

REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION

SIXTH EDITION

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AN OVERVIEW OF INTERNATIONAL ARBITRATION

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A. Introduction

(a) Dispute resolution—worldwide

Arbitration is now the principal method of resolving international disputes involving states, individuals, and corporations. This is one of the consequences of the increased globalisation of world trade and investment. It has resulted in increasingly harmonised arbitration practices by specialised international arbitration practitioners who speak a common procedural language, whether they practise in England, Switzerland, Nigeria, Singapore, or Brazil. **1.01**

These harmonised practices rest on sophisticated rules of arbitration, which are administered by institutions ranging from the International Chamber of Commerce (ICC), the American Arbitration Association (AAA), and the London Court of International Arbitration (LCIA), to a host of more recently established regional arbitration centres located in Europe, Asia, the Middle East, and elsewhere.¹ The sophisticated rules themselves are supported by enlightened national arbitration laws inspired by the United Nations Commission on International Trade Law (UNCITRAL) Model Law. The aim is to maximise the effectiveness of the arbitral process, whilst minimising judicial intervention, other than when it is needed to support arbitration agreements and awards. **1.02**

¹ These different arbitral institutions are described in more detail later in this chapter.

1.03 The result is an impressive edifice of laws and procedures, supported by treaties such as the New York Convention of 1958, which impose an obligation on national courts around the world to recognise and enforce both arbitration agreements and arbitration awards.²

(b) What is arbitration?

1.04 Arbitration is essentially a very simple method of resolving disputes. Disputants agree to submit their disputes to an individual whose judgment they are prepared to trust. Each puts its case to this decision maker, this private individual—in a word, this ‘arbitrator’. He or she listens to the parties, considers the facts and the arguments, and makes a decision. That decision is final and binding on the parties—and it is final and binding because the parties have agreed that it should be, rather than because of the coercive power of any state.³ 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 (although, because of national laws and international treaties such as the New York Convention, that decision will generally be enforceable by a court of law if the losing party fails to implement voluntarily).

1.05 It is hardly surprising that such an informal and essentially *private and consensual* system of dispute resolution came to be adopted by a local tribe or community—or even by a group of dealers or merchants trading within a particular area or market, or attached to a particular chamber of commerce.⁴ It is rather more surprising that such a simple system of resolving disputes has come to be accepted worldwide (and not merely by individuals, but by major corporations and states) as the established method of resolving disputes in which millions, or even hundreds of millions, of dollars are at stake. The way in which this has happened is one of the major themes of this book.

(c) Conduct of an arbitration

1.06 Arbitral proceedings take place in many different countries, with parties, counsel, and arbitrators of many different nationalities, who mix together freely during breaks in the proceedings. There is a striking lack of formality. An arbitral hearing is

² International treaties and conventions are described in more detail later in this book, as is the UNCITRAL Model Law.

³ The limited circumstances in which national courts may set aside, or refuse to recognise and enforce, an arbitral award are discussed in Chapter 11.

⁴ Many chambers of commerce adopted their own rules of arbitration for the settlement of disputes between their members as an alternative to proceedings in the courts of law. The leading example of this is, of course, the ICC, which is based in Paris and which, in 1923, established its International Court of Arbitration to provide for the resolution by arbitration of ‘business disputes of an international character’, in accordance with its Rules of Arbitration: see Art. 1(1) of the 1998 ICC Rules.

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 outward symbols of authority—no flags, maces, orbs, or sceptres. There is simply a group of people seated around a row of tables, in a room hired or provided for the occasion. If it were not for the law books, the stacked piles of lever-arch files, and the transcript writers, with their microphones and stenotype machines, it would look to an outsider as though a conference or a business meeting were in progress. It would not look very much like a legal proceeding at all.

However, 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 also true that, to a large extent, arbitrators and parties may choose for themselves the procedures to be followed. If they want a ‘fast-track’ arbitration, they may have one⁵ (although if it is to take place, for instance, under the Swiss Rules of International Arbitration, it will be known by the more dignified title of an ‘expedited procedure’). If the parties wish to dispense with the disclosure of documents or with the evidence of witnesses, they may do so. Indeed, they may even dispense with the hearing itself if they so wish.⁶ **1.07**

Such emphasis on the ‘autonomy of the parties’ might suggest that parties and arbitrators inhabit a private universe of their own, but this is not so. In reality, the practice of resolving disputes by the essentially private process of international arbitration works effectively only because it is supported by a complex public system of national laws and international treaties. Even a comparatively simple international arbitration may require reference to at least four different national systems of law, which in turn may be derived from an international treaty or convention—or indeed from the UNCITRAL Model Law itself. **1.08**

Amongst these different national systems or rules of law is, first, the law that governs the international recognition and enforcement of the agreement to arbitrate. There is then the law—the so-called *lex arbitri*—that governs 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. **1.09**

These laws may well be the same. The *lex arbitri*, which governs the arbitration proceedings themselves and which will almost always be the national law of the place **1.10**

⁵ Fast-track (or expedited) arbitration is discussed in Chapter 6.

⁶ The 2012 version of the ICC Rules provides, in Art. 25(6), that the arbitral tribunal may make a decision based only on documents ‘unless any of the parties requests a hearing’. Other institutions have similar rules: see, e.g., Art. 42(1)(c) of the Swiss Rules of International Arbitration 2012 (the ‘Swiss Rules’), 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.’

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 sometimes 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.⁷ This ‘applicable’, or ‘substantive’, law will generally be a designated national system of law, chosen by the parties in their contract. But this is not necessarily so. The parties or, in default, the arbitral tribunal on behalf of the parties may choose other systems of law, for example a blend of national law and public international law, or a collection of rules known as ‘international trade law’, ‘transnational law’, the ‘modern law merchant’ (the so-called *lex mercatoria*), or by some other title.⁸ Indeed, if so permitted by the agreement of the parties and the *lex arbitri*, the arbitral tribunal may determine the dispute on the basis of what it considers to be fair and equitable.⁹

- 1.11 Finally, because international arbitrations generally take place in a ‘neutral’ country—that is, a country that is not the country of residence or business of the parties—the system of law that 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.
- 1.12 The dependence of the international arbitral process upon different (and occasionally conflicting) rules of national and international law is another major theme of this book.

(d) A brief historical note.

- 1.13 In its early days, arbitration would have been a simple and relatively informal process. Two merchants, in dispute over the price or quality of goods delivered, would turn to a third whom they knew and trusted, and they would agree to abide by his decision—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.¹⁰

⁷ In June 2012, the six leading chambers of commerce in Switzerland adopted an updated version of the Swiss Rules. Article 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). Article 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. Article 33(2) provides that the arbitral tribunal may decide according to equity, if expressly authorised by the parties to do so.

⁸ The different systems or rules of law that may constitute the substantive law of an international commercial contract are discussed in Chapter 3.

⁹ An agreement that the arbitral tribunal may decide *ex aequo et bono* is not unknown, but is comparatively rare in modern practice.

¹⁰ After referring to ‘the dispute resolution mechanisms of the post-classical mercantile world’ that were adopted in particular trades or trading centres, Lord Mustill comments: ‘Within such

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 the law does not generally concern itself with supervising the conduct of a private members’ club or intervening in its rules unless public policy requires it to do so. **1.14**

However, no modern state can 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’,¹¹ but just as war is too important to be left to the generals,¹² so is arbitration too important to be left to private provision. **1.15**

National regulation of arbitration came first¹³—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 France, for the construction of a power plant in Indonesia, with an agreement that any disputes should be resolved by arbitration in London. Where 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? And if there is an arbitration that leads to an award of damages and costs, how is that award to be **1.16**

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.’ See Mustill, ‘Is it a bird...’, in Reymond (ed.) *Liber Amicorum* (Litec, 2004), p. 20. See also Mustill, ‘The history of international commercial arbitration: A sketch’, in Newman and Hill (eds) *The Leading Arbitrators’ Guide to International Arbitration* (2nd edn, JurisNet, 2008), p. 1. To similar effect, see Paulsson, *The Idea of Arbitration* (Oxford University Press, 2012), p. 1, where he says: ‘The idea of arbitration is that of the binding resolution of disputes accepted with serenity by those who bear its consequences because of their special trust in chosen decision-makers.’

¹¹ Serge 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 it as (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’. (In Greek mythology, Antigone pleaded with Creon for the burial of the body of her brother Eteocle within the city walls.) See Lazareff, ‘L’arbitre singe ou comment assassiner l’arbitrage’, in Aksentiev (ed.) *Global Reflections in International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (ICC, 2005), p. 478.

¹² Attributed to both Georges Clémenceau, French prime minister 1917–20, and Talleyrand (1754–1838), the French statesman.

¹³ 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 in 1806 the French Code of Civil Procedure effectively turned arbitration into the first stage of a procedure that would lead to the judgment of a court. See David, *Arbitration in International Trade* (Economica, 1984), pp. 89–90. The first English statute was the Arbitration Act 1698, although in *Vynior’s Case* (1609) 8 Co Rep 80a, at 81b, the court ordered the defendant to pay the agreed penalty for refusing to submit to arbitration as he had agreed to do. For more information on the history of arbitration, see the various studies by Derek Roebuck, including Roebuck, ‘Sources for the history of arbitration’ (1998) 14 Arb Intl 237.

enforced against the losing party if the losing party refuses to implement the award voluntarily? Again, which court has jurisdiction?

- 1.17** 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, linking national laws together and providing (as far as possible) a system of worldwide enforcement, both of arbitration agreements and of arbitral awards. Such treaties and conventions, and other major international instruments, will be discussed in more detail towards the end of this chapter. For now, 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, in practice, reference is continually made.

(e) International rules, treaties, and conventions

- 1.18** The most important ‘landmarks’ are:

- the Geneva Protocol of 1923 (the ‘1923 Geneva Protocol’);¹⁴
- the Geneva Convention of 1927 (the ‘1927 Geneva Convention’);¹⁵
- the New York Convention of 1958 (the ‘New York Convention’);¹⁶
- the International Centre for Settlement of Investment Disputes (ICSID) Convention of 1965 (the ‘ICSID Convention’);¹⁷
- the UNCITRAL Arbitration Rules (the ‘UNCITRAL Rules’), adopted in 1976¹⁸ and revised in 2010;
- the UNCITRAL Model Law (the ‘Model Law’), adopted in 1985;¹⁹ and
- revisions to the Model Law (the ‘Revised Model Law’), adopted in 2006.²⁰

These landmarks will be considered in more detail later in this chapter.

¹⁴ The Geneva Protocol on Arbitration Clauses of 1923 was drawn up on the initiative of the ICC and under the auspices of the League of Nations, and signed at Geneva on 24 September 1923.

¹⁵ 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.

¹⁶ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on 10 June 1958: United Nations Treaty Series (1959), Vol. 330, p. 38, No. 4739. The text of the Convention is set out in Appendix B.

¹⁷ The ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States, signed in Washington DC on 18 March 1965: United Nations Treaty Series (1966), Vol. 575, p. 160, No. 8359. For a more detailed review of ICSID arbitrations, see Chapter 8.

¹⁸ Adopted by Resolution 31/98 of the General Assembly of the United Nations on 15 December 1976, these Rules are set out in Appendix D. At its Thirty-ninth Session (New York, 17–28 June 2002), UNCITRAL 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 UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the Work of its Forty-ninth Session*, Vienna, 15–19 September 2008, Doc. No. A/CN.9/665, para. 3.

¹⁹ 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.

²⁰ The Revised Model Law was approved by the United Nations in December 2006. Its text is shown in Appendix A.

(f) Meaning of ‘international’

(i) *International and domestic arbitrations contrasted*

The term ‘international’ is used to mark the difference between arbitrations that are purely ‘national’ or ‘domestic’ and those that in some way transcend national boundaries, hence are ‘international’ or (in the terminology adopted by Judge Jessup) ‘transnational’.²¹ **1.19**

It may be said that every arbitration is a ‘national’ arbitration, since it must be held at a given place and is accordingly subject to the national law of that place.²² In a narrow sense, this is correct. If an international arbitration is held in London, the place, or ‘seat’, of the arbitration will be London, the mandatory provisions of English law will apply to the proceedings and the tribunal’s award will be an ‘English’ award. However, in practice, it is usual to distinguish between arbitrations that are purely ‘national’ or ‘domestic’ and those that are ‘international’. There are sound legal and practical reasons for this. **1.20**

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, 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*. **1.21**

Secondly, the parties to an international arbitration are generally (but not always) business or financial 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.²³ **1.22**

Thirdly, the sums involved in international arbitrations are generally considerably greater than those involved in domestic arbitrations, which may (for example) concern a comparatively small dispute between a customer and an agent over a faulty **1.23**

²¹ Judge Jessup used this term to describe rules of law that govern cross-border relationships and transactions: see Jessup, *Transnational Law* (Yale University Press, 1956).

²² See, e.g., Mann, ‘Lex facit arbitrum’ (1986) 2 Arb Intl 241, at 244; however, as discussed later in this chapter, this statement is not true in respect of ICSID arbitrations.

²³ 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 those states that have chosen, rightly or wrongly, to deal with both national and international arbitrations in the same legislative Act: see, e.g., the English Arbitration Act 1996, the Irish Arbitration Act 2010, and the Swedish Arbitration Act 1999.

motor car or a package holiday that failed (perhaps predictably) to live up to its advance publicity.

- 1.24** Fourthly, many states have chosen to adopt a separate legal regime to govern international arbitrations taking place on their territory, recognising that the considerations that apply to such arbitrations are different from those that apply to purely national (or ‘domestic’ arbitrations). In recognising such differences, the states concerned—which include important centres of arbitration such as France, Switzerland, and Singapore—have adopted the same approach as that adopted by the Model Law, which is expressly stated to be a law designed for *international* commercial arbitrations.²⁴
- 1.25** To these four reasons might be added a fifth—namely, that, in some states, the state itself (or one of its entities) is permitted to enter into arbitration agreements only in respect of *international* transactions.²⁵
- 1.26** It might be thought, given its importance, that there would be general agreement on what is meant by ‘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.’²⁶ In accordance with this relaxed approach, the word ‘international’ has at least three different meanings when it comes to international arbitration: the first depends on the nature of the dispute; the second, on the nationality of the parties; and the third approach, which is that of the Model Law, depends on a blending of the first two, plus a reference to the chosen place of arbitration.

(ii) International nature of the dispute

- 1.27** The ICC, as already mentioned, established its Court of Arbitration in Paris in 1923²⁷ to provide for the settlement by arbitration of what were described as ‘business disputes of an international character’.²⁸ Thus the ICC adopted the *nature* of the dispute as its criterion for deciding whether or not an arbitration was an ‘international

²⁴ Model Law, Art. 1(1).

²⁵ The ‘Tapie Affair’ gave rise to a wave of criticism in France when it emerged that the French government had agreed that what was effectively a dispute between a major French bank and a former French minister, Bernard Tapie, should be dealt with by an arbitral tribunal of three French lawyers rather than by the French courts. One of the many criticisms made in the French media was that a case of such political significance had been referred to arbitration, a private process of dispute resolution, rather than left with the French courts. On 17 February 2015, the award of the arbitral tribunal was set aside by the Paris Cour d’Appel: Arrêt du 17 Février 2015, No. 77 (13/13278). As at July 2015, an appeal against this decision is pending.

²⁶ Attributed to Humpty Dumpty in Lewis Carroll’s *Alice through the Looking Glass* (1871).

²⁷ The court is now known as the International Court of Arbitration of the ICC. It is not a court in the generally accepted sense; rather, it is a council that, *inter alia*, oversees the work of arbitral tribunals constituted under the ICC Rules and approves the draft awards of those tribunals, whilst leaving the tribunals themselves in full charge of the cases before them.

²⁸ 1998 ICC Rules, Art. 1(1). These Rules were replaced by new Rules effective from January 2012.

arbitration'. At first, the ICC considered business disputes to be 'international' only if they involved nationals of different countries, but it altered its Rules in 1927 to cover disputes that contained a 'foreign element', even if the parties were nationals of the same country. An explanatory booklet issued by the ICC used to state:

[T]he 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.²⁹

French law, which has undoubtedly influenced the ICC Rules on this issue, considers an arbitration to be 'international' if the nature of the business (for instance the movement of goods or money) is itself 'international', even if the parties concerned are based in the same country or are of the same nationality.³⁰ **1.28**

(iii) *Nationality of the parties*

The second approach is to focus attention not on the *nature* of the dispute, but on the *parties to it*. 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 of 1961,³¹ 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 . . .*'.³² **1.29**

Switzerland is one of the states in which the nationality of the parties determines whether or not an arbitration is 'international'. In Swiss law, an arbitration is 'international' if, at the time when the arbitration agreement was concluded, at least one of the parties was not domiciled or habitually resident in Switzerland.³³ The **1.30**

²⁹ ICC, *The International Solution to International Business Disputes: ICC Arbitration*, ICC Publication No. 301 (ICC, 1977), p. 19. (This useful booklet is no longer in print.)

³⁰ Decree No. 2011-48 of 13 January 2011, Bk IV, Title II, art. 1504; see also Conducci, 'The arbitration reform in France: Domestic and international arbitration law' (2012) 28 *Arb Intl* 125. The current ICC Rules cover 'all business disputes, whether or not of an international character', which suggests a readiness to administer purely 'domestic' disputes, if appropriate.

³¹ European Convention on International Commercial Arbitration, signed at Geneva on 21 April 1961: United Nations Treaty Series (1963–64), Vol. 484, p. 364, No. 7041.

³² European Convention of 1961, Art. I(1)(a) (emphasis added).

³³ For a commentary on Switzerland's law on international arbitration—that is, Ch. 12 of the Swiss Private International Law Act 1987 ('Swiss PIL')—see, e.g., 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 *Rev Arb* 385; Lalive, 'The new Swiss Law on International Arbitration' (1998) 4 *Arb Intl* 2; Geisinger and Voser, *International Arbitration in Switzerland: A Handbook for Practitioners* (2nd edn, Kluwer Law International, 2013).

‘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’.³⁴

(iv) *Model Law*

- 1.31** Problems may arise as a result of the lack of an internationally agreed definition of ‘international’. Each state has its own test for determining whether an arbitration award is ‘international’ or, in the language of the New York Convention, ‘foreign’. The Convention defines ‘foreign awards’ as awards that are made in the territory of a state *other* than that in which recognition and enforcement are sought—but it adds to this definition awards that are ‘not considered as domestic awards’ by the enforcement state.³⁵ In consequence, while one state may consider an award to be ‘domestic’ (because it involves parties who are nationals of that state), the enforcement state might well consider it *not* to be domestic (because it involves the interests of international trade).
- 1.32** The Model Law was specifically designed to apply to *international* commercial arbitration. Accordingly, some definition of the term ‘international’ was essential. The Model Law states, in Article 1(3):
- (3) 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.
- 1.33** This definition combines the two criteria mentioned earlier and, for good measure, adds another:
- the internationality of the *dispute* is recognised in Article 1(3)(b)(i) and (ii);
 - the internationality of the *parties* is recognised in Article 1(3)(a); and
 - Article 1(3)(c) grants the parties liberty to agree amongst themselves that the subject matter of the arbitration agreement is ‘international’.

³⁴ US Code, Title 9 (‘Arbitration’), § 202.

³⁵ New York Convention, Art. 1(1).

For the purposes of this volume, the authors adopt a wide definition. An arbitration is considered to be ‘international’ if (in the sense of the Model Law) it involves parties of different nationalities, or it takes place in a country that is ‘foreign’ to the parties, or it involves an international dispute.³⁶ Nonetheless, a caveat must be entered to the effect that such arbitrations will not necessarily be universally 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. **1.34**

(g) The meaning of ‘commercial’

It was once customary to refer to the ‘commercial’ character of arbitrations such as those to which much of this volume is devoted. This reflects the distinction made in some countries between contracts that are ‘commercial’ and those that are not. This distinction was important at one time because there were (and still are) countries in which only disputes arising out of ‘commercial’ contracts may be submitted to arbitration³⁷ (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). **1.35**

The first of the important modern treaties of international arbitration was the 1923 Geneva Protocol. This distinguished in Article 1, between ‘commercial matters’ and ‘any other matters capable of settlement by arbitration’. The distinction carried with it the implication that ‘commercial matters’ would *necessarily* be capable of being settled (or resolved) by arbitration under the law of the state concerned (because that state would allow such matters to be resolved by arbitration), whilst it might not allow ‘non-commercial’ matters to be resolved in that manner. **1.36**

Further emphasis was added to the distinction between ‘commercial matters’ and ‘any other matters’ by the stipulation in the Geneva Protocol that each contracting state was free to limit its obligations ‘to contracts that are considered as commercial under its national law’.³⁸ This is the so-called commercial reservation, and it remains important since it appears again in the New York Convention.³⁹ **1.37**

³⁶ Spain is one of the countries that has adopted this wide definition in the Spanish Arbitration Act 2003, as amended by the Arbitration Amendment Act 2011, s. 3.

³⁷ For instance, art. 737 of Argentina’s Code of Civil Procedure states that only matters relating to commercial transactions can be validly submitted to arbitration. China is one major state that adopted the ‘commercial reservation’ when it ratified the New York Convention in 1987, and in India, for instance, an ‘international commercial arbitration’ is defined to mean an arbitration relating to legal relationships that are considered to be commercial under the law in force in India: Indian Arbitration and Conciliation Act 1996, s. 2(i)(f).

³⁸ Geneva Protocol of 1923, Art. 1.

³⁹ 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, e.g., it becomes necessary to seek recognition or enforcement of a foreign arbitral award in a state that has adhered

1.38 The draftsmen of the Model Law considered defining the word ‘commercial’,⁴⁰ but gave up the attempt. Instead, they stated as follows in a footnote:

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.⁴¹

The first four editions of this book dealt with ‘commercial’ arbitrations, using ‘commercial’ in the wide sense used in the Model Law. However, given the increased number and importance of investment disputes, the authors decided to delete the reference to ‘commercial’ in subsequent editions of this book.

(h) Key elements of an international arbitration

1.39 As readers will either know or discover, many elements go to make up an international arbitration—but the key elements are as follows:

- the agreement to arbitrate;
- the need for a dispute;
- the commencement of an arbitration;
- the arbitral proceedings;
- the decision of the tribunal; and
- the enforcement of the award.

(i) Agreement to arbitrate

1.40 The foundation stone of modern international arbitration is (and remains) an agreement by the parties to submit any disputes or differences between them to arbitration.⁴² 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

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’.

⁴⁰ Which neither the Geneva Protocol nor the New York Convention had done.

⁴¹ 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 Chapter 8 for more on investor–state disputes.

⁴² Once there is a valid agreement to arbitrate, the scope of any resulting arbitration may be enlarged, e.g. 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 Chapter 2.

international treaties. Under both the New York Convention⁴³ and the Model Law,⁴⁴ 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.⁴⁵

An ‘agreement to arbitrate’ is usually expressed in 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 as part of their contract that any dispute that arises out of, or in connection with, the contract will be referred to arbitration and not to the courts. Arbitration clauses are drawn up and agreed as part of the contract *before* any dispute has arisen, and so they necessarily look to the future. The parties naturally hope that no dispute will arise, but agree that if it does, it will be resolved by arbitration, and not by the courts of law. **1.41**

There is a second, less common, type of agreement to arbitrate, which is made *once* a dispute has arisen. Such an agreement is generally known as a ‘submission agreement’. It is generally much more complex than an arbitration clause—because, once a dispute has arisen, it is possible to nominate a tribunal, and to spell out what the dispute is and how the parties propose to deal with it. **1.42**

These two types of arbitration agreement have been joined by a third—namely, an ‘agreement to arbitrate’, which is deemed to arise under international instruments, such as a bilateral investment treaty (BIT) entered into by one state with another. A feature of such treaties is that each state party to the treaty agrees to submit to international arbitration any dispute that *might* arise in the future between itself and an ‘investor’.⁴⁶ This ‘investor’ is *not* a party to the treaty. Indeed, the investor’s identity will be unknown at the time when the treaty is made. Hence this ‘agreement to arbitrate’ in effect constitutes a ‘standing offer’ by the state concerned to resolve any ‘investor’ disputes by arbitration. It is an offer of which many ‘investors’ have been quick to take advantage.⁴⁷ **1.43**

The New York Convention, which provides for the international recognition and enforcement of arbitration agreements,⁴⁸ insists that arbitration agreements should be ‘in writing’. Indeed, references to the need for ‘writing’ occur throughout the New York Convention. Article II(1) requires each state party to the Convention to recognise ‘an agreement in writing’ under which the parties have undertaken to submit to arbitration disputes that are capable of being settled by arbitration. Article II(2) defines an ‘agreement in writing’ to include arbitration clauses and submission agreements; Article IV states that to obtain enforcement of an arbitral **1.44**

⁴³ New York Convention, Art. V.

⁴⁴ Model Law, Art. 35.

⁴⁵ New York Convention, Art. V(1)(a); Model Law, Art. 36(1)(a)(i).

⁴⁶ Investor–state arbitrations are discussed further in Chapter 8.

⁴⁷ See Chapter 8.

⁴⁸ As well as of arbitration awards.

award the winning party must produce the written agreement to arbitrate or a duly certified copy.

1.45 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 a written arbitration clause in a contract or on a signed submission agreement. This is how things were done when the Convention was concluded in 1958. But much has changed since then. First, modern methods of communication have moved beyond the ‘letters and telegrams’ to which the Convention refers. Secondly, the Convention assumes that *only* parties to the agreement to arbitrate will become parties to any resulting arbitration. However, the increased complexity of international trade means that states, corporations, and individuals who are *not* parties to the arbitration agreement might wish to become parties⁴⁹—or, indeed, might find that they have been joined as parties, irrespective of their wishes. The idea that arbitration involves only two parties—one as claimant and the other as respondent—is no longer valid.

1.46 The Model Law, which came into force many years after the New York Convention, also envisages arbitration as taking place *only* between parties who are parties to a written arbitration agreement. Article 7(1) states that an 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.⁵⁰

However, the Model Law did move beyond ‘letters’ and ‘telegrams’ by extending the definition of ‘in writing’ to include ‘an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement’.⁵¹

1.47 Parties who agree to arbitration give up their right of recourse to the courts of law. It is not unreasonable to require written evidence that they have, in fact, agreed to do this. Many laws of arbitration insist on such evidence. 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*’.⁵²

⁴⁹ What is described here is the problem of ‘non-signatories’, which is considered in more detail in Chapter 2. The word ‘non-signatories’ is not particularly accurate, since anyone in the world who has not signed the arbitration agreement might correctly be described as such. 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.

⁵⁰ Emphasis added.

⁵¹ Model Law, Art. 7(2).

⁵² Swiss PIL, s. 178(1) (emphasis added). See also, e.g., 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

However, in modern business dealings, contracts may 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 that led eventually to the Revised Model Law. States that 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.⁵³ The second option is to dispense altogether with the requirement that an agreement to arbitrate should be in writing.⁵⁴ **1.48**

(i) *Arbitration clauses*

An arbitration clause (or *clause compromissoire*, as it is known in the civil law) 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.⁵⁵ **1.49**

Institutions such as the ICC and the LCIA have their own recommended forms of arbitration clause, set out in their books of rules. The UNCITRAL Rules offer a simple ‘Model Arbitration Clause’, which states that: ‘Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules.’⁵⁶ **1.50**

(ii) *Submission agreements*

An arbitration agreement that 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*. The parties may wish to choose institutional arbitration, or they may prefer to proceed ad hoc, in which case the submission agreement will **1.51**

writing. And, under the US Federal Arbitration Act of 1990, the minimum requirements are that the arbitration agreement be in writing and agreed to by the parties.

⁵³ Revised Model Law, Art. 7, Option I.

⁵⁴ Revised Model Law, Art. 7, Option II. The ‘writing requirement’ is discussed in more detail in Chapter 2. In states that 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. However, Arts II(2), IV, and V(1)(a) of the New York Convention still require a written agreement in a defined form. 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.

⁵⁵ For a similar short form of arbitration clause, see, e.g., *Arab African Energy Corporation Ltd v Olieprodukten Nederland BV* [1983] 2 Lloyd’s Rep 419; more generally, see the discussion in Chapter 2.

⁵⁶ The current UNCITRAL Arbitration Rules are the revised 2010 edition. A note to the recommended arbitration clause, which appears in the Annex to these Rules, 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 and country); and (d) the language to be used in the arbitral proceedings.

usually be 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 that the law of many states recognised,⁵⁷ since recourse to arbitration was permitted only in respect of *existing* disputes. In some states, this is still the position.⁵⁸

- 1.52** However, most states now recognise the validity of arbitration clauses that relate to future disputes—and almost all commercial arbitrations now take place pursuant to an arbitration clause (which is frequently a ‘standard clause’ in standard forms of contract that are internationally accepted for activities as diverse as shipping, insurance, commodity trading, and civil engineering.)

(iii) Importance of the arbitration agreement

- 1.53** The most important function of an agreement to arbitrate, in the present context, is that of making it plain that the parties have indeed consented to resolve their disputes by arbitration. This consent is essential: without it, there can be no valid arbitration.⁵⁹ The fact that international 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 arbitration should be freed from the constraints of national law and treated as ‘denationalised’ or ‘delocalised’.⁶⁰
- 1.54** Once parties have validly given their consent to arbitration, that consent cannot be unilaterally withdrawn. Even if the agreement to arbitrate forms part of the original contract between the parties and that contract comes to an end, the obligation to arbitrate survives. It is an independent obligation separable⁶¹ from the rest of the contract. Even if the validity of the contract that contained the arbitration clause is challenged, the agreement to arbitrate remains in being.⁶²

⁵⁷ This point, and in particular the distinction between existing and future disputes, is discussed later in this chapter.

⁵⁸ For instance, a submission agreement for domestic disputes is still required (whether or not a valid arbitration agreement already exists) in Argentina and Uruguay.

⁵⁹ There are circumstances under which arbitration may be a compulsory method of resolving disputes, e.g. 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 is less real.

⁶⁰ An early mention of this theory appears in Fouchard, *L'Arbitrage Commercial International* (Litec, 1965), although the presence of serious obstacles to the theory is noted; see also Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff, 2010). The theory is discussed in more detail in Chapter 3.

⁶¹ The doctrine of separability is discussed in more detail in Chapter 2.

⁶² The concept of the ‘autonomy’ of an arbitration clause, although not immune from criticism, is now well established: see, e.g., Model Law, Art. 16. By way of example, see also UNCITRAL Rules 2010, Art. 23; English Arbitration Act 1996, s. 7 (‘Separability of arbitration agreement’).

This allows a claimant to begin arbitration proceedings, based on the survival of the agreement to arbitrate as a separate agreement, independent of the contract of which it formed part. It also allows an arbitral tribunal that 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*

An agreement to arbitrate, like any other agreement, must be capable of being enforced at law; otherwise, it would simply be a statement of intention, which, whilst morally binding, would be of no legal effect. But 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. An order for specific performance may be 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’.⁶³ **1.55**

In arbitration, this problem has been met both nationally and internationally by a policy of *indirect* enforcement. Rules of law are adopted that 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 will be the only legal course of action open to it.⁶⁴ **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 arbitration must be enforced internationally and not simply in the place where the agreement was made. This essential requirement is recognised in the international conventions, beginning with the 1923 Geneva Protocol, and it is endorsed in the New York Convention—although the title of the Convention fails to make this clear.⁶⁵ **1.57**

⁶³ It should be noted, however, that in some jurisdictions, when the local court decides that a claim should be arbitrated, the court will order (a) that the court proceedings be discontinued, (b) that arbitration proceedings be commenced within a given period of time, and (c) that the court will retain jurisdiction to ensure that this is done. A distinction can be drawn in this regard between the effect of a ‘dismissal’ of court proceedings and a ‘stay’ of those proceedings: see, e.g., *Lloyd v Horensce LLC* 369 F.3d 263 (3rd Cir. 2004).

⁶⁴ Of course, the party concerned may decide to abandon its claim and is free to do so.

⁶⁵ The full title is the ‘Convention on the Recognition and Enforcement of Foreign Arbitral Awards’. This fails to mention that the Convention *also* applies to the recognition and enforcement of agreements to arbitrate.

(v) *Powers conferred by the arbitration agreement*

- 1.58** An arbitration agreement does not merely serve to establish the obligation to arbitrate, but 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.⁶⁶ Parties to an arbitration are masters of the arbitral process to an extent impossible in proceedings in a court of law. Thus, for example (and with limits that will be considered later), the parties may determine the number of arbitrators on the arbitral tribunal, how this tribunal is to be appointed, in what country it should sit, what powers it should possess, and what procedure it should follow.
- 1.59** The ‘agreement to arbitrate’ also establishes the jurisdiction of the arbitral tribunal. 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. Indeed, a defendant will often find itself in court against its will. In the arbitral process, the jurisdiction of the arbitral tribunal is derived simply and solely from the express or implied consent of the parties.⁶⁷

(j) *Need for a dispute*

- 1.60** At first glance, this may seem to be an unnecessary requirement. Surely, it might be asked, if there is no 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 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 that is due, he or she should be entitled to go to court and ask for summary judgment. However, if there is an arbitration clause in the underlying agreement with the debtor, the claimant may be directed to go to arbitration, rather than to the courts—even though, in the time it takes to establish an arbitral tribunal, a judge with summary powers may well have disposed of the case.
- 1.61** The expedient adopted in certain countries (including initially in England, when legislating for the enactment of the New York Convention) was to add words that were not in that Convention. This allowed the courts to deal with the case if the judge was satisfied ‘that there is not in fact any dispute between the parties with

⁶⁶ See Chapter 3.

⁶⁷ It should be noted, however, that even when the parties think that they have agreed to a set of rules that will govern their dispute, a poorly drafted arbitration clause may mean the issue is taken before a national court: see, e.g., *Insignia Technology Co. Ltd v Alstom Technology Ltd* [2008] SGHC 134.

regard to the matter agreed to be referred'.⁶⁸ In this way, it was possible to avoid a reference to arbitration and to obtain summary judgment. However, English law has now followed the strict wording of the New York Convention.⁶⁹ It can no longer be argued in England that, since there is no genuine dispute, the matter should not be referred to arbitration—although such an argument may remain sustainable in other countries.

(i) *Existing and future disputes*

A distinction is sometimes drawn between 'existing' and 'future' disputes. In the New York Convention, for instance, each contracting state recognises the validity of an agreement under which the parties undertake to submit to arbitration 'all or any differences which have arisen or *which may arise between them*'.⁷⁰ This distinction is principally of historical importance. Most of the states in the civil law tradition that did not originally enforce agreements for future disputes to be referred to arbitration now do so.⁷¹ **1.62**

In the common law systems, fewer difficulties were placed in the way of referring future disputes to arbitration.⁷² 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. It may be cashed for an unknown amount at an unknown future date. It is not surprising that states may adopt a more cautious attitude towards allowing future rights to be given away than they do towards the relinquishment of existing rights. **1.63**

(ii) *Arbitrability*

Even if a dispute exists, this may not be sufficient; it must also be a dispute that, in the words of the New York Convention, is 'capable of settlement by arbitration'. The idea that a dispute may not be 'capable of settlement by arbitration' is **1.64**

⁶⁸ 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.

⁶⁹ 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?

See Lord Saville, 'The Denning Lecture 1995: Arbitration and the courts' (1995) 61(3) *Arbitration* 157, at 161.

⁷⁰ New York Convention, Art. II(1) (emphasis added).

⁷¹ These states included France, which, as the country in which the ICC is based, is an important centre for arbitration. 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.

⁷² Although, in the United States, 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.

not meant as a criticism of arbitrators or of the arbitral process itself. Arbitrators are (or should be) just as ‘capable’ as judges of determining a dispute. But national laws may treat certain disputes as being more suitable 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 by the national law of a particular state as not being ‘capable’ of settlement by arbitration—although it would be more accurate to say that it is not ‘permissible’ to settle the dispute by arbitration.

- 1.65** It is important to know which disputes are ‘arbitrable’ and which are not. It is also important to note the correct definition of ‘arbitrability’, as used in international conventions, so as to avoid the confusion into which some courts and lawyers plunge.⁷³

(k) Commencement of an arbitration

- 1.66** A formal notice must be given in order to start an arbitration. In ad hoc arbitrations, this notice will be sent or delivered to the opposing party.

- 1.67** The UNCITRAL Rules provide, for example, in Article 3(1) and (2), that:

1. The party or parties initiating recourse to arbitration (hereinafter called the ‘claimant’) shall communicate to the other party or parties (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.

- 1.68** The UNCITRAL Rules then state, in Article 3, what should be set out in the notice of arbitration. This includes a reference to the arbitration clause in the contract (or to any other form of arbitration agreement), a brief description of the claim, an indication of the amount involved, if any, 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 the tribunal, as set out in Article 4 of the Rules.

- 1.69** 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. The institution then

⁷³ Some writers (and indeed some judges, particularly in the United States) 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 (2002). In fact, the dispute was perfectly arbitrable, but the reference to arbitration was not made in time. 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. See further, e.g., Shore, ‘Defining arbitrability: The United States vs the rest of the world’, *New York Law Journal*, 15 June 2009. ‘Arbitrability’ is discussed more fully in Chapter 2.

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 the Rules shall submit its Request for Arbitration (the 'Request') to the Secretariat at any of the offices specified in the Internal Rules. The Secretariat shall notify the claimant and the respondent of the receipt of the Request and the date of such receipt.

Similar provisions are found in Article 1 of the LCIA Rules, Article 3 of the Rules of the Singapore International Arbitration Centre (SIAC), Article 2 of the Rules of the Stockholm Chamber of Commerce (SCC), and the rules of other arbitral institutions. **1.70**

(i) *Choosing an arbitrator*

It is evident that an arbitration cannot proceed without an arbitral tribunal.⁷⁴ **1.71** Generally, parties are free to choose their own tribunal—although, sometimes, the parties may have surrendered this freedom by delegating the choice of a tribunal to a third party, such as an arbitral institution.⁷⁵ Where the freedom exists, the parties should make good use of it. A skilled, experienced, and impartial arbitrator is essential for a fair and effective arbitration.

The choice of a suitable arbitrator involves many considerations.⁷⁶ **1.72** What must be recognised is that an international arbitration demands different qualities in an arbitrator from those required for a national or domestic arbitration. In an international arbitration, different rules, and often different systems of law, will apply; the parties will almost certainly be of different nationalities; and the arbitration itself will usually take place in a country that is 'foreign' to the parties. 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, each of the arbitrators may be **1.73** of a different nationality, with each perhaps having grown up in a different cultural and legal environment.⁷⁷ Good international arbitrators will try hard to avoid misunderstandings that may arise because of this difference of background, or even of language.

⁷⁴ The notice of arbitration may sometimes nominate an arbitrator on behalf of the claimant, but this denotes a three-member tribunal, with a second arbitrator to be chosen by the respondent and the presiding arbitrator to be chosen in a neutral fashion.

⁷⁵ In ICC arbitrations, e.g. in which the dispute is to be referred to a sole arbitrator, that person will be selected by the ICC itself unless (as is sensible) the parties agree on a suitable candidate: ICC Rules, Art. 12(3). Similarly, the ICC would select the presiding arbitrator if the parties were to fail to do so: Art. 12(5).

⁷⁶ See Chapter 4 for more discussion of these considerations.

⁷⁷ 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.

- 1.74** Making the right choice of arbitrator is important. Professor Lalive has said that '[t]he 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'.⁷⁸
- 1.75** More recently, Professor Park has observed that '[t]he profile of an ideal arbitrator might be described as someone knowledgeable in the substantive field, able to write awards in the relevant language, free of any nationality restrictions, and experienced in conducting complex proceedings'.⁷⁹
- 1.76** A survey published in 2012 described the rise of what it called 'a third generation of arbitrators'.⁸⁰ According to this survey, the first generation were chosen as arbitrators for their general legal and social aura: they were 'the Grand Old Men' of arbitration. The second generation ('the Technocrats') were chosen for their legal or technical skills. The third, current, generation ('the Managers') are now being chosen for their expertise in arbitration and their skills in case management. The survey concluded, quoting a previous edition of this volume: 'Redfern and Hunter's dictum still seems to hold: "Probably the most important qualification for an international arbitrator is that he should be experienced in the law and practice of arbitration."' ⁸¹

(l) Arbitral proceedings

- 1.77** There are no compulsory rules of procedure in international arbitration, no volumes containing 'the rules of court' to govern the conduct of the arbitration. Litigators who produce their own country's rulebook or code of civil procedure as a 'helpful guideline' will be told to put it aside.
- 1.78** 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 usually cast in very broad terms,⁸² and secondly, the rules that the parties themselves may have

⁷⁸ Lalive, 'Mélanges en l'honneur de Nicolas Valticos', in Dupuy (ed.) *Droit et Justice: Mélanges en l'honneur de Nicolas Valticos* (CEPANI, 1989), p. 289; see also, e.g., Derains and Levy (eds) *Is Arbitration Only as Good as the Arbitrator? Status, Powers and Role of the Arbitrator* (ICC Institute of World Business Law, 2011); Park, 'Arbitrators and accuracy' (2010) 1 J Intl Disp Settlement 25.

⁷⁹ Park, 'Arbitration in autumn' (2011) 2 J Intl Disp Settlement 287. Professor Park adds, at 311: 'To this laundry list, a claimant might add availability for hearings in the not too distant future. Yet someone who meets the bill with respect to experience and qualifications may have commitments that interfere with early hearings.'

⁸⁰ Schultz and Kovacs, 'The rise of a third generation of arbitrators? Fifteen years after Dezalay and Garth' (2012) 28 Arb Intl 161.

⁸¹ *Ibid.*, at 170. The reference is to *Redfern and Hunter on Law and Practice of International Commercial Arbitration* (3rd edn, Sweet & Maxwell, 1999), p. 205. The dictum was repeated in subsequent editions, but as many more women have become arbitrators, the statement should be corrected to read 'that he or she be experienced in the law and practice of arbitration'.

⁸² For example, Model Law, Art. 18, simply states: 'The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.'

chosen, such as the ICC or UNCITRAL Arbitration Rules. Under the rubric of ‘General Provisions’, Article 17(1)–(3) of the UNCITRAL Rules 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 an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting his case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ dispute.
2. As soon as practicable after its constitution and after inviting the parties to express their views, the tribunal shall establish the provisional timetable of the arbitration. The arbitral tribunal may, at any time, after inviting the parties to express their views, extend or abridge any period of time prescribed under these Rules or agreed by the parties.
3. If at an appropriate stage of the proceedings any party so requests, 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.

Some institutional rules of arbitration are more detailed than others, but within the broad outline of any applicable rules parties to an international arbitration are free to design a procedure suitable for the particular dispute with which they are concerned. This is another of the attractions of international arbitration. It is (or should be) a flexible method of dispute resolution: 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 a Procrustean bed, enforcing conformity without regard to individual variation. **1.79**

(m) Decision of the tribunal

It frequently happens that, in the course of arbitral proceedings, a settlement may be reached between the parties. Rules of arbitration usually make provision for this. Article 36(4) of the UNCITRAL Rules, for example, states: **1.80**

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.

However, if the parties themselves 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,⁸³ but in this respect it has a similar function to that of a court, being entrusted **1.81**

⁸³ For a discussion of the differences between a judge and an arbitrator, see Lazareff, ‘L’arbitre est-il un juge?’, in Reymond (ed.) *Liber Amicorum* (Litec, 2004), p. 173; Rubino-Sammartano,

by the parties with both the power and the duty to reach a decision that will be binding upon the parties.

- 1.82** The power (and the duty) of an arbitral tribunal to make binding decisions distinguishes arbitration as a method of resolving disputes from other procedures, such as mediation and conciliation, which aim to arrive at a negotiated settlement. The *procedure* to be followed in order to arrive at a binding decision is flexible, adaptable to the circumstances of each particular case. Nevertheless, it is a *judicial* procedure and a failure by a tribunal to act judicially may be sanctioned by annulment or non-enforcement of that tribunal's award.⁸⁴ 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.⁸⁵
- 1.83** How an arbitral tribunal reaches its decision is something that remains to be explored.⁸⁶ For a sole arbitrator, the task of decision making is a solitary one. Impressions as to the honesty and reliability of the witnesses; opinions on the merits, which have swayed from one side to another as the arbitral process unfolds; points that have seemed compelling under the eloquence of counsel: all will have to be reviewed and reconsidered, once the hearing is over and any post-hearing briefs are received. Money, reputations, and even friendships may depend on the arbitrator's verdict. The sole arbitrator's task, when the moment of decision arrives, is not an enviable one.
- 1.84** If the arbitral tribunal consists of three arbitrators, the task 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 reviewed, the opinions of each arbitrator can

'The decision-making mechanism of the arbitrator vis-à-vis the judge' (2008) 25 J Intl Arb 167; Ancel, 'L'arbitre juge' (2012) 4 Rev Arb 717.

⁸⁴ For example, s. 33(1)(a) of the English Arbitration Act 1996 states that the tribunal shall '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'. This requirement mirrors Model Law, Art. 18, and is of general application.

⁸⁵ 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 will necessarily be in the form of a compromise acceptable to both parties.

⁸⁶ See, e.g., Lowenfeld, 'The party-appointed arbitrator: Further reflections', in Newman and Hill (eds) *The Leading Arbitrators' Guide to International Arbitration* (2nd edn, JurisNet, 2008), pp. 46–48; Fortier, 'The tribunal's deliberations', in Newman and Hill (eds) *The Leading Arbitrators' Guide to International Arbitration* (2nd edn, JurisNet, 2008), pp. 477–482; Puig, 'Deliberation and drafting awards in international arbitration', in Fernández-Ballesteros and Arias (eds) *Liber Amicorum Bernardo Cremades* (La Ley, 2010), pp. 131–158. On the importance of the tribunal's deliberations, see Bredin, 'Retour au délibéré arbitral', in Bernardini et al. (eds) *Liber Amicorum Claude Reymond* (Litec, 2004), p. 50; Derains, 'La pratique du délibéré arbitral', in Aksén (ed.) *Global Reflections in International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (ICC, 2005), pp. 221–224.

be tested, the facts of the case and the relevant law can be discussed, 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 those differences, rather than face the unwelcome prospect of a dissenting opinion.

Experienced commentators remain divided on the question of whether or not dissenting opinions are of any benefit in international arbitration. Some see them as beneficial, allowing each arbitrator freedom of expression and demonstrating that the parties' arguments have been fully considered.⁸⁷ Others, whilst recognising that there are good dissenting awards, just as there are good dissenting judgments,⁸⁸ are concerned that a dissenting judgment may undermine the authority of the tribunal's award.⁸⁹ Indeed, a dissenting opinion 'may provide a platform for challenge to the award'.⁹⁰ 1.85

The debate about dissenting opinions has inevitably spilled over from commercial arbitration, in which awards are generally not publicly available, to investment arbitration, in which a dissenting opinion may have more impact because it is publicly available. One of the principal concerns is that dissenting opinions are almost always issued 'by the arbitrator appointed by the party that lost the case in whole or in part', which raises doubts as to the impartiality (or 'neutrality') of the arbitrator concerned.⁹¹ It is to be expected that a party-nominated arbitrator will usually have some sympathy with the party that appointed him or her—but this should not prevent that arbitrator behaving impartially, as he or she is expected to do.⁹² 1.86

⁸⁷ Rees and Rohn, 'Dissenting opinions: Can they fulfill a beneficial role?' (2009) 25 Arb Intl 329.

⁸⁸ In the famous English case of *Liversidge v Anderson* [1941] 3 All ER 336, Lord Atkins gave a dissenting speech in which he argued against the power of arbitrary arrest, even in times of war. Almost four years later, Lord Diplock said that the time had come to acknowledge that the majority were 'expediently and, at that time, perhaps excusably wrong and the dissenting speech of Lord Atkin was right': *Inland Revenue Commissioners v Rossminster* [1980] AC 952, at 1008.

⁸⁹ Redfern, 'Dissenting opinions in international commercial arbitration: The good, the bad and the ugly' (2004) 20 Arb Intl 223.

⁹⁰ Baker and Greenwood, 'Dissent—but only if you really feel you must: Why dissenting opinions in international commercial arbitration should only appear in exceptional circumstances' (2013) 7 Disp Res Intl 31.

⁹¹ Van den Berg, 'Dissenting opinions by party-appointed arbitrators in investment arbitration', in Arsanjani, Katz Cogan, Sloane, and Wiessner (eds) *Looking to the Future: Essays in Honor of W Michael Reisman* (Koninklijke Brill, 2010), pp. 821–843.

⁹² The debate continues. A response to the criticism of both party-appointed arbitrators and arbitrators dissenting in favour of their appointing party is offered in Brower and Rosenberg, 'The death of the two-headed nightingale: Why the Paulsson–van den Berg presumption that party-appointed arbitrators are untrustworthy is wrong' (2013) 29 Arb Intl 7 ; van den Berg, 'Charles Brower's problem with 10%: Dissenting opinions by party-appointed arbitrators in investment arbitration', in Caron et al. (eds) *Liber Amicorum for Charles Brower* (Oxford University Press, 2015).

(n) Enforcement of the award

- 1.87** Once an arbitral tribunal has made its final award, it has done what it was established to do. It has fulfilled its function.⁹³ The award itself, however, gives rise to important, lasting, and potentially public legal consequences. Although the award is the result of a private process of dispute resolution and is made by a private arbitral tribunal, it nevertheless 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, by the courts at the place where it was made) and internationally, under such international conventions as the New York Convention.
- 1.88** An agreement to arbitrate is not only an agreement to take part in arbitral proceedings, but also an agreement to carry out any resulting arbitral award. It should not be necessary to state the obvious: that, in agreeing to arbitrate, the parties impliedly agree to carry out the award. However, such statements are made, as a precautionary measure, in many rules of arbitration. Article 34(6) of the ICC Rules, for example, states that:
- Every award shall be binding on the parties. By submitting the dispute to arbitration under the 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.
- 1.89** Most arbitral awards are carried out by the losing party or parties—reluctantly perhaps, but without any formal legal compulsion.⁹⁴ But while awards are binding, they are not always carried out voluntarily, and it may be necessary to seek enforcement by a court of law.
- 1.90** But which court of law? This is something that the winning party will need to consider. The usual method for enforcing an award is to obtain judgment on it, and this will generally mean taking enforcement proceedings either (a) in the court of the country in which the losing party resides or has its place of business, or (b) in the court of the country in which the losing party has assets that may be seized.
- 1.91** It follows that, in order to have an effective system of international arbitration, it is necessary to have an interlinking system of national systems of law, so that the courts of country A will enforce an arbitration agreement or an arbitral award

⁹³ Save for incidental matters such as the interpretation of the award or correction of obvious errors for which the tribunal remains in being for a limited period of time, and save also for those rare cases in which the tribunal may be required by a court to reconsider its decision: see Chapter 9.

⁹⁴ See PricewaterhouseCoopers and Queen Mary University, *International Arbitration: Corporate Attitudes and Practices, 2008*, available online at <http://www.arbitration.qmul.ac.uk/docs/123294.pdf>.

made in country B. For this to happen, there must be international treaties or conventions providing for the recognition and enforcement of *both* arbitration agreements and arbitral awards by the courts of those countries that are party to that treaty or convention. The most important of these conventions have already been listed: amongst them, the New York Convention and the ICSID Convention are pre-eminent.⁹⁵

(o) Summary

International 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, under 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 critical importance to the effective operation of international arbitration. **1.92**

The modern arbitral process has lost its early simplicity. It has become more complex, more legalistic, more institutionalised, and more expensive. Yet its essential features have not changed: the original element remains 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 that, if this arbitration runs its full course (that is, 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 that is binding on the parties. That 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.⁹⁶ Such an award binds the parties (subject to any right of appeal or challenge that may exist⁹⁷) and represents the final word on the dispute—and if the award is not carried out voluntarily, it may be enforced worldwide by national courts of law.⁹⁸ **1.93**

⁹⁵ These conventions are reviewed in more detail later in this chapter.

⁹⁶ 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, e.g., the UNCITRAL Rules, Art. 34(3).

⁹⁷ See Chapter 10.

⁹⁸ See Chapter 11.

B. Why Arbitrate?

(a) Introduction

- 1.94** There are many ways in which to settle a dispute. Disagreement about the correct spelling of a word can be 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 handshake may be sufficient (although to suggest this perhaps represents a triumph of hope over experience).
- 1.95** Even where commercial interests are at stake, a dispute need not necessarily lead to all-out confrontation. Initially, the opposing parties will generally attempt to settle matters by meeting and negotiating, sometimes with the assistance of an expert mediator. There may come a point, however, at which attempts at negotiation have failed, it is clear that no agreement is possible, and what is needed is a decision by an outside party, which is both binding and enforceable. The choice then is generally between arbitration before a neutral tribunal and recourse to a court of law.
- 1.96** It might well be said that if the parties wish their dispute to be decided in a manner that 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 a national court? Why has arbitration become accepted worldwide as the established way of resolving international disputes?

(b) Main reasons

- 1.97** There are two reasons of prime importance: the first is neutrality; the second is enforcement.
- 1.98** 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 its end, leads to a decision that is enforceable against the losing party not only in the place where it is made, but also internationally.

(i) Neutrality

- 1.99** Parties to an international contract usually come from different countries and so the national court of one party will be a *foreign* court for the other party. Indeed, it will be 'foreign' in almost every sense of the word: it will have its own formalities, and its own rules and procedures developed to deal with domestic matters, *not* for international commercial or investment disputes. The court 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), its own judges, and its own lawyers, accredited to the court. A party to an international contract that does *not* contain an agreement

to arbitrate may find that it is obliged, first, to commence proceedings in a foreign court, secondly, to employ lawyers other than those whom it usually employs, and thirdly, 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 sitting in court, but understanding very little of the evidence that is given or of how the case is progressing.

By contrast, a reference to arbitration means that the dispute will be determined in a neutral place of arbitration, rather than on the home ground of one party or the other. Each party will 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 such outside institution as 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 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 three, it will be a strictly 'neutral' tribunal. **1.100**

(ii) Enforcement

At the end of the arbitration (if no settlement has been reached), the arbitral tribunal will issue its decision in the form of an award. In this regard, three points should be emphasised. First, 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 a ladder of appeals, like an expensive game of 'snakes and ladders'. Thirdly, once the award has been made, it will be directly enforceable by court action, both nationally and internationally. **1.101**

In this respect, an arbitral award differs from an agreement entered into as a result of mediation or some other form of alternative dispute resolution (ADR), which is binding only 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 have much greater acceptance internationally than do treaties for the reciprocal enforcement of judgments.⁹⁹ **1.102**

⁹⁹ There is a multilateral treaty for the recognition and enforcement of court judgments made in the EU member states and Switzerland: Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgment in civil and commercial matters, OJ L 12/1, 16 January 2001 (formerly the Brussels and Lugano Conventions). The Common Market of the South (Mercado Común del Sur, or Mercosur), comprising 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 drawn up 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

(c) **Additional reasons**

1.103 There are additional reasons that are often put forward as making arbitration an attractive alternative to litigation, at least four of which are worthy of comment.

(i) *Flexibility*

1.104 So long as the parties are treated fairly, an arbitration may be tailored to meet the specific requirements of the dispute, rather than conducted in accordance with fixed procedural rules. To this flexibility of the arbitral process must be added the opportunity to choose a tribunal that is sufficiently experienced that it can 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 time and money, as well as offer them the prospect of a sensible award.

(ii) *Confidentiality*

1.105 The privacy of arbitral proceedings and the confidentiality that surrounds the process are 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 there may simply be a reluctance to have details of a commercial dispute (or some bad decision making) made the subject of adverse publicity. The once-general confidentiality of arbitral proceedings has been eroded in recent years, but it still remains a key attraction of arbitration.¹⁰⁰

(iii) *Additional powers of arbitrators*

1.106 Sometimes, an arbitral tribunal may possess greater powers than those of a judge. For example, under some systems of law or some rules of arbitration, an arbitral tribunal may be empowered to award compound interest,¹⁰¹ rather than simple interest, in cases in which the relevant court has no power to do so.¹⁰²

agreement' would be recognised and enforced in other contracting states. At time of writing, the Convention has been signed by the European Union, the United States, Mexico, and Singapore, and is due to enter into force on 1 October 2015.

¹⁰⁰ Privacy and its counterpart—confidentiality—are discussed in detail in Chapter 2. Jennifer Kirby states that the new French Law 'takes an innovative position with respect to the presumption of confidentiality in international arbitration—it eliminates it. While the new law expressly provides that, unless the parties agree otherwise, French *domestic* arbitral proceedings shall be confidential, this new law consciously avoids any such provision with respect to international arbitration': Kirby, 'Introductory note to the 2011 French Law on Arbitration' (2011) 50 ILM 258, at 259. In this context, it is worth noting that the LCIA Rules contain, in Art. 30, detailed provisions for the confidentiality of the award, the materials created for the purpose of the arbitration, and the deliberations of the tribunal. By contrast, the ICC Rules contain no such provisions (although there are confidentiality provisions for the work of the ICC Court itself).

¹⁰¹ One example is that of English law: under the Arbitration Act 1996, an arbitral tribunal is given the power to award compound interest if it thinks it appropriate to do so. Under the LCIA Rules, Art. 26(4), an arbitral tribunal may order the payment of simple *or* compound interest unless the parties have agreed otherwise.

¹⁰² See, e.g., Secomb, 'A uniform, three-step approach to interest rates in international arbitration', in Kröll, Mistalis, Perales Viscasillas, and Rogers (eds) *International Arbitration and*

(iv) *Continuity of role*

Finally, there is a useful continuity in arbitration: an arbitral tribunal is appointed to deal with one particular case, and its task is to follow that case from beginning to end. This enables the tribunal to become acquainted with the parties, their advisers, and the case, as it develops through the documents, pleadings, and evidence. Such familiarity should help to move the case along—and it may indeed facilitate a settlement. **1.107**

(d) **Is arbitration perfect?**

Is arbitration perfect? The answer is: ‘Of course not.’ Arbitration is based on principles of consent and party autonomy, and so procedures that are usual in litigation may not be available, or may not work very well, in international arbitration. Some examples of the problems to which this can give rise, and possible solutions to these problems, are given below. **1.108**

(i) *Multiparty arbitrations, joinder, and consolidation*

Parties to an arbitration may wish to add (or join) a third party who is in some way involved in the dispute, for example as an insurer or in some other capacity. It would usually make sense to add (or join) this third party, so as to resolve all outstanding disputes in the same forum—but can this be done? **1.109**

Alternatively, there may be two arbitrations between the same parties based on essentially the same facts, but with the claimant in the first arbitration being cited as the respondent in the second. It would make sense to consolidate the two arbitrations—that is, to bring them before the same arbitral tribunal—but, again, can this be done? **1.110**

Problems such as these—multiparty arbitrations, the joinder of additional parties, the consolidation of arbitrations, and so forth—have troubled the users of arbitration for many years. In the celebrated *Dutco* case,¹⁰³ there were two respondents who each wanted to nominate an arbitrator. Under the former ICC Rules, they could not do this; they were instead required to nominate one arbitrator between them. They did so, under protest—but complaint was made to the French court, which said that the right of each party to nominate an arbitrator was part of French public policy and could not be waived. In consequence, the ICC had to devise new rules to deal with such a situation. These new Rules state that where there are multiple claimants or multiple respondents and the parties are unable to agree on a method for the constitution of the arbitral tribunal, the ICC Court itself may **1.111**

International Commercial Law: Synergy, Convergence and Evolution (Kluwer Law International, 2011), pp. 431–450; Veeder, ‘Whose arbitration is it anyway?’, in Newman and Hill (eds) *The Leading Arbitrators’ Guide to International Arbitration* (2nd edn, JurisNet, 2008), p. 356.

¹⁰³ *BKMI and Siemens v Dutco*, French Cass. Civ. 1ere, 7 January 1992, [1992] Bull Civ 1. This case is discussed more fully in Chapter 2.

appoint each member of the tribunal and designate one as president.¹⁰⁴ (The LCIA Rules adopt a similar position,¹⁰⁵ except that they state that the LCIA Court *shall* appoint the arbitral tribunal, rather than that it ‘may’ do so.¹⁰⁶)

- 1.112** As international trade, commerce, and investment becomes both more complex and more global, there are an increasing number of multiparty disputes.¹⁰⁷ For example, a car manufacturer based in Germany may have contracts with suppliers in other parts of Europe, or in Asia, for the manufacture and supply of components for its cars. Any defects in a given range of cars may mean that the German manufacturer will have claims against several suppliers, as it seeks to establish liability for the defects and compensation for its losses.
- 1.113** The leading arbitral institutions are well aware of the different problems that may arise and have taken (or are taking) action to address them,¹⁰⁸ so far as this is possible within the limits of ‘party consent’. After consulting widely with business people and lawyers, the ICC introduced new Rules in 2012 in an attempt to deal with such problems. Under Article 7 of the ICC Rules, the joinder of third parties is now possible at any time up to confirmation or appointment of any arbitrator—or later, if all parties (including the third party) agree. Under Article 8, in an arbitration with multiple parties, claims may be made by one party against any other party, until signature or approval of the terms of reference¹⁰⁹—or later, if authorised

¹⁰⁴ 2012 ICC Rules, Art. 12(6). This provision of the ICC Rules, first adopted in 1998, 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 stated to be fundamental! For a useful note on ICC practice, see Whitesell, ‘Non-signatories in ICC arbitration’, in Gaillard (ed.) *International Arbitration 2006: Back to Basics?* (Kluwer International, 2007), p. 366. Other institutional rules contain similar provisions.

¹⁰⁵ LCIA Rules, Art. 8(1). Article 8(2) goes on to provide that, in such circumstances, the arbitration agreement shall be treated as a written agreement for the nomination and appointment of the arbitral tribunal by the LCIA Court alone.

¹⁰⁶ ‘May’ is the formulation adopted in the ICC Rules.

¹⁰⁷ A total of 767 requests for arbitration were filed with the ICC Court in 2013; in 2014, there were 791, of which six were for emergency measures. The number of parties in 2013 was 2,120; in 2014, 2,222.

¹⁰⁸ For a detailed discussion of joinder, see Voser, ‘Multi-party disputes and joinder of third parties’, Presented at the International Council for Commercial Arbitration (ICCA) International Arbitration Conference, Dublin, 8–10 June 2008. The ICC is not alone in allowing joinder. 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 more restrictive approach: Art. 22(1)(viii) authorises the tribunal to allow one or more third persons to be joined in the arbitration as a party, provided that the applicant and any such third person consents in writing. Under Art. 9 of the ICC Rules, claims arising out of or in connection with more than one contract may be made in a single arbitration, on certain conditions. Finally, under Art. 10 of the ICC Rules, the ICC Court may order consolidation of two or more ICC arbitrations if the parties have agreed, or if all the claims are made under the same arbitration agreement, or where the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes arise in connection with the same legal relationship, and the Court finds the arbitration agreements compatible.

¹⁰⁹ See paragraph 1.167.

by the arbitral tribunal, which will consider the nature of the proposed claims, the stage that the arbitration has reached, and other relevant circumstances.¹¹⁰

(ii) *Non-signatories*

The problem of the so-called non-signatory occurs when a person or a legal entity that is *not* a party to the arbitration agreement wishes to join in the proceedings as a claimant. It occurs more usually, however, when one or more of the existing parties wishes to *add* another party. 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 like to add the *parent* company to 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? **1.114**

While this problem is discussed in more detail later in the volume,¹¹¹ at this point it is 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,¹¹² the ‘reliance’ theory, the concept of 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 that is a mere shell and, accordingly, be treated as if it were a party to any contract made by that subsidiary). **1.115**

(iii) *Conflicting awards*

There is no system of binding precedents in international arbitration—that is, no rule that 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.¹¹³ Each award stands on its own. An arbitral tribunal that is required, for example, to interpret a policy of reinsurance may arrive at a different conclusion from that of **1.116**

¹¹⁰ See ICC Rules, Arts 8(1) and 23(4).

¹¹¹ See Chapter 2.

¹¹² The leading authority on this doctrine is *Chemical France and ors v Isover Saint Gobain* (1984) IX YBCA 131 (the *Dow Chemical* case), which is discussed in Chapter 2, at paragraphs 2.45–2.50. The doctrine is not recognised in all jurisdictions: see, e.g., *Peterson Farms Inc. v C&M Farming Ltd* [2004] EWHC 121 (Comm), at [62], in which an English court ruled that the ‘group of companies’ doctrine did not form part of the law of Arkansas (the substantive law governing the arbitration). On ‘consent’ generally, see Professor Hanatiou, who refers to the increasing complexity of modern business transactions, and argues for an approach that is pragmatic and no longer restricted to express consent, but tends to give more importance than before to the conduct of the parties: Hanatiou, ‘Consent to arbitration: Do we all share a common vision?’ (2011) 27 *Arb Intl* 539.

¹¹³ See Kaufmann-Kohler, ‘Arbitral precedent: Dream, necessity or excuse?’ The 2006 Freshfields Lecture’ (2007) 23 *Arb Intl* 357.

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.

- 1.117** The problem is a real one.¹¹⁴ One solution that has been suggested is to create a new international court for resolving disputes over the enforcement of arbitral awards. But this has been described as ‘the impossible dream’,¹¹⁵ and in cases in which different tribunals reach different conclusions on the same issues, the proposed international court would need to function, in effect, as a court of appeal rather than simply as an enforcement court. This would suit lawyers and arbitrators, who would welcome consistency of decisions, but it might not suit business people, who are looking for the solution to the particular dispute with which they are faced, rather than for the opportunity to contribute, at their own expense, to the development of the law.

(iv) Judicialisation

- 1.118** In recent years, there has been an almost endless discussion about the increasing ‘judicialisation’ of international 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’.¹¹⁶
- 1.119** The problem appears to be at its most stark in the United States,¹¹⁷ where there is a tradition of broad-ranging ‘discovery’, as well as the possibility of challenging

¹¹⁴ For instance, in *Ronald Lander v Czech Republic*, Final Award, UNCITRAL, 3 September 2001 and in *CME v Czech Republic*, Final Award, UNCITRAL, 14 March 2003, two claims brought in respect of a single 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 United States, and Sweden: see Brower, Brower II, and Sharpe, ‘The coming crisis in the global adjudication system’ (2003) 19 *Arb Intl* 424; Cremades and Madalena, ‘Parallel proceedings in international arbitration’ (2008) 24 *Arb Intl* 507. See also Professor Kaj Hobér’s masterly review: Hobér, ‘*Res judicata* and *lis pendens* in international arbitration’, in Hague Academy of International Law, *Collected Courses of the Hague Academy of International Law*, Vol. 366 (Martinus Nijhoff, 2014), pp. 99–406.

¹¹⁵ Howard M. Holtzmann, cited in Brower, Brower II, and Sharpe, ‘The coming crisis in the global adjudication system’ (2003) 19 *Arb Intl* 424, at 435.

¹¹⁶ Brower, ‘W(h)ither international commercial arbitration?’ (2008) 24 *Arb Intl* 181, at 183.

¹¹⁷ See, e.g., Seidenberg, ‘International arbitration loses its grip: Are US lawyers to blame?’, *ABA Journal*, April 2010, p. 51:

Arbitration was supposed to be the solution for international companies seeking to resolve disputes without expensive and drawn-out court battles. But it is starting to look more like the problem... Arbitration of international commercial disputes has taken on many of the characteristics of litigation in US Courts. And this has upset many companies that rely on arbitration to resolve cross-border business disputes.

See also the survey conducted by PricewaterhouseCoopers and Queen Mary University, *Corporate Choices in International Arbitration: Industry Perspectives, 2013*, available online at <http://www.arbitration.qmul.ac.uk/research/2013/index.html>, p. 22, which found that ‘several interviewees linked concerns over increases in the costs of arbitration with... encroaching judicialisation’.

arbitral decisions. The US practice of ‘discovery’ (a term that is not used in international arbitration and for which there is no real equivalent outside the United States) 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.

So far as witness testimony is concerned, witnesses may be required to give oral testimony, and to be cross-examined on 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’. So far as the production of documents is concerned, the parties to an arbitration will usually be ordered to disclose documents that are relevant and material to the issues in dispute, even if the party that has possession, custody, or control of the documents does not wish 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 emails and other electronically stored information (ESI), the time and costs involved in tracing and assembling the relevant material has increased dramatically.¹¹⁸ One US lawyer summed up the position in an article, the title of which 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.’¹¹⁹ **1.120**

This trend towards ‘judicialisation’ is not confined to the United States.¹²⁰ Arbitration has changed from the simple system of resolving disputes described earlier in this chapter to become big business. The arbitral process too has changed, from a system in which the arbitrator was expected to devise a satisfactory solution to the dispute¹²¹ to one in which the arbitrator is required to make a decision in **1.121**

¹¹⁸ The problem posed by ESI has been addressed, amongst many others, by the British Chartered Institute of Arbitrators (CIArb), with its 2008 Protocol for E-Disclosure in Arbitration. The 2010 IBA Guidelines insist upon targeted disclosure of documents, rather than warehouse discovery.

¹¹⁹ Rievman, Paper presented at a conference sponsored by the Centre for International Legal Studies, February 2005; see also Baker, ‘At what price perfect justice?’, Presented as part of a course-book for the 2009 Annual Meeting of the International Institute for Conflict Prevention and Resolution, New York, 15–16 January 2009.

¹²⁰ See, e.g., Redfern, ‘Stemming the tide of judicialisation in international arbitration’ (2008) 2 World Arb & Med Rev 21, at 24: ‘It would be comforting, at least for non US lawyers, if it could be assumed that the blight of increasing expense and delay in international arbitration is unique to the United States. It would be wrong, however, to make this assumption.’

¹²¹ 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’.

See David, *Arbitration in International Trade* (Economica, 1985), p. 29.

accordance with the law.¹²² In reaching that decision, the arbitrator must proceed judicially—giving each party a proper opportunity to present its case and treating each party equally, on pain of having the arbitral award set aside for procedural irregularity.¹²³

- 1.122** Various ways of dealing with the problem have been canvassed. Two of the most interesting proposals have been, first, a return to ‘first principles’, so that the arbitral tribunal would ask, in respect of each particular arbitration, what is the best way of dealing with this case, starting from zero,¹²⁴ and secondly, that, at the outset of the proceedings, the parties should be asked 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?

(v) *Costs*

- 1.123** International arbitration was once a relatively inexpensive method of dispute resolution. It is no longer so. There are several 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 are substantial.¹²⁵ Secondly, it may be necessary to pay the administrative fees and expenses of an arbitral institution—and these too may be substantial.¹²⁶ It may also be thought necessary to appoint a secretary or ‘administrative assistant’ 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 make use of the public facilities of the courts of law.
- 1.124** But the fees of the arbitrators and of the arbitral institutions, the charges for room hire, the costs of court reporters, and other such expenses are usually a drop in the ocean compared with the fees and expenses of the parties’ legal advisers and expert witnesses. In a major arbitration, these will run into many millions, or even tens of millions, of dollars.¹²⁷ This means that international arbitration is not likely to be

¹²² Under modern laws of arbitration and modern rules of arbitration, an arbitrator may decide *ex aequo et bono* only if the parties expressly authorise this: see paragraph 1.140.

¹²³ For instance, under New York Convention, Art. V, or Model Law, Art. 36.

¹²⁴ See, e.g., Rivkin, ‘Towards a new paradigm in international arbitration: The town elder model revisited’ (2008) 24 *Arb Intl* 3, at 378.

¹²⁵ See Chapter 4, paragraphs 4.192ff.

¹²⁶ See Chapter 4, paragraph 4.211.

¹²⁷ There are many reasons for this, including (a) the huge sums of money that are often at stake, (b) the increasing professionalism of lawyers, accountants, and others engaged in the arbitral process, with a determination to leave no stone unturned (which can—and does—lead to excessively lengthy and repetitive submissions), and (c) the increasing ‘judicialisation’ of international arbitration, which has been discussed earlier. For a helpful discussion of how such legal fees and expenses may be allocated between the parties by arbitral tribunals, see Williams and Walton, ‘Seminar in print: Costs in international arbitration’ (2014) 80 *Arbitration* 432.

cheaper than proceedings in a court of first instance unless there is a very conscious effort to make it so.¹²⁸

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, the award of the arbitrators is unlikely to be followed by a series of costly appeals to superior local courts. **1.125**

(vi) Delay

Finally, a major 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 move forward.¹²⁹ 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.¹³⁰ **1.126**

Once again, this is a problem of which the established arbitral institutions are aware. The ICC, for example, now requires arbitrators (before appointment) to confirm that they have reasonable availability,¹³¹ to consider with the parties, at a procedural conference, how best the arbitration can be conducted, without unnecessary delay or expense,¹³² and to deliver their award within six months of the signature of the terms of reference.¹³³ **1.127**

(e) Summary

As the debate about costs and delay continues, it is important to remember that the aim of international arbitration is *not* simply to determine a dispute as quickly and cheaply as possible. That could be done with the spin of a coin. The aim of **1.128**

¹²⁸ One of the objectives of this volume is to show how this can be achieved by means of skilled and effective case management.

¹²⁹ For example, under the ICDR Rules, forty-five 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 ICDR Rules, Art. 6(3).

¹³⁰ One of the reasons for delay is the workload of the chosen arbitrators, particularly if they have other professional commitments, e.g. as counsel or as university professors.

¹³¹ Article 11(2) of the 2012 ICC Rules states that:

‘Before appointment or confirmation, a prospective arbitrator shall sign a statement of acceptance, availability, impartiality and independence’. Article 5(4) of the current LCIA Rules requires a potential arbitrator to make a written declaration that he or she ‘is ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious and efficient conduct of the arbitration’.

(The arbitral institutions will need to check that such commitments are in fact honoured.)

¹³² 2012 ICC Rules, Art. 22.

¹³³ 2012 ICC Rules, Art. 30(1). In practice, extensions of time are granted and awards are rarely made within the six-month time limit.

international arbitration is to arrive at a fair and reasoned decision on a dispute, based on a proper evaluation of the relevant contract, the facts, and the law. As Professor Park has written:

Much of the criticism of arbitration's costs and delay thus tells only half the story, often with subtexts portending a cure worse than the disease. An arbitrator's main duty lies not in dictating a peace treaty, but in delivery of an accurate award that rests on a reasonable view of what happened and what the law says. Finding that reality in a fair manner does not always run quickly or smoothly. Although good case management values speed and economy, it does so with respect for the parties' interest in correct decisions. The parties have no less interest in correct decisions than in efficient proceedings. An arbitrator who makes the effort to listen before deciding will enhance both the prospect of accuracy and satisfaction of the litigant's taste for fairness. In the long run, little satisfaction will come from awards that are quick and cheap at the price of being systematically wrong.¹³⁴

- 1.129** At one time, the comparative advantages and disadvantages of international arbitration versus litigation were much debated.¹³⁵ That debate is now over: opinion has moved strongly in favour of international arbitration for the resolution of international disputes.
- 1.130** 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 business disputes.¹³⁶ The real choice is between recourse to a national court and recourse to international arbitration.
- 1.131** A party to an international contract that decides to take court proceedings will (in the absence of any agreed submission to the jurisdiction of a particular court) be obliged to have recourse to the courts of the defendant's home country, place of business, or residence.¹³⁷ To the claimant, this court (as already stated) will be 'foreign' in almost every sense of that word. If one of the parties to the contract is a state or state entity, the prospect becomes more daunting. The private party will usually have little or no knowledge of the law and practice of the national court of

¹³⁴ Park, 'Arbitration and accuracy' (2010) 1 J Intl Disp Settlement 27.

¹³⁵ For one of the most effective, and certainly the most entertaining, critiques of arbitration see Kerr, 'Arbitration v litigation: The *Macao Sardine* case', in Kerr, *As Far As I Remember* (Hart, 2002), Annex.

¹³⁶ 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 Court of Justice of the European Union (CJEU) in Luxembourg may deal with disputes between private parties under EU law, but disputes of this kind are outside the scope of this book.

¹³⁷ A national court may allow service of its proceedings abroad, 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.

the state party—and it 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 usually object to submitting to the jurisdiction of *any* foreign court.

In such situations, recourse to a neutral tribunal, in a convenient and neutral forum, is almost certainly preferable to recourse to national courts. It is plainly more attractive to establish a ‘neutral’ 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 courts of one of the parties, which may lack experience of commercial matters or which may, quite simply, be biased in favour of the local party. **1.132**

As one commentator has said: **1.133**

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 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.¹³⁸

An authoritative survey of the views of corporate counsel indicates that they agree with this analysis.¹³⁹ **1.134**

¹³⁸ Landau, ‘Arbitral lifelines: The protection of jurisdiction by arbitrators’, in van den Berg (ed.) *International Arbitration 2006: Back to Basics?* (Kluwer Law International, 2007), pp. 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: ‘[I]n the transnational environment, international arbitration is the only game. It is a *de facto* monopoly.’

¹³⁹ ‘Arbitration, because of its neutrality, gives a sense of fairness that litigation in foreign courts sometimes cannot provide’: see PricewaterhouseCoopers and Queen Mary University, *Corporate Choices in International Arbitration: Industry Perspectives, 2013*, available online at <http://www.arbitration.qmul.ac.uk/research/2013/index.html>. Arbitration was the preferred method of resolving disputes for 52 per cent of the companies surveyed. It seems that even financial institutions, which have tended to prefer recourse to national courts in order to resolve disputes, are showing an increased interest in the use of arbitration. For instance, in 2013, the International Swaps and Derivatives Association, Inc. (ISDA) published its arbitration guide, which contains model arbitration clauses: see Freeman, ‘The use of arbitration in the financial services industry’ (2015) 16 *Bus L Intl* 77.

C. Alternative Dispute Resolution

- 1.135** It is becoming commonplace for parties to provide that if a dispute arises, they should attempt to resolve it by negotiation before going to arbitration. One particular formula, frequently found in long-term agreements, provides that, in the event of a dispute arising, the parties will first endeavour to reach a settlement by negotiations ‘in good faith’, before embarking upon arbitration. The problem is that an obligation to negotiate ‘in good faith’ is nebulous.¹⁴⁰ 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’?
- 1.136** Even where negotiations are conducted in good faith, they are unlikely to succeed unless those involved are capable of looking at the crucial issues objectively—and objectivity is difficult to maintain when vital interests (and perhaps even the future of the business itself) are at stake. It is here that an impartial third party may help to rescue discussions that are at risk of going nowhere. This is why international contracts sometimes provide that, before the parties embark upon litigation or arbitration, they will endeavour to settle any dispute by some form of ADR.¹⁴¹

(a) What is meant by alternative dispute resolution?

- 1.137** 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 classified as a method of ‘alternative’ dispute resolution. It is indeed a very real alternative to the courts of law. However, the term is not always used in this wide sense. It is true that:

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

¹⁴⁰ 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, e.g. 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*’ (2003) 19 *Arb Intl* 345; Jarrosson, ‘Observations on *Poiré v Tripier*’ (2003) 19 *Arb Intl* 363. See also Kayali, ‘Enforceability of multi-tiered dispute resolution clauses’ (2010) 27 *J Intl Arb* 551.

¹⁴¹ Construction disputes invariably need to be solved rapidly, if only on a temporary basis, and so those involved in the engineering and construction industry have, with the assistance of their lawyers, developed sophisticated techniques for resolving disputes. One frequently used technique, which might be termed the ‘wedding cake approach’, involves building up ‘tiers’ of dispute resolution, from mandatory discussions at senior management level, to mediation, dispute review boards, and finally arbitration. For a valuable discussion of these procedures, see Jenkins, *International Construction Arbitration Law* (2nd edn, Wolters Kluwer, 2014), esp. chs 3 and 6.

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.¹⁴²

There are many forms of ADR, too numerous to detail here.¹⁴³ It is sufficient to note the broad distinction between methods of ADR, such as mediation and conciliation,¹⁴⁴ in which an independent third party tries to bring the disputing parties to a compromise agreement and those methods in which a binding decision is imposed upon the parties without the formalities of litigation or arbitration.¹⁴⁵ Some forms of ADR combine binding and non-binding elements, for example what is known as ‘med/arb’ (unsurprisingly) involves a combination of mediation and arbitration.¹⁴⁶ The key point to emphasise for present purposes is that, unlike other methods of ADR, international arbitration leads to a binding award that is usually not open to challenge by national courts, and which can be enforced both nationally and internationally, under instruments such as the New York Convention.

1.138

(b) *Amiables compositeurs*, equity clauses, and decisions *ex aequo et bono*

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,¹⁴⁷ that the arbitrators will decide *ex aequo et bono*. Such clauses may become more usual, since the Model Law specifically permits an arbitral tribunal to decide in accordance with equity if the parties authorise it to do so.¹⁴⁸ However,

1.139

¹⁴² Dixon, ‘Alternative dispute resolution developments in London’ (1990) 4 Intl Construction L Rev 436, at 437 (emphasis added).

¹⁴³ For a general introduction, see Jenkins, *International Construction Arbitration Law* (2nd edn, Wolters Kluwer, 2014), ch. 6. For more specialist texts see, e.g., Brown and Marriott, *ADR Principles and Practice* (3rd edn, Sweet & Maxwell/Thomson Reuters, 2011); Boule and Nestic, *Mediation: Principles, Process, Practice* (Butterworths, 2001); Newmark and Monaghan, *Butterworths Mediators on Mediation* (Gottel, 2005); Kendall, Freedman, and Farrell, *Expert Determination* (4th edn, Sweet & Maxwell, 2008).

¹⁴⁴ The terms ‘mediation’ and ‘conciliation’ are often used as if they were interchangeable. A mediator, as an independent third person, will move between the parties, listening first to one and then the other, and trying to persuade them to focus on their real interests rather than what they see as their legal rights. The role of the conciliator is to make proposals for settlement, or, in the words of the UNCITRAL Conciliation Rules, Art. 7(1), to ‘assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute’.

¹⁴⁵ The best known of these methods being expert determination, as to which see, e.g., Kendall, Freedman, and Farrell, *Expert Determination* (4th edn, Sweet & Maxwell, 2008); McHugh, ‘Expert determination’ (2008) 74 Arbitration 148.

¹⁴⁶ There are broadly two versions of this procedure. In the first procedure, the mediator becomes the arbitrator if the mediation fails, whereas in the second, if the mediation fails, the role of the mediator is terminated and the dispute is submitted to a (separate) arbitral tribunal. The second method is plainly a more satisfactory way of proceeding. Moving the dispute from a mediator to an arbitrator makes clear the distinctive functions of a *mediator*, who attempts to facilitate negotiations for a settlement, and an *arbitrator*, who issues a decision on the dispute.

¹⁴⁷ The terms are not meant to be mutually exclusive.

¹⁴⁸ Model Law, Art. 28(3); see also, e.g., the English Arbitration Act 1996, s. 46, which allows the parties to agree what ‘considerations’ should govern the substance of the dispute.

an arbitration that is conducted under the provisions of such ‘equity clauses’ will still be an arbitration and not some species of ADR.¹⁴⁹

D. What Kind of Arbitration?

(a) Introduction

1.140 Any arbitration, wherever it is conducted, is subject to the mandatory rules of the *lex arbitri*—that is, the law of the place of arbitration. Generally, these will be broad and non-specific. They will say, for instance, that the parties must be treated with equality,¹⁵⁰ but they will not set out the way in which this is to be achieved, with exchange of statements of case and defence, witness statements, disclosure of documents, and so forth. For this, more specific rules will be required. 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

1.141 Parties to an *ad hoc* arbitration may establish their own rules of procedure (so long as these rules treat the parties with equality and allow each party a reasonable opportunity of presenting its case).¹⁵¹ Alternatively, and more usually, the parties may agree that the arbitration will be conducted without involving an arbitral institution, but according to an established set of rules, such as those of UNCITRAL, which provide a sensible framework within which the tribunal and the parties may add any detailed provisions as they wish—for example rules providing for the submission of pre-trial briefs or the agreement of expert reports.

1.142 If the issues at stake are sufficiently important (and in particular if a state or state entity is involved), it may be worth negotiating and agreeing detailed rules that take into account the status of the parties and the circumstances of the particular case. For example, any right to restitution may be expressly abandoned in favour of an award of damages.¹⁵² Such specially drawn rules will generally be set out in a formal ‘submission to arbitration’, negotiated and agreed once the dispute has arisen. This submission agreement will confirm the appointment of the arbitral tribunal, set out the substantive law and the place (or ‘seat’) of the arbitration, and

¹⁴⁹ ‘Choice of law’ clauses are discussed in Chapter 3.

¹⁵⁰ See, e.g., Model Law, Art. 18.

¹⁵¹ Many important arbitrations, e.g. reinsurance disputes under the so-called Bermuda form, are regularly conducted *ad hoc*.

¹⁵² In the submission agreement, which was negotiated over a period of months and agreed by the Kuwait government and Aminoil as a basis for the *Aminoil* arbitration, the oil company gave up any claim for restitution of the oilfield that the Kuwait government had taken over.

detail any procedural rules upon which the parties have agreed for the exchange of documents, witness statements, and so forth.

(c) Ad hoc arbitration—advantages and disadvantages

(i) Advantages

One distinct advantage of an ad hoc arbitration is that it can 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 cooperation of the parties and their advisers is necessary; if such cooperation 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’. Many of the well-known arbitrations under oil concession agreements (including the *Sapphire*, *Texaco*, *BP*, *Liamco*, and *Aminoil* arbitrations) were conducted ad hoc.¹⁵³ **1.143**

In practice, ad hoc arbitrations are now usually conducted on the basis of the UNCITRAL Arbitration Rules, which the parties agree to accept as a convenient and up-to-date set of rules.¹⁵⁴ States in particular are likely to regard the UNCITRAL Rules as a preferred option, since they do not derive their authority from an arbitral organisation based in a particular country, but from the United Nations itself. **1.144**

(ii) Disadvantages

The principal disadvantage of ad hoc arbitration is that it depends for its full effectiveness on cooperation between the parties and their lawyers, supported by an adequate legal system in the place of arbitration. It is not difficult to delay arbitral proceedings, for example by refusing at the outset to appoint an arbitrator, so that there is no arbitral tribunal in existence and no agreed book of rules to say what **1.145**

¹⁵³ These cases, which involved state parties, are considered in more detail in Chapter 3.

¹⁵⁴ 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 (although quite why this should be done is another matter). The court in Singapore was faced with an arbitration clause stating that disputes should be resolved by arbitration before SIAC in accordance with the ICC Rules. The Singapore International Arbitration Centre was prepared to administer the arbitration under its rules, applying the ICC Rules to the ‘essential features the parties would like to see’ and the arbitration proceeded on this basis. The Singapore court upheld this arrangement: see *Insignia Technology Co. Ltd v Alstom Technology Ltd* [2008] SGHC 134, at [26]. More recently, in *HKL Group Co. Ltd v Rizq International Holdings Pte Ltd* [2013] SGHC 5, the Singapore High Court found that an arbitration clause in a contract that provided for disputes to be settled by arbitration in Singapore by a non-existent institution under the rules of the ICC was workable as long as the parties were able to secure the agreement of an arbitral institution in Singapore to conduct the arbitration. 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, Oceana, 2000), para. 715.

is to be done.¹⁵⁵ It will then be necessary to rely on such provisions of law as may be available to offer the necessary support.¹⁵⁶ Only when an arbitral tribunal is in existence and a set of rules has been established will an ad hoc arbitration be able to proceed if one of the parties fails or refuses to play its part in the proceedings.

(d) Institutional arbitration

- 1.146** An ‘institutional’ arbitration is one that is administered¹⁵⁷ by a specialist arbitral institution under its own rules of arbitration. There are many such institutions, some better established than others. Amongst the most well known are the ICC, ICSID, the LCIA, and the International Centre for Dispute Resolution (ICDR).¹⁵⁸ There are also regional arbitral institutions (for instance in Beijing and Cairo) and there are chambers of commerce with a well-established reputation, including those of Stockholm, Switzerland, and Vienna.¹⁵⁹
- 1.147** The rules of these arbitral institutions tend to follow a broadly similar pattern.¹⁶⁰ Some rulebooks reflect the influences of civil law (following the model of the ICC), whereas others derive greater inspiration from the common law (as exemplified by the LCIA). What is common to all sets of rules is that they are formulated specifically 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 that: ‘All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.’
- 1.148** This clause is a convenient shorthand way of incorporating a detailed book of rules into the parties’ contract, which rules will govern any arbitration that takes place under that contract. If, at some future date, one party proves reluctant to go ahead with arbitration proceedings, it will nevertheless be possible for the party or parties who wish to arbitrate 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.

¹⁵⁵ Unless it has already been agreed that the UNCITRAL Rules are to govern the proceedings.

¹⁵⁶ See Chapter 3.

¹⁵⁷ As a further refinement, it should be mentioned that an arbitration may be wholly administered or semi-administered. An example of wholly administered arbitration is that of the ICSID, whereby 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 CI Arb Rules: 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 forth.

¹⁵⁸ As explained later, this is the international division of the AAA.

¹⁵⁹ 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.

¹⁶⁰ But they may also diverge, e.g. by providing for ‘fast-track’ or expedited arbitration, as under the Swiss Rules, or for joinder of parties, as under the LCIA Rules.

(e) **Institutional arbitration—advantages and disadvantages**

(i) *Advantages*

Rules laid down by the established arbitral institutions will usually have been proven to work well in practice. They also will generally have undergone periodic revision in consultation with experienced practitioners, to take account of new developments in the law and practice of international arbitration. The rules themselves are generally set out in a small booklet, and parties who agree to submit any dispute to arbitration in accordance with the rules of a named institution effectively incorporate that institution's 'rulebook' into their arbitration agreement. **1.149**

This automatic incorporation of an established 'rulebook' is one of the principal advantages of institutional arbitration. Suppose 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 rulebook will provide for such a situation. It will also contain provisions under which the arbitration may proceed in the event of default by one of the parties. Article 26(2) of the ICC Rules, for instance, stipulates: '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.' A rule such as this, which is also to be found in other institutional rules, as well as the UNCITRAL Arbitration Rules themselves, is extremely valuable to a tribunal (and to a party) faced with a defaulting party. It means that the arbitration may proceed, and an award may be made even if a party fails or refuses to take part in the arbitration. **1.150**

Another advantage of institutional arbitration is that most arbitral institutions provide specialist 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. **1.151**

A further feature of institutional arbitration is the situation in which the institution itself reviews the arbitral tribunal's award in draft form before sending it to the parties. A review of this kind, which is built into the ICC Rules, serves as a measure of 'quality control'. The ICC does not comment on the substance of the award and it does not interfere with the decision of the arbitral tribunal—but it does ensure that the tribunal has dealt with all of the issues before it, and that the award covers such matters as interest and costs (which are frequently forgotten, even by experienced arbitrators). The ICC's practice of 'scrutinising' awards in draft form is sometimes criticised as merely adding to the time taken to issue a tribunal's award. Its value, however, is well illustrated in a case described by Jennifer Kirby, a former deputy secretary general of the ICC Court, in which the ICC Secretariat pointed out to the arbitral tribunal that it had failed to take into account the fact that the **1.152**

contract contained an agreed limit on the amount of consequential damages that it could award.¹⁶¹

- 1.153** Finally, the assistance that an arbitral institution can give to the parties and their counsel in the course of the arbitral proceedings is appreciable. Even lawyers who are experienced in the conduct of arbitrations run into problems that they are grateful to discuss with the institution's secretariat.

(ii) Disadvantages

- 1.154** Under some institutional rules,¹⁶² the parties pay a fixed fee in advance for the 'costs of the arbitration'—that is, the fees and expenses of the institution and of the arbitral tribunal. This fixed payment 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 arbitration, it may be less expensive to conduct the arbitration *ad hoc*.¹⁶³ On the other hand, the ability to pay a fixed amount 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).¹⁶⁴
- 1.155** The need to process certain steps in the arbitral proceedings through the machinery of an arbitral institution inevitably leads to some 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, so setting 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) that involves consideration of voluminous documents and in which the claim that is put forward may, in fact, prove to be a whole series of claims on a series of different grounds.
- 1.156** 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 that a state or state entity needs to obtain approval of important decisions, through its own official channels. In the ICC Rules, for

¹⁶¹ See Kirby, 'What is an award, anyway?' (2014) 31 J Intl Arb 475.

¹⁶² For example, those of the ICC and the Cairo regional centre.

¹⁶³ This may be done by agreement of the parties, even if the arbitration clause in the original agreement provided for institutional arbitration. To sound a cautionary note, however, such a course can lead to complete disaster, leaving the claimant without any effective remedy; see, e.g., ICC Case No. 3383 (1982) VII YBCA 119.

¹⁶⁴ The fixed amount itself takes no account of the time actually spent by the arbitrators, and so the fee paid to an arbitrator, if calculated at an hourly rate, may vary from as little as US\$60 per hour to as much as US\$1,000 or more.

example, the time limit for rendering a final award is six months, although this may be (and generally is) extended by the ICC.¹⁶⁵

(f) Arbitral institutions

An increasing number of institutions administer, or claim to administer, arbitrations. Some serve a particular trade or industry;¹⁶⁶ others cater primarily for a particular country or geographic region. Each has its own set of rules, often based on the UNCITRAL Rules.¹⁶⁷ Each centre also generally has its own model form of arbitration clause. It is sensible (but not essential) to use one of these model forms if institutional arbitration is to be adopted. **1.157**

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 considerations that 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. **1.158**

(i) What to look for in an arbitral institution

An arbitral institution will, of necessity, charge fees to cover the expenses of its premises, its staff, its publications, and so on. Payment starts only 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. Since those fees will add to the cost of arbitration (in some cases substantially), parties and their lawyers should know what to look for in any given arbitral institution. It is suggested that the basic requirements should include the following. **1.159**

Permanency Disputes between parties to an agreement frequently arise many years after the agreement was made, particularly with major projects (such as the construction of a dam or a motorway) or long-term contracts (such as for the supply of liquefied natural gas over a period of years). It is important that the institution named in the arbitration clause should be a genuine institution¹⁶⁸ **1.160**

¹⁶⁵ 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* (Grotius, 1990), p. 204.

¹⁶⁶ The London Maritime Arbitration Association (LMAA) 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: see term 12(b) of the LMAA Terms 2012.

¹⁶⁷ For example, the Swiss Rules state explicitly that they are based on the UNCITRAL Rules, with divergences where this was considered useful.

¹⁶⁸ 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' (NAC), a so-called arbitration service that 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

and that it should still be in existence when the dispute arises;¹⁶⁹ otherwise, the arbitration agreement may prove, in the words of the New York Convention, to be ‘inoperative or incapable of being performed’. In that case, the only recourse (if any) will be to a national court (which is precisely what the arbitration agreement was designed to avoid).

- 1.161** It may well be said that this advice militates against the creation of new arbitral institutions and is unfairly biased in favour of established institutions. That is true—but the lawyer who advises a 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.
- 1.162 Modern rules of arbitration** The practice of international arbitration has changed rapidly in recent years, as new laws, rules, and procedures come into existence. The rules of arbitral institutions should not rest in some comfortable time warp. They should be brought up to date to reflect modern practice. 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.¹⁷⁰
- 1.163 Specialised staff** Some arbitral institutions adopt a ‘hands-on’ approach to the conduct of arbitrations under their rules; others are content to leave matters to the arbitral tribunals appointed by them, whilst keeping an eye on the general progress of the arbitration. Whatever role the arbitral institution plays, it needs specialised—and often multilingual—staff. Their duties are likely to be many and varied, including not only explaining the rules, making sure that time limits are observed, collecting fees, arranging visas, and reserving accommodation, but also advising on appropriate procedures by reference to past experience.
- 1.164 Reasonable charges** Some arbitral institutions assess their own administrative fees and expenses, and the fees payable to the arbitral tribunal, by reference to a

eventually obtained an injunction against the NAC to restrain this activity: see Rau, ‘Arbitral jurisdiction and the dimensions of “consent”’ (2008) 24 *Arb Intl* 204, at n. 19.

¹⁶⁹ In *Suzhou Canadian Solar Inc. v LDK Solar Co. Ltd.*, May 2013, unreported, a Chinese court refused enforcement of an award issued by the former Shanghai subcommission of the China International Economic and Trade Arbitration Commission (CIETAC), following its break away from CIETAC to form a separate arbitral institution, on the basis that the parties had not consented to have their arbitration administered by a different arbitration commission from that specified in their contract.

¹⁷⁰ UNCITRAL published revised Rules in 2010; the ICC issued new rules effective from 1 January 2012, after a widespread consultation process. Other institutions have followed suit: the Swiss Rules were updated in 2012, as were the SIAC Rules, and those of the Hong Kong International Arbitration Centre in 2013. For a review of the revised rules of the ICC, UNCITRAL, CIETAC, and the Vienna International Arbitration Centre (VIAC), see the articles in (2012) 15(6) *Intl Arb L Rev*. The LCIA Rules, which dated from 1 January 1998, have also been revised, with new Rules becoming effective on 1 October 2014.

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 likely 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).

(ii) *Leading arbitral institutions*

There are many arbitral institutions in the world, most, if not all, of which are equipped with their own rulebook and administrative staff, which may vary in number from one or two to fifty or more. **1.165**

One of the world's leading international institutions is the ICC, which was established in Paris in 1923. Arbitrations under the ICC Rules are administered by a highly skilled, multilingual Secretariat, under the supervision of the ICC Court of Arbitration. However, as previously mentioned, the ICC Court is not a court of law; it is, in effect, the administrative body for ICC arbitrations, with members from all over the world.¹⁷¹ Two special features of ICC arbitration are, first, the requirement for terms of reference to be drawn up at the outset of the proceedings, and secondly (as already touched upon), the Court's scrutiny of draft awards, to ensure that they are adequately reasoned and deal with all of the issues in the arbitration, including interest and costs.¹⁷² **1.166**

The AAA, which administers a considerable number of 'domestic' arbitrations within the United States (including, for example, labour disputes) also administers inter-state arbitrations.¹⁷³ In order to cope with the increasing number of such arbitrations, the AAA established the ICDR, which is based in the Irish Republic. **1.167**

International arbitral institutions have also come into prominence in Asia. The China International Economic and Trade Arbitration Centre (CIETAC) was **1.168**

¹⁷¹ In *SNF SAS v Chambre de Commerce Internationale*, Paris Cour d'Appel, 1ère Chambre, section C, 22 January 2009, it was held that the ICC, and not the court, possessed legal personality and was subject to French law, being based in Paris.

¹⁷² There is an abundance of literature on the work of the ICC. The leading authorities are Craig, Park, and Paulsson, *International Chamber of Commerce Arbitration* (3rd edn, Oceana, 2000); Derains and Schwarz, *A Guide to the New ICC Rules of Arbitration* (2nd edn, Kluwer Law International, 2005); Schäffer, Verbist, and Imhoos, *ICC Arbitration in Practice* (Kluwer Law International, 2005). On the 2012 Rules, see Fry, Greenberg, and Mazza, *The Secretariat's Guide to ICC Arbitration* (ICC, 2012); Grierson and van Hooft, *Arbitrating under the 2012 ICC Rules* (Kluwer, 2012). In relation to the scrutiny of awards by the ICC Court, see paragraph 1.152.

¹⁷³ In addition to administering arbitrations under its own rules, the AAA also administers Inter-American Commercial Arbitration Commission (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.

established in Beijing in April 1956 and has a regional arbitration centre in Hong Kong, which was established in 1985. The current CIETAC Arbitration Rules (the 'CIETAC Rules'), which came into force in May 2012, constitute a modern set of rules that is consistent with the internationalisation of Chinese arbitral practice and procedure.

1.169 A few years later, in 1991, SIAC was established in Singapore to provide a dispute resolution centre for Asia. Singapore's law on arbitration is based on the Model Law, and SIAC maintains a list of experienced arbitrators drawn from all parts of the world, from whom the parties may choose 'their' arbitrator, if they so wish. The revised SIAC Arbitration Rules, which came into effect on 1 April 2013, again constitute a complete modern set of rules.

1.170 Finally, mention must be made of the LCIA, which owes its origins to the London Chamber of Arbitration, founded on 23 November 1892.¹⁷⁴ At the time, it was said that:

The chamber is to have all the virtues that 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.¹⁷⁵

1.171 The LCIA has a relatively small administrative staff,¹⁷⁶ as compared to the ICC, for instance, but its rules are drawn in more detail than those of the ICC.¹⁷⁷ It has an important international caseload, including cases from Russia and countries within the former Russian confederation.

1.172 After a long and difficult gestation, the LCIA issued revised Rules to replace the previous 1998 Rules. These revised Rules, which came into effect in October 2014, will no doubt be the subject of detailed review, commentary, and criticism as they are applied in practice. Some of the language used would delight a Chancery lawyer practising at the time of Charles Dickens—the Preamble, for instance, refers to any agreement to arbitrate 'howsoever made', which provides 'in whatsoever manner' for arbitration under the LCIA Rules—but nevertheless the spirit of the 2014 Rules is refreshingly modern, making it evident that the drafting was carried out by lawyers who were well acquainted with the latest

¹⁷⁴ For the history of the LCIA, see Kerr, 'The London Court of International Arbitration 1892–1992' (1992) 8 *Arb Intl* 317; Delvolvé, 'Le centenaire de la LCIA (London Court of International Arbitration)' [1993] *Rev Arb* 599; Kerr, 'London Court of International Arbitration' (1996) 7 *ICCA Congress Series* 213.

¹⁷⁵ Manson (1893) IX *LQR*, cited in Veeder and Dye, 'Lord Bramwell's Arbitration Code' (1992) 8 *Arb Intl* 330.

¹⁷⁶ 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.

¹⁷⁷ For a 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. For a commentary on the LCIA's 2014 Revised Rules, see Wade and Clauchy, *Commentary on the LCIA Arbitration Rules 2014* (Sweet & Maxwell, 2015).

developments in international arbitration and conscious of the justified concerns of business and other users.

There is explicit recognition of current methods of communication, making it clear (for instance) that a request for arbitration and all of its accompanying documents may be submitted in electronic form,¹⁷⁸ and that similar provisions apply to the response and indeed to communications generally.¹⁷⁹ There is recognition also of criticisms that are frequently expressed as to the time that arbitral proceedings often take and the costs involved. **1.173**

One way of speeding up the arbitral process is to provide for expedited arbitrations, as discussed earlier in this chapter. The LCIA Rules do not take this route. However, as in the previous Rules, they do provide for the expedited formation of the arbitral tribunal. They also impose, as has the ICC, a new requirement on a potential arbitrator to confirm that he or she is 'ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious and efficient conduct of the arbitration'.¹⁸⁰ In addition, parties and arbitrators are 'encouraged' to make contact with each other, within twenty-one days of notice of formation of the tribunal, so as to discuss and agree how the arbitration is to be conducted.¹⁸¹ And when it comes to issuing a procedural order, the tribunal is under a newly articulated duty to provide for an 'expeditious means for the final resolution of the parties' dispute'.¹⁸² **1.174**

The parties themselves are expected to do their best to make the proceedings run smoothly and efficiently. Failure to do so may result in one or other of them being sanctioned by a ruling on costs since, in assessing the amount to be awarded for 'legal costs' (that is, the legal and other expenses incurred by a party), the tribunal may take into account 'any non-co-operation resulting in undue delay and unnecessary expense'.¹⁸³ **1.175**

Sometimes, one of the parties to an arbitration agreement may need to seek interim relief *before* the arbitral tribunal is established. There may, for example, be good reason to believe that evidence is likely to be destroyed or assets liquidated before the arbitral proceedings can begin. The usual remedy in such cases is for the concerned party to apply to the appropriate court for a protective order, and it is generally recognised that such an application does not constitute a breach of the agreement to submit disputes to arbitration.¹⁸⁴ However, a new means of recourse has been established. **1.176**

¹⁷⁸ LCIA 2014 Revised Rules, Art. 1.

¹⁷⁹ LCIA 2014 Revised Rules, Arts 2 and 4.

¹⁸⁰ LCIA 2014 Revised Rules, Art. 5(4).

¹⁸¹ LCIA 2014 Revised Rules, Art. 14(1) and (2).

¹⁸² LCIA 2014 Revised Rules, Art. 14(4)(ii).

¹⁸³ LCIA 2014 Revised Rules, Art. 28(4).

¹⁸⁴ See, e.g., UNCITRAL Arbitration Rules, Art. 26(9), which provides that a request for interim measures addressed to a judicial authority 'shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement'.

- 1.177** In the 2012 revision of its Rules, the ICC made detailed provision for the appointment of an ‘emergency arbitrator’ to whom applications for interim or conservatory relief may be made before the arbitral tribunal itself is established.¹⁸⁵ The intention is that, when justified, an ‘emergency arbitrator’ will be appointed within a matter of days, will immediately consider the parties’ arguments, and will make his or her order within a matter of weeks. The LCIA has also brought in new Rules providing for the appointment of an ‘emergency arbitrator’ in circumstances in which this is justified.¹⁸⁶ The detailed provisions for ‘emergency arbitrator’ differ as between the two arbitral institutions, but both agree that the parties may ‘opt out’ of the emergency arbitrator rules,¹⁸⁷ and that any order of the emergency arbitrator may be confirmed, varied, or terminated by the arbitral tribunal, once it is constituted.¹⁸⁸
- 1.178** More controversially, the LCIA Rules entitle the arbitral tribunal to exercise a measure of control over the ‘legal representatives’ of the parties. A new, longer, section of the Rules is devoted to ‘Legal representatives’,¹⁸⁹ replacing the former short section that referred to ‘party representatives’, who could be either ‘legal practitioners or any other representatives’. This new section provides that, before the tribunal’s formation, the registrar of the LCIA may request written confirmation of the names and addresses of each party’s legal representatives in the arbitration. The point of this is to avoid any challenge to an arbitrator on the basis that he or she is not independent because of some perceived connection or association with a legal representative. Once the tribunal is formed, any intended change in a party’s legal representation must be notified to all concerned and is subject to the approval of the tribunal. If the tribunal considers that the proposed change of legal representation might ‘compromise the composition of the Arbitral Tribunal’¹⁹⁰—or, in plain English, lead to challenge of an arbitrator—the tribunal may refuse to approve the proposed change.
- 1.179** A further measure of control by the tribunal over a party’s legal representatives is provided by the Annex to the LCIA Rules. The Annex emulates the IBA Guidelines on Party Representation in International Arbitration, which, in their own words, seek to preserve ‘the integrity and fairness of the arbitral proceedings’. The object of both sets of guidelines is indeed to achieve a fair hearing, and to ‘level the playing field’ as between lawyers from different legal backgrounds and traditions—but whereas the IBA Guidelines apply only if the parties to an arbitration choose to adopt them, the guidelines in the Annex to the LCIA Rules are mandatory. Under Article 18(5) of the LCIA Rules, each party to the arbitration *must* ensure that all

¹⁸⁵ ICC Rules, Art. 29 and Appendix V.

¹⁸⁶ LCIA 2014 Revised Rules, Art. 9B.

¹⁸⁷ ICC Rules, Art. 29(6)(b); LCIA Rules, Art. 9(14).

¹⁸⁸ ICC Rules, Art. 29(3); LCIA Rules, Art. 9(11).

¹⁸⁹ LCIA Rules, Art. 18.

¹⁹⁰ An example would be that of the arbitrator and the potential new legal representative coming from the same chambers or having some other kind of professional relationship.

of its legal representatives appearing by name before the tribunal have agreed to comply with the guidelines contained in the Annex.

The guidelines themselves warn, for instance, against repeated challenges to an arbitrator's appointment or to the jurisdiction of the arbitral tribunal; like the IBA guidelines, they also warn against knowingly making false statements, or putting forward false evidence, or concealing from the tribunal a document of which the tribunal has ordered production. Any failure of compliance by a legal representative may be sanctioned by (a) a written reprimand, (b) a written caution as to future conduct in the arbitration, and (c) 'any other measure necessary to fulfil within the arbitration the general duties required of the tribunal'—namely, to act fairly and impartially, and to adopt procedures that will avoid unnecessary delay and expense. **1.180**

It will be interesting to see to what extent arbitrators (who, broadly speaking, depend for appointment upon the parties) will be prepared to impose cost or other sanctions on a party or its legal representative for conduct that may have added to the expense of the proceedings or delayed bringing them to a conclusion. There are obviously times when each party may be said to be at fault, for example by putting forward arguments that have little or no chance of success, but it is not always possible to point the finger of blame at one party alone. Professor Park, a former president of the LCIA, recognises that the availability of sanctions to promote compliance with professional guidelines 'will prove a challenge', and on the issue of guidelines generally, he concludes: 'In evaluating whether professional guidelines will make arbitration better or worse, the arbitration community must, for now at least, put the matter into a box labelled "Awaiting Further Light".'¹⁹¹ **1.181**

(g) Arbitrations involving a state

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 certainly prefer to submit to arbitration as a 'neutral' process, rather than to the courts of the state with which it is in dispute. **1.182**

Many factors have 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 that a refusal to go ahead with arbitration might have on relations with the state to which the foreign claimant belongs.¹⁹² There are economic considerations, such as the loss of foreign investment that a refusal to arbitrate might bring **1.183**

¹⁹¹ Park, 'A fair fight: Professional guidelines in international arbitration' (2014) 30 *Arb Intl* 579.

¹⁹² Investor–state arbitrations are dealt with in Chapter 8.

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.¹⁹³

- 1.184** It is sometimes said that the right of a state to claim immunity from legal proceedings forms part of its sovereign 'dignity'. However, as a well-known English judge once 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.'¹⁹⁴
- 1.185** 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.¹⁹⁵ There are, however, two institutions that are usually concerned only with disputes in which one of the parties is a state or state entity: ICSID in Washington DC and the Permanent Court of Arbitration (PCA) at The Hague.

(i) International Centre for the Settlement of Investment Disputes

- 1.186** The International Centre for the Settlement of Investment Disputes was established by the ICSID Convention and is based at the principal office of the World Bank in Washington. This convention, which is sometimes also known as the 'ICSID 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 governments to take up their case at an inter-state level, under the principle of 'diplomatic protection'. Instead, the ICSID Convention established a system under which individuals and corporations could demand redress directly against a foreign state by way of conciliation or arbitration.
- 1.187** It was only with the advent of BITs and such intergovernmental treaties 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 names and on their own behalves. This was a major breakthrough. As one commentator 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

¹⁹³ 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 Chapter 3. The Libyan government declined to take part in the arbitrations and so its case went if not unconsidered, at least unargued.

¹⁹⁴ *Rahimtoola v The Nizam of Hyderabad* [1958] AC 379, at 418 *per* Lord Denning.

¹⁹⁵ A number of arbitrations involving states or state entities take place under the ICC Rules. In 2012, the percentage of cases involving a state brought before the ICC was 9.9 per cent. However, PricewaterhouseCoopers and Queen Mary University, *International Arbitration: Corporate Attitudes and Practices, 2008*, available online at <http://www.arbitration.qmul.ac.uk/docs/123294.pdf>, states that 59 per cent of the participating arbitral institutions indicated that less than 25 per cent of their awards are rendered against states.

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.¹⁹⁶

An ICSID arbitration is truly 'delocalised' or 'denationalised' because it is governed by an international treaty, rather than by a national law. The Centre began life quietly, but what has been described as a 'tidal wave' of arbitrations between investors and states has led to a dramatic increase in its workload.¹⁹⁷ **1.188**

(ii) *Permanent Court of Arbitration*

The PCA was established by the Convention for the Pacific Settlement of International Disputes, concluded at The Hague (hence known as the 'Hague Convention') 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'.¹⁹⁸ There was no 'real and durable peace', but some major inter-state disputes are, and have been, settled by arbitration.¹⁹⁹ In 1935, the PCA administered its first commercial arbitration between a private party and a state.²⁰⁰ The PCA is not a court, as such, but an administrative body, with a list of potential arbitrators. **1.189**

Over recent years, the Secretariat of 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. Ad hoc and other tribunals may also take advantage of the established facilities of the Peace Palace at The Hague.²⁰¹ **1.190**

E. Sovereign States, Claims Commissions, and Tribunals

The so-called Jay Treaty of 1794,²⁰² concluded between the United States and Britain following the American War of Independence, represented a 'new starting **1.191**

¹⁹⁶ Lauterpacht, 'Foreword', in Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2001), pp. xi–xii.

¹⁹⁷ As at 31 December 2013, ICSID had registered 459 cases under the ICSID Convention and Additional Facility Rules. The role of ICSID in such arbitrations is discussed in Chapter 8.

¹⁹⁸ Holls, *The Peace Conference at The Hague* (Macmillan, 1900), pp. 8–9.

¹⁹⁹ See Merrills, 'The contribution of the Permanent Court of Arbitration to international law and to the settlement of disputes by peaceful means', in Hamilton, Requena, van Scheltinga, and Shifman (eds) *The Permanent Court of Arbitration: International Arbitration and Dispute Resolution, Summaries of Awards, Settlement Agreements and Reports* (Kluwer, 1999), pp. 3–27.

²⁰⁰ *Radio Corporation of America v China* (1941) 8 ILR 26.

²⁰¹ See the official PCA website online at <http://www.pca-cpa.org>.

²⁰² This was a general treaty of friendship, commerce, and navigation. It was called the 'Jay Treaty' after John Jay, the American Secretary of State.

point for the development of international arbitration'.²⁰³ The Jay Treaty 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 a 'neutral' president chosen by agreement or by drawing lots.

- 1.192** However, it was not until the *Alabama Claims* arbitration, almost a century later, that further progress was made towards the modern system of international arbitration, and again this was on an ad hoc basis, with the United States and Britain again as parties. The *Alabama Claims* arbitration, which took place in Geneva in 1871–72, arose because the British government did not prevent the *Alabama* and other vessels built in British yards from joining the US Civil War on the side of the southern states. The United States 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.'²⁰⁴
- 1.193** Arbitration, as already indicated, was an important part of the Hague 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, '[a]rbitration 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'.
- 1.194** This conclusion led first to the establishment at The Hague of the PCA and then a 'Permanent Court of Justice', which, as a standing judicial tribunal, adjudicated upon disputes that the states concerned were prepared to submit to it. In 1945, following the Second World War, the International Court of Justice (ICJ) was founded, as the successor to the Permanent Court of Justice and the principal judicial organ of the United Nations, also based at the Peace Palace in The Hague.
- 1.195** It is the Statute of the ICJ that serves as 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) of the Statute states:

1. The Court, whose function is to decide in accordance with international law^[205] such disputes as are submitted to it, shall apply:
 - (a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting States;

²⁰³ For a full account of the Jay Treaty and of mixed commissions, see Simpson and Fox, *International Arbitration* (Stevens & Sons, 1959), p. 1.

²⁰⁴ *Ibid.*, at p. 8. The United Kingdom was required to pay US\$15.5 million by way of compensation—a considerable sum at that time.

²⁰⁵ 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.

- (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.

The practice of appointing ‘mixed commissions’ to resolve disputes in which sovereign states are involved 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–United States Claims Tribunal,²⁰⁶ the United Nations Compensation Commission (UNCC),²⁰⁷ and the Claims Resolution Tribunal for Dormant Accounts in Switzerland (the ‘Holocaust Tribunals’).²⁰⁸ 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–United States Claims Tribunal, which shows to advantage the UNCITRAL Rules in action and which, more importantly, demonstrates that arbitration has an important role to play as part of an overall political settlement between states. **1.196**

F. Regulation of International Arbitration

(a) Introduction

A national or ‘domestic’ arbitration—that is, an arbitration between individuals, corporations, or entities resident in the same country—will usually involve only the domestic law of that country. International arbitration is different. As Sir Robert Jennings, former president of the ICJ, said in the preface to the first edition of this book: **1.197**

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.

In practice this means, as already stated, that international arbitration depends for its effectiveness upon the support of different national systems of law, and in particular upon (a) the arbitration law of the country which is the place (or ‘seat’) **1.198**

²⁰⁶ This was established, following the release of American hostages in Iran, to deal with claims against Iran by US claimants.

²⁰⁷ This was established to resolve the millions of claims resulting from the invasion of Kuwait by Iraq in 1990, which it did commendably despite its necessarily ‘mass production’ approach.

²⁰⁸ This was established to deal with claims of the Holocaust victims and their successors.

of the arbitration, and (b) the law of the country or countries in which recognition and enforcement of the arbitral tribunal's award is sought.

(b) Role of national systems of law

- 1.199** An understanding of the interplay between the private arbitral process and the different national systems of law that may impinge upon that process is fundamental to a proper understanding of international arbitration. This interplay may take place at almost any phase of the arbitral process. It may be necessary at the outset of an arbitration 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).
- 1.200** During the course of the arbitration, it may become necessary for a party to apply to the relevant court for assistance that it is empowered to give, for example the blocking of a bank account or the seizure of assets to prevent their disappearance.
- 1.201** When an award has been made, the losing party may seek to challenge it²⁰⁹ on the basis that the arbitral tribunal exceeded its jurisdiction or on some other legally recognised ground. If the challenge succeeds, the award will either be amended or set aside completely.²¹⁰ By contrast, the winning party may need to apply to a national court for recognition and enforcement of the award²¹¹ in a state (or states) in which the losing party has (or is believed to have) assets that can be sequestered.

(c) State participation in the arbitral process

- 1.202** States that recognise international arbitration as a valid method of resolving international disputes are generally 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 a measure of 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.
- 1.203** 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

²⁰⁹ Generally before courts of the place of arbitration.

²¹⁰ See Chapter 10.

²¹¹ See Chapter 11.

the conduct of those arbitral tribunals—if only to ensure that certain minimum standards of justice are met, particularly in procedural matters.²¹²

As to the second proposition, it is generally accepted that states that 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.²¹³ **1.204**

The dependence of the international arbitral process upon national systems of law should be recognised, but not exaggerated. Across the world, there is a growing harmonisation of the national laws that govern both the conduct of international arbitrations, and the recognition and enforcement of international awards. This process of harmonisation was inspired by the New York Convention and has been given fresh impetus by the Model Law. Additionally, the importance of international arbitration, in terms both of its contribution to global trade and of the economic benefit that arbitrations can bring to the host country, is increasingly recognised, with new arbitration centres being established in different parts of the world. Some 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.²¹⁴ **1.205**

(d) Role of international conventions and the Model Law

The most effective method of creating a ‘universal’ 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 that, while they may differ in their wording, have as their common objective the international enforcement of arbitration agreements and of arbitral awards. **1.206**

²¹² See Kerr, ‘Arbitration and the courts: The UNCITRAL Model Law’ (1984) 50 *Arbitration* 3, at 14:

[T]here 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.

²¹³ For further discussion of ‘arbitrability’ and public policy, see Chapter 3.

²¹⁴ Mustill, ‘The history of international commercial arbitration: A sketch’, in Newman and Hill (eds) *The Leading Arbitrators’ Guide to International Arbitration* (2nd edn, JurisNet, 2008), p. 17:

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...

1.207 The first such convention, in modern times, was the Montevideo Convention.²¹⁵ This was established in 1889, and provided for the recognition and enforcement of arbitration agreements between certain Latin American states.²¹⁶ 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 Geneva Convention of 1927.

(i) *Geneva Protocol of 1923*

1.208 The 1923 Geneva Protocol had two objectives. Its first and main 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 arbitration rather than through the courts. This was done, in effect, by requiring national courts to refuse to entertain legal proceedings brought in breach of an agreement to arbitrate. 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.

1.209 The Geneva Protocol is now a spent force. It is still worthy of note, however, since its two objectives—the enforcement of both arbitration agreements and arbitral awards—remain the objectives of the New York Convention and of the Model Law.

(ii) *Geneva Convention of 1927*

1.210 The 1927 Geneva Convention²¹⁷ was intended to widen the scope of the 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).²¹⁸ However, a party seeking enforcement of an award under the 1927 Geneva Convention had to *prove* the conditions necessary for enforcement. This led to what became known as the problem of ‘double exequatur’: to show that the award had become final in its country of origin, the successful party was often obliged to seek a declaration (an exequatur) in the courts of the country in which the arbitration took place to the effect that the award was enforceable in that country before it could go ahead and enforce the award (a second exequatur) in the courts of the place of enforcement.

²¹⁵ Treaty concerning the Union of South American States in respect of Procedural Law, signed at Montevideo on 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*, Vol. II (UN, 1973), p. 5.

²¹⁶ Montevideo Convention, Arts 5–7.

²¹⁷ Convention for the Execution of Foreign Arbitral Awards, signed at Geneva on 26 September 1927.

²¹⁸ The states that have adhered to the Geneva Convention are substantially those that adhered to the Geneva Protocol (with some notable omissions, such as Brazil, Norway, and Poland).

(iii) *New York Convention of 1958*

The New York Convention is one of the cornerstones of international arbitration.²¹⁹ **1.211** Indeed, it is principally because of the New York Convention that international arbitration has become the established method of resolving international 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 145 parties, including Latin American states such as Argentina, Colombia, Mexico, and Venezuela, and Arab states such as Saudi Arabia, Egypt, Kuwait, and Dubai.

The New York Convention provides a simpler and more effective method of obtaining recognition and enforcement of foreign arbitral awards than was available under the 1927 Geneva Convention.²²⁰ The title of the New York Convention suggests that it is concerned *only* with the recognition and enforcement of foreign arbitral awards. This is misleading. The Convention is also concerned with arbitration agreements, as is clear, for instance, in Article II—and indeed in other Articles, such as Articles IV(1)(b) and V(1)(a). **1.212**

In order to enforce arbitration agreements, the New York Convention adopts the technique found in the 1923 Geneva Protocol. The courts of contracting states are required to refuse to allow a dispute that is subject to an arbitration agreement to be litigated before them if an objection to such litigation is raised by any party to the arbitration agreement.²²¹ **1.213**

Courts of different countries have differed (and continue to differ) in their interpretation of the New York Convention.²²² This is often so for local, purely political, reasons, and thus the Convention itself, which was made for a simpler, less 'globalised', world, shows its age.²²³ **1.214**

(iv) *Conventions after 1958*

The New York Convention²²⁴ represents a vital stage in the shaping of modern international arbitration. No convention since 1958 has had the same impact. **1.215**

²¹⁹ In 1953, the ICC proposed a new treaty to govern international arbitration. 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. 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 equally unacceptable in more modern times, when the Model Law was formulated.

²²⁰ The New York Convention replaces the 1923 Geneva Protocol and the 1927 Geneva Convention as between states that are parties to both: see Art. VII(2).

²²¹ New York Convention, Art. 11(3).

²²² The ICCA's *Yearbook of Commercial Arbitration* (YBCA) reports, each year, court decisions made in different countries on the interpretation and application of the New York Convention, translated into English where necessary.

²²³ Such as in the 'writing requirement'.

²²⁴ The recognition and enforcement of awards under the New York Convention, and the grounds for refusal of such recognition and enforcement, are discussed in Chapters 10 and 11.

There are, however, other treaties and conventions, including original conventions, which may enable recognition and enforcement of arbitral awards in appropriate cases. These conventions are discussed in Chapter 11.

(v) Bilateral investment treaties

- 1.216** In the context of international treaties and conventions, a brief mention must be made of BITs. Historically, states doing business with each other often entered into ‘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 more commonly known.²²⁵
- 1.217** The ‘classic’ agreement to arbitrate has already been described as one that is made between the parties themselves, either by means of an arbitration clause in their contract or by a subsequent submission to arbitration. The position is different in a BIT: the state party that is seeking foreign investment in effect makes a ‘standing offer’ to arbitrate any dispute that might arise in the future between itself and a qualifying foreign investor of the other state party to the treaty. Only when a dispute actually arises and the private investor accepts this ‘standing offer’ is an ‘agreement to arbitrate’ formed. 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. The process has therefore been described as ‘arbitration without privity’.²²⁶ However, once the ‘standing offer’ has been accepted, an effective agreement to arbitrate, to which both the state or state entity and the investor are parties, comes into existence.

(vi) Model Law

- 1.218** The Model Law began with a proposal to reform the New York Convention. This led to a report from UNCITRAL²²⁷ 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. A recommendation of the General Assembly

²²⁵ According to the United Nations Conference on Trade and Development (UNCTAD), there are now more than 2,860 BITs and more than 340 ‘other’ international investment agreements (such as free trade agreements, economic partnership agreements, or framework agreements with an investment element): see UNCTAD, ‘International investment policymaking in transition: Challenges and opportunities of treaty renewal’, IIA Issues Note No. 4 (June 2013), available online at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d9_en.pdf.

²²⁶ Paulsson, ‘Arbitration without privity’ (1995) 10 ICSID Rev—Foreign Investment LJ 232.

²²⁷ UNCITRAL, *Study on the Application and Interpretation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UN Doc A/CN.9/168 (UN, 1958).

of the United Nations commending the Model Law to Member States was adopted in December 1985.²²⁸

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, more than sixty states have adopted legislation based on the Model Law, with some, such as England, choosing to modernise their laws on arbitration without adopting the Model Law, whilst being careful to follow its format and to have close regard to its provisions.²²⁹ **1.219**

It may be said that if the New York Convention put international arbitration on the world stage, it was the Model Law that made it a star, with appearances in states across the world. Even so, the Model Law, which was enacted in 1985, has been overtaken by the fast-moving world of international arbitration. In at least two respects: first, the requirement for an arbitration agreement to be in writing; and secondly, the provisions governing the power of an arbitral tribunal to order interim measures of relief. **1.220**

To address these concerns, UNCITRAL established a working group in 2000 to consider revisions to the Model Law. This working group produced proposals that were adopted as revisions to the Model Law and approved by the United Nations in December 2006.²³⁰ **1.221**

As mentioned earlier in this chapter, the 'writing requirement' is now defined in very wide terms in the Revised Model Law, and there is also an 'option' allowing states to adopt this wide definition of 'in writing' or to dispense altogether with the requirement for writing.²³¹ **1.222**

The UNCITRAL working group addressed a further controversial issue: whether an arbitral tribunal should have the power to issue interim measures on the application of one party, without the adverse party being aware of the application. Such *ex parte* applications are a common feature of litigation before the courts. If a party is told, for instance, 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 behind the back of a party, consistent with the underlying **1.223**

²²⁸ For a full account of the origins and aims of the Model Law, see the second edition of this book, pp. 508ff.

²²⁹ The advisory committee established in the United Kingdom to report on the Bill that became the English Arbitration Act 1996 stated in Departmental Advisory Committee on Arbitration Law, *Report on the Arbitration Bill* (HMSO, 1996) (known as the 'DAC Report'), at para. 4: '[A]t 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.'

²³⁰ For example, New Zealand, Mauritius, Peru, Slovenia, Costa Rica, Ireland, and Belgium have adopted legislation based on the Model Law as revised.

²³¹ The 'writing requirement' and the 'option' provisions are discussed in Chapter 2.

basis of arbitration, with its emphasis on treating the parties with equality? The working group decided to allow such applications, but only on strictly limited conditions.²³²

(e) **Practice of international arbitration**

1.224 As this chapter has tried to make clear, there are no fixed, detailed rules of procedure governing an international arbitration: each case is different; each tribunal is different; and each dispute deserves to be treated differently. But there is a basic underlying structure, built upon three essential elements: first, the international conventions (and the Model Law) that have helped to form modern national laws of arbitration; secondly, established rules of international arbitration; and thirdly, the practice of experienced arbitrators and counsel.

(i) *International conventions (and the Model Law)*

1.225 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, the national court or foreign courts in which enforcement is sought may refuse to recognise and enforce any arbitral award. These general principles of the New York Convention now form an integral part of the arbitration law (the *lex arbitri*) of countries throughout the world.

1.226 Other international conventions on arbitration, such as the ICSID 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.

1.227 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.

²³² See Chapter 7.

Countries that have adopted (or adapted) the Model Law thus have a national law governing arbitration that is ‘arbitration friendly’. Those countries that 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.²³³ **1.228**

(ii) *Established rules of international arbitration*

Where, then, are the detailed rules to be found? It might be thought that they are to be found in the UNCITRAL Rules, or in the rules of arbitral institutions such as the ICC and the LCIA. **1.229**

It is true that these rules will usually contain provisions for selecting the place of arbitration (if this has not already been selected by the parties), the appointment of the arbitral tribunal, challenges to arbitrators or to their jurisdiction, the exchange of written submissions, the appointment of experts, the holding of a hearing, and so forth.²³⁴ Such rules define the general ‘shape’ or outline of the arbitral proceedings, from the establishment of the arbitral tribunal to the publication of its eventual award. However, they do not prescribe *in detail* the way in which an arbitration should be conducted—and they do not attempt to do so. **1.230**

This means that, in each arbitration, there are important questions to be answered. Should there be written submissions? If so, how many and in what order—simultaneously or in sequence? Should evidence be called from witnesses? If so, in what manner and under what rules? If written witness statements are submitted, what status should they have? Are they to be taken into account only 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 that 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? **1.231**

These questions, and many others that arise in the course of an arbitration, are important practical questions. The answer to them is to be found in what has come to be known as the ‘soft law’ of international arbitration, and in the practice of experienced arbitrators and counsel. **1.232**

²³³ See, e.g., the comment in the DAC Report, quoted in n. 229.

²³⁴ 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.

(iii) 'Hard law' and 'soft law'

- 1.233** The 'hard law' of international arbitration, as Professor Park has expressed it, 'looks at the process from the outside: the perspective of judges and legislators charged with providing a framework of statutes, treaties and cases setting the contours for judicial recognition and enforcement of arbitration agreements and awards'.²³⁵
- 1.234** This 'hard law' has already been discussed in outline, with reference to international treaties and national systems of law, and it will be discussed in much greater detail in the subsequent chapters of this book.
- 1.235** The 'soft law' of international arbitration looks at the process from the inside. Over the years, many sets of 'rules' and 'guidelines' have been drawn up by established professional bodies or arbitral institutions, and some have achieved recognition and endorsement within the arbitration community. For example, the Rules on the Taking of Evidence in International Arbitration, published by the International Bar Association (IBA) in 2010 in a revised edition, provide useful guidance on the testimony of witnesses and experts, and on the principles governing the disclosure of documents.²³⁶ Again by way of example, certain 'case management techniques' have been advanced by the ICC, as ways of controlling time and costs in arbitration.²³⁷ In general, these rules and guidelines—this 'soft law' of international arbitration—is to be welcomed, but some voices warn against a proliferation of 'rules' and 'guidelines' that may deprive arbitration of its flexibility and adaptability.²³⁸
- 1.236** As already indicated, one particular area in which there is a tendency to create 'soft law' concerns the conduct of counsel in international arbitrations. Lawyers are subject to the rules and etiquette of their own particular bar or law society, but there is no 'international code of conduct' for counsel engaged in international arbitration. In consequence, conduct by counsel that may be regarded in some jurisdictions as perfectly acceptable, such as going through the evidence with a witness, will be regarded as 'unprofessional' in other jurisdictions. The IBA recognised

²³⁵ Park, 'Arbitration in autumn' (2011) 2 J Intl Disp Settlement 1, at 3.

²³⁶ 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, as well as Guidelines on Party Representation in International Arbitration.

²³⁷ These 'case management techniques' are now published as Appendix IV to the ICC's Rules of Arbitration. A better, and more complete, guide is to be found in ICC, *ICC Arbitration Commission Report on Techniques for Controlling Time and Costs in Arbitration* (2nd edn, ICC, 2014).

²³⁸ 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 DAC Report and Supplementary Report, February 1996 and January 1997, at paras 167 and 168. Note also the comment of Professor Reymond that '[t]he 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': Reymond, 'L'Arbitration Act 1996, convergence et originalité' (1997) 1 Rev Arb 45, at 54 (authors' translation).

this potential problem in the first edition of its Rules on the Taking of Evidence in International Arbitration, and the current edition states, at Article 4(3): 'It shall not be improper for a Party, its officers, employees, legal advisers or other representatives to interview its witnesses or potential witnesses and to discuss their prospective testimony with them.' This is helpful, but it plainly does not seek to set down a detailed practice rule indicating (for instance) to what extent counsel is entitled to 'rehearse' the evidence of his or her witnesses or otherwise to 'coach' them.

Efforts are being made by institutions such as the IBA and the ICC to formulate a 'code of conduct' for lawyers in international arbitration, but there are two principal problems: first, with identifying what standards of conduct will find universal acceptance; and secondly, with enforcing compliance with these standards.²³⁹ **1.237**

(iv) Practice of experienced arbitrators and counsel

What tends to happen, when experienced arbitrators and counsel are involved in an international arbitration, is that a mix of different national practices emerges, with the best of each selected and the worst rejected.²⁴⁰ The idea that there is a 'common law approach' and a 'civil law' approach to the practice of international arbitration belongs to the rubbish bin of history. A common thread runs—or should run—through most international arbitrations along the following lines. **1.238**

- (1) An arbitral tribunal may decide for itself (subject to any later application to the courts) on any challenge to its jurisdiction.
- (2) 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 order to prevent the flight of assets from the jurisdiction.
- (3) At the stage of documentary disclosure, the usual procedure (using the IBA Rules on the Taking of Evidence in International Arbitration as guidelines) will be for each party to submit to the tribunal all of the documents on which it relies and to invite requests for disclosure of documents by the other side to such documents as are 'relevant and material to the outcome of the case'.²⁴¹

²³⁹ For instance, the IBA Guidelines on Party Representation in International Arbitration, as adopted by resolution of the IBA Council on 25 May 2013, prescribe certain standards of conduct for a 'party representative', but the sanctions for any 'misconduct' are admonishment, drawing appropriate inferences, or taking account of the misconduct in awarding costs. Such measures will generally fall short of the more draconian sanctions available to the professional body to which counsel (or the party representative) may belong, and 'the remedies for misconduct which appear at the end of the Guidelines are underwhelming': Cummins, 'The IBA Guidelines on Party Representation in International Arbitration: Levelling the playing field' (2014) 30 Arb Intl 429, at 455. The Guidelines draw on both civil law and common law traditions, but in their approach to evidentiary matters, the influence of the common law is significant: see Stephens-Chu and Spinelli, 'The gathering and taking of evidence under the IBA Guidelines on Party Representation in International Arbitration: Civil and common law perspectives' (2014) 8 Disp Res Intl 37.

²⁴⁰ The conduct of an arbitration (including the different practices and procedures that may be adopted) is fully discussed in Chapter 6.

²⁴¹ IBA Rules, Art. 3.

If there are disputed requests for documents that are of any length, they will usually be dealt with by means of the so-called *Redfern* schedule (see Figure 1.1).²⁴²

Figure 1.1 Theoretical example of a claimant's *Redfern* schedule

Document requested	Relevance and materiality of the documents requested to the outcome of the dispute	Responses and objections to the claimant's request to produce documents	Decision of the arbitral tribunal
1. Any and all documents (including documents in electronic form) consisting of information on the general structure of management and the decision-making processes of the respondent, including minutes of board meetings, shareholders' meetings, and other documentation related to the decision-making process at the top level	The claimant asserts that the way in which the management processes were organised at respondent were inadequate and/or were the cause of the delays to production and the generally poor quality of the product. To prove these assertions, the claimant needs to know the respondent's management structure and needs documents normally produced for the purposes of a company's management at the level of top management (i.e. boards, shareholders' meetings, etc.).	This request is so wide that an order for their production would impose an unreasonable burden on the respondent: see the IBA Rules on the Taking of Evidence, Art. 9.	
2. A record of all previous complaints from customers since production began	Such documents will allow the claimant to establish the management methodology adopted by the respondent, and to demonstrate that this methodology was inadequate and unprofessional.	This request is too wide. However, the respondent is prepared to produce a list of complaints received over the last 18 months, whilst keeping the names of the customers confidential.	
3. All correspondence and other documents with the respondent's legal advisers concerning complaints by other customers	Such correspondence will demonstrate the steps to which the respondent went to deny liability for obvious deficiencies in the product.	To the extent that any such correspondence exists (which is denied), it would be covered by legal professional privilege.	

²⁴² In *Elektrim SA v Vivendi* [2007] EWHC 11 (Comm), [26], Aikens J 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.

For the origins of the '*Redfern* schedule', see Redfern, 'Efficiency in arbitration: The *Redfern* schedule', ICCA Review, April 2013, pp. 9 and 12.

- (4) 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 10 minutes or so.
- (5) 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 briefs (although these are not always free of evocative words, or heartfelt appeals to 'honesty' and 'good faith').

G. Summary

The international conventions on arbitration, the Model Law, and the worldwide recognition of the importance of arbitration in resolving disputes in trade, commerce, and investment have brought about the modernisation and harmonisation across the globe of the laws that govern the process of international arbitration. **1.239**

The international conventions operate through the national law of those states that have agreed to be bound by them. Although they may be adopted with reservations (such as to the 'commercial nature' of the dispute) and although states may apply their own criteria (such as to public policy grounds for refusing recognition of an arbitral award), these conventions nevertheless represent a compelling force for unification of national laws on arbitration. The same is true of the Model Law. Indeed, when looking at a particular local (or national) law, it is generally possible to look through the text of that law to a framework derived from a general treaty or convention—or indeed from the Model Law itself.²⁴³ **1.240**

Business people, lawyers, and arbitrators who are involved in international arbitration must abandon a parochial view of the law, as constituted by the particular national system with which they are 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 that may, in some respects, be better than their own and which must, in any event, be taken into account. As one commentator has said: '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.'²⁴⁴ **1.241**

Similar considerations apply to the *practice* of international arbitration. There is no uniform practice or procedure. Arbitrators, parties, and counsel work together **1.242**

²⁴³ Consider, e.g., the German Arbitration Act 1998 and the Irish Arbitration Act 2010.

²⁴⁴ Kaufmann-Kohler, 'Globalization of arbitral procedure' (2003) 36 *Vanderbilt J Transnl L* 1314, at 1323ff.

‘to find some common ground’ by devising a procedure that fits the dispute with which they are concerned.

- 1.243** 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 arbitration, which is to offer a *flexible* means of resolving disputes. Within the general framework of the ‘hard law’ of arbitration and taking advantage of the best features of the so-called soft law, it is possible both to adopt and to adapt procedures that are appropriate to the particular dispute with which the parties and the arbitrators are concerned. As this volume endeavours 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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