for preferring arbitration. The reality appears to be that users are not overly concerned about confidentiality.

What seems most important to users is the enforceability of an arbitral award. The perception is that, by reason of the New York Convention, an arbitral award will be recognized and enforced just about anywhere in the world. Whether or not that perception is justified will be discussed in a later chapter.[15] For now, it will simply be observed that, if the perception is true, then there is no equivalent to the New York Convention in so far as the recognition and enforcement of judgments is concerned.

The instrument that comes closest to enabling judgments by the court of one state to be enforced in another is the 2005 Hague Choice of Court Agreements Convention.[16] By that convention, where the parties to an international commercial contract designate the court of a contracting state as the forum to resolve disputes arising out of the contract, the designated court alone will have jurisdiction to resolve such disputes. Other than in a limited number of circumstances, the courts in other contracting states must decline jurisdiction. Once a designated court has rendered a judgment on the merits, then that judgment will be recognized and enforced in all other contracting states, except in a limited number of situations. Those limited situations are similar to the situations when a court may refuse recognition and enforcement of an arbitral award under the New York Convention.

The 2005 Hague Convention came into effect on 1 October 2015. But there are only 30 states that are parties to the convention at present. Those are Mexico, the countries of the European Union with the exception of Denmark, and Singapore. The United States and the Ukraine have signed the convention, although have yet to ratify and enact the same. This is nothing like the number of parties to the New York Convention. Looked at crudely in terms of numbers of states in which enforcement should be more or less automatic, an arbitral award would seem to be clearly superior to a court judgment.

The second most popular reason for choosing arbitration over other forms of dispute resolution (including litigation) is the avoidance of specific legal systems of national courts. The percentage of respondents citing avoidance (64%) is nearly the same as the percentage giving enforceability as the reason for preferring arbitration.

It is suggested that the two reasons are most likely related to each other. Where the judicial system of state X is notorious for being slow, costly or unpredictable, business persons are likely to shun the courts of state X. They will prefer arbitration, especially where an arbitral award may be readily recognized and enforced in state X as a party to the New York Convention. Arbitration becomes a way of getting around all the inconvenience and expense of litigation in state X. It would be a further plus for arbitration that, at least to an extent, the parties can determine the composition of the tribunal deciding their dispute. The parties would not be left to the vagaries of state X's judicial system, which could assign a judge lacking the commercial expertise to deal with their dispute.

Consider, however, where P from state Y enters into a commercial contract with D from state X. D's assets are located in state X. A dispute arises between the two and P sues D. If an award in P's favour will not be recognized and enforced by state X, there

15 See Chapter 12.
16 Available at <www.hcch.net/en/instruments/conventions/full-text/?cid=98>.

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would be little point in P commencing arbitration proceedings against D. P would instead be compelled to litigate in state X.

The 2015 Survey therefore indicates that the main reason for the popularity of international commercial arbitration as a means of dispute resolution is the prospect that an award in the successful party's favour will be readily recognized and enforced elsewhere, in most (if not all) states where a losing party is likely to have its assets.

1.3 Problems of cost and due process paranoia

It is instructive to look at the flip side of the equation. The 2015 Survey also asked those surveyed to identify the three worst characteristics of international arbitration. The result was as follows: "cost" (68%) ; "lack of effective sanctions during the arbitral process" (46%); "lack of insight into arbitrators' efficiency" (39%); "lack of speed" (36%); "national court intervention" (25%); "lack of third party mechanism" (24%), "lack of appeal mechanism on the merits" (17%), "lack of insight into institutions' efficiency" (12%), "other" (9%), and "lack of flexibility" (3%).[17] It thus appears that the greatest threat to international arbitration as a preferred means of dispute resolution is its high cost.

The 2015 Survey found, in the course of interviews with respondents on how international arbitration might be improved, that "due process paranoia" was "repeatedly raised in responses, and in nearly all the personal interviews". The 2015 Survey defines "due process paranoia" as the "reluctance by tribunals to act decisively in certain situations for fear of the arbitral award being challenged on the basis of a party not having had the chance to present its case fully".[18] It was suggested by some of those interviewed that "due process paranoia" might at least partly explain the increased cost of arbitration.

Under Article V(1)(b) of the New York Convention, an enforcing court may refuse to recognize an arbitral award on the ground that the party against whom enforcement is sought was not given a fair opportunity to present one's case. Given that a tribunal is under an obligation to produce an enforceable award, many arbitrators may hesitate to impose strict deadlines on parties or to reject last-minute evidence, prolix submissions, and late applications, because they fear that, come the time for enforcement of an award, the tribunal will be accused of having failed to give the losing party a reasonable opportunity to be heard and the enforcing court will consequently refuse to recognize or enforce the tribunal's award. The result is that arbitrations become overly long and costs are racked up, because tribunals bend over backwards to accommodate the demands of the respondent to an arbitration. At least in so conducting the arbitration, the tribunal (the justification goes) cannot be accused of having denied the respondent a reasonable opportunity to present its case and to be heard.

Similarly, in drafting its award, the tribunal may feel that it has to summarize every procedural twist and turn that the proceedings have taken (including every interim application (however minor) by one or other party) and every piece of evidence (including nearly verbatim paraphrases of what each witness has said) that has been adduced. All this is done in an effort to pre-empt an enforcing court from finding that the tribunal took into account something that ought not to have been considered and failed to take into

17 Survey (n 11), p. 7.
18 Survey (n 11), p. 10.

Countries are free to adopt as many or as few of the provisions of the Model Law as may be conducive to their needs. Hong Kong has adopted most (but not all) of the articles of the Model Law.

B New York Convention

The 1958 New York Convention is also a United Nations instrument. It offers a convenient mechanism for the recognition and enforcement by a contracting state of an arbitral award made in another contracting state. The Convention contains 16 articles. Those worth noting for the purposes of the exposition in this book are summarized below.

Article I(1) sets out the operative principle of the Convention, namely, 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".

However, by Article I(3), a state "may on the basis of reciprocity declare that it will apply the Convention to . . . awards made only in the territory of another Contracting State". A state may under Article I(3) also declare that the Convention will only apply to "differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the [relevant state]".

The Convention imposes two important obligations on a state. These are found in Article II and III.

Article II obliges a state party to recognize arbitration agreements in writing. This means that, if an action arising out of a dispute covered by an arbitration agreement is brought before the court of that state, then such court "shall, at the request of one of the parties, refer the parties to arbitration". The court is required to do so, unless the arbitration agreement is "null and void, inoperative or incapable of being performed".

Article III is in a sense the corollary to Article II. By Article III, a contracting state must "recognize arbitral awards as binding" and "enforce them in accordance with the rules of procedure of the [contracting state]". Moreover, a contracting state cannot require more onerous conditions or fees for enforcing a foreign award than are imposed for the enforcement of a domestic award.

Articles IV to VI qualify the duty to recognize and enforce foreign awards imposed by Article III.

Article IV deals with the formalities that a court may require before recognizing or enforcing an award. For instance, a state may require the production of a "duly authenticated original award or . . . certified copy thereof" and of the "original [arbitration] agreement . . . or . . . certified copy thereof". The state may also request translations of the award or arbitration agreement.

Article V sets out the limited grounds upon which the court or competent authority of a contracting state may refuse to recognize or enforce an award. Article V states:

> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>   (a) The parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under

> the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
>   (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
>   (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
>   (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
>   (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
>
> 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>   (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
>   (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI states that, if there is a pending application to stay or set aside an award in the seat of arbitration, the court of a contracting state may adjourn any decision on recognizing or enforcing the award.

One other provision worth noting is Article VII. By the article, if it would be more advantageous to enforce an arbitral award through some other treaty, a party is free to rely on that other treaty. The New York Convention is without prejudice to a party's rights under the other treaty.

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be the same and should increasingly reflect a best practice in respect of the Model Law provisions most commonly adopted by states.

In such environment, espousal of the first theory provides little incentive for a jurisdiction to embrace a more global perspective and to modernize its regulatory framework for international commercial arbitration along the lines of the Model Law. If every state and every arbitrator were to adhere to the first theory, there would be the danger of the "tail wagging the dog". The regulatory framework of one state (the seat of arbitration), however restrictive, would determine the extent to which an award rendered in that state in respect of a cross-border dispute, can be recognized internationally.

That being said, even if only tacitly, precisely because it is intuitively appealing as a matter of practical logic, many international commercial arbitrations in Hong Kong today are conducted on the basis of the first theory. Tribunals thus run international commercial arbitrations as if they were essentially just court litigations.

The Model Law only provides the barest of guidelines as to the procedures to be followed in an arbitration. Arbitral rules are equally skeletal. Much is left to a tribunal's discretion in light of the circumstances of a given case. Therefore, questions will inevitably arise as to whether and (if so) how the tribunal should exercise some power (for instance, the power to grant interim measures or the power to order security for costs) in interlocutory proceedings or substantive hearings. Lip-service may be paid to the notion that an arbitration is not bound by court practice. But, when push comes to shove, many arbitrators simply end up applying "by analogy" court practice as found in the Rules of the Hong Kong High Court (Cap.4A, sub leg) whenever a question arises as to how the tribunal is to exercise its power arises.

That is perfectly understandable, especially within the context of the first theory. Mimicking domestic court procedure is a "safe" option. If one closely adopts court practices and procedures, the likelihood of the supervising court (that is, the court of the seat of arbitration) setting aside an award for failing to follow due process or for acting in excess of jurisdiction will be practically nil. The Hong Kong court can hardly say that adherence to its procedures and practices amounts to an abuse of process.

But the danger is that the procedure followed in international commercial arbitration will be or become just as technical, if not more so, than that followed in court litigation. There is much talk about arbitration being "hijacked" by lawyers. There is a danger that procedures will become more technical than in court, because many arbitrators come to international commercial arbitration, after substantial careers as judges or lawyers. The former will be tempted to conduct arbitrations much in the same way as they conducted litigation. The latter, especially those coming to arbitration after having had substantial practice in litigation, may see arbitration as little different from what they have been used to doing in court. Further, any non-lawyers on a tribunal will often defer to the professional experience of the judge or lawyer sitting with them, because such strategy will probably best ensure that an award is not set aside by a supervising court. The non-lawyers will assume that the judge or lawyer knows best when it comes to following court practice and procedure.

Given that to a lesser or greater extent all arbitrators will be prone to due process paranoia (that is, the fear that their award will not be enforceable due to a failure to observe due process), a tribunal operating under the first theory will be concerned that the arbitral process passes muster when compared to court procedure. Otherwise, the

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award will be susceptible to being set aside in the seat and there may be nothing left to enforce elsewhere.

Consider an example of how adherence to the first theory can lead to too much readiness to plug procedural or substantive gaps by reference to the law of the seat of arbitration (Hong Kong, in the specific instance being examined in this book).

In common law jurisdictions including Hong Kong, foreign law is treated as a matter of fact. In Hong Kong court practice (as well as that of other common law jurisdictions), this means that, where the applicable law of a given dispute is foreign law, a party must specifically plead the foreign law upon which it proposes to rely. That party must then adduce evidence, typically evidence from an expert (such as a foreign lawyer or law professor), that the foreign law is as has been pleaded. The experts are subject to cross-examination, much as any other witness. Where a party fails to plead foreign law or if a party does not adduce any evidence of foreign law, the court will proceed on an assumption that the foreign law and the law of the forum (here Hong Kong law) are identical.

Many Hong Kong arbitrators hearing an international commercial arbitration will mechanically follow court practice on foreign law. They will feel uncomfortable in hearing submissions on foreign law directly from an advocate (even an advocate qualified in the foreign law) appearing before them. Where foreign law has not been pleaded, they will simply assume that foreign law on the relevant issue is the same as Hong Kong law on the matter.

But why should Hong Kong court practice be assumed to be applicable in an international commercial arbitration merely because it has a Hong Kong seat and the substantive hearing is taking place in Hong Kong? Model Law Article 28 (which has effect in Hong Kong by section 64 of the Arbitration Ordinance) requires, where the parties to an international commercial contract have failed to designate the applicable law in their agreement, that the tribunal "shall apply the law determined by the conflict of laws rules which it considers applicable". The tribunal will therefore have to be more proactive than simply assuming that, foreign law not having been mentioned, foreign law can automatically be treated as the law of the forum in accordance with Hong Kong practice.

Article 28 imposes a duty on a tribunal to apply foreign law, where it considers on private international law or conflict of law principles that such law applies to a given question before it. The tribunal should therefore at least invite the parties to address it on the applicable foreign law. If the parties respond that they are content for the tribunal to proceed on the footing that the applicable foreign law is the same as Hong Kong law, then the tribunal may safely proceed on the basis of the parties' express agreement.

What one cannot do is blithely to ignore a glaring possibility of foreign law applying to a disputed matter on the slim basis that, since Hong Kong is the seat of the arbitration, Hong Kong law and practice apply by default. In other words, if an award solely derives its validity from the law of the seat, then the typical practice followed by many Hong Kong arbitrators might be justifiable. But Article 28 suggests that the first theory is too crude and that an arbitral award derive its validity from something more than just the law and practices of the seat.

Note that the approach to foreign law just described can lead to other, possibly more economical or practical, approaches to the determination of foreign law in international commercial arbitration being rejected out-of-hand for no good reason. In civil law countries, questions of foreign law are treated as questions of law, not fact. There would seem

to be no good reason for an arbitration in a Hong Kong seat automatically to accept the Hong Kong court's approach to treating questions of foreign law as questions of fact as the only way of proceeding.

If one regards questions of foreign law as questions of law (as would be the more intuitively obvious approach), then that opens up a number of avenues of proving foreign law in an international commercial arbitration taking place in Hong Kong.

The tribunal can of course always direct that normal court practice (that is, resort to foreign law expert evidence) will be followed. But that way of proceeding will typically involve experts preparing and exchanging "without prejudice" expert reports, meeting to work out points of agreement and disagreement, issuing a joint report identifying points of agreement and disagreement, and submitting "with prejudice" reports dealing only with points of disagreement. That procedure may be far too expensive, in the sense of being disproportionate to the amount at stake, for a large number of international commercial arbitrations.

There may be a prevailing view that international commercial arbitrations involve large sums of money running to the millions of Hong Kong dollars. But the reality is far from glamorous. Many international commercial arbitrations involve relatively small sums of money. The typical shipping arbitration, for example, might only involve a few hundred thousands of Hong Kong dollars. It would be too costly in such cases to use the traditional means of proving foreign law through expert evidence.

In civil law jurisdictions (where judges can be under a duty to apply foreign law even when none of the parties has pleaded the same), it is open to courts to determine substantive foreign law in different ways, depending on the circumstances. The way in which the law is determined can be calibrated to the amount at stake. Accordingly, in disputes involving relatively low values, a judge may even ascertain foreign law by resorting to the internet. That would, of course, be subject to the judge being satisfied that a website purporting to set out foreign law on a matter is reliable. Alternatively, judges may hear submissions directly from suitably qualified counsel on matters of foreign law.[7]

It is submitted that similar methods can be applied in Hong Kong international commercial arbitrations. The approach, where a tribunal hears submissions directly on matters of foreign law, may be particularly apposite in arbitration. That is because often, where an arbitration involves foreign law, one or more members of the tribunal will be appointed on account of their knowledge of (or at least acquaintance with) that foreign law. In the interests of due process in such circumstance, the tribunal would need to give interlocutory directions to ensure that each side was made aware in good time of the other side's position on the substance of the relevant foreign law, so that the direct submissions heard by the tribunal will be responsive to each other and no one will be taken by surprise.

This method of hearing direct submissions from advocates appearing before a tribunal may well be less expensive and time-consuming than the traditional mode of expert

7 For further discussion on Article 28 of the Model Law and the determination of the foreign law applicable to an arbitration agreement and to the contract in which the arbitration agreement is contained, see Chapter 6. For further discussion on the proof of foreign law in arbitrations, see Chapter 9. For useful background information on how foreign law is proved in the common law and civil law jurisdictions of the EU, see Institut suisse de droit comparé, "The Application of Foreign Law in Civil Matters in the EU Member States and Its Perspective for the Future: Synthesis Report with Recommendations", JLS/2009/JCIV/PR/0005/E4 (Lausanne, 2011). Available at: <http://ec.europa.eu/justice/civil/files/foreign_law_iii_en.pdf>.

evidence used in court. But this method might be too readily dismissed as inappropriate, if a tribunal was slavishly to follow Hong Kong procedure because that is the safest way of ensuring (especially in light of the first theory) that an award will not be set aside.

2.2 Theory 2: Laws of enforcing states as source of validity

The second theory takes its cue from the New York Convention. It posits that the validity of an award hinges on whether enforcing states will or will not recognize and enforce the award. Thus, the validity of an award stems from the sum total of the laws of enforcing states.[8]

This does not necessarily mean that the law of the seat of arbitration becomes irrelevant. This is because in deciding whether to recognize and enforce an award, an enforcing state may take account of the fact that the award has been set aside by the court of its seat. In this respect, Article V(1)(e) of the New York Convention permits an enforcing state to refuse recognition and enforcement where the award "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made". The fact that the court of the arbitral seat has set aside an award or (as happened in the *Astro Nusantara* case) has held an award to have been made outside of a tribunal's jurisdiction will undoubtedly be a factor, perhaps a significant factor, in an enforcing court's deliberations whether or not to recognize and enforce an award. But under the second theory, the status of an award in its seat will not be conclusive.[9] As happened before the Hong Kong court in *Astro Nusantara*, an award can still be recognized and enforced, despite having been set aside in its seat. This outcome is explicable under the second (but not the first theory) because what ultimately matters (and what gives validity to an award) is not what has happened in the seat, but whether the laws of other states will or will not permit recognition and enforcement.

A corollary of the second theory is that there is no necessity for a respondent to apply to set aside an award in the seat of arbitration. It is instead open to the respondent to sit tight and contest recognition and enforcement of the award in states other than the seat.

The precursor to the New York Convention was the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards.[10] Article 4(2) of the Geneva Convention required a claimant seeking to enforce an arbitral award in a state other than the seat to provide "[d]ocumentary or other evidence to prove that the award has become final, in the sense defined in Article 1(d), in the country in which it was made". Article 1(d) of the Geneva Convention stipulated that an award would not be enforceable elsewhere unless (among other matters) the award:

> has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition, *appel* or *pourvoi en cassation* (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending.

8 Gaillard (n 1), at [23]–[39].
9 Articles V(1) and (2) say that recognition and enforcement "may be refused" (not "shall be refused") if any of the grounds listed in Articles V(1)(a) to (e) or V(2)(a) or (b) are established. The court of an enforcing state thus retains a discretion to recognize and enforce a foreign arbitral award, even when it has been set aside in its seat.
10 Available at <http://www.newyorkconvention.org/11165/web/files/document/1/6/16020.pdf>.

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The two articles in conjunction gave rise to the "double *exequatur*" requirement under the Geneva Convention. It had to be shown that an award was valid in the seat of arbitration, before an award could be recognized and enforced as valid in another state.

The New York Convention was supposed to do away with the cumbersome double *exequatur* requirement. Instead, under the New York Convention regime, a respondent can adopt a "come and get me attitude". The respondent can refuse to take any part in arbitration proceedings in the seat and opt instead to contest an award when the claimant seeks to enforce the same in the respondent's home state or in a jurisdiction in which the respondent has assets. This suggests that it is the plurality of the laws of enforcing states, rather than the law of the seat, that validates an arbitral award.

But the second theory has its own difficulties. For instance, there are presently widely discrepant practices among states on the implementation of the New York Convention within their territories. The second theory could thus easily lead to the situation where a state that gives an idiosyncratically wide interpretation to the New York Convention grounds for refusing recognition and enforcement in Article V(1) and (2), can dictate whether an award is or is not recognized. By what principles is one able to say to such state that its practices are not consonant with the exigencies of international commercial arbitration? Is there a universally accepted standard by which one can argue that the implementation of the New York Convention in a given state is erroneous, because what should be regarded as valid awards are wrongly being refused recognition and enforcement in that state? It is this universal or transnational standard that the third theory is supposed to provide.

But, before moving to the third theory, it is worth examining how arbitrators who espouse the second theory might conduct an international commercial arbitration. In that circumstance, the tribunal's purview will need to go beyond the law of the seat and examine the laws of enforcing states in so far as recognition and enforcement are concerned. The tribunal's duty would be to make all reasonable effort to produce an award that was enforceable in a relevant state. Obviously, a tribunal could not be expected to know the requirements for an enforceable award in every one of the 156 other states party to the New York Convention. That would be impossible and impractical.

Many (if not all) of the major financial centres of the world (London, Paris, New York, Geneva, Hong Kong, Stockholm, Singapore, and Tokyo) are known to be arbitration-friendly. Their courts can no doubt be expected to be pro-enforcement, provided that widely accepted standards of due process are observed. Where an award is to be enforced in such jurisdictions, the tribunal should be able to conduct an arbitration in accordance with well-established standards of fairness. The tribunal should not feel bound religiously to follow the court practices of the seat. The tribunal can be more robust, so long as it is fair.

But other jurisdictions may be less sophisticated. These may not yet have a well-developed jurisprudence as to what constitutes fair or unfair procedure. The courts in such jurisdictions may require evidence that formal procedures have been strictly observed, in order to be satisfied that there has been due process. Such jurisdictions may place a high premium of procedural formality over substantial fairness. They may have little experience in assessing whether the procedures adopted by a tribunal were generally reasonable, whether any deviations from procedural rules were merely trivial, and whether a party was substantively prevented from presenting its case.

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It may be incumbent on a tribunal to inquire of the parties precisely where it is intended to enforce an award that may result from the arbitration. If the arbitrators are told that their award is meant to be enforced in a jurisdiction with unfamiliar rules as to recognition and enforcement, the tribunal may wish to inquire of the parties what the requirements for recognition and enforcement in such places are. Then, in addition to observing generally accepted standards of fairness in terms of procedure, the tribunal may take into account any special requirements for recognition and enforcement in the jurisdictions identified. That may be a reasonable and practical way of proceeding.[11]

Above all, however, one should avoid falling into an over-abundance of due process paranoia and, without seeking clarification from the parties, simply assume that the award might be enforced in any or all of the other 156 states that are party to the New York Convention. The arbitrator who espouses the second theory may decide that playing "safe" (in terms of producing an enforceable award) will entail not only following court practice in the seat of arbitration, but also bending over backwards to accommodate a respondent's requests for procedural indulgences. The arbitrator may take such a view for fear that otherwise the award could be unenforceable in less sophisticated jurisdictions where the award might conceivably be enforced, however remote the prospect of a claimant actually seeking to enforce in such a place.

To proceed in that way would lead to the worst of all possible worlds. One would follow the technicalities of court procedure in the seat (say, Hong Kong), as well as real or imagined constraints on recognition and enforcement in other jurisdictions. The tribunal will hesitate to be robust in dealing with interlocutory applications, not wishing to be seen to be denying one or other party a reasonable chance to be heard. The danger will be that nothing is ever decided as the arbitration proceeds along. There will be case management paralysis. Everything will be left to be determined "once all the evidence is in" at the end of the day, because that will be the surest way of ensuring that everyone has had a reasonable opportunity to be heard.

2.3 Theory 3: Transnational law as source of validity

The third theory, the one favored by Professor Gaillard, is that the validity of arbitral awards hinges on transnational legal principles or an independent "arbitral juridical order". Thus, international commercial arbitration is "de-localized" in the sense of not being tied to the law of a seat or of an enforcing state. Instead, the international commercial arbitration regime transcends domestic law. It is governed by international commercial law principles that exist separately from the laws of a given state. The consequence is that, even where an award has been set aside in its seat or is not enforceable within one or more contracting states to the New York Convention, the award can still be valid and enforceable in other states.[12]

The obvious question is how these transnational principles are to be identified. It does not seem that there can be any comprehensive answer to this question. It may be possible to say at a given time that some principle is such a transnational legal principle, because

11 See J Spigelman, "The Centrality of Contractual Interpretation: A Comparative Perspective" (2013), pp. 19–20, available at: <www.oeclaw.co.uk/images/uploads/documents/KAPLAN_LECTURE_27.11.13.pdf>.

12 Gaillard (n 1), at [40]–[58].

The former Arbitration Ordinance adopted a dual-track regime. International arbitrations were governed by the 1985 Model Law, while domestic arbitrations were governed by a system based on the English Arbitration Act of 1950.

In contrast, the new Arbitration Ordinance promulgated a unitary regime based on the 2006 Model Law. This meant that, subject to transitional provisions, international and domestic arbitrations would be governed from then on by the same regime. This was the major reform under the new statute. The reason for switching to a unified regime following the 2006 Model Law was made clear in section 3(1) of the new Arbitration Ordinance: "to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense".[1] In the rest of this book, references to the "Arbitration Ordinance' will be to Cap.609 and references to the "Model Law" will be to the 2006 Model Law.

The Arbitration Ordinance consists of 112 sections and three schedules. It adopted a substantial portion of the Model Law. It did this by enacting individual articles of the Model Law (in whole or part) in individual sections of the statute. For a concordance table showing which Model Law article corresponds with which Arbitration Ordinance section, see the Appendix to this chapter.

In addition to the Arbitration Ordinance, other legal instruments are of importance. The first is the New York Convention. China acceded to the Convention in 1987 with the result that Hong Kong, as a part of China, is also bound by the New York Convention. But the New York Convention will not apply to arbitral awards with Mainland China or Macao seat, as such awards would be Chinese awards in Hong Kong and would not accordingly be "foreign" awards within Article I of the New York Convention. There would be a similar problem in enforcing Hong Kong arbitral awards in Mainland China and Macao. Consequently, Hong Kong has had to enter into Arrangements with Mainland China[2] and Macao[3] for the reciprocal enforcement of arbitral awards. The Arrangements are similar in their provisions to those of the New York Convention.

3.1.2 Organizations

There are numerous organizations in Hong Kong that are involved in promoting arbitration in some way. The organizations can be classified into two groups.

The first group comprises institutions which administer arbitrations. The principal such institution is the Hong Kong International Arbitration Centre (HKIAC), which was established in 1985. Other such institutions are the China International Economic and Trade Arbitration Commission Hong Kong Arbitration Centre (CIETAC Hong Kong), the International Chamber of Commerce Hong Kong (ICC Hong Kong), and the Permanent

1 Note also section 3(2) of the Arbitration Ordinance: "This Ordinance is based on the principles: (a) that, subject to the observance of the safeguards that are necessary in the public interest, the parties to a dispute should be free to agree on how the dispute should be resolved; and (b) that the court should interfere in the arbitration of a dispute only as expressly provided for in this Ordinance". Arbitration in Hong Kong today is therefore premised on three cardinal principles: (1) the speedy resolution of disputes in a fair and cost-effective manner; (2) party autonomy; and (3) minimal judicial intervention.

2 See *Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the HKSAR*, available at: <www.doj.gov.hk/eng/topical/pdf/mainlandmutual2e.pdf>.

3 See *Arrangement Concerning Reciprocal Recognition and Enforcement of Arbitral Awards Between the HKSAR and the Macao SAR*, available at: <www.doj.gov.hk/eng/mainland/pdf/macaoe.pdf>.

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Court of Arbitration (PCA). Each institution will typically have one or more of its own set of arbitration rules for arbitrations administered by it. For instance, HKIAC has its 2008 or 2013 HKIAC Administered Arbitration Rules, CIETAC has its 2012 or 2015 CIETAC Arbitration Rules, and the ICC has its 2012 or 2017 ICC Arbitration Rules.

The second group comprises institutes that organize conferences, seminars, workshops, and other activities to complement the work of arbitration centres and organizations (such as those in the first group). Examples are the Chartered Institute of Arbitrators (East Asia Branch) (CIArb East Asia) and the Hong Kong Institute of Arbitrators (HKIArb). The institutes typically run regular training courses for persons intending to practise as arbitrators. Persons who pass the requisite training courses of an institute may become Fellows of that institute and earn the right to attach certain letters (for example, CA,[4] FCIArb,[5] or FHKIArb[6]) after their name. The institutes may themselves administer arbitrations or provide support to ad hoc arbitrations by compiling list of persons (usually Fellows of the institute) qualified to sit as arbitrators in given types of disputes.

The Hong Kong Institute of Arbitrators is a Hong Kong company limited by guarantee established in 1996 for professionals and others with an interest in arbitration, mediation and other modes of dispute resolution. A main objective of the institute is to hold workshops, seminars and other educational activities designed to build capacity among members of the public interested in developing the skills and knowledge needed by arbitrators or mediators.

The Chartered Institute of Arbitrators is a non-profit United Kingdom registered charity that provides a wide range of arbitration and ADR-related services and support for members and others involved in dispute resolution. The Chartered Institute offers the only professional arbitration qualifications (for example, the CA and FCIArb qualifications) recognized worldwide. The East Asia Bench of the Chartered Institute is based in Hong Kong, but represents not only members from Hong Kong, but also those in Mainland China, Japan, Vietnam, Korea, Indonesia, the Philippines and Taiwan.

3.1.3 Government support

The Hong Kong government promotes arbitration largely through the efforts of the Department of Justice. The latter has proactively undertaken numerous initiatives to market Hong Kong as an international dispute resolution hub in the Asia-Pacific and the rest of the world. The reform of the Arbitration Ordinance was largely spearheaded by the Department of Justice with the assistance of Hong Kong lawyers and business people.

To further promote arbitration as a means of dispute resolution, the Secretary for Justice has set up an Advisory Committee on Promotion of Arbitration. by its Terms of Reference, the Committee is to perform the following functions (among others):[7]

> (a) considering, advising on and coordinating ongoing and new initiatives and overall strategies for the promotion of the HKSAR's arbitration services in and outside Hong Kong;

4 Chartered Arbitrator.

5 Fellow of the Chartered Institute of Arbitrators.

6 Fellow of the Hong Kong Institute of Arbitrators.

7 The Terms of Reference are available at <www.doj.gov.hk/eng/public/pdf/2016/terms.pdf>.

(b) serving as a forum for discussing such issues as may be raised by the legal and dispute resolution sector concerning the promotion of the HKSAR as a leading centre for arbitration services in the Asia Pacific region; and
(c) such matters as may be incidental to the matters stated in (a) and (b) above (including, but not limited to, the conduct of researches or studies relating to arbitration).

The Committee is made up of representatives from the Department of Justice and from the legal, arbitration and other relevant sectors in Hong Kong. Overseas arbitration experts may also be appointed.

The Law Reform Commission of Hong Kong has also played a role in supporting the development of Hong Kong as an international dispute resolution hub. Recently, the Commission issued its *Report on Third Party Funding for Arbitration.*[8] Under the present law, third party funding of parties engaged in arbitration in Hong Kong is prohibited. Third party funding would constitute maintenance and champerty, which remain in existence as common law criminal offences and tortious wrongs in Hong Kong.[9] The Report recommends that, to enhance Hong Kong's competitive position as an international arbitration centre, the Arbitration Ordinance should be amended to permit third party funding for arbitration-related matters and to that extent the common law prohibition of maintenance and champerty should be abolished.

3.1.4 Judicial support

Hong Kong has established its pre-eminence as an arbitration-friendly jurisdiction. A major contributor to that pre-eminence has been the minimum intervention by the court in the arbitration process. There are several stages where courts are able to intervene in arbitration, such as in relation to the determination of the validity of an arbitration agreement; the grant of anti-suit injunctions, interim measures and other interlocutory relief; and the recognition and enforcement of arbitral awards. The court's stance in respect of international commercial arbitration will be considered in greater detail in Chapter 12.

For now, attention is drawn to the Practice Direction 6.1[10] of the Hong Kong court. That creates and regulates a specialized Construction and Arbitration List within the High Court to deal with arbitration-related matters. The List is managed by a judge who has knowledge and experience of arbitration to ensure that cases within the List are dealt with expeditiously in accordance with the principles underlying the Arbitration Ordinance and the Model Law. All cases touching on arbitration are supposed to be heard in the Construction and Arbitration List (whether or not a party has issued a writ within that List) and are to be dealt with by the specialist judge in charge.

8 Available at <www.hkreform.gov.hk/en/docs/rtpf_e.pdf>.
9 Maintenance occurs when a third party funds litigation in which he or she has no interest or connection. Champerty occurs when a third party funds litigation in return for a share of any monies that might be obtained through such proceedings and, apart from the funding arrangement, the third party has no interest or connection with the litigation.
10 See <legalref.judiciary.gov.hk/lrs/common/pd/pdcontent.jsp?pdn=PD6.1.htm&lang=EN>.

3.1.5 ADR initiatives

3.1.5.1 Mediation

Mediation is a voluntary and private dispute resolution process. It is in effect negotiation conducted with the assistance of a neutral third party intermediary known as the "mediator". Unlike a judge or an arbitrator, a mediator has no power to decide the parties' dispute. The mediator merely uses his or her skills to facilitate the amicable settlement of a dispute.

In Hong Kong, mediation is governed by the Mediation Ordinance (Cap.620), which was enacted in 2012 and came into force in 2013. The Mediation Ordinance has 11 sections and two schedules. The objective of the statute is to promote, encourage and facilitate the resolution of disputes by mediation and to protect the confidential nature of mediation communications.[11]

Section 4 of the statute defines what a mediation involves and, in so doing, provides a convenient summary of the techniques that are at a mediator's disposal in facilitating settlement. The section states:

> Mediation is a structured process comprising one or more sessions in which one or more impartial individuals, without adjudicating a dispute or any aspect of it, assists the parties to the dispute to do any or all of the following:
> (a) identify the issues in dispute;
> (b) explore and generate options;
> (c) communicate with one another; and
> (d) reach an agreement regarding the resolution of the whole, or part, of the dispute.

There are a number of institutions providing mediation services in Hong Kong. These include the Hong Kong Mediation Accreditation Association Limited (HKMAAL), the Hong Kong Institute of Mediation (HKIMed), the Hong Kong Mediation Centre (HKMC), the Hong Kong Mediation Council (HKMC), the Centre for Effective Dispute Resolution (CEDR), and the Conflicts Resolution Centre (CRC). Each organization will have its own mediation rules and will administer mediations in accordance with those rules within the framework of the Mediation Ordinance.

HKIAC itself provides mediation-related services. For this purpose, it has issued a number of publications to facilitate the conduct of mediations These are the HKIAC Mediation Rules, the Hong Kong Mediation Code, Rules for Handling Complaints against an Accredited Mediator, a General Ethical Code, and Guidelines for Professional Practice of Family Mediators.[12]

3.1.5.2 Med-arb

Med-arb is a multi-tier dispute resolution method combining mediation and arbitration. In med-arb, the proceedings take place in two (or perhaps more) stages. The parties initially attempt to reach a settlement through mediation. If parties reach a settlement, the proceedings will come to an end and with the parties' settlement

11 Section 3 of the Mediation Ordinance.
12 Available at <www.hkiac.org/mediation/rules>.

http://www.pbookshop.com

agreement will be embodied in an arbitral award. The award will then be enforceable under the New York Convention. But, if the parties cannot achieve a mediated settlement, the proceedings will enter a second stage in which their dispute will be resolved by an arbitrator. The arbitrator in the second stage may (and, at least in some jurisdictions such as Mainland China, often is) the same person as the mediator in the first stage.

In the course of the second stage, the parties and the arbitrator may feel that it would be useful for the former to resume the initial aborted mediation. In that case, the arbitration can be stayed while the parties go back to attempting to reach a settlement through mediation. The proceedings can switch back to arbitration and so on until the dispute is settled in whole or part through mediation and whatever has not been settled is determined by the arbitrator.

In the course of a mediation, it is common for the mediator to meet with the parties separately, that is, without the other party being present. The idea is that, in a separate meeting, a party will feel more comfortable in unburdening itself and explaining to the mediator its concerns, objectives and constraints in so far as reaching a settlement is concerned. Everything said or done in a mediation is confidential. All unilateral communications between one party and the mediator are confidential as between the communicating party and the mediator. The mediator may not reveal such unilateral communications to the other side without authority from the party making the communication.

Nonetheless, the mediator will not be able to rid his or her mind of the communications, if the med-arb proceedings should progress to an arbitration stage. If the mediator in the first stage becomes the arbitrator in the second stage, there is a real danger that matters communicated in confidence to a mediator, will consciously or sub-consciously influence the same person acting as arbitrator between the parties in the same dispute. There is a high risk of conflict of interest in med-arb proceedings where the same individual is to act as mediator and arbitrator.

Med-arb in Hong Kong is governed by sections 32 and 33 of the Arbitration Ordinance.[13] Those provisions enact necessary safeguards to minimize the possibility of conflict of interest where the same person acts as mediator and arbitrator.

Sections 32(3) and 33(1) make it clear that there is no objection in principle to a person acting as both mediator and arbitrator in a dispute. Where there is to be med-arb, the arbitration must be stayed to allow the mediation to take place (section 33(2)).

Section 33(4), on the other hand, imposes certain limitations on how the mediator-arbitrator is to proceed. In particular:

> If:
>
> (a) confidential information is obtained by an arbitrator from a party during the mediation proceedings conducted by the arbitrator as a mediator; and
>
> (b) those mediation proceedings terminate without reaching a settlement acceptable to the parties, the arbitrator must, before resuming the arbitral proceedings, disclose to all other parties as much of that information as the arbitrator considers is material to the arbitral proceedings.

13 Item 12 of Schedule 1 to the Mediation Ordinance.

It is far from clear that the safeguard in section 33(4) will be adequate.

Presumably, where parties have agreed for med-arb to be conducted by the same person, the parties will be aware of section 33(4) and will go through their separate meetings with the mediator on the understanding that anything said may later be disclosed to the other party to the extent that "the arbitrator considers is material to the arbitral proceedings". The question is how the mediator can be sure, at any time before resuming the arbitral proceedings, that all relevant information communicated to him or her during the mediation has been disclosed.

Some apparently innocent piece of information communicated to the arbitrator during the mediation may, in the course of the arbitration, assume a significance that was not appreciated until later in the arbitration when the real issues in dispute between the parties finally emerge. There will always be the danger of the parties and the arbitrator discovering that some piece of information conveyed in the mediation ought to have been disclosed at the outset of the resumed arbitral proceedings.

Section 33(5) provides that: "No objection may be made against the conduct of the arbitral proceedings by an arbitrator solely on the ground that the arbitrator had acted previously as a mediator in accordance with this section." But can a complaint be made about the arbitration proceedings where, inadvertently, an arbitrator has failed to disclose a relevant communication, the significance of which was only realized late in the arbitration? Further, would an omission to disclose some material communication mean that the arbitrator had not acted in accordance with section 33 and so cannot rely on the protection in section 33(5)?

For all the foregoing reasons, med-arb – in which the same person performs the function of mediator and arbitrator – is uncommon in Hong Kong.

3.1.5.3 Adjudication

Adjudication is mainly used in the construction industry for resolving disputes quickly in the course of a project. The dispute comes before an adjudicating panel of one or more persons. The panel will have a limited number of days in which to come up with an adjudication. There will otherwise be the danger that a construction project will come to a standstill and be significantly delayed, if the dispute is not resolved speedily.

Once the project is completed, a party is at liberty to re-open the panel's adjudication. The party may do so before an arbitral tribunal or whatever forum the parties have agreed to for that purpose in their contract. Until such time as the adjudication is set aside, the panel's order is binding on the parties and is enforceable by the court.

HKIAC administers adjudication in accordance with HKIAC Adjudication Rules.[14] The Rules are based on a number of English and Hong Kong sources.[15] The Rules consists of five sections: (1) Object and Administration of Adjudication, (2) The Referral Process, (3) Conduct of the Adjudication, (4) Adjudication Decisions and Costs, and (5) Supplementary Provisions.

The Hong Kong government is intending to introduce security of payment (SOP) legislation for the construction industry at some stage. The SOP legislation will include a

14 Available at <www.hkiac.org/adjudication>.

15 For details, see the Introductory Notes to the Rules.

http://www.pbookshop.com

statutory scheme of adjudication. However, the detailed provisions of the proposed SOP legislation and when it will come into effect are unknown at present.[16]

3.2 Singapore

Singapore is perceived to be a rival of Hong Kong in competing for a share of the international dispute resolution market. It will be seen that, although there are significant differences in the approaches of Hong Kong and Singapore to the promotion of arbitration and ADR, there are also a large number of similarities.

3.2.1 Legislation

Singapore maintains a dual-track system of arbitration. Arbitrations based on domestic agreements are governed by the Arbitration Act (Cap.10), promulgated in 2001 and amended in 2012. The Act is based on the 1985 Model Law. Arbitrations arising out of international agreements are governed by the International Arbitration Act (Cap.143A) (IAA), also based on the 1985 Model Law. The IAA may also apply to non-international arbitrations if the parties agree in writing that Part II of the IAA and the 1985 Model Law will apply to the arbitration (section 5 of the IAA).

There is a statute for international investment disputes, the Arbitration (International Investment Disputes) Act (Cap.11, 2002 rev. ed.), which follows the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (also known as the ICSID Convention).

There are in addition some statutory arbitration schemes for certain types of disputes, such as the Private Education (Dispute Resolution Schemes) Regulations 2010 and the Estate Agents (Dispute Resolution Schemes) Regulations 2011.

Singapore acceded to the New York Convention in 1986.

3.2.2 Organizations

Much as Hong Kong, there are numerous organizations in Hong Kong providing arbitration-related services. Again, the organizations fall into two categories.

The first category comprises organizations that administer arbitration. The principal such organization is the Singapore International Arbitration Centre (SIAC). Other examples are the International Centre for Dispute Resolution-Singapore (ICDR-Singapore), the International Division of the American Arbitration Association (AAA), the Permanent Court of Arbitration (PCA), the International Chamber of Commerce (ICC), and the World Intellectual Property Organization (WIPO) Arbitration and Mediation Centre. Each institution will have usually have its own arbitration rules. Many have offices in Maxwell Chambers, an international dispute resolution complex located on 32 Maxwell Road.

The second category consists of institutes which complement the work of organizations in the first group. Examples are the Singapore Institute of Arbitrators (SIArb) and the Chartered Institute of Arbitrators Singapore Branch (CIArb Singapore Branch). The

16 For further information, see <www.devb.gov.hk/en/publications_and_press_releases/Consultation_Papers_Reports/sop/index.html>.

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Singapore Institute of Arbitrators is an independent professional body established in 1981. A main objective of the Institute is to promote knowledge of arbitration and other forms of ADR by organizing talks, seminars and training courses for members and the public on a regular basis. The Chartered Institute of Arbitrators Singapore Branch provides similar services and support as the East Asia Branch in Hong Kong.

3.2.3 Government support

The Ministry of Law (MINLAW) has played a significant role in the development of Singapore as an international dispute resolution hub. The Ministry has undertaken numerous initiatives to ensure that a comprehensive range of services and facilities are available in Singapore at competitive rates, so that parties have available a wide choice of means to resolve their cross-border commercial and other disputes. A recent bold initiative has been the establishment of the Singapore International Commercial Court (SICC) to handle disputes arising out of international commercial agreements containing a choice of court clause designating the SICC as the forum to resolve disputes.

The Ministry of Law has also supported the Centre for International Law and the Faculty of Law at the National University of Singapore (NUS) in setting up the Singapore International Arbitration Academy in 2012 to develop practitioners' skills in and knowledge of arbitration.

Two recent developments might be noted.

First, an act to allow third party funding of international commercial arbitration proceedings seated in Singapore, namely, the Civil Law (Amendment) Act 2017[17] was passed by the Singapore Parliament and assented to by the President in early 2017. The new law abolishes the common law torts of maintenance and champerty[18] and, in conjunction with the Civil Law (Third-Party Funding) Regulations 2017,[19] paves the way for third-party funding agreements of international arbitration and related court or mediation proceedings.

Secondly, to strengthen Singapore standing as an international dispute resolution centre, the size of Maxwell Chambers will be tripled.

3.2.4 Judicial support

Singapore courts have also shown a pro-arbitration attitude on a number of important issues such as the validity of an arbitration agreement, interim orders issued by an arbitral tribunal, challenges against arbitral awards, and the recognition and enforcement of arbitral awards. It should be noted in this connection that section 12A of the IAA empowers the Singapore court to order interim measures in support of arbitration proceedings, regardless of the seat of arbitration.

17 Available at: <http://statutes.agc.gov.sg/aol/download/0/0/pdf/binaryFile/pdfFile.pdf?CompId:ae379db0-c3da-4abe-ad09-1d1518181ee9>.

18 But the Act adds in a new section 5A(2) that, subject to section 5B (allowing third party funding under certain conditions), the abolition of the torts of maintenance and champerty "does not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal".

19 Available at: <http://statutes.agc.gov.sg/aol/download/0/0/pdf/binaryFile/pdfFile.pdf?CompId:3dcf06dd-e67f-46f0-b959-f1036c26db2d>.

Where the tribunal consists of more than one arbitrator, an award is by a majority. If the arbitrators do not have a majority decision, the presiding arbitrator alone may make the award for the tribunal.[48]

Rule 32.11 provides that:

> By agreeing to arbitration under these Rules, the parties agree that any Award shall be final and binding on the parties from the date it is made, and undertake to carry out the Award immediately and without delay. The parties also irrevocably waive their rights to any form of appeal, review or recourse to any State court or other judicial authority with respect to such Award in so far as such waiver may be validly made.

Rule 33 deals with the correction and interpretation of awards and the making of additional awards.

4.3 CIETAC arbitration rules

The China International Economic and Trade Arbitration Commission (CIETAC) has its headquarters in Beijing with sub-commissions in Shenzhen, Shanghai, Tianjin and Chongqing. CIETAC and its sub-commissions constitute a single entity. CIETAC has an Honorary Chairperson. It also has a Chairperson, several Vice-Chairpersons, and Members. Each sub-commission has a Secretariat with its own Secretary-General. The Chairperson of CIETAC oversees CIETAC's administered arbitrations in accordance with the CIETAC Rules. CIETAC has an Arbitration Court, which performs functions set out in the CIETAC Rules under the direction of a Vice-Chairperson and the President of the Arbitration Court.

The latest CIETAC Rules came into effect on 1 January 2015.[49] The Rules consist of seven chapters and the three appendixes. The Rules contain a Chapter VI entitled "Special Provisions for Hong Kong Arbitration". That applies to arbitration cases accepted and administered by the CIETAC Hong Kong Arbitration Centre. The latter is the first CIETAC branch established outside Mainland China and administers CIETAC arbitrations with a Hong Kong seat.

4.3.1 Appointment of tribunal

An arbitrator "shall be and remain independent of the parties and treat them equally".[50] The tribunal shall be composed of three arbitrators, unless the parties agree otherwise or the Rules provide otherwise.[51]

The parties typically nominate arbitrators from the CIETAC Panel of Arbitrators.[52] The parties may nominate a person who is not on the Panel, but the nomination will be subject to confirmation by the Chairperson.

Detailed provisions for the appointment of three-person tribunals, a sole arbitrator tribunal, and multiple-party tribunals are respectively to be found in Articles 27 to 29. When appointing arbitrators, the Chairperson takes into account "the law applicable to

48 Rule 32.7.
49 Available at <http://www.cietac.org/Uploads/201703/58c0fe0c7337a.pdf>.
50 Article 24.
51 Article 25.
52 Article 26.

the dispute, the place of arbitration, the language of arbitration, the nationalities of the parties, and other [relevant] factor(s)".[53]

Article 31 provides that an arbitrator "must disclose any facts or circumstances likely to give rise to justifiable doubts as to his/her impartiality or independence". The procedure for challenging an arbitrator is in Article 32. Arbitrators may be replaced in accordance with Article 33 and the arbitration may continue in accordance with Article 34.

4.3.2 Pleadings

Article 12 requires the claimant to submit a statement of claim with supporting documents and evidence as a part of its request for arbitration. Upon the receipt of a request for arbitration, CIETAC will forward the same together with a notice of arbitration and a list of CIETAC's panel of arbitrators to the respondent.[54] Article 15 requires the respondent to submit its statement of defence in writing within 45 days from the receipt of the notice of arbitration. The respondent may file a counterclaim at the same time.[55]

Article 17 allows the claimant to apply to amend its claim and the respondent to amend its counterclaim, unless the arbitral tribunal finds "amendment is too late and may delay the arbitral proceedings".

4.3.3 Conduct of proceedings

Article 6 empowers CIETAC to determine the existence and validity of an arbitration agreement and its jurisdiction over a case. But CIETAC may, where necessary, delegate such power to the tribunal. In this sense, the competence-competence principle is partially preserved. Any objection to an arbitration agreement or to the CIETAC's jurisdiction shall be made in writing before the first oral hearing held by the tribunal.[56] Where the case is administered by CIETAC Hong Kong Arbitration Centre, the tribunal has the power to rule on the existence and validity of an arbitration agreement and its jurisdiction over a case.[57]

Article 7 allows the parties to agree on the place of the arbitration. In the absence of agreement, the place of the arbitration shall be "the domicile of CIETAC or its sub-commission/arbitration centre administering the case". But CIETAC may also determine the place of the arbitration to be another location by taking into account the circumstances of the case.

Article 9 requires the arbitration participants "to proceed with the arbitration in good faith". Article 10 deals with waiver of right to object on account of non-compliance with the Rules.

Article 14 allows the claimant to initiate a single arbitration concerning disputes arising out of two or more contracts so long as the requirements set out in Article 14 are met.

53 Article 30.
54 Article 13.
55 Article 16.
56 Article 6(4).
57 Article 75.

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the latter rules for ad hoc arbitrations. But this would only be with some considerable difficulty, as it will be necessary for the parties wishing to use such rules for an ad hoc arbitration to consider how to deal with references in the rules to the administering institution or its officer performing a specific function. In contrast, the UNCITRAL Rules were originally intended for ad hoc arbitrations.[75]

4.4.1 Appointment of tribunal

In the absence of agreement, the tribunal is to consist of three arbitrators.[76] But, the appointing authority[77] may at the request of a party appoint a sole arbitrator "if it determines that, in view of the circumstance of the case, this is more appropriate". The authority must appoint the sole arbitrator as promptly as possible.[78] If three arbitrators are to be appointed, each party is to appoint one arbitrator and the two persons so designated are to appoint the third (presiding) arbitrator.[79] If the two party-designated arbitrators fail to appoint the presiding arbitrator within 30 days, the appointing authority shall appoint the presiding arbitrator. Article 10(2) allows the parties to agree that the tribunal is to be composed of other than one or three arbitrators. In such case, the arbitrators shall be appointed in the manner agreed by the parties. Where the tribunal fails to be constituted, the appointing authority shall at the request of a party constitute the tribunal.[80]

An arbitrator must "disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence".[81] Articles 12, 13, and 14 deal with challenges to and replacement of arbitrators.

4.4.2 Pleadings

The claimant is to submit a statement of claim with supporting documents in the notice of arbitration (Article 3) or in separate document (Article 20). The statement of claim must contain the matters listed in Article 20(2). Within the time determined by the tribunal, the respondent must submit a statement of defence with supporting documents.[82] The respondent may submit its statement of defence as part of a response to the notice of arbitration or as a separate document. The respondent may also make a counterclaim.

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75 It is possible to use the UNCITRAL Arbitration Rules in administered arbitrations. For example, the Permanent Court of Arbitration (PCA) (based in The Hague) administers arbitrations under its Arbitration Rules 2012. As acknowledged in the Introduction to those Rules, the PCA based its Rules on the 2010 UNCITRAL Arbitration Rules with changes made to "(i) Reflect the public international law elements that may arise in disputes involving a State, State-controlled entity, and/or intergovernmental organization; (ii) Indicate the role of the Secretary-General and the International Bureau of the PCA; and (iii) Emphasize flexibility and party autonomy". HKIAC also has issued a protocol for the administration by HKIAC of arbitrations under the UNCITRAL Rules. See HKIAC's Procedures for the Administration of Arbitration under the UNCITRAL Arbitration Rules, available at: <www.hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/2015_Procedures_for_the_Administration_of_Arbitration_under_the_uncitral.pdf>.

76 Article 7.

77 On the procedure for designating an appointing authority, see Article 6.

78 Article 8.

79 Article 9.

80 Article 10(3).

81 Article 11.

82 Article 21.

Subject to the tribunal's direction, a party may amend or supplement its claim or defence (including counterclaim).[83]

4.4.3 Conduct of proceedings

The tribunal may conduct the arbitration in such manner as it considers appropriate.[84] But the tribunal must secure that "the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case". Further, the tribunal should "conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute".

The parties may agree the place of arbitration.[85] In the absence of agreement, the tribunal must determine the place by taking into account the circumstances of the case. The tribunal may conduct hearings and deliberations at any location. But the award will be deemed to have been made at the place of arbitration.

Article 23 preserves competence-competence and the severability of the arbitration clause. The tribunal may therefore rule on its own jurisdiction and on the validity of the arbitration agreement.

The tribunal may grant interim measures.[86] In so doing, the tribunal can require a requesting party to "provide appropriate security in connection with the measure" and "disclose any material change in the circumstances on the basis of which the interim measure was requested or granted".

The treatment and use of evidence is dealt with in Article 27. Hearings are to be conducted in accordance with Article 28. The arbitral tribunal may appoint one or more experts under Article 29.

The tribunal may declare the hearings closed if the parties no longer have "any further proof to offer or witnesses to be heard or submissions to make".[87]

If a party fails to "object promptly to any non-compliance with these Rules or with any requirement of the arbitration agreement", such failure shall be deemed to be a waiver, unless the party proves that its failure to object was justified.[88]

4.4.4 Award

The tribunal may publish separate awards on different issues at different times.[89] An award must be in writing, and must be final and binding on the parties. An award must contain the reasons upon which the award is based, unless the parties have agreed otherwise. An award must be signed by the arbitrators and must state the date on which the award was made and the place of arbitration. The parties may agree that an award is to be made public.

83 Article 22.

84 Article 17.

85 Article 18.

86 Article 26.

87 Article 31.

88 Article 32.

89 Article 34.

Article 25 stipulates that the tribunal "shall proceed within as short a time as possible to establish the facts of the case by all appropriate means". The tribunal may determine what witnesses and experts will need to be heard or whether the arbitration can proceed solely on documents. Hearings are to be conducted in accordance with Article 26.

The proceedings will close "as soon as possible after the last hearing concerning matters to be decided in an award or the filling of the last authorised submissions".[99] The tribunal will then declare the proceedings closed and inform the ICC Secretariat and the parties of the date when it expects to submit a draft award to the ICC Court.

At the request of a party, the tribunal may grant interim or conservatory measures.[100] Where a tribunal has yet to be constituted, a party may apply for an emergency arbitrator, to be appointed according to Appendix V of the Rules, for urgent interim measures.[101]

Article 30 deals with the Expedited Procedure (the rules for which are to be found Appendix VI entitled "The Expedited Procedure Rules"). This is a feature that has been introduced by the 2017 Rules. Article 30 and Appendix VI will apply where the amount in dispute does not exceed US$2 million.[102] The parties may also agree to use the Expedited Procedure Rules in lieu of the ordinary procedure.[103] But the Expedited Procedure does not apply where an arbitration agreement was concluded before 1 March 2017; where the parties have agreed to opt out of the Expedited Procedure; and where the ICC Court determines that it is inappropriate.[104]

4.5.4 Award

Article 31 provides that the "time limit within which the arbitral tribunal must render its final award is six months". Times starts to run from the date of the signature or approval of the TOR. The ICC Court may extend the time limit. An award must contain the reasons upon which it is based. It is deemed to be made at the place of arbitration and on the date stated in the award.[105]

Before the award is signed, the tribunal must submit a draft to the ICC Court for scrutiny.[106] The ICC Court "may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance". The award is binding on the parties, who undertake to carry out the award without delay and are "deemed to have waived their right to any form of recourse in so far as such waiver can validly be made".[107] Article 36 deals with the correction, interpretation and remission of awards.

99 Article 27.
100 Article 28.
101 Article 29.
102 Appendix VI, Article 1(2).
103 Article 30(2)(b).
104 Article 30(3).
105 Article 32.
106 Article 34. On 5 January 2016, the ICC announced that, where there is unjustifiable delay in the submission by a tribunal of a draft award for scrutiny, the ICC Court will consider reducing the tribunal's fees by between 5% to 20%, depending on the extent of delay. This measure is likely to be copied in the future by other arbitral institutions.
107 Article 35(6).

4.6 Conclusion

In essence, the rules examined here are standard "off-the-peg" packages, which parties can readily adopt in the arbitration clauses of their international commercial contracts. The "packages" save parties and tribunals from the trouble, inconvenience and time of designing their own procedural rules from scratch every time there is a dispute. Arbitrations under the rules will often be administered, with a fee (which may be high) being payable to an institution or centre for administering the arbitration.

From the sample of rules surveyed, it will be seen that arbitration rules are essentially the same, differing from each other in relatively minor ways (such as time limits for certain steps or the TOR requirement for ICC arbitrations). Subject to a basic framework, the rules attempt to give the tribunal a wide discretion to tailor the conduct of the arbitration to the needs of a case.

The "sameness" of arbitration rules is not surprising. Given intense competition among bodies administering arbitrations to attract business to themselves, the successful innovations of one institutional set of rules are likely to be copied by everyone else, for fear of being left out. On the other hand, any troublesome or overly bureaucratic rules are bound to be dropped from the next edition of an institution's rules for the same reason.

It would therefore appear that, in the future, there will be a growing convergence in the bodies of rules issued by arbitration institutions. This greater convergence of rules may be welcomed as a precursor to the development and articulation of internationally accepted minimum standards of due process.

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the parties' intentions as manifested by the terms (which may have been badly expressed) in their agreement.

The other ground is less straightforward. An appointment may be challenged "if circumstances exist that give rise to justifiable doubts as to his impartiality or independence". On the face of it, the second ground is similar (if not identical) to the test for apparent bias identified in the oft-cited case of *Porter v Magill*.[5] The latter test is "whether an objective fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the tribunal was biased" and the test has been applied by the Hong Kong court to the question of apparent bias in an arbitrator.[6] It would consequently be tempting to think that, in deciding whether one is qualified to sit as an arbitrator in a case, a person should go through similar considerations as a Hong Kong judge would when deciding whether or not to recuse one's self from hearing a case.

But caution is necessary when dealing with international commercial arbitration. A party to the arbitration may not be from a common law jurisdiction. The party may be unfamiliar with practices that are taken for granted in litigation before the Hong Kong court.

Thus, in Hong Kong, a distinction is drawn between solicitors and barristers. Solicitors typically act in a firm in partnership with each other. A solicitor would consequently have an interest in the outcome of a case being handled by another solicitor in the firm, because the handling of the case will affect the profits and liabilities of the partnership that is the solicitors' firm. In contrast, barristers are sole proprietors. They cannot enter into partnership with one another. They may form "chambers" and share certain common expenses (for example, secretarial and administrative staff salaries; rental of premises; and payments for equipment (photocopiers, fax machines and telephone systems, etc)). But they remain independent from each other. A barrister does not share profits or liabilities with other barristers in chambers.

Accordingly, it is not uncommon for a barrister to appear before a deputy judge or recorder who is also from the same chambers. In Hong Kong litigation, this circumstance would not normally be thought to justify an application that the deputy judge or recorder recuse himself or herself from hearing a case. The barristers are regarded as wholly independent from each other.

But, in an arbitration, a party not accustomed to Hong Kong practice might query whether it is appropriate for a barrister to sit as arbitrator in a case where another barrister from his or her chambers is acting as counsel for the other side. In the complaining party's view, there may not be a practical difference between barristers working from a set of chambers and solicitors operating as a firm. The difficulty may be compounded by the fact that, frequently, barristers are not instructed in a case until long after the constitution of a tribunal. Barristers may not be appointed to represent a party until shortly before the substantive hearing of an arbitration. If it is objectionable for an arbitrator and a party's counsel to be from the same chambers, how does one deal with the situation where a barrister from the same chambers is appointed and objection is taken by the other side? Can a party in effect prevent the opposite party from using a particular barrister (who

5 [2002] 2 AC 357 (HL).

6 See *Granton Natural Resources Co Ltd v Armco Metals International Ltd* HCCT No. 5 of 2012, 7 December 2012 (Anthony To J), at [22].

may be highly capable) by objecting on the basis that the latter was appointed after the members of the tribunal were known?

For similar reason, a party might query the appropriateness of two barristers from the same set of chambers sitting in a panel of arbitrators. The two barristers will be said to share the same interest, since they work out of the same chambers and share common expenses. It will be argued that, as colleagues in the same chambers, they would be more prone to agree with each other, rather than to approach a dispute with truly independent minds.

From what standpoint then does a barrister evaluate for the purposes of an international commercial arbitration "whether circumstances exist that give rise to justifiable doubts as to his impartiality or independence"? If one looks at the matter from the viewpoint of a fair-minded observer who is informed about Hong Kong litigation practice, it might be said that nothing exists that can give rise to a justifiable doubt. But if one looks at the matter from the standpoint of a fair-minded observer who is informed about international standards of due process, but not necessarily knowledgeable about the practices in Hong Kong as a common law jurisdiction, it is possible to arrive at a different conclusion.

After carefully reviewing available case law on the matter, Hollander and Salzedo[7] (both barristers) reluctantly acknowledge:

> Whatever the English law position, there does seem to be increasing evidence of cases where an arbitrator has been disqualified because counsel was in the same chambers. There is a decision of the International Court of Arbitration for Sport where the tribunal disqualified an arbitrator because he was in the same chambers as one of the advocates: in *Brescia Calcio SpA v West Ham United Plc*[8] Judge Coates, the Australian president of ICAS, ruled that gave rise to 'legitimate doubts' over the arbitrator's independence within the meaning of CAS Rule 34. The tribunal applied the Swiss Federal Code. So too in 2010 the ICC upheld a challenge to the claimant-appointed arbitrator on the basis that she was a member of the same barristers' chambers as two members of the claimant's additional counsel.[9] There are probably . . . other cases to the same effect that have not been reported.

Hollander and Salzedo believe that this trend of disqualifying barristers from acting as arbitrators when they come from the same set as counsel is less than satisfactory. They point out:[10]

> An inexperienced litigant before the English courts might have all sorts of legitimate concerns from the fact that the part-time judge was in the same chambers as opposing counsel, but the fair-minded observer who knew the facts would be taken to know that there was no reason to be concerned. So as a matter of English law and practice, the foreign client who is concerned about the arbitrator being connected with the same chambers as counsel should have no better right to object. Yet that is not how it seems to be perceived amongst the arbitration community.

An attempt by the international arbitration community to provide guidance on questions of conflict of interest may be found in the latest version of the *IBA Guidelines on Conflict of Interest*. These were adopted by resolution of the International Bar Association (IBA)

7 C Hollander and S Salzedo, *Conflicts of Interest* (5th ed, Thomson Reuters, 2016), at [14–027].

8 [2012] ISLR SLR-40.

9 ICC Case No.16553/GZ.

10 *Conflicts* (n 7), at [14–028].

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opportunity that a barrister from the same set of chambers has been instructed by a party or has been appointed to the same tribunal.

It will then be for a party to decide whether to mount a challenge. The outcome of a challenge will depend on the circumstances. For example, where counsel is instructed after a tribunal has been constituted, it may not be a question of an arbitrator from the same set of chambers stepping down. It is more likely to be an issue (if at all) whether the fact of counsel representing a party in such circumstances would give rise to justifiable doubts as to the impartiality and independence of the arbitrator and (if so) whether the counsel belatedly instructed should be allowed to continue representing the party. Otherwise, a party could derail an arbitration by deliberately instructing a barrister from the same chambers as a previously appointed arbitrator and then challenging that arbitrator's ability to continue sitting.

Usually, a person contemplating appointment as an arbitrator will have some idea who a party's legal representatives are, because the relevant names will be set out in the notice of arbitration and answer to the notice. General Standard 7(b) imposes a duty on a party to inform the tribunal and the other side at the earliest opportunity of the names of its counsel "as well as of any relationship, including membership of the same barristers' chambers, between its counsel and the arbitrator". Therefore, an arbitrator should be aware at any given point in time whether there is need for disclosure of a relationship with counsel or an arbitrator from the same chambers.

One other situation that is likely to give rise to questions of potential conflict is the case where persons are repeatedly appointed as arbitrators by a party or its legal representatives. To what extent should the frequency of one's appointments by a particular party or firm of solicitors have to be disclosed under the Guidelines? Might not an arbitrator in drawing up awards favour a party that repeatedly appoints him or her as arbitrator? To do otherwise would potentially be to bite the hand that feeds one. So (it might be suggested) consciously or sub-consciously an arbitrator would realize that an adverse finding against the party appointing him or her, could lead to re-appointments from that party drying up. That could seriously curtail one's career as arbitrator, especially at the moment when one is just starting out.

Under the Guidelines, disclosure is necessary where there have been re-appointments within a period of three years. The Orange List in para.3.1.3 provides that an arbitrator must disclose the fact that he or she "has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties". "Affiliate" is defined in footnote 4 of the Guidelines as a term that "encompasses all companies in a group of companies, including the parent company".

But para.3.1.3 is qualified by footnote 5 of the Guidelines. That states:

> It may be the practice in certain types of arbitration, such as maritime, sports or commodities arbitration, to draw arbitrators from a smaller or specialized pool of individuals. If in such fields it is the custom and practice for parties to frequently appoint the same arbitrator in different cases, no disclosure of this fact is required, where all parties in the arbitration should be familiar with such custom and practice.

The exception in footnote 5 makes sense in specialized arbitrations where the pool of experienced arbitrators, especially those available in a small jurisdiction such as Hong Kong, is limited.

Paragraph 3.1.5 of the Orange List further requires disclosure where an arbitrator "currently serves, or has served within the past three years, as arbitrator in another arbitration involving one of the parties, or an affiliate of one of the parties". Presumably, para.3.1.5 would also be qualified in the situations described by footnote 5. In commodities or shipping arbitrations, the pool of experienced arbitrators to be found in Hong Kong is not large. It may additionally not always be practical to appoint arbitrators from outside Hong Kong for arbitrations with a Hong Kong seat, especially where the amount in a dispute is relatively small (as in many shipping arbitrations).

Where one is repeatedly appointed as arbitrator by the same law firm, albeit acting for different clients, the Orange List in para.3.3.8 provides for disclosure where the arbitrator "has within the past three years, been appointed on more than three occasions by the same counsel, or the same law firm". Again, as a practical matter, it is suggested that para.3.3.8 needs to be read in the context of footnote 5.

It should be stressed that the Guidelines are precisely that. They simply give guidance. They are not intended to be applied mechanically. The situations mentioned in the Lists are merely examples to help tribunals, parties and other stakeholders to decide by analogy whether a conflict of interest arises.

The Guidelines in Part II, para.6 point out that:

> [A]n arbitrator needs to assess on a case-by-case basis whether a given situation, even though not mentioned in the Orange List, is nevertheless such as to give rise to justifiable doubts as to his or her impartiality or independence. Because the Orange List is a non-exhaustive list of examples, there may be situations not mentioned, which, depending on the circumstances, may need to be disclosed by an arbitrator. Such may be the case, for example, in the event of repeat past appointments by the same party or the same counsel beyond the three-year period provided for in the Orange List, or when an arbitrator concurrently acts as counsel in an unrelated case in which similar issues of law are raised. Likewise, an appointment made by the same party or the same counsel appearing before an arbitrator, while the case is ongoing, may also have to be disclosed, depending on the circumstances. While the Guidelines do not require disclosure of the fact that an arbitrator concurrently serves, or has in the past served, on the same Arbitral Tribunal with another member of the tribunal, or with one of the counsel in the current proceedings, an arbitrator should assess on a case-by-case basis whether the fact of having frequently served as counsel with, or as an arbitrator on, Arbitral Tribunals with another member of the tribunal may create a perceived imbalance within the tribunal. If the conclusion is "yes", the arbitrator should consider a disclosure.

The case-by-case basis espoused by the Guidelines can cut both ways. The mere fact that a situation is not listed will not automatically mean that an arbitrator can sit in a reference. By the same token, the mere fact that a matter falls within (say) the Orange List will not necessarily mean that disclosure is absolutely required (as opposed to being advisable).

In *W Limited v M SDN BHD*[12] Knowles J observed:

> 33. The 2014 IBA Guidelines make a distinguished contribution in the field of international arbitration. Their objective, to assist in assessing impartiality and independence, is to be commended.
>
> 34. It is therefore with diffidence that I say that the present case suggests there are weaknesses in the 2014 IBA Guidelines in two inter-connected respects. First, in treating

12 [2016] 1 CLC 437, [2016] 1 Lloyd's Rep 552.

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The author favours this first approach as a means of efficiently managing a case from the outset for two reasons.

One reason is that it enables the tribunal to identify from the beginning what the issues in dispute between the parties actually are. This is accomplished by matching the propositions in a party's pleading against the corresponding admission, non-admission or denial in the other party's pleading. Dispute resolution is issue-driven. It is important for a tribunal and the parties to know from the start what exactly an arbitration is supposed to decide. In that way, as the arbitration proceeds, given good faith on everyone's part, the issues can be narrowed. Matters where the parties are essentially agreed or where there is no real dispute can be disposed of quickly and the arbitration can concentrate on the real issues in contention.

In pleadings the parties set out the contentions of fact, law and evidence upon which they each wish to rely. The pleadings thereby help in identifying what is admitted or agreed and what is disputed. The pleadings are therefore an essential roadmap for highlighting the areas of dispute (that is, the issues) that will need to be determined in the arbitration. As evidence is compiled in the course of preparations for the substantive hearing of the arbitration and each side is able to assess the strengths and weaknesses of its case and that of the opposing side on a given issue, the hope is that the parties will see sense and agree on some issues. That will narrow the matters in dispute to the real issues that the tribunal will ultimately have to decide in its award.

The other reason is that, the real issues having been identified through the pleadings, the parties can propose how those issues are to be determined by the tribunal (that is, what further procedural steps need to be taken to deal with the matters in dispute between the parties in a cost-effective, efficient and fair manner). The approach respects the principle of party autonomy by giving the parties a voice on how their dispute is to be resolved. The tribunal can be flexible here and follow whatever course the parties agree upon. Where the parties are unable to agree on directions, the tribunal can at least take account of their reasons for one or other mode of proceeding and decide how the arbitration should continue. With the parties' input, the tribunal can decide how best to deal with the issues highlighted in the pleadings.

The alternative approach is to issue a comprehensive order for directions no.1 that covers all aspects of the arbitration from the filing of pleadings to the substantive hearing of the arbitration.

An example of a comprehensive order for directions no.1 is in the appendix to this chapter. Some arbitrators like providing even greater detail than that contained in the example. For instance, some arbitrators give specific directions as to the time on any given due date (for example, the close of business hours) pleadings and documents are to be submitted; the electronic formats (for example, Word or pdf) in which pleadings and other documents should be submitted; how many days before a due date applications for extensions of time should be made; the dates and manner in which opening submissions should be filed; the way in which bundles for substantive hearing of the arbitration are to be compiled (including how exhibits to pleadings and witness statements should be identified); the time allotted for examining witnesses on each side during the substantive hearing; and the manner in which the substantive hearing will proceed (including the weight to be given (if any) to the evidence of a witness that has not been cross-examined).

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This alternative approach has the benefit of furnishing a detailed timetable for the arbitration right from the beginning. But it is not the author's preferred approach, because it assumes that there is a "one size fits all" way of proceeding with an arbitration. Moreover, the elaborate timetable in the tribunal's initial order will often be a matter of guesswork. Before full pleadings have been submitted, it will usually not be possible to have a clear idea what periods of time will be required by specific steps. What will often happen then is that, in the course of the arbitration, the parties will inevitably seek extensions of time from this or that due date stipulated in the comprehensive order. That will then necessitate a re-calibration of the remaining dates in the timetable. Sometimes matters crop up (for instance, a challenge to jurisdiction or an application for the arbitration to be bifurcated with (say) the issue of liability being heard before the determination (if any) of quantum), after the pleadings have crystallized the real differences between the parties. These new matters will then somehow have to be fitted within the comprehensive timetable directed by the tribunal at the outset in its order for directions no.1.

Thus, the author's preference is for proceeding in at least two steps. First, get the parties to plead their respective cases fully in order to identify the real areas of dispute between them. Second, once the parameters of the dispute have been defined by the pleadings and one has a better idea of what steps and durations might be involved, tailor a programme for the arbitration that will resolve the parties' differences in the most efficient and cost-effective manner.

The extra time taken by the author's preferred approach (that is, the time attributable to obtaining the parties' views on how the arbitration should proceed in light of the pleadings) is unlikely to delay the arbitration in a substantial way. The parties can have between one or two weeks to suggest how the arbitration should proceed to deal with the issues raised by the pleadings. In contrast, the more complex or comprehensive a proposed order for directions no.1 is going to be, the more time the parties will need to comment on the directions being proposed by the tribunal before its order for directions no.1 is even made. At the end of the day, the difference in time (if any) between the two approaches will not be much.

Consider now two common situations.

First, it sometimes happens that an answer to a notice signals that there will be a challenge to jurisdiction. A tribunal might think it desirable to proceed straightaway into determining the jurisdictional challenge. Its order for directions no.1 might accordingly consist solely of directions (possibly within an expedited time frame) for the respondent to state its case on lack of jurisdiction, for the claimant to explain why there is jurisdiction, and for the respondent to reply to the claimant. The tribunal might further direct that the parties are to advise whether the jurisdictional challenge can be dealt with on documents and the parties' written submissions alone, or whether an oral hearing will be needed. If there is to be oral hearing, it will typically, in an international commercial arbitration, be in the form of a short tele-conference, saving the parties and the members of the tribunal (all of whom may be in different parts of the world) the cost of travelling to Hong Kong for a hearing that is likely to last for no more than two to three hours.

Another situation that can arise is where an aggressive claimant insists on the tribunal giving the respondent a very short time frame (for example, seven days or less) in which to submit a statement of defence. In such case, the claimant will often suggest that its application is urgent and in any event the respondent really has no defence. The claimant

the need to engage in negotiation or mediation for a specified period before proceeding to arbitration) has yet to be met. Finally, it might be argued that, although the parties apparently agreed to arbitrate their differences, the agreement to arbitrate is invalid due to some factor such as mistake, misrepresentation (whether fraudulent, negligent or innocent), undue influence, duress, corruption or illegality that has the effect of vitiating the parties' contract (including the arbitration agreement) under the relevant governing law.

Given the principles of competence-competence and separability, the tribunal has the power to rule on its jurisdiction in all four of the situations just enumerated.

Consider, for example, the facts of the High Court case *Klöckner Pentaplast Gmbh & Co KG v Advance Technology (HK) Co Ltd*.[3] The question there was whether an agreement providing that "arbitration proceedings shall be held in accordance with the arbitration rules of the International Chamber of Commerce (ICC)" was a valid clause under its governing law. The seat of the arbitration was Shanghai and the arbitration was to take place there. Advance Technology contended that the arbitration agreement was null and void due to illegality under PRC law as the governing law. Klöckner, on the other hand, argued that the governing law of the clause was German law and the clause was valid under that law. There was no clear express choice of law in relation to the arbitration agreement or the underlying contract. On what principles might a tribunal determine such a case?

In his judgment, Saunders J first noted that, where the parties have expressly stipulated the governing law of an arbitration agreement, that choice should be respected, even where the consequence would be that a different law would govern the arbitration agreement from the law governing the rest of the contract. The judge accepted (at [22]–[27]) that, in many cases where no express choice of law has been made, the parties might be treated as having implicitly chosen the law of the seat of arbitration as the governing law of an arbitration agreement. This would be because "practical difficulties may arise when the *lex arbitri* is different to that of the seat of the arbitration" (at [23]). But it is not invariably the case that law of the seat of arbitration is to be taken as the governing law of an arbitration agreement. Instead, it is necessary to construe the arbitration agreement in the context of the contract as a whole to discern what law the parties must have intended to govern the arbitration agreement.

Saunders J reasoned that it would be odd if the parties had intended that what was clearly an arbitration agreement should be null and void under its governing law. Yet that would be the result, if (as Advance Technology submitted) PRC law was the governing law of the arbitration agreement.[4] It was more likely, especially in light of other provisions in the rest of the arbitration agreement and the underlying contract, that the parties intended the arbitration agreement to be governed by German law. Under the latter, the agreement to arbitrate would be valid and that was more consonant with the expectations of ordinary business people.

It is submitted that a tribunal's approach in determining the law applicable to an arbitration agreement should mirror the judge's approach in *Klöckner*. The key principle is

3 [2011] 4 HKLRD 262, (Saunders J).

4 This was because it is not possible under PRC law to have an ad hoc arbitration with a Mainland China seat, and PRC law at the time did not treat the reference in the clause to arbitration under ICC rules as sufficient to designate the ICC as the administering body for the arbitration.

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party autonomy. Effect ought to be given to the parties' intentions as manifested in the relevant contract (including the terms of an arbitration clause). Thus, where parties have in good faith chosen an applicable law to their arbitration agreement, that choice should be respected. Where the parties have not expressly chosen an applicable law, the contract as a whole needs to be construed in light of all relevant circumstances at the time of execution, to discern what the parties must have intended to be the governing law of the arbitration agreement. It may be that, on the balance of probability, given the inconveniences that can arise from discrepancies between the law of the seat and the governing law of an arbitration agreement, the parties can be assumed to have intended the latter to be the same as the former. But there is no presumption to that effect.

Nor is there a presumption that the parties must have intended the law governing the underlying contract to be the same as the law governing the arbitration agreement. Again, considering all relevant facts, a tribunal might conclude that in all probability such was what the parties had in mind. However, that conclusion has to be reached as a matter of analysis of the facts of a given case, rather than by the application of some hard-and-fast *a priori* rule.

In determining the law applicable to an international commercial contract as a whole, assistance may be derived from the Hague Choice of Law Principles in International Commercial Contracts.[5] The Principles were approved by the Hague Conference on Private International Law's General Council on General Affairs and Policy in March 2015. The Principles constitute the first soft law instrument that the Hague Conference has produced and, as mentioned in the Preamble to the Principles, are intended for application by courts and arbitral tribunals.

The Principles apply to "international commercial contracts". But the expression is deliberately left undefined. There is only a negative definition of what is to be considered "international". Article 1(2) of the Principles states that "a contract is international unless each party has its establishment in the same State and the relationship of the parties and all other relevant elements, regardless of the chosen law, are only connected with that State". The closest that one comes to the definition of "commercial" is in Article 1(1), referring to the Principles applying to "choice of law in international contracts where each party is acting in the exercise of its trade or profession". Further, Article 1(1) expressly excludes consumer or employment contracts, so that presumably such contracts are not to be regarded as "commercial" contracts, however "international" they may otherwise be.

It should be noted that Article 1(3)(b) expressly says that the Principles are not for use in determining the law governing arbitration and choice of court agreements. The Principles are instead on their face only meant to assist in the identification of the law governing the parties' substantive obligations. Nonetheless, the approach to determining the governing law of a contract under the Principles is similar to the approach discussed above in relation to determination of the governing law of an arbitration agreement. In particular, the Principles in Article 2 enshrine the principle of party autonomy as the basis upon which the governing law should be determined. This is clear from Article 2(1) which provides that a contract is "governed by the law chosen by the parties". It is

5 Available with a commentary at <www.hcch.net/en/instruments/conventions/full-text/?cid=135>.

Article 3 of the Hague Principles imposes a limitation on what would constitute an acceptable body of non-national or non-state rules that a tribunal can apply. Any rules designated by the parties must be "generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise". If there should be a dispute, the tribunal can determine whether a set of rules meet the criterion in Article 3, as a matter of evidence and argument. It would be up to one or either party to satisfy the tribunal that a set of rules is or is not generally accepted.

Consider, for example, the situation where the parties have expressly agreed that the *lex mercatoria* should govern. It would be an impossible task comprehensively to list out the rules comprising the *lex mercatoria* at any given time. Consequently, a tribunal might conclude that the *lex mercatoria* would not (and probably could never) meet the requirement in Article 3.

On the other hand, a different tribunal may conclude that, for the purposes of qualifying under Article 3, it is unnecessary that one should be able to specify the entire body of principles making up the *lex mercatoria*. It would be enough if each party were to identify the specific rules applicable to their dispute and then the tribunal determines whether such rules are or are not generally accepted as forming part of the *lex mercatoria* in the sense of the norms governing commercial relationships among business persons. The analogy would be with the common law. It will not be possible at any given time to identify all the principles of the common law. But that fact alone will not deter a court or tribunal tasked with applying the common law of a state, from determining whether some principle raised by a party is or is not part of the common law.

It should be stressed that one is dealing here with the application of a body of rules (such as the UNIDROIT Principles) as the "law" applicable to an agreement. One is not merely talking about treating (say) the UNIDROIT Principles as being incorporated lock, stock and barrel as terms of an international commercial contract.

There is one other point to be noted in Article 28. By Article 28(2), a tribunal has a duty ("shall apply") to ascertain "the law determined by the conflict of laws rules which it considers applicable". Further, by Article 28(4), where there are relevant trade usages and customs, the tribunal is obliged to ("shall") take account of them. These provisions are expressed in mandatory form, indicating that a tribunal has to be proactive in applying foreign law or trade usage when applicable to a case. The tribunal cannot simply stand by passively and permit questions relating to the applicability of foreign law and trade usage go by default.

In litigation practice, it is left to the parties to raise foreign law or trade usages and customs. If the parties do not plead foreign law or trade usages, the Hong Kong judge is not obliged to ask the parties whether any foreign law or trade usage is applicable and (if so) what the content of that foreign law or trade usage is. Where the parties are silent on (say) foreign law, the judge may simply assume that, if foreign law is applicable, it is the same as Hong Kong law as the *lex fori*. The judge can accordingly proceed to apply Hong Kong law. However, would a similar approach be permissible in an international commercial arbitration with a Hong Kong seat? Would a tribunal be entitled to assume that, no mention having been made of foreign law by the parties, foreign law is the same as the *lex fori* and that the *lex fori* of an arbitration with a Hong Kong seat is Hong Kong law?

It is submitted that, where on its face a case appears to raise questions of foreign law, Article 28(2) requires a tribunal to inquire of the parties or their lawyers how they envisage such questions of foreign law are to be dealt with in the course of the arbitration. If the parties agree that the tribunal can simply proceed on the basis that foreign law is the same as the law of the seat of arbitration (say, Hong Kong), the tribunal may safely proceed on that basis given the principle of party autonomy. But it would not be appropriate merely to apply Hong Kong law by default on the assumption that a rule of civil procedure before the Hong Kong court (namely, the rule that foreign law will be treated as equivalent to Hong Kong law, unless pleaded otherwise) applies equally in international commercial arbitrations with a Hong Kong seat.

Article 28(4) points to a like approach where trade usages or customs are concerned, although here it will be less apparent on the face of a case (unless a party actually brings up the matter) that a trade usage or custom is involved.

If a party says that foreign law is indeed relevant and that it intends to rely on the same, there will then be a question of how foreign law is to be determined in the course of the arbitration. Suggestions on how that may be done will be found in Chapter 9.

6.3 Case management

Article 18(3)(c) of the Model Law (enacted by section 46 of the Arbitration Ordinance) imposes an obligation on a tribunal: "to use procedures that are appropriate to the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for resolving the dispute to which the arbitral proceedings relate". The tribunal, therefore, has a duty to manage proceedings proactively in order to ensure that matters proceed without unnecessary delay. In this respect, the Arbitration Ordinance and the Model Law give the tribunal significant powers to progress an arbitration, including (as noted above in relation to section 47 and Article 19(1)) the power to determine whatever procedures may be appropriate for disposing of a case fairly, expeditiously and cost-effectively.

But what happens when a party refuses to play ball and either refuses to follow the tribunal's directions at all or constantly seeks adjournments? It is on such situation, not uncommon in international commercial arbitrations, that this section concentrates.

It is tempting in the case of a defaulting party for a tribunal to respond in the manner of the Hong Kong court. The judge makes directions and, if there is no compliance with the directions within a reasonable time, the court can impose proportionate sanctions, including (where appropriate) the making of a judgment in default. But it is not as straightforward in the context of international commercial arbitration.

A tribunal is duty-bound to produce an enforceable award. Arbitration is not an academic exercise. At the end of the process, it is meant to produce a concrete result that will be of practical value to the claimant. That concrete and practical result should be an award that will be enforceable where the respondent has assets. The difficulty is that the many jurisdictions that are party to the New York Convention do not all share the same notions of due process. Some are more stringent than others. Some might find what could be regarded as trivial lapses in other jurisdictions, as tantamount to a substantial denial of a respondent's right to be heard, such that an award may be denied recognition and enforcement under Article V(1)(b) of the New York Convention.

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