Broadly speaking, there are two categories of arbitration legislation: statutes which are supportive of the arbitral process (increasingly, but not always, modeled on the UNCITRAL Model Law) and statutes which are not supportive of the arbitral process.

[A] Supportive National Legislation

Most states in Europe, North America and Asia have adopted legislation that provides effective support for the arbitral process. In many cases, states have progressively refined their national arbitration statutes, adopting either amendments or new legislation to make their arbitration regimes maximally supportive for the international arbitral process. Thus, over the past 50 years, virtually all developed countries (and many less developed jurisdictions) have substantially revised or entirely replaced its international arbitration legislation, in every case, to facilitate the arbitral process and promote the use of international arbitration.[73]

Paralleling the New York Convention, the pillars of modern arbitration statutes are provisions that affirm the freedom of parties to enter into valid and binding agreements to arbitrate future commercial disputes, provide mechanisms for the enforcement of such agreements by national courts (through orders to stay litigation or compel arbitration), prescribe procedures for confirming or annulling awards and require the recognition and enforcement of foreign awards. In many cases, arbitration statutes also authorize limited judicial assistance to the arbitral process; this assistance can include selecting arbitrators, enforcing a tribunal's orders for evidence-taking and granting provisional relief in aid of arbitration. In addition, most modern arbitration legislation affirms the parties' autonomy to agree upon arbitral procedures as well as the substantive law governing the parties' dispute, while limiting the power of national courts to intervene in the arbitral process, either when arbitral proceedings are pending or in reviewing awards.

The central objective of contemporary international arbitration statutes has been to facilitate international trade and investment by providing more secure means of dispute resolution. Recognizing that international transactions are subject to unique legal uncertainties and risks, states have sought to promote the use of arbitration as a way of mitigating such risks. In the words of the Indian Supreme Court, "[t]o attract the confidence of the international mercantile community and the growing volume

73. Important enactments, or revisions, have occurred in Algeria (1993, 2008), Argentina (1981, 2001, 2015), Australia (1974, 1989, 2010), Austria (2005, 2013), Azerbaijan (1999), Bahrain (1994, 2009), Bangladesh (2001), Belarus (1999), Belgium (2013), Bolivia (1997), Brazil (1996, 2015), Bulgaria (1993, 2007), Cambodia (2006), Canada (2014), Chile (2004), China (1982, 1991, 1994), Colombia (1996, 1998, 2012), Costa Rica (1997, 2011), Cyprus (1987), Czech Republic (1994, 2012), Denmark (1972, 2005), Djibouti (1984), Dominican Republic (2008), Ecuador (1997), Egypt (1994), El Salvador (2002, 2009), Estonia (2006), England (1996), Finland (1992), France (1981, 2011), Georgia (2009), Germany (1998), Greece (1999), Hong Kong (1997, 2011), India (1996), Indonesia (1999), Iran (1997), Ireland (1998, 2010), Israel (1968, 2008), Italy (1983,1994, 2006), Japan (2004), Jordan (1953, 2001), Kazakhstan (2004), Kenya (1995, 2009), Kuwait (1995), Lebanon (1983, 2002), Libya (2010), Malaysia (2005, 2011), Malta (1996), Mauritius (2008), Mexico (1989, 1993, 2011), Moldova (2008), Morocco (2008), Netherlands (1986, 2004, 2015), New Zealand (1996, 2007), Nigeria (1988, 2009), Norway (2004), Peru (1996, 2008), Philippines (2004), Poland (2005), Portugal (2012), Qatar (1990), Romania (1992, 2013), Russia (1993), Saudi Arabia (1983, 2012), Scotland (2010), Senegal (1998), Singapore (1994, 2001, 2010, 2012), South Africa (1965), South Korea (1966, 1999), Spain (1988, 2003, 2011), Sri Lanka (1995), Sweden (1999), Switzerland (1987, 2011), Syria (2008), Taiwan (2002), Tanzania (2002), Thailand (1987, 2002), Tunisia (1993), Turkey (2001), Ukraine (1994), United Arab Emirates (1992), Uruguay (1988, 2013), Venezuela (1998), Vietnam (2003, 2011) and Yemen (1992, 1997).

of India's trade and commercial relationship with the rest of the world ..., [the] Indian Parliament was persuaded to enact the Arbitration and Conciliation Act of 1996 in UNCITRAL Model."[74]

[B] 1985 UNCITRAL Model Law and 2006 Revisions

The 1985 UNCITRAL Model Law is the single most important statutory instrument in the field of international commercial arbitration. It has been adopted in a substantial (and growing) number of jurisdictions and has served as a model for legislation in many others. Revisions to the Model Law in 2006 sought to improve its legislative framework.

The Model Law was preceded by extensive consultations involving states, the business and international arbitration community, and regional organizations (*e.g.*, Asian-African Legal Consultative Committee). These discussions produced the current final draft of the Model Law, which UNCITRAL approved in a resolution in 1985; the Model Law was approved by a U.N. General Assembly resolution later the same year.[75]

The Model Law was designed to be implemented by national legislatures, with the objective of harmonizing the treatment of international commercial arbitration in different countries. The Law consists of 36 articles which deal comprehensively with the international arbitral process. Among other things, the law contains provisions concerning the enforcement of arbitration agreements (Articles 7-9), appointment of and challenges to arbitrators (Articles 10-15), jurisdiction of arbitrators (Article 16), provisional measures (Article 17), conduct of the arbitral proceedings, including language, seat of arbitration and procedures (Articles 18-26), evidence-taking (Article 27), applicable substantive law (Article 28), arbitral awards (Articles 29-33), setting aside awards (Article 34), and recognition and enforcement of foreign awards, including bases for non-recognition (Articles 35-36).

Under the Model Law, written international arbitration agreements are presumptively valid and enforceable, subject to limited, specified exceptions.[76] Article 8 of the Law provides for the enforcement of valid arbitration agreements, regardless of the arbitral seat, by way of a dismissal or stay of national court litigation. The Law also adopts the separability presumption (Article 16), and grants arbitrators authority (competence-competence) to consider their own jurisdiction (also in Article 16).

Article 5 of the Model Law prescribes a principle of judicial non-intervention in arbitral proceedings. The Law also affirms the parties' autonomy (subject to due process limits) with regard to the arbitral procedures (Article 19(1)) and, absent agreement between the parties, the tribunal's authority to prescribe such procedures (Article 19(2)). The approach of the Model Law to the arbitral proceedings is to define a basic set of procedural rules which – subject to a very limited number of mandatory principles of fairness, due process and equality of treatment[77] – the parties are free to alter by agreement. The Law also provides for judicial assistance to the arbitral process in prescribed and

74. *See Konkan Railways Corp. v. Mehul Constr. Co.*, (2000) 7 SCC 201 (Indian S.Ct.).

75. Model Law on *International Commercial Arbitration* of the United Nations Commission on International Trade Law, U.N. Doc. A/RES/40/72 (1985).

76. UNCITRAL Model Law, Arts. 7-8; *see infra* p. 53 to p. 53 and p. 81 to p. 86. The original Model Law's "writing" requirement for arbitration agreements is broadly similar to, but somewhat less demanding than, Article II of the New York Convention. *See* UNCITRAL Model Law, Art. 7(2). The 2006 revisions include options that substantially reduce or eliminate any writing requirement.

77. UNCITRAL Model Law, Art. 18 ("The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."); *see infra* p. 161 to p. 162.

http://www.pbookshop.com

("choice-of-law clauses").[116] The principal exception is where mandatory national laws or public policies override contractual arrangements.

Where the parties have not agreed upon the substantive law governing their dispute, the arbitral tribunal must determine which law applies. In so doing, the tribunal will sometimes refer to national or international conflict of laws rules.[117] Although the historical practice was to apply the national conflict of laws rules of the arbitral seat, more recent practice is diverse. Some tribunals and commentators adhere to the traditional approach, while others look to the conflicts rules of all states having a connection with the dispute; alternatively, some authorities adopt either international conflict of laws rules or validation principles.

[B] Law Applicable to Arbitration Agreement

As discussed elsewhere, arbitration agreements are universally regarded as presumptively "separable" from the underlying contract in which they appear. One consequence of this is that the parties' arbitration agreement may be governed by a different national law than that of the underlying contract. The governing law may be chosen by the parties, in the absence of any choice, or determined by applying conflict of laws rules (which may select different laws for the parties' arbitration agreement and underlying contract).

As described below, four alternatives for the law governing an arbitration agreement are of particular importance: (a) the law chosen by the parties to govern the arbitration agreement itself; (b) the law of the arbitral seat; (c) the law governing the parties' underlying contract; and (d) international principles, either applied as a substantive body of contract law (as in France) or as rules of non-discrimination (as in most U.S. authority).[118]

[C] Procedural Law Applicable to Arbitral Proceedings

The arbitral proceedings themselves are subject to legal rules, governing both "internal" procedural matters and "external" relations between the arbitration and national courts. In most instances, the law governing the arbitral proceeding is the arbitration statute of the arbitral seat.[119]

Among other things, the law of the arbitral seat typically deals with such issues as the appointment and qualifications of arbitrators, the qualifications and professional responsibilities of parties' legal representatives, the extent of judicial intervention in the arbitral process, the availability of provisional relief, the procedural conduct of the arbitration, the form of an award and standards for annulment of an award. Different national laws take different approaches to these various issues. In some countries, national law imposes significant limits or requirements on the conduct of the arbitration and local courts have broad powers to supervise arbitral proceedings. Elsewhere, and in most developed jurisdictions, local law affords international arbitrators broad freedom to conduct the arbitral process - subject only to basic requirements of procedural regularity ("due process" or "natural justice").

In many jurisdictions, parties are free to select the procedural law of the arbitration (as discussed below). This includes, in some jurisdictions, the freedom to agree to the application of a different procedural law than that of the arbitral seat. This occurs only in very rare cases and should ordinarily

116. *See infra* p. 251 to p. 253; UNCITRAL Model Law, Art. 28(1); UNCITRAL Rules, Art. 35(1).
117. *See infra* p. 244 to p. 249.
118. *See infra* p. 161 to p. 162.
119. *See infra* p. 118 to p. 120.

be avoided because of the uncertainties it creates, including as to which national courts may select and remove arbitrators or annul awards.

[D] Choice-of-Law Rules Applicable in International Arbitration

Selecting each of the bodies of law identified in the foregoing three sections – the law applicable to the merits of the underlying contract, the arbitration agreement and the arbitral proceedings – ordinarily requires application of conflict of laws rules. In order to select the substantive law governing the parties' dispute, for example, the tribunal must ordinarily apply a conflict of laws system. A tribunal must therefore decide at the outset what set of conflicts rules to apply to select each of these systems of law. The practice of tribunals in selecting the law applicable to each of the foregoing issues varies significantly. As discussed in greater detail below, approaches include application of (a) the arbitral seat's conflict of laws rules; (b) "international" conflict of laws rules; (c) successive application of the conflict of laws rules of all interested states; and (d) "direct" application of substantive law (without any express conflicts analysis).

[E] International Guidelines and Best Practices

In addition to national law and institutional arbitration rules, there are a number of international guidelines or codes of best practice regarding the conduct of international arbitrations. These materials can provide important sources of guidance for both tribunals and parties, making the arbitral process more predictable and transparent, while not curtailing the parties' and arbitrators' ability to tailor arbitral procedures in particular cases to the individual needs of those cases.

[1] IBA Rules on the Taking of Evidence in International Arbitration

Although not a set of institutional arbitration rules, the International Bar Association's "Rules on the Taking of Evidence in International Arbitration" fulfill related functions. In 1983, the IBA adopted the "Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration." The Rules attempted to provide a blend of civil law and common law approaches to the subjects of discovery and evidentiary presentations in arbitration. The IBA Rules were extensively revised in 1999, and retitled the "Rules on the Taking of Evidence in International Commercial Arbitration" ("IBA Rules" or "IBA Rules on the Taking of Evidence"). The 1999 IBA Rules established a reasonably-detailed and workable set of procedures for witness evidence and disclosure requests in international arbitrations.

The 1999 IBA Rules were revised in 2010 and (again) retitled "Rules on the Taking of Evidence in International Arbitration," now extending to investor-state and inter-state arbitrations, as well as international commercial arbitrations. According to a recent survey, the IBA Rules are used in 60% of international arbitrations.[120]

Like their predecessors, the 2010 IBA Rules are not independently binding, but are intended for incorporation into parties' arbitration agreements or to provide the rationale for tribunals' procedural rulings. The 2010 IBA Rules contain detailed provisions (discussed below) on witness statements (fact and expert), witness examination and disclosures.

120. Queen Mary, University of London, *International Arbitration Survey: Current and Preferred Practices in the Arbitral Process* 2 (2012).

http://www.pbookshop.com

[B] "Disputes" or "Differences" Requirement

Article II(1) of the Convention and Article 7 of the Model Law (like many other arbitration statutes) applies to agreements to arbitrate "disputes" or "differences." These provisions impliedly require that a real "dispute" or "difference" exists before an arbitration agreement may be enforced. In general, national courts and arbitral tribunals have found this requirement satisfied when a party seeks relief that its counter-party refuses to comply with.[4]

[C] "Commercial" Relationship Requirement

The New York Convention and many arbitration statutes are potentially applicable only to "commercial" relationships. Article 1(3) of the Convention provides that Contracting States may make a "commercial declaration," *i.e.*, declare that the Convention applies only to "relationships … which are considered as commercial under the national law of the State making [the] declaration." A number of nations, including the United States, have made declarations under Article 1(3).[5]

Similarly, many arbitration statutes are limited to "commercial" matters. Article 1(1) of the Model Law limits the Law's application to "international *commercial* arbitration," while §1 of the FAA is limited to arbitration agreements in "transaction[s] involving *commerce*." In general, national courts have adopted broad definitions of the "commercial" requirement, including almost any profit-making activity within its scope.

[D] "Existing or Future" Disputes Requirement

Article II(1) of the Convention provides for the recognition of agreements to arbitrate "differences which *have arisen or may arise*"; Article 7 of the Model Law contains a similar requirement. These provisions are more in the nature of clarifications than limitations: by confirming that arbitration agreements may apply to either "existing *or* future" disputes, these provisions supersede the historic reluctance of courts in some jurisdictions to enforce agreements to arbitrate future disputes.

[E] "Defined Legal Relationship" Requirement

Article II(3) of the Convention requires that an arbitration agreement be "in respect of a defined legal relationship, whether contractual or not"; Article 7 of the Model Law contains a parallel requirement. In virtually all cases, arbitration agreements relate to a written contract and Article II(3)'s requirement is clearly satisfied. Indeed, it is difficult to envisage circumstances in which an arbitration agreement would *not* refer to a relationship with a "defined legal relationship." The requirement is more relevant in confirming that international arbitral tribunals may decide non-contractual, as well as contractual, disputes.[6]

4. *See* G. Born, *International Commercial Arbitration* 338–41 (2d ed. 2014).
5. *See* G. Born, *International Commercial Arbitration* 296–307, 2938–40 (2d ed. 2014).
6. *See* G. Born, *International Commercial Arbitration* 341–42 (2d ed. 2014).

[F] "International" Arbitration Agreement Requirement

Both the Convention and most statutes that regulate international arbitration apply only to arbitration agreements that have some sort of "foreign" or "international" connection. This requirement is consistent with the purpose of both types of instruments, which is to facilitate the *international* arbitral process, without disturbing domestic arbitration matters.

> **New York Convention, Article I(1)**
>
> This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

Article I(1) of the Convention provides a definition of the arbitral awards to which the Convention applies. Under that definition, the Convention is applicable only to awards that: (i) are "made" in a state other than the Contracting State where recognition is sought, or (ii) are "not considered as domestic awards" under the law of the recognizing state.[7] In contrast, the Convention does not provide any equivalent definition of those arbitration *agreements* to which it applies.

Different approaches have been adopted to defining the scope of the Convention as applied to arbitration agreements. Some authorities have applied Article I(1) by analogy to arbitration agreements, holding that Article II applies only to arbitration agreements with a foreign seat (outside the state asked to enforce the agreement), while other authorities have correctly extended the Convention more broadly to any "international" arbitration agreements (even if the arbitration is seated in the relevant Contracting State).[8]

The limitation of the Convention to international arbitration agreements is paralleled by similar jurisdictional requirements in many arbitration statutes. For example, Article 1(1) of the Model Law provides that the Law applies only to "*international* commercial arbitration"; in turn, Article 1(3) defines "international" expansively to include almost any agreement or relationship involving parties from different states or conduct in different states. Most other national laws adopt similarly broad definitions.

[G] Reciprocity Requirements

Article I(3) of the New York Convention permits Contracting States to make "reciprocity reservations," undertaking the Convention's obligations only towards other Contracting States: "[Any Contracting State may] declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State." Nearly two-thirds of Contracting States have made reciprocity reservations.

In addition, Article XIV of the Convention contains a separate, more general reciprocity provision, limiting a Contracting State's rights under the Convention to those it "is itself bound to

7. *See infra* p. 377 to p. 379.
8. *See* G. Born, *International Commercial Arbitration* 313–38 (2d ed. 2014).

http://www.pbookshop.com

circumstances and repudiation. The term "incapable of being performed" refers to impossibility and similar defenses.[26]

Each of these defenses focuses, by reason of the separability presumption, on the *arbitration agreement itself*, rather than the *underlying contract*. For example, in considering claims of unconscionability, the only relevant question is whether the terms of the arbitration clause – not the commercial terms of the underlying contract – are oppressive and unconscionable. Similarly, in considering claims of impossibility, the relevant question is whether it is possible to perform the agreement to arbitrate – not to perform the underlying commercial contract. Finally, in considering each of these defenses, the governing law is that applicable to the agreement to arbitrate, not necessarily the law applicable to the underlying contract.

[2] Unconscionability and Duress

Basic principles of contract law provide that unconscionable agreements are invalid. Although formulations of unconscionability vary, unconscionability generally requires grossly unfair substantive terms of an agreement and a party's abuse of significantly stronger bargaining power.

As a consequence of the separability presumption, courts and tribunals almost always hold that claims that the parties' underlying contract is unconscionable do not implicate the validity of the associated arbitration clause. Unconscionability is a ground for challenging an agreement to arbitrate only in cases where a party challenges the terms of the arbitration agreement itself (*e.g.*, a grossly unfair seat, biased means of selecting the arbitral tribunal, grossly one-sided arbitral procedures) and/or the manner in which the arbitration agreement was negotiated (*e.g.*, undue pressure tactics, deception);[27] unconscionable commercial terms in the underlying contract (*e.g.*, price) are generally irrelevant to these inquiries.

Courts are generally skeptical of unconscionability challenges directed at arbitration agreements in commercial settings. The fact that an arbitration clause was included in a form contract or general terms and conditions; the fact that there was a disparity of bargaining power; and the fact that the contract was in a foreign language are virtually never grounds for finding unconscionability. In rare cases, often involving individuals or small businesses, courts have found that grossly one-sided arbitration procedures are invalid as unconscionable (for example, clauses permitting one party to unilaterally select the arbitrator(s)).

A few courts have held that so-called "asymmetrical" or "non-mutual" arbitration agreements are void on unconscionability or lack of mutuality grounds. These agreements provide that one party, but not the other, has the option of requiring arbitration of the parties' disputes. The weight of authority takes a contrary view and upholds asymmetrical arbitration clauses.[28]

Example of Asymmetrical Arbitration Agreement

"The courts of [England] shall have exclusive jurisdiction to resolve all disputes relating to this Agreement, provided that [Party A] shall have the option of submitting any such dispute for resolution by arbitration under the UNCITRAL Arbitration Rules."

26. *See* G. Born, *International Commercial Arbitration* 841–44 (2d ed. 2014).
27. *See* G. Born, *International Commercial Arbitration* 856–66 (2d ed. 2014).
28. *See* G. Born, *International Commercial Arbitration* 866–70 (2d ed. 2014).

The validity of arbitration agreements may also be challenged on the grounds of duress (or wrongful threat). Duress has generally required the showing of a wrongful act or threat compelling involuntary submission. In practice, most efforts to meet this standard for arbitration agreements in commercial settings have failed, although there are exceptions (particularly in cases involving individuals). Claims of duress must, in principle, be directed at the agreement to arbitrate itself, as opposed to the underlying contract; in some instances, however, it is difficult to distinguish between duress directed at the arbitration clause and duress directed at the underlying contract (*e.g.*, signature of a contract at gunpoint).

[3] Fraudulent Inducement or Fraud

Fraud and fraudulent inducement are not specifically mentioned as grounds for non-enforcement of an arbitration agreement in the Convention or most arbitration statutes. Nonetheless, courts and arbitral tribunals have uniformly concluded that fraud and fraudulent inducement are bases for holding arbitration agreements invalid or null and void.

Under the separability presumption, claims that the parties' underlying contract was fraudulently induced do not affect the validity of an arbitration clause included in the contract. The fact that one party may have fraudulently misrepresented the quality of its goods, services or balance sheet generally does not impeach the parties' separable dispute resolution mechanism.[29] As a consequence, only fraud directed at the agreement to arbitrate itself will impeach that agreement. These circumstances seldom arise in practice, it is very unusual that a party will seek to procure an agreement to arbitrate by fraud.

[4] Impossibility and Frustration

Impossibility and frustration are grounds for challenging the substantive validity of an arbitration agreement.[30] As with other generally-applicable contract law defenses, the relevant issue is whether the separable agreement to arbitrate has been frustrated, not whether the underlying contract has become impossible to perform. Claims of impossibility or frustration typically arise where an arbitrator, named specifically in the arbitration agreement, dies or becomes otherwise unable to fulfill his or her mandate; alternatively, the arbitral institution specified in the parties' agreement may cease to exist or be merged into another institution. In both cases, courts have generally been reluctant to find frustration or impossibility, typically appointing a substitute arbitrator or holding that another institution (or an *ad hoc* arbitration can be employed) implement the parties' basic agreement to arbitrate.

29. *Prima Paint Corp. v. Flood & Conklin Mfg Co.*, 388 U.S. 395 (U.S. S.Ct. 1967) (claim that parties' underlying contract (containing an arbitration clause) had been fraudulently induced did not involve challenge to arbitration clause itself; arbitral tribunal, rather than U.S. court, was competent under FAA to rule upon fraudulent inducement claim); *Fiona Trust & Holding Corp. v. Privalov* [2007] UKHL 40 (House of Lords) ("the doctrine of separability requires direct impeachment of the arbitration agreement before it can be set aside. This is an exacting test.").
30. There are references to the impossibility doctrine in Article II(3) of the Convention, which contemplates non-recognition of arbitration agreements which are "incapable of being performed," and Article 8 of the UNCITRAL Model Law, which contains the same formula. *See* G. Born, *International Commercial Arbitration* 890–93 (2d ed. 2014).

http://www.pbookshop.com

"*any* disputes" formulae more broadly than a simple reference to "disputes," concluding that these terms extend to all disputes having any plausible factual or legal relation to the parties' agreement or dealings.[6]

Most arbitration clauses refer to "disputes" and "differences." A few courts have held that a "dispute" does not exist unless there is a genuine controversy between the parties, sometimes examining the merits of the parties' positions and holding that an arbitrable "dispute" does not exist where one party's position is frivolous.[7] In contrast, most courts have adopted broad interpretations of the terms "dispute," "difference" and "controversy," and refused to inquire into the reasonableness or plausibility of either party's position in their underlying dispute.

Many arbitration agreements use the phrase "relating to" (as in "disputes *relating to* this contract"). Courts in most jurisdictions have held that this term extends an arbitration clause to a broad range of disputes. U.S. courts have repeatedly concluded that the "relating to" formula encompasses non-contractual, as well as contractual, claims and that it reaches any disputes that "touch" or have a factual relationship to the parties' contract.[8] Courts in other jurisdictions have also interpreted the phrase "relating to" broadly.[9] Similar conclusions have been reached with respect to the phrase "in connection with."

Authorities have reached divergent interpretations of agreements to arbitrate all disputes "arising under" or "arising out of" a contract. Most courts have concluded that clauses using the formulation "arising under" or "arising out of" are broad (comparable to "relating to") while a few courts have held that the formulation is "narrow." In the latter category, some courts have concluded that the "arising under" formula does not encompass tort claims that did not directly involve application of the parties' contractual commitments, claims based on pre-contractual conduct or claims about contract formation.[10]

[2] "Broad" Versus "Narrow" Arbitration Clauses

Some U.S. courts have distinguished between "broad" and "narrow" arbitration clauses. Among other things, some courts have said that a "broad" (but not a "narrow") clause will attract a "pro-arbitration" rule of construction and grant the arbitrators competence-competence to decide disputes over the clause's scope. Most other authority correctly holds that a sharp distinction between "broad" and "narrow" clauses is difficult to justify and that the general pro-arbitration approach to construction of arbitration agreements should apply in all cases.

6. Most arbitration clauses provide for arbitration of all "disputes" or "differences," while some clauses also (or instead) refer to "claims" or "controversies." These formulations encompass any sort of disagreement, dispute, difference or claim that may be asserted in arbitral proceedings.
7. *See, e.g., Guangdong Agric. Co. v. Conagra Int'l (Far E.) Ltd*, [1992] HKCFI 247 (H.K. Ct. First Inst.). As discussed above, leading international arbitration conventions and national arbitration legislation apply only to agreements to arbitrate "disputes." *See supra* p. 35 to p. 36, and p. 51. *See also* G. Born, *International Commercial Arbitration* 1348–49 (2d ed. 2014).
8. *See, e.g., Pennzoil Exploration & Prod. Co. v. Ramco Energy Ltd*, 139 F.3d 1061 (5th Cir. 1998) ("relating to" language in arbitration agreement is "broad"; clause reaches claims that "'touch' matters covered by" contract); *McDonnell Douglas Corp. v. Kingdom of Denmark*, 607 F.Supp. 1016, 1019 (E.D. Mo. 1985) ("'relating to' is generally regarded as broad rather than narrow language").
9. *See* G. Born, *International Commercial Arbitration* 1349–50 (2d ed. 2014).
10. *See* G. Born, *International Commercial Arbitration* 1352–53 (2d ed. 2014).

[3] Tort Claims

There is no prohibition in most jurisdictions against the arbitration of non-contractual claims. On the contrary, Article II(1) of the New York Convention (and many arbitration statutes) defines an arbitration agreement as including differences arising from a relationship "whether contractual or not." National courts have generally approached the question whether a particular non-contractual claim falls within an arbitration clause by applying the pro-arbitration presumptions and other rules of construction that are used in other contexts. A number of courts have also said that the scope of an arbitration clause is determined by reference to the factual allegations underlying the parties' claims, regardless of the "legal labels" for those claims.[11]

National courts have frequently addressed cases where conduct relating to the parties' contractual relationship leads to tort claims (such as fraud, defamation or unfair competition). The "pro-arbitration" presumption under most national laws is generally applicable to these tort claims. In addition, it is frequently said that a party may not defeat an arbitration clause by casting its claims in tort, rather than contract. Taking this approach, many decisions have held on particular facts that various tort claims were within the scope of particular arbitration agreements.[12] In other cases, tort claims have been held to fall outside the scope of the parties' arbitration agreement.[13]

[4] Statutory Claims

On the contrary, there is also generally no prohibition against arbitration of claims based on statutory protections.[14] The U.S. Supreme Court has held that the application of arbitration clauses to statutory claims should be subject to no different rules of interpretation than contract claims. The Court declared in *Mitsubishi Motors* that "[t]here is no reason to depart from these [pro-arbitration interpretative] guidelines where a party bound by an arbitration agreement raises claims founded on statutory rights."[15]

On the other hand, some national courts have remarked that "an arbitration clause is no doubt designed primarily to cover claims for breach of contract."[16] This view is archaic, and reflects a minority position that is no longer followed in most jurisdictions.

11. *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, SA*, 863 F.2d 315, 319 (4th Cir. 1988); *Osteomed, LP v. Koby Indus., LP*, 2006 U.S. Dist. LEXIS 84639, at *3 (N.D. Tex.) ("whether a claim is subject to the arbitration clause depends on the factual allegations contained in the complaint, not the causes of action asserted").
12. *See, e.g., Hicks v. Cadle Co.*, 355 F.Appx 186 (10th Cir. 2009) (arbitration agreement covering claims for defamation and intentional infliction of emotional distress); *Ferro Corp. v. Garrison Indus., Inc.*, 142 F.3d 926 (6th Cir. 1998) (refusing to interpret arbitration agreement to exclude fraudulent inducement claims); *Mar-Len of La., Inc. v. Parsons-Gilbane*, 773 F.2d 633, 637 (5th Cir. 1985) (arbitration agreement covering "any dispute arising under" the agreement or "with respect to the interpretation or performance of" the agreement held to cover duress claims); *Ulysses Compania Naviera SA v. Huntingdon Petroleum Serv., The Ermoupolis* [1990] 1 Lloyd's Rep. 160 (Q.B.) (English High Ct.).
13. *See, e.g., Tracer Research Corp. v. Nat'l Environmental Servs. Co.*, 42 F.3d 1292 (9th Cir. 1994) (misappropriation of trade secrets claim not within scope of arbitration agreement covering disputes "arising hereunder"); *Judgment of 4 September 1987*, JLMB 88/309, 309–10 (Liege Cour d'appel) (arbitration clause covering disputes "arising out of the contract" does not cover tort claims related to main contract).
14. As discussed above, in limited circumstances, claims based on mandatory law protections may be treated as non-arbitrable, but these are exceptions.
15. *Mitsubishi Motors*, 473 U.S. at 626.
16. *Lonrho Ltd v. Shell Petroleum Co. Ltd*, IV Y.B. Comm. Arb. 320, 321–22 (1979) (Ch.) (English High Ct. 1978).

http://www.pbookshop.com

[E] Assignment or Transfer

Contracts are frequently transferred from one party to another by way of assignment, novation or assumption. Some early decisions suggested that arbitration agreements were not capable of being transferred, apparently on the theory that they were "personal" obligations, which were binding upon only the original parties.[8] These decisions have been superseded, and it is now universally accepted that parties have the contractual autonomy to transfer or assign arbitration agreements, just as they have the power to transfer other types of contracts.

In principle, the assignment of a contract should have the effect of conveying the arbitration clause associated with the underlying contract to the assignee (at least absent a contractual or legal prohibition that renders the assignment ineffective).[9] Thus, in many jurisdictions, there is a presumption of "automatic" assignment of the arbitration clause together with the underlying contract.[10]

There are often contractual limits on assignment in commercial agreements that may forbid one party from assigning the underlying contract, either absolutely or without its counterparty's consent. If the assignment of the underlying contract and the arbitration clause are in violation of a contractual restriction, then the putative assignee arguably has no rights or obligations under the arbitration clause (since the contract and arbitration clause were arguably never assigned).[11]

[F] Estoppel

A number of authorities have recognized estoppel or related doctrines as a basis for either permitting a non-signatory to invoke an arbitration agreement or holding that a non-signatory is bound by an arbitration agreement. These authorities have held that, where a non-signatory claims or exercises rights as a party under a contract, which contains an arbitration clause, the non-signatory will typically be estopped from denying that it is a party to the arbitration clause. As one U.S. court put it: "In short, [plaintiff] cannot have it both ways. It cannot rely on the contract when it works to its advantage and ignore it when it works to its disadvantage."[12] Similarly, where a party invokes an arbitration clause in national court proceedings, claiming rights under that clause, it will ordinarily be estopped from subsequently denying that it is bound by the arbitration agreement in other proceedings.[13]

Some U.S. courts have gone further, adopting a theory of "equitable estoppel" and holding that a party that receives a "direct benefit" under a contract is estopped from denying that it is a party to

8. *See, e.g.*, *Cotton Club Estates Ltd v. Woodside Estates Co.* [1928] 2 KB 463 (English K.B.).
9. *See* G. Born, *International Commercial Arbitration* 1465–71 (2d ed. 2014).
10. *See, e.g.*, *Asset Allocation & Mgt Co. v. W. Employers Ins. Co.*, 892 F.2d 566, 574 (7th Cir. 1989) (arbitration agreement may be invoked against assignee); *Star-Kist Foods, Inc. v. Diakan Hope, SA*, 423 F.Supp. 1220, 1222–23 (C.D. Cal. 1976); *Judgment of 9 May 2001*, 2002 ASA Bull. 80 (Swiss Fed. Trib.).
11. *See, e.g.*, *Judgment of 16 October 2001*, 2002 Rev. arb. 753 (Swiss Fed. Trib.). In some jurisdictions, however, an assignment in breach of a contractual prohibition is presumptively not invalid, even if it is wrongful, but rather is effective while giving rise to a damages claim for breach of the anti-assignment provision. *See, e.g.*, *Bel-Ray Co. v. Chemrite Pty Ltd*, 181 F.3d 435 (3d Cir. 1999) (following "general rule that contractual provisions limiting or prohibiting assignment operate only to limit a party's right to assign the contract, but not their power to do so, unless the parties manifest an intent to the contrary with specificity"; assignment in violation of contractual provision ordinarily "remains valid and enforceable against both the assignor and the assignee").
12. *Tepper Realty Co. v. Mosaic Tile Co.*, 259 F.Supp. 688, 692 (S.D.N.Y. 1966).
13. *See* G. Born, *International Commercial Arbitration* 1472–77 (2d ed. 2014).

the contract's arbitration clause.[14] Outside the United States, some courts are more reluctant to apply estoppel principles broadly in the context of arbitration agreements.

[G] Corporate Officers and Directors

Some national courts have permitted the officers and directors of a corporate party to invoke the arbitration clause in that party's underlying commercial contracts, notwithstanding the fact that individual officers and directors are not parties to the underlying contract under ordinary contractual principles; for example, if Company A and Company B conclude an arbitration agreement, then the Chief Executive of Company B may be permitted to invoke the agreement if he or she is sued personally by Company A.[15] Decisions in a few other jurisdictions adopt similar reasoning.[16]

These decisions are not unanimously followed. One U.S. court rejected them on the following grounds: "courts must not offer contracts to arbitrate to parties who failed to negotiate them before trouble arrives. To do so frustrates the ability of persons to settle their affairs against a predictable backdrop of legal rules – the cardinal principle to all dispute resolution."[17]

[H] Implied Consent

Under most developed legal systems, an entity may become a party to a contract, including an arbitration agreement, impliedly – typically, either by conduct or non-explicit declarations, as well as by express agreement or formal execution of an agreement.[18] The fundamental question in the context of implied consent is whether the parties' objective intention was that a particular entity be a party to the arbitration agreement.

For example, where a party conducts itself as if it were a party to a commercial contract, by playing a substantial role in negotiations and/or performance of the contract, it may be found to have impliedly consented to be bound by the contract.[19] On the other hand, merely incidental involvement in negotiations or performance has been consistently held to be insufficient to constitute implied consent.[20]

14. *See, e.g.*, *Am. Bureau of Shipping v. Tencara Shipyard SpA*, 170 F.3d 349, 353 (2d Cir. 1999) ("A party is estopped from denying its obligation to arbitrate when it receives a 'direct benefit' from a contract containing an arbitration clause."). *See also* G. Born, *International Commercial Arbitration* 1474 (2d ed. 2014).
15. *See, e.g.*, *Hirschfeld Prod. Inc. v. Mirvish*, 88 N.Y.2d 1054 (N.Y. 1996); *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110 (3d Cir. 1993) (company can only act through employees and officers, and "an arbitration agreement would be of little value if it did not extend to them").
16. *See* G. Born, *International Commercial Arbitration* 1478–80 (2d ed. 2014). Examples include Canada and Germany.
17. *Westmoreland v. Sadoux*, 299 F.3d 462, 467 (5th Cir. 2002).
18. *See* G. Born, *International Commercial Arbitration* 1427–31 (2d ed. 2014).
19. *See, e.g.*, *Judgment of 5 December 2008*, DFT 4A_128/2008, ¶8.6 (Swiss Fed. Trib.) ("a third party who interferes in the execution of the contract containing the arbitration agreement is deemed to have accepted it, by way of conclusive acts").
20. *See, e.g.*, *Air Line Pilots Ass'n Int'l v. US Airways Group Inc.*, 609 F.3d 338, 347 (4th Cir. 2010) (declining to imply agreement to arbitrate where party did not show "clear intent" to do so by participating, or expressing willingness to participate, in arbitration).

http://www.pbookshop.com

Article 20(1) of the Model Law is representative, providing that, failing agreement by the parties, "the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case."[36]

[C] Selection of Arbitral Seat by National Courts

Only in very rare cases, where the parties have not incorporated any institutional rules into their arbitration agreement and cannot agree upon the constitution of the tribunal, will national courts be involved in selecting the arbitral seat. The selection of the seat by national courts is potentially problematic, because of the risks of overlapping judicial competence of courts in different states and the possibility of conflicting decisions from courts in different states.

Very few arbitration statutes grant local courts the power to select a seat. No such power is expressly granted, for example, under the UNCITRAL Model Law (see Article 20). As discussed above, where the parties have not otherwise agreed, most arbitration statutes provide for either the tribunal or an arbitral institution to select the seat; virtually no statute permits a national court to select the seat.

In one important respect, statutory provisions concerning selection of the arbitral seat are circular. Most arbitration statutes apply only to arbitrations with their seat in national territory; this territorial limitation extends to the statutes' provisions regarding the arbitral tribunal's default authority to select the seat (*e.g.*, in Articles 1(2) and 20 of the UNCITRAL Model Law). As a result, when there is no agreement by the parties on the seat, legislative grants of default authority to an arbitral tribunal to select the seat are, by their terms, inapplicable. Moreover, where the parties are unable to agree upon the identity of the arbitrator(s) and have not agreed upon a method for making such a choice, then there will be no tribunal to select the seat and (in many cases) no designated national court with power to select the arbitrators. In part as a consequence, some authorities hold that "blank" arbitration clauses, which do not specify a seat or a means of selecting the seat, are invalid.[37]

In a few legal regimes (*e.g.*, Sweden, Japan), arbitration legislation provides for local courts to select the seat in circumstances where the parties have neither agreed upon a seat nor a means for selecting a seat. Thus, the Swedish Arbitration Act provides: "Arbitral proceedings in accordance with this Act may also be commenced in Sweden against a party which is domiciled in Sweden or is otherwise subject to jurisdiction of the Swedish courts with regard to the matter in dispute, unless the arbitration agreement provides that the proceedings shall take place abroad."[38] If the statutorily-prescribed jurisdictional nexus is satisfied, then an arbitration may be initiated in Sweden, subject to the Swedish Arbitration Act – thereby permitting Swedish courts to select an arbitral tribunal (in the absence of agreement by the parties).

In contrast to legislation in most countries, the FAA grants U.S. courts a potentially significant role in the selection of the arbitral seat in international arbitrations. In particular, the FAA grants U.S. courts the power to compel arbitration (under §4, §206 and §303 of the FAA) in a particular place. In

36. Other legislation adopts the same approach. *See, e.g.*, Swiss Law on Private International Law, Art. 176(3); Japanese Arbitration Law, Art. 28(2). *See also* G. Born, *International Commercial Arbitration* 2094–103 (2d ed. 2014).

37. *See supra* p. 76.

38. Swedish Arbitration Act, §47. *See also* Japanese Arbitration Law, Art. 8(1) ("Even if the place of arbitration has not been designated, [applications for specified judicial assistance] may be made when there is a possibility that the place of arbitration will be in the territory of Japan and the applicant or counterparty's general forum … is in the territory of Japan.").

issuing orders compelling arbitration under the FAA, U.S. courts have therefore sometimes specified the place where the arbitration is to proceed. In some cases, U.S. courts have issued orders compelling arbitration within the United States, even where parties have agreed to arbitration in accordance with institutional rules specifying an alternative means of selecting a seat.[39] This approach is at odds with the overwhelming weight of authority, with U.S. obligations under Article II of the Convention and with principles of party autonomy.

§6.04 CHOICE OF ARBITRAL SEAT

There are a variety of different, but generally related, factors that are relevant to the choice of the arbitral seat. Parties (and arbitral institutions or arbitrators) should consider these various factors in selecting the seat in particular cases. In practice, these considerations frequently lead to the selection of one of a limited number of jurisdictions with proven, well-established pro-arbitration legal regimes.

[A] Considerations Relevant to Choice of Arbitral Seat

[1] Contracting Party of New York Convention

First, the arbitral seat should virtually always be a state that has acceded to the New York Convention (or, exceptionally, a comparable international instrument). The seat is almost always the place where the award will be "made" for purposes of determining the applicability of the Convention (under Article I(2)). This has significant legal consequences for the recognition and enforceability of awards outside the country where they are rendered. If a state is party to the Convention, awards made within its territory will generally be subject to the Convention's pro-enforcement rules in other Contracting States; conversely, if a state is *not* party to the Convention, its awards often will not enjoy the benefits of the Convention, and may instead be subject only to parochial or archaic domestic arbitration legislation when sought to be enforced abroad.[40] With 156 states (as of July 2015) having ratified the Convention, there is no justification for ignoring this requirement.

[2] Standards for Annulment of Arbitral Awards

Second, the courts in the seat are usually competent (and exclusively competent) to entertain actions to annul the award. Further, the scope and extent of judicial review of an award is primarily a matter of national law, that varies from country to country. Under many national arbitration regimes, an award is subject to little or no review of the merits of the tribunal's decision and little review of the arbitral procedures.[41] In contrast, a few states permit relatively extensive review of the merits of awards and the procedures in the arbitration, either explicitly or in the form of extensive public policy inquiries. Selecting a seat with the desired level of judicial review of the arbitrators' award is therefore of overriding

39. *See* G. Born, *International Commercial Arbitration* 2106–19 (2d ed. 2014). *See, e.g.*, *Tolaram Fibers, Inc. v. Deutsche Eng'g Der Voest-Alpine Industrieanlagenbau GmbH*, 1991 U.S. Dist. LEXIS 3565 (M.D.N.C.).

40. Many parties to the New York Convention (including the United States) have adopted "reciprocity" reservations and will only apply the Convention to awards "made" in another Contracting State. *See infra* p. 380 to p. 381.

41. *See infra* p. 311 to p. 314 and p. 319 to p. 335.

http://www.pbookshop.com

standard than the standard required for removal of an arbitrator under Article 12(1). Other institutional rules impose similarly broad disclosure obligations.[41]

Both national law and many institutional rules also impose a continuing obligation on arbitrators to disclose possible conflicts that arise during the arbitral proceedings. For example, Article 12(1) of the Model Law provides that "… [a]n arbitrator, from the time of his appointment *and throughout the arbitral proceedings*, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him." Institutional rules contain similar provisions.[42]

[vi] Grounds for Finding Lack of Impartiality

In practice, a number of specific categories of "conflicts" recurrently arise in assessing an arbitrator's impartiality. These various grounds for potential challenge can be considered independently, or in conjunction with other grounds, as a basis for challenging an arbitrator's impartiality.

Judge in Own Cause. It is elementary that a party may not be an arbitrator in its own case ("*nemo debet esse iudex in propria causa*"). Even where parties have expressly agreed to arrangements where one party, or its representative, is to resolve the parties' future disputes, arbitral institutions and courts have often refused to give effect to such agreements.

Financial Interest in the Dispute. One of the clearest bases for finding a lack of impartiality is the arbitrator's material financial interest in the outcome of the arbitration. This includes cases where the arbitrator would profit financially from his or her own decision or has an ownership interest in a party to the arbitration.

Present Employment by Party. An arbitrator's present employment by a party – as an employee, officer or director – is a presumptive basis for finding a lack of independence.

Prior Involvement in the Dispute. Another presumptive basis for finding a lack of independence is an arbitrator's prior involvement in the parties' dispute, either as a corporate officer, lawyer or witness. The IBA Guidelines provide that an "arbitrator [who] had a prior involvement in the dispute" is subject to a waivable Red List conflict (in Article 2.1.2).

Ex Parte Contacts During Arbitration. Many institutional rules, as well as the IBA and AAA/ABA codes of arbitrator ethics, forbid *ex parte* contacts between an arbitrator and a party concerning the substance of the arbitration.[43] Even absent such rules, undisclosed *ex parte* contacts between an arbitrator and a party during the arbitration concerning the merits of the parties' dispute are presumptively regarded as improper under many national laws.

41. Article 11(2) of the 2012 ICC Rules provides that "The prospective arbitrator shall disclose in writing to the Secretariat any facts or circumstances which *might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties*, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality." (emphasis added) *See also* 2014 LCIA Rules, Art. 5(4) ("the candidate shall sign a written declaration stating: (i) whether there are any circumstances currently known to the candidate likely to give rise to the mind of any party to any justified doubts as to his or her impartiality or independence, and, if so, specifying in full such circumstances in the declaration"); 2014 ICDR Rules, Art. 13(1).

42. *See, e.g.*, 2012 ICC Rules, Art. 11(3) ("An arbitrator shall immediately disclose … any facts or circumstances … concerning the arbitrator's impartiality or independence which may arise during the arbitration."); 2014 ICDR Rules, Art. 13(3) ("If, at any stage during the arbitration, circumstances arise that may give rise to such doubts, an arbitrator or party shall promptly disclose such information …"); 2014 LCIA Rules, Art. 5(5) ("continuing duty as an arbitrator … to disclose in writing any circumstances becoming known to that arbitrator").

43. *See, e.g.*, 2014 ICDR Rules, Art. 13(6); 2013 AAA Commercial Rules, Rule 19; 2014 LCIA Rules, Art. 13(4); 2014 WIPO Rules, Arts. 21, 45; IBA Ethics, Art. 5; AAA/ABA Code of Ethics, Canon III.

Family or Personal Relationship with Party. A family relationship between an arbitrator and one of the parties, the parties' principals (or lawyers) or a key witness can also sustain a finding of lack of independence. A personal relationship between an arbitrator and a party, principal or lawyer can also result in disqualification of an arbitrator.

Business Dealings with Party. If an arbitrator has non-trivial business dealings with a party, a lack of independence will presumptively be found. Conversely, if the business dealings are insignificant, and unrelated to the dispute, they are unlikely to constitute grounds for removal.

Prior Representation of Party. If an arbitrator has previously provided legal (or similar) services on other matters to one of the parties, this may provide grounds for finding lack of independence, depending on the circumstances.

Law Firm Conflicts. Although the arbitrator himself or herself may not represent, or have previously represented, one of the parties to the arbitration, colleagues in his or her law firm may do so, or have done so. In most legal systems, the arbitrator's law firm's conflicts will be relevant to assessing his or her impartiality. In general, courts have been reluctant to uphold challenges where an arbitrator was not personally involved in representations that were wholly unrelated to the arbitration.

Recurrent Arbitral Appointments by Same Party. If an arbitrator is repeatedly appointed by the same party or lawyer, this may give rise to justifiable doubts concerning his or her impartiality. The IBA Guidelines (in Article 3.1.3) generally require disclosure of repeat appointments of an arbitrator by the same party or an affiliate of the party if they are sufficiently frequent (two or more appointments in the past three years), and provide for the possibility of challenges in these circumstances.[44]

Adversity to One Party. Another possible basis for finding lack of impartiality involves an arbitrator's current adverse representation against a party in an unrelated (or related) matter. The IBA Guidelines provide (in Article 3.1.2) for disclosure, and the possibility of a challenge, in cases of adverse representation by the arbitrator (or his or her law firm) within the past three years.

Issue Conflicts. It is sometimes argued that a prospective arbitrator has an "issue conflict" because he or she has previously expressed a position on a legal issue likely to arise in an arbitration. Such claims have been particularly common in investment arbitration, where arbitral awards and submissions are often public and a limited number of common legal issues are likely to recur. Most authorities have rejected such claims on the basis that lawyers, judges and arbitrators inevitably encounter and form views on particular issues in the course of their work.

[2] Nationality of Sole and Presiding Arbitrators

Most institutional rules contain limitations on the nationality of sole and presiding arbitrators (but not the nationality of co-arbitrators). These limitations are designed to implement one of the basic objectives of international arbitration, being to provide an internationally-neutral means of resolving disputes between parties from different countries.

Article 6(7) of the UNCITRAL Rules is representative, providing that, in appointing a sole or presiding arbitrator, the appointing authority shall "have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties."

44. The IBA Guidelines contain an exception for "maritime, sports or commodities arbitration, to draw arbitrators from a smaller or specialised pool of individuals. If in such fields it is the custom and practice for parties to frequently appoint the same arbitrator in different cases, no disclosure of this fact is required, where all parties in the arbitration should be familiar with such custom and practice."

http://www.pbookshop.com

[B] Reply and Counterclaims

National law generally does not address the procedures relating to replies to a request for arbitration or the assertion of counterclaims, instead leaving this to the arbitration agreement or the arbitrators' procedural discretion. Under most institutional rules, the respondent will be afforded an opportunity, within a time limit, to reply to the request for arbitration and assert counterclaims. The time for replying is ordinarily short: Article 5 of the 2012 ICC Rules grants 30 days, as does Article 3 of the 2014 ICDR Rules, while Rule 4(1) of the 2013 SIAC Rules allows for 14 days. These deadlines are often extended, either by agreement between the parties or leave of the institution.

[C] Constitution of Arbitral Tribunal and Challenges

The constitution of the tribunal is a critical procedural step at the outset of any arbitration. There are a variety of mechanisms for appointing arbitrators, in both institutional rules and arbitration agreements. These mechanisms are discussed in Chapter 7 above.

[D] Presiding Arbitrator's Procedural Authority

In three (or five) person tribunals, one of the arbitrators will be the "presiding arbitrator," also called the "president" or "chair." The presiding arbitrator plays a significant role in the arbitral process – particularly in speaking for the tribunal, ruling on procedural matters during hearings, overseeing the tribunal's deliberations, (often) holding a decisive vote and drafting the award.

Some arbitration statutes and institutional rules grant the presiding arbitrator specific authority, generally in terms of a decisive vote in case of deadlocks on the tribunal.[32] The parties are generally permitted to agree to grant the presiding arbitrator broader authority (for example, to rule independently on certain procedural matters). The presiding arbitrator also possesses a degree of inherent authority, by virtue of his or her role in leading deliberations and speaking for the tribunal (both at hearings and otherwise).

[E] Written Communications With Arbitral Tribunal During Proceedings

A tribunal will usually take care at the outset to organize communications made during the arbitration. This includes providing a circulation list for all communications (with addresses and email addresses) and giving directions regarding submissions (*e.g.*, number of copies, mode of transmission). These steps are ministerial, but they can prevent disputes as to whether particular documents were or were not properly sent.

After a tribunal is appointed, the parties and their representatives are generally obliged to refrain from *ex parte* communications about the substance of the case with the arbitrators. This is impliedly required by most national arbitration regimes, by virtue of their requirements regarding the impartiality of the tribunal. The prohibition on *ex parte* communications is made express in ethical standards for international arbitrators. Thus, the IBA Rules of Ethics for International Arbitrators, in Article 5.3, provide: "[t]hroughout the arbitral proceedings, an arbitrator should avoid any unilateral communications

32. UNCITRAL Model Law, Art. 29; Swiss Law on Private International Law, Art. 189(2); Japanese Arbitration Law, Art. 37(3). *See also* G. Born, *International Commercial Arbitration* 2040–43 (2d ed. 2014).

regarding the case with any party or its representatives." Exceptions are made for scheduling or similar logistical issues or, unusually, where the adverse parties have specifically consented.

[F] Jurisdictional Objections

As discussed above, disputes often arise over the validity or scope of arbitration agreements. Although national courts sometimes resolve such disputes, the tribunal itself also often addresses questions of jurisdiction. The timing of such jurisdictional proceedings is discussed in detail in Chapter 2 above.[33] National law in the arbitral seat will sometimes regulate the timing of both the consideration of jurisdictional issues by national courts and the making of a jurisdictional award by the arbitrators. Most national laws and institutional rules leave the timing of a jurisdictional award to the tribunal's discretion, sometimes with a presumption in favor of interlocutory resolution of jurisdictional challenges.[34]

[G] Language of Arbitration

Many arbitration agreements specify the language of the proceedings (and, less frequently, the award). Absent such agreement, most institutional rules authorize the tribunal to select a language (or languages) for the arbitration.[35] Arbitrators will often select the language of the underlying contract to govern the arbitral proceedings. There are exceptions, however, where institutional rules dictate a default language.[36]

The language of the arbitral proceedings is an issue of substantial practical importance. Among other things, the language of the arbitration affects the choice (and performance) of counsel and arbitrators, the effectiveness of witness testimony, and similar matters.

[H] Initial Procedural Conference

Tribunals usually conduct a preliminary conference with the parties and counsel. The purpose of the conference is to discuss and establish the procedural timetable and rules for the arbitration, and to introduce the arbitrators, parties and counsel personally. In practice, tribunals increasingly dispense with physical meetings, in favor of video or telephone conferences.

[I] Procedural Timetable and Time Limits

It is customary for the tribunal to establish a procedural timetable at the outset of the arbitration. For the most part, arbitration statutes do not address the contents of procedural timetables, which are left to the parties' agreement or, absent agreement, the tribunal's directions. The most significant exceptions

33. *See supra* p. 47 to p. 71.
34. *See supra* p. 162, G. Born, *International Commercial Arbitration* 1239–43, 2230–31 (2d ed. 2014).
35. *See, e.g.*, UNCITRAL Rules, Art. 19(1); 2012 ICC Rules, Art. 20; 2014 LCIA Rules, Art. 17; 2014 ICDR Rules, Art. 18.
36. Romanian Chamber of Commerce and Industry Rules, Art. 89(1) (Romanian); Hungarian Chamber of Commerce Court of Arbitration Rules, Art. 9(3) (Hungarian); Polish Chamber of Commerce Arbitration Rules, Art. 20(1) (Polish).

http://www.kluwerlaw.com

provide "their" own expert testimony if that is the course desired by one or both parties; a contrary approach would risk denying one or both parties an opportunity to be heard.

[V] Witness-Conferencing

Various procedural innovations have been suggested to improve the quality of witness examination in contemporary international arbitration practice. One such innovation is "witness-conferencing" where two or more witnesses are simultaneously examined concerning the same set of issues or events. The purpose of witness-conferencing is to confront two or more witnesses with potentially-contradictory testimony in order to identify areas of agreement, force concessions and evaluate the credibility of differing contentions.

Witness-conferencing requires careful preparation and firm control of both witnesses and counsel by the tribunal but, properly-implemented, can effectively expose evasions and inaccuracies. At the same time, witness-conferencing seldom genuinely saves time. On the contrary, witness-conferencing can take more time, because it is often best used in addition to, rather than instead of, traditional cross-examination. This enables cross-examination to identify key areas of disagreement which can then be focused on in a witness conference.[59]

[W] Post-Hearing Written Submissions

It is common in many international arbitrations for there to be post-hearing written submissions. These submissions will be prepared after the transcript of the evidentiary hearing has been circulated and will provide a final summation of each party's position on the complete evidentiary record. Post-hearing briefs are often submitted simultaneously, although some tribunals prefer a sequential process (to avoid "ships passing in the night").

[X] Closing of Arbitral Proceedings

It is important for the tribunal to make an unequivocal close to the submission of evidence and legal argument by the parties. This gives the parties notice of the date beyond which they will not be permitted to further argue their case, ensuring that they focus their energies when the opportunity is available. It also ensures that there will be a definite end to the arbitral process, after which the award will be rendered.

Some institutional rules expressly provide for the tribunal to close the proceedings. Article 27 of the 2012 ICC Rules provides that the tribunal will declare the proceedings closed "[a]s soon as possible after the last hearing concerning matters to be decided in an award or the filing of the last authorized submissions concerning such matters, whichever is later." Even absent such provisions, experienced tribunals will notify the parties in advance of a date after which new evidence will not be permitted (a "cut-off" date) and a date after which no further submissions of any sort will be permitted ("closing of the proceedings").

59. *See* G. Born, *International Commercial Arbitration* 2292–93 (2d ed. 2014).

[Y] *Ex Parte* Proceedings and Default Awards

Although it is almost always a bad idea, parties sometimes boycott arbitration proceedings. Such maneuvers are usually regretted in the end, after a default award is made and enforcement efforts begin. A sensible alternative to defaulting, in most cases, is to proceed under protest while expressly recording objections to the tribunal's jurisdiction (including its competence-competence) or impartiality and/or seeking immediate judicial recourse. Nonetheless, parties sometimes take an alternative course and simply default in the arbitration.

Most arbitration statutes provide for the possibility of default proceedings. Article 25 of the UNCITRAL Model Law provides that, "[u]nless otherwise agreed by the parties, if, without sufficient cause, ... (b) the respondent fails to communicate his statement of defense [within the relevant time period], the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations." Other legislation is similar.[60] In practice, tribunals frequently make default awards and national courts routinely reject annulment and non-recognition defenses to default awards.[61]

Most institutional rules also provide that arbitral proceeding may go forward, without the defaulting party's presence, to a default award. For example, the UNCITRAL Rules provide that, if the claimant fails to communicate its claim in due time, the tribunal shall terminate the arbitration; if the respondent fails to defend, the tribunal "shall order that the proceedings continue."[62] The ICC Rules similarly provide for the appointment of an arbitrator on behalf of the defaulting party and: "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."[63]

Even without express authorization by national law or institutional rules, a tribunal has the inherent authority to conduct proceedings in the absence of one party and to make a default award. Doing so is an essential element of adjudicatory power and is necessary to ensure an effective arbitral process which one party cannot frustrate through a refusal to participate.

If a party defaults, the tribunal will ordinarily proceed with the arbitration on an *ex parte* basis, ensuring that the defaulting party receives notice of steps in the proceedings. Importantly, however, a tribunal is not a court, empowered to issue a default judgment predicated simply on one party's non-participation. Rather, the tribunal is responsible for assessing the issues presented to it; a party's non-participation does not abrogate that obligation.[64] A tribunal will therefore usually direct the claimant to make written submissions, present evidence, and, where appropriate, appear at a hearing with its witnesses. The tribunal will also, without substituting itself for the defaulting party, generally seek to satisfy itself that the claimant's claims are well-founded and thereafter render a reasoned award, setting forth the facts and basis for its decision.

60. *See* G. Born, *International Commercial Arbitration* 2297–2300 (2d ed. 2014).
61. *See* G. Born, *International Commercial Arbitration* 2297–2300, 3027–28, 3247, 3530–31 (2d ed. 2014).
62. UNCITRAL Rules, Art. 30(1). Article 30(2) provides: "If a party, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration."
63. 2012 ICC Rules, Art. 26(2). *See also* 2014 ICDR Rules, Arts. 26(1), (2); 2014 LCIA Rules, Art. 15(8); 2013 AAA Commercial Rules, Rule 31; 2014 JCAA Rules, Rule 48(2).
64. *See, e.g.*, UNCITRAL Model Law, Art. 25(c) ("the arbitral tribunal may continue the proceedings and make the award on the evidence before it").

http://www.pbookshop.com

witnesses. This authority is recognized in some institutional rules, as well as the IBA Rules.[37] The tribunal's power to draw adverse inferences is also well-recognized in arbitral authority and national court decisions.[38] There are cases where national courts have concluded that a tribunal exceeded its authority in drawing adverse inferences, but this is rare.

§9.02 ROLE OF NATIONAL COURTS IN OBTAINING EVIDENCE FOR USE IN INTERNATIONAL ARBITRATIONS

As discussed above, most disclosure in international arbitration occurs within the context of the arbitration, between the parties and under the control of the tribunal. Nevertheless, there are instances in which the tribunal (or, more rarely, the parties) may seek the assistance of a national court in obtaining disclosure for use in the arbitration. This is particularly likely where disclosure is sought from non-parties to the arbitration, but is also available against parties. Judicial assistance of this sort is available only when provided for by national law and, as a practical matter, is infrequently sought.

[A] National Arbitration Legislation

Arbitration legislation in many jurisdictions provides that a tribunal may obtain the assistance of a national court in taking evidence. These legislative provisions are broadly similar to statutes providing for judicial assistance in granting provisional relief (discussed below).[39]

[1] UNCITRAL Model Law

Article 27 of the UNCITRAL Model Law is representative of arbitration statutes providing for judicial assistance in evidence-taking. Article 27 provides "[t]he arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence."

The Model Law provides for the tribunal, or a party "with the approval of the arbitral tribunal" to seek judicial assistance in evidence-taking. Importantly, Article 27 does not permit a party – acting without the tribunal's approval – to seek judicial assistance in taking evidence. Rather, as with other aspects of the arbitral procedure, the arbitrators retain control over applications for judicial assistance. It also appears that Article 27 is available only for tribunals seated within national territory (and not in foreign-seated arbitrations).

It is generally accepted that the tribunal enjoys broad discretion over evidence-taking and determining whether particular items are, or are not, evidence. The purpose of Article 27 of the Model

37. *See* IBA Rules on the Taking of Evidence, Arts. 4.8, 5.5, 9.4, 9.5 ("If a Party fails without satisfactory explanation to make available any other relevant evidence, including testimony, sought by one Party to which the Party to whom the request was addressed has not objected in due time or fails to make available any evidence, including testimony, ordered by the Arbitral Tribunal to be produced, the Arbitral Tribunal may infer that such evidence would be adverse to the interests of that Party.").

38. *See, e.g., INA Corp. v. Islamic Repub. of Iran, Award in IUSCT Case No. 184-161-1 of 13 August 1985*, 8 Iran-US C.T.R. 373, 382 (1985); *Final Award in ICC Case No. 6497*, XXIV Y.B. Comm. Arb. 71, 75–79 (1999); *Forsythe Int'l, SA v. Gibbs Oil Co.*, 915 F.2d 1017, 1023 n.8 (5th Cir. 1990). *See also* G. Born, *International Commercial Arbitration* 2388–94 (2d ed. 2014).

39. *See infra* p. 218 to p. 220.

Law is to enable tribunals to seek assistance from courts in enforcing a discovery order (not to disable tribunals from ordering and receiving the production of evidence). The drafting history of the Model Law underscores this point by explaining that a court "may take the evidence itself … or it may order that the evidence be provided directly to the arbitral tribunal, in which case the involvement of the court is limited to exerting compulsion."[40]

[2] Other National Arbitration Legislation

Likewise, Article 184(2) of the Swiss Law on Private International Law provides that arbitral tribunals seated in Switzerland may seek the assistance of Swiss courts in taking evidence:

> If the assistance of state judiciary authorities is necessary for the taking of evidence, the Arbitral Tribunal or a party with the consent of the Arbitral Tribunal, may request the assistance of the state judge at the seat of the Arbitral Tribunal; the judge shall apply his own law.

Swedish law is similar, with §26 of the Swedish Arbitration Act granting parties to an arbitration seated in Sweden the right, with the approval of the arbitrators, to seek the assistance of local courts in sworn witness testimony or the production of documents ("as evidence"). Other arbitration legislation is comparable.[41]

[3] United States

The FAA adopts a somewhat different approach to court-ordered discovery than the Model Law. Section 7 of the FAA grants a tribunal seated in the United States authority to order testimony and document production, including by third parties, in certain circumstances. At the same time, §7 also provides for judicial assistance in taking evidence at the request of one of the parties to the arbitration (as distinguished from the arbitrators). If the arbitrators' orders are not complied with, §7 authorizes the tribunal to seek judicial assistance in compelling compliance.

U.S. courts have adopted divergent approaches to the scope of judicial assistance in ordering "discovery" under §7. Some lower courts have held that §7 does not permit a tribunal to obtain judicial assistance in obtaining pre-hearing "discovery" from third parties (whether document discovery or depositions), but instead only permits a tribunal to require the production of "evidence" at an evidentiary hearing.[42] Other U.S. courts appear to have held that §7 allows an arbitrator, in principle, to obtain judicial assistance to compel third parties to provide pre-hearing discovery, but have limited the scope of such assistance, requiring either showings of need or materiality.[43] In one court's words:

40. *Report of the Secretary-General on the Analytical Commentary on Draft Text of A Model Law on International Commercial Arbitration*, U.N. Doc. A/CN.9/264 (1985).

41. G. Born, *International Commercial Arbitration* 2399–401 (2d ed. 2014).

42. *See, e.g., Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 406 (3d Cir. 2004) (no third party pre-hearing discovery orders by arbitrators in any circumstances). *See* G. Born, *International Commercial Arbitration* 2401–04 (2d ed. 2014).

43. *See, e.g., COMSAT Corp. v. Nat'l Science Found.*, 190 F.3d 269, 271 (4th Cir. 1999) (Section 7 "does not authorize an arbitrator to subpoena third parties during pre-hearing discovery, absent a showing of special need or hardship"). *See* G. Born, *International Commercial Arbitration* 2399–401 (2d ed. 2014).

http://www.pbookshop.com

[A] Status of Provisional Measures as "Final" Awards

A significant question with regard to the enforceability of tribunal-ordered "provisional" measures is whether such decisions can qualify for enforcement as "awards" under the provisions of national arbitration statutes. Some authorities hold that only "final" awards can be recognized and enforced under the New York Convention and most national arbitration legislation, and that "provisional" measures are not "final." In the words of one decision, "whilst it is true that a valid interlocutory order is in one sense 'binding' on the parties to the arbitration agreement … an interlocutory order which may be rescinded, suspended, varied or reopened by the tribunal which pronounced it is not 'final' and binding on the parties."[41]

In contrast, a number of recent authorities hold that the grant of provisional measures finally disposes of the request for such measures and that judicial enforcement of such measures is important to the arbitral process. In the United States, the FAA provides no express guidance as to the enforceability of arbitral decisions granting provisional measures, but a number of courts have held that decisions granting provisional measures are "final" awards and subject to enforcement. According to one U.S. decision, an order of provisional measures should be enforced because "such an award is not 'interim' in the sense of being an 'intermediate' step toward a further end. Rather, it is an end in itself, for its very purpose is to clarify the parties' rights in the 'interim' period pending a final decision on the merits."[42]

The better view is that provisional measures should be enforceable as arbitral awards under generally-applicable provisions for the enforcement of awards. Provisional measures are "final" in that they dispose of a request for relief pending conclusion of the arbitration. Orders granting provisional relief are meant to be complied with, and to be enforceable; they are in this respect different from interlocutory decisions that merely decide certain subsidiary legal issues (*e.g.*, choice of law, liability) or establish procedural timetables. It is also important to the efficacy of the arbitral process for national courts to be able to enforce provisional measures. If this possibility does not exist, then parties will be more willing to refuse to comply with provisional measures, resulting in precisely the harm that such measures were meant to foreclose.

[B] Specialized National Arbitration Legislation Permitting Enforcement of Provisional Measures

Given the uncertainty concerning the enforceability of provisional measures, some states have adopted legislation that authorizes judicial enforcement of tribunal-ordered provisional measures, outside the context of final awards. These statutes typically provide for enforcement of tribunal-ordered provisional measures by courts in the arbitral seat (as opposed to other states). These provisions materially enhance the enforceability of provisional measures ordered by tribunals, but do not deal with enforcement abroad.

One of the first such provisions was Article 183(2) of the Swiss Law on Private International Law, which provides that, if a party does not comply with tribunal-ordered provisional measures, "the

41. *Resort Condos. Int'l Inc. v. Bolwell*, (1993) 18 ALR 655 (Queensland Sup. Ct.).

42. *S. Seas Nav. Ltd v. Petroleos Mexicanos of Mexico City*, 606 F.Supp. 692 (S.D.N.Y. 1985) ("[I]f an arbitral award of equitable relief based upon a finding of irreparable harm is to have any meaning at all, the parties must be capable of enforcing or vacating it at the time it is made."). *See also Metallgesellschaft AG v. M/T Capitan Constante*, 790 F.2d 280, 282–83 (2d Cir. 1986).

arbitral tribunal may request the assistance of the competent court." Similarly, the German version of the UNCITRAL Model Law provides that "the court may, at the request of a party, permit enforcement of a measure … unless application for a corresponding interim measure has already been made to a court."[43] The German legislation also provides for judicial review of interim measures ordered by a tribunal, as well as judicially-ordered damages for unjustified grants of provisional relief (against the party that requested such relief). Legislation in a number of other jurisdictions is similar.[44]

The 2006 revisions to the Model Law adopted a specialized enforcement regime for provisional measures issued by arbitral tribunals. Article 17H(1) provides that "[a]n interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court." The provision provides that enforcement may be sought "irrespective of the country in which it was issued," permitting provisional measures to be enforced outside the arbitral seat. The enforceability of provisional measures under Article 17H is subject to exceptions (in particular those applicable to the recognition and enforcement of final awards).[45]

Some recently-amended arbitration laws also include specific provisions for the enforcement of interim measures by emergency arbitrators.[46] Notably, the Article 1043(b) of the Netherlands Code of Civil Procedure provides that such interim measures are enforced as awards (unless the arbitrator decides to issue them in a different form).

§11.03 PROVISIONAL MEASURES ORDERED BY NATIONAL COURTS IN AID OF ARBITRATION

An arbitral tribunal is not the only source of provisional relief in connection with an international arbitration: in addition, national courts generally possess concurrent authority to grant provisional measures in connection with arbitral proceedings. In some instances, national courts are the only realistic source of provisional relief.

As noted above, until the tribunal is in place, there is no prospect of obtaining provisional relief from it. Efforts by a number of arbitral institutions to provide pre-arbitral mechanisms for non-judicial emergency relief have begun to address this, but numerous *ad hoc* and other arbitrations continue not to offer such avenues for interim relief in the arbitral process. In addition, where attachments and other provisional measures binding third parties are concerned, arbitrators can virtually never provide effective relief. As a consequence, parties who require urgent provisional relief at the outset of a dispute must often seek the assistance of national courts.

Arbitration legislation generally provides national courts with concurrent power to order provisional measures in aid of an international arbitration (absent agreement to the contrary). The existence of concurrent jurisdiction, shared by arbitral tribunals and national courts, is an exception to the general principles of arbitral exclusivity and judicial non-interference in the arbitral process. Concurrent jurisdiction in this field is nonetheless well-recognized and is essential to the efficacy of the arbitral process.[47]

43. German ZPO, §1041(2).

44. *See* G. Born, *International Commercial Arbitration* 2516–19 (2d ed. 2014).

45. *See* G. Born, *International Commercial Arbitration* 2517–19 (2d ed. 2014).

46. See, e.g., Singapore International Arbitration Act, §§2(1), 12(6); Hong Kong Arbitration Ordinance, §22B.

47. *See* G. Born, *International Commercial Arbitration* 2522–63 (2d ed. 2014).

http://www.pbookshop.com

Contractual Obligations and the Rome Convention.[34] Alternatively, some tribunals have relied on general principles that they have discerned in earlier awards considering conflict of laws matters.[35]

[7] *Application of Non-National Legal System in Absence of Parties' Choice-of-Law Agreement*

Application of either a choice-of-law system or "direct" application of the appropriate substantive law results in application of some set of legal rules. In most cases, this will be the national law of a particular state, selected through the application of a conflict of laws system. Nonetheless, a few international tribunals have applied so-called non-national legal systems or rules of law – including *lex mercatoria*, general principles of law, the UNIDROIT Principles of International Commercial Contracts or the Principles of European Contract Law ("PECL"). The content of these various non-national systems is discussed below.[36]

It is unclear whether the selection of a non-national legal system will result in a valid award (at least absent a choice-of-law agreement selecting such a system). As discussed below, Article 28(1) of the Model Law (as well as some other arbitration statutes[37]) provides for the tribunal to apply the "rules of law" selected by the parties. The reference to "*rules of law*," rather than merely "*law*," has been interpreted as permitting parties to select non-national legal systems in their choice-of-law agreements. In contrast, Article 28(2) of the Model Law provides for the arbitrators to apply the "*law*" determined by applicable conflicts rules. That difference in the text of Articles 28(1) and 28(2) suggests that arbitrators may not – absent a choice-of-law agreement selecting such a legal system – apply non-national rules of law.[38]

A few jurisdictions, including Switzerland and Canada, have modified Article 28(2) of the Model Law to refer to "*rules of law*."[39] This change is intended to authorize arbitrators to select a set of non-national rules to govern a dispute, even absent an agreement to this effect. In contrast, several influential jurisdictions have declined to follow this approach when adopting versions of the Model Law, including England, Germany and Japan.

Even where arbitrators may select a non-national legal system, as a practical matter, they have refused to do so in most commercial cases. Non-national legal systems generally fail to provide predictable results, particularly insofar as complex commercial affairs are concerned.[40] That is confirmed by the reluctance of commercial parties to agree to choice-of-law clauses selecting non-national legal systems. Given this reluctance, tribunals are generally very hesitant to impose non-national legal systems on commercial parties.

34. *See* G. Born, *International Commercial Arbitration* 2620–21, 2651–53 (2d ed. 2014).
35. *See , e.g., Award in ICC Case No. 4237*, X Y.B. Comm. Arb. 52 (1985) ("The decided international awards published so far show a preference for the conflict rule according to which the contract is governed by the law of the country with which it has the closest connection."); *Harnischfeger Corp. v. Ministry of Roads & Transp., Partial Award in IUSCT Case No. 144-180-3 of 13 July 1984*, 7 Iran-US C.T.R. 90, 99 (1984) (applying "under general choice of law principles, the law of the United States, the jurisdiction with the most significant connection with the transaction and the parties").
36. *See infra* p. 249 to p. 250.
37. *See* G. Born, *International Commercial Arbitration* 2661–64, 2755–58 (2d ed. 2014); *see infra* p. 252 to p. 253 and p. 261.
38. *See* G. Born, *International Commercial Arbitration* 2661–64 (2d ed. 2014); *see infra* p. 261 and p. 291.
39. Swiss Law on Private International Law, Art. 187(1) (emphasis added); Canadian Commercial Arbitration Act, Art. 28(1).
40. *See* G. Born, *International Commercial Arbitration* 2661–63, 2758, 2763–64 (2d ed. 2014).

[E] "Direct" Application of Substantive Law

Some authorities conclude that international arbitrators are free to "directly" apply substantive law rules, supposedly without first engaging in any choice-of-law analysis. As discussed above, Article 1511 of the French Code of Civil Procedure authorizes arbitrators in an international arbitration to "directly" apply the substantive law that they consider appropriate. Similar legislation has been adopted in a few other states (as discussed above).[41] Similarly, many institutional rules also permit "direct" application of substantive laws, putatively without any conflict of laws analysis. Article 21(1) of the 2012 ICC Rules is representative: "[i]n the absence of any such agreement [by the parties as to applicable law], the Arbitral Tribunal shall apply *the rules of law which it determines to be appropriate*."

Although frustration with contemporary choice-of-law rules is understandable, "direct" application of national law is not an appropriate response. The purposes of conflict of laws rules include structuring the decision-maker's discretion and providing parties with a measure of certainty about the substantive law governing their conduct. "Directly" applying a substantive law, putatively without conflict of laws analysis, leaves the parties' substantive rights to turn on subjective, unarticulated instincts of individual arbitrators and does little to further interests of predictability and fairness.

[F] Distinction Between Matters of Substance and Procedure

A recurrent issue in conflict of laws analysis is identifying what issues are subject to (a) the "substantive" law selected by the arbitrators' choice-of-law analysis, and (b) the "procedural" law governing the arbitration. Among other things, this question of characterization applies to issues such as burden of proof, evidentiary matters, statutes of limitations and remedies.[42] The distinction between substantive and procedural issues is elusive even within national legal systems. In the international context, where multiple differing characterizations may exist in different legal systems, the distinction is even more complex.

[1] *Burden of Proof*

A recurrent question in international arbitration is what party bears the burden of proving a particular issue. In general, the better view is that questions of burden of proof should not be assimilated solely with either the substantive law governing the merits of the dispute or the procedural law of the arbitration, but instead resolved by international standards in light of both.

[2] *Statute of Limitations*

Most nations impose limitations periods within which civil claims must be brought. Choosing between various potentially applicable statutes of limitations in international arbitration raises significant choice-of-law questions.

In some (particularly U.S.) jurisdictions, statutes of limitations have been regarded as "procedural," and therefore governed by the law of the forum.[43] In contrast, civil law states generally regard statutes of limitations as "substantive," and hold that limitations issues are governed by the law applicable to

41. *See supra* p. 242 to p. 242 and p. 246.
42. *See* G. Born, *International Commercial Arbitration* 2668–70 (2d ed. 2014).
43. *Restatement (Second) Conflict of Laws* §142 e, §143 comment c (1971).

http://www.kluwerlawbookshop.com

represent clients in arbitrations conducted in other U.S. states.[12] A number of states have adopted the ABA's approach, although a few jurisdictions have imposed stricter limitations. In particular, New York, Florida and Washington, D.C. have all adopted legislation or bar association rules making it clear that non-U.S. lawyers may represent parties in locally-seated international arbitrations. The few U.S. judicial decisions to address the issue likewise generally allow out-of-state lawyers to act in domestic arbitrations; these U.S. state law restrictions are generally inapplicable, by their terms, to international arbitrations (and, were they to so apply, would very likely be preempted by the U.S. FAA and the New York Convention).[13]

In one example of a restrictive judicial decision, *Birbrower, Montalbano, Condon & Frank, PC v. Superior Court*, the California Supreme Court held that a New York law firm engaged in the "unauthorized practice of law" by advising a client in California in preparation for a possible domestic arbitration (to be conducted in California).[14] The Court held that California law "articulates a strong public policy favoring the practice of law in California by licensed State Bar members. In the face of the Legislature's silence, we will not create an arbitration exception under the facts presented."[15]

The California legislature promptly responded to *Birbrower* by enacting a statute that permits out-of-state lawyers to represent parties in domestic arbitrations conducted in California, subject to certain registration requirements and, most notably, the identification of a California lawyer to serve as "the attorney of record."[16] In what critics view as an oversight, these requirements do not apply expressly to international arbitrations seated in California. Indeed, the *Birbrower* court suggested in *dicta* that international arbitrations seated in California were governed by separate legislation, under which a party's representative "need not be a member of the legal profession or licensed to practice law in California."[17] If adopted, this view reflects the general, and liberal, approach towards representation in international arbitrations in the United States.

§14.02 EXERCISE OF RIGHT TO REPRESENTATION

In practice, parties virtually always retain legal counsel to represent them in international arbitrations, often seeking specialized international arbitration counsel. This is in large part because international arbitration almost invariably involves the application of law to an evidentiary record in the context of an adjudicatory procedure that is similar in important respects to litigation. Although non-lawyers may play important roles on a party's team in an international arbitration (*e.g.*, as technical advisers), there are few instances where lawyers are not included in, and responsible for directing, the team.[18]

12. ABA Model Rules of Professional Conduct, Rule 5.5(c) ("A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that … (3) are in or reasonably related to a pending or potential arbitration, mediation or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires *pro hac vice* admission.").
13. *See* G. Born, *International Commercial Arbitration* 2840–44 (2d ed. 2014).
14. *Birbrower, Montalbano, Condon & Frank, PC v. Superior Court*, 949 P.2d 1 (Cal. 1998).
15. *Birbrower*, 949 P.2d at 9.
16. California Code of Civil Procedure §1282.4(c)(11).
17. *Birbrower*, 949 P.2d at 9 (citing Cal. C.C.P. §1297.351).
18. As noted above, there are some specialized industry contexts (*e.g.*, maritime, commodities) where arbitrations customarily do not involve (or permit) legal representatives. *See supra* p. 269.

There are a variety of possible choices for legal representatives in international arbitrations. As a practical matter, in larger cases, parties usually retain specialized international arbitration counsel. International arbitration can involve complex legal issues, both substantive and procedural, as well as logistical challenges in obtaining and presenting evidence. Specialized counsel are frequently best-placed to deal with these sorts of issues.[19]

As discussed above, there is generally no requirement that parties retain local counsel from the arbitral seat. Nonetheless, depending on the nature of the dispute and the tribunal, parties sometimes choose to include local counsel on their legal teams. That is particularly true where local court proceedings (such as jurisdictional challenges or applications for provisional measures) are foreseen. Additionally, some parties instinctively want lawyers from their home jurisdiction, for reasons of trust and familiarity, and such counsel are often included on the legal team.

§14.03 STANDARDS AND SUPERVISION OF PROFESSIONAL CONDUCT

International arbitration raises issues of professional conduct by legal representatives during the arbitral proceedings. These issues parallel those that arise in national court litigation, but involve significant additional complexities. As one commentator describes, "[i]nternational arbitration dwells in an ethical no-man's land."[20]

In national court litigation, the rules of professional conduct for legal representatives are prescribed by local statute or regulation and are enforced by the local judiciary or regulators (such as a bar association, bar society or *barreau*). These approaches to professional conduct are not readily transposed to international arbitration. International arbitration raises specialized and complex ethical issues, while a local lawyer's conduct in a foreign-seated arbitration is often not easily supervised by domestic professional bodies. In part as a consequence, the IBA and some arbitral institutions have adopted rules (or guidelines) for the professional conduct of party representatives in international arbitration, and, in particular, the IBA Guidelines on Party Representation in International Arbitration.

[A] Recurrent Professional Conduct Issues

National rules of professional conduct for lawyers generally regulate: (a) the quality of representation (including requirements of "zealous" representation of client interests and the definition of malpractice); (b) conflicts of interest; (c) compensation (including the permissibility (or impermissibility) of contingent or conditional fee arrangements); (d) confidentiality; (e) attorney-client privilege; (f) relations with other counsel and courts; and (g) publicity and advertising. International arbitrations not infrequently give rise to issues under many of these types of regulation.

19. That is reflected in reports on counsel in significant international arbitrations. *See* M. Goldhaber, *Arbitration Scorecard 2011: The Biggest Cases You Never Heard of*, The American Lawyer (July/August 2011).
20. Rogers, *Fit and Function in Legal Ethics: Developing A Code of Conduct for International Arbitration*, 23 Mich. J. Int'l L. 341, 342 (2002).

http://www.pbookshop.com

an award, national law generally requires that a statement of the reasons for the omitted signatures be appended to the award.[70]

There are instances in which all three arbitrators may have different views about the appropriate resolution of a dispute (for example, regarding quantum of relief or where two or more claims are asserted). Where this occurs, there may be no majority position, and instead three different views. In this event, some arbitration statutes and institutional rules provide that the decisive position be that of the presiding arbitrator, who is then authorized to make an award alone.[71] Other arbitration statutes and institutional rules do not expressly provide for awards by the presiding arbitrator alone (and it is doubtful that such authority is implied); in these circumstances, an award can be made only if the presiding arbitrator and one of the co-arbitrators compromise their initial views and agree upon a common position.[72]

[J] Dissenting, Concurring and Separate Opinions

Most arbitration legislation is silent on the subject of separate or dissenting opinions, although a few statutes expressly permit dissenting opinions. During the drafting of the UNCITRAL Model Law, proposals were made to permit dissenting opinions, but insufficient need was seen to do so.[73] In jurisdictions where arbitration legislation does not expressly permit separate opinions, judicial or academic authority usually approves the practice.[74]

A number of institutional rules provide for dissenting or separate opinions,[75] although there are some notable exceptions.[76] Even where institutional rules provide for the possibility of a dissenting or separate opinion, it is sometimes suggested, usually by civil law practitioners, that such an opinion may only be attached to an award or issued separately if the majority of the tribunal permits it. In very rare instances, tribunals have refused to release a dissenting opinion, notwithstanding the dissenting arbitrator's request that they do so.[77]

Although there are legal systems where dissenting or separate opinions are not permitted, these domestic rules have little application in the context of party-nominated co-arbitrators. Diverse tribunals

70. Institutional rules also generally permit awards by a majority of the arbitrators, with an explanation for the omitted signature. *See, e.g.*, UNCITRAL Rules, Arts. 33(1), 34(4); 2012 ICC Rules, Art. 31(1); 2014 ICDR Rules, Art. 30(2); 2014 LCIA Rules, Art. 26(6); 2015 CIETAC Rules, Arts. 49(5), (6); 2013 VIAC Rules, Art. 35(1).

71. *See, e.g.*, English Arbitration Act, 1996, §20(4); Swiss Law on Private International Law, Art. 189(2); Chinese Arbitration Law, Art. 53; 2012 ICC Rules, Art. 31(1); 2014 LCIA Rules, Art. 26(5); SCC Rules, Art. 35(1).

72. *See, e.g.*, French Code of Civil Procedure, Art. 1513 ("The award is rendered by majority."); German ZPO §1052(1) ("[In] an arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members."); Japanese Arbitration Law, Art. 39(1); UNCITRAL Rules, Art. 33(1); 2014 ICDR Rules, Art. 29(2).

73. H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 837, 856 (1989).

74. *See* G. Born, *International Commercial Arbitration* 3053–56 (2d ed. 2014).

75. *See, e.g.*, ICSID Rules, Rule 47(3); SCC Rules, Art. 38; 2015 CIETAC Rules, Art. 49(5).

76. UNCITRAL Rules, Arts. 34(3), (4). The Iran-United States Claims Tribunal adopted the UNCITRAL Rules with an amendment to permit dissenting and separate opinions. Iran-U.S. Claims Tribunal, Rules of Procedure, Art. 32 ("any arbitrator may request that his dissenting vote and the reasons therefore be recorded").

77. *Noble China Inc. v. Lei*, [1998] O.T.C. LEXIS 2175 (Ontario Super. Ct.) (court rejected application to annul award, but ordered release of dissenting opinion; court also refused to admit into evidence in annulment proceeding the dissenting arbitrator's affidavit regarding tribunal's deliberations and refusal to release dissenting opinion).

and reasoned awards. Even absent express authorization in national law or applicable institutional rules, the right of an arbitrator to deliver a dissenting opinion is properly considered as an element of his or her adjudicative mandate, particularly in circumstances where a reasoned award is required. Only explicit prohibitions should preclude the making of a dissenting opinion, which serves an important role in the deliberative process and can provide a valuable check on arbitrary or indefensible decision-making.[78]

The fact that arbitrators are permitted to issue dissenting or separate opinions does not mean that they should – or even are permitted to – issue *any* dissenting or separate opinion that they choose. To the contrary, the arbitrator's personal duties of impartiality, confidentiality and diligence require that any separate or dissenting opinion respect the secrecy of the arbitral deliberations (*e.g.*, not disclose or comment upon statements made during deliberations or prior drafts of awards), respect the collegiality of the tribunal (*e.g.*, not make offensive comments) and respect the arbitrator's duties of impartiality (*e.g.*, not adopt a partisan approach merely advocating one party's position).

There have inevitably been instances where the foregoing principles were not observed. Classic examples include a variety of the separate and/or dissenting opinions issued by members of the Iran-United States Claims Tribunal and bilateral investment treaty tribunals.[79] These opinions have included personal accusations and efforts to undermine the enforceability of the award. Opinions of this character are inappropriate and arguably a breach of the arbitrators' obligations of impartiality.

Finally, a separate or dissenting opinion is only an "opinion," not an "award." A separate or dissenting opinion reflects only the views of the arbitrator publishing it, and is not an act of the tribunal. It forms no part of the award and is not subject to annulment or recognition.[80]

§15.05 TIME LIMITS, SERVICE AND PUBLICATION OF INTERNATIONAL ARBITRAL AWARDS

National law, institutional rules and arbitration agreements often prescribe requirements with regard to time limits for making an award, service and notification of an award, and related matters. These requirements are generally non-controversial and, as a practical matter, give rise to few disputes.

78. It has been suggested that the confidentiality of the tribunal's deliberations forbids any separate or dissenting opinion, because this would reveal that the tribunal was non-unanimous. This is misconceived. The confidentiality of the arbitral deliberations does not extend to a formal statement of an arbitrator's views concerning the claims submitted to the tribunal; indeed, the same argument would prevent an arbitrator from refusing to do anything other than sign an award with which he or she disagrees (which is both unacceptable and not the law). *See* G. Born, *International Commercial Arbitration* 3049–50, 3056–61 (2d ed. 2014).

79. *See, e.g.*, *Granger Assocs. v. Islamic Repub. of Iran, Award in IUSCT Case No. 320-184-1 of 20 October 1987*, 16 Iran-US C.T.R. 317 (1988) ("It is also wrong for my colleagues to confirm the improper actions of the Claimant in pestering the Chamber Clerk … ."; "It is completely unjustifiable to contend, as my colleagues do, …"); *CME Czech Repub. BV v. Czech Repub., Partial Ad Hoc Award of 13 September 2001*, 14 WTAM 288 (2002) ("The mistakes and errors in the legal conclusions have been basically [produced] by the fact that the two arbitrators seem to have firstly agreed upon the final decision as it is expressed in the Award and only thereafter they looked for the arguments to the favor of the Claimant.").

80. *See* G. Born, *International Commercial Arbitration* 3056–61 (2d ed. 2014).

http://www.pbookshop.com