CHOICE OF VENUE IN INTERNATIONAL ARBITRATION

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OXFORD
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Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

First Edition published in 2014

Impression: 1

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2013946098

ISBN 978–0–19–965571–7

Printed in Great Britain by
CPI Group (UK) Ltd, Croydon, CR0 4YY

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INTRODUCTION

The choice of venue of an arbitration is often the last decision made during the drafting of a dispute resolution clause—itself often the last clause agreed in a complex contract negotiation. Contracting parties all too often neglect to select a venue, either for lack of care or because the topic is considered to be a matter of personal preference too contentious to address when a deal is ready to close. The venue is, however, much more than a matter of personal preference or party convenience. It plays a critical role in setting the legal foundation for any resulting arbitration.

While most people familiar with arbitration are at least generally aware of the role the venue plays in determining both the substance of and procedure for challenges to arbitration awards after they are rendered, the law of the venue has an impact on every stage of the arbitral procedure. The law of arbitration and the judicial attitude towards arbitration at the place the parties have chosen (or that has been chosen for them in the absence of agreement) will most critically determine whether the local courts will support or hinder the commencement of arbitration proceedings. It will determine the availability and timing of challenges to arbitral jurisdiction. It will determine the scope of independence and impartiality requirements for the selection of arbitrators and the process for challenges to and replacement of arbitrators. The law of the venue can play a key role in determining access to evidence held by the opposing party or by third parties.

This book reviews the impact of the choice of venue in international arbitration by studying these key legal issues affecting all phases of arbitration proceedings using a thorough and comparative method across the most commonly used arbitral seats in the world. The aim of this review is two-fold. First, both practitioners and users of arbitration will be able to make more informed choices for the venues of their arbitrations. Similarly, when faced with an arbitration in an unfamiliar jurisdiction, they will quickly be able to identify legal issues that may affect their strategy—and their costs. Second, students of arbitration law will have

access to parallel, in-depth studies of multiple jurisdictions that go beyond a 'practitioner's handbook'. Comparative legal studies of arbitration venues can find their start here.

No introduction can substitute for the detailed analysis that follows. We nevertheless aim to present an overview of the broad range of topics affected by arbitral venue, while giving insight into some of the key variations that can be found even between the leading centres for arbitration practice.

Other than tangential references, questions of enforcement of arbitration awards are excluded from this overview, and this book. Venue, after all, will take us only through the issuance and subsequent challenge to an international arbitration award. Afterwards, the question of that award's enforceability will in large part be independent of the venue of its origin.

Sources of Law

In any jurisdiction, local arbitration law and international agreements provide the legal framework defining the international arbitration regime. Concerning international arbitration, the 1985 UNCITRAL Model Law on International Commercial Arbitration, as amended in 2006 (the Model Law)[1] is generally considered the paragon of a law conducive to international arbitration. Accordingly, a number of prominent international arbitration venues (Hong Kong, Singapore, Stockholm), as well as jurisdictions on the rise as such venues (Cairo, Dubai, Mexico City), have arbitration laws based entirely or in part on the Model Law. For jurisdictions traditionally perceived as less arbitration-friendly, reluctance to adopt the Model Law generally correlates with greater judicial interference with arbitration, even where this interference is not mandated by the law, and a less effective arbitration regime (Argentina, China, India). On the other hand, the arbitration laws of traditional international arbitration strongholds such as London, Paris, New York, and Switzerland are not based on the Model Law. This suggests that the Model Law is not necessary for the establishment of a strong foundation for international arbitration, but that for up-and-coming venues, the adoption of the Model Law is an important first step in developing a modern arbitration regime and signals their commitment to developing an arbitration-friendly legal environment.

As far as international sources of law are concerned, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[2] is without question the principal international instrument governing arbitration. Of the 20 jurisdictions in this book, every single state is a signatory to the Convention, regardless of its perceived stance towards arbitration. The only tangible variable between jurisdictions in this respect relates to their host states' treatment of the principle of reciprocity: while some have committed to enforce foreign arbitral awards under the Convention regardless of where the award was issued (eg Dubai, Brazil (São Paolo), Egypt (Cairo), and Australia (Sydney)), others have ratified the Convention subject to the reciprocity reservation, meaning that they will only enforce

[1] UNCITRAL Model Law on International Commercial Arbitration (the UNCITRAL Model Law) (1985) 24 ILM 1302, with amendments as adopted in 2006.

[2] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) (1968) 330 UNTS 38; 7 ILM 1046.

awards issued in other signatory states (eg China, India, the Russian Federation (Moscow), the United Kingdom (London), and the United States).

Judicial Attitude to Arbitration

Judicial attitudes towards arbitration appear to correlate with how long-standing the practice of arbitration is in the respective jurisdiction. Thus, courts in Hong Kong, London, Paris, Singapore, Stockholm, Switzerland, and the United States tend to exhibit a markedly pro-arbitration attitude. In London and Paris, there are even specialized judicial resources dedicated to arbitration cases, the Commercial Court and the Technology and Construction Court in London, and the bench of the *juges d'appui*, or supporting judges, on the *Tribunal de Grande Instance* in Paris. On the whole, the courts of arbitration venues on the rise also tend to be arbitration-friendly, even though the extent to which this attitude has been internalized varies (eg it is very well developed in Dubai, and only recently adopted in São Paolo). Among the venues examined in this book, only a handful bear the risk of unsupportive or even anti-arbitration courts: Buenos Aires, where some court decisions indicate judicial hostility towards arbitration, which may well be a by-product of the host of investment arbitration cases against Argentina in the past years; India, where courts tend to be interventionist and to set aside arbitration awards with some frequency; and Moscow, where court practice can be unpredictable.

Court Assistance in Commencing the Arbitration

Generally speaking, a dispute subject to arbitration should proceed largely extra-judicially, as long as neither party is attempting to undercut the proceedings. In accordance with this principle, most courts become involved in the commencement of the proceedings only when a party brings judicial proceedings over a dispute that another party considers subject to arbitration. In these circumstances, most courts follow the generally accepted principle that the suit must be dismissed as long as there is a valid and enforceable arbitration agreement in place. The only exception arises in Vienna, where a court does not necessarily need to decline jurisdiction over a dispute covered by a valid arbitration agreement: instead, the court may hear the dispute if the tribunal declines jurisdiction, or fails to rule on its jurisdiction within a reasonable time.

It is largely incumbent upon the parties to object to a court's jurisdiction on the basis that a dispute is subject to arbitration. A party's failure to raise that objection before a certain juncture in the proceedings is usually considered a waiver of the right to arbitrate the dispute. Typically, a party must raise the objection prior to its first submission on the merits (eg in Brussels, Dublin, Hong Kong, India, London, Mexico, Stockholm, and Switzerland), even though some jurisdictions require that an objection be made before the party participates in the proceedings in any way (Buenos Aires, Cairo, Dubai, and Singapore), while others extend the waiver deadline until the first court hearing (China and Germany). In Vienna, on the other hand, a court faced with a dispute potentially subject to arbitration may raise the issue *ex officio*, even where a party fails to avail itself of the right to arbitrate.

In determining whether there is a valid arbitration agreement in place, courts will look to a variety of formal and substantive requirements. Substantive requirements tend to be a

question of contract law, covering matters such as the parties' capacity to enter into the agreement (eg in Brussels), or whether the agreement conveys a clear intention to arbitrate (eg in Sydney and Vienna). The most ubiquitous formal requirement is that an arbitration agreement be in writing, even though this is not necessary in every jurisdiction (eg an agreement need not be in writing in Stockholm and Switzerland).

A number of jurisdictions treat the validity of an arbitration agreement separately from the validity of the contract containing that agreement (eg Brussels, Dublin, Mexico City, Paris, Switzerland, the United States, and Vienna). This approach—known as the principle of severability or separability—effectively immunizes the arbitration agreement from the nullity or unenforceability of the overall contract.

Sometimes folded in the analysis of the validity of the arbitration agreement is the question of the arbitrability of the dispute, or whether the dispute is capable of being settled by arbitration. Commercial matters are generally considered arbitrable, with some jurisdiction-specific exceptions: some insurance contracts (eg in Brussels and Sydney), some property rights (eg in Buenos Aires), some consumer contracts (eg in Dubai and Hong Kong), intellectual property matters (eg in London and Sydney), insolvency matters (eg in Sydney), and disputes of a public policy nature (eg in Moscow). Singapore arguably has the most liberal arbitrability regime, deeming any dispute that the parties have agreed to arbitrate to be subject to arbitration, unless proceeding to arbitrate the dispute would be contrary to public policy. Criminal and family matters are not considered arbitrable in most jurisdictions.

Court Assistance in Appointing the Tribunal

Courts may also be called upon to assist in the appointment of arbitrators to the arbitral tribunal in cases of vacancy due to failure of the appointment procedure or the removal of an arbitrator from the tribunal. Courts typically have the power to make such appointments in order to enable the arbitration proceedings to continue. The exceptions to this are China, Russia, and Hong Kong, whose courts do not have the authority to appoint arbitrators.

Jurisdiction of the Tribunal

In cases in which the jurisdiction of the arbitral tribunal is challenged, most states follow the generally accepted principle of *competence-competence*, pursuant to which an arbitral tribunal is empowered to rule on its own jurisdiction. Indeed, in the majority of the jurisdictions covered in this book, the principle of *competence-competence* is explicitly set out in the local arbitration law and followed by the courts. One exception is India, where, even though *competence-competence* is recognized by the law, its application has been undermined by a recent court decision. In 2005, the Supreme Court of India held that where a court had exercised its authority to appoint an arbitrator, questions relating to the jurisdiction of the arbitral tribunal so constituted were to be finally decided by the court; the full implications of this decision on the principle of *competence-competence* are yet to be seen.[3]

[3] *SBP & Co v Patel Engineering Ltd* [2005] 8 SCC 618.

In other instances, the principle of *competence-competence*, while set out in the local arbitration law, may be limited. This is the case where, for example, the law also provides for recourse to the courts on matters relating to the jurisdiction of the arbitral tribunal prior to the commencement of the proceedings (London) or even during the proceedings (Stockholm).

Finally, in some jurisdictions *competence-competence* is not recognized under the local arbitration law and is applied restrictively either because the law directs matters relating to the jurisdiction of the arbitral tribunal to the courts (China, Germany) or arbitration institutions (China), or because of judicial attitudes towards the doctrine (Buenos Aires, the United States).

Even in jurisdictions that recognize and apply *competence-competence*, however, the courts exercise judicial oversight over the tribunal's determination on its jurisdiction. Typically, the tribunal's decision is immediately subject to challenge before the courts, with the exceptions of Brussels and Paris, where the challenge against a tribunal's jurisdiction can be brought only after the conclusion of the proceedings, as grounds for setting aside the award.

Courts' Role in Enjoining Arbitration

Courts may also be seised to use their injunctive powers to preclude arbitration proceedings from commencing or proceeding. However, this is not common. In many of the jurisdictions dealt with in this work, the courts have never been seised with such a request, and, should one be made, the likelihood of its succeeding is low (eg in Brussels, Dubai, Dublin, Hong Kong, and Sydney). Some courts' restrictive powers over arbitration are limited to rulings relating to the validity of the arbitration agreement or the tribunal's jurisdiction, and do not extend to enjoining arbitration proceedings (eg in Germany and Stockholm). At the other extreme are Buenos Aires and India: the Argentinian courts have enjoined arbitrations involving government-owned entities, and the Indian courts frequently take it upon themselves to enjoin arbitration proceedings, including ones seated abroad. Finally, while the courts in some jurisdictions are empowered to enjoin arbitration, anti-arbitration injunctions are not issued at alarming rates, arguably either because of judicial restraint (eg in Moscow and some states in the United States), or because the law limits the circumstances where injunctions are appropriate (eg in Cairo, limiting injunctions to situations in which the tribunal has failed to render a timely award, and London, where the likelihood of an injunction largely depends on the procedural basis for the request).

During the Arbitration

The logical consequence of the initiation of arbitral proceedings should be that courts no longer have to intervene in the dispute or in its resolution. However, courts may intervene either to assist the arbitral process, or to prevent it from continuing. The venue will necessarily have an impact on each of these relationships between the arbitral tribunal and the domestic courts: the law applicable to the arbitral procedure or to different elements of the arbitral procedure (such as the production of evidence or the calling of witnesses) will influence the pursuit of arbitration itself.

Although at first glance this might look like an obstacle to arbitration (why choose arbitration if state court intervention will still be necessary?), overall, a balanced relationship

between state jurisdictions and arbitral tribunals seems to exist in the different venues. This is shown by the collaborative and complementary role generally adopted by state courts with regard to arbitral tribunals.

The range of occasions leading to state court intervention is an important issue in choosing a venue—indeed, counsel and parties will have to examine carefully the role given to the state courts and the role these courts understand themselves to have. While some aspects of a law might seem particularly attractive, others might not be—it will be necessary to analyse the overall provisions of the law of the venue that can affect the arbitration. The multiplicity of elements to be taken into consideration makes the choice of a venue in arbitration an algebraic activity with different unknowns to be determined.

Roles of courts in deciding challenges to arbitrators

Challenges are often first dealt with by the arbitral tribunal itself (eg in Argentina, Austria, Germany, and Mexico). They can also be dealt with by the administering institution, when the arbitration is not ad hoc.[4] Courts will rarely have the opportunity—or even be allowed—to intervene during the course of an arbitration when an administrative body exists to oversee challenges. For example, French courts have no jurisdiction to review an institutional decision regarding a challenge, although they may ultimately review the question upon a challenge to an award. In some jurisdictions, the institution's decision may be attacked without waiting (eg the Netherlands).[5] This is unusual and may be criticized as ignoring the parties' intent to submit their arbitration to an administrative institution. So long as the courts act quickly, however, it can be deemed an advantage in providing a final view on the challenge without needing to await a challenge to a final award. In any event, it is clear that courts will be called upon more frequently to intervene in ad hoc arbitrations, where no institution exists to review the challenge in the first instance.

There appears to be uniformity in the conceptual basis for challenging arbitrators—namely issues relating to their impartiality and independence. One exception is the English Arbitration Act 1996, which deliberately omitted the term 'independence', precisely to avoid controversy on the definition of the term. Although the dictionary definition of these terms is seemingly uniform throughout the different jurisdictions, the interpretation of these concepts is quite varied. While often a question of degree, local particularities still appear—in India, for example, a company's employee may sit as arbitrator in a dispute opposing the employer and another private company.

In reaction to the difficulty of setting clear standards for independence and impartiality, an obligation of disclosure has progressively emerged not just as a procedure, but as an obligation in its own right. This obligation has recently been incorporated into different sets of arbitration rules[6] and newly modified legislation (eg in Mexico). This emerging obligation, which can be seen as displacing in some measure the underlying impartiality and independence obligations, has created recent turbulence in various jurisdictions. For example, French

[4] ICC Rules 2012, Art 14.1.

[5] A well-known example involved a challenge to an arbitrator in the courts of The Hague immediately following a decision by the Permanent Court of Arbitration not to accept a challenge within the arbitral proceedings. See J van Haersolte-van Hof, 'United Nations Commmission on International Trade Law (UNCITRAL) Arbitration Rules, 1976' in *Concise International Arbitration* (Kluwer, 2010) 187.

[6] ICC Rules 2012, Art 11(2).

courts are leading the way in considering a failure of disclosure of matters potentially affecting independence or impartiality as itself being a failure to meet the independent and impartial standard. This occurred recently in the highly-publicized *Tecnimont* decision, which annulled an ICC award after an arbitrator failed to disclose matters handled by his firm of which he was in fact unaware.[7] The *Tecnimont* case itself, however, illustrates the difficulty of evaluating compliance with the disclosure obligation and has created significant debate. The question remains whether this decision—if it survives a pending review on *cassation*—will make France more desirable as a venue by requiring the highest level of care on disclosure or less desirable due to the fear that awards that can be years in the making will be subject to attack on the basis of information that did not in fact affect the independence or impartiality of the arbitrator.

The interpretation and application of the concepts of independence, impartiality, and disclosure may affect both the effectiveness of arbitration in general and the award rendered in particular. Overly stringent criteria of impartiality and independence—and the concomitant disclosure requirement—in any given venue may form a hurdle to arbitration, especially in specialized fields in which there are a limited number of qualified arbitrators. Overly permissive criteria, however, may make it difficult to enforce the award in other jurisdictions, because a tribunal deemed acceptable at the venue may be considered improperly constituted at the place of enforcement.

Role of courts in implementing provisional measures/provisional relief

In some venues, arbitral tribunals are allowed to issue orders related to provisional measures (eg in Belgium, Brazil, England and Wales, France, Germany, and Switzerland). Indeed, the ability of arbitral tribunals to issue provisional measures has become an important issue in arbitration—and led to legislative amendments (eg by Mexico).

In some countries, the arbitral tribunal's power to implement provisional measures is complete, in that the existing legislation provides that the arbitral tribunal can impose a fine on the parties until they comply with the measures ordered—as is the case in France and Belgium. This is, however, not automatic: thus, in Germany, although the arbitral tribunal has the power to issue provisional measures, it lacks the power to declare them enforceable—the parties must go to the state courts to demand the enforceability of the measures. This supplementary procedure adds both costs and time to the arbitration and is open to criticism.

State courts can have a role not only in enforcing tribunal-issued provisional measures, but also in issuing such measures themselves, whether aimed at parties or at third parties. The question is whether state courts retain this capacity at all times or whether that power is put aside when arbitral proceedings are initiated. In some venues (eg in France), the courts' competence with respect to provisional measures is generally limited to the period prior to the constitution of the arbitral tribunal,[8] while in others, the courts have authority to order provisional measures during the arbitration (eg in Germany, Mexico, and Switzerland). The

[7] CA Reims 2 November 2011, *SAJ & P Avax v Société Tecnimont SPA* (2012) ASA Bulletin 197, (2012) Rev arb 112 (Regional Court of Appeal).

[8] Code de procédure civile, art 1449. Although not yet tested, the courts in France would still be likely to grant provisional measures after the tribunal is constituted in urgent and essentially uncontested cases or to prevent imminent or manifestly illicit harm. C Jarrosson and J Pellerin, 'Le droit français de l'arbitrage après le décret du 13 janvier 2011' (2011) Rev arb 5, paras 17–18.

courts' competence to intervene in the arbitral proceedings by ordering interim measures may yet be circumscribed by the parties; thus, in England, the *Scott v Avery* clause means that the parties have precluded any judicial remedy by the state courts, whether before or during the arbitration.

Role of courts in compelling testimony and evidence

The question of the ability to ensure the presence of witnesses and the production of essential documents in the arbitral proceedings is of course critical, as the reasoning of the award will be based upon the facts derived from witness testimony and documentary evidence available to the tribunal.

A preliminary issue is determining who can be called upon as witness in front of the arbitral tribunal—in some venues, parties may not be allowed to appear as witnesses (eg in Argentina). This will, of course, pose great difficulties insofar as the interest of arbitration is precisely its flexibility in providing private resolution to (generally commercial) disputes. In French court proceedings, for example, parties and employees of parties may not testify, which is seen as a hurdle in judicial commercial proceedings. In France, this limitation is often circumvented by introducing an arbitration agreement between commercial parties, which will lead to a more flexible procedure, allowing parties and their employees to testify. No such exit door is available in arbitration in Argentina.

A peculiarity of arbitration, of course, is that it is born in contractual agreement and is thus limited to those parties that have consented to arbitration. One consequence of this is that the arbitral tribunal has no authority over third parties and cannot compel third parties to testify. It may therefore be necessary to rely on state courts for assistance in obtaining evidence. Whether the parties or the arbitral tribunal will be allowed to apply to the state courts for this depends on local legislation. In some venues (eg in France), a filter will be implemented as parties will have to request the arbitral tribunal's authorization before applying to state courts to ask for a third party's testimony. The assistance of courts may go to issuing a subpoena to a potential witness in an arbitration proceeding (eg in Singapore and Sydney). In India, the courts may issue summonses for witnesses to appear in front of an arbitral tribunal, whether at the tribunal's request or at a party's request (following approval of the arbitrators). If the witnesses were not to comply, they could be sanctioned for contempt of court. These systems have their limitations, however, as subpoenas will likely be enforced only in the country of the court issuing the order.

Solutions to this difficulty may come in surprising ways. Thus, in Belgium, the arbitral tribunal may not be able to hear a witness when it refuses to appear before the panel or if it refuses to take an oath when required to do so. The parties can be authorized to request that a state court hear the witness, the arbitral tribunal relying on the testimony thus provided. This may be considered as a good alternative way to obtain the necessary information. However, this also means that the arbitral tribunal will not have direct access to the witness and will not be able to ask questions or assess the witness's demeanour. In Austria, this difficulty is set aside as the arbitral tribunal and the parties will be allowed to assist and participate in the witness hearing in front of the state courts. This may indeed be the high water mark of collaboration between the judiciary and arbitration tribunals.

Although oaths are generally not considered necessary, it is habitual that arbitrators will ask witnesses to acknowledge that they will tell the truth. While criminal prosecutions are rare,

witnesses who lie in arbitration proceedings can variously be subject to criminal and/or civil liability.

Some parties may request—sometimes simply for cultural reasons—that a witness be sworn in. Swedish legislation provides that if a party considers an oath to be absolutely necessary for a witness testimony, the examination will have to be realized with the assistance of a district court judge. Careful attention to whether a witness must be sworn in or not in a given venue may be of crucial importance at the moment of evaluating the validity of the award.

Regarding the preservation or the production of evidence, the arbitral tribunal may also need to rely on the assistance of state courts. Parties may apply for the preservation of evidence to the arbitral tribunal (eg in France and Germany), to state courts when the arbitral procedure has not yet been initiated (eg in France), or to the competent arbitral authorities (eg in China). Regarding the production of evidence—in particular evidence held by third parties—the cooperation of state courts becomes crucial. A balanced position seems to have been reached in different venues (eg in France and Sweden), where parties may obtain evidence held by third parties by applying to state courts after being so authorized by the arbitral tribunal. This implies that the arbitral tribunal itself will not be allowed to require the state courts' assistance in obtaining evidence. In Germany, both arbitral tribunals and parties (with the arbitrators' consent) may apply directly to the German courts to have their support in taking evidence. Courts, however, will not have the power to compel document production (by parties or by third parties) and will be allowed to draw adverse inferences only from any refusal.

More expansive assistance by the courts has been implemented in the United States in the wake of the 2004 *Intel* decision of the Supreme Court.[9] In that case, the Supreme Court indicated that arbitral tribunals seated in other venues may be 'foreign or international tribunals' under the terms of section 1782 of Title 28 of the United States Code, which provides for judicial assistance in obtaining evidence for such tribunals. Various federal courts have since granted assistance to arbitral tribunals in the preservation and production of evidence. Both parties and the arbitral tribunal may request the assistance of the federal courts in obtaining evidence for the arbitral proceedings, which may impose penalties for failure to comply with a production order.

In Ireland, a specific provision of the legislation specifies that the High Court may assist foreign-seated arbitral tribunals in taking evidence located in Ireland; this, however, is limited by the requirement that the parties specify that the Irish High Court is allowed to make document discovery orders. The most expansive view regarding foreign-seated arbitral tribunals thus seems to be embodied by the US jurisprudence.

As to the authenticity of documents provided to the arbitral tribunal, the powers granted to the arbitrators differ from venue to venue. Whereas the arbitral tribunal's power to evaluate the authenticity of an element of proof has long been admitted in France,[10] legislation in other venues does not grant arbitrators that right—thus, in Belgium, state courts have the prerogative to evaluate the authenticity of a document. This can be considered to be

[9] *Intel Corp v Advanced Micro Devices, Inc* 542 US 241 (2004).
[10] CPC, art 1470.

an unnecessary burden, causing both supplementary delays and costs to the parties to arbitration.

Restrictions/requirements regarding the ability of foreign practitioners to appear as counsel or arbitrators

There are few, if any, restrictions or requirements regarding the ability of foreign practitioners to appear as counsel or arbitrators. Proper qualifications are generally left to the parties' discretion; an insufficiently qualified arbitrator may be removed under English law on this ground.

The lack of nationality-related criteria is probably due to the fact that, although materially localized, international arbitration is independent of any state procedure or substantive law. Nationality issues are more relevant regarding arbitrators—parties may, as such, prefer that none of the arbitrators sitting on the panel shares the nationality of one of the parties. This would usually have to be expressly mentioned in the arbitration agreement, as this question is generally not dealt with by the applicable legislation (eg in France, Germany, or Mexico). Whether arbitrators may or may not be required to be of a different nationality than the parties is currently being analysed by the European Commission in the *Jivraj* case.[11]

A more recurrent restriction on counsel or arbitrators would seem to be professional qualifications. If having the bar exam is not a condition in Belgium, the qualification as *agent d'affaires* bars the person from acting as counsel in arbitration. *A contrario*, in Mexico, having the bar exam is a mandatory requirement for participation as counsel in arbitration proceedings.

Local requirements for conduct of arbitration hearings (limitations of language, swearing of witnesses, etc)

Hearings are not mandatory in arbitration, although they are held in most proceedings. The local requirements for the conduct of hearings must be determined before choosing the venue, as they are not necessarily known or even expected by the arbitrators or the parties. The respect of these local requirements is crucial to protect the validity and enforceability of an ensuing award. Generally, the basic principles of legal hearings are to be respected—fair and equal treatment of the parties, due process, and assistance by counsel chosen by the parties. These reflect general conceptions of the right of access to justice.[12]

As legislators seem to be aware, imposing too many local particularities might be seen as a hurdle for the development of a venue for international arbitration. As such, few local requirements for the arbitration hearings themselves are to be found. As explained earlier, regarding the swearing in of witnesses, there are usually no provisions in the laws of the different venues described throughout this book. Equally, there are usually no mandatory language provisions, except in some very restrictive cases, for example in Brazil, where public-private partnerships and concession disputes submitted to arbitration must be conducted in Brazil and in Portuguese.

[11] Following the decision of the UK Supreme Court's in *Jivraj v Hashwani* [2011] UKSC 40.

[12] See eg the European Convention on Human Rights, Art 6; and the 1966 International Covenant on Civil and Political Rights, Art 14.

The Award

The award is the final result of the arbitral proceedings, granting the parties rights that are to be enforced. The award must respect some basic rules in order to be recognized and enforced.

Mandatory rules as to form

Awards must comply with certain basic formal requirements in order to be effective, and ultimately, to be recognized and enforced. Some elements are basic guarantees of the award's existence and authenticity, for example the names of the parties and of the arbitrators, the signatures of the arbitrators on the award, the date, and the seat of the arbitration. Each of these elements will have bearing on the award—for example the date will determine the moment the award has *res judicata*; the seat of the arbitration will determine the jurisdiction for the annulment procedure. The absence of some of these elements will not necessarily per se lead to a possible setting aside of the award, such as the lack of a date (eg in Austria and France). Some states may require more elements, which must be carefully studied beforehand, as they may seem unusual to the parties and their counsel. One example is the requirement, in India, to have a stamp on the award in accordance with the Indian Stamp Act.

The reasoning of an award is considered to be a formal requirement rather than a substantive requirement. State courts are not allowed to review the arbitral tribunal's reasoning, but only to check whether the arbitral tribunal motivated its decision on a *prima facie* reading of the award (eg in Belgium, France, and Mexico). The obligation to include the reasons may, under Austrian law, be excluded by the parties at any stage, whether expressly or implicitly. Such a decision implies that the parties waive the right to request that the award be set aside for lack of reasoning.

Mandatory rules as to substance

It must be kept in mind that, in most countries, the substance of the award will not be subject to review by courts. As such, although there are some mandatory rules as to substance, these will not be reviewed in depth, but only in a formalist manner.

Thus, for example, the award must answer the claims of the parties in accordance with their chosen law and establish the costs and damages to be attributed to the parties. Some legislation provides for a default, applicable law if the parties have not chosen one, for instance in India when all the parties are Indian.

In some countries, there is determined content as to costs, for example whether the award on costs shall include counsels' fees or not (eg in Germany), or whether the parties can agree in advance that each side will bear its own costs (as is the case in Ireland). There may also be determined content for damages. For example, in some venues punitive damages will not be admitted or enforced (eg in Mexico). In other venues the issue is unresolved, for instance in France, where the courts have recognized a foreign judiciary decision applying punitive damages, when these are forbidden in French law. It remains to be determined whether the same approach can be retained for arbitral awards.

Post-Award

Despite the extent of the venue-related issues reviewed above that may have an impact on an arbitration proceeding until the award is rendered, it is often the case that the venue is of only incidental effect on a smoothly run arbitration until the award is in hand. It is post-award, and in particular if one party seeks to set the award aside in front of the courts, that the choice of venue will show its most important effects.

Local standards for setting aside/annulment

The basic standards for setting aside or annulment of an arbitral award are fairly standard across all venues, and they track the grounds for refusing enforcement set in the New York Convention. Some venues have, however, generated additional grounds for the annulment of an award or interpreted the core standards in ways not generally accepted elsewhere.

In particular, although the United States generally accepts that courts may not review the substance of an international arbitration award, a concept of 'manifest disregard of the law' as a ground for annulment continues to appear. Despite some attempts to justify this concept as procedural, it inevitably implies that the courts will delve into the merits of the case. A similar practice exists in England, although on the basis of clear statutory authority, where it is possible to appeal against an award on a point of law in some instances. However, this cannot be generalized to all common law venues. Substantive review of an award is as such prohibited in Ireland, Hong Kong, and Singapore.[13]

Of the core grounds for annulment existing in all venues, the most undefinable notion is that of a violation of public policy, varying according to each state's interpretation of the concept. For example, Singapore has distinguished between the grounds for breach of public policy and breach of natural justice, whereas in most states (in particular civil law states), a violation of basic principles of natural justice (such as due process) will be encompassed by the notion of public policy.

Public policy can, of course, be highly dependant on political elements. As such, and as underscored by Jingzhou Tao, the concept of public policy in China is malleable because it is highly dependent on political preoccupations and interests. The influence of politics may also be seen in other countries, such as in Argentina, where opportunistic decisions have led to loosely-reasoned conclusions, preventing a clear development of the notion of public policy. However, as highlighted by Alejandro M Garro and Michael Fernandez, these decisions are not necessarily being followed either by lower courts or by the Argentine Supreme Court of Justice.

The approach to public policy may either define the attractiveness of a venue or become one of its worst marketing points. Thus, the French position regarding the verification that the award is not contrary to public policy is generally hailed as a very liberal approach—with only the most egregious violations of international public policy, rather than domestic public

[13] Substantive challenges are possible according to Hong Kong law, but only if parties have opted for this. That is usually not the case in international arbitration.

policy, being considered. However, this approach can be criticized as leading to the absence of any real control of awards for the respect of public policy.[14] *A contrario*, the Indian conception of public policy, including the patent illegality of the award, its unfairness or unreasonableness, has led to criticisms of the Indian system as unreliable. In Singapore, a leading regional centre in international arbitration, the courts consider themselves entitled to correct an arbitral tribunal's decision on the issue of illegality.

The timeframe in which parties may demand the annulment or setting aside of an award for violation of public policy is also significant in evaluating the importance granted to this ground by each venue. Whereas in France this particular ground is not treated differently from the four other grounds allowing the setting aside of an award, other venues have granted longer timeframes or even decided to have no time limits for parties to raise an argument based on the violation of public policy.

Whether deemed to be arising out of public policy or not, it is important to note a new ground for setting aside arbitral awards that has been developing in recent years: an award may be annulled if it has been obtained by fraud in Austria or in Belgium. While under Belgian law there is no limitation to raise this particular objection, in Austrian law, the party must raise its claim in the four weeks after actually learning of the circumstances giving rise to the challenge.

Local procedures for setting aside/annulment

Although time limits may differ according to the grounds underlying the request for the annulment (see the preceding paragraph), the time limits for seeking annulment are generally short. They range from one month (eg in France) to six months (eg China), with most venues keeping the UNCITRAL-defined time limit of three months (eg in Brazil, Germany, and Sweden). In some countries, supplementary recourses are available, through constitutional contestation of the decision of the court regarding the request for setting aside (*amparo*, eg in Mexico).

Parties and counsel must also bear in mind that any action to set aside an award will have to be carried out in the local courts of the venue of arbitration. This can have a number of effects on procedural efficiency, party comfort, and cost. The most obvious example is that local litigation generally leads to local language requirements (in France, proceedings will be in French, while in Belgium, proceedings may be in French or in Dutch). This means not only that pleadings will be in the local language, but also that the award being challenged may need to be translated—although in Germany, the requirement of translation is often waived for English-language documents. Parties will also need to engage local counsel, to the extent the counsel used in the arbitration are not admitted to practice in the courts of the venue.

Finally, the time and cost associated with local annulment actions varies tremendously from venue to venue. In most civil law venues (and notably France and Switzerland, where the courts have extensive experience with such actions), annulment actions are relatively quick, with only very short hearings. Costs are accordingly low. In other civil law venues (eg in

[14] P Mayer, 'La sentence contraire a l'ordre public au fond' (1994) Rev arb 615.

Stockholm) and many common law venues, local court procedures can involve lengthy hearings with the accompanying costs.

Each of the issues presented in this overview, and analysed in great detail for each of the covered venues in this book, can individually make the choice of venue a critical moment in the decision to arbitrate disputes. Taken together, the choice of venue in international arbitration should never be taken lightly.