13.5%). Similar growth trends can be seen with respect to the location of ICC arbitration seats. In 1980, no ICC arbitrations were seated in South and East Asia and Oceania. In 1990 eight ICC arbitrations were seated in the region (or 3.2%); and in 2000 there were 13 (or 10.7%). That figure had increased six fold by 2009 when 78 new ICC arbitrations (or 12.4%) were seated in the region. Those 78 cases were seated in 11 different countries but the most common Asia-Pacific seat for ICC arbitrations is Singapore (38 arbitrations in 2009 or 6.03% of all 2009 ICC cases worldwide).

1.148 At the time of writing, all Asia-Pacific arbitral institutions, including the ICC’s Hong Kong branch, reported growth for the first half of 2010. The institutions put this growth partly down to disputes having increased as a consequence of the global economic recession, but it confirms the extent to which parties to Asia-Pacific related disputes are choosing arbitration as their preferred method of dispute resolution.

1.149 Despite all these encouraging signs, certain regional jurisdictions still have some distance to go before they can offer an arbitration-friendly legal environment. Some countries are not yet parties to the New York Convention. These include Myanmar and Taiwan. Furthermore, ratifying the New York Convention does not guarantee enforcement of foreign arbitral awards. Problems can be faced enforcing awards in China, Thailand, India, Indonesia and Vietnam, which have all ratified the New York Convention. In a study on the views of in-house counsel at leading multinational corporations published in 2008, the respondents perceived China, India and Russia as the three countries that are most hostile to enforcement of foreign arbitral awards.

1.150 Courts in India, Indonesia and the Philippines have on occasions purported to assert jurisdiction to set aside awards not made in those jurisdictions. This conflicts with the universal principle of international arbitration law, reflected in the Model Law, that only a court at the seat of arbitration can set aside an international arbitral award.

1.151 Furthermore, Indonesian, Indian, Bangladeshi and Pakistani courts have on occasion issued injunctions to prevent arbitrations from proceeding despite agreements to arbitrate disputes.

1.152 The reality, however, is that curial interference has occurred in spite of ostensible support of arbitration and express support in legislation. While the right phrases have been used and repeated, the actual judicial practice has sometimes demonstrated overreach and an approach that can be said to be more visceral than cerebral. Part of the problem has been attributed to overcoming residual historical distrust of arbitration. The other part may be attributed to a misplaced sense of judicial parochialism and perhaps unfamiliarity with the arbitration process. However, on the whole, we do see a growing trend towards pro-arbitration sentiments and practices pursuant to the increasing support of arbitration in India, Indonesia and the Philippines. However, there are some signs that courts in these countries are becoming more supportive of arbitration.

In the Philippines, the legislature has taken the right approach. Section 25 of the Alternative Dispute Resolution Act 2004 states that “In interpreting the Act, the court shall have due regard to the policy of the law in favour of arbitration”. However this has not prevented some questionable decisions from the Philippines. For some interesting comments on the teething problems of modern international arbitration in India, see PS Narain ‘Finality in India: The Impossible Dream’, (1994) 10 Arbitration International 4, at p. 373.

1.153 Hwang and Lee, op. cit. fn 142, p. 876.
The problems mentioned above are for the most part in the process of being rectified effectively. The international arbitration community, and particularly that in the Asia-Pacific, is successfully taking steps towards better educating legislatures, judiciaries, lawyers and companies in those jurisdictions where it is necessary. The trend for law schools in the Asia-Pacific to offer international arbitration on their curricula should ensure that the future generation of practitioners will be well versed in arbitration.

Finally, for cultural, political or other reasons, arbitration has not taken off to the extent that might have been expected within one of Asia’s superpowers: Japan. Nottage points out that Japanese companies often now include arbitration clauses in their cross-border contracts and appear regularly in arbitral and court proceedings around the world, but that ‘arbitration has failed to take root in Japan’. He cites a key reason as being a general disinterest by the Japanese government but says that the modern, effective, international (and domestic) arbitration law adopted in 2004 might well change this, attracting ‘perhaps larger and more complex matters where Japan’s mania for minutiae could actually become a comparative advantage’.

Another historical reason might be an unexpected side effect of limits on foreign lawyers practising in Japan, although an amendment in 1996 clearly allows them to represent clients in international arbitrations, and full profit-sharing partnerships with Japanese lawyers have been permitted since 2004.

4.2 Asian culture and international arbitration

A question is often raised about differences in the dispute resolution approaches or cultures between different countries and regions and the impact of those differences on international arbitrations. Given that the Asia-Pacific is now a vibrant region for international arbitrations to take place, in this section we examine the influence of Asian culture on international arbitration and the influence of the Western, particularly Continental European, approach.

4.2.1 Asian social, religious and political cultural diversity

The Asian countries and cultures that are the focus of this book are extraordinarily diverse. They are arguably far more diverse than in other regions of the world with established international arbitration environments. Asia is probably more diverse than Europe for example, even counting Central and Eastern Europe. One need only consider the diversity of Asian languages and religious influences. There is also intense cultural diversity within many Asian countries, notably China, India, Indonesia and Japan.

All this intra-country and inter-country diversity adds to the seemingly impossible task of proclaiming common threads between Asian cultures. What is
certain is that Asian culture is very different from Western culture. As Taniguchi
elegantly puts it:\footnote{151}

Even the Far East, including China, Korea and Japan which have been heavily influenced
by Confucianism for centuries, is not uniform. Each country has a language and culture
distinctively different from that of others. When we view broader Asia, it is impossible to
characterise it except as being 'non-Western'. Even the degree and nature of non-
Westernness vary country to country. Moreover, some countries like Singapore are
multicultural. \ldots \text{Nevertheless, for an Asian, Asia is Asia. We Asians feel more at home}
in Asia than in Europe or in America. Despite all kinds of differences we still seem to
share more in common with other Asians than with non-Asians.}

Any comparison of social, religious or political cultures is, in any event, outside
the scope of this book. What we rather comment on in this section is the culture of
dispute resolution and mainly international arbitration in Asia.\footnote{152}

4.2.2 Asian dispute resolution culture

History and culture strongly influence the law as well as commercial and business
practices. There is little doubt that each Asian sociopolitical environment has
influenced the development of its own unique approach to dispute resolution
and evolution of a legal system. The diversity between Asian cultures has in
turn created substantial, corresponding diversity between dispute resolution
and legal systems.

As others explain:\footnote{153}

Certainly we can identify some shared cultural and legal traditions across the region,
such as those of Islamicisation in parts of South East Asia or the Sinic roots of law and
legal culture in North East Asia. The customary law developed within ethnic groups
that transcends national borders such as those of commercial networks in the Chinese
Diaspora is a supra-national phenomenon. The rise of lawyers and multi-jurisdictional
law firms in Asia is also likely to lead to some convergence of forms and techniques
for high-value cross-border transactions within Asia. However, at the foundational
level if we compare contemporary legal systems and approaches to law in Australia
and Taiwan; in Japan and Indonesia; or in Mongolia and Hong Kong SAR, we are
still struck by dramatic differences. It is very difficult to identify any common cultural
and legal norms or sources of positive laws that are uniformly formed from the former
Soviet Far East to Sulawesi, even though there are dense linkages in subgroups, such as
those sharing a common colonial heritage. Nonetheless there is no organic relationship
linking the cultural and legal histories of all the countries loosely identified as 'Asia'.

While we attempt to identify major influences on the legal systems and interna-
tional dispute resolution cultures of Asia, we are conscious of the brevity of

\footnote{151} Taniguchi, 1996, op. cit. fn 23, p. 67.

\footnote{152} We focus on South and East Asia itself here, to the exclusion of former British colonies that are physically
in the region like Australia and New Zealand, which took British culture and, as we will see further below, helped to spread the influence of European arbitration culture into Asia.

\footnote{153} V. Taylor and M Pyles, The Culture of Dispute Resolution in Asia, in M Pyles (ed), Dispute Resolution
in Asia, 3rd edn, Kluwer Law International, 2006, p. 7. See also at p. 1 where they speak of the 'economic and political
factors that influence the design of legal institutions and constitute drivers for legal convergence and
divergence within individual Asian jurisdictions today'.

\footnote{154} For a detailed explanation of the difference between Eastern and Western cultures of dispute resolution, see SP All, 'Approaching the Global Arbitration Table: Comparing the Advantages of Arbitration as Seen by Practitioners in East Asia and The West', (2009) 28 Review of Litigation 791, particularly at p. 803 et seq.

\footnote{155} Taniguchi, 1996, op. cit. fn 23, at p. 31. See also at p. 36 ('What I call the 'conciliation culture', on the
other hand, is based on a diametrically opposed ideology. It stems from a deep mistrust in any pre-set rules of
law and the concept of right as an absolute entitlement.').

\footnote{156} Grant Kim 'East Asian Cultural Influences' in M Pyles and M Moser (eds), The Asian Leading Arbitrators' Guide to International Arbitration, JurisNet, 2007, pp. 27-28. See also M Pyles and M Moser's 'Introduction' in the
same book at p. 2 and, regarding China, Jiangzhou Tao, op. cit. fn 5, pp. 10-100; Bobby Wong, 'Traditional Chinese Philosophy and Dispute Resolution', (2000) 30 Hong Kong Law Journal 304, at p. 306. For a more
detailed analysis see SP All, op. cit. fn 154, at p. 812 et seq.
it more cheaply and quickly in a non-court setting. Such differing perspectives can arguably be applied not only to explain patterns in commercial arbitration, but also investment arbitration involving Japanese or other Asian parties. In a detailed study of the reasons behind the Japanese business world’s apparent adversity to litigation, Tony Cole contends that Japan’s arbitration framework does not suffer from the alleged institutional obstacles identifiable in court litigation, thus rejecting the second view noted by Nottage. Cole analyses the litigation adversity with reference to Japanese cultural issues and the relationship between the law and society.

Whatever the reason behind it, a preference for softer, conciliatory mechanisms is known to lie behind the Asian culture of dispute resolution, at least historically. After a thoughtful analysis, Ali concludes that:

The unique underpinnings of the concept of dispute resolution in East Asia have had a long lasting impact on its legal system and continue to impact the process of arbitration in the region. In comparison, Western emphasis on a clear ‘winner’ and ‘loser’ and limited emphasis on compromise has given rise to institutional bifurcation of conciliation and arbitration processes.

However, Kim points out that Asian jurisdictions have become much more litigious in recent years, as reflected, among other indicators, in the increased case loads of Asian arbitral institutions. He also observes, in our view quite correctly, that it is not clear whether a presumed traditional preference for amicable forms of dispute resolution would have any influence on international arbitrations in Asia and/or involving Asian parties.

That background might have an impact in some instances – particularly where all of the parties, their lawyers and the arbitrators are from one or more Asian cultures where mediation is ingrained as the norm. The arbitration might even take on a kind of hybrid between arbitration and mediation (so-called ‘armed’) that is rarely seen in Western arbitrations but is said to be more popular in this region. This might also explain why many of the region’s Model Law countries have enacted provisions in their domestic legislation enabling arb-med procedures. Despite these assertions and legislative developments, at the time of writing arb-med was still infrequently practiced in international arbitration proceedings in the Asia-Pacific, with the exception of China.

Generally, once arbitration has commenced the parties must accept that they have a legal dispute. The embarrassment of not being able to rely on ‘il’ (as described in Kim’s quotation above) would therefore irreversibly have occurred. For that reason, it is sometimes even said that Asian parties are less likely to settle their dispute after having commenced litigation or arbitration, whereas Western parties often do settle after proceedings are commenced. Thus while the common Asian stereotype of reluctance to litigate may reduce the number of arbitrations that is commenced (although there is no complete empirical or even unequivocal anecdotal evidence for this), the culture of international arbitration once it begins is not, in our view, necessarily affected by it in a systematic – as opposed to occasional or individual – manner.

It is even possible that the historical dislike of harsh, legal confrontation has transformed into a preference for non-court based dispute resolution; that is, a preference for arbitration over litigation. Pyles and Taylor, while wary of generalisations about a preference for non-confrontational dispute resolution in Asia, consider that:

The perceived ‘Asian’ preference for non-court dispute resolution is pragmatic, as much as cultural. In most of Asia courts do not provide dispute resolution services that are market-responsive, reliable or reciprocal. For these reasons commercial arbitration remains a default choice in most cross-border transactions in the region.

It seems that the explanation offered by Pyles and Taylor might hold true in Indonesia. Karen Mills notes that ‘Indonesia is not, on the whole, a litigious culture. [Its] underlying philosophy, Pancasila, calls for deliberation to reach a consensus and discourages contention’. But she concludes that the reluctance to use Indonesian courts is more generally based ‘upon the uncertainty and unpredictability of court judgments and the inordinate amount of time it can take to reach a final and binding decision through the judicial system’.

Leaving aside Confucian and other historical traditions, one cannot ignore that Asian legal and business cultures were strongly influenced by their colonial
past. The particular European empire which colonised each Asian country shaped the growth of its legal system significantly, arguably more so than anything pre-colonisation. 169 Several Asian legal systems were British colonies or otherwise saw a strong influence from the common law (e.g. Singapore, Hong Kong, Australia, New Zealand, Brunei, Malaysia, India and Bangladesh) while others inherited civil law traditions (e.g. Japan, South Korea, China, Taiwan, Thailand, Indonesia, Vietnam and Laos). The Philippines and Sri Lanka can be put into both categories. Many Asian jurisdictions were also influenced by associated political or economic (socialist, democratic, capitalist etc.) and/or religious (Hindu, Buddhist, Muslim, Christian etc.) factors.

Pryles and Taylor correctly note that ‘today we can still classify Asian legal systems by their predominant source of law; former colonial influence (or voluntary borrowing) and contemporary religious or ideological influence’ and that despite the diverse range of social, religious, political and legal influences, ‘the point here is that most [Asian] systems fit within more than one category’. 170 The overlap in those colonial influences on South-East Asian dispute resolution cultures has been analysed in closer detail elsewhere. 171

Those varying influences combined with radical cultural differences to begin with have left so much diversity in Asian legal systems and attitudes to the law that it is almost futile to compare their general dispute resolution cultures. When it comes to comparing international arbitration cultures, however, the task is simplified by the heavy influence of Europe, which is the ultimate source of the legal and practical framework for international arbitration culture worldwide.

As explained above, 172 Asia now has several thriving domestic or regional arbitration centres and a thriving international arbitration culture. But today’s arbitration craze did not happen overnight and without guidance from the other side of the world. When considering the culture of international arbitration in Asia, one therefore cannot ignore broader, historical international influences. The most significant in this sense is that modern international arbitration evolved in the West. As Taniguchi notes, 173

There has been, however, a distinct ‘commercial arbitration culture’ in the West, and through the reception of the western legal system by the non-western world, arbitration has become a legitimate method of dispute resolution virtually everywhere in the world with a varying degree and scope of its application. . . . The present trend appears to be towards a single international arbitration culture. The New York Convention of 1958 has been extremely instrumental in bringing about a uniform standard for international arbitral practice. UNCITRAL has also made a great contribution toward the unification of arbitration law and arbitration rules, although some of the major centers of international commercial arbitration, namely Paris, London and New York, do not seem directly affected. Nobody can deny the fact that these developments have contributed greatly to the formation of a single arbitration culture. This culture is now going to cover the world.

International arbitration mainly developed in Europe and has been quasi-codified by predominantly European-based or European-influenced international organisations and associations. 174 That is not to say that Asia-Pacific practitioners have not influenced the way that arbitration developed in Europe (as well as in this region). They certainly have, particularly in recent times, as will be explained further below. But the principal historical academic and practical contributors were Europeans or at least European educated.

For example, the best examples of quasi-codification have come from UNICITRAL, ICCA, the ICC, and the IBA. While these are all truly international bodies these days, they have European influences. These ‘supra-national sources’ of arbitration law are rarely binding (one exception is the Model Law if it is actually adopted as law) but rather guide arbitration practice. They have guided Asian arbitration practice just like they have guided it in the rest of the world.

Academic writings are another major supra-national source of international arbitration practice. Until about 20 years ago, by far the most influential academic publications measured by quantity and quality emanated from Europe. While we now see significant academic contributions coming from other regions, the European origins have heavily influenced the content of those contributions. Like in any academic discipline the origins shape what is to follow both directly, through citations, discussions and analysis of prior seminal works, and indirectly by shaping opinions and views of educated authors.

The same can be said for other ways in which knowledge and expertise about international arbitration is disseminated. Conferences and seminars are hugely popular in international arbitration. They provide fora for less experienced practitioners to learn and for their more experienced colleagues to share their knowledge and to network by acting as speakers and teachers. Once again, while there are now strong regional influences in these events, especially in recent years in Asia, many speakers and many experiences shared still come from Europe or the Americas.

169 See generally Morgan, op. cit. fn 62, p. 41. See also the previous article in the same journal by Schaefer, op. cit. fn 62, p. 30. Schaefer examines the reasons for abandoning colonial arbitration laws in favour of internationally recognised laws such as the Model Law.

170 Taylor and Pryles, op. cit. fn 153, p. 6.

171 See generally Morgan, op. cit. fn 62, and the previous article in the same journal by Schaefer, op. cit. fn 62. Schaefer examines the reasons for abandoning colonial arbitration laws in favour of internationally recognised laws such as the Model Law.

172 Section 4.1.

173 Taniguchi, 1996, op. cit. fn 23, pp. 33, 35–36. See also Taniguchi, 1997, op. cit. fn 119, p. 67 (‘Assuming that there is a distinctive “dispute resolution culture” in Asia, such culture may collide with the Euro-American culture as the economic and other contact increases and globalisation progresses in all aspects of human life.’) and p. 68 (‘A fair guess is that Asian businessmen have learned how to do business with Europeans and Americans. Until some 20 years ago, a Japanese defendant was willing to settle at any cost if sued in an American court. Today, they are ready to fight and will settle only when an offer is reasonable.’).

174 See in that respect the discussion of the history of international arbitration (Section 2 above) and the sources of international arbitration law (Section 3.5 above). See also, generally, Y Decasal and BG Garth, Dealing In Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order, University of Chicago Press, 1996, who explain in detail that international arbitration was created in Europe by a group of European ‘grand old men’.

175
Another way that knowledge is shared is through formal education. Asian students may study arbitration in Europe or North America. Similarly, academics from such regions regularly teach in Asia. The traditional methods of teaching arbitration emerge from its European origins. There is very steady growth in the number of dedicated international arbitration courses at universities in this region. The traditional methods of arbitration are also taught when Asian practitioners gain experience in law firms and arbitral institutions abroad and then bring that knowledge home.

International arbitration – again of a historically European style – became the norm in the US as its economy boomed and its companies became the world’s most influential players in a globalised commercial market place. The economic force of the US meant that its international business practices influenced the rest of the world and especially developing countries which strived for stability and, in particular, inward investment. Pyfles and Taylor point out that ‘much of the aid provided for legal infrastructure development by [Western states] is predicated on the idea that the new commercial law developed will be modelled on a western scheme and will be, therefore, transparent and familiar to western investors and trade partners’. Commercial conditions of that kind mould the evolution of legal structures towards what is familiar to the West.

With growing investment in Asia from Western cultures, expatriate professionals started relocating there. These individuals in turn influenced the way that Asia did business. Global commercial law firms followed. The influence in Asia of major law firms from Western cultures (i.e. from the US, UK and Australia) has been significant concerning foreign investment, commercial deals and, consequently, international arbitration culture. Many law firms have even sent experienced arbitration partners to Asia to build up the practice. Such individuals, bringing with them the way that they were taught or practised arbitration, may act as arbitrators, conference speakers, part-time academics, and publish articles etc., again influencing the development of arbitration.

This Western influence on international arbitration culture in Asia should not be seen as negative. To the contrary, it could be considered as having helped to attract foreign investment in certain Asian economies, particularly in public interest areas of infrastructure, resources and utilities, and assisted local businesses in their exporting activities by making them savvier and more attractive to foreign business partners. Moreover, international commercial arbitration is an inherent part of today’s globalisation and modernisation process that is transforming the entire world. While modern international arbitration had its origins in the West, its growth and global utilisation are detaching it (or perhaps have now detached it) from those origins, making it difficult to link arbitration – in its current form – to any one tradition or region. It is not a form of clandestine Western imperialism but an integral part of the universal modernisation process, which serves to facilitate international trade and commerce. As Samuel P Huntington elegantly notes, ‘modernisation ... strengthens [non-Western] cultures and reduces the relative power of the West. In fundamental ways, the world is becoming more modern and less Western’. International arbitration as a species of modernisation strengthens non-Western economies and reduces the East-West divide.

In any event, all of this Western influence has not prevented Asia from developing to some extent its own uniquely Asian variation of international arbitration. In order to appreciate how that occurred, it should be recalled that a major benefit of international arbitration is that its flexibility enables it to adapt to a literally infinite combination of cultural requirements. Conversely, domestic courts are parochial in the sense that an international dispute the procedures will be very familiar to one side and completely foreign to the other.

Experienced international arbitrators are generally adept at creating an atmosphere that is culturally acceptable to both sides in a dispute. That cultural acceptance could result from the arbitrator designing a procedure that is at least partially culturally familiar for both sides, and/or because the arbitrator adopts a culturally neutral, international arbitration approach to procedure. The latter theory may well be gaining popularity but an ability to identify and appreciate cultural differences remains essential, both for the arbitrators and lawyers involved in arbitrations. Kim explains that-multiculturalism is a strength of international arbitration because it promotes acceptance of international arbitration by multiple cultures, allows the tribunal to combine the best features of diverse cultures, and helps to promote a fair result that takes into account the cultures of the parties involved.

Indeed, the best international arbitral tribunals are those where all of the arbitrators are open to all kinds of cultures. Thus it is possible that a previously sought after cultural neutrality has been transformed into a desire for cultural empathy and acceptance, while avoiding any unnecessary parochial influence. A keen awareness of other cultures will always be an essential ingredient of an efficient international arbitration. Good practitioners must develop a vision of the culture of each individual arbitration, considering the parties themselves, including the individuals within the companies who are representing those parties, as well as the lawyers, witnesses and other arbitrators or experts. The best international arbitration lawyers and arbitrators are people who take all of those aspects into account for each arbitration proceeding and adapt their behaviour accordingly.
The individuals involved in any particular arbitration are the key to optimising the procedural flexibility that international arbitration offers. They shape and mould the procedure and accordingly have the greatest say, and the greatest influence, on the way that any culture can affect it.

Kaplan notes the important influence that arbitrators and counsel have.  

How do cultural differences affect the arbitration itself? The answer to that question, to a great extent, lies in the personality of the arbitrators and of counsel. An American lawyer appearing for an American contractor... will be very wise to behave calmly, politely, but firmly. He should not take on the assumed cultural attributes of his clients. He should cross-examine politely and courteously - just what is not expected of him.

It seems to me that at the arbitration, it is the cultural attributes of counsel that are often more crucial than that of the client. I am sure one could take the very same dispute and have it tried with two different sets of lawyers and end up with two completely different arbitrations with perhaps two differing results.

Kim considers that arbitrators have the greatest influence.

The avenue by which culture is likely to have the greatest impact is through the arbitrators. This is because the arbitrators have the power to make the decision and control the proceedings, and thus have the greatest influence over the arbitration. Experienced international arbitrators have some familiarity with and sensitivity to multiple cultures. Nevertheless, arbitrators tend to be influenced by their own culture.

In considering how Asian parties, arbitrators and lawyers will shape international arbitrations, one must also keep in mind the evolving preferences of transnational companies. Given the contemporary multicultural nature of both international business and international arbitration practices, parties' priorities appear to be evolving. Many now consider factors like time and cost efficiency, specially tailored procedures, expertise, and international enforcement of outcomes to be more important than an appearance of cultural neutrality. These preferences are reflected in the global acceptance of harmonised arbitration procedural laws, with legislators preferring to support international trade by adopting a law that is universally familiar rather than one that is individually tailored to the particularities of the country concerned.

We accordingly agree with Taniguchi that:  

the Asian trend is clearly toward a more internationalised international commercial arbitration. True, internationalisation of the international arbitration sounds funny. But it is particularly important in Asia in order for an arbitration to be accepted internationally.... Internationalisation does not necessarily mean the abandonment of traditional characteristics as long as they are agreeable with internationalisation. If successful an international commercial arbitration with an acceptable Asian flavour will enhance the use of Asian arbitration.

Accordingly, in our view the craze for international arbitration combined with the peculiarities of Asian culture and the adaptability of international arbitration procedure has left Asia with its own flavour of international arbitration culture. The evolution of that flavour was a key inspiration for this book.

Finally, this section has focused mainly on the culture or approach to international arbitration proceedings conducted by arbitrators rather than the culture of domestic court judges in Asia who may be dealing with international arbitration issues. The latter will apply their own procedures, rules and laws in a way that reflects their legal system and education and social or cultural environment. Lawyers pleading before judges will usually be from the same jurisdiction as the judges and have a similar legal education and social and cultural background. Domestic court proceedings are therefore heavily influenced by individual parochial culture.

Nonetheless, in our view the Asia-Pacific international arbitration environment has influenced the way that courts and national jurisdictions operate in relation to arbitration matters. A simple example is the widespread adoption of the Model Law. Another is the fact that several jurisdictions, supported by their legislators and judiciaries, are now competing between each other as seats of arbitration. Another is that the sheer growth of arbitration in the Asia-Pacific has helped to develop in many regional domestic court judges a respect for international commercial arbitration and an increasingly sophisticated understanding of its subject matter. The influence of Asian international arbitration culture on its courts, and a growing Asian approach by the courts, will be demonstrated indirectly throughout the following chapters of this book.
hearing in another country—for instance, for the purpose of taking evidence...In such circumstances, each move of the arbitral tribunal does not of itself mean that the seat of the arbitration changes. The seat of the arbitration remains the place initially agreed by or on behalf of the parties.

4 Lex arbitri, arbitral procedural law and arbitration rules

2.12 Lex arbitri, arbitral procedural law, and arbitration rules are all terms referring to provisions that regulate, among other matters, the procedure of an international arbitration. The differences between them are important to understand but sometimes difficult to grasp. The terms are often used incorrectly or interchangeably. In the following paragraphs we briefly define each, before distinguishing the terms in Sections 4.1–4.3.

2.13 The Latin phrase ‘lex arbitri’ means the law of the arbitration.14 The lex arbitri is not directly chosen by the parties. When the parties choose country Y as the seat, the automatic consequence, without the need for express words, is that aspects of country Y’s laws and legal framework become the lex arbitri.15 This point was clearly made by the Singapore Court of Appeal in PT Garuda Indonesia v Birgen Air,16 referred to above. In that circumstance the court had been called upon to determine the lex arbitri and whether the parties had changed the seat of arbitration from Indonesia to Singapore. The Court of Appeal stated: ‘Clearly, if it was established that the parties had agreed to change the “place of arbitration” to Singapore, then it must follow that the curial law would be Singapore law’17 (emphasis added).

2.14 The lex arbitri legitimates and provides a general legal framework for international arbitration. The relevant law itself might be found in an independent statute on international arbitration or it might be a chapter in another law, such as a civil procedure code or a law also governing domestic arbitration. However, the lex arbitri of a given jurisdiction can also include other statutes and codes (even those not specifically dealing with arbitration), and case law which relates to the basic legal framework of international arbitrations seated there. If the seat of arbitration is, for example, Hong Kong, then the lex arbitri constitutes those provisions of Hong Kong’s laws which, among other things, permit the resolution of disputes in Hong Kong by way of arbitration rather than by Hong Kong court litigation. Other general features of the lex arbitri are that it gives (with certain exceptions) parties the freedom to choose the law and rules to apply and it indicates what types of matters cannot be arbitrated.18

In some ways, the lex arbitri is to an arbitration proceeding what the lex fori is to a domestic national court. However, although the lex arbitri and the lex fori perform certain similar functions for arbitration and domestic national courts respectively, they are different and should not be confused. One such difference relates to the application of conflict of laws rules and mandatory rules of law, both of which are discussed in Chapter 3.19 Arbitration does not have a lex fori.20 It is therefore unfortunate that there are continuing lines of English authority which use the expression lex fori when in reality they are referring to the lex arbitri. This authority has influenced common law courts in this region.21

The procedural law sets out the parameters of the procedure and support for international arbitration. It provides, for example, mandatory rules about how arbitration can be conducted. These include rules requiring equal treatment, due process and the independence of arbitrators. One way to conceptualise the differences between the lex arbitri and procedural law is to consider the lex arbitri as governing matters external to the arbitration and the procedural law as governing matters internal to the arbitration procedure (but excluding substantive issues).22

Having explained lex arbitri and procedural law, the final category is procedural rules or arbitration rules. These are rules chosen by the parties that relate to the mechanism and processes of arbitration. They typically regulate the conduct of the arbitration from its initiation until a final award is rendered, and can be likened to the civil procedure rules of a court. Arbitration rules comprise the rules of an arbitral institution, ad hoc arbitration rules such as the UNCITRAL Arbitration Rules, and rules that are tailor-made and agreed to by the disputing parties. Arbitration rules generally apply as a matter of contract—not law—although default arbitration rules are usually found in procedural laws. Typical arbitration rules, such as those of arbitration institutions, generally cover the practical aspects of how to commence an arbitration and to see it through until the end. The subject matter of rules include provisions on filing a request for arbitration, answering the request for arbitration, appointing arbitrators, challenging non-neutral arbitrators, removing non-performing arbitrators, the arbitral tribunal’s procedural powers and basic rules relating to hearings and the taking of evidence.

14 See the discussion in Chapter 3, Section 3.1.
15 See the discussion in Chapter 3, Section 3.2 (conflict of laws) and Section 4 (mandatory laws).
16 Poudret and Basson, op. cit. fn 15 at para 114.
17 The expression ‘lex fori’ is used to describe the rules of the seat of the arbitration in cases such as Black Clawson International Ltd v Paperwurke Walldorf-Aischaffenbarg AG (1981) 2 Lloyd’s Rep 446 (Queen’s Bench, Commercial Court) through to C-V (2007) EWCA Civ 1282 (English Court of Appeal). It was also used in the Singaporean decision of PT Garuda Indonesia v Birgen Air (2002) 1 SLR 993 (Singapore Court of Appeal).
18 See also Channel Tunnel Group v Balfour Beatty Ltd (1993) 1 All ER 664, 683 (Lord Mustill, House of Lords).
4.1 Lex arbitri v arbitral procedural law

2.18 The arbitral procedural law and the lex arbitri are rarely separated. For this reason, many people do not distinguish between lex arbitri and procedural law, or alternatively use the terms as synonyms. While this approach is understandable, it is nevertheless problematic and better avoided. Redfern and Hunter observe that the lex arbitri is much more than a purely procedural law. As explained above the lex arbitri is the law that gives the arbitration its nationality and legal validity. An example of a non-procedural issue that is determined under the lex arbitri is objective arbitrariness.

2.19 The potential for confusion and need for a clear distinction arise from the fact that arbitrating parties in some jurisdictions may select an arbitral procedural law that is different from the lex arbitri. This means that the parties may select their arbitration in one jurisdiction and choose the procedural law of a different jurisdiction. It is vital to remember that, as Born explains, 'the foreign law will not ordinarily supplant, but rather operate within the arbitration legislation of the arbitral seat'. While theoretically and legally possible, choosing a foreign procedural law can create many practical problems. For example, to which courts would the parties have recourse to seek an interim measure or to set aside an arbitral award? Assuming the proper courts in which to bring these applications are identified, which jurisdiction's procedural laws would those courts apply?

2.20 There is English authority on point that may be instructive, at least for common law jurisdictions. Lord Justice Kerr clearly recognised in Naviera Amazonica Peruana S.A. v Compania Internacional de Seguros del Peru as early as 1988 that 'there is equally no reason in theory which precludes parties to agree that an arbitration shall be held at a place or in a country X subject to the procedural laws of Y'. In Union of India v McDonnell Douglas Corporation the Queen's Bench Division of the Commercial Court was asked to determine the lex arbitri where the arbitration clause selected London as the seat of arbitration but expressly identified the Indian Arbitration Act 1940 as applicable. Justice Saville noted that English law admitted the theoretical possibility of parties choosing the procedural law notwithstanding a contradictory choice of seat:

It is clear from the authorities cited above that English law does admit of at least the theoretical possibility that the parties are free to choose to hold their arbitration in one country but subject to the procedural laws of another, but against this is the undeniable fact that such agreement is calculated to give rise to great difficulties and complexities. This situation highlights some of the complexities in trying to choose a different procedural law from the lex arbitri. Justice Saville, having referred to a variety of significant legal authorities, was concerned by the 'great difficulties and complexities' of such an approach and the 'potentially unsatisfactory method of regulating... arbitration procedures'. Nonetheless, he held that if the Court were convinced that the parties had chosen the procedural law of another country, then it might well be slow to interfere with the arbitral process. Given the grave dangers, however, Justice Saville ultimately concluded that choosing a foreign procedural law could not have been the parties' intentions. He held that in this particular case the parties must have intended the Indian Arbitration Act to regulate only the internal conduct of the arbitration (i.e. to apply like arbitration rules and not as procedural law), and English law to govern the external supervision of the arbitration by the courts.

The decision implies that if parties desire a foreign procedural law to govern their arbitration, they should say so very clearly in English. But, as noted above, it is difficult to imagine why parties would want to choose foreign procedural law given the risks and complexities. Nowadays, there is far less need to take such risks because many countries have modern arbitration legal systems, whether based on the Model Law or otherwise.

There are perhaps two scenarios where the choice of a foreign procedural law might be warranted. The first is when the award will need to be enforced in a specific and known non-New York Convention signatory country. Choosing that jurisdiction's procedural law to govern the conduct of a foreign arbitration might (though with no guarantee) provide recourse to the enforcement procedures in that law, without the need to seat the arbitration in that jurisdiction. The second is when the chosen arbitral seat has a less than modern arbitration legal system but is chosen nevertheless to avoid award enforcement problems based on a 'reciprocity reservation' that a state has made when concluding in the New York

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23 CBI NZ Ltd v Badger Choy Ltd (1989) 2 NZLR 669 (New Zealand Court of Appeal); American Diagnostic Inc v Gradspore Ltd (1998) 44 NSWLR 312 (New South Wales Supreme Court); John Holland Ltd v Yso Engineering Corp (2001) 2 SLR 262 (Singapore High Court); Dermajoy Properties Sdn Bhd v Premium Properties Sdn Bhd (2002) 2 SLR 164 (Singapore High Court); PT Garuda Indonesia v Birgen Air (2002) 1 SLR 395 (Singapore Court of Appeal).

24 For example, Justice Burrell in the Hong Kong High Court decision of Karaba Bodas Co Ltd v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (also known as Pertamina) (2003) 380 HCCU 1, at p. 8 stated that 'a variety of expressions are used to describe this such as lex arbitri, curial law and procedural law. For consistency I shall use the expression lex arbitri'.


26 See the discussion in Chapter 4 Section 8.2.

27 G Born, International Commercial Arbitration, Kluwer, 2009, at p. 1515. Born devotes considerable effort to explaining that the need to distinguish between the arbitral procedural law and the law of the place of arbitration. His analysis is well reasoned. It would therefore be unfortunate if he were interpreted as suggesting that parties could choose their lex arbitri. At p. 1346, Born states that the suggestion that parties could not choose two lex arbitri is incorrect. It is apparent from his following discussion that he is referring to the selection of procedural laws, and not the law of the seat of the arbitration (i.e. lex arbitri).

28 Whether it is legally possible depends on the lex arbitri, the ultimate framework law regulating all arbitrations seated in the jurisdiction. See Redfern, Hunter et al., op. cit. In 15, at para 2-20; see also L. Nottage and R Garnett (eds), International Arbitration in Australia, Federation Press, forthcoming 2010, Chapter 2.

29 [1948] 1 Lloyd's Rep 116, at p. 120 (English Court of Appeal).

From the wealth of authority cited by both counsel on this issue can be gleaned the following starting point: 'The curial law (lex arbitri) is normally, but not necessarily, the law of the place where the arbitration proceedings are held... The place plainly refers to the legal seat of the arbitration (here Geneva) not a random city of convenience for the arbitrators (here Paris). For the normal situation not to apply there must be strong pointers to the contrary. Such pointers as there may be in this case cannot, in my view, be regarded as strong when put in context and balanced against the following factors.

(1) Had the parties wanted to, expressly, depart from the norm they could have said so in the contracts but they did not. The contracts are specific as to the substantive law (Indonesian) but silent as to the lex arbitri (procedural law).

(2) The drafters of the contracts were explicit on many matters such as the choice of a neutral place (Geneva), the adoption of the UNICTRAL rules in the arbitration and the choice of Indonesian law as the law of the contracts. It is not a difficult inference to draw that had Pertamina insisted on an express provision stating that the lex arbitri (procedural law) was to be Indonesian law, the contracts would not have been signed. I find it irresistible that the choice of Geneva as the "place" was also a choice that it was the formal "seat" in the legal sense. By the same token it is plain that the choice of an independent neutral seat of arbitration carried with it an intention to be bound by the lex arbitri of that place.

(4) Pertamina, as evidence of 'strong pointers' to rebut the presumption rely, inter alia, on the fact that the contracts themselves are 'replete with references to the provisions of Indonesian law'. The expression 'replete with' somewhat overstates the position but they point out that the contracts expressly provide for the modification of, in particular, four Articles of the Indonesian Code of Civil Procedure. Article 650.2 (appointment of arbitrators) and 620.1 (time limit on arbitrations) have been modified, Article 631 (authority to arbitrators to decide on 'amiabiles composteuros') has been invoked and Article 641 (rights of appeal) has been waived.

4.2 Arbital procedural law v arbitration rules

There is usually an overlap between procedural laws and arbitration rules. As noted above, the former will also provide default procedural rules, in case the parties have not otherwise agreed. Normally arbitration rules specifically chosen by the parties will override those provided in a procedural law, except to the extent that the latter are mandatory.

Pyles explains the difference between procedural law and arbitration rules as follows:

It is true that the arbiral procedural law may deal with many matters concerning the conduct of an arbitration which can be addressed in procedural rules selected by the parties to apply to the arbitration. In a sense, therefore, the arbitral procedural law may deal with matters which the parties have failed to address, either by not selecting any arbitration rules (institutional or otherwise) or because those rules are deficient. Where the parties do select arbitral rules, they are likely to prevail over the 'fall-back' [default] provisions made by the law governing the arbitral procedure. This is because
the latter will be regarded as non-mandatory and liable to be displaced by the parties’ express provisions to the contrary. But, some provisions of the arbitral procedural law will be different in nature to those contained in arbitral rules selected by the parties, be they institutional or ad hoc. For example, the arbitral procedural law may prescribe the degree of judicial supervision of the arbitration, including appeals and applications to set aside an award. The arbitral procedural law may also provide for judicial assistance in aid of an arbitration, for example, the issue of a subpoena requiring a witness to attend the hearing. Plainly, these are matters which cannot be the subject of contractual rules agreed by the parties and incorporated into the arbitration clause.

2.30 Australian Granites v Eisenwerk Hensel Beyreuth GmbH\(^{41}\) is a decision of the Queensland Court of Appeal in Australia that found an express choice by parties of ICC arbitration demonstrated an intention to exclude the Model Law under Section 21 of the Australian International Arbitration Act.\(^{42}\) Singapore legislation has similar Model Law opt-out provisions and a similar decision was subsequently made in the Singapore High Court – John Holland Ltd v Toyo Engineering Ltd\(^{43}\) which essentially adopted the Queensland Court of Appeal position.

2.31 Both of these decisions were incorrect because it is not inconsistent with the Model Law to choose a set of institutional arbitration rules to apply in an arbitration. Choosing institutional rules is permitted within the scope of Article 19(1) of the Model Law.\(^{44}\) To the extent any inconsistencies exist between the Model Law and the chosen rules, the latter will apply, so long as they do not conflict with mandatory provisions of either the Model Law or of the law of the seat.

2.32 Following the Singaporean case mentioned above, the Singapore Government moved quickly to amend Section 15 of the Singapore International Arbitration Act as well as shortly thereafter introducing Section 15A:

(1) It is hereby declared for the avoidance of doubt that a provision of rules of arbitration agreed to or adopted by the parties, whether before or after the commencement of the arbitration, shall apply and be given effect to the extent that such provision is not inconsistent with a provision of the Model Law or this Part from which the parties cannot derogate.

(2) Without prejudice to subsection (1), subsections (3) to (6) shall apply for the purposes of determining whether a provision of rules of arbitration is inconsistent with the Model Law or this Part.

42 Section 21 of the Australian International Arbitration Act will be amended in 2010, however prior to that amendment it provided:

Sentiment of the dispute otherwise than in accordance with Model Law
If the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) agreed that any dispute that has arisen or may arise between them is to be settled otherwise than in accordance with the Model Law, the Model Law does not apply in relation to the settlement of that dispute.

43 [2001] 2 SLR 262. See also Dermaiya Properties Sdn Bhd v Premium Properties Sdn Bhd [2002] 2 SLR 164 (Singapore High Court).

(3) A provision of rules of arbitration is not inconsistent with the Model Law or this Part merely because it provides for a matter on which the Model Law and this Part is silent.

(4) Rules of arbitration are not inconsistent with the Model Law or this Part merely because the rules are silent on a matter covered by any provision of the Model Law or this Part.

(5) A provision of rules of arbitration is not inconsistent with the Model Law or this Part merely because it provides for a matter which is covered by a provision of the Model Law or this Part which allows the parties to make their own arrangements by agreement but which applies in the absence of such agreement.

(6) The parties may make the arrangements referred to in subsection (5) by agreeing to the application or adoption of rules of arbitration or by providing any other means by which a matter may be decided.

(7) In this section and section 15, ‘rules of arbitration’ means the rules of arbitration agreed to or adopted by the parties including the rules of arbitration of an institution or organisation.

This section makes clear that a choice of arbitral rules is not tantamount to excluding the Model Law. In late 2009, the Australian government introduced a bill to amend Australia’s international arbitration laws.\(^{45}\) As part of those amendments Section 21 has been revised. Despite this likely amendment, it remains advisable that parties arbitrating in Australia include in their arbitration agreement an indication that the Model Law is still to apply despite the choice of institutional rules. The ACICA Rules have adopted this approach in Article 2(3).\(^{46}\)

4.3 Procedural pyramid
As the differences between the lex arbitri, arbitral procedural laws and arbitration rules can be conceptually difficult it may be useful to visualise their relationship as a pyramid.

This pyramid shows that the lex arbitri is the foundation on which the arbitration is built. Procedural laws are the next layer, and then finally arbitration rules. To the extent that any layer overlaps with one that is below it in the pyramid, it will normally take precedence over the lower layer except where relevant provisions of the lower layer are mandatory.

45 Australian International Arbitration Amendment Bill 2009. See also Cargill International SA v Peabody Australia Mining Ltd [2010] NSWSC 887 at para 91 which found the Eisenwerk decision ‘plainly wrong’.
46 ACICA Rules Article 2.3 reads ‘By selecting these Rules the parties do not intend to exclude the operation of the UNCITRAL Model Law on International Commercial Arbitration’.
As an illustration of the order of this hierarchy, assume that the *lex arbitri*’s own arbitral procedural law may contain provisions regarding the default appointment of arbitrators. Assume that the parties choose a foreign arbitral procedural law which contains different default procedures and the parties also choose arbitration rules which have a third default method. In this situation, it is the default mechanism in the chosen arbitration rules that will apply. However, mandatory provisions of the *lex arbitri* or procedural law will displace the chosen arbitration rules if those arbitration rules conflict with the mandatory provisions.

### 5 Diverging views on link between arbitration proceedings and seat of arbitration

Lively theoretical debate has ensued about the extent to which arbitration proceedings are linked to and constrained by the seat of arbitration’s laws and courts. We briefly introduce two broad legal theories explaining this link, the traditional and delocalised theories, before developing them from the perspective of international relations theory. We then consider the legal and practical reality of delocalisation based on international norms and laws, before finally discussing where these theories leave us today.

#### 5.1 Traditional view

The traditional or jurisdictional view is that every private, commercial arbitration must be attached to a legal seat of arbitration. That is, it must be attached to some existing legal jurisdiction. According to this view, the seat of arbitration is the jurisdiction that gives legitimacy and legality to the arbitration proceedings and the resulting award. Consequently, without the international arbitration law of the seat (i.e. the *lex arbitri*), which permits arbitration to take place, any arbitration proceeding would not exist legally.

The traditional view is based on accepted legal theories that date back at least as far as the 1600s in Western cultures. In Eastern cultures these debates are even older. The Peace of Westphalia (1648) is widely considered to represent the birth of the nation-state system that exists today. Decades of religious conflict in Europe were put to an end by the signing of two peace treaties that comprised the Peace of Westphalia. This divided Europe into various states and emphasised the supreme power of the sovereign ruler over the territory of his or her respective state. Accordingly, each state was obliged, under the principle of state sovereignty, to respect the independence and integrity of other states. A vital and central feature of state sovereignty was said to be jurisdiction, which concerns the power of a state to affect people, property and circumstances ... and is an exercise of authority which may alter or create or terminate legal relationships and obligations.

A consequence of this particular conception of sovereignty is that states are the highest authority regulating the lives and activities of private individuals and companies. In other words, states are exclusively empowered to regulate anything and everything that occurs within their boundaries.

With this background, quite early in the development of international arbitration as a discipline of law, Francis Mann suggested that in reality there was no such thing as an *international* arbitration – arbitration had to be connected to and controlled by a domestic legal system. Two quotes from Mann illustrate his views particularly well:

> It would be intolerable if the country of the seat could not override whatever arrangements the parties may have made. The local sovereign does not yield to them except as a result of the freedoms granted by himself.

> Is not every activity occurring on the territory of a State necessarily subject to its jurisdiction? Is it not for such State to say whether and in what manner arbitrators are assimilated to judges and, like them, subject to the law? Various States may give various answers to the question, but that each of them has the right to, and does, answer it according to its own discretion cannot be doubted.

His arguments and reasoning at first appear both logical and plausible. If the sovereign state is the highest authority and it has exclusive power to make and enforce laws relating to persons, property or events within its territory, it stands to reason that it is only because of the laws of the seat that the arbitration agreement (and ultimately the arbitration award) gains legal recognition. According to the traditional view, an arbitration agreement, like any contract, has no legal effect unless some domestic law gives it effect. The *lex arbitri* thus regulates and limits the arbitration proceedings in any way its lawmakers wish. Markham Ball explains this as follows:

> Arbitration is not a separate, free-standing system of justice. It is a system established and regulated pursuant to law, and it necessarily bears a close relationship to a nation’s courts and judicial system.

However, as we will see below, this is not the only view.

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47 Arguments of this kind have been espoused in Eastern cultures as far back as Mencius (also known as Meng Zi) whose works collectively known as *The Mencius* were published after his death in 2809 BCE.


49 The rise of international organizations like the World Trade Organization and groupings like the European Union now challenge this conception.


The current restrictions imposed by the Government of India on the availability of foreign exchange of which judicial notice can be taken will make it virtually impossible for the Indian Firm to take its witnesses to Moscow for examination before the Arbitral tribunal and to otherwise properly conduct the proceedings there. Thus, the proceedings before that Tribunal are likely to be in effect ex parte. The High Court was, therefore, right in exercising discretion in the matter of granting an interim injunction in favour of the Indian Firm.

2.119 Rogers notes that: 106

It seems harsh indeed that meeting the test of impossibility should be insufficient to avoid the forum selection clause on the basis of the principle of forum non conveniens.

2.120 However, the reality is that the Indian courts did not change the seat of arbitration: they merely refused to stay their own court proceedings. They refused the stay mainly because of an erroneous interpretation of Article II of the New York Convention, and not on what Rogers describes as forum non conveniens grounds.

We do not consider the Indian company's arguments to have been forum non conveniens related in any event. An argument that the agreed seat is no longer appropriate or possible affects the validity and enforceability of the agreement on that seat of arbitration. That is why we have suggested above that the only circumstance in which a seat of arbitration could be changed is where the agreement on the initial seat has become practically, physically or legally frustrated or impossible to perform.

7 The Model Law as lex arbitri

7.1 Asia-Pacific and the Model Law

We now turn to consider the Model Law and the role it has played in the Asia-Pacific. This discussion focuses principally on mandatory law issues, and relates to a general level. Other texts and journal articles can be consulted for individual country analysis. 107 Many Asian jurisdictions have separate laws dealing with international arbitration, 108 or arbitration in general with special provisions for international arbitration. 109 These statutes mainly regulate issues that include:

(i) questions concerning the formal validity of an arbitration agreement;
(ii) basic, default structure concerning the nomination and removal of arbitrators;
(iii) fundamental (often mandatory) procedural rules, such as the requirements of arbitrator independence, natural justice and procedural fairness;
(iv) formal and substantive requirements for arbitral awards;
(v) the mode of recourse against arbitral awards; and
(vi) the recognition and enforcement of arbitration agreements and arbitral awards.

This is by no means an exhaustive list and it is important that each country be considered individually.

Globalisation, increased international trade and the substantial growth of international arbitration have led to numerous jurisdictions adopting international arbitration laws. This in turn has led to international scrutiny and discussion of those laws and increasing uniformity among arbitration laws. This process has been greatly assisted by the Model Law. As noted in Chapter 1, the Model Law text has no independent legal status whatsoever. 110 It is simply a suggested model of an international arbitration law recommended by UNCITRAL. Any jurisdiction can adopt the Model Law partially or entirely and with any modifications it chooses.

The Model Law was prepared in 1985 and covers broadly the elements listed above as typical to arbitration laws. At the time of writing, it had been used as a basis for the arbitration laws of about 60 jurisdictions around the world. It is particularly prominent in the Asia-Pacific. Within this region most jurisdictions have based their legislation on the Model Law. 111

UNCITRAL revised the Model Law in 2006. The revisions do not affect in any way the laws in force in the jurisdictions that have already adopted the 1985 text, or any part of it. At the time of writing only Australia, (Florida, USA), Ireland, Mauritius, New Zealand, Peru, Rwanda, Singapore and Slovenia have adopted all or some of the 2006 amendments. Hong Kong is understood to be in the process of passing legislative amendments. 112

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106 Ibid., p. 254.

108 For example Australia, Hong Kong (although it is expected consolidation into a single system will occur in 2010), Singapore and Pakistan.
109 Brunei, China, India, Indonesia, Japan, Korea, the Philippines, Malaysia and New Zealand. Sri Lanka has one Act which makes very little distinction between domestic and international arbitration.
110 See the discussion in Chapter 1, Section 2.3.5.
111 A list of countries whose arbitration laws are based on the Model Law is provided at Appendix 3.
112 The arbitration law reforms currently before the Hong Kong Legislative Council, if adopted, will mean that both domestic and international arbitration will be governed by a single system.
7.2 Mandatory provisions of the Model Law (1985 text)

The principle of party autonomy in international arbitration dictates that parties should be free to agree on the procedure of their arbitrations. However, like all laws the Model Law contains mandatory provisions. Mandatory provisions of arbitral procedural law apply irrespective of party choice when an arbitration is seated in a particular jurisdiction.

Despite early proposals to do so the Model Law does not contain a list of mandatory provisions. The UNCITRAL Working Group that formulated the Model Law reported that the group considered it ‘desirable to express the non-mandatory character in all provisions of the final text which were intended to be non-mandatory’. By implication therefore one could assume that unless an article of the Model Law contains the phrase ‘unless otherwise agreed by the parties’, or something similar, then the article will be mandatory. However, as explained in the quote from Holtzmann and Neuhaus below, this would be a dangerous assumption, and making a determination on that basis alone would be unwise.

The issue is certainly difficult, as can be evidenced by the significant deliberations of the UNCITRAL Working Group on this topic alone. In their commentary on the development of the Model Law, Holtzmann and Neuhaus say of mandatory provisions:

The proposal for an Article listing such mandatory provisions was initially made during the Working Group’s second session on the Model Law and was subsequently adopted by the Group. The Secretariat then raised doubts as to the wisdom of such an Article, on the ground that such a provision was not needed and was subject to drafting difficulties. It noted that the great majority of Articles that were intended to be non-mandatory had been drafted so as to indicate their non-mandatory [sic] nature, and suggested that words such as ‘unless otherwise agreed by the parties’ be added to the few remaining articles that were thought to be non-mandatory. The Working Group adopted this approach, but with a significant caveat: it stated in its Report that ‘[i]t was understood’ that the decision to express the non-mandatory character of those provisions ‘did not mean that all those provisions of the Model law which did not express their non-mandatory character were necessarily of a mandatory nature.’

The proposal for an Article listing the mandatory Articles of the Law was not revived during the Commission’s session.

113 In the report of the working group on its seventh session, it is noted that the working group agreed that an article listing mandatory provisions should not be included, despite its appearance in earlier drafts, UN Doc A/CN.9/246–6 (March 1994) at paras 170.
114 UN Doc A/CN.9/246–6 (March 1994) at para 177.
117 Fourth Working Group Report, A/CN.9/245, para 175, p. 1151 infra. (Original footnote.)
118 See Fourth Secretariat Note, A/CN.9/WG.I/INF/59, para 9, pp. 1151–52 infra. One example of the drafting difficulties was that a number of the provisions of the Law granted a freedom to the parties, accompanied by supplementary rules to apply in the absence of agreement. Here, the Secretariat said ‘the question of mandatory nature seems to be a philosophical one and . . . redundant’. Ibid. (Original footnote.)
119 Ibid. (Original footnote.)
120 Fifth Working Group Report, A/CN.9/246, para 177, pp. 1152–53 infra. At the same time, the Working Group suggested that the Commission might wish to express the non-mandatory character of other provisions, since it was ‘the prevailing view, adopted by the Working Group . . . that it was desirable to express the non-mandatory character in all provisions of the final text which were intended to be nonmandatory’. Ibid. (Original footnote.)
121 Although Articles 34 and 36 of the Model Law refer to public policy, they do not make any attempt to characterize what constitutes matters of public policy.
(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

(4) For the purposes of paragraph (3) of this article:
(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;
(b) if a party does not have a place of business, reference is to be made to his habitual residence.

(5) This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

2.132 This article is not typically included in a list of mandatory provisions. However it must, at least in part, be mandatory. Article 1 states when the Model Law applies. Although parties may subsequently derogate from particular articles, they cannot prevent the application of the Model Law under Article 1 as to do so would create a paradox. If the Model Law itself gives the parties the power to amend non-mandatory terms, logically it must apply before any amendment is legally possible.

2.133 As a matter of practice this is a largely unnecessary theoretical question, but it does point to a real conflict of laws issue. It is important always to identify properly the actual source of a power to act. Commonly in arbitration the power to amend— or even exclude altogether—the Model Law is found in the legislation that introduces it. As the source of the power is the Act and not the Model Law itself the paradox does not arise.

Article 7 Definition and form of arbitration agreement (1985 version)

1. ‘Arbitration agreement’ is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

2. The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

2.134 In the 1985 version of the Model Law Article 7 provides a definition and stipulates form requirements for an arbitration agreement. Although Article 7(2) is couched in the language of a mandatory term, it fails the test proposed above, and consequently is not strictly mandatory. This view is supported by the fact that in the 2006 revision of the Model Law, Article 7 Option II does not refer to writing at all. Whether or not the agreement is in writing has no impact on the very nature of arbitration, that is to say that the arbitral process will not be fundamentally changed if it arises out of an oral agreement. However, it is included in this list because, as a matter of practice, it would generally be advantageous for an arbitration agreement to be in writing or evidenced in writing. While some jurisdictions permit oral arbitration agreements, 122 the New York Convention requires an arbitration agreement to be in writing in order to have the award enforced.

Article 8(1) Arbitration agreement and substantive claim before court

1. A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is real and void, inoperative or incapable of being performed.

2.135 Article 8(1) of the Model Law imposes a mandatory stay of court proceedings where a valid arbitration agreement exists. Other commentators have suggested that this is a mandatory article. 123 Applying the test proposed above, an innate aspect of arbitration is that arbitration agreements must be enforceable. A party should not be permitted to renege on its initial promise to arbitrate. It is of course different if both parties subsequently agree not to arbitrate their dispute, in which case neither Article 8 nor the entire Model Law apply at all.

Articles 11(4) and (5) Appointment of arbitrators

4. Where, under an appointment procedure agreed upon by the parties,
(a) a party fails to act as required under such procedure, or
(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or
(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,
any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

5. A decision on a matter entrusted by paragraph (3) and (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than that of the parties.

122 For example, New Zealand Arbitration Act 2006, Article 7, Schedule 1.
123 See, e.g., A Broches, 'UNCITRAL Commentary On The Model Law' in J Paulsson (ed), International Handbook on Commercial Arbitration, Suppl 11, Kluwer, 1990. It is possible to misconstrue Broches on this point. At p. 92 he states 'I submit that the only mandatory provisions concerning the conduct of the proceedings, other than Article 16, are Article 24(2) and (3) and Article 27 (g.v.).' In this statement he is only referring to those articles concerning the conduct of the proceedings and not to the Model Law as a whole.
As noted above, Article 11(4) is mandatory in so far as its purpose is to ensure that the arbitration proceeds, and cannot be frustrated by an unwilling participant. Broches confirms that, notwithstanding the wording of the last sentence of Article 11(4), parties cannot contract out of the court specified by Article 6 as an appointing authority of last resort.

Article 11(5) refers to the mandatory requirements that arbitrators be impartial and independent. These are fundamental to the prospect of the parties receiving equal treatment and a fair hearing – both essential characteristics of arbitration. However, where parties have agreed on institutional arbitration rules which contain a test for securing an arbitrator's independence or impartiality, any domestic court considering a challenge should take into consideration, when applying its own rules on impartiality and independence, that the parties have expressed a view on the appropriate test.

**Article 12(1) Grounds for challenge**

1. When a person is appointed in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

2. Article 12(1) is not mandatory, however it is identified in this list because it might at first sight be considered such. The problem lies in the different subject obliged to act under that article – the arbitrator as opposed to the parties.

The article places an obligation of disclosure on the arbitrator and not on either of the parties to the arbitration agreement. If the parties agreed that the arbitrator need not make any disclosures, this would not relieve the arbitrator of the obligation, but may prevent the parties from later objecting to that failure to disclose. Thus in a practical sense the effect of the article can be avoided. This should not be understood, however, as a waiver of the right to object to an arbitrator who is not independent. It is very unlikely that parties would be permitted to waive that right in advance of receiving the relevant information.

If a party came into information regarding a lack of independence, by a means other than an arbitrator disclosure, then a challenge could be brought.

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**Article 18 Equal treatment of parties**

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

Article 18 can be described as a true cornerstone of arbitration. As an illustration of the importance of this provision, in the New Zealand decision of Methanex Motunui Ltd v Spellman, the Court of Appeal in Wellington found that a clause purporting to exclude a right of review for a breach of natural justice would be an impermissible attempt to derogate from Article 18.

**Article 24(2) and (3) Hearings and written proceedings**

2. The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.

3. All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

Article 24(2) relates to giving the parties sufficient notice of hearings and meetings. It is simply an extension of the principle embodied in Article 18. Without due notice a party will not be in a position to present its case properly.

It has been suggested by Aron Broches that Article 24(3) is also mandatory. The basic obligation in this article is that 'all statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party'.

**Article 34 Application for setting aside as exclusive recourse against arbitral award**

1. Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

2. An arbitral award may be set aside by the court specified in article 6 only if:

   (a) the party making the application furnishes proof that:

   (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

   (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

   (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those

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124 See para 2.130.
125 Broches op. cit. fn 123, at p. 56.
126 However an interesting view of the independence of an arbitrator requirement was taken in the Supreme Court of India decision Aox Pipeline Contracts Private Ltd v Bharat Petroleum Corporation Ltd, (2007) 5 SCC 304. In that case, an arbitration clause which named a representative of one party as the arbitrator was upheld. This case is explored further in Chapter 6, Section 2.2.
127 Broches takes the view that this is a mandatory provision, see Broches, op. cit. fn 123, at p. 59.
128 However, see the Supreme Court of India decision Aox Pipeline Contracts Private Ltd v Bharat Petroleum Corporation Ltd, (2007) 5 SCC 304 discussed in Chapter 6, Section 2.2.
130 Broches, op. cit. fn 123, at p. 92.
award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language.

Article 35 sets out one of the fundamental tenets of arbitration, its binding and enforceable nature. As discussed in the context of Article 34, parties are not able to undermine this principle by permitting the courts to review awards on grounds other than those provided by the law. It is therefore mandatory.

2.143 Article 34 of the Model Law deals with applications to set aside awards. Lew, Mistelis and Kröll state that 'in principle, court control over an arbitration award in challenge proceedings can never be excluded'. Some jurisdictions do, however, allow parties to limit the power of courts to set aside awards. Those exceptions aside, Article 34 can be considered mandatory. Additionally, it is uncertain whether parties would be permitted to add further grounds upon which courts could review or set aside an award, such as error of law. In a 2008 US Supreme Court decision *Hall Street Associates LLC v Mattel Inc.*, it was held that parties could not add grounds to those stated in the Federal Arbitration Act. How countries in this region would react when faced with the same issue is not clear, especially as the domestic arbitration laws of several jurisdictions (which international parties can opt into) generally permit expanded grounds of judicial review and/or appeals.

**Article 35 Recognition and enforcement**

1. An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

2. The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the

132 For example, Article 1717(4) of the Belgium Judicial Code. See also Article 192 of the Swiss Statute on Private International Law and the decision of the Swiss Federal Tribunal (ATF 133 III 235, 240/241/242).
133 128 S Ct 1396, 2008 (US Supreme Court).
Arbitration agreement

1 Introduction

4.1 Arbitration agreements embody the consent of the parties to submit their disputes to arbitration. In essence they oust the jurisdiction of domestic courts to decide certain disputes and instead empower an arbitral tribunal to resolve those disputes. The extent and scope of these two functions are dependent on the words of the arbitration agreement and the laws governing both that agreement and the arbitration proceedings. The arbitration agreement is especially important in determining the jurisdiction and powers of an arbitral tribunal.

4.2 Some suggest that arbitration agreements are so powerful that they are supranational and beyond domestic laws. The French courts have on occasion adopted this position. They have held that an arbitration agreement is independent of all national laws and forms a supranational source of authority for arbitral jurisdiction.

4.3 This chapter begins with a general discussion of the form and formal requirements of arbitration agreements in Section 2. Section 3 explains the concept of the doctrine of separability, which concerns the separation of an arbitration clause from the contract in which it is contained. Section 4 moves on to consider the issues of identity, non-signatories and capacity, following which Section 5 addresses the requirement of a defined legal relationship. The focus of the chapter then turns to the issues of consolidation, joinder and intervention of third parties in Section 6. Section 7 considers the enforcement of arbitration agreements. Section 8 covers the important topic of arbitrability and distinguishes between subjective arbitrability and objective arbitrability. Finally Section 9 addresses the drafting of arbitration agreements.

2 Arbitration agreement

2.1 Is an arbitration agreement necessary?

The short answer is yes: an arbitration agreement is necessary in order to institute arbitration proceedings. The Philippines Supreme Court (among many others) has stated this in clear and simple language:

Disputes do not go to arbitration unless and until the parties have agreed to abide by the arbitrator's decision. Necessarily, a contract is required for arbitration to take place and to be binding.

Every international commercial arbitration requires an arbitration agreement. Arguably, there are exceptions where no arbitration agreement exists but where the parties are treated as though one had been concluded between them. For example, the definition of arbitration agreements in Article 7(2) of the Model Law includes an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. An arbitration could thus be based on the failure to deny an arbitration agreement even if that agreement did not in fact exist. Similarly, arbitrations may take place without an arbitration agreement if an estoppel or similar legal doctrine operates to preclude a party from denying the existence of an arbitration agreement. This may occur when that party fails to object to the absence of an agreement during the early stages of an arbitration or because, on the basis of a party's conduct, it would be unfair for that party to deny the existence of an arbitration agreement. The effect of estoppel on arbitration agreements is discussed below.

Furthermore, in some domestic jurisdictions, the law provides for so-called 'compulsory arbitration'. This refers to the court practice of compelling parties to submit their dispute to arbitration whether or not the parties have signed an arbitration agreement.

Another exception occurs in the context of investor-state arbitration. The state's consent to arbitrate may be given in a bilateral or multilateral treaty, such as the 1988 Agreement between the Government of Australia and the Government of the People's Republic of China on the Reciprocal Encouragement and Protection of Investments, or the North American Free Trade Agreement. In this situation there is no direct arbitration agreement between the state and an investor who institutes arbitration against that state. The consent to arbitrate is derived in two separate phases. The state provides its consent in the provisions of the treaty and the investor's consent is deemed to be provided when

2 See Section 4.2.1.
it institutes arbitration proceedings pursuant to the treaty. Consequently, an arbitration takes place in the absence of a direct arbitration agreement between the parties. Jan Paulsson has famously described this type of dispute resolution as ‘arbitration without privity’.\(^5\) Investor-state arbitration is examined in Chapter 10.

2.2 Types of arbitration agreements

Arbitration agreements may be concluded before or after the dispute arises. The latter are called ‘submission agreements’. In practice, most arbitration agreements are contained in contracts. Submission agreements are relatively rare because once a dispute arises one side may see an advantage in arbitration while the other refuses to arbitrate in order not to give the first side an advantage and/or to delay resolution of the case.

If the arbitration agreement is in the form of a clause contained in a substantive contract (which is the norm), the arbitration agreement will generally be considered as having been formed at the same time as the contract is formed. However, despite the identical time of formation and the fact that the arbitration agreement is a clause of the substantive contract, the arbitration agreement is normally treated as an agreement separate from the rest of the contract.\(^6\) This means that it is possible for an arbitration agreement to have been made even though the substantive contract in which that agreement is contained never came into existence. In these circumstances the arbitration agreement is preserved to resolve a dispute relating, for example, to the formation of the substantive contract.

2.3 Definition and formal requirements of an arbitration agreement

2.3.1 General

The 1985 version\(^7\) of Article 7 of the Model Law provides a useful definition of arbitration agreements. However, it must be recalled that the particular form requirements may vary from country to country.

Article 7. Definition and form of arbitration agreement
(1) ‘Arbitration agreement’ is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in the contract or in the form of a separate agreement.
(2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

The 1985 Model Law Article 7(2) was directly inspired by the New York Convention. Articles II(1) and (2) of the New York Convention use much of the same language.\(^8\)

From the plain language of Article 7(2) of the 1985 Model Law and Article II of the New York Convention it appears essential that a valid arbitration agreement be in writing. However, this is not quite correct. A distinction should be drawn between a requirement which, if not satisfied, renders an arbitration agreement void (sometimes called a solemn form requirement); and a requirement which is not a condition but an evidentiary rule making it difficult to prove the existence or validity of the arbitration agreement (sometimes called a proof form requirement). Reading closely it can be seen that both the Model Law and the New York Convention require that an arbitration agreement be evidenced in writing.\(^9\) An oral arbitration agreement could therefore be valid and enforceable if the consent of all parties was recorded in writing.

The writing requirement was further relaxed in the 2006 version of the Model Law. In that version, two optional texts for Article 7 are provided. The second does not stipulate any writing requirement whatsoever:

Option 1

Article 7. Definition and form of arbitration agreement
(1) ‘Arbitration agreement’ is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

\(^6\) See Section 3.
\(^7\) This is the version of the Model Law that is most prevalent. At the time of writing only Australia, (Florida, USA), Ireland, Mauritius, New Zealand, Peru, Rwanda, Singapore and Slovenia have implemented some or all of the 2006 Model Law amendments. Hong Kong is understood to be in the process of passing legislative amendments. See also the discussion of the Model Law in Chapter 2.
\(^8\) New York Convention Article II provides:
1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
2. The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
The arbitration agreement shall be in writing.

An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; ‘electronic communication’ means any communication that the parties make by means of data messages; ‘data message’ means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

Option II

Article 7. Definition of arbitration agreement

‘Arbitration agreement’ is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

The note accompanying the 2006 version of the Model Law observes that the movement away from a strictly enforced writing requirement reflects modern realities:

It was pointed out by practitioners that, in a number of situations, the drafting of a written document was impossible or impractical. In such cases, where the willingness of the parties to arbitrate was not in question, the validity of the arbitration agreement should be recognized. For that reason, article 7 was amended in 2006 to better conform to international contract practices. In amending article 7, the Commission adopted two options, which reflect different approaches on the question of definition and form of arbitration agreement. The first approach follows the detailed structure of the original 1985 text... It follows the New York Convention in requiring the written form of the arbitration agreement but recognizes a record of the ‘contents’ of the agreement ‘in any form’ as equivalent to traditional ‘writing’. The agreement to arbitrate may be entered into in any form (e.g. including orally) as long as the content of the agreement is recorded. This new rule is significant in that it no longer requires signatures of the parties or an exchange of messages between the parties... It also states that the reference in a contract to any document (for example, general conditions) ‘containing an arbitration clause constitutes an arbitration agreement in writing provided that the reference is such as to make that clause part of the contract’. It thus clarifies that applicable contract law remains available to determine the level of consent necessary for a party to become bound by an arbitration agreement allegedly made ‘by reference’.

The second approach defines the arbitration agreement in a manner that omits any form requirement.

Even prior to its adoption of the 2006 revision to the Model Law, New Zealand expressly recognised arbitration agreements made orally and similarly recognises any resulting award. The language of the New Zealand statute, ‘[a]n arbitration agreement may be made orally or in writing,’ is expressed inclusively. This position can be contrasted with the negative phrasing of Hong Kong’s Arbitration Ordinance, Section 2AC of which expressly states that for the purpose of that Ordinance an agreement is not an arbitration agreement if it is not in writing. This is a subtle but significant drafting difference – the latter may be considered an example of a solemn form requirement as explained above. However, fortunately Section 2AC has been interpreted very liberally. In the Hong Kong District Court decision of Winbond Electronics (HK) Ltd v Achilea Components China Ltd it was noted:

H Smal Ltd v Goldroyce Garment Ltd [1994] 2 HKC 526, 529 where it was said that ‘There is no basis for arguing that the arbitration agreement can be established by a course of dealings or the conduct of the parties... unless there is a record whereby the defendant has in writing assented to the agreement to arbitrate.’ In view of the present Section 2AC, what was there said or held is no longer the law – the arbitration agreement may now be established by a course of dealings or conduct of the parties provided there is reference to terms (of arbitration) that are in writing.

As the quoted passage indicates, the statute in Hong Kong was amended between these two decisions. Somewhat appropriately, Neil Kaplan commented on H Smal Ltd v Goldroyce Garment Ltd in a lecture given approximately two years later, and after he had retired from judicial service. Kaplan said of the decision:

I venture to suggest that this decision, even if technically correct, produces an absurd result which is inconsistent with commercial reality. There was no doubt that the parties entered into a contract which was contained in or evidenced by the written order and B’s conduct. Why on earth should the arbitration clause in the contract require to be established by any higher degree of proof than the basic contractual terms themselves? I hasten to add that I am not advocating the bringing within the New York Convention of oral agreements to arbitrate. All I am suggesting is that on the facts of the case under discussion there are sufficient legal theories available which could lead to a form of words which would bring the case not only within the Model Law but also the New York Convention.

11 New Zealand Arbitration Act 1996 Article 7(1), Schedule 1. ‘An arbitration agreement may be made orally or in writing. Subject to [section 11], an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.’

12 Section 2AC(1) of the Hong Kong Arbitration Ordinance states ‘An arbitration agreement is not an arbitration agreement for the purposes of this Ordinance unless it is in writing.’

13 See para 4.12.


4.17 In response to the sorts of criticisms and observations made by Kaplan, UNCITRAL formulated the ‘Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session’. In relevant part it states:

Taking into account also enactments of domestic legislation, as well as case law, more favourable than the Convention in respect of form requirement [sic] governing arbitration agreements, arbitration proceedings and the enforcement of arbitral awards,

Considering that, in interpreting the Convention, regard is to be had to the need to promote recognition and enforcement of arbitral awards,

1. Recommends that article II, paragraph 2, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, be applied recognizing that the circumstances described therein are not exhaustive.

4.18 Kaplan’s view is attractive, especially his rhetoric as to ‘Why on earth should the arbitration clause in the contract require to be established by any higher degree of proof than the basic contractual terms themselves?’ Ultimately, the role of the writing requirement is to assist in proving that an arbitration agreement exists and the terms of that arbitration agreement. So long as that proof can be established, then there appears to be no reason to place a significantly higher burden on a party trying to establish the existence or content of an arbitration agreement than one trying to establish the existence or content of any other contractual obligation. The evolution in the Model Law and UNCITRAL’s guidance on interpretation are therefore to be commended.

4.19 Whereas the discussion above considers the policy behind the ‘in writing’ requirement, we now turn to consider what ‘in writing’ actually means. Increasingly, countries are expanding the definition of writing to include examples of newer forms of communication, such as electronic communications. These clarifications are usually drafted to remove doubt. Hong Kong adopted a different approach by defining writing as ‘includ[ing] any means by which information can be recorded’. The writing requirement must necessarily be understood with reference to its underlying purpose, and interpreted according to technology and business practices that prevail today, not those that existed over 50 or 25 years ago when, respectively, the New York Convention and the Model Law were originally drafted.


17 For instance, the specific addition of electronic communications, found in Article 1 of the Supreme People’s Court’s Interpretation of Several Issues regarding the Application of the Arbitration Law of the PRC (Fashi (2006) No. 7), the Australian International Arbitration Amendment Act 2010, and Singapore International Arbitration (Amendment) Act 2009 to note just a few examples. However, specific note should be taken that the Singapore amendments only apply to Part II of the Singapore International Arbitration Act and not Part III. The Explanatory Statement which accompanies the Bill states that the distinction is because Part III deals with the New York Convention which does not have a modernised definition of an arbitration agreement.

18 Hong Kong Arbitration Ordinance, Section 2AAC(4).

2.3.2 Incorporation by reference

Difficulties can arise when the arbitration agreement is said to have been incorporated by reference. This situation arises where parties have not included an arbitration agreement in their own contract, but merely include a reference to another document which contains an arbitration agreement. The question is whether the arbitration agreement in the other document is binding on the parties to the contract.

Although some arbitration laws provide guidance, the question of whether or not a clause has been properly incorporated must ultimately be considered in light of the law governing the arbitration agreement. Born notes that different jurisdictions have adopted different approaches to this issue. After commenting that most jurisdictions will recognise the incorporation of an arbitration clause where it has been specifically drawn to the attention of a party, he observes that where there is a general reference to the other document as a whole, ‘there is little apparent uniformity among different national legal regimes’. As we explain below, there appears to be a consistent approach adopted by the majority of countries within the Asia-Pacific region.

Where we find Born persuasive is that the question of incorporation by reference should not in any way be confused with or influenced by the doctrine of separability. That doctrine is dealt with in detail in the next section. Essentially, it treats an arbitration clause in a contract as a separate and independent agreement from the contract containing it. Born notes that some might incorrectly assume that because the arbitration agreement is considered separate, it could not as a matter of construction be incorporated without some specific reference. Indeed, denying that an arbitration agreement has been incorporated by reference on this reasoning alone would be insufficient.

The general issue of incorporation by reference has come before different national courts in this region on a number of occasions. It typically arises in the context of an application to stay court proceedings. The factual scenarios often involve charterparty agreements and bills of lading, where reference is made in the bill of lading to the charterparty agreement – and the arbitration agreement is found in the charterparty agreement. Although there have been some exceptions, the general approach adopted in the Asia-Pacific region is that it is not necessary to refer specifically to the arbitration agreement for it to be incorporated by reference. The test is simply whether the parties intended to incorporate the arbitration agreement. A specific reference, while not strictly necessary, is nevertheless advisable to avoid sometimes lengthy arguments on the point.
Arbitral jurisdiction

1 Introduction

The features and requirements of arbitration agreements were examined in Chapter 4. This chapter addresses procedural and other issues that can arise when a party wishes to contest an arbitral tribunal's jurisdiction. It also considers the link between an arbitral tribunal's authority to rule on its own jurisdiction and the control of that authority by domestic courts.

An arbitral tribunal's jurisdiction is far from automatic. It derives from the disputing parties' free will, i.e. their agreement to arbitrate. The consensual nature of arbitral jurisdiction must be contrasted with the jurisdiction of domestic courts, which is established by the domestic law of the forum and any applicable treaties dealing with international judicial competence.

The consensual basis of arbitration means that a respondent party can attempt to contest or deny arbitral jurisdiction. The objecting party might never have agreed to arbitrate or, even if it previously agreed, may now prefer to litigate the dispute in a domestic court. In the latter case the objecting party may seek to escape its obligation to arbitrate by denying its previous agreement. Alternatively, that party might raise jurisdictional objections in an attempt to delay and frustrate the resolution of the dispute.

After introducing and summarising the procedure of jurisdictional objections (Section 2), we examine preliminary issues concerning arbitral jurisdiction (Section 3), before dealing with the competence-competence rule and prima facie jurisdictional decisions by courts (Section 4), prima facie jurisdictional decisions by arbitral institutions (Section 5), and finally the effects of a court, institution or arbitral tribunal's jurisdictional decision (Section 6).

2 Overview and summary of jurisdictional objections

Jurisdictional objections are generally raised at the outset of an arbitration. If an arbitration progresses to completion, a party may also deny arbitral jurisdiction at the end, during a procedure to challenge the award or to resist enforcement of the award. However, a party's failure to raise jurisdictional objections promptly may give rise to a finding that the party is deemed to have waived those objections.

Overall, a party (typically the respondent) wanting to contest jurisdiction has the following options available to it:

(i) First, the respondent may challenge jurisdiction by making its objections directly with the arbitral tribunal. Arbitral tribunals are empowered to decide on their own jurisdiction by virtue of a principle found in virtually all arbitration laws and rules known as the 'competence-competence' rule.

- An essential feature of the competence-competence rule is that an arbitral tribunal's decision that it possesses jurisdiction is not final – it can be reviewed by a domestic court during proceedings to set aside the decision. Save for exceptional circumstances (and erroneous decisions by some domestic courts), the only domestic court with jurisdiction to set aside an arbitral tribunal's jurisdictional decision is a court at the seat of arbitration.

- However, while a court at the seat of arbitration can always hear an action to set aside an arbitral tribunal's decision that the arbitral tribunal possesses jurisdiction, this is not true when an arbitral tribunal decides that it lacks jurisdiction. As explained further below, only some legal systems expressly empower their courts to review an arbitral tribunal's negative jurisdictional decision.

(ii) Second, the respondent party may refuse to participate in the arbitration, wait for the arbitral tribunal's final award and then (i) seek to have that award set aside (i.e. challenge it) at the seat of arbitration on the basis that the arbitral tribunal did not have jurisdiction to make the award or (ii) wait

1 Most of the issues summarised in this list are dealt with in more detail below in this chapter. For an analysis of the different kinds of uncooperative respondent tactics, see M Hwang, "Why Is There Still Resistance to Arbitration in Asia?", Lunchtime address to The International Arbitration Club, Singapore, Autumn 2007. An earlier version of the paper was published in G Aksoy, K-H Becketkugel, MJ Mustill, PM Patocchi and AM Whitesell (eds), Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner, ICC Publishing, 2005. See also M Philippe and P Blondeau, 'Comment se manifestent certaines tactiques dilatoires dans l'arbitrage', (1999) 15(7) DallbsAfferes 169, at p. 1097.

2 This rule is discussed in Section 4.

3 Regarding setting aside proceedings see Chapter 9, Section 3.2.
for the claimant to commence proceedings to enforce the award and then resist enforcement for the same reason.

- Either of these strategies raises significant risks for the respondent. The failure to participate in the arbitration will mean that the respondent's views, arguments and position were not heard by the arbitral tribunal. This means that if its jurisdictional plea before the domestic court fails (whether in the seat of arbitration or before the court where the opposing side is trying to enforce the award), it will be faced with and bound by an award made in circumstances where its position was never argued before the arbitral tribunal. Additionally, in some circumstances the respondent's failure to participate will be considered as a waiver of its right to object to the arbitral tribunal's jurisdiction.

- If the respondent participates in the arbitration without raising an objection to the arbitral tribunal's jurisdiction but subsequently contests that jurisdiction before a court, the respondent will almost always be considered by the court to have waived its right to object to arbitral jurisdiction. (The facts on which a waiver is based may also or alternatively be used to support the invocation of other legal doctrines, such as issue estoppel or abandonment*). (iii) Third, the respondent may seek from the arbitration's outset a ruling directly from a domestic court at the seat of arbitration that the arbitral tribunal lacks jurisdiction. Whether or not a court at the seat of arbitration is competent to decide an issue of arbitral jurisdiction before the arbitral tribunal has ruled on its own jurisdiction depends on the local law and practice of the courts. It depends, in particular, on that jurisdiction's interpretation and application of the competence-competence rule.

- A respondent sometimes seeks a similar ruling from a court outside the seat of arbitration – for example a court in its home jurisdiction. As a general rule, a decision from a court outside the seat of arbitration should not affect the arbitral tribunal's jurisdiction because the court concerned would not be competent under the law of the seat of arbitration to make such a decision.

(iv) Fourth, another alternative is for the respondent to commence court litigation proceedings against the claimant on the substance of the dispute. If it does so, the other side could accept – expressly or implicitly – the domestic court's competence, thereby waiving its right to invoke the arbitration agreement in connection with that dispute. For example, if the opposing party Proceeds to argue its defence before the domestic court without objecting to that court's jurisdiction on the basis of the parties' arbitration agreement it will usually be considered to have waived the arbitration agreement for that dispute. If, however, the opposing party contests the court's jurisdiction on the basis of the arbitration agreement then that court will, depending on its law, either rule on the arbitral tribunal's jurisdiction or order the parties to arbitrate their dispute (thus staying or dismissing its own proceedings), including their dispute as to the issue of the arbitral tribunal's jurisdiction.

Most of the issues set out in the above summary are developed in much more detail in the following sections.

3 Preliminary issues relating to arbitral jurisdiction

3.1 Partial and absolute jurisdictional objections

An objection to an arbitral tribunal's jurisdiction can be absolute (i.e. contesting arbitral jurisdiction per se, or over a particular party per se) or partial (i.e. only with respect to certain of the claims or issues submitted to arbitration).

Absolute jurisdictional objections are the most common. They are usually raised on the ground that one of the alleged parties to the arbitration is not a proper party to the arbitration agreement. They may also be raised on grounds, for example, that the respondent did not have capacity to enter into the arbitration agreement, that the arbitration agreement is illegal, void or incapable of being performed, or that the claimant has waived its right to invoke the arbitration agreement.

Partial jurisdictional objections arise primarily as a consequence of the concept that an arbitral tribunal has jurisdiction to decide only those matters which the parties have agreed that it can decide. Sometimes an arbitration agreement expressly limits arbitral jurisdiction to certain carefully defined issues. Those issues could be listed in the arbitration agreement, or listed in a document created at the outset of the arbitration such as the terms of reference.

Even if no specific list of issues exists, a partial jurisdictional objection could arise from the plain language of the arbitration agreement. A typical arbitration clause contained in a contract may provide for the resolution of all disputes relating to this contract (or words to that effect). The respondent could argue that the parties did not agree to arbitrate non-contractual claims, for example pre-contractual or post-contractual tort claims. That would be a partial jurisdictional objection. In the face of a more broadly drafted clause, for example providing for the resolution of all disputes arising out of or in connection with this contract, such an argument would be very difficult to sustain.

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4 The concept of waiver is applied differently by domestic courts depending on the jurisdiction concerned. A discussion of the differences between waiver and other doctrines such as issue estoppel or abandonment is beyond the scope of this book, and we use the catch-all term 'waiver' to cover all of those legal concepts even at the risk of over-simplification in some contexts.

5 Various examples of absolute jurisdictional objections are provided in the discussion of Article 6.2 of the ICC Rules below in Section 5.

6 In relation to Terms of Reference see Chapter 7, Section 6.5.
A partial jurisdictional objection based on the scope of an arbitration clause was raised before the Singapore High Court in the 2004 case Sabah Shipyard (Pakistan) Ltd v Government of the Islamic Republic of Pakistan. The parties disputed whether the ICC arbitral tribunal had jurisdiction to decide on a claim for costs which had been incurred during a prior, related ICC arbitration which had been withdrawn. It was argued that the costs claim from the previous arbitration did not fall within the scope of the arbitration agreement providing for arbitration of disputes ‘arising out of or in connection with’ the contract. The Singapore High Court disagreed. It found that the parties must have intended that the costs of a prior arbitration arising out of the same contract could be settled by a subsequent arbitral tribunal.

Partial jurisdictional objections can arise in many other ways. A party could argue for example that one of its opponent’s claims arises from a different contract. The other contract might contain a different dispute resolution clause, such as an inconsistent arbitration clause or a clause designating a domestic court as competent.

Partial jurisdictional objections can also arise by virtue of the law governing the arbitration agreement or the law governing the arbitration proceedings. Either of those laws may place limits on the kind of claims that are capable of resolution by arbitration, some subject matters being considered inarbitrable. Accordingly, a partial jurisdictional objection could allege that certain issues are inarbitrable under the relevant law.

Finally, a distinction needs to be drawn between an arbitral tribunal’s jurisdiction and the scope of its powers. It is sometimes argued that an arbitral tribunal does not possess the power, legally speaking, to make certain orders. For example, there has historically been debate about the extent of arbitrators’ powers to order certain preliminary injunctive relief, and in particular interim injunctions that affect a party’s ability to deal with immovable property. Such issues concern an arbitral tribunal’s powers rather than its jurisdiction over the claims or parties involved and should be clearly distinguished.

### 3.2 Jurisdictional objections raised by a party

The most common scenario in which a jurisdictional issue will arise is where the respondent objects to the arbitral tribunal’s jurisdiction at the beginning of the arbitration. Arbitration laws and rules usually require a party to raise any jurisdictional objections early, generally prior to that party’s first submission on the substance of the dispute. Failure to do so can mean irrevocable waiver of that party’s right to raise jurisdictional objections. A comparison of the relevant provisions of the Model Law and the 1976 UNCITRAL Arbitration Rules follows.

Article 16(2) of the Model Law provides:

A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

Article 21(3) of the 1976 UNCITRAL Arbitration Rules is slightly different:11

A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim.

Both Articles provide that if a respondent wants to raise jurisdictional objections, it must do so not later than when filing its statement of defence. The Model Law expressly provides, in addition, that mere participation in the constitution of an arbitral tribunal will not preclude the respondent from later objecting to jurisdiction. In contrast to the Model Law, the UNCITRAL Arbitration Rules deal expressly with objections regarding arbitrable jurisdiction over counterclaims. However, delay in raising such an objection would be caught by the general wording of Article 16(2) of the Model Law. Thus an objection to the arbitral tribunal’s exercise of authority must be brought as soon as the matter is raised in the arbitration. That ‘catch all’ covers jurisdiction over new claims, including counterclaims. Finally, only the Model Law expressly empowers the arbitral tribunal to admit a later plea if it considers the delay justified.

Numerous jurisdictions including Hong Kong, Singapore, Malaysia, India, Korea, Australia and New Zealand have adopted Article 16(2) of the Model Law without any substantive modification.12 Japan has chosen a slightly different approach. Article 23(2) of the 2003 Japanese Arbitration Law states:

A plea that the arbitral tribunal does not have jurisdiction shall be raised promptly in the case where the grounds for the assertion arise during the course of arbitral proceedings, or in other cases before the time at which the first written statement on the substance of the dispute is submitted to the arbitral tribunal (including the time at which initial assertions on the substance of the dispute are presented orally at an oral hearing).
5.22 This provision is clearly inspired by the Model Law but its language is stricter. The jurisdictional objections must be raised before any written or oral submission on the merits is filed.

5.23 If a party participates in the arbitration but fails to raise a jurisdictional objection within the time limit specified by the applicable law, its silence may amount to entering into an arbitration agreement. Article 7(2) of the Model Law refers to an arbitration agreement being in writing ‘if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another’. An example of where the respondent’s failure to object to jurisdiction worked against it is found in Bauer (M) Sdn Bhd v Daewoo Corp. Although the Malaysian Court of Appeal agreed with the trial judge that the parties had not incorporated an arbitration agreement into their contract, it found that the acts of the respondent in participating in the arbitration eschewed it from subsequently denying the arbitrator’s jurisdiction. Thus its failure to raise its jurisdictional objection in good time extinguished its right to do so at a later stage.

3.3 Arbitral tribunal’s ex officio examination of jurisdiction

5.24 Jurisdictional objections can only be raised by an entity named as a party to arbitration proceedings. However, regardless of whether jurisdictional issues are raised by one or more parties, it is prudent for all arbitral tribunals to consider on their own initiative whether they have jurisdiction, both absolutely and with respect to each claim on which they have been asked to rule. An arbitral tribunal should always comment on jurisdiction in its award(s), even if it is only to cite the arbitration agreement and confirm that neither party objected to jurisdiction.

5.25 An express decision on jurisdiction must also be made if one or more parties to the arbitration proceedings do not participate at all. Unlike domestic court proceedings, ‘default judgments’ cannot be issued simply because a party fails to appear in an arbitration. If a party does not participate, the arbitration continues without the defaulting party or parties. In these circumstances, the arbitral tribunal should examine and take an express decision on its own jurisdiction. Before doing so, it should ask the participating party or parties to file submissions on jurisdiction and expressly provide an opportunity for the non-participating parties to do so as well. Each non-participating party should be kept informed of and invited to participate in all steps in the arbitration.

5.26 It is essential for an arbitral tribunal to examine and rule on jurisdiction where the respondent is not participating because the respondent may subsequently raise its objections in court proceedings challenging the award or resisting its enforcement. As noted above, however, failing to participate in an arbitration in the hope that the award can later be challenged is a high-risk strategy. If the respondent loses on the jurisdictional arguments before the courts, it will find itself bound by the substance of an arbitral award resulting from a procedure in which it did not defend its position.

In addition to an arbitral tribunal’s duty to ensure that it has jurisdiction over all of the claims submitted to it, an arbitral tribunal must of its own initiative ensure that it does not decide issues incapable of settlement by arbitration under the law governing the arbitration agreement or the law of the seat of arbitration. Arbitrators must also ensure that parties do not use arbitration to avoid certain mandatory provisions of a domestic law.

3.4 Appropriate time to decide jurisdiction

When an arbitral tribunal is faced with a challenge to its jurisdiction, it has two broad options as to when it will decide that challenge. The first is that it can bifurcate the proceedings, thus hearing arguments on jurisdiction separately and then rendering a decision on jurisdiction before proceeding to examine the merits. The second is that it can decide to join the issue of jurisdiction to the merits and decide both in one single award.

An arbitral tribunal’s power to split an arbitration into separate phases arises from its general powers to manage the proceedings. In addition, the Model Law and most arbitration laws expressly reiterate this power in relation to jurisdictional decisions. Article 16(3) of the Model Law provides that ‘the arbitral tribunal may rule on a jurisdictional objection either as a preliminary question or in an award on the merits’. Article 186 of the Swiss Private International Law Act 1987, which appears to have been inspired by Article 21(4) of the 1976 UNCITRAL Arbitration Rules, is different in that it provides a presumption in favour of deciding jurisdiction as a preliminary matter: ‘The arbitral tribunal shall, as a rule, decide on its jurisdiction by preliminary award.’ The ACIGA Rules,

13 [1999] 4 MLJ 545. See also for China, Reply of Supreme People’s Court to the Request of Enforcement of Arbitral Award made in England by Swiss Bangi Co., Ltd (Civil 4, Miscellaneous), No. 47 (2000).
14 See, e.g., ICID Rules Rule 41(2).
15 In 2009, there was at least one non-participating party in 6% of ICC arbitration cases at the time the ICC Court was requested to take decisions in connection with constituting the arbitral tribunal and other preliminary matters.
16 See Chapter 7, Section 6.10 on non-participating parties.
17 Deciding a dispute that is not capable of settlement by arbitration under the law of the seat of the arbitration is not always fatal to the award. See Chapter 4, Section 6 on arbitrariness.
18 See discussion in Chapter 3, Section 4 regarding mandatory rules.
19 A decision on jurisdiction is sometimes taken in the form of a procedural order and sometimes in the form of an award. However, it is now more common to find such decisions in the form of an award. Awards on jurisdiction are preferable because they permit scrutiny if the competent arbitral institution’s rules provide for scrutiny, immediate enforceability and challenge (in some but not all jurisdictions). As discussed further below in Section 6.2, a negative jurisdictional decision cannot technically be an award.
20 An arbitral tribunal can bifurcate, trifurcate or add even more phases to arbitration. See further Chapter 7, Section 6.9 in this regard. See also Chapter 7, Section 6.1 describing the typical procedural steps in an arbitration.
21 Hong Kong, Singapore, Malaysia, Korea, the Philippines, New Zealand and Australia have not modified the Model Law in this regard. Section 23(4) of the Japanese Arbitration Law is slightly different, but equivalent. Section 16(3) of the Indian Arbitration and Conciliation Act is slightly different again, but it is not clear whether it applies differently. In China this does not apply because there is no competence-competence rule empowering the arbitral tribunal to decide jurisdiction (see Section 4.2 below).
5.30 The advantage of deciding jurisdiction separately from the merits is that it saves a long and costly proceeding on the merits when it is certain whether or not the arbitral tribunal possesses jurisdiction. Time and costs could have been wasted if the arbitral tribunal later rules that it does not have jurisdiction.

5.31 On the other hand, the advantages of combining jurisdiction and the merits are twofold. First, bifurcating the proceedings will almost always add time and, as a consequence, costs to the overall procedure if the arbitral tribunal finds that it has jurisdiction. Second, if the jurisdictional objections are in any way intertwined with the substantive issues in dispute there may be a degree of overlap. A classic example is where a respondent argues that it is not a proper party to either the contract or the arbitration agreement. The issues may be similar for both decisions. Separating jurisdiction from the merits when they are closely related is not only potentially inefficient, because issues may have to be re-argued, but can create a risk that the arbitral tribunal inadvertently decides something in the jurisdiction phase that will constrain or influence its subsequent decision on the merits. Similarly, the arbitral tribunal would put itself in a difficult position if it decided in favour of jurisdiction and then, subsequently when examining the merits, discovered facts that would have led it to a different conclusion on jurisdiction. Some jurisdictional issues are best decided only after the arbitral tribunal is cognisant of all the relevant facts.

5.32 The factors for an arbitral tribunal to consider when deciding whether to rule on jurisdiction separately from the merits are, therefore: (i) the complexity of the jurisdictional issues (high complexity sometimes leans in favour of bifurcation); (ii) the degree of potential overlap between the jurisdictional and substantive issues (significant potential overlap being a strong factor against bifurcation); and (iii) considerations of economy and efficiency. Without prejudging the issues, international arbitrators may also consider their first impressions of the likelihood of success of the jurisdictional objections. If the objections appear to be frivolous, which is not uncommon in attempted dilatory tactics, this may lean against bifurcation which would serve only to delay progression to the merits of the case. The reverse also applies: if the jurisdictional objections seem prima facie well founded, it may make sense to deal with them first before time and money is wasted on a proceeding on the merits.

5.33 It has been said by a well-known arbitrator that 'the best course for an arbitral tribunal to take is ... where possible, it should hear arguments on the issue of jurisdiction as a preliminary matter and render an interim award on the point. This enables the parties to know where they stand at a relatively early stage'. However, for the reasons set out above, we consider that there are often very good reasons not to hear jurisdiction separately. In many cases, bifurcation will only cause delay and additional costs and may pose risks where the issues are intertwined with the merits.

3.5 Waiver of the right to invoke an arbitration agreement

A party that has waived an arbitration agreement loses its right to rely on the arbitration agreement. Waiver may either be express (e.g. the party expressly states that it waives the arbitration agreement) or implied by a party's conduct. In practice, disputes about express waiver are rare. Implied waiver on the other hand is sometimes alleged by a party contesting arbitral jurisdiction or resisting the stay of a court action. Ultimately, the requirements for establishing that waiver has occurred will depend on the law governing the arbitration agreement. The rest of this section discusses mainly the general principles relevant to implied waiver.

Poudret and Besson explain:

The arbitration agreement is terminated in the case of mutual waiver, which can be explicit or tacit and is not subject to any requirements of form. Such waiver shall be deemed made where the claimant proceeds before a court and the respondent pleads on the merits without invoking the arbitration clause to contest the jurisdiction of the court.

As Poudret and Besson note, the most common form of implied waiver occurs during domestic court proceedings. It will occur where the following conditions are met:

(i) one of the parties to the arbitration agreement commences court litigation against another party or parties to the arbitration agreement;

22 The institutional arbitration rules in this region repeat the Model Law approach except for the ACICA Rules (Article 24.4), BANI Rules (Article 18.4) and KASB International Rules (Article 19.4), which all follow the Swiss approach.

23 The 2010 UNCITRAL Arbitration Rules use a different construction in Article 23(3), and there is no longer a presumption in favour of ruling on jurisdiction as a preliminary matter.

24 See also Article 36(1) of the ASEAN Comprehensive Investment Agreement, signed 26 February 2009 ("Where issues relating to jurisdiction or admissibility are raised as preliminary objections, the tribunal shall decide the matter before proceeding to the merits.").

25 An arbitration clause in a contract is separate and distinct from the substantive contract containing it. This means that a party may have entered into one but not the other. This point is discussed in more detail in Chapter 4, Section 3.


27 As noted in the introduction to this chapter, we use 'waiver' as an umbrella term that should be understood to encompass different legal terminology for different circumstances (such as issue estoppel or abandonment).

28 See Chapter 4, Section 7 on the enforcement of arbitration agreements.

5.44 As a general proposition a defendant to a court proceeding who wants the dispute to be determined by arbitration must raise the arbitration agreement (or object to the court’s jurisdiction) not later than when submitting his first statement on the substance of the dispute or it will be too late. In Hong Kong, this phrase from the Model Law has been interpreted fairly liberally by courts, in favour of arbitration. The Philippines legislation is slightly different, requiring the objection to be raised not later than the pre-trial conference. The pre-trial conference would usually be later than a party’s first statement on the substance of the dispute.

A party participating in any court proceeding where an arbitration agreement may cover the same dispute should be very cautious about implicitly waiving the arbitration agreement. Whether as plaintiff or defendant, it is prudent expressly to mention in each submission to the court that by making that submission the party does not intend to waive its right to invoke the arbitration agreement.

4 Arbitral tribunal’s determination of jurisdiction: Competence-competence rule

5.46 There are various facets to the competence-competence rule. At its simplest, it empowers an arbitral tribunal to decide on any and all objections as to its own jurisdiction. A more thorough consideration of the competence-competence rule reveals close links to the courts, and in particular the circumstances under which a court will allow an arbitral tribunal to rule on its jurisdiction prior to a court examining that jurisdiction. It is therefore a rule that affects the temporal priority as between the arbitral tribunal and the courts in decisions relating to the arbitral tribunal’s jurisdiction. There is great variation in the approaches by different courts in this respect. Section 4.1 introduces the competence-competence rule and Section 4.2 examines it from the perspective of Asia-Pacific courts.

4.1 Introduction to the competence-competence rule

The competence-competence rule means that an arbitral tribunal may be authorised to determine its own jurisdiction. This may at first seem illogical given that the arbitral tribunal’s decision could be in the negative. How could an arbitral tribunal decide that it does not have jurisdiction if a consequence of that decision is that the arbitral tribunal did not have jurisdiction to make it in the first place? Given the consensual basis for arbitral jurisdiction, one might consider that without an agreement to arbitrate, an arbitral tribunal could not – as a matter of common sense – decide anything, and any decision it does make would be void of any effect. Pursuing that line of reasoning, one may argue that only a competent court could rule on the jurisdiction of arbitral tribunals.

Arbitral tribunals can, however, decide on their own jurisdiction, and even rule that they do not have jurisdiction. As explained by Fouchard, Gaillard and Goldman, ‘the competence-competence principle also allows arbitrators to determine that an arbitration agreement is invalid and to make an award declaring that they lack jurisdiction without contradicting themselves’. In order to overcome the apparent contradiction of an arbitral tribunal deciding that it does not have jurisdiction, the competence-competence rule must exist above and beyond the agreement to arbitrate. Arbitration experts therefore tend to agree that the source of an arbitral tribunal’s power to determine its own jurisdiction is not the agreement to arbitrate but rather the law governing the arbitration proceedings. In other words, an arbitral tribunal has the authority to decide on its own jurisdiction ultimately because an applicable domestic arbitration law authorises it to do so. This was confirmed by a decision of the Supreme Court of British Columbia, Canada. While outside the Asia-Pacific, the decision is of interest because British Columbia’s international arbitration law is based on the Model Law. The court in H&H Marine Engine Services Ltd v Volvo Penta of the Americas Inc refused to recognise the competence-competence rule as applying automatically, but found that it only applies where the law governing the arbitration proceedings or the arbitral rules enact the principle.
The competence-competence rule is almost universally recognised in arbitration laws, but in distinctly varying degrees and in different ways. Even in laws where it is not expressly recognised, the competence-competence rule is sometimes implied into those laws and applied as a general principle of international arbitration law and/or practice. However, as shown by the British Columbian case referred to in the previous paragraph, it should not be assumed that the competence-competence rule applies as a matter of course. Some courts will only apply it where the lex arbitri (or perhaps arbitration rules) enact it specifically.

The competence-competence rule is set out in Article 16(1) of the Model Law:

The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

The first sentence of this Article enacts the competence-competence rule, while the following sentences concern the related concept of separability of an arbitration clause; that is the concept that for the purposes of an arbitral tribunal ruling on jurisdiction an arbitration clause in a contract is considered as a separate agreement from the contract containing it.

In addition to its recognition by virtually all legal systems, the competence-competence rule is reiterated in most arbitration institutional rules. Typical regional examples include Rule 25 of the 2007 SIAC Rules ('The Tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, termination or validity of the arbitration agreement') and Rule 33 of the JCAA Rules ('The arbitral tribunal may decide challenges made regarding the existence or validity of arbitration agreement or its own jurisdiction').

It is important to understand that while these institutional rules repeat the competence-competence principle, they are generally not considered to be the ultimate source of its authority, because they apply only by virtue of the parties' agreement. If an arbitral tribunal lacks jurisdiction over a party, then any chosen arbitration rules do not apply with respect to that party either, and the authority supposedly sourced in such rules disappears. As noted above, theoretically, the ultimate authority for the principle of competence-competence must therefore be found in the arbitration law of the seat of arbitration, either by express legislative recognition, judicial acceptance or by virtue of its status as a general principle of international arbitration law. Nonetheless, the British Columbian case of H&H Marine Engine Services Ltd v Volvo Penta of the Americas Inc curiously suggests that the source of competence-competence authority can alternatively be arbitral rules. While arbitration rules (as opposed to laws) are not ordinarily considered to be the ultimate source of competence-competence powers, there are certain advantages in selecting arbitration rules which reiterate the principle. Redfern and Hunter note that selecting such rules confirms the parties' desire for the competence-competence rule to be applied as set out in the chosen rules. They also explain that in some jurisdictions arbitrators only decide their own jurisdiction to the extent that the parties authorise them to do so. That authorisation may be in the form of the putatively applicable arbitration rules. Finally, reiteration of the principle in arbitration rules specifically chosen by the parties can be used as an additional argument as to why a domestic court seized of a matter covered by an arbitration agreement should take only a prima facie examination of that agreement before referring the parties to arbitration.

The competence-competence rule is sometimes said to have a negative and a positive effect. The positive effect is that parties gain a right to have their jurisdictional dispute determined by an arbitral tribunal, at least in the first instance. The negative effect is that the parties lose their right to have the jurisdictional dispute determined by a court. An essential component of the competence-competence rule is sometimes overlooked. That component is that an arbitral tribunal's decision that it has jurisdiction is not final. As discussed in Section 6.2 below, such decisions are capable of review by or appeal to courts in the seat of arbitration.

The competence-competence rule can therefore be considered as a rule of temporal priority, empowering the arbitral tribunal to rule on its jurisdiction in the first instance. As noted above, the extent to which a court will give priority to the arbitral tribunal varies immensely depending on the jurisdiction of the court concerned and on other circumstances. This is the subject of the next section.
4.2 Competence-competence rule and extent of domestic court intervention

5.8 Domestic courts can be called on to decide, or at least consider, arbitral jurisdiction in several circumstances before an arbitral tribunal has ruled on jurisdiction. The most common is when a party has commenced an action on the merits of the dispute in a domestic court and the opposing side contests the court's jurisdiction on the basis of the arbitration agreement. In these circumstances, the domestic court should refer the parties to arbitral procedure provided that there is a binding arbitration agreement. In so doing, to what extent does domestic court consider the existence, scope and validity of the arbitration agreement? And to what extent does its decision bind the arbitral tribunal or override the arbitral tribunal's authority to rule on its own jurisdiction under the competence-competence rule?

5.9 There is variation among courts as to the extent to which priority is given to the arbitral tribunal to decide on jurisdiction. Certain courts will scarcely look at an arbitration agreement if an arbitral tribunal has already been constituted. They will wait until a party seeks to challenge the arbitral tribunal's jurisdictional decision and then may exercise their control over jurisdiction. At the other extreme, some courts will in certain circumstances accept to rule definitively on arbitral jurisdiction before an arbitral tribunal does, thus usurping the arbitral tribunal's competence-competence powers. Somewhere in the middle lie the vast majority of courts (including most Asia-Pacific courts) which are a hybrid and will examine only the prima facie existence of an arbitration agreement before staying their own proceedings and referring the parties to arbitration for the resolution of their dispute, including their dispute about whether the arbitral tribunal has jurisdiction. In order to satisfy such a prima facie test, the party seeking to rely on the arbitration agreement generally has to show that there is an arguable case in favour of arbitral jurisdiction. The courts may refuse such an application if it is clear that a challenge to the arbitrator's jurisdiction should succeed.

57 Another instance is when a court is requested to provide support to start arbitration proceedings (for example to appoint an arbitrator where a party has defaulted in doing so) and there is doubt as to arbitral jurisdiction (see the discussion of SJIB v Patel Engineering below in Section 4.2). Another still is when the parties have expressly agreed that a court should decide the jurisdictional dispute as a preliminary matter before commencement of the arbitration such as under the domestic Australian Commercial Arbitration Acts (briefly discussed below in Section 4.2). See also Sections 32 and 72 of the English Arbitration Act 1996 and Article 11 of the Sri Lankan Arbitration Act, which allows an application to the High Court of Sri Lanka to determine arbitral jurisdiction even during an arbitration.

58 See Chapter 4, Section 7 regarding the enforcement of arbitration agreements.

59 No example has been found in the Asia-Pacific, but see Article 1458 of the French New Code of Civil Procedure.

60 For example, Section 11 of the Sri Lankan Arbitration Act allows an application to the High Court of Sri Lanka to determine arbitral jurisdiction at any time, even during an arbitration. This is also the approach under the federal law, see Sandvik AB v Advent Int’l Corp. 220 F 3d 99, 3d Circuit, 2000.

61 Various different approaches to this temporal question of when a court can and will examine arbitral jurisdiction under the competence-competence rule are discussed in Park, op. cit. fn 46, p. 55, particularly at p. 65 et seq.
Article 5
(1) Only disputes of a commercial nature, or those concerning rights which, under the law and regulations, fall within the full legal authority of the disputing parties, may be settled through arbitration.
(2) Disputes which may not be resolved by arbitration are disputes where according to regulations having the force of law no amicable settlement is possible.

Korean legislation is similarly broad, with one commentator noting that since the 1999 amendment to the Korean Arbitration Act, all that is required now is that the dispute be 'private and legal'.

The Australian courts have also taken a positive attitude towards the objective arbitrariness of international disputes and consequently there are few types of commercial disputes where arbitration is prohibited. Matters capable of settlement by arbitration have been interpreted as 'any claim for relief of a kind proper for determination in a court'. The leading Australian decision is Walter Rau Neusser Oel Und Fett AG v Cross Pacific Trading Ltd in which Justice Allsop promotes a liberal approach. However, as noted above with reference to the Philippines, there are exceptions. Unlike the Philippines legislation non-arbitrable issues are not specifically identified in Australia's enabling arbitration legislation itself - rather it is necessary to look to other issue specific legislation. For example, Section 11 of Australia's carriage of Goods by Sea Act 1991 declares void an arbitration agreement in a bill of lading or similar document relating to the international carriage of goods to or from Australia, unless the place of arbitration is in Australia. Similarly, Section 8 of the Australian Insurance Contracts Act 1984 potentially impacts the arbitrability of insurance related disputes.

This type of legislation is not unique to Australia. Section 8 of the New Zealand Insurance Law Reform Act 1977 stipulates that clauses in insurance policies requiring arbitration are not binding. Similarly, in India the Carriage by Air Act 1972, the Specific Relief Act 1963, the Atomic Energy Act 1962 and the Aircraft Act 1934 all have provisions that affect arbitrability and the operation of the Indian Arbitration and Conciliation Act 1996 generally.

In many jurisdictions, disputes are not arbitrable if determining them through arbitration would contravene public policy or the public interest. However, these are amorphous concepts that are not precisely defined in most, if indeed any,

Drafting arbitration agreements

If a contractual dispute arises, the last thing that parties want is an additional dispute about the dispute resolution agreement itself. It stands to reason that arbitration agreements must therefore be drafted with great care and precision. A multitude of issues could be dealt with in an arbitration agreement, however, this section limits itself to dealing with the essential and most advisable elements.

9.1 Essential elements to include in an arbitration agreement

There are four certainties required for an effective arbitration agreement:

(i) certainty regarding the identity of the parties;
(ii) certainty that the parties have agreed to submit their disputes exclusively to arbitration (and not another method of dispute resolution);
(iii) certainty as to the subject matter or scope of arbitrable disputes; and
(iv) certainty of the seat of arbitration, if designated.

9.1.1 Identity of parties

It is essential to ensure that the arbitration agreement specifies the identities of those who are agreeing to arbitrate. If the arbitration agreement forms part of a substantive contract, the term 'parties' will usually be defined in the contract, or will be assumed to mean all the parties to the contract. However, in complex commercial transactions where there is a series of contracts and some of the parties are different in the different contracts, the arbitration clause should be clear about which parties are bound by it.

9.1.2 Obligation to arbitrate

Arbitration agreements should provide that the dispute will be referred to arbitration. If an arbitration agreement provides that a dispute may be referred to arbitration, or words to the effect that 'the parties might decide to refer a dispute
to arbitration', there is not a clear obligation to arbitrate. Ambiguity may lead to disputes concerning whether the matter is to be referred to the courts or to arbitration, and could even deny enforceable effect to the arbitration agreement.

4.151 Clauses providing for the settlement of disputes by arbitration but which are silent as to whether the parties may also go to court have sometimes led to arguments that the silence permits parties to litigate in courts. Such arguments should not prevail. As the Hong Kong Court of Appeal stated in *Grandeur Electrical Co Ltd v Cheung Kee Fung Cheung Construction Co Ltd*, 'a clause in a contract providing for disputes to be settled by arbitration should not readily be construed as giving a choice between arbitration and litigation unless that is specifically and clearly spelt out'.

4.152 Uniform practice does not exist in relation to whether arbitration agreements containing an option either to arbitrate or litigate are valid for lack of certainty. In Australia such optional agreements are valid.

4.153 Similarly, the High Court of Singapore has observed that 'it is clear that an agreement in which the parties have the option to elect for arbitration which, if made, binds the other parties to submit to arbitration is an arbitration agreement.' These remarks were made when considering an earlier decision of a Sri Lankan court involving the same parties. The defendant in the Singaporean proceedings had commenced proceedings against the plaintiff before the Colombo High Court. The plaintiff had sought a stay on the basis of Section 5 of the Sri Lankan Arbitration Act 1995. Section 5 provides:

"Where a party to an arbitration agreement institutes legal proceedings in a court against another party to such agreement in respect of a matter agreed to be submitted for arbitration under such agreement, the Court shall have no jurisdiction to hear and determine such matter if the other party objects to the court exercising jurisdiction in respect of such matter.

4.154 The arbitration clause that the plaintiff relied on read:

This Agreement shall be governed by and construed in accordance with the laws of England and Wales. In the event that the parties have a dispute over any term or otherwise relating to this Agreement they shall use their best endeavours to resolve it through good faith negotiations. In the event that they fail to do so after 14 days then either party may elect to submit such matter to arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ('SIAC Rules') for the time being in force which rules are deemed to be incorporated by reference with this clause to the exclusive jurisdiction of which the parties shall be deemed to have consented. Any arbitration shall be referred to three arbitrators, one

arbitrator being appointed by each party and the other being appointed by the Chairman of the SIAC and shall be conducted in the English language. (Emphasis added)

As is explained in the Singaporean judgment, the Colombo High Court found that the Sri Lankan Arbitration Act referred to compulsory arbitration agreements—that is agreements where the parties were compelled to arbitrate rather than having litigation as an alternative. In this instance, the words 'may elect' were interpreted by the Sri Lankan court to mean that the parties could choose either arbitration or the courts, and thus the clause was not of the sort contemplated by Section 5. The High Court of Colombo refused the stay application and asserted jurisdiction over the dispute.

Confirmation that the drafting of optional arbitration clauses should be avoided can also be found in judgments from China and South Korea. In China, the Supreme People's Court 'appears to have declared that such a clause is an invalid arbitration clause, but the other party wishing to rely on this article must raise its objection prior to the first substantive hearing in the arbitration'. In South Korea the courts have ruled:

"An optional arbitration clause such as 'the dispute shall be referred to adjudication/arbitration in accordance with the laws of the Purchaser's country' shall be deemed to become valid as an arbitration agreement if any party to the Goods Supply Contract of the present case opts for a recourse to arbitral proceedings instead of the adjudication by a court against the other party and the other party, without particular objections, submits itself to such arbitral proceedings. Therefore, where the other party clearly objected to a settlement by arbitration by vigorously contending the non-existence of an arbitration agreement in its Answer to the defendant's Request for an arbitration, the arbitration clause cannot be deemed as valid as an arbitration agreement."

When drafting an arbitration clause it is also very important that it is arbitration that the parties are choosing as their dispute resolution method. To be safe, the word 'arbitration' or something similar (e.g. 'arbitrator', 'arbitral tribunal') must appear in the arbitration agreement.

There is sometimes confusion about the difference between arbitration and expert determination. Although these two processes share some similarities, there are nevertheless fundamental differences, and different consequences at law. For example, a matter may not at law be capable of resolution by arbitration, whereas expert determination of that same dispute may still be possible. While indicative, simply because parties refer to someone as an 'arbitrator' will not clothe that person with the attributes of one, and that person may in fact be
Arbitration is a process involving a judicial inquiry, whereas expert determination does not involve such an activity. The two forms of dispute resolution have been contrasted by the Singapore High Court:

The crucial difference between expert determination and arbitration laid in the procedure and the absence of remedies for procedural irregularity in expert determination. An expert could adopt an inquisitorial, investigative approach, and need not refer the results to the parties before making the decision while an arbitrator needed the parties’ permission to take the initiative, and had to refer the results to the parties before making the award.

Further guidance can be taken from the Hong Kong decision of Justice Kaplan (as he then was) in *Mayers v Dlugosh*. He there stated:

**Arbitration is a tried and tested method of dispute resolution where the parties do not wish to litigate their differences before state courts. Expert determination, although having been used for centuries, is perhaps not so widely known. The classic features of expert determination are:**

1. The expert makes a final and binding decision.
2. The decision can only be challenged in the most exceptional circumstances such as where the expert answers the wrong question (see *Jones v Sherwood Computer Services Inc* [1992] 1 WLR 277, *Campbell v Edwards* [1976] 1 WLR 403 and *Nikko Hotels (UK) Ltd v MEPC* [1991] 32 EG 86).
3. The expert can be sued for negligence in the absence of an agreed immunity (*Arenson v Gasson Beckman Rutley* [1997] AC 405).
4. The expert’s determination cannot be enforced as an arbitral award.

In the context of international commercial arbitration, point 4 is of significant practical relevance. One of the significant advantages of international arbitration is the international enforceability of the award. Expert determinations are not covered by the New York Convention and there is no other international regime for their enforcement. These determinations can only be enforced as a matter of ordinary contract law. Nevertheless the process does have some popularity in various national construction industries. In most cases, parties seeking to enforce such a determination would need to commence proceedings (probably for breach of contract) in the jurisdiction where enforcement is sought.

The final observation to make about the obligation to arbitrate is that in many jurisdictions it must be an equally shared obligation between all the parties to the agreement. An obligation to arbitrate requires that all parties be bound by the outcome. However, this is not quite the same as stating that each party must have the same rights. For example, must all parties to the arbitration agreement have the right to initiate arbitration? In Australia, the answer appears to be no. The influence of English law may well lead the other common law jurisdictions in this region to the same position. In contrast, Yuen has noted that a one-sided agreement, such as one which only allows the seller to designate an arbitral commission would be invalid under Chinese law.

### 9.1.3 Subject matter and scope of arbitration

An arbitration agreement must clearly specify which disputes it covers. This is closely linked to subjective arbitrability, addressed above. Parties sometimes seek to limit the disputes that will be resolved by arbitration. Extreme care needs to be exercised if parties wish to do this in advance of a dispute arising in order to avoid future disputes about which claims fall within the scope of the arbitration agreement. In the absence of a real reason to limit the scope of arbitrable disputes, and in order to avoid the possibility of parallel court proceedings, an advisable strategy is to maximise as far as possible the scope of the arbitration agreement. Broad wording should be used, such as ‘all disputes arising out of, connected with or in any way related to this contract shall be resolved by arbitration.’

The scope of arbitration agreements was considered in more detail under the headings of subjective arbitrability and defined legal relationship.

### 9.1.4 Certainty of the seat if designated

It is strongly advisable to designate a seat in the arbitration agreement. If one is designated, it must be clear and certain. There are two reasons for this. First, an ambiguous reference to the seat of arbitration can in a worst case scenario give rise to doubts about the validity or effectiveness of the arbitration agreement. Even in a best case scenario it is possible that additional jurisdictional disputes will arise in the arbitration proceedings and/or a separate court action will be commenced. Second, the chosen seat may have particular

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189 *Uttam Wires & Machines P. Ltd v State of Rajasthan* [1990] AIR (Del) 72 (High Court, Delhi) as cited by A Jain, ‘Pathological Arbitration Clauses and Indian Courts’, (2008) 25 *Journal of International Arbitration* 435, at p 439. Jain identifies a number of Indian decisions on this particular issue and other issues which may lead to a pathological arbitration clause. For a general discussion of pathological arbitration clauses see Section 9.6 below.

180 *Ago Old Builders Pty Ltd v Swintons Pty Ltd* [2003] VSC 307, at para 19 (Supreme Court of Victoria).

181 *Evergreat Construction Co Pty Ltd v Prescrete Engineering Pte Ltd* [2006] 3 SLR 634 at 635.


184 See PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service (1995) 144 CLR 301. While this case concerned a domestic arbitration conducted pursuant to legislation that has now been repealed, the relevant definition of 'arbitration agreement' has not changed. It should also be noted here that in the context of ISCID arbitration, only the investor and not the state has the right to institute an ISCID arbitration.

185 For the English position, see *Low Debutern Trust Corp Plc v Elektrum Finance BV* [2005] 1 All ER 476. For commentary on this case, see S Neshit and H Quinlan, ‘The Status and Operation of Unilateral or Optional Arbitration Clauses’, (2006) 22 *Arbitration International* 133.


187 See Section 6.1.

188 See Section 5.

189 A discussion of how a seat is designated in the absence of party agreement can be found in *Peking 2008* 4(L) 42 *Asian International Arbitration Journal* 195, at p 214.
requirements for an arbitration agreement. For example, if the parties chose a seat located in China, the arbitration agreement would need to comply with Article 16 of the Chinese Arbitration Law. That article states that an agreement must contain: (i) an expression of the intent to arbitrate; (ii) a description of the matters subject to arbitration; and (iii) a designated arbitration commission.\textsuperscript{201} If parties fail to designate the seat of arbitration, there are default mechanisms in rules and laws for its determination.\textsuperscript{202}

9.2 Advisable elements to include

In addition to the required elements noted above, it is advisable, but not essential, to include the following selective elements in an arbitration agreement:

(i) the number of arbitrators;
(ii) the language of the proceedings;
(iii) the confidentiality of the arbitration proceedings and the resulting award; and
(iv) any desired special powers for the arbitral tribunal.

The number of arbitrators is discussed further in Chapter 6.\textsuperscript{203} Whether or not it is necessary or desirable to choose the number of arbitrators in advance may depend on the chosen arbitration rules, and whether they provide a suitable mechanism for determining the number of arbitrators in the absence of party choice. Selecting a language in the arbitration agreement may avoid a dispute prior to the commencement of the arbitration as to what should be the language. In choosing the language, the potentially substantial cost, time and logistical issues relating to document translation and use of interpreters during the hearing must be borne in mind.

Concerning confidentiality, as discussed in Chapter 7,\textsuperscript{204} while arbitrations are private, documents and information disclosed during an arbitration may not necessarily be confidential in the absence of a further contractual obligation. In this region, this is especially important for arbitrations seated in Australia and possibly Singapore.\textsuperscript{205} The Australian case of Esso v Plowman\textsuperscript{206} cast doubt on the extent of confidentiality in arbitration under Australian law. In many jurisdictions an obligation of confidentiality is implied. However, it is prudent to assume that it is not. Most sets of arbitral rules now also include specific confidentiality provisions.\textsuperscript{207}

When parties intend to grant arbitrators particular powers, these should be clearly specified in the arbitration agreement. Such specificity is necessary, for example, where parties wish the arbitrators to act as amiable compositeur, or to resolve the dispute on the basis of fairness and equity.\textsuperscript{208} Special powers might also be given to affirm the arbitral tribunal’s authority to award punitive damages, issue ex parte interim relief, make special costs awards, or award specific performance.

9.3 Ad hoc or institutional arbitration?

Once parties have decided that arbitration will be their chosen method of dispute resolution, they face the further choice as to whether the arbitration will be ad hoc or institutional.\textsuperscript{209} That decision should be specified in the arbitration agreement. In an institutional arbitration, the arbitral institution provides certain support services for the arbitration. In ad hoc arbitrations there is no institution involved. Most international arbitrations are conducted under the auspices of an arbitral institution.\textsuperscript{210}

Although never going so far as to usurp the arbitral tribunal’s decision-making power, different institutions administer arbitrations in varying degrees.\textsuperscript{211} It is important that parties and their legal representatives appreciate these differences when choosing an institution. The choice of institution and corresponding rules can have a significant influence on the kind of arbitration that will occur.

The ICC and SIAC Rules, for example, provide for considerable institutional involvement and supervision, whereas the ACICA Rules take a much more hands-off approach. This difference is manifested in a number of ways throughout the arbitration. For instance, an award delivered in an ICC or SIAC arbitration will be reviewed by the ICC Court or SIAC Registrar,\textsuperscript{212} while there is no similar provision in the ACICA Rules.

In terms of costs, under the ACICA Rules arbitrators are paid based on the arbitrators’ usual hourly rates. The ICC and SIAC, on the other hand, both administer all of the costs in their arbitrations, each using a comparable system based on the monetary value of the dispute.

The ICC, SIAC and ACICA Rules all follow a similar procedure with regard to challenges to arbitrators. Challenges are determined by the institution. A different procedure has been adopted by the Vietnam Arbitration Centre. The Arbitration Rules of the Centre refer challenges first to the unchallenged arbitrators. The President of the Centre then effectively acts as an umpire if necessary.

Aside from technical differences in institutional rules, it is very important to understand that when parties choose a set of institutional rules they are not simply choosing that procedure, but that institution as well. Institutions vary immensely in their level of experience and the quality of the staff.

Drawing an analogy between choosing a law firm and choosing an arbitration institution serves to illuminate the particularities associated with the latter choice. There are two essential differences. First, the choice of an arbitral institution is usually made in a contractual dispute resolution clause. Such clauses are

\textsuperscript{201} For further discussion on the requirement of an arbitral institution, see Section 9.3.
\textsuperscript{202} See Chapter 2, Section 6.1.
\textsuperscript{203} See Chapter 6, Section 2.1.
\textsuperscript{204} See Chapter 7, Section 11.
\textsuperscript{205} Outside the Asia-Pacific, this is also an important consideration in Sweden and the US.
\textsuperscript{206} (1995) 183 CLR 10. This case is also discussed in Chapter 7, Section 11 of this book.
\textsuperscript{207} See, e.g., SIAC Rules, Rule 34; HKIAC Rules Article 39; ACICA Rules Article 18.
\textsuperscript{208} See Chapter 3, Section 8.
\textsuperscript{209} See also Chapter 7, Section 3.1.2.
\textsuperscript{210} See the statistics in Chapter 1, Section 3.4.7.
\textsuperscript{211} The basic services provided by arbitral institutions were explained in Chapter 1, Section 3.4.7.
\textsuperscript{212} ICC Rules Article 27; SIAC Rules, Rule 27.1.
agreed long before a dispute actually arises and before anyone knows the type or subject matter of the dispute or how much it could be worth to the parties. Conversely, a law firm is usually chosen as and when the need arises: the choice is made with the benefit of knowing the particular dispute or commercial issues. Second, it is generally not possible to change the choice of arbitral institution after signing the contract in which that choice is contained. That choice can only be varied if all of the parties to the arbitration agree. This contrasts with the choice of a law firm, which can usually be changed at any time if the client is not satisfied with the legal services rendered. Consequently, in choosing an arbitral institution, it is advisable to consider carefully the costs, range of services, supervision and support it is able to provide before it is selected and agreed to in a dispute resolution clause.

Parties sometimes attempt to agree on one institution's rules but with a different institution administering those rules. Mason notes that 'ICC officials have complained that the "mixing and matching" scenario is something they have been faced with quite a bit. The problem is not one limited to ICC experience as Mason also cites LCIA and ICDR examples. Trying to mix and match institutional rules is a very dangerous and risky strategy. In the case of a highly specialised institution like the ICC, for example, other institutions are not able to provide the services that are contemplated under the ICC Rules. The attempted mix and match is highly likely to lead to costly jurisdictional disputes and to invalidate the award or make it unenforceable.

As noted above, an 'ad hoc arbitration' is one that is not administered by an institution. Ad hoc is something of a term of art in arbitration. In common parlance, the phrase refers to something established for a singular or sole purpose. In the context of arbitration, the emphasis is instead on the lack of institutional administration of the arbitration. This specific focus is understandable and quite logical – every single arbitration would be ad hoc if the common parlance meaning was applied. In Bovis Lend Lease Pte Ltd v Jay-Tech Marine & Projects Pte Ltd, the High Court of Singapore had cause to consider the difference between ad hoc and institutional arbitration. It chose to explain that difference in this way:

'...the parties selected an ad hoc arbitration because they did not submit it to the administration of any particular institution...'

There may be some limited institutional involvement in an ad hoc arbitration, such as performing the role of appointing authority. This should not be considered as an act of administering the arbitration. Parties agree to institutions performing this role because they are usually best placed to do so, particularly because they often possess lists of suitable and competent arbitrators at their disposal. Parties may nominate anyone (e.g. a private individual, an institution, a judge, etc.) to act as appointing authority.

Ad hoc arbitration agreements often adopt a set of ad hoc rules, the most common being the UNCTAD Arbitration Rules. The parties can alternatively rely on the local law at the seat of arbitration to provide the relevant rules of arbitration (e.g. the procedure set out in the Model Law for those countries that have adopted it), or can stipulate at length in the contract specifically agreed procedures to be followed.

Aside from practical issues relating to the everyday conduct of the arbitration, the choice between ad hoc or institutional arbitration can, in rare circumstances, affect the validity of the arbitration agreement, and thus jeopardise the enforceability of the award. An institution must be chosen where China is the seat of arbitration. Furthermore, if the seat is in China, it is unclear whether non-Chinese institutions can administer the arbitration. The issue arose in the Wuxi Woco-Tongyong Rubber Engineering Co Ltd v Züblin Int’l GmbH case, in which the Wuxi Intermediate People's Court refused to enforce an award on the basis of Article V(1)(a) of the New York Convention. This article permits enforcement to be denied if the arbitration agreement is not valid under the law of the place where the award was made. The court had reasoned that the arbitration agreement did not specify an institution. It appeared to be making a very literal interpretation of the arbitration agreement, which read 'Arbitration: ICC Rules, Shanghai shall apply'. Since that decision, the Interpretation of Several Issues regarding the Application of the Arbitration Law of the PRC was promulgated by the PRC Supreme People's Court. It indicates in contrast to the Züblin decision that an arbitration agreement will be valid if an arbitral institution can be identified from the chosen arbitral rules.

9.4 Multi-tiered arbitration agreements

A multi-tiered arbitration clause provides for one or more other steps, such as an amicable form of dispute resolution, before arbitration. For example, the clause might first require negotiation, followed by mediation and then arbitration.


211 [2005] SGHC 91.

212 Ibid., para 71.
(Building) Ltd. This was a case involving an international arbitration and in which the Hong Kong High Court considered Article 7 of the Model Law. In Gay Construction Justice Kaplan (as he then was) stated:

To require a specific reference to the arbitration clause would be far too restrictive and clearly was not intended by those drafting the Model Law.

4.32 There have been cases in Hong Kong which appear to take a contrary view; however, they can be distinguished as not being exactly on point. In light of the persuasive decisions delivered by Justices Kaplan and Burrell referred to above, it can be said that the test in Hong Kong, like those countries discussed above, is simply a question of whether there was an intention to incorporate the arbitration clause, and there is no requirement that there be a specific reference.

Proceedings under the New York Convention to enforce an award are another context in which incorporation of an arbitration clause by reference raises difficulties. Article II(2) of the New York Convention does not refer directly to incorporation by reference. It states:

(2) The term ‘agreement in writing’ shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

4.34 As Di Pietro notes, Article II does not deal directly with incorporation of arbitration clauses by reference. Therefore, it is unclear whether Article II(2) only applies to cases where the arbitration clause is contained in the documents exchanged by the parties or whether it also applies to cases where:

(a) although the documents exchanged do not contain an arbitration clause, nonetheless, they make express reference to an arbitration clause contained in another document (a so-called relatio perfecta); or

(b) the documents exchanged by the parties do not contain an arbitration clause but make reference to a document containing one, although there is no express reference to it in the exchange of documents (a so-called relatio imperfecta).

... the prevailing case law seems to support the argument that the exchange of documents described under Article II(2) should be read as entailing scenario (a) above. Whether scenario (b) applies is much more controversial.

4.35 In the context of an enforcement proceeding, Di Pietro refers to the Jiangxi Prov Metal & Minerals Imp & Exp Corp v Sulanser Co decision of the Supreme Court of Hong Kong. In that case the court reasoned that the omission in Article II(2) of the word 'only' meant that the definition in that provision was not exhaustive. Di Pietro observes that this reasoning may not sit as well with the other language versions of the Convention, such as the French and Spanish versions which do use terms equivalent to 'only'.

3 Doctrine of separability

The doctrine of separability treats an arbitration agreement contained in a contract as a separate agreement from the contract itself. The Supreme Court of the Philippines has noted:

... the doctrine of separability, or severability as other writers call it, enunciates that an arbitration agreement is independent of the main contract. The arbitration agreement is to be treated as a separate agreement and the arbitration agreement does not automatically terminate when the contract of which it is part comes to an end.

The doctrine is supported by case law and arbitration rules. As the following discussion demonstrates it is also found in arbitration laws. Even if it were not so supported, the compelling logic of the doctrine would make it difficult to present a reasoned argument against it.

Article 16(1) of the Model Law codifies the doctrine of separability as follows:

Art 16 – Competence of arbitral tribunal to rule on its jurisdiction

1. The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

38 [1995] 2 HCPC 373.
39 Di Pietro, op. cit. fn 37, p. 442, n 7 which states: 'The French version of art. II(2) reads: "[o]n entend par "convention écrite" une clause compromissoire insérée dans un contrat, ou un compromis, signé par les parties ou contenue dans un échange de lettres ou de télégrammes." The phrase 'on entend', which in this context can be translated into the English "it is understood" seems much narrower than the phrase "shall include" employed in the English version and seems also to contradict what was advocated in the decision taken by the Supreme Court. Similar observation [sic] can be made with reference to the Spanish version according to which: "[l]a expresión "acuerdo por escrito" denota una cláusula compromisoria incluida en un contrato o un compromiso, firmados por las partes o contenidos en un canje de cartas o telegramas." Also here, the verb 'denotar', which, can be translated into the English 'to denote', seems to challenge the interpretation advocated by the Supreme Court in Hong Kong'.
42 See, e.g. HKIA Rules Article 20.2; SIAC Rules, Rule 25.1; ACICA Rules Article 24.2.
43 However, see A Bacon, 'Arbitration and the Fiction of Severability', (1999) 19 Australian Bar Review 50, at pp. 50-66 and discussion below.
Within this region, most laws on separability follow the Model Law example. However, in the past China was considered a notable exception. Article 19 of the Chinese Arbitration Law was previously criticised as 'one of the most ambiguous provisions of the [Arbitration Law]', providing only 'partial separability'.\textsuperscript{44} Now this law must be interpreted in the light of the Supreme People's Court's Interpretation of Several Issues regarding the Application of the Arbitration Law of the PRC.\textsuperscript{45} As a consequence the arbitration agreement is now unconditionally independent and, accordingly, an arbitral tribunal has the jurisdiction over the dispute even if the existence and effect of the main contract is questioned.\textsuperscript{46}

4.40 Without the doctrine of separability, or some equivalent, the entire arbitral process could be frustrated – a party wanting to avoid arbitration could simply assert that the contract was void and therefore go to court. But the doctrine of separability is not without its critics. Some commentators disagree with the present manifestation of the doctrine of separability, describing it as a legal fiction that favours commercial pragmatism over logic.\textsuperscript{47} Others support the importance of the doctrine in general but dispute its application where there is an allegation that the contract never existed at all.\textsuperscript{48} These two criticisms are discussed in turn below.

4.41 The core problem identified by those arguing that the doctrine is a legal fiction is that if a contract is void ab initio then as a matter of law it never had any effect; necessarily implying that the arbitration agreement never had any legal effect either. In our view it is incorrect to describe the doctrine of separability as a legal fiction. The argument fails to recognise modern forms of contracting such as point by point negotiation. All that is necessary is a finding that the parties intended to treat their arbitration agreement separately. There has been some debate about whether this would need to be explicit. However, it seems likely that implicit presumptive intent is sufficient.\textsuperscript{49}

4.42 Those who argue against separability in cases of disputed existence of the contract then turn their attention to the actual text of the arbitration agreement. They contend that if the arbitration agreement refers to a contractual relationship then there is a problem. According to them, even if the parties intended their arbitration agreement to survive, its scope is limited to disputes relating to the contract which never came into existence. There is certainly logic to this assertion but it will not apply if the arbitration agreement is found to cover disputes about formation of a contract, or claims relating to pre-contractual gains or expectations – quantum meruit or culpa in contrahendo for example. To determine this question, the arbitral tribunal, or court as the case may be, will need to consider as a matter of fact what was the parties' intended scope of the arbitration agreement. In doing so, consideration should be given to the language of and law governing the arbitration agreement,\textsuperscript{50} and the evidence led by the parties.

Some authors appear to suggest that for the purposes of the separability doctrine it is necessary to distinguish between cases in which a contract originally existed but thereafter was terminated or voidable and cases where there was never a contract from the beginning. Similarly, some courts in the US have demonstrated a preference to decide the existence or otherwise of an arbitration agreement when the existence of the entire contract is also in question.\textsuperscript{51} The practical reasons behind this distinction are at best questionable. One possible explanation for the view can be found in the interpretation of the English Arbitration Act 1996. Section 9(4) of that Act states that 'on an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed'. While its key operative language is identical to Article 8(1) of the Model Law and Article II of the New York Convention, Section 9(4) has been interpreted to mean that a court must first find that an arbitration agreement actually exists before it will order a stay.\textsuperscript{52}

This interpretation should not be extended to international arbitration generally, and in particular not to Model Law countries despite the identical language in Article 8(1). Article 16(1) of the Model Law specifically empowers the arbitral tribunal to decide 'any objections with respect to the existence or validity of the arbitration agreement'. (Emphasis added). In contrast, Section 30 of the English Arbitration Act 1996, which sets forth the competence-competence rule\textsuperscript{53} in that jurisdiction, empowers the arbitral tribunal to decide 'whether there is a valid arbitration agreement' and 'whether the arbitral tribunal is properly constituted', without mentioning existence.

50 See Section 8.1, in particular the discussion of how different phrases can have different meanings when interpreted according to different laws.

51 T Várnacky, C Barceló and A von Mehren, International Commercial Arbitration – A Transnational Perspective, 3rd edn, Thomson, 2006, at p. 90, citing Sandvik AB v Advent International Corp, 220 F 3d 99 (3d Cir 2000) (Party seeking stay of court action in favour of arbitration claimed no contract did not come into existence because its purported signatory did not have authority. It nevertheless sought to rely on the arbitration clause in the contract. The Third Circuit Court of Appeals refused to apply the separability concept and ruled that a court decision on the existence of the contract was a prerequisite to sending the parties to arbitration.).

52 See Albon (trading as N A Carriage Co) v Naza Motor Trading SDN BHD (2007) 2 All ER 1075. In this case the court was asked to stay proceedings in favour of an arbitration seated in Malaysia. The party resisting the stay application alleged that the signature on the arbitration agreement was a forgery. The court refused to stay the proceedings on the ground that it was not satisfied that an arbitration agreement actually existed. See commentary on the decision – N Pengalob, 'Albon v Naza Motor Trading: Necessity for a Court to Find that there is an Arbitration Agreement Before Determining that it is Null and Void', (2008) 24 Arbitration International 171.

53 The competence-competence rule is explained in Chapter 5, Section 4.
The doctrine of separability simply instructs the inquirer to treat the arbitration agreement separately from the main contract for the purposes of determining its existence and validity. If the alleged main contract never existed, then it might well be that the arbitration clause never existed either. Consequently the existence of the arbitration agreement still needs to be considered. Take for example a situation where one party (Buyer) puts forward to another (Seller) an offer to enter a sales contract which contains an arbitration agreement. Buyer purports to withdraw or revoke its offer, while at the same time Seller purports to accept it. Seller now claims that a sales contract exists which Buyer denies. If the sales contract does exist, then so will the arbitration agreement. But even if the sales contract does not exist, the arbitration agreement may still exist as the parties may still have intended to have any dispute resolved by arbitration. Thus the doctrine of separability applies to situations where the main contract existed but was terminated or voidable, as well as situations where it is alleged that the main contract never came into existence.

Three broad consequences may follow from the application of the doctrine of separability: the arbitration agreement’s validity is considered separately from the main contract’s validity (which we have touched on in the discussion above); ‘juridical autonomy’, meaning that a different law may apply to the arbitration agreement than that which applies to the substantive contract; and finally there is an aspect of autonomy from all laws. Although this last aspect is not generally found in Asia-Pacific international arbitration jurisprudence it has influenced arbitral practice and doctrine. These three points will be discussed in turn.

3.1 Validity of main contract and arbitration agreement

When parties conclude a contract containing an arbitration agreement, they are in effect concluding two separate agreements. In the words of Judge Schwebel, formerly of the International Court of Justice, ‘[w]hen the parties to an agreement containing an arbitration clause enter into that agreement, they conclude not one but two agreements, the arbitral twin of which survives any birth defect or acquired disability of the principal agreement.’

In a 1994 New South Wales Court of Appeal decision, former Justice Kirby (then President of that court) adopted the following explanation:

validity of the arbitration clause does not depend upon the validity of the remaining parts of the contract in which it is contained. This allows an arbitration tribunal to declare a contract invalid and yet retain its jurisdiction to decide a dispute as to the consequences of such invalidity provided that the arbitration agreement is valid as a separate entity and is sufficiently broad in its wording so as to cover non-commercial disputes.

As a consequence, the arbitral tribunal can determine whether the main contract is valid, or even whether it exists, without contradicting its own jurisdiction. As suggested above, the reasons for this are logically compelling. If the arbitration clause were part of the main contract, the arbitration clause would not come into existence unless the main contract did, and would be terminated when the main contract terminates. Further, separability in this context avoids a paradox. If the arbitration clause were part of the main contract, and one party contended that the main contract was void, an arbitral tribunal may not be able to decide that allegation because if it finds that the contract was void, the basis of its power to make that decision would never have existed.

Thus the validity of an arbitration clause must be considered as a question separate from the validity of the contract containing that arbitration clause. Moreover, the arbitral tribunal remains competent not only to determine its own jurisdiction but also to determine the validity or existence of the substantive contract. This concept has important ramifications. The arbitration agreement can for example survive the novation, nullity, or termination of the main contract. The House of Lords has noted:

The arbitration agreement must be treated as a ‘distinct agreement’ and can be void or voidable only on grounds which relate directly to the arbitration agreement. Of course there may be cases in which the ground upon which the main agreement is invalid is identical with the ground upon which the arbitration agreement is invalid. For example, if the main agreement and the arbitration agreement are contained in the same document and one of the parties claims that he never agreed to anything in the document and that his signature was forged, that will be an attack on the validity of the arbitration agreement. But the ground of attack is not that the main agreement was invalid. It is that the signature to the arbitration agreement, as a ‘distinct agreement’, was forged. Similarly, if a party alleges that someone who purported to sign as agent on his behalf had no authority whatever to conclude any agreement on his behalf, that is an attack on both the main agreement and the arbitration agreement.

On the other hand, if (as in this case) the allegation is that the agent exceeded his authority by entering into a main agreement in terms which were not authorized or for improper reasons, that is not necessarily an attack on the arbitration agreement. It would have to be shown that whatever the terms of the main agreement or the reasons for which the agent concluded it, he would have had no authority to enter into an arbitration agreement. Even if the allegation is that there was no concluded agreement (for example, that terms of the main agreement remained to be agreed) that is not necessarily an attack on the arbitration agreement. If the arbitration clause has been agreed, the parties will be presumed to have intended the question of whether there was a concluded main agreement to be decided by arbitration.

3.2 Law governing main contract and arbitration agreement

As an arbitration clause in a contract is an agreement separate from that in which it is contained, the determination of the law that governs the arbitration clause and that which governs the contract must also be separate. Since the two agreements have different purposes, it is quite conceivable that a different

56 The power of arbitrators to rule on their own jurisdiction is discussed in Chapter 5, Section 4.
57 Premium Nafta Products Ltd v Fiji Shipping Company Ltd [2007] 2 All ER (Comm) 1053, at paras 17 and 18 per Lord Hoffmann.
law applies to each. This does not mean that the governing laws are necessarily different, but rather that they might be different.

4.51 Much like the practice that exists in relation to commercial contracts, parties are free to choose the law that governs their arbitration agreement.58 This freedom of choice is implicitly recognized in the Model Law and the New York Convention. Article 34(2)(a) of the Model Law and Article V(1)(a) of the New York Convention refer to the determination of the validity of an arbitration agreement ‘under the law to which the parties have subjected it’. There is no doubt that parties are free to choose the law that governs their arbitration agreement, even if it is a different law from that governing the main contract or from the lex arbitri. In practice, however, parties very rarely express a choice as to the law that governs the arbitration agreement so a question arises as to how it is to be determined.

4.52 Following England’s lead, common law jurisdictions have historically applied a rebuttable presumption that the law governing the main agreement will also govern the arbitration agreement. It is indeed only a presumption.59 However that position, in England at least, appears to be changing. In the English Court of Appeal decision of C v D, Lord Justice Longmore speaking for the entire court said by way of obiter dictum:60

if there is no express law of the arbitration agreement, the law with which that agreement has its closest and most real connection is the law of the underlying contract or the lex arbitri.

It seems to me that... the answer is more likely to be the law of the seat of arbitration than the law of the underlying contract.

4.53 The Indian case of Shin-Etsu Chemical Co Ltd v Aksh Optifibre Ltd expounds an interesting hybrid between the common and (as explained above) civil law positions, but nevertheless highlights the fact that a different law can apply to the arbitration agreement:61

This question of choice of law has been conclusively decided by the judgment of this court in National Thermal Power Corporation v. Singer Company, where it was observed: ‘The proper law of the arbitration agreement is normally the same as the proper law of the contract. It is only in exceptional cases that it is not so even where the proper law of the contract is expressly chosen by the parties. Where, however, there is no express choice of the law governing the contract as a whole, of the arbitration agreement as such, a presumption may arise that the law of the country where the arbitration is agreed to be held is the proper law of the arbitration agreement. But that is only a rebuttable presumption.’

4.54 It makes a lot of sense that the presumption, in as much as there is one, should be in favour of the law of the seat of arbitration. It is generally in accord with the approach adopted in a number of civil law countries62 including China,63 and arguably also in the USA.64 The substantive law, if determined by the application of conflict of laws rules, is selected because of the connection that that law has to the substance of the principal contractual obligations under the contract. For example, in a contract dealing with the construction of a facility in Indonesia, the choice of Indonesian law would seem most relevant given its close connection to the characteristic performance (i.e. construction) in Indonesia. If we were to apply that same principle – i.e. looking for the law with the closest connection to the characteristic obligation – to determine the law governing the arbitration agreement, would we end up with the same law? The characteristic or principal obligation under an arbitration agreement is an obligation to arbitrate disputes. The obligation to undertake the procedure of arbitration to resolve one’s disputes appears much more closely related to the place that that procedure will happen – that is the legal place of that procedure, in other words the seat of arbitration. The performance will occur at the seat of arbitration and therefore the obligation is most closely connected to that place and that law.

Moreover, if the parties have chosen a seat of arbitration that is outside the place of the substantive contractual law, the parties could be considered to have indicated an intention to separate their substantive obligations under the contract from their obligations in relation to arbitration. There might be a very good reason for this. Take the Indonesian project example just given. In that case, if Indonesian law governed the arbitration agreement that agreement would be subjected to certain peculiarities of Indonesian Arbitration law which are not quite in line with international arbitration standards. On the other hand, if the parties had chosen a Singapore seat of arbitration, Singapore law should be presumptively considered (i.e. if the parties have not expressly chosen a law to govern the arbitration agreement) as governing all aspects of the dispute resolution process. It would be reasonable to expect that Singapore law was intended to govern this part of the agreement to avoid the Indonesian particularities mentioned above.

The Singapore High Court decision of Philippines v Philippine International Air Terminals Co Inc,65 is an example of just how significant this choice of law to govern an arbitration agreement can be. In that case, a contract between the Philippines Government and a foreign consortium operating through a Philippines incorporated company provided for ICC arbitration with the seat in Singapore. The contract also included a choice of law clause providing that it

58 An explanation of the extent to which arbitrating parties are free to choose the law governing their contract is provided in Chapter 3, Section 3.


61 (2005) 7 SCC 234, at pp. 268–269 (Supreme Court of India).

62 See Bow, op. cit. fn 19, pp. 470–479 referring particularly to Japan, Germany, Switzerland and Sweden, but Bow also notes that the approach is not uniformly settled. See also Poudret and Besson, op. cit. fn 9, at para 300 noting authority from Belgium and Italy in favour of the main contract law presumption.

63 Under Chinese law the position has been settled in favour of applying the law of the seat of the contract, or in the absence of a seat being designated, in the law of the forum, Article 16 of the Supreme People’s Court’s Interpretation of Several Issues regarding the Application of the Arbitration Law of the PRC (Fashí [2006] No. 7); Reply of Supreme People’s Court to the Query about the Arbitration Clause in the Sales Contract between Boyuan Trade Co and Yu Jianguo, 4 Civil, Miscellaneous), No. 38 (2007). See also Wan E Xiang and Yu Xiu, op. cit. fn 46, at p. 190.

64 Redfern, Hunter, et al, op. cit. fn 48, para 2–91. But see also Bow, op. cit. fn 19, p. 485 et seq.; and Poudret and Besson, op. cit. fn 9, para 300, n 716a.

65 [2007] 1 SLR 278.
was to be governed by Philippines law. The Philippines Government challenged jurisdiction, arguing that since the entire contract had been invalidated by the Philippines Supreme Court there was no arbitration agreement. A preliminary question for the arbitral tribunal was which law governed the arbitral proceedings and the arbitration agreement.

The arbitral tribunal delivered a partial award finding that it had jurisdiction. The reported judgment is a challenge to that award before the Singapore courts. After first accepting the doctrine of separability, the arbitral tribunal went on to consider whether an arbitration agreement could have a proper law different from that of the main agreement. Having found that it could, the arbitral tribunal was then required to determine what law governed the arbitration agreement in this instance. The arbitral tribunal found that Singapore law governed both the arbitration agreement and the arbitral proceedings. This was despite the choice of Philippines law as the law governing the main contract, despite the fact that both parties were Filipino, and despite the fact that the contract related to a project carried out entirely in the Philippines. According to the arbitral tribunal, although all relevant connecting factors pointed to the Philippines, the fact that parties had deliberately chosen ICC arbitration seated in Singapore indicated that the parties preferred a law other than that of the Philippines to govern their dispute resolution clause and the related process.

If Philippines law had been found to govern the arbitration it seems likely that there would have been no arbitration agreement and consequently no arbitral jurisdiction as a result of decisions already taken by the Philippines Supreme Court. In this case, the advantage of the principle that a different law can govern the arbitration agreement should therefore be obvious. As the Arbitral Tribunal held:

In the opinion of the arbitral tribunal a strong implication arises that the parties not only removed non-construction and Works disputes from the jurisdiction of the Philippines but also intended that the obligation to arbitrate these disputes should not be referred to the law of the Philippines. In other words, by designating Singapore and the ICC Rules in contrast to the other arbitration obligation appertaining to construction and Works disputes, the parties implied a choice of Singapore law to govern the arbitration agreement as well as the arbitral proceedings for nonconstruction and Works disputes.

One further point can be made. Mustill and Boyd state that if the choice lies between two systems of law, one of which would uphold the arbitration agreement and the other would not, the former may be preferred. A question may arise in this case as to whether the arbitration agreement is valid under the law of the Philippines in view of the decision of the Supreme Court of the Philippines holding that the ARCA is void ab initio. This factor also inclines towards construing the agreement to arbitrate disputes in Singapore as governed by the law of Singapore.

3.3 Validity of arbitration agreement determined independently of all national laws

Some French decisions from the mid-1970s prompted discussion about whether an arbitration agreement needs to be governed by any law at all. The theory was that the existence and validity of an arbitration agreement should be determined simply by looking at the facts of the case in order to establish the parties' intentions. Reference to any governing law was considered unnecessary.

The French position was first espoused in the 1975 decision of the Court of Appeal of Paris in the case of Menticucci. The Court of Appeal held:

It is sufficient, for determining objections to the arbitral tribunal's competence, to note that taking account of the autonomy of the arbitration agreement in an international contract, that agreement is valid independently of the reference to any state law.

Several French cases have followed this decision or reached a similar result, most recently in the 2009 decision of Soerini v ASB, but it continues to be the subject of academic debate. In their analysis of Menticucci and cases that followed, Poudret and Besson observe that the prevailing opinion among French authors supports the rule. However, Poudret and Besson persuasively criticise it, noting that the approach contradicts the need for connecting factors found in Article V(1)(a) of the New York Convention.

An approach which seeks to determine the validity of an arbitration agreement independently of all national laws has notions of delocalisation at its heart. When expressed as the simple proposition that a court should only examine whether the parties agreed to arbitrate – which is a question of fact not law – it at first sounds attractive. However, when carefully considered this approach cannot be endorsed as it is not a question of fact at all. Rather it is simply saying...
because of its neutrality. The seat may have absolutely no connection to the dispute, the contract or the parties. Where an arbitral tribunal has rejected jurisdiction, the putatively agreed seat of arbitration is usually rejected as well. As a consequence, the local court's international jurisdiction rules may not provide it with any ground on which to assert jurisdiction to review a negative jurisdictional ruling short of specific legislative recognition.

In practice, the absence in most jurisdictions of a means of recourse from negative jurisdictional decisions is very unfortunate and frustrating. An incorrect arbitral tribunal decision that there is no jurisdiction could deny the aggrieved party access to all of the advantages of arbitration that it seeks. That party would have two options for having its substantive dispute resolved, neither of which is satisfactory. First, it could start an action in some domestic court with all of the disadvantages that it sought to avoid by choosing arbitration in the first place; e.g., potentially inflexible and unfamiliar procedure, non-specialist judges, non-neutrality and judgment enforcement difficulties. Alternatively, the aggrieved party could attempt to constitute a new arbitral tribunal. This would raise a question as to whether there is a jurisprudential basis to argue that the initial decision would prevent another arbitral tribunal from reconsidering the jurisdictional issue. Theoretically, it is possible that a party could continue to constitute arbitral tribunals until one decided that it had jurisdiction since negative jurisdictional decisions have no recognised legal authority. In practice, however, an arbitral tribunal would be reluctant to overrule a prior arbitral tribunal's decision on the same jurisdictional question, even if the res judicata doctrine were technically inapplicable due to the lack of legal effect of the first decision.

These practical issues outlined in the preceding paragraphs have prompted strong calls for arbitration laws to address and provide for recourse from negative jurisdictional decisions.

6.3 Scope of court review of arbitral tribunal's jurisdictional decisions

Because one of the consequences of entering into an arbitration agreement is losing one's right to go to court, the ultimate authority to determine that there is a valid agreement to arbitrate must lie with the competent courts. Therefore, when a court at the seat of arbitration reviews an arbitral tribunal's decision on jurisdiction, the scope of that review is normally de novo. This is implied in the wording of Article 16(3) of the Model Law which empowers the court simply 'to decide the matter' of jurisdiction when a party contests the arbitral tribunal's positive jurisdictional decision. The possibility for a de novo re-hearing results from the fact that domestic courts have the final say on jurisdiction and may need to hear new arguments and evidence in order to make their determination.

This was well explained by the Singapore High Court in *Insignia Technology Co Ltd v Alsthom Technology Ltd*, referring to relevant academic writing:

In the text *Jurisdiction and Arbitration Agreements and their Enforcement* by David Joseph QC (2005, Sweet and Maxwell, London) (*Jurisdiction and Arbitration Agreements*), it is stated (at para 13.28) that the power of the court in deciding whether the tribunal has jurisdiction is not limited to reviewing the tribunal's decision for error, but involves a re-hearing, including if necessary the calling of witnesses already heard by the tribunal. This statement was based on the authority of a number of first instance English decisions that considered the meaning and effect of s67 of the English Arbitration Act 1996. Whilst I am not aware of any authority on the point in connection with the Model Law, it is my view that, under this legislation too, the court's jurisdiction to decide on the jurisdiction of an arbitral tribunal is an original jurisdiction and not an appellate one. This is clear from the wording of Article 16(3) of the Model Law. It simply provides for the court 'to decide the matter of jurisdiction after it has been made a ruling that it has jurisdiction'. This is not language implying that the court's powers to act are of an appellate nature. Although the word 'appeal does appear within the Article, the context in which it is found is the specification that there should be no appeal against the decision of the court on jurisdiction.

There are also good reasons why the court should have the power to hear the matter afresh rather than to take the position of an appellate body. These are enumerated in the same paragraph of *Jurisdiction and Arbitration Agreements and are as follows. First, if the court was limited to a process of review, it might be reviewing the decision of a tribunal that itself had no jurisdiction to make such a finding. Second, the procedure to determine jurisdiction is available to a party that took no part in the arbitral proceedings; if the court was confined to a review of the tribunal's decision this would greatly undermine the ability of the challenging party to make its case. Third, if there is to be a challenge on an issue of fact, the court should not be in a worse position to make an assessment than the tribunal, and should therefore be able to examine witnesses in the usual way. Accordingly, therefore, a party is entitled to raise an objection to jurisdiction before the judge that it had not raised and argued before the arbitrator. However, 'a failure to raise a specific point before the arbitrator is likely to be relevant as to weight.' (*Jurisdiction and Arbitration Agreements at [para 13.51].*)

Recent authority from the English court of appeal confirms that, in England, de novo review of an arbitral tribunal's jurisdictional decision is alternatively available when resisting the enforcement of an award. The seat of arbitration

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140 It has been suggested that if a matter is decided in one arbitration, the arbitration agreement between the parties (if there is one) is 'null and void, inoperative or incapable of being performed' with respect to that matter under Article 11 of the New York Convention. See AJ van den Berg, *The New York Convention of 1958: Towards a Uniform Interpretation*, Kluwer Law, 1981, p. 158.


was Paris and the respondent, the Ministry of Religious Affairs of the Government of Pakistan, had challenged the arbitral tribunal's jurisdiction in the course of the arbitration. The arbitral tribunal found in a partial award that it possessed jurisdiction. The Ministry then ceased participating in the arbitration and the arbitral tribunal proceeded to issue a final award ordering damages of US$19 million against the Ministry. Rather than challenging either of the awards in Paris, the Ministry waited until Dallah, the claimant in the arbitration, sought to enforce the award against it in England and resisted enforcement of the award. The Court of Appeal confirmed the lower court's decisions (i) that jurisdiction could be re-examined de novo by the enforcing court and (ii) that the arbitral tribunal had erred in its finding that it had jurisdiction over the Ministry.

While rarely, if ever, done, in some jurisdictions parties may effectively be able to exclude the ability of courts to review certain jurisdictional issues. After the jurisdictional dispute arises, the parties could enter into a new arbitration agreement, either expressly or implicitly through conduct or a document such as terms of reference, which empowers the arbitral tribunal to decide finally a disputed issue of jurisdiction relating to their initial arbitration agreement. By entering into a second arbitration agreement, the scope of which includes the jurisdictional dispute arising from the first, the aspect of the competence-competence rule that allows court review of jurisdictional decisions would apply only to the second arbitration agreement. Only the new arbitration agreement could be challenged and not the first. This would in effect 'raise the stakes'.

The party challenging jurisdiction, if successful, would have a more final resolution of the issue. The party that wins on the jurisdictional issue arising from the first arbitration agreement would have a more final resolution of the issue because only the new arbitration agreement could be challenged in the courts.

6.4 Subsidiary orders with negative jurisdictional decisions

If an arbitral tribunal decides that it does not have jurisdiction over a party, and/or rejects absolute jurisdiction, then it ceases from that moment to have any authority with respect to that party. It logically follows that an arbitral tribunal in these circumstances has no power to make a subsidiary order, such as an order for costs.\textsuperscript{147}

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\textsuperscript{144} For example, terms of reference could in some circumstances inadvertently include an agreement that the arbitral tribunal finally decide a jurisdictional issue arising from the initial arbitration agreement, see Greenberg and Secomb, op. cit. fn 139, p. 135.

\textsuperscript{145} See the example of this given in Pack, op. cit. fn 46, pp. 64-65 and his discussion at pp. 72-79 et seq giving examples of US cases which have confirmed this approach. Not all jurisdictions will allow this though as it might be seen as an attempt to oust the jurisdiction of the courts completely. See, e.g. Czarnikow v Ruth Schmidt [1922] 2 KB 478 concerning the traditional prohibition on ousting court jurisdiction.

\textsuperscript{146} See Section 3.1 above.

\textsuperscript{147} Other possible subsidiary orders include orders of confidentiality, payment of fees to the arbitrator and interim measures of protection (or more likely, unwinding interim measures of protection).
The arbitral tribunal

1 Introduction

High quality arbitrators are an essential ingredient of effective arbitration proceedings. As arbitration specialists have noted, '[t]he reputation and acceptability of international arbitration depends on the quality of the arbitrators themselves'. The composition of the arbitral tribunal can significantly affect a range of important factors including whether the arbitration is conducted efficiently and economically, whether the award is susceptible to challenge, and even an individual party's chances of success or failure. Issues surrounding the constitution of the arbitral tribunal therefore deserve special attention.

This chapter follows the life cycle of an arbitral tribunal chronologically. Section 2 describes how an arbitral tribunal is constituted, including the number of arbitrators and their appointment in multiparty arbitrations. In Section 3 we discuss the process of choosing an arbitrator, whether as chairperson, sole arbitrator or party-nominated co-arbitrator, as well as the qualities and qualifications that are generally desirable for international arbitrators. The formal appointment process is discussed in Section 4. In Section 5 we examine the obligations of arbitrators, such as diligence, impartiality and independence, and disclosure of potential conflicts of interest. Section 6 deals with challenges to arbitrators. Finally, issues relating to the resignation, removal and replacement of arbitrators are addressed in Section 7.

2 Constitution of the arbitral tribunal

6.3 The main principle guiding the appointment of arbitrators is party autonomy. In their contract or even after a dispute arises, parties are free to agree on the number of arbitrators, how they will be appointed, and who they will be. Where there is no agreement or one party refuses or fails to participate in the constitution of the arbitral tribunal, the applicable arbitration rules or procedural law will provide a fallback mechanism to prevent the constitution process from being frustrated.2

6.4 An issue that requires determination prior to constitution of the arbitral tribunal is the number of arbitrators to be appointed. Once the number is agreed or decided, the procedural question of how to constitute the arbitral tribunal arises. Disputes involving more than two parties may require special arrangements to be considered when constituting the arbitral tribunal. This section discusses these three issues in turn.

2.1 Number of arbitrators

6.5 For obvious reasons, the number of arbitrators should be odd – usually one or three, but occasionally five. Parties often specify the number of arbitrators in their arbitration agreement, or agree on it once the dispute has arisen.

6.6 There are several factors that may need to be considered when deciding the number of arbitrators.3 Appointing a sole arbitrator usually produces significant cost savings because only one arbitrator’s fees and expenses have to be paid. A sole arbitrator may also be more time effective. For example, coordinating meetings and hearing times should be easier and decisions should be made faster because the sole arbitrator, in contrast to the chairperson of a three-member tribunal, is not required to deliberate or reach consensus with any other arbitrators. Furthermore, the desire to reach consensus among three arbitrators may sometimes lead to compromised solutions as opposed to straightforward outcomes. In extreme cases, co-arbitrators that have been nominated by one of the parties have been suspected of deliberately sabotaging the arbitration process, by causing delay or otherwise, to provide some advantage or benefit to the nominating party.4 This is rare because most international arbitrators are highly professional but it can occur when a party selects a party-nominated co-arbitrator for the wrong reasons. This will not occur in sole arbitrator tribunals because individual parties have no right to select a member of the panel (unless all parties agree on that person).

6.7 On the other hand, opting for a sole arbitrator means that the outcome of the arbitration will be determined by one person alone. This may increase the risk of misunderstandings and errors. The combined knowledge, skills, expertise, cultural awareness, and perhaps even languages of three arbitrators may prove beneficial to the quality of the decisions and the parties’ confidence in the process.5 Perhaps the most compelling reason for preferring three arbitrators is that each side usually is entitled to nominate one member of the arbitral tribunal.6 Moses has observed that “it is generally believed that the award is more likely to be within parties’ expectations when considered by three arbitrators and that unusual or inexplicable awards are less likely to occur.”7 After making a similar observation, Redfern and Hunter suggest that “[i]t follows that the ultimate award is more likely to be acceptable to the parties.”8

ICC statistics show that when the number of arbitrators is determined by party agreement, the number agreed is usually three. In 2008, a three-member tribunal was appointed in 61% of ICC arbitrations. In 93.5% of those cases, the number of three was determined by party agreement rather than by the ICC Court.9 This is different for sole arbitrator cases. In the ICC arbitrations where there were sole arbitrators in 2008, the parties decided the number in only 69.4% of cases. In the remaining 30.6% of cases, it was the ICC Court which decided that there would be a sole arbitrator.10 Where parties agree on a number of arbitrators, they should be careful to record that agreement clearly. Arbitration agreements occasionally contain apparent inconsistencies where the plural ‘arbitrators’ is used interchangeably with ‘arbitrator,’ leaving ambiguity as to what the parties intended. Although party choice as to the number of arbitrators will be respected,11 that choice must first in fact be exercised. An Indian Supreme Court decision in 2009 found that an arbitration clause which merely referred to ‘arbitrator(s)’ without specifying a number did not amount to an agreement for a three-person arbitral tribunal.12

Absent party choice, most arbitration laws and rules provide a default number of arbitrators or a mechanism for determining the number. A brief survey of the laws and institutional rules in the Asia-Pacific reveals variation among the approaches.

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4 Ibid., at p. 354, citing numerous references.
6 Ibid., para 10–18.
7 Redfern, Hunter, et al., op. cit. fn 1, para 4–17.
9 Redfern, Hunter, et al., op. cit. fn 1, para 4–187.
10 Article 8(2) of the ICC Rules provides: “Where the parties have not agreed upon the number of arbitrators, the Court shall appoint a sole arbitrator, save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators.”
12 In the Singapore decision of NCC International AB v Land Transport Authority of Singapore [2008] SGHC 186, the Singapore High Court found that Rule 5.1 of the SIAC Rules did not give the SIAC discretion to alter the number of arbitrators where the parties have already agreed.
13 Stms Darby Engineering SDN BHD v Engineers India Ltd, Arbitration Petition 5/2009.
6.11 The Model Law in Article 10 provides for a default of three arbitrators. Many jurisdictions, such as Australia, the Philippines, South Korea, Sri Lanka, and Bangladesh have adopted the Model Law approach without amendment. Malaysia defaults to three arbitrators for international and one arbitrator for domestic arbitration. The position in Japan is slightly different. Although providing a basic default of three arbitrators where there are two parties, if it is a multiparty arbitration the question of the number of arbitrators can be referred to a court. By contrast, Singapore, although adopting the Model Law, altered Article 10 of the Model Law to provide that the default should be one arbitrator. Likewise, a sole arbitrator default has been adopted by India. Hong Kong has specifically vested the power in the HKIAC to determine the number of arbitrators when the parties have failed to do so. Article 30 of the Arbitration Law of China does not specify a default number; it simply stipulates that an arbitral tribunal may be composed of one or three arbitrators.

6.12 Turning to institutional rules, again there is variation as to the fallback number of arbitrators. There are broadly four approaches which can be distilled from rules in this region. The most common is that found in its simplest form in Rule 23 of the JCAA Rules and Article 11 of the KCAB International Rules: the default is one arbitrator, but a party can request the institution to consider whether, given the particulars of the dispute, three arbitrators would be better. A slight variation of this approach is found in Rule 5.1 of the SIAC Rules, where SIAC’s Registrar may decide in favour of three, rather than the default of one, where it appears in the light of ‘the complexity, the quantum involved or other relevant circumstances of the dispute, that the dispute warrants the appointment of three arbitrators’.

6.13 The second approach does away with the default of one arbitrator. An example is Article 8 of the ACICA Rules, which gives ACICA discretion to choose the number after taking into account all relevant circumstances. The HKIAC Rules provide that the HKIAC Council will decide the number of arbitrators absent a choice by the parties. The HKIAC Rules enumerate a detailed procedure and several factors to be considered in deciding the number of arbitrators:

Article 6 – Number of Arbitrators
6.1 If the parties have not agreed upon the number of arbitrators, the HKIAC Council shall at the request of a party decide whether the case shall be referred to a sole arbitrator or to a three-member arbitral tribunal, taking into account the factors set out in Rule 9 of the ‘Arbitration (Appointments of Arbitrators and Umpires) Rules’ made under the Hong Kong Arbitration Ordinance. These include:

(a) the amount in dispute;
(b) the complexity of the claim;
(c) the nationalities of the parties;
(d) any relevant customs of the trade, business or profession involved in the said dispute;
(e) the availability of appropriate arbitrators; and
(f) the urgency of the case.

6.14 Before deciding on the number of arbitrators to be appointed, the HKIAC Council shall allow the other party or parties to the arbitration to serve on the HKIAC Secretariat brief written responses in support of their contention as to the number of arbitrators appropriate for their dispute. Where no such reasons are served on the HKIAC Secretariat within 14 days of the day on which a request for responses has been made by the HKIAC Secretariat, the HKIAC Council may proceed with the decision.

A third and very unusual approach is seen in Rule 22 of the Indian Council of Arbitration Rules, where the number of arbitrators is determined by the amount in dispute and whether the parties have paid their cost deposit:

Rule 22
The number of arbitrators to hear a dispute shall be determined as under:
(a) Where the claim including determination of interest, if any, being claimed up to the date of commencement of arbitration in terms of Rule 15, does not exceed Rs. One crore and where the arbitration agreement does not specify three arbitrators, the reference shall be deemed to be to a sole arbitrator, unless the parties to the dispute agree to refer the dispute to three arbitrators within thirty days from the date of notification of request for arbitration.
(b) Where the claim including determination of interest, if any, being claimed up to the date of commencement of arbitration in terms of Rule 15 exceeds Rs. One crore, the dispute will be heard and determined by three arbitrators, unless the parties to the dispute agree to refer the dispute to a sole arbitrator within thirty days from the date of the notification of the request for arbitration.
(c) Where three arbitrators have to be appointed as per the above sub-rule and any of the parties to the dispute fails to make the necessary deposit towards the cost and expenses of arbitration, instead of three arbitrators, the Registrar may appoint a sole arbitrator, where the claim is up to One crore. Where the claim is for more than Rs. One crore, the Registrar may appoint arbitrator/s on behalf of the Respondent as well as Presiding Arbitrator.

The problem with rules (or agreements) which determine the number of arbitrators based on the value of the dispute is that the value in dispute may not be clear at the outset of a case. For example, the claimant may be seeking unquantified or declaratory relief and/or the respondent may not have filed its counterclaims.

The fourth approach, reflected by way of example in Article 5 of the PDRCI Rules, is simply to state a default of three, like the Model Law.

It is interesting to see how the UNCITRAL Arbitration Rules have evolved in that respect. The 1976 version provides for a default number of three arbitrators. However, it appears likely that there will be a slight change. The default position under the 1976 Rules has been retained, subject to a new discretion granted to
the Appointing Authority to appoint a sole arbitrator at the request of a party. This discretion is limited to certain circumstances, such as the failure of a respondent to participate in constituting the arbitral tribunal. This approach overcomes the problem in the 1976 rules that where the respondent is not participating the claimant can be left with no option but to proceed with an unnecessarily expensive three-member arbitral tribunal to decide a small case.

2.2 Procedure for constituting the arbitral tribunal

6.18 All institutional arbitration rules recognise the principle of party autonomy by allowing parties to agree on the procedure for constituting the arbitral tribunal and to participate in its constitution. Should party autonomy fail, all rules provide a default process to ensure that the arbitral tribunal is constituted and that the arbitration proceeds. The default rules prevent a recalcitrant party from frustrating the process by, for example, refusing to nominate an arbitrator. By adopting arbitration rules in their arbitration agreement, the parties voluntarily agree to this default process. The appointment of arbitrators by an 'appointing authority' or institution, as specified in the arbitration rules, is therefore entirely consistent with party autonomy.

6.19 Typically, if the parties fail to agree on an arbitrator (in the case of a single arbitrator) or if one party fails to nominate/appoint a co-arbitrator, the arbitral institution will make the appointment. In a three-person arbitral tribunal, each side usually nominates one arbitrator and the party-nominated co-arbitrators may be charged with jointly appointing the chairperson. If the co-arbitrators are unable to agree, that responsibility may again shift to the institution, depending on its rules. Rules 6 and 7 of the 2007 SIAC Rules are an example of this process:

**Rule 6: Sole Arbitrator**

6.1 If a sole arbitrator is to be appointed, either party may propose to the other the names of one or more persons, one of whom would serve as the sole arbitrator. Where parties have reached an agreement on the nomination of a sole arbitrator, Rule 5.3 shall apply.

6.2 If within 21 days after receipt by the Registrar of the Notice of Arbitration made in accordance with Rule 3, the parties have not reached an agreement on the nomination of a sole arbitrator, the Chairman of SIAC shall make the appointment as soon as practicable.

6.3 A decision of the Chairman of SIAC under this Rule shall not be subject to appeal.

**Rule 7: Three Arbitrators**

7.1 If three arbitrators are to be appointed, each party shall nominate one arbitrator.

7.2 If a party fails to make a nomination within 21 days after receipt of a party's nomination of an arbitrator, the Chairman of SIAC shall proceed to appoint the arbitrator on its behalf.

7.3 Unless the parties have agreed upon another procedure for appointing the third arbitrator, the third arbitrator who shall act as the presiding arbitrator shall be appointed by the Chairman of SIAC. Any nomination made pursuant to the procedure agreed to by the parties shall be subject to confirmation pursuant to Rule 5.3.

7.4 A decision of the Chairman (of SIAC) under this Rule shall not be subject to appeal.

If the parties have opted for ad hoc arbitration, reference will have to be made either to their chosen ad hoc rules or to the applicable procedural law. Article 11 of the Model Law provides the following mechanism for the constitution of the arbitral tribunal:

**Article 11. Appointment of arbitrators**

1. No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

2. The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.

3. Failing such agreement,

   a. in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;

   b. in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.

4. Where, under an appointment procedure agreed upon by the parties,

   a. a party fails to act as required under such procedure, or

   b. the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or

   c. a third party, including an institution, fails to perform any function entrusted to it under such procedure, any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

5. A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties. (Emphasis added)

As can be seen in the Model Law extract above, Article 11(3)(a) refers the appointment responsibility to 'the court or other authority specified'. This is an extremely important task and the different jurisdictions in this region have designated a variety of persons and institutions to perform it. In Singapore, the Chairman of SIAC has been designated in the legislation as the person to select default arbitrators. In Malaysia the Director of the KLRCA is given

20 Singapore International Arbitration Act 2002 Section 8(2).
the responsibility, however should the director be unable or fail to make the appointment, parties can approach the High Court. The Philippines is another jurisdiction in which a specific person is nominated, in this instance the 'National President of the Integrated Bar of the Philippines (IBP) or his duly authorized representative', failing which the parties can turn to a Regional Trial Court. In Hong Kong, the appointing power under the legislation is referred to HKIAC as an institution. The Indian legislation nominates 'the Chief Justice of India or the person or institution designated by him' Australia, New Zealand and Japan each designate courts.

Parties sometimes identify a specific individual or individuals as arbitrator(s) in their arbitration clause in a contract. It is not advisable to attempt to select arbitrators before a dispute has arisen. While a perceived advantage is that the arbitral tribunal composition will be faster and more certain, difficulties arise when the named person passes away in the interim period or for some other reason is unable or unwilling to act once a dispute arises. Additionally, that person might, in the course of his or her personal life or professional activities since the arbitration agreement was made, have developed a conflict of interest.

In Ace Pipeline Contracts Private Ltd v Bharat Petroleum Corporation Ltd the parties' arbitration agreement provided that the arbitrator would be the marketing director of one of the parties or another officer of that party designated by the marketing director. It stated that all disputes:

arising out of or in relation to this agreement shall be referred to the Sole Arbitration of the Director (Marketing) of the Corporation or of some officer of the Corporation who may be nominated by the Director (Marketing). The Vendor will not be entitled to raise any objection to any such Arbitrator on the ground that the Arbitrator is an Officer of the Corporation or that he has dealt with the matters to which the contract relates or that in the course of his duties as an Officer of the Corporation he had expressed views on all or any other matters in dispute or difference.

This rather draconian clause, at least for the party opposing the corporation, was upheld by the Indian Supreme Court which ruled:

In the present case, in fact the applicant's demand was to get some retired Judge of the Supreme Court to be appointed as arbitrator on the ground that if any person nominated in the arbitration clause is appointed, then it may suffer from bias or the arbitrator may not be impartial or independent in taking decision. Once a party has entered into an agreement with eyes wide open it cannot wriggle out of the situation that if any person of the respondent-BPCL is appointed as arbitrator he will not be impartial or objective. However, if the applicant feels that the arbitrator has not acted independently or impartially, or he has suffered from any bias, it will always be open to the party to make an application under Section 34 of the Act . . . .

Rather than identifying a specific arbitrator in the arbitration agreement, a better practice is to identify in advance an appointing authority (which could even be an individual identified by his or her position) or institution charged with selecting arbitrators if the parties cannot agree – an example may be the chairperson of the Chartered Institute of Arbitrators. However, the most common and effective approach is by reference to a set of arbitration rules as described above.

Because the constitution of the arbitral tribunal can be used as a tactical instrument, it is not surprising that the appointment of arbitrators can be a source of great controversy. At the heart of this controversy is party involvement in the selection process. The benefits of joint selection of arbitrators by all parties can rarely be doubted. Arbitrator selection by an individual party is, however, a potentially different matter. As noted above, it is common for each side in an arbitration to select one of the co-arbitrators. One key advantage of this approach is that the power to select an arbitrator should give the nominating party confidence in the arbitral tribunal. A perceived disadvantage is that the arbitrator could consciously or subconsciously favour the nominating party. As discussed below, parties may nominate co-arbitrators who they believe will assist their case. Nonetheless, arbitrators have mandatory obligations of impartiality and independence.

2.3 Multiparty arbitrations

As noted above, where three arbitrators are required it is usual that each party nominates one arbitrator and the third, who will act as chairperson, is chosen by the two nominated co-arbitrators, an arbitral institution or some other agreed process. Uncertainty can arise in arbitrations involving more than two parties, because if each party were to nominate an arbitrator the arbitral tribunal would comprise as many arbitrators as there are parties, plus a chairperson.

There has been very substantial growth in multi-party international arbitrations over the last 10–20 years. Arbitrations involving more than one party now account for approximately one-third of ICC arbitrations. In 2009, 233 ICC arbitrations (28.5%) involved more than two parties. Out of these 233 cases, 206 (88.4%) involved between three and five parties, 21 (9%) involved between six

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21 Malaysian Arbitration Act Section 13.
22 Philippines Alternative Dispute Resolution Act Section 26.
23 Philippines Alternative Dispute Resolution Act Section 27.
24 Hong Kong Arbitration Ordinance Section 12.
25 Indian Arbitration and Conciliation Act Section 11. With respect to this section, see the Indian Supreme Court decision of Citation Infowarees Ltd v Equinox Corporation, Arbitration Application No. 8 of 2008, which considered whether the Chief Justice could appoint an arbitrator even where foreign law governed the main contract.
26 Australian International Arbitration Act 1974 Section 18. However following the introduction of amendments to the Act, provision will be made for the government to designate a prescribed authority (such as ACICA) without requiring further legislative change.
29 See, e.g. the Indian Supreme Court case of Ace Pipeline Contracts Private Ltd v Bharat Petroleum Corporation Ltd (2007) 5 SCC 304 discussed below.
30 (2007) 5 SCC 304 (Indian Supreme Court).
31 See Section 3.2.2 below.
planned well in advance with details of exactly how long it will take, who will be present, and how the interview will be conducted. For the benefit of both the party and the arbitrator a precise record of the interview should be made and provided to the opposing side once the arbitrator has been appointed. Interviews of sole or presiding arbitrators should not take place in the presence of one party alone. The guidelines also suggest that unsuccessful interviewees should usually only be compensated for reasonable expenses but not time. Those who are successfully appointed should submit their claims for expenses and time in the usual way – carefully noting that they relate to the interview. In practice, arbitrators rarely charge fees for these pre-appointment interviews.

Pre-appointment interviews become most controversial when the parties do not limit themselves to interviewing one prospective arbitrator about availability etc., but interview several candidates with the aim of establishing which one is most likely to decide in their favour. This practice has been termed a ‘beauty parade’, in a similar way to beauty contests between law firms that are pitching to a client for prospective briefs. Whether beauty parades are ethically acceptable depends primarily on the content of the discussions and whether they are disclosed to the opposing party. The recommendations of the above-mentioned Chartered Institute Guidelines are helpful in this respect.

4 Formal appointment of arbitrators

It is important to distinguish between the nomination and the appointment of an arbitrator. Simply because a person is nominated (or proposed) to act as arbitrator does not impose an obligation on him or her to accept the nomination. Much like an ordinary contract for services, the position hinges on the principles of offer and acceptance. The nomination only binds the arbitrator once accepted. As reviewed below, the arbitrator’s acceptance of the nomination may be all that is required to appoint an arbitrator but under certain rules the acceptance may constitute only a pre-condition to appointment.

The point at which appointment occurs can be of importance as it carries certain effects. It is generally only when an arbitrator has been appointed that he or she may be afforded immunity from civil liability. The point of time from which immunity takes effect may vary under some institutional rules because even if arbitrators accept the nomination there may be further steps to be taken for them to be officially appointed. For example, under Article 9 of the ICC Rules, party-nominated arbitrators who have accepted nomination must thereafter be confirmed by the ICC Court or Secretary-General. Consequently, under this procedure a party-nominated arbitrator is not appointed until he or she has been confirmed. At the opposite end of the scale are the ACICA Rules, which follow the more common formula (also used, for example, in the UNCITRAL Arbitration Rules). The terminology adopted in the ACICA Rules refers solely to the appointment of arbitrators with no mention as to their nomination. Implicit in this wording is the need first to nominate an arbitrator, who is then required to accept or decline the nomination. Upon acceptance, the arbitrator would be appointed under those Rules.

The 2007 SIAC Rules follow the ICC approach. In a circular released to announce those 2007 Rules, Lawrence Boo, then SIAC’s Deputy Chairperson, stated:

The unequivocal, institutional nature of SIAC arbitration is embodied in the 2007 Rules...

(i) SIAC’s role as the appointing authority is clarified in Rule 5, whether arbitrators are party-appointed, party nominated, agreed to by parties, or nominated or appointed by any third person. In all cases, an arbitrator is not deemed to be appointed until confirmed by the Chairman of SIAC.

The equivalent provision now appears as Rule 6 in the 2010 SIAC Rules. Indeed, in this edition the Chairman’s authority appears to be further emphasised by reference to the finality of his/her decision in Rule 6.4.

5 Obligations of arbitrators

International arbitrators should be impartial, independent, competent, diligent and discreet. Such is the first line of the Introductory Note of the 1987 IBA Rules of Ethics for International Arbitrators. This guideline highlights the fact that being an arbitrator carries certain duties and obligations. However, it has been suggested that there are people who will willingly accept an appointment as an arbitrator without fully appreciating their duties. This could seriously affect the conduct of a specific arbitration, but it will also tarnish the reputation of arbitration generally. The responsibility for ensuring that potential arbitrators are aware of their obligations should be shared by the prospective arbitrators and those who are appointing them.

This section begins by considering the general obligations of arbitrators and their potential liability. It then moves to a specific discussion of their disclosure.

82 Some common law practitioners refer to the act of acceptance as: ‘entering the reference’.
83 There is a generally accepted view that a contractual (or at least quasi-contractual) relationship exists between the arbitrators and the parties, although it is not without its critics. If such a relationship does exist, the arbitrators may find themselves subject to civil damages claims. Although most claims one might expect would naturally arise after the commencement of the arbitration (and hence after the appointment of the arbitrator), it is conceivable that a claim such as for breach of confidentiality may occur before an arbitrator’s appointment. For a discussion of the contractual relationship between arbitrators and parties see S Kloner, ‘The Arbitrator’s Contract’, (1999) 15(2) Arbitration International 161; and Lew, Mistelis and Kroll, op cit fn 5, at p 276, para 12-4.
84 For an explanation of the appointment process in ICC arbitration see Fry and Greenberg, op cit fn 11.
86 Although these rules are not directly binding on either arbitrators or parties (unless specifically adopted by agreement), they are one of the few such guidelines of their kind. They cover not only the duty of disclosure, but issues such as fees, diligence, involvement in settlement discussions and confidentiality of deliberations.
obligation. The special obligations of impartiality and independence are addressed separately in the discussion on challenges to arbitrators in Section 6.

5.1 General obligations and potential liability

6.78 In accepting an appointment, arbitrators agree to the inherent duties of care and diligence attached to their role. These duties may not be spelt out in arbitration rules but are nonetheless implied. As part of these duties, arbitrators should make themselves available and be able to devote the time and effort necessary to read the parties’ submissions carefully, examine the evidence produced, attend all meetings and hearings, and work on producing a quality award after a thorough, unbiased analysis of the entire case. Naturally, an arbitrator should refrain from doing anything which would prejudice the arbitration or the parties.

6.79 Born suggests that the obligations of international arbitrators can be summarised as:88

- a duty to resolve the parties’ dispute in an adjudicatory manner;
- a duty to conduct the arbitration in accordance with the parties’ arbitration agreement;
- a duty to maintain the confidentiality of the arbitration;
- in some contexts, a duty to propose a settlement to the parties; and
- a duty to complete the arbitrator’s mandate.

6.80 The first duty Born refers to is particularly important. It encompasses a number of more discrete obligations and significantly overlaps with the other duties he lists. Redfern and Hunter describe this as a duty to act judicially,89 which perhaps better captures the nature of the obligation. Although arbitrators are given wide discretion to determine the parties’ disputes, there are expectations about the process which will lead to that determination. This is clearly described in Rule 15(2) of the SIAC Rules, which reads:90

In the absence of procedural rules agreed by the parties or contained in these Rules, the Tribunal shall conduct the arbitration in such manner as it considers appropriate to ensure the fair, expeditious, economical and final determination of the dispute.

(Emphasis added)

6.81 We have referred to the fundamental importance of a fair process repeatedly throughout this book. It includes the issues of impartiality and independence which are discussed separately below.91 The requirements of an expeditious and economical process in part relate to availability. The arbitrator must allocate the time and commitment to see the arbitration through to its prompt completion. Arbitrators should be professional, calm and diligent in this process.

6.82 Some rules expressly refer to an obligation on the arbitrator to make every effort to deliver an enforceable award.92 Where it is not referred to expressly

such an obligation may be implied generally or in the requirement of final determination.93 There are nevertheless limits to this obligation. Even the most experienced international arbitrators cannot foresee every single issue (such as a form or process requirement) that every possible enforcement court in the world might raise. Even if arbitrators have this information at their disposal, it may not be practicable to attempt to comply with all such requirements in a single case. Furthermore, theoretically some of these requirements may be contradictory, rendering it impossible to deliver an award simultaneously enforceable in two particular jurisdictions. Therefore, arbitrators should make every effort to ensure that they deliver an award that: (i) complies with the spirit of the New York Convention; (ii) is enforceable at the seat of arbitration; and (iii) is enforceable in any jurisdictions that the arbitral tribunal can reasonably foresee that a party to the arbitration may seek to enforce the award.

If an arbitrator breaches a general obligation during the course of an arbitration, the breach might provide grounds for an application to remove the arbitrator. The resignation, removal and replacement of arbitrators is considered in Section 7 below. In some circumstances, parties may even be able to bring legal action against an arbitrator.

As briefly referred to above, some international arbitration laws provide arbitrators with protection from civil law suits.94 Although the precise wording differs slightly between the various legislation, for obvious reasons immunity is not generally given in situations where there has been fraud or some similar intentional dishonesty on the part of the arbitrator. The New Zealand legislation takes a slightly different approach. Rather than providing a blanket statement of immunity from liability and then carving out exceptions, it provides a general immunity from negligence in the course of acting in the capacity of an arbitrator without any other qualification.95

Most international arbitration rules also contain an exclusion of liability provision to protect arbitrators and arbitral institutions from civil liability.96 In early 2009 a decision of the Paris Court of Appeal caused concern among the arbitration community when it suggested that the ICC Court could not validly exclude liability for acts or omissions in the performance of its essential duties.97 The reasoning of this decision, while directed at an arbitral institution, could arguably be applied mutatis mutandis to arbitrators. While arbitrators and arbitral institutions should be accountable for their actions or omissions, it is important they

88 Born, op. cit. fn 88, at p. 1615.
89 See, e.g., Section 28 of the Australian International Arbitration Act; Section 2G of the Hong Kong Arbitration Ordinance; Section 47 of the Malaysian Arbitration Act; Section 25 of the Singapore International Arbitration Act. Japan is an exception. There are relatively few cases from this region involving the liability of arbitrators. In a Victorian Supreme Court case concerning a domestic Australian arbitration, the legal costs associated with an annulled award were unsuccessfully sought against the arbitrator in Mond v Berger [2004] VSC 150. There is a New Zealand High Court case from 1994, Pickens v Templeton [1994] 2 NZLR 718; however this was prior to the introduction of Section 13 of the New Zealand Arbitration Act.
90 Section 13 of the New Zealand Arbitration Act ([a]n arbitrator is not liable for negligence in respect of anything done or omitted to be done in the capacity of arbitrator).
91 See, e.g., ACICA Rules Article 44; HKIAC Rules Article 40; SIAC Rules Article 33.
92 SIAC Arbitration Rules, Article 11.3; LCIA Rules Article 32.2.
93 Born, op. cit. fn 88, at p. 1621.
94 See, e.g., Section 28 of the Australian International Arbitration Act; Section 2G of the Hong Kong Arbitration Ordinance; Section 47 of the Malaysian Arbitration Act; Section 25 of the Singapore International Arbitration Act. Japan is an exception. There are relatively few cases from this region involving the liability of arbitrators. In a Victorian Supreme Court case concerning a domestic Australian arbitration, the legal costs associated with an annulled award were unsuccessfully sought against the arbitrator in Mond v Berger [2004] VSC 150. There is a New Zealand High Court case from 1994, Pickens v Templeton [1994] 2 NZLR 718; however this was prior to the introduction of Section 13 of the New Zealand Arbitration Act.
95 Section 13 of the New Zealand Arbitration Act ([a]n arbitrator is not liable for negligence in respect of anything done or omitted to be done in the capacity of arbitrator).
96 See, e.g., ACICA Rules Article 44; HKIAC Rules Article 40; SIAC Rules Article 33.
are able to perform their functions without fear of spurious liability claims. Given the considerable sums of money frequently involved in international commercial arbitrations, potential exposure to civil liability claims could have detrimental consequences on the manner in which arbitrators and institutions conduct arbitrations.

The Japanese Arbitration Law does not expressly address the issue of immunity for an arbitrator against civil liability. Rather unusually it contains criminal sanctions for miscreant arbitrators. Significantly these would apply whenever the seat of arbitration was in Japan, even if the offending conduct took place in a different jurisdiction. 99

5.2 Disclosure obligations

Arbitration laws and rules impose a duty of disclosure of all facts or circumstances that may give rise to justifiable doubts as to the arbitrator’s impartiality or independence. Impartiality and independence represent core obligations of an arbitrator. They are so widely recognised that they amount to general international principles and are therefore incumbent on any arbitrator in all circumstances. All arbitration laws and rules require arbitrators to be and remain independent, although there is variation in the precise language used. The concepts of impartiality of independence are closely related but not exactly the same. 99

Identifying which facts or circumstances an arbitrator should disclose is not always easy. The International Bar Association published in 2004 Guidelines on Conflicts of Interest in International Arbitration to assist arbitrators in deciding what should be disclosed. These Guidelines are discussed below, after reviewing the general principles of disclosure as found in arbitration laws and rules.

5.2.1 General principles of disclosure

Most laws and rules require prospective and serving arbitrators to disclose to the parties any circumstances that might give rise to a reasonable doubt about their independence or impartiality. When the parties have opted for institutional arbitration, the arbitrator’s disclosure obligations may extend to the arbitral institution.

Article 12(1) of the Model Law is typical of the laws in this region:

When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment until the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.


99 See Section 6.1.1.

100 CIETAC Rules Article 25.

101 See, e.g. the US decision Consolidated Coal v Local 1643 United Mine Workers, 48F 3d 125 (4th Cir 1995) (US Court of Appeals, Fourth Circuit).

102 Paris Court of Appeal, 12 February 2009 (07/223164).

103 IBA Guidelines (Conflicts), op. cit. fn 79, at p. 3.

The second sentence is important because it requires a continuing obligation of disclosure right through until the end of the proceedings.

Under the CIETAC Rules, the arbitrator’s disclosure obligation is only to CIETAC and not the parties. 100 CIETAC then communicates the disclosure to the parties.

Depending on the arbitration rules, the arbitrator may have to sign a declaration or statement of independence when appointed. Article 7(2) of the ICC Rules provides in this regard:

Before appointment or confirmation, a prospective arbitrator shall sign a statement of independence and disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator’s independence in the eyes of the parties. The Secretariat shall provide such information to the parties in writing and fix a time limit for any comments from them.

Once a declaration of this kind has been made, a presumption exists that the arbitrator is impartial and independent as at the date of the declaration. The onus of rebutting that presumption lies with the party bringing the challenge. 101

Disclosure duties can be very strict, requiring arbitrators associated with large law firms to check thoroughly whether any offices of their firm have acted or are acting for a party or one of its subsidiaries. A recent decision of the Paris Court of Appeal suggests that an arbitrator’s actual knowledge of a potential conflict of interest involving his law firm is not necessary, and that constructive knowledge may be sufficient to disqualify the arbitrator. 102 It should be noted that this case is currently being appealed to the Cour de Cassation, France’s highest court.

5.2.2 IBA Guidelines

The different national tests, as well as cultural attitudes towards impartiality and independence, can create doubts as to what an arbitrator must disclose. The IBA has noted that ‘even though laws and arbitration rules provide some standards, there is a lack of detail in their guidance and of uniformity in their application. As a result, members of the arbitration community often apply different standards in making decisions concerning disclosure, objections and challenges’. 103 As noted above, in order to assist its members and the profession generally the IBA has produced Guidelines on Conflicts of Interest in International Arbitration (‘IBA Guidelines’), setting out principles and examples of circumstances arbitrators should disclose in connection with impartiality and independence.
6.96 The IBA Guidelines do not have the force of law but are merely guidelines. Nonetheless, they are now widely referred to by parties, arbitrators and courts. The Secretariat of the ICC Court also refers to them in footnotes to memoranda that it prepares to brief the ICC Court on its decisions on challenges and contested arbitrator confirmations. The Guidelines certainly do not bind the ICC Court. Both the current and former Secretaries General of the ICC Court have explained why the ICC Court is not bound.\textsuperscript{105}

6.97 The IBA Guidelines consider various scenarios concerning when issues as to impartiality and independence arise and when they do not. For ease of reference, these are then categorised by colour – red, orange, and green. Situations described in the Red List are those which create a conflict of interest. This list is divided into two sub-categories: the ‘non-waivable Red List’ and the ‘waivable Red List’. Situations described in the non-waivable Red List give rise to a conflict of interest which automatically disqualifies arbitrators from accepting or continuing their mandate, regardless of whether a party has challenged the arbitrator. As an example, the non-waivable Red List contains the situation where ‘the arbitrator has a significant financial interest in one of the parties or the outcome of the case’. However, a situation where ‘the arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties’ falls into the waivable Red List. This means a conflict of interest exists that must be disclosed. The effect of a waivable Red List categorisation is that the arbitrator cannot continue to act unless the parties agree otherwise.

The Green List covers situations which do not give rise to a conflict of interest and, according to the IBA Guidelines, need not be disclosed. An example of these situations is a pre-appointment interview with a party that is limited to availability etc. or the fact that ‘the arbitrator has previously published a general opinion (such as in a law review article or public lecture) concerning an issue which also arises in the arbitration (but the opinion is not focused on the case that is being arbitrated)’.\textsuperscript{106}

In-between situations fall into the tricky Orange List, which is ‘a non-exhaustive enumeration of situations which (depending on the facts of a given case) in the eyes of the parties may give rise to justifiable doubts as to the arbitrator’s impartiality or independence’.\textsuperscript{110} The arbitrator is under a duty to disclose those situations. If an Orange List disclosure is made and the parties fail to object, then the parties are understood to have accepted the arbitrator. Although it may sound like a clear and simple approach, in practice, it can require a very onerous conflict of interest check. For example, an arbitrator must disclose that ‘the arbitrator’s law firm has within the past three years acted for one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator’.\textsuperscript{111}

The IBA Guidelines are not without their critics.\textsuperscript{112} When reading them it is important to remember the perspective from which they were drafted. Michael Bond has observed that:

\begin{quote}
[leftmargin=*]One might reasonably question whose interests the IBA Working Group served. It consisted of 19 members; of the 13 members for whom information is available from Martindale Hubbell, eight work at firms with more than 275 lawyers. Five of those members work at firms with more than 500 lawyers, including the world’s largest law firm.
\end{quote}

This might explain what is sometimes considered a relaxed approach by the IBA Guidelines to situations where the arbitrator’s law firm has provided services for or against one of the parties to the arbitration.

Finally, numerous gaps in the IBA Guidelines have been identified. One of the gaps – the situation where an arbitrator is concurrently serving as co-counsel with one of the parties’ counsel in another matter – is significant because it led to four successful challenges or non-confirmations of arbitrators by the ICC Court between 1 July 2004 and 1 August 2008.\textsuperscript{114}

6 Challenges to arbitrators

After formal appointment of an arbitrator, that arbitrator can be challenged. A successful challenge will result in the impugned arbitrator’s removal. Ordinarily, he or she will be replaced but sometimes the remaining arbitrators can proceed without such a replacement. The possibility for parties to challenge arbitrators ensures the integrity of the arbitration process. As explained below, depending on the arbitral rules adopted, challenges to arbitrators may be determined by the authority that appointed the arbitrator, the arbitral institution (or its delegate), the unchallenged members of the tribunal, or even the arbitral tribunal including the challenged arbitrator.

\textsuperscript{104} See, e.g., I. Trakman, 'The Impartiality and Independence of Arbitrators Reconsidered', (2007) 10 International Arbitration Law Review 999, who suggests that the jury is still out on whether the guidelines are the cause of the increase in challenges, but does describe the increase as a 'flood'. Contrary to Trakman's suggestion, the ICC Court has not seen an increase in the number of challenges since the Guidelines were released in 2004. See also Fry and Greenberg, op. cit. fn 11, at p. 17.


\textsuperscript{106} IBA Guidelines (Conflicts), op. cit. fn 79, Non Waivable Red List, 1.3.

\textsuperscript{107} Ibid., Waivable Red List 2.1.1.

\textsuperscript{108} Ibid., Green List 4.5.1.

\textsuperscript{109} Ibid., Green List 4.1.1.

\textsuperscript{110} Ibid., Part II, para 3.

\textsuperscript{111} Ibid., Orange List, 3.1.4.

\textsuperscript{112} See, e.g., M Ball, 'Proximity Deconstructed: How Helpful, Really, are the New International Bar Association Guidelines on Conflicts of Interest in International Arbitration?', (2005) 21(3) Arbitration International 323. Despite expressing some criticisms, Ball does conclude by stating that the guidelines have made an important contribution.


\textsuperscript{114} Fry and Greenberg, op. cit. fn 11, at p. 17.
6.1 Challenges for partiality or lack of independence

The underlying purpose of independence or impartiality requirements is to ensure that the parties are treated equally and that the award is not influenced by an arbitrator's bias. What matters most, therefore, is ensuring that the arbitrator is free of any influence on his or her decision-making. It follows that a party should be entitled to challenge an arbitrator who it considers to be lacking impartiality for any reason. Challenges for partiality or lack of independence are by far the most common form of challenge.

The concepts of impartiality and independence are distinguishable. Section 6.1.1 explains the distinction. Section 6.1.2 focuses on the challenge process. Sections 6.1.3 and 6.1.4 address how allegations of partiality and lack of independence are assessed by arbitral institutions and by courts respectively. An issue raised in the context of the assessment of impartiality and independence is whether the same standard applied to chairpersons or sole arbitrators should apply to party-nominated co-arbitrators. This is addressed in Section 6.1.5. We then discuss how impartiality and independence are treated in 'arb-med' proceedings in Section 6.1.6.

6.1.1 Impartiality and independence distinguished

Most laws and rules use 'independence' and/or 'impartiality' as the operative language to test arbitrator bias.\(^2\) These terms are considered to be clearer and more precisely definable than the concept of 'neutrality.'\(^3\) Although closely related, independence and impartiality are generally considered to be technically distinguishable terms, but somewhat interchangeable for practical purposes in international arbitration.

Some practitioners contend that the overall concept that covers both impartiality and independence is clear without the need for individual definition of either of these terms.\(^4\) While others have argued that excessive analysis of the definitions in inconsistent ways has led to greater confusion rather than clarity.\(^5\) Despite such commentary, distinct definitions are extractable from scholarly writings.

A generally accepted definition of independence is the absence of actual, identifiable relationships with a party to proceedings or someone closely connected to the party.\(^6\) The test for independence examines the appearance of bias and not actual bias\(^7\) and is thus entirely objective. It looks only at tangible elements; facts that can be shown or proved. Satisfying a test for independence does not require showing the effect of any relationships on the mind of the arbitrator concerned. Offending relationships could be of a business, social, family or financial nature. Slightly more contentious is the question whether identifiable relationships between a party's legal counsel and an arbitrator affect independence.\(^8\) Generally, such relationships are examined to see whether they are relevant to independence. Relationships with counsel are likely to affect independence if they involve financial dependence, such as regular referrals of work. They will probably affect independence if social relationships go beyond ordinary business encounters (such as membership of the same professional association) to significant social contact outside of business.

In limited circumstances, the fact that an arbitrator and counsel share barristers' chambers may affect independence. This issue arose in the ICSID case of Hrvatska Elektroprivreda v Slovenia.\(^9\) There, however, the claimant applied to prevent the counsel from acting in the arbitration rather than to challenge the arbitrator. The particularly experienced arbitral tribunal ruled in favour of the claimant and ordered that the counsel could not participate in the case. The arbitral tribunal cited the respondent's late announcement of the involvement of that particular counsel as a critical factor.

Impartiality, in contrast to independence, is a subjective concept, concerned with the tendency of an arbitrator actually to favour one of the parties' positions. Impartiality is not concerned with the outside appearance of bias. It does not necessarily require tangible relationships that could be the cause of the arbitrator acting unfairly. It examines the likelihood of an arbitrator actually having a state of mind or prejudice that favours one side in the dispute. A lack of impartiality could be caused by totally immeasurable, psychological motives or prejudices.\(^10\)
so is foreseeable that an arbitrator could act partially without any objectively explainable or provable reason for doing so. 124 It is thus a subjective and more abstract concept than independence, in that it involves primarily a state of mind. This presents special difficulties in terms of measurement. 125

6.111 A case against an arbitrator for an alleged lack of impartiality could most easily be made out where the arbitrator blatantly favours one party. Blatant favouritism is very rare and difficult to prove, 126 so statutes referring to impartiality usually reduce the evidentiary burden by allowing for removal of arbitrators where there are justifiable or reasonable doubts as to their impartiality. 127 Unfortunately, whether advances in neurological science will ever enable us realistically to test impartiality remains a question so hypothetical that it can safely be ignored. Rather, in order to prove partiality or lack of independence, we must rely on objective factors that can be proved and tested in front of a court, arbitral tribunal or institution. In practice therefore, much like the way independence is assessed, objective factors (i.e. independence) are the best means to examine impartiality.

6.1.2 Procedure

6.112 The procedural aspects of the challenge process will be determined by any express provisions of the arbitration agreement itself, the parties' choice of arbitration rules or the lex arbitri. For example, if the parties have chosen institutional arbitration like ICC or SIAC, a body (or individual) within the relevant institution will rule on the challenge. 128 Other rules vest the power in different bodies, such as the authority that appointed the arbitrator, 129 the unchallenged members of the tribunal, 130 or even the arbitral tribunal including the challenged arbitrator. 131 If a procedure has not been determined by the parties, the lex arbitri should provide one. Where the Model Law applies, Article 13 (set out below) provides that the challenge will first be submitted to the arbitral tribunal and, if the challenge is rejected, may be submitted to a designated court.

6.113 There are three possible scenarios once a challenge is filed and before that challenge is determined. First, the opposing party may agree to the challenge. The arbitrator's mandate would then ordinarily terminate, although an arbitrator occasionally purports to remain on the panel despite all parties agreeing to remove him. 132 A second possible scenario is that the arbitrator resigns. The arbitrator may not wish to continue the mandate if one party has lost confidence in him or her. A question arises as to whether such resignations should be accepted. The ICC Court does not always accept an arbitrator's resignation in these circumstances. 133 It is important to note that tendering a resignation after having been challenged should not be seen as an admission that the challenge was justified. Article 11(3) of the UNCITRAL Rules specifically provides in relevant part that:

When an arbitrator has been challenged by one party, the other party may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his office. In neither case does this imply acceptance of the validity of the grounds for the challenge. (Emphasis added)

The third scenario is perhaps the most frequent: the arbitrator does not resign and the opposing party contests the challenge. In this scenario a decision on the merits of the challenge will have to be taken.

The 2010 SIAC Rules 12 and 13 provide a typical example of the procedure for a challenge submitted to an arbitral institution. 134

6.114 Notice of Challenge

12.1 A party who intends to challenge an arbitrator shall send a notice of challenge within 14 days after the receipt of the notice of appointment of the arbitrator who is being challenged or, except as provided in Rule 10.6, within 14 days after the circumstances mentioned in Rule 11.1 or 11.2 became known to that party.

12.2 The notice of challenge shall be filed with the Registrar and shall be sent simultaneously to the other party, the arbitrator who is being challenged and the other members of the Tribunal. The notice of challenge shall be in writing and shall state the reasons for the challenge. The Registrar may order a suspension of the arbitration until the challenge is resolved.

12.3 When an arbitrator is challenged by one party, the other party may agree to the challenge. The challenged arbitrator may also withdraw from his office. In neither case does this imply acceptance of the validity of the grounds for the challenge...

6.115 Decision on Challenge

13.1 If, within 7 days of receipt of the notice of challenge, the other party does not agree to the challenge and the arbitrator who is being challenged does not withdraw voluntarily within 7 days of receipt of the notice of challenge, the Committee of the Board (of SIAC) shall decide on the challenge...

13.5 The Committee of the Board's decision made under this Rule shall be final and not subject to appeal.

Pursuant to Rule 13.5, the decision of the Committee of the Board of SIAC is expressed to be final, expressly denying any opportunity of appeal to SIAC or
Disregarding information is a required skill that arbitrators should possess. Arbitrators may be required to consciously disregard information that is not presented during arbitral proceedings, such as public documents, information in the media and previous experience during the course of 'normal' arbitral proceedings. Additionally, arbitrators may also be required to disregard evidence they deem inadmissible after first reviewing the evidence for admissibility.

As a practical matter, it would seem highly advisable for arbitrators to seek not only the parties' agreement in writing, but also to have the parties waive challenge rights which may arise from the mediation process. Naturally, such a waiver would not affect the arbitrator's duty to act independently and impartially. Arbitrators might alternatively consider inviting the parties to adopt provisions similar to those found in the Hong Kong and Singaporean legislation.

6.2 Challenges for misconduct

Most arbitration rules and laws provide a mechanism for removing arbitrators for reasons other than relating to their independence or impartiality. Arbitrators can be removed for misconduct or when they fail to perform their functions, or fail to perform them in good time.

After examining what constitutes misconduct and the procedure for such challenges, this section provides examples of arbitral institution and court decisions on misconduct.

6.2.1 Definition and procedure

Misconduct is not a term used in the Model Law or international arbitration statutes generally. However, it remains relatively common in domestic arbitration statutes. Singapore's domestic legislation no longer uses the term misconduct but, when it did, in 2002 the Singapore High Court observed:

There is no statutory definition of what constitutes 'misconduct' but this term has been discussed in many cases and academic texts and there is a clear understanding of what it means in relation to the behaviour of an arbitrator in respect of himself or the proceedings. It should be noted at once that to find misconduct on the part of the arbitrator does not of itself impute any slur on his character. Misconduct can be found in respect of the technical handling of the arbitration and need not be a matter of bias or prejudice or other disreputable action on the part of the arbitrator.

No actual bias or partiality need be shown as long as the court is satisfied from the conduct of the arbitrator, either by his words, his action or inaction or his handling of the proceedings, that he displayed a real likelihood that he might not be able to act judicially.

As the above citation suggests, there is occasionally overlap in domestic court case law between decisions dealing with an allegation of partiality or dependence and issues of misconduct. In some legal systems, the courts consider partiality or dependence as a species of misconduct.

Article 14 of the Model Law provides for removal of an arbitrator who 'becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay'. The mechanism in Article 14 is very different from Article 13 (which deals with challenges as to independence and impartiality) because it provides a direct route to the court and is not time limited. However, it does not give the court a supervisory role as the article is not invoked by technical misconduct – that is, the court cannot assess whether the arbitrator is conducting the proceedings in an appropriate manner. A court is only able to intervene to keep the arbitration moving when it has effectively stopped – albeit by the drastic measure of removing the arbitrator.

Although the Singapore (domestic) Arbitration Act adopts much of the Model Law, Section 16 follows the English model. In the Singaporean decision of Yee Hong Pte Ltd v Powen Electrical Engineering Pte Ltd, the court examined the differences between the former Singaporean legislation governing domestic arbitration and the then new legislation. After noting that the word 'misconduct' had been removed from the legislation it observed that the test was now 'one of substantial injustice'.

Under s 16(1)(b) of the Act, an applicant has to show that the arbitrator's conduct of the proceedings has caused or will cause him to suffer substantial injustice. Loss of confidence in an arbitrator's ability to come to a fair and balanced conclusion is itself not capable of being substantial injustice. Dusan J in Conder Structures v Kuwer Construction Ltd [1999] ADRLJ 305 said, and I adopt his statement, that loss of confidence in an arbitrator is neither a sufficient nor a necessary condition of substantial injustice. Previously, as long as the court was satisfied that from the conduct of the arbitrator a
reasonable person would think that he had displayed real likelihood of not being able to act judicially, that was enough to remove him for misconduct. That is no longer the case. The test now is different.

6.174 Despite this, it may be possible to argue that apparent breaches of natural justice are the result of bias and therefore impartiality.\(^{215}\) Such an approach would avail the complainant of the procedures in Article 13 of the Model Law. As noted before there is occasional overlap between misconduct and bias.

An evident policy of the Model Law is to ensure that the arbitration proceeds through to an award. For example, a challenged arbitrator is empowered to proceed and deliver an award notwithstanding a pending challenge against the arbitrator.\(^{216}\) However, this does not necessarily prevent a party from challenging the award for that reason after it has been delivered. In the New Zealand High Court decision of *Grey District Council v Banks*\(^{217}\) (the appeal from which was referred to above), Justice Panikhurst specifically stated that he made no comment on whether failing to object in time would affect any later challenge to an award.

6.176 Most arbitration rules also deal with the situation where an arbitrator misconducts the proceedings in some way. Article 15(2) of the ACICA Rules provides a typical example:\(^{218}\)

In the event that an arbitrator fails to act or in the event that the de jure or de facto impossibility of him or her performing his or her functions, the procedure in respect of the challenge and replacement of an arbitrator as provided in the preceding Articles shall apply.

6.177 Article 14(2) of the KCAB International Rules vests the same power in the institution. However, it does not indicate exactly how that power is to be exercised:

The Secretariat may remove any arbitrator who fails to perform his or her duties or unduly delays in the performance of his or her duties, or is legally or actually unable to perform his or her duties.

6.178 Arbitrators are usually only removed on the application of a party to the proceeding. The above provision does not make clear whether a replacement can be on the KCAB's own initiative. Article 27(1) of the CIETAC Rules is similarly unclear. The ICC Court's power to remove an arbitrator on its own initiative is examined in the next section. The Indian Council of Arbitration Rules,\(^{219}\) the JCAA Rules\(^{220}\) and the Rules of Arbitration of the Bangladesh Council of Arbitration\(^{221}\) include similar provisions.

### 6.2.2 Arbitral institution decisions on misconduct

As noted above, the fact that arbitration is in principle confidential means that published decisions of arbitral institutions are rare. Nonetheless, some examples of ICC Court decisions on the removal of arbitrators have been made public.

Article 12(2) of the ICC Rules provides that an arbitrator will be replaced 'on the Court's own initiative when it decides that he is prevented de jure or de facto from fulfilling his functions, or that he is not fulfilling his functions in accordance with the Rules or within the prescribed time limits'. According to Fry and Greenberg, 'the most common ground for initiating replacement proceedings is when the arbitrator is causing unacceptable delays, is not responding to correspondence from the Secretariat and/or the parties, or is not conducting the arbitration in accordance with the Rules'.\(^{222}\) Article 12(2) resulted in the removal of an arbitrator by the ICC Court on 19 occasions between 1998 and 2008. The following represent recent examples:\(^{223}\)

(i) Due to a series of disagreements among them, the members of the arbitral tribunal were having difficulties working together, and there were serious delays in the completion of a majority award in accordance with the ICC Rules. The ICC Court replaced the chairman of the arbitral tribunal. With a strong, fresh chairman, the case quickly moved back on track.

(ii) In another case, replacement proceedings were initiated on the basis that the arbitrator was not available for a hearing at any of the times requested by the parties. One party pointed out this scheduling difficulty to the Secretariat and the ICC Court decided to initiate replacement proceedings. The sole arbitrator immediately resigned.

(iii) In yet another case, the sole arbitrator had little previous experience acting as an international arbitrator. This showed in the way that he managed (or failed to manage) the file. Doubt existed as to whether the sole arbitrator had verified that his correspondence reached the intended addressees and whether messages left with his assistant reached him. Furthermore, the sole arbitrator's statements on jurisdiction in the draft terms of reference suggested prejudgment of the issue. The sole arbitrator resigned after the replacement proceedings were commenced.

(iv) There was also a case in which the ICC Court decided to initiate replacement proceedings against the co-arbitrator nominated by the respondent after he twice cancelled his participation in the hearing on the merits at the eleventh hour, appearing to prioritise his other professional activities. The situation caused delays and additional costs for the parties and other members of the arbitral tribunal. After the ICC Court had initiated the replacement


\(^{216}\) See, e.g., *Mitsui*, ibid., where an interim injunction to prevent a challenged arbitrator from proceeding to an award was refused.

\(^{217}\) (2003) NZAR 487.

\(^{218}\) See also for example: PDRCI Rules Article 13(2); SIAC Rules, Rule 13(2); UNCITRAL Rules Article 13(2); 2010 UNCITRAL Arbitration Rules Article 12(2); and ICC Rules Article 12(2). The 2010 SIAC Rules, Rule 14.2 notably also expressly refers to fulfilling functions within prescribed time limits.

\(^{219}\) ICA Rules, Rule 27.

\(^{220}\) JCAA Rules, Rule 30.

\(^{221}\) BCA Rules, Rule 9.8.1.

\(^{222}\) Fry and Greenberg, op. cit. fn 11, at p. 29.

\(^{223}\) Ibid.
Applicable substantive law

1 Introduction

3.1 This chapter concerns the identification of the law that applies in an international arbitration. Various laws may apply to different aspects of the dispute.

3.2 After providing an overview of the types of choice of law issues that arise in international arbitration (Section 2), the remainder of this chapter focuses on the law applicable to the merits or substance of the parties' dispute. It first examines how an arbitral tribunal should determine the applicable law (Section 3). It then considers other issues such as mandatory laws, which apply regardless of the otherwise applicable substantive law (Section 4), how an arbitral tribunal should determine the content of the applicable law (Section 5), the compulsory application of the terms of the contract and trade usages (Section 6), the possibility of applying national rules of law or the lex mercatoria (Section 7), and finally the possibility for international arbitrators to decide cases based on principles of fairness and justice without reference to law (Section 8).

3.3 The treatment of applicable law issues in investment arbitrations under the ICSID Convention is completely different from international commercial arbitration. It is addressed in Chapter 10, Section 4.5.

2 Types of conflict of law issues in international arbitration

3.4 Determining the applicable law in an international litigation matter (i.e. before a state court) can be very complex, yet seductively interesting from an academic perspective. It involves an analysis of the interaction between different legal systems and their rules for determining the applicable law, usually referred to as 'conflict of laws rules' or 'private international law rules'. Indeed, it has been observed that:

The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires and inhabited by learned but eccentric professors who theorise about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when entangled in it.

It might be thought that these conflict of laws complications would not exist in a system such as international commercial arbitration, one of the features and benefits of which is to do away with excess formality. This is not, however, entirely correct. While resolving conflict of laws issues in international arbitration is certainly more flexible than in international litigation, there is arguably an additional complication which does not exist in state courts: in international commercial arbitration there is no fallback legal forum or the lex fori. Lex fori means literally the law of the forum; it is the law of the jurisdiction where a domestic court proceeding is taking place. Among other matters, such a legal system provides the courts of that jurisdiction with fallback conflict of laws rules for determining the law that applies in a case involving foreign elements.

The lex fori should be distinguished from the lex arbitri which, as explained in Chapter 2, is the law regulating arbitration at the seat of the international arbitration (which is not necessarily its physical location but where it legally takes place). International arbitration proceedings have no lex fori because they are not connected to the seat of arbitration in the same way that domestic court proceedings are connected to the forum. In particular, although the lex arbitri provides the legal backbone of the arbitration it does not provide a system of conflict of laws rules. So when an arbitral tribunal has to decide a question of applicable law, it does not have a fixed conflict of laws regime at its disposal. Moreover, any and all elements which may precede or be a necessary part of resolving conflict of laws questions in domestic courts are undefined in international arbitration.

With that background, it is useful first to consider briefly the conflict of laws issues faced by a judge in domestic litigation proceedings. In international litigation, there are primarily two types of conflict of laws questions: First, which

2 Some authors consider that the seat of arbitration is the lex fori, but the prevailing view is that there is no lex fori in international arbitration. One of the early proponents of this view was Y Dekrée, 'L'application cumulative par l'arbitre des systèmes de conflit de lois interested au litige', (1972) Revue de l'arbitrage 99, at p. 102.
3 As explained in Section 3.2.1.4 below, both the Japanese (Article 36) and South Korean (Article 29(1)) arbitration laws are exceptions because they include a conflict of laws rule for arbitrators in determining the governing contractual law in the absence of party choice. These rules are, however, very flexible and do not cover all conflict of laws issues that might arise, as do domestic conflict of laws rules when there is a lex fori.
The question of the law governing the arbitral procedure has been dealt with in Chapter 2. As explained in that chapter, the international arbitration procedural law at the seat of arbitration normally applies. Alternatively, the parties may be free to choose a different procedural law.\(^7\)

The law governing an individual reference or instance of arbitration means the procedural law governing a given submission to arbitration. Put another way, it is the procedural law that governs a particular dispute which has been referred to arbitration. A contract could lead to several separate disputes that might in turn give rise to several separate referrals to arbitration. It is possible — although unlikely — that a different arbitration procedural law will apply to each instance of arbitration.

The interesting question of which law governs an arbitration agreement is dealt with in Chapter 4.\(^8\) For the purposes of this chapter it is sufficient to note two things. First, an arbitration agreement in the form of a clause in a broader commercial contract is considered to be an agreement separate and independent from the contract containing it. One consequence of this division is that the arbitration clause might be governed by a law other than the law governing the contract itself. The second point to note is that since an arbitration agreement is a contract, similar principles and methods can be used to determine which law governs an arbitration agreement as are used to determine which law governs any contract. This means that the choice of law methodology for contracts that is set out in the present chapter has some relevance to determining the law governing an arbitration agreement.

Supervisory, supportive and enforcement measures in an international arbitration are all proceedings that ordinarily take place before domestic courts. The law governing these measures depends on the law where they are sought, that is the lex fori, including the conflict of laws rules at that place. During arbitration proceedings, parties and arbitrators should keep in mind jurisdictions where enforcement may take place, so as to make efforts to ensure that the resulting award is valid and enforceable under the law of such fora.\(^9\)

A party's capacity (for example to enter into a contract and/or an arbitration agreement) will generally be governed by its lex personum (personal law), that is the law of its nationality, even if a different law applies to the merits of the parties' dispute. For a company, that will be the law of the place of incorporation or place of business. For a state (i.e. a government), however, international arbitrators may in some circumstances find it inappropriate to apply that state's own law to the question of its capacity to contract internationally. A company is a legal person created under the laws of a state with powers that are limited by those laws. In contrast, a state possesses international legal personality, is capable of exercising rights and bears obligations under international law. When entering into a contract with a foreign party, it cannot be assumed that a state possesses

\(^{4}\) An example relevant to civil and commercial matters is the Convention of 2 October 1973 on the Law Applicable to Product Liability, which has been adopted by most European Community states. A list of these Hague Conference conventions is available on its website: www.hcch.net.

\(^{5}\) For example, the 1980 Rome Convention on the Law Applicable to Contractual Obligations, which was recently superseded for European Community countries by EC Regulation No. 593/2008 on the Law Applicable to Contractual Obligations. There is also EC Regulation No. 864/2007 on the Law Applicable to Non-Contractual Obligations.


\(^{7}\) See Chapter 2, Section 4.1.

\(^{8}\) See Chapter 4, Section 3.2.

\(^{9}\) See further Chapter 7, Section 9 (relating to interim measures of protection) and generally Chapter 9.
capacity that is limited by its own law. Whether a party has validly entered into a contract or arbitration agreement may alternatively be determined by the law governing that contract or arbitration agreement.

The question of which law governs the merits of the dispute is the focus of the rest of this chapter. As we will see, if the parties have not chosen the governing law, the answer is occasionally provided by the law of the seat of arbitration, but more generally has evolved by arbitration practice and academic studies. Even in those domestic jurisdictions where a fixed rule applies, international arbitral tribunals tend to follow international practice in applying such rules.

3 Determining the law applicable to the substance of the dispute

In some international arbitrations, the parties and arbitrators never actually refer to the substantive law at all. Even where there is a choice of law clause in the contract providing for the application of a specified law, the arbitral tribunal might not find it necessary to refer expressly to the law because the case can be decided directly by reading the contract clauses, perhaps supplemented by 'trade usages' of the particular industry. Nonetheless, even if the law is not specifically referred to, every contract has to be governed by some law or rules of law. The question is which law?

Article 28 of the Model Law is illustrative of provisions which address the question of applicable substantive law in international arbitration. It provides:

3.19 Article 28. Rules applicable to substance of dispute

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly refering to the substantive law of that State and not to its conflict of laws rules.

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.


11 A party's capacity to enter into an arbitration agreement is considered in Chapter 4, Section 4.2.

12 Trade usages are dealt with below at Section 6.

13 Unless the parties agree that an arbitrator can decide as amiable compositeur, which is rare. See below Section 8.

14 See respectively Sections 8 and 6 below.

15 The arbitration laws of most Asia-Pacific jurisdictions include an identical or similar provision to Article 28(1) of the Model Law with the exception of China, which is discussed below. Section 30(2) of Malaysia's Arbitration Act has a slight but significant difference, substituting 'rules of law' for 'law' in the first sentence (see the discussion below in Section 7). Among the institutional rules, one exception is the SIAC Rules, which do not include a provision relating to the applicable substantive law. Most SIAC arbitrations are seated in Singapore so the fallback would be Article 28(1) of the Model Law which applies in Singapore without modification. The 2010 SIAC Rules now include a provision on applicable law at Article 27.

16 This figure hovered between 77% and 87% from 2000 to 2008. The percentage seems to be increasing gradually but steadily over the years. ICC statistics can be found in the ICC's Published Statistical Reports for each year. See e.g. '2009 Statistical Report', (2010) 21 ICC International Court of Arbitration Bulletin 1.

17 See, e.g. Y Derains and E Schwartz, A Guide to the ICC Rules of Arbitration, 2nd edn, Kluwer, 2005, p. 238 (They cite ICC case number 4154 as stating that: 'the principle of autonomy - widely recognized - allows the parties to choose any law to rule their contract, even if not obviously related to it.')
manner'. This provision is complemented by the treatment of applicable law in the Chinese law of contracts, which limits the types of contracts for which parties can choose the law, even if there is a foreign element in the case. The combined effect of these provisions is that parties may choose the applicable law only for certain types of contractual disputes that are submitted to arbitration seated in China. 18

Domestic arbitration laws also sometimes contain restrictions. For example, Section 28(1)(a) of the Indian Conciliation and Arbitration Act 1996 provides that where the arbitration is 'other than an international commercial arbitration' Indian law will be the substantive law irrespective of party choice. 19

The other limitation on the parties' choice of law is so-called 'mandatory laws', which apply regardless of the parties' chosen law. These are addressed below. 20 Apart from the exceptions just mentioned, it follows that if the parties have chosen the law, the arbitral tribunal must respect that choice, whatever it may be. It is only if they have not chosen the law, or if their choice is limited to certain aspects of the dispute, that a conflict of laws analysis becomes necessary.

3.2 Applicable law where there is no choice of law by the parties

Where the parties have not agreed on the governing law, the arbitral tribunal has to determine it by some form of conflict of laws analysis. As noted above, conflict of laws issues in international arbitration can be complex yet interesting. Despite this, conflict of laws in international arbitration has not been the subject of significant court decisions or academic studies in the Asia-Pacific region. The regional treatment in arbitration laws and rules is addressed below (3.2.1), before moving on to a discussion of the conflict of law methods used by international arbitrators generally (3.2.2). The latter section draws significantly on material from outside this region given the scant regional treatment.

3.2.1 Arbitration laws and institutional rules regarding applicable law in the absence of party choice

An arbitral tribunal's power to decide the law where the parties have not agreed on it is recognised in almost all arbitration rules and laws. There are several categories of approaches among the laws and rules in the Asia-Pacific region. These are addressed in turn.

21 Article 28(2) of the Model Law was set out above. That provision applies unmodified, or similarly, in Hong Kong, Singapore, Korea, New Zealand, the Philippines and Australia. Discussed below in this section are the unusual provisions of India, Malaysia, China, Indonesia and Sri Lanka.
22 Most Asian institutional rules follow the direct approach. See, e.g., Article 34.1 of the ICCA Rules, Article 55.1 of the ACIArb International Rules, Article 13 of the IAA Rules, and Rule 6 of the Indian Arbitration Centre Rules. The different approach of Article 31(1) of the HKIAC Rules is addressed below. In addition to being found in many institutional rules, this direct method is found in one regional arbitration law, that of India. Section 28(1)(b)(iii) of the Indian Conciliation and Arbitration Act provides: "failing any designation of the law... by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.'
23 See Section 3.2.2.8 below.
24 Gaillard and Savage, op. cit. fn 10, para 1550.
arbitrators tend to prefer the direct method because it is more straightforward, but the outcome should logically be the same either way.

3.2.1.2 Requiring the application of the substantive law of seat of arbitration

Indonesia and Sri Lanka appear to have adopted the approach of requiring arbitral tribunals to apply their respective local laws in the absence of a different choice by the parties. The Indonesian Arbitration Law is unique in the Asia-Pacific in that it does not provide any indication as to how an arbitral tribunal should determine the law in the absence of party choice. Article 56(2) provides simply that the parties are entitled to designate the choice of law to be applied to the resolution of disputes which may arise, or which have arisen, between or among them. It therefore appears that Indonesian law would apply as the fallback if another law has not been chosen. The Sri Lankan Arbitration Act contains an unusual provision at Section 24(3), the effect of which is that the parties would have to empower an arbitral tribunal specifically to decide the applicable law in the absence of party choice. The consequences of the parties not having so authorised the arbitral tribunal are not stated, but once again its language suggests that Sri Lankan law applies as the default.

3.2.1.3 Requiring the application of the conflict of laws rules of the seat of arbitration

Two Asian jurisdictions require the arbitral tribunal to apply the seat of arbitration's conflict of laws rules if the parties have not chosen the applicable law. One is China. The second appears to be Malaysia, depending on how its relatively recent arbitration law will be interpreted. Malaysia's Arbitration Act 2005 is based principally on the Model Law, but has modified several provisions. Article 28(2) of the (unmodified) Model Law provides: 'Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.' (Emphasis added) However, Section 30(4) of the Malaysian Arbitration Act is different: 'Failing any agreement [by the parties], the arbitral tribunal shall apply the law determined by the conflict of laws rules'. The Malaysian Arbitration Act thus omits which it considers applicable' while maintaining the definite article 'the' before 'conflict of laws rules'. The only linguistically loyal interpretation of Section 30(4) would be that 'the' is referring to Malaysian conflict of laws rules, thus suggesting that the arbitral tribunal must apply them.

While that interpretation is linguistically correct, it is possible that this drafting in the Malaysian law was an oversight and that Section 30(4) will be interpreted

3.2.2 Conflict of laws methodology adopted by international arbitrators

As noted earlier, when there is an international element in a case before a domestic court, fixed conflict of laws rules in the lex fori direct the judge on how to determine the applicable law. As we have seen in the previous section, this is not true for international arbitrators because international arbitrations have no lex fori and the vast majority of arbitration legislation and rules leave arbitrators with great flexibility and little guidance. The question is how the arbitral tribunal will determine the applicable law within the scope of its broad discretion. A decision about which law applies may have a direct impact on the parties' substantive rights. Surprisingly, however, there is notable diversity in approaches adopted by arbitrators. Leading practitioners who have written separately on the subject claim to report on the 'common methods', yet different practitioners report different methods as being common.

This section first explains that domestic courts tend not to interfere with conflict of laws decisions made by arbitral tribunals, before setting out the methodologies commonly used by international arbitrators to determine the applicable law.

liberally. There do not appear to be any court decisions or published arbitral awards on this point as yet.

3.2.4 Requiring the application of the law with the closest connection to the dispute

Two Asia-Pacific jurisdictions mandate a fixed conflict of laws rule for arbitrators to apply where the parties have not chosen the applicable law. Article 36(2) of the Japanese Arbitration Law provides: 'Failing agreement as provided in the preceding paragraph, the arbitral tribunal shall apply the substantive law of the State with which the civil dispute subject to the arbitral proceedings is most closely connected.' A rule with similar effect is found in Article 29(1) of the South Korean Arbitration Act. Arguably, such laws do not leave international arbitrators the usual freedom to select the applicable law by any method they wish. An analysis of this choice of law rule as applied by international arbitral tribunals is provided below.

3.36

3.37

3.38

See also Article 31 of the HKIAC Administered Rules and Rule 41(2) of the JCAA Rules. A similar rule applies in Switzerland, Germany, Italy and Mexico. However, Blessing submits in relation to the equivalent Swiss provision that there is no such restriction: 'Clearly, it would not be incompatible with Article 187(1) [of the Swiss Private International Law Act] to operate the voix directe advocated by a number of scholars and practitioners.' He appears to make this assertion on the basis that finding the closest connection is at the heart of every set of conflict rules anyway. See M Blessing, 'The New International Arbitration Law in Switzerland: A Significant Step Towards Liberalism', (1988) 5(2) Journal of International Arbitration 9, at p. 99.

See below Section 3.2.2.6.

The spread of methods is reported in S Greenberg 'The Law Applicable to the Merits in International Arbitration', (2004) 8 Vindobona Journal 315. The following discussion in this chapter draws on various aspects of that article.
3.2.2.1 Absence of court interference in arbitral tribunal's conflict of laws decisions

There is nothing in either the grounds for setting aside awards or the grounds for resisting their enforcement that empowers a court to review an arbitral tribunal's decision as to the applicable law. As a result, such decisions can be considered like those relating to the substance of the dispute, meaning that they are not subject to any review by the courts.

In practice, courts tend not to interfere in the power of arbitrators to decide the law even where the determination of law could affect the court's jurisdiction to decide claims under mandatory domestic laws. For example, in Transfield Philippines Inc v Pacific Hydro Ltd, an ICC arbitral tribunal sitting in Singapore decided that Transfield's claims for misleading and deceptive conduct and negligent misrepresentation were governed by the laws of the Philippines, thus rejecting Transfield's contention that those claims were governed by Australian trade practices legislation. Transfield later sought to bring those claims in the Supreme Court of Victoria, Australia, contending that the claims were no longer capable of settlement by arbitration because the arbitral tribunal had declined to hear them. Justice Hollingworth held:

71. The... arbitral tribunal held that [Transfield's] claims for misleading and deceptive conduct and misrepresentation were governed by the law of the Philippines and the [Australian trade practices legislation was] not applicable to the arbitral proceeding. The arbitral tribunal gave thorough consideration to the approach it should adopt to the selection of the applicable law, and found that 'the preponderance of claims put forward are clearly rooted in a contract governed by the law of the Philippines.'

73. ...it would not be appropriate for an Australian court to adjudicate claims for misrepresentation under Australian statutes dealing with misleading and deceptive conduct, once the arbitral tribunal had determined, applying appropriate choice of law rules, that such claims are governed by the law of the Philippines. To do so would lead to a multiplicity of proceedings, usurp the jurisdiction of the tribunal and deny the intention of the parties as expressed by them in the arbitration agreement.

3.41 Practice and doctrine have developed various solutions for resolving conflict of laws issues in international arbitration. These vary in flexibility, rigour and appropriateness for an international environment. Some of the major themes are assessed in the following sections.

3.2.2.2 Substantive law of the seat of arbitration

A now very outdated approach was for arbitrators to apply the substantive law of the seat of arbitration. It was thought that if parties had not chosen the substantive

37 See further Chapter 2, Section 6, on selecting the seats of arbitration.
38 Annuaire de l'Institut du Droit International 1957, at p. 469. This recommendation did not gain state support and was not adopted.
39 See the discussion of the law applicable to non- contractual claims at Section 3.3 below
theory, the conflict of laws rules of the seat of arbitration would be considered inappropriate. Another more practical problem is that domestic conflict of laws rules are developed with national and sometimes political interests in mind. They may not be well suited for use in a truly international dispute.41

On balance, despite some notable support for use of the arbitral seat’s conflict of laws rules,42 we agree with the majority of commentators who oppose such an approach.43 The approach is out of touch with the truly transnational character of international arbitration, ignores the fact that domestic conflict of laws rules may not be well suited or adapted to international arbitrations, limits the flexibility that is such a commendable feature of international arbitration, and fails to address the situation where the parties have failed to agree on the seat of arbitration (meaning that the seat would have to be determined by the lex arbitri, arbitral rules or arbitral institution).

3.2.2.4 Cumulative application of the conflict of laws rules connected to the dispute

The cumulative method involves applying all of the domestic conflict of laws rules connected to a particular dispute to see whether they converge and result in the application of one substantive law.44 For example, consider a dispute between a party from India and a party from Thailand in relation to a project that took place in the Philippines. Applying the cumulative method, the arbitral tribunal would need to examine the conflict of laws rules of India, Thailand and the Philippines to see whether, in the circumstances of the case, they would all lead to the application of the same substantive law.

When performing the cumulative method, the domestic conflict of laws rules of each jurisdiction should be applied exactly as a judge of that state would apply them. For example, if the various conflict of laws rules all designated the same law with the ‘closest connection to the dispute’, that phrase should be applied in the same way it is applied by judges in the jurisdictions where those laws have been enacted.45 Any less rigorous interpretation would be inappropriate.

41 Lew, Mistelis and Köll, op. cit. fn 26, paras 17–41.
45 M Blessing, ‘Regulations in Arbitration Rules on Choice of Law’ (1994) 7 ICCA Congress Series 391, at p. 411. Furthermore, in order to apply domestic conflict of laws rules correctly, the arbitrator would have to take into account that jurisdiction’s attitude towards the doctrine of renvoi. Renvoi is a technical conflict of laws concept that is beyond the scope of this book. In brief, the doctrine deals with whether or not a foreign jurisdiction’s conflict of laws rules are taken into account when applying that jurisdiction’s laws. Properly applying renvoi could help achieve a convergence when using the cumulative method, but may also complicate the process.

Surprisingly enough, it is not uncommon for the cumulative method to result in convergence.46 This is because domestic conflict of laws rules rely on a finite number of connecting factors.47 For example, it is common to find a conflict of laws rule which says that, absent party choice of law, a contract is to be governed by the law with which it has the closest connection. Common threads are also found in subsets of that rule. For example, in many legal systems there is a presumption that the law with the closest connection to a sale of goods contract is the law of the seller’s place of business.48 Thus, even if the conflict of laws rules are themselves not the same, the different rules may nonetheless lead to the application of the same substantive law.

If convergence is not initially achieved, a slightly more complicated variation of this method is to sidestep the conflict of laws convergence and look directly for convergence of substantive legal solutions from the different potentially applicable laws. In this situation, the arbitral tribunal would need to examine whether the legal outcome is the same regardless of which potentially applicable law is applied. Whenever there is a dispute about which law applies, it is not uncommon for arbitrators to analyse the parties’ substantive rights under several potentially applicable laws in any event, by way of prudence, and to give further support to their reasoning.

If convergence of solutions is ultimately found, the cumulative method is very sound theoretically. Successful application of it means that the interests of the states connected to the case are respected. This may in turn increase the enforceability of the resulting award.49 It also removes any perceived subjectivity or arbitrariness arising from the flexibility left to international arbitrators to decide which law applies.

3.2.2.5 General principles of private international law

This method involves the arbitral tribunal applying ‘general principles’ of private international law or conflict of laws.50 Despite historical calls for a ‘supranational’ system,51 there is no universally accepted set of conflict of laws rules. This means that the exact nature of these general principles is often debated.

An arbitral tribunal using this method has several alternatives. It might compare the conflict of laws rules of the domestic legal systems connected to the dispute to establish common themes. In doing so, it would be looking for general principles of private international law as between the jurisdictions connected to the case, rather than general principles of private international law throughout.

46 As noted by Born, 2009, op. cit. fn 27, p. 2129.
47 Although in a slightly different context, the major trends in connecting factors and the weights attached to them are summarised by Blessing, 1994, op. cit. fn 45, p. 414.
49 See Chapter 9 regarding enforcement of awards generally. If a state’s conflict of laws rules have not been respected there are less likely to be issues of public policy that may derail the enforcement process.
50 As noted above, ‘private international law’ is another name for conflict of laws rules.
51 Goldman advocated the need for such an approach as early as 1953, see Goldman, op. cit. fn 42, p. 415.
the world. Another possibility is to extract general principles from international or regional conventions on private international law, such as the 1980 Rome Convention on the Law Applicable to Contractual Obligations ("Rome Convention") \(^{52}\) and the various Hague Conventions. \(^{53}\) Finally, some arbitral tribunals simply announce what they consider to be a general principle of private international law based on their own experience.

There are no international or regional conventions on conflict of laws that apply in the Asia-Pacific, but those applicable in Europe, such as the Rome Convention, could be considered for general guidance. In that respect, Giardini suggests that much more importance should be given to regional conventions on private international law as evidence of general principles. He says that arbitrators should use conventions like the Rome Convention to back up other methods and reduce arbitrariness. \(^{54}\)

Other commentators note the growing acceptance of general principles of private international law, \(^{55}\) while others criticise them as too unpredictable because of inconsistency in determination. \(^{56}\) One author suspects that purporting to use the conflict laws of international law is, in reality, nothing more than a veiled attempt to allow the arbitrators to choose any substantive law they wish'. \(^{57}\)

Indeed, while individual arbitrators may have their own views about what does or does not constitute a general principle of private international law, it is not clear the extent to which general principles exist from a truly international perspective. Apart from some very general rules, like the 'closest connection' rule for contracts, there are few universally accepted conflict of laws rules, even for determining the law applicable to contractual obligations. Any individual arbitrator's view about what constitutes a general principle is likely to be clouded by his own background and experience, thus leading to unpredictability.

3.2.2.6 Law with the closest connection to the dispute

The freedom granted to international arbitrators by arbitration rules and laws means that they can decide to adopt a very simple method, like determining which law has the closest connection to the dispute. As noted above, this rule is often found in domestic legal systems for determining the law applicable to contracts and is one of the few general principles of private international law. It has also been adopted by international conventions such as the Rome Convention.

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52 This was recently superseded for European Community countries by EC Regulation No. 593/2008 on the Law Applicable to Contractual Obligations. See also EC Regulation No. 864/2007 on the Law Applicable to Non-Contractual Obligations.
53 An example relevant to civil and commercial matters is the Convention of 2 October 1973 on the Law Applicable to Product Liability, which has been adopted by most EC states. A list of the conventions prepared by the Hague Conference on Private International Law is available on its website: www.hcch.net.
56 See, e.g. Born, 2001, op. cit. fn 27, p. 531. However, Born's more recent treatise points out simply that 'there is as yet no such body of international conflict of laws rules'; see Born, 2009, op. cit. fn 27, p. 2132.
From a theoretical perspective, if genuine evidence of contractual intent can be found, it should be applied. Otherwise, however, the theories of implied intent seem to be superficial if the same connecting factors would be used for a more objective method anyway.

3.64 As indicated above, Article 28(2) of the Model Law and almost all Asia-Pacific arbitration laws require the arbitral tribunal to choose and apply 'conflict of laws rules', while most regional institutional rules allow arbitral tribunals directly to choose the law that they 'consider appropriate' without passing via conflict of laws rules.

3.65 If an arbitral tribunal must choose a set of domestic conflict of laws rules, there are several which could logically be considered. One is the conflict of laws rules of the seat of arbitration, addressed above. Another possibility is the conflict of laws rules of the place where the award is likely to be enforced. However, the place of enforcement is rarely a certainty.

3.66 Another option is to apply the conflict of laws rules of the jurisdiction that would have been competent but for the arbitration clause. However, this is extraordinarily complex and has been strongly rejected by commentators. Usually, several jurisdictions would find themselves competent (except, perhaps, where there is an effective applicable international convention on judicial competence, such as in European Community countries). Moreover, the answer might turn on where the action was first commenced, something about which the arbitral tribunal could only speculate. Finally, one reason parties choose arbitration is to find a more neutral dispute resolution forum than the one that would ordinarily be competent.

3.67 Better conflict of laws rules include those of the place of contractual performance, those of a jurisdiction with some element common to the parties, such as common residence, domicile or nationality, or those of the jurisdiction with the closest connection to the dispute. One might wonder, however, how an arbitrator would decide between these possibilities.

3.68 The cumulative method, if it works, is the most rigorous and acceptable approach. It should satisfy the parties, it is theoretically justified because it is international, and it increases the enforceability of the resulting arbitral award by respecting the interests of the states connected to the dispute. The disadvantage of this method is that it can be complex and does not always result in convergence.

If the cumulative method fails, the next best option is debateable. There is comfort in the security and certainty of the choice of law rules of the seat of arbitration. As noted above, however, we consider the seat of arbitration's conflict of laws rules inappropriate, mainly because there is often no connection whatsoever between the seat of arbitration and the underlying substantive dispute.

In our view, the preferred approach failing successful application of the cumulative method is to apply the general principles of private international law, established by eliciting common themes from the conflict of laws rules of the jurisdictions connected to the substance of the dispute. If an appropriate general principle of private international law cannot be established, a fallback rule should be to apply the law with the closest connection to the underlying substantive dispute, taking into account the particular claims that the parties have raised.

Given the uncertainty of the determination of applicable substantive law in international commercial arbitration, some guidance would be welcome to assist arbitrators in this process. This would be especially useful for arbitrators who do not have expertise in the specialised discipline of the conflict of laws. Rather than attempting an international convention, however, a set of soft guidelines would be preferable. These could provide guidance without being prescriptive to the detriment of flexibility.

3.3 The law applicable to non-contractual claims

Normally, arbitration clauses are drafted broadly enough to include non-contractual claims within the jurisdiction of the arbitral tribunal. Contractual choice of law clauses are often narrower, referring expressly to the contract. For example, a typical choice of law clause might be drafted in the following terms: 'this contract shall be governed by and construed in accordance with the laws of X, while a typical arbitration clause is broader, such as: 'all disputes arising out of or relating to this contract shall be decided by arbitration ...'. Thus, read literally, a choice of law clause generally does not cover all claims that potentially fall within the scope of an arbitration agreement. Furthermore, there is no guidance on this in arbitration rules or laws. This raises the issue of whether the parties were aware of this or intended to include non-contractual claims in the arbitration agreement.

66 Numerous courts have found arbitration clauses that are even narrower than the example given above as sufficiently broad to cover tort claims. For example, the Korean Supreme Court has held that an arbitration agreement containing 'legal disputes regarding this contract' to arbitration was broad enough to cover tort claims (91 Da 17'446, 14 April 1992, cited in Seung Wba Chang, 'Article V of the New York Convention and Korea' (2008) 25 Journal of International Arbitration 865, at p. 868). Such clauses are, however, occasionally read down as to not to cover torts. See, e.g., Jan De Nul NV v Imol Klaas Sdn Bhd (2006) 3 CLJ 46, where the Malaysian Court of Appeal found that tort claims were not covered by an arbitration clause which referred to 'any dispute or difference arising out of or in connection with this agreement'. The Malaysian Court of Appeal referred with approval to the Full Federal Court of Australia's decision in Hi-Fert Pty Ltd v Kiukiang Maritime Carriers [1998] 159 ALR 142. Aspects of the Hi-Fert decision related to this issue were specifically overruled by the Full Federal Court in Comrandate Marine Corp v Pan Australia Shipping Pty Ltd (2006) FCAFC 192. See also the discussion of this point in Chapter 4, Section 8.1.)
question as to which law applies to non-contractual claims that are raised in an arbitration.

3.73 Complex contractual disputes might give rise to any number of non-contractual claims. Examples of these are restitution, unjust enrichment, culpa in contrahendo, and torts, including statutory torts like antisuit or trade practices claims. Claims based on any of these doctrines could well be governed by a law different from the law governing the contract. It certainly should not be assumed that the contractual law will govern non-contractual claims simply because those claims are somehow connected to the contractual relationship.

3.74 Surprisingly little attention has been given to the law applicable to non-contractual claims in arbitration.67 It is possible that when a non-contractual issue arises, lawyers and arbitrators fail to recognise that a different law might apply to it. They might not properly identify the differences. As will be seen below, in many cases the law applicable to non-contractual claims will be the same law that governs the contract. But in other cases it can be different, and it may well be to the distinct advantage of one party to argue that a different law applies.

3.3.1 Characterisation of claims as contractual or not

3.75 The first step in determining whether a different law might apply to a given claim is to characterise the claim as contractual or otherwise. If it is a contractual claim, the applicable contractual law should apply. If not, the issue of applicable law needs to be considered separately.

3.76 It is not always evident whether a particular claim is based in contract, tort or otherwise. Sometimes claims can be dressed up as one or the other, depending among other things on whether the party making the claim sees some advantage in having a different law apply to it. Domestic legal systems generally provide established rules enabling the judge to characterise claims. Those rules are part of the lex fori (i.e. the legal system where the court is situated). But an international arbitrator has no lex fori because, as noted above,68 the laws of the seat of arbitration do not constitute a lex fori. An international arbitrator must therefore decide which characterisation rules to use, if any, in order to characterise the claims.

3.77 To ensure consistency and eliminate overlap, the chosen characterisation system must be consistent with the law governing the contract.69 It has been suggested that claims should be characterised by a cumulative application of all the characterisation rules of the jurisdictions connected, or possibly connected, to the dispute and, if that does not work, by using general principles of private international law.70 In our view, the best characterisation rules to ensure harmony with the contractual law are those of the law governing the contract. The contractual law necessarily has a close connection to the dispute. Using its characterisation rules will eliminate inconsistencies and overlaps. This approach also avoids the complexities of the cumulative approach and the uncertainty associated with general principles of private international law.

3.3.2 Parties’ choice of law applicable to non-contractual claims

3.78 As noted above,71 the parties’ ability to choose the law governing their contract is of paramount importance in international arbitration. It is also a widely recognised general principle of private international law and applied by domestic courts all over the world. But it is not clear whether the same principle applies to empower the parties to choose the law to govern non-contractual claims.

3.79 Experts’ views are mixed. At least one commentator is confident that, as a matter of policy, parties can choose the law applicable to torts after the tort has occurred. He is less decisive as to whether parties can choose the law before a tort occurs, but concludes that they probably can.72 On the other hand, a leading treatise states that “according to traditional private international law thinking, the principle of party autonomy does not apply [to non-contractual claims].”73

3.80 There are logical reasons why party autonomy may be restricted in relation to the law governing non-contractual claims. Contracts regulate the relationship between private, consenting parties. Tort law is mandatory and formulated by legislators in order to attribute responsibility and provide compensation specifically outside contractual relationships. A tort may even affect third parties’ rights, such that a choice of law for a tort claim between two parties may impact the rights of others. Furthermore, certain statutory torts are designed to protect the common good (e.g. relating to anti-trust, environmental protection, safety of employees, etc.). It would not be acceptable if contracting parties could circumvent mandatory laws designed to improve or protect a nation’s society as a whole by choosing a foreign law as applicable.74

3.81 These policy considerations do not seem to be reflected in international arbitration legislation. Arbitration laws tend not to prohibit – at least expressly – parties from choosing the law to govern tort claims. For example, Article 28(1) of the Model Law states: “The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the

67 One eminent private international law professor has commented, following a speech on this topic, that: “You have explored a subject that is new; it seems that there has never been a study on those problems of (the law applicable to) tort and extra-contractual responsibility in arbitration.” [Author’s translation from original French]. See P Lagarde, ‘Débats’ in C Reymond, ‘Conflits de lois en matière de responsabilité délictuelle devant l’arbitre international’, (1991) [1988-1989] ‘Travaux du Comité Français de Droit International Privé 97, at p. 107. We are aware of more recent studies on this subject although, as addressed below, the law applicable to non-contractual claims generally is the subject of a new European Community Regulation.

68 See above Section 2.


70 Reymond, op. cit. fn 67, p. 112.

71 See Section 3.1 above.


73 Galliard and Savage, op. cit. fn 10, para 1530.

74 See further the discussion of mandatory laws at Section 4 below.
the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

3.91 There are various special circumstances and exceptions to this rule stipulated in the Rome II Regulation. Of particular relevance to international commercial arbitration is Article 4(3):

Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in [Articles 4(1) and 4(2)], the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

3.92 Arbitrators and lawyers in the Asia-Pacific, especially if they come from or were trained in civil law countries, might well be guided by the Rome II Regulation’s approach. Common lawyers may be less interested because Rome II was drafted from a predominantly civil law perspective.

3.93 An example of an arbitral tribunal determining the law applicable to non-contractual claims in this region occurred in Transfield Philippines Inc v Luzon Hydro Corporation Ltd.⁸⁰ The dispute related to the construction of a hydroelectric power station in Northern Luzon, the Philippines. The subcontractor, Transfield Philippines Inc. ("TPI"), commenced arbitration against the contractor, Luzon Hydro Corporation ("LHC"), and sought various relief under the contract. In accordance with the arbitration clause, the seat of the ICC arbitration was Singapore and a contractual choice of law clause stipulated that the contract was governed by the laws of the Philippines.

3.94 In addition to its contractual claims, TPI raised claims for pre-contractual misleading and deceptive conduct and negligent misrepresentation by LHC’s directors about what TPI might expect in relation to the project. It contended primarily that those claims were governed by Australian trade practices legislation rather than Philippines law, on the basis that the relevant misrepresentations and misconduct had occurred in Australia. The arbitral tribunal ruled on the issue of applicable law in its first partial award as follows:⁸¹

...the claims for misleading and deceptive conduct are governed by the law of the Philippines under either of two alternative approaches. The first is to apply the law of the Philippines directly without recourse to choice of law rules ("voie directe"). Alternatively if the governing law is to be selected indirectly through the application of a choice of law rule, the arbitral tribunal determines that the appropriate choice of law rule (application of the law most closely connected with the claim) also leads to the selection of the law of the Philippines.

[TPI] has indicated that it will institute court proceedings in Australia if this arbitral tribunal does not determine claims under the [Australian trade practices legislation]. [TPI] has submitted that resort to two tribunals is undesirable. The arbitral tribunal agrees. However, this consideration is not of itself sufficient to warrant the application of a law which the tribunal considers in all the circumstances, not to be appropriate to the dispute between the parties. Further, this tribunal notes that [TPI] has also sought damages for misrepresentation under the law of the Philippines. The claim for misrepresentation will still proceed in this arbitration but will be determined in accordance with the law of the Philippines.

The arbitral tribunal did not appear to ground its decision on the fact that TPI's non-contractual claims were covered by the contractual choice of law clause. Rather, it held that Philippines law governed the claims because it was the appropriate law or, alternatively, by virtue of a general principle of private international law because it was the law most closely connected to the claims.

Given the uncertainty of using the cumulative approach or trying to establish general principles of private international law applicable to non-contractual claims, in our view, as a general rule it is best to use the contractual law’s conflict of laws rules (discussed above in this section). That legal system will not only provide characterisation rules, but also a system of conflict of laws rules that can be applied to any and all conflict of laws issues that may arise. Alternatively, an arbitral tribunal might use the Rome II Regulation for guidance as to the general principles of private international law for torts.

4 Limitations on choice of law: Mandatory laws and public policy

Mandatory laws are imperative provisions of law that are imposed on arbitrating parties regardless of their choice of law. They constitute a limitation on the general principle that parties are free to choose the applicable law. It is rare in practice that a mandatory law will apply. One may apply only if the legal system to which the mandatory law belongs cannot be ignored by virtue of some close connection that legal system has to the facts of the underlying dispute and the mandatory law itself was intended to be applied in the circumstances of the case, including, where relevant, extraterritorially.

In a seminal article on the topic, Pierre Mayer explains that:⁸²

a mandatory rule (loi de police in French) is an imperative provision of law which must be applied to an international relationship irrespective of the law that governs that relationship. To put it another way: mandatory rules of law are a matter of public policy (ordre public), and moreover reflect a public policy so commanding that they must be applied even if the general body of law to which they belong is not competent

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⁸⁰ See, e.g., Transfield Philippines Inc v Pacific Hydro Ltd (2006) VSC 175 (Supreme Court of Victoria, Australia).
⁸² P Mayer, 'Mandatory Rules of Law in International Arbitration', (1986) 21(4) Arbitration International 274, at p. 274. See further generally (2009) 18(1-2) American Review of International Arbitration which is a special edition of this journal focusing on mandatory laws in international arbitration and litigation, including several articles by leading scholars and practitioners.
by application of the relevant rule of conflict of laws. It is the imperative nature per se of such rules that make them applicable.

3.99 Mandatory laws only exist when there is a fundamental and unavoidable public policy objective at stake. A classic example that could interfere with a commercial relationship is anti-trust or competition laws. Statue enacts anti-trust laws to encourage competition for the protection of consumers. If commercial parties were able to avoid complying with anti-trust laws by simply choosing a different law to govern their contract, this would completely frustrate the broad, policy objectives behind anti-trust laws.

That said, a mandatory competition law (or any other mandatory law) will not apply simply because the dispute is somehow related to the legal system which enacts that law. There must be a real connection to the underlying transaction that would trigger the law’s application. Thus, for example, if an arbitration between parties from China and Singapore in relation to the acquisition of a company in the Philippines happens to have its seat of arbitration in Australia, there is no ground whatsoever to apply mandatory Australian competition or trade practices laws. On the facts given, there would be no connection between those laws and the underlying transaction.

Other classic examples of mandatory laws relate to criminal law, corruption, money-laundering, racial or gender discrimination, environmental protection, and employment law.

3.102 The concept of mandatory laws is not generally seen in statutes relating to arbitration or in arbitration rules. There are no references to them in the Asia-Pacific arbitration laws or institutional rules. References to mandatory laws can sometimes be seen in regional or international conventions on applicable law. The recent European Community Regulation on the Law Applicable to Contractual Obligations (‘Rome I Regulation’), which entered into force for European Community countries at the end of 2009, provides various rules for determining the law applicable to contracts, based on its predecessor the Rome Convention. It also reserves the possibility for courts to apply mandatory laws regardless of the applicable contractual law. While this obviously has no direct application in the Asia-Pacific, Article 9 provides a useful definition of mandatory laws that may guide arbitrators in this region:

1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

3.103 Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.

3. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

A regional example of a court applying a mandatory law in the context of arbitration proceedings can be found in a series of Federal Court of Australia decisions in Clough Engineering Ltd v Oil & Natural Gas Corporation Ltd. Clough had won a tender from Oil & Natural Gas to develop oil and gas fields off the coast of India. The contract was governed by Indian law and included an arbitration clause with the seat of arbitration in India. Before arbitration was commenced, Clough sought an injunction from the Australian Federal Court to prevent certain Australian banks from paying out on an unconditional performance bond with a value of 10% of the contract price which Clough had procured in favour of Oil & Natural Gas in order to secure the contract. Clough argued that the Federal Court had jurisdiction to issue the injunction for several reasons, including the fact that it had claims against Oil & Natural Gas under mandatory provisions of the Australian Trade Practices Act. The connection between these claims and Australia was that the relevant written communications that amounted to Oil & Natural Gas’s allegedly unconscionable conduct had been received in Australia and the damage, alleged to be the unconscionable calling of the performance bonds, would occur in Australia.

Justice Gilmour, referring to various authorities, noted:

The [Trade Practices Act] is a ‘public policy statute’. Its operation cannot be ousted by private agreement. Parliament passed the [TPA] to stamp out unfair or improper conduct in trade or in commerce; it would be contrary to public policy for special conditions such as those with which this contract was concerned to deny or prohibit a statutory remedy for offending conduct under the [TPA]. Any attempt to contract out of the remedies conferred by the Act may be void.

Justice Gilmour granted an ex parte interim injunction in favour of Clough. He must have been satisfied that there was at least a prima facie case for applying mandatory trade practices laws despite acknowledging that this was contrary to the parties’ choice of Indian substantive law and arbitration seated in India. The
injunction was ultimately set aside, as confirmed on appeal to the Full Court of the
Australian Federal Court. 86

While it is not uncommon that mandatory laws are asserted in the context
of international arbitrations, they are rarely applied. Examples of how arbitral
tribunals have dealt with these issues can be found in ICC jurisprudence:
(i) ICC Case No. 4132 (1983) – A supply and purchase agreement was governed
by Korean law but European antitrust law was considered. The arbitral
tribunal recognised that antitrust and fair trade laws possessed a public
policy character. It ultimately held, however, that since the agreement
did not affect trade between EU Member states, only Korean law was
relevant. 87
(ii) ICC Case No. 6320 (1992) – The arbitrators accepted that US mandatory
laws prohibiting corruption could apply extraterritorially to a contract
governed by Brazilian law. However, a condition (which was not met in
this case due to lack of factual, geographic proximity to the US) would be
that the particular rule relating to corruption reflected ‘an important and
legitimate interest’ of the US. 88
(iii) ICC Case No. 6379 (1990) – The arbitral tribunal would not allow Italian
law, which had been chosen by the parties to govern their contract, to be
disregarded in favour of Belgian distributorship law, which provides that it
must be applied to exclusive distributorship agreements producing effects
in all or part of Belgium. 89
(iv) ICC Case No. 7047 (1994) – The parties entered into a contract governed by
Swiss law for sales assistance in support of various products. In an attempt
to avoid liability for non-performance of its obligations, the defendant
relied on regulations in the country where the contract was to be performed,
which prohibited the use of intermediaries in that field of activity. The
arbitral tribunal rejected the defendant’s argument on the grounds that
‘the parties are entitled to submit their legal relations to whatever law they
choose, and to exclude national laws which would apply in the absence
of a choice. Consequently the provision of the law thus excluded can only
prevail over the chosen law in so far as they are matters of public policy.’ 90

The asserted laws were not, according to the arbitral tribunal, matters of
public policy.

3.107 The above examples demonstrate the high burden of a connection to the under-
lying dispute that a party seeking to assert the application of a mandatory law
must establish. Mandatory laws are not, and should not be, applied readily, but
only where there is a real connection to the dispute and real public policy issues
at stake.

It is sometimes said that there are two kinds of mandatory laws, those of a
domestic nature and those of an international nature. We do not find the distinc-
tion especially useful because the real question should be whether a particular
mandatory law is in fact mandatory in the given circumstances, particularly
taking into account the location of the conduct (i.e. the relevant aspect of
performance of the contract) which potentially offends the law. If the distinction
is made, however, it will be important 91 because only international mandatory
laws should affect international arbitrations. As Voser notes, ‘a domestic manda-
tory rule can only have the quality of an international mandatory rule if the
enacting state itself wants it to be applied in international situations’. 92

A question arises as to whether an arbitral tribunal should apply a mandatory
law only when a party has requested its application or whether it may do so
of its own initiative, i.e. ex officio. It is one thing for an arbitral tribunal to go
beyond the parties’ choice of law agreement and apply, on one party’s request,
a mandatory law, the application of which is disputed by the opposing party. An
even more delicate question is whether arbitrators should consider applying a
mandatory law on the arbitral tribunal’s own initiative when neither party has
requested the application of that law.

This conundrum leads authors Barraclough and Waincymer wisely to point
out that ‘arbitrators confronted with mandatory rules questions find few easy
answers’. 93 The authors argue that the issue will remain unclear until the nature
of arbitration (judicial or contractual) is resolved one way or the other. Not
surprisingly, Professor Pierre Mayer’s seminal 1986 article identifies the same
central, intellectual debate as being at the core of whether to apply mandatory
laws. Mayer notes that arbitrators ‘would . . . be confronted, unlike the national
judge, with a conflict between the will of the State having promulgated the
mandatory rule of law, on the one hand, and on the other hand, the will of the
parties from which indeed his authority is derived’. 94

Professor Mayer focuses on when and to what extent arbitrators (i) may apply
mandatory laws, (ii) are obliged to do so and (iii) if so, which mandatory laws.
He says that if a party invokes the mandatory law, the arbitral tribunal would at
least be required to consider applying it. If, however, neither party has referred to
the mandatory law, but its existence nonetheless comes to the arbitral tribunal’s

86 Clough Engineering Ltd v Oil and Natural Gas Corporation Ltd [2008] FCAPC 136 (22 July 2008).
87 Award in ICC Case No. 4132, In S Jarvis, Y Derains and JJ Arnaud, Collection of ICC Arbitral Awards
88 Award in ICC Case No. 6320, In S Jarvis, Y Derains and JJ Arnaud, Collection of ICC Arbitral Awards
89 Award in ICC Case No. 6379, in ibid., p. 134 at p. 142.
90 Award in ICC Case No. 7047, in ibid., p. 32 at p. 51.
91 See generally N Voser, ‘Current Development: Mandatory Rules of Law as a Limitation on the Law
319.
92 Ibid., p. 347.
93 A Barraclough and J Waincymer, ‘Mandatory Rules of Law in International Commercial Arbitration’,
(2005) 6 Melbourne Journal of International Law 205, at p. 243. See also more recently J Waincymer,
International Arbitration Journal 1.
94 Mayer, op. cit. fn 82, p. 275. See also P Mayer, ‘Effect of International Public Policy in International
Arbitration’ in Millet & Lew, op. cit. fn 93, p. 141 et seq. See also the discussion of delocalisation in
Chapter 2, Section 5.2.
attention, or is simply obvious, the tension between the judicial and contractual nature of arbitration intensifies. If arbitration is characterised as purely contractual, then the arbitral tribunal should do nothing that the parties have not requested of it. If proceeding in this way offends an arbitrator's professional integrity he should resign. But if the nature of arbitration is considered to be quasi-judicial, then arbitrators owe duties to the state. In that latter scenario, one may ask to which state(s) an arbitral tribunal owes a duty: the state of the seat of arbitration, the applicable substantive law, the parties' nationalities, or another?

Apart from the Australian example given above, there are few examples of courts in the Asia-Pacific dealing with the application of mandatory laws in international arbitration.\textsuperscript{95} These issues have, however, come to the attention of domestic European courts as well as the European Court of Justice (ECJ) in the context of EC competition laws. In the famous \textit{Eco Swiss v Benetton},\textsuperscript{96} case, the contract contained a choice of law clause selecting Dutch law to govern the contract and an arbitration clause providing for arbitration of all disputes or differences under the rules of the Netherlands Arbitration Institute. Eco Swiss obtained an award in its favour of just over US$26 million. Benetton sought to set aside the award in the Netherlands on the basis that the underlying agreement was contrary to EC competition law. The competition law in question had not been raised by either party during the arbitration. The Dutch court submitted several questions to the ECJ, one being whether an arbitral tribunal had a duty ex officio to apply EC competition laws. The ECJ avoided answering that question directly, but held that a Dutch court could, during setting aside proceedings, examine whether EC competition law had been respected. This means that if mandatory competition laws are not dealt with by the arbitral tribunal, an award can still be set aside if it contravenes such laws. Following this decision, a prudent arbitral tribunal, in the interests of increasing the enforceability of its award, ought to consider raising and addressing such mandatory competition laws during the arbitration.

Also interesting is the Paris Court of Appeal decision of \textit{Thales v Euromissile},\textsuperscript{97} which, among other issues, proceeded on the assumption that an arbitral tribunal could raise a competition law issue ex officio. A subsequent decision of the Swiss Federal Tribunal cast confusion on the matter. The Federal Tribunal doubted that competition law was per se of a sufficiently public policy character to be raised as a basis to set aside an arbitral award. On the one hand, this means that arbitrators may be reluctant to raise competition laws ex officio. On the other hand, however, it means that if an arbitrator considers the competition law to be mandatory he or she may wish to apply it in the place of a domestic judge so that the parties cannot escape the application of these laws.\textsuperscript{98}

\textsuperscript{95} See, however, the hypothetical example given in the conclusion of Waincymer, op. cit. fn 93, p. 39.
\textsuperscript{96} (1999) ECR 3655.
\textsuperscript{97} 18 November 2004, Paris Court of Appeal, Case No. 2002-60932.
\textsuperscript{98} See C Partasides and L Burger, 'The Swiss Federal Tribunal’s Decision of 8 March 2006: A Deepening of the Arbitrator’s Public Policy Dilemma', (2006) 3 Concurrency, p. 26, which discusses all three of these cases.

Another factor influencing whether an arbitral tribunal should apply a mandatory law is its source, i.e. which jurisdiction it comes from. Domestic judges dealing with an international litigation case may apply mandatory laws of their own jurisdiction (the \textit{lex fori}) that are applicable in international matters even if the dispute is governed by a foreign substantive law. Whether or not domestic judges will apply foreign international mandatory laws that are not part of the \textit{lex fori} depends on the \textit{lex fori}'s conflict of laws rules and its rules regarding the application of foreign mandatory laws. For countries within the EC, the above-cited Article 9 of the Rome II Regulation provides for the application of mandatory laws that are neither part of the \textit{lex fori} nor the \textit{lex contractus} (law governing the contract).

Once again, a difficulty in relation to conflict of laws issues in international arbitration is that there is no \textit{lex fori} and the rules of the \textit{lex arbitri} are of limited relevance.\textsuperscript{99} Nonetheless, lawyers and international arbitrators should be alert to any jurisdictions where mandatory laws may be relevant. It is obvious that if a party asserts an international mandatory law that is part of the \textit{lex contractus}, the arbitral tribunal must apply it. But if the mandatory law arises from some other legal system connected to the dispute, the matter is more complex. Potential mandatory laws arise from any jurisdiction which has a close factual connection to the transaction at the heart of the dispute.

Authors Barraclough and Waincymer contend that there are four categories of mandatory laws which are not (or should not be) controversial. These are: (i) laws which legitimately create a force majeure for one of the parties, (ii) laws implementing transnational public policy, (iii) mandatory rules of the \textit{lex contractus}, and (iv) mandatory procedural rules of the \textit{lex arbitri} that are applicable to international arbitrations.\textsuperscript{100}

Perhaps most contentious is mandatory substantive laws of the \textit{lex arbitri}. These are potentially applicable, but in reality they may have no connection to the underlying transaction. As in the example of competition laws given above, mandatory laws of the \textit{lex arbitri} should be applied very sparingly.

Voser convincingly objects to the application of any mandatory laws (procedural or substantive) at the seat of arbitration. Her analysis of the European and US conflict of laws approaches to applying mandatory laws leads her to recommend that arbitral tribunals apply an approach 'based on the Continental European theory of Special connection of mandatory rules ('Sonderanknungstheorie').\textsuperscript{101} In Voser's view, this approach ensures the application of genuine mandatory rules of all concerned states. She asserts that the seat of arbitration is acknowledged as having a close relationship for any mandatory procedural laws, but not mandatory laws that apply to the merits of the case, unless the seat has some other connection to the dispute. Her rationale is the absence of a \textit{lex fori}—arbitral tribunals are not an organ of the state and are therefore under no obligation to
apply the public policies of that state. A fundamental premise of Voser's argument is that the mandatory laws of all sufficiently interested states are to be treated equally. Since an arbitral tribunal does not itself belong to any state, all mandatory laws, including those of the seat of arbitration, are 'foreign' and relevant (or irrelevant) to the same extent.  

3.119 As should be clear from this section so far, we tend to agree with Voser. The point is whether or not the mandatory law has a genuine factual connection to the issue it seeks to regulate. The lex arbitri's mandatory laws should always be kept in mind because there is a risk that a judge in subsequent setting aside proceedings will see his own mandatory laws as prevailing and apply them as international public policy. Nonetheless, the mere fact that an arbitral award could possibly be set aside is insufficient for an arbitral tribunal to decide to apply a law that it otherwise determines to be irrelevant, if doing so would affect a party's substantive rights. An arbitral tribunal should do what it finds to be correct as a matter of law in the circumstances. It should not be excessively constrained by hypothetical predictions as to future decisions of state courts. Barracough and Waincymer's advice is a sound conclusion:

For arbitrators who want a present workable solution for their daily practice, there do appear to be two feasible alternatives. There is a restrictive approach that applies mandatory rules only in the accepted categories . . . or alternatively an approach that gives arbitrators a broader discretion . . . [A]lternative, giving arbitrators a broader discretion, on balance, seems to be the most attractive of determining mandatory rules' applicability.

5 Content of the applicable law

3.120 So far this chapter has focused on determining which law applies to a dispute. Once the law is established, an arbitral tribunal has to determine its content. Given the diverse range of countries across which an international arbitration may span, it very often happens that some or all of the arbitrators are not specialists in the applicable law. It is also not uncommon that none of the parties' lawyers are specialists in the applicable law either. A question therefore arises as to how an international arbitrator should establish the content of the law.

3.121 Once again, this issue differs in international arbitration in contrast with domestic litigation. A domestic court will have a well-established body of rules relating to the manner in which foreign law is established and dealt with. There are no such rules in international arbitration, once again because there is no fallback lex fori. No Asia-Pacific arbitration laws or rules contain guidance as to how foreign law is to be established.  

Arbitrators therefore have considerable 

102 Ibid., p. 338.
103 Apart from simple confirmations of an arbitrator's power to decide how to ascertain the law. See, e.g., Section 208(6) of the Hong Kong Arbitration Ordinance, which provides that 'In conducting arbitration proceedings, an arbitral tribunal may decide whether and to what extent it should itself take the initiative in ascertaining the facts and the law relevant to those proceedings'. Some laws do provide guidance or a
and decisions despite a reluctance by both parties. Usually, this is done by gentle persuasion, but sometimes more senior arbitrators possess the confidence, judgment and experience to express strong views on a matter, which the parties effectively have to accept.

(vii) The role of domestic courts – Court decisions concerning a given arbitration are often not fully consistent with what the parties originally agreed in relation to that arbitration. A notable example of court interference with party autonomy is found in the Singapore case of Dermajaya Properties Sdn Bhd v Premium Properties Sdn Bhd. In that case the parties chose the UNCITRAL Arbitration Rules to apply to their arbitration but the court took the view that because they were not fully compatible with the Model Law, they were completely excluded in favour of the Model Law.16

3 Rules, procedural law and guidelines

3.1 Arbitration rules

3.1.1 Choice of arbitration rules

7.9 The parties may, but are not required to, agree on a set of institutional or ad hoc arbitration rules to apply to their arbitration. If they do not agree on a set of arbitration rules, then none will apply. Alternatively, they may simply formulate their own rules or rely on the procedural law at the seat of arbitration.

7.10 If a set of arbitration rules is chosen, the choice may be expressed in the parties' arbitration agreement or made before or during the arbitral proceedings. Parties commonly refer in their arbitration agreement to a set of institutional rules. For instance, parties may agree to an arbitration clause that reads:

Any dispute, controversy or claim arising out of or relating to this contract, including the validity, invalidity, breach or termination thereof, shall be settled by arbitration in Hong Kong under the Hong Kong International Arbitration Centre Administered Arbitration Rules in force when the Notice of Arbitration is submitted in accordance with these Rules.

7.11 By virtue of this clause, the procedural rules of HKIAC will govern the proceedings if a dispute arising out of that contract is submitted to arbitration. Should the procedural rules chosen by the parties be silent as to any matter, the necessary procedure may be chosen by further agreement between the parties or it may be determined by the arbitral tribunal or the lex arbitri.

7.12 If no specific rules are indicated but reference is made to an arbitration institution only, that reference generally implies that the parties have agreed on the rules of that institution. The reverse also applies. If the parties choose a set of institutional arbitration rules, they are presumed to have chosen that institution to administer the arbitration.

Consistent with the party autonomy principle, parties are free to choose the procedural rules of any arbitral institution. Some of the arbitration institutions in the region that have formulated their own rules include ACICA, CIETAC, JCAA, KCAB, SIAC and HKIAC. The KLRCA, on the other hand, has not drafted its own detailed set of rules but has adopted (with modifications) the UNCITRAL Arbitration Rules to govern arbitrations conducted under its auspices.17 If an arbitration is ad hoc, the rules typically adopted by the parties are the UNCITRAL Arbitration Rules. However, an arbitration can be entirely ad hoc, with no set of arbitration rules involved.

A number of arbitration institutions offer two or more sets of rules from which parties may choose. Those rules may be designed specifically for the business sector in which the parties operate and the type or magnitude of dispute that may arise. For example, the HKIAC has adopted 'Short Form Arbitration Rules' that contain very brief periods (e.g. 14 days) within which to submit written submissions; a 'Small Claims Procedure' for disputes involving less than US$500; 'Securities Arbitration Rules'; and a 'Semiconductor Intellectual Property Arbitration Procedure'. In addition to offering its own set of arbitration rules, the JCAA has 'Administrative and Procedural Rules for Arbitration under the UNCITRAL Arbitration Rules'. The latter facilitate arbitrations administered by the JCAA but specifically enable those arbitrations to be conducted under the UNCITRAL Arbitration Rules.

The procedural rules chosen never cover all the procedural issues that may arise. Usually, once an arbitral tribunal has been appointed, it will hold a preliminary meeting with the party representatives in which many points of procedure will be discussed. For example, in this meeting it may be decided which written submissions and documentary evidence should be filed, hearing dates may be fixed and the applicable rules of evidence may be determined. Other questions of procedure are raised and dealt with frequently during an arbitration.

It is rare that parties do not indicate (through an express choice or by implicitly incorporating institutional rules) what rules will govern their arbitration. But if they do not agree on any rules, the law of the seat of arbitration will govern the arbitral procedure. If the seat of arbitration is in a Model Law country, the Model Law specifically provides a number of fallback procedural provisions. Those relating to the procedure of the arbitration are principally contained in Articles 19–22. In other countries, absent an agreement by the parties, provisions of the domestic law (which may be different from the Model Law) will apply.

15 [2002] 2 SLR 164 (Singapore High Court).
16 Swift legislative action followed to avoid damage to Singapore's reputation as an arbitration-friendly venue. Article 15A was inserted into the Singapore International Arbitration Act, which provides that a provision in the arbitration rules chosen by the parties would be given effect to the extent that it is not inconsistent with the mandatory provisions of that Act. See generally, M Pillay, 'The Singapore Arbitration Regime and the UNCITRAL Model Law', (2004) 20 Arbitration International 355, at pp. 375–383.
17 See Rule 1 of the KLRCA Rules.
18 These documents are available at www.hkiac.org/show_content.php?article_id=34. Similarly, SIAC has a range of arbitral rules designed for specific industry sectors, available at www.siac.org.sg/cms/. In addition, many institutions now have separate rules for expedited arbitrations. See Chapter 7, Section 6.11.
19 As at 1 July 2009.
3.1.2 Differences between institutional and ad hoc arbitration procedures

7.17 The degree of supervision or administration offered by arbitral institutions varies. While the policy of most arbitral institutions is to leave the arbitral tribunal as free as possible, some are more proactive in ensuring that the arbitration proceeds smoothly and efficiently and complies with its own rules. The ICC Rules, for example, while being very flexible on procedure generally, require an arbitral tribunal to draw up 'terms of reference' that identify the issues to be determined.\(^{20}\) The 2007 SIAC Rules also contain a requirement for a 'memorandum of issues' which is a very similar document.\(^{21}\)

7.18 It follows that ad hoc arbitrations are generally more flexible in the procedure that they may adopt because they are not constrained by the requirements set by arbitral institutions. But the lack of an arbitral institution may in fact be a drawback because such institutions perform important administrative functions and employ counsel with the relevant legal experience, who are available to advise the arbitral tribunal and parties on day-to-day issues. Where a party is recalcitrant or otherwise difficult, the support of a supervisory institution will help to minimise that party's misconduct. Arbitrators also find comfort with the support of an experienced institution that offers a neutral sounding-board for complicated aspects of arbitration practice.\(^{22}\) Institutional support can also minimise the adverse impact of an arbitrator who is not performing his functions diligently or in due time by requiring the arbitrator to do so or, ultimately, by removing him.

3.1.3 Failure to object to non-compliance with procedural rules

7.19 A party that does not object to a failure to comply with an applicable procedural rule may be deemed to have waived its right to object subsequently. Many institutional rules contain a provision addressing this issue. For example, Article 28 of the HKIAC Rules provides:\(^{23}\)

A party who knows or ought reasonably to know that any provision of, or requirement arising under, these Rules (including the agreement to arbitrate) has not been complied with and yet proceeds with the arbitration without promptly stating its objection to such non-compliance, shall be deemed to have waived its right to object.

7.20 This rule is related to the doctrines of waiver and estoppel.\(^{24}\) It requires that procedural objections be raised not long after the time the non-compliance occurred, otherwise the right to object later may be lost. However, it has been commented that in China, the legality of such presumed waiver provisions in arbitration procedural rules may be questionable because they deprive parties of the legal right to sue, i.e. it may preclude them from bringing a court action to challenge the award.\(^{25}\)

3.1.4 Applicable version of rules

A question as to the applicable version of any arbitration rules can arise when the rules are revised or otherwise amended between the time the arbitration agreement is concluded and the time the arbitration is commenced.\(^{26}\) This situation arose in Black and Veatch Singapore Pte Ltd v Jurong Engineering Ltd.\(^{27}\) In that case, the contract at issue contained an agreement to arbitrate under the SIAC arbitration rules. At the time the agreement was entered into, SIAC had only one set of rules. By the time the dispute arose, SIAC had two sets of rules – one for domestic and one for international arbitration. The Singapore High Court found that the parties had agreed on SIAC administered arbitration generally, and that they would be bound to the most appropriate SIAC Rules available at the time of their submission to arbitration. Consequently, because the arbitration was domestic, it was held that the domestic rules of SIAC were applicable even though they did not exist at the time the arbitration agreement was concluded. This decision is consistent with international practice.\(^{28}\) The Singapore Court of Appeal, confirming the High Court's decision, also noted that the burden of proving an earlier or less appropriate version of arbitration rules applies lies with the party seeking the application of such rules.\(^{29}\)

The presumption in favour of the latest or most appropriate set of arbitration rules should be compared with the KCAB's press release in 2007 announcing its new rules, which stated:\(^{30}\)

These newly enacted Rules that go into effect shall be applied to international arbitration cases in which the parties have a written agreement to resolve disputes through arbitration in accordance with these Rules. Therefore, as a general rule, the existing arbitration rules shall be applied to all cases in which the parties have no agreement about these new Rules.

\(^{20}\) See ICC Rules Article 16.

\(^{21}\) See SIAC Rules, Rule 17. This requirement is not included in the 2010 SIAC Rules.


\(^{23}\) See also, Model Law Article 4; ACICA Rules Article 31; LCIA Rules Article 8; ICC Rules Article 33; ICAA Rules, Rule 51; KCAB International Rules Article 43; SIAC Rules, Rule 35.1; UNCITRAL Arbitration Rules Article 50.


\(^{25}\) See J Mo, 'Legality of the Presumed Waiver in Arbitration Proceedings under Chinese Law', (2001) 29 International Business Lawyer 21, at p. 25 (also noting that in China, the legality of a deemed/presumed act (e.g. a waiver) must be stipulated by law, and that there is no provision in China's 1994 Arbitration Law that deals with a party's waiver of its right to challenge the validity of an arbitral award).


\(^{27}\) [2004] SGCA 30 (Singapore Court of Appeal).

\(^{28}\) See, e.g. ICC Rules Article 6(1) and HKIAC Rules Article 1.4. See generally Greenberg and Mange, op. cit. fn 26.


3.2 IBA Rules of Evidence

Efforts toward greater harmonisation of arbitral procedure have been made through the adoption of guidelines or rules in areas usually left uncharted by the mainstream arbitral rules. We have seen, for example, in Chapter 6 the formulation of guidelines on arbitrators' conflicts of interest. Another prime manifestation of these efforts is the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration ("IBA Rules of Evidence"). These Rules, as indicated in their Preamble, are designed not to supplant but 'to supplement the legal provisions and the international or ad hoc rules according to which the Parties are conducting their arbitration'.

The IBA Rules of Evidence have in large measure established a generally acceptable synthesis of common law and civil law practice in relation to presenting and obtaining evidence, including the often delicate issue of discovery or production of documents. In David Rivkin's forward to the IBA Rules of Evidence, he notes that the Rules 'reflect procedures in use in many different legal systems, and they may be particularly useful when the parties come from different legal cultures'. However, they have not been immune to the criticism that they are more oriented towards a common law approach. On the other hand, it may be said that the provisions relating to document production are more akin to the civil law approach because they require the requesting party to identify a document or a narrow category of documents. Overall, the IBA Rules of Evidence have gained a wide degree of respect and their use in international arbitration is constantly on the increase.

The IBA Rules of Evidence could play many roles in an arbitration. As the Preamble to the Rules states, they may be adopted in whole or in part by the parties and the arbitral tribunal or they may be varied or simply used as guidelines in developing procedures for the particular circumstances of an arbitration. Frequently, parties agree that the arbitral tribunal may refer to them for guidance without being bound by them. However, even where parties have not agreed on their use, it is not uncommon for arbitral tribunals to refer to them. Some arbitrators consider themselves to be 'inspired though not bound' by the IBA Rules of Evidence while others prefer to adopt them as binding.

The broad acceptance of the IBA Rules of Evidence is also manifested in the fact that institutional rules are starting to refer to them explicitly. Article 27(2) of the ACICA Rules states that in relation to evidence and the hearing, the arbitral tribunal 'shall have regard to, but is not bound to apply' the IBA Rules of Evidence. However, Article 27(3) adds that 'an agreement of the parties and the Rules (in that order) shall at all times prevail over an inconsistent provision in the IBA Rules of Evidence'.

4 Core procedural rights and duties

State courts exercise supervisory jurisdiction over arbitrations that are seated in that state. A major aim of this supervisory function is to ensure that the fundamental procedural rights of parties are protected. The core procedural rights of parties and duties of arbitral tribunals are discussed in this section.

4.1 Right to present case

A fundamental right accorded to all parties to an arbitration is that each party be given a reasonable opportunity to present its case. It is a procedural right based on the Latin maxim audi alteram partem (hear the other side). This right includes the entitlement to be notified as to the commencement of arbitration proceedings, as well as hearings and other steps in the arbitration, and the right to answer the assertions made by the opposing party.

To enable the presentation of each party's case, all documents or information supplied to the arbitral tribunal by one party should at the same time be communicated to the other parties. The 1976 version of the UNCITRAL are used as prescriptive guidelines of accepted international arbitral practice. As such, they provide a useful starting point on, inter alia, how to approach the contentious issue of disclosure of documents. The IBA Rules themselves have some degree of built-in flexibility, allowing the arbitral tribunal to exercise its discretion as best suits the individual case.

31 Adopted by a resolution of the IBA Council on 1 June 1999. These 1999 Rules had their genesis in the IBA's Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration, adopted on 28 May 1983, (1985) X Yearbook of Commercial Arbitration 152. A revised version of the 1999 Rules was adopted by the IBA Council on 29 May 2010. This occurred just prior to publication. As a result, references to the 'IBA Rules of Evidence' in this book are to the 1999 Rules unless otherwise stated. Among other things, the 2010 revisions provide greater guidance on (i) the content of expert reports, (ii) requests for documents or electronic information, and (iii) issues of legal privilege. The 2010 Rules also expand confidentiality protections concerning produced or submitted documents and provide for the use of videoconference technology.


33 See, e.g., Yang, op. cit. fn 14, pp. 184–185.

34 In a survey conducted by the IBA Rules of Evidence Subcommittee, 18% of participants indicated they chose the IBA Rules of Evidence in an arbitration agreement in every case or most cases. Thirty-three percent replied that they were chosen in some instances. When asked how often the IBA Rules are adopted later (i.e., if not in the arbitration agreement), for example, in the terms of reference or in arbitral tribunal directions, 43% said in every case or most cases and 42% said in some cases. These figures were kindly provided to the authors by one of the members of the IBA Rules of Evidence Subcommittee, who revised those Rules. See also TC Thye and J Choong, 'Disclosure of Documents in Singapore International Arbitrations: Time for a Reassessment', (2005) 1 Avitan Journal of International Arbitration 49, at p. 59 (the IBA Rules can be and
Arbitration Rules frames this as obligatory. However, this obligation was a matter of minor controversy during the revision of the UNCITRAL Arbitration Rules. The Working Group considered that while this contemporaneous communication generally reflected an important principle, there would be circumstances where it would be inappropriate and have the potential to create procedural inequality. It occasionally occurs that one party is given a short extension of the time in which it must communicate submissions. If the rule is rigidly enforced and the procedure calls for a simultaneous exchange of briefs, the late-filing side would arguably have an unfair advantage because it would see the opposing side's submissions that were filed on time—thus impeding on another fundamental right—to be treated equally. The Working Group therefore recommended giving the arbitral tribunal a discretion to vary the rule. The issue was further discussed by the Commission with the result that the 2010 UNCITRAL Rules give the arbitral tribunal discretion only where it is permitted by applicable law. A related requirement is that any expert report or evidentiary document relied on by the arbitral tribunal must be communicated to the parties.

7.30 Certain rules and laws, such as Article 2GA of the Hong Kong Arbitration Ordinance, expressly provide for the giving of a 'reasonable' opportunity to each party to present its case. The term 'reasonable' avoids reference to a 'full' opportunity to present a party's case, as is the terminology used in Article 18 of the Model Law. The high standard inherent in the word 'full' has led some to comment that the phrasing may enable parties to make the arbitration unmanageable, for example, by demanding that an excessively high number of witnesses be called or by requesting the presentation of legal argument in an unreasonably lengthy fashion. Responding to these arguments, the 2010 UNCITRAL Arbitration Rules now use the word 'reasonable'.

7.31 There is very little case law on expansive claims to a 'full' opportunity to present a case, perhaps indicating how spurious such a claim would be. Chamber Three of the Iran-US Claims Tribunal squarely rejected any misuse of the word 'full' when it stated:

The Tribunal is unpersuaded that any Party can credibly claim that it has been denied a 'full opportunity of presenting [its] case' given the procedural history of these Cases. The key word is 'opportunity': the Tribunal is obliged to provide the framework within which the parties may present their cases, but is by no means obliged to acquiesce in a party's desire for a particular sequence of proceedings or to permit repetitious proceedings.

Finally, it should be noted that a party's right to present its case does not necessarily include the right to an oral hearing. Although it is not a common practice, an arbitral tribunal may decide within the discretion granted to it to determine the facts or legal points at issue on the documents alone. However, some arbitral rules do require the arbitral tribunal to hold a hearing if a party so requests.

4.2 Right to equal treatment

The rights to present one's case and to be treated equally overlap significantly. However, it is helpful to keep the two separate as each also possesses distinctive features. The requirement that parties be treated with equality is well established and constitutes a cardinal principle of arbitral procedure. This right is enshrined in virtually all international commercial arbitration instruments, and is frequently found in the same provision that deals with the opportunity to present one's case.

However, there is no precise formula to determine how parties are to be treated equally. An appropriate institutional rule is Article 15(2) of the ICC Rules, which provides that 'the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case'. The reason for referring to 'fairly and impartially' rather than 'equal treatment' has been said to be that 'in some cases, treating the parties in precisely the same manner may lead to unfair results'. It would be injudicious for an arbitrator to apply an equal treatment provision too rigidly. As one experienced arbitrator from the region has said, the arbitral tribunal's obligation 'to treat parties equally [at a hearing] does not require allowing an equal number of witnesses or an equal amount of time'.

In this regard, the drafting history of the UNCITRAL Arbitration Rules also provides valuable insight because an earlier draft that formed the basis for those rules

40 Model Law Article 24(3).
41 Similar wording is contained in CIETAC Rules Article 29; HKIAC Rules Article 14; ICC Rules Articles 15(2) and 25. See also JCA Rules, Rule 32 (referring to a 'sufficient opportunity'); ICAB International Rules Article 22 (referring to a 'fair opportunity') and Section 20 of the Malaysian Arbitration Act 2005 (referring to a 'fair and reasonable opportunity').
42 See, also UNCITRAL Arbitration Rules Article 15; Japanese Arbitration Law Article 25(2); Section 25 of Thailand's Arbitration Act 2002. Interestingly, Article 17(1) of the ACICA Rules employs the words 'full opportunity', whereas Article 13(1) of the ACICA Expedited Rules refers to a 'reasonable opportunity'.
43 See T Sawada, 'Conduct of the Hearing', in Pross and Moyer, op. cit. fn 8, p. 289, at p. 291. However, parties now have the choice of selecting expedited procedures such as those provided by a number of arbitral institutions. See Section 6.11.
45 Dastan International v Islamic Republic of Iran, (1995) 31 Iran-US CTR 127, at 144. Similarly, see Bin Cheng, op. cit. fn 24, p. 296. Additionally, Redfern and Hunter suggest the word 'full' must be interpreted from an objective (rather than subjective) standpoint. A Redfern, M Hunter, N Blackaby and C Partasides, Law and Practice of International Commercial Arbitration, 4th edn, Sweet & Maxwell, 2004, para 6-07. Also see the 1999 IBA Rules of Evidence Article 8(1) and Article 8(2) of the 2010 version of those Rules and Law, Marfell and Krill, op. cit. fn 22, paras 22-61 and 22-71.
46 See, e.g. D Caron, L Caplan, and M Pellonpää, The UNCITRAL Arbitration Rules: A Commentary, Oxford University Press, 2006, p. 29 (the issue of equality has mainly arisen as a question concerning the right to present one's case).
47 See, e.g. Bin Cheng, op. cit. fn 24, p. 290.
48 See, e.g. ICAB International Rules Article 20(3); CIETAC Rules Article 19; Model Law Article 18; UNCITRAL Arbitration Rules Article 15(1); Japanese Arbitration Law 2003 Article 25(1); Hong Kong Arbitration Ordinance Section 2GA(1)(a); Malaysian Arbitration Act 2005 Section 20; Indian Arbitration and Conciliation Act 1996 Section 18.
49 Section 2GA(3)(a) of the Hong Kong Arbitration Ordinance also uses the 'fair and impartial' wording in preference to 'equality of treatment'.
50 Derains and Schwartz, op. cit. fn 24, p. 229.
51 Sawada, op. cit. fn 43, p. 297.
required parties to be treated with ‘absolute equality’. The modifier ‘absolute’ was subsequently deleted. Some commentators have observed that this deletion ‘indicates that the provision aims to guarantee not so much formal equality as equality in the sense of justice and fairness’.

4.3 Arbitrators’ duty to avoid delay and expense

Related to arbitral procedure and to some extent procedural rights is an emerging duty on arbitrators to avoid unnecessary costs and delay. As an example, Section 2GA(1)(b) of the Hong Kong Arbitration Ordinance requires arbitrators ‘to use procedures that are appropriate to the particular case, avoiding unnecessary delay and expense, so as to provide a fair means for resolving the dispute to which the proceedings relate’. Similar considerations are echoed in Rule 15(2) of the SIAC Rules, which provides that ‘[i]n the absence of procedural rules agreed by the parties or contained in these Rules, the arbitral tribunal shall conduct the arbitration in such manner as it considers appropriate to ensure the fair, expeditious, economical and final determination of the dispute’. Where the Model Law applies, in extreme circumstances parties may apply to the court under Article 14(1) to terminate the mandate of an arbitrator if he ‘fails to act without undue delay’.

A number of institutional rules, such as Article 33 of the KCAB International Arbitration Rules, impose a time limit within which the arbitral tribunal should render its award. This time period is extendable. Under the ICC Rules, the failure of the arbitral tribunal to complete the arbitration in a timely manner may lead to a reduction in its fees, which are fixed by the ICC Court, or in an extreme case one or more members of the arbitral tribunal may be replaced. In certain jurisdictions, domestic courts may hold arbitrators personally liable if they have not rendered an award within the time period agreed by the parties.

Other rules such as the 1976 UNCITRAL Arbitration Rules do not make specific reference to delay and expense avoidance. They simply provide the arbitral tribunal with the discretion to conduct the proceedings ‘in such manner as it considers appropriate’. Even where the rules are silent, however, arbitral tribunals have an inherent duty to avoid unnecessary delays and expense.

Should parties choose expedited arbitral procedures, extra pressure is applied on arbitrators (as well as the parties) to complete the arbitration within a short time-frame. Article 3(1) of the ACICA Expedited Arbitration Rules, for example, states that its ‘overriding objective . . . is to provide arbitration that is quick, cost effective and fair, considering especially the amount of dispute and complexity of issues or facts involved . . .’. Article 3(2) adds that ‘[b]y invoking these Rules the parties agree to accept the overriding objective and its application by the Arbitrator’.

Matthew Gearing has drawn attention to the growing perception that international arbitration is a slower and more expensive dispute resolution process when compared with litigation. He has taken the view that a more pro-active approach by arbitrators is needed to improve efficiency in arbitration. In his opinion, a major reason behind this problem is the conflict between an arbitrator’s duty to implement more efficient procedures and the duty to abide by the parties’ wishes.

A growing concern about time and costs in arbitration prompted the ICC Commission on Arbitration to set up a special Task Force in 2004 dedicated to the issue. As a result of its research the ICC published in 2007 a guide called Techniques for Controlling Time and Costs in Arbitration. It is a practical tool designed to stimulate the conscious choice of arbitral procedures with a view...
of arbitral tribunals that are composed of arbitrators trained in common law jurisdictions. When arbitrators from both the civil law and the common law sit together, cross-cultural influences may lead to the adoption of the better aspects from each tradition and the avoidance of weaker aspects. It is instructive to examine briefly the general features of both common law and civil law approaches to litigation. From this comparison, it is easier to identify the hybrid practices that are common in international arbitration.

The following table, at the risk of oversimplification, is an attempt to provide a general comparison of common law, civil law, and international arbitration procedures for resolving private, contractual commercial disputes. What emerges from the international arbitration column is a mixed process that cannot be categorised as having a distinctly common law or civil law foundation.

<table>
<thead>
<tr>
<th>Written Submissions or Hearings</th>
<th>Civil Law</th>
<th>Common Law</th>
<th>International Arbitration</th>
</tr>
</thead>
<tbody>
<tr>
<td>Content of written submissions</td>
<td>Contain detailed and factual arguments that are to be grounded in the documents or witness statements and evidence</td>
<td>Contain summary statements of the material facts, with no evidence or very little law.</td>
<td>Contain facts, law, documentary evidence, witness statements, and argument, with no evidence or very little law.</td>
</tr>
<tr>
<td>Mode of proceedings</td>
<td>Open to cross-examination and written statements related to the proceedings</td>
<td>Generally, a procedural exchange of written statements or affidavits.</td>
<td>Typically two rounds of written submissions, followed by a hearing or a written exchange of information.</td>
</tr>
<tr>
<td>Filing of statement of claim</td>
<td>Filing of statement of claim (by plaintiff), a defence (by defendant), and any counterclaim or cross-claim.</td>
<td>Usually a written statement of claim or counterclaim.</td>
<td>Typically two rounds of written submissions followed by a hearing or a written exchange of information.</td>
</tr>
</tbody>
</table>

Comparative Table

- See, e.g. Peter Caldwell’s observation that “[m]any international arbitrations are conducted in a manner that can be said to be neither inquisitorial nor adversarial, but an amalgam of the two.” P Caldwell, “Must Arbitration be a Bloodbath?”, (2000) Asian Dispute Review 66, at p. 87.
- The information in the civil law column is based on Hanotiau, op. cit. fn 35, pp. 360-361 and the helpful comments provided by the author, Professor John Dugan.
- This column is more reflective of the English court procedure rather than US procedure.
- This column shows a common approach in international arbitration but it is certainly not the only approach because international arbitration procedures vary immensely.
Documents are tendered to the court by the parties and must be in accordance with the limitations and procedures set out in the standing orders of the court. The judge may order the production and inspection of the documents if it is necessary to ensure that all relevant evidence is presented. The court may also order the disclosure of documents to encourage the parties to settle the dispute out of court.

The Evidence Act, 1872 (India), provides for the admission of evidence in the form of documents, and it is admitted on the basis of its probative value and relevance to the case. The judge may also consider the nature of the document, its authenticity, and the manner in which it was obtained.

In cases where documents are challenged, the judge may order the party to produce the original document or a certified copy. The party must also disclose the source of the document and any relevant information that may affect its admissibility.

The judge may also consider the testimony of witnesses who have knowledge of the contents of the document or who have information that may affect its admissibility. The judge may also consider the testimony of experts who have knowledge of the subject matter of the document.

The judge may also consider the impeachability of the document, which includes consideration of any improprieties or irregularities in the manner in which the document was obtained. The judge may also consider the relevance and probative value of the document in determining its admissibility.

The judge may also consider the nature of the document and its probative value in determining its admissibility. The judge may also consider the testimony of witnesses who have knowledge of the contents of the document or who have information that may affect its admissibility.

The judge may also consider the testimony of experts who have knowledge of the subject matter of the document. The judge may also consider the impeachability of the document, which includes consideration of any improprieties or irregularities in the manner in which the document was obtained.

The judge may also consider the relevance and probative value of the document in determining its admissibility.
6 Arbitral proceedings

6.1 Overview of typical procedural steps

The flexibility of arbitral procedure is further enhanced by the wide discretion granted to the arbitral tribunal in its conduct of the proceedings. A typical example of this type of discretion is contained in Article 20(2) of the KCAB International Rules, which provides:

Subject to the Rules, the Tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.

However, vesting the arbitral tribunal with an overly wide discretion may have a negative side effect. As Philip Yang has observed, it may lead to unpredictability or uncertainty, particularly if the parties and their legal representatives are going before an unfamiliar international tribunal (which often happens), as it can render every application in arbitration proceedings a guessing game.

6.2 Initiating the arbitration

The notice of arbitration (or request for arbitration) initiates the arbitration process. This document demands that a certain dispute be referred to arbitration. It typically includes details of the parties, the arbitration clause or agreement invoked, the nature of the claim and remedy sought, and proposals for the appointment of arbitrators. Institutional arbitration rules often require that the respondent submit an answer (or response) to the notice or request, which is a brief document responding to the notice of arbitration. Later provisions of those rules may require parties to file more detailed written submissions, such as a statement of claim (or case) or a statement of defence.

The approach of the CIETAC Rules is different in that Article 10 requires a statement of facts and grounds of claim with supporting evidence to be included in the request for arbitration. Thereafter, the respondent is required under Article 11 to submit a 'Statement of Defence' in which the respondent must set forth
Another case in which an arbitral tribunal's deliberations became the subject of a court proceeding was *Czech Republic v CME Czech Republic BV*. The Svea Court of Appeal admitted testimony by arbitrators as to their deliberations because under Swedish law deliberative confidentiality applied only to judges, not to arbitrators.

3 Content, form and effect of arbitral awards

3.1 Formalities

The form requirements of an award vary according to the procedural rules adopted or the *lex arbitri*. The Model Law form requirements are set out in Article 31, which provides:

(i) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(ii) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.

(iii) The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place.

(iv) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

Institutional rules usually contain most of these basic requirements, for example, the need for an award to be in writing, to be signed by the arbitrator(s), to contain the reasons on which it is based and to state the date and place (i.e. the seat of arbitration) where the award was made. But many go further and require extra details:

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11 Svea Court of Appeal, Sweden, Case No. T 8735-01, 5 ISID Reports 439.
12 For examples of arbitration rules of procedure that specify in detail the required contents of an award, see CIETAC Rules Article 43(2); ICSID Rules, Rule 47; and JCAA Rules, Rule 54(1).
13 ACIA Rules Article 33.2; HKIAC Rules Article 30(2); HKIAC International Arbitration Rules Article 31(1); UNCITRAL Arbitration Rules Article 52(2); 2010 UNCITRAL Arbitration Rules Article 34(2). Some Rules do not stipulate in express terms that the award is required to be in writing, but it may be implied that this is the case. See, e.g., CIETAC Rules Article 43(3) (CIETAC's stamp shall be affixed to the award); JCAA Rules, Rule 54 and SIAC Rules, Rule 27.
14 ACIA Rules Article 33.3; CIETAC Rules Article 43(2); HKIAC Rules Article 30.3; ICA Rules, Rule 64; HKIAC International Arbitration Rules Article 31(1); JCAA Rules, Rule 54(1)(4); UNCITRAL Arbitration Rules Article 34(1); and the 2010 UNCITRAL Arbitration Rules Article 34(3). Most of these rules are subject to the freedom of the parties to agree that no reasons are to be given. In the absence of such an agreement, all arbitral awards should contain reasons. Note also that Article 31(2) of the Model Law allows parties to agree that no reasons are to be given in the award.
15 ACIA Rules Article 33.4; CIETAC Rules Article 43(2); HKIAC Rules Article 30.4; ICA Rules, Rule 65; JCAA Rules, Rule 54(1); HKIAC International Arbitration Rules Article 31(2); UNCITRAL Arbitration Rules Article 32(4); and the 2010 UNCITRAL Arbitration Rules Article 34(4). This will in most instances establish the seat of arbitration and the date serves to calculate time limits within which any challenge to the award must be brought. See B. Brems, 'The Arbitral Award', in Newman and Hill, op. cit. fn 3, at p. 487. See also Model Law Article 31(3).

3.2 Reasons for the award

Three different approaches exist in institutional arbitration rules as to the giving of reasons:

(i) Reasons are required and there is no provision stating that parties may agree to dispense with reasons.

(ii) Reasons are required and there is a provision stating that parties may agree to dispense with reasons.

(iii) No provision requiring reasons is included in the rules.

Points one and two above (and the corresponding footnotes) support Born's view that '[i]t is now a nearly universal principle that international arbitral awards must set forth the reasons for the tribunal's decision, as well as containing a
dispositive section specifying the relief ordered by the tribunal.²⁴ That view is not controversial. Even if the arbitration rules are silent on the issue of reasons, as is the case with the SIAC Rules, the lex arbitri may require that reasons be given. Thus if a SIAC arbitration is seated in Singapore, as most are, Article 31(2) of the Model Law, as the lex arbitri, would still require reasons.

8.15 A question arises as to the requisite standard of reasoning. In BHP Billiton Ltd v Oil Basins Ltd,²⁵ which involved judicial review of an Australian domestic award, Justice Hargrave of the Victorian Supreme Court held that in a large-scale commercial arbitration the standard of reasoning to be given by an arbitral tribunal is the same as that required by a judge in a comparable court case. He held,²⁶

the standard to be applied in considering the sufficiency of an arbitrator’s reasons depends upon the circumstances of the case including the facts of the arbitration, the procedures adopted in the arbitration, the conduct of the parties to the arbitration and the qualifications and experience of the arbitrator or arbitrators. For example, in a straightforward trade arbitration before a trade expert, a less exacting standard than would be expected of a judge’s reasons should be applied in considering the adequacy of the reasons for the making of an award. On the other hand, in a large-scale commercial arbitration, where the parties engage in the exchange of detailed pleadings and witness statements prior to a formal hearing before a legally qualified arbitrator, a higher standard of reasons is to be expected. This is especially so where the arbitrator is a retired judicial officer.

My review of the authorities and the facts of this case leads me to conclude that the arbitrators were under a duty to give reasons of a standard which was equivalent to the reasons to be expected from a judge deciding a commercial case. The arbitration was a large commercial arbitration involving many millions of dollars. It was attended with many of the formalities of a legal proceeding, including the exchange of points of claim and defence and of substantial witness statements. The hearing occupied 15 sitting days. In addition to oral argument, substantial written submissions were made by the parties. The arbitrators were obviously chosen for their legal experience and were retired judges of superior courts. Both sides were represented by large commercial firms of solicitors and very experienced Counsel. (Emphasis added)

8.16 The Victorian Court of Appeal affirmed this decision but clarified that ‘it is the nature of a dispute which sets the standard for reasons, not the nature of the arbitrator’.²⁷ It also held,²⁸

As with reasons which a judge is required to give, the extent to which an arbitrator needs to go in explaining his or her decision depends on the nature of the decision. … the judicial obligation to give reasons is not based solely on rights of appeal. Ultimately, it is grounded in the notion that justice should not only be done but be seen to be done. And in point of principle, there is not a great deal of difference between that idea and the imperative that those who make binding decisions affecting the rights and obligations of others should explain their reasons. Each derives from the fundamental conception of fairness that a party should not be bound by a determination without being apprised of the basis on which it is made. So, in arbitration, the requirement is that parties not be left in doubt as to the basis on which an award has been given. To that extent, the scope of an arbitrator’s obligation to give reasons is logically the same as that of a judge.

There are, however, compelling arguments in support of the proposition that the standard of reasons required of an arbitrator is less onerous than that required of a judge. As is discussed in Chapter 7, there is an emerging duty on arbitrators to resolve disputes expeditiously and efficiently.²⁹ A commercial arbitrator’s role is not that of a national judge who might be making decisions that need to accord with notions of fairness applicable to the community at large or that will set a precedent for future disputes between other parties. As Sir Thomas Bingham (as he then was) has remarked, arbitrators are not required to make a detailed analysis of the law, they need only summarise the arguments and express their conclusion in an intelligible manner.³⁰ An appropriate standard for arbitration was well formulated by the English Court of Appeal in Bremer Handelsgesellschaft v Westsucker:³¹

All that is necessary is that the arbitrators should set out what, on their view of the evidence, did or did not happen and should explain succinctly why, in the light of what happened, they have reached their decision and what that decision is. This is all that is meant by a ‘reasoned award’.

This decision is to be preferred to the BHP Billiton Ltd v Oil Basins Ltd judgments.³² If extensive reasoning is required, arbitration will ‘increasingly mimic litigation, with comparable costs and delays’.³³ Additionally, if the Oil Basins approach is adopted in a Model Law state in relation to an international arbitration, it would effectively be augmenting the exhaustive setting aside grounds listed in Article 34(2), i.e. adding a requirement for ‘adequate reasons’. Moreover, endless debate could ensue as to whether this standard was met in a given case. This could ultimately weaken the finality of arbitral awards and/or reduce the efficiency of international arbitration because arbitrators would be required to develop extensive reasoning.

²⁴ See Chapter 7, Section 4.3.
²⁵ T Bingham, ‘Differences between a Judgement and a Reasoned Award’, (1997) 16 The Arbitrator 19, at p 30 et seq.
²⁶ [1981] 2 Lloyd’s Rep 130. See also D Caron, L Caplan and M Pelissié, The UNCITRAL Arbitration Rules: A Commentary, Oxford University Press, 2006, p 880 (‘Among the most important obligations that an arbitral tribunal owes the parties is the rendering of a coherent, accurate and complete award.’); and H Lloyd, M Darmon, J-P Ansot, L Dervalv, C Liebouch and V Verhulst, Drafting Awards (ICC Arbitration), (2005) 16(2) ICC International Court of Arbitration Bulletin 19, at paras 5.2.2 (A national court has ever to examine an award, for example for the purpose of recognition or setting aside, it will naturally be less likely to be critical if the reasoning adopts a pattern with which it is familiar. However, an award cannot be drafted merely to please some national court and on the assumption that it, or its recognition or enforcement, will be challenged.’).
²⁸ We are only able to note briefly here that just prior to publication, another court in Australia, the New South Wales Court of Appeal in Gordon Runoff Limited v Westport Insurance Corporation (2010) NSWCA 57,
3.3 Signature, place and date

In an arbitral tribunal comprised of three members, all three arbitrators may not be able to sign the award at the same time or place. This is due to a number of factors: the arbitrators frequently reside in three separate countries; final deliberations do not necessarily take place in person (e.g. they can be done by telephone or by email); and it would add unnecessary costs to require arbitrators to travel and be in one place or at the arbitration’s seat simply to sign the award. Awards may therefore be circulated to the arbitrators for signature wherever they are. Once signed, the award will typically be couriered back to the relevant arbitral institution, the chairperson or the secretary of the arbitral tribunal. In a three-member tribunal, the date of the award is usually deemed to be the date of its final signature.

Most modern arbitration laws and arbitral rules state that an award is made or deemed to be made at the seat of arbitration, no matter where it is actually signed. If there is no such provision that deems a signature to be made at the seat, a problem could arise where arbitrators sign the award in a place different to the seat. It could open the door to an argument that the seat of arbitration is the place where the award was signed, which may not be the seat agreed by the parties.

In England, the House of Lords in Hiscox v Outhwaite decided that an award was made at the place where it was signed (Paris), and not at the seat of arbitration (London). Consequently, the English courts held that the award fell within the scope of the New York Convention. The English parliament subsequently amended the Arbitration Act 1996 to ensure that an award was treated as being made at the seat of arbitration regardless of where it was signed, dispatched or delivered to any of the parties.

3.4 Time limits

Arbitration laws governing international commercial arbitration usually do not prescribe time limits for rendering an award. In contrast, arbitral rules often rejected the reasons standard in Oil Baws. See also the judgment by Justice Croft of the Victorian Supreme Court in Thoroughvision Pty Ltd v Sky Channel Pty Ltd & Anor (2010) VSC 139. Although he does not reject Oil Baws, he takes a more arbitration-friendly approach to the standard of reasons required in an award.

34 See Indian Arbitration and Conciliation Act Section 31(4); Japanese Arbitration Law Article 59(4); Korean Arbitration Act Article 52(1); Malaysian Arbitration Act Section 33(4); New Zealand Arbitration Act 1996, Article 31(3) of Schedule 1; Model Law Article 31(3); ACICA Rules Article 19; CIETAC Rules Article 31(3); HKIAC Rules Article 15(4); and ICA Rules, Rule 65. See generally Chapter 2, Section 3 of this book.

35 In this regard, China’s Arbitration Law Article 33 and Indonesia’s Arbitration and Dispute Resolution Act Article 54 do not contain such a deeming provision.

36 (1992) 1 AC 562.

37 See Sections 53 and 100(2)(b) of the English Arbitration Act 1996.

38 For example, no time limit is stated in the Model Law. See generally, ibid, op. cit. fn 21, at p. 247; and ICSID-ICAC Law, LA Mabiss and SM Krull, Comparative International Commercial Arbitration, Kluwer Law International, 2003, at para 24-38. An exception is Section 37(2) of the Spanish Arbitration Act 2003, based on the Model Law, which sets a six-month time limit for awards. The arbitral tribunal may extend the time limit for a period not exceeding two months.

specify a period of time within which the arbitral award should be issued, usually coupled with a means of extending this period. Article 33 of the KCAB International Rules provides an example of such a rule:

1. Unless all parties agree otherwise, the Arbitral Tribunal shall make its Award within forty-five (45) days from the date on which final submissions are made or the hearings are closed whichever comes later.

2. The Secretariat may extend this time limit pursuant to a reasoned request from the Arbitral Tribunal or on its own initiative if it decides it is necessary to do so.

Unsurprisingly, the time limits for rendering an award are relatively shorter in expedited arbitration procedures. For example, under the CIETAC Rules, the period for rendering an award under its summary procedure is an extendable three months from the date the arbitral tribunal is formed (Article 56), whereas an extendable six-month period is adopted under the normal arbitral procedure (Article 42). In the HKIAC Rules, no time limit is specified under the standard procedure, whereas six months is set, with provision for extension, under its expedited procedure (Article 38(2)(d)).

In some jurisdictions it is vital that the arbitral tribunal comply with time requirements for rendering an award or risk invalidating the award. Once the time limit expires without extension, the view might be taken that this brings to an end the arbitral tribunal’s mandate regardless of whether certain issues remain undecided. However, in some cases it has been held that violations of the time limit to render an award will not be a ground for its annulment if no prejudice was caused or if such a harsh penalty is unjustified in the circumstances. Moreover, if the time limit is short, there must be a balance struck between meeting that deadline and ensuring that the parties have been given a reasonable opportunity to present their cases and that the arbitral tribunal has been afforded a reasonable time to deliberate and decide.

39 See also CIETAC Rules Article 42(1) (six months from formation of arbitral tribunal); ICA Rules, Rule 63 (preferably six months from the date of reference to arbitration, with a maximum of two years); ICC Rules Article 24 (six months from signature of terms of reference—while the plain language of this provision suggests that only the ICC Court is empowered to extend the time limit for the final award, in practice the court will always recognise an agreement of all parties to extend the time limit); and JCAA Rules, Rule 53(1) (five weeks from the ‘termination’ of the arbitral tribunal’s examination of the case). Rule 27.1 of the SIAC Rules requires that a draft award be submitted to the Registrar within 45 days from the date the proceedings are declared closed. No time is prescribed for issuing an award under the ACICA Rules, HKIAC Rules or either of the UNCITRAL Arbitration Rules.

40 See Chapter 7, Section 6.11.

41 See, e.g., SM Bloch et fils v SM Delaroie Mob Hotels, 1984 Revue de la Forbach 498, 17 January 1984 (Paris Court of Appeal). Additionally, the French Cour de Cassation has held that the ‘time-limit fixed by the parties either directly or by reference to arbitration rules, cannot be extended by the arbitrators themselves’... Communal urbains de Casablance v Degremont, 1995 Revue de la Forbach 88, 15 June 1994 (French Court of Cassation).

42 Cremades, op. cit. fn 15, p. 492.

43 See, e.g., Hasbro Inc v Catalyst USA Inc, 367 F 3d 689, 10 May 2004 (US Fed 7th Circuit Court of Appeals), at p. 694, paras 18 and 19 (‘time was not of the essence under this arbitration agreement. Therefore, the arbitrators did not exceed their authority by issuing an unimpeachable award to the extent that the harsh penalty of forfeiture or rescission was warranted. . . This is not to say, obviously, that arbitrators may indefinitely delay issuance of an award, in open violation of the AAA rules, without the parties’ consent.’).
3.5 Drafting an arbitral award

The award is usually drafted by the sole arbitrator or the chairperson of a three-member tribunal. In the latter circumstance, the chairman may allocate the drafting of different sections to other members of the arbitral tribunal. Any drafts of an award are circulated to all other arbitrators for comment. By signing an award, unless stated otherwise, arbitrators are confirming that the award is an accurate reflection of their views. In terms of the substantive portions of an award, it is the arbitrators alone who must make all the decisions.

In *Luson Hydro Corp v Transfield Philippines Inc*, a Singapore High Court case, it was alleged that an expert provided a considerable amount of assistance to the arbitral tribunal. The applicant attempted to set aside the arbitral award on the grounds, among others, that the rules of natural justice had been breached because the expert’s involvement was substantially beyond what was agreed by the parties and the expert took over the arbitral tribunal’s function of reviewing and determining the relevance of the evidence. The application was dismissed by Justice Prakash for a number of reasons, which included her finding that the applicant had not established that the expert had overstepped his function; that given the complexity of the case, the amount of time spent by the expert was not surprising; and that ‘strong and unambiguous evidence of irregularity’ was lacking.

The CIETAC Rules are one of the few sets of procedural rules that include a provision specifically on the duties of arbitrators in making their award. Article 43(1) provides that:

The arbitral tribunal shall independently and impartially make its arbitral award on the basis of the facts, in accordance with the law and the terms of the contracts, with references to international practices and in compliance with the principle of fairness and reasonableness.

This appears to be an attempt by CIETAC to ensure the quality of its awards. However, the consequences of a failure to comply with these criteria are not clear. For example, what happens where an award makes no reference to ‘international practices’ or if it is alleged that the award was made unfairly or unreasonably? Might that render an award susceptible to challenge on the basis that it was not in conformity with the chosen rules, which are part of the parties’ arbitration agreement?

International arbitrators should draft an award in a manner that minimises the chance that it will be set aside at the seat of arbitration, or that it will be refused recognition or enforcement under the New York Convention. This concern is reflected in arbitration rules such as Article 35.3 of the SIAC Rules, which provides that SIAC’s Chairman, the Registrar and the arbitral tribunal ‘shall make every reasonable effort to ensure . . . the enforceability of the award’.

3.6 Scrutiny of the draft award

CIETAC, the ICC and SIAC have a scrutiny procedure that is not found in most other arbitral institutional rules and is not a feature of ad hoc arbitrations. Before the award is finalised in CIETAC, ICC and SIAC arbitrations, the arbitral tribunal must send a draft for scrutiny, respectively, to CIETAC, the ICC Court or SIAC’s Registrar. The relevant 2007 SIAC Rule is Article 27(1), which provides:

Before issuing any award, the Tribunal shall submit it in draft form to the Registrar. Unless the Registrar extends time or the parties agree otherwise, the Tribunal shall submit the draft award to the Registrar within 45 days from the date on which the Tribunal declare the proceedings closed. The Registrar may suggest modifications as to the form of the award and, without affecting the Tribunal's liberty of decision, may also draw its attention to points of substance. No award shall be issued by the Tribunal until it has been approved by the Registrar as to its form.

Article 27(1) of the SIAC Rules appears to have been closely modelled on the equivalent provision in the ICC Rules, which is Article 27. A difference between the two sets of rules on this point is that the SIAC draft award must be submitted 45 days from the date on which proceedings are declared closed by the arbitral tribunal, whereas a similar time limit is not stipulated in the ICC Rules. However, ICC awards are to be rendered within six months from the date of the last signature of the Terms of Reference, and ICC arbitrators are required to indicate to the parties and the ICC Secretariat at the time they declare the proceedings closed when they expect to submit their award.

Scrubption of awards is one of the cornerstone features of the ICC system. Each award is firstly reviewed by the ICC Secretariat’s Counsel in charge of administering the case. He or she occasionally spots an obvious discrepancy which can be brought to the arbitral tribunal’s attention even before the award goes to the ICC Court. The award is then reviewed by the Deputy Secretary General and/or the Secretary General or General Counsel. It is then submitted to the ICC Court and reviewed by several ICC Court members. If the award goes to a Plenary Session, an ICC Court member is assigned the task of reporting to the rest of the ICC Court on the award. In 2009, the ICC Court received and scrutinised 415 draft awards, 382 of which were returned to the arbitral tribunal with comments, suggesting modifications of form and/or drawing the tribunal’s attention to a point of substance. While this process is thorough, involving more

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46 See CIETAC Rules Article 45; SIAC Rules, Rule 27(1); 2010 SIAC Rules, Rule 28.2; ICC Rules Article 27.
47 See Articles 22 and 24 of the ICC Rules.
48 Article 6 of the Internal Rules of the International Court of Arbitration (Appendix II to the ICC Rules) provides that 'whe[ne] the Court scrutinizes draft Awards in accordance with Article 27 of the Rules, it considers, to the extent practicable, the requirements of mandatory law at the place of arbitration'.
than five or six arbitration specialists reviewing every award, of course there can be no guarantee that all potential problems in an award will be picked up.

The types of substantive matters that ICC scrutiny may draw attention to is wide-ranging. The ICC Court may question whether all issues have been decided, draw attention to applicable statutes of limitation or point out flaws in the award’s analysis. 49 However, it has been said in relation to Article 27 of the ICC Rules that it: 50

makes clear that the ICC’s scrutiny process cannot require the arbitral tribunal to change the substance of its award, nor does it involve a review of the facts or a re-examination of questions of law. The tribunal’s ‘liberty of decision’ remains untouched and – while the arbitrators’ attention can be drawn to matters of substance – it is not the Court’s role to interfere with the tribunal’s discretion to decide the case as it sees fit.

Article 45 of the CIETAC Rules requires that the arbitral tribunal submit the award to CIETAC for scrutiny before it is signed. In response, ‘CIETAC may remind the arbitral tribunal of issues in the award on the condition that the arbitral tribunal’s independence in rendering the award is not affected’. 3.7 Finality

Once an arbitral award is issued, it is usually said to be ‘final and binding on the parties’. 51 The decisions in awards are not mere recommendations to the parties. They are decisions that the parties are obliged to follow and usually compel the performance of certain acts, such as paying compensation, performing a contractual obligation or surrendering property. Article 33.2 of the ACICA Rules requires that ‘the parties undertake to carry out the award without delay’. Some rules, such as the CIETAC Rules, go further. Article 43(8) states:

The arbitral award is final and binding upon both parties. Neither party may bring a suit before a law court or make a request to any other organisation for revising the award.

Article 35 of the Korean Arbitration Act equates awards issued in arbitrations seated in Korea with court decisions:

The arbitral award shall have the same effect on the parties as the final and conclusive judgment of the court.

In Singapore, Justice Prakash stressed the finality of awards in her judgment in Luzon Hydro Corp v Transfield Philippines Inc. 52

Whatever its grounds for dissatisfaction and however well founded that may be (a matter that was not, and could not be, argued before me) Luzon had to accept the tribunal’s decision, as under the Act there was no avenue for appeal. I could not permit it to mount what appeared to be a ‘back-door’ appeal…

In Tang Boon Jek Jeffrey v Tan Poh Leng Stanley, 53 the arbitrator delivered an award on 10 January 2000 that was described as ‘final save as to costs’ and which dismissed Jeffrey Tang’s counterclaim. In an additional award on 17 January 2000, the arbitrator acknowledged that he had not dealt with particular issues raised in the counterclaim. Nonetheless, he reaffirmed his 10 January decision and dismissed Mr Tang’s counterclaim. On the request of Mr Tang, the arbitrator thereafter permitted both parties to make further submissions on 31 January 2000 in which Mr Tang argued, among other things, that the arbitrator rejected the counterclaim on the basis of a point not argued before him. The arbitrator then delivered an award on 6 March 2000 on costs and reversed his decision on the counterclaim (the ‘6 March award’). Stanley Tan successfully applied to the Singapore High Court, which set aside the 6 March award on the basis that it was a nullity because the arbitrator was at the time of its making functus officio having already dismissed the counterclaim in the 10 January award. Jeffrey Tang appealed this decision to the Court of Appeal. In its reasoning, the Court of Appeal contrasted the Model Law with the English Arbitration Acts of 1950 and 1996 and found that whereas the provisions of the English Acts may render an arbitrator functus officio on an issue by issue basis, the Model Law does not. 54 The Court of Appeal effectively found that Article 32 of the Model Law enabled an arbitral tribunal to continue to change its decision up until it had determined all the issues between the parties (including costs) and delivered the final award in the arbitration. 55

It is true that in the 10 January award, as well as the 17 January award, the arbitrator had described the award as ‘final’. But the label which the arbitrator gave to the award could not be conclusive if the facts were that there was still the claim on costs which had yet to be adjudicated upon. Accordingly, as the mandate of the arbitrator had not yet been terminated, he was entitled to reconsider his decision and if he thought fit, as he did here, to reverse himself.

Legislative action was taken to reverse the effect of the Court of Appeal’s unexpected decision. Sections 19A and 19B were consequently introduced into the Singapore International Arbitration Act, which provide:

(1) An award made by the arbitral tribunal pursuant to an arbitration agreement is final and binding on the parties and on any persons claiming through or under them and may be relied upon by any of the parties by way of defence, set-off or otherwise in any proceedings in any court of competent jurisdiction.

50 Ibid., paras 70-72.
51 See, e.g. SIAC Rules, Rule 27(8).
52 [2004] 4 SLR 705 (High Court), at para 20.
53 [2001] 3 SLR 237 (Singapore Court of Appeal).
54 Ibid., at para 59.
55 Ibid., at para 36.
3.8 Notification or deposit of award

In institutional arbitrations, originals of the final, signed award are usually delivered by the arbitral tribunal to the relevant institution. Depending on the institution, originals or certified copies of the award are then sent to each party once all costs of the arbitration have been paid. In some jurisdictions, notification may not be the final act by an arbitral tribunal. Under Article 32(4) of the Korean Arbitration Act, for example, an original of the award must be deposited with the competent court.

When an award is completed and before the parties have paid the arbitrators' outstanding fees and expenses, it is not unusual for either the relevant institution or the arbitral tribunal to exercise a lien on the award to secure payment (i.e. it will not release the award before the fees and costs are fully paid). For example, Rule 9 of the HKIAC Schedule of Fees and Costs of Arbitration provides as follows:

The HKIAC and the arbitral tribunal shall have a lien over any awards issued by a tribunal to secure the payment of the costs referred to in Article 36.1, paragraphs (a), (b), (c) and (f), and may accordingly refuse to release any such awards to the parties until all such costs have been paid in full.

As regards ad hoc arbitrations, the UNCITRAL Arbitration Rules do not contain a provision that deals with this issue. However, it is well-established practice that ad hoc arbitral tribunals may exercise a lien over an award until all its fees and expenses are paid.

4 Definition of an arbitral award

Whether or not a decision is characterised as an arbitral award gives rise to significant legal consequences. First and foremost, only those decisions that are

8.43 'awards' can be the subject of setting aside proceedings (e.g. under Article 34 of the Model Law) and can be recognised or enforced under the New York Convention. It is therefore important to understand what types of decisions constitute arbitral awards.

An arbitral tribunal makes numerous decisions during the term of its mandate. Some of these decisions constitute awards but others do not. Obviously, an arbitral tribunal's 'mere titling of a document as an award does not make it an award'. The difference between awards and decisions has been elaborated by Lew, Mistelis and Kröll in the following terms:

While all awards are decisions of the tribunal not all decisions are awards. The term 'decision' is generic and refers to the result of any conclusion or resolution reached after consideration while an 'award' is a decision affecting the rights between the parties and which is generally capable of being enforced, for instance, under the New York Convention.

Types of decisions unlikely to be classified as arbitral awards include:

(i) negative decisions on jurisdiction;
(ii) procedural rulings or orders made by the arbitral tribunal in respect of routine procedural questions such as the sequence in which witnesses are to be examined at the hearing, document production, or the date on which the oral hearing will commence; and
(iii) decisions pertaining to the arbitration proceedings made by an arbitral institution in the exercise of its administrative functions.

Agreement on a precise, internationally accepted definition of an 'arbitral award' has been elusive. The New York Convention, for example, avoids a specific definition of the term. It states simply that "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted. A definition of an award was proposed for inclusion in the Model Law but it was not adopted.

57 See SIAC Rules, Rule 27(3); ICC Rules Article 28(1); JCA Rules, Rule 55. See also Model Law Article 31(4), Article 33(5) of the ACICA Rules requires the arbitral tribunal to communicate copies of the award to the parties and ACICA.
58 See also ACICA Rules Article 33.6; ICA Rules, Rule 56; ICC Rules Article 28(1); JCAAA Rules, Rule 55(3); HKIAC International Rules Article 35(1); and SIAC Rules, Rule 27.5.
59 PT Insuransi Jasa Indonesia (Persero) v Dexta Bank S/A (2006) SGCA 41, (Singapore Court of Appeal) 1 December 2006, at para 70. See also Resort Condominiums International Inc v Bolwell (Queensland Supreme Court) 29 October 1993, (Qld SC) (1995) XX Yearbook of Commercial Arbitration 628, at para 40 (concluding 'that the Interim Arbitration Order and Award' made by the arbitrator on 16 July 1993 is not an 'arbitral award' within the meaning of the Convention nor a 'foreign award' within the meaning of the Act. It does not take on that character simply because it is said to be so.'); and Tong Boon Aik v Stanisky (2001) 3 SLR 237 (Singapore Court of Appeal), para 38. Similarly, the US Seventh Circuit Court of Appeals held in Publicus Communication and Publicis Inc v True North Communications Inc, 206 F 3d 725 (7th Cir 2000), at 729, that an arbitral tribunal's decision issued under the name of an 'order' was in fact a final award because it was more than a mere procedural matter and concerned 'the very issue True North wanted arbitrated.' On this issue, see Section 5.3.
60 Lew, Mistelis and Kröll, op. cit. fn 38, at para 24-3 (footnotes omitted).
61 These points reflect the view of Cremona, op. cit. fn 15, p. 494.
62 There is also doubt as to whether a positive decision on jurisdiction constitutes an award for purposes of the Model Law. See Chapter 5, Section 5.6.
63 See Cremona, op. cit. fn 15, p. 483.
64 See H. Holtzmann and J Neuhaus, A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary, Kluwer, 1989, pp. 133-144 (commenting that the drafters of the Model Law encountered 'considerable difficulty ... in finding an acceptable general definition that would have the effect of properly regulating court control of arbitral decisions'). See also J. Boo, 'Ruling on Arbitral Jurisdiction – Is that an Award?', (2007) 3 Asian International Arbitration Journal 125, at pp. 131-133.
The failure to agree on a detailed definition in those two seminal international arbitration instruments is reflective of the difficulties encountered in defining an award.

Nonetheless, definitions of awards are found in the domestic legislation of Malaysia, New Zealand, the Philippines and Singapore (all Model Law countries). Except for the Philippines, they define an award as 'a decision of the arbitral tribunal on the substance of the dispute and includes any interim, interlocutory or partial award.' The Singaporean and Malaysian laws expressly exclude 'orders or directions.' The focus in these jurisdictions is thus the 'substance of the dispute' rather than the title of the document containing the decisions. The substance of the dispute is also emphasised in the description of an award in the ICC Commission on Arbitration's report on drafting arbitral awards:

An award is generally a decision about the rights and obligations of the parties in the relationship, normally contractual, that gave rise to the dispute and to the arbitration. It is not about the rights and obligations of the parties under the procedure resulting from the arbitration agreement which will be the subject of procedural orders.

Arbitral rules ordinarily do not define an award but may state that it includes an interim or partial award. The SIAC Rules are an exception because they add that an award is a decision on the 'substance of the dispute.'

There is doubt as to whether decisions on jurisdiction will constitute an award or whether awards are confined to decisions on the merits of the dispute. The Model Law appears to draw a distinction between these two types of decision. Lawrence Boo argues that its drafters intended to differentiate between a preliminary ruling on jurisdiction and an award on the merits when they provided in Article 16(3) for immediate judicial review upon an arbitral tribunal's preliminary ruling that it has jurisdiction rather than enabling that decision to be contested as an award under Article 34. In relation to a preliminary ruling that the arbitral tribunal lacks jurisdiction (i.e. a negative ruling), he states:

A decision on the preliminary question of jurisdiction (as opposed to an 'award on the merits') remains only a decision on a preliminary question of jurisdiction and does not morph into an 'award' even if, by virtue of the negative ruling [i.e. that the tribunal lacks jurisdiction] the arbitration comes to an end. This is because such a ruling leaves unresolved all the substantive claims, counterclaims and issues that would have been resolved if the tribunal had jurisdiction.

This view was accepted by the Singapore Court of Appeal in PT Asuransi Jasa Indonesia (Persero) v Dextra Bank SA. The court in that case appointed Lawrence Boo as amicus curiae and agreed with his opinion. The Court of Appeal held that a negative determination on jurisdiction is not a decision on the substance of the dispute. On the contrary, it is a decision not to determine the substance of the dispute, and therefore cannot be an award for the purposes of Art 34 of the Model Law.

### 5 Types of awards

During the course of an arbitration, a number of different awards may be issued. This is stated, for example, in Section 19A(1) of Singapore's International Arbitration Act, which provides:

> Unless otherwise agreed by the parties, the arbitral tribunal may make more than one award at different points in time during the arbitration proceedings on different aspects of the matters to be determined.

The main types of arbitral awards are final awards, partial awards, interim or provisional awards, and consent awards. These are discussed in turn below, in addition to default awards and other matters.

#### 5.1 Final awards

Article 32(1) of the Model Law states that the 'arbitral proceedings are terminated by the final award...'. However, the term 'final award' is not defined in the Model Law. A final award generally signifies that the arbitral tribunal has determined all issues (or all remaining issues) submitted by the parties and within the jurisdiction of the arbitral tribunal. Nothing more should be left for the arbitral tribunal to decide, not even, for example, costs.

Awards made at different stages of the arbitration (e.g. partial awards as discussed below) may be 'final' in the sense that the issues determined in them are final and binding on the parties. As mentioned previously, Article 19B of Singapore's International Arbitration Act emphasises this aspect of award finality by providing that, subject to exceptions, 'upon an award being made... the arbitral tribunal shall not vary, amend, correct, review, add to or revoke the award'.

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65 Section 3(1) of the Philippines Alternative Dispute Resolution Act 2004 defines an award as 'any partial or final decision by an arbitrator in resolving the issue in controversy'.

66 See Singapore's International Arbitration Act Section 21; Malaysian Arbitration Act 2005; New Zealand Arbitration Act Section 21; See also Boo, op. cit. fn 64, at p. 124.

67 Lloyd, et al., op. cit. fn 31, at p. 25.

68 See, e.g. ICA Rules, Rule 2; KCAB International Rules Article 2; and ICC Rules Article 2.

69 See, e.g. SIAC Rules, Rule 12(1) (an 'award' is defined as 'a decision of the Tribunal on the substance of the dispute and includes an interim, interlocutory, partial or final award').

70 Boo, op. cit. fn 64, at p. 133. Compare the Model Law approach with Section 314(1)(a) of the English Arbitration Act 1996, which states that the arbitral tribunal has the power to rule on its own jurisdiction 'in an award as to jurisdiction, or deal with the objection in its award on the merits'. (Emphasis added)

71 Boo, op. cit. fn 64, at p. 135. The review of jurisdictional decisions and the question of whether a decision on jurisdiction can constitute an award are dealt with in Chapter 5, Section 5.


unified opinion has yet formed as to the establishment or the eventual parameters of such an appeals mechanism. The debate will likely continue given the increased number of investment arbitration awards and the regular need to interpret and apply provisions of investment treaties that are very similar or identical to those dealt with by other investment arbitral tribunals. In Chapter 10, we discuss an investor-state arbitration internal challenge process—the ICSID annulment mechanism—but this is far from an appeals process.

As to the second and third options of an unsuccessful party noted above, the Singapore High Court in *Newspeed International Ltd v Citius Trading Pte Ltd* held that these options 'were alternatives and not cumulative'. This position is incorrect. That case concerned a CIETAC award rendered in China in favour of Newspeed. Citius unsuccessfully challenged the award in China's Intermediate People's Court. Subsequently, when Newspeed sought to enforce the award in Singapore, Citius resisted enforcement. The Singapore High Court held that Citius was entitled either to seek to set aside the award before a Chinese court or resist enforcement at the place of enforcement. Because it had exercised the former option, the High Court held it was not permitted to resist enforcement. This decision eviscerates the fundamental rights accorded by the New York Convention to the party opposing enforcement. Nothing in the Model Law or the New York Convention states that a failed setting aside application prevents a party from resisting enforcement of the award in another jurisdiction. And it is doubtful whether *res judicata* would have any application as between a setting aside application and an enforcement proceeding because the causes of action are not the same.

Moreover, while the Singapore High Court in *Newspeed* referred to Justice Kaplan's Hong Kong High Court decision in *Paklito Investment Ltd v Klokker East Asia Ltd* to support its decision, it did not refer to the Hong Kong Court of Final Appeal's decision in *Hebei Import & Export Corp v Polytek Engineering Co Ltd*. The judgment of Sir Anthony Mason in that latter case also referred to *Paklito* but took a different position.

In [Paklito] Kaplan J expressed the view that a party faced with a Convention award against him has two options. He can apply to the court of supervisory jurisdiction to set aside the award or he can wait to establish a [New York Convention] ground of opposition...such a party is not bound to elect between the two remedies... (Emphasis added)

The policy reasons that support the finding in *Newspeed* are understandable. International arbitral awards should as far as possible be final. International

judicial comity requires courts to respect decisions made by foreign courts and re-litigation of issues in different courts should be discouraged. However, these are not inflexible rules. *Newspeed* is too rigid a decision.

### 3 Challenging awards

The typical mode of challenging an award is to apply to have it set aside by the competent court at the seat of arbitration. Most countries in the Asia-Pacific employ the phrase 'setting aside' of an award, which is also part of the Model Law nomenclature. In the US, however, vacate is the generally used term rather than setting aside. The ICSID annulment procedure should not be fully equated with the setting aside procedures commonly found in domestic laws. The annulment process under the ICSID Convention is discussed in Chapter 10, Section 8.

The discussion in this section will first deal with the issue of state control over awards at the seat of arbitration. It will then consider setting aside at the seat of arbitration, examine the problematic issue of courts setting aside awards made outside their territory, touch upon the period of time within which a setting aside application can be made, and examine briefly the consequences of challenging an award. The section will focus on the Model Law's setting aside provisions because most of the countries in the region have used this as the basis for their international arbitration legislation.

#### 3.1 State control over awards at the seat of arbitration

At the seat of the arbitration, a state effectively offers the support of its judicial system to ensure that the parties' agreement to arbitrate is carried out. Nonetheless, state courts retain an important supervisory role that is intended to prevent the arbitration from deviating from fundamental principles of justice, such as due process. Related to this function of judicial supervision is the power of domestic courts to set aside an international arbitral award issued by an arbitral tribunal seated within its jurisdiction. The power of courts to set aside an award on grounds such as those contained in Article 34 of the Model Law is generally considered of such importance that it cannot be excluded by contract. For

12 (2003) 3 SLR 1
16 Ibid., para 45. He observed at para 46 that 'a failure to raise the public policy ground in proceedings to set aside an award cannot operate to preclude a party from resisting on that ground the enforcement of the award in the enforcing court in another jurisdiction'. See also G Smith, *Resisting Enforcement of a New York Convention Arbitration Award*, (2003) Asian Dispute Review 32.
17 Even in the Singapore courts, the *Newspeed* principle does not appear to be fully embraced. Justice Prakash in *Aloe Vera of America Inc v Atlantic Food Pte Ltd* (2006) 3 SLR 174 narrowed the effect of *Newspeed* by noting that a setting aside application and an application to resist enforcement are usually identical nor based on similar grounds.
18 See, e.g. the US Federal Arbitration Act, 9 USC §§ 9–10.
19 Laws that diverge from the Model Law setting aside provisions include Article 70 of Indonesia's Arbitration and Dispute Resolution Act 1999; and Articles 58 and 70 of China's Arbitration Law.
20 Swiss law, which is not based on the Model Law, takes a different approach, see the Swiss Private International Law Act, Article 192. See also the decision of the Swiss Federal Supreme Court in *Conifor v ATP Tour* (ATF 133 III 255, 240/241/242) (2007).
countries, including England, have wider setting aside grounds, as well as rights of appeal on points of law to national courts.\(^{25}\)

The procedure established for challenges to ICSID awards is very different. One major difference is that ICSID awards cannot be challenged in domestic courts. The challenge, in the form of an application for annulment, must be submitted to an ad hoc committee which is an ICSID arbitral tribunal formed specifically to determine that particular challenge.\(^{26}\) This process is discussed in Chapter 10.

### 3.2 Setting aside awards

#### 3.2.1 Setting aside at seat of arbitration

Assuming that country Y has adopted the Model Law, an award rendered by an arbitral tribunal seated in Y may be challenged in Y's courts pursuant to Article 34. (An equivalent procedure exists in all non-Model Law countries). However, successful setting aside actions are relatively rare.\(^{27}\) Paragraph 1 of Article 34 of the Model Law provides:

Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

The thrust of this provision is clear: (i) setting aside is the only recourse that a dissatisfied party can have against an award and (ii) the setting aside application must comply with Article 34(2) and (3). Additionally, the provision needs to be read in conjunction with Model Law Articles 1(2) and 6:

(Article 1(2)) The provisions of this Law, except articles 8, 9, 35 and 36,\(^{28}\) apply only if the place of arbitration is in the territory of this State.

(Article 6) The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by ... [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]

Supposing the seat of an arbitration is Singapore, then Article 1(2) prescribes that an Article 34 setting aside application in relation to an award rendered in that arbitration must take place in Singapore and it must be made before the Singapore High Court, the court specified for the purposes of Model Law Article 6.\(^{29}\) This fundamental position relating to the setting aside of awards is reflected in most national arbitration laws.

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21 Methanex Motunui Ltd v Spellman [2004] 3 NZLR 454 (New Zealand Court of Appeal), at paras 107–108. The reference to Article 34 in the quotation is to Article 34 of Schedule 1 of New Zealand’s Arbitration Act 1996, which closely corresponds to the identically numbered Model Law provision. See also the New York Convention’s recognition of the supervisory authority of a state over arbitral awards rendered in its territory under Article VI(1)(e).
23 See Article 1502 of the French Code of Civil Procedure.
25 See Sections 68 and 69 of the English Arbitration Act 1996. As mentioned previously, Section 69 contains a right of appeal. Nevertheless, parties are free to agree not to have such an appeal right. The right of appeal in international arbitration is discussed in Section 2 above.
26 See Rules 50 and 52 of the ICSID Rules.
28 The 2006 version of the Model Law has added Articles 17 H, 17 I and 17 J to this list of provisions.
29 See Section 8 of the Singapore International Arbitration Act. In very rare cases, the arbitration may be governed by the procedural law of a state in which the arbitration is not seated and it may be arguable (as indicated in Article VI(1)(e) of the New York Convention) that an award obtained in that arbitration may be set aside not at its seat but in the courts located in the state whose procedural law is applicable.
3.2.2 Setting aside foreign awards

9.22 The vast majority of setting aside applications are filed - as they should be - with the courts at the seat of arbitration. As is evident from Section 3.2.1, that is the correct procedure. Nonetheless, a few courts in the region have deviated from it.

In Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina) (No. 2), 30 a Cayman Islands company obtained a US$270 million arbitral award against the Indonesian respondents. Notwithstanding that the seat of arbitration was in Geneva, Switzerland, the Indonesian courts set aside the award. Subsequently, enforcement of the Swiss arbitral award was sought in Hong Kong against one of the respondents, Pertamina, which resisted enforcement under the Hague Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the 'New York Convention'), which was in force at the time in Indonesia. The New York Convention has now annulled the award under its own law is . . . a matter which has no effect on this court's task. 31

9.24 In Hitachi Ltd v Mitsui & Co and Rupali Polyester, 32 the Supreme Court of Pakistan assumed jurisdiction in a challenge to an ICC award resulting from an arbitration seated in England on the basis that the proper law of the contract was Pakistani law. Similarly, the Philippines Court of Appeal in Luzon Hydro Corporation v Baybay and Transfield Philippines 33 set aside an award on the basis that it was in breach of Philippine public policy even though the arbitration was seated in Singapore.

Another decision of concern is that of the Indian Supreme Court in Venture Global Engineering v Satyam Computer Services. 34 Although India's Arbitration and Conciliation Act 1996 is based on the Model Law, its Supreme Court held that an award made in an LCIA arbitration seated in London between Indian and US parties, though a foreign award, could be set aside under Section 34 of the Act as being contrary to public policy, a provision based on Article 34 of the Model Law. This decision applied Section 34 despite its location in Part 1 of that Act, which Part applies (pursuant to Section 2(2)) 'where the place of arbitration is in India'. The judgment in Venture Global has rightly been criticised for creating a new law not found in the Indian Arbitration and Conciliation Act. 35

9.25 Article V(1)(e) refers to the setting aside of an award 'by a competent authority of the country . . . under the law of which . . . that award was made'. See also Chapter 2, Section 4.1 of this book.

9.26 The above cases in which awards have been set aside by courts outside the seat of the arbitration do not represent correct international arbitral practice. Fortunately, these types of decisions are rare.

3.2.3 Model Law setting aside grounds and their exclusivity

Article 34(2) of the Model Law lists the six grounds upon which a setting aside action may be based.

9.27 The award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have submitted it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

9.28 There are three important aspects to this provision:

(i) Paragraph 2 states that the court may set aside the award if any of the grounds is satisfied. In other words, the court retains a discretion not to set aside an award even if one of the grounds has been established.

(ii) The word 'only' is employed to exclude any ground other than those enumerated.

(iii) The two grounds stipulated in sub-paragraph (b) are grounds that the court of its own initiative may raise, even if not raised by the party challenging the award.

Because all the Article 34 grounds are replicated in Article V of the New York Convention and those Article V grounds are discussed in Section 6 below, they will not be discussed here unless there are cases or issues that require special discussion.

9.29 of Law & Justice consultation paper, which proposes to amend the Arbitration and Conciliation Act 1996 in a manner that would reverse the Venture Global decision.
Article 34, particularly by reason of the exclusive nature of the setting aside grounds, does not permit a court to entertain a challenge application that concerns the merits (such as findings of fact and law) of the award. This was clearly articulated by the Singapore High Court in Government of the Republic of the Philippines v Philippine International Air Terminals Co Inc.\(^{36}\) An arbitral award is not liable to be struck down on application in the courts because of allegations that it was premised on incorrect grounds whether of fact or of law. An application to set aside an award made in an international arbitration is not an appeal on the merits and cannot be considered in the same way as the court would consider the findings of a body over whom it had appellate jurisdiction.

This position is to be contrasted with the well-known finding in the US Supreme Court decision of Wilko v Swan (relating to a domestic arbitral award), holding that an award may be set aside for ‘manifest disregard of the law’.\(^{37}\) However, Wilko v Swan appears difficult to reconcile with the strong opinion of the US Supreme Court in the more recent case of Hall Street Associates, LLC v Mattel Inc.\(^{38}\) The Supreme Court in this latter case took the view that the setting aside grounds under the US Federal Arbitration Act are exclusive. This ruling suggests that the ‘manifest disregard’ doctrine, which is not found in the Federal Arbitration Act, may no longer have a valid place in US law.\(^{39}\) Moreover, other US courts have refused to apply the ‘manifest disregard’ ground in foreign arbitral enforcement proceedings.\(^{40}\)

On one reading of China’s Arbitration Law, courts in China have the power to review the procedure as well as the merits of the award in determining whether to set aside awards issued in Chinese domestic arbitrations.\(^{41}\) On the other hand, ‘foreign-related’ awards (i.e. those issued inside China with a foreign element) may only be set aside in China on certain procedural grounds.\(^{42}\)

Furthermore, there is strong US Supreme Court authority holding that parties cannot extend by agreement the narrow setting aside grounds in the Federal Arbitration Act, for example to create a right of appeal. In the Hall Street case, the US Supreme Court held that parties were not free to expand the limited statutory grounds for setting aside awards by private agreement. The case hinged on the interpretation of Sections 9–11 of the US Federal Arbitration Act, which regulate court confirmation, modification or vacation (setting aside) of arbitral awards. Those provisions permit the setting aside of an award on very narrow grounds, such as corruption, fraud or excess of power. However, the parties’ arbitration agreement in this case provided that if either party were dissatisfied with the outcome of the arbitral award, it could appeal to a designated US court. The relevant arbitration clause provided:

\[\text{[the United States District Court for the District of Oregon may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) where the arbitrator’s findings of fact are not supported by substantial evidence, or (ii) where the arbitrator’s conclusions of law are erroneous.]}\]

The Supreme Court held that the parties could not by contract widen the Federal Arbitration Act and agree to their own procedure under which courts may vacate (i.e. set aside) an arbitral award on the basis of an arbitrator’s legal error.

Even though Hall Street related to a domestic arbitration, its reasoning fits well with the underlying philosophy of international commercial arbitration and is likely to be followed in relation to international arbitrations both in the US and in other jurisdictions.\(^{44}\) A similar approach was taken by the New Zealand Court of Appeal in Methanex Motunui Ltd v Spellman\(^{45}\) when it held that Article 34 of Schedule 1 of New Zealand’s Arbitration Act (which corresponds broadly to the identical numbered Model Law provision):

\[\text{is expressed in exclusionary terms: it specifies the only grounds upon which a Court may intercede in an award in review proceedings. Accordingly, it is not open to the parties to a submission to arbitration to confer, by contract, a more extensive jurisdiction on the Court, for instance to review for factual error. On this (perhaps literal) approach, a contractual stipulation which further limits the grounds upon which review is available merely supplants Article 34 and does not derogate from it.}\]

\[\text{The Tokyo District Court has also espoused this view in KK Descente v Adidas-Salomon AG.}\]


\[\text{36} 128 S Ct 1396, 2008 (US Supreme Court).\]

\[\text{44} \text{But see Born, op. cit. in 39, p. 2609 ('It is difficult to see why parties should not be permitted to contract for ‘ordinary’ judicial review, of the sort that would apply if the arbitral award was a first instance judgment.')}.\]

\[\text{45} 2004 NZLR 454, at para 105.\]

\[\text{46} \text{Tokyo District Court judgment of 26 January 2004, 1847 Hanbel Jihb 123.}\]
a Korean court. This provision was enacted to override a provision in an earlier version of that Act which enabled a party to apply to set aside an award after its enforcement was ordered. Theoretically, at least, the new law does not prohibit the setting aside of an award that has been enforced by a court outside of Korea.

3.4 Consequences of challenge

Depending on the applicable law, a court hearing a challenge to an award may rule in favour of the challenge and set aside the award in whole or in part; vary parts of the award; remit the award to the arbitral tribunal for reconsideration; or refuse to set aside the award despite the applicant having established one or more grounds. An unsuccessful challenge obviously leaves the court no other option but to refuse to set aside the award. However, should a setting aside action be unsuccessful at the seat of the arbitration, this does not preclude the unsuccessful applicant from subsequently resisting enforcement of that same award.

As mentioned previously, the award annulment procedure under the ICSID Convention is to be contrasted with the diverse options afforded to courts in resolving a setting aside action. A challenge to an ICSID award is not heard by a court but by an arbitral tribunal known as an ad hoc committee. As the name of the process suggests, the powers of the ad hoc committee are limited to annulling all or part of an award. The ad hoc committee cannot vary parts of the award or remit it to the original arbitral tribunal. If an annulment application succeeds, the matter must be remitted not to the original arbitral tribunal but rather to a newly constituted arbitral tribunal.

From the perspective of an enforcement action, if the courts at the seat of arbitration have set aside or suspended an award, the enforcing court may refuse to enforce the award pursuant to Article V(1)(e) of the New York Convention. On a number of occasions, particularly in the US and France, courts have enforced awards that have been previously annulled at the seat of the arbitration. Additionally, if an action to set aside an award is pending and, at the same time, an application for enforcement of that award is made in another country, Article VI of the New York Convention gives the court determining the enforcement application the discretion to adjourn its proceedings.

It must not be forgotten that even if an award is set aside by a court, many jurisdictions provide for the possibility of appealing that court decision to a higher court. Under Section 37 of the Indian Arbitration and Conciliation Act, for example, an appeal is available from a court's decision either to set aside or refuse to set aside an award.

4 Recognition of awards

Although the New York Convention deals with both recognition and enforcement of awards, the former receives considerably less attention than the latter. Nonetheless, the importance of the recognition of awards should not be underestimated. An enforcement action, for example, cannot take place without recognition (often implicit) of the award by the enforcing court. Moreover, a need to recognise an award without enforcement may arise when a court action is filed involving the same parties to the arbitration and in respect of the same subject matter or dispute determined in the arbitration. In that instance, the party that succeeded in the arbitration may ask the court for formal recognition that the award binds the parties. It may also seek to invoke the award as a set-off or a counterclaim. The approach of the court will depend on its applicable domestic law and persuading the court to recognise the facts or points of law as determined by the arbitral tribunal may prove difficult.

Article III of the New York Convention requires that '[e]ach Contracting State shall recognise arbitral awards as binding ....' Along similar lines, some domestic laws deal with recognition specifically. Section 29(2) of the Singapore Arbitration Act, for example, provides:

Any foreign award which is enforceable under subsection (1) shall be recognised as binding for all purposes upon the persons between whom it was made and may accordingly be relied upon by any of those parties by way of defence, set-off or otherwise in any legal proceedings in Singapore.

A notable omission in the Agreement on Mutual Enforcement of Arbitral Awards between Hong Kong and mainland China is any reference to recognition of awards. Accordingly, uncertainty exists as to the ability to make a 'recognition only' application in Chinese courts of an award obtained in Hong Kong and vice versa.

5 Enforcement of New York Convention awards

The enforcement of awards is one of the main advantages of international commercial arbitration over international litigation. There would be little point in arbitration if the eventual award could not be enforced against the losing party. In domestic legal systems, legislation usually provides for the enforcement of arbitral awards made within that state against property or other assets. By and large, that system is not problematic because a state's governmental jurisdiction.
5.2 Enforcement at the seat of arbitration

Two options are possible for the enforcement of an arbitral award within the jurisdiction of the seat of arbitration. First, for enforcement purposes, courts at the seat may not consider the award as falling within the scope of the first sentence of Article I(1) of the New York Convention because it is not a 'foreign award' but rather may treat it as an 'international award' issued within its territory.\(^{117}\) For example, in Australia, Section 3 of the International Arbitration Act defines a 'foreign award' as 'an arbitral award made, in pursuance of an arbitral agreement, in a country other than Australia, being an arbitral award in relation to which the [New York Convention] applies'. According to that Australian Act, an award obtained in an arbitration in New South Wales involving a claimant from Singapore and a respondent from Hong Kong would not constitute a 'foreign award' under the New York Convention. If enforcement of this award were required in Australia, Articles 35 and 36 of the Model Law could be invoked because the award would have been obtained in an 'international arbitration' within the Article 1(3) Model Law definition.\(^{118}\)

In some countries the above type of 'international' award may arguably also be enforced under the New York Convention regime if the enforcing court considers that this award is one that is 'not considered as domestic' pursuant to the second sentence in Article I(1) of that Convention.\(^{119}\) This enforcement option is not available in Australian courts because Australia has not implemented the second sentence of Article I(1) of the New York Convention in its legislation. Under Chinese law, awards issued inside China are either 'foreign-related awards' (these involve a foreign element) or purely 'domestic awards'. Despite some Chinese judgments to the contrary, 'foreign-related awards' are generally considered not to be 'foreign awards' subject to enforcement in China under the New York Convention.

5.3 Bilateral and multilateral enforcement agreements

In addition to the New York Convention, there are a number of bilateral and regional agreements between states that aim to facilitate the enforcement of foreign arbitral awards. Article VII(1) of the New York Convention\(^{120}\) provides, in part, that the Convention:

shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States . . .


118 See ibid., at pp. 516-517; and van den Berg, 2008, op. cit. fn 27, pp. 41-42.

119 See, e.g., Bergesen v Joseph Moller Corp 710 F.2d 928 (2d Cir. 1983), at 932 (US Court of Appeals) (an award issued in New York under New York law in an arbitration between two foreign parties was held to be non-domestic). See also Jacobs (Europe) Ltd v International Marketing Strategies Inc, 401 F.3d 701 (6th Cir. 2005), at 708 (US Court of Appeals).

120 On this provision, see generally E. Gaillard, 'The Relationship of the New York Convention with Other Treaties and Domestic Law', in Gaillard and Di Pietro, op. cit. fn 2, pp. 59-87.

9.87 Two prominent multilateral treaties dealing with enforcement of arbitral awards are the 1975 Panama Convention\(^{121}\) and the 1961 European Convention on International Commercial Arbitration.\(^{122}\) Bilateral treaties that include provisions on award enforcement usually concern other matters as well, such as trade, commerce or investment protection.\(^{123}\)

The second part of Article VII(1) of the Convention, often referred to as the 'more-favourable-right' provision, states that it:

shall not . . . deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

This means that if a conflict arises between the New York Convention and the domestic law of the enforcing state or another international convention signed by that state, the more favourable right to enforce an award will prevail. The Okayama District Court applied this more-favourable-right provision to give preference to the 1974 Japan-China Trade Agreement over the New York Convention in a case involving the recognition and enforcement of an arbitral award.\(^{124}\)

5.4 Application of the New York Convention

5.4.1 Scope

The New York Convention facilitates the enforcement of a wide range of awards, including those which assess and order damages, make declaratory statements as to the rights of the parties and require specific performance.\(^{125}\) Article I(1) of the Convention sets out its scope of application in respect of enforcement. It states:

This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.


accept the case. Even after registration, the Shanghai court is said to have used delay tactics and ultimately dismissed the enforcement application on the ground that the award debtor had filed for bankruptcy and lacked any assets against which enforcement could be sought. It has been suggested that during the period of the delay, the Chinese party transferred its assets to other companies. In response to this case, the Supreme People's Court decreed that local courts must order enforcement within two months from the date enforcement is sought, and that the enforcement process should be completed within six months from the date of that order.

In the Chinese case of Hong Kong Hung Chun Cereal & Oil Food Co Ltd v Anhui Cereal & Oil Food Import & Export Co, the time between the initial application for enforcement and the final decision, which denied enforcement, appears to have been around five years. However, this case is somewhat exceptional as there were delays resulting from the British handover of Hong Kong to mainland China without an agreement on how Hong Kong awards would be enforced in mainland China.

Bose, Yap and Jalliwala, in their commentary on problematic enforcement processes in Asia, have reported the following award enforcement periods as being of concern in the Asian region: Vietnam – more than one year; India – six to 12 months for uncontested applications and up to two years for contested applications; and Thailand – eight to 18 months at first instance and even longer where an appeal is made to the Supreme Court.

Some jurisdictions permit appeals for court decisions in relation to the enforcement of arbitral awards, which may also prolong the enforcement process. In certain jurisdictions an appeal is allowed only if a court refuses enforcement. In others, an appeal may be made regardless of whether enforcement was granted or not. In other jurisdictions, third parties may have rights to object to enforcement. This latter practice is to be discouraged; it not only imports uncertainty into the enforcement regime but it may unnecessarily delay the enforcement process.

6 Enforcement refusal grounds

Once a party applying for enforcement (the 'award creditor') has satisfied the Article IV requirements of the New York Convention, the burden shifts to the party against whom enforcement is sought (the 'award debtor') if it wants to resist enforcement. The award debtor must establish one of the grounds set out in Article V. These Article V grounds are exhaustive. As Justice Prakash stated in Aloe Vera of America Inc v Asianic Food Pte Ltd, in determining an application to resist enforcement of a foreign award:

I can only permit Mr Chiew to resist enforcement if he is able to establish one of the grounds set out in s. 31(2) of the Act [corresponding to New York Convention Article V(1)]. Except to the extent permitted by those grounds, I cannot look into the merits of the Award and allow Mr Chiew to re-litigate issues that he could have brought up either before the Arbitrator or the supervisory court.

This statement reflects not only the plain language and intent of the New York Convention but also well-established practice. Moreover, one of the classic studies of the New York Convention has observed that:

As far as the grounds for refusal of enforcement of the award as enumerated in Article V are concerned, [the pro-enforcement bias of the New York Convention] means that they have to be construed narrowly. (Original emphasis)

Article V of the New York Convention permits a court only to enforce or refuse the enforcement of an award. As has been stated already in this chapter, it does not allow a court considering an enforcement application to set aside the award. An anomaly is found in Section 42 of the Philippines Alternative Dispute Resolution Act, which provides: if the application for rejection or suspension of enforcement of [a foreign] award has been made, the regional trial court may, if it considers it proper, vacate its decision . . . ' However, effective from October 2009, Rule 13.4 of the Philippines Supreme Court Special Rules of Court on Alternative Dispute Resolution prescribes that 'A Philippine court shall not set aside a foreign arbitral award'.

Article V(1) of the New York Convention provides:

Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

164 Peerboom, op. cir. fn 85, p. 250, n. 5.
166 Supreme People's Court (2003) Civil 4 Miscellaneous No. 9.
167 See Lee, op. cir. fn 76, at p. 53.
168 See also Section 5.1 above.
169 Bose, Yap and Jalliwala, op. cir. fn 92, p. 3.
171 See, e.g. the Vietnam Civil Procedure Code Articles 372–373.
(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

e) The award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

The phrase 'only if' in the introductory paragraph to Article V(1) indicates that the five grounds are exhaustive (in addition to the Article V(2) grounds). Philippine legislation confirms this by prescribing that 'Any other ground raised shall be disregarded by the regional trial court.'

The decision in *Re Resort Condominiums International Inc v Bolwell* raised eyebrows in the international arbitration community. The Queensland Supreme Court took the view that Australian courts have a general discretion that extends beyond the Article V grounds to refuse enforcement under the New York Convention. The decision was based on the omission in Section 8(5) of Australia's International Arbitration Act of the 'only if' phrase in Article V(1) of the New York Convention. In the light of the unambiguous wording of the New York Convention, its pro-enforcement objectives, the decisions on this issue by courts in other countries and Australia's international obligations under that treaty, the interpretation of Australia's implementing legislation by the court in *Resort Condominiums* is incorrect. Much clearer words in the Australian legislation would be required to show that the drafters intended to give courts a discretion beyond the Article V refusal grounds.

Another vital phrase in the Article V(1) introductory paragraph is 'may be refused.' The ordinary meaning of the word 'may' demonstrates without doubt that refusal is discretionary. Thus even if one of the five refusal grounds is established, the court can still order enforcement. This comports with the pro-enforcement object and purpose of the Convention. In *China Nanhai Oil Joint Service Corp v Gee Tai Holdings Co Ltd*, Justice Kaplan of the High Court of Hong Kong (as he then was), referring to Article V of the New York Convention, said:

> even if a ground of opposition is proved, there is still a residual discretion left in the enforcing court to enforce nonetheless. This shows that the grounds of opposition are not to be inflexibly applied. The residual discretion enables the enforcing court to achieve a just result in all the circumstances.

The position in Hong Kong is a good model. The party resisting enforcement must establish a real risk of injustice and that its rights have been violated in a material way.

In China, the Supreme People's Court's Notice on the Implementation of China's Accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1987 appears to be inconsistent with the flexible approach prescribed by the New York Convention. It states that enforcement 'shall be rejected if the party opposing the application can establish one of the refusal grounds.'

China also has a very distinctive process if its lower courts consider that enforcement should be refused. The Supreme People's Court has issued a notice requiring any Intermediate People's Court that intends to refuse recognition or enforcement of a foreign arbitral award issued in a New York Convention state to report its tentative finding to the Higher People's Court. If the Higher People's Court agrees that recognition or enforcement should be refused, it must in turn ask the Supreme People's Court for confirmation that recognition or enforcement can be refused. The overall effect is that no lower Chinese Court can refuse recognition or enforcement unless the Supreme Court approves it. An underlying rationale for this notice appears to be that the Higher People's Court and Supreme People's Court are considered to be less influenced by local protectionism and therefore more objective. A statistic reported in 1999 was articles are applicable to a treaty such as the New York Convention. Other important Article 31 interpretation criteria are the content of the terms and the object and purpose of the treaty. These rules are commonly used in investor-state arbitrations to interpret bilateral investment treaties but less so by domestic courts in interpreting the New York Convention.

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*Notes and References*

175 Section 45 of the Philippine Alternative Dispute Resolution Act 2004.


177 The relevant part of Section 8(5) of Australia's International Arbitration Act states: 'in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may, at the request of the party against whom it is invoked, refuse to enforce the award if that party proves to the satisfaction of the court that: . . .'

178 See A. Pyles, *Interlocutory Orders and Convention Awards: The Case of Resort Condominiums v Bolwell*, (1994) 10 Arbitration International 385, at p. 395; and Garnett and Pyles, op. cit. fn 136, p. 905. Further concern has arisen because subsequent Australian cases appear not to have disagreed with the finding in *Resort Condominiums*. See, e.g., *International Movie Group Inc* v *Palace Entertainment Corp Pty Ltd* (1995) 128 FLR 458 (Supreme Court of Victoria); and *ACN 006 397 413 Pty Ltd v International Movie Group (Canada) Inc* (1997) 2 VR 31 (Vicotorian Court of Appeal) where 'uncertainty' of an award appears to have been accepted as a ground for refusal. See the comments on this case in Garnett and Pyles, op. cit. fn 136, pp. 905–906.

179 The term 'ordinary meaning' is used here because it belongs to part of the rules of treaty interpretation as expressed in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties. Consequently, those

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that 80% of cases in which the Intermediate and Higher People's Courts contemplated refusing enforcement of an award were resolved in favour of enforcement when sent to the Supreme People's Court. More recently, Judge Wan, the Vice President of the Supreme People's Court, has reported that from 2000 to the end of 2007 only 12 foreign awards were refused recognition or enforcement in China. Finally, as a point of comparison, it is worth noting that the internal annulment mechanism of the ICSID Convention also contains limited grounds which, if satisfied, may give rise to the award's annulment. These grounds provide a good comparative contrast to the New York Convention and Model Law grounds. For example, there is a requirement in Article 52 of the ICSID Convention for an award to be reasoned. This requirement is not in the New York Convention.

6.1 Overlap of the New York Convention with Articles 34, 35 and 36 of the Model Law

As mentioned in Section 3.2.3 above, Article V of the New York Convention (except Article V(1)(c)) has been substantially reproduced in Article 34 of the Model Law, which concerns the setting aside of awards. Additionally, Article 36 of the Model Law, which addresses the recognition and enforcement of awards irrespective of the seat of arbitration, replicates all the New York Convention Article V refusal grounds. Consequently, much of the ensuing discussion on Article V will be relevant mutatis mutandis to understanding the meaning and application of Articles 34 and 36 of the Model Law. In this regard, a Canadian court has observed:

The grounds for challenging an award under the Model Law are derived from Article V of the New York Convention. Accordingly, authorities relating to Article V of the New York Convention are applicable to the corresponding provisions in Articles 34 and 36 of the Model Law. These authorities accept that the general rule of interpretation of Article V is that the grounds for refusal of enforcement are to be construed narrowly.

Model Law countries that have also signed or acceded to the New York Convention have to address the overlap between Articles IV to VI of the New York Convention and Articles 35 and 36 of the Model Law. For example, Section 20 of Australia's International Arbitration Act provides that where the Model Law and

University of Hong Kong, 2005 (on file with the authors), pp. 23 et seq; and Bose, Yap and Jaiwala, op. cit. fn 92, pp. 5-6.


919 Judge Wan's speech at a symposium in China in June 2008 to celebrate 50 years of the New York Convention, available (in Chinese) at www.civillaw.com.cn/article/default.asp?id=39787. Anecdotal evidence, however, suggests that the Supreme People's Court takes an extremely long time to hand down its decision, if its decision is that the award will not be recognised or enforced.

919 Those ICSID Convention annulment grounds are discussed in Chapter 10, Section 8.


921 Chinese Supreme People's Court (2003) Civil 4 Miscellanea No. 9. See also Alex Vara of America Inc v Asiatic Food Prod. Ltd. [2006] 3 SLR 174, at paras 64-69; and Hebei Peak Harvest Battery Co Ltd v Polytek Engineering Co Ltd, [1998] 1 HKC 676.

922 See Lee, op. cit. fn 76, at p. 53.

the New York Convention overlap, the latter shall prevail. In Singapore (a New York Convention state), Section 3 of its International Arbitration Act provides that the Model Law has force of law in Singapore but Articles 35 and 36 of the Model Law are expressly excluded.

6.2 Article V(1) of the New York Convention

The discussion on the five Article V refusal grounds below is not intended to be exhaustive. Only a selection of cases is presented to illustrate the grounds. A number of the issues raised in Article V(1) are dealt with in more detail elsewhere in this book.

6.2.1 Party incapacity or agreement invalidity

Article V(1)(a) of the New York Convention refers to three situations in which the consent to arbitrate is defective:

(i) A party did not have the legal capacity under the law applicable to it to enter into the arbitration agreement.

(ii) The arbitration agreement was not valid under the law chosen by the parties to govern that agreement.

(iii) If the parties did not choose a law to govern that agreement, it was not valid under the law 'where the award was made'.

As to the incapacity of a party, many cases concern whether the parties had the proper authority to sign or otherwise enter into the arbitration agreement. In Hong Kong Hsuan Chun Cereal & Oil Food Co Ltd v Anhui Cereal & Oil Food Import & Export Co, the respondent in the arbitration did not sign the contract pursuant to which the arbitration was initiated. In fact, a third party fabricated documents and purported to enter into the contract under the name of the respondent. Notwithstanding these events, the matter went to arbitration, the respondent failed to persuade the arbitral tribunal that it was not a party to the contract and the subsequent award determined that the respondent was liable for breach of that contract. In an enforcement action, the Supreme People's Court in Beijing found, among other things, that the award was not enforceable on the ground that the party that actually signed the contract lacked capacity.

A major international arbitration issue in China is that arbitration agreements may be invalid if they fail to include an express designation of an 'arbitration commission', which term has been said to be limited to Chinese arbitration
New York Convention Article V(1)(a) to argue that the arbitral agreement was invalid because the party had not challenged that agreement during the proceedings.198

The validity of an arbitration agreement may be challenged in Korea if it is selective, i.e. it leaves open the option to go to domestic courts. The reasoning behind this is that arbitration is defined under Article 3(1) of the Korean Arbitration Act as a dispute settlement procedure that precludes adjudication by courts. If no such preclusion is indicated, then there is no arbitration agreement in the strict sense.199 However, there is more recent authority from the Korean Supreme Court that it is prepared to consider as valid a selective arbitration clause.200

Other issues relating to the validity of arbitration agreements and the capacity to enter into them are discussed in Chapter 4.

6.2.2 Violation of due process

Article V(1)(b) of the New York Convention identifies three violations of due process rights on which a court may rely to refuse enforcement:201

(i) No proper notice of appointment of the arbitrator.
(ii) No proper notice of the arbitration proceedings.
(iii) The inability of a party to present its case.

Defences to enforcement based on the failure to give notification of the arbitrator’s appointment or of the arbitration proceedings are relatively rare in comparison to the occasions where a party asserts it has been unable to present its case. A restraint on the ability to present one’s case is sometimes described as constituting a breach of natural justice rules or a denial of due process. As to the content of this principle, the exposition by the Singapore Court of Appeal in Soh Beng Tee v Fairmount as to due process rights in arbitration is highly instructive:202

(1) Parties to arbitration had, in general, a right to be heard effectively on every issue that might be relevant to the resolution of a dispute. The overriding concern was fairness.

(2) Fairness, however, was a multidimensional concept and it would also be unfair to the successful party if it were deprived of the fruits of its labour as a result of a dissatisfied party raising a multitude of arid technical challenges after an arbitral award had been made. The courts were not a stage where a dissatisfied party could have a second bite of the cherry.


194 This award’s enforcement ought to have been governed by China’s Civil Procedure Law because that was the applicable procedural law. Nonetheless, the Wuxi Intermediate People’s Court (the court of first instance) took the view that the award was an arbitral award not considered as domestic in the state where enforcement was sought. As such, the court held that the award fell within the meaning of the second sentence of Article 1(1) of the New York Convention. See Darwazeh and Yeoh, op. cit. fn 85, p. 840.

195 Decision of 22 April 2009, ICC award 14006/M5/C/IB/EM.

196 Promulgated by the Judicial Committee of the Supreme People’s Court on 26 December 2005, and effective as of 8 September 2006.

197 Mai Tai and Zheng, op. cit. fn 193, at p. 31.


200 Supreme Court of Korea Case No. 2003 Da 318, 22 August 2003, in Choe and Dhammamanda, op. cit. fn 66, p. 67.


(3) The latter conception of fairness justified a policy of minimal curial intervention, which had become common as a matter of international practice.

(4) The delicate balance between ensuring the integrity of the arbitral process and ensuring that the rules of natural justice were complied with in the arbitral process was preserved by strictly adhering to only the narrow scope and bases for challenging an arbitral award that had been expressly acknowledged under the Act.

(5) It was almost invariably the case that parties proposed diametrically opposite solutions to resolve a dispute. The arbitrator, however, was not bound to adopt an either/or approach.

(6) Each case should be decided within its own factual matrix. It had always to be borne in mind that it was not the function of the court to assiduously comb an arbitral award microscopically in an attempt to determine if there was any blame or fault in the arbitral process; rather, an award should be read generously such that only meaningful breaches of the rules of natural justice that have actually caused prejudice are ultimately remedied.

9.151 Soh Beng Tee related to a domestic arbitration but the Court of Appeal indicated that the principles were equally applicable to international arbitrations. It also indicated that for Article V(1)(b) purposes the breach of natural justice should be connected to the making of the award.

9.152 The passage from Soh Beng Tee just quoted indicates a high threshold for proving a denial of due process. This is also evident in the GKN case decided by the Supreme Court of Korea in which the notice requirement in Article V(1)(b) was at issue. The defendant in that case closed its London office before the notice of LCIA arbitration proceedings was served on its London address. The defendant did not participate in the arbitration and an award was issued in its absence. When an application to enforce the award was made in Korea, the defendant objected. The Korean Supreme Court found that the defendant's right to make a defence was not severely impaired. In its view, the notice was served according to the procedures stipulated under the contract, the wholly owned subsidiary of the defendant in fact received the notice (it used the same office of the defendant) and the principal of the defendant was actually aware (by oral notification) of the notice. The court took a very narrow view of Article V(1)(b).

9.23 Excess of jurisdiction

The Article V(1)(c) refusal ground refers to three instances in which the arbitral tribunal has exceeded its jurisdiction:

(i) The award dealt with a difference not contemplated by the submission to arbitration.

(ii) The award dealt with a difference not falling within the terms of the submission to arbitration.

(iii) The award decided matters beyond the scope of the submission to arbitration.

A saving provision is also contained in Article V(1)(c) which allows those parts of the award that are within the jurisdiction of the arbitral tribunal to be enforced at
the same time as refusing enforcement of those parts that fall outside the arbitral tribunal's jurisdiction.

The actual text of Article V(1)(c) has justifiably been criticised by Albert Jan van den Berg as being 'somewhat obscure and repetitive'.\(^{212}\) When dealing with this provision, a distinction is to be drawn between the scope of the arbitration clause and the matters submitted by the parties to the arbitral tribunal for resolution (i.e., its mandate). The arbitral tribunal's mandate is usually narrower than the arbitration agreement's scope. In this context, it is important to note that Article V(1)(c) specifically refers to the 'submission to arbitration' and not to the scope of the arbitration agreement.

By deciding or dealing with a matter outside its mandate, the arbitral tribunal is acting ultra petita, i.e., beyond the authority that was provided to it by the parties. As just discussed, this situation is covered by Article V(1)(c). However, that provision does not cover an arbitral tribunal's infra petita acts, i.e., failure to address what was submitted to it. As van den Berg comments,\(^{213}\) infra petita does not qualify for refusal of enforcement.

A failure to apply Article V(1)(c) properly is evident in Hemofarm DD vs Jinan Yongning Pharmaceutical Co Ltd.\(^{214}\) In that case, Hemofarm and others entered into a joint venture contract (JVC) with Jinan Yongning Pharmaceutical (Jinan Yongning) to establish C, a joint venture company. The JVC provided that disputes connected with it were to be resolved by ICC arbitration in Paris. Jinan Yongning commenced litigation in China against C in the People's Court to recover rent for land and machinery leased to C. C objected to the jurisdiction of the People's Court, pointing to the JVC arbitration clause. The court rejected this argument, holding that C was not a party to the JVC. The court found in favour of Jinan Yongning and effectively froze C's assets. Thereafter, Hemofarm commenced ICC arbitration proceedings in Paris against Jinan Yongning alleging, inter alia, that it was unable to continue with the JVC because of the Chinese litigation. The ICC arbitral tribunal ruled in favour of Hemofarm et al. It found that the Chinese litigation proceedings instituted by Jinan Yongning and the measures the People's Court consequently ordered against C prejudiced Hemofarm's rights and benefits arising out of the JVC, and that by its conduct Jinan Yongning breached the JVC. The arbitral tribunal ordered USD 8 million against Jinan Yongning for damages and costs.

Hemofarm attempted to enforce the ICC award in China and the matter ultimately reached the Supreme People's Court. That court determined that disputes between C and a joint venture party could only be litigated before the People's Courts and that the arbitral tribunal had exceeded the scope of the arbitration agreement by 're-adjudicating' and issuing an award in relation to a dispute heard by a People's Court. Accordingly, in addition to other grounds, it refused enforcement pursuant to Article V(1)(c) of the New York Convention. The matter obviously should not have fallen under Article V(1)(c) because the arbitral tribunal was dealing with a dispute between Jinan Yongning and Hemofarm as was contemplated under the JVC. Moreover, it was not attempting to 're-adjudicate' the matter between Jinan Yongning and C. In effect, Jinan Yongning circumvented its arbitration commitments under the JVC by filing its claim against C, and bringing the matter before domestic courts.\(^{215}\)

The Korean Supreme Court has held that an arbitral tribunal, in interpreting an arbitration agreement submitting to arbitration 'legal disputes regarding this contract', was permitted to determine a tort claim and was not surpassing its authority in so doing.\(^{216}\)

An allegation that an arbitral tribunal is exceeding its jurisdiction must be made in a timely fashion. In Sam Ming City Forestry Economic Co v Lam Pun Hung Trading as Henry Company,\(^{217}\) an application to set aside a court enforcement order was made on the ground that the arbitral tribunal lacked jurisdiction to make the award. The court held that the parties had submitted to the arbitral tribunal's jurisdiction by arguing the matter before it and were estopped from raising the jurisdictional objection subsequently.\(^{218}\) An arbitral tribunal's excess of jurisdiction is also discussed in Chapter 5.

6.2.4 Irregularity in procedure or composition of arbitral tribunal

Article V(1)(d) of the New York Convention refers to two procedural defects:\(^{219}\)

(i) The method of composing the arbitral tribunal was not in accordance with the parties' agreement, or failing such agreement, was in violation of the lex arbitri.

(ii) The arbitral procedure adopted was not in accordance with the parties' agreement, or failing such agreement, was in violation of the lex arbitri.

Article V(1)(d) deals generally with the procedure chosen by the parties and confirms the importance of international arbitration places on the principle of party

\(^{212}\) van den Berg, 2006, op. cit. fn 27.

\(^{213}\) Ibid. But see Born, op. cit. fn 39, pp. 2798-2799.

\(^{214}\) This case is cited in Darwazeh and Yeoh, op. cit. fn 85, pp. 847-849. The facts summarised here are taken from that article.

\(^{215}\) See Darwazeh and Yeoh, op. cit. fn 85, p. 849.


\(^{217}\) Unreported decision, Hong Kong Court of Appeal, 27 June 2001, CLOUT Case 448.

\(^{218}\) See also Article 75 of the Chinese Supreme People's Court Notice of 29 December 2005, Fafa (2005) No. 26, precluding an application for setting aside an award on the basis of lack of jurisdiction if a jurisdictional objection was not raised during the arbitral process. This Notice circulated the Minutes of the Second National Convention on Judiciary Business in connection with Foreign-related Commercial and Shipping Cases. It is not an interpretation of law but represents a judicial consensus on relevant issues that are likely to be followed by Chinese courts. See generally M Lin and T Wong, 'Arbitration in the People's Republic of China: A Recent Notice from the Supreme People's Court,' (2006) Asia Dispute Review 109, pp. 110.

autonomy. However, the failure to make a timely objection to a procedural irregularity may be fatal to any subsequent attempt to object to enforcement of an award based on that irregularity. In addition, even if significant irregularity is proved and the refusal ground is satisfied, an enforcing court may well use its residual discretion to allow enforcement if it considers that the irregularity is unlikely to have affected the outcome of the case, as has been discussed in Section 6.2.2.

In a case before the Supreme Court of Korea, the arbitration clause authorized each party to appoint one arbitrator. Nevertheless, the KCAB followed its own appointment procedure and appointed arbitrators not chosen by the parties. Neither party objected during the presentation of their cases at the first hearing. In the Supreme Court of Korea's view, while the appointment process was clearly not in accordance with the parties' original agreement, the conduct of both parties at the hearing constituted a new implicit agreement as to the composition of the tribunal. It consequently rejected the respondent's contention that the composition of the arbitral tribunal was contrary to the parties' agreement.

Likewise, in the Hong Kong case China Nanhai Oil Joint Service Corp v Gee Tai Holdings Co Ltd, the arbitration agreement required disputes to be submitted to CIETAC in Beijing. The plaintiff, however, submitted its claim to CIETAC in Shenzhen. The composition of the arbitral tribunal according to the arbitration agreement should have been based on the Beijing list of arbitrators. This was not the case and the Shenzhen list was used. The defendant therefore attempted to thwart enforcement on the ground that the method of appointing the arbitrators was not made in accordance with the parties' agreement. The court decided that although the arbitrators were not selected in conformity with the arbitration agreement, the defendant was estopped from raising this point because it failed to object to the composition during the proceedings. Justice Kaplan (as he then was) stated:

It strikes me as quite unfair for a party to appreciate that there might be something wrong with the composition of the tribunal, yet not make any formal submission whatsoever to the tribunal about its own jurisdiction, or to the arbitration commission which constituted the tribunal and then to proceed to object on the merits and then 2 years after the award attempt to nullify the whole proceedings on the ground that the arbitrators were chosen from the wrong CIETAC list.

Another reason for denying an objection to enforcement despite the satisfaction of an Article V(1)(d) ground is that no prejudice has been caused to the party resisting enforcement. In Wernher A Bock KG v N's Co Ltd, the Hong Kong Court of Appeal held that the irregularity in the composition of the arbitral tribunal was of such a nature that it would be unjust to refuse enforcement and allow the defendant to benefit from this irregularity because it had not been prejudiced.

In a rather rigid application of Article V(1)(d), the Chinese Supreme People's Court allowed the Chengdu Intermediate Court to refuse enforcement of two Stockholm Chamber of Commerce awards in PepsiCo v Sichuan PepsiCo and PepsiCo (China) v Sichuan Yunlv Industrial Co Ltd. The arbitration clauses required specific negotiation periods before a party could commence arbitration. Enforcement was refused because the claimant could not prove compliance with these negotiation periods. In other words, the courts took the view that the procedures followed were not in accordance with the arbitration agreements.

The composition of arbitral tribunals and arbitral procedure are discussed respectively in Chapters 6 and 7.

6.2.5 Award not yet binding or set aside
Article V(1)(e) of the New York Convention deals with refusal grounds relating to the award's status at the time of enforcement:

(i) The award has not yet become binding on the parties.
(ii) The award has been set aside or suspended by a competent authority of the country in which that 'award was made'.
(iii) The award has been set aside or suspended under the law of which that 'award was made'.

To invoke the first point it may be argued that an award has not become binding because it still requires confirmation by the courts of the seat. This argument should be rejected on the ground that 'an award is considered binding on the parties even though an additional formal requirement must be complied with before the award is enforceable in the country where it was made'. It is well accepted that an award to become binding on a party, leave to enforce the award is not required from the courts of the country in which it was made. In order to avoid the need to seek confirmation of the award from courts in both the jurisdiction where enforcement is sought and the seat of arbitration, i.e. a double exequatur, the drafters of the New York Convention used the word 'binding' in Article V(1)(e) rather than 'final'. The latter was the word used in the 1927 Geneva Convention.

The process for setting aside awards is explained in Section 3 above. It is relatively rare that state courts will enforce awards set aside in other states.

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220 This is discussed in detail in Chapter 7, Section 2.
221 See Chapter 7, Section 3.1.3.
224 Ibid., p. 677, para 18.
225 (1978) HLRK 281.
230 See van den Berg, 2006, op. cit. fn 27, p. 61. The double exequatur requirement under the 1927 Geneva Convention is discussed in Chapter 1, Section 2.3.1.
231 See, e.g. Van den Berg, 2008, op. cit. fn 27, p. 52 ("the vast majority of courts in the other Contracting States (i.e. not France and the US) do not enforce arbitral awards that have been set aside in the country of origin"); J Paulsson, "Derealization of International Commercial Arbitration: When and Why It Matters", (1993) 21 International and Comparative Law Quarterly 95; and J Paulsson, May or Must under the New York Convention: An Exercise in Syntax and Linguistics", (1998) 14 Arbitration International 227. Also to be noted here is the provision in Article 36(a) of the Korean Arbitration Act, which states that an award that has been enforced should not be set aside.
Notwithstanding this general position, a number of awards set aside at the seat of arbitration have been enforced in a different country, particularly in France and the US. Two cases that have gained notoriety in this regard are *Hilmarton* and *Chromalloy*. In the first, a French court enforced an award set aside in Switzerland and, in the second, a US court enforced an award set aside in Egypt. In Hong Kong, obiter dicta by Justice Burrell in *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina)* suggests that Hong Kong courts may in certain circumstances enforce an award annulled at the seat.

Concerning suspension, the law at the seat may provide that the enforcement of an award is automatically suspended as a result of, for example, the commencement of a setting aside action. But this is not enough to satisfy Article V(1)(e). Otherwise, a mere application to set aside could defeat an enforcement action. Albert Jan van den Berg has observed:

[...] in order for the suspension to be a ground for refusal of enforcement of the award, the respondent must prove that the suspension of the award has been effectively ordered [i.e. considered and then ordered] by a court in the country of origin.

### 6.3 Article V(2) of the New York Convention

Article V(2) differs from Article V(1) not simply because of the content of its refusal grounds but because a court may apply Article V(2) ex officio, on its own initiative. It provides that:

- Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
  - (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
  - (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

The competent authority, almost invariably a court, may thus raise these two grounds even if the party resisting enforcement has not raised them. In practice, however, it is rare that a court will raise these matters on its own initiative.

#### 6.3.1 Arbitrability

Article V(2)(a) of the New York Convention deals with objective arbitrability. This concept covers situations where, even if a valid arbitration agreement exists, an arbitral tribunal is not permitted to decide the dispute because of the nature of the subject matter or claims involved. It is to be contrasted with subjective arbitrability, which focuses on the scope of the arbitration agreement. An argument that a particular claim is not subjectively arbitrable would be considered under Article V(1)(c) of the New York Convention, which is discussed above.

An important aspect of Article V(2)(a) is that it concerns whether the matter is objectively arbitrable under the law of the country where enforcement is sought. Assume an award is issued in an arbitration seated in Thailand and the subject matter is objectively arbitrable under Thai law. If enforcement proceedings are brought in Australia, the Australian court may still determine that the matter is not capable of settlement by arbitration under Australian law and refuse enforcement under Article V(2)(a). Arbitrability is discussed in detail in Chapter 4.

#### 6.3.2 Public policy

The reference to public policy in Article V(2)(b) of the New York Convention is associated with international rather than domestic standards of public policy. On the international plane, the meaning of public policy has evolved to the extent that the general contours of an internationally accepted standard have...
emerged. Foucault, Gaillard and Goldman’s observation on Article V(2)(b) is insightful.

The provision certainly refers to international public policy, not domestic public policy. Not every breach of a mandatory rule of the host country could justify refusing recognition or enforcement of a foreign award. Such refusal is only justified where the award contravenes principles which are considered in the host country as reflecting its fundamental convictions, or as having an absolute, universal value.

9.181 Under this standard, the meaning of public policy is narrow. The Singapore Court of Appeal captured the essence of this point in PT Asuransi Jasa Indonesia (Persero) v Dextra Bank SA.

Although the concept of public policy of the State is not defined in the [Singapore International Arbitration Act or the Model Law, the general consensus of judicial and expert opinion is that public policy under the act encompasses a narrow scope. In our view, it should only operate in instances where the upholding of an arbitral award would ‘shock the conscience’. . . or is clearly injurious to the public good or . . . wholly offensive to the ordinary, reasonable and fully informed member of the public’ . . . or where it violates the forum’s most basic notion of morality and justice . . . (Original emphasis)

9.182 A number of other Asia-Pacific court decisions have also taken a narrow view of public policy in applying Article V(2)(b). Given the high threshold for establishing a breach of public policy, rarely does this ground prevent recognition or enforcement of an award.

The Indian Supreme Court in Renusagar Power Co Ltd v General Electric Corp held that in order to fall within the ground of public policy:

It is to be noted here that the ICSID Convention does not have a public policy ground for annulment of an award.


[1996] 2 HKC 22, [1998] 1 HRC 192, and A V R [2009] HRCU 632 (High Court), 30 April 2009, at para 23, as Justice Reyes (observing that “[i]f the public policy ground is to be raised, there must be something more, that is, a substantial injustice arising out of an award which is so shocking to the Court’s conscience as to render enforcement repugnant.”).

Japan – the District Court of Yokohama has held that the contravention of Japanese public policy ‘should be such that it falls foul of basic principles or rules of the Japanese judicial order’. Zhong Guo Hua Gong Jian Sh Quiliao Cong Gong y Color Chemical Industry KK, (Dist Court Yokohama), 25 August 1999, (2002) XXVII Yearbook of Commercial Arbitration 515; also cited in Taniguchi and Nakamura, op cit fn 198, at PP 8-11-8.

Korea – Adria NV v Korea Overseas Construction Corporation, 14 February 1995 (Supreme Court), (1996) XXI Yearbook of Commercial Arbitration 612 (holding that ‘[a]ls do regard should be paid to the stability of international commercial order, as well as domestic concerns; [Article V(2)(b)] should be interpreted narrowly’). See also Choie and Dharmananda, op cit fn 66, p 89; and Seung Wha Chang, op cit fn 205, at pp 869-971.


9.183 The award must invoke something more than the violation of the law of India. . . Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice and morality.

It is well established, as noted in Renusagar, that violating the law of the enforcing country is not an enforcement refusal ground. However, it may be questioned whether the Supreme Court’s reference to ‘interests of India’ comports with the accepted meaning of public policy. Rather, it appears to grant Indian courts wide discretion to refuse enforcement.

What then are violations that would contravene generally accepted notions of ‘international public policy’? An award tainted by fraud, or having some fundamentally illegitimate purpose (for example illicit drug importation), is an obvious example. As Article 36(3)(a) of Schedule 1 to the New Zealand Arbitration Act 1996 provides, ‘an award is in conflict with the public policy of New Zealand if . . . [t]he making of the award was induced or affected by fraud or corruption’.

Another obvious transgression of international public policy is found in the case of Agro Industries (P) Ltd v Texuna International Ltd. The Hong Kong High Court there indicated that when the opposition is before it it would be likely that the arbitral avenue relied on an affidavit in favour of the respondent made by a witness kidnapped by the respondent and obtained through distress – it would be contrary to the public policy of Hong Kong to enforce the award.

The award having been made by a biased arbitral tribunal is another possible public policy violation (although this may also give rise to a refusal of enforcement under Article V(1)(b)). In this regard, the Hong Kong High Court in Hebei Import & Export Corp v Polytek Engineering Co Ltd held that a party resisting enforcement on the basis of public policy must show actual bias rather than apparent bias. Notions of public policy may also be violated where the arbitral
tribunal relies on inadmissible evidence in a manner that is 'repugnant to fairness and justice'.

A number of courts in the region have from time to time made rather unfortunate interpretations of the meaning of public policy in Article V(2)(b). One example is the Supreme Court of Queensland's decision in *Re Resort Condominiums International Inc v Bolwell*. The court indicated that for an arbitral tribunal's decision to be in conformity with the enforcing state's public policy it must comply with the enforcing state's laws. As previously mentioned, the decision sought to be enforced in that case was entitled 'Interim Arbitration Order and Award'. The court found that this 'Order and Award' was not a foreign award within the meaning of the New York Convention, but added that even if it were such an award, it would still refuse enforcement on Article V(2)(b) public policy grounds. The court adopted a very low threshold to determine whether the terms of the 'Order and Award' were contrary to public policy.

Many of the orders of the present kind are contrary to the public policy of Queensland not only in the sense that many of them as drafted would not be made in Queensland, particularly without undertakings as to damages and appropriate security and in certain other respects, but also because of possible double vexation and practical difficulties in interpretation and enforcement.

It has been said that this approach in *Resort Condominiums* is 'both extremely parochial as well as inconsistent with the traditionally narrow scope of the public policy exception and the pro-enforcement policy underlying the Convention itself. Additionally, it has been commented that the approach would reduce the number of awards that are enforceable under the Convention and is impractical because the arbitral tribunal generally will not know in what jurisdictions the award will be enforced and, in turn, will not know which legal rules need to be followed.

The New Zealand case of *Downer-Hill Joint Venture v Government of Fiji* (a case concerning a setting aside application) demonstrates how an alleged denial of natural justice, as a species of public policy, may lead to a re-examination of the merits of a claim. Downer applied to set aside the award on the ground that a breach of natural justice had occurred because the arbitral tribunal made findings of fact that were unsupported by evidence. The High Court held, contrary to ordinary international arbitration principles, that an arbitral tribunal's

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257 (2005) NZLR 554 (New Zealand High Court).
The result in the case was also likely to be inconsistent with that country's obligations under the New York Convention, given its excessively wide interpretation of 'basic principles of the law of Vietnam'. The approach effectively requires a foreign award to comply with every provision of Vietnamese law which directly conflicts with the Convention drafters' intention that an award cannot be refused enforcement because of non-compliance with local law.

9.192

An overly broad approach to public policy in the context of setting aside an award has also been taken in the Philippines. Its Court of Appeals in Luzon Hydro Corp v Hon Rommel O Baybay & Transfield Philippines Inc held that an award issued by an arbitral tribunal seated in Singapore, which found that costs followed the event, was not consistent with Philippines law. The court found that Philippines public policy prevents a litigant from bearing the other side's costs if its position was bona fide. On this basis, it held that the arbitral tribunal's approach to costs violated Philippines public policy and the award was set aside—despite Singapore being the seat of arbitration.

9.193

Another decision of concern is Harris Adacom Corp v Perkom Sdn Bhd, in which the Malaysian High Court indicated that to recognise an award issued in an arbitration between a Malaysian party and an Israeli party would be contrary to public policy.

9.194

It is also worth noting that in Singapore's International Arbitration Act, Section 24 defines the public policy ground for setting aside an award as including fraud, corruption or breach of natural justice. This is to be compared with Section 31(4)(b) of that Act, in which the public policy ground for refusing enforcement of a foreign award contains no such qualification.

9.195

A famous English judgment on public policy in international commercial arbitration is Westacre Investments Inc v Jugoimport-SFDR Holding Co Ltd. Westacre and Jugoimport entered into a contract governed by Swiss law under which Westacre endeavoured to procure sales of Jugoimport's military equipment by Kuwait. Jugoimport repudiated the contract and Westacre instituted arbitration proceedings in Switzerland. As part of its defence, Jugoimport alleged that the contract involved bribing Kuwaiti officials and was in violation of Kuwaiti law and public policy. The arbitral tribunal decided in favour of Westacre, finding that there was no corruption and that 'lobbying' to procure public contracts was not illegal under the contract's governing law. An unsuccessful attempt to set aside the award was made before the Swiss Federal Tribunal. In attempting to resist enforcement of the award before the English courts, Jugoimport filed new affidavit evidence to support its corruption allegations. However, the Court of Appeal rejected the challenge to enforcement, taking into account that although the contract would have been contrary to Kuwaiti public policy, it was contrary to Swiss public policy. Since the parties chose Swiss substantive law and the arbitration took place in Switzerland, objections on grounds of international public policy could not be made before English courts to resist enforcement. One commentator has observed that:

9.196

The Court of Appeal held that the public policy of sustaining international arbitration awards on the facts of this case outweighed the public policy of discouraging international corruption. In this context, lest it be thought that the (C)ourt was condoning corruption, the issue of illegality by reason of corruption had been considered and rejected by high caliber ICC arbitrators.

9.197

Finally, the case of VV v VW merits reference. There the Singapore High Court held that a disproportionate costs award in an arbitration did not constitute a violation of public policy.

6.4 Adjournment of enforcement proceedings (New York Convention Article VI)

Simultaneous applications are often made (i) by the losing party to set aside the award at the seat of the arbitration and (ii) by the winning party to enforce the award in another country. In such a case, Article VI of the New York Convention gives a domestic court hearing the enforcement application discretion 'if it considers it proper' to adjourn the enforcement proceedings.

9.198

One study has found that the trend in case law under this New York Convention provision is to adjourn enforcement proceedings if the court hearing the enforcement application considers that there is a probability of success in the proceedings to set aside. For example, in Hebei Import & Export Corp v Polytek Engineering Co Ltd, the High Court of Hong Kong held that the party seeking the adjournment must demonstrate that the application to set aside the award in the foreign court has 'some reasonably arguable grounds which afford some prospects of success'. Despite this trend in case law, a suspension should not be automatic on showing a likelihood of success in the setting aside proceedings. There may be factors, viewed in their totality, that are more compelling than a 'probable success' approach. Some of these other factors, as noted in Europcar Italia SpA v Maellino Tours Inc include:

260 For a rare instance of denial of enforcement on the ground of public policy by the English courts, see Soleimany v Soleimany (1999) 3 All ER 847, English Court of Appeal. The award at issue in that case was rendered in a domestic arbitration (the parties were English residents, the contract was made in England, and the arbitration was seated in London). The Court of Appeal held that it was contrary to public policy to enforce an English award ordering payment pursuant to an illegal contract and that it would not enforce 'a contract governed by the law of a foreign and friendly state, or which requires performance in such country, if performance is illegal by the law of that country' (1999) 3 All ER 847, at p. 861.


265 Rico, op. cit. in 271, p. 81.

enforce are apparent in Article 267, enforcement of an award seriously in breach of public policy may be refused.285

8 Execution of awards

9.207 Obtaining a court order that permits an award creditor to enforce the award is not the end of the process. That order must be executed against assets in order to achieve the ultimate goal: obtaining cash or other assets to satisfy the award. Most discussions of enforcement give scant, if any, attention to execution. Execution must be requested against specified assets. Usually, no separate application for execution is required and it is dealt with in the enforcement proceedings. For example, in Fuerst Day Lawson v Jindal Exports Ltd, the Indian Supreme Court held:286

for enforcement of foreign awards there is no need to take separate proceedings, one for deciding the enforceability of the award… and the other to take up execution thereafter. In one proceeding…the Court enforcing a foreign award can deal with the entire matter.

9.208 There is a paucity of empirical evidence as to the ultimate success of enforcement actions in international arbitration and most information derives from anecdotes. Mainland China has been identified as a place where there is a significant gap between enforcement orders and the conversion of this into cash.287 Also with respect to China, it has been reported that political issues and relationships with the local police and bailiffs have played a role in the chances of success in obtaining cash from an enforcement order.288 China appears to be aware of this problem and is taking responsive measures. For example, new criminal sanctions have been enacted for the evasion of awards and court judgments. Pursuant to Article 313 of China’s Criminal Law, a maximum sentence of three years may be imposed where a party, against whom enforcement is sought, either conceals, transfers or destroys property to avoid satisfying the award. Sanctions are also available against guarantors, parties who have a ‘duty to assist’ the enforcement but fail to do so and state officials who abuse their official capacity.289

In Hong Kong, the problem with enforcement is said to be the difficulty in identifying company assets against which execution may be made.290 In practice, if assets are difficult to locate, parties often engage lawyers and/or private investigators to find them.

9 Other enforcement issues

9.1 Forum non conveniens

9.210 There have been some US cases in which a party resisting enforcement has asserted that another court is better placed to deal with enforcing the award and has urged the enforcing court to decline enforcement on the basis of forum non conveniens. The doctrine has been applied by the US 2nd Circuit Court of Appeal in Monegasque de Reassurances SAM v Nak Naftogaz of Ukraine to dismiss a petition seeking confirmation of an arbitral award under the New York Convention.291 The Court of Appeal considered (incorrectly) that it could apply the forum non conveniens doctrine because Article III of the New York Convention permitted it to take into account ‘the rules of procedure of the territory where the award is relied upon’. In the court’s view, it was easier, more expeditious and less expensive to conduct the enforcement proceeding in the Ukraine and the Ukrainian court was better suited to resolve the legal questions raised.

Born contends that forum non conveniens is not a rule of procedure but:292

reflects substantive policies and discretionary judgments, not questions of filing fees, time requirements, or similar matters that were contemplated by Article III. Extending Article III’s provisions requiring recognition of awards in accordance with domestic ‘rules of procedure’ to permit non-recognition of awards based on a court’s assessment of substantive comity interests, U.S. and foreign regulatory policies, and similar matters distorts the Convention’s objectives and would grant national courts excessive discretion to avoid or reformulate a Contracting States[‘] obligations in particular cases in the guise of forum non conveniens analysis; that is inconsistent with the Convention’s objectives and very far from what Article III was meant to accomplish.

Moreover, the US Court of Appeal’s decision in the Nak Naftogaz case was incorrect because it did not give due consideration to the additional words in Article III of the New York Convention, which states that local rules of procedure are to be taken into account ‘under the conditions laid down in the following Articles’. In applying this phrase, attention must be drawn to the absence of forum non conveniens as an enforcement refusal ground in Article V of the New York Convention. The doctrine of forum non conveniens has no place at all in the context of refusing to enforce awards in New York Convention countries.

9.2 State responsibility for illegal court interference with award

9.213 The responsibility of a state under public international law for its court’s interference with an international arbitration or unlawful setting aside of an arbitral

285 See Yeeh, op. cit. fn 152, p. 259, at pp. 271 and 284.
288 Ibid.
289 Wang Sheng Chang, op. cit. fn 165, at p. 33.
291 See Monegasque de Reassurances SAM v Nak Naftogaz of Ukraine, 311 F 3d 488, at 498 (2d Cir 2002).
292 Born, op. cit. fn 39, p. 2402 (footnote omitted).
the conference continued its deliberations using the Dutch proposals as the basis for discussions. A Working Party was appointed and prepared a revised draft in the light of the discussions. That version, with some further modifications, was adopted by the conference on 10 June 1958 by 35 votes to none, with four abstentions.

The final text of the New York Convention was not quite as business-friendly as some lobbyists might have wished, but was nonetheless a remarkable achievement given the diversity of cultural and political interests that ultimately consented to it.

The New York Convention facilitates the recognition and enforcement of foreign arbitral awards and agreements. It is said to have a pro-enforcement bias. There are many reasons for this bias but two are paramount. First, a major object and purpose of it is to encourage and liberalise the process of recognition and enforcement of awards by decreasing the scope for obstruction by national courts and laws. The second reason is due to the principle of comity. As Justice Prakash stated in the Singapore High Court decision of Hainan Machinery Import & Export Corporation v Donald & McArthy Pte Ltd:

the principle of comity of nations requires that the awards of foreign arbitration tribunals be given due deference and be enforced unless exceptional circumstances exist. As a nation which itself aspires to be an international arbitration centre, Singapore must recognise foreign awards if it expects its own awards to be recognised abroad.

If the party against whom enforcement of an award is sought does not resist enforcement, the procedure should be very straightforward and akin to quasi-administrative proceedings. There are very limited grounds in Article V on which a party can resist enforcement.

Twenty-five states were parties to the New York Convention by the end of 1958. Since then, numerous others have signed, bringing the total number of parties at the time of writing to approximately 145. States seeking to portray themselves as players on an international commercial market, and wishing to attract foreign investment, readily adopted it. The growing number of parties meant that the New York Convention in turn expanded its geographical reach and, consequently, the advantages that it offered. It became vital to the expansion of cross-border trade and investment and caused a dramatic shift in the way that international business disputes are resolved. One reason for its success is that it had no real competitor – there was no comparable convention providing for the international recognition and enforcement of domestic court judgments.

By the time the New York Convention was completed, further interesting arbitrations were taking place in Asia. An example of a West Asian arbitration in the early post-World War Two era is the famous Aramco case of 1963. It concerned an oil concession granted to the Arabian American Oil Company ('Aramco') by the Kingdom of Saudi Arabia in 1933. Aramco purportedly reserved the contractual right to determine how it would transport the oil that it extracted, including the right to engage foreign tankers. However, in 1954 the Kingdom of Saudi Arabia granted a Saudi company a 30-year right of priority for the export of any Saudi oil. The parties agreed to refer their dispute to an arbitral tribunal seated in Geneva and chaired by George Sauser-Hall, a Swiss international arbitrator. Finding Aramco law insufficient to deal with the complexity of the concession agreement, the arbitral tribunal resorted to the parties' agreed fallback choice of law: international customs relating to the petroleum industry, general principles of law and international law. The arbitral tribunal held for Aramco. This led the Saudi Government swiftly to enact a decree prohibiting arbitration of any dispute involving Saudi state entities. The decree left Saudi Arabia virtually off the international arbitration map until it became a party to the ICSID Convention in 1980 and the New York Convention in 1994.

The growth of international arbitration since the New York Convention can be seen in various ways. ICC statistics are insightful. Viewed at 10-year intervals, the ICC Court saw 29 new arbitrations filed in the year 1960, 56 in 1970, 152 in 1980, 251 in 1990, 541 in 2000 and 817 in 2009. Furthermore, over one-third of the more than 17,000 arbitrations that the ICC has administered since 1923 were in the last 10 years, demonstrating the recent exponential growth of international arbitration.

The New York Convention's success sparked related developments at the international legal level. These included the 1965 ICSID Convention, the 1966 United Nations Commission on International Trade Law (UNCITRAL) and its 1976 Arbitration Rules and, of particular importance in the Asia-Pacific, the 1985 UNCITRAL Model Law on International Commercial Arbitration (Model Law). Each of these is discussed in turn.

2.3.2 1965 ICSID Convention

The ICSID Convention was formulated under the auspices of the World Bank to facilitate a specialised method of international dispute settlement: investment...
treaty arbitration. The claimant in this form of arbitration is a private party that is a national of one state and the respondent is a foreign state ('host state') in which the private party has invested. The treatment of the investor or its investment by the host state is typically the subject matter of the dispute.

In the first half of the 20th century, investment disputes multiplied as a result of vast land reforms, nationalisations, repudiation of government concessions in Central America, the rise of socialism from 1917, and World War One. Following World War Two, socialism expanded, with certain industries being nationalised in France and the UK for instance, former colonies sought independence and many petroleum and mining concessions were nationalised. This environment of political risk for investors prompted a movement towards the creation of instruments to protect foreign investments (e.g. the 1948 Havana Charter, the 1948 Bogota Economic Agreement and the 1949 ICC International Code of Fair Treatment for Foreign Investors). However, these early attempts were not successful.

A growing desire emerged to encourage foreign investment in developing countries so as to boost their economies. This met with resistance from many developing countries which wanted to avoid becoming economically dependent on foreign companies. These states expressed a strong desire to exercise their sovereignty over their natural resources. To address the problems associated with these issues, two Harvard professors (Louis Sohn and Richard Baxter) published in 1961 a Draft Convention on the International Responsibility of States for Injuries to Aliens. Although this document did not become a treaty, it was an important first step towards creating a legal framework for the protection of foreign investors. In 1962, the UN General Assembly adopted the famous Resolution 1803 (XVII) entitled Permanent Sovereignty over Natural Resources. It recognises the permanent sovereignty of states over their natural resources and determines that nationalisations are lawful only when appropriate compensation is paid to foreign investors whose assets are expropriated. The OECD also contributed to establishing a satisfactory legal environment for foreign investment with its 1962 Draft Convention on the Protection of Foreign Property. This Draft Convention was not accepted by less developed OECD members (such as Greece, Portugal and Turkey) because they considered some of its provisions to be heavily in favour of capital exporting interests.

The World Bank, a key player in the field of foreign investment and development, was the institution that managed to produce a groundbreaking solution that was internationally acceptable. The World Bank's staff, notably its General Counsel, Aron Broches, prepared a draft convention in 1962 embodying a unique concept – it was a convention dealing exclusively with dispute resolution procedure and did not touch on matters of substance. Four regional consultations with legal experts were conducted in Africa, the Americas, Asia and Europe to discuss this draft. In the light of these consultations, government experts, World Bank staff and its Executive Directors worked at improving the original draft. The final text of the ICSID Convention was approved by the bank's Executive Directors on 18 March 1965 and entered into force on 14 October 1966. As of mid 2010, 144 states were parties to the ICSID Convention, including most of the prominent trading nations in the Asia-Pacific region.

A remarkable innovation of the ICSID Convention was that it gave rights to investors to make direct claims against a state or state entity. Traditionally, private parties did not have standing to bring claims by themselves against states before international courts or tribunals because only states were recognised as subjects of international law. Seeking assistance from the investor's home state through the mechanism of diplomatic protection was also inadequate, partly because state to state relations involve a multitude of other political, military and economic priorities and compromises.

The prior unsuccessful attempts at concluding a convention that protected foreign investment raises a question as to why the ICSID Convention was accepted so readily by states. One of the main reasons is that it did not establish the substantive rights to be accorded to foreign investors. It established only a procedural mechanism by which disputes between foreign investors and host states could be resolved. Binding arbitration is used as a means to provide redress to foreign investors that have suffered loss or damage as a result of the acts or omissions of the host state. As discussed in Chapter 10, the substantive rights granted to investors are dealt with in separate, multilateral or bilateral investment treaties.

The ICSID Convention established the International Centre for Settlement of Investment Disputes (ICSID), which administers investment treaty arbitrations that fall within the ICSID Convention's jurisdictional scope. The ICSID Convention also deals with the annulment and enforcement of awards rendered by ICSID arbitral tribunals.

In its first 30 years, ICSID handled a humble average of one case per year but since 1995 the number has grown significantly. Most awards rendered under the auspices of ICSID are now published and have significantly contributed to the development of the law on foreign investment and to some extent international arbitration practice.
2.3.3 1966 United Nations Commission on International Trade Law (UNCITRAL)

In 1966, the General Assembly of the United Nations established UNCITRAL. It was established amid a climate of expanding world trade in the 1960s with a mandate to advance the harmonization and unification of international trade law. It originally comprised a committee of representatives of 29 states elected for a term of six years. Membership has now expanded to 60 states representing all geographic regions and principal economic and legal systems in the world. Although only member states make Commission decisions, non-member states ("observer states") and non-government organizations also participate in the drafting of UNCITRAL documents. UNCITRAL has developed a wide range of conventions, model laws and other instruments relevant to procedural and substantive aspects of international trade law. It has accordingly played a key role in the development of international arbitration.

UNCITRAL refers preparatory work to various working groups. At present there are six working groups each tasked with work in one of the areas for which UNCITRAL is responsible. Working Group II has focused on the topic of international arbitration since 2000. It comprises representatives from the 60 UNCITRAL member states. Other interested states and non-governmental organisations are invited to participate as observers. As a consequence, a wealth of knowledge and practical experience is utilised by Working Group II. At the time of writing, Working Group II has just completed its revision of the UNCITRAL Arbitration Rules. It took on this task after it had completed the 2006 version of the UNCITRAL Model Law on International Commercial Arbitration. The revision of the Model Law was a very involved process and took a number of years. Working Group II has also prepared an interpretative instrument regarding Article II(2) of the New York Convention.

2.3.4 1976 UNCITRAL Arbitration Rules

An UNCITRAL initiative of particular importance to international commercial arbitration was the 1976 UNCITRAL Arbitration Rules. These flexible rules apply as though they are incorporated into the parties' contract when parties to an arbitration agreement expressly select them. They were innovative in many ways when they were released in 1977, and have stood the test of time. They have been used for some of the largest and most politically sensitive international commercial arbitrations in history.

Certain features of the UNCITRAL Arbitration Rules soon gained substantial international acceptance and became part of a body of generally accepted principles of international commercial arbitration. They have also been a source of considerable inspiration for the rules of international arbitral institutions seeking to adopt these globally accepted principles. Some institutions adopted the UNCITRAL Arbitration Rules verbatim, granting themselves certain supervisory functions like default appointment of arbitrators, whereas others used them as inspiration for their own rules.

The UNCITRAL Arbitration Rules gained considerable exposure due to their use (in a slightly varied form) by the busiest single arbitral tribunal ever: the Iran-United States Claims Tribunal. The Iran-United States Claims Tribunal was established pursuant to the Algiers Declarations of 19 January 1981 to deal with the aftermath of the 1979 Iranian Revolution. It has dealt with literally thousands of claims involving disputes mostly between nationals of the US and the Iranian government. According to one source, "as of April 2006, the Tribunal had issued over 800 awards and decisions - a total of 600 awards (including partial awards and awards on agreed terms), eighty-three interlocutory and interim awards, and 133 decisions - in resolving almost 4,000 cases." A significant contribution of this tribunal to arbitral practice is that its decisions and orders applying the UNCITRAL Arbitration Rules to a multitude of situations were made publicly available, thus creating a body of decisions that has been described as 'a gold mine of information for perceptive lawyers'. A number of books have reported and commented on these decisions.

Just prior to this book being completed, UNCITRAL adopted the 2010 UNCITRAL Arbitration Rules. It is understood that these rules will be effective from 15 August 2010 for arbitration agreements made after that date. The 1976 UNCITRAL Arbitration Rules will however remain relevant for arbitration agreements concluded before that date, and in particular for bilateral investment treaties concluded before that date.

2.3.5 1985 UNCITRAL Model Law on International Commercial Arbitration

One of the most significant global legislative spin-offs of the New York Convention, particularly for Asia, was the Model Law. The Model Law is a suggested

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Justice Aikens’ treatment of Section 14(4) of the UK State Immunity Act 1978 in *AIG Capital Partners Inc v Kazakhstan*[^314] is also noteworthy. That provision states that the property of a foreign state’s central bank is immune from enforcement in English courts. Justice Aikens took the view that this provision ‘impinge[s] on the rights of access of parties to the enforcement jurisdiction of the UK courts’.[^315] Immediately thereafter he indicated that ‘if severe’, a restriction on the court remedies available to parties could amount to a limitation of a party’s access to court in contravention of Article 6(1) of the European Convention on Human Rights.[^316] But in the case before him, Justice Aikens held that the Section 14(4) restriction on enforcement against the property of a foreign state bank was legitimate and proportionate.[^317] There is no equivalent multilateral human rights treaty that is in force among states in the Asia-Pacific.

To be absolutely sure that a state is not immune from the enforcement or execution of an arbitral award, an express waiver of a state’s immunity from execution should be included in the arbitration agreement. Another method would be to agree with the state that it will earmark property that can be used to satisfy sums due under an award issued against a state.[^318]


[^315]: Ibid. at para 78, per Justice Aikens.

[^316]: Ibid.

[^317]: Ibid., at para 79, per Justice Aikens.

[^318]: See, e.g. Articles 18 and 19 of the 2004 UN Convention on Jurisdictional Immunities of States and Their Property. See also the recommendations for parties contracting with states in Dunham and Greenberg, op. cit. in 302, at pp. 148–149.

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### 10 Investment treaty arbitration

#### 1. Introduction

In the last decade, investment treaty arbitrations have rapidly increased in number and in significance. As its name suggests, this area of arbitration is based on treaties that enable a foreign investor to claim for loss or damage relating to its investment against a state in which that investment has been made. The three most distinctive features of this form of arbitration in comparison with international commercial arbitration are that:

1. There is at least one state (or state entity) that is a party to the proceedings, whereas international commercial arbitration does not necessarily involve a state party.

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[^315]: Ibid. at para 78, per Justice Aikens.

[^316]: Ibid.

[^317]: Ibid., at para 79, per Justice Aikens.

[^318]: See, e.g. Articles 18 and 19 of the 2004 UN Convention on Jurisdictional Immunities of States and Their Property. See also the recommendations for parties contracting with states in Dunham and Greenberg, op. cit. in 302, at pp. 148–149.

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[^2]: However, a large number of arbitrations involving state parties are not, in fact, investment arbitrations. For example, in 2009 78 of the ICC International Court of Arbitration’s 817 new cases involved a state or state entity. Moreover, arbitrations involving states are often entirely ad hoc, for example using the UNCITRAL Arbitration Rules, and/or partially administered by the Permanent Court of Arbitration in The Hague. By
(ii) The legal rights invoked generally arise out of treaties and public international law, rather than from domestic law or contracts.

(iii) In the case of ICSID arbitrations, the arbitral process is almost completely delocalised. 3

10.2 A dedicated chapter on investment treaty arbitration is included in this book not only because of its growing importance and frequency of use but also because it provides a wealth of comparative material for international commercial arbitration.

10.3 This chapter proceeds with an overview of international investment law in Section 2. Investment treaties and their dispute settlement clauses are discussed in Section 3. Various features of ICSID and its jurisdictional requirements are examined in Section 4. The chapter then deals with the advantages, disadvantages and innovative features of the ICSID Convention in Section 5. Substantive aspects of international investment law are briefly surveyed in Section 6. Section 7 outlines the remedies available under investment treaties. This chapter concludes with a discussion of the annulment and enforcement of ICSID awards, respectively, in Sections 8 and 9.

2 International investment law

10.4 The legal framework of modern international investment law has been established primarily through treaties. They take the form of BITs or multilateral treaties. 4 These treaties aim to protect and promote foreign investments as well as to develop the economy of the state in which the investment is made (the host state). The framework strives to increase inflows of foreign direct investment into countries (particularly developing nations) by:

(i) requiring that the host state treat investors in accordance with international standards; and

(ii) granting foreign investors the right to institute an international arbitration against the host state if these standards are not met.

10.5 Increasingly, international commercial lawyers need to understand these rights and protections, whether or not their clients engage directly with the host state or its organs. In other words, if host state action negatively affects a foreign investor or its investment, rights to commence an arbitration that state comparison, ICSID's total number of new cases for 2009 was 25, i.e. less than half of the ICC's 2009 case load for states. It should also be noted that, although rare, arbitrations under investment treaties may involve a state claiming against another state.

3 Delocalisation is explained in Chapter 2, Section 5.


may be granted to the investor under an investment treaty even in the absence of a directly negotiated arbitration agreement between them.

The Asia-Pacific region has been associated with a number of significant developments in this area of law. 6 Pakistan was a party to the first bilateral investment treaty (BIT) to be signed. 7 One of the earliest and longest running ICSID cases involved an Asian state. 8 A number of jurisprudentially important investment treaty awards relate to investments made in this region. And China, having concluded upwards of 120 BITs, is second only to Germany in the number of BITs any single country has concluded. 9 Notwithstanding this strong connection with international investment treaties, the Asia-Pacific has not yet seen as many investment treaty arbitrations as would have been expected when compared with other regions of the world. 10

3 Investment treaties

BITs are treaties signed between two states pursuant to which each offers substantial standards of treatment to private investors that originate from the other state. A vast proportion of BITs also contain dispute settlement clauses (discussed below) to resolve disputes between the investor and the host state. In terms of numbers, upwards of 2700 BITs now exist. 11 UNCTAD has reported that by the end of 2008, states from Asia and Oceania had signed 41% of all BITs, i.e. a total of 1112. 12


8 Amco Asia Corp v Republic of Indonesia, ICSID Case No. ARB/81/1. The case was registered in 1981 and a final decision in that case (a second annulment decision) was issued in 1992.


10 See I Nottage and R Weeramantry, 'Investment Arbitration for Japan and Asia: Five Perspectives on Law and Practice', Sydney Centre for International Law, Working Paper No. 21, March 2009, at www.law.usyd.edu.au/scl/WorkingPapers.html. Investment claims have been brought against several states from the Asia-Pacific region, including Bangladesh, India, Indonesia, Malaysia, Myanmar, Mongolia, New Zealand, Pakistan, the Philippines, Sri Lanka, Thailand and Vietnam. These claims include those instituted under the ICSID Convention as well as non-ICSID arbitrations. For a list of most of these cases, see Savage, 'Investment Treaty Arbitration' op. cit, fn 6, at p. 477. For a list of cases in which the claimants are from the Asia-Pacific region, see Nottage and Weeramantry, ibid., at Appendix B.


12 UNCTAD, ibid., p. 2.
10.8 As mentioned previously, the first ever BIT signed was the 1959 Pakistan-Germany BIT. However, the number of BITs entered into during the following decade was modest - fewer than eight BITs were signed per year during that period. Thereafter, the numbers of BITs gradually increased until the 1990s, when a dramatic rise took place. In that decade, an average of 146 BITs were signed each year. The upturn in BIT numbers during the 1990s has been attributed to the end of the Cold War, the movement of many Central and Eastern European nations from socialist to free market economies and the rapid economic development of East Asian countries. From an Asian standpoint, the recent growth of BITs has led Dolzer and Schreuer to observe:

The most significant trends in the evolution of BIT practice in the past decade concerns the negotiation of BITs by Asian states. China has concluded 117 treaties between 1982 and 2006. India concluded its first BIT in 1994, had already entered into 26 BITs by 1999, and in 2006 was a party to 56 treaties. Japan has decided to join the practice of other OECD countries and in 2006 was a party to 12 investment agreements.

10.9 BITs were originally signed between developed states and developing states, with the intention that this would promote the flow of investment from the former to the latter. More recently, an increasing number of BITs have been signed between developing countries. Additionally, case law shows that investor claimants are now not simply from developed countries. A number of cases can be found in which investors from developing countries are invoking BITs to institute claims against developed or developing countries.

10.10 Free trade agreements (FTAs), unlike BITs, are treaties that are not solely dedicated to investment protection. For example, the 2009 Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (the ASEAN-ANZ Treaty) contains 18 chapters on a diverse range of subjects, including customs procedures, electronic commerce, intellectual property, trade in goods and movement of persons. Only Chapter 11 is devoted to investment protection. Combined trade and investment agreements often contain investment protection provisions similar to those found in BITs. At the end of 2007, 254 of these treaties were in existence and at least 75 more were under negotiation.

A vital element of investment treaty arbitration is the dispute settlement clause found in investment treaties. It grants investors a right to institute arbitration proceedings directly against a state. This type of clause represents a change from traditional international law practice whereby an investor was generally dependent on its home state to pursue a diplomatic protection claim on behalf of the investor. As will be seen below, the latter system of dispute resolution has many drawbacks for the investor.

Several different options may be provided in investment treaty dispute settlement clauses. Article 21(1) of Chapter 11 of the ASEAN-ANZ Treaty contains a good sample of the alternatives:

A disputing investor may submit a claim... at the choice of the disputing investor:
(a) where the Philippines or Viet Nam is the disputing Party, to the courts or tribunals of that Party, provided that such courts or tribunals have jurisdiction over such claim; or
(b) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the disputing Party and the non-disputing Party are parties to the ICSID Convention; or
(c) under the ICSID Additional Facility Rules, provided that either of the disputing Party or non-disputing Party are a party to the ICSID Convention; or
(d) under the UNCITRAL Arbitration Rules; or
(e) if the disputing parties agree, to any other arbitration institution or under any other arbitration rules, provided that resort to one of the fora listed in Subparagraphs (a) to (e) shall exclude resort to any other.

The phrase that follows sub-para (e) is frequently referred to as a 'fork in the road' provision. It is not as simple as to apply as it first appears. Whether the election of one option precludes recourse to another may depend on a number of factors, including the legal nature of the claims made in the different fora (e.g. were they both treaty-based claims?) and the parties involved in the two proceedings (e.g. were they identical in both instances?)

Usually, investment treaty dispute settlement provisions would be conditional upon the expiry of a certain period of time for amicable settlement. For example,

in Chapter 11 of the ASEAN-Australia and New Zealand (ANZ) Treaty, Article 19 requires amicable resolution through consultation but if the dispute cannot be settled amicably within 180 days, Article 20 permits the investor to refer the dispute to arbitration.\textsuperscript{25}

4 The International Centre for Settlement of Investment Disputes (ICSID)

4.1 Background and structure of ICSID

A short history of the ICSID Convention is provided in Chapter 1, Section 2.3.2. ICSID is an international institution established pursuant to Article 1 of the ICSID Convention. It is based in Washington DC, USA. The centre offers special, autonomous procedures for administering investment arbitrations between a state (i.e. a government) or state entity and a foreign private investor. ICSID was created as an independent international organisation\textsuperscript{26} but it is structurally linked to the World Bank. The bank’s governors sit ex officio on ICSID’s Administrative Council (described below), the Chairman of the Administrative Council is the World Bank’s President and the ICSID Secretariat (described below) is funded through the World Bank.\textsuperscript{27}

The two constituent bodies of ICSID are its Administrative Council and Secretariat. The Administrative Council is composed of all ICSID Convention contracting states. Essentially, it functions as the governing body of ICSID, possessing the power to adopt and approve the Centre’s budget, administrative regulations and rules of arbitral procedure.\textsuperscript{28} The ICSID Secretariat, on the other hand, provides the day-to-day administrative and support functions for arbitrations, much like most arbitral institutions.

Initially, the number of case registrations at ICSID was low. In the five years that followed the ICSID Convention’s entry into force in 1966, no case was registered with ICSID\textsuperscript{29} and between 1966 to 1996, only 35 ICSID cases were registered – an average of approximately one per year.\textsuperscript{30} Today, the picture is fundamentally different. From 1996 through 2005, 156 ICSID cases were registered and in November 2009, a total of 121 cases were pending before ICSID.\textsuperscript{31} Several more investment treaty arbitrations are pending at other arbitral institutions.\textsuperscript{32} Two major reasons for this rise in investment treaty arbitration are the proliferation in the 1990s of bilateral investment treaties (most of which contained ICSID dispute settlement clauses) and Argentina’s financial crisis.\textsuperscript{33}

4.2 ICSID jurisdiction

Article 25(1) of the ICSID Convention is central to ICSID arbitrations. It defines ICSID’s jurisdiction in the following terms:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally . . .

The key jurisdictional criteria under this provision relate to:

(i) the nature of the dispute (rustione materie) – it must be legal and arise out of an investment;
(ii) the parties (rustione persone) – the claimant must be a national of an ICSID contracting state and the respondent must be another ICSID contracting state; and
(iii) the consent of the parties to have the dispute resolved in accordance with ICSID procedure.

Jurisdictional issues pertaining to the meaning of an investment, the nationality of the claimant and the consent of parties to resolve disputes under the ICSID Convention will be addressed in the following section. ICSID’s Additional Facility will also be discussed, which may be used for certain claims falling outside the scope of Article 25.

4.3 Requirement of an ‘investment’

As this book generally indicates, international commercial arbitration may be utilised to resolve a broad range of disputes.\textsuperscript{34} In contrast, the subject matter of the disputes that may be resolved in investment treaty arbitrations is far more circumscribed. Article 25(1) of the ICSID Convention limits the jurisdiction

\textsuperscript{25} This is analogous to multi-tier dispute resolution clauses discussed in Chapter 4, Section 9.4 of this book. Some ICSID tribunals have not required strict compliance with these negotiation periods. See, e.g., SGS Société Générale de Surveillance S.A. v Pakistan, 6 August 2003, 8 ICSID Reports 406, at para 184 and Rejandr Insat Turizm Ticaret Ve Sanayi A.S. v Pakistan, 14 November 2005, at para 106. But see Generation Ukraine Inc v Ukraine, 16 September 2003, 10 ICSID Reports 240, at para 14.3.

\textsuperscript{26} Article 18 of the ICSID Convention states: ‘The Centre shall have full international legal personality. The legal capacity of the Centre shall include the capacity: (a) to contract; (b) to acquire and dispose of movable and immovable property; (c) to institute legal proceedings.’

\textsuperscript{27} See ICSID Convention Articles 2, 4, 5; and The World Bank, A Guide to The World Bank, 2003, p. 44.


\textsuperscript{29} Holiday Inn S.A. v Morocco (ICSID Case No. ARB/72/1) was the first case to be registered at ICSID on 13 January 1972. It was settled and discontinued on 17 October 1978.


\textsuperscript{32} Two of the other arbitral institutions that administer a number of investment treaty arbitrations are the Stockholm Chamber of Commerce and the ICC International Court of Arbitration. See UNCITRAL, Latest Developments in Investor State Dispute Settlement, EA Monitor No. 1, 2009, UN Doc. UNCITRAL/WEB/D/IA/IIA/2009/6, p. 2. The non-ICSID investment treaty arbitration figures are uncertain due to their confidential nature.

\textsuperscript{33} More than 40 investment treaty arbitrations were instituted against Argentina as a result of the government’s response to the Argentine financial crisis of 2000–2001.

\textsuperscript{34} See generally Chapter 4, Section 8 in this book.
of ICSID arbitrations to 'legal disputes arising directly out of an investment' between an ICSID contracting state and an investor who is a national of a different ICSID contracting state. To exercise jurisdiction over ICSID claims, many ICSID tribunals have had to determine whether an 'investment' existed within the meaning of Article 25. No definition of the term is provided in the Convention. In the words of the World Bank’s Executive Directors: 35

This statement indicates that it was left to contracting states to define in separate instruments the scope of an investment for the purposes of the Convention. Nonetheless, and despite the fact that almost every bilateral or multilateral investment treaty expressly defines an 'investment', the question as to what constitutes an 'investment' for the purpose of Article 25 has led to considerable debate. A number of ICSID tribunals have, independently of any definition of 'investment' in the BIT invoked, assessed that term on the basis of four criteria. 36 A leading case in this regard is Salini v Morocco in which it was said that: 37

The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and participation in the risks of transaction. In reading the [ICSID] Convention’s preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.

A different position was taken in Malaysian Historical Salvors Sdn Bhd v Malaysia, 38 which gives importance not to the meaning of 'investment' in Article 25 but to the definition of an investment as found in BITs. 39 The majority of the ‘ad hoc committee’ there annulled the original tribunal’s award because it failed to take into account the ICSID Convention drafters’ intention that ‘investment’ in Article 25 was to be defined by states in their instrument providing recourse to ICSID, e.g. a BIT. In contrast to Salini v Morocco it considered that the ICSID Convention’s drafters rejected imposing any specific duration or pre-set monetary value in respect of the investment. It also held that the need for an economic contribution to the host state was not a jurisdictional condition that would exclude small contributions from the coverage of the ICSID Convention.

36 These criteria have been based in large measure on Schreuer’s understanding of the meaning of investment. See Schreuer, op. cit. fn 28, p 140; and Delaere and Schreuer, op. cit. fn 1, p 68.
37 Decision on Jurisdiction, 23 July 2001, 6 ICSID Reports 400, at para 52.
38 Decision on the Application for Annulment, 16 April 2009.
39 BITs usually define ‘investment’ broadly, such as including ‘all assets’ or ‘every kind of investment’ in the territory of one contracting party by nationals of another contracting party. In relation to BITs signed by South Asian states, see P Ranjan, ‘Definition of Investment in Bilateral Investment Treaties of South Asian Countries and Regulatory Delegation’, (2009) 26 Journal of International Arbitration 217.

Also relevant to this discussion is the view of some ICSID arbitral tribunals that the term ‘investment’ is different from ‘ordinary commercial transactions,’ for example, a contract for the sale of goods. They have held that disputes as to the latter fall outside the scope of the ICSID regime. 40 Concrete examples of ‘investments’ held to fall within the scope of Article 25 of the ICSID Convention include the construction of dams and highways, the running of hotels, the provision of pre-shipment inspection services, shareholdings in privatised government entities and resources spent to salvage a shipwreck.

A final point to be made here is that certain BITs signed by countries in the Asia-Pacific region contain not only a descriptive definition of protected investments, e.g. ‘every kind of asset’, but additionally include an added requirement that those investments must be invested in government ‘approved projects’ or be approved by a designated authority. 41 In Grulin v Malaysia, 42 the investor claimed under the BIT between Malaysia and the Belgo-Luxemburg Economic Union, which required pursuant to Article 1(3) that the ‘investment’ be ‘invested in a project classified as an ‘approved project’ by the appropriate Ministry in Malaysia’. The arbitral tribunal held that it lacked jurisdiction to hear the claim because the investment – securities listed on the Kuala Lumpur Stock Exchange – was not duly authorised as an ‘approved project’. 43

4.4 Nationality

Nationality is important for ICSID arbitration for two principal reasons. First, pursuant to Article 25(1) the claimant’s nationality must be that of a state that is a party to the ICSID Convention. Second, if a claimant seeks to rely on consent to ICSID arbitration under a BIT, it ordinarily must have the nationality of one of the two state parties to that bilateral treaty.

If claimants are individuals, their nationality will usually be determined by the law of the country of which the claimant is (or claims to be) a national. But the question of nationality may not be straightforward, particularly where the claimant has more than one nationality. For example, under some national laws an individual may lose his or her original nationality if another nationality is subsequently acquired. 44 Also, under Article 25(2)(a) of the ICSID Convention, claimants are not permitted to institute an ICSID arbitration if they have the nationality of both the home state and host state.

The nationality of corporations is usually determined by their place of incorporation or registered office or, alternatively, the effective seat of the business

42 Philippe Grulin v Malaysia, Final Award, 27 November 2000, 5 ICSID Reports 484.
43 Ibid., at pp 507-508, para 27.5.
44 See, e.g. SoufPhati v United Arab Emirates, Award on Jurisdiction, 7 July 2004, 12 ICSID Reports 158.
Where a BIT provides that the nationality of a company is to be determined by incorporation, arbitral tribunals have generally denied applications to pierce the corporate veil and look at the nationality of its shareholders or ultimate owners. Company shareholders are also usually entitled to institute arbitration proceedings under BITs. Article 25(2)(b) of the ICSID Convention and some BITs also provide that a 'national' of a home state may be a legal entity that is incorporated in the host state but is controlled by nationals of the home state.

Corporations have been known to locate themselves deliberately in a particular country for the purpose of obtaining benefits or protection under a BIT or other treaty. This strategy appears to have gained general acceptance in international investment law. The arbitral tribunal in Agua del Tunari SA v Bolivia, for example, has said:

... it is not uncommon in practice, and—absent a particular limitation—not illegal to locate one's operations in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for example, of taxation or the substantive law of the jurisdiction, including the availability of a BIT.

... The language of the definition of national in many BITs evidences that such national routing of investments is entirely in keeping with the purpose of the instruments and the motivations of the state parties.

Accordingly, the arbitral tribunal rejected Bolivia's contention that the 'migraton' of the relevant company from one state to another constituted an abuse of corporate form or fraud.

4.5 Choice of law

Article 42(1) of the ICSID Convention deals with the applicable substantive law:

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

The principle of party autonomy concerning the choice of applicable law as enunciated in Article 42(1) is consistent with international commercial arbitration practice. If the parties have not chosen the applicable law, the arbitral tribunal must apply the law of the state party to the dispute and 'such rules of international law as may be applicable.' Although there is debate as to the meaning of the latter phrase, it appears that both the host state's law and international law may be applicable where lacunae exist in the choice of law. And where there is a conflict between those two bodies of law, international law seems to prevail over the domestic law. The arbitral tribunal in LG&E Energy Corp v Argentina drew attention to the reasoning behind this point when it stated:

International law overrides domestic law when there is a contradiction since a State cannot justify non-compliance of its international obligations by asserting the provisions of its domestic law.

4.6 Consent to ICSID arbitration

Similar to international commercial arbitration, ICSID arbitration is available only if all parties have consented to it. Article 25(1) of the ICSID Convention speaks of 'consent in writing'. As we saw in Chapter 4, written consent to international commercial arbitration usually arises from a clause in a contract or from an independent arbitration agreement signed by all parties stipulating that any or certain disputes will be submitted to arbitration. In investment arbitration, agreements submitting present or future disputes to ICSID arbitration concluded directly between the investor and host state are likewise recognised as consent within the meaning of Article 25 of the ICSID Convention, so long as all the jurisdictional criteria are satisfied.

Alternatively, the claimant and respondent need not be privy to an arbitration agreement as is traditionally the case. In a claim made under an investment treaty, the ICSID system has developed a consensual basis for arbitration that does not fall within the usual understanding of mutual 'consent in writing' to arbitration. No direct agreement between the investor and the host state is required under the ICSID regime. Rather, consent is achieved in two separate acts. The host state may expressly consent through its domestic legislation or in an investment treaty dispute settlement clause (as discussed above). The investor's consent
is deemed to be provided at a later point in time, namely, through its act of instituting ICSID proceedings against the host state based on that domestic law or dispute settlement clause. The institution of a claim completes the ‘written’ consent required for ICSID arbitration. As the arbitral tribunal in Generation Ukraine v Ukraine explained: 54

it is firmly established that an investor can accept a State’s offer of ICSID arbitration contained in a bilateral investment treaty by instituting ICSID proceedings. There is nothing in the BIT to suggest that the investor must communicate its consent in a different form directly to the State . . .

. . . . It follows that the Claimant validly consented to ICSID arbitration by filing its Notice of Arbitration at the ICSID Centre.

This particular consensual process has famously been described by Jan Paulsson as ‘arbitration without privy’. 55

4.7 Additional facility

Aside from arbitration conducted under the ICSID Convention and the ICSID Rules, it is worth adding that since 1978 a set of Additional Facility Rules authorise the ICSID Secretariat to administer disputes between states and foreign nationals that fall outside the jurisdictional ambit of the ICSID Convention. Often, cases brought under the Additional Facility Rules are ones in which either the investor’s home state or the host state is not a party to the ICSID Convention. 56

An important point to note is that proceedings under the Additional Facility Rules are not governed by the ICSID Convention. Consequently, Additional Facility arbitrations do not benefit from the advantages of arbitration conducted under the ICSID Convention, particularly the Convention’s exclusion of domestic court involvement and its annulment and enforcement mechanisms (addressed below). The Additional Facility is frequently used to determine investor-state arbitrations under the North American Free Trade Agreement because, unlike the US, Canada and Mexico are not parties to the ICSID Convention. 57

5 Assessment of the ICSID Convention

This section takes a closer look at the advantages and disadvantages of the ICSID Convention, particularly from the point of view of investors, and also highlights some of the Convention’s innovative features.

5.1 Advantages

Foreign investment usually requires the commitment of substantial amounts of capital for a long period of time, without any return on the investment for years. Such long-term ventures in foreign countries carries concomitant political risks for the investor, particularly the potential for expropriation of property rights or other negative governmental interference. The architects of the ICSID Convention believed that its arbitration mechanism could provide a safeguard against such risk and enhance the security of foreign investments.

In addition to providing investors with direct rights of arbitration against host states, thereby bypassing the need to seek diplomatic protection, the ICSID Convention grants several advantages to investors, particularly when compared with the practice and procedure common to international commercial arbitration. 58

The advantages of ICSID arbitration include:

(i) an insulated procedural system that is the most delocalised form of arbitration in the world; 59
(ii) the right of investors to file arbitration claims directly against the host state – this may exist even if it has not concluded an arbitration agreement or has no working relationship with the government of the host state;
(iii) the application of international substantive rights and protections, rather than those found under domestic law; and
(iv) an enforcement procedure under which the losing party cannot invoke any ground, such as under Article V of the New York Convention, to resist enforcement.

5.2 Disadvantages

ICSID arbitration also has disadvantages for certain investors when compared with international commercial arbitration. 60 One of the more obvious drawbacks for investors desiring confidentiality is the fact that ICSID awards are usually made public. 61 Another drawback for investors may be the 2006 amendment to the ICSID Arbitration Rules empowering ICSID arbitral tribunals to allow a ‘non-disputing party’ to submit written submissions regarding matters within the scope of the dispute. Further, given ICSID’s jurisdictional limitations, which

54 Generation Ukraine Inc v Ukraine, 16 September 2003, 10 ICSID Reports 240, at paras 12.2 and 12.3.
56 See Article 2 of the Additional Facility Rules. This Article also permits arbitration or conciliation proceedings to be administered by the ICSID Secretariat in relation to legal disputes that do not arise directly out of an investment, provided that either the State party to the dispute or the State whose national is a party to the dispute is a Contracting State . . .
57 Canada signed the ICSID Convention on 15 December 2006 but has not ratified it. Mexico has not signed the Convention.
59 It is far more delocalised than international commercial arbitration between private entities that has been the main subject of this book. For discussion of delocalisation in this context see Chapter 5 Section 5. For instance, it is not possible under any circumstances for a domestic court to set aside an ICSID award or play any role in an ICSID arbitration.
61 Even though Article 48(5) of the ICSID Convention provides that the ‘Centre shall not publish the award without the consent of the parties’, in practice, most decisions are made public. Additionally, in 2006, the ICSID Arbitration Rules were amended to require that the centre promptly include its publications excerpts of the legal reasoning of the Tribunal’ (Article 48(4)).
subject to the annulment process. \(^65\) The length of time to resolve a dispute if all (or even some) of these procedures are invoked may also be inordinate.

5.3 Innovative features

The ICSID Convention introduced a number of innovative features into arbitrations between investors and states. This section will deal with three: the exclusion of diplomatic protection, the self-contained procedure established by the ICSID Convention and the absence of a requirement to exhaust domestic remedies. Two other major innovations – concerning the annulment and enforcement of ICSID awards – are discussed in the final two sections of this chapter.

5.3.1 Exclusion of diplomatic protection and investor’s direct rights

Traditionally, investors depended on their home states to pursue claims on their behalf against host states before an international court or tribunal. This process, known as diplomatic espousal or protection, has been circumvented by the ICSID Convention. The International Court of Justice summarised the difficulties individuals or corporations face under the practice of diplomatic protection in the Barcelona Traction case. \(^66\)

The Court would here observe that, within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. …

The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case. Since the claim of the State is not identical with that of the individual or corporate person whose cause is espoused, the State enjoys complete freedom of action. \(^67\)

A monumental shift away from these difficulties has been facilitated by the ICSID Convention’s grant to investors of direct arbitration rights against states, even if the investor has no direct agreement with that state. \(^68\) Aggrieved foreign investors who can harness rights under the ICSID Convention (or for that matter under most non-ICSID dispute settlement provisions found in modern investment treaties) are no longer subject to the considerable limitations traditionally inherent in a state’s exercise of diplomatic protection. \(^69\)


\(^63\) See, e.g. Lauder v Czech Republic, Final Award, 3 September 2001, 9 ICSID Reports 62; and CME Czech Republic BV v Czech Republic, Partial Award, 15 September 2001, 9 ICSID Reports 121. These were two investment treaty arbitrations brought separately by Mr Lauder in London under the US-Czech Republic BIT and his investment vehicle (CME) in Stockholm under the Netherlands-Czech Republic BIT. The dispute and factual issues were essentially the same in both cases but the outcomes were different. For example, although the two BIT provisions on expropriation were similar, the CME arbitral tribunal held the Czech Republic responsible for expropriation whereas the Lauder arbitral tribunal did not. See also the divergent findings by different arbitral tribunals in relation to Argentina’s plea of necessity as a ground to exempt it from liability for its acts during the 1999-2002 Argentine financial crisis in LG&E Energy Corp v Argentina, Decision on Objections to Jurisdiction, 30 April 2004, 11 ICSID Reports 414, at paras 225-261 and CMS Gas Transmission Company v Argentina, Award, 15 May 2005, (2006) 44 International Legal Materials 1205, at paras 353-378. See also CMS Gas Transmission Company v Argentina, Annulment Proceeding, 25 September 2007, at paras 110-126. The SOS cases discussed in Section 6.7 have gained fame for taking different approaches to similar BIT provisions.


\(^66\) Barcelona Traction, Light and Power Company Ltd (Belgium v Spain), Judgment, (1970) ICJ Reports 3, at pp. 64, paras 78 and 79. See also Dolezal and Schreuer, op. cit. fn 1, pp. 211-212.

\(^67\) If the investor has a contract with a state that includes an arbitration agreement, private commercial arbitration also provides a solution to this problem – the arbitration agreement is considered to constitute an implied waiver of state immunity from suit. See P Dunham and S Greenberg, ‘Balancing Sovereignty and the Contractor’s Rights in International Construction Arbitration Involving State Entities’, (2006) 23(2) International Construction Law Review 130, at p. 147. This is to be contrasted with waiver of immunity from execution. See Section 9 below.
In addition to granting investors direct access to arbitration against states, the ICSID Convention expressly excludes diplomatic protection unless a respondent state fails to comply with an ICSID award. On this point, Article 27(1) of the Convention provides:

No Contracting State may give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this [ICSID] Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

5.3.2 ICSID’s self-contained procedure

In contrast with other arbitral institutions, ICSID procedure is self-contained and insulated from domestic court involvement during the arbitral process. This should be compared to non-ICSID forms of investment treaty arbitration, which are subject to domestic court supervision.68

As we have seen in previous chapters, laws and arbitral rules enable domestic courts in certain circumstances, especially at the seat of arbitration, to intervene in international commercial arbitrations. This has benefits and drawbacks. Courts can offer assistance, for example issuing subpoenas to compel recalcitrant witnesses to attend or ordering the production of documents. On the other hand, domestic courts may sometimes interfere in the arbitral process if one party to the arbitration uses the courts to frustrate the arbitration. In sharp contrast, ICSID procedure is free from such domestic court interference. As Professor Schreuer has observed, the seat of arbitration “has little legal relevance.”69

The insulation of ICSID arbitral procedure from the influence of domestic courts is achieved through a number of provisions in the ICSID Convention. Under the ICSID Convention regime, domestic courts have no power to set aside ICSID awards. The only means to challenge an ICSID award is to invoke ICSID’s internal annulment process in accordance with ICSID Convention Article 52. Any default appointment of arbitrators is made by the chairman of the ICSID’s Administrative Council pursuant to Article 38 of the Convention. The chairman also has the power under Article 58 to disqualify arbitrators if they are challenged and the other arbitral tribunal members cannot agree on the challenge or if the challenged arbitrator is a sole arbitrator. Moreover, under Article 54, ICSID awards are automatically enforceable in a contracting state’s domestic courts without any possibility of objection to enforcement as is permissible under Article V of the New York Convention. None of these internal features of the ICSID arbitration process are granted to arbitrations conducted under the Additional Facility Rules or non-ICSID investment treaty arbitrations.

6 Substantive rights and protections under investment treaties

This section contains a short overview of the main types of substantive rights or protections that a host state offers to a foreign investor under investment treaties. One problem with these rights or protections is that they are expressed in general terms (e.g. “fair and equitable treatment”), which makes them susceptible to a

68 The following are examples of domestic court decisions that involve court review of non-ICSID investment treaty arbitral awards: Czech Republic v CME Czech Republic BV, Svea Court of Appeal (Sweden) (2000), 9 ICSID Reports 439; and United Mexican States v Metalclad Corporation, British Columbia Supreme Court (2001) BCLR (3rd) 359, 5 ICSID Reports 236.

69 Schreuer, op. cit. fn 28, p. 1242.
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69 Schreuer, op. cit. fn 28, p. 1242.

However, domestic courts may have a role to play in relation to provisional measures in ICSID arbitrations. Rule 39(6) of the 2006 version of the ICSID Arbitration Rules enables domestic courts to order provisional measures if the parties have so agreed in the document providing consent to ICSID arbitration.

5.3.3 Exhaustion of domestic remedies not required

Under general principles of international law, the submission of a private party’s claim against a state before an international tribunal (by way of diplomatic protection or otherwise) requires that party first to exhaust the domestic legal remedies available to it in the respondent state’s domestic courts or tribunals. The ICSID Convention reverses this traditional international law position; it presumes that parties to the Convention have waived the requirement of exhaustion of domestic remedies unless otherwise indicated. 70 Article 26 of the ICSID Convention provides:

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.

Although the language of Article 26 permits states to require that domestic remedies be exhausted, most BITs do not contain such a requirement. The absence of a need to pursue domestic remedies presents the investor with significant advantages. 71 Some investment treaties may, however, require investors first to seek redress in the courts or administrative tribunals of the host state for a certain duration of time. 72

6 Substantive rights and protections under investment treaties

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70 There may be exceptions to this general position, for example, where a denial of justice is alleged against a state, claimants have been required to show that all legal appeals available in the respondent state were made. See Lown v United States, Award, 26 June 2003, 42 International Legal Materials 540, at paras 142–217. See also the commentary on this decision by R Weeramantry in www.investmentsclaims.com.
71 Some of the significant advantages of the ICSID system, in comparison with domestic legal systems, is set out in Section 5.1 above.
72 See, e.g. Article 8 of the Agreement between the Government of the Republic of Korea and the Government of the Republic of Argentina on the Promotion and Protection of Investments, signed at Seoul on 17 May 1994 and entered into force on 24 September 1996. Pursuant to Article 8(3) a dispute may be submitted to international arbitration only in the following circumstances: (a) if one of the parties so requests, where, after a period of eighteen (18) months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision, or where the final decision has been made but the parties are still in dispute; (b) where the Contracting Party and the investor of the other Contracting Party have so agreed.
range of different interpretations. A significant part of a given case will therefore turn on the facts at issue but may also depend on the arbitral tribunal’s approach to interpretation of the treaty provisions and its attitude toward other arbitral awards that have determined similar issues.

10.56
Before discussing substantive rights, a short point on the international law of state responsibility needs to be made. A state is not automatically responsible for any conduct that is in breach of that state’s investment treaty. That conduct must also be attributable to the state. The acts of state organs, such as police, army or the judiciary, are attributable to states without much controversy. Private citizens’ acts may also be attributable to states in certain circumstances, for example, where they are acting under directions of the state or the state acknowledges that conduct as its own.73 A state may also assert certain defences, such as necessity and force majeure.74

6.1 Expropriation

10.57
International law recognises that a host state may under certain conditions legitimately expropriate foreign property. Investment treaties confirm this position. The legality of the expropriation depends on whether a state’s conduct is:75
(i) for a public purpose;
(ii) non-discriminatory;
(iii) in accordance with due process principles; and
(iv) accompanied by prompt, adequate and effective compensation.

10.58
If one or more of these conditions are not satisfied, the conduct of the state may constitute an unlawful expropriation that violates the investment treaty in question.

10.59
Expropriations are classified into two groups: direct and indirect. The former involves the physical seizure of the foreign investor’s property or transfer of the legal title to that property to a person who is not the rightful owner. In an indirect expropriation, the title of the property may remain in the name of the investor but its use and enjoyment is deprived or significantly affected. This latter form of expropriation is more prevalent though it is usually more difficult to prove than the direct taking of property. A frequently quoted award that examined indirect expropriation is Metalclad Corporation v Mexico, in which the arbitral tribunal observed that expropriation could include:76

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74 See, e.g. Articles 23 and 25 of the ILC Articles on State Responsibility.

75 See, e.g. (with slight variations) Article 11(1) of the ASEAN Agreement for the Promotion and Protection of Investments, signed on 19 December 1987, (1988) 27 International Legal Materials 612; Article 4 of the China Model BIT and Article 6 of the US Model BIT. These Model BITs are reproduced in Dolzer and Schreuer, op cit fn 1, Annoes 4 and 8.

76 Metalclad Corporation v Mexico, Award, 30 August 2000, 5 ICSID Reports 209, at para 103. It is sometimes asserted that this test for indirect expropriation is more lenient than what is referred to as the more ‘orthodox’ approach. See, e.g. M Ewing-Chow, Thesis, Antithesis and Synthesis: Investor Protection in BITs, WTO and covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.

Nonetheless, a good deal of debate still exists as to the circumstances that may constitute an unlawful expropriation. Finally, it should be mentioned that in addition to assets, contractual rights may also be expropriated, e.g. the contractual right to develop a housing project.77

6.2 Fair and equitable treatment

6.2.1
Although fair and equitable treatment is a substantive provision found in most investment treaties, it has no authoritative definition. An example of the term is found in Article III of the 1988 Australia-China BIT,78 which provides that ‘[a] Contracting Party shall at all times . . . ensure fair and equitable treatment in its own territory to investments and activities associated with such investments’. The content of this type of treatment has tended to evolve over time, particularly through the jurisprudence of investment treaty arbitration awards. The general nature of this provision enables it to be invoked in a broad range of circumstances. One of the most detailed expositions of fair and equitable treatment was articulated in Tecnicas Medioambientales Tecmed SA v Mexico:79

The Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparent in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereafter, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also

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79 Tecnicas Medioambientales Tecmed SA v Mexico, Award, 29 May 2003, 10 ICSID Reports 133, (2004) 43 International Legal Materials 133, at para 154. See also the test articulated in Metalclad Corporation v Mexico, Award, 30 August 2000, 5 ICSID Reports 209, at para 76, in which the tribunal discussed NAFTA’s fair and equitable treatment standard by taking into account the reference to transparency in Article 102(2) of NAFTA.
expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.

Some argue that this is a standard that most states would find difficult not to contravene. Generally, however, concepts of legitimate expectations, transparency, predictability, consistency and denial of justice have become prominent criteria in determining fair and equitable treatment. Given the broad nature of this standard of treatment, its breach is largely dependent on the specific facts and circumstances of each case.

6.3 Full protection and security

A common example of a full protection and security (FPS) protection provision is contained in Article 2(2) of the 1994 Cambodia-Malaysia BIT, which provides that ‘Investments of investors of either Contracting Party . . . shall enjoy full protection and security in the territory of the other Contracting Party’.

The traditional understanding of this standard of treatment was that it protected a foreign national from physical violence directed against his or her person or property. The standard does not create strict liability on the part of a state for any physical harm suffered by an investor or an investment. It establishes a state’s responsibility in circumstances where it fails to exercise due diligence and take reasonable measures to protect the affected investor from acts of others. A well-known regional case in this respect is Asian Agricultural Products Ltd v Sri Lanka. In that case, Sri Lankan government security forces destroyed a shrimp farm during a military operation against rebel forces. Although the arbitral tribunal was not able to determine whether the rebels or the government forces were responsible for the destruction, Sri Lanka was held responsible for failing to provide adequate precautions to prevent the destruction from taking place.

As is the case with a number of these investment treaty standards, the meaning of FPS has evolved over the years. Arbitral tribunals now consider that it extends beyond physical security and applies to intangible assets. This standard of treatment may therefore be breached even if no physical violence or damage has been incurred.

6.4 Arbitrary or discriminatory treatment

To some extent, provisions prohibiting arbitrary or discriminatory treatment may overlap with fair and equitable treatment provisions but most treaties have accorded both standards a separate and distinct status. An example of an arbitrary or discriminatory treatment provision is found in Article 2(3) of the China-Germany BIT.

Neither Contracting Party shall take any arbitrary or discriminatory measures against the management, maintenance, use, enjoyment and disposal of the investments by the investors of the other Contracting Party.

In the absence of a definition of ‘arbitrary measures’ in the relevant BIT, the arbitral tribunal in Lauder v Czech Republic relied on the Black’s Law Dictionary definition of arbitrary: ‘depending on individual discretion; . . . founded on prejudice or preference rather than on reason or fact’. It needs to be borne in mind that discriminatory standards in investment treaties are founded on international law, not domestic law. Accordingly, a violation of domestic law is not required to prove that conduct is discriminatory under an investment treaty. Local laws may in fact permit discrimination against foreigners but a state cannot rely on its own law to avoid its international obligations.

6.5 National treatment

The national treatment standard compares the treatment accorded to the host state’s investors with that provided to foreign investors. Article 4(1) of the 1999 Australia-India BIT declares:

Each Contracting Party shall, subject to its laws, regulations and investment policies, grant to investments made in its territory by investors of the other Contracting Party treatment no less favourable than that which it accords to investments of its own investors.

Overlaps may also occur in respect of this standard, particularly with the arbitrary and discriminatory treatment standard. Some investment treaties, especially those signed by the US, tend to include the proviso that the host state must accord foreign investors no less favourable treatment than that it accords ‘in like circumstances’ to its own investors. Case law on this point is not fully settled. On the one hand, the arbitral tribunal in Feldman v Mexico narrowed the ‘like circumstances’ comparative exercise to firms involved in the specific line of business as the claimant. SD Myers Inc v Canada on the other hand indicates a broader approach that may take into account the relevant ‘economic sector’ in which the investor at issue is involved.

80 As to the denial of justice and its relation to fair and equitable treatment, see particularly Article 143(2) of the NZ-China Free Trade Agreement, signed on 7 April 2008 and entered into force on 1 October 2008.
81 Bilateral Agreement for the Promotion and Protection of Investments between Cambodia and Malaysia, signed on 17 August 1994.
82 Award, 27 June 1990, 4 ICSID Reports 246, at para 85(B).
83 See, e.g. CME Czech Republic v Czech Republic, Partial Award, 13 September 2001, 9 ICSID Reports 121, at para 613, which observed that the amendment of laws or actions of administrative bodies could breach full protection and security standards.
84 Article 143 of the NZ-China Free Trade Agreement (signed 7 April 2008, entered into force 1 October 2008), for example, is headed ‘Fair and Equitable Treatment’ but it includes an ‘unreasonable and discriminatory measures’ provision (Article 143(4)).
86 Lauder v Czech Republic, Final Award, 3 September 2001, 9 ICSID Reports 66, at para 221.
87 Ibid., at para 220.
89 See, e.g. NAFTA Article 1102.
90 Award, 16 December 2002, 7 ICSID Reports 341, at para 171.
91 Partial Award, 13 November 2000, 8 ICSID Reports 18, 40 International Legal Materials 1408, at para 250.
6.6 Most favoured nation treatment

10.71 The scope of most favoured nation (MFN) treatment may vary depending on the wording of the investment treaty. Article 3(2) of the 1994 Malaysia-Indonesia BIT provides:

Each Contracting Party shall not in its territory subject investors of the other Contracting Party, as regard their management, use, enjoyment or disposal of investment, as well as to any activity connected with these investments, to treatment less favourable than that which it accords to investors of any third State.

10.72 From the perspective of a Malaysian investor, the effect of this provision is to enable it to claim rights that Indonesia has afforded to non-Malaysian foreign investors that are more favourable, usually under other investment treaties concluded by Indonesia with other states.

It is generally accepted that MFN clauses apply to standards of substantive treatment afforded to investors from third states. For example, in Mayor v Pakistan, the arbitral tribunal used an MFN clause to import a fair and equitable treatment clause in another treaty. In contrast, a good deal of debate has taken place as to whether a MFN clause may also entitle the importation into a treaty of more favourable dispute settlement procedures. The arbitral tribunal in Maffessini v Spain triggered the debate when it applied the MFN clause in the Argentina-Spain BIT to import from the Chile-Spain BIT a more favourable provision, namely, a dispute resolution clause that enabled a claimant to commence investment treaty arbitration after a six-month negotiation period and without having to seek relief in the Spanish courts. The Argentina-Spain BIT required the claimant to resort to Spain’s domestic courts for 18 months prior to instituting proceedings.

In the opposing camp is Plama Consortium Ltd v Bulgaria. The arbitral tribunal in that case held that the MFN provision in the Bulgaria-Cyprus BIT did not clearly indicate that it applied to dispute settlement provisions and therefore it could not be invoked to import the ICSID arbitration provision contained in the Bulgaria-Finland BIT.

10.75 The prevalent view in this area appears to be that the determination as to whether an MFN provision can be invoked will hinge on the language of that provision and, as Plama suggests, whether it leaves no doubt that an external dispute settlement provision may be imported.

6.7 Umbrella clauses

Umbrella clauses are investment treaty provisions that may be described as ‘observance of obligations’ clauses. A typical example is Article X(2) of the Swiss-Philippines BIT:

Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party.

Clauses such as these raise the question whether they enable contractual breaches to be ‘elevated’ to the status of treaty violations. The two most famous cases at the forefront of this debate have strong connections with this region: SGS v Pakistan and SGS v Philippines.

In SGS v Pakistan, the arbitral tribunal expressed concern about the number of potential claims that could be made under an umbrella clause if it were interpreted to include contract breaches. For this and other reasons, it refused to hold that a contractual breach constituted a treaty violation under the umbrella clause in the Swiss-Pakistan BIT. Only a few months later, the SGS v Philippines arbitral tribunal held that the umbrella clause in the Swiss-Philippines BIT could give rise to a breach of that treaty if the host state failed to observe its contractual commitments or obligations. This latter case appears to represent the dominant view. However, a point that bears emphasis is that not every breach of a contract will trigger an umbrella clause.
7 Remedies

7.1 Compensation for expropriation

A vexed issue in international law has been the identification and application of the standard of compensation for an expropriation. In most investment treaties, the compensation standard is expressed as ‘prompt, adequate and effective’ which is also known as the Hull formula. It is generally understood today in international investment law that inclusion of the Hull formula is a reference to the fair market value of the asset at the time of the expropriation.

Nonetheless, a difference of opinion exists as to the amount of compensation to be paid in the event of an unlawful expropriation. One school of thought asserts that a higher amount may be awarded for an unlawful expropriation compared with the compensation due for a lawful expropriation of the same property. Others take the view that (unlike a lawful expropriation) an unlawful expropriation enables the arbitral tribunal to order restitution of the expropriated property and award compensation for the increase in the value of the property from the date of taking until the decision awarding compensation.

7.2 Compensation for non-expropriatory treaty breaches

Investment treaties generally do not specify the standard of compensation that should be awarded if a host state breaches a non-expropriatory investment treaty provision. Because a treaty breach is a violation of international law, the guiding principle for compensation in such cases must also come from international law. In a well-accepted passage in the Chorsow Factory case, the Permanent Court of International Justice (the predecessor to the International Court of Justice) articulated the principle as follows:

The essential principle contained in the actual notion of an illegal act...is that reparation must, in so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.

Accordingly, the aim of compensation for an ‘illegal act’ is that the claimant is ‘placed financially in the position in which it would have found itself, had the [treaty] breaches not occurred’.

7.3 Costs

Article 61(2) of the ICSID Convention gives the arbitral tribunal the discretion to apportion the costs of the arbitration. Many investment treaty arbitrations require that the fees and expenses of ICSID and the arbitrators be shared and for each party to bear their own expenses. However, the practice is not uniform. Costs have been awarded against parties where their conduct has so warranted and, increasingly, arbitral tribunal awards cost in favour of the successful party.

7.4 Interest

Interest is an area in which investment treaty arbitration is developing a practice that is distinct from the traditional position in public international law. The issue relates to whether investment treaty arbitral tribunals are empowered to award simple or compound interest.

The traditional international law view was expressed in 1943 by Marjorie Whiteman: ‘[i]f there are few rules within the scope of the subject of damages in international law that are better settled than the one that compound interest is not allowable. Her view has had considerable influence on investor-state arbitrations in the second half of the 20th century, which tended to deny awarding compound interest.

In contrast, the dominant trend in contemporary investment treaty arbitration is to award compound interest. A leading case in this regard is Santa Elena, in which the arbitral tribunal observed:

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where an owner of property has at some earlier time lost the value of his asset but has not received the monetary equivalent that then became due to him, the amount of compensation should reflect, at least in part, the additional sum that his money would have earned, had it, and the income generated by it, been reinvested each year at generally prevailing rates of interest. It is not the purpose of compound interest to attribute blame to, or to punish, anybody for the delay made to the expropriated owner; it is a mechanism to ensure that the compensation awarded to the claimant is appropriate in the circumstances.

8 Annulment of ICSID awards

Pursuant to Article 53 of the ICSID Convention, all awards are binding on the parties and are not subject to appeal or other remedies except as provided in the Convention. The only recourse available under the ICSID Convention is by way of the annulment process. Any party may make an annulment application. On receipt of such an application, the Chairman of ICSID's Administrative Council must appoint a three-person ad hoc committee to decide whether the impugned award should be annulled. Members of the ad hoc committee cannot have (1) the nationality of any members of the tribunal that rendered the impugned award; (2) the nationality of the state party to the dispute; or (3) the nationality of the investor. The ad hoc committee's review is limited to the five narrow grounds listed in Article 52(1):

- Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
  - (a) that the Tribunal was not properly constituted;
  - (b) that the Tribunal has manifestly exceeded its powers;
  - (c) that there was corruption on the part of a member of the Tribunal;
  - (d) that there has been a serious departure from a fundamental rule of procedure; or
  - (e) that the award has failed to state the reasons on which it is based.

An application for annulment must be made within 120 days from the date on which the award was rendered. The duration of an annulment procedure is variable. It generally ranges from about a year, if everything goes well, to around three years if complex issues arise. The function of the ad hoc committee is not to amend or otherwise review the award. It has power only to annul the award in full or in part. In the event an ad hoc committee annuls an award, under Article 52(6) of the ICSID Convention, the dispute cannot be resubmitted to the original tribunal but must be submitted to a newly constituted tribunal.

Article 54 of the ICSID Convention imposes an automatic duty on a contracting state to recognize and enforce any pecuniary obligations under an ICSID award as though it were a final judgment of a court of that contracting state. Domestic courts are not empowered to review ICSID awards even during the enforcement process and no refusal of the extent of such as those provided in Article V of the New York Convention can be invoked by the losing party to prevent enforcement. This feature of ICSID provides an advantage over international commercial arbitration where state courts may refuse to enforce a foreign award pursuant to Article V of the New York Convention. Article 54 is, however, limited to the enforcement of 'pecuniary obligations'. Restitution or other forms of specific performance are thus not covered within the scope of this provision.

Once an order for enforcement of an ICSID award is granted, this is not the end of the matter. Execution of this order may need to be carried out against a specific asset, such as a bank account or other property. At this stage, Article 54 of the ICSID Convention allows the domestic court determining the execution request to apply the 'laws concerning the execution of judgments in force in the State in whose territory such execution is sought'. This position is supported by Article 55, which adds:

"Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution."

This latter provision has been described by Professor Schreuer as the 'Achilles' heel of the [ICSID] Convention'. He continues:

"The self-contained nature of the procedure which excludes the intervention of the domestic courts does not extend to the stage of execution... The Convention does not enjoin the courts of States parties to the Convention to enforce ICSID awards if this would be contrary to their law governing the immunity from execution of judgments and arbitral awards. Therefore, a State whose courts refuse execution of an ICSID award for reasons of State immunity is not in violation of Art. 54."
that Articles 54 and 55 of the ICSID Convention may prove to be a stumbling block at the finish line of the ICSID arbitral process, the ICSID system remains relatively effective. A factor often identified as enhancing the effectiveness of the ICSID process is seen to be the reluctance of states to be looked on disfavourably by the World Bank, particularly because of its links with ICSID and the bank's ability to provide (or withhold) significant amounts of funding for states. The veracity of this hypothesis is open to debate.128

128 See, e.g. G Born, International Commercial Arbitration, Kluwer Law International, 2009, p. 2328, n 7 ('States are often very reluctant to be seen to float awards made by ICSID tribunals, given the World Bank's importance as a lender'); and E Baldwin, M Kantor and M Nolan, 'Limits to Enforcement of ICSID Awards', (2006) 23 Journal of International Arbitration 1, at p. 22 ('the World Bank's Operational Procedures (and the bank's articles of agreement) do not directly address the situation where a member country refuses to honor an [ICSID arbitration] award. Additionally, the World Bank has not, to the authors' knowledge, spoken publicly about the consequences (if any) for new loans to a Contracting State if that state refused to honor its obligations under the award and the ICSID Convention.').

APPENDIX 1

Asia-Pacific arbitral institutions at a glance

The tables in this section provide a basic overview of some arbitral institutions established in or relevant to the Asia-Pacific region.

<table>
<thead>
<tr>
<th>Australian Centre for International Commercial Arbitration – ACICA</th>
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</thead>
<tbody>
<tr>
<td><strong>Website</strong></td>
</tr>
<tr>
<td><strong>Where headquartered</strong></td>
</tr>
<tr>
<td><strong>Year established</strong></td>
</tr>
<tr>
<td><strong>Administrative structure</strong></td>
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<tr>
<td><strong>Current Rules</strong></td>
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<tr>
<td><strong>Default appointment process</strong></td>
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<tr>
<td><strong>Arbitrator challenge adjudication</strong></td>
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<tr>
<td><strong>Terms of Reference/Memorandum of issues</strong></td>
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<tr>
<td><strong>Award scrutiny</strong></td>
</tr>
<tr>
<td><strong>Costs</strong></td>
</tr>
</tbody>
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