



# 1. An Overview of International Arbitration

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## A. Introduction

### a. What is arbitration?

**1.01** International arbitration has become the principal method of resolving disputes between States, individuals, and corporations in almost every aspect of international trade, commerce, and investment. The established centres of arbitration report increasing activity, year on year; new arbitration centres have been set up to catch this wave of new business; States have modernised their laws so as to be seen to be 'arbitration friendly'; firms of lawyers and accountants have established dedicated groups of arbitration specialists; conferences and seminars proliferate; and the distinctive law and practice of international arbitration has become a subject for study in universities and law schools alike.

**1.02** Amidst all this activity, it would be easy to forget that, in its origins, <sup>(1)</sup> the concept of arbitration is a simple one. Parties who are in dispute agree to submit their disagreement to a person whose expertise or judgment they trust. They each put their respective cases to this person—this private individual, this arbitrator—who [page "1"](#) listens, considers the facts and the arguments, and then makes a decision. That decision is final and binding on the parties; and it is binding because the parties have agreed that it should be, rather than because of the coercive power of any State. Arbitration, in short, is an effective way of obtaining a final and binding decision on a dispute or series of disputes, without reference to a court of law.

**1.03** It is easy to see how such a basically simple, informal, and essentially private system of dispute resolution came to be adopted by a local tribe or community—or even by a group of traders, dealers, or merchants within a particular area or market. What is perhaps more difficult to understand is how such an elementary system came to be accepted—and accepted not merely in a local or national setting, but worldwide (not merely by individuals, but by governments and major corporations) as the established method of resolving disputes in which millions or even hundreds of millions of

## Source

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**1. An Overview of International Arbitration** in Nigel Blackaby, Constantine Partasides, et al., Redfern and Hunter on International Arbitration, (Oxford University Press 2009) pp. 1 - 83

dollars are at stake. Nevertheless, this is what has happened; and the way in which it has happened is one of the major themes of this book.

## **b. The conduct of an arbitration**

**1.04** There is a deceptive simplicity about the way in which arbitral proceedings are conducted. They take place in many different countries, with parties, counsel, and arbitrators of many different nationalities who mix together freely during breaks in the meetings or the hearings. There is a striking lack of formality. An arbitration is not like proceedings in a court of law. There are no ushers, wigs, or gowns; no judge or judges sitting in solemn robes upon a dais; no national flags, orbs, or sceptres. There is simply a group of people seated around a row of tables, in a room hired for the occasion. If it were not for the stacked piles of lever-arch files, the law books, and the transcript writers with their microphones and stenotype machines, it might look to an outsider as if a conference or a business meeting was in progress. It would not look like a legal proceeding at all.

**1.05** In fact, the appearance conceals the reality. It is true that the parties themselves choose to arbitrate, as an alternative to litigation or other methods of dispute resolution. It is true too that, to a large extent, the arbitrators and the parties may choose for themselves the procedures to be followed. If they want a 'fast-track' arbitration, (2) they may have one (although if it is to take place under the Swiss Rules of International Arbitration, it will be known by the somewhat more dignified title of an 'Expedited Procedure'). If the parties want to dispense with the [page "2"](#) disclosure of documents or the evidence of witnesses, they may do so. Indeed, they may even dispense with the hearing itself if they wish. (3)

**1.06** It might seem as if parties and arbitrators inhabit their own private universe; but in reality the practice of resolving disputes by international arbitration only works effectively because it is held in place by a complex system of national laws and international treaties. (4) Even a comparatively simple international arbitration may require reference to at least four different national systems or rules of law, (5) which in turn may be derived from an international treaty or convention—or indeed, from the UNCITRAL Model Law on international arbitration, which is referred to later in this chapter. First, there is the law that governs the international recognition and enforcement of the agreement to arbitrate. Then there is the law—the so-called '*lex arbitri*'—that governs, or regulates, the actual arbitration proceedings themselves. Next—and generally most importantly—there is the law or the set of rules that the arbitral tribunal is required to apply to the substantive matters in dispute. Finally, there is the law that governs the international recognition and enforcement of the award of the arbitral tribunal.

**1.07** These laws may well be the same. The *lex arbitri*, which

governs the arbitral proceedings themselves, and which will almost always be the national law of the place of arbitration, may also govern the substantive matters in issue. But this is not necessarily so. The law that governs the substantive matters in issue (and which goes by a variety of names, including 'the applicable law', 'the governing law', or, in England 'the proper law') may be a different system of law altogether. For example, an arbitral tribunal sitting in Switzerland, governed (or regulated) by Swiss law as the law of the place of arbitration, may well be required to apply the law of New York as the applicable or substantive law of the contract. <sup>(6)</sup>

*page "3"* Moreover, this applicable or substantive law will not necessarily be a particular national system of law. It may be public international law; or a blend of national law and public international law; or even an assemblage of rules known as 'international trade law', 'transnational law', the 'modern law merchant' (the so-called *lex mercatoria*), or some other title. <sup>(7)</sup> Finally, because most international arbitrations take place in a 'neutral' country—that is to say, a country which is not the country of the parties—the system of law which governs the international recognition and enforcement of the award of the arbitral tribunal will almost always be different from that which governs the arbitral proceedings themselves. This dependence of the international commercial arbitral process upon different, and occasionally conflicting, rules of national and international law is another of the major themes of this book.

### **c. A brief historical note**

**1.08** There is as yet no general history of arbitration. Indeed, writing such a history would be like trying to put together an immense jigsaw puzzle, with many of the pieces missing and lost forever. One problem for the would-be historian is that of language. A general history would need to look at the development of arbitration across the globe, as well as across the ages. <sup>(8)</sup> Another problem is that of sources. <sup>(9)</sup> A truly general history would involve a 'round-the-world tour' of libraries and universities, court texts, and historical records; and this would be no easy task since, as a method of resolving disputes, arbitration in one form or another has been in existence for thousands of years. <sup>(10)</sup>

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**1.09** Arbitration has been described as an 'apparently rudimentary method of settling disputes, since it consists of submitting them to ordinary individuals whose only qualification is that of being chosen by the parties'. <sup>(11)</sup> It is not difficult to visualise the 'rudimentary' nature of the arbitral process in its early days. Two merchants, in dispute over the price or quality of goods delivered, would turn to a third, whom they knew and trusted for a decision on that dispute and would agree to abide by that decision without further question; or two traders, arguing over equipment that one claimed to be defective, would agree to settle the dispute by accepting the judgment of a fellow dealer. And they would do this, not because of

any legal sanction, but because this was what was expected of them in the community within which they carried on their business:

... it can be said with some confidence that the dispute resolution mechanisms of the post-classical mercantile world were conducted within, and drew their strengths from, communities consisting either of participants in an individual trade or of persons enrolled in bodies established under the auspices and control of geographical trading centres. Such communities gave birth to the implicit expectations and peer-group pressures which both shaped and enforced the resolution of disputes by an impartial and often prestigious personage. Within such communities, external sanctions would have been largely redundant, even if a legal framework had been available to bring them into play, which in the main it was not. <sup>(12)</sup>

**1.10** Within a local community, the authority of the lord of the manor in an English village, or of a Sheikh in one of the territories of Arabia, <sup>(13)</sup> may well have been sufficient to ensure that the parties accepted and carried out the decisions that were made. Similarly, within a particular trade or market, a merchant's concern for his reputation (or the risk of sanctions being imposed by his trade association) <sup>(14)</sup> would usually be sufficient to ensure compliance.

**1.11** In theory, such a localised system of 'private justice' might have continued without any supervision or intervention by the courts of law—in much the same way as, in general, the law does not concern itself with supervising or enforcing the private rules of a members' club. Roman law did in fact adopt such an attitude of indifference to private arbitration. An arbitration agreement was not unknown and it was not illegal; but neither the arbitration agreement nor any award made [page "5"](#) under it had any legal effect. To overcome this problem, parties would make a double promise (a '*compromissum sub poena*'): a promise to arbitrate and a promise to pay a penalty if the arbitration agreement or the arbitral award was not honoured. The Roman court would not enforce the arbitration agreement or the award, but it would enforce the promise to pay the penalty. <sup>(15)</sup>

**1.12** It is doubtful whether any modern State could afford to stand back and allow a system of private justice—depending essentially on the integrity of the arbitrators and the goodwill of the participants—to be the only method of regulating commercial activities. Arbitration may well have been 'a system of justice, born of merchants' <sup>(16)</sup> but, just as war is too important to be left to the generals, <sup>(17)</sup> so arbitration was too important to be left to private provision.

**1.13** National regulation of arbitration came first; <sup>(18)</sup> but international arbitration does not stay within national borders. On the

contrary, it crosses them again and again. A corporation based in the United States might contract with another corporation based in Germany, for the construction of a power plant in Egypt, with an agreement that any disputes should be resolved by arbitration in London. How is such an arbitration agreement to be enforced, if a dispute arises and one of the parties refuses to arbitrate? Which court will have jurisdiction? If there is an arbitration which leads to an award of damages and costs, how is that award to be enforced against the assets of the losing party, if the losing party refuses to carry out the award voluntarily? And again, which court has jurisdiction?

**1.14** It is evident that the national law of one State alone is not adequate to deal with problems of this kind, since the jurisdiction of any given State is generally limited to its own territory. What is needed is an international treaty or convention, [page "6"](#) linking together national laws and providing, so far as possible, a system of worldwide enforcement, both of arbitration agreements and of arbitral awards. Those treaties and conventions, and other major international instruments, will be discussed in more detail towards the end of this chapter. For the present, it is useful simply to list them: they are all significant landmarks in the development of a modern law and practice of international arbitration—and they are landmarks to which reference will continually be made.

#### ***d. International rules, treaties, and conventions***

**1.15** The most important landmarks are:

- (1) The Geneva Protocol of 1923 (the 1923 Geneva Protocol). [\(19\)](#)
- (2) The Geneva Convention of 1927 (the 1927 Geneva Convention). [\(20\)](#)
- (3) The New York Convention of 1958 (the New York Convention). [\(21\)](#)
- (4) The UNCITRAL Arbitration Rules (the UNCITRAL Rules) adopted by resolution of the General Assembly of the United Nations in December 1976. [\(22\)](#)
- (5) The Washington Convention of 1965 (the Washington Convention). [\(23\)](#)
- (6) The UNCITRAL Model Law (the Model Law) adopted by the United Nations Commission on International Trade Law in June 1985. [\(24\)](#)
- (7) Revisions to the Model Law (the Revised Model Law) adopted in December 2006. [\(25\)](#)

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For the present, it is sufficient simply to note the names of these 'landmarks'. They will be considered in more detail later in this chapter.

#### ***e. The meaning of 'international'***

### ***i. International and domestic arbitrations contrasted***

**1.16** The term ‘international’ is used to mark the difference between arbitrations which are purely national or domestic and those which in some way transcend national boundaries and so are ‘international’ or, in the terminology adopted by Judge Jessup, ‘transnational’. (26)

**1.17** It has been said that every arbitration is a ‘national’ arbitration, in that it must be held at a given place and is accordingly subject to the national law of that place. (27) In a narrow sense, this is correct. If an international arbitration is held in Brussels, the place or ‘seat’ of the arbitration will be Brussels and the tribunal’s award will be a Belgian award. But in practice it is usual to distinguish between arbitrations which are purely national or ‘domestic’ and those which are ‘international’. There are good legal and practical reasons for this.

**1.18** First, to the extent that the procedure in any arbitration is regulated by law, that law is normally the law of the place of arbitration: that is to say, the law of the ‘seat’ of the arbitration. In an international arbitration (unlike its national or ‘domestic’ counterpart), the parties usually have no connection with the seat of the arbitration. Indeed, the seat will generally have been chosen by the parties, or by an arbitral institution, precisely *because* it is a place with which the parties have no connection. It will be a truly *neutral* seat.

**1.19** Secondly, the parties to an international arbitration are usually (but not always) corporations, States, or State entities, whilst the parties to a domestic arbitration will more usually be private individuals. This means that an element of consumer protection will almost certainly form part of the law governing domestic arbitrations. (28)

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**1.20** Thirdly, the sums involved in international arbitrations are usually (but not always) considerably greater than those involved in domestic arbitrations, which may—for example—concern a comparatively trivial dispute between a customer and an agent over a faulty motor car or a package holiday that failed to live up to its advance publicity.

**1.21** To these three reasons might be added a fourth, namely that in some States, the State itself—or one of its entities—is only permitted to enter into arbitration agreements in respect of international transactions.

**1.22** Given its importance, it might be thought that there would be general agreement on the meaning of ‘international arbitration’. But this is not so. ‘When I use a word,’ said Humpty Dumpty ‘it means just what I choose it to mean—neither more nor less.’ (29) In

deference to this relaxed approach to language, the word 'international' has at least three different definitions when it comes to international arbitration. The first depends on the nature of the dispute. The second depends on the nationality of the parties. The third approach, which is that of the Model Law, depends on the blending of the first two, plus a reference to the chosen place of arbitration. This is significant, because the essential difference between domestic and international arbitration was recognised in the Model Law, which is *expressly* stated to be a law designed for international commercial arbitration. Many States have adopted a separate legal regime to govern international arbitrations taking place on their territory, recognising the different considerations that apply to such arbitrations. These States include (but are not limited to) Belgium, Brazil, Colombia, France, Hong Kong, Singapore, and Switzerland.

## ***ii. The international nature of the dispute***

**1.23** The International Chamber of Commerce (ICC) established its Court of Arbitration in Paris in 1923 <sup>(30)</sup> to provide for the settlement by arbitration of what are described as 'business disputes of an international character'. <sup>(31)</sup> The ICC was quick to adopt the *nature* of the dispute as its criterion for deciding whether or not an arbitration was an 'international arbitration' under its rules. Although at first the ICC only considered business disputes as 'international' if they involved nationals of different countries, it altered its rules in 1927 to cover disputes that [page "9"](#) contained a foreign element, even if the parties were nationals of the same country. There is no definition in the ICC Rules of what is meant by 'business disputes of an international character' but the explanatory booklet issued by the ICC used to state:

... the international nature of the arbitration does not mean that the parties must necessarily be of different nationalities. By virtue of its object, the contract can nevertheless extend beyond national borders, when for example a contract is concluded between two nationals of the same State for performance in another country, or when it is concluded between a State and a subsidiary of a foreign company doing business in that State. <sup>(32)</sup>

**1.24** This wide interpretation of the term 'international' is also to be found in the French law on international arbitration. By a Decree of 12 May 1981, a separate legal regime was created for 'international' arbitrations conducted in France. <sup>(33)</sup> The definition given in the Decree itself is sparse. Article 1492 of the French Code of Civil Procedure simply provides that 'an arbitration is international when it involves the interests of international trade'. <sup>(34)</sup> In using this language, the Code has adopted the definition given by the highest French court (the Cour de Cassation) in several previous decisions:



It is generally recognised that this definition covers the movement of goods or money from one country to another, with significant regard being paid to other elements such as the nationality of the parties, the place of the conclusion of the contract, etc. (35)

Former French colonies, such as Djibouti and the Côte d'Ivoire and, to a lesser extent, Algeria and Tunisia, also follow this approach in defining what is meant by an 'international' arbitration.

### ***iii. The nationality of the parties***

**1.25** The second approach is to focus attention on the parties. This involves reviewing the nationality, place of residence, or place of business of the parties to the arbitration agreement. It is an approach that was adopted in the European Convention [page "10"](#) of 1961, (36) which, although little used, contains several useful definitions, including a definition of the agreements to which it applies as:

Arbitration agreements concluded for the purpose of settling disputes arising from international trade between physical or legal persons having, when concluding the agreement, their habitual place of residence or their seat in different Contracting States. (37)

**1.26** Switzerland is an example of a country in which the nationality of the parties determines whether or not an arbitration is 'international'. Arbitration in Switzerland used to be governed by the law of the canton in which the arbitration was based (the place or 'seat' of arbitration). Since 1 January 1989, international arbitrations that are located in Switzerland are governed by Switzerland's law on international arbitration. Under this law an arbitration is 'international' where, at the time the arbitration agreement was concluded, at least one of the parties was not domiciled or habitually resident in Switzerland. (38)

**1.27** The 'nationality' test is also used by the United States for the purposes of the New York Convention; but arbitration agreements between US citizens or corporations are excluded from the scope of the Convention, unless their relationship 'involves property located abroad, envisages performance or enforcement abroad or has some reasonable relation with one or more foreign states'. (39)

### ***iv. The approach of the Model Law***

**1.28** The lack of an internationally agreed definition of 'international' in the context of international commercial arbitration may cause problems. Each State has its own test for determining whether an arbitration award is 'domestic' or, in the language of the New York



Convention, 'foreign'. The Convention defines 'foreign awards' as awards which are made in the territory of a State *other* than the State in which recognition and enforcement is sought; but it adds to this definition, awards which are 'not considered as domestic awards' by the enforcement State. <sup>(40)</sup> In consequence, an award that one State considers to be 'domestic' (because it involves parties who are nationals of that State) might well be considered by the enforcement State as *not* being domestic (because it involves the interests of international trade).

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**1.29** As already stated, the Model Law was specifically designed to apply to *international* commercial arbitration. Accordingly, some definition of the term 'international' was essential. The official Report on the Model Law stated that, in considering the term 'international' it would appear to be:

necessary, though difficult, to define that term since the Model Law is designed to provide a special legal regime for those arbitrations where more than purely domestic interests are involved. <sup>(41)</sup>

The definition adopted in the Model Law <sup>(42)</sup> is as follows:

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. <sup>(43)</sup>

**1.30** This definition combines the two criteria mentioned earlier. The first criterion of internationality is related to the *parties*, arising from their having places of business in different States. <sup>(44)</sup> There is the alternative criterion of the internationality of the *dispute* itself in that, for instance, the place with which the subject-matter of the dispute is most closely connected may be foreign to the parties. <sup>(45)</sup> Finally, there is the element of internationality that may arise

from the choice of a foreign place of arbitration or, it would seem, from an agreement between the parties that the subject-matter of the arbitration agreement is international. (46)

**1.31** For the purposes of this work, the authors adopt a wide definition. An arbitration is considered as 'international' if (in the sense of the Model Law) it involves parties of different nationalities, or it takes place in a country which is 'foreign' to the parties, or it involves an international dispute. (47) Nonetheless, a *caveat* must be entered to the effect that such arbitrations will not necessarily be universally [page "12"](#) regarded as international. If a question arises as to whether or not a particular arbitration is 'international', the answer will depend upon the provisions of the relevant national law.

#### ***f. The meaning of 'commercial'***

**1.32** In the past, it was customary to refer to the 'business' or 'commercial' character of arbitrations such as those to which much of this book is devoted. This reflects the distinction made in civil law countries between contracts which are 'commercial' and those which are not. It is a distinction that at one time was very important, because there were and still are countries in which only disputes arising out of 'commercial' contracts could be submitted to arbitration. (48) (Thus it might be permissible to hold an arbitration between two merchants over a contract made in the course of their business but not, for example, in respect of a contract for the allocation of property on the marriage of their children.)

**1.33** The first of the major treaties on international arbitration, the 1923 Geneva Protocol, started with the assumption that *commercial* matters would normally be capable of resolution (or settlement) by arbitration, whilst others might not be. The Protocol obliged each contracting State to recognise the validity of an arbitration agreement concerning disputes that might arise from a contract 'relating to commercial matters or to any other matter capable of settlement by arbitration'. The distinction that is made in the Protocol between 'commercial matters' and others carries with it the implication that 'commercial matters' will necessarily be capable of being settled (or resolved) by arbitration, under the law of the State concerned (because that State will permit such matters to be resolved by arbitration), whilst it may (or may not) allow other matters to be resolved in this way.

**1.34** Further emphasis is added to this distinction between 'commercial matters' and 'any other matter' by the stipulation in the Geneva Protocol that each contracting State may limit its obligations 'to contracts that are considered as commercial under its national law'. (49) This is the so-called 'commercial reservation'. It is still of importance, since it appears again in the New York Convention. (50)

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**1.35** Neither the Geneva Protocol nor the New York Convention attempted to define 'commercial'. Instead, they left it to any contracting State which enters the commercial reservation to decide for itself what is meant by 'commercial'.

**1.36** The draftsmen of the Model Law considered defining the word, but gave up the attempt. Instead, they stated in a footnote that:

The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road. (51)

In practice, then, the term 'commercial' is usually construed widely, so as to include all aspects of international business. In this book, the authors follow this wide interpretation of the term. However, it has been omitted from the title page of the present edition, since the scope of the book now covers most (if not all) types of dispute that are referred to international arbitration, including investor/State disputes.

#### ***g. The key elements of an international arbitration***

**1.37** There are many aspects of an international arbitration, as readers will discover, but by way of introduction it is useful to consider the following key elements, namely:

- the agreement to arbitrate;
- the need for a dispute;
- starting an arbitration: the appointment of an arbitral tribunal;
- the arbitral proceedings;
- the decision of the tribunal;
- enforcement of the Award.

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#### ***h. The agreement to arbitrate***

**1.38** The foundation stone of modern international arbitration is

(and remains) <sup>(52)</sup> an agreement by the parties to submit to arbitration any disputes or differences between them. Before there can be a valid arbitration, there must first be a valid agreement to arbitrate. This is recognised both by national laws and by international treaties. For example, under both the New York Convention <sup>(53)</sup> and the Model Law, <sup>(54)</sup> recognition and enforcement of an arbitral award may be refused if the parties to the arbitration agreement were under some incapacity, or if the agreement was not valid under its own governing law. <sup>(55)</sup>

**1.39** Historically, there were two types of arbitration agreement.

<sup>(56)</sup> The first, which is still very much the most commonly used, is an *arbitration clause* in a contract. Arbitration clauses are discussed in more detail later; but what they do is to make it clear that the parties have agreed that any dispute which arises out of or in connection with the contract will be referred to arbitration, either *ad hoc* or under the rules of an arbitral institution. Since arbitration clauses are drawn up and agreed before any dispute has arisen, they necessarily look to the future: to the possibility that a dispute may arise and that if it does, it will (if necessary) be resolved by recourse to arbitration rather than to the courts of law. The second type of agreement is one that is made *after* a dispute has actually arisen. This is the so-called 'submission agreement' and, as will be seen, it will usually be more detailed than an arbitration clause—because once a dispute has arisen, it is possible to spell out in some detail what the dispute is about and how the parties propose to deal with it.

**1.40** These two traditional types of arbitration agreement have now been joined by a third. This is an 'agreement to arbitrate' which is deemed to arise under international instruments, such as a Bilateral Investment Treaty entered into by one State with another. It is a feature of such treaties (as discussed in more detail later) <sup>(57)</sup> that each State party to the treaty will agree to submit to international arbitration, in relation to any dispute that might arise in the future between itself and an 'investor' (who, not being a State, is not a party to the treaty and whose identity will be unknown, at the time when the treaty is made). This 'agreement' in effect constitutes a 'standing offer' by the State concerned to resolve any such <sup>page</sup> "15" disputes by arbitration. As will be seen, it is an offer of which many claimants have been quick to take advantage.

**1.41** It is a fundamental requirement of the New York Convention, which provides for the international recognition and enforcement of arbitration agreements, <sup>(58)</sup> that such agreements should be 'in writing'. States that are parties to the Convention agree, in Article II(1), that they will recognise any 'agreement in writing' to submit to arbitration disputes which are capable of settlement by arbitration. In Article II(2) an 'agreement in writing' is defined to include an arbitration clause in a contract; or an arbitration agreement 'signed by the parties or contained in an exchange of letters or telegrams'. The need for the agreement to be 'in writing' is further emphasised

by Article IV of the New York Convention, which provides that, to obtain recognition and enforcement of an international arbitral award, it is necessary to produce to the court of enforcement *both* the award itself (or an authenticated copy) and the agreement referred to in Article II. The need for this to be a valid agreement is emphasised in Article V(1)(a), which provides that recognition and enforcement might be refused, if the parties to the agreement were under some incapacity or if the agreement itself is invalid.

**1.42** When the New York Convention was drawn up, the position was relatively simple. Arbitration, for the purposes of the Convention, was to be based either on an arbitration clause in a contract or on a written agreement to which the parties were signatories. When the Convention was concluded in 1958, this was a perfectly workable proposition. But things are different now. There are two major problems. First, modern methods of communication have moved beyond letters and telegrams: contracts are frequently made by fax or by electronic methods of communication, including emails and electronic data exchange. Secondly, the Convention assumes that *only* parties to an arbitration agreement will become parties to any resulting arbitration. But, with the increased complexity of modern international trade, States, corporations, and individuals who are *not* parties to the arbitration agreement might nevertheless become, or wish to become, parties to the arbitration. (59)

**1.43** The UNCITRAL Rules, which are closely modelled on the New York Convention, maintain both the references to ‘the parties to a contract’ and to an agreement ‘in writing’, by stating in Article I(1) that:

Where the *parties to a contract* have *agreed in writing* that disputes in relation to that contract shall be referred to arbitration under the UNCITRAL Rules, then such page "16" disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree in writing. (emphasis added)

**1.44** The Model Law also contemplates arbitration only between parties who are parties to a written arbitration agreement. Article 7(1) states:

‘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. (emphasis added)

However, the definition of what was meant by ‘in writing’ was extended, by Article 7(2), to include ‘an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement ...’.

**1.45** Parties who agree to arbitrate disputes thereby renounce their right of recourse to the courts of law in respect of any such dispute. It would seem to be perfectly reasonable to require some evidence, in written form, that the parties have indeed agreed to do this. Many laws of arbitration adopt this position: in Swiss law, for example, an arbitration agreement has to be made ‘in writing, by telegram, telex, telecopier or any other means of communication *which permits it to be evidenced by a text*’. <sup>(60)</sup>

**1.46** In modern business dealings, contracts may, of course, be made orally—for instance, at a meeting or by a conversation over the telephone. In the same way, an agreement to arbitrate may be made orally; and this was recognised in the deliberations which led eventually to the Revised Model Law. States which adopt this revised law are given two options. The first is to adhere to the writing requirement, but with the definition of ‘writing’ extended to include electronic communications of all types. <sup>(61)</sup> The second option is to dispense altogether with the requirement that an agreement to arbitrate should be in writing. <sup>(62)</sup>

**1.47** In States which adopt the second option of the Revised Model Law, an oral agreement to arbitrate will be sufficient and there will be no requirement to produce a written agreement to arbitrate when seeking enforcement of an award. <sup>(63)</sup> However, as already indicated, Articles II(2), IV, and V(I)(a) of the New York *page "17"* Convention still require a written agreement in a defined form. <sup>(64)</sup> This means that there is a risk that an arbitral award made pursuant to an oral agreement may be refused recognition and enforcement under the New York Convention, in which event the time, money, and effort expended in obtaining the award will have been wasted. <sup>(65)</sup> The ‘writing requirement’ is discussed in more detail in Chapter 2.

### ***i. Arbitration clauses***

**1.48** As already pointed out, an arbitration clause (or *clause compromissoire*, as it is known in the civil law) relates to disputes that might arise between the parties at some time in the future. It will generally be short and to the point. An agreement that ‘Any dispute is to be settled by arbitration in London’ would constitute a valid arbitration agreement—although in practice so terse a form is not to be recommended. <sup>(66)</sup>

**1.49** Institutions such as the ICC, which administer arbitrations, have their own standard forms of arbitration clause, set out in the Institution’s book of rules. The UNCITRAL Rules also have a ‘Model Arbitration Clause’ which is suitable for any *ad hoc* arbitration that is to be conducted under the UNCITRAL Rules. The Clause states:

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 Rules. <sup>(67)</sup>

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## **ii. Submission agreements**

**1.50** An arbitration agreement which is drawn up to deal with disputes that have *already* arisen between the parties is generally known as a submission agreement, a *compromis*, or a *compromiso*. It is usually a fairly detailed document, dealing with the constitution of the arbitral tribunal, the procedure to be followed, the issues to be decided, the substantive law, and other matters. At one time, it was the *only* type of arbitration agreement recognised by the law of many States, <sup>(68)</sup> since recourse to arbitration was only permitted in respect of *existing* disputes. In some States, this is still the position. <sup>(69)</sup>

**1.51** Most States, however, are prepared to recognise the validity of arbitration clauses that relate to future disputes. In fact, as already indicated, almost all international commercial arbitrations take place pursuant to an arbitration clause. (Such a clause is often a standard clause in standard forms of contract that are internationally accepted in such diverse activities as shipping, insurance, commodity trading, and major civil engineering projects.)

## **iii. The importance of the arbitration agreement**

**1.52** In an international arbitration, the arbitration agreement fulfils several important functions. In the present context, the most important function is that of making it plain that the parties have consented to resolve their disputes by arbitration. This consent is essential. Without it, there can be no valid arbitration. <sup>(70)</sup> The fact that international commercial arbitration rests on the agreement of the parties is given particular importance by some continental jurists. The arbitral proceedings are seen as an expression of the will of the parties and, on the basis of party autonomy (*l'autonomie de la volonté*) it is sometimes argued that international commercial arbitration should be freed from the constraints of national law and treated as denationalised or delocalised. <sup>(71)</sup>

**1.53** Once parties have validly given their consent to arbitration, that consent cannot be unilaterally withdrawn. Even if the arbitration agreement forms part of *page "19"* the original contract between the parties and that contract comes to an end, the obligation to arbitrate survives. It is an independent obligation separable <sup>(72)</sup> from the rest of the contract. This doctrine of the autonomy of an arbitration agreement, under which it is deemed to be severable from the contract in which it is contained, is now well established. <sup>(73)</sup> It means that even if the contract containing an arbitration clause comes to an end, or has its validity challenged, the arbitration agreement remains in being. This allows a claimant to begin



arbitration proceedings, based on the survival of the arbitration agreement as a separate contract; and it also allows an arbitral tribunal which is appointed pursuant to that arbitration agreement to decide on its own jurisdiction—including any objections with respect to the existence or validity of the arbitration agreement itself. The tribunal, in other words, is competent to judge its own competence.

#### ***iv. Enforcement of the arbitration agreement***

**1.54** An agreement to arbitrate, like any other agreement, must be capable of being enforced at law. Otherwise, it will be a mere statement of intention which, whilst morally binding, is without legal effect. However, an agreement to arbitrate is a contract of imperfect obligation. If it is broken, an award of damages is unlikely to be a practical remedy, given the difficulty of quantifying the loss sustained; and an order for specific performance is equally impracticable, since a party cannot be compelled to arbitrate if it does not wish to do so. As the saying goes, 'you can lead a horse to water, but you cannot make it drink'.

**1.55** In arbitration this problem has been met, both nationally and internationally, by a policy of *indirect* enforcement. Rules of law are adopted which provide that, if one of the parties to an arbitration agreement brings proceedings in a national court in breach of that agreement, those proceedings will be stopped at the request of any other party to the arbitration agreement (unless there is good reason why they should not be). This means that if a party wishes to pursue its claim, it must honour the agreement it has made and it must pursue its claim by arbitration, since this is the only legal course of action open to it. <sup>(74)</sup>

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**1.56** It would be of little use to enforce an obligation to arbitrate in one country if that obligation could be evaded by commencing legal proceedings in another. Therefore, as far as possible, an agreement for international commercial arbitration must be given effect *internationally* and not simply in the place where the agreement was made. This vital, indeed essential, requirement is recognised in the international conventions, beginning with the 1923 Geneva Protocol and endorsed in the New York Convention—although the title of the Convention does not make this clear. <sup>(75)</sup>

#### ***v. Powers conferred by the arbitration agreement***

**1.57** An arbitration agreement does not merely serve to establish the obligation to arbitrate. It is also a basic source of the powers of the arbitral tribunal. In principle, and within the limits of public policy, an arbitral tribunal may exercise such powers as the parties are entitled to confer and do confer upon it, whether expressly or by implication, together with any additional or supplementary powers that may be conferred by the law governing the arbitration. <sup>(76)</sup>

Parties to an arbitration are masters of the arbitral process to an extent impossible in proceedings in a court of law. For example, the parties may decide (within limits which will be considered later) the number of arbitrators to comprise the arbitral tribunal, how this tribunal should be appointed, in what country it should sit, what powers it should possess, and what procedure it should follow.

**1.58** Finally, it is the arbitration agreement that establishes the jurisdiction of the arbitral tribunal. The agreement of the parties is the only source from which this jurisdiction can come. In the ordinary legal process, whereby disputes are resolved through the public courts, the jurisdiction of the relevant court may come from several sources. An agreement by the parties to submit to the jurisdiction will be only one of those sources. It is not uncommon for a defendant to find itself in court against its will. In the arbitral process, which is a private method of resolving disputes, the jurisdiction of the arbitral tribunal is derived simply and solely from the express or implied agreement of the parties. <sup>(77)</sup>

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#### ***i. The need for a dispute***

**1.59** At first glance, this may seem to be an unnecessary question. Surely, it might be said, if the parties are not in dispute, there is nothing to resolve? The problem arises when one party has what it regards as an 'open and shut' case, to which there is no real defence. For example, someone who is faced with an unpaid cheque or bill of exchange may take the view that there cannot be any *genuine* dispute about liability and that, if legal action has to be taken to collect the money which is due, he or she should be entitled to go to court and ask for summary judgment. Such a claim may be met, however, by the argument that there was an arbitration clause in the underlying agreement with the debtor and that the remedy is accordingly to go to arbitration, rather than to the courts. The problem is that, in the time it may take to establish an arbitral tribunal, a judge with summary powers could well have disposed of the case.

**1.60** The expedient adopted in certain countries (including initially England) when legislating for the enactment of the New York Convention, was to add words that were not in that Convention. This allowed the court to deal with the case, if the judge was satisfied 'that there is not in fact any dispute between the parties with regard to the matter agreed to be referred'. <sup>(78)</sup> In this way, it was possible to avoid a reference to arbitration and to obtain summary judgment. English law has now followed the strict wording of the New York Convention. <sup>(79)</sup> It can no longer be argued in England that since there is not a genuine dispute, the matter should not be referred to arbitration; but such an argument may still remain sustainable in other countries. <sup>(80)</sup>

#### ***i. Existing and future disputes***

**1.61** A distinction is sometimes drawn between existing and future disputes. This is seen in the international conventions on arbitration. For instance, there is a provision in the 1923 Geneva Protocol, under which each of the contracting States agrees to recognise the validity of an arbitration agreement, 'whether relating to existing or *future* differences'. <sup>(81)</sup> Similarly, in the New York Convention each contracting State recognises the validity of an agreement under which the parties [page "22"](#) undertake to submit to arbitration 'all or any differences which have arisen or *which may arise between them*'. <sup>(82)</sup>

**1.62** This distinction is principally of historical importance. Most States in the civil law tradition, which did not enforce agreements for future disputes to be referred to arbitration, <sup>(83)</sup> now do so. The reason for the traditional civil law view is that, by agreeing to arbitrate, the parties agree to accept something less than their full entitlement, which is to have recourse to the established courts of the land. Such recourse was regarded as the sovereign remedy—in some cases literally so, since the courts were the Sovereign's courts and justice was the Sovereign's justice. On this view, an agreement to arbitrate represented a compromise on the part of the parties; and this is perhaps reflected in the language of the civil law that refers to a submission agreement as a *compromis* <sup>(84)</sup> and to an arbitration clause as a *clause compromissoire*. <sup>(85)</sup>

**1.63** In the common law systems, fewer difficulties were placed in the way of referring future disputes to arbitration. <sup>(86)</sup> Even so, States that follow common law traditions often find it convenient for other reasons to differentiate between existing disputes and future disputes. An arbitration clause is a blank cheque which may be cashed for an unknown amount at a future, and as yet unknown date. It is hardly surprising that States adopt a more cautious attitude towards allowing future rights to be given away than they do towards the relinquishment of existing rights.

## ***ii. Arbitrability***

**1.64** Even if a dispute exists, this may not be sufficient. It must be a dispute which, in the words of the New York Convention, is 'capable of settlement by arbitration'. The concept of a dispute which is not 'capable of settlement by arbitration' is not meant as an adverse reflection on arbitrators or on the arbitral process. Arbitrators are—or should be—just as 'capable' of determining a dispute as judges. But national laws may decide to treat certain disputes as being more appropriate for determination by their own public courts of law, rather than by a private arbitral tribunal. For instance, a dispute over matrimonial status may be regarded [page "23"](#) by the national law of a particular State as not being 'capable' of settlement by arbitration—although a better term would be that it is 'not permitted' to be settled by arbitration.

**1.65** It is important to know which disputes are not 'arbitrable' in this sense <sup>(87)</sup> and the question is discussed more fully in Chapter 2.

***j. Starting an arbitration: the appointment of the arbitral tribunal***

**1.66** In order to start an arbitration, some form of notice will have to be given. In *ad hoc* arbitrations, this notice will be sent or delivered to the other party. Thus the UNCITRAL Rules, for example, provide in Article 3(1) and (2) that:

- (1) The party initiating recourse to arbitration (hereinafter called the 'claimant') shall give to the other party (hereinafter called the 'respondent') a notice of arbitration.
- (2) Arbitration proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent.

Article 3 of the UNCITRAL Rules goes on to state what should be set out in the Notice of Arbitration. This includes a reference to the arbitration clause or the arbitration agreement, a general indication of the claim and the amount involved, and a statement of the relief or remedy sought. The Notice of Arbitration may also include proposals for the appointment of a sole arbitrator, or the appointment of a party-nominated arbitrator (depending upon the provisions of the arbitration clause or the arbitration agreement).

**1.67** In an institutional arbitration, it is usual for the notice to be given to the relevant institution by a 'request for arbitration' or similar document, and the institution then notifies the respondent or respondents. For instance, Article 4(1) of the ICC Rules provides as follows:

A party wishing to have recourse to arbitration under these Rules shall submit its Request for Arbitration (the 'Request') to the Secretariat, which shall notify the Claimant and Respondent of the receipt of the Request and the date of such receipt.

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Similar provisions are found in the London Court of International Arbitration (LCIA) Rules, <sup>(88)</sup> the Rules of the Singapore International Arbitration Centre, <sup>(89)</sup> the Rules of the Stockholm Chamber of Commerce, <sup>(90)</sup> and so forth.

**1.68** Following the notice of arbitration, an arbitral tribunal will have to be constituted. This is a crucial moment in the life of any arbitration. One of the principal features which distinguishes arbitration from litigation is the fact that the parties to an arbitration are free to choose their own tribunal. Sometimes, it is true, this

freedom is unreal, because the parties may implicitly have delegated the choice to a third party, such as an arbitral institution. <sup>(91)</sup> However, where the freedom exists, each party should make sensible use of it. A skilled and experienced arbitrator is a key element of a fair and effective arbitration.

**1.69** The choice of a suitable arbitrator involves many considerations. These are discussed in detail later. <sup>(92)</sup> At this stage, however, all that needs to be stressed is that an international arbitration demands different qualities in an arbitrator from those required for a purely national, or domestic, arbitration. This is because of the different systems of law and the different rules that will apply; and also because the parties will almost invariably be of different nationalities and the arbitration itself will often take place in a country that is 'foreign' to the parties themselves. Indeed, the place of arbitration will usually have been chosen precisely because it *is* foreign, so that no party has the advantage of 'playing at home', so to speak. If the arbitral tribunal consists of three arbitrators (as is normally the case in any major dispute), each of the arbitrators may be of a different nationality, with each of them (if they are lawyers) perhaps having been brought up in a different legal environment—whether of the civil law, the common law, or the Shari'ah. <sup>(93)</sup>

**1.70** This means that there is almost inevitably a difference of legal (and often of cultural) background amongst those involved in an international arbitration. Good international arbitrators will be aware of this: they will try hard to avoid misunderstandings that may arise because of this difference of background or [page "25"](#) simply because of different nuances of language. Choosing the right arbitrator for a particular dispute is essential. <sup>(94)</sup> It can hardly be repeated too often that:

The choice of the persons who compose the arbitral tribunal is vital and often the most decisive step in an arbitration. It has rightly been said that arbitration is only as good as the arbitrators. <sup>(95)</sup>

**1.71** The qualities demanded of a good international arbitrator are many. They include experience of the international arbitral process itself and of the different institutional or *ad hoc* rules that may govern a particular arbitration; good case management skills; an ability to work with others; integrity; and a strong sense of fair play. They are discussed in more detail later in this book. <sup>(96)</sup>

### ***k. The arbitral proceedings***

**1.72** International arbitration is not like litigation in the courts of law. There is no volume containing the rules of court, no code of civil procedure to govern the conduct of an international arbitration—and litigators who produce their own country's rule book or code of civil procedure as a 'helpful guideline' to the conduct of an international arbitration will be told, politely but firmly, to put it away.

**1.73** The rules that govern an international arbitration are, first, the mandatory provisions of the *lex arbitri*—the law of the place of arbitration—which are generally cast in broad terms. <sup>(97)</sup> Secondly, there are the rules that the parties may have chosen to govern the proceedings, such as those of the ICC or of UNCITRAL. Article 15 of the UNCITRAL Rules, for example, simply states:

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.
2. If either party so requests at any stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.
3. All documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party.

This means that in an international arbitration, the tribunal and the parties have the maximum flexibility to design a procedure suitable for the particular dispute with which they are concerned. This is one of the major attractions of [page "26"](#) international arbitration: it is a flexible method of dispute resolution—in which the procedure to be followed can be tailored by the parties and the arbitral tribunal to meet the law and facts of the dispute. It is not some kind of Procrustean bed, enforcing conformity without regard to individual variation. <sup>(98)</sup> This again is one of the major themes of this book.

### ***1. The decision of the tribunal***

**1.74** In the course of arbitral proceedings, a settlement may be reached between the parties. Rules of arbitration usually make provision for this. The UNCITRAL Rules, for example, state:

If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by both parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award. <sup>(99)</sup>

If the parties cannot resolve their dispute, the task of the arbitral tribunal is to resolve it for them by making a decision, in the form of a written award. An arbitral tribunal does not have the powers or prerogatives of a court of law, <sup>(100)</sup> but in this respect, it has a similar function to that of the court, namely that of being entrusted by the parties with the right and the obligation to reach a decision which will be binding upon the parties.

**1.75** The power to make binding decisions is of fundamental importance. It distinguishes arbitration as a method of resolving disputes from other procedures, such as mediation and conciliation, <sup>(101)</sup> which aim to arrive at a negotiated settlement. As already stated, the *procedure* that must be followed in order to arrive at a binding decision is a flexible one, adapted to the circumstances of each particular case. Nevertheless, it is a *judicial* procedure, in the sense that the arbitral tribunal must 'act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent'. The quotation is from the English Arbitration Act, <sup>(102)</sup> but the requirement is one of [page "27"](#) general application. <sup>(103)</sup> No similar enforceable requirement governs the procedures to be followed where parties are assisted in arriving at a negotiated settlement by mediation, conciliation, or some other process of this kind. <sup>(104)</sup>

**1.76** It is surprising that more is not written about the way in which an arbitral tribunal reaches its decision, considering how fundamentally important to the parties the decision of the arbitral tribunal is. <sup>(105)</sup> For the sole arbitrator, of course, the task of decision making is a solitary one. Impressions as to the honesty and reliability of the witnesses; opinions which have swayed from one side to another as the arbitral process unfolds; points which have seemed compelling under the eloquence of counsel—all will usually have to be reviewed and re-considered, once the hearing is over and any post-hearing briefs are received. The moment of decision has arrived. Money, reputations, and even friendships may depend on the arbitrator's verdict: at this point, the task of a sole arbitrator is not an enviable one.

**1.77** When the arbitral tribunal consists not of one but of three arbitrators, the task of decision making is both easier and more difficult. It is easier, because the decision does not depend upon one person alone: the arguments of the parties can be discussed, opinions can be tested, the facts of the case can be reviewed, and so forth. It is at the same time more difficult, because three different opinions may well emerge during the course of the tribunal's deliberations. It will then be necessary for the presiding arbitrator to try to reconcile these differences, rather than face the unwelcome prospect of a dissenting opinion. <sup>(106)</sup>

### ***m. The enforcement of the award***



**1.78** Once an arbitral tribunal has made its award, it has fulfilled its function and its existence comes to an end. <sup>(107)</sup> The award itself, however, gives rise to important, [page "28"](#) lasting and potentially public legal consequences. Although the award is the result of a private arrangement, and is made by a private arbitral tribunal, it constitutes a binding decision on the dispute between the parties. If the award is not carried out voluntarily, it may be enforced by legal proceedings—both locally (that is to say, in the place in which it was made) and internationally, under such provisions as the New York Convention.

**1.79** An agreement to arbitrate carries with it an agreement not only to take part in any arbitral proceedings, but also an agreement to carry out any resulting arbitral award. Otherwise, the agreement to arbitrate would be pointless. It should not be necessary to state the obvious—that is, that the parties to an arbitration necessarily agree to carry out the award, but this is nevertheless done, as a precautionary measure, in many rules of arbitration. The ICC Rules, for example, state:

Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.

**1.80** Such statistics as are available indicate that most arbitral awards are carried out by the losing party or parties—reluctantly, perhaps, but without any formal legal compulsion. <sup>(108)</sup> However, although agreements are binding, they are not always carried out voluntarily. It is at this point that the arbitral process may need to be supported by the courts of law.

**1.81** But which courts of law? The point has already been made that an international arbitration involves parties with different nationalities or places of business, arbitrating in a country which is generally not their own country. A party to a contract, with a claim against another party, may consider it more convenient to start proceedings in the courts of its own country—for instance, to collect money which it considers to be due—rather than to abide by its agreement to arbitrate. If it is to be stopped from doing so, this can most effectively be done by the courts of its own country, who will say in effect ‘You cannot come to us. You agreed to arbitrate and that is what you must do’.

**1.82** Similarly, the winning party in an arbitration may need to enforce its award against the losing party. The most effective way of doing this is to obtain an enforceable judgment against the losing party in a court of law; but this will generally be the court of the country where the losing party resides or has its place of business, or the court of the country in which the losing party has assets that

may be seized.

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**1.83** This means that, in order to have an effective system of international arbitration, it is necessary to have an inter-linking system of national systems of law, so that—for example—the courts of country A will enforce an arbitration agreement or an arbitral award made in country B. In short, this means that there must be international treaties or conventions which provide for the recognition and enforcement of both arbitration agreements and arbitral awards by the national courts of those countries which are parties to that treaty or convention. The most important of these treaties and conventions have already been listed: amongst them, the New York Convention and the Washington Convention stand out as pre-eminent. <sup>(109)</sup>

#### ***n. Summary***

**1.84** International commercial arbitration is a hybrid. It begins as a private agreement between the parties. It continues by way of private proceedings, in which the wishes of the parties play a significant role. Yet it ends with an award that has binding legal force and effect and which, on appropriate conditions, the courts of most countries of the world will recognise and enforce. In short, this essentially private process has a public effect, implemented with the support of the public authorities of each State and expressed through that State's national law. This interrelationship between national law and international treaties and conventions is of vital importance to the effective operation of international arbitration.

**1.85** As will be seen later in this book, the modern arbitral process has lost its early simplicity. It has become more complex, more legalistic, more institutionalised, more expensive. Yet its essential features have not changed. There is still the original element of two or more parties, faced with a dispute that they cannot resolve for themselves, agreeing that one or more private individuals will resolve it for them by arbitration; and if this arbitration runs its full course (that is to say, if the dispute is not settled in the course of the proceedings) it will *not* be resolved by a negotiated settlement or by mediation or by some other form of compromise, but by a decision which is binding on the parties. This decision will be made by an arbitral tribunal, composed of one or more arbitrators, whose task is to consider the case put forward by each party and to decide the dispute. The tribunal's decision will be made in writing in the form of an award and will almost always set out the reasons on which it is based. <sup>(110)</sup> Such an award binds the parties (subject to any right of appeal or challenge that may exist <sup>(111)</sup> ) and represents the final word on the *page "30"* dispute. If it is not carried out voluntarily, the award may be enforced not only nationally but internationally, by legal process against the assets of the losing party. <sup>(112)</sup>

#### ***B. Why Arbitrate?***

### ***a. Introduction***

**1.86** There are many ways to settle a dispute. In a word game, a disputed spelling can be quickly resolved by reference to a dictionary; in a game of cricket, the toss of a coin will determine which side has the choice of whether to bat or to bowl; in a minor car accident, an apology and a hand-shake may be sufficient (although to suggest this may perhaps represent a triumph of hope over experience).

**1.87** Where commercial interests are at stake, something more substantial is likely to be required—but this does not necessarily mean an all-out confrontation. Unless relations have broken down completely, the parties will usually attempt to settle the dispute by discussion and negotiations; and, as will be touched upon later in this chapter, such negotiations may be facilitated by an expert conciliator and may well lead to a settlement which is acceptable to the parties. However, there often comes a point when attempts at negotiation have failed, no agreement is possible, and what is needed is a decision by some outside party, which is both binding and enforceable. In this situation, the choice is between arbitration before a neutral tribunal and recourse to a court of law.

**1.88** It might well be argued, of course, that if parties wish a dispute to be decided in a way which is both binding and enforceable, they should have recourse to the established courts of law, rather than to a specially created arbitral tribunal. Why should parties to an international dispute choose to go to arbitration, rather than to an established national court? Why has arbitration become accepted worldwide as the principal method of resolving international disputes?

### ***b. The main reasons***

**1.89** There are two main reasons. The first is neutrality; the second is enforcement. As to 'neutrality', international arbitration gives the parties an opportunity to choose a 'neutral' place for the resolution of their dispute and to choose a 'neutral' tribunal. As to 'enforcement', an international arbitration, if carried through to the end, leads to a decision which is enforceable against the losing party not only [page "31"](#) in the place where it is made but also internationally, under the provisions of such treaties as the New York Convention.

#### ***i. A choice of a 'neutral' forum and a 'neutral' tribunal***

**1.90** Parties to an international contract usually come from different countries. The national court of one party will be a foreign court to the other party. It will be 'foreign' in almost every sense. It will have its own formalities and its own rules and procedures, which may (quite naturally) have been developed to deal with domestic matters

and not for international commercial or investment disputes. It will also be 'foreign' in the sense that it will have its own language—which may or may not be the language of the contract—and its own bench of judges and lawyers. This means that a party to an international contract which does *not* contain an agreement to arbitrate may find, when a dispute arises, that it is obliged to commence proceedings in a foreign court, to employ lawyers other than those who are accustomed to its business and to embark upon the time-consuming and expensive task of translating the contract, the correspondence between the parties, and other relevant documents into the language of the foreign court. Such a party will also run the risk, if the case proceeds to a hearing, of understanding very little of what is said about its own case.

**1.91** By contrast, a reference to arbitration means that the dispute is likely to be determined in a neutral forum (or place of arbitration) rather than on the home ground of one party or the other. Each party will also be given an opportunity to participate in the selection of the tribunal. If this tribunal is to consist of a single arbitrator, he or she will be chosen by agreement of the parties, or by some outside institution to which the parties have agreed; and he or she will be required to be independent and impartial. If the tribunal is to consist of three arbitrators, two of them may be chosen by the parties themselves, but nevertheless each of them will be required to be independent and impartial (and may be dismissed if this proves not to be the case). In this sense, whether the tribunal consists of one arbitrator or of three, it will be a strictly 'neutral' tribunal.

## ***ii. An internationally enforceable decision***

**1.92** At the end of the arbitration (if no settlement has been reached between the parties), the arbitral tribunal will issue its decision in the form of an award. As to this, three points need to be made. First, as already stated, the end result of the arbitral process will be a binding decision and not (as in mediation or conciliation) a recommendation that the parties are free to accept or reject as they please. Secondly, and within limits that will be discussed later, the award will be final: it will not, as is the case with some court judgments, be the first step on an expensive ladder of appeals. Thirdly, once the award has been made, it will be directly enforceable by court action, both nationally and internationally.

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**1.93** In this respect, an award differs from an agreement entered into as a result of mediation or some other form of 'alternative dispute resolution', which is only binding contractually. In its *international* enforceability, an award *also* differs from the judgment of a court of law, since the international treaties that govern the enforcement of an arbitral award (such as the New York Convention) have much greater acceptance internationally than treaties for the reciprocal enforcement of judgments. (113)

## ***c. Additional reasons***

**1.94** There are other reasons which make arbitration an attractive alternative to litigation, of which at least four are worth listing.

### ***i. Flexibility***

**1.95** So long as the parties are treated fairly, an arbitration can be tailored to meet the specific requirements of the dispute, rather than having to be conducted in accordance with fixed rules of civil procedure. To this flexibility—and adaptability—of the arbitral process, must be added the prospect of choosing a tribunal which is experienced enough to take advantage of its procedural freedom. Such a tribunal should be able to grasp quickly the salient issues of fact or law in dispute. This will save the parties both time and money, as well as offering them the prospect of a sensible award.

### ***ii. Confidentiality***

**1.96** The privacy of arbitral proceedings, and the confidentiality that surrounds the process, is a powerful attraction to companies and institutions that may become involved (often against their will) in legal proceedings. There may be trade secrets or competitive practices to protect; or simply a reluctance to have details of a commercial dispute (or some bad decision-making) made the subject of adverse publicity. The confidentiality of arbitral proceedings, which was at one time general, has been eroded in recent years, but it still remains a key attraction to [page "33"](#) many participants. Privacy and its counterpart—confidentiality—are discussed in detail in Chapter 2.

### ***iii. Additional powers of arbitrators***

**1.97** There may be situations in which, somewhat unusually, an arbitral tribunal has greater powers than those possessed by a judge. For example, under some systems of law, or some rules of arbitration, an arbitral tribunal may be empowered to award compound interest, <sup>(114)</sup> rather than simple interest, in cases where the relevant court has no power to do so. In an article which, amongst other things, looks at the history of awards of interest, a leading commentator concludes:

... where compound interest would provide a fair and reasonable element of compensation to the innocent victim of a contract breaker, it is increasingly awarded by international commercial arbitrators either as trade usage, *règle matérielle de droit international* or under an expressly agreed provision e.g. Article 26 of the LCIA Rules. In Switzerland and England, as with other European countries hospitable to international arbitration, the award of such compound interest is not contrary to public policy, *ordre public* or other

mandatory law ... (115)

#### ***iv. Continuity of role***

**1.98** Finally, there is a continuity of role in an arbitration, since the arbitral tribunal is appointed to deal with one particular case and to follow it from beginning to end. This enables the arbitral tribunal to get to know the parties, their advisers, *and* the case as it develops through the documents, the pleadings, and the evidence. It should speed the process; and the familiarity with the case which is engendered may facilitate a settlement of the dispute.

#### ***d. Perceived disadvantages of arbitration***

**1.99** Not everything in the garden is lovely. Arbitration has its critics. A glance at the arbitration journals, or a day at one of the many seminars and conferences on arbitration, will show that amongst the matters that are most frequently criticised are: the costs of arbitration; limits on arbitrators' powers; the difficulty of bringing multi-party disputes before the same tribunal or joining third parties; conflicting awards; and what is generally referred to as the 'judicialisation' of international arbitration. These are now discussed in turn.

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#### ***i. The costs of arbitration***

**1.100** It used to be said that arbitration was a speedy and relatively inexpensive method of dispute resolution. (116) This is no longer so, at least where international arbitration is concerned. There are many reasons for this. First, the fees and expenses of the arbitrators (unlike the salary of a judge) must be paid by the parties; and in international arbitrations of any significance, these charges may be substantial. (117) Secondly, it may be necessary to pay the administrative fees and expenses of an arbitral institution, and these too can be substantial. (118) In a major arbitration, it may be thought necessary (or desirable) to appoint a secretary or registrar to administer the proceedings. Once again, a fee must be paid. Finally, it will be necessary to hire rooms for meetings and hearings, rather than making use of the public facilities of the courts of law.

**1.101** But the fees and expenses of the arbitrators and of the arbitral institutions, the charges for room-hire, court reporters, and so forth may be a drop in the ocean as compared to the fees and expenses of the parties' legal advisers and expert witnesses. In a major arbitration, these may easily run into millions or even hundreds of millions of dollars. (119) This means that international arbitration is unlikely to be cheaper than proceedings in a court of first instance, unless there is a conscious effort to make it so. (120)

**1.102** However, one point that should not be forgotten in considering the cost of arbitration is that it is a form of 'one-stop shopping'. Although the initial cost is not likely to be less than that of proceedings in court (and may indeed be more), the award of the arbitrators is unlikely to be followed by a series of costly appeals to superior local courts.

### ***ii. Delay***

**1.103** An increasing complaint is that of delay, particularly at the beginning and at the end of the arbitral process. At the beginning, the complaint is of the time that it may take to constitute an arbitral tribunal, so that the arbitral process can start to [page "35"](#) move forward. <sup>(121)</sup> At the end of the arbitration, the complaint is of the time that some arbitral tribunals take to make their award, with months—and sometimes a year or more—passing between the submission of post-hearing briefs and the delivery of the long-awaited award. <sup>(122)</sup>

### ***iii. Limits of arbitrator's powers***

**1.104** In general, the powers accorded to arbitrators, whilst adequate for the purpose of resolving the matters in dispute, fall short of those conferred upon a court of law. <sup>(123)</sup> For example, the power to require the attendance of witnesses under penalty of fine or imprisonment, or to enforce awards by the attachment of a bank account or the sequestration of assets, are powers which form part of the prerogative of the State. They are not powers that any State is likely to delegate to a private arbitral tribunal, however eminent or well intentioned that arbitral tribunal may be. In practice, if it becomes necessary for an arbitral tribunal to take coercive action in order to deal properly with the case before it, such action must usually be taken indirectly, through the machinery of the local courts, rather than directly, as a judge himself can do. <sup>(124)</sup>

### ***iv. Multi-party arbitrations/bi-polar arbitrations***

**1.105** Arbitration works most easily when there are only two parties involved—one as the claimant and the other as the respondent. The existing rules of arbitration reflect this position. The UNCITRAL Rules, for example state (in Article 3) that: 'the party initiating recourse to arbitration (hereinafter called 'the claimant') shall give the other party (hereinafter called 'the respondent') a notice of arbitration.' This is the classic position—one claimant and one respondent. The Model Law adopts the same position: in relation to the appointment of arbitrators, for instance, the Model Law states that 'in an arbitration with three arbitrators, *each party* shall appoint one arbitrator ...' <sup>(125)</sup> Arbitration will work equally easily, of course, if there are two or more parties on each side, provided that they are all parties to the [page "36"](#) arbitration



agreement and are prepared to leave the leadership of the case to one designated party, who will then be responsible (no doubt in consultation with its co-parties) for nominating arbitrators, appointing lawyers, and generally assuming control of the conduct of the case.

**1.106** This idea of a 'bi-polar arbitration' is what was envisaged in the New York Convention, the UNCITRAL Rules and the Model Law: it was based on the traditional concept of an arbitration, as being similar to a game in which the players are conveniently grouped on one side of the net or the other. But this traditional concept did not last. First, as in the celebrated *Dutco* case, <sup>(126)</sup> the players on one side of the net (the respondents) were required, under the former ICC Rules, to nominate one arbitrator between them. They did so, under protest; but the French court said that the right of each party to nominate an arbitrator was part of public policy and could not be waived. New rules had to be put in place to deal with such a situation. Article 10 of the ICC Rules now provides that, where there are multiple parties and they are unable to agree on a method for the constitution of the arbitral tribunal, the ICC Court itself *may* appoint each member of the tribunal and designate one as chairman. <sup>(127)</sup> The LCIA Rules adopt a similar position, <sup>(128)</sup> except that they state that the LCIA Court *shall* appoint the arbitral tribunal, rather than that it 'may' do so. <sup>(129)</sup>

**1.107** The question of how an arbitral tribunal is to be appointed, when parties on the same side cannot agree amongst themselves, is not by any means the only problem posed by multi-party arbitrations. There are a growing number of such arbitrations, <sup>(130)</sup> as international business becomes more complex—and more global in its reach. The dispute might, for instance, concern a consignment of training shoes, designed in France or Italy, manufactured in China or Korea, and sold to department stores worldwide. If the shoes prove to be unfit for purpose, the department stores may wish to join forces to seek compensation from the designer or the manufacturer—or both. Or, again, by way of example, the dispute [page "37"](#) might concern a power plant, designed in Europe and constructed in Asia, with major components manufactured in other, different parts of the world, so that any failure by the plant to meet its design criteria will mean that the owners of the plant have a long list of suspects, as they seek to establish liability for the failure.

## ***v. Non-signatories***

**1.108** There is also, as indicated earlier in this chapter, the problem of the so-called 'non-signatory party'. This problem arises when an individual or a legal entity which is *not* a party to the arbitration agreement wishes to join in the arbitration as one of the claimants—or, more usually, is brought unwillingly into the arbitration as one of the respondents. A common example is that of a claimant with a dispute under a contract between itself and the subsidiary of a major international corporation. The contract contains an arbitration clause, and so arbitration can be compelled against

the subsidiary company; but the claimant would very much like to bring the parent company into the arbitration, so as to improve its chances of being paid, if it succeeds in its claim. Is it possible to do this, if the parent company is not a party to the contract?

**1.109** The problem is discussed in more detail in Chapter 2. At this point, it is probably sufficient to say (in very general terms) that the key issue is whether there is any *deemed* or *assumed* consent to arbitration. Various legal theories or doctrines have been developed to try to establish such assumed consent, including the 'group of companies' doctrine; <sup>(131)</sup> the 'reliance' theory; agency; and the US concept of 'piercing the corporate veil' (so that, for example, a parent company may be taken to be responsible for the actions of a subsidiary which is a mere shell and accordingly is treated as if it were a party to any contract made by that subsidiary).

**1.110** There are also cases in which it would make sense to bring *all* the relevant parties into the arbitral proceedings, if this could be done. The classic example is that of a major construction project involving a series of parties, including the employer, the design and consulting engineers, a main contractor, and specialist equipment suppliers and sub-contractors. If all the relevant parties could be brought into the same arbitral proceedings, it would reduce the risk of conflicting decisions. But this is not possible, unless all parties are joined in some way by an arbitration agreement. <sup>(132)</sup>

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## **vi. Consolidation**

**1.111** A different problem arises where there are several contracts with different parties, each of which has a bearing on the issues in dispute. This is again something that is becoming increasingly common, with the development of global trade. For example, a major international construction project is likely to involve not only the employer and the main contractor (which itself may be a consortium of companies), but also a host of specialised suppliers and sub-contractors. Each of them will be operating under different contracts, often with different choice of law and arbitration clauses; and yet any dispute between, say, the employer and the main contractor is likely to involve one or more of the suppliers or sub-contractors. In court proceedings, it would usually be possible to bring all the relevant parties before the court in the same proceedings; in international arbitration, this is more difficult (and often impossible) to achieve, as discussed in Chapter 2.

## **vii. Third parties**

**1.112** To conclude this brief survey of multi-party arbitrations, mention should be made of those situations in which it would be convenient to bring a third party into an arbitration. It might happen, for instance, that the claimant seeks certain intellectual property rights from the respondent, but learns from the respondent's

statement of defence that these rights belong (or are alleged to belong) to a third party. <sup>(133)</sup> It would obviously be convenient if the third party could be brought into the arbitration, since the entire dispute could be resolved in one single arbitration; but can it be done? The answer will depend upon the specific facts of each case, but also on whether such joinder of third parties is allowed under the relevant law or under the rules of arbitration. There are some rules of arbitration which allow joinder of third parties in certain circumstances; <sup>(134)</sup> and the problem generally is under consideration as part of the proposed revisions of the UNCITRAL Rules.

### **viii. Conflicting awards**

**1.113** Finally, there is the problem of conflicting awards. There is no system of binding precedents in international arbitration—that is to say, no rule which means that an award on a particular issue, or a particular set of facts, is binding on arbitrators confronted with similar issues or similar facts. <sup>(135)</sup> Each award stands on page "39" its own; and it may well happen that an arbitral tribunal which is required, for example, to interpret a policy of reinsurance will arrive at a different conclusion from another tribunal faced with the same problem. The award of the first tribunal, if it is known—and it may not be known, because of confidentiality—may be of persuasive effect, but no more.

**1.114** The problem is a real one. In *CME v Czech Republic*, for instance, a single investment dispute involving virtually undisputed facts produced conflicting awards from arbitral tribunals in London and Stockholm, as well as giving rise to litigation in the Czech Republic, the US, and Sweden. <sup>(136)</sup> It has been suggested that one solution would be to create a new international court for resolving disputes over the enforcement of arbitral awards; but this has been described as ‘the impossible dream’, <sup>(137)</sup> and in a case such as *CME v Czech Republic*, the proposed international court would need to function as, in effect, a court of appeal rather than simply as an enforcement court. This would no doubt suit lawyers and arbitrators, who would welcome consistency of decisions, but it might not suit businessmen, who are looking for the solution to a particular dispute with which they are faced, rather than for the opportunity to contribute, at their own expense, to the development of the law.

### **ix. Judicialisation**

**1.115** The charge that international arbitration has become too much like litigation is not new. In a collection of essays on *International Arbitration in the 21st Century*, Lillich and Brower wrote about the increasing ‘judicialisation’ of international commercial arbitration ‘meaning both that arbitrations tend to be conducted more frequently with the procedural intricacy and formality more native to litigation in national courts and that they are more often subjected to

judicial intervention and control'. (138)

**1.116** The problem seems to be most stark in the United States, where there is a tradition of broad-ranging 'discovery', as well as the possibility of challenging arbitral decisions. The US practice of 'discovery' (a term which is not used in international arbitration, and for which there is no real equivalent outside the US) describes a process of seeking out and collecting pre-trial evidence. Such evidence takes two forms: first, witness testimony, and secondly, the production of documents. Witnesses may be required to give oral testimony, and to be cross-examined on [page "40"](#) oath, by the parties' counsel. Their testimony is recorded in a transcript which is then made available for use in the arbitration proceedings as a 'pre-trial deposition'.

**1.117** So far as the production of documents is concerned, the parties to the arbitration may be ordered to disclose documents which may be relevant to the issues in dispute, even if the party in possession or control of the documents does not wish to rely upon them or to produce them. In a major arbitration, the task of tracing and assembling these documents may take months and cost considerable sums of money, with phrases such as 'warehouse discovery' only palely reflecting the scope of the work to be done. Since 'documents' include e-mails and other electronically stored information (ESI), the time and money involved in tracing and assembling the relevant material has increased dramatically. (139) One US lawyer summed up the position in an article whose title says it all: 'How the Creep of United States Litigation-Style Discovery and Appellate Rights Affects the Efficiency and Cost-Efficacy of Arbitration in the United States.' (140)

**1.118** It might be some comfort to those involved in international arbitration if this trend towards 'judicialisation' was confined to the United States. But it is not. Arbitration has changed from the simple, almost rudimentary system of resolving disputes described earlier in this chapter and has become big business. The arbitral process too has changed, from being a system in which the arbitrator was expected to devise a satisfactory solution to the dispute, (141) to one in which the arbitrator is required to make a decision in accordance with the law; (142) and in reaching that decision, the arbitrator is required to proceed judicially—giving each party a proper opportunity to present its case and treating each party equally, on pain of having his or her arbitral award set aside for procedural irregularity. (143)

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**1.119** Various possible ways of dealing with the problem have been canvassed. These include a return to first principles, whereby the arbitral tribunal would ask, in respect of each particular arbitration, what is the best way of dealing with this case, starting from zero; (144) and a proposal that the parties who pay for the arbitration might be given the opportunity to make an informed choice—

namely, do they want a full-blown trial of their dispute, whatever it costs, or, to save time and money, would they be prepared to accept some form of shortened procedure, recognising that this would limit their opportunity to develop their respective cases as meticulously as they might wish? <sup>(145)</sup> This is an important topic; and one to which the authors revert in a later chapter.

#### **e. Summary**

**1.120** At one time, the comparative advantages and disadvantages of international arbitration as opposed to litigation were much debated. <sup>(146)</sup> The debate is now over. Opinion has moved strongly in favour of international arbitration for the resolution of international disputes.

**1.121** In purely domestic disputes, the question of whether to arbitrate or to litigate may be finely balanced. In the final analysis, much may depend upon the circumstances of each particular case and the reputation and procedures of the local courts. However, where the question arises in an international transaction, the balance comes down firmly in favour of arbitration. In a domestic context, parties who are looking for a binding decision on a dispute will usually have an effective choice between a national court and national arbitration. In an international context there is no such choice. There is no international court to deal with international commercial disputes. <sup>(147)</sup> In effect, the real choice is between recourse to a national court and recourse to international arbitration.

**1.122** A claimant who decides to take court proceedings will, in the absence of any agreed submission to the jurisdiction of a particular court, usually be obliged to have recourse to the courts of the defendant's home country, place of business, [page "42"](#) or residence. <sup>(148)</sup> To the claimant, this court (as already stated) will be 'foreign' in every sense of that word—in nature, character, and origin. The claimant will generally not be able to be represented by lawyers of its own nationality, with whom the claimant is accustomed to dealing, but instead will have to use the services of foreign lawyers. The claimant may well find that the language of the court is not that of the contract, so that essential documents and evidence will have to be translated, with all the attendant costs, delay, and opportunities for misunderstanding to which that may give rise. Finally, the claimant may find that the court is unaccustomed to international commercial transactions and that its practices and procedures are not adequate to deal with them. When viewed against this background, the prospect of bringing a claim arising out of an international business transaction before a foreign court is not attractive.

**1.123** If one of the parties to the contract is a State or State entity, the prospect will be even less attractive. The private party to the contract will be reluctant to have its dispute submitted to the national courts of the State party. The private party will usually have

little or no knowledge of the law and practice of that court and will be afraid of encountering judges predisposed to find in favour of the government to which they owe their appointment. For its part, the State (or State entity) concerned will not wish to submit to the national courts of the private party. Indeed, it will probably object to submitting to the jurisdiction of *any* foreign court.

**1.124** In situations of this kind, recourse to international arbitration, in a convenient and neutral forum, is generally seen as more acceptable than recourse to national courts. It is plainly more attractive to establish a carefully chosen tribunal of experienced arbitrators, with knowledge of the language of the contract, and an understanding of the commercial intentions of the parties, who will sit in a 'neutral' country and do their best to carry out the reasonable expectations of the parties, than it is to entrust the resolution of the dispute to the court of one of the parties, which may lack experience of commercial matters or may, quite simply, be biased in favour of the local party.

**1.125** For many business people, this is *the* decisive argument in favour of international arbitration, as the only truly neutral method of obtaining a decision on a dispute under a contract involving parties of different nationalities. As one commentator has said:

Although there are many reasons why parties might prefer international arbitration to national courts as a system of dispute resolution, the truth is that in many areas of [page "43"](#) international commercial activity, international arbitration is the only viable option, or as once famously put, 'the only game in town'. National courts may be considered unfamiliar, inexperienced, unreliable, inefficient, partial, amenable to pressure, or simply hostile. The larger and more significant the transaction in question, the less appropriate, or more risky, a national court may be. And so, where a third country's courts cannot be agreed upon, international arbitration becomes an essential mechanism actively to *avoid* a particular national court. (149)

It would seem that corporate counsel tend to share this opinion. (150)

#### ***f. Alternative dispute resolution***

**1.126** This, it may be said, is all very well, but arbitration (like litigation) is a contentious process. Would it not be better if the parties were to settle their differences in a less confrontational manner? The answer is that there are alternative (and less confrontational) methods of dispute resolution; and whilst this book is concerned with international arbitration, a brief note on these alternatives may be helpful.

**1.127** The first rule for parties to an international dispute is to try to resolve the dispute for themselves. The parties are—or should be—in the best position to know the strengths and weaknesses of their respective cases. Indeed, it is increasingly common for a clause to be inserted in international contracts to the effect that, if a dispute arises, the parties should try to resolve it by negotiation, before proceeding to some system of dispute resolution. One particular formula, often found in long-term agreements, is to the effect that in the event of a dispute arising, the parties will first endeavour to reach a settlement, by negotiations ‘in good faith’. The problem is that an obligation to negotiate ‘in good faith’ is nebulous. <sup>(151)</sup> Who is to open negotiations? How long are they to last? How far does a party need to go in order to show ‘good faith’? Is a party obliged to make concessions, even on matters of principle, in order to demonstrate good faith?

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**1.128** No negotiation is likely to succeed unless those involved are capable of looking at the crucial issues objectively, like an outside observer. However, objectivity is difficult to attain when vital interests (and perhaps the future of the business) are under threat. It is here that an impartial third party may help to rescue discussions which are at risk of getting nowhere. This is why international contracts often provide that, before the parties embark upon litigation or arbitration, they will endeavour to settle any dispute by some form of alternative dispute resolution (ADR).

#### ***i. What is meant by ADR?***

**1.129** The growing cost of litigation in the United States gave rise to a search for quicker and cheaper methods of dispute resolution; and this cost was measured not only in lawyers' fees and expenses, but also in management and executive time, made worse by procedural delaying tactics, overcrowded court lists, and the jury trial of civil cases, often leading to the award of hugely excessive damages against major corporations (and their insurers).

**1.130** These alternative methods of dispute resolution are usually grouped together under the general heading of ADR. Some of them come close to arbitration in its conventional sense. Others—in particular, mediation and conciliation—are seen as first steps in the settlement of a dispute, to be followed (if unsuccessful) by arbitration or litigation. Accordingly, although there are specialist works on ADR, which this book does not pretend to be, it may be useful to describe briefly what is meant by ADR; how it works; and why it has developed as a method of resolving disputes.

**1.131** When something is described as an ‘alternative’, the obvious question is: ‘alternative to what?’ If alternative dispute resolution is conceived as an ‘alternative’ to the formal procedures adopted by the courts of law as part of a system of justice established and administered by the State, arbitration should be properly classified as a method of ‘alternative’ dispute resolution. It is *indeed* a very real



alternative to the courts of law. However, the term ADR is not always used in this wide (or, it might be said, precise) sense. Accordingly, for the purpose of this section, arbitration is not included:

Arbitration presents an alternative to the judicial process in offering privacy to the parties as well as procedural flexibility. However, it is nonetheless *fundamentally the same in that the role of the arbitrator is judgmental*. The function of the judge and the arbitrator is not to decide how the problem resulting in the dispute can most readily be resolved so much as to apportion responsibility for that problem. (152)

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**1.132** There are many different forms of ADR. The broad distinction, however, would seem to be between those methods—such as mediation and conciliation—in which an independent third party tries to bring the disputing parties to a compromise agreement and those in which, in one way or another, a binding decision is imposed upon the parties, without the formalities of litigation or arbitration.

## ***ii. Non-binding ADR***

### ***Mediation***

**1.133** Mediation lies at the heart of ADR. Parties who have failed to resolve a dispute for themselves turn to an independent third person, or mediator, who will listen to an outline of the dispute and then meet each party separately—often ‘shuttling’ between them (153) — and try to persuade the parties to moderate their respective positions. (154) The task of the mediator is to attempt to persuade each party to focus on its real interests, rather than on what it conceives to be its contractual or legal entitlement.

### ***Conciliation***

**1.134** The terms ‘mediation’ and ‘conciliation’ are often used as if they are interchangeable; and there is no general agreement as to how to define them. Historically, a conciliator was seen as someone who went a step further than the mediator, so to speak, in that the conciliator would draw up and propose the terms of an agreement that he or she considered represented a fair settlement. In practice, the two terms seem to have merged.

**1.135** The UNCITRAL Conciliation Rules, which were recommended by the General Assembly of the United Nations in December 1980, may be considered very briefly as an example of how the conciliation process works. (155) First, the parties agree

that they will try to settle any dispute by conciliation. This may be done *ad hoc*—that is to say, once a dispute has arisen—or it may be done by prior agreement, by inserting a provision for conciliation or mediation in the contract; (156) and the relevant Rules deal not only with the conciliation process itself, but also with [page "46"](#) important provisions such as the admissibility in subsequent litigation or arbitration of evidence or documents put forward during the conciliation. (157)

**1.136** The role of the conciliator is to make proposals for a settlement. The proposals need not be in writing, and need not contain reasons.

The conciliator assists the parties in an independent and impartial manner in their attempt to reach an *amicable* settlement of their dispute. (158)

To what extent is a conciliator free to disclose to one party information given to him or her in private by the other party? The UNCITRAL Conciliation Rules provide (159) that a conciliator may disclose the substance of any *factual* information he or she receives, 'in order that the other party may have the opportunity to present any explanation which he considers appropriate'.

**1.137** If no settlement is reached during the course of the proceedings, the conciliator may formulate the terms of a possible settlement and submit them to the parties for their observations. The process comes to an end either when a settlement is achieved or when it appears that no settlement is possible. (160)

**1.138** In 2002, UNCITRAL published its Model Law on International Commercial Conciliation, which is intended as a guide for States that wish to implement legislation or conciliation. (161)

### ***Mediation/arbitration***

**1.139** One procedure for dispute resolution that is increasingly used in international commercial contracts is a mixed procedure of mediation and arbitration known, not surprisingly, as 'Med/Arb'. There are broadly two versions of this [page "47"](#) procedure: in the first, if the mediation fails, the mediator becomes the arbitrator; in the second, if the mediation fails, the role of the mediator is terminated and the dispute goes to an arbitral tribunal.

**1.140** The first version, in which the mediator becomes an arbitrator, is used in the United States (for instance, in labour disputes). To a lawyer, it raises many questions. For example, how frank are the parties likely to be in their discussions with the mediator (for instance, by indicating what settlement proposals they would accept), whilst knowing that, if there is no settlement, that same person will change hats and appear as an arbitrator? And how can an arbitrator who has previously held private discussions with

the parties separately satisfy (or appear to satisfy) the requirements of 'impartiality' and 'a fair hearing'? The second version is plainly a more satisfactory way of proceeding. It makes clear the different roles of a mediator (who attempts to facilitate negotiations for a settlement—and who for this purpose may talk to one side without the presence of the other) and an arbitrator, who listens to both sides together and who issues a *decision* on the dispute—and not a proposal for settlement.

**1.141** In previous editions of this book, various different forms of mediation were discussed, including the 'mini-trial' (or 'rent-a-judge', as it is sometimes called); neutral listener agreements; and 'last offer' or 'baseball arbitration'. This discussion is omitted from the present edition, in order to save space.

### ***iii. Expert determination***

**1.142** Whilst the aim of mediation and conciliation is to bring about a settlement of the dispute, there are methods of alternative dispute resolution which produce a binding decision. Of these, probably the best known is that of expert determination. <sup>(162)</sup>

**1.143** The *traditional* role of an expert is that of assessment, valuation, and certification. An expert may be asked to value a house or a block of flats; to assess the price of shares in a private company or a professional partnership; or to certify the sum payable for work done by a building or engineering contractor. But the work of the expert extends beyond this traditional role into that of a 'decision-maker'—someone whose determination of a dispute may well put an end to it.

**1.144** When an expert becomes a decision-maker (or adjudicator) the process of expertise comes to resemble that of arbitration. Both experts and arbitrators are in what might be called 'the dispute resolution business'. But there is a difference and it is an important one. First, arbitrators, unlike experts, are generally regarded as being [page "48"](#) immune from liability for negligence in carrying out their functions. <sup>(163)</sup> Secondly, an arbitral award is directly enforceable, both nationally and internationally, under such treaties as the New York Convention. By contrast, the decision of an expert is only binding contractually. If it is not carried out voluntarily, it will need to be enforced by legal proceedings.

### ***iv. Dispute Review Boards***

**1.145** The increasing use of experts to resolve disputes once they have arisen may be seen in some of the major international construction projects carried out in recent years. In the Channel Tunnel project, for example, any dispute had to be referred to the Panel of Experts and then, if either party so requested, to arbitration under the ICC Rules. In the Hong Kong Airport Core programme, four steps were contemplated. First, disputes were submitted for decision by the engineer; if either party was dissatisfied, this was

followed by mediation, then by adjudication, and finally by arbitration. These complex dispute resolution procedures, built up tier by tier like a wedding cake, are a reflection of the amounts of money likely to be at stake in major projects—and of the parties' reluctance to trust in one decision-maker. (164)

**1.146** Dispute Review Boards, Panels of Experts (or whatever they may be called) are generally regarded as forming part of ADR. However, there is nothing voluntary or consensual in the procedures to be followed. Once parties have agreed to refer their disputes to a Review Board or Panel, they are contractually bound to go down this route, if one party insists upon it (in the same way as a party must arbitrate, if there is a valid and binding agreement to arbitrate which the other party is not prepared to waive). Once the Review Board or Panel has given its decision, that decision is usually binding and must be carried out, unless or until it is reversed by subsequent arbitration or by court proceedings. (165)

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#### ***v. Why has ADR developed as it has?***

#### ***Business and cultural considerations***

**1.147** There is nothing new about trying to settle a dispute by negotiation. It is what every sensible businessman (166) should do. Nor is there anything new in turning to an independent third party for help in resolving a dispute which the parties themselves cannot resolve. This is probably how resort to arbitration itself began, 'with mediation no doubt merging into adjudication'. (167) As one commentator has said:

In my view, modern dispute resolution techniques, although couched in the language of sociology—and indeed often in a jargon of their own—reflect techniques used by successful outsiders for centuries in settling disputes in many cultures and legal systems. (168)

What is new is the different form, structure, and impetus that ADR has given to negotiating and decision making; and what is clear is that these new methods have struck a chord not only with businessmen, but with lawyers, judges, and even governments.

**1.148** There are at least two important, and distinct, reasons for this. The first is a question of time and money—of searching for a solution that is relatively quick and inexpensive. The second is a question of approach—of wishing to avoid confrontation, if possible. This wish may spring from a simple desire to maintain friendly relations (as, perhaps, in a partnership dispute), or to maintain a potentially profitable business relationship (as in a joint venture, for

instance). However, the wish may have deeper roots than this—it may be part of a tradition that dislikes confrontation:

... arbitration has a striking cultural drawback in an increasingly important sub-set of disputes—those between Asian and Western parties. The traditions of many Asian trading nations abhor such a confrontational form of dispute resolution. They prefer face-saving mutually agreeable compromises to awards proclaiming one party's rights. Consequently, Asian parties may resist clauses that send disputes straight to arbitration. (169)

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## **vi. ADR—future perspectives**

**1.149** For some of its advocates, ADR is a way of resolving disputes that will make existing conventional techniques as outmoded as the coach and horses. This is probably going too far. There are useful practices to be learnt from ADR (including strict limits upon the extent of disclosure and time limits for hearings) which can be readily adopted to reduce the time and expense of more conventional methods of resolving disputes, such as arbitration. (170) However, there are obvious limits to the ADR process.

- First, ADR is likely to work better where the parties, and the mediator, have the same (or a similar) national background. It may be relatively easy, for example, for a well respected former judge of a US appeals court to persuade two US corporations to settle their differences. It is likely to be considerably less easy if the parties are of different nationalities and backgrounds and the mediator is of a third nationality.
- Secondly, the aim of ADR is compromise—and there are some disputes which cannot, or should not, be compromised. An obvious example is where the dispute concerns the interpretation of a clause in a standard form contract. The interpretation given to that clause may affect hundreds, or thousands, of other contracts. What is needed by the insurers, bankers, shipowners, or others who rely on the document is a decision, not a compromise solution.
- Thirdly, one party may find it better to delay and not agree to any meaningful resolution of the dispute—particularly if the business relationship has broken down and there is no prospect of its being renewed. In such a case, any attempt at mediation is likely to be a waste of time and money. What is needed is an enforceable decision, not a proposed compromise that is simply ignored.
- Finally, it has to be accepted that the mediation process may fail, in which case it will only have added to the delay and expense of reaching a resolution of the dispute.

## **vii. The need for judicial control**

**1.150** If ADR develops as a widely accepted method of resolving commercial disputes, there will almost certainly be abuses. This means that there will be a need for judicial control—much as the arbitral process is subject to control, to ensure that the parties are treated ‘with equality’ (to use the words of the Model Law) and that the arbitral tribunal is impartial. There may be corrupt or dishonest mediators; or there may be defendants who use the process in order to find out the strengths and weaknesses of the claimant's case—and, in particular, what is the least that he or [page "51"](#) she will accept—and then make use of this knowledge to fight in the courts. Some measure of judicial control is likely to be needed, if only for consumer protection; but the risk then is that the process will lose the speed and flexibility which is one of its major attractions.

## **viii. ‘Amiable compositeur’, equity clauses, decisions ‘ex aequo et bono’**

**1.151** It should perhaps be mentioned, as a footnote to this section on ADR, that arbitration agreements sometimes specify that the arbitrators are to act as ‘*amiables compositeurs*’ or, if the agreement has been drafted by public international lawyers or scholars, [\(171\)](#) that the arbitrators will decide *ex aequo et bono*. Such clauses are likely to become more usual, given the influence of the Model Law which specifically permits an arbitral tribunal to decide in accordance with equity if the parties authorise it to do so: [\(172\)](#) choice of law clauses are discussed in detail in Chapter 3. However, an arbitration which is conducted under the provisions of such clauses will still be an arbitration and not some kind of ADR.

## **C. What Kind of Arbitration?**

### **a. Introduction**

**1.152** Any arbitration, wherever it is conducted, is subject to the mandatory rules of the *lex arbitri*—that is to say, the law of the place of arbitration. Generally, however, these mandatory rules will be broad and non-specific. They will say, for instance, that the parties must be treated with equality, [\(173\)](#) but they will not go into the details of how this is to be achieved, in terms of the exchange of statements of case and defence, witness statements, documents, and so forth. For this, more specific rules will be required; and here, the parties have a choice. Should the arbitration be conducted *ad hoc*—that is, without the involvement of an arbitral institution—or should it be conducted according to the rules of one of the established arbitral institutions?

### **b. Ad hoc arbitration**

**1.153** An *ad hoc* arbitration is one which is conducted pursuant to rules agreed by the parties themselves or laid down by the arbitral tribunal. <sup>(174)</sup> Parties to an *ad hoc* arbitration may establish their own rules of procedure (provided that the rules [page "52"](#) they devise treat the parties with equality and allow each party a reasonable opportunity of presenting its case). Alternatively, and more usually, the parties may agree that the arbitration will be conducted (without involving an arbitral institution) according to an established set of rules, such as the UNCITRAL Rules. This ensures a sensible framework within which the Tribunal and the parties can devise detailed rules; and it saves spending time and money in drafting a special set of rules.

**1.154** However, if the case is important enough (and in particular if a State or State entity is involved) it may be worth negotiating and agreeing special rules, which take into account the status of the parties and the circumstances of the particular case: for example, the right to restitution may be expressly abandoned in favour of an award of damages. Such a specially drawn set of rules will usually be set out in a formal 'Submission to Arbitration', which will be negotiated and agreed once a dispute has arisen. Amongst other things, it will usually confirm the establishment of the arbitral tribunal, set out the substantive law and the place (or 'seat') of the arbitration, and detail any procedural rules upon which the parties have agreed for the exchange of documents, witness statements, and so forth. It may also provide for the Tribunal to be assisted by an administrative assistant. <sup>(175)</sup>

### ***c. Ad hoc arbitration—advantages and disadvantages***

#### ***i. Advantages***

**1.155** A distinct advantage of an *ad hoc* arbitration is that it may be shaped to meet the wishes of the parties and the facts of the particular dispute. For this to be done efficiently and effectively, the co-operation of the parties and their advisers is necessary; but if such co-operation is forthcoming, the difference between an *ad hoc* arbitration and an institutional arbitration is like the difference between a tailor-made suit and one that is bought 'off-the-peg'. The greater flexibility offered by *ad hoc* arbitration means that many important arbitrations involving a State party are conducted on this basis. Many of the well-known arbitrations under oil concession agreements (including the *Sapphire*, *Texaco*, *BP*, *Liamco*, and *Aminoil* arbitrations) were *ad hoc* arbitrations. <sup>(176)</sup>

**1.156** There is much to be said in favour of *ad hoc* arbitration where the sums at stake are large—and in particular, perhaps, where a State or State entity is involved, and issues of public policy and sovereignty are likely to arise, since in an *ad hoc* arbitration, it is possible for an experienced tribunal and counsel to devise a procedure <sup>(177)</sup> [page "53"](#) which is sensitive to the particular



status and requirements of the State party, whilst remaining fair to both parties.

## **ii. Disadvantages**

**1.157** The principal disadvantage of *ad hoc* arbitration is that it depends for its full effectiveness on cooperation between the parties and their lawyers, backed up by an adequate legal system in the place of arbitration. It is not difficult to delay arbitral proceedings—for instance, by refusing to appoint an arbitrator, so that at the very outset of the proceedings there will be no arbitral tribunal in existence, and no book of rules available to deal with the situation.

(178) It will then be necessary to rely on such provisions of law as may be available to offer the necessary support. (179) It is only when an arbitral tribunal is in existence, and a proper set of rules has been established, that an *ad hoc* arbitration will proceed as smoothly as an institutional arbitration, if one of the parties fails or refuses to play its part in the proceedings.

## **d. Institutional arbitration**

**1.158** An 'institutional' arbitration is one that is administered (180) by a specialist arbitral institution, under its own rules of arbitration. There are many such institutions. Amongst the better known are the ICC, the International Centre for Dispute Resolution (ICDR), (181) the International Centre for Settlement of Investment Disputes (ICSID), and the LCIA. There are also regional arbitral institutions (for instance, in Beijing and Cairo) and there are Chambers of Commerce [page "54"](#) with an established reputation, including those of Stockholm, Switzerland, and Vienna. (182)

**1.159** The rules of these arbitral institutions tend to follow a broadly similar pattern. (183) They are formulated for arbitrations that are to be administered by the institution concerned; and they are usually incorporated into the main contract between the parties by means of an arbitration clause. The clause recommended by the ICC, for instance, states:

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

**1.160** In common with other institutional clauses, this clause is a convenient, short-form method of incorporating into the contract between the parties a detailed book of rules, which will govern any arbitration that may take place in the future. If, at some future stage, one party proves reluctant to go ahead with arbitration proceedings, it will nevertheless be possible for the party or parties who wish to bring a claim to do so effectively, because there will be a set of rules

to regulate both the way in which the arbitral tribunal is to be appointed and the way in which the arbitration is to be conducted and carried through to its conclusion.

#### ***e. Institutional arbitration—advantages and disadvantages***

##### ***i. Advantages***

**1.161** Rules laid down by the established arbitral institutions (for instance, those of the ICC, the ICDR, ICSID, and the LCIA) will generally have proved to work well in practice; and they will have undergone periodic revision in consultation with experienced practitioners, to take account of new developments in the law and practice of international arbitration. As already mentioned, the rules themselves are generally set out in a small booklet. Parties who agree to submit any dispute to arbitration in accordance with the rules of a named institution effectively incorporate that institution's book of rules into their arbitration agreement.

**1.162** This automatic incorporation of an established book of rules is one of the principal advantages of institutional arbitration. Suppose, for instance, that there is a challenge to an arbitrator, on the grounds of lack of independence or impartiality; or suppose that the arbitration is to take place before an arbitral tribunal of three arbitrators and the defending party is unwilling to arbitrate and fails or refuses to appoint an arbitrator? The book of rules will provide for this situation. It will also [page "55"](#) contain provisions under which the arbitration may proceed in the event of any other default by one of the parties. The ICC Rules, for instance, stipulate that:

If any of the parties, although duly summoned, fails to appear without valid excuse, the Arbitral Tribunal shall have the power to proceed with the hearing. [\(184\)](#)

In a default situation, such rules are of considerable value.

**1.163** Another advantage of institutional arbitration is that most arbitral institutions provide trained staff to administer the arbitration. They will ensure that the arbitral tribunal is appointed, that advance payments are made in respect of the fees and expenses of the arbitrators, that time limits are kept in mind, and, generally, that the arbitration is run as smoothly as possible. If an arbitration is not administered in this way, the work of administration will have to be undertaken by the arbitral tribunal itself—or by a registrar or tribunal secretary appointed by the tribunal for that purpose.

**1.164** A further advantage of institutional arbitration is where the institution itself reviews the arbitral tribunal's award in draft form, before it is sent to the parties. Such a review, which is undertaken with particular attention to detail by the ICC, serves as a measure of 'quality control'. The institution does not comment on the substance of the award, or interfere with the decision of the arbitral tribunal, but

it does ensure that the tribunal has dealt with all the issues before it and that its award also covers such matters as interest and costs (which are frequently forgotten, even by experienced arbitrators).

**1.165** Finally, the assistance which an arbitral institution can give to the parties and their counsel in the course of the arbitral proceedings is not to be underestimated. Even lawyers who are experienced in the conduct of arbitrations sometimes run into problems that they are grateful to discuss with the arbitral institution's secretariat.

## ***ii. Disadvantages***

**1.166** Under some institutional rules, <sup>(185)</sup> the parties pay a fixed fee in advance for the 'costs of the arbitration'—that is to say, the fees and expenses of the institution and of the arbitral tribunal. This fixed fee is assessed on an *ad valorem* basis. If the amounts at stake in the dispute are considerable, and the parties are represented by advisers experienced in international commercial arbitration, it may be less expensive to conduct the arbitration *ad hoc*. <sup>(186)</sup> On the other hand, the ability [page "56"](#) to pay a fixed fee for the arbitration, however long it takes, may work to the parties' advantage (and to the disadvantage of the arbitrators, in terms of their remuneration).

**1.167** The need to process certain steps in the arbitral proceedings through the machinery of an arbitral institution inevitably leads to delay in the proceedings. Conversely, the time limits imposed by institutional rules are often unrealistically short. A claimant is unlikely to be troubled by this, since a claimant usually has plenty of time in which to prepare its case before submitting it to the respondent or to the relevant arbitral institution, and so set the clock running. However, a respondent is likely to be pressed for time, particularly in a case (such as a dispute under an international construction contract) which involves consideration of voluminous documents and where the claim that is put forward may, in fact, prove to be a whole series of claims on a series of different grounds.

**1.168** Although extensions of time will usually be granted, either by the institution concerned or by the arbitral tribunal, the respondent is placed in the invidious position of having to seek extensions of time from the outset of the case. The respondent starts on the wrong foot, so to speak. The problem is worse if the respondent is a State or State entity. The time limits laid down in institutional rules usually fail to take account of the time which a State or State entity needs to obtain approval of important decisions, through its own official channels. In the ICC Rules, for example, the time limit for rendering a final award is six months, although this may be (and generally is) extended by the ICC. <sup>(187)</sup>

## ***f. Arbitral institutions***

**1.169** There are numerous institutions around the world which exist to administer international arbitrations. Some, such as the Hong Kong International Arbitration Centre or the Cairo Regional Centre for Arbitration, are directed primarily towards a particular country or region. Some, such as the maritime associations in Paris or London, <sup>(188)</sup> serve a particular trade or industry, whilst others, such as the World Intellectual Property Organisation (WIPO) in Geneva, offer their services for a particular type of dispute.

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**1.170** Each arbitral centre tends to have its own set of rules, although in the newer centres these are often based on the UNCITRAL Rules. <sup>(189)</sup> Each centre also generally has its own model form of arbitration clause. It is usual (but not essential) to use one of these model forms if institutional arbitration is to be adopted. No fee is payable to the institution for referring to it in an arbitration agreement. Payment only starts if it becomes necessary to make use of the institution's services, either for the appointment of an arbitrator or for the conduct of an arbitration.

**1.171** Given the great number of arbitral institutions, or centres, in the world and the fact that new ones continue to come into existence, it is not practicable to list them all. What is proposed is, first, to set out the type of considerations which the parties (or their lawyers) should have in mind in choosing an arbitral institution; and, secondly, to review briefly some of the better known institutions.

#### ***i. What to look for in an arbitral institution***

**1.172** An arbitral institution will, of necessity, charge fees for its services to cover the expenses of its premises, its staff, its publications, and so on. Since these fees will add to the cost of arbitration (in some cases substantially), parties and their lawyers should have some concept of what to look for in any given arbitral institution. It is suggested that the basic requirements should include the following.

#### ***ii. Permanency***

**1.173** Disputes between parties to an agreement frequently arise many years after the agreement was made, particularly in major project agreements (for instance, for the construction of a motorway) or in long-term contracts (for instance, for the supply of liquefied natural gas (LNG) to a particular State or trading company). It is clearly important that the institution named in the arbitration clause should be a genuine institution <sup>(190)</sup> and should still be in existence when the dispute arises. Otherwise, the arbitration agreement may prove to be 'inoperative or incapable of being performed', in the words of the New York Convention. The only recourse then (if any) will have to be to national courts (which the arbitration agreement was designed to avoid).

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**1.174** It might be said, with some justice, that this militates against the creation of new arbitral institutions in the developing world and so is unfairly biased in favour of established institutions. This is true; but a lawyer who advises his or her client to select a particular arbitration centre will need to be confident that the advice is good. It is easier to have such confidence if the institution or centre that is chosen has an established track record or, if it is a recent creation, has a reasonable guarantee of permanency.

### ***iii. Modern rules of arbitration***

**1.175** The practice of international arbitration changes and develops, as new laws, rules, and procedures come into existence. It is important that the rules of the arbitral institutions should not rest in some comfortable time warp, but should be brought up to date to reflect these changes. It is difficult to conduct an effective, modern arbitration under rules designed for a different era. Parties are entitled to expect that institutional rules will be reviewed, and, if necessary, revised at regular intervals. (191)

### ***iv. Qualified staff***

**1.176** The main purpose of an arbitral institution is to assist arbitrators and the parties in the proper and efficient conduct of an arbitration. This assistance may extend not only to explaining the rules, making sure that time limits are observed, collecting fees, arranging visas, and reserving accommodation, but also to advising on appropriate procedures by reference to past experience. It is a task that requires a combination of qualities—tact and diplomacy, as well as legal knowledge and experience.

### ***v. Reasonable charges***

**1.177** Some arbitral institutions assess their own administrative fees and expenses, and the fees payable to the arbitrator, by reference to a sliding scale which is based on the amounts in dispute (including the amount of any counterclaim). This has the advantage of certainty, in that the parties can find out at an early stage what the total cost of the arbitration is estimated to be. However, it operates as a disincentive to experienced arbitrators if the amounts in dispute are not substantial or if the arbitration takes a long time. Other institutions, such as the LCIA, assess their administrative costs and expenses, and the fees of the arbitrators, by reference to the time spent on the case (with an upper and lower limit, so far as the fees of the arbitrators are concerned).

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### ***vi. Some well-known institutions***

## **The ICC**

**1.178** The International Court of Arbitration of the International Chamber of Commerce was established in Paris in 1923 as an autonomous division of the worldwide International Chamber of Commerce (the ICC). The ICC has played an important role in promoting international laws on arbitration (such as the New York Convention) and the Court (the ICC Court) is one of the world's leading organisations in the arbitration of international commercial disputes. <sup>(192)</sup> It should be noted, however, that, as already mentioned, the ICC Court is not a 'court' in the sense of a court of law. <sup>(193)</sup> It is, in effect, the administrative body for ICC arbitrations, with representatives from all over the world.

**1.179** ICC arbitrations are conducted by an arbitral tribunal established for each particular case. If the parties have agreed that there is to be a sole arbitrator, they may wish to nominate a suitable person and simply ask the court to confirm their choice. Otherwise, the appointment will be made by the court itself. If the parties have agreed that there should be three arbitrators, the parties are each entitled to nominate one arbitrator for confirmation by the court and the third arbitrator will be appointed directly by the court, unless the parties agree otherwise. <sup>(194)</sup> Where there is no agreement as to the number of arbitrators, the ICC will decide whether there should be one or three, its decision depending basically upon the size and nature of the dispute.

**1.180** The day-to-day work of the ICC is carried out by the Secretary-General and other counsel who, as already mentioned, besides being multilingual, provide administrative guidance and assistance to the arbitral tribunals whose cases are assigned to them. <sup>(195)</sup> The current version of the ICC Rules came into effect on 1 January 1998. They provide an effective modern code for the conduct of an international commercial arbitration, whilst still leaving considerable freedom of action to the parties and their arbitral tribunal.

**1.181** Two features of the ICC Rules call for particular comment, as they are not always properly understood. The first is the provision for Terms of Reference; the second is the provision for scrutiny of awards by the ICC Court.

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### **vii. Terms of reference**

**1.182** Once the arbitral tribunal receives the file of documents from the Secretariat of the ICC, it is required <sup>(196)</sup> to draw up Terms of Reference which set out, *inter alia*, the names and addresses of the parties and their representatives, a summary of their claims, the place of arbitration, and, unless the arbitral tribunal considers it inappropriate, a list of the issues to be determined.

**1.183** It is a useful discipline for an arbitral tribunal to draw up such a document at the outset of an arbitration. Indeed, many arbitrators will go through a similar exercise, even if they are not obliged to do so by the rules under which they are operating. In particular, if the ‘issues to be determined’ can be defined, this helps to focus the attention of both the parties and the arbitrators on what is really at stake. But it is not always easy to determine the issues at a relatively early stage of the proceedings and so this is no longer a mandatory requirement, as it was under previous editions of the ICC Rules. <sup>(197)</sup>

### ***viii. Scrutiny of awards***

**1.184** When the arbitral tribunal is ready to deliver its award, the tribunal is required <sup>(198)</sup> to submit it in draft form for ‘scrutiny’ by the ICC Court. The court does not interfere with the arbitrators’ decision—and it would be wrong to do so. However, the court does check the formal correctness of the award, to ensure that it deals with all the matters with which it is required to deal (including costs) and that there are no obvious misprints or arithmetical errors.

### ***ix. The LCIA***

**1.185** The LCIA owes its origins to the London Chamber of Arbitration, which was founded on 23 November 1892. <sup>(199)</sup> At the time, with a rhetoric that almost certainly exceeded the reality, it was said:

This Chamber is to have all the virtues which the law lacks. It is to be expeditious where the law is slow, cheap where the law is costly, simple where the law is technical, a peace-maker instead of a stirrer up of strife. <sup>(200)</sup>

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**1.186** The LCIA has a relatively small administrative staff, but an increasing caseload of international arbitrations. <sup>(201)</sup> Its ‘Court’ consists of arbitration practitioners drawn from the major trading nations, including China and Japan, and is concerned with issues of policy, rather than with the administration of individual arbitrations. The LCIA, in common with other arbitral institutions, has its own book of rules, revised in 1998: they are drawn in significantly more detail than those of other institutions, which provides useful guidance to both parties and tribunals. <sup>(202)</sup> Amongst the LCIA Rules that merit being singled out for special comment are rules for the expedited formation of tribunals; a default schedule for the exchange of written submissions; an express provision (which is not to be found in the ICC Rules or the UNCITRAL Rules) for the confidentiality of awards and materials created for, or produced in, the arbitration; and state-of-the-art provisions for reasoned decisions



on challenges to arbitrators. (203)

**1.187** The LCIA is based in London but has joined forces with the Dubai International Financial Centre to open an office in Dubai, for which purpose special rules of arbitration (and conciliation) have been formulated. An office has also been opened in Delhi, India, as a subsidiary of the LCIA.

#### ***x. The American Arbitration Association and the ICDR***

**1.188** The American Arbitration Association (AAA) was established in 1926 to study, promote, and organise the private resolution of disputes, through the use of arbitration and other techniques of dispute settlement. In order to deal with the dramatic expansion in the number of disputes being referred to international arbitration, the AAA established a separate international division; this division, the ICDR, now has a considerable caseload. (204) It has a central location in New York and offices in Dublin and Mexico City, and maintains a list, or panel, of arbitrators.

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#### ***xi. The WIPO Arbitration Centre***

**1.189** The WIPO Arbitration Centre was established in 1994, under the auspices of the World Intellectual Property Organisation. (205) This Arbitration Centre, based in Geneva, has its own rules, for mediation and for arbitration, and maintains a list of arbitrators. When the Centre is required to appoint an arbitrator, each party is sent an identical list of potential candidates and is asked to strike out anyone to whom it objects, and to mark the remaining names in order of preference. The work of the Centre includes domain name disputes, which are conducted online, are generally resolved within a short time of the filing of a request, and only very rarely involve oral hearings. (206)

#### ***g. Arbitrations involving a State***

**1.190** Disputes between States belong to the realm of public international law. However, where the State enters into a commercial agreement with a private party, either by itself or through a State entity, any disputes are likely to be referred either to the courts of the State concerned or to international arbitration. The private party to such a contract will almost always prefer to submit to arbitration as a 'neutral' process, rather than to the courts of the State with which it is in dispute.

**1.191** There are many factors to be weighed in the balance when a State or State entity considers whether or not to submit to arbitration. There are political considerations, such as the effect which a refusal to go ahead with arbitration might have on relations

with the State to which the foreign claimant belongs. <sup>(207)</sup> There are economic considerations, such as the loss of foreign investment which a refusal to arbitrate might bring about. There are also, of course, considerations such as the effect of an award being granted *in absentia*, as happened in the Libyan oil nationalisation arbitrations. <sup>(208)</sup>

**1.192** In addition, questions of national prestige are involved in being seen as a State that is prepared to honour its commitments. It is sometimes said that the right of a State to claim immunity from legal proceedings forms part of its sovereign dignity. <sup>page "63"</sup> However, one might prefer to agree with a well-known English judge who said: 'It is more in keeping with the dignity of a foreign sovereign to submit himself to the rule of law than to claim to be above it.' <sup>(209)</sup>

**1.193** Arbitrations in which one of the parties is a State or State entity often take place under the rules of institutions such as those already discussed. <sup>(210)</sup> However, two arbitral institutions are usually concerned only with disputes where one of the parties is a State or State entity. These are the International Centre for the Settlement of Investment Disputes (ICSID) in Washington and the Permanent Court of Arbitration (the PCA) at The Hague.

#### *i. ICSID*

**1.194** ICSID, which was established by the Washington Convention, is based at the principal office of the World Bank in Washington. The Washington Convention broke new ground. It gave both private individuals and corporations who were 'investors' in a foreign State the right to bring legal proceedings against that State, before an international arbitral tribunal. It was no longer necessary for such investors to ask their own government to take up their case at an inter-State level, under the so-called principle of 'diplomatic protection'. Instead, the Washington Convention established a system under which individuals and corporations could demand redress directly against a foreign State, by way of conciliation or arbitration.

**1.195** However, it was only with the advent of Bilateral Investment Treaties (BITs) and such inter-governmental agreements as the North American Free Trade Agreement (NAFTA) that investors began to take advantage of their right of direct recourse against a foreign State, in their own name and on their own behalf. This was a major breakthrough. As one commentator has pointed out:

For the first time a system was instituted under which non State entities—corporations or individuals—could sue States directly; in which State immunity was much restricted; under which international law could be applied directly to the relationship between the investor and the host State; in which the operation of the local remedies rule was excluded; and in which

the tribunal's award would be directly enforceable within the territories of the State's parties. <sup>(211)</sup>

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**1.196** Because it is governed by an international treaty, rather than by a national law, an ICSID arbitration is truly delocalised or denationalised. What has been described as a 'tidal wave' of arbitrations between investors and States has led to a dramatic increase in the number of arbitrations administered by ICSID. <sup>(212)</sup> The role of ICSID in such arbitrations is discussed in Chapter 8.

## ***ii. The PCA***

**1.197** The PCA was established by the Convention for the Pacific Settlement of International Disputes, concluded at The Hague in 1899, and revised in 1907. It was the product of the first Hague Peace Conference, which was convened on the initiative of Tsar Nicholas II of Russia 'with the object of seeking the most effective means of ensuring to all peoples the benefits of a real and durable peace'. <sup>(213)</sup> The creation of the PCA did not avert the great wars of the twentieth century, but a number of major inter-State disputes were arbitrated there in its early years, <sup>(214)</sup> and in 1935 it administered its first commercial arbitration between a private party and a State. <sup>(215)</sup>

**1.198** Over recent years, the PCA has expanded its role to include not only the designation of appointing authorities for the appointment of arbitrators under the UNCITRAL Rules but also the administration of arbitrations in disputes involving private parties as well as States. <sup>(216)</sup> *Ad hoc* and other tribunals may also take advantage of the excellent facilities of The Peace Palace. <sup>(217)</sup>

## ***D. Sovereign States, Claims Commissions, and Tribunals***

**1.199** There is a long history of sovereign States resolving disputes between themselves by arbitration; but the modern system of arbitration between States began with the so-called Jay Treaty of 1794. <sup>(218)</sup> This Treaty, which was concluded between page "65" the United Kingdom and the United States, following the earlier Declaration of Independence by the former British colony, established various 'Commissions' to resolve boundary and shipping disputes between the two countries. Each 'Commission' consisted of one or two commissioners nominated by each party, with the third or fifth commissioner being chosen by agreement or by drawing lots.

**1.200** There followed what might be called a 'monarchical period' when Kings or Queens were nominated as arbitrators in inter-State disputes. Queen Victoria, for example, acted (nominally) as arbitrator in a dispute between Mexico and France, which was concerned with responsibility for acts of war, with the award being

given without reasons. During the same period, more usually, there was a series of Mixed Commissions, with each State appointing one commissioner and the commissioners agreeing upon an arbitrator or umpire.

**1.201** The *Alabama Claims* arbitration, which took place in Geneva in 1871–72, marked another step on the way to the modern system of international arbitration. A dispute between the United Kingdom and the United States arose because the United Kingdom had permitted the *Alabama* and her supply ship, *Georgia*, to be built in a British yard and delivered to the Southern States during the American Civil War. The US claimed that this was a breach of neutrality. A new type of tribunal was established to determine the dispute—one member from each side, with ‘neutral’ members being appointed by the King of Italy, the President of the Swiss Confederation, and the Emperor of Brazil: ‘a collegiate international court, which was to set the pattern for many others, had emerged’.

(219)

**1.202** By the end of the nineteenth century, arbitration between States was a customary method of settling disputes. Arbitration itself formed an important part of the Hague Peace Conventions of 1899 and 1907. The Hague Convention of 1899 stated that, in questions of a legal nature, and particularly in the interpretation or application of treaties or conventions: ‘arbitration is recognised by the Signatory Powers as the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle.’

**1.203** This conclusion led to the establishment at The Hague of the so-called ‘Permanent Court of Arbitration’ which, at the time, consisted of no more than a [page "66"](#) Bureau and a list of potential arbitrators. As part of the peace settlement which followed the war of 1914–18, a Permanent Court of Justice was established, as a standing judicial tribunal to adjudicate upon disputes which the States concerned were prepared to submit to the Court; and in 1945, following the Second World War, the International Court of Justice (the ICJ), was founded, as the principal judicial organ of the United Nations and as the successor to the Permanent Court of Justice.

**1.204** The ICJ, which is based at the Peace Palace at The Hague, is sometimes known as the ‘World Court’. Article 38(1) of the Statute of the ICJ is a guide both for the ICJ and for other tribunals (including arbitral tribunals) in ascertaining the applicable rules of public international law, to which reference is frequently made in investor/State arbitrations and, indeed, in other cases involving States or State entities. Article 38(1) states:

1. The Court, whose function is to decide in accordance with international law (220) such disputes as are submitted to it, shall apply:
  - (a) international conventions, whether general or particular, establishing rules expressly

- recognised by the contesting States;
  - (b) international custom, as evidence of a general practice accepted as law;
  - (c) the general principles of law recognised by civilised nations;
  - (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

**1.205** The practice which started with the Jay Treaty, of establishing 'Mixed Commissions' to resolve disputes in which sovereign States are involved, is a practice which still continues. In recent years, various international claims commissions or tribunals have been established to determine claims by individuals and corporations. Amongst the most significant of these are the Iran–US Claims Tribunal, <sup>(221)</sup> the United Nations Compensation Commission (UNCC), <sup>(222)</sup> and the Claims Resolution Tribunal for Dormant Accounts in Switzerland (Holocaust Tribunals). <sup>(223)</sup> The work of these Tribunals and Commissions has been discussed in detail in previous editions of this book. In particular, reference was made to the jurisprudence of the Iran–US Claims Tribunal, which showed to advantage the UNCITRAL Rules in action. Reference was also made to the 'mass production' [page "67"](#) approach of the UNCC, in dealing with over one million individual claims. The Iran–US Claims Tribunals demonstrated how arbitration had an important role to play as part of an overall political settlement between States, whilst the work of the UNCC demonstrated not only the value but also the inherent flexibility of arbitral procedures. Limitations of space have led the authors to omit such detailed discussion in the present edition.

## ***E. Regulation of International Arbitration***

### ***a. Introduction***

**1.206** A national or domestic arbitration—that is to say, an arbitration between individuals, corporations, or entities resident in the same country—will usually involve only the domestic law of that country. An international arbitration is different. As Sir Robert Jennings, former President of the ICJ, said in the preface to the first edition of this book:

International commercial disputes do not fit into orthodox moulds of dispute procedures—they lie astraddle the frontiers of foreign and domestic law—

and raise questions that do not fit into the categories of private international law either. Not least they raise peculiar problems of enforcement.

What this means in practice is that international arbitration depends for its effectiveness upon the support of different national systems of law and in particular (i) the arbitration law of the country which is the place (or 'seat') of the arbitration; and (ii) the law of the country or countries in which recognition and enforcement of the arbitral tribunal's award is sought.

### ***b. The role of national systems of law***

**1.207** An understanding of the interchange between the arbitral process and the different national systems of law that may impinge upon that process is fundamental to a proper understanding of international arbitration. Such an interchange may take place at any phase of the arbitral process. At the beginning of an arbitration, for instance, it may be necessary for the claimant to ask the relevant national (or local) court to enforce an agreement to arbitrate, which the adverse party is seeking to circumvent by commencing legal proceedings. Or it may be necessary to ask the relevant court to appoint the arbitral tribunal (if this cannot be done under the arbitration agreement or under the relevant rules of arbitration).

**1.208** After an award has been made, national courts may once again be asked by the parties to intervene. The losing party, for example, may seek to challenge the award before the courts of the place in which it was made, on the basis that the arbitral tribunal exceeded its jurisdiction, or that there was a substantial *page "68"* miscarriage of justice in the course of the proceedings, or on some other legally recognised ground. If this challenge succeeds, the award will either be amended or set aside completely. *(224)* By contrast, the winning party may need to apply to a national court for recognition and enforcement of the award *(225)* in a State (or States) in which the losing party has, or is believed to have, assets that can be sequestrated.

### ***i. State participation in the arbitral process***

**1.209** States which recognise international arbitration as a valid method of resolving commercial and other disputes are usually ready to give their assistance to the arbitral process. Indeed, in many cases they are bound to do so by the international conventions to which they are parties. In return, it is to be expected that they will seek to exercise some control over the arbitral process. Such control is usually exercised on a territorial basis—first, over arbitrations conducted in the territory of the State concerned, and secondly, over awards brought into the territory of the State concerned for the purpose of recognition and enforcement.

**1.210** As to the first proposition, it would be unusual for a State to

support arbitral tribunals operating within its jurisdiction *without* claiming some degree of control over the conduct of those arbitral tribunals—if only to ensure that certain minimum standards of justice are met, particularly in procedural matters:

... there is virtually no body, tribunal, authority or individual in this country whose acts or decisions give rise to binding legal consequences for others, but who are altogether immune from judicial review in the event of improper conduct, breaches of the principles of natural justice, or decisions which clearly transcend any standard of objective reasonableness. (226)

**1.211** As to the second proposition, it is generally accepted that States which may be called upon to recognise and enforce an international arbitral award are entitled to ensure that certain minimum standards (of due process) have been observed in the making of that award; that the subject matter of the award is 'arbitrable' in terms of their own laws; and that the award itself does not offend public policy. (227)

**1.212** The dependence of the international arbitral process upon national systems of law should be recognised, but not exaggerated. The modern tendency is towards harmonisation of the different systems of law that govern the conduct of international arbitrations, and the recognition and enforcement of international awards. The New York Convention inspired this process of harmonisation; and [page "69"](#) the Model Law has given it considerable further impetus. In addition, there is increasing recognition of the importance of international arbitration, in terms of both its contribution to global trade and the economic benefit such arbitrations can bring to the host country. Arbitration centres have been set up in many parts of the world. Some of them may have only a nominal existence, but taken as a whole they represent a potential source of revenue (and perhaps of prestige) to a country:

National governments have also sought to gain economic advantage from the promotion of local arbitration by backing the establishment of arbitration or dispute resolution centres, the idea being that if there is in one's own country a focus of intellectual and practical activity in this field, with facilities for the conduct and study of arbitrations, contracting parties will choose to conclude agreements for arbitration there ... (228)

### ***c. The role of international conventions and the Model Law***

**1.213** The most effective method of creating an international system of law governing international arbitration has been through international conventions (and, more recently, through the Model Law). International conventions have helped to link national systems of law into a network of laws which, although they may differ in their



wording, have as their common objective the international enforcement both of arbitration agreements and of arbitral awards.

**1.214** There have been several such international treaties or conventions on arbitration. The first, in modern times, was the Montevideo Convention. <sup>(229)</sup> This was made in 1889 and provided for the recognition and enforcement of arbitration agreements between certain Latin American States. <sup>(230)</sup> It was, therefore, essentially a regional convention. The first modern and genuinely *international* convention was the 1923 Geneva Protocol, which was drawn up on the initiative of the ICC and under the auspices of the League of Nations. It was quickly followed by the 1927 Geneva Convention.

#### ***i. The Geneva Protocol of 1923***

**1.215** The 1923 Geneva Protocol had two objectives. Its first and principal objective was to ensure that *arbitration clauses* were enforceable *internationally*, so that parties to an arbitration agreement would be obliged to resolve their dispute by *page "70"* arbitration, rather than through the courts. The way in which this was done was, in effect, to bar a party that had entered into an arbitration agreement from starting court proceedings in breach of that agreement, by having the court refuse to entertain such proceedings.

**1.216** The second and subsidiary objective of the 1923 Geneva Protocol was to ensure that *arbitration awards* made pursuant to such arbitration agreements would be enforced in the territory of the States in which they were made. (These two objectives of the 1923 Geneva Protocol—the enforceability both of arbitration agreements and of arbitral awards—are also to be found in a more modern version in the New York Convention.)

**1.217** The 1923 Geneva Protocol was limited both in its range and in its effect. It applied only to arbitration agreements made ‘between parties subject respectively to the jurisdiction of different contracting States’; <sup>(231)</sup> and it could be further limited by States availing themselves of the ‘commercial reservation’, which has already been discussed. So far as enforcement of arbitral awards was concerned, each contracting State agreed to ensure the execution under its own laws of awards *made in its own territory* pursuant to an arbitration agreement which was covered by the Protocol. <sup>(232)</sup>

#### ***ii. The Geneva Convention of 1927***

**1.218** On 26 September 1927 a convention on the execution of foreign arbitral awards was drawn up in Geneva, again under the auspices of the League of Nations. <sup>(233)</sup> The purpose of this convention was to widen the scope of the 1923 Geneva Protocol by providing for the recognition and enforcement of Protocol awards made within the territory of any of the contracting States (and not

merely within the territory of the State in which the award was made). (234)

**1.219** A number of problems were encountered in the operation of both Geneva treaties. There were limitations in relation to their field of application, (235) and, under the 1927 Geneva Convention, a party seeking enforcement had to *prove* the conditions necessary for enforcement. This led to what became known as the problem [page "71"](#) of 'double *exequatur*'. In order to show that the award had become final in its country of origin, the successful party was often obliged to seek a declaration in the courts of the country where the arbitration took place to the effect that the award was enforceable in that country, before it could go ahead and enforce the award in the courts of the place of enforcement. Despite their limitations, the Geneva treaties have a well-deserved place in the history of international commercial arbitration. They represent a first step on the road towards international recognition and enforcement of both international arbitration agreements and international arbitral awards.

### ***iii. The New York Convention of 1958***

**1.220** It was again the ICC that, in 1953, promoted a new treaty to govern international commercial arbitrations. (236) The ICC's proposals were taken up by the United Nations Economic and Social Council (ECOSOC) and resulted in the New York Convention, which was adopted in 1958.

**1.221** The New York Convention is the most important international treaty relating to international commercial arbitration. It is one of the cornerstones of international arbitration; and it is no doubt because of the New York Convention that international arbitration has become the established method of resolving international trade disputes. The major trading nations of the world have become parties to the New York Convention. At the time of writing, the Convention has more than 144 parties, including Latin American States, such as Argentina, Colombia, Mexico, and Venezuela, and Arab States, including Saudi Arabia, Egypt, Kuwait, and Dubai.

**1.222** The New York Convention is a considerable improvement upon the 1927 Geneva Convention. It provides for a much more simple and effective method of obtaining recognition and enforcement of foreign arbitral awards; and it replaces the 1927 Geneva Convention as between States that are parties to both conventions. (237) Although the full title of the Convention suggests that it is concerned only with the enforcement of foreign awards, this is misleading: the Convention is also concerned with arbitration agreements. It gives much wider effect to the validity of *arbitration agreements* than the 1923 Geneva Protocol: and again the Convention replaces the Protocol, as between States which are bound by both. (238) [page "72"](#) In order to enforce arbitration agreements, the New York Convention adopts the technique found in

the 1923 Geneva Protocol: the Convention requires the courts of contracting States to refuse to allow a dispute that is subject to an arbitration agreement to be litigated before its courts, if an objection to such litigation is raised by any party to the arbitration agreement.

(239)

**1.223** Unlike the 1923 Geneva Protocol, the New York Convention does not provide that the parties to an arbitration agreement to which the Convention applies shall be 'subject respectively to the jurisdiction of different contracting states'. Plainly, however, the New York Convention is intended to apply to *international* arbitration agreements, rather than to purely domestic arbitration agreements; and it is in this sense that the Convention has been interpreted by national laws implementing the Convention and by the reported decisions of national courts, when called upon to apply the Convention. (240)

**1.224** The operation of the New York Convention has not been without practical difficulties. Courts of different countries have sometimes differed in their interpretation of the Convention; and the Convention itself, which was made for a simpler, less 'global-trading' world, is now beginning to show its age. (241) The recognition and enforcement of awards under the New York Convention, and the grounds on which such recognition and enforcement may be referred, are discussed in Chapters 10 and 11.

#### ***iv. Conventions after 1958***

**1.225** The New York Convention represented a vital stage in the shaping of modern international arbitration. No convention since 1958 has had the same impact. Yet later conventions are worthy of brief examination for the direction of development they indicate and the approach they reveal.

**1.226** The European Convention of 1961 (the European Convention) was made in Geneva under the aegis of the Trade Development Committee of the United Nations Economic Commission for Europe. It applies to international arbitrations to settle trade disputes between parties from different States, whether European or not.

(242) Amongst its useful provisions is an express recognition of the capacity of the State or other public body to enter into an arbitration agreement, [page "73"](#) although the European Convention also allows a State, on becoming a party to the European Convention, to limit this faculty to such conditions as may be stated in its declaration. (243) Otherwise, however, the European Convention has failed to meet its objectives. First, its approach was theoretical rather than practical. More importantly, it did not deal with the recognition and enforcement of awards. This was left to other conventions such as the New York Convention to which the European Convention may fairly be seen as a supplement. (244)

**1.227** The next development was a brave but unsuccessful attempt

to unify the national arbitration laws of the Member States of the Council of Europe in the Strasbourg Uniform Law of 1966. <sup>(245)</sup> Only Austria and Belgium signed the Convention and it has only been implemented in Belgium. It is, therefore, of little practical interest.

#### ***v. Regional conventions***

**1.228** There are also regional conventions on arbitration, such as the Panama Convention and the Amman Convention, which may need to be consulted in relation to arbitration agreements or awards that concern those regions. Some of these (such as the Panama Convention, to which the US is a party, as are many South American States) may be of particular importance in terms of enforcing an arbitral award. <sup>(246)</sup>

#### ***vi. Bilateral investment treaties***

**1.229** To complete this discussion of international treaties and conventions, a brief mention must be made of bilateral investment treaties. Historically, States doing business with each other often entered into so-called 'Treaties of Friendship, Commerce and Navigation'. In order to encourage trade and investment, the States concerned would grant each other favourable trading conditions and agree that any disputes would be resolved by arbitration. Such treaties have now given way to bilateral investment treaties, or 'BITs' as they are generally known. <sup>(247)</sup>

**1.230** The classic agreement to arbitrate has already been described as one that is made between the parties themselves, either by an arbitration clause in their contract or by a subsequent submission to arbitration. In a BIT, however, the position is different.

*page "74"* The State party which is seeking foreign investment makes a 'standing offer' to arbitrate any dispute that might arise in the future between itself and a foreign investor of the other State party to the treaty. It is only when a dispute actually arises and the private investor accepts this offer that an 'agreement to arbitrate' is formed. This has been well described as 'arbitration without privity'.

<sup>(248)</sup> Certainly, the concept of a 'standing offer' to arbitrate with anyone who fits the required definition is different from the conventional model in which the parties are known to each other when they make an agreement to arbitrate. However, once the 'standing offer' has been accepted, there comes into existence an effective agreement to arbitrate, to which both the State (or the State entity) and the private investor are parties:

In view of the huge and still rapidly growing number of such treaty consents in particular, it is increasingly likely that any given investor will, in accordance with the terms of such a consent, be able to resort to arbitration in respect of a dispute with a host state despite the absence of an earlier arbitration agreement with the state—or, in many instances, despite the

existence of an earlier agreement describing a different method for settling the dispute. (249)

### **vii. The Model Law**

**1.231** The Model Law began with a proposal to reform the New York Convention. This led to a report from UNCITRAL (250) to the effect that harmonisation of the arbitration laws of the different countries of the world could be achieved more effectively by a model or uniform law. The final text of the Model Law was adopted by resolution of UNCITRAL, at its session in Vienna in June 1985, as a law to govern international commercial arbitration; and a recommendation of the General Assembly of the United Nations commending the Model Law to Member States was adopted in December 1985. (251)

**1.232** The Model Law has been a major success. The text goes through the arbitral process from beginning to end, in a simple and readily understandable form. It is a text that many States have adopted, either as it stands or with minor changes, as their own law of arbitration. So far, over 40 States have adopted legislation based on the Model Law, with some States, such as England, choosing to modernise [page "75"](#) their laws on arbitration without adopting the Model Law whilst paying careful attention to following its format and having close regard to its provisions. (252)

### **d. The Revised Model Law**

**1.233** If the New York Convention propelled international arbitration onto the world stage, the Model Law made it a star, with appearances in States across the world. Even so, since its adoption by UNCITRAL in June 1985, the Model Law has lost touch with the fast-moving world of international arbitration, in at least two respects: first, the requirement for an arbitration agreement to be in writing, if it is to be enforceable; and secondly, the provisions of Article 17 governing the power of an arbitral tribunal to order interim measures of relief.

**1.234** In order to address these concerns, UNCITRAL established a Working Group to consider revision to the Model Law. As one of the US delegates has explained: (253)

The need to revise the writing requirement was pretty obvious, given all the developments in electronic commerce. But why did UNCITRAL also focus on enforcement of interim measures? I think there are two main issues. First, it was recognized that interim measures were increasingly important in international arbitration. This is not just because parties seem to be seeking such measures more frequently. It is also because, as the UNCITRAL Secretariat explained in one of its early working papers, a final award may be

of little value to the successful party, if, in the meantime, the defending party is allowed to dissipate its assets or remove them from the jurisdiction. Those are the kinds of actions by a party that interim measures are designed to stop. Therefore, as the Secretariat pointed out, 'an interim order can be at least as or even more important than an award'.

The Working Group met twice a year from 2000 onwards. It is a large group. All 60 or so UNCITRAL nations are working members and there are a number of participating observers. It is perhaps a miracle that such a large Working Group produced any concrete proposals at all; but it did so eventually. The consequent revisions to the Model Law were adopted by the Commission in July 2006 and approved by the General Assembly of the United Nations in December 2006. (254)

**1.235** The 'writing requirement' is defined in very wide terms in the Revised Model Law and includes an 'electronic communication' which means information generated, sent, received, or stored by electronic, magnetic, optical, or similar means. (255) *page "76"* In addition, the more traditional forms of written record, including references to a document containing an arbitration clause, are maintained. (256) One curious feature of the Revised Model Law is that States which propose to adopt it are given an option. They may adopt the wide definition of 'in writing' which is set out in the Model Law, as the first option; or they may decide to dispense altogether with the requirement for writing, in which case they will adopt the second option, which simply states:

'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. (257)

It remains to be seen which option States prefer. (258)

**1.236** The UNCITRAL Working Group also addressed a further issue, which caused considerable controversy—namely, whether or not an arbitral tribunal should have the power to issue interim measures on the application of one party and without the adverse party or parties being aware of the application. Such *ex parte* applications are a common feature of litigation before the courts. The reason is apparent. If a party is told that there is to be an application to prevent disposal of its assets, those assets may well have 'disappeared' before the application is heard. But are *ex parte* applications, made so to speak behind the back of the adverse party, consistent with the underlying basis of arbitration, with its necessary emphasis on treating the parties with equality and its reliance on the independence and impartiality of arbitrators? The

Working Group decided to allow such applications, but only on strictly limited conditions. These are discussed as part of the general discussion of interim measures in Chapter 7.

#### ***e. The practice of international arbitration***

**1.237** There are no fixed, detailed rules of procedure governing an international arbitration. Each tribunal is different; each case is different; and each case deserves to be treated differently. But there is a basic underlying structure, which is built upon three essential elements: first, the international conventions (and the Model Law) which have helped to bring about modern national laws of arbitration; secondly, established rules of international arbitration; and thirdly, the practice of experienced arbitrators and counsel.

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#### ***i. The international conventions (and the Model Law)***

**1.238** The international conventions on arbitration do not prescribe—and they do not attempt to prescribe—the way in which an international arbitration should be conducted. Instead, they lay down certain general principles. The New York Convention, for example, requires that a party should be given proper notice of the appointment of the arbitrator or of the arbitral proceedings; that the arbitral procedure should be in accordance with the agreement of the parties or the law of the country in which the arbitration takes place; and that each party should be given a proper opportunity to present its case. If this is not done, recognition and enforcement of any arbitral award may be refused by the national court or by foreign courts in which enforcement is sought. These general principles of the New York Convention now form part of the arbitration law (the *lex arbitri*) of countries throughout the world.

**1.239** The Model Law takes matters further. It contains detailed provisions for the appointment (and challenge) of arbitrators and for the appointment of substitute arbitrators where necessary; it authorises an arbitral tribunal to rule on its own jurisdiction, treating an arbitration clause as an agreement that is independent of the contract of which it forms part; it authorises an arbitral tribunal to grant interim measures of relief—for instance, to preserve assets or material evidence; and it deals, in outline, with the submission of statements of claim and defence and other matters. Those countries which have adopted (or adapted) the Model Law thus have a national law governing arbitration which, in a phrase, is ‘arbitration friendly’. Those countries which have considered it necessary to go beyond the Model Law, in the sense of making more detailed provisions, have nevertheless taken full note of the Model Law in drafting their own ‘arbitration friendly’ legislation. (259)

**1.240** Other international conventions on arbitration, such as the Washington Convention, which is concerned with investment disputes, go into more detail than the New York Convention but—



like that Convention—avoid setting down detailed rules of procedure. Where, then, are such detailed rules to be found?

## ***ii. Established rules of international arbitration***

**1.241** It might be thought that the answer to this question is to be found in the rules of arbitral institutions such as the ICC and the LCIA, or in the UNCITRAL Rules. It is true, of course, that where an arbitration is being conducted under the rules of an arbitral institution, or under the UNCITRAL Rules, there will be a book of rules to provide guidance. They will be expressed in broad terms, but they will [page "78"](#) usually contain provisions governing the place of arbitration (if this has not already been chosen by the parties), the appointment of the arbitral tribunal, challenges to any of the arbitrators or to their jurisdiction, the exchange of written submissions, the appointment of experts, the holding of a hearing, and so forth. [\(260\)](#)

**1.242** These rule books are helpful in establishing the general shape or outline of the arbitral proceedings, from the establishment of the arbitral tribunal to the publication of the eventual award. However, they do not prescribe in any detail the way in which an arbitration should be conducted and, quite properly, they do not attempt to do so.

**1.243** This means that, in each arbitration, there are fresh questions to be answered. Should there be written submissions and, if so, what kind? Should evidence be called from witnesses and, if so, in what manner and under what rules? If written witness statements are submitted, what status do they have? Are they only to be taken into account if the witness subsequently appears at the hearing, or should they be given some weight, even if the person who made the statement fails to attend a subsequent hearing? Is the lawyer representing a party to the arbitration allowed to interview potential witnesses or is this a breach of professional rules? Where a witness appears at a hearing should he or she be cross-questioned and if so, by whom—the representatives of the parties, the tribunal, or both? Should experts be appointed and, if so, by whom—the parties themselves or the tribunal? How should arguments of law be presented—in writing, orally, or both?

**1.244** These—and many other questions which arise in the course of an arbitration—are important, practical questions. The answer to them is to be found in the practice generally followed in international arbitration.

## ***iii. The practice of experienced arbitrators and counsel***

**1.245** There is a wealth of shared knowledge and experience within the international arbitral community. The International Bar Association (IBA), for example, published (in August 1999) the second edition of 'The IBA Rules on the Taking of Evidence in International Commercial Arbitration'. Unlike the first edition, the IBA

Rules of Evidence have proved to be extremely effective in practice: they are particularly useful in their provisions for limiting the disclosure of documents to those which are strictly relevant and material to the outcome of the case. (261) UNCITRAL also has issued its 'Notes on Organizing Arbitral Proceedings' which [page "79"](#) are useful for anyone making a debut in the world of international arbitration: the 'Notes' provide a checklist of matters which will generally need to be covered in the course of an arbitration, including the rules to be followed, the applicable law, the language and place of arbitration, the exchange of written submissions, and so forth.

**1.246** As emphasised earlier in this chapter, one of the main advantages of arbitration, as opposed to litigation, is its flexibility.

(262) An international arbitration, which comes into existence only to deal with a particular dispute, should be fashioned so that it fits that dispute. What the arbitral tribunal and the parties should do is to adopt 'procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined'.

(263)

**1.247** Where experienced arbitrators and counsel are involved in an international arbitration, there is a mix of different national practices, with the best of each being selected and the worst rejected. (264) The idea that there is a 'common law approach' and a 'civil law' approach to the practice of international arbitration is now outdated. A common thread runs through most international arbitrations. For example:

- (i) an arbitral tribunal may decide for itself (subject to any later application to the courts) on any challenge to its jurisdiction;
- (ii) as the proceedings develop, an arbitral tribunal may be called upon to issue interim measures of relief, such as an order for security for costs or an injunction to prevent the flight of assets from the jurisdiction;
- (iii) at the stage of documentary disclosure, the usual procedure (following the IBA Rules of Evidence) will be for each party to submit to the tribunal all the documents on which it relies; and to limit requests for disclosure of documents by the other side to such documents as are 'relevant and material to the outcome of the case'. (265) If there are disputed requests for documents [page "80"](#) which are of any length, they will usually be dealt with by means of a so-called 'Redfern Schedule'; (266)
- (iv) the evidence of witnesses will usually be submitted in the form of written statements, with reply statements if considered necessary or appropriate; and the direct examination of witnesses will usually be limited, by agreement, to no more than ten minutes or so;
- (v) old-fashioned advocacy, in terms of long speeches, theatrical flourishes, and 'jury-type' appeals to the emotions is no longer the custom: it has been replaced by written and workman-like

post-hearing briefs.

#### ***iv. Future trends***

**1.248** In the first edition of this book <sup>(267)</sup> the present chapter concluded with the hope for the establishment of a 'new, uniform and genuinely international practice and procedure of international commercial arbitration'. <sup>(268)</sup> By the time of the fourth edition <sup>(269)</sup> the authors felt sufficiently confident to refer with approval to what an experienced arbitrator called 'the emerging common procedural pattern in international arbitration', which was designed to achieve 'finality and fairness and economy of costs'. <sup>(270)</sup>

**1.249** There is indeed a common procedural pattern to be found in international arbitration, as this book will endeavour to show. But there are divergences too. States that have adopted the Model Law may decide, for good reason, not to adopt the Revised Model Law; and States which *do* adopt the Revised Model Law will have to choose which options to adopt, in looking at the definition of an arbitration agreement. <sup>(271)</sup> UNCITRAL and the various arbitral institutions which are considering how to deal with problems such as multi-party arbitrations, consolidation of arbitrations, and joinder of third parties, may choose different solutions, in which case there will be a further divergence from the 'common procedural pattern'. Indeed, to some extent this has already been happening: for instance, [page "81"](#) several arbitral institutions <sup>(272)</sup> have decided to introduce simplified and mandatory procedures for claims below a stated amount. So long as the basic rights of the parties are respected, this would appear to be a desirable move and one that could be extended further, so as to reduce the cost and delay of international arbitration. <sup>(273)</sup>

#### ***F. Summary***

**1.250** The international conventions on arbitration, the Model Law, and the recognition of the importance of arbitration in resolving disputes in trade, commerce, and investment, have brought about the modernisation and harmonisation of the national laws that govern the process of international arbitration across the globe.

**1.251** These conventions operate through the national law of those States that have agreed to be bound by them. It is true that they may be adopted with reservations as to 'reciprocity' and as to the 'commercial nature' of the dispute. It is also true that States may apply their own criteria as to the 'arbitrability' of a dispute and as to public policy grounds for refusing recognition of an arbitration agreement or award. Nevertheless, the principal conventions represent a compelling force for unification of national laws on arbitration. Indeed, when looking at different local and national laws, it is generally possible to see through the detailed drafting to a framework derived from a particular treaty or convention, such as the

New York Convention, or from the Model Law. (274)

**1.252** Business people, lawyers, and arbitrators who are involved in international arbitration need to be capable of abandoning a parochial view of the law, as constituted by the particular national system with which they happen to be familiar, in favour of a wider and more international outlook. In particular, they must be prepared to accept that there are other systems of law which may, in some respects, [page "82"](#) be better than their own and which must in any event be taken into account. As one commentator has expressed it:

Recent national arbitration laws have broadened the autonomy of parties, provided it does not effect a violation of due process. The freedom thus granted has allowed arbitration practice to develop a set of rules which progressively rise to the level of a standard arbitration procedure. Such standard procedure has the invaluable merit of merging different procedural cultures. This comes as no surprise. International arbitration is a place where lawyers, counsel and arbitrators, trained in different legal systems, meet and work together. They have no choice but to find some common ground. (275)

**1.253** Similar considerations apply to the *practice* of international commercial arbitration. There is no uniform practice or procedure: arbitrators, parties, and counsel work together to devise a procedure that fits the dispute with which they are concerned. International disputes take on many different forms. Any attempt to design a uniform arbitral procedure would be fraught with problems. It would also run the risk of defeating the purpose of international commercial arbitration, which is to offer both a binding and a *flexible* means of resolving disputes: within the general framework of the applicable rules of arbitration, what is needed is initiative and open-mindedness in adopting, adapting, and developing the appropriate procedures to deal with the dispute in question. As this book will endeavour to show in the chapters that follow, this is part of the continuing challenge of the law and practice of international arbitration.

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<sup>1</sup> 'Consider your origins' said Dante, 'Living like a brute is not the destiny of men like you, but knowledge and virtue ever our pursuit' (Divina Commedia, Inferno, canto 26, 1.118 in the translation by Michael Palma, 2008).

<sup>2</sup> Fast-track (or expedited) arbitration is discussed in [Ch 6](#).

<sup>3</sup> [The Rules of Arbitration of the International Chamber of Commerce \(ICC Rules\)](#) provide in Art 20.6 that the arbitral tribunal may make a decision based on documents only 'unless any of the

parties requests a hearing'. Other institutions have similar rules: see, eg, [Art 42\(1\)\(c\)](#) of the Swiss Rules of International Arbitration which states: 'Unless the parties agree that the dispute shall be decided on the basis of documentary evidence only, the arbitral tribunal shall hold a single hearing for the examination of the witnesses and expert witnesses as well as for oral argument.'

<sup>4</sup> As will be seen, the support of international treaties, such as the [New York Convention of 1958](#) on the Recognition and Enforcement of Foreign Awards, is essential to the effectiveness of arbitration internationally.

<sup>5</sup> See [Ch 3](#); and see also, for instance, the comment of Richard Kreindler: 'Increasingly, the body or rules of law as agreed by the parties are different from those at the *situs*, from those at the place of principal or characteristic performance and, in turn, from those at the place or places of likely enforcement': 'Approaches to the Application of Transnational Public Policy by Arbitrators', *Journal of World Investment*, Geneva, April 2003, Vol 4, No 2, 239. This echoes the statement by Lord Mustill: 'It is by now firmly established that more than one national system of law may bear upon an international arbitration', [Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd \[1993\] AC 334, at 357](#).

<sup>6</sup> In January 2006, the six leading Chambers of Commerce in Switzerland adopted the Swiss Rules of International Arbitration (the Swiss Rules). [Art 1\(1\)](#) of these Rules states that they will govern the conduct of the arbitration—together with any mandatory rules of Swiss law (although the latter is not expressly stated); [Art 33\(1\)](#) provides that the arbitral tribunal shall decide the case in accordance with the rules of law agreed by the parties or, in the absence of choice, by the rules of law with which the dispute has the closest connection. (By [Art 33\(2\)](#), the arbitral tribunal may decide according to equity, if expressly authorised by the party to do so.)

<sup>7</sup> The different systems or rules of law which may constitute the substantive law of an international commercial contract are discussed in [Ch 3, paras 33.88 et seq.](#)

<sup>8</sup> And although the past is another country, the ancient world of the Greeks and the Romans would also require study.

<sup>9</sup> 'Even the written records date back for at least 2,500 years and some form of pacific dispute resolution by an impartial third party must be much older than this.' See Mustill, 'The History of International Commercial Arbitration: A Sketch' in *The Leading Arbitrators' Guide to International Arbitration* (2nd edn, 2008) at 1.

<sup>10</sup> Anyone contemplating such a world tour would do well to start with 'Sources for the History of Arbitration'. This scholarly work, by Derek Roebuck, begins with a general survey of arbitration and then gives a list, extending to 40 pages, of potential sources for a history of arbitration: (1998) 14 Arb Intl. According to the same author, both private and public arbitration were common in the Egypt of antiquity and both started with attempts to bring about a settlement: see 'Cleopatra Compromised: Arbitration in Egypt in the First Century BC' (2008) 74 Arbitration 3 at 263.

<sup>11</sup> Fouchard, *L'Arbitrage Commercial International* (Litec, 1965), 1, 30, and 31 (translation by the authors).

<sup>12</sup> Mustill, 'Is it a bird ...' in Reymond, *Liber Amicorum* (Litec, 2004), 209.

<sup>13</sup> 'Disputes in pre-Islamic Arabia were resolved under a process of arbitration (of sorts) ... This was voluntary arbitration, an essentially private arrangement that depended on the goodwill of the parties.' [Majeed, 'Good Faith and Due Process: Lessons from the Shari'ah' \(2004\) 20 Arb Intl 104.](#)

<sup>14</sup> Cf the power of commodity trade associations, such as the Federation of Oils, Seeds and Fats Associations Ltd (FOFSA), to punish a member who fails to comply with an arbitration award by 'posting' the defaulter—that is to say, by giving notice of the default to all members, thus warning members against doing further business with the defaulter.

<sup>15</sup> See David, *Arbitration in International Trade* (Economica, 1984), 84 and 85.

<sup>16</sup> Lazareff used this illuminating phrase, which describes how arbitration was seen as a way of settling disputes by reconciling legal principle with equity. He describes, in the authors' translation: 'This system of justice, born of merchants, which brings together law and respect for trade usage and knows how to reconcile the approach of Antigone with that of Creon.' See Lazareff, 'L'arbitre singe ou comment assassiner l'arbitrage', in *Global Reflections in International Law, Commerce and Dispute Resolution* (ICC Publishing, 2005) 477, at 478. (In Greek mythology, Antigone pleaded with Creon for the burial of the body of her brother Eteocle within the City walls.)

<sup>17</sup> 'War is too serious a matter to be left to military men': attributed to Georges Clémenceau, French Prime Minister, 1917–1920, but also to Talleyrand, the French statesman (1754–1838).

<sup>18</sup> The first English statute was the Arbitration Act of 1698, although in *Vynior's Case* ((1609) 8 Co Rep 80a, 81b) the court ordered the defendant to pay the agreed penalty for refusing to submit to arbitration as he had agreed to do. In France, an edict of Francis II promulgated in August 1560 made arbitration compulsory for all merchants in disputes arising from their commercial activity. Later this edict came to be ignored. During the French Revolution, arbitration came back into favour as 'the most reasonable device for the termination of disputes arising between citizens' and in 1791, judges were abolished and replaced by 'public arbitrators'. However, this proved to be a step too far and the French Code of Civil Procedure, in 1806, effectively turned arbitration into the first stage of a procedure which would lead to the judgment of a court. See David, n 15 above, 89 and 90.

<sup>19</sup> The Geneva Protocol on Arbitration Clauses of 1923 was drawn up on the initiative of the International Chamber of Commerce (ICC) and under the auspices of the League of Nations and signed at Geneva on 24 September 1923.

<sup>20</sup> This 'Convention for the Execution of Foreign Arbitral Awards' followed on from the Geneva Protocol and was signed at Geneva on



26 September 1927: League of Nations Treaty Series [\(1929–30\), Vol XCII, p 302](#).

21 [‘The Convention on the Recognition and Enforcement of Foreign Arbitral Awards’ done at New York on 10 June 1958 United Nations Treaty Series \(1959\), Vol 330, 3, No 4739](#). The text of the Convention is set out in Appendix B.

22 The UNCITRAL Rules [\(Resolution 31/98 adopted by the General Assembly on 15 December 1976\)](#). These Rules are set out in Appendix D. At its 39th Session (New York, 17–28 June 2002) the United Nations Commission on International Trade Law agreed that revision of the UNCITRAL Rules should be given priority; and that such revision ‘should not alter the structure of the text, its spirit, its drafting style, and should respect the flexibility of the text rather than add to its complexity’: see Note of the 49th Session of the Working Group, Vienna, September 2008, at para 7 of A/CN.9/WG.11/WP.150.

23 ‘The Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States’, done at Washington, 18 March 1965. United Nations Treaty Series (1966), Vol 575, 160, No 8359. For a more detailed review of ICSID arbitrations, see [Ch 8](#).

24 The Model Law on International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law on 21 June 1985. The text of this is set out in Appendix A.

25 The Revised Model Law was approved by the United Nations in December 2006.

26 Judge Jessup used this term to describe those rules of law, whether local, national, or international, which govern cross-border relationships and transactions: see Jessup, ‘Transnational Law’, *Storrs Lectures on Jurisprudence* (1956).

27 See, for instance, Mann ‘Lex facit arbitrum’ in (1986) 2 Arb Intl 241, at 244; however, this statement is not true in respect of ICSID arbitrations, which are governed by international law as discussed later in this chapter.

28 Many years ago, the English appellate court proclaimed that there would be ‘no Alsatia in England where the King’s Writ does not run’. Its concern was that powerful trade associations would otherwise impose their own ‘law’ on traders and citizens less powerful than they. For this reason, some control (and even ‘supervision’) of the arbitral process by the local courts was considered desirable. The same concern for consumer protection is to be seen in the modern laws of States which have chosen, rightly or wrongly, to deal with both national and international arbitrations in the same legislative act: see, for instance, the English Arbitration Act 1996, the [Irish Arbitration \(International Commercial\) Act 1998](#), and the [Swedish Arbitration Act 1999](#). (There is a proposal to replace the Irish Act of 1998 by an Act applying the Model Law to all arbitrations within the Republic, but as at the date of writing this new Act has not yet been adopted.)

29 Attributed to Humpty Dumpty in Lewis Carroll’s *Alice Through the Looking Glass*.



- 30 The court is now known as the International Court of Arbitration of the ICC. It is not a court in the generally accepted sense. It is, rather, a council that, *inter alia*, supervises the administration of arbitral tribunals constituted under the ICC Rules and approves the draft awards of these tribunals, whilst leaving the tribunals themselves in full charge of the cases before them.
- 31 [ICC Rules, Art 1\(1\).](#)
- 32 'The International Solution to International Business Disputes—ICC Arbitration', ICC Publication No 301 (1977), 19 (copyright ICC 1983). (This useful booklet is no longer in print.)
- 33 The Decree No 81–500 of 12 May 1981 is conveniently set out in French, English, and German in Delvolvé, *Arbitration in France, The French Law of National and International Arbitration* (1982).
- 34 This definition looks to the subject-matter of the dispute, rather than the nationality of the parties.
- 35 Delvolvé, 'France as a forum for international arbitration—the decree of May 12, 1981 (Arts 1492 to 1507 of the French Code of Civil Procedure)' 2 *The International Contract Law and Finance Review* 7, 421 at 422; see also [Craig, Park, and Paulsson, 'French Codification of a Legal Framework for International Commercial Arbitration: the Decree of May 12, 1981' \(1982\) VII Ybk Comm Arb 407](#); and Delvolvé, Rouche, and Pointon, *French Arbitration Law and Practice* (2003).
- 36 [European Convention on International Commercial Arbitration, done at Geneva, 21 April 1961, United Nations Treaty Series \(1963–64\), Vol 484, No 7041, 364.](#)
- 37 [European Convention of 1961, Art I.1\(a\).](#)
- 38 In such cases, the parties may opt for Cantonal law, but are unlikely to do so. For a commentary on Switzerland's law on international arbitration (Ch 12 of Swiss Private International Law Act 1987 (Swiss PIL)) see, eg, Bucher and Tschanz, *International Arbitration in Switzerland* (Helbing & Lichtenhahn, 1989); [Reymond, 'La nouvelle Loi Suisse et le droit d'arbitrage international: Réflexions de droit comparé' \(1989\) 3 Revue de l'Arbitrage 385](#); Lalive, 'The New Swiss Law on International Arbitration' (1998) 4 *Arb Intl* 2.
- 39 [US Code, Title 9 \(Arbitration\), s 202.](#)
- 40 [New York Convention, Art 1\(1\).](#)
- 41 Report of the Secretary-General, 14th Session of UNCITRAL, 19–26 June 1981, UN Doc A/CN 9/207, para 32.
- 42 [Model Law, Art 1\(3\).](#)
- 43 [Ibid.](#)
- 44 [Ibid, Art 1\(3\)\(a\).](#)
- 45 [Ibid, Art 1\(3\)\(b\)\(ii\).](#)
- 46 [Ibid, Art 1\(3\)\(b\)\(i\) and \(c\).](#)
- 47 Spain is one of the countries that has adopted this wide definition in the [Spanish Arbitration Act 2003, at Art 3.](#)
- 48 For instance in Costa Rica, non-economic matters are not arbitrable.

- 49 Geneva Protocol of 1923, Art 1.
- 50 [New York Convention, Art I\(3\)](#). It may be important to know whether the legal relationship out of which the arbitration arose was or was not a commercial relationship. If, for example, it becomes necessary to seek recognition or enforcement of a foreign arbitral award in a State that has adhered to the New York Convention, but has entered the commercial reservation, it will be necessary to look at the law of the State concerned to see what definition it adopts of the term 'commercial'.
- 51 The definition appears as a footnote to [Art 1\(1\), which states that the Model Law applies to 'international commercial arbitration'](#). It is interesting to see that the Model Law includes 'investment' within the definition of the term 'commercial', since in practice a separate regime for investment disputes has tended to develop, particularly where a State or State entity is concerned: see [Ch 8](#) for investor/State disputes.
- 52 Once there is a valid agreement to arbitrate, the scope of any resulting arbitration may be enlarged—for instance, to cover so-called 'non-signatories', whose consent to arbitrate is a 'deemed' or 'implied' consent, rather than a real agreement. The issues of non-signatories, consolidation of arbitrations, and third party involvement (where any 'consent' may be largely fictional) are touched upon later in this chapter, but discussed in more detail in [Ch 2](#).
- 53 [The New York Convention, Art V](#).
- 54 [The Model Law, Art 35](#).
- 55 [New York Convention, Art V\(1\)\(a\); Model Law Art 36\(1\)\(a\)\(i\)](#).
- 56 These are discussed in more detail in [Ch 2 paras 2.02–2.05](#).
- 57 Investor/State arbitrations are discussed in [Ch 8](#).
- 58 As well as arbitration awards.
- 59 What is described here is the problem of 'non-signatories', which is touched on later in this chapter but considered in more detail in [Ch 2](#). The phrase 'non-signatories' is not particularly accurate, since everyone in the world who has not signed the arbitration agreement might correctly be described as a 'non-signatory'. Nevertheless, it has become a convenient way of describing those who may become a party to the arbitration, despite not having signed the relevant agreement to arbitrate or a document containing an arbitration clause.
- 60 Swiss PIL, [Art 178\(1\)](#) (emphasis added). See also, eg, the [Italian Code of Civil Procedure \(Art 807\)](#) which states that 'the submission to arbitration shall, under penalty of nullity, be made in writing and shall indicate the subject-matter of the dispute'. Arbitration clauses must also be in writing. See the Federal Arbitration Act 1990 of the United States under which the minimum requirements are that the arbitration agreement be in writing and agreed to by the parties.
- 61 [Revised Model Law, Art 7, Option I](#).
- 62 [Ibid., Art 7, Option II](#).
- 63 [Ibid., Art 35](#). States which have no formal requirement for an

arbitration agreement include Sweden (Arbitration Act, Art 1) and Norway.

64 The United Nations General Assembly adopted a Recommendation by UNCITRAL, on 7 July 2006, to the effect that these Arts of the New York Convention should be given 'a uniform interpretation in accordance with modern practice'. In other words, they should be read as if they expressly include modern forms of communication. However, as Professor Moss notes; 'It is even doubtful whether such an instrument can truly be considered as an authoritative interpretation of the Convention, since UNCITRAL can hardly be regarded as the issuing or enabling body': Moss 'Form of Arbitration Agreements: Current Developments within UNCITRAL and the Writing Requirement of the New York Convention' (2007) ICC International Court of Arbitration Bulletin, Vol 18 No 2.

65 Professor Moss also raises the intriguing possibility that a party which recognises the difficulty of obtaining recognition and enforcement of an award under the New York Convention, and seeks to go to court instead of arbitrating, may find that the court declines jurisdiction, on the ground that the dispute is covered by an arbitration agreement which, albeit oral, is valid under the law of that country. Any resulting arbitral award may then be refused recognition and enforcement under the New York Convention, since there was no written agreement to arbitrate. Moss, n 64 above, at 63.

66 For a similar short form of arbitration clause, see, eg, *Arab African Energy Corp Ltd v Olieproducten Nederland BV* [1983] 2 Lloyd's Rep 419; and more generally, see the discussion in [Ch 2, paras 2.55](#)*et seq.*

67 A note states that the parties may wish to add:

- (a) the name of the party that will appoint arbitrators ('the appointing authority') in default of any appointment by the parties or the co-arbitrators themselves;
- (b) the number of arbitrators (one or three);
- (c) the place of arbitration (town or country);
- (d) the language of the arbitral proceedings.

68 This point, and in particular the distinction between existing and future disputes, is discussed later in this chapter.

69 For instance, a submission agreement is still required (whether or not a valid arbitration agreement already exists) in Argentina and Uruguay.

70 There are circumstances in which arbitration may be a compulsory method of resolving disputes, eg in domestic law, arbitrations may take place compulsorily under legislation governing agricultural disputes or labour relations. The growth of court-annexed arbitration may perhaps be said to constitute a form of compulsory arbitration. And, as previously mentioned, where the scope of arbitral proceedings is widened to include 'non-signatories', or where there is compulsory consolidation of arbitrations or joinder of third parties, the element of consent becomes less real.

71 An early mention of this revolutionary theory appears in Fouchard, n 11 above, although the presence of serious obstacles to the theory is noted. The theory is discussed in more detail in [Ch 3, paras 3.30–3.32](#).

72 The issue of separability is discussed in more detail in [Ch 2](#).

73 See, for instance, the [Model Law, at Art 16](#); and, by way of example, the UNCITRAL Rules, at [Art 21](#), and the English Arbitration Act 1996, at s 7 ('Separability of arbitration agreement'). Although well established, the doctrine of the separability of an arbitration clause, giving rise to the associated doctrine that an arbitral tribunal is competent to judge its own jurisdiction (the doctrine of *competens/competens*) is not immune from criticism. It is said, for instance, that 'if a contract is induced by fraud it would appear that none of the provisions of the contract would be valid, including the arbitration provision': see Reuben, 'First Options, Consent to Arbitration and the Demise of Separability' (2003) 56 Southern Methodist University Law Review 819, at 827; see also Scott Rau, 'Everything You Really Need to Know About "Separability" in Seventeen Simple Questions' (2003) 14 Am Rev Intl Arb 1, 1–120.

74 Of course, the party concerned may decide to abandon its claim, and is free to do so.

75 The full title is 'The Convention on the Recognition and Enforcement of Foreign Arbitral Awards'. The fact that the Convention also applies to the recognition and enforcement of agreements to arbitrate is not mentioned. (The most important international conventions are reviewed in more detail later in this chapter.)

76 See [Ch 3](#).

77 It should be noted, however, that even when the parties think that they have agreed to a set of rules which will govern their dispute, a poorly drafted arbitration clause may mean the issue is taken before a national court. See for instance the recent case of [Insignia Technology Co Ltd v Alstom Technology Ltd \[2008\] SGHC 134](#).

78 [Arbitration Act 1975, s 1\(i\)](#). This Act was repealed by the Arbitration Act 1996, although the New York Convention continues to be part of English law.

79 [Arbitration Act 1996, s 9](#). Lord Saville, stated: 'The action of the Courts in refusing to stay proceedings where the defendant has no defence is understandable. It is, however, an encroachment on the principle of party autonomy which I find difficult to justify. If the parties have agreed to arbitrate their disputes, why should a Court ignore that bargain, merely because with hindsight one party realises that he might be able to enforce his rights faster if he goes to Court?' 'Arbitration and the Courts', The Denning Lecture 1995, p 13.

80 Proposals for an arbitral tribunal being empowered to award summary judgments are now under consideration—for instance, in connection with the revision of the UNCITRAL Rules.

- 81 Geneva Protocol of 1923, Art 1 (emphasis added).
- 82 [New York Convention, Art II\(1\)](#) (emphasis added).
- 83 These States included France which, as the country in which the ICC is based, is an important centre for arbitration.
- 84 In Robert, *Dictionnaire de la langue Française* the secondary meaning of *compromis* is given as 'an agreement under which the parties make mutual concessions'.
- 85 It was not until 1925, two years after acceding to the 1923 Geneva Protocol, that France altered its law to allow the arbitration of future disputes, in line with the Protocol.
- 86 Although in the US it was not until 1920 that the State of New York recognised arbitration clauses as valid and enforceable; and it was the first state to do so: see [Coulson, 'Commercial Arbitration in the United States' \(1985\) 51 Arbitration 367.](#)
- 87 In a confusing use of language, some writers (and indeed some judges, particularly in the US) will describe a dispute as being not 'arbitrable' when what they mean is that it falls outside the jurisdiction of the tribunal, because of the limited scope of the arbitration clause or for some other reason. For example, the US Court of Appeals for the Tenth Circuit considered that a dispute was not 'arbitrable' because the reference to arbitration was made after the relevant time limit: see [Howsam v Dean Witter Reynolds Inc 537 US 79, 123 S Ct 588, decided 10 December 2002.](#) This unfortunate misuse of the term 'arbitrable' is so deeply entrenched that it cannot be eradicated; all that can be done is to watch out for the particular sense in which the word is being used.
- 88 [Art 1.](#)
- 89 [Art 3.](#)
- 90 [Art 2.](#)
- 91 In ICC arbitrations, eg, where the dispute is to be referred to a sole arbitrator, that person will be chosen by the ICC itself, unless (as is sensible) the parties agree on a suitable candidate: [ICC Arbitration Rules, Art 8.3.](#)
- 92 See [Ch 4.](#)
- 93 In the well-known *Aminoil* arbitration, in which the original authors took part as counsel, the members of the arbitral tribunal were respectively French, British, and Egyptian and the registrar was Swiss; the parties, lawyers, and experts were Kuwaiti, American, Swiss, British, Egyptian, and Lebanese. The seat of the arbitration was France.
- 94 This is discussed in more detail in [Ch 4.](#)
- 95 Lalive, 'Mélanges en l'honneur de Nicolas Valticos' in *Droit et Justice* (1989), 289.
- 96 See [Ch 4 paras 4.48 et seq.](#)
- 97 eg [Art 18](#) of the Model Law simply states: 'The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.'
- 98 Lawyers who are not experienced in international arbitration

sometimes find this difficult to accept and travel to the place of arbitration with a well-thumbed copy of their own court's procedural rules, which they suggest the tribunal might like to adopt. It is hardly necessary to repeat that any such suggestion will be rejected out of hand by any experienced tribunal!

99 [UNCITRAL Rules, Art 34.1.](#)

100 For a discussion of the differences between a judge and an arbitrator, see Lazareff, 'L'arbitre est-il un juge?' in Reymond, *Liber Amicorum* (Litec, 2004), 173 and Rubino-Sammartano, 'The Decision-Making Mechanism of the Arbitrator vis-à-vis the Judge' (2008) 25 *J Intl Arb.* 167–170.

101 For further discussion of these topics see below.

102 [English Arbitration Act 1996, s 33\(1\)\(a\).](#)

103 See, for instance, the [Model Law, Art 18](#), which states: 'The parties shall be treated with equality, and each party shall be given a full opportunity of presenting his case.'

104 The arbitral process also produces a different *result* from that which might have been reached by the parties through negotiation, with or without the help of a mediator or conciliator, since a negotiated agreement must necessarily be in the form of a compromise acceptable to both parties.

105 There is, however, some literature on this point. As to how arbitrators reach their decisions, see, eg, Lowenfeld, 'The Party-Appointed Arbitrator: Further Reflections' in *The Leading Arbitrators' Guide* (in 9 above), at 46–48; and Fortier, 'The Tribunal's Deliberations', in the same volume at 477–482. On the importance of the tribunal's deliberations, see Bredin, 'Retour au délibéré arbitral' in *Liber Amicorum Claude Reymond* (2004), 43 at 50; and Derains, 'La Pratique du Délibéré Arbitral' in *Global Reflections* (2005) at 221–224.

106 On dissenting opinions, see (eg) Redfern, 'Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly' (2004) 20 *Arb Intl* 3 at 223; Levy, 'Dissenting Opinions in International Arbitration in Switzerland' in (1989) 35 *Arb Intl*; and Mosk and Ginsberg, 'Dissenting Opinions in International Arbitration' in *Liber Amicorum Bengt Broms* (1999).

107 Save possibly for incidental matters such as the interpretation of the award or correction of obvious errors; and those rare cases in which the tribunal may be required by a court to reconsider its decision: [see Ch 9, paras 9.198 et seq.](#)

108 A study conducted by PricewaterhouseCoopers and Queen Mary University referred to in n 150 below states that in only 11% of cases did the major corporations interviewed need to proceed to enforce an award; and that in these cases, only 19% of the corporations encountered major difficulties when seeking enforcement.

109 These conventions are reviewed in more detail later in this chapter.

110 Both institutional and international rules of arbitration usually require the arbitral tribunal to state the reasons upon which the



tribunal bases its decision, although under some rules the parties may agree that this is not necessary: see, eg, the [UNCITRAL Rules, Art 32, r 3](#).

111 See [Ch 10](#).

112 See [Ch 11](#).

113 The only major multilateral treaty for the recognition and enforcement of court judgments is contained in European Council Regulation No 44/2001 (formerly the Brussels and Lugano Conventions) in relation to judgments made in the Member States of the European Union and Switzerland. The Mercosur common market (Argentina, Brazil, Paraguay, and Uruguay) has also established the Las Leñas Protocol for the mutual recognition and enforcement of judgments from Mercosur States within the region. The Hague Conference on Private International Law has produced a 'Convention on Choice of Court Agreements', under which a judgment by the court of a contracting State designated in an exclusive 'choice of court agreement' would be recognised and enforced in other contracting States. However at the time of writing, only two States have adopted the Convention.

114 One example is that of English law: under the 1996 Arbitration Act, an arbitral tribunal is given the power to award compound interest, if it thinks it appropriate to do so.

115 Veeder, 'Whose Arbitration Is It Anyway?' in *The Leading Arbitrators' Guide to International Arbitration* (2nd edn, Juris Publishing, 2008), 356.

116 The early rules of arbitration of the ICC, for instance, envisaged that an Award would be made within 60 days from the date of signature of the Terms of Reference, according to [Art 23 of the 1955 Rules](#). Nowadays the average time for a final award to be rendered is 12–24 months.

117 See [Ch 4, paras 4.192 et seq.](#)

118 See [Ch 4, para 4.211](#).

119 There are many reasons for this, including (i) the huge sums that are often at stake; (ii) the increasing professionalism of lawyers, accountants, and others engaged in the arbitral process, with a determination to leave no stone unturned; and (iii) the increasing 'judicialisation' of international arbitration, which is discussed later in this chapter.

120 One of the objectives of this book is to show how this can be done, by skilled and effective case management.

121 For example, under the ICDR Rules, 45 days may elapse after receipt of the Notice of Arbitration before the administrator is requested to appoint the arbitrator(s) and designate the presiding arbitrator; and this process may take further time, with the need to find suitable candidates who have no conflict of interest: see [Art 6\(3\) of the ICDR Rules](#).

122 One of the reasons for delay is the workload of the chosen arbitrators, particularly if they have other professional commitments—for instance, as counsel or as university professors.

123 This is not always so, however. For instance, as already



mentioned, arbitrators may have the power to order compound interest, which the relevant court may not have. And so a tribunal may order the payment of such interest, at such rates as it considers meet the justice of the case. Where this power exists, it is likely to make international arbitration a particularly attractive prospect for businessmen claiming compensation for damages suffered or monies unpaid (see n 115).

124 For further discussion of this topic, see [Ch 5](#).

125 [Model Law, Art 11\(3\)\(a\)](#) (emphasis added).

126 French Cass. Civ. 1ere, 7 January 1992 Bull. Civ. 1 ([BKMI and Siemens v Dutco](#) 1992): this case is discussed more fully in [Ch 2](#).

127 This provision of the ICC Rules works well in practice, although it removes from the parties their right to nominate an arbitrator if they are unable to agree how this should be done. Interestingly, this is the very issue on which the French court took its stand, the right of a party to nominate its own arbitrator being recognised as fundamental. Other institutional rules of arbitration contain similar provisions: for a useful note on ICC practice, see Whitesell, 'Non-Signatories in ICC Arbitration' in *International Arbitration 2006: Back to Basics?* (Kluwer International, 2007) at 366.

128 [LCIA Rules, Art 8](#).

129 'May' is the formulation adopted in the [ICC Rules](#).

130 In 2007, the number of multi-party disputes before the ICC represented 31% of the total cases filed which was similar to the preceding year. Of the 186 multi-party disputes, 161 involved between two and five parties, 21 involved between six and ten parties, and the remaining 4 involved over ten parties. See ICC, *2007 Statistical Report*.

131 The leading authority on this doctrine is the *Dow Chemical case* (*Chemical France et al v Isover Saint Gobain* IX YBCA 131 (1984) *et seq*), which is discussed in [Ch 2 paras 2.42–2.43](#).

132 Instead of seeking a 'deemed' or 'implied' consent to arbitrate, which may or may not be real, one solution is to draft a suitable arbitration agreement. This is unlikely to be a simple task; but the AAA's Practical Guide to Drafting Dispute Resolution Clauses available at <<http://www.aaauonline.org>> indicates one way in which it might be done.

133 For a detailed discussion of these issues see Voser, 'Multi-Party Disputes and Joinder of Third Parties': ICCA Congress Series (2008).

134 For example, [Art 4\(2\)](#) of the Swiss Rules authorises the arbitral tribunal to decide whether a third person should be joined in the arbitration, after consulting all parties and taking into account all relevant circumstances. The LCIA Rules take a different approach: [Art 22\(h\)](#) authorises the Tribunal to allow one or more third persons to be joined in the arbitration as a party, provided the applicant and any such third person consents in writing.

135 See Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?', Freshfields Arbitration Lecture, 14 November 2006.

136 [See Brower I, Brower II, and Sharpe, 'The Coming Crisis in the](#)

[Global Adjudication System' \(2003\) 19 Arb Intl 424](#), and Cremades and Madalena, 'Parallel Proceedings in International Arbitration' [\(2008\) 24 Arb Intl 4, 507–540](#).

137 Ibid, 436.

138 Lillich and Brower (eds), *International Arbitration in the 21st Century: Towards Judicialisation and Conformity* (Brill, 1994) at ix.

139 The problem posed by ESI has been addressed, amongst many others, by the British Chartered Institute of Arbitrators, with its *Protocol for E-Disclosure in Arbitration* (2008); and it is being addressed by the IBA, in its Review of the IBA Rules of the Taking of Evidence in International Commercial Arbitration.

140 Paper, in outline format by Joshua D Rievman at a conference sponsored by the Centre for International Legal Studies (February, 2005); see also William H Baker 'At What Price Perfect Justice?' (part of a coursebook for the 2009 Annual Meeting of the International Institute for Conflict Prevention and Resolution).

141 The late René David, a distinguished French arbitrator and author wrote that, historically: 'The arbitrator was chosen *intuitu personae*, because the parties trusted him or were prepared to submit to his authority; he was a squire, a relative, a mutual friend or a man of wisdom, of whom it was expected that he would be able to devise a satisfactory solution for a dispute. The Italian Code of Procedure of 1865 significantly treated arbitration in a preliminary chapter "On Conciliation and Arbitration"'. David, *Arbitration in International Trade* (Economica, 1985) at 29.

142 Under modern laws of arbitration and modern rules of arbitration, an arbitrator may only decide *ex aequo et bono* if the parties expressly authorise this. If parties want an equitable decision, rather than one which is correct in law but may or may not be fair, they should so provide in their arbitration agreement.

143 For instance, under [Art V of the New York Convention](#) or [Art 36](#) of the Model Law.

144 See, eg, Rivkin, 'Towards a New Paradigm in International Arbitration: The Town Elder Model Revisited' [\(2008\) 24 Arb Intl 3 at 378](#).

145 See, eg, Redfern, 'Stemming the Tide of Judicialisation in International Arbitration' (2008) 2.5 World Arb & Med Rev.

146 For one of the most effective, and certainly the most entertaining, critiques of arbitration see [Kerr, 'Arbitration v Litigation, the Macao Sardine Case'](#), reproduced as an annexe to Kerr, *As far as I remember* (2002).

147 Unless these disputes are between States, in which case the States concerned may by agreement submit their case to the International Court of Justice (ICJ) at The Hague. The European Court of Justice (ECJ) in Luxembourg may deal with disputes between private parties under EU law, but disputes of this kind are outside the scope of this book.

148 A national court may allow service abroad of its proceedings, but this so-called extraterritorial jurisdiction is unlikely to be exercised if the foreign defendant has no connection with the

country concerned. In any event, difficult problems of enforcement may arise, particularly if a judgment is obtained by default.

149 Landau, 'Arbitral Lifelines: the Protection of Jurisdiction by Arbitrators' in *International Arbitration 2006: Back to Basics?* ICC Congress (2007) 282–287. Paulsson made a similar point, that *international* arbitration is 'the only game in town', in his talk at McGill University on 28 May 2008 entitled 'International Arbitration is not Arbitration'. He said that whilst national (or domestic) arbitration is an alternative to national courts of law, there is no alternative to international arbitration—'in the transnational environment, international arbitration is the only game. It is a *de facto* monopoly'.

150 'Corporate counsel perceived arbitration as a private and independent system, largely free from external interference': see the survey of major corporations conducted by Pricewaterhouse Coopers and Queen Mary University entitled 'International Arbitration: Corporate Attitudes and Practices, 2008'. The same survey reports that 88% of those that participated in the survey had used arbitration and that there was a high degree of voluntary compliance (90%) with arbitral awards.

151 An agreement to try to settle disputes by mediation (which in many legal systems would be regarded as an unenforceable 'agreement to agree') may prove to be enforceable if there is sufficient certainty as to what procedure is to be followed—for instance, because there is provision for recourse to a recognised centre such as The Centre for Effective Dispute Resolution (CEDR): see Mackie, *The Future for ADR Clauses after Cable and Wireless* and Jarroson, '[Observations on Poiré v Tripier](#)' in (2003) 19 *Arb Intl* 3 at 345 and 363 respectively.

152 Dixon, 'Alternative Dispute Resolution Developments in London' (1990) 4 *Intl Construction L Rev* 436, at 437; emphasis added.

153 'He moves backwards and forwards between the parties: the Chinese word for conciliator is said to be a "go-between who wears out a thousand sandals"', Donaldson, 'ADR' (1992) 58 *JCI Arb* 102.

154 These separate meetings are known as 'caucuses'.

155 Arbitral institutions, including the ICC and ICSID, have also drawn up rules designed to provide for conciliation.

156 [The Model Clause appears at the end of the UNCITRAL Conciliation Rules](#). The Rules themselves may be accessed on the UNCITRAL website, <<http://www.uncitral.org>>. The Model Clause recommended by UNCITRAL states: 'Where, in the event of a dispute arising out of or relating to this contract, the parties wish to seek an amicable settlement of that dispute by conciliation, the conciliation shall take place in accordance with the UNCITRAL Conciliation Rules as at present in force.'

157 It is obviously important to know, for instance, whether evidence produced or admissions made by a party in the course of the conciliation proceedings can be used if conciliation fails and is followed by litigation or arbitration. In its *International Arbitration Legislation*, Bermuda has introduced statutory provisions for conciliation that deal with the issue by making it an implied term of the conciliation agreement that unless otherwise agreed in writing,

the parties will not introduce in evidence in subsequent proceedings any opinion, admissions, or proposals for settlement made in the course of the conciliation proceedings. See [Rawding, 'ADR: Bermuda's International Conciliation and Arbitration Act 1993' \(1994\) 10 Arb Intl 99](#).

158 [UNCITRAL Conciliation Rules, Art 7.1](#) (emphasis added).

159 [Art 10](#). However, the Rules also provide that a party may give information to the conciliator, subject to a specific condition as to confidentiality, in which case the conciliator is bound by that condition.

160 As a safeguard, it would be sensible to couple a conciliation agreement with an agreement to arbitrate.

161 This may be accessed on the UNCITRAL website, above. It should be noted that the development of ADR has led to the growth of organisations devoted to this method of resolving disputes (as opposed to organisations such as the ICC which are primarily concerned with arbitration, but which offer conciliation as an additional service). In the US, for example, there are various centres, including the Center for Public Resources in New York. In Europe, one of the best-known organisations is the CEDR which is based in London and was established in 1990 with the backing of industrial and professional firms.

162 For a comprehensive and helpful review of the role of the expert as decision-maker, see Kendall, Freedman, and Farrell, *Expert Determination* (4th edn, 2008).

163 See the discussion in [Ch 5](#).

164 In earlier and simpler times, the 'engineer' under a construction contract would give a decision that would be binding unless reversed by subsequent arbitration. The engineer was well placed to do this, since he and his staff would be familiar with the project and likely to be aware of the problems as soon as they arose. However, the engineer, who is appointed by the employer has come to be regarded as lacking the necessary independence to make important decisions.

165 One of the problems involved in setting up a Review Board or a Panel of Experts is that of deciding what qualifications are required of those who are to constitute the panel. In a major construction project, it is easy to suggest that the experts should be engineers. But from what precise disciplines should they be drawn? In a project for the construction of a major airport, an expert who is highly qualified in one discipline (for instance, runway construction) would not be of much use (as an expert) if a dispute were to arise over the air traffic control system. It may be that, for long-term engineering projects involving different disciplines, there should be a list of experts from whom to draw, rather than a permanent 'Panel' as in the Channel Tunnel project. In this way, it would be possible to establish a suitably qualified panel for each particular dispute as it arose, much as an arbitrator is generally only chosen once a dispute has arisen.

166 Consider, eg, the Churchillian phrase that 'Jaw-jaw is better than war-war'.

167 [Mustill, 'Arbitration: History and Background' \(1989\) 6 J Intl Arb 43.](#)

168 Holtzmann, Workshop on 'The Peaceful Settlement of International Disputes in Europe: Future Prospects', Hague Academy of International Law, September 1990.

169 Burton, 'Combining Conciliation with Arbitration of International Commercial Disputes' (1995) 18 Hastings Intl Comp L Rev 636, at 637. Thus, it is said, parties may prefer, in the tradition of Confucius, to conduct business and to settle their differences within the cultural ethic of 'Li' (peace, harmony, and conciliation) rather than 'Fa' (the strict application of legal rules).

170 The original authors were proponents of such practices for both litigation and arbitration long before ADR came into fashion.

171 The terms are not meant to be mutually exclusive.

172 [Model Law, Art 28\(3\)](#); and see, for instance, the [English Arbitration Act 1996, which \(in s 46\)](#) allows the parties to agree what 'considerations' should govern the substance of the dispute.

173 See, eg, [Art 18](#) of the Model Law.

174 Many important arbitrations—eg, re-insurance disputes under the so-called 'Bermuda Form'—are regularly conducted *ad hoc*.

175 As to which, see [Ch 2, paras 2.106](#)*et seq*.

176 These cases are considered in more detail in [Ch 3](#).

177 It is not advisable to try to adopt or adapt institutional rules—such as those of the ICC—for use in an *ad hoc* arbitration, since such rules make repeated references to the institution concerned and are unlikely to work properly or effectively without it. It seems however (although it is not a practice that the authors would recommend) that it may be possible to involve two arbitral institutions, in what would otherwise be an *ad hoc* arbitration (why this should be done is another matter!). The Court in Singapore was faced with an arbitration clause which said that disputes should be resolved by arbitration before the Singapore International Arbitration Centre (SIAC) in accordance with the ICC Rules. SIAC was prepared to administer the arbitration under its rules, with the ICC Rules applied to the 'essential features the parties would like to see ... eg use of the Terms of Reference procedure, scrutiny of awards' as contemplated by the ICC Rules and the arbitration proceeded on this basis. The Court upheld this arrangement, stating: 'There is, in principle, no problem with one institution administering arbitration proceedings in accordance with another set of rules chosen by the parties:' see *Insignia Technology Co Ltd v Alstom Technology Ltd* [2008] SGHC 134 at para 26. For its part, the ICC Court is unwilling to administer proceedings fundamentally different from its own basic concepts: see Craig, Park, and Paulsson, *International Chamber of Commerce Arbitration* (3rd edn, 2000) at para 715.

178 Unless it has already been agreed that the [UNCITRAL Rules](#) are to govern the proceedings.

179 See [Ch 3](#).

180 As a further refinement, it should be mentioned that an

administered arbitration may be wholly administered or semi-administered. An example of wholly-administered arbitration is that of ICSID, where the Centre provides a full service to the arbitral tribunal. An example of semi-administered arbitration is that of certain arbitrations conducted in England under the Rules of the Chartered Institute of Arbitrators: in these cases, the Institute collects the initial advance on costs from the parties, appoints the arbitral tribunal, and then leaves it to the arbitral tribunal to communicate with the parties, arrange meetings and hearings, and so on.

181 This is the international division of the American Arbitration Association (the AAA).

182 As previously mentioned, six leading Swiss Chambers of Commerce, including those of Geneva and Zurich, now operate under the same rules of arbitration, namely the Swiss Rules.

183 But they may now diverge—for instance, by providing for ‘fast-track’ or expedited arbitration, as under the [Swiss Rules](#), or for joinder of parties, as under the LCIA Rules.

184 [ICC Rules, Art 21.2.](#)

185 eg those of the ICC and the Cairo regional centre.

186 This may be done by agreement of the parties, even if the arbitration clause in the original agreement provided for institutional arbitration; however, to sound a cautionary note, such a course can lead to complete disaster, leaving the claimant without any effective remedy; see, eg, [ICC Case No 3383, reported in \(1982\) VII Ybk Comm Arb 119.](#)

187 One commentator has quoted with approval the authors’ suggestion that institutional time limits ‘are often unrealistically short’ and has added that, although speed may be an undoubted good in standard commercial arbitrations, ‘rules which cater to that desideratum may not be appropriate in cases involving difficult issues of public policy’: Toope, *Mixed International Arbitration* (1990) 204.

188 The London Maritime Arbitration Association receives literally thousands of requests for arbitration per year—although not all of these cases proceed to arbitration, and others may be resolved on the basis of documents only.

189 The Swiss Rules, eg, state explicitly that they are based on the [UNCITRAL Rules](#), with divergences where this was considered useful.

190 Fake arbitral institutions are not unknown. In 2002, Citibank began receiving letters stating that it must arbitrate disputes under the rules of the National Arbitration Council (the NAC), a ‘so-called’ ‘arbitration service’ which was in fact provided by someone with a grudge against the bank. Citibank did not participate in any ‘arbitrations’, but customers who took advantage of the service received an ‘award’ for the amount of their credit card debt, plus the fee of the NAC. Citibank eventually obtained an injunction against the NAC to restrain this activity: see Rau, ‘Arbitral Jurisdiction and the Dimension of Consent’ in (2008) 24 *Arb Intl* 2, 204, fn 19 and in Macmahon (ed), *Multiple Party Actions in International Arbitration*:



*Consent, Procedure and Enforcement* (2009).

<sup>191</sup> The ICC published new rules effective from 1 January 1998, the last minor revision to the Rules having been made 10 years earlier. The LCIA also published new rules, effective from the same date. Both institutions are in the process of revising their rules, which involves consultation with arbitrators, lawyers, and other interested parties.

<sup>192</sup> Since its inception in 1923, the ICC has received over 15,000 requests for arbitration. One third of these requests have been filed in the last ten years.

<sup>193</sup> In *SNF v Chambre de Commerce International* Cour d'Appel de Paris, 1ère Chambre section C, 22 janvier 2009, held that it was the ICC, and not the Court, which possessed legal personality and was subject to French law, being based in Paris.

<sup>194</sup> As already mentioned, there is a special provision in the ICC Rules for the appointment of the whole tribunal by the ICC itself, following the *Dutco* case: see n 126.

<sup>195</sup> There is an abundance of literature on the work of the ICC. The leading authority is Craig, Park, and Paulsson, *International Chamber of Commerce Arbitration* (3rd edn, 2000); see also Derains and Schwarz, *A Guide to the New ICC Rules of Arbitration* (2nd edn, 2005); and Schäffer, Verbist, and Imhoos, [ICC Arbitration in Practice](#) (2005).

<sup>196</sup> [ICC Rules, Art 18](#).

<sup>197</sup> [ICC Rules, Art 181\(d\)](#) states, in relation to the Terms of Reference, that they should contain a list of issues 'unless the Arbitral Tribunal considers it inappropriate'.

<sup>198</sup> [ICC Rules, Art 27](#).

<sup>199</sup> For a general discussion of the history of the LCIA, see Kerr, 'The London Court of International Arbitration 1892–1992' (1992) 8 *Arb Int* 317; J L Delvolvé, 'Le centenaire de la LCIA (London Court of International Arbitration)' [1993] *Rev arb* 599; Kerr, 'London Court of International Arbitration' in *ICCA Congress Series No 7* (1996) 213; Veeder, 'London Court of International Arbitration—the New 1998 LCIA Rules' (1998) 23 *YCA* 366; Winstanley, 'The LCIA—History, Constitution and Rules' in Berkeley and Mimms (eds), *International Commercial Arbitration: Practical Perspectives* (2001) 21; and Turner and Mohtashami, *A Guide to the LCIA Arbitration Rules* (2009).

<sup>200</sup> Manson (1893) IX LQR cited by [Veeder and Dye, 'Lord Bramwell's Arbitration Code'](#) (1992) 8 *Arb Intl* 330.

<sup>201</sup> The number of disputes referred to the LCIA in 2007 rose for the third consecutive year, with 137 new filings, compared to 133 in 2006. By November 2008 when the latest annual report was published, the LCIA had received 158 new referrals.

<sup>202</sup> The LCIA is also prepared to act as an appointing authority and as arbitration administrator under the UNCITRAL Rules.

<sup>203</sup> For a valuable discussion of the decisions of the LCIA Court see Nicholas and Partasides, 'LCIA Court Decisions on Challenges to Arbitrators: A Proposal to Publish' [\(2007\) 23 Arb Intl 1](#).



204 In addition to administering arbitrations under its own rules, the AAA also administers IACAC arbitrations and makes its services available, if required, in arbitrations conducted under the UNCITRAL Rules, whether those arbitrations are held inside or outside the United States.

205 In various forms, this has been in existence as an inter-governmental agency for over 100 years, since the conclusion of the Paris Convention for the Protection of Industrial Property in 1883.

206 Disputes relating to domain names are a bi-product of the growth of the internet. The Uniform Domain Name Dispute Resolution Policy (UDRP) is incorporated into the registration agreement for any internet domain name; and there is a mandatory resolution of domain name disputes by approved providers. The WIPO Arbitration and Mediation Centre is one such provider; others include the CPR Institute for Dispute Resolution and e-Resolution.

207 Investor/State arbitrations are dealt with more fully in [Ch 8](#).

208 The three major international arbitrations arising out of the nationalisation by the Libyan Government of oil concession agreements with foreign corporations which still had many years to run are discussed in [Ch 3](#). The Libyan Government declined to take part in the arbitrations and so its case went, if not unconsidered, at least unargued.

209 Lord Denning in [Rahimtoola v The Nizam of Hyderabad \[1958\] AC 379, at 418](#).

210 A considerable number of arbitrations involving States or State entities take place under the ICC Rules. In 2007, the percentage of cases involving a State brought before the ICC rose to 11.4% from 10.5% in 2006. However the PricewaterhouseCoopers survey (at n 150 above) states that 59% of the participating arbitral institutions indicated that less than 25% of their awards are rendered against States.

211 Lauterpacht, in his foreword to Schreuer, *The ICSID Convention: A Commentary* (2001), xi–xii.

212 The year 2008 was the busiest yet for ICSID with 145 pending cases representing a 12% year-on-year increase. See, ICSID Annual Report 2008, September 2008.

213 Holls, *The Peace Conference at The Hague* (1900), 8–9.

214 See Merrills, 'The Contribution of the Permanent Court of Arbitration to International Law and to the Settlement of Disputes by Peaceful Means' in Hamilton *et al* (eds), *The Permanent Court of Arbitration: International Arbitration and Dispute Resolution, Summaries of Awards, Settlement Agreements and Reports* (1999) 3–27.

215 *Radio Corporation of America v China* (1941) 8 ILR 26.

216 The first arbitration between a State and a private party held at the Peace Palace under the PCA's (old) 1962 Rules was *Turriff Construction (Sudan) Ltd v Government of the Republic of Sudan*. The original authors took part in the arbitration on behalf of Turriff and can testify to the excellence of the facilities at the Peace Palace.

- 217 See the official [PCA website at <http://www.pca-cpa.org>](http://www.pca-cpa.org).
- 218 This was a General Treaty of Friendship, Commerce and Navigation. It was called the 'Jay Treaty' after John Jay, the American Secretary of State. For a full account of the Jay Treaty and of Mixed Commissions, see Simpson and Fox, *International Arbitration* (1959).
- 219 Simpson and Fox, *ibid*, 8. The United Kingdom was required to pay US\$15,500,000 by way of compensation, a considerable sum at that time. And see Brownlie, *Principles of Public International Law* (7th edn, 2008) at 702: 'Modern arbitration begins with the Jay Treaty of 1794 between the United States and Great Britain, which provided for adjudication of various legal issues by mixed commissions. The popularity of arbitration increased considerably after the successful *Alabama Claims* arbitration of 1872 between the United States and Great Britain. In this early stage of experience arbitral tribunals were often invited by the parties to resort to "principles of justice and equity" and to propose extra-legal compromises. However, by the end of the century, arbitration was primarily if not exclusively associated with the process of decision according to law and supported by appropriate procedural standards.'
- 220 The reference to 'international law' in Art 38(1) is a reference to what is generally known as 'public international law', which generally regulates the relationship between sovereign States.
- 221 This was established, following the release of American hostages in Iran, to deal with claims against Iran by US claimants.
- 222 This was established to resolve the millions of claims resulting from the invasion of Kuwait by Iraq in 1990.
- 223 This was established to deal with claims of the Holocaust victims and their successors.
- 224 See [Ch 10](#).
- 225 See [Ch 11](#).
- 226 Kerr, 'Arbitration and the Courts: the [UNCITRAL Model Law](#)' (1984) 50 *Arbitration* 14.
- 227 For further discussion of 'arbitrability' and public policy see [Ch 3](#).
- 228 Mustill, 'The History of International Commercial Arbitration—a Sketch' in *The Leading Arbitrators' Guide to International Arbitration* (2nd edn, 2008) 1, at 17.
- 229 Treaty concerning the Union of South American States in respect of Procedural Law, signed at Montevideo, 11 January 1889. The Treaty is published, in an English translation, in United Nations, *Register of Texts of Conventions and other Instruments concerning International Trade Law, Volume II* (1973), 5.
- 230 Montevideo Convention, Arts 5, 6, and 7.
- 231 Geneva Protocol of 1923, Art 1
- 232 Many European countries became parties to the 1923 Geneva Protocol. These included Belgium, Czechoslovakia, Denmark, Finland, France, Germany, Greece, the Netherlands, Norway,

Poland, Portugal, Spain, and the UK. One Latin American country, Brazil, became a party to the Protocol; and so did India, Japan, Thailand, and New Zealand.

233 Convention for the Execution of Foreign Arbitral Awards signed at Geneva, 26 September 1927, *League of Nations Treaty Series* (1929–30), Vol XCII, 302.

234 The States which have adhered to the Geneva Convention are substantially those which adhered to the Geneva Protocol (with some notable omissions, such as Brazil, Norway, and Poland).

235 In particular, the parties had to be subject to the jurisdiction of different contracting States.

236 The draft document produced by the ICC gave an early indication of the debate that has continued ever since, concerning the feasibility of a truly *international* award. However, the ICC's proposal for such an award, which would not be subject to control by the law of the place in which it was made, was unacceptable to the majority of States. It has also proved to be so in more modern times, when the Model Law was formulated.

237 [New York Convention, Art VII\(2\)](#). In fact, at the time of preparation of this book, the Geneva treaties were only relevant for arbitral awards made in Portugal or Mauritius.

238 [Ibid.](#)

239 [New York Convention, Art 11\(3\)](#).

240 The ICCA Yearbook of Commercial Arbitration reports each year court decisions made in different countries on the interpretation and application of the New York Convention, translated into English where necessary.

241 As, for instance, in the 'writing requirement'.

242 European Convention on International Commercial Arbitration, done at Geneva, 21 April 1961, *United Nations Treaty Series* [\(1963–1964\), Vol 484, No 7041, 364](#). For a note on the background and objectives of the Convention, see Benjamin, 'The European Convention on International Commercial Arbitration' (1961) BYIL 478. Nineteen countries have ratified or acceded to the European Convention. For a useful comment on the Convention see the article by Hascher in (1990) XV Ybk Comm Arb 624.

243 [European Convention of 1961, Art II.2](#).

244 [van den Berg, above, para 1.18](#); (1984) IX Ybk Comm Arb 396.

245 European Convention providing a Uniform Law on Arbitration, done at Strasbourg, 20 January 1966, *European Treaty Series*, No 56.

246 See the discussion in [Ch 10](#).

247 There has been what has been described as an 'explosion' in the number of BITs over the past years, a total of more than 2,608 having been recorded by the end of 2007, although there was a slight slowdown in 2007 itself. See UNCTAD, *Recent Developments in International Investment Agreements* (2008).

248 Paulsson, 'Arbitration without Privity' (1995) 10 Foreign Investment LJ 232.

249 Parra, 'Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment' (1997) 12 Foreign Investment LJ 287.

250 This report was entitled 'Study on the Application and Interpretation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards', UN Doc A/CN9/168.

251 For a full account of the origins and aims of the [Model Law](#), see the second edition of this book, pp 508 *et seq.*

252 The Departmental Advisory Report (DAC Report) on the Model Law stated, at para 4: 'at every stage in preparing a new draft Bill, very close regard was paid to the Model Law, and it will be seen that both the structure and the content of the July draft bill, and the final bill, owe much to this model.'

253 Castello, 'Interim Measures under UNCITRAL's Model Law: New Proposals', 2nd ITA-CANACO Workshop, Luncheon Address, Mexico City.

254 New Zealand, Mauritius, Peru, and Slovenia have recently adopted legislation based on the Model Law as revised.

255 Revised Model Law, Option 1.

256 [Ibid. Art 7\(5\) and \(6\).](#)

257 Art 7, Option II.

258 The 'writing requirement' and the first and second Options are discussed in more detail in [Ch 2](#).

259 See, [eg. the comment in the DAC Report at n 252.](#)

260 Even if the arbitration is to be conducted *ad hoc* and without reference to any particular set of rules, an experienced tribunal will have well in mind the provisions of such rules, which are designed to ensure orderly and fair proceedings, leading to a reasoned award.

261 The IBA has also issued 'Guidelines on Conflicts of Interest in International Arbitration' to deal with problems (real or perceived) of conflict of interest on the part of arbitrators.

262 The idea of a special code of procedure to deal with the arbitration of small claims was considered but rejected by the Departmental Advisory Committee on Arbitration Law in the preparation of the English Arbitration Act 1996. It was considered that it would be wrong for the Act 'to lay down a rigid structure for any kind of case': see their Report and Supplementary Report, February 1996 and January 1997, at paras 167 and 168. Note also the comment of Professor Reymond: 'The reaction of certain people has been to propose the adoption of more and more detailed rules of procedure, which would deprive arbitration of one of its main advantages, subtlety and adaptability' (authors' translation) (see ['L'Arbitration Act 1996, Convergence et Originalité' \(1997\) 1 Revue de l'Arbitrage 45 at 54](#)).

263 The quotation is from [s 33\(1\)\(b\) of the English Arbitration Act 1996](#), but the principle is one of general application.

264 The conduct of an arbitration (including the different practices and procedures that may be adopted) is fully discussed in [Ch 6](#).

265 [IBA Rules, Art 3](#).

266 In [Elektrim SA v Vivendi](#), Mr Justice Aikens referred to a Procedural Order by the arbitral tribunal which dealt *inter alia* with the procedures to be adopted for the disclosure of documents. The judge said: 'The parties were to present their requests for production of documents in accordance with a procedure known in international arbitration as "the Redfern Schedule". The routine is that the party requesting the documents identifies the documents requested and the reasons for the request. The opposing party then sets out its reasons for its opposition to production (if any). The schedule then sets out the decision of the tribunal' [2007] EWHC 11 (Comm) at para 26.

267 In 1986.

268 1st edn, at 51.

269 2004.

270 4th edn, at 73. The quotations are from the late Sir Michael Kerr's Keating Lecture, 'Concord and Conflict in International Arbitration' (1997) 13 Arb Intl 121. Sir Michael was a former Appeal Court Judge and President of the LCIA.

271 See the Revised Model Law, [Art 7](#), Options I and II.

272 The Swiss Rules, as already stated, provide for an 'Expedited Procedure' for claims under one million Swiss francs; the AAA has a so-called 'Fast-Track' procedure for claims of no more than 75,000 US dollars; and the ICC, the LCIA, CIETAC, the Quebec National and International Commercial Arbitration Centre, and the Stockholm Chamber of Commerce also allow for some form of expedited or simplified procedure.

273 Under [Art 42\(1\)](#) of the Swiss Rules, eg, parties may agree to the simplified 'Expedited Procedure' even if their claim exceeds the limit of one million Swiss francs.

274 Consider, eg [the German Arbitration Act 1998](#) and [the Irish Arbitration \(International Commercial\) Act 1998](#).

275 Kaufmann-Kohler, 'Globalization of Arbitral Procedure' (Oct 2003) 36 Vanderbilt Journal of Transnational Law 4, 1314, at 1323.

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