



LATHAM & WATKINS

# **Guide to International Arbitration**

# Latham & Watkins'

## International Arbitration Practice

The firm's international arbitration lawyers represent private corporations, States and State-owned enterprises in major international disputes all over the world. The practice embraces disputes from a broad range of areas: oil and gas, construction, energy and infrastructure projects, concessions, off-take agreements, telecommunications, finance and corporate transactions, joint ventures, insolvency, insurance and reinsurance, fraud, accountants' liability, intellectual property, environmental, distribution, import and export, and numerous others.

Latham lawyers have conducted proceedings in many jurisdictions and under all of the major international arbitration rules, and are accustomed to addressing choice of law, choice of jurisdiction, comparative law, and cross-cultural issues. The firm takes full advantage of the Latham network of international offices supported by an advanced, unified, technology platform. This facilitates communication and coordination, both internally and with clients, and enhances Latham's effectiveness, giving the firm the edge in transnational, multi-jurisdictional, disputes requiring a coordinated strategy and the application of multiple laws.

The firm is able to assemble experienced teams of talented professionals and dedicated support staff to help clients to meet legal, linguistic, technical, and any other requirements across the globe.



**Latham & Watkins has an outstanding, multi-faceted global practice in international dispute resolution.**

# Contents

<b>Foreword</b>	Why International Arbitration?	
<b>Chapter I</b>	What Is Arbitration? .....	2
<b>Chapter II</b>	When Should Provision for Arbitration Be Made? .....	4
<b>Chapter III</b>	The Tribunal .....	10
<b>Chapter IV</b>	The Choice of Arbitration Rules .....	12
<b>Chapter V</b>	The Place of Arbitration .....	22
<b>Chapter VI</b>	Typical Steps in an Arbitration .....	24
<b>Chapter VII</b>	Checklist of Areas to Consider .....	26
<b>Chapter VIII</b>	Arbitration Between Foreign Investors and States .....	32
<b>Annex 1</b>	Model Arbitration Clauses .....	38
<b>Annex 2</b>	New York Convention States .....	42
<b>Annex 3</b>	Arbitral Institutions .....	46
<b>Annex 4</b>	Glossary.....	48
<b>Contacts</b>	.....	56

# FOREWORD

## Why International Arbitration?

The expansion and globalisation of cross-border investment and trade has led to increased and ever more complex relationships between businesses, investors, and States. As, inevitably, some of those relationships break down, parties need to consider (preferably at the outset of the relationship) the best means of resolving any disputes which may arise. In many cases, that will be arbitration.

Arbitration has been used for centuries, with Plato writing about arbitration amongst the ancient Greeks. In more modern times, arbitration became the standard method for resolving disputes in certain industry sectors (such as construction, commodities, shipping, and insurance) where the arbitrators' technical expertise was particularly valued. However, over the last 50 years or so, the international community has increasingly embraced arbitration, with many recognising its importance as the primary means of resolving complex, transnational, disputes (as well as the economic benefits for a State perceived as "arbitration friendly").

**Here, in a nutshell, are a few of the features that have led to the prominence of arbitration in the international arena:**

- **Enforceability:** Arbitration awards are more widely and readily enforceable than court judgments primarily as a result of the 1958 New York Convention, a multilateral treaty for the enforcement of arbitral awards to which over 150 states are party.
- **Neutral forum:** A party will often prefer not to submit to the jurisdiction of another party's national courts. International arbitration can provide a neutral forum for dispute resolution.
- **Procedural flexibility:** Arbitration rules are streamlined, flexible, and far less complex than most national rules of civil procedure, making them better suited to parties from different jurisdictions.
- **Arbitrators with the appropriate experience:** Arbitrators can be selected by the parties for their familiarity with relevant commercial practices, trade usages, and legal structures, and their ability to apply different national laws and deal with comparative law issues.
- **Party autonomy:** The parties to an arbitration can shape their dispute resolution process by, for example, selecting the governing law, the place of arbitration, many aspects of the arbitral procedure, and, of course, arbitrators whom they believe will ensure a fair hearing of their case.



. . . over the last 50 years or so, the international community has increasingly embraced arbitration, with many recognising its importance as the primary means of resolving complex, transnational commercial disputes.

Arbitration is not right for every party in every situation. Arbitration might have drawbacks, depending upon a party's particular circumstances and objectives. It is therefore necessary to make a considered decision in each case.

This Guide is designed to help with that decision and, where appropriate, to assist in the drafting of arbitration provisions. Although an arbitration clause need not be complicated, as the source of the arbitrators' mandate, an arbitration clause is critical.

Unlike courts, arbitral tribunals in commercial disputes have no inherent power or jurisdiction. Their authority arises from the parties' contract (albeit that, once selected by the parties, arbitration has the backing of statutes and treaties). Therefore, parties should take particular care in drafting arbitration provisions. Once a dispute has arisen, self-interest will often mean that it is too late to reach further agreement on how a dispute should be resolved.

In short, whilst this Guide provides convenient and practical assistance in relation to the principal matters that arbitrators and parties to arbitration should address, it is not intended to be a comprehensive treatise on arbitration or a substitute for specialist advice.

## What Is Arbitration?

Commercial arbitration is a private form of binding dispute resolution, conducted before an impartial tribunal, which emanates from the agreement of the parties, but which is regulated and enforced by the State. The State requires the parties to honour their contractual obligation to arbitrate, provides for limited judicial supervision of arbitral proceedings, and supports the enforcement of arbitral awards in a manner similar to that for national court judgments.

Arbitrations are typically conducted by either one or three arbitrator(s), referred to in each case as the “tribunal”. The tribunal is the equivalent of a judge (or panel of judges) in a court action. However, the arbitrators are generally selected by the parties (either directly or indirectly through a third party or institution) and, as a result, the parties maintain some control over who is to determine their dispute. Arbitrators in international cases are usually very experienced lawyers and/or experts in the field in which the dispute has arisen.

The tribunal’s powers and duties are fixed by the terms of the parties’ agreement (including, in particular, any arbitration rules that have been adopted) and the national laws which apply in each case.

Under most leading legal systems, arbitrators are obliged to make their awards according to the applicable law unless the parties have agreed otherwise (for example, by empowering the tribunal to decide in accordance with what it perceives to be “fair”). The tribunal is obliged to follow due process and ensure that each party has a proper opportunity to present its case and defend itself against that of its opponent. However, in other respects, the procedure can be very flexible.

National laws generally recognise and support arbitration as a mutually exclusive alternative to litigation as a means of finally resolving disputes. Some practitioners

(particularly in the US) therefore refer to arbitration as a form of alternative dispute resolution (ADR). However, the acronym ADR is more often used to describe non-binding procedures (such as mediation), thereby distinguishing between litigation and arbitration on the one hand, and ADR on the other.

In fact, non-binding procedures are not really an “alternative” to litigation and arbitration because, unless the parties reach a settlement, they must still resort to a binding procedure, such as arbitration or litigation, to resolve their dispute. This has caused some to redefine ADR as “amicable dispute resolution”, thereby emphasising that mediation and related approaches depend upon the voluntary cooperation and agreement of the parties.

Arbitration is also to be distinguished from binding expert determination. As the procedures for both can largely be prescribed in the parties’ contracts, they can take very similar forms. On a decision-making level, the distinction is that whilst the arbitrators may be selected for their experience in particular fields, they are tasked with deciding the dispute primarily upon the basis of the parties’ submissions and the applicable law, whereas experts use their own knowledge to come to their decision.

The distinction between arbitration and expert determination can be very important because, whereas arbitration is normally regulated by national arbitration laws, which safeguard the constitution of the tribunal and the procedure followed, expert determination is virtually unregulated. In the international context, arbitration also benefits from enforcement conventions that allow the direct enforcement of awards. The decisions of experts only have the force of contract and, to enforce them, parties must bring a new action in the appropriate jurisdiction for breach of contract.

# When Should Provision for Arbitration Be Made?

Parties should consider whether or not to provide for arbitration every time they enter into a contract. However, providing for arbitration is particularly important if the parties (or their assets) are in different jurisdictions or if disputes might give rise to complex technical issues.

Lawyers commonly refer to the “advantages and disadvantages” of arbitration. However, whether any given feature of arbitration is an advantage, a disadvantage, or of no interest to a party is entirely dependent upon its objectives. This Guide has therefore simply placed the features that most often prove conclusive in the decision-making process towards the top of the list that follows.

**Enforceability:** Due to international conventions, the potential for enforcing arbitral awards worldwide is much greater than that for court judgments. As there is little point in obtaining a court judgment that cannot be enforced against suitable assets, this feature often conclusively determines the choice of arbitration for international contracts. The most important enforcement convention (although there are others) is the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the New York Convention). Over 150 countries are party to the New York Convention, each of which broadly agrees to enforce arbitral awards made in other contracting States subject only to limited grounds for objection. The parties to the New York Convention are listed in Annex 2. There is no such wide-ranging convention providing for the enforcement of court judgments (the closest being the Recast Brussels Regulation, which is limited to Member States of the European Union).

**Neutrality:** A party to an international contract will often wish to avoid resolving disputes through the local courts of another party. Arbitration provides the opportunity for



neutral dispute resolution (e.g., with international rules being applied by a multinational tribunal in a mutually acceptable venue).

**Confidentiality:** Although the degree of confidentiality afforded by the arbitration law of different jurisdictions (absent express provision by the parties) varies, there can be no doubt that arbitration provides greater privacy and confidentiality than litigation (which is often public). Few arbitration rules deal with confidentiality (the London Court of International Arbitration Rules are an exception in this regard) so if parties want to make provision for confidentiality, they need to do so in their arbitration agreement. However, if enforcement through the courts becomes necessary, confidentiality might be put at risk by the court process, and parties must pay regard to any mandatory reporting obligations.

**Technical expertise and experience:** The parties can select arbitrators with relevant expertise or experience. Although some jurisdictions have very good specialist courts (e.g., the Commercial Division of the New York Supreme Court and the English Technology and Construction Court), in others, parties run the risk of their dispute being decided by a judge with little or no relevant experience.

**Procedural simplicity and flexibility:** Arbitration rules are generally far simpler and more flexible than court rules. As a result, they are relatively easy to understand for parties of different nationalities, the proceedings are more easily focused on the substantive issues and the parties are better able to adapt the dispute resolution process to suit their relationship and the nature of their disputes. In many cases, parties (or tribunals exercising discretion left to them by the parties) choose to follow a procedure that is similar to court procedures,

although parties might change, for example, the scope of disclosure or waive rights of appeal. However, in some cases, parties go much further, waiving the right to an oral hearing or empowering the tribunal to decide according to principles of fairness rather than according to the law. Of course, a potential drawback arising from the flexibility and the generality of arbitration rules is that, where the parties do not reach agreement in advance, there is a greater risk of debate over procedure, which can cause uncertainty and lead to delays.

**Choice of arbitrators:** Unlike court proceedings, in which generally parties have no input into the choice of judge for their case, the parties to an arbitration usually appoint, nominate, or at least have some input into the selection of the arbitrator(s). Most developed arbitration laws require that all of the arbitrators be impartial. However, a party can use its choice or input into the selection process to help ensure that, as far as possible, the tribunal will understand the commercial context, the relevant issues, and the party's procedural preferences. The parties may agree upon certain criteria for the arbitrators, or for the presiding arbitrator, although they should take care not to narrow the field so far that there are difficulties in identifying potential candidates. In arbitrations with more than one party on either side, or where other parties might be joined in to the proceedings, maintaining the parties' right to choose the arbitrators (rather than simply delegating the choice to an institution) can be particularly challenging. For example, if one party has the right to select an arbitrator but two parties on the other side cannot agree upon a joint selection, the latter could claim that they were not being treated equally. Careful consideration as to the means of appointing the arbitrators is therefore required in such multi-party scenarios.

**Cost:** There is no simple answer as to whether arbitration is cheaper than litigation. As legal fees generally account for the majority of the costs of proceedings (whether arbitration or litigation), the controlling factors are largely the complexity of the dispute, the way the proceedings

are conducted and their length. In arbitration, parties must pay for the arbitrators, any administering institution, and the hiring of venues for hearings. On the other hand, there are no court fees and parties are free to agree to a process tailor-made for their dispute. This might be, for example, a streamlined, “fast track” procedure (although inflexible and unrealistic schedules can be problematic). Significantly, parties normally agree that there is no right of appeal (on the merits) from any award (potentially saving years of further proceedings). England is unusual in having a limited right of appeal on a point of English law, but even this is usually excluded in international arbitration agreements. In most jurisdictions, courts may only review awards for strictly limited reasons, such as alleged procedural irregularities or jurisdiction issues. International arbitral tribunals are generally empowered to award the successful party the majority, or at least a measure, of its costs, although practice varies depending on the applicable rules/law and the composition of the tribunal.

**Pre-emptive remedies:** Arbitral tribunals are often empowered (by the parties or the applicable law) to grant preliminary relief, such as an order freezing assets. In addition, many arbitration rules provide for the appointment of an “emergency arbitrator” to consider any application for interim relief before an arbitral tribunal has been constituted to determine the substantive dispute. However, no arbitral tribunal or emergency arbitrator can impose criminal sanctions upon a defaulting party or bind third parties. In order to enable parties to obtain effective relief, arbitration rules/laws commonly allow parties to apply to courts for interim relief (as distinct from a hearing of the merits of the case) if this is not available from the tribunal (for example, because this has not been constituted) or an emergency arbitrator (for example, because third parties are involved).

**Joinder of parties and related disputes:** In contrast to court proceedings, generally all parties must consent before additional parties or related disputes can be joined to an existing arbitration. Whilst a few national

legal systems (e.g., the Netherlands) allow parties to apply to the courts to order a third party to be joined to an arbitration, this is unusual. Some arbitration rules make limited provision for joinder. In addition, if consideration is given to this issue at the time the contract is drafted, the difficulty can be addressed by express provisions in the arbitration agreement. In essence, such provisions record the parties' consent to joinder in advance of the situation arising, and set out a procedure for the joinder to take place. In multi-contract and/or multi-party transactions, provisions for joinder can become complicated and require considerable care in drafting. However, if provision is not made before a dispute arises, it will often be difficult to obtain the consent of all parties because of their differing self-interests. In such circumstances, relevant parties will have to decide whether or not to pursue separate proceedings in relation to the third party.

**Default judgment:** In some court proceedings, judgment can be made against a party that has transgressed the rules of the court procedure without the court ruling formally on the merits of the dispute. This is generally not available in arbitration. Even if a party has committed serious procedural defaults or has completely ignored the arbitration process, institutional arbitration rules and national arbitration laws generally require that an arbitral tribunal still examine the merits of the claim based on whatever evidence has been put before it. If insufficient evidence has been provided to prove a claim to the necessary standard, the claim will still fail, regardless of the opposing party's procedural defaults.

**Summary judgment:** There is no exact equivalent in arbitration of applications for summary judgment (in the English courts) or motions to dismiss (in the US courts). However, arbitral tribunals may adopt shortened procedures in certain cases. For example, in cases such as simple loan defaults, the arbitral tribunal may feel that it is unnecessary to hear full evidence or even conduct an oral hearing. Arbitral tribunals have

... whether any given feature of arbitration is an advantage, a disadvantage or of no interest to a party is entirely dependent upon its objectives.

traditionally been more reluctant to adopt summary procedures than some courts, perhaps in part due to the lack of an appeals mechanism. However, in order to encourage more tribunals to take this step in appropriate cases, some institutional rules (e.g., those of the Singapore International Arbitration Centre) now expressly provide for a form of summary procedure if the tribunal considers that a claim or a defence “manifestly lacks legal merit”. Parties may also make express provision for a summary procedure in their arbitration agreement.

**Appeals:** Appeals in arbitration are uncommon, as distinct from challenges to the award, which generally are based on a failure to accord a party due process or the improper assumption of jurisdiction on the part of the arbitral tribunal. One of the reasons for arbitration’s popularity is precisely because of the lack of an appeals mechanism and the certainty generated by the final award. The English Arbitration Act is somewhat anomalous by international arbitration standards, as the act permits parties to appeal points of English law to the English courts, albeit in limited circumstances. However, parties have the flexibility to exclude this right of appeal in their arbitration agreement if they wish, and institutional arbitration rules such as those of the London Court of International Arbitration and the International Chamber of Commerce do so without requiring further provision.

### The Tribunal

In the vast majority of cases, the arbitral tribunal consists of either one or three arbitrators. The choice between one or three arbitrators can be made in advance or left for agreement between the parties (or for decision by an arbitral institution or appointing authority) after the dispute has arisen.

Arbitration with a sole arbitrator is generally cheaper than using three arbitrators, both because of the savings in arbitrators' fees and because he or she can conduct the proceedings more quickly, without the need to coordinate with two other busy professionals. However, providing for a sole arbitrator means that the parties cannot each select or nominate an arbitrator and, of course, the proceedings revolve around just one decision-maker. In addition, the exchanges and interplay among the arbitrators in a three-member panel can sometimes give more insight into the tribunal's decision-making process, allowing a party to alter its strategy accordingly. For these reasons, high-value and complex international disputes are generally referred to three arbitrators.

**Parties usually seek advice from their lawyers as to suitable arbitrators. If Latham advises in this regard, the firm draws upon experience of persons with the required attributes . . .**

The major arbitration rules (and many national laws) provide methods for the appointment of the tribunal in default of agreement between the parties. In general, sole arbitrators are selected by agreement between the parties or, if no agreement is reached within the allotted time, by the chosen appointing authority (or, if none, the relevant court). Where three arbitrators are to be appointed, two of them are normally selected (nominated) by the parties, with the presiding arbitrator chosen either by the two

party-nominated arbitrators or by the appointing authority (or court). Some institutional arbitration rules reserve to the institution the final appointment of the nominated arbitrators, thereby affording the institution the ability to stop appointments where the independence or impartiality of the arbitrator(s) is in question.

The parties can require that the arbitrators (or the presiding arbitrator) possess specified qualities (*e.g.*, persons in practice for at least 10 years or of different nationalities from the parties or with experience in international financial transactions). The arbitrators need not be lawyers but, for high-value international disputes, they normally are.

Parties usually seek advice from their lawyers as to suitable arbitrators. If Latham advises in this regard, the firm draws upon experience of persons with the required attributes (including experience as an arbitrator) and works with a client to identify those arbitrators expected to follow thought processes most in tune with a client's case. Among the factors Latham considers are:

- The candidate's familiarity with the governing law and the applicable arbitration rules
- The candidate's background (*e.g.*, legal training and experience, experience in the relevant industry or similar industries)
- The language and the place of the arbitration
- The candidate's writings (although many arbitrators are guarded in their publicly expressed views) and past decisions/awards to the extent known or available
- The firm's interactions with the candidate in previous arbitrations or at conferences, the views of Latham colleagues, and the candidate's general reputation
- The candidate's ability to influence the selection of the presiding arbitrator and the likelihood that the candidate's views will carry weight with the other arbitrators during deliberations

# The Choice of Arbitration Rules

Many countries have arbitration laws that provide a legal framework for the conduct of arbitrations. However, subject to mandatory requirements of the applicable law, parties are free to agree upon the procedure for their arbitration (or simply accept the default procedure under that law). Rather than drafting a custom-made procedure for each contract, parties usually adopt (and modify as appropriate) a set of tried and tested ready-made arbitration rules. These rules (as amended or supplemented by the parties) are then to be interpreted against the backdrop of the arbitration law of the seat (legal place) of the arbitration.

### Institutional arbitration

There are many arbitral institutions across the world: some focus on disputes with a strong tie to the country or region in which the institution is based, some focus on disputes in particular subject matters and some are fully international in scope and are used by parties throughout the world. This Guide focuses below on five pre-eminent international institutions, which are widely used and provide a good basis for discussing the factors parties should consider when choosing institutions and rules (additional important institutions are included in Annex 3):

- **The International Court of Arbitration of the International Chamber of Commerce (ICC).** The ICC, based in Paris, was established in 1923. It is probably the most widely known international commercial arbitration institution. For further information, see [www.iccwbo.org](http://www.iccwbo.org).
- **The London Court of International Arbitration (LCIA).** The LCIA, based in London, was established in 1892. It is a leading international arbitration institution and is very well known internationally.



There are many arbitration rules to choose from and, in considering the selection, it is useful to distinguish between arbitrations which are to be administered by institutions (institutional arbitrations) and those which are not (non-administered and ad hoc arbitrations).

The LCIA has affiliated arbitral institutions in Dubai (DIFC-LCIA), and Mauritius (LCIA-MIAC). For further information, see [www.lcia.org](http://www.lcia.org).

- **The International Centre for Dispute Resolution (ICDR).** The ICDR is a part of the American Arbitration Association (AAA). The AAA was established in 1926 and is frequently used for arbitrations in the US or by US-based parties. The ICDR administers international arbitrations (pursuant to its International Arbitration Rules). For further information, see [www.adr.org](http://www.adr.org).
- **The Hong Kong International Arbitration Centre (HKIAC).** HKIAC, based in Hong Kong, was established in 1985. The HKIAC is one of the best-known international arbitration institutions in Asia, with many of its cases having a China-related element. For further information, see [www.hkiac.org](http://www.hkiac.org).
- **The Singapore International Arbitration Centre (SIAC).** SIAC, based in Singapore, was established in 1991. SIAC is a highly respected international arbitration institution, particularly in Asia and the Indian subcontinent. For further information, see [www.siac.org.sg](http://www.siac.org.sg).

*(For details of many more arbitration institutions by region, see Annex 3.)*

The rules of the ICC, LCIA, ICDR, HKIAC, and SIAC are all suitable for use around the world and for arbitrations conducted in various languages and under various governing laws. In each case, the arbitrators must resolve the dispute, with the institutions simply administering the arbitrations.

Each of these institutions will receive and distribute the parties' initial submissions, assist with the appointment of the tribunal (with or without party-nominations), and resolve any challenges that a party may make against an arbitrator. The arbitration rules of each institution leave a considerable degree of flexibility with the parties and the tribunal. What particularly distinguishes these institutions from each other is the degree of administration (or supervision) their rules entail and their fee structure.

### **Degree of administration**

The ICC procedure is the most actively administered, involving the following two additional steps not found in many other rules (such as those of the LCIA, ICDR, and HKIAC):

- The preparation of Terms of Reference, a document which defines the scope of the arbitration by setting out the basic claims and defences, the relief sought, and the issues to be addressed
- The formal scrutiny of draft awards, especially as regards issues which might affect their enforceability, by the ICC Court before the final awards can be issued to the parties

SIAC subjects awards to a formal scrutiny process that is similar to that of the ICC.

The procedures under the LCIA and ICDR Rules are more lightly administered, with the role of the LCIA and the ICDR in each case primarily focused on the appointment of (and challenges to) the tribunal. There is no formal requirement for Terms of Reference or the scrutiny of draft awards.

Many countries have arbitration laws which provide a legal framework for the conduct of arbitrations.

### **Fee structure**

The fees of the ICC and SIAC, and the tribunals appointed pursuant to their rules, are based upon the amount in dispute.

The ICC requires payment of two “advances” on the estimated fees and costs at the start of the process: a provisional advance to cover the period until the Terms of Reference, and a full advance to cover the rest of the arbitration (although this can be adjusted later if deemed appropriate). In high-value disputes, parties to arbitrations under the ICC rules must therefore pay (or guarantee payment of) substantial sums up front. The SIAC fees are also payable by means of advances taken at an early stage of the arbitration.

By contrast, the LCIA charges (for itself and the arbitrators) principally according to the time actually spent. The fee rates that the LCIA agrees with arbitrators are generally far lower than the amounts that those same arbitrators would seek to charge if approached directly by the parties. Advances on costs are requested by the LCIA from the parties incrementally through the arbitration (rather than all at an early stage), with the intention that sufficient sums are always held by the LCIA to cover the next steps to be taken.

Although the ICDR’s administrative fees are based upon the amount in dispute, the tribunal’s fees (as with the LCIA) are calculated according to the time spent.

The administrative fees of the HKIAC are also based on the amount in dispute, but in relation to the tribunal’s fees, the parties have a choice between a fee structure based on the amount in dispute or the time actually

spent. The latter option includes a maximum fee cap on the tribunal's hourly rate, though this can be dispensed with if agreed by the parties in writing or in "exceptional circumstances".

There are differing views as to which fee structure generally works best and, in any event, their suitability for each case will vary according to factors such as the amount in dispute, and the time taken and effort required by the arbitrators to bring the proceedings to a conclusion.

### **Expedited and summary procedures**

The flexibility of arbitration generally enables parties and tribunals to adopt expedited or summary procedures in appropriate circumstances, regardless of whether the institutional rules make express provision for such procedures. In recent years, however, some institutions have developed express provisions in their rules authorising, and in some cases requiring, parties to use these types of abridged procedures.

In expedited arbitration procedures, the normal process is streamlined to enable the final award to be delivered more quickly. Increased speed is achieved by early case management conferences, tight timeframes for each step in the process, and the ability for the tribunal to dispense with an oral hearing.

The ICC Expedited Procedure Provisions supplement the traditional ICC Rules, applying either through the express choice of the parties or, where the arbitration agreement is concluded after 1 March 2017, if the dispute is valued at US\$2 million or less (unless the parties have expressly opted out of the Expedited Procedure). Unlike the normal ICC procedure, in order to save time, there are no Terms of Reference. The tribunal (which the ICC Court appoints) is to hold an early case management conference and render a final award within six months of that date.

Ad hoc arbitration often arises because parties do not agree upon (or simply fail to provide for) any institutional rules.

Both the HKIAC and SIAC include similar provisions to the ICC Expedited Procedure Provisions in their arbitration rules. The applicable monetary threshold is slightly higher than that of the ICC (at HK\$25 million and US\$6 million respectively), but notably the expedited procedure must be requested by a party and does not apply automatically. The award should be rendered within six months from the time the tribunal received its file (HKIAC) or is constituted (SIAC).

The monetary threshold applicable to the ICDR Expedited Procedure is US\$250,000. A sole arbitrator hears the proceedings and an award is to be rendered within 30 days of the oral hearing. However, tribunals decide cases worth less than US\$100,000 without a hearing.

The LCIA has express provisions to expedite the formation of the tribunal in appropriate cases. The parties and/or the tribunal must then use the flexibility in the Rules to streamline the process as appropriate.

In summary procedures, the parties are not required to undertake all the normal procedural steps. Traditionally, arbitral tribunals have been wary of adopting summary procedures, even though the broad provisions of many institutional rules impliedly empower tribunals to do so.

SIAC is an exception amongst the institutions discussed in this Guide, in making express provision in its rules for the early dismissal of claims or defences if they are either “manifestly without legal merit” or “manifestly outside the jurisdiction of the Tribunal”.

## **Unadministered and ad hoc arbitrations: the UNCITRAL Arbitration Rules and pure ad hoc arbitrations under national arbitration laws**

Although some practitioners refer to all non-institutional arbitration as being “ad hoc”, there is a useful distinction to be made between arbitration under the UNCITRAL Arbitration Rules and arbitration that is purely under a national law.

The UNCITRAL Arbitration Rules (developed by the United Nations Commission on International Trade Law) were originally developed as a neutral alternative to the other major rule systems, which, fairly or not, were viewed with scepticism in many capital-importing countries. However, the UNCITRAL Arbitration Rules have been widely used in both general commercial transactions and arbitrations between States and individuals (they were used as the basis for the Iran-US Claims Tribunal Rules and for a number of Bilateral Investment Treaties). The UNCITRAL Arbitration Rules have also influenced other rule systems.

If the UNCITRAL Arbitration Rules are selected, the parties may also designate an institution to administer the arbitration (under the UNCITRAL Arbitration Rules) or to act as an “appointing authority” to appoint the arbitrator(s) if the system of party appointments breaks down, and to deal with any challenges to the arbitrators.

Many arbitral institutions (such as the ICC, the LCIA, and the ICDR) will serve as an administering or an appointing authority under the UNCITRAL Arbitration Rules for a fee. If no appointing authority is designated and the system of party appointments breaks down, all is not lost as, pursuant to the UNCITRAL Arbitration Rules, the Secretary General of the Permanent Court of Arbitration in The Hague (a body created by the 1899 Hague Convention for the Pacific Settlement of International Disputes) will appoint an appointing authority. However, the delay caused by this additional step is best avoided by the parties designating the appointing authority in advance.

Rather than drafting a custom-made procedure for each contract, parties usually adopt (and modify as appropriate) a set of tried and tested ready-made arbitration rules.

Most jurisdictions allow parties to agree to arbitrate without requiring parties to specify any rules or procedures. In such event, the procedure for the appointment of the tribunal and the conduct of the arbitration will be that provided by the law of the seat of the arbitration. However, many national arbitration laws make only limited provision for the procedure to be followed, leaving it to the parties and the tribunal to decide how the arbitration will be conducted (which can lead to disagreement and delay at the outset).

Ad hoc arbitration often arises because parties do not agree upon (or simply fail to provide for) any institutional rules. Parties may, for example, agree that any arbitration shall be conducted pursuant to a particular national law. However, in an international context, parties should first satisfy themselves that they are content with the relevant legislation and that they are willing to go to the local courts, if necessary, to resolve difficulties.

Parties sometimes also believe that, by avoiding the fees of arbitral institutions, ad hoc arbitration might prove cheaper than institutional arbitration. Whilst this is possible in theory, in practice, the benefits of the institution's administrative services and the lower charges of arbitrators under institutional rules can easily outweigh the costs involved, especially in connection with large and complex disputes, in

which many procedural issues are likely to arise. Ad hoc arbitration significantly increases the likelihood of court intervention and these potentially significant costs must also be considered. Therefore, before selecting ad hoc arbitration, parties should satisfy themselves that they would not be better served by an institutional form of arbitration or by using the UNCITRAL Arbitration Rules.

### **Important “specialist” international arbitration organisations**

There are also specialist arbitration organisations for specific types of disputes, such as:

- **The International Centre for the Settlement of Investment Disputes (ICSID).** Based in Washington, D.C., and operating under the auspices of the World Bank, ICSID was established pursuant to the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which has been ratified by over 150 States. ICSID is concerned predominantly with disputes arising directly out of an investment between a Contracting State to the Washington Convention and a national of another Contracting State, although ICSID also operates an Additional Facility for certain types of other disputes. Jurisdiction is established on the basis of consent contained in contracts, local investment legislation, or treaties. A rise in investor-State disputes and the increase in the number of bilateral or multilateral investment treaties providing for ICSID arbitration has resulted in significant growth in the number of arbitrations administered by ICSID. Investor-state disputes are discussed in greater detail in Chapter VIII.
- **The World Intellectual Property Organisation (“WIPO”) Arbitration and Mediation Center.** Established in Geneva in 1994 as an offshoot of WIPO (itself an agency of the United Nations), the Center provides arbitration and mediation services (under its own rules) for intellectual property disputes.



## Summary overview

There are a large number of arbitral institutions and rules to choose from, some appropriate for a wide range of disputes and some only for specific types. Whilst parties may receive certain advantages and disadvantages by using a particular set of rules, the ICC, LCIA, ICDR, SIAC, HKIAC, and UNCITRAL Arbitration Rules are largely interchangeable and can all be selected for use wherever the arbitration is to take place. However, some differences in drafting might be advisable depending upon the rules selected (for example, specifying an appointing authority in the case of the UNCITRAL Arbitration Rules).

# The Place of Arbitration

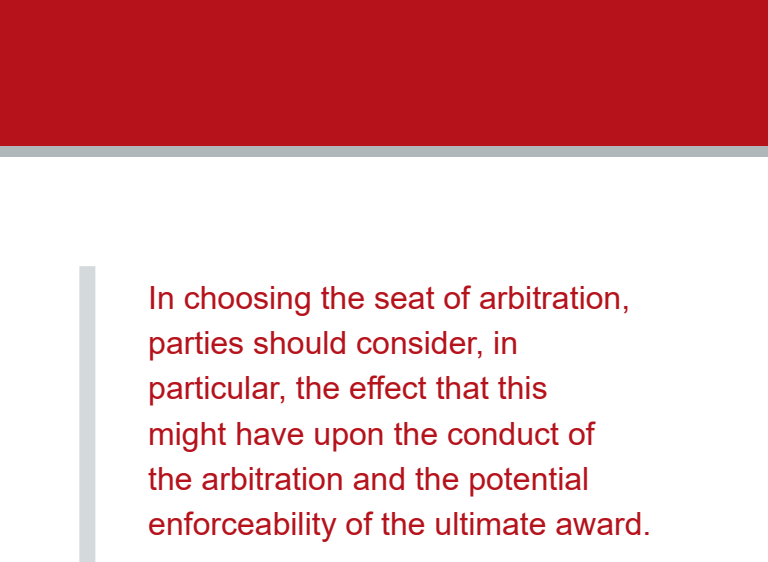
There is an important distinction between the legal place (the seat) of any arbitration and the place where one or more of the hearings or other procedural steps physically take place. Although the two often coincide, in practice, it is the seat which determines the legal framework within which the arbitration takes place, not the location where the parties or the tribunal choose (as a matter of convenience) to meet.

When selecting the seat of arbitration, parties should consider, in particular, the effect that this selection might have upon the conduct of the arbitration and the potential enforceability of the ultimate award.

### **The conduct of the arbitration**

In choosing the seat of the arbitration, the parties are selecting the procedural law that applies. For example, by selecting London, England, as the seat, the parties bring about the application of the 1996 Arbitration Act.

The procedural laws applicable in arbitration-friendly centres (such as London, New York, Paris, Hong Kong, and Singapore) have few mandatory provisions and allow the parties considerable freedom to agree upon the lawyers to represent them, the procedure to be followed, the language of the arbitration, and the tribunal to decide their dispute. The result is that these centres and the specialist lawyers, experts, and technical staff (such as translators, stenographers, and IT personnel) who service them are able to accommodate the considerable diversity of disputes arising in the international arena. The role of the courts in connection with arbitrations in arbitration-friendly centres is kept to a minimum; being primarily to support the arbitration process and to assist, if necessary, with the enforcement of the award.



In choosing the seat of arbitration, parties should consider, in particular, the effect that this might have upon the conduct of the arbitration and the potential enforceability of the ultimate award.

In less arbitration-friendly countries, the courts have greater powers to assume control over disputes within their jurisdiction and tend to be more interventionist (particularly if disputes have a political dimension). There are also sometimes constraints upon the conduct of the arbitration, such as the requirement to use locally qualified lawyers and restrictions upon who can act as arbitrators.

### **Enforceability of the award**

The seat of arbitration is also of critical importance to the enforceability of the resulting award pursuant to the New York Convention. In broad terms, by becoming party to the Convention, each of the States (see Annex 2) has agreed, subject to limited grounds of refusal, to enforce commercial arbitral awards made in other States party to the New York Convention. Accordingly, by selecting a State that is party to the New York Convention as the seat for any arbitration, parties provide considerable scope for enforcement of their awards.

# Typical Steps in an Arbitration

The procedure for an arbitration can take many forms. In some arbitrations, parties agree that the dispute shall be resolved upon the basis of written submissions, without a hearing. In others, such as commodity arbitrations, the parties rely very heavily upon the arbitrator's own expertise, blurring the distinction between arbitration and expert determination (the latter does not enjoy the statutory backing and enforcement regimes applicable to arbitration).

Typically, a substantial international arbitration will include most of the following steps (although some of the steps may overlap or take place simultaneously):

- Claimant's Request for Arbitration, including at least a summary of the claims
- Respondent's Answer, which will indicate any counterclaims to be made
- Claimant's Reply to Counterclaim (if appropriate)
- Appointment of the tribunal
- Procedural hearing setting the steps and timetable for the arbitration
- Claimant's full Statement of Case (if not served with the Request for Arbitration)
- Respondent's full Defence and Counterclaim (if not served with the Answer)
- Claimant's Reply and Defence to Counterclaim
- Disclosure of the documents relied upon or of the (often very limited) categories of documents requested by the other party
- Exchange of witness statements (sometimes followed by rebuttal statements)

For a substantial and complex dispute, an arbitration typically takes about 12-18 months from commencement to the final hearing, although it can be shorter or longer depending upon, for example, the procedures adopted, the availability of the tribunal and the parties' conduct.

- Exchange of expert reports (sometimes followed by rebuttal reports)
- Meeting of experts to narrow issues and joint statement of matters agreed/in dispute
- Exchange of pre-hearing submissions
- Hearing
- Post-hearing submissions
- Award

The procedure outlined above, with separate steps for statements of case, witness statements, and expert reports is the normal process (absent agreement of the parties or a direction from the tribunal to the contrary) in LCIA arbitrations. In contrast, in many other arbitration procedures (including under the ICC Rules), parties most commonly follow the “memorials” approach, in which the parties’ statement of case / defence are served together with witness evidence, and expert reports. In substantial cases involving a disclosure stage, there are sometimes two (or more) rounds of memorials, one before and one after the disclosure stage. Ultimately, most arbitration systems are flexible and the process can be tailored to meet the circumstances, either by agreement of the parties or by direction(s) of the tribunal.

# Checklist of Areas to Consider

Model arbitration clauses promulgated by the ICC, LCIA, ICDR UNCITRAL, SIAC, and HKIAC are set out in Annex 1. However, those model clauses are deliberately very basic (in order to cover a range of situations) and might well require adaptation to suit the needs of a particular case. This Guide includes a checklist of the principal matters to be considered in drafting an arbitration agreement (or determining whether and, if so, how to modify one of the model clauses).

**ADR:** The parties might wish to include provision for them to attempt an ADR procedure (such as mediation) prior to commencing (and as a means of potentially avoiding) arbitration. A sample ADR and arbitration clause is set out in Annex 1.

Parties are always free to agree to an ADR procedure at any stage, but providing for the procedure in advance avoids concerns that proposing ADR after a dispute has arisen might be seen as a sign of weakness. However, parties might be more inclined to settle (in which case ADR proceedings will have a greater chance of success) after a dispute has reached a stage where their respective positions are better defined. In addition, where multi-tiered dispute resolution provisions provide for negotiation or mediation as a mandatory precursor to arbitration, this can lead to issues as to whether and when a party is entitled to commence arbitration.

There are a number of organisations that will assist parties with ADR procedures, such as the Centre for Effective Dispute Resolution (CEDR), which is based in London, and the Center for Public Resources, which is based in the US. Many arbitral institutions, including the ICC, LCIA, ICDR, and HKIAC will also administer ADR proceedings.

**Option clauses:** Parties sometimes wish to provide an option for one or more parties to choose between referring a dispute to arbitration or to the courts. As well as raising drafting issues, this type of provision requires careful legal analysis as, under some laws (but not English law), option clauses can, by their very nature, invalidate the arbitration provision (for uncertainty or, if the option is one-sided, lack of mutuality).

**Capacity/authority:** The capacity and/or authority of the parties and signatories to the arbitration agreement should be checked. For example, some laws require governmental entities to obtain parliamentary (or other) approval before executing an arbitration agreement.

**Mandatory requirements:** The governing law of the arbitration agreement and/or the law of the seat of arbitration and/or the law of the place of enforcement might impose mandatory requirements on the parties as to the form and/or contents of the arbitration agreement (especially if a governmental party is involved). For example, parties may have to initial or sign the arbitration agreement, the seat may have to be that of a governmental party, and/or the parties may have to state clearly the involvement of an arbitral institution.

**Scope and arbitrability:** The parties should decide what disputes they wish to be referred to arbitration. Generally, clauses are drafted very broadly so as to capture all disputes which might arise between the parties. However, sometimes parties wish certain categories of disputes to be resolved by other means, such as expert determination. This scope requires careful drafting, including provision for the resolution of disputes regarding the category into which a dispute falls. Notably, as a matter of public policy, some disputes might not be arbitrable under the applicable law.

**The tribunal and its powers:** Chapter III addresses the selection of the tribunal. The parties also should consider the tribunal's powers under the chosen rules and the applicable law, and whether they wish to

adjust or clarify those powers by express provision. For example, the parties might prohibit awards of punitive damages or empower the tribunal to reach a decision in simple cases upon documents alone, or to decide the dispute according to notions of fairness rather than strictly according to the law.

**Procedural rules, including disclosure/discovery:**

Chapter IV addresses the choice of suitable arbitration rules. Consideration should be given as to whether, in light of the applicable law or otherwise, any amendments should be made to the selected rules. For example, whilst the ICC and LCIA Arbitration Rules both exclude any appeal to the courts on the merits of the dispute, there is no such provision in the UNCITRAL Arbitration Rules. The incorporation of the UNCITRAL Arbitration Rules into a contract might therefore need to be supplemented by a specific provision excluding any right of appeal under the applicable law. Consideration might also be given as to whether to provide for the application of the International Bar Association (IBA) Rules on the Taking of Evidence in International Commercial Arbitration, or the application or exclusion of other rules addressing disclosure/discovery.

**Seat:** Chapter V addresses the selection of the legal place where the arbitration is deemed to take place, which is known as the seat of arbitration.

**Language:** If the language of the arbitration might otherwise be open to debate, parties should expressly select the language in their arbitration agreement in order to avoid a dispute over this and therefore save time and costs. The language should generally be that of the underlying contract and/or the majority of the documentation (otherwise such documents may need to be translated into the language of the arbitration).

**Governing law:** Unless stated elsewhere, the arbitration agreement should include the governing law of the contract (and, where there might be some argument, the governing law of the arbitration agreement). If there is a separate governing law clause,



it is advisable to check that it does not also contain a submission to courts that would be inconsistent with the arbitration agreement.

**Confidentiality:** The extent to which (if at all) the confidentiality of the arbitration will be protected by the rules or applicable law varies and parties might wish to make an express contractual provision.

**The powers of the courts (including appeals):** The parties should consider the powers of the courts of the seat under the selected rules and applicable law, and whether the parties wish to adjust or clarify the powers by express provision. Courts often have power to make orders in support of the arbitration (for example, interim relief prior to the appointment of the tribunal). Courts also usually have limited powers to review the award. Court powers to challenge the award for lack of jurisdiction or procedural irregularities are usually (but not always) mandatory. However, if the courts have power to hear appeals against the award (such as the English law right of appeal on a point of English law) these can often be excluded by agreement.

**Multi-party/agreement issues:** If disputes occur between more than two parties and/or under more than one contract, specific drafting issues might arise. For example, if there are only two parties to a dispute and they wish to appoint a tribunal of three arbitrators, the parties often agree to select one each. However, if there are three or more parties, this method will not work. One common solution is for the claimant parties to select one arbitrator and the respondent parties another. However, this assumes that the interests of the claimants and respondents respectively are aligned. Moreover, in some jurisdictions (notably France), concerns have been raised that stipulating in advance that multiple parties must agree upon one arbitrator between them (out of a tribunal of three) might be held contrary to public policy. Where this is a concern, parties can avoid the issue by, for example, providing for a sole arbitrator or for an appointing authority to appoint all three arbitrators.

Other multi-party/agreement issues arise out of the fact that arbitration is based upon the contract between the disputing parties. For example, it is generally not possible to join a third party to an arbitration unless all of the parties concerned agree (which, if a party is likely to want joinder, should preferably be done in advance and recorded in the arbitration agreement). If there are two or more related contracts, the agreement of the parties to joinder can be recorded by the parties entering into a separate “umbrella” arbitration agreement. An umbrella agreement also provides the parties with an opportunity to agree that the same tribunal will hear all disputes between them and empower the tribunal to consolidate related arbitrations where appropriate.

**State immunity:** If a contract is to be made with a State or one of its instrumentalities, consideration should be given to the express waiver of any immunities or privileges attaching to that party which might impact upon the resolution of disputes. In particular, whilst entering into an arbitration agreement will itself often be treated as a waiver of any immunity from suit, an express waiver will normally be required to deal with immunity from enforcement of any award.



# Arbitration Between Foreign Investors and States

### **Arbitration between foreign investors and States under bilateral investment treaties and multilateral agreements**

No guide to international arbitration would be complete without a brief discussion of the availability of international arbitration as a means to resolve investor-State disputes that fall within the scope of bilateral investment treaties (BITs) or multilateral trade and investment agreements (such as the North American Free Trade Agreement).

In recent years, the value and significance of arbitration as a dispute resolution mechanism has grown as the number of BITs has increased, and as foreign investors (or their lawyers) have become progressively more familiar with the substantive protections and procedural rights that many BITs create. With more than 2,900 BITs concluded throughout the world, savvy foreign investors are wise to consider obtaining specialist legal advice both when they structure a foreign investment, which will determine whether these protections and rights will ultimately be available, and after a dispute actually arises. The following discussion is an introduction to BITs, which should be supplemented with specialist legal advice.

**BITs:** A BIT is a treaty between two States that is designed to promote and reciprocally protect investments made by nationals of one State (the home State) in the territory of the other (the host State). BITs confer covered investors with a wide range of legal rights that are generally directly enforceable against the host State through international arbitration. Importantly, investors enjoy these rights, including the right to enforce them, through international arbitration in a neutral forum, even if they are not parties to a contract with the host State.

BITs confer covered investors with a wide range of legal rights that are generally directly enforceable against the host State through international arbitration.

**Core investment protections:** Because each BIT is a product of negotiations between two States, the content and scope of the investment protections differ from BIT to BIT. Nevertheless, a number of core protections are common to most BITs.

These core protections address the following:

- **Expropriation:** Protection against the expropriation of investments, except if accompanied by the payment of “prompt, adequate, and effective” compensation. Generally, expropriation is not limited to the outright nationalisation of a sector or the seizure of a specific investment. Rather, it encompasses actions tantamount to expropriation, including an act or series of acts attributable to the State that unreasonably interfere with an investment to such a degree that the investor is deprived of fundamental rights of ownership. Whilst the line between expropriatory and non-expropriatory State action is always case-specific, tribunals have concluded that actions such as the forced renegotiation of a contract and the cancellation of an operating licence can give rise to a right to compensation.
- **Fair and equitable treatment:** The right to “fair and equitable treatment” of investors and their investments. Although no definition of fair and equitable treatment” exists, arbitral jurisprudence shows that the standard includes protection against discriminatory or arbitrary treatment, ensures

transparency in the legal framework governing the investor's operations, ensures that decisions affecting an investor are transparent and can be traced to the applicable legal framework, and prevents a State from frustrating the legitimate investment-backed expectations of foreign investors in making their investments. This standard could be breached, for example, if the host State failed to implement the required authorisations for an approved investment project or if State organs acted inconsistently, or abused their authority. Since the judiciary is an organ of the State, this standard could similarly be breached if an investor faced a denial of justice before the courts of the host State.

- **Protection and security:** The right to full or constant “protection and security” imposes an obligation of due diligence on the State to take reasonable measures to prevent interference with an investment by third parties or organs of the State. This standard could be breached, for example, if the State fails to take reasonable steps to prevent physical harm to property during an armed conflict or period of civil strife, or fails to investigate acts of violence, or diligently prosecute the wrongdoers.
- **Discrimination:** Prohibition against discriminatory treatment, frequently combined with a requirement that the host State treat investors no less favourably than the host state treats its own nationals or the nationals of any third State (also known as most-favoured-nation or MFN treatment). This basic protection allows investors to rely on and invoke more favourable provisions in other investment treaties binding on the host State, as well as how the host State has actually treated other investors in like circumstances.
- **Funds transfer:** The right to transfer funds into and out of the host State, in freely transferable currency, and without delay. This protection would include, for instance, the right to make dividend or debt payments outside of the host State.

If an investor is to maximise the possible benefits of BIT protection against the host State, the key time for the investor to consider whether a BIT will be available is when it structures the investment.

**The right to resolve disputes directly with the host State through international arbitration:** Most modern BITs allow foreign investors to enforce their treaty rights directly against the host State through international arbitration. The most frequent types of arbitration specified in BITs are institutional arbitrations under the auspices of ICSID and ad hoc arbitrations using the UNCITRAL Arbitration Rules. Significantly, if an investor pleads that the host State has violated the rights established by a BIT, the investor may have a right to arbitrate under the BIT, even if the same conduct would also constitute a breach of contract, and the underlying contract limits recourse to the host State's courts or some other form of dispute resolution.

**Conclusion:** Most BITs grant a significant degree of legal protection, both in terms of the substantive and procedural rights BITs create, and the types of investments BITs cover. These investments range, for instance, from tangible property such as a factory or an oil field, to intangible property such as concession rights, shares in a corporation, a licence, or IP rights. Whilst it is natural for an investor to consider what, if any, recourse it may have under a BIT once a dispute has materialised, in some cases this recourse may be too late. If an investor is to maximise the possible benefits of BIT protection against the host State, the key time for the investor to consider whether a BIT will be available is when the investor structures the investment. For instance, all other things being equal, an investor might decide to invest through a subsidiary incorporated in a

State which has a comprehensive BIT in force with the host State, rather than through a subsidiary incorporated in a State that does not.

An investor should take into account the following types of questions at the project formation and contract negotiation stages (though this is not an exhaustive list):

- What BITs or other investment treaties are in effect with the host State?
- What is the scope of those BITs or other investment treaties? How do they define covered investors and investments? Do they require investment registration or compliance with specific legal requirements?
- What substantive rights do the BITs confer?
- Does it make sense to structure the company making the investment so that the company is directly or indirectly controlled by a national of a State that is party to a BIT or another investment treaty?
- If the investment vehicle is an offshore entity organised in an overseas territory of another State (such as the Channel Islands or the Netherlands Antilles), has the State extended the treaty to cover investors from that territory? If not, does it make sense to re-structure the investment vehicle in another territory?





## Model Arbitration Clauses

The following standard clauses are recommended by their respective organisations as basic provisions for arbitration. However, the clauses might well need amending to suit the needs of particular cases (see the checklist for drafting an arbitration agreement in Chapter VII). An example of a combined ADR and arbitration provision is also set out below.

### ICC

*“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”.*

### LCIA

*“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 International Rules

*“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 ICDR also provides the following guidance:

“The parties should consider adding:

- The number of arbitrators shall be (one or three).
- The place of the arbitration shall be [city, (province or state), country].
- The language(s) of the arbitration shall be [ ]”.

## UNCITRAL

*“Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules”.*

The following guidance is provided:

*“Note: Parties should consider adding:*

- a) The appointing authority shall be ... [name of institution or person].*
- b) The number of arbitrators shall be ... [one or three].*
- c) The place of arbitration shall be ...[town and country].*
- d) The language to be used in the arbitral proceedings shall be [ ]”.*

### HKIAC

*"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 arbitration shall be [Hong Kong].*

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

### SIAC

*"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 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 seat of the arbitration shall be [Singapore].*

*The Tribunal shall consist of [State an odd number. Either state one or three.] arbitrator(s).*

*The language of the arbitration shall be [ ]."*

### **A sample ADR and arbitration provision**

*“If any dispute, controversy or claim arises out of or in connection with this contract, including any question regarding its existence, validity, interpretation, breach or termination (a ‘Dispute’), it shall be referred, upon written notice (a ‘Dispute Notice’) given by one party to the other, to a senior executive from each party.*

*The senior executives shall seek to resolve the Dispute on an amicable basis within 14 days of the Dispute Notice being received.*

*Any Dispute not resolved within 14 days of the Dispute Notice being received may be referred by either party to mediation before a mediator to be agreed between the parties or, failing such agreement, to be appointed by [CEDR / CPR]. The parties shall share (equally) the costs of the mediator, the mediation venue and [CEDR / CPR].*

*If either party fails or refuses to agree to or participate further in the mediation procedure or if, in any event, the Dispute is not resolved within 35 days from receipt of the Dispute Notice, the Dispute shall be referred to and finally resolved by arbitration pursuant to the Rules of the [ICC / LCIA], which Rules are deemed to be incorporated by reference into this Clause.*

*The tribunal shall consist of three arbitrators, two of whom shall be nominated by the respective parties. The Chairman of the tribunal shall be nominated by agreement between the two party-nominated arbitrators within 14 days of the nomination of the second such arbitrator. Failing such agreement, the Chairman shall be appointed by the [ICC / LCIA Court].*

*The seat of arbitration shall be [ ].*

*The language of the arbitration shall be [ ].*

*The governing law of this Clause and the contract shall be the substantive law of [ ].”*

# New York Convention States

The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides for the enforcement of arbitral awards in more than 150 countries worldwide, subject only to limited defences set out in the Convention. To take advantage of the Convention, it is often necessary for the award to be made in a country that is a party to the Convention.

### Key Articles of the Convention

Article III of the Convention sets out the basic obligation undertaken by contracting States — to recognise and enforce foreign arbitral awards:

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

Article V of the Convention sets out the limited grounds upon which contracting States may refuse to recognise and enforce foreign arbitral awards:

*“1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:*

- a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or*

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

## ANNEX 2 *(continued)*

### Convention states

The following States had acceded, ratified, or succeeded to the Convention as of 24 May 2017:

Afghanistan	Croatia
Albania	Cuba
Algeria	Cyprus
Andorra	Czechia (Czech Republic)
Angola	Democratic Republic of Congo
Antigua and Barbuda	Denmark
Argentina	Djibouti
Armenia	Dominica
Australia	Dominican Republic
Austria	Ecuador
Azerbaijan	Egypt
Bahamas	El Salvador
Bahrain	Estonia
Bangladesh	Fiji
Barbados	Finland
Belarus	France
Belgium	Gabon
Benin	Georgia
Bhutan	Germany
Bolivia (Plurinational State of)	Ghana
Bosnia and Herzegovina	Greece
Botswana	Guatemala
Brazil	Guinea
Brunei Darussalam	Guyana
Bulgaria	Haiti
Burkina Faso	Holy See
Burundi	Honduras
Cambodia	Hungary
Cameroon	Iceland
Canada	India
Central African Republic	Indonesia
Chile	Iran (Islamic Republic of)
China	Ireland
Colombia	Israel
Comoros	Italy
Cook Islands	Jamaica
Costa Rica	Japan
Côte d'Ivoire	Jordan



Kazakhstan	Qatar
Kenya	Republic of Korea
Kuwait	Republic of Moldova
Kyrgyzstan	Romania
Lao People's Democratic Republic	Russian Federation
Latvia	Rwanda
Lebanon	Saint Vincent and the Grenadines
Lesotho	San Marino
Liberia	Sao Tome and Principe
Liechtenstein	Saudi Arabia (Kingdom of)
Lithuania	Senegal
Luxembourg	Serbia
Madagascar	Singapore
Malaysia	Slovakia
Mali	Slovenia
Malta	South Africa
Marshall Islands	Spain
Mauritania	Sri Lanka
Mauritius	State of Palestine
Mexico	Sweden
Monaco	Switzerland
Mongolia	Syrian Arab Republic
Montenegro	Tajikistan
Morocco	Thailand
Mozambique	The Former Yugoslav Republic of Macedonia
Myanmar	Trinidad and Tobago
Nepal	Tunisia
Netherlands	Turkey
New Zealand	Uganda
Nicaragua	Ukraine
Niger	United Arab Emirates
Nigeria	United Kingdom of Great Britain and Northern Ireland
Norway	United Republic of Tanzania
Oman	United States of America
Pakistan	Uruguay
Panama	Uzbekistan
Paraguay	Venezuela (Bolivarian Republic of)
Peru	Vietnam
Philippines	Zambia
Poland	Zimbabwe
Portugal	

# Arbitral Institutions

The following is a non-exhaustive list, by region, of some of the well-known arbitral institutions:

### Asia

- **China:** the China International Economic and Trade Arbitration Commission (CIETAC – visit [www.cietac.org](http://www.cietac.org))
- **Hong Kong:** the Hong Kong International Arbitration Centre (HKIAC – visit [www.hkiac.org](http://www.hkiac.org))
- **Japan:** the Japanese Commercial Arbitration Association (JCAA – visit [www.jcaa.or.jp](http://www.jcaa.or.jp))
- **Singapore:** the Singapore International Arbitration Centre (SIAC – visit [www.siac.org.sg](http://www.siac.org.sg))
- **Malaysia:** the Kuala Lumpur Regional Centre for Arbitration (KLRCA – visit <http://klrca.org/>)

### Europe

- **Austria:** the Vienna International Arbitral Centre (VIAC – visit <http://www.viac.eu/en/>)
- **England:** the London Court of International Arbitration (LCIA – visit [www.lcia.org](http://www.lcia.org))
- **France:** the International Court of Arbitration of the International Chamber of Commerce (the ICC – visit [www.iccwbo.org](http://www.iccwbo.org))
- **Germany:** the German Institute of Arbitration (DIS – visit [www.dis-arb.de](http://www.dis-arb.de)) • **The Netherlands:** the Netherlands Arbitration Institute (NAI – visit [www.nai-nl.org](http://www.nai-nl.org))
- **Sweden:** the Arbitration Institute of the Stockholm Chamber of Commerce (SCC – visit [www.sccinstitute.com](http://www.sccinstitute.com))

- **Switzerland:** the Swiss Arbitration Association (ASA – visit [www.arbitration-ch.org](http://www.arbitration-ch.org)); the Chamber of Commerce & Industry of Geneva (visit [www.ccig.ch](http://www.ccig.ch)); the Zurich Chamber of Commerce (visit <http://www.zhk.ch/en/>); the World Intellectual Property Organisation (WIPO) Arbitration and Mediation Centre (visit [www.wipo.int](http://www.wipo.int))

## Middle East and Africa

- **Bahrain:** the Bahrain Chamber for Dispute Resolution (BCDR-AAA – visit [www.bcdr-aaa.org](http://www.bcdr-aaa.org))
- **DIFC:** the Dubai International Financial Centre-London Court of International Arbitration Centre (DIFC-LCIA – visit <http://www.difc-lcia.org/> )
- **Dubai:** the Dubai International Arbitration Centre (visit [www.diac.ae](http://www.diac.ae))
- **Egypt:** the Cairo Regional Centre for International Commercial Arbitration (visit [www.crcica.org.eg](http://www.crcica.org.eg))
- **Mauritius:** the London Court of International Arbitration-Mauritius International Arbitration Centre (visit [www.lcia-miac.org](http://www.lcia-miac.org))

## North America

- The American Arbitration Association (AAA – visit [www.adr.org](http://www.adr.org))
- The International Centre for Settlement of Investment Disputes (ICSID – visit <https://icsid.worldbank.org/en/>)

## Glossary

**AAA:** The American Arbitration Association — see Ch. IV and visit [www.adr.org](http://www.adr.org).

**ADR:** Alternative Dispute Resolution — see Ch. I.

**Ad hoc arbitration:** An arbitration that is not administered by an institution — see Ch. IV.

**Amiable compositeur:** A tribunal empowered to decide a dispute in accordance with its notions of fairness / “ex aequo et bono” / according to “equity”, rather than being bound to decide according to the parties’ strict legal rights. The effect of empowering a tribunal in this way differs depending upon the applicable law. For example, under English law it might rule out any possibility of an appeal on a question of law.

**Appeal:** Referral of an award to another tribunal or to a national court for reconsideration of its merits. For many arbitrations, there is no right of appeal, either because the applicable law does not provide such a right or because the parties have waived it. Appeals should not be confused with challenges — see *below*. See also “Remission” and “Set aside”.

**Applicable law:** The law that applies. Many international arbitrations require the application of more than one law. See also “Governing law”, “Lex arbitri”, “Lex fori”, “Lex mercatoria”, and “Procedural law”.

**Arbitrability:** Whether, under the applicable law, arbitration can settle a particular dispute. This is essentially a question for the public policy of the State in question, and which types of dispute (for example, bankruptcy, matrimonial, and criminal matters) the State wishes to reserve to the jurisdiction of its national courts. If a dispute is not arbitrable under an applicable law (for example, the law of the agreement, the place of arbitration or the place of enforcement) any award might be unenforceable.

**Arbitral tribunal:** The arbitrator(s) — see Ch. III.

**Arbitration agreement:** The parties’ agreement to submit their disputes (future or existing) to arbitration. Whilst such agreement usually consists of one or more clauses within another contract, it is generally deemed by the applicable law to be a separate agreement which will, for example, survive the termination of the contract of which it forms a part. See also “Competence – Competence”, “Submission agreement”, Ch. VII and Annex 1.

**Arbitration:** A private form of final and binding dispute resolution by an impartial tribunal, based upon the agreement of the parties but regulated and enforced by the state — see Ch. I.

**Arbitrator:** The decision-maker in an arbitration (akin to a judge in court proceedings).

**Award:** The decision of an arbitral tribunal on a substantive issue (as distinct from a merely procedural order or direction). Awards are often referred to as “interim”, “partial”, and/or “final” awards, although, confusingly, the term “interim” is also sometimes used to mean “partial”. Interim awards have only temporary effect and do not finally decide an issue (which, accordingly, a tribunal can revisit at a later stage of the arbitration). A partial award finally decides one or more (but not all) of the issues before the tribunal. A final award decides all the (or all the remaining) issues and (subject to any corrections) essentially ends the arbitration. *See also* “Consent award”.

**BITs:** Bilateral Investment Treaties — see Ch. VIII.

**CEDR:** The Centre for Effective Dispute Resolution, an independent body (based in London) which provides a broad range of services in connection with ADR procedures — visit [www.cedr.com](http://www.cedr.com).

**Challenge to award:** The word “challenge” is often used to describe the procedures, other than an appeal on the merits, by which awards can be impugned in the courts of the seat of arbitration. Challenges are usually concerned with the jurisdiction of the tribunal or the procedure followed. In contrast to rights of appeal, most major jurisdictions provide rights to challenge awards and, in many cases, the parties cannot waive such rights. *See also* “Appeal”, “Remission”, and “Set aside”.

**CIETAC:** The China International Economic and Trade Arbitration Commission. Based in Beijing, but with sub-commissions elsewhere in China, CIETAC is an international arbitral institution with its own rules and panel of arbitrators — visit [www.cietac.org](http://www.cietac.org).

**Competence — Competence:** The legal doctrine by which an arbitral tribunal can decide upon its own jurisdiction, even if the contract containing the arbitration agreement is invalid or has been terminated. *See also* “Separability”.

**Conciliation:** A form of ADR, similar to mediation (*see below*), whereby an independent third party “conciliator” assists the parties in attempting to settle their dispute. A conciliator cannot force parties to settle but may be requested to express his opinion on the possible outcome of any legal proceedings.

**Conflict of laws:** The legal rules in each jurisdiction by which the applicable law is determined. Factors that might be taken into consideration in deciding the law applicable to the merits

of the dispute include the parties' nationality, the place of performance of the contractual obligations, and the place and subject matter of the arbitration.

**Consent award:** An award recording the terms agreed by the parties to settle their dispute. The principal advantage of obtaining a consent award is that, if not complied with, it may be enforced as with any other award (whereas a settlement agreement is merely a contract). *See also* "Award".

**Consolidation:** The merger of separate arbitrations. This normally requires the agreement of all of the parties and, if consolidation is a possibility, consideration should be given to including appropriate language in the arbitration agreement. *See also* "Joinder".

**Costs of the arbitration:** Depending upon the applicable law, rules, and the discretion of the tribunal, the successful party will often be awarded all or part of its costs of the arbitration, including the fees and expenses of the lawyers, the tribunal, any institution, experts, witnesses, and the costs of hearing facilities, interpreters, translators, and reporting services. Although possible in limited circumstances, parties will not normally recover sums in respect of their management and employee time engaged on the arbitration.

**CPR:** International Institute for Conflict Prevention & Resolution is an independent body established in the US to promote ADR — visit [www.cpradr.org](http://www.cpradr.org).

**Designation of arbitrator:** The proposal of an arbitrator for appointment by an institution — *see also* "Nomination of arbitrator" and Ch. III.

**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. There is a range of possibilities as to the extent of disclosure (from none at all to all relevant documents) and the order made is usually a matter for the discretion of the tribunal (which is often influenced by the legal traditions of the jurisdiction to which each arbitrator belongs — civil law jurisdictions generally having far more restricted disclosure than common law jurisdictions). The obligation to disclose normally arises whether or not the documents are damaging to the position of the party handing them over.

**Domestic arbitration:** Some jurisdictions distinguish between "international" and "domestic" arbitrations, according to criteria such as the nationality of the parties, the nature of the dispute, and the applicable law. The importance of the distinction lies in the different rules that are applied to the two categories (for example, the distinction sometimes affects the ability of the parties to set aside, remit, or appeal an award).

**Emergency arbitrator:** An arbitrator appointed by an arbitral institution on an urgent basis specifically to deal with an application for interim relief, which cannot wait for the constitution of the tribunal to deal with the substantive dispute between the parties. In the absence of an emergency arbitrator procedure or sometimes as an alternative option, parties needing urgent interim relief often can apply to a relevant national court.

**Expedited procedure:** A mechanism for streamlining elements of the normal arbitration procedure and reaching the final award faster than usual. Some institutional rules provide for the expedition of all parts of the arbitration procedure. Others, such as the LCIA, expedite a particular stage of the procedure, such as the formation of the tribunal.

**Enforcement of award:** If a party does not comply with an award, the other party may apply to a court for the recognition (see “Recognition of award” below) and enforcement of the award using that court’s enforcement processes (for example, the seizure of assets). For the wide scope for the international enforcement of awards, see Ch. II and Annex 2.

**Equity clauses:** See “Amiable compositeur”.

**Ex aequo et bono:** See “Amiable compositeur”.

**Experts:** Experts appointed by the parties and/or the tribunal for an arbitration provide their impartial opinions on specified matters in dispute by drawing on their experience and/or qualifications. For the distinction between expert determination and arbitration, see Ch. I.

**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 convention States but has now largely been superseded by the New York Convention (see below).

**Governing law:** The law according to which the relevant contract is to be interpreted.

**IBA:** The International Bar Association — visit [www.ibanet.org](http://www.ibanet.org).

**IBA Rules of Evidence:** The IBA’s Rules on the Taking of Evidence in International Commercial Arbitration.

**ICA:** The International Court of Arbitration — see “ICC Court”.

**ICC:** The International Chamber of Commerce. The ICC provides a number of services to the international business community. The most significant aspect of the ICC’s work in the context of arbitration is the ICC Court (see below), but it also provides other dispute resolution assistance (for example, a conciliation service, a centre for expertise, and a pre-arbitral referee procedure to enable parties to obtain urgent interim relief).

**ICC Court:** The International Court of Arbitration of the International Chamber of Commerce — see Ch. IV and visit [www.iccwbo.org](http://www.iccwbo.org).

**ICSID:** The International Centre for the Settlement of Investment Disputes — see Ch. IV, Ch. VIII and visit [www.icsid.worldbank.org](http://www.icsid.worldbank.org).

**ICSID Convention:** The Convention on the Settlement of Investment Disputes between States and Nationals of Other States made at Washington, D.C. in 1965 (also referred to as the Washington Convention), which provides for the resolution of investment disputes through ICSID (see *above*).

**Impartiality and independence:** All arbitrators in international arbitrations must act impartially (*i.e.*, not be biased towards or against a party or in relation to the issues in dispute), failing which they may be removed, the award challenged or its enforcement resisted. As part of this, many arbitration rules and laws emphasise the need for arbitrators to be independent of (*i.e.*, unconnected to) the parties.

**Interim relief:** National courts are sometimes able to support an arbitration by granting interim relief (for example, ordering a party to preserve property or assets) pending the tribunal's award. This is particularly helpful if urgent relief is needed before the tribunal has been appointed and/or where the powers of the courts to impose criminal sanctions in the event of non-compliance are required (the tribunal not having such powers).

**International arbitration:** See “Domestic arbitration”.

**Investment treaties:** See Ch. VIII.

**Joinder:** Bringing a new party into an ongoing arbitration. Joinder generally requires the agreement of all of the parties and, where anticipated, a term providing for joinder should be included in the arbitration agreement (thereby providing the consent to joinder in advance). See *also* “Consolidation”.

**Jurisdiction:** A jurisdiction is a national legal system. The tribunal's jurisdiction is its scope of authority or competence.

**Language(s) of the arbitration:** The language(s) in which all matters connected with the arbitration will be conducted, including the parties' written submissions, evidence (whether written or oral) and the award itself.

**LCIA:** The London Court of International Arbitration — see Ch. IV and visit [www.lcia.org](http://www.lcia.org).

**Lex arbitri:** The procedural law of the arbitration, which is usually that of the seat of the arbitration (and is often different from the law governing the matters in dispute). See *also* “Seat of the arbitration”.

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

**Lex mercatoria:** A set of legal principles based on concepts found in developed legal systems and widely recognised by



the international business community. The existence, scope, and application of *lex mercatoria* is the subject of much debate. However, *lex mercatoria* has been successfully invoked in arbitrations as the basis on which the tribunal should resolve issues in the absence of any clearly applicable law. In such cases, the UNIDROIT principles (*see below*) are frequently used.

**Mandatory requirements:** Those provisions of the applicable law that are not subject to any contrary agreement of the parties.

**Model Law:** The Model Law on International Commercial Arbitration. The Model Law, adopted by UNCITRAL in 1985, was promoted as the basis for the reform and harmonisation of arbitration legislation around the world. To date, the arbitration laws of at least 40 countries have been reformed having regard to the Model Law.

**Mediation:** A form of ADR (*see above*) involving an independent third-party “mediator” who seeks to facilitate the settlement of the parties’ dispute. A mediator cannot impose a settlement and tends not to give an opinion on the legal merits. *See* “Conciliation”.

**NAFTA:** North American Free Trade Agreement — *see* Ch. VIII.

**New York Convention:** The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards — *see* Ch. II and Annex 2.

**Nomination of arbitrator:** The proposal of an arbitrator for appointment by an institution — *see* “Designation of arbitrator” and Ch. III.

**Panama Convention:** The 1975 Inter-American Convention on International Commercial Arbitration. This Convention provides for the enforcement of awards in more than 15 countries in the Americas (including the United States) subject to specified grounds of refusal. In order for an award to be enforced under the Convention, it must normally have been made in a Convention state.

**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 which are party to the 1899 or 1907 Hague Conventions (*see* [www.pca-cpa.org](http://www.pca-cpa.org)). Under the UNCITRAL Rules, the Secretary-General of the PCA will designate an appointing authority if the parties fail both to make the necessary appointment(s) of an arbitrator(s) and to designate an appointing authority themselves — *see* Ch. IV.

**Preliminary issue:** An issue decided in advance of the main hearing, usually in an attempt to save time and costs by resolving an important issue (such as jurisdiction) at an early stage.

**Presiding Arbitrator:** The arbitrator responsible for leading and managing proceedings in an arbitration where three arbitrators are needed. The other two arbitrators or the appointing authority usually chooses the Presiding Arbitrator.

**Public policy:** A State's notions of justice and public morality. Public policy considerations may affect whether a dispute is arbitrable or an award enforceable (for example, where the dispute arises out of a contract regarded as void for public policy reasons).

**Procedural law:** The law applicable to the procedure for the arbitration (typically the law of the seat). In many cases, the procedure for the arbitration will be a mixture of the rules adopted by the parties (often through the incorporation by reference of a recognised set of rules, such as those of the ICC, LCIA, AAA, or UNCITRAL) and the rules set down by the law of the seat. *See also* "Lex arbitri", "Mandatory requirements", and "Seat of the arbitration".

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

**Remission:** The power of a court, upon the application of one of the parties, to refer an award back to the arbitral tribunal for reconsideration in whole or in part. *See also* "Appeal", "Challenge to award", and "Set aside".

**Rules of arbitration:** The procedural rules pursuant to which the arbitration is conducted — *see* Ch. IV.

**Seat of the arbitration:** The jurisdiction in which the arbitration is deemed to take place and the award made (regardless of the physical location of the tribunal) — *see* Ch. V.

**Separability:** The legal doctrine by which the arbitration clause (agreement) is deemed separate from the contract in which it is included (allowing, for example, the arbitration agreement to survive the termination of the main contract). *See also* "Competence — Competence" above.

**Settlement:** The voluntary resolution of a dispute by the parties involved. *See also* "Consent award" above.

**Set aside:** In certain circumstances, a court in the seat of the arbitration generally has the power to set aside (*i.e.*, annul) the award. *See also* "Appeal", "Challenge to award", and "Remission".

**Slip rule:** A rule allowing a tribunal to correct minor (for example, typographical or mathematical) errors in its award.

**Sovereign (or State) immunity:** The protection enjoyed by sovereign States and/or their entities both against the jurisdiction of other State's courts or tribunals and from the execution of any judgment or award — *see* Ch. VII.

**Stay of court proceedings:** A court order suspending proceedings before it, which were commenced in breach of an agreement to submit disputes to arbitration.

**Submission agreement:** An arbitration agreement in respect of existing disputes. *See also* “Arbitration agreement”.

**Summary procedure:** A shortened arbitration procedure in which the arbitral tribunal does not hear full evidence and argument, and sometimes dispenses with an oral hearing. Summary procedures are suited to dealing with cases where the dispute is confined to a legal issue, with no evidence requiring a full trial, and/or where there is clearly no viable claim or defence.

**Terms of Reference:** A document required by the ICC Rules, which sets out the names and addresses of the parties and their representatives, a summary of their claims, the place of arbitration, and, if appropriate, a list of the issues to be determined.

**Trade usages:** The standard terms on which members of a particular business community are accustomed to deal. Under some arbitration rules (notably those of the ICC), the tribunal is required to take account of any relevant trade usages.

**Umbrella clause:** In the context of bilateral investment treaties (BITs), this is a promise made by one signatory State to comply with all obligations or commitments the State has assumed towards investments made by investors from the other signatory State.

**UNCITRAL:** The United Nations Commission on International Trade Law. The UNCITRAL arbitration rules are discussed in Ch. IV. *See also* “Model Law” and visit [www.uncitral.org](http://www.uncitral.org).

**UNIDROIT Principles:** A system of international contract law rules published by the International Institute for the Unification of Private Law in 1994. The UNIDROIT Principles are based on concepts familiar to many legal systems and are therefore reflective of *lex mercatoria* (*see above*).

**Washington Convention:** The ICSID Convention — *see above*.

**WIPO:** The World Intellectual Property Organisation — *see* Ch. IV and visit [www.wipo.int](http://www.wipo.int). ■

## Contacts

For further information, including examples of our many engagements, please contact:

### Düsseldorf

**Christine Gärtner**

+49.211.8828.4619

christine.gaertner@lw.com

### Frankfurt

**Volker Schäfer**

+49.69.6062.6507

volker.schaefer@lw.com

### Hamburg

**Sebastian Seelmann-Eggebert**

+49.40.4140.3259

sebastian.seelmann@lw.com

### Hong Kong

**Simon Powell**

+852.2912.2693

simon.powell@lw.com

**Ing Loong Yang**

+852.2912.2790

ingloong.yang@lw.com

### London

**Oliver Browne**

+44.20.7710.1825

oliver.browne@lw.com

**Charles Claypoole**

+44.20.7710.1178

charles.claypoole@lw.com

**Philip Clifford**

+44.20.7710.1861

philip.clifford@lw.com

**Sophie Lamb**

+44.20.7710.3012

sophie.lamb@lw.com

**Sebastian Seelmann-Eggebert**

+44.207.710.1000

sebastian.seelmann@lw.com

### Madrid

**Antonio Morales**

+34.91.791.5030

antonio.morales@lw.com

### Munich

**Markus Rieder**

+34.91.791.5030

markus.rieder@lw.com

## **New York**

### **Claudia Salomon**

+1.212.906.1230

claudia.salomon@lw.com

## **Paris**

### **Fabrice Fages**

+33.1.40.62.28.15

fabrice.fages@lw.com

### **Fernando Mantilla-Serrano**

+33.1.40.62.20.40

fernando.mantilla@lw.com

## **San Francisco**

### **Melanie Blunsch**

+1.415.391.0600

melanie.blunsch@lw.com

## **Tokyo**

### **Daiske Yoshida**

+81.3.6212.7818

daiske.yoshida@lw.com

Other relevant Latham & Watkins materials that may be of interest:

- Public International Law Practice brochure
- International Investment Protection Practice brochure

Please contact one of the individuals below to receive a copy of either of these publications. To receive regular International Arbitration or Public International Law updates from Latham & Watkins, please visit **LW.com**.

If you wish to update your contact details or customise the information you receive from Latham & Watkins, please visit [www.lw.com/LathamMail.aspx](http://www.lw.com/LathamMail.aspx) to subscribe to our global client mailings program.

Latham & Watkins operates as a limited liability partnership worldwide with affiliated limited liability partnerships conducting the practice in France, Italy, Singapore, and the United Kingdom and as affiliated partnerships conducting the practice in Hong Kong and Japan. Latham & Watkins operates in South Korea as a Foreign Legal Consultant Office. Latham & Watkins works in cooperation with the Law Office of Salman M. Al-Sudairi in the Kingdom of Saudi Arabia. © Copyright 2018 Latham & Watkins. All Rights Reserved.



A low-angle, upward-looking photograph of a large, modern glass dome. The dome's structure is composed of a complex network of steel beams and glass panels. A prominent radial steel beam extends from the center towards the bottom right. A large, circular skylight is visible on the left side of the dome. The sky is visible through the glass panels. The image is overlaid with a semi-transparent red filter.

LATHAM & WATKINS

LW.com