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HANDBOOK ON INTERNATIONAL ARBITRATION

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About the Author

Greg Laughton is a Senior Counsel practising at 13 Wentworth Chambers and 1 Gray's Inn South London.

He has postgraduate qualifications in international commercial and competition law, and has extensive experience in these.

He has wide experience in international dispute resolution involving private corporations and state owned enterprises in significant disputes worldwide, particularly in Europe and the Asia Pacific Region.

He deals with disputes across civil and common law jurisdictions in an extensive range of areas including information technology; sale of goods; maritime; oil and gas; construction; supply chain/distribution; energy; infrastructure; cross border insolvency; finance; corporate transactions; general commercial; joint ventures; insurance and re-insurance; fraud; professional liability; intellectual property; deceased estates; environment; import and export and others.

He has appeared in and conducted arbitrations and cross border and international investment disputes in numerous jurisdictions particularly within the United Kingdom; continental Europe and the Asia Pacific Region.

He regularly advises on and argues in Courts or in arbitrations: choice of law; choice of jurisdiction; comparative law and cross-cultural disputes across civil and common law jurisdictions.

His collaboration with barristers in and his unlimited access to the facilities in his London Chambers in 1 Gray's Inn Square, London gives him unfettered access to the United Kingdom and continental Europe and provides him with a significant competitive advantage. It ensures he is effective in transnational and multinational disputes, which require strategies that are coordinated, particularly when multinational laws apply.

His experience and expertise give his clients flexibility and the ability to efficiently dispose of disputes in many jurisdictions, at the lowest cost achievable.

His aim is to keep costs to a minimum, while achieving the best outcome.

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WHAT IS INTERNATIONAL ARBITRATION?

1. The world is a much smaller place than it was even ten years ago. The international trade of goods and services across international borders and territories by governments and private entities continues to increase at a rapid rate.
2. The world economy is projected to grow in 2016 by 3.4%, rising to a rate of 3.6% in 2017 and beyond.¹
3. The rate of growth in advanced economies is projected to gradually increase, and, despite the slowdown in China's economy, developed and emerging economies are expected to grow.²
4. The rapid increase in international trade has been accompanied by a significant expansion in globalisation and therefore the reach of international trade, which has produced relationships between entities and countries that are diverse in terms of:
 - 4.1 cultural perceptions and norms, and as a consequence;
 - 4.2 the legal systems that cater for and regulate a wide range of cultural perspectives and norms,so that what is usual for one entity or country is an anathema to another.
5. The rapid increase in international trade and its reach has led to increasingly complex and diverse commercial and diplomatic relationships between businesses, investors and countries.
6. Almost inevitably, disputes arise and parties need, at the outset of the relationship, to consider and provide for, in any agreement they have, the best means of resolving any disputes that may arise (the dispute resolution clause).
7. From a commercial perspective, the dispute resolution clause should have, as one of its priorities, the aim of preserving the relationship between the parties, if at all possible. It may not be, but particularly when a dispute arises in an ongoing relationship, such as a construction contract or an agreement for the continuing supply of goods or services, the dispute resolution clause should contain steps, such as "escalation" provisions, that attempt to resolve the dispute before the parties become entrenched in their respective positions, and the commercial relationship between them reaches the point of being unworkable and fails.
8. The best way to resolve many disputes is arbitration.

¹ International Monetary Fund - World Economic Outlook, updated January 2016

² International Monetary Fund - World Economic Outlook, updated January 2016

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9. Arbitration has been used to resolve disputes for centuries. It is spoken of with approbation in the Old Testament³ and in the New Testament.⁴
10. Arbitration was common in northern Europe.⁵
11. Plato advocated arbitration in the last of his works⁶ and the Romans used it extensively.
12. In contemporary times, arbitration became popular in resolving maritime; construction; commodity and insurance disputes in which arbitrators with expertise in particular industries were appointed.
13. Since the 1960s, arbitration across almost all major industry sectors has been increasingly used to resolve both simple and complex transnational and multinational disputes, commercial and state.
14. It has resulted in increasingly harmonised arbitration practices throughout the world.
15. While not identical, many jurisdictions such as Hong Kong; Singapore; the United Kingdom; Dubai Financial Centre and Australia have similar legislation, which promotes and protects the intention of the parties to have their disputes resolved by arbitration reflected in any arbitration clauses that they have entered.
16. Many jurisdictions have similar rules about the conduct of arbitrators.

SUMMARY OF THE ADVANTAGES OF ARBITRATION

Neutral Forum

17. (A) properly selected arbitrator(s) is/are neutral. For various reasons, a party will not necessarily want to have a dispute determined by the Court of the country of the other party. The legal system may be very different to that which a party understands and the Courts may be unreliable for a variety of reasons. International arbitration can provide a neutral forum for dispute resolution.

Enforceability

18. 156 countries are parties to the *New York Convention*, 1958, which is a multilateral treaty for the enforcement of arbitral awards. As a result, arbitral

³ Zecharia 8.16.2; Sam 8.15

⁴ 1Corinthians 6.5

⁵ Maureen Cain and Kalman Kulcsar "Thinking with Disputes" and an Essay in the Origins of the dispute industry; *Law and Society Review* 16, (1981/2) at 375.402

⁶ David Luban "Some Greek Trials"; "Order and Justice in Homer" Hesiod, Aeschylus and Plato, (1986) 54 *Tennessee Law Review*, 279

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awards are more widely enforceable in the signatory states, and the Court processes in the signatory states in which arbitration awards are enforced are more accessible and streamlined. The Convention makes arbitral awards more easily enforceable than interstate Court judgments or awards.

Procedural Flexibility

19. Arbitration rules are more simple; flexible and streamlined than most Court civil procedural rules. Parties from different jurisdictions are more easily able to understand, and therefore comply with, the arbitral rules.

Arbitrators with Expertise

20. The parties can select arbitrators with industry; country or other particular expertise, whereas in Court the parties are provided with a judge who may or may not have specialist expertise in particular areas.
21. Also, arbitrators with knowledge of practices; trade usage and other technical aspects in arbitration can be selected. The arbitration proceeds more quickly and often with less need for expert evidence to be called on subjects with which the arbitrator is familiar. This results in a faster, less expensive hearing, and a shorter interval before the arbitral award is delivered.

Party or Autonomy

22. The parties to an arbitration can control, by agreement, the processes of the arbitration, including such things as the governing law; where the arbitration is to occur; the procedure to be adopted by the arbitration and who is going to determine the dispute, by selecting the arbitrator who will ensure a fair hearing.

Confidentiality

23. A significant advantage of arbitration is its confidentiality. Evidence, often commercially sensitive, does not become part of the public record and the existence of the dispute does not go into the public domain, which ensures that all aspects of the respective businesses of the parties remain confidential.
24. If an award has to be registered in a Court to enable it to be enforced, only the award becomes public knowledge. Thus a large volume of evidence remains confidential except insofar as it is referred to in the award.

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Not All Disputes can be Arbitrated

25. Not all disputes can be arbitrated and it may be contraindicated for some parties, depending upon the nature of their business and the circumstances in which the dispute arises.

Essential to arbitrability, is the existence of a dispute.

26. Disputes that should not be arbitrated include:
 - 26.1 criminal matters;
 - 26.2 divorce or dissolution of marriage;
 - 26.3 declaration of paternity;
 - 26.4 illegal contracts;
 - 26.5 adoption; and
 - 26.6 ownership of property.
27. An illegal contract cannot be arbitrated because the award may force a party to carry out an illegal act.
28. Aside from these matters, the worldwide trend supports the arbitrability of most disputes. For instance, an antitrust claim has been held to be arbitral, and, in an international case under American law, a dispute under the US *RICO Act* has also been held to be arbitral.
29. It is necessary to determine whether a dispute should be arbitrated, depending upon the circumstances in which the dispute arose.
30. This handbook aims to assist the reader in making a decision as to whether a dispute should be arbitrated and, if it is, the steps to be taken in the arbitral process.
31. It is not a substitute for competent legal advice but provides assistance with the necessary steps that are to be taken.
32. It also assists with the drafting of an arbitration provision in an agreement in accordance with the aims set out at paragraph 7 above.

The Importance of the Arbitration Clause

33. The drafting of the arbitration clause, and the terms upon which the arbitral tribunal is to resolve a dispute between the parties, is an essential step in ensuring that the dispute is determined in a manner that is consistent with the nature of the dispute, using procedures that are fair and able to be understood by the parties.

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34. The arbitration clause confers authority on the arbitrator(s) to adjudicate the dispute, and is therefore of great importance in ensuring that the arbitration proceeds in a manner consistent with the authority conferred by the clause.
35. Once the arbitrators are selected, in most jurisdictions the parties can rely on the support of the Courts for enforcement of their rights, but those rights must be clearly stated in the arbitration clause. Also, many treaties or model laws by which the arbitration is to be conducted commence to operate.
36. It is important that the arbitration clause deals with all the issues likely to arise under the contract. After a dispute has arisen, it is unlikely the parties will be able to reach an agreement on how the dispute is to be resolved if it is not agreed upon at the outset.

What is Arbitration?

37. Arbitration is a private consensual process to achieve judicial determination of a dispute by an independent third party in whose judgment the parties are prepared to trust, which emanates from an agreement between the parties to have their dispute determined other than by recourse to Courts, but which is regulated and enforced by the State.
38. In most jurisdictions the Courts:
 - 38.1 require the parties to comply with the obligations set out in the agreement to submit the dispute to arbitration;
 - 38.2 provide limited judicial oversight of the proceedings before the arbitrator(s);
 - 38.3 provide processes by which an arbitral award is enforced within the jurisdiction, in a manner similar to the enforcement of judicial awards by national courts.
39. An arbitral tribunal typically comprises of one or three arbitrator(s) depending upon:
 - 39.1 the arbitral agreement between the parties;
 - 39.2 the complexity, or potential complexity, of the dispute and the value at issue.
40. The arbitrators can be selected in a number of ways:
 - 40.1 by agreement between the parties; or
 - 40.2 by an arbitral institution; or
 - 40.3 if the parties fail to make an agreement, by an arbitral institution; or
 - 40.4 one by each party (assuming two parties to the dispute) and the presiding member by the arbitrators or an arbitral institution, which

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enables the parties to retain some control over who is to adjudicate their dispute.

41. Arbitrators in international cases are usually former judges or experienced lawyers, some of whom with expertise in the industry or field within which the dispute arises.
42. The powers of the arbitral tribunal and its duties are contained in the arbitration agreement. It includes:
 - 42.1 the substantive law to be applied to the dispute;
 - 42.2 rules about the processes of the arbitration;
 - 42.3 rules about the way in which the evidence is to be received.
43. The substantive law that operates to facilitate resolution of the dispute can be determined by the arbitrator(s) in the absence of any provision that provides for the substantive and procedural law in the arbitration agreement.
44. Arbitrators are usually required to determine the dispute according to the applicable law, unless the parties have agreed otherwise. Some parties agree that the dispute will be decided by what the tribunal regards as fair rather than by the application of any particular law or laws.
45. In most jurisdictions however, the tribunal is required to follow “due process” and allow each party an opportunity to properly present its case and to defend itself against the case of the opponent. Otherwise, the procedure can be extremely flexible.
46. Most leading legal systems recognise the importance of and the need to support arbitration as a “stand alone” alternative to litigation as a method of resolving disputes.

Alternative Dispute Resolution

47. Arbitration generally falls into the genre of dispute resolution procedures called alternative dispute resolution or ADR.
48. ADR is a group of non-binding procedures, including:
 - 48.1 mediation;
 - 48.2 expert determination;
 - 48.3 conciliation;
 - 48.4 early neutral evaluation;
 - 48.5 in house facilitation.

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49. ADR processes can be:
 - 49.1 Facilitative, in which an ADR practitioner assists the parties to identify the disputed issues; develop options; consider alternatives and endeavor to reach an agreement about some issues or the whole of the dispute;
 - 49.2 an advisory process, in which an ADR practitioner considers and appraises the dispute and provides advice on some or all of the facts and aspects of the dispute; the law or desirable outcomes;
 - 49.3 a determinative process, in which an ADR practitioner evaluates the dispute and makes a determination. It includes arbitration and expert determination;
 - 49.4 a blended dispute resolution process, where the ADR practitioner plays multiple roles, for example conciliation and conferencing, in which the ADR practitioner may facilitate discussion as well as provide advice on the merits of the dispute, or MED/MED/ARB, where the arbitrator attempts to mediate a dispute either before or during an arbitration in an effort to either reduce the number of issues or to resolve the whole of the dispute.
50. Mediation; in house facilitation; conciliation and early neutral evaluation are non-binding consensual procedures that depend upon the voluntary participation and agreement of the parties.
51. Arbitration needs to be distinguished from binding expert determination because while they can take similar forms, they are separate processes: arbitrators are selected for experience in particular fields and are required to decide disputes upon the basis of the parties' submissions; any oral and/or documentary evidence and the law that applies to the dispute, whereas experts use their own knowledge to come to their decision.
52. Arbitration is regulated in most jurisdictions by arbitration laws, which protect the tribunal and the procedures that the tribunal adopts in the resolution of the dispute.
53. Expert determination is, in most jurisdictions, unregulated. Usually, the only regulation that applies to an expert determination is found in the dispute resolution clause by which the dispute is referred to the expert determiner, including enforcement of the expert determiner's decision.
54. An award following an international arbitration can be enforced by conventions that provide for the enforcement of arbitral awards, such as the *New York Convention*. Expert determination can only use the provision of the contract for enforcement and a new action has to be brought for breach of contract.

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To Arbitrate Or Not To Arbitrate

55. For every contract that is entered, an organisation; corporation or state should consider whether the contract ought to contain a dispute resolution clause, and, if so, the structure of that clause.
56. It is particularly important for an alternate dispute resolution clause to be considered if:
- 56.1 the parties to the contract; or
 - 56.2 the object of the contract; or
 - 56.3 the assets, tangible or intangible, infrastructure or other assets of an organisation or corporation,
- are in different jurisdictions, or whether the potential disputes may raise complex technical issues.
57. If, for instance, the object of the contract is to deliver fertiliser by ship from China to Nepal and the vendor is in Hong Kong, the matter of which law is to apply becomes critical. If a dispute resolution clause is inserted, it should express the law that is to apply to the disputes arising under the contract because, potentially, Chinese, Nepalese or Hong Kong law could apply to the contract, depending upon where a number of events occurred. Disputes under a contract such as this example are ideally suited to ADR, and particularly to arbitration.
58. Whether arbitration is a suitable process to resolve a dispute is dependent upon the objective of the parties to the contract, which in turn is dependent upon a number of factors, including:
- 58.1 the nature of the relationship between the parties; ie whether it is an ongoing relationship;
 - 58.2 the type of contract; ie the purpose of the contract and whether it is for the ongoing provision of goods and services, such as a construction or consulting contract;
 - 58.3 when a dispute is likely to arise; ie at the inception of the contract; during the contract or at its conclusion;
 - 58.4 the extent to which the parties seek to preserve the commercial relationship between them;
 - 58.5 the type of relief likely to be sought by the injured party; eg damages; performance of the terms of the contract or rectification of work performed under the contract;
 - 58.6 the purpose of the contract; ie whether it is for the supply of goods and services or a free trade agreement that provides for arbitration in the occasion of certain events occurring.

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59. In order to consider whether to insert an ADR and particularly an arbitration clause into a contract, the following aspects of arbitration should be considered.

Confidentiality

60. The extent to which an arbitration is confidential differs between jurisdictions. However, in almost all jurisdictions litigation is conducted in open courts and the record is available for inspection by persons not associated with the litigation.
61. The arbitration agreement can make the arbitral process as confidential as the parties agree upon, until enforcement of the award becomes necessary and the terms of the award go onto the public record in the court system.
62. In some jurisdictions, the arbitral institutions have an obligation to report at least the outcome of an arbitration to a central authority.

Enforceability

63. The *New York Convention* of 1958 provides a mechanism for the enforcement of an arbitral award by Courts within the signatory countries. The relief granted to a particular party to an award following an arbitration is subject to only very limited grounds upon which a Court in a signatory country can refuse to enforce an award.
64. The parties to the *New York Convention* are set out at Annexure 2 to this Handbook.

Neutrality

65. The selection process of arbitrators minimises the chance that arbitrators will be biased, or worse, corrupt.
66. One party to an international contract will often seek to avoid having disputes under the contract determined by the courts in the country of another party to the contract. A significant advantage of arbitration is the neutrality of the arbitrators if international rules are applied by a multinational tribunal in a mutually accepted venue.

Technical Expertise And Experience

67. Some jurisdictions have specialist expert courts, including the UK Technology and Construction Court and the New York Supreme Court Commercial

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Division. In other jurisdictions, parties are at risk of having the dispute determined by a judge who lacks experience within the industry sector, thereby requiring the calling of experts for comprehensive, and therefore more expensive, expert evidence, to inform the judge of the specialist subject matter of the dispute.

Choice of Arbitrators

68. The parties to an arbitration usually appoint; nominate or at least have some input into the selection of the arbitrator(s). Arbitration laws require the arbitrator(s) to be impartial, but a party can use its choice or influence in the selection process to help ensure that the tribunal will be unbiased and understand the commercial context and the issues, and to reflect the procedural law preferences that the parties have.
69. The parties may agree in the arbitration agreement on the qualifications; experience or other areas of expertise that the arbitrator(s) should have.
70. Selection of arbitrator(s) is a significant step in the arbitration process and needs to be done with extreme care. Often, expert advice will assist the process, however care should be taken in the drafting of the arbitration clause to define the power that the parties have to select arbitrator(s).
71. In multi-party arbitrations, difficulties can arise if the tribunal has only three members and parties can combine their votes to out vote another party's choice of arbitrator.
72. The arbitration clause needs to set out a specific and detailed method by which the arbitrator(s) is/are appointed.

Costs

73. Generally, arbitration is less expensive than litigation, for a number of reasons:
 - 73.1 if (an) arbitrator(s) with industry knowledge is/are appointed, then the duration of an arbitration is usually shorter, with consequential cost saving;
 - 73.2 similarly, if (an) arbitrator(s) has/have industry knowledge, less expert evidence is required to be called, which saves on the cost of experts;
 - 73.3 procedural rules are generally more simple than in litigation, and the cost of complying with rules for such things as discovery; production of third party documents and admissibility of evidence is less.
74. Against that, the parties have to pay the costs of the arbitrator(s). The cost of a three arbitrator tribunal, for even a relatively short arbitration, can be

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significant, whereas the cost of a judge is paid by the state. In addition, the parties are required to pay the costs of any appointed arbitral institution; the hire costs of venues; the cost of transcript; any support staff such as an arbitration secretary and other incidental costs, most of which, if not all, would be met by the state if a dispute is determined by a Court.

75. There are no court fees or hearing fees, which courts in some jurisdictions impose, although most arbitral institutions charge fees for filing statements of claim or the initiating process and fees for administering an arbitration.
76. The advantage for the parties is that they may agree upon a process that best suits the dispute, such as a single expert or an expedited process where the real issues are identified and only those issues are determined.
77. There is usually no right of appeal. The absence of any right of appeal from any award potentially saves significant costs and whatever time it would otherwise take to have an appeal heard.
78. In many jurisdictions, awards may only be reviewed in limited circumstances.
79. Most international arbitral tribunals are empowered to award costs, at their discretion, in favour of one party or the other. It may not represent all of the costs, but at least some are recoverable as part of the award, depending upon the procedural rules and applicable substantive law that applies to the arbitration.
80. Costs will depend upon the complexity of dispute; the manner in which the proceedings are conducted and the length of the dispute.

Interim Measures

81. Most arbitral tribunals have the power, granted by either the parties in their contract or the law that applies to the arbitration, to grant interim measures such as injunctions or freezing orders. The difficulty is that unlike courts, arbitrations cannot impose criminal sanctions such as for contempt for, a breach of, or failure to comply with, an injunction.
82. In most jurisdictions in which the Courts are supportive of arbitration, the Courts will grant interim measures in order to support the arbitral processes.
83. Some jurisdictions are not supportive of arbitrations. It is therefore important to ensure that the arbitration clause in the agreement between the parties contains a provision for a seat and/or venue for the arbitration in a jurisdiction that is supportive of arbitration. See below under the heading Seat or Venue of Arbitration at paragraph 218.

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Joinder of Non-Parties to the Contract and Related Disputes

84. Generally, it is necessary to obtain the consent of all parties to the arbitration agreement before additional parties or disputes that are related to the dispute the subject of the arbitration can be joined to an existing arbitration.
85. A few notable legal systems, such as the Netherlands, allow parties to apply to the Courts to order that a third party be joined to an arbitration.
86. This difficulty can be overcome by provisions in the arbitration agreement that contain the consent of the parties to the arbitration agreement to the joinder of third parties or the inclusion of disputes in the arbitration arising out of “related matters”.
87. The arbitration clause usually then sets out procedure for the joinder of a party or the inclusion in the arbitration of a related dispute.
88. Multi-party contracts, or multi-party transactions, involve provisions for joinder of parties and inclusion of related disputes that are complicated and require considerable care to draft.
89. If provisions are not made for joinder of parties, or the inclusion of related disputes in an arbitration does not occur before a dispute arises, it will often be difficult to obtain the consent of all of the parties to allow the joinder of a party or the inclusion of related disputes in an arbitration because of the necessary self-interest of a party or parties to not consent to that course.
90. In the absence of consent, affected parties then need to consider whether to pursue separate court proceedings against third parties and/or against parties to disputes not caught by the arbitration clause.
91. Arbitral institutions individually have rules on the circumstances in which joinder can occur:
 - 91.1 The *LCIA Arbitration Rules* 22.1(h) allows joinder when the non-party and the party requesting joinder consent in writing to the joinder, and the non-party is either a party to the agreement; the proceedings or a linked contract. The tribunal, under 22.1, also has the power to consolidate the arbitration with one or more others without consent of the parties when no arbitral tribunal has been formed for the other arbitration(s), and the arbitration(s) have been commenced under the same or compatible arbitration agreement(s) between the same disputing parties;
 - 91.2 UNCITRAL, under rule 17.5, allows third persons party to the arbitration agreement at the request of any party to the arbitration to be joined, so long as the joinder does not prejudice any party. Consent of the parties is not necessary, although the tribunal is required to hear arguments regarding the joinder from the parties;

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- 91.3 *ICC Rules of Arbitration* give the tribunal the power to join a third party without the consent of the parties in cases where the third party has signed the arbitration agreement the subject of the arbitration, and the request for joinder was made before the tribunal was formed and involves a claim against the third party;
- 91.4 HKIAC allows tribunals to join a third party without the consent of the parties both when the third party wishes to join and at the request of an original party. There must be a claim between an original party and the third party that the applicant wishes to introduce. The third party does not need to be a signatory of the arbitration agreement;
- 91.5 The *Swiss Rules of International Arbitration* Article 4(2) gives the tribunal power to join a third party upon application by it or an original party without consent of the parties after consulting with the parties and taking into account the relevant circumstances;
- 91.6 The *Netherlands Arbitration Institute Rules* allow a third person to be appointed to the tribunal to determine if consolidation should be allowed. It is permitted if it does not cause unreasonable delay in the pending proceedings and the proceedings are connected so that it is expedient to determine them together to avoid the risk of an irreconcilable decision resulting from separate proceedings.
92. Courts may also allow the tribunal to join a third party for several reasons. For example, the ICC has allowed joinder on the grounds of:⁷
- 92.1 Inter-related contracts;⁸
- 92.2 Lack of corporate personality;⁹
- 92.3 Fraud;¹⁰
- 92.4 Participation in negotiation through special vehicle;¹¹
- 92.5 Bound by admission in judicial action.¹²
93. Article 10 under the *ICC Rules of Arbitration* allows the Court to consolidate related disputes in two cases, where:
- 93.1 “b) all of the claims in the arbitrations are made under the same arbitration agreement; or
- 93.2 c) where the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible.”

⁷ William Park (2009). *Non-Signatories and International Contracts: An Arbitrator's Dilemma in Multiple Parties in International Arbitration*. Oxford.

⁸ ICC Case No. 1434; ICC Case No. 8910

⁹ ICC Case No. 3879 ('*Westland*'); ICC Case No. 5721

¹⁰ ICC Case No. 5730; ICC Case No. 8385

¹¹ ICC Case No. 11160

¹² ICC Case No. 7604; ICC Case No. 7610

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The Arbitral Tribunal

94. The arbitral tribunal usually consists of one or three arbitrators. The choice between one or three arbitrators is usually made during the negotiation for the arbitration clause, although it can be left for agreement between the parties after a dispute arises or, if an arbitral institution or appointing authority is involved, the authority can select the number of arbitrators, and the arbitrators themselves.
95. The cost saving benefits of a sole arbitrator are usually:
 - 95.1 there is one set of arbitrators' fees to be paid;
 - 95.2 a sole arbitrator can usually conduct the arbitration more quickly, without the need to co-ordinate with the other arbitrators.
96. The drawback of a sole arbitrator is that as each party cannot nominate an arbitrator, not all interests are represented and there can be a disadvantage in having only one decision maker.
97. The combined experience and intellect of three arbitrators often gives more weight in the tribunal's decision-making process.
98. Complex; large; high value and important or "test" cases invariably benefit from having three arbitrators.
99. The rules of many of the main arbitration institutions and national law provide a variety of methods for the appointment of an arbitral tribunal when the parties cannot reach agreement as to the appointment of arbitrators between themselves.
100. Generally, sole arbitrators are selected by agreement between the parties. If no agreement is reached between the parties within a time allotted by either the arbitration clause or an arbitral institution, an appointing authority is often contained in the arbitration clause, or if there is not, a Court can appoint an arbitrator.
101. If there are three arbitrators to be appointed, each of the parties usually nominate an arbitrator when there are two parties to the dispute. If there are more than two parties, then difficulties can arise and the arbitration clause needs to promote a process by which the arbitrators are appointed.
102. The chairman or president of the arbitral tribunal is then chosen by:
 - 102.1 the two arbitrators selected by the party; or
 - 102.2 the appointing authority; or
 - 102.3 the Court of the seat of the arbitration;

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103. The parties must specify the qualifications that the arbitrator and/or the chairman must have in order to be appointed to the arbitral tribunal:
 - 103.1 a minimum period of legal practice; or
 - 103.2 nationality; or
 - 103.3 experience in particular areas, especially the subject matter of the dispute.

104. The matters that need to be considered in the selection of an arbitrator include:
 - 104.1 the arbitrator's academic qualifications, including his or her knowledge of substantive and procedural law;
 - 104.2 specifically, the arbitrator's association with and knowledge of the law governing contracts and the arbitration rules under which the arbitration will be heard;
 - 104.3 the arbitrator's experience in other arbitrations of a similar type;
 - 104.4 the arbitrator's experience in the industry in which the dispute arose;
 - 104.5 the arbitrator's familiarity with the language of and the place where the arbitration is to be heard;
 - 104.6 the assessment of the arbitrator's performance, usually anecdotally from other legal practitioners, including the arbitrator's reputation, particularly for fairness; impartiality and knowledge of the law;
 - 104.7 the arbitrator's reputation is particularly important if the arbitrators have the role of selecting the chairperson of the tribunal, and in influencing the extent to which the selected arbitrator's view will, or at least will be likely to, be persuasive of the other arbitrators during consideration of the evidence and law preparatory to and while the award is being written by them;
 - 104.8 the reasonableness of the arbitrator, and the extent to which the arbitrator is prepared to "work" to familiarise him or herself with the material;
 - 104.9 a very topical matter is the speed with which tribunals deliver their awards, and a significant consideration is the speed with which the arbitrator has in the past delivered his or her award.

105. Parties to an arbitration are normally guided by their legal representatives in the selection of arbitrators.

Institutional versus Ad Hoc Arbitrations

Institutional Arbitrations

106. Institutional arbitrations are those that are administered by particular arbitral institutions.

107. The institutions each have their own rules, and a number of them have "fast track" rules for urgent arbitrations.

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108. They provide lists of arbitrators and also a service for the appointment of the chairperson or president of the arbitral tribunal in the event of a dispute between the appointed arbitrators as to who is to chair the arbitration.
109. In the Asia Pacific region, there are a number of well-regarded arbitral institutions including:
 - 109.1 the Hong Kong International Arbitration Centre (HKIAC);
 - 109.2 the Singapore International Arbitration Centre (SIAC) and the Singapore International Commercial Court (SICC); and
 - 109.3 the Australian Centre for International and Commercial Arbitration (ACICA).
110. In addition, there are well established and well-regarded international institutions that are extensively used, including:
 - 110.1 the International Court of Arbitration of the International Chambers of Commerce (ICC);
 - 110.2 the London Court of International Arbitration (LCIA); and
 - 110.3 the International Centre for Dispute Resolution (ICDR)

Hong Kong International Arbitration Centre (HKIAC)

111. HKIAC was established in 1985 and has a substantial arbitration and mediation facility in the centre of Hong Kong.
112. It has recently opened offices in Shanghai, China and is expected to overtake London and New York as the leading global financial centre in 2016.¹³
113. At Annexure 1 is a set of draft arbitration clauses that nominate HKIAC as the arbitral institution.

Singapore International Arbitration Centre and Singapore Court of Arbitration (SIAC)

114. SIAC commenced arbitrations in 1991, and is based and has offices in Singapore.
115. The Singapore Arbitration Centre Court of Arbitration comprises of 17 arbitration practitioners from around the world.
116. The main functions of the Court include the appointment of arbitrators and overall supervision of case administration.¹⁴

¹³ Further information is available at www.hkiac.org

¹⁴ Further information is available at www.siac.org.sg

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117. At Annexure 1 is a set of draft arbitration clauses that nominate SIAC as the arbitral institution.
118. The Singapore Arbitration Centre has offices in New Delhi and, from 2 March 2016, in Shanghai, China.
119. The SIAC rules contain an expedited procedure by which an arbitration can be heard very quickly, which can be important for parties who are in an ongoing commercial relationship.

Arb-Med-Arb or Med-Arb-Med

120. Parties who have signed an arbitration agreement and/or who have commenced arbitration may wish to refer their dispute to mediation.
121. Med-Arb is a process where a dispute is referred to mediation, with the mediator usually then taking a role as one of or all the arbitrator(s). If the parties settle their dispute through mediation, the settlement will be recorded as a consent award, entered by the arbitrator(s).
122. There can then be variations on the same theme, with an arbitration followed by a mediation (Arb-Med) with the arbitrator(s) as the mediator. If the mediation is unsuccessful and the matter cannot be settled by mediation, then the arbitration continues.
123. Arb-Med-Arb occurs when a dispute is referred to arbitration before mediation is attempted. If the parties are able to settle their dispute through mediation, their mediated settlement may be recorded as a consent award. If the parties are unable to settle their dispute through mediation, they may continue with the arbitration proceedings.
124. Med-Arb with its variations is popular in continental Europe.
125. Under the SIAC-SIMC Arb-Med-Arb Protocol, the arbitrator(s) and the mediator(s) are separately and independently appointed to the dispute proceedings by SIAC and SIMC respectively, under the applicable arbitration and mediation rules of each Centre. Unless the parties otherwise agree, the arbitrator(s) and the mediator(s) will generally be different persons.

Australian Centre for International Commercial Arbitration (ACICA)

126. ACICA commenced in 1985. It is Australia's leading and only international dispute resolution body. It is an organisation dedicated to the promotion and development of ADR in the Asia Pacific Region and advancing Australia's profile as one of the region's premier seats for resolving cross-border disputes.

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127. Its rules incorporate emergency arbitrator provisions, and it has its own standalone ACICA expedited arbitration rules, which were revised and commenced in 2016.
128. It provides all of the services that most of the major arbitral institutions offer, including a list of arbitrators and mediators.¹⁵
129. At Annexure 1 is a set of draft arbitration clauses that nominate ACICA as the arbitral institution.
130. ACICA has a co-operation agreement with India, and enables arbitration involving disputes between Australia and Indian organisations with the FICCI Arbitration and Conciliation Tribunal (FACT).
131. ACICA's fees are based on the amount in dispute and require the payment of "upfront" registration fees of \$2,500.

International Court of Arbitration of the International Chambers of Commerce (ICC)

132. The ICC is based in Paris and was established in 1923. This is the best known international commercial arbitration institution.¹⁶

The London Court of International Arbitration (LCIA)

133. The LCIA is based in London and was established in 1892. After the ICC, it is Europe's leading international arbitration institution, and has affiliated arbitral institutions in Dubai (DIEFC/LCIA); India (LCIA) and Mauritius (LCIA-MIAC).¹⁷

International Centre for Dispute Resolution (ICDR)

134. ICDR is part of the American Arbitration Association (AAA) and was established in 1926. It has a network of offices in the US and administers a number of domestic, as well as international, arbitrations.¹⁸
135. Clauses may also be added to require Med-Arb, the party-appointed method of arbitrator selection, and limitations on time; information and document exchange.

¹⁵ Further information is available at www.acica.org.au

¹⁶ Further information is available at www.iccwbo.org

¹⁷ Further information is available at www.lcia.org

¹⁸ Further information is available at www.icdr.org

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136. The rules of each of the major arbitration centres are suitable for use anywhere in the world for arbitration conducted in any language, under any governing law.
137. The arbitral institutions operate as a “registry” and carry out the following functions:
 - 137.1 receive initiating process such as statements of claim or similar;
 - 137.2 render accounts for the arbitration;
 - 137.3 collect deposits towards the costs of arbitration;
 - 137.4 process the tribunal's fees and expenses;
 - 137.5 supervise and monitor the progress of the arbitration;
 - 137.6 conduct, in some cases, scrutiny of the arbitral award;
 - 137.7 receive and distribute the initial submissions of the parties;
 - 137.8 assist with the appointment of the tribunal whether the contract allowed the parties to the arbitration to nominate arbitrators or not;
 - 137.9 resolve any challenges that the parties may make to an arbitrator hearing the arbitration.
138. The rules that regulate the conduct of an arbitration administered by each of the institutions are similar in their effect. They leave it up to the parties to agree upon aspects of the arbitral procedure, failing which the arbitral tribunal has power to rule on procedural issues.
139. The differences between the institutions are really:
 - 139.1 how closely the arbitration is administered by the institution; and
 - 139.2 their respective fee structures.
140. The ICC more closely supervises the arbitration. Its rules:
 - 140.1 require the relief sought and the matters to be determined by the arbitral tribunal;
 - 140.2 can slow the arbitration down while the parties reach agreement on the issues to be addressed, particularly the issues to be addressed by the arbitral tribunal.
141. Further, the ICC scrutinises drafts of the awards. The scrutiny is particularly directed to issues that might affect the enforceability of the award.
142. SIAC similarly scrutinises draft awards, but, like most of the other institutions, does not require terms of reference to be prepared.
143. The additional administrative functions add to the cost.
144. The other arbitral institutions do not so closely administer the arbitration.

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Calculation of fees by the Arbitral Institutions

145. The fees of the ICC, and arbitral tribunals appointed by it, are calculated as a percentage of the amount in dispute.

Deustche Institute of Arbitrators

146. Deustche Institute of Arbitrators calculates its fees on a similar basis.
147. The administrative fee is calculated as a percentage of the amount in dispute.
148. The fee for each arbitrator is dependent on the amount in dispute, up to 50.000,00 €.
149. For larger amounts, the fee involves a lump sum plus a percentage of the amount exceeding the lower end of the bracket in which the amount in dispute falls.

Hong Kong International Arbitration Centre

150. HKIAC's administrative fees calculated under Schedule 1 of the *HKIAC Administered Arbitration Rules* are determined according to the sum in dispute.
151. The fees for the tribunal itself are calculated either under Schedule 2, at an hourly rate, or Schedule 3, which involves either a lump sum plus a percentage of the dispute value, or a percentage of the dispute value, depending on the size of the sum in dispute.
152. Schedule 2 lists a maximum agreed hourly rate of 6,500 HKD per hour, with the actual hourly fee determined between the parties and their arbitrator(s). HKIAC determines the rate if the parties and arbitrator(s) do not agree.
153. Under Schedule 3, larger sums have a large lump sum and a small percentage, and for sums under 400,000 HKD, the fee is 11 per cent of the amount. Depending on the complexity of the subject matter and time spent by the tribunal, these fees can adjust so that they are reasonable in amount (Article 10.3).
154. The parties choose which method of fee calculation they prefer, however if they are unable to agree within thirty days from the Notice of Arbitration, the fees are calculated at an hourly rate as per Schedule 2.
155. For ad hoc and domestic arbitration, these fees differ.

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156. Parties may also choose to follow *HKIAC Procedures for the Administration of International Arbitration* so that they are afforded flexibility under the *UNCITRAL Arbitration Rules*. In this case, the fees depend on the arbitrator's hourly or daily rates for all work reasonably carried out in connection with the arbitration, unless the parties agree otherwise. There is also a separate administrative fee set out in Schedule 1 4.1, between 16,500 and 292,580 HKD.

Singapore International Arbitration Centre

157. SIAC requires parties to pay an administration fee, which changes according to a scale dependent on the sum in dispute and involves a lump sum plus a percentage of the sum in dispute. The fees of the arbitrator(s) similarly are calculated according to a quantum-based scale.
158. The benefit of the respective fee structure of the institutions depends upon:
- 158.1 the amount in dispute; and/or
 - 158.2 the time it is going to take the arbitrators to make an award.

The China International Economic and Trade Arbitration Commission (CIETAC)

159. In contractual negotiations with companies based in China involving the delivery of goods and services into China, many Chinese companies will forcefully opt for CIETAC as the arbitral institution. China prohibits ad hoc arbitration.
160. CIETAC was established in April, 1956, and has headquarters in Beijing.
161. It is the first established and the largest arbitration institution in China.
162. It has its own rules, which are not dissimilar to the rules of the other major arbitral institutions.¹⁹
163. Legal advice should be sought if a company negotiating to do business in China finds itself with a Chinese company that will only allow CIETAC as the arbitral institution in the arbitration clause.

Dubai International Arbitration Centre (DIAC)

164. DIAC commenced operation in 1994.
165. It has integrated with the Dubai Chamber of Commerce and Industry (DCCI) established in 1965, the object of which is to create a favorable business

¹⁹ Further information is available at www.cietac.org

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environment; support the development of business and promote Dubai as an international business hub.²⁰

166. DIAC:
 - 166.1 oversees arbitral proceedings in commercial disputes;
 - 166.2 appoints arbitrators;
 - 166.3 chooses and provides venues for arbitration;
 - 166.4 fixes the fees of arbitrators and mediators.
167. Dubai has two separate seats and legal frameworks for arbitration:
 - 167.1 Dubai itself; and
 - 167.2 A free zone within Dubai, called the Dubai International Financial Centre (DIFC), which has its own arbitration law, called the *DIFC Arbitration Law*, 2008.
168. DIFC is a free zone designed to encourage international investment and trade.²¹
169. In addition, DIFC has an arbitration centre, again with its own rules, which operates in conjunction with the LCIA.²²
170. The DIFC has its own independent judicial system within the Dubai International Financial District.
171. The DIFC Court Independent Common Law Judiciary are an independent common law judicial system with exclusive jurisdiction over all civil and commercial disputes within the DIFC financial district, including corporations registered in the DIFC.²³
172. The DIFC Courts have an international judicial panel of commercial and civil law judges. The Chief Justice is Michael Hwang SC.
173. The common law legal system within the DIFC is different to the civil legal system that the rest of the UAE has.
174. The Dubai International Arbitration Centre (DIAC) has similar arbitration rules and the LCIA rules apply to the Dubai LCIA Arbitration Centre.

²⁰ Further information is available at www.diac.ae

²¹ Further information is available at www.difc.ae

²² Further information is available at www.difc-lcia.org

²³ Further information is available at www.difccourts.ae

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International Institutions which deal with specific types of disputes

The International Centre for the settlement of investment disputes (ICSID)

175. ICSID was established by the 1965 *Washington Convention* on the settlement of investment disputes between other states and nationals of other states (the *ICSID Convention*).
176. It operates under the umbrella of the World Bank and is based in Washington DC.
177. Bilateral Investment Treaties (BITS) have increased in popularity and have produced a significant increase in the number of investor state disputes.
178. Many BITS contain provisions for ICSID arbitrations to determine disputes arising out of investments between states that enter BITS and personal companies or other entities of another state that are parties to a BIT.
179. The jurisdiction of the arbitrator(s) is established by the entry of the two contracting states into the BIT. It usually contains an offer by each party of consent to arbitration. That offer may be accepted by nationals or another state party to the treaty, often by starting arbitration proceedings.
180. In addition, the claimants typically rely on the substantive standards guaranteed by the BIT. The bases of jurisdiction do not determine the law to be applied to the dispute.
181. Questions of jurisdiction are governed by their own system, which is defined by the instrument that contains the consent of the parties to the jurisdiction, including Article 25 of the *ICSID Convention* and the provisions of the consent instrument, including the BITS. Jurisdiction also can arise from the terms of the *ICSID Convention*.

The World Intellectual Property Organisation (WIPO)

182. WIPO is an agency of the United Nations in 1994 and has 188 member states. It established its own arbitration and mediation centre for the resolution of intellectual property disputes by arbitration and mediation between private parties and provides domain name disputes resolution services under WIPO's *Uniform Domain Name Dispute Resolution Policy* (UDRP).
183. The Centre provides mediation; arbitration and expedited arbitration and expert determination facilities.
184. It recommends WIPO arbitration clauses, which are available in WIPO's Arbitration and Mediation Rules.

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Conclusion

185. There is a wide range of arbitration institutions available worldwide, with broad-based arbitral panels comprised of arbitrators with extensive commercial and specialist knowledge and skill.
186. There are also a number of specialist arbitral institutions that resolve more specialised disputes, such as those involving intellectual property; domain names (WIPO) and those between the states, nationals and other states (ICSID).
187. The rules of the main arbitral institutions are similar but not identical, and care needs to be taken to ensure that the arbitral rules that are usually incorporated by reference into the arbitration clause are suitable for the types of disputes that are likely to arise between the parties to the contract.
188. If the UNICTRAL rules are to apply, care needs to be taken to include an appointing authority to avoid the risk of agreement not being reached about the arbitrator(s) who are to determine the dispute.

Ad Hoc Arbitrations

189. Essentially, all arbitrations that are not administered by an institution are ad hoc.
190. Under this head are arbitrations that are heard:
 - 190.1 under the UNCITRAL rules; or
 - 190.2 under a national law.
191. Arbitrations are usually ad hoc because the parties to the arbitration agreement have failed to agree upon or make provisions in the agreement for any particular procedural rules.
192. Occasionally, parties agree that arbitration will be conducted under a designated national law, but that law may be inadequate in providing for procedural rules to determine a particular dispute.
193. Further, the courts that apply the nominated national law may not be sympathetic to arbitration, in which case the party with the grievance may find itself in difficulty.
194. One of the reasons for nominating arbitration or any of the other alternative dispute resolution processes as a method for resolving disputes is to avoid certain national courts for the reasons set forth above.

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195. It is a mistake to think that ad hoc arbitration can minimise the cost by not requiring the arbitral institution's fees to be paid.
196. Invariably, the fees of arbitrators on the lists of arbitrators kept by arbitral institutions are lower than those of arbitrators on an ad hoc basis.
197. Further, the administrative costs are well spent, in order to give the arbitration order and consistency.
198. If the subject matter of the dispute is complex, or the amount in issue is significant, the cost of an institutional arbitration is money well spent because issues such as discovery; production of documents; admissibility of expert and other evidence and the sufficiency of evidence on particular issues are all likely matters for determination with which an institutional arbitration is more readily able to deal than ad hoc arbitration.
199. Legal advice concerning the benefit of ad hoc arbitration as opposed to institutional arbitration, or, at the very least, an arbitration conducted under the *UNCITRAL Arbitration Rules*, should be sought by parties when drafting an arbitration clause.
200. That involves matters of:
 - 200.1 costs;
 - 200.2 balanced against the procedural and other advantages of institutions or UNCITRAL institutional arbitration, or at least an arbitration governed by the *UNCITRAL Arbitration Rules*.

UNCITRAL Rules

201. The *UNCITRAL Arbitration Rules* were adopted in 1976. The rules are the product of extensive deliberations and consultations with interested international organisations and leading arbitration experts.
202. The *UNCITRAL Arbitration Rules* were revised and adopted in 2010 and reflect the evolution in arbitral practice since the original rules were adopted.
203. The 2010 *UNCITRAL Arbitration Rules* apply to arbitration agreements concluded after 15 August 2010.
204. The parties should specify an appointing authority in their arbitration agreement to appoint arbitrators and decide challenges to arbitrators.
205. Both the 1976 and 2010 *UNCITRAL Arbitration Rules* provide that, in the absence of appointing authority, any party may request the Secretary General of the Permanent Court of Arbitration to designate an appointing authority.

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206. Alternatively, under both the 1976 and 2010 rules, the Secretary General of the Permanent Court of Arbitration may be the appointing authority if the parties agree.
207. The Permanent Court of Arbitration is located in the Hague, and was created by the 1899 *Hague Convention for the Pacific Settlement of International Disputes*.
208. In 2013, the 2010 *UNCITRAL Arbitration Rules* were modified to incorporate the new *UNCITRAL Arbitration Rules on Transparency in Treaty-based Investor State Arbitration*, and apply to treaty-based investor state arbitrations under the *UNCITRAL Arbitration Rules* for treaties that were concluded on or after 1 April 2014, unless the parties to the treaties have agreed otherwise.
209. The *UNCITRAL Arbitration Rules on Transparency in Treaty-based Investor State Arbitration* will also apply to investment treaties concluded before 1 April 2014, if the parties to the arbitration or the parties to the investment treaty have agreed to their application after 1 April 2014.
210. In the case of multilateral investment treaties concluded before 1 April 2014, the rules on transparency will apply if the state of the claimant and the respondent's state have agreed that the rules apply.
211. The rules may also be used in ad hoc proceedings or investor state arbitrations instituted under rules other than the *UNCITRAL Arbitration Rules*.
212. The *UNCITRAL Arbitration Rules* have been the basis of other arbitration rule systems.

The Choice of Arbitration Rules

213. The law of the seat of the arbitration will usually provide the procedure for the appointment of the arbitral tribunal and the procedure of the arbitration.
214. Many, indeed most, arbitration laws contain only very basic procedural rules, presumably on the basis that it is up to the parties and the arbitrator(s) to determine how the arbitration will be procedurally conducted.
215. Often that will lead to disagreement between the parties before the tribunal commences to hear the dispute, resulting in delays and increased costs.
216. One of the attractive features of international arbitration is that the parties are able to agree upon the procedure and the procedural rules by which the arbitration is to be determined.
217. In some countries, there are mandatory rules and laws that contain a framework of the manner in which arbitrations are to be conducted.

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The Seat or Venue of the Arbitration

218. The seat of the arbitration is the legal place of the arbitration. The law of the seat governs the arbitral proceedings, including:
 - 218.1 the powers of the arbitral tribunal;
 - 218.2 the supervisory powers of the Courts over the arbitration; and
 - 218.3 whether the award is enforceable.
219. The place or venue is where the arbitration takes place.
220. As the law of the seat governs the arbitral process, the place where the arbitration occurs or the venue is usually no more than the place where the parties, the arbitrator(s) and the legal representatives meet to hear the arbitration.
221. When selecting the seat, care needs to be taken about:
 - 221.1 the national court rules that will apply to the arbitration, including,
 - 221.2 the enforceability of the award.
222. In selecting the seat of the arbitration, the parties choose the national procedural law as the law that will apply to the arbitration.
223. The national procedural law should not be confused with the rules of the arbitral institution.
 - 223.1 In Hong Kong, the *Arbitration Ordinance* applies.
 - 223.2 In Singapore, the *International Arbitration Act* applies.
 - 223.3 In London, the *Arbitration Act* applies.
224. Some jurisdictions such as Hong Kong; Singapore, London; Dubai; New York; Paris and Sydney actively promote and assist the arbitral processes on the basis that the parties have chosen to have their disputes resolved by arbitration rather than the Courts.
225. Therefore, the procedural laws that apply to an arbitration in those places nominated as the seat of the arbitration contain a small number of compulsory requirements that allow the parties to agree upon the procedure that is to be followed; the language of the arbitration and the members of the tribunal to determine the dispute.
226. In those centres, the Courts actively promote arbitration, often as a way of minimising court lists and to facilitate trade.
227. Further, those seats each aggressively enforce the arbitral award. In some countries, the national legislation gives the Courts jurisdiction to take control

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of disputes and will more readily intervene often to the detriment of the parties.

Enforceability of the award

228. The *New York Convention* facilitates the enforceability of arbitral awards between states that are parties to the Convention.
229. The states that are parties to the Convention have agreed to enforce awards in international commercial arbitration made in other contracting states by a streamlined registration of the award and limited grounds upon which the Court can refuse to register and enforce the award.
230. The national Court in some states that are not signatories to the Convention:
 - 230.1 may not allow enforcement of the award for the most tenuous of reasons; or
 - 230.2 may not even recognise the award at all.
231. For that reason, care should be taken to identify the enforcement regime in states in which the arbitral award is likely to be enforced, and particularly the presence of assets of the party that loses the arbitration and where those assets are located.

Arbitration Clauses Generally

Alternative Dispute Resolution

232. Not many arbitration clauses based on the model clauses in Annexure 1 aim to refer any dispute to other alternatives than arbitration. Other ADR methods should be considered.
233. Consideration of the commercial relationship between the parties needs to be given before the matter is referred to arbitration and, almost inevitably, the relationship is damaged.
234. Before the matter is referred to arbitration, and the commercial relationship is irretrievably lost, the parties may consider alternate dispute resolution procedures.
235. There are a number of possibilities, which include:
 - 235.1 escalation of the dispute through various layers of management of the two parties who are in dispute; and/or
 - 235.2 mediation; and/or
 - 235.3 expert determination, of all or parts of the dispute.

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236. Arbitral institutions including ACICA; HKIAC; SIAC; ICC; LCIA and ICDR provide ADR services, including accessing expert determiners and mediators.
237. A number of organisations administer ADR in addition to the Arbitral Institutions:
 - 237.1 the Centre for Effective Dispute Resolution (CEDR), based in London;
 - 237.2 the International Institute for Conflict Prevention & Resolution (CPR), which commenced in 1979 as the Center for Public Resources and is based in New York.
238. Additionally, parties ought to consider a number of areas when drafting an arbitration clause:
 - 238.1 the possibility of ADR prior to arbitration;
 - 238.2 option clauses that allow the parties to elect to use arbitration or the Courts to seek a remedy;
 - 238.3 the capacity and/or authority for the parties to make the arbitration agreement;
 - 238.4 mandatory requirements that may be imposed by the law of the arbitration agreement, seat, or areas where the agreement would be enforced;
 - 238.5 scope and arbitrability of disputes that could arise;
 - 238.6 the tribunal and its powers;
 - 238.7 the procedural rules that apply, including disclosure and discovery;
 - 238.8 the seat in which the arbitration takes place;
 - 238.9 the language of the arbitration;
 - 238.10 the governing law of the contract;
 - 238.11 whether confidentiality of the arbitration is to be afforded to the parties;
 - 238.12 the powers of the Courts of the relevant seat;
 - 238.13 multi-party and agreement issues including the process by which arbitrators are nominated and joinder of non-parties;
 - 238.14 if state immunity applies.

Investor/State Arbitrations

Introduction

239. Investment Treaties, both bilateral (BITS) and multilateral, such as the *North American Free Trade Agreement* (NAFTA), will often contain arbitration clauses in order to protect the significant investments by foreign entities in some countries.
240. Not all BITS contain arbitration clauses, however many do.
241. There are more than 2,800 BITS.

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242. One of the best protections is to ensure that the investment from one entity into a foreign country is made from a country with an operating or workable BIT.

Multilateral Investment Treaty

243. International investment and trade is one of the ways in which capital moves between countries and regions. Foreign investment is regulated by the domestic law of each state, but a number of international treaties bear upon and modify those laws.
244. Multilateral investment treaties, such as the *ICSID Convention* and the proposed *Trans-Pacific Partnership* (TPP) are broad-based investment treaties that are designed to promote investment across a much wider geographical region than BITS.
245. For example, the *ICSID Convention* is a central pillar of the international investment regime and provides a specialised facility, the International Centre for Settlement of Investment Disputes, for arbitrations and conciliations arising out of the *ICSID Convention*, under the auspices of the World Bank.
246. It has 150 contracting states and is designed to facilitate the settlement of investment disputes that are “*legal disputes arising directly out of ...investment that the parties have agreed to submit to ICSID.*”
247. Investment disputes are defined as controversies that arise out of an investment that is between a contracting (or host) state or a designated state-related entity from that state and a national of another contracting state (or investor).
248. The *ICSID Convention* does not apply to disputes that do not involve a contracting state and an investor from another contracting state; to ‘ordinary’ commercial disputes that do not involve investment (such as the sale of goods) or to disputes between private parties who are not nationals of a contracting state.
249. The Convention provides both conciliation and arbitration procedures, but does not provide an independent standalone basis for arbitrating particular disputes under the Convention. ICSID arbitration must be preceded by a separate consent to arbitration by the foreign investor and the host state, which is usually an arbitration clause in an investment contract or a consent in a foreign investment law; a BIT or another treaty.
250. ICSID awards are immediately recognised and enforced in the Courts of contracting states without needing to set aside the award or conduct any other form of review by national Courts either in the seat or elsewhere. ICSID

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awards can be scrutinised by ICSID ad hoc committees, which sit and annul awards for jurisdictional or procedural unfairness.

251. Another treaty is the *Energy Charter Treaty*, which provides a multilateral framework for energy cooperation. It is designed to promote energy security through the operation of more open and competitive energy markets within the constraints of sustainable development and the sovereignty of states over energy resources.
252. It was signed in December 1994; entered into legal force in April, 1998 and has 54 signatories.
253. It provides for the resolution of disputes between participating states and, in the case of investments, between investors and hosts states.

North American Free Trade Agreement (NAFTA)

254. NAFTA is multilateral treaty between Canada, Mexico and the United States that deals with trade; investment and other matters.
255. It contains standards for treatment by each NAFTA state of investors from other NAFTA states and arbitration provisions for resolving investment disputes under the standards.
256. NAFTA includes protection against discriminatory treatment of a NAFTA investment by the host state and unfair or inequitable treatment and expropriation of the investor's assets without adequate compensation.
257. No separate consent to arbitration is required under NAFTA to enable an investor from one NAFTA state to arbitrate claims under the NAFTA provisions against another NAFTA state.

Bilateral Investment Treaties

258. BITS are bilateral treaties that are adapted to meet the conditions prevailing between the signatories to the BIT, and are made only by two contracting states.
259. Most BITS provide significant protection for investments made by investors from one of the two contracting states in the territory of the other contracting state, including:
 - 259.1 guaranteeing against uncompensated expropriation;
 - 259.2 unfair or inequitable treatment;
 - 259.3 discriminatory treatment;
 - 259.4 the right to transfer funds to and from the host state.

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260. Not all BITS contain dispute resolution provisions, but most do.
261. The dispute resolution provision entitles investors from one contracting state to submit investment disputes with the other contracting state to arbitration.
262. Usually, the dispute resolution provisions in BITS contains the irrevocable consent by each state to arbitrate any investment disputes, which enables investors to demand arbitration of disputes that are not properly covered by the BIT against the host state without an arbitration agreement contained in the investment contract with the host state or other separate consent to arbitration by the host state ("arbitration without privity").
263. The arbitration clauses vary from state to state. Some BITS contain an agreement to refer an investment dispute to ICSID arbitration. Others contain an agreement to arbitrate under the BIT or for UNICTRAL or some other form of institutional arbitration.
264. The range of investment types that the protection granted by the BIT covers is wide and includes land; building; intellectual property; licenses and shares.
265. It is essential for an investor to consider all relevant issues at the outset of the planning stage of the investment, before the investor commits to the investment.
266. There are a number of considerations:
 - 266.1 how is the investment to be made, that is, personally; by a holding company or through a subsidiary;
 - 266.2 how is the investment to be secured, and what is the local law of the country in which the investment is to be made concerning security, and particularly enforcement of security;
 - 266.3 is there a BIT between the state from which the investment is made and the state in which the investment is to be made, and, if not, is there a mechanism by which the investment can be made from a country with a BIT with the country in which the investment is to be made;
 - 266.4 is the investment required to be registered to the government of the state in which the investment is to be made;
 - 266.5 does the BIT between the two states from and to which the investment is to be made provide substantive rights to the investor, and if so, what are those substantive rights and how do they affect the investor;
 - 266.6 is, given the size of the investment, the state in which the investment is to be made capable of repaying the investment to the investor with interest and any other penalties;
 - 266.7 how stable or otherwise is the state in which the investment is to be made;

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- 266.8 how likely is it that the state in which the investment is to be made will protect or expropriate the investment.

Third Party Funding or Litigation Lending in International Commercial and Treaty Arbitrations

267. There is an increasing use of litigation or third party funding in international commercial and treaty arbitrations, which has been caused by the increasing costs of higher value and complex claims, particularly in relation to legal representations and the retention of experts.
268. Many litigants are under economic pressure caused by the global economy and therefore need to manage the financial risks of conducting large international commercial or treaty claims.
269. Third party or litigation funding is well established in countries such as the United Kingdom; Canada; South Africa and Australia. There is an increasing use of funding in the USA.
270. Funders have become increasingly interested in funding international commercial arbitration and treaty claims, and as a result, funding is becoming more common than it was five or ten years ago.
271. Funding involves a commercial fund agreeing to pay some or all of the legal fees and other costs associated with a dispute, for reimbursement of the amounts paid by the fund and a share of any sum recovered from resolution of the dispute, be that by settlement or award.
272. The amount taken by the fund varies, and is on average between 15 and 50 per cent. The more usual amount is about one third.
273. The amount recovered by the fund depends upon the amount of the costs that are likely to be incurred and the overall risks involved in funding the dispute.
274. In some cases, the funder will agree to pay any cost order made against the funded party, and provide security for costs, if required to do so.
275. Depending upon the scope of the agreement between the party to the arbitration and the funder, the funder may pay the legal fees of the funded party and/or any costs that are awarded against that party, if the claim by the funded party fails.
276. A funder's decision as to whether it will fund a claim is an investment decision. The funder will consider the various factors that bear upon the final financial risks that it is being asked to assume, including the prospects of success and value of the claim; the terms of the arbitration agreement or treaty and the seat of the arbitration.

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277. A party seeking funding usually approaches the funder through its lawyers, and if the claim meets the funder's threshold criteria, which are usually about the value and nature of the claim, the funder will then carry out a detailed due diligence into all aspects of the claim.
278. A funding agreement is negotiated and entered between the funder and the funded party. The funding agreement may allocate risks to other parties such as having the lawyers act on a contingency or part contingency basis and the involvement of other funders or insurers. Therefore the funding agreement may be between a number of the parties, other than just the funded party and the funder.
279. Funding facilitates access to justice. Funded parties with meritorious claims but with limited financial resources or a desire to manage scarce resources can use third party funding to enable the claims to be pursued.
280. Funding provides financial resources and opportunities to manage the financial risks that are associated with an arbitration.
281. The funded party is able to lay off some or all of the financial risks to the funder, albeit at not insignificant cost, without having to pay legal fees and other costs during the preparatory and hearing stage of the arbitration.
282. Controlling the costs of arbitration is an issue of increasing concern within the arbitration community.
283. An experienced fund can assist the lawyer and the funded party in the preparation and hearing stage of the arbitration in the choice of Counsel, experts and arbitrators and in strategic and tactical decisions.
284. There are risks associated with the funding of international and treaty arbitration. By providing funding, the funder gains a degree of power in the relationship with the funded party and the outcome of the dispute. While it can be a joint enterprise between the funder and the funded party, the funded party's lawyer is an important moderating influence in the relationship between the funded party and the funder.
285. The lawyer is able to ensure that a proper balance is achieved between the significant economic power of the funder, and the funded party. In particular, the lawyer's role is to ensure that the terms of the funding agreement and the manner in which the funding agreement is implemented remain balanced between the funder and the funded party.
286. Advice should be taken on the funding agreement, without exception.
287. Of course, the funder needs to have adequate capital or appropriate insurance in place to meet the obligations to which it agrees in the funding arrangement.

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288. The assets and capital structure of the fund needs to be properly understood by the funded party and its lawyers. A potential funded party should therefore investigate the capital position of the funder; its business structure and generally its ability to comply with its obligations under the funding agreement.
289. Funding complex and high value claims is extremely capital intensive, and funders have a range of structures:
 - 289.1 public companies with traded share capital, which are required to disclose their financial position publicly, such as:
 - 289.1.1 Burford Capital Limited and Jurica Investments Limited, both of which are listed on the London Stock Exchange ILM Market;
 - 289.1.2 IMS, which is listed on the Australian Securities Exchange;
 - 289.2 private companies such as Harbour Litigation Funding Limited, in England;
 - 289.3 a number of private funds including hedge funds hold themselves out as investing in high value legal claims.
290. Conflicts of interest can arise where, for instance, the lawyer for the funded party is unduly influenced by the funder, which pays the legal and other bills, and the lawyer can be tempted to favour the interests of the funder rather than the interests of the funded party.
291. The client needs to ensure that it is comfortable that any relationship between its lawyer and the funder is not going to result in the funded party's interests being secondary to those of the funder.
292. Advice needs to be taken by the funded party from its lawyer on the question of funding and its risks and benefits.
293. Conflicts of interest often emerge during settlement negotiations in an arbitration. The funder may be of the opinion that the funded party should accept an offer which is on the table and the funded party may not.
294. If the funder has recommended the lawyer to the funded party, or there is further work available through the lawyer from the funder, a significant conflict of interest can arise for the lawyer.
295. The funded party needs to be alert to that possibility, and there should be open discussion between the funded party; the funder and the lawyer when possible conflicts of interest arise and in communicating how those conflicts are to be managed.

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296. The funding agreement needs to provide for those circumstances by providing the lawyer for the funded party professional and fiduciary duty to the funded party only, and, in the event of a conflict of interest between the funded party and the funder, providing that the lawyer may continue to act solely for the funded party, even if the funder's interests are adversely affected by the lawyer doing so.
297. Conflict about settlement may also be dealt with in the funding agreement by, for instance, providing that differences over the settlement must be referred to the nominated Counsel for a binding expert opinion on whether the settlement is reasonable, or some other dispute resolution clause, such as mediation.
298. For a funder to carry out its due diligence, it must have access to all information held by the funded party and its lawyers that may be relevant to the claim and the decision of the fund to proceed to fund the arbitration.
299. A failure to provide the full and frank disclosure to the funder may be grounds for the funder to terminate the funding agreement.
300. The lawyer's duty of confidentiality to the funded party and the lawyer's advice to the funded party, which is privileged, would be compromised by the lawyer providing information about the claim to the funder. Usually a confidentiality agreement is entered between the fund; the funded party and the lawyer at the commencement of the relationship or there are confidentiality provisions in the funding agreement.
301. In some jurisdictions, contractual provisions about confidentiality may not prevent a party to the arbitration from seeking to discover documents in the possession of the funder, if those documents are relevant to the matters in issue.
302. There remains a risk that privilege in documents prepared by the lawyer for the funded party for the purpose of the dispute will be waived when those documents are given to the funder, or that communication between the funder; the funded party's lawyer and the funded party will not be protected by privilege in jurisdictions that do not recognise common interest privilege.

Disclosure of the Existence of Funding

303. The leading arbitral institutions seem to have no rules that require a party to disclose that it is being funded. It can become relevant when, for instance, a respondent seeks security for its costs.

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After the Event Insurance

304. After the Event Insurance (ATE) is a type of legal expenses insurance taken out after a dispute has arisen to protect a party from the present risk that the party will have to pay the costs of another party to the arbitration, including legal fees and expenses. ATE insurance can be obtained for international arbitration proceedings.
305. An ATE policy can include the insured party's costs; disbursements such as expert's fees and may include the arbitrator(s) fees, and even, uncommonly, the insured's own legal fees.
306. Before The Event Insurance (BTE) is also available before the dispute has arisen.
307. In England, the ATE premium is recoverable from the losing party in litigation as part of costs awarded. The ATE premium can be made payable only in the event that the claim is won. It is unclear the extent to which an international tribunal would allow recovery of an ATE premiums, which are often 50 per cent or more of the cover being provided.

Credit Defaults

308. Credit defaults from financial institutions may also be taken out to hedge the risks inherent in arbitration proceedings.
309. Credit default swaps are a type of derivative financial instrument used to hedge credit risk by creditors to purchase financial assurance against the default or bankruptcy of a debtor.
310. Litigation funding in some jurisdictions remains restricted because they continue the common law prohibition on maintenance and champerty.
311. For instance, in Hong Kong, maintenance and champerty remains, but there are public policy exclusions from the restrictions.
312. The test is whether the funding arrangement poses a genuine risk to the integrity of the process.
313. The Hong Kong Law Reform Commission has formed a subcommittee to review the current position of funding for arbitration and to make recommendations for reform.
314. In October 2015, the subcommittee published a consultation paper,²⁴ recommending that the Arbitration Ordinance be amended to permit litigation

²⁴ The full consultation paper is available at www.hkreform.gov.hk/

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funding, contingent on financial and ethical safeguards. As of April, 2016, these changes have not been implemented.

315. Similarly, litigation funding of arbitration is restricted in Singapore by the continued torts of champerty and maintenance.

ANNEXURE 1

MODEL ARBITRATION CLAUSES

The Arbitral Institution recommends model clauses for the reference of dispute to arbitration. A model clause may not be suitable for particular agreements and cases. The clauses may need amendment to cater for differences in particular circumstances.

At paragraphs 7 and 33 to 36 above is a list of matters to be considered when drafting an arbitration agreement.

HKIAC administered arbitration rules:

“Any dispute, controversy, difference or claim arising out of or relating to this Contract, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it, shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted.

The law of this arbitration clause shall be Hong Kong Law.

The seat of the arbitration shall be Hong Kong.

The number of arbitrators shall be one or three. The arbitration proceedings shall be conducted in [insert language].”

Arbitration administered by HKIAC under the UNCITRAL Rules:

“Any dispute, controversy, difference or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach, or termination thereof, or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the UNCITRAL Arbitration Rules in force when the Notice of Arbitration is submitted, as modified by the HKIAC Procedures for the Administration of International Arbitration.

The law of this arbitration clause shall be Hong Kong Law.

The seat of the arbitration shall be Hong Kong.

The number of arbitrators shall be one or three. The arbitration proceedings shall be conducted in [insert language].”

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Ad Hoc Arbitration under the UNCITRAL Rules:

“Any dispute, controversy, difference or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach, or termination thereof, or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration under the UNCITRAL Arbitration Rules in force when the Notice of Arbitration is submitted, as modified by the HKIAC Procedures for the Administration of International Arbitration.

The law of this arbitration clause shall be Hong Kong Law.

The seat of the arbitration shall be Hong Kong.

The number of arbitrators shall be one or three. The arbitration proceedings shall be conducted in [insert language].”

SIAC model clause:

“Any dispute, arising out of or in connection to this contract, including any question regarding its existence, validity, or termination shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre (SIAC) in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (SIAC) for the time being in force, which rules are deemed to be incorporated by reference in this Clause.

The seat of the arbitration shall be Singapore.

The tribunal shall consist of [] arbitrator(s).

The language of the arbitration shall be ...

This contract is governed by the laws of ...”

UNCITRAL Rules:

“Any dispute, controversy, or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof shall be settled by arbitration in Singapore in accordance with the UNCITRAL arbitration rules for the time being in force.

The arbitration shall be administered by Singapore International Arbitration Centre (SIAC) in accordance with its practice note on UNCITRAL cases.

The appointing authority shall be the president or vice-president of SIAC Court of Arbitration.

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The number of arbitrators shall be...

The language of the arbitration shall be ...”

SIAC Expedited Procedure model clause:

“Any dispute, arising out of or in connection to this contract, including any question regarding its existence, validity, or termination shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre (SIAC) in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (SIAC) rules for the time being in force, which rules are deemed to be incorporated by reference in this Clause.

The parties agree that any arbitration commenced pursuant to this clause shall be conducted in accordance with the Expedited Procedure set out in Rule 5.2 of the SIAC Rules.

The seat of the arbitration shall be [Singapore].

The tribunal shall consist of one arbitrator.

The language of the arbitration shall be ...

This contract is governed by the laws of ...”

ACICA recommends use of the following clauses:

“ACICA arbitration Agreement:

Any dispute, controversy or claim arising out of or relating to or in connection with this contract including any question regarding its existence, validity or termination shall be resolved by arbitration in accordance with the ACICA Arbitration Rules. The seat of the arbitration shall be Sydney Australia [or choose another city] the language of the arbitration shall be English [or choose another language]. The number of arbitrators shall be one [or three][or delete this sentence and rely on article 10 of the ACICA arbitration rules].”

The ICC model clause for arbitration without an emergency arbitrator:

“All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules. The Emergency Arbitrator Provisions shall not apply.

The law governing the contract is ...;

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The number of arbitrators shall be ...;

The place of arbitration shall be ...;

The language of the arbitration shall be...”

LCIA model clause:

“Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.

The number of arbitrators shall be [one/three].

The seat, or legal place, of arbitration shall be [City and/or Country].

The language to be used in the arbitral proceedings shall be [].

The governing law of the contract shall be the substantive law of [].”

ICDR model clause:

“Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules.”

The number of arbitrators shall be [one or three];

The place of arbitration shall be [city, (province or state), country];

The language(s) of the arbitration shall be...”

Future Disputes - WIPO Arbitration Clause:

“Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be referred to and finally determined by arbitration in accordance with the WIPO Arbitration Rules. The arbitral tribunal shall consist of [a sole arbitrator][three arbitrators]. The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute, controversy or claim shall be decided in accordance with the law of [specify jurisdiction].”

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Existing disputes - WIPO Arbitration Submission Agreement:

“We, the undersigned parties hereby agree that the following dispute shall be referred to and finally determined by arbitration in accordance with the WIPO Arbitration Rules: [brief description of dispute].

The arbitral tribunal shall consist of [sole arbitrator] [three arbitrators]. The place of arbitration shall be [specify place] the language to be used in the arbitration shall be [specify language]. The dispute, controversy or claim shall be decided in accordance with the law of [specify jurisdiction].”

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ANNEXURE 2

NEW YORK CONVENTION STATES

Afghanistan	Democratic Republic	Lesotho
Albania	of the Congo	Liberia
Algeria	Denmark	Liechtenstein
Andorra	Djibouti	Lithuania
Antigua and Barbuda	Dominica	Luxembourg
Argentina	Dominican Republic	Madagascar
Armenia	Ecuador	Malaysia
Australia	Egypt	Mali
Austria	El Salvador	Malta
Azerbaijan	Estonia	Marshall Islands
Bahamas	Fiji	Mauritania
Bahrain	Finland	Mauritius
Bangladesh	France	Mexico
Barbados	Gabon	Monaco
Belarus	Georgia	Mongolia
Belgium	Germany	Montenegro
Benin	Ghana	Morocco
Bhutan	Greece	Mozambique
Bolivia (Plurinational	Guatemala	Myanmar
State of)	Guinea	Nepal
Bosnia and	Guyana	Netherlands
Herzegovina	Haiti	New Zealand
Botswana	Holy See	Nicaragua
Brazil	Honduras	Niger
Brunei Darussalam	Hungary	Nigeria
Bulgaria	Iceland	Norway
Burkina Faso	India	Oman
Burundi	Indonesia	Pakistan
Cambodia	Iran (Islamic Republic	Panama
Cameroon	of)	Paraguay
Canada	Ireland	Peru
Central African	Israel	Philippines
Republic	Italy	Poland
Chile	Jamaica	Portugal
China	Japan	Qatar
Colombia	Jordan	Republic of Korea
Comoros	Kazakhstan	Republic of Moldova
Cook Islands	Kenya	Romania
Costa Rica	Kuwait	Russian Federation
Côte d'Ivoire	Kyrgyzstan	Rwanda
Croatia	Lao People's	Saint Vincent and the
Cuba	Democratic Republic	Grenadines
Cyprus	Latvia	San Marino
Czech Republic	Lebanon	Sao Tome and Principe

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Saudi Arabia	Tajikistan	United Republic of
Senegal	Thailand	Tanzania
Serbia	The former Yugoslav	United States of
Singapore	Republic of Macedonia	America
Slovakia	Trinidad and Tobago	Uruguay
Slovenia	Tunisia	Uzbekistan
South Africa	Turkey	Venezuela (Bolivarian
Spain	Uganda	Republic of)
Sri Lanka	Ukraine	Viet Nam
State of Palestine	United Arab Emirates	Zambia
Sweden	United Kingdom of	Zimbabwe
Switzerland	Great Britain and	
Syrian Arab Republic	Northern Ireland	

ANNEXURE 3

ARBITRAL INSTITUTIONS

Asia Pacific

- Australia: the Australian Centre for International and Commercial Arbitration (ACICA – visit www.acica.org.au)
- China: the China International Economic and Trade Arbitration Commission (CIETAC – visit www.cietac.org)
- Hong Kong: the Hong Kong International Arbitration Centre (HKIAC – visit www.hkiac.org)
- India: LCIA India (visit www.lcia-india.org)
- Japan: the Japanese Commercial Arbitration Association (JCAA – visit www.jcaa.or.jp/e/)
- Singapore: the Singapore International Arbitration Centre (SIAC – visit www.siac.org.sg); the Singapore International Commercial Court (SICC – visit www.sicc.gov.sg/)

Europe

- Austria: the Vienna International Arbitral Centre (VIAC) for the Austrian Federal Economic Chamber (visit www.viac.eu)
- England: the London Court of International Arbitration (LCIA – visit www.lcia.org)
- France: the International Court of Arbitration of the International Chamber of Commerce (ICC – visit www.iccwbo.org)
- Germany: The German Institute of Arbitration (DIS – visit www.dis-arb.de/en/)
- The Netherlands: the Netherlands Arbitration Institute (NAI – visit www.nai-nl.org/en)
- Sweden: the Arbitration Institute of the Stockholm Chamber of Commerce (SCC – visit www.sccinstitute.com)
- Switzerland: the Swiss Arbitration Association (ASA – visit www.arbitration-ch.org); the Chamber of Commerce & Industry of Geneva (visit www.cci.ch); the Zurich Chamber of Commerce (visit www.zhk.ch/en/); the World Intellectual Property Organisation (WIPO) Arbitration and Mediation Centre (visit www.wipo.int)

Middle East and Africa

- Bahrain: the Bahrain Chamber for Dispute Resolution (BCD-AAA – visit www.bcdr-aaa.org)
- Dubai: the Dubai International Arbitration Centre (DIAC – visit www.diac.ae); Dubai International Financial Centre (DIFC – visit www.difc.ae); DIFC Courts (visit difccourts.ae/)
- Egypt: the Cairo Regional Centre for International Commercial Arbitration (CRCICA – visit cricca.org.eg)

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- Mauritius: the LCIA-MIAC Arbitration Centre (visit www.lcia-miac.org)

The United States

- The American Arbitration Association (AAA – visit www.adr.org)
- International Centre for Dispute Resolution (ICDR – visit www.icdr.org)
- The International Centre for Settlement of Investment Disputes (ICSID – visit icsid.worldbank.org)

ANNEXURE 4

GLOSSARY

AAA: The American Arbitration Association. The AAA is a U.S. organisation that provides administrative services for arbitrations. Internationally, it facilitates arbitration through its International Centre for Dispute Resolution (ICDR). For more information, visit www.adr.org.

ACICA: The Australian Centre for International and Commercial Arbitration. The ACICA is Australia's foremost international dispute resolution authority, and provides services for domestic and international arbitrations, including the appointment of arbitrators. It has developed a set of Arbitration Rules under which disputes can be heard. For more information, visit www.acica.org.au.

ADR: Alternative Dispute Resolution; a group of non-binding procedures involving an impartial third party that allow parties to solve disputes and issues without resorting to Court.

Ad hoc arbitration: An arbitration that is not administered by an institution, meaning that the parties to the dispute need to agree upon the procedural matters.

Amiable compositeur: The authority for a tribunal to decide a dispute *ex aequo et bono* (according to equity), rather than being bound to decide according to the parties' strict legal rights. The tribunal looks at what would be considered just in the specificities of the case to arrive at the most fair outcome.

Appeal: The referral of an arbitral award to another tribunal or to a national Court for reconsideration. There are only limited rights of appeal, if any, for international arbitrations, dependent on the specific rules used.

Applicable law: The law that applies to the dispute.

Arbitrability: Whether, under the applicable law, a particular dispute can be settled by arbitration. This is determined by the public policy of the state in question and the subject of the dispute. For example, criminal matters; divorce or dissolution of marriage; declaration of paternity; illegal contracts; adoption and ownership of property are not arbitrable. If a dispute is not arbitrable under an applicable law, any award from an arbitration may be unenforceable.

Arbitral tribunal: The arbitrator(s) who determine the dispute.

Arbitration agreement: The agreement between parties to refer their disputes to arbitration. It usually forms part of the contract between the parties, but is considered to be a separate agreement that survives the termination of the contract within which it is contained.

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Arbitration: A formal dispute resolution process heard and decided by an impartial tribunal. The parties must agree to refer the matter to arbitration, however it is regulated and enforced by the state.

Arbitrator: The third party who hears and decides the outcome of an arbitration.

Award: The decision of an arbitral tribunal on a substantive issue. Awards can be interim; partial; provisional or final. An interim award is made during the proceedings and is binding, but has only temporary effect and does not finally decide an issue. A partial award finally decides one or more (but not all) of the issues before the tribunal. A provisional award, on the other hand, is an unenforceable decision; it can be varied or revoked. A final award decides all the (or all the remaining) issues and closes the arbitration.

BITs: Bilateral Investment Treaties. These are treaties between two states that govern and protect investment between the contracting states.

CEDR: The Centre for Effective Dispute Resolution, an independent body based in London that provides Alternate Dispute Resolution services. For more information, visit www.cedr.com.

Challenge to award: The process a party can use to impugn an award, usually concerning a serious irregularity of the tribunal's jurisdiction or procedure, in the courts of the seat of arbitration. In contrast to rights of appeal, most major jurisdictions provide rights to challenge awards that cannot be waived by the parties.

CIETAC: The China International Economic and Trade Arbitration Commission. The largest arbitration centre in China, CIETAC is based in Beijing and has sub-commissions throughout China, as well as a centre in Hong Kong. For more information, visit www.cietac.org.

Competence—Competence: The legal principle that gives an arbitral tribunal the power to decide upon its own jurisdiction. This power remains even if the contract containing the arbitration agreement is invalid or has been terminated due to the separability principle.

Conciliation: A form of ADR, similar to mediation. It is a voluntary dispute resolution process in which an independent third party conciliator assists the parties in attempting to settle their dispute. The conciliator may provide a non-binding settlement proposal or express his/her opinion on the possible outcome if legal proceedings are pursued, but cannot force the parties to settle.

Conflict of laws: The legal rules in each jurisdiction that determine the applicable law in the dispute. To decide the applicable law for a given dispute, Courts may take into account the place of performance of the contractual obligations (*lex loci*); the parties' nationality; the place of the arbitration (*lex fori*) and subject matter of the arbitration.

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Consent award: An award recording the terms of settlement of the dispute. Unlike usual arbitration awards, the terms of the consent award are determined by the parties, rather than by the arbitral tribunal's evaluation of the dispute on its merits. Advantageously, the terms of the consent award can be enforced if parties do not comply, like any other award. A settlement agreement, on the other hand, is essentially a contract.

Consolidation: The merger of separate arbitrations. This normally requires the agreement of all of the parties, although some arbitral institution rules allow consolidation without this absolute consent.

Costs of the arbitration: Depending upon the applicable law; arbitral rules and the discretion of the tribunal, the successful party will often be awarded all or part of its costs of the arbitration, divided into the broad categories of procedural costs and parties' costs. Procedural costs include the fees of the tribunal; any institution; experts and witnesses; and the costs of hearing facilities; interpreters; translators and reporting services. Parties' costs are the costs incurred by the parties in preparing and presenting the dispute, such as the fees and expenses of the lawyers. Costs in respect of management and employee time engaged on the arbitration generally are not awarded. Parties may take out After the Event insurance to protect themselves against the risk of costs awarded against them.

CPR: The International Institute for Conflict Prevention & Resolution. CPR is an independent body established in the US to promote ADR. It helps businesses worldwide to prevent and resolve disputes. For more information, visit www.cpradr.org.

Designation of arbitrator: An arbitral institution's selection of (an) arbitrator(s) for appointment to a dispute.

Disclosure / Discovery: The process by which the parties make available to each other certain documents in their possession or under their control that are relevant to the dispute. The extent of disclosure (from none to all relevant documents) is decided by the discretion of the tribunal. The tribunal traditionally should only allow a limited use of discovery if the parties do not specify the extent, however they are influenced by the extent traditionally allowed in the jurisdiction of each arbitrator: those from civil law jurisdictions generally prefer more restricted disclosure than those from common law jurisdictions. The obligation to disclose arises even in situations where the documents are damaging to the position of the party required to present the documents.

Dispute Resolution Clause: The clause inserted in a contract that states the situations in which a dispute will be referred to arbitration (or other forms of ADR); steps to protect the commercial relationship, such as "escalation" provisions; the express law that is to apply; the rules that will govern the arbitration and similar concerns.

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Domestic arbitration: arbitration between parties that are in the same jurisdiction or share the same nationality. Whether it is distinguished from international arbitration depends on the nature of the dispute and the applicable law. Some institutions apply different rules, such as the ability for parties to appeal an award, depending on the category.

Enforcement of award: If a party does not comply with the terms of an award, the other party may apply to a court for the recognition and enforcement of the award. The enforcement procedures depend on the court and can include processes such as the seizure of assets. Parties in states that ratified the *New York Convention* can have the award enforced against them according to the Convention's rules.

Equity clauses: See "Amiable compositeur" above.

Ex aequo et bono: See "Amiable compositeur" above.

Experts: Experts are appointed by the parties and/or the tribunal to provide their impartial opinions on specific matters in the dispute in which they have experience or qualifications.

Expert determination: a determinative process where an ADR practitioner evaluates the dispute and makes a determination, using their own knowledge to decide the dispute. The parties can only use the provision of the contract for enforcement, and it is a largely unregulated process.

Geneva Convention: *The Convention on the Execution of Foreign Arbitral Awards*, signed in Geneva in 1927. This Convention provided for the recognition and enforcement of certain foreign awards in party states. It was superseded by the *New York Convention*.

Governing law: The law on which the contract the subject of the dispute is to be interpreted.

IBA: The International Bar Association. It is an organisation of international legal practitioners, bar associations and law societies. For more information, visit www.ibanet.org.

IBA Rules on the Taking of Evidence in International Arbitration: a set of rules on the mechanisms for presenting documents; witnesses and experts. They aim to ensure the use of evidence in arbitrations is efficient and fair.

ICC: The International Chamber of Commerce. The ICC provides a number of services to the international business community and promotes international trade and investment. The most significant aspect of the ICC's work in arbitration is the ICC Court, but it also provides other dispute resolution services, such as a mediation service under the ICC International Centre for ADR; proposal and appointment of experts; administration of expert proceedings and Dispute Boards. For more information, visit iccwbo.org.

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ICC Court: The International Court of Arbitration of the International Chamber of Commerce. The Court administers ICC arbitrations and performs functions under the ICC Rules of Arbitration, including appointing arbitrators; deciding on any challenges; scrutinising and approving arbitral awards and managing the costs of the arbitration.

ICSID: The International Centre for the Settlement of Investment Disputes, a specialised facility that administers disputes in international investment. It provides conciliation; arbitration and fact-finding processes. For more information, visit icsid.worldbank.org.

ICSID Convention: The Convention on the Settlement of Investment Disputes between States and Nationals of Other States was signed in Washington, D.C. in 1965 (the '*Washington Convention*') and has 150 contracting states. It created ICSID and provides for the resolution of investment disputes the parties have agreed to submit to ICSID.

Impartiality and independence: All arbitrators in international arbitrations must not be biased towards or against a party or in the subject matter of the dispute, meaning that they must be unconnected to the parties. Any bias by the arbitrator(s) results in the possibility that the arbitrator(s) is/are removed; the award is challenged or its enforcement resisted.

Interim relief: Depending on the law governing the institution, national courts have the authority to support an arbitration by granting interim relief, such as orders for the production of evidence or freezing of assets, before the appointment of the tribunal; the conclusion of an arbitration or the creation of an award. This is particularly helpful in situations where criminal sanctions are sought as the tribunal does not have the power to impose these.

International arbitration: Arbitration that concerns parties in different jurisdictions or of different nationalities.

Investment treaties: treaties between states that govern investment between party states and modify the domestic laws regulating foreign investment.

Joinder: The addition of a non-party to the arbitration. Joinder generally requires the consent of all parties to the dispute, although, depending on the rules governing the arbitration, the tribunal may have the power to join third parties in some situations. Preferably, a term providing for joinder should be included in the arbitration agreement as this can be evidence of consent to joinder.

Jurisdiction: The legal system of a state. The tribunal's jurisdiction is its scope of authority; what it can determine and on whom.

Language(s) of the arbitration: The language(s) in which all matters connected with the arbitration are conducted, including the parties' written submissions; evidence and any awards.

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LCIA: The London Court of International Arbitration. This body covers commercial dispute resolution and administers arbitration and other ADR processes for jurisdictions globally. For more information, visit lcia.org.

Lex arbitri: The procedural law of the arbitration, which is usually that of the seat of the arbitration.

Lex fori: The law of the country where the arbitration takes place.

Lex mercatoria: A set of legal principles of international commerce based on concepts found in developed legal systems. It continues to be recognised by the international business community, however its existence; status as law; scope and application is debateable. In arbitration cases where there is no clear applicable law or the UNIDROIT principles apply, it has been invoked as the law on which the dispute should be decided.

Mandatory requirements: The provisions of the applicable law that cannot be opposed by the parties.

Model Law: The Model Law on International Commercial Arbitration. The Model Law, which was adopted by UNCITRAL in 1985, was designed to create uniform, modern legislation governing arbitration globally. To date, 72 States and 102 jurisdictions have adopted legislation based on the Model Law.

Mediation: A form of ADR involving an independent third party “mediator” where parties to a dispute identify issues; develop options and seek to come to an agreement, facilitated by the mediator. A mediator cannot impose an award and tends not to give an opinion on the legal merits.

Med-Arb: a process where a dispute is referred to mediation, with the mediator usually then taking a role as one or all of the arbitrators if the dispute is not resolved through mediation.

NAFTA: North American Free Trade Agreement. This agreement aimed to lift barriers to trade between Canada; the United States and Mexico, and provides law governing trade and investment between the party states.

New York Convention: The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It is a multilateral treaty that provides for the enforcement of arbitral awards in the 156 party states.

Nomination of arbitrator: An arbitral institution’s selection of (an) arbitrator(s) for appointment to a dispute.

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Panama Convention: The 1975 Inter-American Convention on International Commercial Arbitration. Like the 1958 *New York Convention*, the *Panama Convention* provides for the enforcement of arbitral awards in more than 15 countries subject to specified grounds of refusal. Usually, the award to be enforced needs to have been made in a Convention state. The *Panama Convention* does not have the same rights to independently compel arbitrations as the *New York Convention*, and often Courts use the *New York Convention* over its successor. In some disputes, however, Courts are obligated to use the *Panama Convention*.

Party autonomy: The parties' freedom of choice (for example, to determine the procedure to be followed).

Permanent Court of Arbitration: Established in 1899 and based in The Hague, the Permanent Court of Arbitration (PCA) deals with disputes between states; state entities; international organisations and private parties that are party to the 1899 or 1907 Hague Conventions. The PCA does not have any sitting judges, and instead the parties to the dispute appoint the arbitrator. Under the *UNCITRAL Rules*, the Secretary-General of the PCA will designate an appointing authority if the parties fail to appoint (an) arbitrator(s) and do not designate an appointing authority. For more information, visit www.pca-cpa.org.

Preliminary issue: An issue decided prior to the hearing. It usually involves deciding on a central issue such as jurisdiction in advance as to save in the time and costs of the main hearing.

Public policy: A state's notions of justice and public morality and its perception of its essential political; social or economic interests. Public policy considerations may affect whether a dispute is arbitrable or an award enforceable.

Procedural law: The law applicable to the arbitration's procedure. This is typically the law of the seat, although can include recognised set of rules, such as those of the ICC; LCIA and UNCITRAL.

Recognition of award: Confirmation by a court that an award is valid and binding.

Redfern schedule: A document completed by parties in an arbitration to formally request certain documents. The party receiving this request must produce the documents to the requesting party or raise an objection to the party and the tribunal. The arbitral tribunal then rules on the request in the form of a procedural order.

Remission: The power of a court to return an award to the arbitral tribunal for reconsideration in whole or in part. This is rarely permitted.

Rules of arbitration: The procedural rules pursuant to which the arbitration is conducted.

Seat of the arbitration: The jurisdiction in which the arbitration is deemed to take place. This can be different from the physical location of the tribunal.

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Separability: The ability for the arbitration clause to be considered separate from the contract in which it is placed. The agreement therefore can survive the termination of the main contract.

Settlement: The voluntary resolution of a dispute by its parties.

Set aside: The power of a court to annul an otherwise enforceable award.

Slip rule: A rule allowing a tribunal, on application of a party or on its own initiative, to correct minor errors and remove ambiguity in its award.

Sovereign (or state) immunity: The idea that sovereign states and their entities cannot be compelled without their consent to act in accordance with the judgments or awards of courts of other states or tribunals.

Stay of court proceedings: A court order suspending proceedings permanently or for a specific length of time. In arbitration, the court can stay proceedings if they were commenced in breach of an agreement to submit disputes to arbitration.

Submission agreement: An agreement to arbitrate in respect of a dispute that has already arisen.

Terms of Reference: A document, required by the ICC Rules, that lists the full names; addresses and descriptions of the parties and their representatives; a summary of their claims; the place of arbitration and, in some cases, a list of the issues to be determined.

Trade usages: The standard terms on which members of a particular business community customarily operate. Under some arbitration rules (such as the ICC's), the tribunal is required to take account of any relevant trade usages.

UNCITRAL: The United Nations Commission on International Trade Law. It is a UN organisation specialising in commercial transactions globally, and has its own set of rules governing arbitration, the UNCITRAL rules. For more information, visit www.uncitral.org.

UNIDROIT Principles: A set of international contract law rules published by the International Institute for the Unification of Private Law in 1994, currently in its 3rd edition. The UNIDROIT Principles attempt to harmonise international contract law and therefore reflect *lex mercatoria*.

Washington Convention: The ICSID Convention.

WIPO: The World Intellectual Property Organisation. Established in 1994, it is an agency of the United Nations. It has an arbitration and mediation centre created to resolve disputes regarding intellectual property. For more information, visit www.wipo.int.