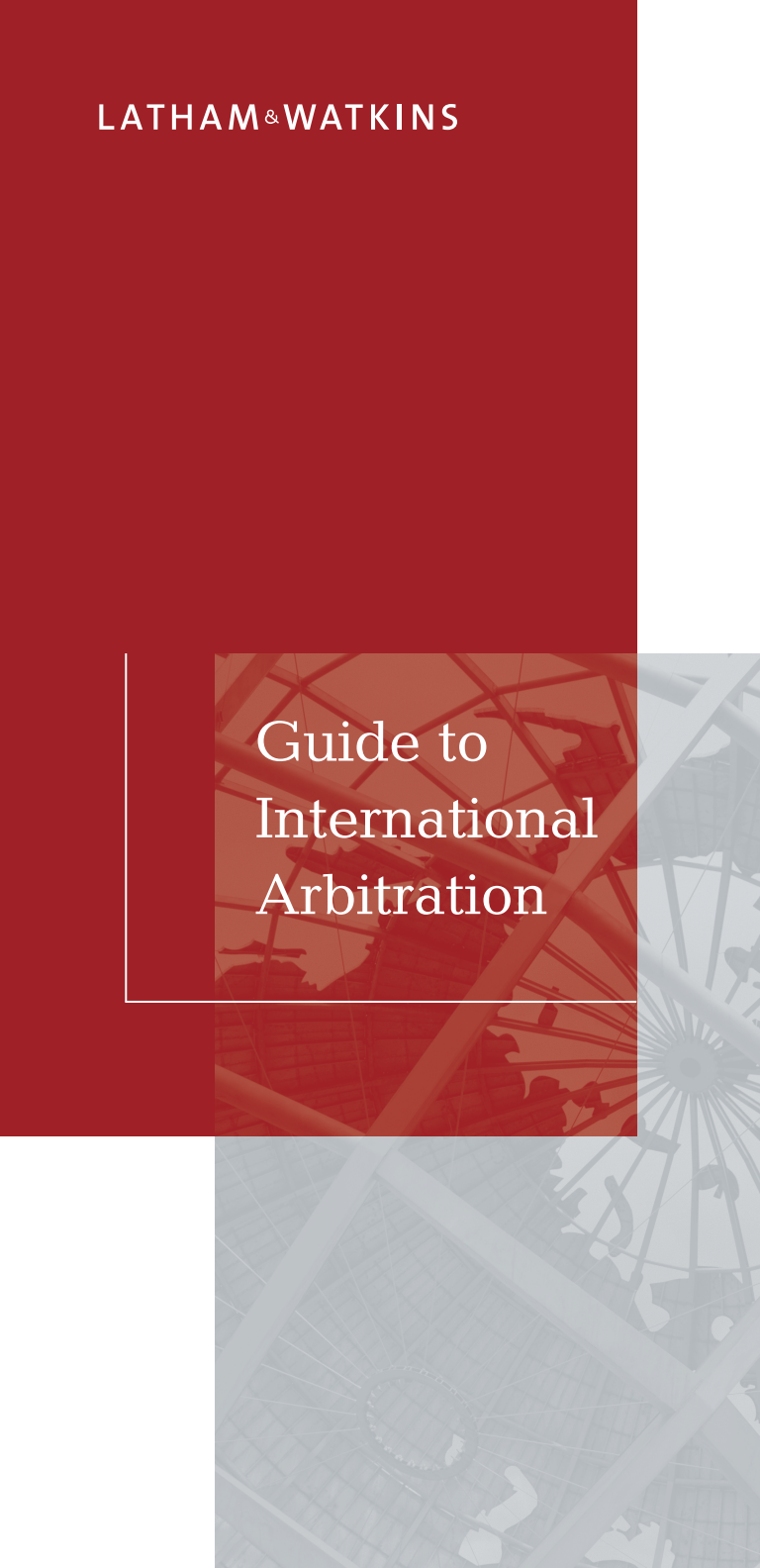


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Guide to
International
Arbitration

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FOREWORD

Why International Arbitration?

The expansion and globalisation of cross-border investment and trade has led to increased and ever more complex commercial relationships between businesses, investors and states. As, inevitably, some of those relationships break down, parties need to consider (preferably at the outset of the relationship) the best means of resolving any disputes which may arise. In many cases, that will be arbitration.

Arbitration has been used for centuries, with Plato writing about arbitration amongst the ancient Greeks. In more modern times, arbitration became the standard method for resolving disputes in certain industry sectors (such as construction, commodities, shipping and insurance) where the arbitrators' technical expertise was particularly valued. However, over the last 50 years or so, arbitration has been increasingly embraced by the international community, with many recognising its importance as the primary means of resolving complex, transnational commercial disputes (as well as the economic benefits for a state of being perceived as "arbitration friendly").

Here, in a nutshell, are a few of the features that have led to the prominence of arbitration in the international arena:

- **Enforceability:** Arbitration awards are more widely and readily enforceable than court judgments as a result, primarily, of the 1958 New York Convention, a multilateral treaty for the enforcement of arbitral awards to which more than 145 states are party.
- **Neutral forum:** A party will often prefer not to submit to the jurisdiction of another party's national courts. International arbitration can provide a neutral forum for dispute resolution.
- **Procedural flexibility:** Arbitration rules are streamlined, flexible and far less complex than most national rules of civil procedure, making them better suited to parties from different jurisdictions.
- **Arbitrators with the appropriate experience:** Arbitrators can be selected for their familiarity with relevant commercial practices, trade usages and legal structures, and their ability to apply different national laws and deal with comparative law issues.

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- **Party autonomy:** The parties to an arbitration can shape their dispute resolution process by, for example, selecting the governing law, the place of arbitration, many aspects of the arbitral procedure and, of course, arbitrators whom they believe will ensure a fair hearing of their case.

However, arbitration is not right for every party in every situation. It might have drawbacks, depending upon a party's particular circumstances and objectives. It is therefore necessary to make a considered decision in each case.

This Guide is designed to help with that decision and, where appropriate, to assist in the drafting of arbitration provisions. Although an arbitration clause need not be complicated, as the source of the arbitrators' mandate, it is critical.

Unlike courts, arbitral tribunals have no inherent power or jurisdiction. Their authority arises from the parties' contract (albeit that, once selected by the parties, arbitration has the backing of statutes and treaties). It is therefore particularly important to take care in drafting the arbitration provisions. Once a dispute has arisen, self interest will often mean that it is too late to reach further agreement upon how it should be resolved.

In short, whilst this Guide is not a comprehensive treatise on arbitration or a substitute for specialist advice, it provides convenient and practical assistance in relation to the principal matters to be addressed.

What is Arbitration?

Arbitration is a private form of binding dispute resolution, conducted before an impartial tribunal, which emanates from the agreement of the parties but which is regulated and enforced by the state. The state requires the parties to honour their contractual obligation to arbitrate, provides for limited judicial supervision of arbitral proceedings and supports the enforcement of arbitral awards in a manner similar to that for national court judgments.

Arbitrations are typically conducted by either one or three arbitrator(s), referred to in each case as the “tribunal”. The tribunal is the equivalent of a judge (or panel of judges) in a court action. However, the arbitrators are generally selected by the parties (either directly or indirectly through a third party or institution) and, as a result, the parties maintain some control over who is to determine their dispute. Arbitrators in international cases are usually very experienced lawyers and/or experts in the field in which the dispute has arisen.

The tribunal’s powers and duties are fixed by the terms of the parties’ agreement (including, in particular, any arbitration rules which have been adopted) and the national laws which apply in each case.

Under most leading legal systems, arbitrators are obliged to make their awards according to the applicable law unless the parties have agreed otherwise (for example, by empowering the tribunal to decide in accordance with what it perceives to be “fair”). The tribunal is obliged to follow due process and ensure that each party has a proper opportunity to present its case and defend itself against that of its opponent. However, in other respects, the procedure can be very flexible.

National laws generally recognise and support arbitration as a mutually exclusive alternative to litigation as a means of finally resolving disputes. Some practitioners

(particularly in the US) therefore refer to arbitration as a form of alternative dispute resolution (“ADR”). However, the acronym “ADR” is more often used to describe non-binding procedures (such as mediation), thereby distinguishing between litigation and arbitration on the one hand, and ADR on the other.

In fact, non-binding procedures are not really an “alternative” to litigation and arbitration because, unless the parties reach a settlement, they must still resort to a binding procedure, such as arbitration or litigation, to resolve their dispute. This has caused some to redefine ADR as “amicable dispute resolution”, thereby emphasising that that mediation and related approaches depend upon the voluntary cooperation and agreement of the parties.

Arbitration is also to be distinguished from binding expert determination. As the procedures for both can largely be prescribed in the parties’ contracts, they can take very similar forms. On a decision-making level, the distinction is that whilst the arbitrators may be selected for their experience in particular fields, they are tasked with deciding the dispute primarily upon the basis of the parties’ submissions and the applicable law, whereas experts use their own knowledge to come to their decision.

The distinction between arbitration and expert determination can be very important because, whereas arbitration is normally regulated by national arbitration laws, which safeguard the constitution of the tribunal and the procedure followed, expert determination is virtually unregulated. In the international context, arbitration also benefits from enforcement conventions which allow the direct enforcement of awards. The decisions of experts only have the force of contract and, to enforce them, a new action must be brought in the appropriate jurisdiction for breach of contract.

When Should Provision for Arbitration be Made?

Parties should consider whether or not to provide for arbitration every time they enter into a contract. However, it is particularly important to do so where the parties (or their assets) are in different jurisdictions or where disputes might give rise to complex technical issues.

Lawyers commonly refer to the “advantages and disadvantages” of arbitration. However, whether any given feature of arbitration is an advantage, a disadvantage or of no interest to a party is entirely dependent upon its objectives. We have therefore simply placed the features which most often prove conclusive in the decision-making process towards the top of the list that follows.

Enforceability: Due to international conventions, the potential for enforcing arbitral awards worldwide is much greater than that for court judgments. As there is little point in obtaining a court judgment which cannot be enforced against suitable assets, this feature often conclusively determines the choice of arbitration for international contracts. The most important enforcement convention (although there are others) is the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the New York Convention). More than 145 countries are party to the New York Convention, each of which broadly agrees to enforce arbitral awards made in other contracting states subject only to limited grounds for objection. The parties to the New York Convention are listed in Annex 2. There is no such wide-ranging convention providing for the enforcement of court judgments (the closest being the Brussels Regulation, which is limited to parties in Europe).

Neutrality: A party to an international contract will often wish to avoid resolving disputes through the local courts of another party. Arbitration provides the opportunity for neutral dispute resolution (e.g., with international rules being applied by a multinational tribunal in a mutually acceptable venue).

Confidentiality: Although the degree of confidentiality afforded by the arbitration law of different jurisdictions (absent express provision by the parties) varies, there can be no doubt that arbitration provides greater privacy and confidentiality than litigation (which is often public). Further, parties can provide for the required degree of confidentiality in their arbitration agreement (at least until such time, if ever, that enforcement through the courts becomes necessary, when confidentiality might be put at risk by the court process, and subject to any mandatory reporting obligations).

Technical expertise and experience: The parties can select arbitrators with relevant expertise or experience. Although some jurisdictions have very good specialist courts (e.g. the Commercial Division of the New York Supreme Court and the English Technology and Construction Court), in others, parties run the risk of their dispute being decided by a judge with little or no relevant experience.

Procedural simplicity and flexibility: Arbitration rules are generally far simpler and more flexible than court rules. As a result, they are relatively easy to understand for parties of different nationalities, the proceedings are more easily focused on the substantive issues and the parties are better able to adapt the dispute resolution process to suit their relationship and the nature of their disputes. In many cases, parties (or tribunals exercising discretion left to them by the parties) choose to follow a procedure which is similar to court procedures, although they might change, for example, the scope of disclosure or waive rights of appeal. However, in some cases, parties go much further, waiving the right to an oral hearing or empowering the tribunal to decide according to principles of fairness rather than according to the law. Of course, a potential drawback arising from the flexibility and the generality of arbitration rules is that,

where the parties do not reach agreement in advance, there is a greater risk of debate over procedure, which can cause uncertainty and lead to delays.

Choice of arbitrators: Unlike court proceedings, where parties generally have no input into the choice of judge for their case, the parties to an arbitration usually appoint, nominate or at least have some input into the selection of the arbitrator(s). Most developed arbitration laws require that all of the arbitrators be impartial. However, a party can use its choice or input into the selection process to help ensure that, as far as possible, the tribunal will understand the commercial context, the relevant issues and the party's procedural preferences. The parties may agree upon certain criteria for the arbitrators, or for the presiding arbitrator, although care should be taken not to narrow the field so far that there are difficulties in identifying potential candidates. In arbitrations with more than one party on either side, or where other parties might be joined in to the proceedings, maintaining the parties' right to choose the arbitrators (rather than simply delegating the choice to an institution) can be particularly challenging. For example, if one party has the right to select an arbitrator but two parties on the other side cannot agree upon a joint selection, the latter could claim that they were not being treated equally. Careful consideration as to the means of appointing the arbitrators is therefore required in such multi-party scenarios.

Cost: There is no simple answer as to whether arbitration is cheaper than litigation. As legal fees generally account for the majority of the costs of proceedings (whether arbitration or litigation), the controlling factors are largely the complexity of the dispute, the way the proceedings are conducted and their length. In arbitration, parties have to pay for the arbitrators, any administering institution and the hiring of venues for hearings. On the other hand, there are no court fees and parties are free to agree to a process tailor-made for their dispute. This might, for example, be a streamlined, "fast track" procedure (although inflexible and unrealistic schedules can be problematic). Significantly, parties to international contracts normally agree that there is no right of appeal (on the merits) from any award (potentially saving years of further proceedings). In any event, in many

. . . whether any given feature of arbitration is an advantage, a disadvantage or of no interest to a party is entirely dependent upon its objectives.

jurisdictions, awards may only be reviewed in strictly limited circumstances. International arbitral tribunals are generally empowered to award the successful party the majority, or at least a measure, of its costs, although practice varies depending on the applicable rules/law and the composition of the tribunal.

Pre-emptive remedies: Whilst arbitral tribunals are often empowered (by the parties or the applicable law) to grant preliminary relief, such as an order freezing assets, they cannot impose criminal sanctions upon a defaulting party. For this reason, and to allow relief before the tribunal has been appointed, arbitration rules/laws commonly allow parties to apply to courts for interim relief (as distinct from a hearing of the merits of the case).

Joinder of parties and related disputes: In contrast to court proceedings, it is generally necessary to obtain all parties' consent before additional parties or related disputes can be joined to an existing arbitration. Whilst a few national legal systems (e.g., the Netherlands) allow parties to apply to the courts to order a "third party" to be joined to an arbitration, this is unusual. Where consideration to this issue is given at the time the contract is drafted, the difficulty can be addressed by appropriate provisions in the arbitration agreement. In essence, such provisions record the parties' consent to joinder in advance of the situation arising, and set out a procedure for the joinder to take place. In multi-contract and/or multi-party transactions, provisions for joinder can become complicated and require considerable care in drafting. However, if provision is not made before a dispute arises, it will often be difficult to obtain all of the parties' consent because of their differing self-interests. In such circumstances, relevant parties will have to decide whether or not to pursue separate proceedings in relation to the third party.

The Tribunal

In the vast majority of cases, the arbitral tribunal consists of either one or three arbitrators. The choice between one or three arbitrators can be made in advance or left for agreement between the parties (or for decision by an arbitral institution or appointing authority) after the dispute has arisen.

Arbitration with a sole arbitrator is generally cheaper than using three arbitrators, both because of the savings in arbitrators' fees and because he or she can conduct the proceedings more quickly, without the need to coordinate with two other busy professionals. However, providing for a sole arbitrator means that the parties cannot each select or nominate an arbitrator and, of course, the proceedings revolve around just one decision-maker. In addition, the exchanges and interplay among the arbitrators in a three-member panel can sometimes give more insight into the tribunal's decision-making process, allowing a party to alter its strategy accordingly. For these reasons, high-value and complex international disputes are generally referred to three arbitrators.

Parties usually seek advice from their lawyers as to suitable arbitrators. When we advise in this regard, we draw upon our experience of persons with the required attributes . . .

The major arbitration rules (and many national laws) provide methods for the appointment of the tribunal in default of agreement between the parties. In general, sole arbitrators are selected by agreement between the parties or, if no agreement is reached within the allotted time, by the chosen appointing authority (or, if none, the relevant court). Where three arbitrators are to be appointed, two

of them are normally selected by the parties, with the Chairman or President being chosen either by the two party-selected arbitrators or by the appointing authority (or court).

The parties can require that the arbitrators (or the Chairman) possess specified qualities (e.g., persons in practice for at least 10 years or of different nationalities from the parties or with experience in international financial transactions). The arbitrators need not be lawyers but, for high value international disputes, they normally are.

Parties usually seek advice from their lawyers as to suitable arbitrators. When we advise in this regard, we draw upon our experience of persons with the required attributes (including experience as an arbitrator) and work with our client to identify those arbitrators who we would expect to follow thought processes most in tune with our client's case. Among the factors we consider are:

- the candidate's familiarity with the governing law and the applicable arbitration rules;
- the candidate's background (e.g., legal training and experience, experience in the relevant industry or similar industries);
- the language and the place of the arbitration;
- the candidate's writings (although many arbitrators are guarded in their publicly expressed views) and past decisions/awards to the extent known or available;
- our interactions with the candidate in previous arbitrations or at conferences, the views of our colleagues and the candidate's general reputation; and
- the candidate's ability to influence the selection of the Chairman/President and the likelihood that the candidate's views will carry weight with the other arbitrators during deliberations.

CHAPTER IV

The Choice of Arbitration Rules

Many countries have arbitration laws which provide a legal framework for the conduct of arbitrations. However, subject to mandatory requirements of the applicable law, parties are free to agree upon the procedure for their arbitration (or simply accept the default procedure under that law). Rather than drafting a custom-made procedure for each contract, parties usually adopt (and modify as appropriate) a set of tried and tested ready-made arbitration rules. These rules (as amended or supplemented by the parties) are then interpreted against the backdrop of the arbitration law of the seat (legal place) of the arbitration.

Institutional arbitration

There are many arbitral institutions across the world: some focus on disputes with a strong tie to the country or region in which the institution is based, some focus on disputes in particular subject matters and some are fully international in scope and are used by parties throughout the world. We focus below on three pre-eminent international institutions, which are widely used and provide a good basis for discussing the factors to be considered when choosing institutions and rules:

- **The International Court of Arbitration of the International Chamber of Commerce (“ICC”).** The ICC, which is based in Paris, was established in 1923. It is probably the best known international commercial arbitration institution. For further information, see www.iccwbo.org;
- **The London Court of International Arbitration (“LCIA”).** The LCIA, which is based in London, was established in 1892. It is Europe’s second leading international arbitration institution (after the ICC) and is very well known internationally. The LCIA has affiliated arbitral institutions in Dubai (DIFC-LCIA), India (LCIA India) and Mauritius (LCIA-MIAC). For further information, see www.lcia.org; and

There are many arbitration rules to choose from and, in considering the selection, it is useful to distinguish between arbitrations which are to be administered by institutions (“institutional arbitrations”) and those which are not (“non-administered” and “ad hoc” arbitrations).

- **The International Centre for Dispute Resolution (“ICDR”).** The ICDR is a part of the American Arbitration Association (“AAA”), which was established in 1926, and is the best known arbitral institution in the US. The AAA administers a large number of domestic disputes through its network of US offices. The ICDR administers international arbitrations (pursuant to its International Arbitration Rules). For further information, see www.adr.org.

(For details of many more arbitration institutions by region, see Annex 3.)

The rules of the ICC, LCIA and ICDR are all suitable for use around the world and for arbitrations conducted in various languages and under various governing laws. In each case, it is for the arbitrators to resolve the dispute, with the institutions simply administering the arbitrations.

In this capacity, the ICC, LCIA and ICDR each receive and distribute the parties’ initial submissions, assist with the appointment of the tribunal (with or without party-nominations) and resolve any challenges that a party may make against an arbitrator. The arbitration rules of each institution are broadly similar: all leave a considerable degree of flexibility with the parties and the tribunal. What particularly distinguishes

these institutions from each other are the degree of administration (or supervision) their rules entail and their fee structure.

Degree of administration

The ICC procedure is more actively administered, involving two additional steps not found in many other rules (such as those of the LCIA and ICDR):

- the preparation of Terms of Reference, a document which defines the scope of the arbitration by setting out the basic claims and defences, the relief sought and the issues to be addressed; and
- the scrutiny of draft awards, especially as regards issues which might affect their enforceability, by the ICC Court before the final awards can be issued to the parties.

The value of these supervisory functions must be weighed up against the likely additional time and cost to be devoted to them.

In contrast, the procedures under the LCIA and ICDR Rules are lightly administered, with the role of the LCIA and the ICDR in each case being primarily concerned with the appointment of (and challenges to) the tribunal. There is no formal requirement for Terms of Reference or the scrutiny of draft awards.

Fee structure

The fees of the ICC and tribunals appointed pursuant to its Rules are based upon the amount in dispute. The ICC requires payment of two “advances” on the estimated fees and costs at the start of the process: a provisional advance to cover the period until the Terms of Reference; and then a full advance to cover the rest of the arbitration (although this can be adjusted later if deemed appropriate). In high value disputes, this requires parties to pay (or guarantee payment of) substantial sums up front.

By contrast, the LCIA charges (for itself and the arbitrators) according to the time actually spent. The fee rates which the LCIA agrees with arbitrators are

Many countries have arbitration laws which provide a legal framework for the conduct of arbitrations.

generally far lower than those same arbitrators would seek to charge if approached directly by the parties.

Although the ICDR's administrative fees are based upon the amount in dispute, the tribunal's fees (as with the LCIA) are calculated according to the time spent.

There are differing views as to which fee structure generally works best and, in any event, their suitability for each case will vary according to factors such as the amount in dispute and the time taken and effort required by the arbitrators to bring the proceedings to a conclusion.

Unadministered and ad hoc arbitrations: the UNCITRAL Rules and pure ad hoc arbitrations under national arbitration laws

Although some practitioners refer to all non-institutional arbitration as being "ad hoc", there is a useful distinction to be made between arbitration under the UNCITRAL Rules and arbitration which is purely under a national law.

The UNCITRAL Rules (developed by the United Nations Commission on International Trade Law) were originally developed as a neutral alternative to the other major rule systems which, fairly or not, were viewed with scepticism in many capital-importing countries. However, they have been widely used in both general commercial transactions and arbitrations between states and individuals (they were used as the basis for the Iran-US Claims Tribunal Rules and for a number of Bilateral Investment Treaties). They have also influenced other rule systems.

Although there is no administering institution under the UNCITRAL Rules, parties commonly designate an “appointing authority” to appoint the arbitrator(s) if the system of party appointments breaks down, and to deal with any challenges to the arbitrators. Many arbitral institutions (such as the ICC, the LCIA and the ICDR) will serve as an appointing authority under the UNCITRAL Rules for a fee. If no appointing authority is designated and the system of party appointments breaks down, all is not lost as, pursuant to the UNCITRAL Rules, the Secretary General of the Permanent Court of Arbitration in The Hague (a body created by the 1899 Hague Convention for the Pacific Settlement of International Disputes) will appoint an appointing authority. However, this additional step is best avoided by the parties designating the appointing authority in advance.

Rather than drafting a custom-made procedure for each contract, parties usually adopt (and modify as appropriate) a set of tried and tested ready-made arbitration rules.

Most jurisdictions allow parties to agree to arbitrate without them having to specify any rules or procedures. In such event, the procedure for the appointment of the tribunal and the conduct of the arbitration generally will be that provided by the law of the seat of the arbitration. However, many national arbitration laws make only limited provision for the procedure to be followed, leaving it to the parties and the tribunal to decide how the arbitration will be conducted (which can lead to disagreement and delay at the outset).

Ad hoc arbitration often arises because parties do not agree upon (or simply fail to provide for) any institutional rules. Parties may, for example, agree

Ad hoc arbitration often arises because parties do not agree upon (or simply fail to provide for) any institutional rules.

that any arbitration shall be conducted pursuant to a particular national law. However, in an international context, parties should first satisfy themselves that they are content with the relevant legislation and that they are willing to go to the local courts where necessary to resolve difficulties.

Parties sometimes also believe that, by avoiding the fees of arbitral institutions, ad hoc arbitration might prove cheaper than institutional arbitration. Whilst this is possible in theory, in practice, the benefits of the institution's administrative services and the lower charges of arbitrators under institutional rules can easily outweigh the costs involved, especially in connection with large and complex disputes, where many procedural issues are likely to arise. Ad hoc arbitration significantly increases the likelihood of court intervention and these potentially significant costs must also be considered. In the main, before selecting ad hoc arbitration, parties should satisfy themselves that they would not be better served by an institutional form of arbitration or the use of the UNCITRAL Rules.

Important “specialist” international arbitration organisations

There are also specialist arbitration organisations for specific types of disputes, such as:

- **The International Centre for the Settlement of Investment Disputes (“ICSID”)**. Based in Washington, D.C., and operating under the auspices of the World Bank, ICSID was established pursuant to the 1965 Washington Convention on the Settlement of Investment Disputes between states and nationals of other states. ICSID is concerned

exclusively with disputes arising directly out of an investment between a contracting state and a national of another contracting state. Jurisdiction is established on the basis of consent, contract, local investment legislation or treaty rights. A rise in investor-state disputes and the explosion in Bilateral Investment Treaties which provide for ICSID arbitration have made ICSID of increasing importance in investor/state disputes. Investor-state disputes are discussed in greater detail in Chapter VIII;

- **The World Intellectual Property Organisation (“WIPO”) Arbitration and Mediation Center.** Established in Geneva in 1994 as an offshoot of WIPO (itself an agency of the United Nations), the Center provides arbitration and mediation services (under its own rules) for intellectual property disputes; and
- **The China International Economic and Trade Arbitration Commission (“CIETAC”).** As many Chinese counterparties insist upon CIETAC, companies doing business in China might well find themselves incorporating CIETAC provisions into their agreements. CIETAC is one of the most active arbitration centres in the world.

Summary overview

There are a large number of arbitral institutions and rules to choose from, some appropriate for a wide range of disputes and some only for specific types. Whilst there may be certain advantages and disadvantages for a party in using a particular set of rules, the ICC, LCIA, ICDR and UNCITRAL Rules are largely interchangeable and can all be selected for use wherever the arbitration is to take place. However, some differences in drafting might be advisable depending upon the rules selected (for example, specifying an appointing authority in the case of the UNCITRAL Rules).

The Place of Arbitration

There is an important distinction between the legal place (the “seat”) of any arbitration and the place where one or more of the hearings or other procedural steps physically take place. Although the two often coincide in practice, it is the seat which determines the legal framework within which the arbitration takes place, not the location where the parties or the tribunal choose (as a matter of convenience) to meet.

When selecting the seat of arbitration, parties should consider, in particular, the effect that this might have upon the conduct of the arbitration and the potential enforceability of the ultimate award.

The conduct of the arbitration

In choosing the seat of the arbitration, the parties are selecting the procedural law which applies. For example, by selecting London, England, as the seat, the parties bring about the application of the 1996 Arbitration Act.

The procedural laws applicable in arbitration “friendly” centres (such as London, New York, Paris, Hong Kong and Singapore) have few mandatory provisions and allow the parties considerable freedom to agree upon the lawyers to represent them, the procedure to be followed, the language of the arbitration and the tribunal to decide their dispute. The result is that these centres and the specialist lawyers, experts and technical staff (such as translators, stenographers and IT personnel) who service them are able to accommodate the considerable diversity of disputes which arise in the international arena. Arbitration is encouraged (often in order to promote trade) and, accordingly, the role of the courts is kept to a minimum, being primarily to support the arbitration process and to assist, if necessary, with the enforcement of the award.

In less arbitration-friendly countries, the courts have greater powers to assume control over disputes within their jurisdiction and tend to be more interventionist (particularly where disputes have a political dimension). There are also sometimes constraints upon the conduct of the arbitration, such as the requirement to use locally qualified lawyers and restrictions upon who can act as arbitrators.

In choosing the seat of arbitration, parties should consider, in particular, the effect that this might have upon the conduct of the arbitration and the potential enforceability of the ultimate award.

Enforceability of the award

The seat of arbitration is also of critical importance to the enforceability of the resulting award pursuant to the New York Convention. By becoming party to the Convention, each of the states (*see Annex 2*) has agreed, subject to limited grounds of refusal, to enforce commercial arbitral awards made in other contracting states. Accordingly, by selecting a state which is party to the New York Convention as the seat for any arbitration, parties provide considerable scope for enforcement of their awards.

CHAPTER VI

Typical Steps in an Arbitration

The procedure for an arbitration can take many forms. In some arbitrations, parties agree that the dispute shall be resolved upon the basis of written submissions, without a hearing. In others, such as commodity arbitrations, the parties rely very heavily upon the arbitrator's own expertise, blurring the distinction between arbitration and expert determination (which does not enjoy the statutory backing and enforcement regimes applicable to arbitration).

Typically, a substantial international arbitration will include most of the following steps (although some of them may overlap or take place simultaneously):

- Claimant's Request for Arbitration, including at least a summary of the claims
- Respondent's Answer, which will indicate any counterclaims to be made
- Claimant's Reply to Counterclaim (if appropriate)
- Appointment of the tribunal
- Procedural hearing setting the steps and timetable for the arbitration
- Claimant's full Statement of Case (if not served with the Request for Arbitration)
- Respondent's full Defence and Counterclaim (if not served with the Answer)
- Claimant's Reply and Defence to Counterclaim

For a substantial and complex dispute, an arbitration typically takes about 12-18 months from commencement to the final hearing, although it can be shorter or longer depending upon, for example, the procedures adopted, the availability of the tribunal and the parties' conduct.

- Disclosure of the documents relied upon or of the (often very limited) categories of documents requested by the other party
- Exchange of witness statements (sometimes followed by rebuttal statements)
- Exchange of expert reports (sometimes followed by rebuttal reports)
- Meeting of experts to narrow issues and joint statement of matters agreed/in dispute
- Exchange of pre-hearing submissions
- Hearing
- Post-hearing submissions
- Award

Checklist of Areas to Consider

Model arbitration clauses promulgated by the ICC, LCIA, ICDR and UNCITRAL are set out in Annex 1. However, those model clauses are very basic and might well require adaptation to suit the needs of a particular case. We set out below a checklist of the principal matters to be considered in drafting an arbitration agreement (or determining whether and, if so, how to modify one of the model clauses).

ADR: The parties might wish to include provision for them to attempt an ADR procedure (such as mediation) prior to commencing (and as a means of potentially avoiding) arbitration. A sample ADR and arbitration clause is set out in Annex 1.

Parties are always free to agree to an ADR procedure at any stage, but providing for it in advance avoids concerns that proposing ADR after a dispute has arisen might be seen as a sign of weakness. However, parties might be more inclined to settle (in which case ADR proceedings will have a greater chance of success) after a dispute has reached a stage where their respective positions are better defined.

There are a number of organisations which will assist parties with ADR procedures, such as CEDR (Centre for Effective Dispute Resolution), which is based in London, and the Center for Public Resources, which is based in the US. Many arbitral institutions, including the ICC, LCIA and ICDR will also administer ADR proceedings.

Option clauses: Parties sometimes wish to provide an option for one or more parties to choose between referring a dispute to arbitration or the courts. As well as raising drafting issues, this requires careful legal analysis as, under some laws (but not English law), option clauses can, by their very nature, invalidate the arbitration provision (for uncertainty or, where the option is one-sided, lack of mutuality).

Capacity/authority: The capacity and/or authority of the parties and signatories to the arbitration agreement should be checked. For example, some laws require governmental entities to obtain parliamentary (or other) approval before executing an arbitration agreement.

Mandatory requirements: The governing law of the arbitration agreement and/or the law of the seat of arbitration and/or the law of the place of enforcement might impose mandatory requirements on the parties as to the form and/or contents of the arbitration agreement (especially if a governmental party is involved). For example, the arbitration agreement might have to be initialled or signed, the seat might have to be that of a governmental party and/or the involvement of an arbitral institution might have to be clearly stated.

Scope and arbitrability: The parties should decide what disputes they wish to be referred to arbitration. Generally, clauses are drafted very broadly so as to capture all disputes which might arise between the parties. However, sometimes parties wish certain categories of disputes to be resolved by other means, such as expert determination. This requires careful drafting, including provision for the resolution of disputes regarding the category into which a dispute falls. It should also be noted that, as a matter of public policy, some disputes might not be arbitrable under the applicable law.

The tribunal and its powers: The selection of the tribunal is addressed in Chapter III. The parties should also consider the powers of the tribunal under the chosen rules and applicable law, and whether they wish to adjust or clarify them by express provision (for example, the parties might prohibit awards of punitive damages or empower the tribunal to reach a decision in simple cases upon documents alone or to decide

the dispute according to notions of fairness rather than strictly according to the law).

Procedural rules, including disclosure/discovery:

The choice of suitable arbitration rules is addressed in Chapter IV. Consideration should be given as to whether, in light of the applicable law or otherwise, any amendments should be made to the selected rules. For example, whilst the ICC and LCIA Rules both exclude any appeal to the courts on the merits of the dispute, there is no such provision in the UNCITRAL Rules. The incorporation of the UNCITRAL Rules into a contract might therefore need to be supplemented by a specific provision excluding any right of appeal under the applicable law. Consideration might also be given as to whether to provide for the application of the IBA Rules on the Taking of Evidence in International Commercial Arbitration, or the application or exclusion of other rules addressing disclosure/discovery.

Seat: The selection of the seat of arbitration is addressed in Chapter V.

Language: If the language of the arbitration might otherwise be open to debate, it is preferable, in order to save time and costs, to make an express selection in the arbitration agreement. The language chosen should generally be that of the underlying contract and/or the majority of the documentation.

Governing law: Unless stated elsewhere, the governing law of the contract (and, where there might be some argument, the governing law of the arbitration agreement) should be stated in the arbitration agreement. If there is a separate governing law clause, it is advisable to check that it does not also contain a submission to courts which would be inconsistent with the arbitration agreement.

Confidentiality: The extent to which (if at all) the confidentiality of the arbitration will be protected by the rules or applicable law varies and parties might wish to make an express contractual provision.

The powers of the courts (including appeals): The parties should consider the powers of the courts of the seat under the selected rules and applicable law, and whether they wish to adjust or clarify them by express provision. Courts often have power to make orders in support of the arbitration (for example, interim relief prior to the appointment of the tribunal). They also usually have limited powers to review the award. Court powers to challenge the award for lack of jurisdiction or procedural irregularities are usually (but not always) mandatory. However, where the courts have power to hear appeals against the award (such as the English law right of appeal on a point of law) these can often be excluded by agreement.

Multi-party/agreement issues: Where any disputes might be between more than two parties and/or under more than one contract, specific drafting issues might arise. For example, where there are only two parties to a dispute and they wish to appoint a tribunal of three arbitrators, they often agree to select one each. However, if there are three or more parties, this method will not work. One common solution is for the claimant parties to select one arbitrator and the respondent parties another. However, this assumes that the interests of the claimants and respondents respectively are aligned. Moreover, in some jurisdictions (notably France), concerns have been raised that stipulating in advance that multiple parties must agree upon one arbitrator between them (out of a tribunal of three) might be held contrary to public policy. Where this is a concern, parties can avoid the issue by, for example, providing for a sole arbitrator or that all three arbitrators are to be appointed by an appointing authority.

Other multi-party/agreement issues arise out of the fact that arbitration is based upon the contract between the disputing parties. For example, it is generally not possible to join a third party to an arbitration unless all of the parties concerned agree (which, if you are likely to want joinder, should preferably be done in advance in the arbitration agreement). Where there are two or more related contracts, this can be achieved by the parties entering into a separate “umbrella” arbitration agreement. This also provides the parties with an opportunity to agree that the same tribunal will hear all disputes between them and empower it to consolidate related arbitrations where appropriate.

State immunity: Where a contract is to be made with a state or one of its instrumentalities, consideration should be given to the express waiver of any immunities or privileges attaching to that party which might impact upon the resolution of disputes. In particular, whilst entering into an arbitration agreement will itself often be treated as a waiver of any immunity from suit, an express waiver will normally be required to deal with immunity from enforcement of any award.

CHAPTER VIII

Arbitration Between Foreign Investors and States

Arbitration between foreign investors and states under bilateral investment treaties and multilateral agreements

No guide to international arbitration would be complete without a brief discussion of the availability of international arbitration as a means to resolve disputes between investors and states that fall within the scope of bilateral investment treaties (“BITs”) or multilateral trade agreements (such as the North American Free Trade Agreement).

In recent years, the value and significance of arbitration as a dispute resolution mechanism has grown as the number of BITs has increased, and as foreign investors (or their lawyers) have become progressively more familiar with the substantive protections and procedural rights that many BITs create. With more than 2,500 BITs concluded throughout the world, savvy foreign investors are wise to consider obtaining specialist legal advice both when they structure a foreign investment, which will determine whether these protections and rights will ultimately be available, and after a dispute actually arises. The discussion here is intended to introduce BITs, but should not be understood to serve as a replacement for that advice.

BITs: A BIT is a treaty between two states that is designed to promote and reciprocally protect investments made by nationals of one state (the “home state”) in the territory of the other (the “host state”). BITs confer covered investors with a wide range of legal rights that are directly enforceable against the host state and usually provide for international arbitration. Importantly, investors enjoy these rights, including the right to enforce them through international arbitration in a neutral forum, even if they are not parties to a contract with the host state. In international dispute resolution circles, this is commonly referred to as “arbitration without privity”.

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Core investment protections: Because each BIT is a product of negotiations between two states, the content and scope of the investment protections differ from BIT to BIT. Nevertheless, there are a number of core protections that are common to most BITs. These include the following:

- Protection against the expropriation of investments or other forms of severe interference with property rights, except where accompanied by the payment of “prompt, adequate and effective” compensation. It is generally understood that expropriation is not limited to the outright nationalisation of a sector or the seizure of a specific investment. Rather, it encompasses actions tantamount to expropriation, including incremental acts attributable to the state that unreasonably interfere with an investment to such a degree that the investor is essentially deprived of its fundamental rights of ownership. Whilst the line between expropriatory and non-expropriatory state action is always case-specific, tribunals have concluded that actions such as the forced renegotiation of contracts and the cancellation of an operating licence can give rise to a right to compensation.
- The right to “fair and equitable treatment” and full protection and security to investors and their investments. This standard is understood to protect investors against arbitrary, deliberate or grossly

careless actions by host states that harm the investors' legitimate interests. This standard could be breached, for example, if the host state manifestly disregarded an investment agreement or failed to implement the required authorisations for an approved investment project. Since the judiciary is an organ of the state, this standard could similarly be breached if an investor faced a denial of justice before the courts or the host state.

- Prohibition against discriminatory treatment, frequently combined with a requirement that the host state treat investors no less favourably than it treats its own nationals or the nationals of any third state (also known as “most-favoured-nation” or “MFN” treatment). This basic protection allows investors to rely on and invoke more favourable provisions in other investment treaties binding on the host state, as well as how the host state has actually treated other investors in like circumstances.
- The right to transfer funds into and out of the host state, in freely transferable currency and without delay. This protection would include, for instance, the right to make dividend or debt payments outside of the host state.

The right to resolve disputes directly with the host state through international arbitration: Most modern BITs allow foreign investors to enforce their treaty rights directly against the host state through international arbitration. The most frequent types of arbitration specified in BITs are institutional arbitrations under the auspices of ICSID and ad hoc arbitrations using the UNCITRAL Rules. Significantly, a series of recent decisions rendered by ICSID tribunals confirm that when an investor pleads that the host state has violated the rights established by a BIT, the investor has a right to arbitrate under the BIT even if the same conduct would also constitute a breach of contract, and the underlying contract limits recourse to the host state's courts or some other form of dispute resolution.

Conclusion: The degree of the legal protections granted by most BITs is significant, both in terms of the substantive and procedural rights they create, and in terms of the types of investments that they cover (ranging, for instance, from tangible property such as a factory or an

If an investor is to maximise the possible benefits of BIT protection against the host state, the key time for the investor to consider whether a BIT will be available is when it structures the investment.

oil field, to intangible property such as concession rights, shares in a corporation, a licence or IP rights). Whilst it is natural for an investor to consider what, if any, recourse it may have under a BIT once a dispute has materialised, in some cases this may be too late. If an investor is to maximise the possible benefits of BIT protection against the host state, the key time for the investor to consider whether a BIT will be available is when it structures the investment. For instance, all other things being equal, an investor might decide to invest through a subsidiary incorporated in a state which has a comprehensive BIT in force with the host state, rather than a subsidiary incorporated in a state that does not.

Although this is not an exhaustive list, these are the types of questions that an investor should take into account at the project formation and contract negotiation stages:

- What BITs or other investment treaties are in effect with the host state?
- What is the scope of those BITs or other investment treaties? How do they define covered investors and investments? Do they require investment registration?
- What substantive rights do they confer?
- Does it make sense to structure the company making the investment so that it is directly or indirectly controlled by a national of a state that is party to a BIT or another investment treaty?
- If the investment vehicle is an offshore entity organised in an overseas territory of another state (such as Bermuda, the British Virgin Islands, the Cayman Islands or the Netherlands Antilles), has the state extended the treaty to cover investors from that territory? If not, does it make sense to re-structure the investment vehicle in another territory?

Model Arbitration Clauses

The following standard clauses are recommended by their respective organisations as basic provisions for arbitration. However, the clauses might well need amending to suit the needs of particular cases (see the checklist for drafting an arbitration agreement in Chapter VII).

ICC

“All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules”.

LCIA

“Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Rules of the LCIA, which Rules are deemed to be incorporated by reference into this clause.

The number of arbitrators shall be [one / three].

The seat, or legal place, of arbitration shall be [city and / or country].

The language to be used in the arbitral proceedings shall be [].

The governing law of the contract shall be the substantive law of []”.

ICDR International Rules

“Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules”.

The ICDR also provides the following guidance:

“The parties should consider adding:

- *The number of arbitrators shall be (one or three).*
- *The place of the arbitration shall be [city, (province or state), country].*
- *The language(s) of the arbitration shall be []”.*

UNCITRAL

“Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules”.

The following guidance is provided:

“Note: Parties should consider adding:

- a) The appointing authority shall be ... [name of institution or person].*
- b) The number of arbitrators shall be ... [one or three].*
- c) The place of arbitration shall be ... [town and country].*
- d) The language to be used in the arbitral proceedings shall be []”.*

A sample ADR and arbitration provision

“If any dispute, controversy or claim arises out of or in connection with this contract, including any question regarding its existence, validity, interpretation, breach or termination (a ‘Dispute’), it shall be referred, upon written notice (a ‘Dispute Notice’) given by one party to the other, to a senior executive from each party.

The senior executives shall seek to resolve the Dispute on an amicable basis within 14 days of the Dispute Notice being received.

Any Dispute not resolved within 14 days of the Dispute Notice being received may be referred by either party to mediation before a mediator to be agreed between the parties or, failing such agreement, to be appointed by [CEDR / CPR]. The parties shall share (equally) the costs of the mediator, the mediation venue and [CEDR / CPR].

If either party fails or refuses to agree to or participate further in the mediation procedure or if, in any event, the Dispute is not resolved within 35 days from receipt of the Dispute Notice, the Dispute shall be referred to and finally resolved by arbitration pursuant to the Rules of the [ICC / LCIA], which Rules are deemed to be incorporated by reference into this Clause.

The tribunal shall consist of three arbitrators, two of whom shall be nominated by the respective parties. The Chairman of the tribunal shall be nominated by agreement between the two party-nominated arbitrators within 14 days of the nomination of the second such arbitrator. Failing such agreement, the Chairman shall be appointed by the [ICC / LCIA Court].

The seat of arbitration shall be [].

The language of the arbitration shall be [].

The governing law of this contract shall be the substantive law of []”.

New York Convention States

The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides for the enforcement of arbitral awards in more than 145 countries worldwide, subject only to limited defences set out in the Convention. To take advantage of the Convention, it is often necessary for the award to be made in a country that is a party to the Convention.

Key Articles of the Convention

Article III of the Convention sets out the basic obligation undertaken by contracting states, being to recognise and enforce foreign arbitral awards:

“Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards”.

Article V of the Convention sets out the limited grounds upon which contracting states may refuse to recognise and enforce foreign arbitral awards:

- “1. 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*

- 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.*
2. *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”.*

Convention states

The following states had acceded, ratified or succeeded to the Convention as of February 2014:

| | |
|----------------------------------|------------------------------|
| Afghanistan | Czech Republic |
| Albania | Democratic Republic of Congo |
| Algeria | Denmark |
| Antigua and Barbuda | Djibouti |
| Argentina | Dominica |
| Armenia | Dominican Republic |
| Australia | Ecuador |
| Austria | Egypt |
| Azerbaijan | El Salvador |
| Bahamas | Estonia |
| Bahrain | Fiji |
| Bangladesh | Finland |
| Barbados | France |
| Belarus | Gabon |
| Belgium | Georgia |
| Benin | Germany |
| Bolivia (Plurinational State of) | Ghana |
| Bosnia and Herzegovina | Greece |
| Botswana | Guatemala |
| Brazil | Guinea |
| Brunei Darussalam | Haiti |
| Bulgaria | Holy See |
| Burkina Faso | Honduras |
| Cambodia | Hungary |
| Cameroon | Iceland |
| Canada | India |
| Central African Republic | Indonesia |
| Chile | Iran (Islamic Republic of) |
| China | Ireland |
| Colombia | Israel |
| Cook Islands | Italy |
| Costa Rica | Jamaica |
| Côte d'Ivoire | Japan |
| Croatia | Jordan |
| Cuba | Kazakhstan |
| Cyprus | Kenya |

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|----------------------------------|--|
| Kuwait | Republic of Korea |
| Kyrgyzstan | Republic of Moldova |
| Lao People's Democratic Republic | Romania |
| Latvia | Russian Federation |
| Lebanon | Rwanda |
| Lesotho | Saint Vincent and the Grenadines |
| Liberia | San Marino |
| Liechtenstein | Sao Tome and Principe |
| Lithuania | Saudi Arabia (Kingdom of) |
| Luxembourg | Senegal |
| Madagascar | Serbia |
| Malaysia | Singapore |
| Mali | Slovakia |
| Malta | Slovenia |
| Marshall Islands | South Africa |
| Mauritania | Spain |
| Mauritius | Sri Lanka |
| Mexico | Sweden |
| Monaco | Switzerland |
| Mongolia | Syrian Arab Republic |
| Montenegro | Tajikistan |
| Morocco | Thailand |
| Mozambique | The Former Yugoslav Republic of Macedonia |
| Myanmar | Trinidad and Tobago |
| Nepal | Tunisia |
| Netherlands | Turkey |
| New Zealand | Uganda |
| Nicaragua | Ukraine |
| Niger | United Arab Emirates |
| Nigeria | United Kingdom of Great Britain and Northern Ireland |
| Norway | United Republic of Tanzania |
| Oman | United States of America |
| Pakistan | Uruguay |
| Panama | Uzbekistan |
| Paraguay | Venezuela (Bolivarian Republic of) |
| Peru | Vietnam |
| Philippines | Zambia |
| Poland | Zimbabwe |
| Portugal | |
| Qatar | |

Arbitral Institutions

The following is a non-exhaustive list, by region, of some of the best known arbitral institutions:

Asia

- **China:** the China International Economic and Trade Arbitration Commission (“CIETAC” – visit www.cietac.org);
- **Hong Kong:** the Hong Kong International Arbitration Centre (“HKIAC” – visit www.hkiac.org);
- **India:** LCIA India (visit www.lcia-india.org);
- **Japan:** the Japanese Commercial Arbitration Association (“JCAA” – visit www.jcaa.or.jp); and
- **Singapore:** the Singapore International Arbitration Centre (“SIAC” – visit www.siac.org.sg).

Europe

- **Austria:** the International Arbitration Centre for the Austrian Federal Economic Chamber (visit www.wko.at/arbitration);
- **England:** the London Court of International Arbitration (“LCIA” – visit www.lcia.org);
- **France:** the International Court of Arbitration of the International Chamber of Commerce (the “ICC” – visit www.iccwbo.org);
- **Germany:** the German Institute of Arbitration (“DIS” – visit www.dis-arb.de);

- **The Netherlands:** the Netherlands Arbitration Institute (“NAI” – visit www.nai-nl.org);
- **Sweden:** the Arbitration Institute of the Stockholm Chamber of Commerce (“SCC” – visit www.sccinstitute.com); and
- **Switzerland:** the Swiss Arbitration Association (“ASA” – visit www.arbitration-ch.org); the Chamber of Commerce & Industry of Geneva (visit www.ccig.ch); the Zurich Chamber of Commerce (visit www.zurichcci.ch); the World Intellectual Property Organisation (“WIPO”) Arbitration and Mediation Centre (visit www.wipo.int).

Middle East and Africa

- **Bahrain:** the Bahrain Chamber for Dispute Resolution (“BCDR-AAA” – visit www.bcdr-aaa.org);
- **Dubai:** the Dubai International Arbitration Centre (visit www.diac.ae);
- **Egypt:** the Cairo Regional Centre for International Commercial Arbitration (visit www.crcica.org.eg); and
- **Mauritius:** the LCIA-MIAC Arbitration Centre (visit www.lcia-miac.org);

The United States

- The American Arbitration Association (“AAA” – visit www.adr.org); and
- The International Centre for Settlement of Investment Disputes (“ICSID” – visit www.icsid.worldbank.org).

Glossary

AAA: The American Arbitration Association – see Ch. IV and visit www.adr.org.

ADR: Alternative Dispute Resolution – see Ch. I.

Ad hoc arbitration: An arbitration which is not administered by an institution – see Ch. IV.

Amiable compositeur: A tribunal empowered to decide a dispute in accordance with its notions of fairness / “ex aequo et bono” / according to “equity”, rather than being bound to decide according to the parties’ strict legal rights. The effect of empowering a tribunal in this way differs depending upon the applicable law. For example, under English law it might rule out any possibility of an appeal on a question of law.

Appeal: Referral of an award to another tribunal or to a national court for reconsideration of its merits. For many arbitrations, there is no right of appeal, either because the applicable law does not provide such a right or because the parties have waived it. Appeals should not be confused with challenges – see *below*. See *also* “Remission” and “Set aside” below.

Applicable law: The law which applies. Many international arbitrations require the application of more than one law. See *also* “Governing law”, “Lex arbitri”, “Lex fori”, “Lex mercatoria” and “Procedural law” below.

Arbitrability: Whether, under the applicable law, a particular dispute can be settled by arbitration. This is essentially a question for the public policy of the state in question, and which types of dispute (for example, bankruptcy, matrimonial and criminal matters) it wishes to reserve to the jurisdiction of its national courts. If a dispute is not arbitrable under an applicable law (for example, the law of the agreement, the place of arbitration or the place of enforcement) any award might be unenforceable.

Arbitral tribunal: The arbitrator(s) – see Ch. III.

Arbitration agreement: The parties’ agreement to submit their disputes (future or existing) to arbitration. Whilst such agreement usually consists of a clause(s) within another contract, it is generally deemed by the applicable law to be a separate agreement which will, for example, survive the termination of the contract of which it forms a part. See *also* “Competence – Competence”, “Submission agreement”, Ch. VII and Annex 1.

Arbitration: A private form of final and binding dispute resolution by an impartial tribunal, based upon the agreement of the parties but regulated and enforced by the state – see Ch. I.

Arbitrator: The decision-maker in an arbitration (akin to a judge in court proceedings).

Award: The decision of an arbitral tribunal on a substantive issue (as distinct from a merely procedural order or direction). Awards are often referred to as “interim”, “partial” and/or “final” awards, although, confusingly, the term “interim” is also sometimes used to mean “partial”. Interim awards have only temporary effect and do not finally decide an issue (which can, accordingly, be revisited by the tribunal at a later stage of the arbitration). A partial award finally decides one or more (but not all) of the issues before the tribunal. A final award decides all the (or all the remaining) issues and (subject to any corrections) essentially ends the arbitration. See *also* “Consent award” below.

BITs: Bilateral Investment Treaties – see Ch. VIII.

CEDR: The Centre for Effective Dispute Resolution, an independent body (based in London) which provides a broad range of services in connection with ADR procedures – visit www.cedr.com.

Challenge to award: The word “challenge” is often used to describe the procedures, other than an appeal on the merits, by which awards can be impugned in the courts of the seat of arbitration. Challenges are usually concerned with the jurisdiction of the tribunal or the procedure followed. In contrast to rights of appeal, most major jurisdictions provide rights to challenge awards and, in many cases, the parties cannot waive such rights. See *also* “Appeal”, “Remission” and “Set aside”.

CIETAC: The China International Economic and Trade Arbitration Commission. Based in Beijing but with sub-commissions elsewhere in China, CIETAC is an international arbitral institution with its own rules and panel of arbitrators – visit www.cietac.org.

Competence—Competence: The legal doctrine by which an arbitral tribunal can decide upon its own jurisdiction, even where the contract containing the arbitration agreement is invalid or has been terminated. See *also* “Separability” below.

Conciliation: A form of ADR, similar to mediation (*see below*), whereby an independent third party “conciliator” assists the

parties in attempting to settle their dispute. A conciliator cannot force parties to settle but may be requested to express his opinion on the possible outcome of any legal proceedings.

Conflict of laws: The legal rules in each jurisdiction by which the applicable law is determined. Factors which might be taken into consideration in deciding the law applicable to the merits of the dispute include the parties' nationality, the place of performance of the contractual obligations and the place and subject-matter of the arbitration.

Consent award: An award recording the terms agreed by the parties to settle their dispute. The principal advantage of obtaining a consent award is that, if not complied with, it may be enforced as with any other award (whereas a settlement agreement is merely a contract). *See also* "Award" above.

Consolidation: The merger of separate arbitrations. This normally requires the agreement of all of the parties and, where consolidation is a possibility, consideration should be given to including appropriate language in the arbitration agreement. *See also* "Joinder" below.

Costs of the arbitration: Depending upon the applicable law, rules and the discretion of the tribunal, the successful party will often be awarded all or part of its costs of the arbitration, including the fees and expenses of the lawyers, the tribunal, any institution, experts, witnesses and the costs of hearing facilities, interpreters, translators and reporting services. Although possible in limited circumstances, parties will not normally recover sums in respect of their management and employee time engaged on the arbitration.

CPR: The Center for Public Resources is an independent body established in the US to promote ADR – visit www.cpradr.org.

Designation of arbitrator: The proposal of an arbitrator for appointment by an institution – *see also* "Nomination of arbitrator" below and Ch. III.

Disclosure / Discovery: The process by which the parties make available to each other certain documents in their possession or under their control which are relevant to the dispute. There is a range of possibilities as to the extent of disclosure (from none at all to all relevant documents) and the order made is usually a matter for the discretion of the tribunal (which is often influenced by the legal traditions of the jurisdiction to which each arbitrator belongs – civil law jurisdictions generally having far more restricted disclosure than common law jurisdictions). The obligation to disclose normally arises whether or not the documents are damaging to the position of the party handing them over.

Domestic arbitration: Some jurisdictions distinguish between “international” and “domestic” arbitrations, according to criteria such as the nationality of the parties, the nature of the dispute and the applicable law. The importance of the distinction lies in the different rules which are applied to the two categories (for example, the distinction sometimes affects the ability of the parties to set aside, remit or appeal an award).

Enforcement of award: If a party does not comply with an award, the other party may apply to a court for the recognition (see “Recognition of award” below) and enforcement of the award using that court’s enforcement processes (for example, the seizure of assets). For the wide scope for the international enforcement of awards; see Ch. II and Annex 2.

Equity clauses: See “Amiable compositeur” above.

Ex aequo et bono: See “Amiable compositeur” above.

Experts: Experts appointed by the parties and/or the tribunal for an arbitration provide their impartial opinions on specified matters in dispute by drawing on their experience and/or qualifications. For the distinction between expert determination and arbitration, see Ch. I.

Geneva Convention: The Convention on the Execution of Foreign Arbitral Awards. Signed in Geneva in 1927, this Convention provided for the recognition and enforcement of certain foreign awards in convention states but has now largely been superseded by the New York Convention (see below).

Governing law: The law according to which the relevant contract is to be interpreted.

IBA: The International Bar Association – visit www.ibanet.org.

IBA Rules of Evidence: The IBA’s Rules on the Taking of Evidence in International Commercial Arbitration.

ICA: The International Court of Arbitration – see ICC Court below.

ICC: The International Chamber of Commerce. The ICC provides a number of services to the international business community. The most significant aspect of the ICC’s work in the context of arbitration is the ICC Court (see below), but it also provides other dispute resolution assistance (for example, a conciliation service, a centre for expertise and a pre-arbitral referee procedure to enable parties to obtain urgent interim relief).

ICC Court: The International Court of Arbitration of the International Chamber of Commerce – see Ch. IV and visit www.iccwbo.org.

ICSID: The International Centre for the Settlement of Investment Disputes – see Ch. IV, Ch. VIII and visit www.icsid.worldbank.org.

ICSID Convention: The Convention on the Settlement of Investment Disputes between States and Nationals of Other States made at Washington, D.C. in 1965 (also referred to as the “Washington Convention”), which provides for the resolution of investment disputes through ICSID (see above).

Impartiality and independence: All arbitrators in international arbitrations must act impartially (*i.e.*, not be biased towards or against a party or in relation to the issues in dispute), failing which they may be removed, the award challenged or its enforcement resisted. As part of this, many arbitration rules and laws emphasise the need for arbitrators to be independent of (*i.e.*, unconnected to) the parties.

Interim relief: National courts are sometimes able to support an arbitration by granting interim relief (for example, ordering a party to preserve property or assets) pending the tribunal’s award. This is particularly helpful if urgent relief is needed before the tribunal has been appointed and/or where the powers of the courts to impose criminal sanctions in the event of non-compliance are required (the tribunal not having such powers).

International arbitration: See “Domestic arbitration” above.

Investment treaties: See Ch. VIII.

Joinder: Bringing a new party into an ongoing arbitration. Joinder generally requires the agreement of all of the parties and, where anticipated, a term providing for joinder should be included in the arbitration agreement (thereby providing the consent to joinder in advance). See also “Consolidation” above.

Jurisdiction: A jurisdiction is a national legal system. The tribunal’s jurisdiction is its scope of authority or competence.

Language(s) of the arbitration: The language(s) in which all matters connected with the arbitration will be conducted, including the parties’ written submissions, evidence (whether written or oral) and the award itself.

LCIA: The London Court of International Arbitration – see Ch. IV and visit www.lcia.org.

Lex arbitri: The procedural law of the arbitration, which is usually that of the seat of the arbitration (and is often different from the law governing the matters in dispute). See also “Seat of the arbitration” below.

Lex fori: The law of the country where the arbitration takes place.

Lex mercatoria: A set of legal principles based on concepts found in developed legal systems and widely recognised by the international business community. The existence, scope and application of *lex mercatoria* is the subject of much debate. However, it has been successfully invoked in arbitrations as the basis on which the tribunal should resolve issues in the absence of any clearly applicable law. In such cases, the UNIDROIT principles (*see below*) are frequently used.

Mandatory requirements: Those provisions of the applicable law which are not subject to any contrary agreement of the parties.

Model Law: The Model Law on International Commercial Arbitration. The Model Law, which was adopted by UNCITRAL in 1985, was promoted as the basis for the reform and harmonisation of arbitration legislation around the world. To date, the arbitration laws of at least 40 countries have been reformed having regard to the Model Law.

Mediation: A form of ADR (*see above*) involving an independent third party “mediator” who seeks to facilitate the settlement of the parties’ dispute. A mediator cannot impose a settlement and tends not to give his opinion on the legal merits. See “Conciliation” above.

NAFTA: North American Free Trade Agreement – see Ch. VIII.

New York Convention: The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards – see Ch. II and Annex 2.

Nomination of arbitrator: The proposal of an arbitrator for appointment by an institution – see “Designation of arbitrator” above and Ch. III.

Panama Convention: The 1975 Inter-American Convention on International Commercial Arbitration. This Convention provides for the enforcement of awards in more than 15 countries in the Americas (including the United States) subject to specified grounds of refusal. In order for an award to be enforced under the Convention, it must normally have been made in a Convention state.

Party autonomy: The parties’ freedom of choice (for example, to determine the procedure to be followed).

Permanent Court of Arbitration: Established in 1899 and based in The Hague, the Permanent Court of Arbitration (“PCA”) deals with disputes between states which are party to the 1899 or 1907 Hague Conventions (*see* www.pca-cpa.org). Under the UNCITRAL Rules, the Secretary-General of the PCA will designate an appointing authority if the parties fail both to make the necessary appointment(s) of an arbitrator(s) and to designate an appointing authority themselves – see Ch. IV.

Preliminary issue: An issue decided in advance of the main hearing, usually in an attempt to save time and costs by resolving an important issue (such as jurisdiction) at an early stage.

Public policy: A state's notions of justice and public morality. Public policy considerations may affect whether a dispute is arbitrable or an award enforceable (for example, where the dispute arises out of a contract regarded as void for public policy reasons).

Procedural law: The law applicable to the procedure for the arbitration (typically the law of the seat). In many cases, the procedure for the arbitration will be a mixture of the rules adopted by the parties (often through the incorporation by reference of a recognised set of rules, such as those of the ICC, LCIA, AAA or UNCITRAL) and the rules set down by the law of the seat. *See also* "Lex arbitri", "Mandatory requirements" and "Seat of the arbitration".

Recognition of award: Confirmation by a court that an award is valid and binding.

Remission: The power of a court, upon the application of one of the parties, to refer an award back to the arbitral tribunal for reconsideration, in whole or in part. *See also* "Appeal", "Challenge to award" and "Set aside".

Rules of arbitration: The procedural rules pursuant to which the arbitration is conducted – *see* Ch. IV.

Seat of the arbitration: The jurisdiction in which the arbitration is deemed to take place and the award made (regardless of the physical location of the tribunal) – *see* Ch. V.

Separability: The legal doctrine by which the arbitration clause (agreement) is deemed to be separate from the contract in which it is included (allowing, for example, the arbitration agreement to survive the termination of the main contract). *See also* "Competence – Competence" above.

Settlement: The voluntary resolution of a dispute by the parties involved. *See also* "Consent award" above.

Set aside: A court in the seat of the arbitration generally has the power, in certain circumstances, to set aside (*i.e.*, annul) the award. *See also* "Appeal", "Challenge to award" and "Remission" above.

Slip rule: A rule allowing a tribunal to correct minor (for example, typographical or mathematical) errors in its award.

Sovereign (or state) immunity: The protection enjoyed by sovereign states and/or their entities both against the jurisdiction of other state's courts or tribunals and from the execution of any judgment or award – *see* Ch. VII.

Stay of court proceedings: A court order suspending proceedings before it, which were commenced in breach of an agreement to submit disputes to arbitration.

Submission agreement: An arbitration agreement in respect of existing disputes. *See also* “Arbitration agreement” above.

Terms of Reference: A document required by the ICC Rules, which sets out the names and addresses of the parties and their representatives, a summary of their claims, the place of arbitration and, if appropriate, a list of the issues to be determined.

Trade usages: The standard terms on which members of a particular business community are accustomed to deal. Under some arbitration rules (notably those of the ICC), the tribunal is required to take account of any relevant trade usages.

UNCITRAL: The United Nations Commission on International Trade Law. The UNCITRAL arbitration rules are discussed in Ch. IV. *See also* “Model Law” above and visit www.uncitral.org.

UNIDROIT Principles: A system of international contract law rules published by the International Institute for the Unification of Private Law in 1994. The UNIDROIT Principles are based on concepts familiar to many legal systems and are therefore reflective of *lex mercatoria* (*see above*).

Washington Convention: The ICSID Convention – *see above*.

WIPO: The World Intellectual Property Organisation – *see* Ch. IV and visit www.wipo.int. ■

Other relevant Latham & Watkins materials that may be of interest are:

- Public International Law Practice brochure
- International Investment Protection Practice brochure

Should you wish to receive a copy of either of these publications, please contact your local Latham office. You may also be interested in signing up to our Arbitration mailing list or visiting our Public International Law Web site. To do so, please visit **LW.com**.

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