Convention of 1927. The old regime distinguished between enforceability of arbitration agreements and arbitration awards. The problem was the so-called double exequatur, since awards were enforceable only in the State where the award was made and leave for enforcement was needed in any other State. This issue is now addressed and settled by the New York Convention that ensures enforceability of arbitration awards internationally. The ICC proposal was taken up by the United Nations Economic and Social Council (ECOSOC) and led to the adoption of the New York Convention of 1958. The Convention entered into force on 7 June 1959. The current status of ratification may be found at the UNCITRAL website and specifically at <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html>. The preparatory documents (travaux préparatoires) of the Convention which may well have a bearing on its (historical) interpretation are available from <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NY Convention_travaux.html>.

3. Sources. Despite the great popularity of the Convention there are fairly few books published on the topic in English. A few publications can be referred to in the context of this concise commentary:

- Marc Blessing (ed.), *The New York Convention of 1958. A Collection of Reports and Materials* delivered at the ASA Conference held in Zürich on 2 February 1996, ASA 1996
- Domenico Di Pietro and Martin Platte, *Enforcement of International Arbitration Awards. The New York Convention of 1958* (Cameron May 2001)
- Emmanuel Gaillard and Domenico Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards. The New York Convention in Practice* (Cameron May 2008)
- Giorgio Gaja (ed.), *New York Convention* (Oceana, 1978-1996)
- Herbert Kronke, Patricia Nacimiento, Dirk Otto and Nicola Christine Port (eds), *Recognition and Enforcement of Foreign Arbitral Awards. A Global Commentary on the New York Convention* (Kluwer 2010)
- Loukas Mistelis and Stavros Brekoulakis (eds), *Arbitrability. International and Comparative Perspectives* (Kluwer 2009)
- United Nations (eds.), *Enforcing Arbitral Awards under the New York Convention. Experience and Prospects* (1999)
- UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (2014) with the leadership provided by Emmanuel Gaillard and George Bermann, at <http://newyorkconvention1958.org/index.php> and the comprehensive bibliography on the Convention at <http://newyorkconvention1958.org/pdf/Bibliography_NYCG_August2014.pdf>
- Albert Jan van den Berg, *The New York Arbitration Convention of 1958. Towards a Uniform Judicial Interpretation* (Kluwer 1981)

- Albert Jan van den Berg, *Consolidated Commentary on New York Convention*, part of ICCA Yearbook but also available at <www.kluwerarbitration.com>, since 1976
- Reinmar Wolff (ed.), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary* (Beck – Hart – Nomos 2012)

[Scope of Application]

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.

2. The term 'arbitral awards' shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

1. Scope of application: the territorial criterion. The Convention determines its scope of application by adopting a 'territorial criterion'. It applies to arbitral awards rendered in a State other than the State where recognition and enforcement are sought. During the negotiation of the Convention, it was considered whether other alternative criteria based on traditional conflict of laws elements should be adopted in order to determine which awards should fall within the scope of application of the Convention. Eventually, the territorial criterion was adopted because it allowed for an objective standard that was in line with the degree of detachment from domestic laws, which international arbitration is generally believed to be entitled to. Unless a State has made a reciprocity reservation pursuant to art. I(3), the Convention applies to awards made in any State, whether or not a Contracting State. In some jurisdictions the territorial criterion is the only one applicable to determine whether an award falls within the scope of the Convention or not. Hence for jurisdictions such as Australia, Brazil (*Nuevo Pignone*), England (*Yukos* v *Dardana*), Germany (Kammergericht 2008), the Netherlands and Spain, only

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awards made in a State other than the State where recognition and enforcement is sought fall within the scope of the Convention as also discussed in the UNCITRAL Guide (Article I, para 46 and footnotes 74 to 81).

2. Qualification of the territorial criterion. In order to pursue the Convention's general pro-enforcement bias, it was agreed that it would be desirable to allow the application of the Convention to arbitral awards that – by strict application of the territorial criterion – would be outside of the Convention's scope. This was considered as a necessary step to protect the enforcement of arbitral awards rendered in the country of recognition and enforcement which, because of factual or legal circumstances, are characterised by a degree of detachment from that jurisdiction. The determination as to which arbitral awards should not be considered as 'domestic awards' was left to the legislation of the State where recognition and enforcement are sought. In this way the Convention allows for delocalised or denationalised arbitration and the recognition and enforcement of awards rendered under such regimes. The discretion of national courts and national law to determine whether an award is deemed to be domestic (or not) is confirmed by case law, including *BG Group* v *Argentina* (USA). In some jurisdictions, such as China in *Duferco*, an award made within the jurisdiction but pursuant to international arbitration rules (in the case at hand, ICC) is considered non-domestic. In most cases the non-domestic criterion is applied in addition to the territorial criterion to determine whether the award falls within the scope of the Convention. Typical cases where the non-domestic criterion has been employed by national courts include (a) awards made in the State where recognition and enforcement in sought under the procedural law of another State as per travaux preparatoires (at 5-6) and *RZS* (US); (b) awards made in the State where recognition and enforcement is sought but with one or several international elements, including when both disputing parties are foreign per UNCITRAL Guide (Art. I, paras 54-64 and accompanying notes); (c) a-national or non-national awards, i.e. awards which cannot be deemed to be connected with the law of any specific jurisdiction as in *SEEE* (Netherlands) and *Iran* v *Gould* (USA).

3. Definition of arbitral awards. Interestingly, the Convention does not provide a definition of the term 'award'. This is not a moot issue since it cannot be assumed that any means of dispute resolution other than domestic court proceedings should per se qualify as 'arbitration' under the Convention. Similarly, it should not be taken for granted that any orders issued by an arbitral tribunal could be enforced under the New York Convention. It is submitted that to be within the scope of the Convention an arbitral award should (i) be issued in a means of dispute resolution genuinely alternative to the jurisdiction of domestic courts (the so-called 'alternativity test') and (ii) finally settle one or more of the issues submitted to the jurisdiction of an arbitral tribunal (the so-called 'finality test'). National jurisprudence is consistent that in order to determine whether an 'award' falls within the scope of the Convention regard is to be had to the object and purpose of the Convention as in *Comitas* v *SOVAG* (Germany) and *Merck* (Colombia). Courts tend to look at the nature and the content of arbitral decision rather than the nomenclature employed by the arbitral tribunal to determine whether the decision is an award; the typical case addressed in case law is particularly, but not exclusively, the distinction of decision of arbitration tribunals between procedural order and arbitral awards and their relevant qualities where only the latter (awards) would typically be capable of being recognised and enforced. Typical examples are *Publicis* (USA), BGH 2007 (Germany) and *Brasoil* (France). National courts have found that decisions made by arbitration tribunals would qualify as awards if they determine all or parts of a dispute, in a final and binding (meaning: not subject to an appeal before another arbitral tribunal or a national court) manner as in *Opinter* (France) and the UNCITRAL Guide (UNCITRAL Secretariat Guide Art. I, para 22, 29-33 and 66-69). Awards dealing with jurisdiction are enforceable under the Convention. This is limited by consistent case law on the issue and support from all commentators. Even awards refusing jurisdiction are enforceable if they contain a decision on costs according to *Montague* (Australia) and BGH 2007 (Germany). Partial final awards, i.e. awards finally disposing with one aspect of the dispute before an arbitral tribunal are enforceable under the Convention. Some national courts even equate some interim awards to partial final awards, if they finally determine at least part of the dispute, as did the Australian courts in *Resort Condominiums* (Australia), capable of recognition and enforcement, as OLG Thüringen (Germany) and *Alcatel* (USA).

4. Reservations. One of the main tools for the Convention's undeniable success, is the fact that it allows Contracting States to 'mould', at least to a certain extent, the Convention's provisions to avoid any clash with the core principles of each Contracting State's domestic law. One example of this can be found in the two reservations available to Contracting States under art. I.

5. Reciprocity reservation. The first reservation allows Contracting States to limit the application of the Convention to awards made in another Contracting State. Therefore, an award made in a non-Contracting State would not benefit from enforcement under the Convention in a State which has adopted this reservation. Seventy-two States have made a reciprocity reservation. Nowadays this reservation has lost much of its significance because of the widespread adoption of the Convention (in 154 States). There are only very few cases where an award was refused enforcement because of the operation of the reciprocity reservation and these are older cases.

6. Commercial reservation. The second reservation allows Contracting States to limit recognition and enforcement to awards relating to commercial relationships, either contractual or not. This reservation was made available in order to facilitate the signing of the Convention by countries whose national legal systems only allowed referral to arbitration of commercial disputes. In fact, 45 States have made use of this reservation. The

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test as to whether a matter is to be considered as a 'commercial' one is to be carried out by using the law of the place where enforcement of the award is sought. Generally the notion of commercial relationship is broad and is intended to encompass most disputes save for matrimonial or domestic matters as discussed in the UNCITRAL Guide (Art. I, paras 86-88). Examples of commercial disputes include, but are not limited to, sale of goods, supply of services, construction disputes, intra-corporate disputes, share purchase agreements, transport of goods, joint venture agreements, intellectual property licensing, mergers and acquisitions and the like. In practice, the commercial reservation has given rise to few isolated problems even though its potential in this regard is much higher than that of the reciprocity reservation. One notable example is the US case *BV Bureau Wijsmuller* where a US District Court considered the salvage of a US warship outside the scope of the Convention as such activities are normally considered as 'non-commercial' in international law. Some domestic courts of States that have adopted the commercial reservation have at times adopted a rather narrow interpretation of their own notion of 'commercial'. In *Societè d'Investissement Kal*, the Tunisian courts were called upon to deal with a dispute between a company and two architects that had been retained to draw up urbanisation plans for a resort. The contract contained a clause referring all disputes to ICC arbitration in Paris. A dispute arose concerning the payment of outstanding fees and an ICC arbitral tribunal rendered an award in favour of the architects. The architects sought enforcement of the award in Tunisia, where the Court of Appeal confirmed the lower court's decision and denied enforcement. The Court of Appeal explained that Tunisia had adopted the commercial reservation and architectural and urbanisation works were not commercial matters under Tunisian law. The Supreme Court upheld the decision of the Court of Appeal. It is important to stress, however, that the majority of domestic courts seem prepared to construe the commercial reservation rather narrowly. An example of such approach is a much quoted case entertained by the courts of India in *RM Investment & Trading Co*. The local High Court had held that the rendering by a company of consultancy services for promoting a related commercial deal should not be regarded – pursuant to Indian law – as a commercial transaction. The decision was reversed by the Supreme Court of India which held that: 'While construing the expression commercial it has to be borne in mind that the aim of the Convention is to facilitate international trade by means of facilitating suitable alternative ways of settlement of international disputes and therefore any expression adopted in the Convention should receive, consistent with its literal and grammatical sense, a liberal construction. The expression commercial should therefore be construed broadly having regard to the manifold activities which are integral part of international trade nowadays.' Needless to say, this approach is not common to all jurisdictions and it might not be even common to all the courts within the same jurisdiction. Indeed, some domestic courts might stick to the definition of 'commercial'

available under domestic law and make no allowance to reflections on the needs and principles of international trade. It would therefore be highly advisable to perform a preliminary assessment of this issue when drafting the arbitration clause and when planning enforcement.

7. Recognition and enforcement. Pursuant to art. I the Convention applies to the 'recognition' and 'enforcement' of awards covered by the Convention. It has no application on court proceedings purporting to setting aside or annul an award. The Convention does not define the key terms 'recognition' and 'enforcement'. One court clearly held in *Drummond* v *Ferrovias* (Colombia) that the 'recognition' gives legal force and effect to an award while 'enforcement' is the 'forced execution' of an award, previously recognised. In other words, recognition is the process of declaring the award binding while enforcement is the action to give effect to the award. Very few cases address the distinction between recognition and enforcement. In 1981 the German Supreme Court when construing the two terms in order to address the issue whether an action for recognition can be brought separately from an action for enforcement stated that the two actions are so closely interrelated so that they cannot be sought separately, as per BGH 1981 (Germany). Courts from other jurisdictions held that recognition can be sought separately from enforcement and this is also the view expressed in the travaux preparatoires and in scholarly writing and more specifically in *Yusuf Alghanim* (USA), *Brace Transport* (India), and Evora Court of Appeal (Portugal).

[Arbitration agreements]

Article II

1. Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

1. Scope. Despite the fact that the Convention's title seems to focus on recognition and enforcement of arbitral awards, a good part of the Convention, and certainly its most controversial aspect, deals with enforcement of arbitration agreements. It is interesting to note that art. II, which deals

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with the issues of form, validity and enforcement of arbitration agreements, was a last-minute addition to the Convention's text. Some of the uncertainties connected to such provisions are therefore 'blamed' on the fact that comparatively little time was devoted to the negotiation of art. II. There has been a debate as to whether art. II imposes any territorial limitations to the arbitration agreements covered by it, perhaps by application by analogy of art. I. There is, however, now consensus amongst commentators and case law that the Convention did not intend to incorporate any territorial limitations on the scope of application on agreements falling within the scope of art. II as pointed out in UNCITRAL Guide (Art. II, A/CN.9/814/Add.1, paras. 4-6).

2. Meaning of 'agreement'. Art. II(1) refers to the agreement to arbitrate but it does not offer a definition of 'agreement'. It is undisputed that an agreement is needed and such agreement should convey the intent of the parties to arbitrate 'in respect of defined legal relationship'. Courts would typically rely on the consent of the parties to arbitrate, as an evidence of common intent. The US Supreme Court in *Mitsubishi* v *Soler* (USA) clearly indicated that before compelling any party to arbitration it is important to establish that the parties actually agreed to arbitrate their dispute. The Supreme Court of New South Wales in *ACD Tridon* v *Tridon Australia* (Australia) further confirmed that the consent is inevitably assessed on a case-by-case basis. The UNCITRAL Guide surveyed more than 350 cases and reports that consent was found in many cases, including 'when the parties (i) participated in the negotiation of the contract, (ii) participated in the performance of the contract, (iii) participated in both the negotiation and the performance of the contract, (iv) had knowledge of the arbitration agreement, or (v) participated in the arbitral proceedings without raising any objection to the arbitral tribunal's jurisdiction' (UNCITRAL Guide, Art. II A/CN.9/814/Add.1, paras. 15-23). However, there is no universal acceptance of these cases of consent and in most cases before them courts wish to find a 'meeting of the minds'. Perhaps the most controversial instance is that of non-signatory parties who may have participated in the negotiation and the performance of the contract, as was the case in *Dallah* v *Pakistan* (UK/France). In this case the English courts found that absent a signature of the arbitration agreement there was no evidence that the common intention of the signatories was to add the government of Pakistan as a party to the main contract and the arbitration agreement, while the French courts found (in agreement with the arbitration tribunal) that the parent (the government) which participated in the negotiation and performance of the contract is bound by the arbitration agreement it did not sign. In some jurisdictions knowledge of the arbitration agreement includes also that a party ought to have known of the arbitration agreement either because of the content of general terms and conditions of a particular trade, as was the case in *Del Medico* (Italy), or when the agreement is implied from relevant trade usages typically for this industry or field of business as per BGH 1992 (Germany).

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3. Content of the agreement to arbitrate. Art. II(1) imposes upon Contracting States the public international law obligation to recognise agreements in writing by which the parties have agreed to submit their future or existing disputes to arbitration (arbitration clauses and submission agreements). This is evidenced by the use of the word 'shall' which clearly leaves discretion to national courts as pointed out in *Scherk* (USA, Supreme Court, *Scherk* v *Alberto-Culver Company*, 17 June 1974, 73-781) and *Tradax* (Switzerland, Federal Tribunal, *Tradax Export SA* v *Amoco Iran Oil Company*, 7 February 1984). Art. II(1) employs the word 'differences' which can be assumed to be equivalent to, if not wider than 'disputes'. The words 'whether contractual or not' are considered to be aimed at entailing claims in tort. It is important to note that such a general obligation imposed upon Contracting States is limited with respect to disputes that can be validly submitted to arbitration. The most problematic aspect of art. II, however, resides in what constitutes an 'agreement in writing'. The definition of what is an agreement in writing can be found under art. II(2) of the Convention where it is explained that the term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

4. Matter capable of settlement by arbitration (arbitrability). The New York Convention imposes upon its Member States an obligation to recognise arbitration agreements provided that they are intended to settle disputes that are arbitrable. This is a 'ratione materiae' notion, which is normally referred to as 'objective' arbitrability as it is independent of the quality of the parties or their will. Art. II does not indicate which law should be taken into account in order to assess the arbitrability of a given dispute. On one hand, it is suggested that the issue of arbitrability should be resolved in accordance with the lex fori, i.e. the law of the courts that have been seized with the question as to whether an arbitration agreement deals with a matter capable of being settled through arbitration. On the other hand, it is suggested that the issue of arbitrability should be settled through the application of the law applicable to the arbitration agreement. In other words, the validity of the arbitration clause should be determined in all respects on the basis of the same law, whether the issue is one of arbitrability or whether it is an issue of validity of the parties' consent. As far as the practice of arbitration tribunals is concerned, the majority of cases seem to follow the view that the issue of arbitrability should be settled with reference to the law in force at the place of arbitration, even though in some cases, tribunals have avoided taking a clear-cut position on the issue where it had been ascertained that the dispute would have been arbitrable under each of the laws that the transaction was connected to. An interesting approach in this regard was adopted in *Meadows Indemnity*. The court observed that 'reference to the domestic laws of only one country, even the country where enforcement of an award will be sought', does not resolve whether a claim is 'capable of settlement by arbitration under Article II(1) of the Convention'. The court continued that such determination must be made

'on an international scale, with reference to the laws of the countries party to the Convention'. Similarly, the French courts consistently have established the validity of an arbitration clause irrespective of any reference to national law and hence distinguished the question of arbitrability under art. II and art. V(2)(a). A typical example is *ABS* v *Jules Verne* (France). It has, however, been observed that in the majority of cases, courts have determined the question of arbitrability according to their domestic law. This is normally done without any conflicts of law analysis, even though a number of decisions have been resolved by applying the provisions of art. V(2)(a).

5. Agreement in writing. The Convention contains two alternative requirements of form in order to comply with its definition of 'in writing'. An arbitration agreement must be either (i) signed by the parties or (ii) contained in an exchange of letters or telegrams. The reference to 'letters or telegrams' is certainly obsolete and out of touch with modern business practice. However, it has given rise to very few problematic issues. Most domestic courts accept the idea that the reference to such 'old fashioned' means of communication should be read in the light of developing technology as also suggested by the UNCITRAL Secretariat in its note of 14 December 2005. This was formally adopted by the United Nations Commission on International Trade Law on 7 July 2006 as the 'Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention'. Accordingly, the Commission recommends that art. II(2) should be applied (and be interpreted) in a dynamic way recognising that the circumstances described therein are not exhaustive. Furthermore, the Commission recommends that art. VII(1) should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement. In the case of *Chloe Z Fishing Co.* it was held that the means of communication employed at art. II(2) should be read to include other forms of written communication regularly adopted to conduct business in the various contracting parties. It would, however, be incautious to assume that such an approach is unqualifiedly accepted in all jurisdictions. In a decision rendered by the Norwegian Court of Appeal (Hålogaland Court of Appeal 16 August 1999) it was indeed held that a contract that had been concluded by exchange of emails making reference to a charter party did not comply with the requirements of validity of arbitration agreements under the Convention. Such cases are no likely to be repeated as email has established itself as a means of communication and the recommendation for the interpretation of art. II is now in force. The most problematic issues with regard to the interpretation of art. II, however, arise in connection with the issue of actual signature and exchange of documents containing a clause (which need not be signed). A strict application of the Convention's provisions would exclude several common business practices such as where a written contractual offer containing an arbitration clause is accepted and given effect through performance (so-called tacit acceptance). The signature

can be seen as the evidence that the parties authenticate their expression of consent. As a result, in some jurisdictions, such as China in *Concordia Trading* (China) and Brazil in *Plexus Cotton* (Brazil), the courts refuse to enforce an arbitration agreement against parties that have not signed it.

6. Incorporation by reference. A considerable number of business contracts are frequently entered into by reference to contractual provisions contained in a separate document. The provisions referred to are normally contractual provisions of industry-specific trade associations or the general conditions of trade elaborated by one of the parties. Usually, the document which the parties make reference to contains, amongst other provisions, an arbitration clause. Whether such reference has the effect of validly concluding an arbitration agreement has been the subject of debate. Art. II does not deal directly with incorporation of arbitration clauses by reference. Therefore, it is unclear whether art. II(2) only applies to cases where the arbitration clause is contained in the documents exchanged by the parties or whether it also applies to cases where: a) although the documents exchanged do not contain an arbitration clause, they nonetheless make express reference to an arbitration clause contained in another document (so-called relatio perfecta), or b) the documents exchanged by the parties do not contain an arbitration clause but make reference to a document containing one, although there is no express reference to it in the exchange of documents (so-called relatio imperfecta). The case law on art. II seems to suggest that domestic courts are inclined to uphold the validity of incorporation of arbitration clauses to which the parties have made express reference. More uncertain is the fate of clauses where there is only a general reference to the document or set of rules in which the arbitration clauses are contained. Some decisions tend to affirm the validity of arbitration clauses where the document in which they are contained is either known or available to the parties. Most decisions upholding the validity of arbitration clauses incorporated without specific reference tend to do so by placing importance on the status of the parties and particularly on whether the parties are experienced traders that are used to entering into contracts governed by certain rules or are aware of the outcome generated by the reference. Although such case law is regarded as complying with the pro-enforcement bias of the Convention, it is not possible to assume that a similar conclusion should be reached by any courts under any circumstances. The silence of art. II on the issue may produce inconsistent case law. As a matter of fact, some courts have denied the validity of incorporation where the reference was not specific or where it was not possible to ascertain whether the parties were in a position to foresee the outcome of the incorporation. The arbitration statutes of a considerable number of Contracting States have adopted provisions that are much clearer on the issue of incorporation, at least with regard to issues of express reference. The majority of such statutes, however, are silent on the issue of general reference to a document containing an arbitration clause (relatio imperfecta). The case law on such statutes too seems to generally favour enforcement in the presence of evidence as to the

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parties' actual or deemed awareness of the existence of an arbitration clause in the document incorporated by reference.

7. Assignment. Assignment of a contract is a recurrent feature in international business. Assigned contracts often contain arbitration clauses. It is not a settled issue whether the assignment of a contract automatically results in the valid assignment of the arbitration agreement contained in the contract. The issue is rather complex as it entails the question of whether it is possible to assign both benefits and burdens of an arbitration clause. In other words, whether assignees can validly start arbitration proceedings against original counterparties and whether signatories can validly start arbitration proceedings against non-signatory assignees. The New York Convention does not explicitly address such an issue. It is therefore left to the relevant applicable law (or laws) to solve the problem. Many jurisdictions seem to advocate a commercially minded approach that takes into account the characteristics of modern trade as well as the pro-enforcement bias of the Convention. Most notably, in this latter regard the Paris Court of Appeal in *Bomar Oil NV* v *Entreprise d'Actvitiés Pétrolières* observed that since the New York Convention's 'drafters were desirous to facilitate the resolution of disputes by means of arbitration in the field of international trade', it was appropriate to look at any available evidence of consent, including commercial practices, in order to determine whether an arbitration agreement had been entered into between the parties. From other corners it has, however, been suggested that any too speculative interpretation of the Convention may lead to results that may be inconsistent with the intention of the Convention's Contracting States. It is highly advisable that where an assignment is likely to take place or in any event where it does take place, the parties structure the relevant contracts in order to address such an issue.

8. Null and void, inoperative or incapable of being performed. Art. II(3) requires domestic courts of Contracting States to stay any legal proceedings in breach of an arbitration agreement. As the Supreme Court of Canada notes in *GreCon Dimter* (Canada), the object and purpose of art. II(3) is to strengthen the obligation to enforce arbitration agreements. This obligation is not an absolute one. First of all, it is for the interested party to object to the jurisdiction of the domestic court pointing out the existence of a valid arbitration agreement. Therefore, a domestic court is not in a position to raise the issue on its own motion. Secondly, the obligation to stay the proceedings does not operate if the domestic court finds that the arbitration agreement is null and void, inoperative or incapable of being performed. The double description 'null and void' used in the English version should be construed in accordance with the common law countries' practice, according to which the two terms are actually the description of a single phenomenon whose existence is not conditional to the coming into play of two different requirements. The concept of what it is 'null and void' may change radically depending on the approach taken by the jurisdiction concerned. Indeed, in

order to ascertain whether an arbitration agreement is null and void, reference should be made to the law by which the arbitration agreement is governed. However, it might be assumed that the words 'null and void' may be generally interpreted as referring to circumstances where the arbitration agreement is affected by some invalidity, such as lack of consent due to misrepresentation, duress, fraud or undue influence. Overall the meaning of 'null and void' is that the arbitration agreement is devoid of any legal effect. The 'inoperative' defence makes reference to cases where the arbitration agreement, even though existing, has no effect or has ceased to have effect. This means that an agreement has become inapplicable to the parties or the dispute. This type of defect in an arbitration agreement may be caused by a plethora of reasons such as: the validity of the arbitration agreement is conditional, the arbitration agreement is explicitly or implicitly revoked or modified, or because of issues of res judicata. Unlike cases of inoperativity, where the agreement has ceased to have binding effect between the parties, 'incapability of performance' entails cases where, even though both existence and binding force of the agreement are not in dispute, the arbitration agreement lacks clarity or intelligibility and therefore cannot be performed, i.e. cases where the arbitration cannot be effectively set into motion. A classic example would be a substantially pathological clause. Some of the issues that have given rise to incapability of performance are the following: inconsistency, uncertainty (when the arbitration clause is too vaguely worded) and deadlock clauses (such as where the clause makes reference to institutions or individual that are no longer available). In *Lucky Goldstar* (Hong Kong), the Hong Court courts have taken a pro-arbitration stance and interpreted a vague agreement as an enforceable one as the intention of the parties to have their dispute by arbitration should be upheld. Similar cases can be found in Switzerland and Germany.

9. Extent of review of validity of arbitration agreements by national courts. There are two main approaches: typically civil law courts will decline jurisdiction when there is an arbitration agreement while common law courts will normally will stay proceedings. Both these approaches are consistent with the Convention. The Convention does not, however, address the issue of the nature and standard of review of existence and validity of an arbitration agreement by national courts in accordance with art. II(3). Some courts seem to perform a full review while other courts opt for a mere prima facie investigation. The Italian courts opted for a full review in *Heraeus* (Italy), while courts in many other jurisdictions fully presented in the UNCITRAL Guide (A/CN.9/814/Add.2, paras 85-99) have opted for a prima facie review and gave arbitration tribunals the chance to decide on this matter first. A good example is the English decision in *Fiona Trust* (UK) and the US decision in *Chevron* v *Ecuador* (USA) which found that the parties agreed to give the power to the arbitrators to determine the existence and validity of the arbitration agreement while courts reserve the right to have a second look, where necessary.

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[Obligation to recognise and enforce arbitral awards]

Article III

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

1. General. Art. III imposes a general obligation on signatory States to recognise arbitral awards made in other countries, subject to procedural requirements no more onerous than those applicable to domestic awards. Furthermore, it is one of a number of provisions stipulating that the award needs to be binding (*Fertilizer Corporation of India*, 957-958).

2. Presumption of validity of awards. Art. III presumes the validity of awards and places the burden of proving invalidity on the party opposing enforcement. This has been consistently upheld. (See e.g., Queensland, 29 October 1993; *Rosseel*; Geneva CA, 14 April 1983; Corte di Cassazione 7 June 1995; *Iran* v *Gould, Inc*, 1364 n. 11.)

3. No definition of 'award'. Art. III does not introduce nor support a definition of 'award'. It merely provides for its main characteristics: awards are binding and enforceable. The overarching principles embodied within 'under conditions laid down in the following articles' are, first, awards are binding; secondly, awards are not subject to any review; and thirdly there is no need for confirmation of awards. Various provisions of the Convention employ some of these terms. This discussion is more appropriately considered under art. V.

4. Reference to law of forum. The general obligation to recognise Convention awards as binding under art. III confirms the application of the procedural law of the forum to those aspects incidental to the enforcement, which are not regulated by the Convention. Examples are discovery of evidence, estoppel or waiver, set-off or counterclaim against award, the entry of judgment clause, period of limitation for enforcement of a Convention award, and interest on the award (Van den Berg, *Consolidated*).

5. Procedural requirements for recognition and enforcement. Art. III is generally the starting point for the requirement that the courts are not to engage in a substantive review of the facts. Awards need not be confirmed at the seat of arbitration before enforcement can be sought abroad (no double exequatur). Signatory States may not impose procedural requirements that are more onerous, or a fee or charge that it is higher than those applicable to the recognition and enforcement of domestic arbitral awards. The Convention

thus does not contain substantive requirements providing for either expeditious or efficient procedural mechanisms for enforcing Convention awards; it merely requires signatory States to use procedures no more cumbersome than their domestic enforcement procedures.

6. Jurisdiction to enforce an award. The question of whether a court of a Contracting State has jurisdiction to enforce an award depends, in principle, on rules of jurisdiction. Applications to have foreign awards declared enforceable presupposes that the court has jurisdiction over the respondent, although a case can be made in favour of the proposition that the Convention itself provides a basis for jurisdiction. England is a country where no jurisdictional requirements are imposed for enforcement of an award under the Convention. *Rosseel*: 'The English Court is bound by a statute, arising from treaty obligations, to enforce the award'.

7. Assets in the jurisdiction. The presence of assets in the jurisdiction is not a precondition to the enforcement of the award (Van den Berg, *Consolidated, 1996*, 501 Procedure for Enforcement, in General). However, the existence of assets within a country would be sufficient to establish jurisdiction for enforcement actions. The award creditor will have to investigate where assets of the unsuccessful party are located and where enforcement proceedings will be simpler. Unlike setting aside proceedings, which can, in principle, only be held at the place of arbitration, enforcement proceedings are generally possible more or less anywhere assets are located. This allows for forum shopping. Such discretion in relation to choosing a forum for enforcement proceedings is welcome. In the US, however, courts have exercised their discretion not to enforce an award where they considered that they were not the appropriate forum (forum non conveniens) (*Monde Re* v *Naftogaz*: Ukraine was the natural forum for enforcement; the State of Ukraine invoked the Foreign Sovereign Immunity Act, *Base Metal* v *OJSC*; *Glencore* v *Shivnath Rai Harnarain*; *Dardana* v *Yuganskneftegaz*).

8. Equal treatment of domestic and foreign awards. An Italian court (Corte d'Appello di Napoli 13 December 1974) rejected the argument that from the reference in art. III that 'no substantially more onerous conditions ... than for domestic awards' it would follow that a foreign award would have to be assimilated to a domestic award and that, for this reason, art. 825 of the Italian CCP would also apply to a foreign award. A clear distinction between the two types of awards should be made. The Italian Supreme Court in another case dealt with the allegation that the Court of Appeal had, in violation of art. III, directed the respondent to pay the costs of the enforcement proceedings because national law would not allow to award costs in domestic enforcement proceedings (Corte di Cassazione 3 April 1987). The Supreme Court rejected the contention, reasoning that art. III concerns the costs to be borne by the party requesting recognition and that it does not derogate from the principle apportioning the costs in proceedings arising from the other party's opposition to the recognition of the award.

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[Formalities required to obtain recognition and enforcement]

Article IV

(1) To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

- **(a) The duly authenticated original award or a duly certified copy thereof;**
- **(b) The original agreement referred to in article II or a duly certified copy thereof.**

(2) If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

1. General. The formalities required for obtaining recognition and enforcement of awards to which the Convention applies are simple and minimal. The party seeking recognition and enforcement is merely required to produce to the relevant court the duly authenticated original award or a duly certified copy; and the original arbitration agreement, referred to in art. II, or a duly certified copy thereof. If the award and the arbitration agreement are not in the official language of the country in which recognition and enforcement is sought, certified translations are needed. However, courts in several countries do not insist on submission of translations, if the award was made in easily accessible foreign language.

2. Authenticated award/original arbitration agreement. An authenticated award or a certified copy is essential as it is evidence of the entitlement of the party seeking enforcement. The fact that art. IV additionally requires the submission of the arbitration agreement referred to in art. II does not imply any obligation on the party seeking enforcement to establish the formal validity of the arbitration agreements (Di Pietro/Platte, *Enforcement of International Arbitration Awards*, 125; Van den Berg, *New York*, 250). *Dardana Ltd* v *Yukos* held that the presentation of a prima facie valid arbitration agreement is required. This shifts the burden of proof to the respondent wishing to resist enforcement, but see the stricter approach followed in Hålogaland Court of Appeal 16 August 1999, where enforcement was refused due to lack of an arbitration agreement (the correspondence was contained in emails and the court held that under the Convention the party had not submitted a valid arbitration clause for enforcement). In the case of an ICC arbitration, no copy of the arbitration agreement will be required, provided the parties sign the terms of reference.

3. Authentication. The required authentication refers generally to the signing of the award by the tribunal and the document being genuine.

Certification is an assurance that the submitted documents are a true copy of the original. The Convention is silent as to how this certification should be effected, in terms of form or legal requirements. As a general rule it is the law of the place of enforcement that stipulates how the award should be authenticated and certified, e.g., by a notary, consular or judicial authorities of the place where the award was made. The few reported cases suggest that the enforcing courts have taken a rather liberal attitude in respect of authentication and certification (Van den Berg, *New York*, 250-258). This is evidenced by a decision of the German Federal Court (BGH 17 August 2000: the arbitration proceedings were based on an undertaking to arbitrate contained in the Treaty of Friendship between Germany and Poland so that it was impossible to submit a copy of an arbitration agreement. The respondent alleged that the copy of the award submitted was not duly certified. The Federal Court considered art. IV to be a rule establishing a standard of proof. As long as the authenticity of the award was not challenged, the non-fulfilment of the form requirements does not constitute a ground to refuse enforcement). International conventions regarding the recognition of international documents for civil procedure may also be of use (e.g. the Hague Convention Abolishing the Requirement of Legalisation of Foreign Public Documents, 5 October 1961).

5. Translation of originals. The party seeking enforcement also must produce a translation of the award and the agreement if they are in a language other than the official language of the court in which enforcement is sought. The translation must be certified by an official translator or by a diplomatic or consular authority. Courts normally accept a translation made in the country where the award was made or in the country where enforcement is sought (Van den Berg, *New York*, 258-262).

6. Time for submission of documents. The two documents may be submitted at the same time as the application for enforcement. If this is not the case it can be rectified by subsequent submission of the arbitration agreement and such 'delay' cannot be a ground to deny enforcement (OGH 17 November 1965; *Baruch Foster*).

7. No further requirements. Once the necessary documents have been supplied, the court will grant recognition and enforcement unless one or more of the grounds for refusal, listed in the Convention, are present. Permission for enforcement from the courts in the country where the award was made is not required. This was different under the 1927 Geneva Convention that required that the award had become final in the country in which the award was made.

8. Most applications are successful. Despite the simplicity, cases are from time to time reported in which the application for enforcement fails. For example, the decisions of the Corte di Cassazione, in *Lampart*, and the Bulgarian Supreme Court's decision in *National Electricity*.

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to ICSID arbitration requires one or more additional separate actions, noting that 'a party's consent becomes irrevocable only after both parties to the dispute have given their consent' (see Broches, *Explanatory Notes and Survey*, paras. 31 and 38). Likewise, the Preamble to the Convention itself proclaims the centrality of bilateral consent: 'Recognising that **mutual** consent by the parties to submit such disputes to conciliation or to arbitration through such facilities constitutes a binding agreement …' (emphasis added). This is echoed in Rule 2(3) of the ICSID Institution Rules, which provides that the "[d]ate of consent' means the date on which the *parties* to the dispute consented in writing to submit it to the Centre; **if both parties did not act on the same day**, it means the date on which the second party acted' (emphasis added). On this view, a unilateral offer in an investment law or BIT does not constitute 'consent' for the purposes of art. 72, and that offer cannot therefore be perfected following receipt of the notice of denunciation. The contrary view is to the effect that the offer of ICSID arbitration contained in national legislation or a BIT in fact constitutes the Contracting State's consent, which requires no perfection. Thus, once given, this consent cannot be unilaterally withdrawn, unless the instrument in which it is contained is also terminated (see discussion in *Murphy Exploration and Production Company International* v *Ecuador*; Gaillard, *NYLJ*, p. 3; and Schreuer et al., *Commentary*, p. 1281). While such termination may be easily achieved where national legislation is concerned (and often with immediate effect), it may be more difficult in the context of BITs, not least because of 'survival' clauses protecting existing investments for ten to fifteen years after termination of the BIT. Moreover, certain BITs, such as the Belgium/Luxembourg–Bolivia BIT, specifically provide that the parties 'irrevocably' consent to submit disputes with investors to ICSID arbitration. This raises the question as to whether denunciation of the Convention while the BIT remains in force is simply a breach of the BIT (to be pursued at the inter-State level) or, in addition, non-opposable to a Belgium/Luxembourg investor (with the consequence that ICSID jurisdiction is still intact). No clear jurisprudence yet exists to shed light on this debate in the context of art. 72 (The *ETI Telecom* v *Bolivia case*, registered by ICSID on 31 October 2007, long after Bolivia's notice of denunciation of 2 May 2007 was filed, and merely days before it took effect, may have done so, however, the proceedings were discontinued by the claimant).

6. Implications of art. 72 for BITs. From a practical perspective, it is important to bear in mind that, even if art. 72 does not apply to preserve an investor's ability to accept an offer of ICSID arbitration made in national legislation or a BIT, other dispute resolution options in that legislation or BIT will naturally not be affected by the Contracting State's denunciation. Most BITs contain an offer to arbitrate under a selection of dispute resolution rules (ICSID, ICSID Additional Facility, UNCITRAL, SCC or ICC). The non-ICSID avenues will remain available unless the Contracting State validly terminates the offer of arbitration in national legislation or the BIT.

[Depositary of the Convention]

Article 73

Instruments of ratification, acceptance or approval of this Convention and of amendments thereto shall be deposited with the Bank which shall act as the depositary of this Convention. The depositary shall transmit certified copies of this Convention to States members of the Bank and to any other State invited to sign the Convention.

1. General. Art. 73 designates the World Bank as the Convention's depository. The World Bank receives instruments of ratification, acceptance or approval of the Convention as well as amendments, denunciations (art. 71) and notices of exclusion (art. 70) or designation (art. 25). The World Bank is also charged with the transmittal of certified copies of the Convention to the Contracting States and to all States that are eligible, pursuant to art. 67, to accede to the Convention.

[Registration of the Convention]

Article 74

The depositary shall register this Convention with the Secretariat of the United Nations in accordance with Art. 102 of the Charter of the United Nations and the Regulations thereunder adopted by the General Assembly.

1. General. Art. 74 requires the World Bank to register the Convention with the UN Secretariat in accordance with art. 102 of the United Nations Charter, which provides that 'every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it'. The Convention was registered with the UN Secretariat on 17 October 1966 and was published in the United Nations Treaty Series Vol. 575.

[Notification]

Article 75

The depositary shall notify all signatory States of the following:

(a) signatures in accordance with Article 67;
(b) deposits of instruments of ratification, acceptance and approval in accordance with Article 73;
(c) the date on which this Convention enters into force in accordance with Article 68;
(d) exclusions from territorial application pursuant to Article 70;

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(e) **the date on which any amendment of this Convention enters into force in accordance with Article 66; and**
(f) **denunciations in accordance with Article 71.**

1. General. According to art. 75, the World Bank, as depositary of the Convention pursuant to art. 73, shall notify the Contracting States of legally relevant facts relating to the treaty: deposits of instruments of ratification, acceptance and approval; the Convention's entry into force date; territorial exclusions pursuant to art. 70; the date of entry into force of amendments; and denunciations.

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL) ARBITRATION RULES, 2010†

(Resolution 65/22, Adopted by the General Assembly on 6 December 2010)

Author's note: UNCITRAL first adopted its Arbitration Rules (and the UN General Assembly first recommended them for use) in 1976, following almost two years of drafting and deliberations by the Commission and its delegates. The 1976 Rules have been revised only once since then, resulting in a second version adopted by UNCITRAL (and again recommended for use by the General Assembly) in 2010. The 2010 Rules resulted from four years of preparatory work by UNCITRAL's Working Group II (Arbitration and Conciliation) and by the Commission itself. The Commentary below cites these travaux préparatoires from 1974 to 1976 and from 2006 to 2010, which are referred to, respectively, as the work of the '1976 drafters' and of the '2010 drafters'. The travaux are available on the UNCITRAL web site: <www.uncitral.org>. The Commentary on the 1976 Rules in the first edition of *Concise International Arbitration* was written by Jacomijn van Haersolte-van Hof. Since the only updating of the Rules occurred 34 years after adoption of the initial version, the 2010 Rules reflect a comprehensive revision of the text, which in turn required the new Commentary set forth below. Nonetheless, where a provision of the 1976 Rules has been preserved in the 2010 version, Ms. van Haersolte's Commentary on either the travaux or the jurisprudence concerning that provision has often been retained in this Commentary. With respect to jurisprudence, the most extensive record of the Rules' application lies in the orders and awards of the Iran-United States Claims Tribunal, established in 1981 at The Hague pursuant to the Algiers Accords and still in operation today. That body operates under a slightly modified version of the 1976 Rules; its decisions under those Rules are public and are referred to in this Commentary as rulings by 'the Iran-US Claims Tribunal'.

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SECTION 1. INTRODUCTORY RULES

[Scope of application]*

Article 1

(1) Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such

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disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree.

(2) The parties to an arbitration agreement concluded after 15 August 2010 shall be presumed to have referred to the Rules in effect on the date of commencement of the arbitration, unless the parties have agreed to apply a particular version of the Rules. That presumption does not apply where the arbitration agreement has been concluded by accepting after 15 August 2010 an offer made before that date.

(3) These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

*** A model arbitration clause for contracts can be found in the annex to the Rules.**

1. Scope – form of agreement. Art. 1(1) sets out the scope of the 2010 Rules' application, requiring that the parties agree that their dispute shall be referred to arbitration under the UNCITRAL Arbitration Rules before such dispute can be settled in accordance with those Rules. The 2010 Rules (unlike the 1976 version) no longer require that the parties' agreement to arbitrate be in writing. The drafters recognised that the revised Model Law (2006) includes alternative versions of art. 7 ('Definition and form of arbitration agreement'), only one of which continues to require that enforceable arbitration agreements be 'in writing'. The other version ('Option II') imposes no requirement as to written form. Thus, by deleting from the 2010 Rules the requirement that arbitration agreements be in writing, the drafters avoided any conflict with the applicable law in jurisdictions where legislators decide (whether by adopting art. 7 (Option II) of the Model Law or otherwise) not to require that enforceable arbitration agreements take a particular form. (UNCITRAL, *Report on Forty-sixth Session of Working Group on Arbitration* (2007), UN Doc A/CN.9/619, paras. 28-31.)

2. Scope – non-contractual disputes. The provision of art. 1(1) extending the Rules' scope of application to disputes arising from any 'defined legal relationship, whether contractual or not' (words taken from art. 7(1) of the Model Law) replaces narrower language in the 1976 Rules that limited the Rules' application to disputes 'in relation to a contract'. This revision accommodates, inter alia, the growing number of UNCITRAL Rules arbitrations arising under investment treaties, in which there often is no prior contractual relationship between the investor claimant and the respondent state. Recent statistics show that more than a quarter of all investment treaty arbitrations have been brought under the UNCITRAL Rules. (UNCTAD, *Recent Developments In Investor-State Dispute Settlement* (2013), pp. 3-4.)

3. Model Arbitration Clause. Notwithstanding the 2010 revisions in art. 1(1) that expand the Rules' application to encompass arbitrations pursuant

to unwritten agreements as well as arbitrations of disputes arising from a 'defined legal relationship, whether contractual or not', the vast majority of UNCITRAL Rules arbitrations will undoubtedly continue to be those arising under international commercial contracts. For that reason, the 2010 drafters retained the Model Arbitration Clause for Contracts, which is now set forth in an annex to the Rules but cross-referenced by an asterisked footnote to the Rules' heading that precedes art. 1.

4. Modifications of the Rules. Art. 1(1) explicitly allows the parties to modify the Rules, and here again the 2010 Rules omit (for the same reason indicated in the preceding note 1) the requirement that such modifications be agreed in writing. A prime example of a modified version of the Rules is the specially adapted version of the Rules used by the Iran-US Claims Tribunal. For a further example of an adapted version of the Rules, see the modification agreed by the parties in the NAFTA *Glamis Gold* arbitration. The Rules are adaptable for different types of disputes; art. 1 deliberately does not limit their applicability to certain categories of cases, although the Rules were originally designed with international commercial arbitration in mind.

5. Which version of the Rules applies? Art. 1(2) addresses a question that inevitably arose once UNCITRAL adopted a revised version of its Rules in 2010: if the parties' arbitration agreement provides for UNCITRAL Rules arbitration without specifying a particular version of those Rules, should the 1976 Rules or the 2010 Rules apply? With respect to future arbitration agreements, art. 1(2) adopts a general principle to help in resolving this uncertainty: if, after 15 August 2010 (the effective date for the 2010 Rules), parties enter into such an arbitration agreement, they will be presumed to want any subsequent arbitration to be governed by the version of the UNCITRAL Rules that is in effect at the time the arbitration is filed. This presumption does not apply, of course, if the parties agree (in their arbitration agreement or otherwise) on a particular version of the Rules. No presumption governs the interpretation of an arbitration agreement entered into before 15 August 2010 that provides only generally for UNCITRAL Rules arbitration. If an arbitration arises under such an agreement after 15 August 2010, and if the parties do not at that time agree on which version of the Rules should apply, the adjudicating authority (presumably the arbitral tribunal, at least in the first instance) will have to determine whether the parties' agreement envisions use of the Rules in effect when the agreement was signed (the 1976 Rules) or the Rules in effect when the arbitration arises (which will be the 2010 Rules or, possibly, a subsequent version).

6. Application of 2010 Rules in certain treaty arbitrations. According to the last sentence of art. 1(2), the presumption that parties who agree after 15 August 2010 to arbitrate under the Rules have agreed to do so under the 2010 Rules does not apply if that arbitration agreement was formed by one party's accepting an offer to arbitrate that was actually made before 15 August 2010. The primary purpose and effect of this exception is to prevent

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application of the 2010 Rules by presumption to any arbitration arising after 15 August 2010 under an investment treaty concluded before that date. The 2010 drafters understood that an agreement to arbitrate under an investment treaty comes about only when an investor files a notice of arbitration, thereby accepting a standing offer to arbitrate that the respondent State has made in its treaty. If a State made that offer before the 2010 Rules came into effect, it could not be presumed to have offered to arbitrate under a version of the Rules not yet in existence, and the investor could not subsequently 'accept' an offer to arbitrate that was different from what the State had proposed (UNCITRAL, *Report on Forty-eighth Session of Working Group on Arbitration* (2008), UN Doc A/CN.9/646, para. 76).

7. Conflict with domestic law. Art. 1(3) sets out the relationship between the Rules and other applicable laws, such as, in particular, the domestic law of the place of arbitration. The Rules shall govern an arbitration except to the extent that any of them is in conflict with 'a provision of law applicable to the arbitration from which the parties cannot derogate', in which case such provision shall prevail. There are relatively few procedural provisions of arbitration laws that are mandatory.

[Notice and calculation of periods of time]

Article 2

(1) A notice, including a notification, communication or proposal, may be transmitted by any means of communication that provides or allows for a record of its transmission.

(2) If an address has been designated by a party specifically for this purpose or authorized by the arbitral tribunal, any notice shall be delivered to that party at that address, and if so delivered shall be deemed to have been received. Delivery by electronic means such as facsimile or e-mail may only be made to an address so designated or authorized.

(3) In the absence of such designation or authorization, a notice is:

(a) Received if it is physically delivered to the addressee; or

(b) Deemed to have been received if it is delivered at the place of business, habitual residence or mailing address of the addressee.

(4) If, after reasonable efforts, delivery cannot be effected in accordance with paragraphs 2 or 3, a notice is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means that provides a record of delivery or of attempted delivery.

(5) A notice shall be deemed to have been received on the day it is delivered in accordance with paragraphs 2, 3 or 4, or attempted to be delivered in accordance with paragraph 4. A notice transmitted by electronic means is deemed to have been received on the day it is sent, except

that a notice of arbitration so transmitted is only deemed to have been received on the day when it reaches the addressee's electronic address.

(6) For the purposes of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice is received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

1. Modes of transmitting notices. Art. 2 has been substantially revised and expanded in the 2010 Rules, beginning with the addition of para. 1, which establishes a general standard for the permissible modes of transmitting notices. 'Notices' are defined as including 'any notification, communication or proposal'. A mode of transmitting notices is permissible if it is 'any means of communication that provides or allows for a record of its transmission'. This is meant to include modes of electronic communication that are currently in use, such as faxes (which yield transmission reports) and e-mails (which produce a record of the mail sent), without referring expressly to any particular mode, which could become obsolete during the life of the 2010 Rules (UNCITRAL, *Report on the Forty-ninth Session of the Working Group on Arbitration* (2008), UN Doc A/CN.9/688, paras. 23-30). However, art. 2(2) permits the electronic communication of notices only when the receiving party has designated – or the tribunal has authorised – an electronic address for this purpose. This limitation prevents (for example) the sending of an arbitration notice to an e-mail address that is printed on a business card that the sending party obtained from the receiving party years before the arbitration, which address may no longer be active or regularly monitored.

2. Acceptable delivery addresses – the designated address. Paras. 2 through 4 of art. 2 establish an order of preference among acceptable delivery addresses, beginning in art. 2(2) with the preferred address, which is one that a party has designated or that a tribunal has authorised for the purpose of receiving arbitration 'notices'. If there has been such a designation or authorisation, then, under art. 2(2), 'any notice shall be delivered to that party at that address'. A party might designate such an address in the arbitration agreement (or in the contract that surrounds it) or in subsequent correspondence, while a tribunal would typically identify such an address in an early procedural order during the arbitration.

3. Acceptable delivery addresses – the habitual address. Absent any designation or authorisation of an address, art. 2(3)) directs that delivery should be made either physically to the addressee or to the addressee's habitual residence, place of business, or mailing address.

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4. Acceptable delivery addresses – the default address. Only if none of the addresses described in arts. 2(2) and 2(3) can be found after reasonable enquiry may delivery be made (pursuant to art. 2(4)) to the addressee's last-known residence or place of business. Such delivery must be made (or attempted) 'by registered letter or any other means that provides a record of delivery or of attempted delivery'.

5. Receipt of notices. The effectiveness of exchanging notices obviously depends on the notices' being received. The drafters chose not to presume that receipt occurs within some fixed period after a notice's transmission. Rather, according to arts. 2(2) to 2(4), a notice is either received when it is physically delivered to the addressee or it is deemed to be received if it is delivered to any of the addresses (following the descending order of preference) in arts. 2(2) to 2(4). Consequently, the time of receipt (or of deemed receipt) is the time of such delivery, with one exception. In the case of electronic communications, art. 2(5) provides that the time of delivery is the day on which the communication is sent. Note, however, that this rule establishes a presumed time of delivery, not a presumption of delivery. Thus, even an electronically communicated notice must be delivered to the electronic address in order to be deemed received (UNCITRAL, *Report on Forty-third Session* (2010), UN Doc A/65/17, para. 24). Moreover, this presumption as to the time of electronic delivery does not apply to notices of arbitration. The time when an electronically transmitted notice of arbitration is delivered is 'when it reaches the addressee's electronic address'. This precaution reflects the extra care to be taken in establishing the date on which a Notice of Arbitration is received (in this regard, see art. 3(2) and note 2 thereto). The special rule regarding time of delivery to an electronic address only applies to notices of arbitration because it would be impractical to apply this rule to all other communications during an arbitration; the task of confirming the time of each notice's electronic delivery to an adverse party's address would greatly complicate the parties' calculation of time periods for their further obligations (UNCITRAL, *Report on Forty-third Session* (2010), UN Doc A/65/17, para. 24).

6. Calculation of time periods. Art. 2(6) sets out the rule for calculating periods of time. Periods of time under the Rules begin to run on the day after receipt of a notice or other communication. Most of the cases that have come before the Iran-US Claims Tribunal regarding art. 2 concern 'Refusal Cases', where a request for filing a Statement of Claim has been made outside the deadline stated in the Iran-US Claims Tribunal's specially tailored version of the Rules. The Iran-US Claims Tribunal has consistently enforced these deadlines strictly; for example, claims that were delayed by a severe storm and arrived one day after the stated deadline were refused in the *Cascade* arbitration. However, the Iran-US Claims Tribunal's strict approach is a consequence of the jurisdictional nature of the particular filings and should therefore not be extrapolated to regular submissions in ad hoc arbitrations.

7. Holidays and non-business days. Art. 2(6) also provides that, if the last day of a time period is an official holiday or a non-business day at the addressee's residence or place of business, that period will be extended until the first business day that follows. Official holidays or non-business days occurring during the running of the period of time are included when calculating the period.

[Notice of arbitration]

Article 3

(1) The party or parties initiating recourse to arbitration (hereinafter called the 'claimant') shall communicate to the other party or parties (hereinafter called the 'respondent') a notice of arbitration.

(2) Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent.

(3) The notice of arbitration shall include the following:

- **(a) A demand that the dispute be referred to arbitration;**
- **(b) The names and contact details of the parties;**
- **(c) Identification of the arbitration agreement that is invoked;**
- **(d) Identification of any contract or other legal instrument out of or in relation to which the dispute arises or, in the absence of such contract or instrument, a brief description of the relevant relationship;**
- **(e) A brief description of the claim and an indication of the amount involved, if any;**
- **(f) The relief or remedy sought;**
- **(g) A proposal as to the number of arbitrators (i.e. one or three), if parties have not previously agreed thereon.**

(4) The notice of arbitration may also include:

- **(a) A proposal for the designation of an appointing authority referred to in article 6, paragraph 1;**
- **(b) A proposal for the appointments of a sole arbitrator referred to in article 8, paragraph 1;**
- **(c) Notification of the appointment of an arbitrator referred to in article 9 or 10;**

1. Notice of arbitration. Art. 3(1) provides that a claimant must send a notice of arbitration to a respondent in order to initiate arbitral proceedings. It is possible that the national law or a treaty governing the arbitration may impose additional notice requirements. The purpose of the notice of arbitration is to ensure that the respondent is informed that arbitral proceedings have been started and that a claim will be submitted (*Report of the Secretary-General on the Preliminary Draft Set of Arbitration Rules*, UNCITRAL, 8th Session, UN Doc A/CN.9/97 (1974), reprinted in (1975) VI UNCITRAL Ybk 163, 167 (Commentary on Draft Article 3)).

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2. Commencement of proceedings. Art. 3(2) specifies the exact point in time at which proceedings will be deemed to have commenced (the date on which the respondent receives the notice of arbitration), in order to provide a reference point for national law provisions on prescription of rights or limitation of actions.

3. Contents of the notice. Art. 3(3) lists the information that is to be included in a notice of arbitration under the Rules. The Notice must explicitly demand that the dispute be referred to arbitration. The claimant is also required to provide information on the identity of the parties, the arbitration clause or agreement invoked, the contract at issue, the general nature of the claim and amount involved, and the relief or remedy sought. The claimant must make a proposal regarding the number of arbitrators if this has not previously been agreed. The purpose of the list is to ensure that the respondent receives sufficient information to be apprised of the 'general context of the claim asserted against him' (*Report of the Secretary-General on the Preliminary Draft Set of Arbitration Rules*, UNCITRAL, 8th Session, UN Doc A/CN.9/97 (1974), reprinted in (1975) VI UNCITRAL Ybk 163, 167 (Commentary on Draft Article 3, para. 2) and 'to enable him to decide on his future course of action' (*Report of the Secretary-General on the Revised Draft Set of Arbitration Rules*, UNCITRAL, 9th Session, Addendum 1 (Commentary), UN Doc A/CN.9/112/Add.1 (1975), reprinted in (1976) VII UNCITRAL Ybk 166, 168 (Commentary on Draft Article 4, paras. 1 & 3).

4. Optional content. Claimants are not restricted to supplying only the information listed in art. 3(3) in the notice of arbitration. Pursuant to art. 3(4), a claimant may also include, if relevant, its proposal for appointing a sole arbitrator under art. 8(1) or an appointing authority under art. 6(1). In cases where three arbitrators will be used, the claimant may notify the respondent of his appointment of an arbitrator pursuant to arts. 9 or 10.

5. Relationship of notice of arbitration to statement of claim. The notice of arbitration should not be confused with the subsequent statement of claim required by art. 20. In *Ethyl Corporation*, the NAFTA tribunal confirmed that the Rules provide for different contents of a notice of arbitration and a statement of claim. However, depending upon a claimant's strategy, the availability of preparation time, and the nature of the case, a claimant may submit a sufficiently comprehensive notice of arbitration that it also satisfies the requirements for a statement of claim. Thus, art. 20(1) provides that, when the time comes to submit the statement of claim, a claimant may elect to treat its notice of arbitration as having already encompassed this further submission, provided that the notice of arbitration meets the requirements set forth in the remainder of art. 20.

[Response to the Notice of Arbitration]

Article 4

(1). Within 30 days of the receipt of the notice of arbitration, the respondent shall communicate to the claimant a response to the notice of arbitration, which shall include:

(a) The name and contact details of each respondent;

(b) A response to the information set forth in the notice of arbitration, pursuant to article 3, paragraphs 3 (c) to (g).

2. The response to the notice of arbitration may also include:

(a) Any plea that an arbitral tribunal to be constituted under these Rules lacks jurisdiction;

(b) A proposal for the designation of an appointing authority referred to in article 6, paragraph 1;

(c) A proposal for the appointment of a sole arbitrator referred to in article 8, paragraph 1;

(d) Notification of the appointment of an arbitrator referred to in article 9 or 10;

(e) A brief description of counterclaims or claims for the purpose of a set-off, if any, including where relevant, an indication of the amounts involved, and the relief or remedy sought;

(f) A notice of arbitration in accordance with article 3 in case the respondent formulates a claim against a party to the arbitration agreement other than the claimant.

3. The constitution of the arbitral tribunal shall not be hindered by any controversy with respect to the respondent's failure to communicate a response to the notice of arbitration, or an incomplete or late response to the notice of arbitration, which shall be finally resolved by the arbitral tribunal.

1. Response to the notice of arbitration. Art. 4 creates a new stage of the arbitral process that was not addressed in the 1976 Rules; it is thus one of only two entirely new articles in the 2010 Rules (see also art. 16), expanding the overall number of articles from 41 to 43. Under the 1976 Rules, the respondent was not required to make any substantive submission in an arbitration before its statement of defence (which follows the claimant's statement of claim), and thus, as the drafters in 2010 recognised, the 'arbitral tribunal might be constituted without the respondent having an opportunity (or being required) to state its position with respect to matters such as the jurisdiction, the claim, or any counterclaim' (UNCITRAL, *Report on Forty-fifth Session of Working Group on Arbitration* (2006), UN Doc A/CN.9/614, para. 56). Accordingly, it was decided to provide for an earlier statement of the respondent's position by requiring a response to the notice of arbitration, recognising the 'advantage of clarifying at an early stage of the procedure the main issues raised by the dispute' (id., para. 57).

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2. Contents of the response to the notice. The structure of art. 4 mirrors that of art. 3, in that art. 4(1) requires a 'response' from the respondent to each of the points that, according to art. 3(3), the claimant 'shall include' in its notice of arbitration. And, just as the claimant 'may' (pursuant to art. 3(4)) include in its notice three further matters, so 'may' the respondent (pursuant to art. 4(2)(b)-(d)) address the same matters in its response to the notice. In addition, the respondent 'may' include in its response an objection to the tribunal's jurisdiction as well as any counterclaim that it intends to present. The inclusion of jurisdictional objections or counterclaims is permissive at this stage because, for example, a respondent may present such objections in its statement of defence (and possibly later if the tribunal 'considers the delay justified' – see art. 23(2)). Similarly, the respondent has the option of not raising a counterclaim until its statement of defence 'or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances' (see art. 21(3)).

3. Joinder of a party by the respondent. Art. 4(2)(f) also allows the respondent to include in its response a further notice of arbitration directed to another party that is bound by the same arbitration agreement under which the arbitration arises but that is not yet a party to the arbitration. This is one of two provisions added to the 2010 Rules that provide for joinder of a party after the arbitration has been initiated. Art. 4(2)(f) was added after the drafters had adopted the principal joinder provision in art. 17(5), since the drafters recognised that the latter provision 'only applied after the constitution of the tribunal' but that joinder might be sought at an earlier stage (UNCITRAL, *Report on Fifty-second Session of Working Group on Arbitration* (2010), UN Doc A/CN.9/688, para. 67).

4. Implications of early joinder. Joinder pursuant to art. 4(2)(f) will occur at what the drafters felt was 'the most appropriate time … before the arbitral tribunal [i]s constituted' (id.). At that stage, the newly joined party may still have an opportunity to participate in the selection of a multi-member tribunal. Or, if such input is not accommodated and the newly joined party objects to the tribunal that is formed on the ground that its right to participate in that formation has been infringed, the newly joined party may still insist that the tribunal be reconstituted by an appointing authority, pursuant to art. 10(3). Accordingly, joinder effected under art. 4(2)(f) should not give rise to any unequal treatment of the parties in the selection of arbitrators, such as was condemned by France's highest court in the famous *Dutco* case, in which the multiple parties in an ICC Rules arbitration were afforded unequal levels of input in the selection of arbitrators and the award upholding that result was set aside.

5. Consequences of a missing or incomplete response. Art. 4(3) again mirrors a corresponding provision in art. 3(5), authorising the arbitral tribunal to resolve any dispute concerning the sufficiency of a response to the notice of arbitration and providing that such a dispute will not hinder the constitution of the tribunal.

[Representation and assistance]

Article 5

Each party may be represented or assisted by persons chosen by it. The names and addresses of such persons must be communicated to all parties and to the arbitral tribunal. Such communication must specify whether the appointment is being made for purposes of representation or assistance. Where a person is to act as a representative of a party, the arbitral tribunal, on its own Initiative or at the request of any party, may at any time require proof of authority granted to the representative in such a form as the arbitral tribunal may determine.

1. Representation. This article provides that each party may appoint representative(s) who will be deemed to act on its behalf before the arbitral tribunal. The phrase 'may be represented … by persons chosen by it' replaces more permissive language contained in the 1976 Rules ('… by persons of their choice'). This change was introduced in the 2010 Rules to 'avoid the implication that the party had an unrestricted discretion, at any time during the proceedings, to impose the presence of any counsel (for example, a busy practitioner that would be unable to meet reasonable time schedules set by the arbitral tribunal)' (UNCITRAL, *Report on Forty-sixth Session of Working Group on Arbitration* (2007), UN Doc A/CN.9/619, para. 63). The acts of the representatives shall be binding on the appointing party. A representative is not required to be licensed to practice law.

2. Assistance. Arbitrating parties may also be assisted in proceedings before the arbitral tribunal by one or more persons of their choice. Such persons, unless they are also appointed as representatives, are not deemed to act before the tribunal on behalf of the appointing party, to bind the appointing party or to receive notices, communications or documents on behalf of the appointing party. Any such assistant is not required to be licensed to practice law. This article seems to limit the category of assisting persons to those who assist 'in the proceedings'. In *Starrett Housing*, the Iran-US Claims Tribunal held that the Rules do not prevent an attorney from using assistants, nor from assigning them to argue before the Iran-US Claims Tribunal.

3. Communication to the other party. It is unlikely that the drafters intended the requirement of communicating the names and addresses of both representatives and assistants to the other party to be given a broad interpretation; otherwise, this provision might imply that the names and addresses of all supporting staff assistants, such as translators or paralegals, should be provided. Although the travaux préparatoires from 1976 are unclear on the matter, a better view is that only the identity of those assistants who appear in the hearing or make any kind of submission should be disclosed.

4. Requirement for a power of attorney. The 1976 Rules did not address the question of whether a person purporting to act on behalf of a party could

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be required to demonstrate his or her authorisation to do so. The general view has been that no power of attorney is required of representatives (see *International Technical Products*), but before the Iran-US Claims Tribunal most parties appear to have provided it voluntarily. The drafters of the 2010 Rules decided that tribunals should have an explicit power to require proof of a representative's authority, whence comes the final sentence of art. 5. That sentence allows 'the arbitral tribunal to determine on its own motion the extent to which it need[s] to be provided with information on the scope of authority' (UNCITRAL, *Report on Forty-sixth Session of Working Group on Arbitration* (2007), UN Doc A/CN.9/619, para. 66.), since the drafters recognised that in some circumstances a demand for such information 'could have the consequence of forcing disclosure of certain communications between the party and its representative that should be kept confidential, such as ... a power to settle a claim at a certain amount' (id., para. 65).

[Designating and appointing authorities]

Article 6

(1) Unless the parties have already agreed on the choice of an appointing authority, a party may at any time propose the name or names of one or more institutions or persons, including the Secretary-General of the Permanent Court of Arbitration at The Hague (hereinafter called the 'PCA'), one of whom would serve as appointing authority.

(2) If all parties have not agreed on the choice of an appointing authority within 30 days after a proposal made in accordance with paragraph 1 has been received by all other parties, any party may request the Secretary-General of the PCA to designate the appointing authority.

(3) Where these Rules provide for a period of time within which a party must refer a matter to an appointing authority and no appointing authority has been agreed on or designated, the period is suspended from the date on which a party initiates the procedure for agreeing on or designating an appointing authority until the date of such agreement or designation.

(4) Except as referred to in article 41, paragraph 4, if the appointing authority refuses to act, or if it fails to appoint an arbitrator within 30 days after it receives a party's request to do so, fails to act within any other period provided by these Rules, or fails to decide on a challenge to an arbitrator within a reasonable time after receiving a party's request to do so, any party may request the Secretary-General of the PCA to designate a substitute appointing authority.

(5) In exercising their functions under these Rules, the appointing authority and the Secretary-General of the PCA may require from any party and the arbitrators the information they deem necessary and they shall give the parties and, where appropriate, the arbitrators, an opportunity to present their views in any manner they consider appropriate.

All such communications to and from the appointing authority and the Secretary-General of the PCA shall also be provided by the sender to all other parties.

(6) When the appointing authority is requested to appoint an arbitrator pursuant to articles 8, 9, 10 or 14, the party making the request shall send to the appointing authority copies of the notice of arbitration and, if it exists, any response to the notice of arbitration.

(7) 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.

1. General. Art. 6 brings together a number of provisions relating to the appointing authority that were previously scattered among several articles in the 1976 Rules. A key purpose of this consolidation is 'to clarify for the users of the Rules the importance of the role of the appointing authority, particularly in the context of non-administered arbitration' (UNCITRAL, *Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules (Note by the Secretariat)* (2010), UN Doc A/CN.9/703, para. 14). Hence, new language in art. 6(1) reminds parties that they 'may at any time propose the name or names' of candidates for appointing authority, which is intended to encourage such proposals at the earliest stage of the proceedings.

2. Appointing and designating authorities. The Rules provide that parties should seek recourse to an appointing authority in several circumstances, including (i) for the selection of an arbitrator if, for example, the initial method for such appointment fails (see arts. 8(1) and 9(2)-(3)); (ii) for resolving challenges to an arbitrator if the challenge is not accepted by the other party or parties or the challenged arbitrator does not resign (see art. 13(4)); (iii) for a determination whether, in replacing an arbitrator, exceptional circumstances justify depriving a party of its right to appoint the substitute arbitrator (see art. 14(2)), and (iv) for a review and possible revision of the tribunal's announced methodology for establishing its fees and expenses or of the tribunal's final determination of its fees and expenses (see, respectively, arts. 41(3) and 41(4)). A definition of 'appointing authority' was deliberately excluded from the Rules, in order to leave the authority's selection to the parties' discretion (UNCITRAL, *Report on Ninth Session* (1976), UN Doc A/31/17, para. 37, 7 UNCITRAL Ybk at 69). The travaux préparatoires *from 1976* reflect the fact that, if the appointing authority is an institution, there will be benefits in terms of continuity and expertise, without excluding the possibility of selecting an individual for this function (*Summary Record of the 15th Meeting of the Committee of the Whole (II)*, UNCITRAL, 9th Session, UN Doc A/CN.9/9/C.2/SR.15 (1976) at 4).

3. Function of the designating authority. Pursuant to art. 6(2), if the parties are unable to agree on an appointing authority within 30 days of one

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[Three-Arbitrator Tribunal]

Article 27

(1) Within fifteen (15) days from the date of receipt of the Notice of Arbitration, the Claimant and the Respondent shall each nominate or entrust the Chairman of the CIETAC to o appoint, an arbitrator, failing which the arbitrator shall be appointed by the Chairman of CIETAC.

(2) Within fifteen (15) days from the date of the Respondent's receipt of the Notice of Arbitration, the parties shall jointly nominate, or entrust the Chairman of CIETAC to appoint, the third arbitrator, who shall act as the presiding arbitrator.

(3) The parties may each recommend one to five arbitrators as candidates for the presiding arbitrator and shall submit the list of recommended candidates within the time period specified in the preceding paragraph 2. Where there is only one common candidate on the lists, such candidate shall be the presiding arbitrator jointly nominated by the parties. Where there is more than one common candidate on the lists, the Chairman of the CIETAC shall choose the presiding arbitrator from among the common candidates having regard to the circumstances of the case, and he/she shall act as the presiding arbitrator jointly nominated by the parties. Where there is no common candidate in the lists, the presiding arbitrator shall be appointed by the Chairman of the CIETAC.

(4) Where the parties have failed to jointly nominate the presiding arbitrator according to the above provisions, the presiding arbitrator shall be appointed by the Chairman of the CIETAC.

1. Priority of party autonomy. Art. 27, which implements art. 31 Arbitration Law, largely reflects international practice and gives the parties the autonomy to decide on the mechanism of constitution of the arbitral tribunal. Art. 27(3) further contains an unusual and quite innovative rule concerning the appointment of the presiding arbitrator.

2. Appointment of party arbitrators. Art. 27(1) provides that each party shall nominate one arbitrator within fifteen days upon receipt of the 'Notice of Arbitration', or shall entrust the Chairman of CIETAC to make such appointment. If a party fails to nominate an arbitrator, the arbitrator will be appointed by the Chairman of CIETAC. Thus, where the parties do not specifically specify the mechanism for the constitution of the arbitral tribunal, they will have the choice between appointing an arbitrator themselves or referring this task to the Chairman.

3. Nomination and appointment of the presiding arbitrator. Art. 27(2) states that the parties must jointly nominate the presiding arbitrator. By 'jointly nominate', art. 27(2) actually refers to the mechanism provided for in art. 27(3). According to this peculiar mechanism, each party must suggest one to five arbitrators. If there is one common candidate on both lists, this

person shall be the appointed presiding arbitrator. If there is more than one common candidate on both lists, the Chairman of CIETAC will decide on the most appropriate one based on the circumstances of the dispute. If there is no common candidate, the Chairman of CIETAC will appoint the presiding arbitrator at its sole discretion, from the candidates mentioned on the lists or persons from outside the lists. Note that in the CIETAC Arbitration Rules 2005, if there was no common name appearing on the parties' lists, the Chairman of CIETAC would then choose the presiding arbitrator from outside the lists. The parties are, however, free to provide for another mechanism of appointment of the presiding arbitrator in their arbitration agreement, for example nomination by the two party-appointed arbitrators.

4. Important role of the Chairman of CIETAC. The Chairman of CIETAC plays an important role in the appointment of arbitrators, since he is responsible for appointing arbitrators whenever the parties fail to constitute the arbitral tribunal using the applicable mechanism, or whenever they expressly entrust the Chairman with the task.

[Sole-Arbitrator Tribunal]

Article 28

Where the arbitral tribunal is composed of one arbitrator, the sole arbitrator shall be nominated or appointed pursuant to the procedure stipulated in paragraphs 2, 3 and 4 of Article 27.

1. List system. Art. 28 refers to the mechanism of appointment of the presiding arbitrator provided for in art. 27(2), (3) and (4). Each party thus suggests up to five arbitrators, and the sole arbitrator will be appointed by the Chairman of CIETAC either from among the common recommendations of the parties, or failing such common recommendation, from the Panel of Arbitrators at the Chairman's sole discretion. Here again, the parties may provide for a different mechanism in their arbitration agreement.

[Multi-Party Tribunal]

Article 29

(1) Where there are two or more Claimants and/or Respondents in an arbitration case, the Claimant side and/or the Respondent side, following discussion, shall each jointly nominate or jointly entrust the Chairman of CIETAC to appoint one arbitrator.

(2) The presiding arbitrator or the sole arbitrator shall be nominated in accordance with the procedure stipulated in paragraphs 2, 3 and 4 of Article 27 of these Rules. When making such nomination pursuant to paragraph 3 of Article 27 of these Rules, the Claimant side and/or the

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Respondent side, following discussion, shall each submit a list of their jointly agreed candidates.

(3) Where either the Claimant side or the Respondent side fails to jointly nominate or jointly entrust the Chairman of CIETAC to appoint one arbitrator within fifteen (15) days from the date of its receipt of the Notice of Arbitration, the Chairman of CIETAC shall appoint all three members of the arbitral tribunal and designate one of them to act as the presiding arbitrator.

1. Multi-party. Art. 29 refers to the case where there are more than two parties to the arbitration, in particular where there are two or more claimants and/or two or more respondents.

2. Appointment of the party arbitrators. For the appointment of the party arbitrators, the parties are separated into two groups, i.e. claimants and respondents, and each group must either jointly designate one arbitrator or entrust the Chairman of CIETAC to do so.

3. Appointment of the presiding arbitrator. The presiding arbitrator will be determined according to the mechanism described in art. 27(3). Each group of claimants and respondents must recommend one to five candidates, and the presiding arbitrator will be appointed from both groups' common candidates. If there is no common candidate, the presiding arbitrator will be appointed by the Chairman of CIETAC at its discretion (see art. 27, note 3).

4. Failure to jointly nominate the co-arbitrator. Under the CIETAC Arbitration Rules 2005, the Chairman of CIETAC would, in the case of a multi-party arbitration, only appoint the arbitrator for the group of parties that fails to jointly nominate or jointly entrust the Chairman of CIETAC to appoint one arbitrator within the specified time limit (art. 24(2)). The CIETAC Arbitration Rules 2012 and 2015 revised the old mechanism. According to art. 27(3) of the CIETAC Arbitration Rules 2012 and art. 29(3) of the CIETAC Arbitration Rules 2015, where either group of parties fails to nominate or entrust the Chairman of CIETAC to appoint the party-nominated arbitrator, the Chairman of CIETAC will appoint all three members of the arbitral tribunal, including the arbitrator to be nominated by the non-defaulting group of parties and the presiding arbitrator. This adapted mechanism is in line with the practices adopted by international arbitration institutions such as the ICC and SIAC. The purpose of this new rule is to create a level playing field for both sides so that the parties enjoy equal rights. Consequently, there will be no ground, including unfair treatment, for the defaulting party to rely on in any attempt to set aside the arbitral award.

5. Joinder of proceedings/third party intervention. Sometimes, when there are more than two parties involved in a dispute, it may happen that each of them has a claim against the other and that they cannot be separated into two groups of claimants and respondents, or that although the dispute

affects several parties, the arbitration is only initiated against some of them. The question then arises whether these disputes between the different parties can be joined into one arbitration procedure, or whether it is necessary to initiate separate arbitral proceedings. The Arbitration Law and the CIETAC Rules are silent concerning these questions. In practice and contrary to other arbitration institutions, CIETAC is very reluctant to join different proceedings, although it is not excluded that, based on a well-drafted arbitration agreement providing for an appropriate mechanism, a joinder of proceedings or third party intervention may be possible and admitted by CIETAC. With the development of international arbitration practice in this respect, it is only a matter of time until CIETAC adopts a more flexible approach. It remains, however, uncertain how local courts will react when faced with a request for cancellation or non-enforcement of an arbitral award based on such joinder of proceedings or third party intervention.

[Considerations in Appointing Arbitrators]

Article 30

When appointing arbitrators pursuant to these Rules, the Chairman of CIETAC shall take into consideration the law applicable to the dispute, the place of arbitration, the language of arbitration, the nationalities of the parties, and any other factor(s) the Chairman considers relevant.

1. A neutral presiding arbitrator. It is commonly accepted that the presiding arbitrator shall be neutral, and the requirement of 'neutral' not only reflects on him being 'impartial', but also reflects on his nationality, i.e. the chair of the arbitral tribunal shall be of a nationality other than those of the parties. This has been written into the arbitrational rules of many major international arbitration institutions, including ICC and HKIAC (see art. 11(3), HKIAC Administered Arbitration Rules, and art. 13(5) of ICC Arbitration Rules). The reason for such requirement is understood to be to eliminate potential bias that may arise due to the presiding arbitrator and one of the parties sharing the same home country. For example, the presiding arbitrator may have a very similar value system as the party from the same home country, thus may be inclined to show sympathy toward such party. However, prior to the CIETAC Arbitration Rules 2012, the CIETAC Arbitration Rules were silent on the requirement regarding the nationality of the presiding arbitrator, let alone the co-arbitrators. In practice, it is not uncommon that the parties would incorporate into their arbitration agreement a provision requiring the presiding arbitrator to be of nationality different from both sides. In the CIETAC Arbitration Rules 2012 and 2015, though not expressly adopting a similar mechanism as the ICC or HKIAC and requiring the presiding arbitrator to be of a different nationality from the parties, it is required that the Chairman of CIETAC shall take into consideration the nationalities of the

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parties when appointing arbitrators including the presiding arbitrator, which is deemed a reflection of CIETAC's attitude in such respect.

[Disclosure]

Article 31

(1) An arbitrator nominated by the parties or appointed by the Chairman of CIETAC shall sign a Declaration and disclose any facts or circumstances likely to give rise to justifiable doubts as to his/her impartiality or independence.

(2) If circumstances that need to be disclosed arise during the arbitral proceedings, the arbitrator shall promptly disclose such circumstances in writing.

(3) The Declaration and/or the disclosure of the arbitrator shall be submitted to the Arbitration Court to be forwarded to the parties.

1. Declaration of Independence. As with most international arbitration institutions, in order to ensure the independence and impartiality of the arbitrator, the arbitrator must disclose to CIETAC any circumstances that may give rise to 'justifiable doubts' as to his impartiality or independence. He does so by filling out a 'Declaration of Independence' within three to five days of his appointment. The Declaration of Independence will then be forwarded to the parties, each of them being able to raise objections as to the appointment of such arbitrator (see art. 32, notes 1 et seq.). If no objection is raised, CIETAC will confirm the appointment of the arbitrator. On the basis of the previous rules, the CIETAC Arbitration Rules 2015 further clarified that any disclosure shall be made to the Arbitration Court in writing, and the Arbitration Court will forward such disclosure to the parties.

2. Form of the Declaration of Independence. The Declaration of Independence is very similar to the ICC Arbitrator's Declaration of Acceptance and Statement of Independence. In the first part of the document, the arbitrator accepts the case and undertakes to respect all applicable laws and rules; in the second part of the document, the arbitrator confirms being independent and is invited to disclose circumstances that may give rise to any doubts as to his impartiality or independence.

3. Disclosure during the proceedings. If any circumstances giving rise to justifiable doubts as to an arbitrator's impartiality and independence arise during the arbitral proceedings, the arbitrator shall 'promptly' inform CIETAC in writing and disclose such circumstances. According to the circumstances, the arbitrator may be obliged to withdraw, or the parties may have the right to request his challenge according to art. 32 (see art. 32, notes 3 et seq.).

4. Justifiable doubts as to his independence or impartiality. In this respect, see art. 32, note 4.

[Challenge to Arbitrator]

Article 32

(1) Upon receipt of the Declaration and/or written disclosure of an arbitrator, a party wishing to challenge the arbitrator on the grounds of the disclosed facts or circumstances shall forward the challenge in writing within ten (10) days from the date of such receipt. If a party fails to file a challenge within the above time period, it may not subsequently challenge the arbitrator on the basis of matters disclosed by the arbitrator.

(2) A party having justifiable doubts as to the impartiality or independence of an arbitrator may challenge that arbitrator in writing and shall state the facts and reasons on which the challenge is based with supporting evidence.

(3) A party may challenge an arbitrator in writing within fifteen (15) days from the date it receives the Notice of Formation of the Arbitral Tribunal. Where a party becomes aware of the reasons for a challenge after such receipt, the party may challenge the arbitrator in writing within fifteen (15) days after such reasons become known to it, but no later than the conclusion of the last oral hearing.

(4) The challenge by one party shall be promptly communicated to the other party, the arbitrator being challenged and the other members of the arbitral tribunal.

(5) Where an arbitrator is challenged by one party and the other party agrees to the challenge, or the arbitrator being challenged withdraws from his/her office, such arbitrator shall no longer be a member of the arbitral tribunal. However, in neither case shall it be implied that the reasons for the challenge are sustained.

(6) In circumstances other than those specified in paragraph 5, the Chairman of CIETAC shall make a final decision on the challenge with or without stating the reasons.

(7) An arbitrator who has been challenged shall continue to fulfil the functions of arbitrator until a decision on the challenge has been made by the Chairman of CIETAC.

1. Challenge based on the content of the Declaration of Independence. According to art. 32(1), upon receipt by the parties of the Declaration of Independence, they are given ten days to request in writing the challenge of an arbitrator based on the facts or circumstances described in his Declaration. If the parties fail to raise such a request within those ten days, they will be precluded from doing so in the future based on a matter already disclosed in the Declaration.

2. Challenge based on facts revealed after the receipt of the Declaration of Independence but before the constitution of the arbitral tribunal. Art. 32(2) entitles the parties to challenge an arbitrator within fifteen days after

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receipt of the Notice of Formation of the arbitral tribunal. The parties may, however, only challenge the arbitrator for reasons that were not disclosed in the Declaration of Independence and that came to light in the meantime, i.e. between the receipt of the Declaration of Independence and the receipt of the Notice of Formation of the arbitral tribunal.

3. Challenge based on facts revealed at a later stage. Where a party becomes aware of grounds to challenge an arbitrator (which were not disclosed in the Declaration of Independence), it has to do so within fifteen days of such grounds becoming known. In any case, however, the challenge must be submitted before the end of the last hearing. However, it should be mentioned that if a party is informed – after the last hearing or even after the rendering of the award – of circumstances that create doubts as to the arbitrator's impartiality and independence, the party concerned may request to set aside the award or may object to its enforcement based on arts. 70 and 71 Arbitration Law in connection with art. 274(3) Civil Procedure Law (see art. 70 Arbitration Law, notes 1 et seq.).

4. Justifiable doubts. The reasons for challenge are listed in art. 34 Arbitration Law and apply to situations: where the arbitrator is a party to the arbitral proceedings, or is related to any party or their respective attorneys in the arbitral proceedings; where the case is one in which the arbitrator has personal interest; where the arbitrator has a relationship with a disputing party or any attorneys involved in the case that may prejudice the rendering of a fair and impartial arbitral award; or where the arbitrator has met in private with any party to the arbitration or their respective attorneys, or has accepted gifts or hospitality from any of the parties or their respective attorneys. This list is further complemented by the CIETAC Ethical Rules for Arbitrators, which provides for a list of further circumstances: the arbitrator has discussed the case with a party or counsel, or has given advice or opinions concerning the merits of the case to a party or his counsel; the arbitrator has a relationship with a party or his counsel that involves debt or credit, or concerns business cooperation or competition; the arbitrator is an advisor to or has previously provided advice to a party or to the counsel of a party; the arbitrator has the same employer as a party or the counsel of a party; the arbitrator was previously engaged as a conciliator in a separate conciliation process that failed to resolve the dispute, and all the parties to the arbitration object to the arbitrator serving as an arbitrator in the subsequent arbitral proceedings; or the arbitrator has a relationship with a party or his counsel, such as teacher, student, neighbour or friend, to such an extent that it may possibly affect the impartiality of the arbitrator. The IBA Guidelines on Conflicts of Interest in International Arbitration have not been adopted by CIETAC, although they are well known in arbitration circles in China and serve as guidelines for the arbitrators. As a consequence, a violation of the principles stated in the IBA Guidelines on Conflicts of Interest in International Arbitration will usually not constitute a sufficient basis to challenge an arbitrator, unless the violation

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of such principle simultaneously violates a rule already contained in the CIETAC Rules or in the Ethical Rules for Arbitrators.

5. Consequences of the request for challenge. Where a party raises a request for challenge to an arbitrator, the consequences of such request differ according to whether: the other party agrees, the arbitrator agrees to withdraw, or neither the other party nor the concerned arbitrator agrees with the request. In the first two cases, the arbitrator will no longer be a member of the arbitral tribunal, and no further decision is necessary. In the case where neither the other party nor the concerned arbitrator agrees with the request for his challenge, the Chairman of CIETAC shall take a final decision on the challenge. Until such decision is taken, the concerned arbitrator shall continue to exercise his duties as arbitrator.

6. Decision by the Chairman of CIETAC. Requests for challenge of an arbitrator have to be addressed to CIETAC, and not to the arbitral tribunal. Such request has to be made in writing and should explain the facts and reasons giving rise to justifiable doubts as to the impartiality or independence of the arbitrators. The Chairman of CIETAC will decide upon the challenge, unless he is himself a member of the concerned arbitral tribunal, in which case the decision will be made collectively by CIETAC (see art. 36 Arbitration Law). If the arbitration is handled by a Sub-Commission of CIETAC, the decision on the challenge of an arbitrator will still be taken by the Chairman of CIETAC at CIETAC's headquarters, and not by the Vice-Chairman of the Sub-Commission (see art. 4(1), note 1).

[Replacement of Arbitrator]

Article 33

(1) In the event that an arbitrator is prevented de jure or de facto from fulfilling his functions, or fails to fulfil his functions in accordance with the requirements of these Rules or within the time period specified in these Rules, the Chairman of CIETAC shall have the power to replace the arbitrator. Such arbitrator may also voluntarily withdraw from his/her office.

(2) The Chairman of CIETAC shall make a final decision on whether or not an arbitrator should be replaced with or without stating the reasons.

(3) In the event that an arbitrator is unable to fulfil his functions due to challenge or replacement, a substitute arbitrator shall be nominated or appointed within the time period specified by the Arbitration Court according to the same procedure that applied to the nomination or appointment of the arbitrator being challenged or replaced. If a party fails to nominate or appoint a substitute arbitrator accordingly, the substitute arbitrator shall be appointed by the Chairman of CIETAC.

(4) After the replacement of an arbitrator, the arbitral tribunal shall decide whether and to what extent the previous proceedings in the case shall be repeated.

1. Grounds for replacement. According to art. 33, the Chairman of CIETAC has the power to revoke and replace an arbitrator, when that arbitrator is unable to fulfil his functions in accordance with the Rules. The phrase 'unable to fulfil his functions' may refer to different kinds of situations, including but not limited to the case where there are grounds for challenge or withdrawal of the arbitrator, where the arbitrator is removed from the CIETAC's Panel of Arbitrators, where he has resigned, or where he simply no longer fulfils the minimum requirements for arbitrators (see art. 13, note 2). Thus, although art. 33 follows art. 32 concerning the challenge/withdrawal of an arbitrator, its scope of application is much wider and is not only limited to cases where an arbitrator is challenged due to a lack of impartiality or independence. Art. 33 applies to all cases where an arbitrator is unable – for whatever reasons – to fulfil his obligations.

2. Removal from CIETAC's Panel of Arbitrators. In certain serious cases of a violation of his duties, an arbitrator may be removed from CIETAC's Panel of Arbitrators. This is the case when an arbitrator violates his duties under arts. 34(4) and 58(6) Arbitration Law (see art. 38 Arbitration Law, note 1), i.e. when he has privately met with a party or when he has committed embezzlement, accepted bribes or engaged in malpractice for personal benefit, or perverted the law in the arbitration of the case. In those cases, it is evident that such arbitrator will also be replaced in any pending arbitral proceedings he may act in. Actually, the CIETAC Rules only stipulate certain circumstances under which an arbitrator shall be replaced, but there is no exhaustive list of such circumstances, nor is there any provision as to when and how to remove such arbitrator from the CIETAC Panel. Besides the abovementioned circumstances, CIETAC has in practice removed arbitrators from its Panel where the arbitrator was charged of a crime, or where he had seriously delayed the procedure or unjustifiably influenced other arbitrators. CIETAC has a wide discretion in this respect.

3. Resignation of an arbitrator. Art. 33 also mentions the case in which an arbitrator resigns from the arbitral tribunal. The term resignation applies to situations where an arbitrator steps out of the arbitration, not because of any lack of independence or impartiality, but for other reasons mainly unrelated to the arbitration case. The CIETAC Rules do not address the question of when an arbitrator is allowed to resign from the arbitral tribunal. Art. 7 of the Ethical Rules for Arbitration sets forth that '[f]ollowing acceptance of appointment to an arbitral tribunal, an arbitrator must guarantee the availability of sufficient time for conducting any arbitral hearing, and sitting in private session for effecting deliberations on the case. In no circumstances may an arbitrator impede the handling of a case'. The resignation of an arbitrator

strongly affects the arbitral proceedings, as it causes delays and supplementary costs in the case of a replacement. Based thereon, it can be deduced that an arbitrator may not resign from an arbitral tribunal as he wishes, but can only do so where there exist justifiable reasons that impede him from fulfilling his task as an arbitrator. In practice, it is rare that arbitrators resign, and where they do, their request needs to be approved by the Chairman of CIETAC, who will usually grant such request. In an ICC arbitration, an arbitrator resigned from the tribunal for the reason that he had taken office as a government official and was therefore prevented by his public duties from continuing to serve as an arbitrator. It remains unclear whether CIETAC would accept such a resignation by its own arbitrators.

4. Discretionary power of the Chairman of CIETAC. According to art. 33(2), the Chairman of CIETAC has discretionary power to decide 'whether an arbitrator should be replaced'. Such discretionary power also applies to the removal of an arbitrator and to his subsequent replacement.

5. Recommencement of proceedings. According to art. 33(3), in case an arbitrator is replaced, the newly constituted arbitral tribunal (not CIETAC) should decide whether it is necessary and to what extent to repeat the previous proceedings (see also art. 37(2) Arbitration Law). In practice, it is extremely rare to repeat the whole proceedings. However, it is common to repeat a hearing, if the new arbitrator joined after that hearing. This is to make sure that all the arbitrators make a decision based on the same information. If the replacement takes place before the oral hearing, there is usually no reason to repeat the proceedings, since the new arbitrator can gain a view of the case based on the written submissions.

6. Replacement procedure. According to art. 33(3), the new arbitrator must be appointed according to the same procedure as applies to the appointment of the replaced arbitrator (see art. 27 et seq.), i.e. to be first nominated by the party that nominated the replaced arbitrator, failing which, to be appointed by the Chairman of CIETAC. The CIETAC Rules 2015 further specify that such replacement needs to be conducted within a time period specified by the Arbitration Court.

[Continuation of Arbitration by Majority]

Article 34

After the conclusion of the last oral hearing, if an arbitrator on a three-member arbitral tribunal is unable to participate in the deliberations and/or to render the award owing to his/her demise or to his/her removal from CIETAC's Panel of Arbitrators, the other two arbitrators may request the Chairman of CIETAC to replace the arbitrator pursuant to Article 33 of these Rules. After consulting with the parties and upon the approval of the Chairman of CIETAC, the other two arbitrators may also continue the arbitral proceedings and make decisions, rulings or

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render the award. The Arbitration Court shall notify the parties of the above circumstances.

1. Avoidable replacement of an arbitrator if his removal occurs after the conclusion of the last oral hearing. Art. 34 sets out the principle that, if an arbitrator is removed (for whatever reasons) from the arbitral proceedings after the conclusion of the last oral hearing, this does not necessarily trigger his replacement. The main purpose of this article is to avoid extra delay. The concerned arbitrator will only be replaced if the two other arbitrators make an according request with the Chairman of CIETAC or if CIETAC otherwise deems it necessary. In any case, the Chairman of CIETAC will consult with the parties. CIETAC may then allow the two arbitrators to continue the proceedings and render an award. It should be noted that this provision, which is largely inspired by art. 15(5) ICC Rules, is not totally in compliance with art. 37(1) Arbitration Law, which provides that '[i]f an arbitrator cannot perform his duties due to his withdrawal or for other reasons, a substitute arbitrator shall be selected or appointed in accordance with this Law'. Although the Arbitration Law does seem to impose a replacement and does not seem to leave any space for discretionary power of the arbitration commission, CIETAC holds its position giving priority to the parties' autonomy.

Section 3. Hearing

[Conduct of Hearing]

Article 35

(1) The arbitral tribunal shall examine the case in any way that it deems appropriate unless otherwise agreed by the parties. Under any circumstances, the arbitral tribunal shall act impartially and fairly and shall afford reasonable opportunities to both parties to present their case.

(2) The arbitral tribunal shall hold oral hearings when examining the case. However, the arbitral tribunal may examine the case on the basis of documents only if the parties so agree and the tribunal consents or the arbitral tribunal deems that oral hearings are unnecessary and the parties so agree.

(3) Unless otherwise agreed by the parties, the arbitral tribunal may adopt an inquisitorial or adversarial approach in hearing the case having regard to the circumstances of the case.

(4) The arbitral tribunal may hold deliberation at any place or in any manner that it considers appropriate.

(5) Unless otherwise agreed by the parties, the arbitral tribunal may, if it considers it necessary, issue procedural orders or question lists, produce term of reference or hold pre-hearing conference, etc. With the authorization of the other members of the arbitral tribunal, the

presiding arbitrator may decide on the procedural arrangements for the arbitral proceedings at his/her own discretion.

1. Oral hearing not compulsory. In principle, the arbitral tribunal shall conduct hearings. However, such request is not compulsory. Art. 35(2) implements the principle set forth in art. 39 Arbitration Law (see art. 39 Arbitration Law, note 1), according to which the arbitral tribunal may omit to conduct oral hearings based on a corresponding agreement of the parties. Note also that if the parties agree to conduct the arbitration without hearing, the arbitral tribunal may still insist on the conduct of oral hearing if it deems such hearings necessary. In practice, it is extremely rare that an arbitral tribunal will decide to render an award based on written applications only.

2. Hearings: inquisitorial or adversarial? According to art. 35(3), the arbitral tribunal may adopt either an inquisitorial or an adversarial approach when examining the case. The term 'inquisitorial' refers to the role of the judge in civil law systems, and means that the arbitrators will be taking the lead in the proceedings, especially as regards the evidentiary proceedings. The term 'adversarial' refers to the common law approach and means that the parties' counsel will be given the lead in the proceedings. Although art. 35(3) keeps both doors open, in practice, arbitral tribunals composed of a majority of Chinese arbitrators will adopt a more inquisitorial than adversarial approach. This is also due to the fact that there is a lack of detailed rules on evidentiary proceedings, and that arbitrators will therefore often refer to statutory procedural rules (as for example the SPC Provisions on Evidence), which are heavily influenced by an inquisitorial system.

3. Place of deliberation. According to art. 35(4), the arbitral tribunal can hold deliberations at any given place (see also art. 36(1), note 1). This provision applies to 'deliberations', i.e. internal meetings of the arbitral tribunal. The place of the hearing is determined in accordance with art. 36. In practice, the arbitrators tend to meet and discuss the case some time prior to the hearing, and the subjects and content discussed during the deliberation could vary greatly depending on the style of the arbitrators.

4. Procedural orders. Art. 35(5) expressly gives the arbitral tribunal the authority to issue procedural orders and other documents in order to efficiently organise the proceedings. The arbitral tribunal is also free to decide on the number, place and time of hearings. By doing so, the arbitral tribunal has nevertheless the duty to respect the procedural rights of the parties, and shall also comply with any existing agreement of the parties as regards procedural issues. The 2015 version has taken into consideration (i) the practice that in a three-member tribunal, the presiding arbitrator often handles the direct communication with the parties on behalf of the entire tribunal, and (ii) it is often difficult to coordinate the availability of three arbitrators when an urgent procedural decision is required. Accordingly, art. 35(5) provides

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that the presiding arbitrator may decide on the procedural arrangements at his own discretion.

[Place of Oral Hearing]

Article 36

(1) Where the parties have agreed on the place of an oral hearing, the case shall be heard at that agreed place except in the circumstances stipulated in Paragraph 3 of Article 82 of these Rules

(2) Unless otherwise agreed by the parties, the place of oral hearings shall be in Beijing for a case administered by the Arbitration Court or at the domicile of the sub-commission/arbitration centre administering the case, or if the arbitral tribunal considers it necessary and with the approval of the President of the Arbitration Court, at another location.

1. Party's autonomy as to the place of hearing. In general, hearings may be held at the place agreed upon between the parties, the place where the arbitration commission is located, or any place designated by the arbitral tribunal, upon approval by the Secretary-General of CIETAC. (Note that in CIETAC Arbitration Rules 2012, the Secretary-General of a sub-commission no longer has the authority to decide on the issue regarding the place of hearing. All decisions in such respect shall be made by the Secretary-General of CIETAC, or the President of the Arbitration Court under the CIETAC Rules 2015.) Art. 36 contemplates the priority of the party's autonomy. However, it should be mentioned that if the parties choose a place different from the domicile of CIETAC or its sub-commission, CIETAC or the sub-commission may charge the parties for the supplementary costs incurred. If the parties fail to pay those additional costs, the hearings will take place at the domicile of CIETAC (see art. 7, note 3).

2. Distinction as to the place of arbitration. Again, it should be stressed that the place of hearing is different from the place of arbitration. Whereas the place of arbitration may determine the law applicable to the arbitration and the nationality of the award, the place of the hearing is simply the place where oral hearings will take place and have no further influence on the arbitral proceedings (see art. 7, note 1 et seq.).

[Notice of Oral Hearing]

Article 37

(1) Where a case is to be examined by way of an oral hearing, the parties shall be notified of the date of the first oral hearing at least twenty (20) days in advance of the oral hearing. A party having justified reasons may request a postponement of the oral hearing. However, the party shall communicate such request in writing to the arbitral tribunal within

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five (5) days of its receipt of the notice of the oral hearing. The arbitral tribunal shall decide whether or not to postpone the oral hearing.

(2) Where a party has justified reasons for its failure to submit a request for a postponement of the oral hearing in accordance with the preceding Paragraph 1, the arbitral tribunal shall decide whether or not to accept the request.

(3) A notice of a subsequent oral hearing, a notice of a postponed oral hearing, as well as a request for postponement of such an oral hearing shall not be subject to the time periods specified in the preceding Paragraph 1.

1. Short time limit. When deciding to hold an oral hearing, the arbitral tribunal has to notify the parties and their counsel 20 days prior to the hearing. The parties may request postponement of the scheduled hearing based on justifiable grounds. Compared with the CIETAC Rules 2005, the time limit for submitting the request of postponement of an oral hearing has been shortened from 10 days prior to the oral hearing to five days upon receipt of the notice of oral hearing. This aims to accelerate the proceedings and to avoid unnecessary and tactical delay of the arbitral proceedings.

2. Failure to request for postponement. If a party fails to request a postponement within the time limit under art. 37(1), it still has a second chance to make such request provided it can be justified. The tribunal has the discretionary power to decide whether to grant the postponement sought by the parties.

[Confidentiality]

Article 38

(1) Hearings shall be held in camera. Where both parties request an open hearing, the arbitral tribunal shall make a decision.

(2) For cases heard in camera, the parties, their representatives, the arbitrators, the witnesses, the interpreters, the experts consulted by the arbitral tribunal, the appraisers appointed by the arbitral tribunal and other relevant persons shall not disclose to any outsiders any substantive or procedural matters of the case.

1. Confidentiality of hearings. Art. 38(1) is identical to art. 40(1) Arbitration Law, and provides that hearings should not be public, but held in camera, unless both parties agree otherwise.

2. General duty of confidentiality? Art. 38 is located in between provisions concerning arbitral hearings, and art. 38(1) expressly refers to the term 'hearings'. There is no express mention of a general duty of confidentiality. The same is true as regards the Arbitration Law, which also only mentions

the privacy of hearings but makes no statement as to a general duty of confidentiality (see art. 40 Arbitration Law, note 2). However, it is widely admitted among arbitration practitioners that the duty of confidentiality has a much wider scope and encompasses not only information exchanged during the 'hearings', but applies to the entire arbitral proceedings, including their existence. This is confirmed by art. 38(2), which prohibits any participant to the arbitration to disclose 'any substantive or procedural matters of the case'.

3. Reinforced duty of confidentiality of the arbitrator. According to art. 13 of the Ethical Rules for Arbitrators, an arbitrator must strictly maintain the confidentiality of all information revealed during the case and may not disclose this information to third parties, including substantive and procedural information relating to the arbitration – this includes details of the dispute, the process of conducting the hearings or information relating to private sittings of the arbitral tribunal. In particular, arbitrators may not reveal their personal opinions regarding the case or any information concerning the private sittings of the arbitral tribunal to any party.

4. Consequences of a violation of the duty of confidentiality. The consequences of a violation of the duty of confidentiality will depend on the perpetrator of the violation. If an arbitrator violates his duty, so as to compromise his independence or impartiality, he may be challenged by a party or his appointment may be revoked by CIETAC. In case of serious violation, he may also be removed from CIETAC's Panel of Arbitrators. If a party violates its duty of confidentiality, it is uncertain how an arbitral tribunal will react. It will firstly depend on whether the arbitral tribunal considers the duty of confidentiality to be a substantive (i.e. contractual) or a procedural duty. In the case of a substantive obligation, the arbitral tribunal may decide on the violation of the duty of confidentiality and may condemn the violating party to compensate the other for any damages incurred therefrom. However, if the arbitral tribunal considers that the duty of confidentiality is of a purely procedural nature, it is unlikely that it will decide thereon in the award. It may, at the utmost, compel the party concerned to respect its obligation of confidentiality and take any violation thereof into account when allocating the arbitration costs.

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[Default]

Article 39

(1) If the Claimant fails to appear at an oral hearing without showing sufficient cause, or withdraws from an ongoing oral hearing without the permission of the arbitral tribunal, the Claimant may be deemed to have withdrawn its application for arbitration. In such a case, if the Respondent has filed a counterclaim, the arbitral tribunal shall proceed with the hearing of the counterclaim and make a default award.

(2) If the Respondent fails to appear at an oral hearing without showing sufficient cause, or withdraws from an ongoing oral hearing without the permission of the arbitral tribunal, the arbitral tribunal may proceed with the arbitration and make a default award. In such a case, if the Respondent has filed a counterclaim, the Respondent may be deemed to have withdrawn its counterclaim.

1. Failure to appear at a hearing. Art. 39 resembles art. 42 Arbitration Law. Where a claimant fails to appear at the hearing without good reason, or leaves the hearing without the permission of the arbitral tribunal, then such claimant will be deemed to have withdrawn his claim. The same applies to the respondent as regards its counterclaim. Further, if the respondent fails to appear at a scheduled hearing without good reason, or leaves the hearing without the permission of the arbitral tribunal, then the arbitral tribunal may proceed to render an award in default.

[Record of Oral Hearing]

Article 40

(1) The arbitral tribunal may arrange for a written and/or audio-visual record to be made of an oral hearing. The arbitral tribunal may, if it considers it necessary, take minutes of the oral hearing and request the parties and/or their representatives, witnesses and/or other persons involved to sign and/or affix their seals to the written record or the minutes.

(2) The written record, the minutes and the audio-visual record of the oral hearing shall be available for use and reference by the arbitral tribunal.

(3) At the request of a party, the Arbitration Court may, having regard to the specific circumstances of the arbitration, decide to engage a stenographer to make a stenographic record of an oral hearing, the cost of which shall be advanced by the parties.

1. Optional recording in writing of oral hearings. In accordance with art. 69 Arbitration Law, whilst it is mandatory for a domestic arbitration tribunal to retain a written record of the hearing (see art. 64, note 1 and art. 48 Arbitration Law, note 1), CIETAC may, in a foreign-related arbitration, free the arbitral tribunal from such obligation. The main difference lies in whether the minutes need to be signed by the parties. In domestic arbitration, such signature is necessary, whereas in foreign-related arbitration the signature of the parties is optional.

2. Commonly used means of recording. In the recent practice of CIETAC, the secretary of CIETAC in charge of the case will usually make a written record of the hearing. Moreover, if the oral hearing is held in the

hearing rooms of CIETAC or its Sub-Commissions, an audio-visual recording of the hearing will be made. Also, if the arbitral tribunal considers it useful, it may arrange for written minutes and have all participants sign the minutes.

3. Access to the records. The records are freely accessible only by the arbitrators, whereas the parties will not be granted such access. Nevertheless, this does not prevent the parties from recording the hearings themselves. Such recording may, however, only be done in writing (other means of recording are prohibited) and will have no official value.

4. Distinction between written and stenographic records. Art. 40(3) is newly introduced into the CIETAC Rules 2015, which makes a distinction between the written record, which is often required, and the stenographic record, which is optional and at the costs of the parties. This development reflects prevailing international arbitration practice.

[Evidence]

Article 41

(1) Each party shall have the burden of proving the facts on which it relies to support its claim, defence or counterclaim and provide the basis for its opinions, arguments and counter-arguments.

(2) The arbitral tribunal may specify a time period for the parties to produce evidence and the parties shall produce evidence within the specified time period. The arbitral tribunal may refuse to admit any evidence produced after that time period. If a party experiences difficulties in producing evidence within the specified time period, it may apply for an extension before the end of the period. The arbitral tribunal shall decide whether or not to extend the time period.

(3) If a party bearing the burden of proof fails to produce evidence within the specified time period, or the produced evidence is not sufficient to support its claim or counterclaim, it shall bear the consequences thereof.

1. Burden of proof. Art. 41 resembles art. 43 Arbitration Law and is the corollary in arbitration of the general principle contemplated by art. 64(1) Civil Procedure Law, according to which each party has to bear the burden of proving the facts it relies on. The arbitral tribunal may, either of its own accord, or at the request of a party to the arbitration, require the party bearing the burden of proof to provide supporting evidence. Failure to present evidence will lead to the rejection of the claim by the arbitral tribunal. An addition made in art. 41(1) is that the parties should not only submit evidence supporting the relevant facts of their cases, but also evidence forming the basis of their opinions and arguments, which, in theory, could include legal authorities that the parties rely on.

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2. Production of evidence. Based on the wording of art. 41(2), the arbitral tribunal is entitled to order the parties to submit certain evidence within a specified time limit. Arguably, an arbitral tribunal established under the CIETAC Rules in principle has the power to order the production of evidence, in particular of documents. In fact, historically, arbitral tribunals proceeding under the CIETAC Rules have had ample powers in terms of the discovery of evidence, according to the strong inquisitorial tradition of the Chinese legal system. The arbitral tribunal will fix a time limit for the submission of all relevant evidence. Although practice is quite flexible in this respect, it is generally admitted that all relevant evidence has to be submitted at the latest before the end of the last hearing.

3. Types of evidence. Neither the Arbitration Law nor the CIETAC Rules contain detailed provisions as to which kind of evidence is admissible. Arbitral tribunals in China will therefore often refer to art. 63 Civil Procedure Law, which classifies evidence into eight types: statements of the parties, including the disputing parties, documentary evidence, physical evidence, audio-visual materials, electronic data, witness testimonies, expert opinions, and records of inspections and examinations. However, arbitrators usually handle evidence with much more flexibility than courts.

4. Evidentiary procedure. Neither the Arbitration Law nor the CIETAC Rules provide for a detailed mechanism of evidence production. Here again, the arbitral tribunal will often refer to the rules applicable before courts. In December 2001, the SPC promulgated its Provisions on Evidence which comprehensively outline the rules of evidence to be used in civil lawsuits before the People's Courts. Whilst these Provisions on Evidence do not directly apply to arbitration in China, it is widely expected that they will ultimately be formally incorporated into the next revision of the Chinese Arbitration Law. Therefore, it is to be expected that the same principles of evidence-gathering will apply mutatis mutandis to Chinese arbitration. As regards the IBA Rules on Evidence, they do not apply automatically, but only if the parties have provided for their applicability. In practice, it is rare that parties reach an agreement regarding the application of the IBA Rules on Evidence in their arbitration agreement. Nevertheless, the Chinese arbitration community has begun to refer to the IBA Rules of Evidence when dealing with matters of evidence in the arbitral proceedings, especially when international practitioners are involved in the arbitration. In order to encourage the use of the IBA Rules on Evidence, CIETAC has provided a Chinese translation.

[Examination of Evidence]

Article 42

(1) Where a case is examined by way of an oral hearing, the evidence shall be produced at the oral hearing and may be examined by the parties.

(2) Where a case is to be decided on the basis of documents only, or where the evidence is submitted after the hearing and both parties have agreed to examine the evidence by means of writing, the parties may examine the evidence in writing.

In such circumstances, the parties shall submit their written opinions on the evidence within the time period specified by the arbitral tribunal.

1. No mandatory examination of evidence. Art. 42(1) mirrors art. 45 of the PRC Arbitration Law, according to which, the parties must present their evidence at the hearing but shall have the option whether to examine the evidence produced by the other party. This free choice is however, not available in PRC court proceedings. Art. 68 of the Civil Procedure Law specifically requires that the evidence shall be produced at the hearing and be examined by the parties. The reason for such discrepancy between the Arbitration Law and the Civil Procedure Law may be because arbitration is by nature more flexible and attaches more importance to party autonomy than court proceedings. In fact, the former versions of CIETAC Rules adopted the same approach as art. 68 of the Civil Procedure Law, which obliges the parties to examine the evidence presented during the hearing. This is no longer the case under the CIETAC Arbitration Rules 2012 and 2015.

2. Limited use of the examination of evidence in writing. According to art. 42(2), there are only two circumstances under which the evidence can be examined or challenged in writing, (i) where the case is to be decided on the basis of documents only, and (ii) where the evidence is submitted after the hearing and both parties have agreed to examine the evidence in writing. In the latter case, if the parties oppose the examination of evidence by way of writing, and for the sake of efficiency, the arbitral tribunal may organise an informal hearing between the parties to examine the evidence, which would be recorded by the Secretariat and without attendance of the tribunal. Previously under the CIETAC Arbitration Rules 2005, if evidence is submitted after the hearing and the arbitral tribunal decides not to hold an oral hearing, the arbitral tribunal can directly request the parties to submit their written opinions thereon within the specified time period. The CIETAC Arbitration Rules 2012 and 2015 restrict the power of the arbitral tribunal and require written examination of the evidence submitted after the hearing to be conditional upon the consent of the parties.

[Investigation and Evidence Collection by the Arbitral Tribunal]

Article 43

(1) The arbitral tribunal may undertake investigation and collect evidence as it considers necessary.

(2) When investigating and collecting evidence, the arbitral tribunal may notify the parties to be present. In the event that one or both parties fail to be present after being notified, the investigation and collection shall proceed without being affected.

(3) Evidence collected by the arbitral tribunal through its investigation shall be forwarded to the parties for their comments.

1. Inquisitorial power of the arbitral tribunal. Contrary to the principle stated in art. 41(1), the arbitral tribunal may in certain circumstances also collect evidence on its own. This is namely the case when the parties and their representatives cannot collect the evidence because of objective reasons or simply when the arbitral tribunal deems it necessary for the hearing (see also art. 64(2) Civil Procedure Law and art. 43 Arbitration Law).

2. Notification of the parties. Previously, under the CIETAC Arbitration Rules 2005, the arbitral tribunal had the duty to notify the parties to be present at any investigation or evidence-collecting that it conducted on its own initiative where necessary (art. 37(2)). Such requirement is no longer imposed in the CIETAC Arbitration Rules 2012 and 2015. According to art. 43(2), the arbitral tribunal 'may' notify the parties to be present during its investigation, which means the tribunal may also choose not to make such a notification. Upon the notice of the tribunal, the absence of a party will not prevent the arbitral tribunal from collecting evidence.

3. Examination of evidence. After the collection of the evidence by the arbitral tribunal, the parties must be given the opportunity to comment on it.

[Expert's Report and Appraiser's Report]

Article 44

(1) The arbitral tribunal may consult experts or appoint appraisers for clarification on specific issues of a case. Such an expert or appraiser may be a Chinese or foreign institution or natural person.

(2) The arbitral tribunal has the power to request the parties, and the parties are also obliged, to deliver or produce to the expert or appraiser any relevant materials, documents, property or physical objects for examination, inspection or appraisal by the expert or appraiser.

(3) Copies of the expert's report and the appraiser's report shall be forwarded to the parties for their comments. At the request of either party and with the approval of the arbitral tribunal, the expert or appraiser shall participate in an oral hearing and give explanations on the report when the arbitral tribunal considers it necessary.

1. Appointment of an expert. The arbitral tribunal may, on its own initiative or on request of one party or both parties, appoint an appraiser or expert for clarification of specific, usually technical, issues.

1. General. Art. 78 is a common transitional provision, according to which existing regulations of an inferior or equal level of the Arbitration Law, which are contrary to the Arbitration Law shall not be applied anymore ('lex posterior derogat legi priori').

[Reorganisation of arbitration commissions]

Article 79

(1) Arbitration institutions established prior to the implementation of this Law in the municipalities directly under the Central Government, in the cities that are the seats of the people's governments of provinces or autonomous regions and in other cities divided into districts shall be reorganised in accordance with this Law. Arbitration institutions that have not been reorganised shall terminate upon the end of one year from the date of the implementation of this Law.

(2) Other arbitration institutions established prior to the implementation of this Law that do not comply with the provisions of this Law shall terminate on the date of the implementation of this Law.

1. Compulsory reorganisation. Art. 79 requires the reorganisation of all arbitration commissions existing before the enactment of the Arbitration Law in district cities and all cities in which municipal, provincial or autonomous regional governments are located. Art. 79 also provides for the automatic termination, within one year of the date of effectiveness of the Law, of any arbitration institutions established prior to the Law's date of effectiveness, that subsequently fails to conform to the reorganisation requirements set forth in the Arbitration Law. This led to the automatic dissolution per 1 September 1996 of numbers of arbitration commissions established within administrative organs of local government, such as the SAIC, the State Construction Commission, the State Science and Technology Commission, etc. Indeed these commissions no longer could fulfil the requirement of independence of art. 14 (see art. 14, note 1).

[Effectiveness of the law]

Article 80

This Law shall come into force as of 1 September 1995.

1. Effectiveness. Because of art. 79, which required a substantial reorganisation of arbitration commissions throughout the country, the Arbitration Law is one of the few laws that took as long as one year from the date of its promulgation to its entering into effectiveness, i.e. from 31 August 1994 to 1 September 1995.

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ENGLISH ARBITRATION ACT 1996 (CHAPTER 23), 1996 – ARBITRATION LAW IN ENGLAND, WALES AND NORTHERN IRELAND*

(In force as from 31 January 1997)

[Introduction]

1. Sources of arbitration law. The arbitration law of England, Wales and Northern Ireland can be found principally in the Arbitration Act 1996 (c. 23). The 1996 Act is not a comprehensive code and therefore some aspects of English arbitration law are still prescribed by the common law (i.e. in decisions of the courts). In addition, it is necessary to look to case law for rulings on the interpretation and application of many provisions of the 1996 Act. The procedure for making arbitration claims to the court is set out in Civil Procedure Rules, Part 62, and Practice Direction 62. The 1996 and 1997 DAC Reports (see below) and several commentaries provide a very useful aid to the understanding of English arbitration law.

2. Territorial scope. The Arbitration Act 1996 applies in England, Wales and Northern Ireland (but not in Scotland, except for Sections 89 to 91: see the Arbitration (Scotland) Act 2010). However, as an abbreviation, this commentary refers to 'England' and 'English', unless otherwise stated, with apologies to those in Wales and Northern Ireland.

3. Applicable laws. When reading the 1996 Act, it is important to bear in mind that a number of different laws may apply or be relevant to any arbitration, including: (a) the governing (or proper) law of the underlying agreement; (b) the governing (or proper) law of the arbitration agreement; (c) the law of the domicile/nationality/incorporation of the parties; (d) the procedural (or curial or adjectival) law(s) of the arbitration; and (e) the laws in jurisdictions other than the seat of the arbitration which give certain powers to the courts in those jurisdictions to support foreign arbitrations (e.g. to order injunctive relief or to enforce an award). The Act is concerned principally with (d) – the procedural laws applicable to an arbitration taking place in England. The parties may agree different procedural rules (e.g. by submitting their dispute to the rules of an arbitral institution), with the exception of any mandatory provisions of the Act (see Section 4(1) and Schedule 1). The English courts have also clarified that, absent an express or implied agreement by the parties to the contrary, where the seat or the arbitration is England, the governing law of the arbitration agreement (that is, (b) above) will probably be English law where it is the law with which the contract has the closest and most real connection, even where the governing law of the

* I am grateful to Anna Kirkpatrick and Ali Adamjee for their assistance in updating this commentary.

underlying agreement (that is, (a) above) is not English law (see *Sul America v Enesa Engenharia*). The Act also contains provisions aimed at supporting foreign arbitrations.

4. History of arbitration in England. The private resolution of disputes by experts familiar with the relevant industry, particularly in the construction, insurance, and maritime and commodity sectors, has long been favoured in England as an alternative to determination by the courts. In addition, the fact that London is one of the major centres of international commerce, together with the prevalence of English language contracts, the influence of English law, and the reputation of the English legal system and legal profession, means that many international agreements provide for arbitration in London. Accordingly, English arbitration law and its application are of major significance, both domestically and internationally. English legislation relating to arbitration dates back to the Arbitration Act 1698. Modern English arbitration law was created in the 19th century with the Civil Procedure Act 1833, the Common Law Procedure Act 1854 (c. 125) and the Arbitration Act 1889 (c. 49) (by which the courts were given powers to enforce arbitration agreements and to support the arbitral process). The earlier legislation was consolidated in the Arbitration Act 1950 (c. 27) and that remained the principal arbitration statute until the 1996 Act. There was, in addition: the Arbitration Act 1975 (c. 3), which gave effect to the 1958 New York Convention; the Arbitration (Internal Investments Disputes) Act 1966 (c. 41), which enacted the 1965 Washington Convention (i.e. the ICSID Convention); and the Arbitration Act 1979 (c. 42), which abolished the special case procedure and reduced the supervisory powers of the English courts over commercial arbitrations. The 1996 Act was intended to restate in clearer terms the previous legislation on arbitration, codify principles established by case law and generally to improve the law, particularly in order to increase the attractiveness and efficacy of arbitration as a method of dispute resolution and the attractiveness of London as a venue for international arbitration. The Act implemented most of the recommendations of the Departmental Advisory Committee (DAC) chaired by Lord Saville. It was intended to reflect as far as possible the format and language of the UNCITRAL Model Law, although the Act is significantly more detailed. The DAC published a detailed Report on the proposed new legislation in February 1996 (which included recommendations on the text of the Bill introduced in Parliament in December 1995 and supplementary recommendations based on the second reading of the Bill in the House of Lords and on comments made by domestic and international practitioners), and a Supplementary Report on the Arbitration Act 1996 (in January 1997). The DAC's Reports have often been referred to by courts when construing the Act's provisions. After public consultation and parliamentary debate, the 1996 Act was enacted on 17 June 1996 and came into force on 31 January 1997 (save for Sections 85 to 87): see Arbitration Act 1996 (Commencement No. 1) Order 1996 (S.I. 1996 No. 3146 (c. 96). A report of the parliamentary

debates in the House of Commons and House of Lords concerning the Act can be found in *Hansard*.

5. Philosophy of the 1996 Act. The Act is intended to be a comprehensive statute (but not an exhaustive code) that – through its logical structure and non-technical language – will more easily enable the lay arbitrator or foreign lawyer to find out how an arbitration under English law should be conducted. The Act is notable in particular for its statements of general principle, which is unusual in English legislation. Section 1 states that Part I of the Act is founded on certain general principles and shall be construed accordingly. Thus, the object of arbitration is explicitly stated to be 'to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense'. In addition, party autonomy is acknowledged and direction is given to the courts not to interfere with the arbitral process unless absolutely necessary. Later in the Act, general duties of the tribunal and parties are set out (Sections 33 and 40, respectively). These are aimed at ensuring that arbitrations are conducted fairly, economically and expeditiously. One of the main purposes of the Act is to define clearly an arbitrator's powers in the common situations which might arise, such as a challenge to his jurisdiction. In addition to the statements of general principle, many sections of the Act reinforce the policy considerations that party autonomy and the supremacy of the arbitration agreement are paramount. In addition, the Act redefines the relationship between the courts and the arbitral process in favour of the arbitrator(s): the role of the court is limited to those occasions when it is obvious either that the arbitral process needs assistance or that there has been or is likely to be a clear denial of justice. There is no distinction made between domestic and international arbitration. Two notable aspects of arbitration law not addressed in the 1996 Act, but found in some other countries' legislation are: privacy and confidentiality and joinder. As to consolidation of proceedings, the court has no such power under the Act; the arbitral tribunal is only permitted to do so with the parties' agreement.

6. Privacy and Confidentiality. Two basic tenets of English arbitration law that have not been addressed by the Act are those of privacy and confidentiality. These are often cited as two of the main advantages of arbitration over court proceedings. However, the DAC concluded that 'given [the] exceptions and qualifications, the formulation of any statutory principles would be likely to create new impediments to the practice of English arbitration and, in particular, to add to English litigation on the issue' (DAC Report, para. 17). The privacy and confidentiality of arbitration has been upheld in strong and unequivocal terms by the English courts (e.g. in *Ali Shipping Corporation v 'Shipyard Trogir'*; *AEG Insurance Services Ltd* v *European Reinsurance Co. of Zurich*; *Michael Wilson & Partners Ltd* v *Emmott*). The courts have, however, recognised a limited number of exceptions, namely where there is: express or implied consent; an appropriate order or other leave granted by a court; a necessity to protect the legitimate interests of one party to the

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arbitration in subsequent legal proceedings; and, in the interests of justice. The CPR provides that the court has a discretion, but generally proceedings relating to arbitration should remain private, except for applications concerning a point of law (CPR Rule 62.10). However, the courts have held that the presumption should be that any judgment should be made public, but redacted if necessary to protect sensitive information (*City of Moscow v Bankers Trust*).

7. Joinder and Consolidation. The Act provides that the parties may agree that two or more arbitral proceedings shall be consolidated or that concurrent hearings shall be held (Section 35). It is, of course, open for a third party to be joined as a party to an arbitration, if all parties agree. The DAC was not prepared to recommend that parties should be forced to arbitrate with others with whom they had not agreed to do so, particularly in light of the overriding principle of party autonomy (DAC Report, para. 180). This is a controversial and difficult area, but one which some commentators have suggested might have benefited from legislation giving a discretion to the courts to make appropriate orders.

8. European Convention on Human Rights. The English courts have confirmed that arbitration generally and the 1996 Act in particular satisfy art. 6 of the ECHR, so long as the agreement to arbitrate is freely entered into and due process is adhered to (see, e.g., *Stretford* v *Football Association*; *Sumukan* v *Commonwealth Secretariat*).

9. New start. The 1996 Act was intended to create a new arbitration regime in England and to encourage a supportive approach from the courts. It has succeeded in these aims. Since its enactment, the courts have often said that the Act marked a new start and they have regularly expressed a pro-arbitration attitude. See, for example, the discussion of the novel aspects of the Act by the House of Lords in *Lesotho Highlands Development Authority* v *Impregilo SpA* and the positive reception of the House of Lords' decision in *Fiona Trust* v *Privalov*, which concerned the separability and scope of the arbitration agreement and the supportive approach of the courts in *AES* v *UST* even where arbitration proceedings are neither on foot nor contemplated.

Part I. ARBITRATION PURSUANT TO AN ARBITRATION AGREEMENT

INTRODUCTORY

[General principles]

Section 1

The provisions of this Part are founded on the following principles, and shall be construed accordingly –

(a) **the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;**

(b) **the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;**

(c) **in matters governed by this Part the court should not intervene except as provided by this Part.**

1. General. Section 1 sets out the three fundamental principles underlying Part I of the Act (i.e. paras. 1-84). Part I is to be construed in accordance with these principles. Although it is non-mandatory (see Section 4(2)), it is unlikely that the English courts would accept that Section 1 can be affected by contrary agreement of the parties. A statement of general principles is unusual in English legislation and is to be welcomed. Parallels can be drawn between this provision and CPR Rule 1.1, which sets out the 'overriding objective of enabling the court to deal with cases justly'. Section 1 and its three general principles have been referred to and approved in many cases. See DAC Report paras. 18-22.

2. The object of arbitration. Section 1(a) describes the object of arbitration by reference to principles of procedural fairness and efficiency. The DAC Report stated the Committee's intention was that 'all the provisions of the Bill must be read with this object of arbitration in mind' (para. 18). This objective is expanded upon later in the Act (see Sections 33 and 40, which provide further corresponding general duties of the tribunal and the parties). The requirement of impartiality is reinforced in Section 24(1)(a) of the Act (power of court to remove an arbitrator).

3. Party autonomy. Section 1(b) affirms the consensual nature of the arbitral process and the principle of party autonomy and reflects art. 19(1) of the Model Law. Absent overriding public interest concerns (as prescribed in the mandatory provisions of the Act, see Section 4(1), and principles of public policy), this has two consequences. First, parties are to be held to their agreements to arbitrate. Secondly, parties are given considerable freedom to customise their arbitration and to opt-in or opt-out of the non-mandatory provisions of the Act (see Section 4(2)); however, any agreement of the parties must be in writing (see Section 5). Agreeing the procedural rules of an arbitral institution or UNCITRAL constitutes such an agreement (and such rules also often recognise the principle of party autonomy, e.g. LCIA art. 14.1). Failure by a tribunal to conduct the proceedings in accordance with the procedure agreed by the parties is a ground for challenging any subsequent award (see Section 68(2)(c)).

4. Limitations on court intervention. Section 1(c) reflects art. 5 of the Model Law (although it uses permissive language) and by giving strong

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guidance to the courts it seeks to address the criticism that was often made that the English court intervened excessively in international arbitrations. (See also Section 44(5).) The English courts have respected this important principle. Section 1 applies only to Part I of the Act and therefore it does not apply in respect of consumer arbitrations under Sections 89 to 91 of the Act.

[Scope of application of provisions]

Section 2

(1) The provisions of this Part apply where the seat of the arbitration is in England and Wales or Northern Ireland.

(2) The following sections apply even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined –

(a) sections 9 to 11 (stay of legal proceedings, &c.), and

(b) section 66 (enforcement of arbitral awards).

(3) The powers conferred by the following sections apply even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined –

(a) section 43 (securing the attendance of witnesses), and

(b) section 44 (court powers exercisable in support of arbitral proceedings);

but the court may refuse to exercise any such power if, in the opinion of the court, the fact that the seat of the arbitration is outside England and Wales or Northern Ireland, or that when designated or determined the seat is likely to be outside England and Wales or Northern Ireland, makes it inappropriate to do so.

(4) The court may exercise a power conferred by any provision of this Part not mentioned in subsection (2) or (3) for the purpose of supporting the arbitral process where –

(a) no seat of the arbitration has been designated or determined, and

(b) by reason of a connection with England and Wales or Northern Ireland the court is satisfied that it is appropriate to do so.

(5) Section 7 (separability of arbitration agreement) and section 8 (death of a party) apply where the law applicable to the arbitration agreement is the law of England and Wales or Northern Ireland even if the seat of the arbitration is outside England and Wales or Northern Ireland or has not been designated or determined.

1. General. Section 2 sets out the scope of application of Part I of the Act. While it is not a mandatory provision (see Section 4(1)), the courts are unlikely to accept that its meaning and application can be affected by contrary

agreement of the parties. It reflects art. 1(2) of the Model Law. See DAC Report paras. 23-25 and DAC Suppl. paras. 6-19.

2. Seat. Part I of the Act applies where the seat is in England and Wales or in Northern Ireland. Scotland is a separate jurisdiction for these purposes, with a different arbitration law (Arbitration (Scotland) Act 2010). Concerning the determination of the seat of the arbitration, see Section 3. The simplicity of Section 2(1) was intended to mask the complexity of the rules of conflict of laws as they apply to arbitration, upon which there was no consensus. Section 2(2) to (5) are exceptions to the basic rule in Section 2(1). It remains possible for the parties to choose a foreign law as the applicable law in respect of any matter which is not governed by a mandatory provision (Section 4(5)), although this is not recommended.

3. Application of Part I notwithstanding foreign or no designated seat. Under Section 2(2), certain provisions of Part I are stated to apply even if the seat of the arbitration is outside of England and Wales or Northern Ireland or where no seat has been designated. These relate to: (a) the stay of legal proceedings (Sections 9 to 11), because of the UK's obligations under the 1958 New York Convention to stay legal proceedings brought in contravention of a valid arbitration agreement, wherever that arbitration is to take place; and (b) the enforcement of arbitral awards (Section 66), which applies to all awards wherever made. (See *A* v *B*.)

4. Arbitral powers notwithstanding foreign or no designated seat. Under Section 2(3), the English court may exercise certain powers even if the seat of the arbitration is outside of England and Wales or Northern Ireland or where no seat has been designated. This provision is intended to overcome the common law position that the English court cannot exercise its powers in support of a foreign arbitration. The court's powers relate to securing the attendance of witnesses (Section 43) and the court's general powers in support of arbitral proceedings (Section 44), including the granting of freezing and search orders. However, as the proviso indicates, the court retains a broad discretion to refuse to exercise such powers where there is little or no connection with England (see *Commerce & Industry Insurance Co. of Canada* v *Lloyd's Underwriters*; *Mobil Cerro Negro Ltd* v *Petroleos De Venezuela SA* and *Malhotra* v *Malhotra*).

5. Exercise of powers by a court. Under Section 2(4), the court may exercise any additional powers conferred by any provision in Part I where the seat of the arbitration has not yet been determined, but the court must be satisfied that the connection with England is sufficient to make it appropriate to do so (see *Chalbury McCouat* v *PG Foils Ltd*).

6. Sections of the Act that have substantive effect. Under Section 2(5), the English courts are able to make orders in respect of Sections 7 (separability of arbitration agreement) and 8 (death of a party) where the governing law

of the arbitration agreement is English law, notwithstanding that the seat of the arbitration is foreign or not yet determined.

[The seat of the arbitration]

Section 3

In this Part 'the seat of the arbitration' means the juridical seat of the arbitration designated –

(a) by the parties to the arbitration agreement, or

(b) by any arbitral or other institution or person vested by the parties with powers in that regard, or

(c) by the arbitral tribunal if so authorised by the parties,

or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances.

1. General. Section 3 concerns the juridical seat of the arbitration. While it is not a mandatory provision (see Section 4(1)), the courts are unlikely to accept that its meaning and application can be affected by contrary agreement of the parties. It reflects art. 20(1) of the Model Law (which uses the phrase 'place of arbitration', but the two phrases have the same meaning). The concept of a seat or place of arbitration is not new to English law, having been developed by the courts (see *Channel Tunnel* v *Balfour Beatty*). The seat is of considerable significance in determining the application of the Act, the powers of the court to review the award, and for enforcement purposes (see below). See DAC Report paras. 26 and 27.

2. Identified by seat or country. The seat of the arbitration is the legal jurisdiction in which the arbitration is said to be rooted. It must be a State or territory associated with a recognisable and distinct system of law. Accordingly, the seat could be England and Wales or Northern Ireland; but not the United Kingdom, because Scotland has a different arbitration regime: see *Braes of Doune Wind Farm (Scotland) Ltd* v *Alfred McAlpine*. (However, a reference to the laws of or the seat being the United Kingdom is often construed as a reference to England and Wales.) Parties often prescribe a particular city rather than State or territory, but a reference to, for example, London implies that the juridical seat is England and Wales.

3. Determining the seat. If the seat is not prescribed by the parties in writing (see Section 5(2)), it may be determined by any applicable arbitral institution with powers in that regard (e.g. see LCIA art. 16.1) or by the arbitral tribunal once constituted if so authorised by the parties. In the absence of any such designation, the court may have to determine the seat if an arbitration application is made by a party. The court (and also by implication any arbitral institution or tribunal) will have regard to the parties' agreement and all the relevant circumstances. The courts have held that the circumstances they will consider are limited to those which existed before the issue of proceedings

(*Dubai Islamic Bank PJSC* v *Paymentech Merchant Services*). Relevant factors include the nationality of the parties, the location of performance of any obligations, the language of the agreement, the substantive governing law (if expressly chosen by the parties) and any reference to national courts (see *Sumitomo Heavy Industries* v *Oil and Natural Gas Commission*). Unlike certain other jurisdictions, the Act does not allow for the possibility under English law for an arbitration that has no seat (sometimes referred to as a 'floating' or 'delocalised' arbitration). Statutory arbitrations are deemed to have their seat in England and Wales or Northern Ireland (as appropriate) (see Section 95(2)).

4. Venue. Where the seat of the arbitration is England and Wales, hearings may take place anywhere (typically referred to as the 'venue' of the arbitration or 'place of hearings'), see Section 34(2)(a). This is often confirmed expressly in arbitral procedural rules (e.g. LCIA art. 16.2; UNCITRAL art. 18(2)).

5. Legal consequences. The seat of the arbitration determines the curial or procedural law of the arbitration (see *ABB Lummus Global Ltd* v *Keppel Fels Ltd*). Accordingly, an arbitration with its seat in England is governed by the Act, and the parties may only opt out of its non-mandatory provisions (see Section 4(2)). The seat determines the scope of application of the Act (see Section 2), with most provisions in Part I only applying where the seat is in England and Wales or Northern Ireland. In addition, unless the parties agree otherwise, the seat is the place in which the arbitration award shall be deemed to have been made (see Section 53). The seat is also significant in relation to the enforcement of awards under international conventions, e.g. 1958 New York Convention, art. I (and see Section 100(2)(b)). The choice or determination of England to be the seat of the arbitration may also mean that, absent express or implied agreement by the parties to the contrary, the governing law of the agreement to arbitrate is English law where it is the law with which the contract has the closest and most real connection (see *Sul America* v *Enesa Engenharia*).

[Mandatory and non-mandatory provisions]

Section 4

(1) The mandatory provisions of this Part are listed in Schedule 1 and have effect notwithstanding any agreement to the contrary.

(2) The other provisions of this Part (the 'non-mandatory provisions') allow the parties to make their own arrangements by agreement but provide rules which apply in the absence of such agreement.

(3) The parties may make such arrangements by agreeing to the application of institutional rules or providing any other means by which a matter may be decided.

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(4) It is immaterial whether or not the law applicable to the parties' agreement is the law of England and Wales or, as the case may be, Northern Ireland.

(5) The choice of a law other than the law of England and Wales or Northern Ireland as the applicable law in respect of a matter provided for by a non-mandatory provision of this Part is equivalent to an agreement making provision about that matter.

For this purpose an applicable law determined in accordance with the parties' agreement, or which is objectively determined in the absence of any express or implied choice, shall be treated as chosen by the parties.

1. General. Section 4 explains that some provisions of the Act are mandatory (Section 4(1)), whilst others are not (Section 4(2)). Although it is not stated to be mandatory itself, it is unlikely that the English courts would accept that Section 4 can be affected by contrary agreement of the parties. It is not based on any previous provision in English law or the Model Law. See DAC Report paras. 28 to 30.

2. Mandatory provisions. Section 4(1) provides that those provisions listed in Schedule 1 of the Act cannot be overridden by agreement between the parties. In addition to those provisions listed in Schedule 1, it is likely that the court would consider that the parties could not derogate from Sections 1 to 6 of the Act. However, all such mandatory provisions only apply to an arbitration where the seat is in England and Wales or Northern Ireland (see Section 2); they do not apply to an arbitration where the seat is elsewhere even if the governing substantive law is English law.

3. Non-mandatory provisions. Most of the provisions in the Act are non-mandatory, but they apply in the absence of agreement to the contrary, i.e. the parties need to opt out. Such provisions usually include the phrase 'unless otherwise agreed by the parties'. Certain other provisions need to be opted into, and have the phrase 'the parties are free to agree that …' or similar wording. Any agreement to opt in or opt out of a non-mandatory provision must be in writing (see Section 5).

4. Importing other arbitral rules. Section 4(3) allows the parties to displace non-mandatory provisions of the Act by agreeing to the use of institutional or ad-hoc rules (for instance, those of the LCIA, ICC, WIPO or UNCITRAL). Where the chosen rules are silent, the default provisions in the Act will still apply (unless the chosen rules purport to be a complete code).

5. Importing arbitral laws from another jurisdiction. Section 4(5) allows the parties to displace non-mandatory provisions of the Act by agreeing to the application of a foreign procedural law. However, in practice, such an agreement may raise substantial practical difficulties and even prove unworkable (see *ABB Lummus Global Ltd* v *Keppel Fels Ltd*). In no circumstances can foreign provisions override the mandatory provisions of the Act.

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[Agreements to be in writing]

Section 5

(1) The provisions of this Part apply only where the arbitration agreement is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing.

The expressions 'agreement', 'agree' and 'agreed' shall be construed accordingly.

(2) There is an agreement in writing –

(a) if the agreement is made in writing (whether or not it is signed by the parties),

(b) if the agreement is made by exchange of communications in writing, or

(c) if the agreement is evidenced in writing.

(3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.

(4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.

(5) An exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged.

(6) References in this Part to anything being written or in writing include its being recorded by any means.

1. General. Section 5 concerns the writing requirement for any arbitration agreement or matter affecting that agreement. Although it is not stated to be mandatory (see Section 4(1)), it is unlikely that the English courts would accept that it can be affected by contrary agreement of the parties. It derives from art. 7(2) of the Model Law. See DAC Report paras. 31-40. For the definition of an arbitration agreement, see Section 6.

2. Application of Part I. Section 5(1) provides that Part I of the Act only applies to an agreement in writing. In addition, any ancillary matter affecting the arbitration agreement, such as an agreement to opt out of a non-mandatory provision of the Act, must also be in writing. However, an agreement to abandon or terminate arbitration proceedings does not have to be in writing in order to be effective (see Section 23(4)).

3. Agreement in writing. Section 5(2) defines 'agreement in writing' very widely, with the reference in para. (c) to agreements 'evidenced in writing' intended to be a 'catch-all' provision. Such definition is wider than that in the Model Law and art. II(2) of the 1958 New York Convention. There is no need for there to be a signed agreement: it is sufficient, for instance, for there to be

an exchange of correspondence (see *Lombard-Knight* v *Rainstorm Pics*). In addition, it is sufficient for one party or a third party to record the agreement if so authorised (Section 5(4) and *Toyota Tsusho Sugar Trading* v *Prolat*). Further, an arbitration agreement will be held to exist if such agreement is alleged and is not denied in the exchange of written submissions in arbitral or legal proceedings (Section 5(5)).

4. Oral agreement. An arbitration agreement that is not in writing may still be enforced. The common law rules concerning the effect of an oral agreement are expressly saved by Section 81(1)(b). In addition, Section 5(3) provides that Part I of the Act nevertheless applies to oral agreements that refer to terms that are in writing (such as is common in salvage operations, e.g. Lloyd's Open Form) or by making reference to written arbitration rules. It would also be sufficient for there to be an oral agreement referring to the Act (see *Midgulf* v *Groupe Chimique Tunisien*).

5. Recorded by any means. Section 5(6) provides that agreements in writing may be recorded by any means. This is more extensive than the definition of 'writing' in Schedule 1 of the Interpretation Act 1978, which provides that 'writing' includes 'modes of representing or reproducing words in visible form'.

THE ARBITRATION AGREEMENT

[Definition of arbitration agreement]

Section 6

(1) In this Part an 'arbitration agreement' means an agreement to submit to arbitration present or future disputes (whether they are contractual or not).

(2) The reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement.

1. General. Section 6 provides a definition of 'arbitration agreement'. Although it is not stated to be mandatory (see Section 4(1)), it is unlikely that the English courts would accept that it can be affected by contrary agreement of the parties. It reflects art. 7(1) of the Model Law and re-enacts with minor differences Section 32 of the 1950 Act. See DAC Report paras. 41 and 42. A party may challenge the substantive jurisdiction of the tribunal on grounds that there is no valid arbitration agreement (Section 30(a)).

2. Agreement. The usual common law rules apply for determining whether or not the parties have made a concluded contract (see *Birse Construction* v *St David Ltd No. 2*). Accordingly, a party may, for instance, evidence its agreement by conduct (see *Oceanografia SA de CV* v *DSND Subsea AS*).

For statutory arbitrations, the relevant enactment is treated as the arbitration agreement (Section 95(1)(a)).

3. Arbitration. The agreement must be to refer a dispute to arbitration, but 'arbitration' is not defined. Its essential characteristics may be identified by reference to the Act, including Section 1(a) (i.e. the fair resolution of disputes by an impartial tribunal). In addition, it entails a procedure aimed at determining legal rights and obligations, by way of a binding decision enforceable in law (see *Walkinshaw* v *Diniz* and *Flight Training* v *Int'l Fire Training*).

4. Dispute. A dispute includes 'any difference' (see definition in Section 82(1)) and should be construed broadly. It is not necessary for there to exist an arguable defence to an allegation in order for a dispute to be said to exist (see *Halki Shipping Corp.* v *Sopex*; and *Amec Civil Engineering Ltd* v *Secretary of State for Transport*).

5. Existing and future disputes. Most arbitration agreements concern future disputes, but existing disputes may also be referred to arbitration (pursuant to what is sometimes called a submission agreement).

6. Contractual disputes or not. The reference to non-contractual disputes is merely a restatement of the common law, whereby tortious and restitutionary disputes may be referred to arbitration. However, the scope of the matters that are referred to arbitration depends upon the wording of the specific agreement.

7. Scope of agreement. The parties may limit the type of disputes that may be referred to arbitration (with all other disputes subject to another specified dispute resolution procedure or the default jurisdiction of national courts). A typical formulation which is intended to be as wide as possible is: 'any disputes arising out of or in connection with this contract' (i.e. the LCIA recommended clause). The House of Lords, in *Fiona Trust* v *Privalov*, held in a forceful and influential decision that it was time to draw a line under the authorities that made fine semantic distinctions (e.g. between 'disputes arising under' and 'disputes arising out of' an agreement) and that the construction of an arbitration clause had to start from the assumption that the parties, as rational businessmen, were likely to have intended any dispute arising out of the relationship into which they had entered, or purported to have entered, to be decided by the same tribunal, unless the language of an arbitration clause made it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. (See also Section 7, separability of the arbitration agreement.)

8. Arbitrability. The common law rules relating to arbitrability are saved by Section 81(1)(a).

9. Incorporation by reference. Consistent with the wide definition of 'agreement in writing' in Section 5(3), Section 6(2) allows for the parties to incorporate an arbitration clause by reference in an agreement to another

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written form of arbitration clause or to another document containing an arbitration clause. This is common in the construction industry where a bespoke agreement may refer to an industry standard form (e.g. one of the FIDIC forms of contract) or a subcontractor agreement may refer to the terms of the main agreement between contractor and employer. It is also common in the shipping industry where bills of lading often incorporate the terms of a charterparty. However, it was not intended that Section 6(2) should resolve the then conflict of authorities as to whether a mere reference to another document containing an arbitration clause is sufficient or whether a specific reference to the arbitration clause must also be made. The DAC Report preferred the former approach. While the trend is towards accepting a general reference as being sufficient, the issue has not been finally settled (see *Sea Trade Marine Corp.* v *Hellenic Mutual War Risks Association (Bermuda) Ltd ('The Athena')* and *Habas Sinai* v *Sometal*). Ultimately, the question is one of construction of the relevant incorporating clause.

10. Parties to the agreement. The Act does not prescribe how to determine the proper parties to the arbitration agreement, save that Section 82(2) provides that references in Part I of the Act to a party to an arbitration agreement include any person claiming under or through a party to the agreement. Accordingly, the usual common law rules of privity of contract apply in determining whether or not a person is party to an arbitration agreement, including the rules relating to agency and estoppel. However, English law does not include a 'group of companies' doctrine (see *Peterson Farms Inc* v *C & M Farming Ltd*). Absent a specific prohibition on assignment, an assignee of the underlying contract becomes a party to any arbitration agreement contained therein (see *Through Transport* v *New India Assurance (The Hari Bhum No. 2)*). While not a party to the original agreement, a third party seeking to enforce any benefit bestowed upon it pursuant to the Contracts (Rights of Third Parties) Act 1999 must do so in accordance with any agreement between the contracting parties to refer disputes to arbitration (see *Fortress Value* v *Blue Skye Opportunities*).

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[Separability of arbitration agreement]

Section 7

Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.

1. General. Section 7 confirms the common law position that an arbitration clause is effective even in circumstances where the contract that forms

the subject matter of the dispute is invalid, lapsed or otherwise ineffective. This Section is non-mandatory (see Section 4(2)), but will apply to the extent that there is no written agreement to the contrary. It reflects art. 16(1) of the Model Law. See DAC Report paras. 43 to 47 and DAC Suppl. para. 20.

2. Survivorship. Under English law and that of many jurisdictions, the arbitration agreement is severable from the main contractual obligations. This is the position whether or not the agreement to arbitrate forms part of a contract or is contained in separate documentation. Accordingly, the arbitration agreement survives the termination of the underlying contract.

3. Jurisdiction. A further application of the doctrine of separability is that an arbitral tribunal has jurisdiction to determine disputes between the parties even when it is alleged that the substantive contract is illegal or induced by fraud or misrepresentation or duress (*Beijing Jianlong Heavy Industry Group* v *Golden Ocean Group*). It is only when it is alleged that the arbitration agreement itself is impeached that the tribunal may have to defer jurisdiction over that issue to the courts (*Fiona Trust* v *Privalov*).

4. Governing law. Because the arbitration agreement is regarded as a separate agreement, it has its own governing law. The English courts have decided that, absent express or implied agreement to the contrary, where the seat is England, the governing law of the arbitration agreement may be English law where this is the law most closely connected to the arbitration agreement, even if the underlying contract has a different governing law where this is the law most closely connected to the arbitration agreement (see *Sul America* v *Enesa Engenharia*).

5. Assignment. Although it is deemed to be a separate agreement, the common law position is that an assignment of the underlying contract will carry with it the agreement to arbitrate (absent a specific prohibition on assignment).

[Whether agreement discharged by death of a party]

Section 8

(1) Unless otherwise agreed by the parties, an arbitration agreement is not discharged by the death of a party and may be enforced by or against the personal representatives of that party.

(2) Subsection (1) does not affect the operation of any enactment or rule of law by virtue of which a substantive right or obligation is extinguished by death.

1. General. Section 8 concerns the effect of the death of a party on the agreement to arbitrate. It is non-mandatory (see Section 4(2)) and largely recreates the position under Section 2 of the 1950 Act (that provision did not, however, allow the parties any discretion to agree otherwise). This Section

does not apply to statutory arbitrations (Section 97(a)). See DAC Report paras. 48 and 49. Whilst the death of an individual is addressed in the Act, provisions relating to the effect of bankruptcy of an individual or the dissolution or liquidation of a company are found in other legislation (see below).

2. Effect of death of a party. The death of a party does not discharge the arbitration agreement, unless the parties have agreed otherwise. However, Section 8(2) limits the application of this rule of survivability so that it does not affect the operation of any other legal provision (either statutory or at common law) which operates to extinguish legal rights upon death. Accordingly, Section 8 cannot operate to sustain a cause of action that would otherwise fall away upon the death of a party (e.g. specific performance). Concerning the effect of the death of a party on the authority of the arbitrator appointed by that party, see Section 26(b).

3. Bankruptcy. For the effect on arbitration of bankruptcy of an individual, see Section 349A of the Insolvency Act 1986, as inserted by para. 46 of Schedule 3 of the Act. The enforceability of an arbitration agreement to which that individual is a party depends upon whether or not the Trustee in Bankruptcy adopts the contract or not. If he does, then it is enforceable by or against him. If he does not, then nevertheless he (subject to the consent of the creditors' committee) or the other party to the arbitration agreement can apply to the court with bankruptcy jurisdiction for an order referring the dispute under the agreement to arbitration.

4. Dissolution of a company. Where a corporate entity ceases to exist, any arbitration agreement to which it is a party cannot be enforced and any arbitration in which it was involved lapses completely and cannot be revived. There may be exceptions to this rule where a company is temporarily struck off the register only to be reinstated (*Union Trans-Pacific Co. Ltd* v *Orient Shipping Rotterdam BV*) or where a company merges with another and is then dissolved, i.e. corporate succession (*Eurosteel Ltd* v *Stinnes AG*).

5. Insolvency of a company. For the effect on arbitration of the appointment of an administrator or administrative receiver over a company, see Sections 11(3)(d), 14(1)(b) and 42(1) and Schedule 1 of the Insolvency Act 1986. For the effect of the appointment of a liquidator, see Sections 126, 130(2) and (3), 165(3) and 167 (1)(a) and Schedule 4 of the Insolvency Act 1986. The court will allow a claim to proceed only if it had a real prospect of success (*Enron Metals* v *HIH Casualty*). Where insolvency proceedings have been opened in another EU Member State, it is English law that determines the effect of that insolvency on any arbitration seated in England and may allow the arbitration to proceed (*Syska* v *Vivendi* and *Fortress Value* v *Blue Skye Opportunities*).

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STAY OF LEGAL PROCEEDINGS

[Stay of legal proceedings]

Section 9

(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.

(2) An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.

(3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.

(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.

(5) If the court refuses to stay the legal proceedings, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.

1. General. Section 9 concerns the stay of litigation in favour of arbitration. It is mandatory (see Section 4(1)) and applies even if the seat of the arbitration is outside England and Wales or Northern Ireland or has not been determined (see Section 2(2)). Section 9 largely re-enacts Section 4 of the 1950 Act and Section 1 of the 1975 Act; however, the court no longer has any discretion if the conditions of a stay are met, so as to comply with the UK's obligations under the 1958 New York Convention (art. II). See DAC Report paras. 50-57.

2. Legal proceedings. Legal proceedings is defined to mean civil proceedings in the High Court or county court (Section 82(1)), i.e. essentially any civil litigation.

3. Party. Only a defendant to a claim or counterclaim can apply to have the legal proceedings stayed (see *City of London* v *Sancheti*). A party includes any person claiming under or through a party to the agreement, e.g. an insurer or assignee (Section 82(2)). It does not permit another party to the putative arbitration agreement to apply if it is not a defendant in the legal proceedings (which is a change from the 1950 Act).

4. Arbitration agreement. Any application must be based upon the existence of an arbitration agreement, as defined in Section 6. Where the party

resisting the stay calls into question the existence of an arbitration agreement, the court may either decide that issue itself or refer the matter to arbitration for the tribunal to rule on its substantive jurisdiction (pursuant to Section 30, with the right of that party to object and ultimately challenge any award under Sections 31 to 32 and 67). The trend is in favour of granting a stay and referring the issue to the arbitral tribunal in the first instance, which reflects the doctrine of 'Kompetenz-Kompetenz' (see *Birse Construction Ltd* v *St David Ltd*). Nevertheless, before granting the stay, the court should be satisfied that there is a good arguable case as to the validity and scope of the arbitration agreement (see *Al-Naimi* v *Islamic Press Agency* and *Golden Ocean*). An allegation that the underlying agreement (including any arbitration agreement) is illegal or induced by fraud, duress or misrepresentation does not prevent the court granting a stay and referring that issue to the arbitral tribunal, unless the arbitration agreement itself is impeached (*Fiona Trust* v *Privalov*).

5. Application and notice. Any application for a stay must be made pursuant to CPR Rule 62.8. Notice must be given to the other parties to the proceedings (see Section 80).

6. Discretion. A stay will be granted only if a party makes an application. Even if a valid arbitration agreement exists, a party may prefer to have the dispute determined by the courts and will waive its right to insist on arbitration. The court cannot grant a stay of its own motion. Once the conditions for a stay are satisfied, the court does not have any discretion as to whether or not to grant a stay (as it did under the previous law). The DAC intended for the court to retain a discretion in respect of domestic arbitrations (see Section 86), but this was not brought into effect because it was inconsistent with the United Kingdom's obligations under the 1958 New York Convention and EC law.

7. Counterclaim and/or part of proceedings. Section 9(1) removes the doubt that existed under the previous law concerning the possibility of a stay of proceedings in respect of a counterclaim as well as a claim. In addition, the Section now makes clear that a stay can be in respect of a part of the claim as well as the whole. Nevertheless, this can give rise to complications where all the claims arise from the same underlying facts and either the arbitral tribunal or the courts may, as part of their case management powers, suspend their proceedings until after the outcome of the other.

8. Pre-condition to arbitration. Section 9(2) allows for a stay to be granted even though the matter cannot be referred to arbitration until certain pre-conditions (such as satisfying other dispute resolution procedures) have been met.

9. Taking a step in the legal proceedings. Under Section 9(3), a party is precluded from applying for a stay once it has taken any steps in the substantive proceedings beyond acknowledging the proceedings and objecting to the

jurisdiction of the court (see *Bilta* v *Nazir*). Applying to set aside a default judgment does not constitute a 'step' in the proceedings (see *Patel* v *Patel*).

10. Null and void, inoperative or incapable of being performed. A stay must be granted by a court presented with evidence of a prima facie applicable arbitration agreement unless the opposing party can establish that the arbitration agreement falls within one of the exceptions in Section 9(4), namely that it is null and void, inoperative or incapable or being performed (see *JSC Aeroflot* v *Berezovsky*). This repeats almost word for word art. II(3) of the 1958 New York Convention. 'Null and void' refers to a situation in which there is no effective agreement. 'Inoperative' relates to the scope of the arbitration clause, the arbitrability of the subject matter, the termination or cancellation of the arbitration clause and the identities of the parties to the arbitration clause (see Section 6). The phrase 'incapable of being performed' covers the case in which one of the parties is prevented by some external cause from performing its obligations. The relevant date for the court to assess the validity or the arbitration clause is upon commencement of the judicial proceedings. If a clause is invalid on that date, the stay must be granted. Following *Fiona Trust* v *Privalov*, it is likely to be more difficult to resist applications for a stay because arbitration clauses are now to be interpreted as widely as possible by the courts. Following that case, it is also more likely that a court will defer to the arbitral tribunal to determine jurisdiction rather than, for example, decide on the basis of affidavit evidence that there is an arbitration agreement, decide that the issue will be tried under CPR Rule 62.8, or decide that there is neither an agreement to arbitrate nor does the claim fall within the scope of the arbitration clause.

11. No dispute. A previous supplemental ground in the 1975 Act which allowed for stay applications to be resisted on the ground that there was no dispute between the parties has not been retained in the 1996 Act. Nonetheless, it remains a sine qua non of the granting of a stay that a dispute must have arisen between the parties; this will be a factual determination to be made on a case-by-case basis. As noted under Section 7, an allegation that the underlying contract is void ab initio on grounds that it is illegal or was induced by fraud or duress or misrepresentation is not sufficient to resist an application for stay, unless the arbitration agreement itself is impeached.

12. *Scott* v *Avery* clauses. Section 9(5) is a new provision designed to address *Scott* v *Avery* clauses. Under such a clause, the parties agree that arbitration is a condition precedent to court proceedings, such that court proceedings can only be brought to enforce the tribunal's award. The Act provides that where the arbitration agreement is found to be null and void, inoperative or incapable of being performed, it no longer operates as a condition precedent to legal proceedings.

13. Right of appeal against decision under Section 9. Although the Act prescribes no express right of appeal of a decision under Section 9, the House

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