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BPP PROFESSIONAL EDUCATION
INTERNATIONAL COMMERCIAL ARBITRATION

SESSION 1 – LAWS AFFECTING INTERNATIONAL ARBITRATION

A: INTRODUCTION

1. Some characteristics of an international commercial contract.

   - Parties have places of business in different countries.
   - Place of performance is in a country other than that where one or both parties have their place of business.
   - The contract concerns property in a foreign country.
   - One or both parties have their principal/only assets in country other than that of place of performance.
   - Third parties (eg sureties and providers of letters of credit) who have an interest in the performance must perform obligations in a country other than their place of business.

2. Possible methods for resolving disputes under international commercial contracts.

   Litigation
   Advantages: judicial expertise in national law and procedure, coercive power in the face of disruptive tactics, power to order joinder in multi-party disputes, public nature of judgements.
   Disadvantages:

   - Courts of one party may not be acceptable to the other party.
   - Courts of one party may be perceived by other as incompetent or biased by the other party, or language and procedure may be inaccessible.
   - Local court expertise in the national law may be irrelevant to the substantive law of the contract.
   - Local courts may lack specialist judiciary familiar with the relevant commercial issues, or be jury based.
   - Public nature of court proceedings may be unacceptable.
   - Extensive rights of appeal can be used as delaying tactics.
   - Cost and complexity of commencing proceedings and litigating in a foreign court, generally that of defendant, may be unacceptable.
   - Problems with service of process on defendants out of the jurisdiction.
   - Problems with the international recognition and enforceability of court orders and judgements.

International arbitration

Disadvantages: Costs of tribunal/administration not state subsidised; delays in convening multi-arbitrator tribunals, problems with joinder (unless contracted for), weak coercive power over parties and, in particular, non-parties.

Advantages:

- A neutral forum divorced from the parties' legal cultures, alternatively a forum in which each party's legal culture is represented.
- A forum, free from the procedural constraints of either party's local courts.
- An independent tribunal with relevant technical and commercial expertise, or legal expertise appropriate to the law of the parties' contract.
- Party autonomy, tribunal having procedural flexibility over matters not agreed.
- Privacy (usually) and, in many jurisdictions, confidentiality.
- Limited scope for delaying enforcement, because limited grounds for challenging or appealing an arbitral award.
- World wide (almost) recognition and enforcement of arbitral awards in commercial disputes under the New York Convection on the Recognition and Enforcement of Foreign Arbitral Awards 1956 (The New York Convention).

Note also dispute review boards, adjudication and mediation. These are outside the scope of this course.

3. Possible definitions of international arbitration

(The Model Law) An arbitration is international if: (a) the parties to the arbitration agreement have, at the time it is concluded, their places of business in different States; (b) either the place of arbitration, any place where a substantial part of the obligation of the relationship is to be performed, or the place with which the subject matter of the dispute is most closely connected, is outside the State where the parties have their places of business; or (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

(New York Convention) Any arbitration where the award will have to be enforced in a state other than that where the award was made.

4. Types of commercial arbitration.

By subject matter. Quality of commodity disputes, such as those dealt with under GAFTA, have little in common with general commercial arbitrations. The former are often decided by a person actively engaged in the trade concerned with legal representation excluded. The latter will, ordinarily, involve lawyers both as representatives and tribunal members.

Commercial: Covers matters arising from all relationships of a commerical nature, whether contractual or not. Such relationships ordinarily include, but are not limited to, any trade transaction for the supply or exchange of goods or services, distribution agreements, commercial representation or agency, factoring, leasing, construction of works, consulting, engineering, licensing, investment, financing, banking, insurance, exploitation agreements or concessions, joint ventures and other forms of industrial or business co-operation, carriage of goods or passengers by air, sea, rail or road.

By party. Private commercial arbitration (principally between private entities). Mixed arbitration (principally between a private and a state entity, in which the administrative or executive decision making of the state entity may be in issue). State arbitration (disputes between states). **State arbitration is outside of the scope of this course**.

5. The nature of international arbitration.

One definition: The process in which the solution of a commercial dispute is obtained, not from the State authorities and judges, but from private individuals selected by the parties themselves, directly or indirectly. A method of decision making by a tribunal of the parties' choice within a procedural framework they have agreed or which reflects more closely their disparate cultures (both social and legal) than can a national court. Professor Pierre Lalive: Former President of the Swiss Arbitration Association.

Contrast the English view. Arbitration involves a formulated dispute or difference between the parties, the submission of that dispute or difference by agreement to a third party for resolution in a judicial manner and an opportunity for parties to present evidence or submissions in support of their claims in the dispute; Arenson v. Arenson [1977] AC 405 (HL), Lord Wheatley.

6. A political and economic dimension

There is a political and economic dimension to international arbitration. Politically it may viewed with suspicion, as favouring western (capitalist) commerce, particularly by developing countries and those with socialist or communist structures. It may also be viewed with suspicion by national courts concerned at inroads into national law. But economically, the encouragement of inward investment and international trade is dependent on a stable and certain context for trans-national commercial transactions and a neutral environment for enforcement.

In excess of 120 states have ratified/ acceded to the New York Convection, creating a minimum international standard for the recognition and enforcement not just of arbitration awards, but of arbitration agreements.

A similar number of states are signatories to, and have ratified the Washington Convention 1965, which provides for the settlement of investment disputes between foreign private investors and Host States by arbitration. There is also a recent proliferation of multilateral and bilateral investment protection treaties (BITS), many of which provide for arbitration.

International commercial arbitration is also business in itself. Thus, States in which most international arbitration takes place have, over recent years, modernised their arbitral laws to reduce court interference in the process. There is also a growing harmonisation of arbitral law prompted by the promulgation by the UN of the Model Arbitration Law of 1985 (The Model Law).

7. De-localised arbitration?

There is a school of thought that argues that arbitration concerned with transitional commerce should be divorced from all municipal systems of law and not be subject to state court control or interference at any level. Consider the Iran-US Claims Tribunal and the arbitration system created by the Washington Convention 1965.

This is unrealistic. State court support is required, as a minimum, to recognise and enforce arbitral agreements and arbitral awards. State court support may also be required in constituting tribunals and in assisting with interim and conservatory measures. Thus, a degree of state supervision is only to be expected, not just on enforcement of any award, but at the place of the arbitration.

De-localisation from State court procedure is possible. See, for example, 1998 ICC Rules, article 15(1), subject to any mandatory procedural rules at the seat (place) of arbitration, eg AA1996, s. 4(1).

B: LEGAL SYSTEMS AFFECTING INTERNATIONAL ARBITRATION

8. There are a number of different legal systems relevant to international arbitration; Channel Tunnel v. Balfour Beatty [1993] AC 334, 357.

- The law of the substantive agreement.
- The law of the arbitration agreement.
- The procedural (curial) law of the arbitration.
- The law of the place or places of domicile (or residence)/nationality of the parties.
- The law of the place of enforcement of the arbitration agreement and of recognition and enforcement of the tribunal's award.

9. The law of the substantive agreement. This includes the proper law of the contract and, possibly, any mandatory rules of law applicable at the place of performance and the parties' countries of domicile/nationality).

The proper law of the contract (the governing law/the applicable law) is concerned with the validity and interpretation of the contract, the parties' rights and obligations, performance and substantive remedies, eg. damages, and limitation where it is a substantive defence or deemed to be such.

There is an unresolved debate whether concurrent, non-contractual claims, eg. in tort, should be governed by the law of the contract, or the law of the place of the tort.

The *Lex mercatoria* (international principles of law)
May local laws permit such a choice: eg. France, NCCP, art. 1496; Swiss PILA, art 187(1); Model law, art 28. The main objection to it is uncertainty. Are there legal principles that are generally followed by the international commercial community? Consider, for example:

> The Uniform Law on the Formation of Contacts for the International Sale of Goods 1964
> The Uniform Law on the International Sale of Goods 1964. This is part of UK law but only if adopted by the parties.
>
> Both of these are now embodied in the Vienna Convention on Contacts for the International Sale of Goods 1980 (CISG). CISG, art 1: defines international sales as contracts for sale of goods between parties whose places of business are in different states.

(International?) Public policy restrictions
Some laws are not amenable to choice of law clauses:

> Laws linked to capacity of the parties (considered below).
>
> Mandatory rules of law (at place of domicile/nationality, place of performance of obligations, place of enforcement of award?) that cannot be waived by a choice of law clause. For example, health and safety, restraint of trade, anti-trust and competition law, enshrined in national or trans-national legislation (eg the Sherman Act 1890 (USA) and article 81 of the Treaty of Rome (EU)) or laws governing bribery, money laundering and corruption. Outside of the domestic arena, many of these are no longer regarded as raising questions of arbitrability, but issues of (international) public policy. Consider Mitsubishi Motors Corp v. Soler Chrysler-Plymouth Inc YB

Comm Arb XI, 555 (US Supreme Court).

10. The law of the arbitration agreement. In general, an arbitration agreement is regarded as separate from any substantive agreement in which it is found (the doctrine of seperability or autonomy). This means that it can survive the invalidity or premature discharge of the substantive agreement in which it is embodied. See, for example, Harbour Assurance v. Kansa [1993] 1 Lloyd's Rep 455 (CA); AA1996, s. 7. It also means that the law of the arbitration agreement is not necessarily the same as the either the curial law or the proper law of the contract. It is, however, concerned with the same matters as the proper law of a contract, in particular the validity and interpretation of the arbitration agreement and its performance and discharge.

A law governing the arbitration agreement is seldom stated expressly. Thus, there can be problems in deciding the parties' intentions; the principal options being the curial law or the law of the substantive agreement. There is academic support for a presumption in favour of the latter, but the former cannot be disregarded and appears to accord more closely with the New York Convention, art. V(1)(a). Contrast XL Insurance v. Owens Corning [2001] 1 All ER (Comm) 529 with Union of India v. McDonnell Douglas [1993] 2 Lloyd's Rep 48. But note Black Clawson v. Papeirwerke [1981] 2 Lloyd's Rep 446, 453-5. A more recent trend, focussing on the doctrine of regard it as governed by *lex mercatoria*, if no specific is law identified. Eg. Dalico (1993) (France).

It matters: Consider Hamlyn v. Talisker [1894] AC 202; XL Insurance v. Owens Corning; Nirma Ltd v. Lurgi Energie, (India), YB Comm Arb XXVIII, 790 (the approach of the Indian courts finds little favour elsewhere).

A note on confidentiality

The traditional view (based on an implied term theory) is that arbitral proceedings are confidential, except for the award where this is needed to preserve or enforce a legal right. See, for example, the law of England and Wales: Dolling-Baker v. Merrett [1990] 1 WLR 1205 (CA). A similar view is taken in France: Aita v. Ojjeh (1986) Rev Arb, 583.

Few arbitral laws, other than the New Zealand Arbitration Act 1996 (which provides for it), deal expressly with confidentiality. Standard procedural rules deal with the problem in a variety of different ways varying from full confidentiality, to little or no mention of confidentiality or privacy.

Privacy is concerned with the rights of person other than the tribunal, parties, their advisors and witnesses to attend meeting and hearings. Confidentiality is concerned with the obligation not to divulge or give out information relating to the contents of the proceedings, documents or the award. Consider:

Privacy of proceedings and the tribunal's deliberations
Confidentiality as to existence of proceedings and parties.
Confidentiality of material engendered during the proceedings.
Confidentiality after the award.

Is total confidentiality desirable? It may, in any case, be undermined by court proceedings concerned with the arbitration.

While there is little argument that arbitration is private, not all legal systems accept that arbitral proceedings are confidential. Consider:

Australia: Esso v. Plowman (1995) 128 ALR 391 (HC). Private, but not confidential.

Sweden. AI Trade Finance v. Bulgarian Foreign Trade Bank (Bulbank) YB Comm Arb 291). Private, but no implied duty of confidentiality on parties (but tribunal had to recognise confidentiality, and counsel were bound by their professional rules.

USA. United States v. Panhandle Eastern Corporation 118 FRAT 346 (D Del 1998). No implied obligation of confidentiality, but US equivalent to rules of legal professional privilege may restrict what can be disclosed.

Questions of privacy and confidentiality should, ideally, be dealt with expressly in the arbitration agreement, particularly if there are concerns about possible disclosure of trade secrets and the like. It may be difficult to bind persons other than the parties, the tribunal and the arbitral institution (such as witnesses and representatives). It may be necessary to make the receiving party responsible for maintaining confidentiality in such material provided to it for the purpose of the arbitration.

11. The procedural (curial) law of the arbitration (*lex arbitri, lex fori*). This sets standards, potentially independent of the parties' agreement (mandatory provisions), for the conduct of the arbitration. For example, matters such appointment, removal and replacement of arbitrators, challenges to arbitrators, time limits, conduct of the arbitration, procedural issues, such as disclosure, interim measures of protection, power to consolidate, the power to proceed *ex aequo et bono*, ordering costs and interest, as well as the form of award and its finality. The curial law also governs the court's supportive and supervisory powers and the applicable procedural law (eg conflicts rules, procedural time bars.). The curial law may also determine (objective) arbitrability, but the law of the place of enforcement may also be relevant, as may the law of the arbitration agreement.

The curial law is the law of the country where the arbitration has it legal place. This is increasingly referred to as the seat of arbitration to distinguish the legal place of arbitration from the physical location where the tribunal holds its meetings (which may be different); Union of India v. McDonnell Douglas [1993] 2 Lloyd's Rep 48.

In many cases, the arbitration agreement identifies the seat (eg. "London arbitration clause"). Consider Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd [1993] 1 WLR 262 (HL), Lord Mustill;. If it does not, the agreed rules may provide an answer (eg. ICC Rules, art 14(1)). If not, the tribunal (or a court?) must decide. See, for example, AA 1996, ss. 2(4) and 3; Dubai Islamic Bank v. Paymentech, [2000] 1 Lloyd's Rep 65.

A note on natural justice

The curial law will generally dictate minimum standards of natural justice that the tribunal must observe. The words used in different jurisdictions may be similar but they have different nuances.

In England and Wales natural justice is expressed in terms of fairness and impartiality (AA1996, ss. 24(1)(a), 33(1) (actual and apparent) and the parties' right to a reasonable opportunity to put forward their cases and know and be able to deal with the case against them (AA1996, s. 33). There is no separate common law requirement of independence, although this can be imposed by agreement between the parties, AT&T Corp v. Saudi Cable Co [2000] 1 Lloyd's Rep 22 (HL).

In many other jurisdictions, the focus is on (actual and apparent) independence, eg Swiss PILA, art. 180(1)(c), and procedural principles of equality and contradiction (a civil law concept often translated into English as the adversarial principle). See eg. Swiss PILA, art 182.

> The Model law requires both impartiality and independence (art. 12(2)), and the parties to be treated with equality and each given a full opportunity of presenting its case (art. 18).

For a common law lawyer the dictates of procedural natural justice may be seen as reflecting common law court procedure. Civil law lawyers may seen them as embodying the civil law court procedure and regard the common law (English/US) approach as labour intensive, costly and culturally insular. In both cultures, there is a growing recognition that the principles of natural justice must be balanced by the need for an expeditious and economical process.

The civil law/common law debate

The civil law tradition allows for a conciliation in the process of arbitration (most proceedings settle and this should be facilitated). This is not the tribunal's role in the common law tradition.

Common law procedures for exchange of written material generally favour successive exchange of case statements, documents, witness statements, expert reports leading to a full testing of evidence at an oral hearing. Many civil law lawyers would expect all material relied on to be adduced with case statements and full double exchange of this material. In the civil law tradition any hearing may be limited to a day or two, even in complex matters, and concerned with the questioning of key witnesses by the tribunal, and to giving the parties' representative an opportunity to orally explain their parties' cases. There is, however, a degree of consensus in international arbitration that, even if questioning of a witness is initiated by the tribunal, the parties should have a limited opportunity to ask questions of their own.

The common law tradition is that wide powers of disclosure are an essential feature adversarial proceedings and indispensable to a just result. The civil law tradition regards the ideal of producing all documents, both those that help and those that are unhelpful to one's case, as unpalatable and the concept of depositions as incomprehensible. This divide can lead to unfairness where one party is represented by civilian lawyers, the other by common law lawyers. For instance, they will have different concepts of what constitutes compliance with an order for general disclosure and of their professional duties in respect of such an order. The International Bar Association, (IBA) Rules of Evidence 1999 (which provide for limited involuntary disclosure) were devised as an attempt to bridge this gap and there is a growing consensus towards their use in international arbitration.

Common law procedures are generally more lengthy and costly then the civil law procedures. Common law lawyers may consider that they offer a greater investigation of the truth, then is possible under civil law procedures. But, is this something the parties to international arbitration want or can afford?

A note on joinder

In most jurisdictions, questions of joinder are regarded as a matter for party agreement, see, for example, England and Wales AA1996, s. 35. There are, however, a few jurisdictions in which court ordered joinder is a possibility.

> The United States, where the court appears to have power to order consolidation between different arbitral proceedings under the Federal Rules of Civil Procedure.
>
> Hong Kong, where the power is provided by s. 6B of the Hong Kong Arbitration Ordinance 1982 (domestic arbitrations). There is a similar provision in s. 6 of the Bermudan Arbitration Act 1986). Consider, for example, Schindler Lifts v. Shui On Construction YB Comm Arb XIV, 213.

The Netherlands where, unless excluded by agreement, the power is provided by art. 1046 of the Dutch Arbitration Act 1986. This gives the President of the District Court in Amsterdam power to order partial or full consolidation of separate arbitral proceeding commenced in the Netherlands, whose subject matters are connected. Consequential orders concerning the constitution of tribunal, including remuneration of removed arbitrators can also be made.

There is some doubt about whether court ordered joinder might prejudice the enforcement of any resulting award. One view is that, since such an order abrogates the parties' agreements, the award may not be enforceable. The alternative view is that, if all the parties to the joined proceedings have agreed to a curial law that allows joinder, the possibility of joinder and a tribunal constituted by the court to achieve this, is accepted by their agreements. But what if a common seat is selected by an arbitral institution, such as the ICC (see Rule 14(1)), or where the various arbitration agreements identify different seats?

12. The law of the place or places of domicile of the parties. The capacity to arbitrate (subjective arbitrability) is generally determined by the law of the place of domicile/nationality of the parties. This law may also determine how a party can instruct representatives. In some countries, for instance, representatives must have a power of attorney.

The Shari'ah

This procedural and substantive code applies where both parties are Muslim irrespective of where they are based. It only applies by agreement if one of the parties is a non-Muslim and does not apply if neither is a Muslim. The substance of the Shari'ah is outside the scope of this course. For a brief introduction see Redfern & Hunter (3rd Edition), 110ff.

Arbitration with state entities

The problem: Can a state or its offshoots resist arbitral proceedings on the grounds of sovereign immunity? Can it, on those grounds, resist recognition and enforcement of an arbitral award made against it, or execution? Do the courts at the seat have jurisdiction over the foreign country in proceedings concerning the arbitration?

The problem is particularly acute in civil law jurisdictions that distinguish between private and administrative laws and provide is a separate court system for each (eg France). Some such countries forbid the state or its offshoots from submitting to arbitration or require a particular form of ratification (eg by a Council of Ministers/by Parliament!). Consider Fougerolle v. Syria, YB Com Arb XV, 515.

Some international conventions deal expressly with (part of) this problem

> The European Convention on International Commercial Arbitration (Geneva 1961), Art II(1): legal persons considered by the law that is applicable to them as "legal persons of public law" have the right to conclude valid arbitral agreements. Note also the European Convention on State Immunity (Basle 1972), Article 12(1): Where a Contracting State has agreed in writing to submit disputes which has arise or may arise out of a civil or commercial matter to arbitration, that State may not claim immunity from the jurisdiction of a court of another contracting State where the arbitration has or will take place in relation to any proceedings relating to the validity or interpretation of the arbitration agreement, the arbitration procedure and the setting aside of the award, unless the arbitration agreement provides otherwise.
>
> The Convention on the Settlement of Investment Dispute Between States and Nationals of Other States (Washington, 1965), Article 54(1): Each Contracting State shall recognise an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgement of a court in that State. Article 55: Nothing in Article 54 shall be

construed as derogating from the law in force in any Contracting State relating to immunity of that State or any foreign State from execution.

In the absence of a relevant treaty obligation, many national legal systems distinguish between waiver of immunity from jurisdiction and waiver of immunity from execution and enforcement. See for example, Swiss Private International Law Act (PILA) 1986, art. 177(2): If a State or an undertaking or organisation under its control or domination is a party to an arbitration, it cannot rely on its own law to challenge the arbitrability of a dispute or its capacity to be a party to an arbitration.

In France, the problem has been addressed in a number of Supreme Court decisions. Galakis [1966] Rev Arb 99-100, and Dalico (20 December 1993); Société Creighton v. Qatar YB Comm Arb 451. But note Creighton v. Qatar (USA) YB Comm Arb XXV, 1001.

13. The law of the likely country/countries of enforcement of the arbitration agreement and the tribunal's award. The former is the law of any country where an attempt is made to commence legal proceedings. The latter is the law of any country where relevant assets are located.

The critical issue is whether that law will enforce arbitration agreements (including those that provide for arbitration elsewhere) and whether it will recognise and enforce arbitral awards rendered in other jurisdictions. If so, what matters it will consider, in deciding whether or not to do so. In practice, the principal question is whether that country has ratified the New York Convention 1958 or some other relevant convention, eg. The Washington Convention 1965. These conventions are considered later.

In the case of arbitration agreements a particular concern is the formalities the law requires for such agreements to be valid and what restrictions it places on their scope.

In the case of awards, there may be a concern over whether mandatory requirements of public policy are likely to conflict with the legal principles applied by the tribunal, and whether a distinction is made between domestic and international public policy. What of, for example, competition laws, currency controls, environment protection, embargo, blockade and boycott, drug trafficking, and money laundering?

C: TREATIES AND CONVENTIONS PROVIDING FOR ARBITRATION

14. Arbitration of international investment disputes

Limited remedies are available to foreign national investors whose investments are confiscated or damaged by the authorities of the State in which they invest (the Host State). Consider

Litigation in the Host State or diplomatic pressure between States.

Export credit guarantee and insurance schemes to manage risk.

Letters of credit to secure payment.

A stable and certain context for the negotiation, agreement and operation of long term commercial transactions in foreign states requires a method of dispute resolution before a neutral tribunal in a neutral venue with enforceable outcomes. This is what the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (the Washington Convention) and a more recent, proliferation of Multilateral

(MITs, eg the North Atlantic Free Trade Agreement (NAFTA), the European Energy Charter Treaty) and Bilateral Investment Treaties (BITs), seek to provide.

The Washington Convention provides for ICSID arbitration of investment related disputes between a Host State and a foreign private investor. So do many MITs and BITs and some State investment laws but, possibly only after attempts made to reach an amicable resolution or (possibly) exhausting local remedies. If BITs and MITs provide for arbitration, it need not necessarily be under ICSID.

15. ICSID arbitration.

Under the Washington Convention ICSID's jurisdiction extends to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another contacting State, which the parties to the dispute consent in writing to submit to the Centre".

What is an investment?
Investment is not defined. It depends on the nature of the parties' relationship and how they characterise it.

> Examples of ICSID arbitration (see: web site www.worldbank.org/icsid) include the following. Holiday Inns v. Morocco: Construction and operation of hotels where the Host State failed to provide promised financing or, Amco Asia v. Republic of Indonesia, (The State authorities seized control of the enterprise. Adriano Gardella v. Cote d'Ivorie: Cultivation of crops and construction of a textile factory were the Host State failed to pay for materials invoiced in accordance with the project agreement. Llockner v. United Republic of Cameroon: Construction and management of a fertiliser factory where the Host State failed, in breach of contract, to pay construction costs. Alcoa Minerals v. Jamaica: Mining of bauxite were the Host State raised a production levy in breach of a no further tax agreement.

What is consent in writing?
The Washington Convention does not confer a right to arbitration on an investor, just a facility. In general, an investor can only request ICSID arbitration if there is an ICSID arbitration clause in its contract with a Contracting State or State-entity, if there is an applicable treaty (BIT or MIT or foreign investment law in which the Contracting State gives its advance consent to ICSID arbitration or, if both the Host and Home states are contracting states to the Washington Convention and the Host State is prepared to grant consent to arbitration.

Thus, two levels of submission are necessary.

- The first is ratification of the Convention by the relevant States. Ratification can be subject to reservations. Reservations are, in effect, policy declarations since the state is not, in any case, bound unless it complies with the second level of submission.

- The second is written consent. No particular form is required. Consent can be individually negotiated, for instance, as a term in a contract, and can be express or implied, Amco Asia v. Indonesia 1 ICSID Rep 277. Consent by a State can also be embodied in a national law or in a MIT or BIT. In such circumstances, the individual party consents by initiating arbitration.

Who can be parties?
Foreign nationals, who are nationals of a Home State (ie. a Contracting State, one who has ratified the Convention), including individuals and companies. A company is, in general, a

national of the country in which it is which incorporated or registered. But, since many Host States require investment to be channelled though a local company, the Washington Convention provides a permissive facility whereby a company incorporated in Host State, but controlled by a foreign investor, is be treated as a company of the State of that investor.

What is an act of a Host State?

Can be problems in deciding whether something it the act of the Host State (ie. the acts of a regional or federated region in a state or nationalised corporations).

Outline of the procedure

Either party to an investment dispute can request the ICSID Secretary General to initiate ICSID conciliation or arbitration (conciliation is seldom used) and he must to do unless the dispute is manifestly outside the jurisdiction of ICSID.

ICSID Arbitration is self contained. Consent to ICSID generally excludes all other remedies.

Constituting the panel: There must be an odd number of arbitrators; the presumption is three. Each party nominates one and, if they cannot agree a chairman, the Chairman of the Counsel appoints, having regard to the need to avoid a majority of nationals of either party.

The tribunal determines its own competence. It must apply the law agreed by the parties or, of no agreement, the law of the Host State (including its conflict rules). Tribunal can decide *ex aequo and bono*, if the parties agree.

If a party fails to participate, the Tribunal can continue to determine the matter on its merits.

The Tribunal can only award damages.

Awards are binding and not subject to appeal or challenge other than as provided within the ICSID system. Other than in the case of applications for annulment, all applications are to the tribunal.

- Within 45 days of award, either party can ask the tribunal to deal with omitted matters and make corrections.

- Either party can, if the parties disagree on its meaning, ask the tribunal to give an interpretation of its award.

- Either party can, within 90 days, request the revision of an award where new information of a decisive effect to the Award comes to light and its previous ignorance of that information was not due to the applicant's negligence.

- An award can be annulled, in whole or in part, on application made within 120 days where (a), the tribunal was improperly constituted; (b) the tribunal manifestly exceeded its powers; (c) an arbitrator was corrupt; (d) there was a serious departure from fundamental rules of procedure; or (e) the tribunal failed to state its reasons. Such challenges are decided by a three-person tribunal appointed by the Chairman of the Council. If an award is annulled, the dispute may be submitted to a new tribunal on the request of either party.

Contracting States are not to give diplomatic protection or bring international claims in respect of disputes by companies submitted to ICSID, unless the Host State (the State party to the dispute) fails to honour the award.

Enforcement. Each Contracting State must recognise and enforce pecuniary obligations awarded by ICSID tribunals as if final judgements of that State. But this does not override State laws on sovereign immunity. The Washington Convection does not deal with execution, so it may be difficult to execute against a State in a court where the law gives that State extensive immunity from execution.

The additional facility

The ICSID Additional Facility, adopted in 1979, extends the Centre's jurisdiction to certain cases where the Convention jurisdictional requirements are not satisfied: Conciliation or arbitration proceedings for the settlement of investment disputes between parties one of which is not a Contracting State or a national of a Contracting State; conciliation or arbitration proceedings between parties, at least on of which is a Contracting State or a national of a Contract State, for the settlement of disputes that do not directly arise out of an investment; and fact-finding proceedings. The approval of the Secretary-General of ICSID must be obtained to institute such proceedings.

The additional facility is, for example, used for arbitration under BITs where one of the States Parties is not a signatory to the Washington Convention.

16. Other State accords and conventions providing for arbitration, or similar (not considered in these notes).

Iran – US Claims Tribunal: Set up pursuant to the Algiers Accords: seat in the Hague. Provides for arbitration of claims by US Nationals against Iran, and by Iranian nationals against the US, and certain claims between the US and Iran.

The UN Convention on the Law of the Sea 1982: provides for the settlement of disputes between States in respect of matters governed by the Convention, such as fishing and exploitation of the sea bed in areas beyond national jurisdiction, by tribunals constituted for that purpose.

The General Agreement on Tariffs and Trade (GATT), now the World Trade Organisation (WTO). Disputes between Contracting States are not concerned with breaches of WTO obligations, but with breaches of negotiated liberalisation commitments. There are procedures for dealing with third party interests, but only Contracting States can be complainants. Panels are constituted by the WTO Diplomatic Support Body.

International Court of Justice at the Hague. Only States can be parties to proceedings before the court.

BPP PROFESSIONAL EDUCATION
INTERNATIONAL COMMERCIAL ARBITRATION

SESSION 2 – SUPPORT AND SUPERVISION FROM LOCAL COURTS

A: INTRODUCTION

1. The role of State courts in international commercial arbitration is both supportive and supervisory.

   Support is concerned with matters such as enforcing arbitral agreements, assisting in constituting the tribunal, granting conservatory measures and interim relief (including witness orders). Supervision is concerned with controls over arbitrators, jurisdiction issues, and awards. Recognition and enforcement of awards can be regarded as supporting the arbitral process, but that topic is considered in a separate section of these notes.

   Apart from under art. II of the New York Convention, and in those States that have adopted the Model law, there is, outside ICSID, little harmonisation of municipal law on these questions. This creates uncertainty and unpredictably.

B: ENFORCING ARBITRAL AGREEMENTS

2. Enforcing arbitral agreements under the New York Convention (also, where relevant provisions of the Model Law apply).

   Article II of the New York Convention provides internationally accepted minimum standards for the recognition and enforcement of arbitral agreements in the territories of Contracting States (States that have ratified/acceded to the Convention), but subject to the possibility of two reservations (reciprocity and commercial disputes).

   > Article II(1): Each Contracting State must recognise agreements in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
   >
   > Article II(3) The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of article II shall, at the request of one of the parties, refer to the parties to arbitration, unless it find that the said agreement is null and void, inoperative or incapable of being performed.
   >
   > Compare article 8 of the Model Law: Provides that a court before which an action is brought in a matter that is the subject of an arbitration agreement shall, if a party so requests not later than when submitting its first statement on the substance of the dispute, refer to the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

   <u>What is an agreement in writing (formal validity)?</u>
   Article II(2): The term agreement in writing includes "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams". But note art. VII: domestic law (see, eg. England and Wales, AA1996, s. 5, Swiss PILA, art 178) may have less onerous formalities.

This definition of writing fails to address technical advances in manner in which agreements are concluded; eg. what of agreements concluded by conduct, oral acceptance, agency or trade usage? How does it apply where rights are assigned or transferred on business re-organisation?

A somewhat wider definition in the Model lw, art. 7: includes, as well as signed agreements, agreements contained in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by another. Furthermore, that the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

As with arbitrability, it is not clear which law should be applied to decide these questions: The local law, the law of the arbitration agreement or the curial law of the arbitration. In practice, different State laws interpret these requirements in different ways, reflecting their attitude towards arbitration.

> The interpretation of article II(2) is also relevant on enforcement proceedings. Consider A Ltd v. BAG (Switzerland) YB Comm Arb XXVIII, 835).

The scope of an arbitration agreement?
Objective arbitrability: Different states take different views about what is arbitrable and what commercial matters are reserved to the courts. For example, as anti trust or unfair competition issues, securities, intellectual property, labour and company law disputes.

There is an ongoing debate about whether arbitrability, on an article III(3) application, to be decided under local law, under the law of the parties' arbitration agreement, under the curial law of the arbitration, or under the law of the likely place or places of enforcement.

> Consider: Van Hopplynus v. Coherent Inc (Belgium) YB Com Arb XXII, 637; also the second look doctrine, Mitsubishi Motors Corp v. Soler Chrysler-Plymouth Inc YB Comm Arb XI, 555 (Supreme Court). But contrast Fincantieri-Cantieri v. Iraq (Italy) YB Com Arb XXI 594.

Capacity of parties
Subjective arbitrability: Neither the New York Convention, nor the Model Law deals with this capacity. Capacity to arbitrate is decided principally by the law of the place of domicile/nationality, but may also be affected by waivers applied by curial law of the arbitration).

3. A note on anti-suit injunctions in support of arbitration
Certain countries exercise an exorbitant jurisdiction to restrain parties to an arbitration agreement that provides for arbitration under their laws from prosecuting an action in a foreign court in breach of that agreement, even if there is no other connection between the parties or their dispute and that country.

For example, if an action in another country is commenced in breach of an alleged agreement that provides for arbitration in England and Wales, the defendant may apply for an anti-suit injunction in the High Court to restrain the claimant from prosecuting that action on the grounds that, by so doing, it is in breach of that agreement, and may do so irrespective of whether or not the action is brought in a New York Convention State,

> Consider Aggeliki Charis Compania Maritima SA v. Pagnan SpA [1995] 1 Lloyd's Rep 87 (CA); Donohue v. Armco [2001] UKHL 64. Provided the remedy is sought promptly,

before the overseas action is too far advanced, the court will not be unduly diffident in granting an injunction in these circumstances; XL Insurance Ltd v. Owens Corning [2001] 1 All ER (comm) 530.

C: COMPOSITION OF THE TRIBUNAL

4. Most arbitration laws include procedures for constituting and appointing an arbitral tribunal if the parties have not agreed a mechanism for this. They also give one or more designated court's power to appoint arbitrators if the appointment procedure breaks down or is unworkable.

The Model Law provides for a three person tribunal, including a chairmen, each party to appoint an arbitrator, and the two to agree a third, if the parties' arbitration agreement is silent on the number of arbitrators, and how the tribunal is to be constituted. It also provides for appointments to be made by the court, on application in a number of situations. If a party fails make the appointment required of it under the agreed or default appointment procedure, or, where agreement to an arbitrator is required, the parties fail to agree an arbitrator, or where a third party fails to perform appointment functions entrusted to it by the appointment procedure.

D: JURISDICTIONAL OBJECTIONS

5. Most arbitration laws recognise the principle of Kompetenz-Kompetenz: subject to court review, an arbitral tribunal may rule on its own substantive jurisdiction.

The Model Law, art. 16, provides that an arbitral tribunal may rule on its own Jurisdiction, including any objection with respect to the existence or validity of the arbitration agreement; for which purpose an arbitration agreement in a contract is treated as an independent agreement. Such objections to be raised no later than the submission of the statement of defence or, in the case of an excess of authority, as soon as the matter said to be beyond the tribunal's authority is raised, with the tribunal having power to admit late objections. The tribunal may give its ruling as a preliminary question or in an award on the merits. In the former case, the relevant court (art. 6) can be requested to decide the matter, provided the request is be made within 30 days the ruling being notified. If the ruling is by award on the merits, the award must be challenged by application to set aside under article 34.

6. Typical jurisdictional concerns.
An arbitral tribunal's jurisdiction derives principally from the parties' agreement to arbitrate and national laws governing the capacity of parties to arbitrate and the arbitrability of disputes and, thereafter, by the request or requests for arbitration and the parties' submissions. Possible jurisdictional concerns include:

Has the correct party been sued? Do successors or assigns have *locus standi*?
Does the scope of the arbitration clause encompass other entities in a group of companies?
Can third parties be compelled to take part, can they intervene of their own motion, eg sub-contractors?
Does an arbitration clause signed by a State-controlled organisation bind the State to the tribunal's jurisdiction?
Does an arbitration clause signed by a government official bind the state or organisation? Some local laws require ministerial approval.
Has a party validly signed the arbitration clause? Does that party have capacity to sue and be sued?
Is the subject matter arbitrable? Does it come within the scope of the clause?

Can a multi-party arbitration be conducted?
Has the tribunal been properly constituted?

Some of these concerns relate to the substantive law of the contract or arbitration agreement, others to the curial law, yet others to the law of the country of domicile or nationality.

E: CONSERVATORY AND INTERIM MEASURES

7. An arbitral tribunal will, in general, have certain powers to order interim or conservatory measures, either under the curial law or under institutional rules incorporated into the arbitration agreement. The tribunal will invariably have power to make procedural orders, for instance concerning evidence and documents. But these powers may be unavailable, for instance, because the tribunal is not constituted, or inadequate, because the tribunal lacks effective sanctions to ensure compliance or its jurisdiction does not extend to those concerned.

> Since arbitration is consensual, an arbitral tribunal's power is generally restricted to the parties, it has no power to compel third persons to preserve property or produce evidence or documents. Thus, there is a potential role for assistance from the courts at the seat of arbitration (and elsewhere?)
>
> USA arbitral law is exceptional in providing international arbitral tribunals sitting (holding hearings in) in the USA with power, under s. 7 of the Federal Arbitration Act to summon in writing any person to appear them at a hearing as witnesses and to produce documents that are material as evidence. This does not, however, extend to ordering pre-hearing depositions or general discovery.

Enforcing the tribunal's orders through the courts
Few arbitration laws address this problem directly. Exceptions include England and Wales (see AA1996, s. 42 (wide power), and Switzerland, PILA, s. 183 (more limited scope). See also s. 7 US Federal Arbitration Act.

Enforcement of the tribunal's orders under the New York Convention
It is not clear whether a tribunal can render its orders as awards, so as to make them amenable to enforcement under the New York Convention?

> Consider Resorts Condominiums International v. Bolwell (Australia) (1993) 118 ALR 655. Court refused to enforce "interim arbitration order and award" for various injunctions and US-style discovery, which was expressed to apply during the pendency of this arbitration made by tribunal in USA. Note also Merck & Co Inc v. Tecnoquímicas SA, (Columbia) YB Comm Arb XXVI, 755.
>
> Publicis Communications v. True North Communications (US) 206 F.3d 725 (7th Cir Ill, 2000). Court enforced tribunal award requiring production of tax records relating to a joint venture, under the New York Convention.

It has been argued that the Publicis approach might work generally, if there is a contractual right to the information. This approach is more doubtful where the right is only procedural unless, perhaps, it can be argued that there is a breach of the arbitration agreement in complying with the tribunal's order.

Seeking interim or conservatory relief from a court
A few arbitral laws provide (sometimes with restrictions) for a party to arbitral proceedings to seek interim or conservatory measures from a court; the Model law, art. 9, being facilitative in respect of such measures. One difficulty with such provisions is that foreign parties may not be amenable to the jurisdiction of the court at the seat. Few jurisdictions expressly envisage an exorbitant jurisdiction.

In England and Wales the courts have powers to grant interim and conservatory relief of defined types in support of arbitral proceedings and, unusually, may do so irrespective of the seat of arbitration. But these powers may only be used on application by a party with the consent of the tribunal and where the tribunal or other agreed body is unable to act effectively. Only in urgent cases concerned with the preservation of evidence or assets, do these restrictions not apply; AA1996, s. 44. In Hong Kong, the court has as somewhat similar range of powers but differently circumscribed and not (apparently?) exercisable in support of arbitral proceedings elsewhere.

In some jurisdictions, the court's powers to order interim relief are not excluded merely because the parties agree to arbitration. Consider Van Uden Maritime v. Duco Line [1998] ECR I-7091, see [1999] 2 WLR 1181.

Court assistance with obtaining evidence (oral and documentary)

In some jurisdictions there are provisions that allow the court to assist the tribunal with the obtaining of evidence (from third persons, not just the parties). Thus, the Model Law, art. 27, provides that, on application by the tribunal or a party with the tribunal's approval, the court can assist in taking evidence in accordance with its own rules. It may be that, in some jurisdictions, the court's powers extend to the issuing of letters of request (letters rogatory) to a foreign court to take evidence from a witness out of the jurisdiction.

See, for example, Switzerland, PILA, art 184 (request by party or tribunal is to the court at the seat of the arbitral tribunal); England and Wales, AA1996, s. 43 (application by a party, with the consent of the tribunal, seat need not be in England and Wales, provided the witness and the hearing is in the court's jurisdiction).

It may be that even if a country's arbitral law is silent on this matter, the courts can exercise powers available to them in litigation, in support of arbitration. Consider the USA case Deiulemar Compagnia v. MV 'Allegra' 198 F ed 473 (4th Cir Md 1999): order under Rule 27 of the Federal Rules of Civil Proceedings, to preserve evidence in connection with intended arbitral proceedings in England. A US court might also be prepared to order limited discovery prior to constitution of the tribunal.

F: CHALLENGING THE TRIBUNAL OR THE PROCEEDINGS IN A LOCAL COURT

8. Supervision of arbitrators. Most arbitration laws require arbitrators to be impartial and/or independent and provide a mechanism by which an arbitrator can be challenged by court action, if they are reasonably believed not to be, and in limited other circumstances.

Article 12 of the Model law provides that an arbitrator can be challenged on the ground that circumstances exist that give justifiable doubts as to his impartiality or independence, or if he does not possess the qualifications agreed by the parties. Right of recourse to the court is only available after recourse to the tribunal or under an agreed challenge procedure have been exhausted and, then, is subject to a 30 day time limit from the date the initial challenge is rejected. Article 14, recourse to court can also be had to terminate an arbitrator's mandate if he is unable to perform his functions or fails to act without undue delay.

A note on independence and impartiality

Standards of independence and impartiality may not, in all cultures, be the same for party arbitrators as for chairpersons and sole arbitrators.

In some cultures, eg. Arab states, the party appointed arbitrator (co-arbitrator) is viewed as an intermediary, a means of communication between the tribunal and the parties. The requirement to refrain from separate contacts may not be understood. In some countries (eg US domestic arbitration, contrast the AAA International Arbitration Rules) a party arbitrator may be viewed as a second tier advocate, rather than an independent judge.

Nevertheless a consensus is emerging along the lines of the IBA Ethics for International Arbitrators in International Arbitration. This requires all members of the tribunal to be and remain free from bias, the criteria for assessing this being independence and impartiality.

9. Supervision of the proceedings. Few modern laws of arbitration provide the court with general powers of supervision over arbitral proceedings. The powers available to the courts of England and Wales to remove arbitrators for reasons other than for incapacity, want of impartiality or lack of agreed qualifications, in particular, failure, other than by delay or incapacity, to properly conduct the proceedings, and to determine preliminary questions of law and jurisdiction, are regarded as unusual and, at any rate by the international arbitral community, unwarranted.

10. In certain countries however, the courts exercise a somewhat inchoate jurisdiction to control an arbitral tribunal, even one whose seat is elsewhere, thorough the grant of injunctions to restrain its members from acting. The effectiveness of such injunctions, which are often issued on application of a party domiciled in the country concerned, and addressed to the tribunal as well as to the party wishing to prosecute the arbitration, depends on the territorial reach of the court concerned.

If a member of the tribunal is injuncted and refuses to act, consideration must be given to whether the truncated tribunal can proceed or whether that arbitrator can be removed on the grounds that they are unable to act, and replaced.

Truncated tribunals
Few curial laws expressly recognises the validity of a truncated tribunal (But note Bermuda and Germany). The problems may be dealt with in the applicable arbitral rules.

G: CHALLENGING AN AWARD IN A LOCAL COURT

11. A challenge to an award is concerned with having it modified or set aside (nullified). In contrast to recognition and enforcement, which are concerned with giving effect to the award by enforcing its terms, through imposing sanctions, if necessary. Court proceedings at the seat of arbitration, in respect of an award, can be concerned with challenges as well as recognition and enforcement. Court proceedings in respect of an award in other jurisdictions are, ordinarily, concerned with recognition and enforcement. The concern here is with challenges to an award.

12. Apart from the Washington Convention (1965) there are few international conventions that govern the extent of challenge to arbitral awards. But almost all laws of arbitration provide, unless excluded by treaty, limited grounds for challenging an arbitral award made in international arbitral proceedings subject to their jurisdiction; requiring any challenge to be mounted within a specific period of the award being made.

At one end of the spectrum is the arbitral law of England and Wales, regarded by many as unduly interventionist. This allows, in addition to challenges for want of jurisdiction and for "serious (generally, procedural) irregularity", appeals of questions of law; although the right of appeal can be excluded by agreement and, in the

international context often is, either by choosing a foreign proper law of the contract or, by the incorporated arbitral rules (see eg 1998 ICC rules art. 28(6).

At the other end of the spectrum was, until recently reformed, the arbitral law of Belgium. This provided that, where neither party had a connection with Belgium, there was no right of challenge to an award in the Belgium courts.

Some arbitral laws (including, now Belgium) provide limited grounds of challenge (the usual being want of or excess of jurisdiction, serious breach of procedural natural justice (common law), or of the right to equal treatment and contradiction (Civil law), public policy. But provide that some or all of these can be excluded by agreement of the parties. See, for example Swiss PILL, arts 190, 192.

The Model law (art. 34) takes a middle position by providing limited grounds (which mirror those in art. V of the New York Convention, other than art. V(1)(e) and cannot be excluded by agreement) for setting aside an arbitral award and stating that setting aside for these grounds is the only recourse against an award (these grounds are considered later).

13. Those who favour de-localisation question why there should be any right of challenge at the seat of arbitration, and would prefer all objections to the award to be raised solely on enforcement proceedings. But a challenge at the seat may, if successful "kill" the award so that the risk of multiple enforcement is minimised.

14. The effect of a challenge depends on its outcome, considered in the light of the arbitral law under which it was brought. But, in many jurisdictions the only relief is setting aside, with the court having power to suspend the proceedings for a limited period to enable the tribunal to resume the proceedings and eliminate the grounds for setting aside. In some jurisdictions relief that can be granted on a challenge may include one or more of the following.

Setting aside the award. The award looses its validity in the country where the order is made (generally the seat of arbitration) and provides a ground for refusing recognition and enforcement elsewhere (under New York Convention, art V(1)(e)/ Model Law, art. 36(1)(a)(v). Setting aside the award may have the effect of reviving the tribunal's jurisdiction over the disputes decided.

Remitting an award (an alternative to suspending the setting aside proceedings). The tribunal's jurisdiction revives in so far as necessary to deal with the remitted matters and amend/issue a new award.

Varying an award, this remedy, which is available to the courts of England and Wales, is anomalous and uncertain in effect. If an English Award may need to be enforced overseas, is best avoided. Remitting the award to the tribunal for re-consideration, is preferable.

Confirming the award (an alternative to merely dismissing the challenge).

G: THE ARBITRATION EXCEPTION IN THE BRUSSELS AND LEGANO CONVENTIONS AND THE JUDGEMENTS REGULATION

15. If the parties are domiciled in States that are members of the European Union or EFTA, then any legal proceedings commenced by one against the other are, ordinarily subject to the EU Council Regulation on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters (the Judgements Regulation), or its predecessors, the Brussels and Legano Conventions. The general rule is that the action must be commenced in the courts of

the defendant's country of domicile.

16. This is not the case the where the action concerns arbitration, since "arbitration" is excluded from their ambit. The scope of the exception is not, however, as clear as it might be. Consider:

> Mark Rich and Co AG v. Societa Italina Impianti [1991] 1 ECR 3855; [1992] 1 Lloyd's Rep 342 (judgment only). Ask "what is the nature of the subject matter of the proceedings". If arbitration; the proceedings are within the exception.
>
> Van Uden Maritime v. Duco Line [1998] ECR 7091, [1999] 2 WLR 1181. Arbitration exception does not apply to court proceedings for provisional measures in support of arbitration
>
> ABCI v. Banque Franco-Tunisienne [1996] 1 Lloyd's Rep 495. Judgement of a French court enforcing an ICC Award made in Paris, was not enforceable under the Brussels Convention.

But what where the legal proceedings are solely concerned with the validity of an arbitration agreement. For instance, a claim for a declaration as to its validity and/or for an anti-suit injunction to restrain proceedings in another Convention/Regulation State said to be in breach of it. Consider:

> Toepfer International v. Cargill Furnace SA [1997] 2 Lloyd's Rep 89 (Colman J), [1998] 1 Lloyd's Rep 379 (CA). Anti-suit injunction to restrain party from prosecuting action in France in breach of an arbitration agreement. The court may give permission for service of proceedings claiming such relief out of the jurisdiction on any person alleged to be a party to that agreement. Although the point remains open for determination by the European Court of Justice ("ECJ"), the courts of England and Wales also regard such proceedings as falling within the arbitration exception provided for in the Brussels and Legano Conventions and the Jurisdiction Regulation, since their essential focus or essential subject matter is arbitration; Navigation Maritime Bulgare v. Rustal Trading [2002] 2 Lloyd's Rep 106, rejecting the contrary conclusion in Partenreederei M/S "Heidberg" v. Grovsner Grain and Feed Co Ltd [1995] 2 Lloyd's Rep 287.

What is the status of a court decision made in a Convention/Regulation State concerning the validity of an arbitration agreement. Consider:

> The Heidberg [1994] 2 Lloyd's Rep 287 (entitled to recognition as within the Convention), doubted in Navigation Maritime Bulgare v. Rustal Trading [2002] 2 Lloyd's Rep 106.

What is the status of a court judgement on the merits made in breach of an arbitration agreement, but following a failed application to stay legal proceedings before it, under that State's equivalent to article II of the New York Convention?

BPP PROFESSIONAL EDUCATION
INTERNATIONAL COMMERCIAL ARBITRATION
COURT SUPPORT AND SUPERVISION

SESSION 3 – AGREEING TO ARBITRATE AND CONDUCT OF PROCEEDINGS

A: NEGOTIATING ARBITRAL CLAUSES IN INTERNATIONAL CONTRACTS

1. Dispute resolution clauses in international contracts are often negotiated as an afterthought once the substantive negotiations are concluded. This is unfortunate as they need careful drafting and consideration of a number of, potentially controversial issues, the resolution of which are critical in the event of subsequent disputes.

2. Negotiating the substantive law of the contract.
The three possibilities are: agree a substantive law during contract negotiations, agree a mechanism for the tribunal to determine the proper law, say nothing.

Party agreement
Ideally, the parties should agree a proper law, as it is relevant to the selection of standard terms, and to their rights and obligations, and will make it easier for an appropriate tribunal to be selected. National laws are not all the same.

Each party will have a view on whether its local law should (or should not be chosen), but agreement to one or the other may be difficult. If a party's local law cannot be agreed, consider a neutral law, against criteria such as:

- Accessibility and knowledge of proposed law;
- Effect of proposed law on the parties' rights and obligations;
- Effect of chosen law on arbitrability.
- Compatibility of proposed law with the contract terms;
- Administrative implications of choice.

Chose a system that is sufficiently developed in regard to the disputes that may occur and is compatible with the contract terms. Exclude conflict of law rules by referring to the substantive law of a country. Check that the chosen national law permits the subject matter of the contract to be resolved by arbitration,

- Dépeçage: A contract can be made subject to an assemblage of different laws at the same time, each limited to a different issue. It may be possible to choose a non-municipal system such as the *lex mercatoria* or "norms of international law". But are such choices wise.

- Stabilisation clauses. It is possible to freeze the applicable law by providing that it is the law in force at a specific date, such as the date the contract was concluded.

Commonly encountered wording: "For all questions not settled in the contract, the substantive law of country x shall apply". This means that contractual stipulations must be applied even where apparently null and void (for instance on public policy grounds) in the law of country x. "This agreement is governed by the law of country x". This means that the contract will have effect subject to the substantive law of country x.

If parties agree an applicable law, tribunal should apply it. See, for example, the Model Law, art 28.1, Rome Convention 1980, art 2.3, AA1996, s. 46(1).

Agreed mechanisms

If agreement to a proper law is not possible (eg because of cultural differences) seek to agree a mechanism for the tribunal to apply in making a choice.

- The indirect approach requires the tribunal to chose the conflict of law rules that it considers appropriate and apply it (eg Model Law, art. 28.2, AA1996, s. 46(3).

- The direct approach gives the tribunal discretion to chose the applicable law it considers appropriate (eg. France, NCCP, art 1496, ICC Rules, art 17(1)), or with which the case has the closest connection (eg. Swiss PILA, art. 187).

Silence

If no choice and no express machinery, the choice is resolved by the conflict of law rules of the curial law of the arbitration. See, for example, the Rome Convention 1980. But note Compagnie d'Armement v. Compagnie Tunisienne [1970] 2 Lloyd's Rep 99 (HL) (pre-Rome convention).

3. Negotiating the law of the arbitration agreement

Ideally, this should also be agreed to avoid arguments about whether it was intended to be the same as the substantive law of the contract or the curial law. An express choice is particularly important where the substantive law of the contact is that of India or Pakistan. Consider Nirma Ltd v. Lurgi Energie un Entsorgung GmbH (India) YB Comm Arb, XXVIII, 790.

4. Negotiating he curial law of the arbitration

Ideally the parties should agree a curial law by specifying a seat (legal place) of the arbitration in their contract or, if this is not possible, provide a mechanism to be applied by the tribunal or arbitral institution in deciding the seat.

Agreeing a seat (curial law)

As with the substantive law, each party may favour its own country as the seat of arbitration, but have to compromise on a neutral seat. In identifying a neutral seat, matters such as the following should be considered in respect of any proposed curial law.

- Is it a Contracting State to the New York Convention (with what reservations, if any).
- Has it enacted a modern arbitral law (a Model Law root), does that law impose any mandatory requirements?
- Is the country politically stable and friendly to the parties' States.
- What powers does it give the tribunal/the courts (supervision and support), can court powers be excluded?
- Are the local courts supportive of arbitration?
- Is the procedural approach rooted in the common law or civil law.
- How does it deal with matters such as representation, proof, taking evidence, witness examination, compelling witnesses and disclosure?
- Is the language of the proposed seat appropriate (to parties, witnesses, law, documents, contract)?
- If the curial law to be different from the substantive law of the contract; if so, how is the substantive law to be proved.
- Does it allow claims for interest, costs?
- What are the procedural remedies and defences (limitation)?

Agreeing a mechanism

If the parties cannot agree seat, agree a mechanism for the tribunal or an arbitral institution to apply in choosing a seat.

Consider 1998 LCIA Rules, art. 16(1); ICC Rules, art. 14; The Model Law, art 20(1).

In choosing a seat, the tribunal/institution will consider matters such as enforceability of awards, attitude to arbitration, efficiency, practicability, relation to parties and their dispute, fairness and convenience to parties, language.

5. How many arbitrators

The principal options are a tribunal of one appointed by a third person if not agreed, or a tribunal of three (comprising one appointed/nominated by each party and a chairperson appointed by a third person if not agreed (by arbitrators/by parties). Two party arbitrators, with umpire is now, uncommon.

Tribunal of one

Process will generally be quick and cheaper than with a tribunal of three, but it will probably be necessary for the tribunal to have a different nationality than that of the parties. This may lead to difficulties in communication and cultural understanding.

Tribunal of three

Internationally, particularly where a state party, a bias towards the tribunal of three. This allows each party to have an arbitrator from its own culture. One who can explain its legal, economic and business context of that culture to the others. It can also bring a greater range of technical and legal expertise to the problem, introduce checks and balances and lead to improved decision making and a more acceptable award.

The process will be more costly, slower and cumbersome due to the difficulties of arranging meetings between members.

6. The need for writing and capacity

Consideration should be given to how the parties' agreement to arbitration is to concluded. It should not be assumed that merely because the curial law takes a relaxed view of what is necessary (eg AA1996, s. 5(2)), that all other laws, in particular those at likely places of enforcement, will take a similarly relaxed view.

Both article II of the New York Convention, and 7(2) of the Model law focus on signature or exchange of written communications.

In some states written communications sent on behalf of a party may, particularly if the party in question is a state or state offshoot, not bind that party in the absence of special forms of authorisation. Other laws take a more relaxed view and may readily regard non-signatories as parties.

B: DRAFTING AN ARBITRAL CLAUSE IN AN INTERNATIONAL CONTRACT

7. The minimum requirements for an arbitration clause

Even the most rudimentary mention of arbitration may, in some jurisdictions, be sufficient to create a binding arbitration agreement (eg Hobbs Padgett & Co (Reinsurance Ltd v. Kirkland Ltd [1969] 2 Lloyd's Rep 547. But, preferably, although not be long or complex, an arbitration should be clear about the principal matters necessary to make the process work effectively.

The ICC suggest: "All disputes arising in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."

- "All disputes arising in connection with ..". This defines the scope of the arbitration agreement (the type of disputes encompassed). Such words are, in most jurisdictions, given a wide meaning. The widest wording is, probably, "All disputes arising out of or in connection with the present agreement ..."; Harbour Assurance v. Kansa [1993] 1 Lloyd's Rep 455 (CA).

- "shall be finally settled under the Rules of ...". This identifies the incorporated institutional rules, if any, and makes it clear that any award is to be final.

- "by one or more arbitrators appointed in accordance with the said Rules ...". Ideally the number of arbitrators should be stated and, unless the incorporated Rules provide for this, an appointing body identified where the appointment of any arbitrator (sole or chairperson) would otherwise depends on agreement.

Other matters that should be dealt with include identifying the proper law of the contract, the seat of the arbitration and the law of the arbitration agreement. This will avoid unnecessary uncertainties at the outset of any proceedings.

8. Checklist of ancillary matters to consider.

- The language of any proceedings
- Particular confidentiality requirements
- Mandatory rules of relevant legal systems, particularly the curial law.
- Possible ambiguity, particularly over the seat if the institutional rules are those of a body that, itself has its headquarters in a particular place. Is that place to be the seat of arbitration.
- Should procedural rules be incorporated, should they provide for institutional arbitration. Should the institution's model arbitration agreement be used?

9. Pathological (defective) arbitration clauses.

- Clauses that provide for non-existent rules of arbitration or administration by a non-existent body; eg. "the Singapore ICC".
- Clauses that provide for inconsistent administration and rules, eg "arbitration before the London Court of Arbitration in accordance with ICC rules".
- Clauses that are ambiguous as to the seat, eg "Arbitration in Geneva under ICC Rules, Paris".
- Clauses that provide for institutional arbitration, but seek to modify the powers of the institution concerned.

B: INSTITUTIONAL ARBITRATION

10. Many bodies publish standard arbitration rules (UNCITRAL), but not all of these provide for institutional (administered) arbitration.

Standard form arbitration rules

These seek to overcome divergences between local laws by providing an agreed framework for the conduct of arbitral proceedings. They deal with matters such as the following:

- How are arbitral proceedings commenced?

- How it the tribunal constituted.
- Questions of joinder (usually badly).
- Confidentiality
- Conservatory and/or interim measures.
- Can the tribunal act ex *aequo et bono* (without strict regard to law) or as *amiable compositeur* (as conciliator).
- Determination of applicable law, language and procedure.
- Costs (and fees) and interest.
- Waiver of rights of challenge to any award (in so far as allowed).
- Most institutional rules are open-textured as regards the conduct of the proceedings. A good example is art. 11 of the ICC Rules.

Institutional arbitration

In institutional arbitration (eg. ICC, LCIA, ICSID), the rules will also, to varying degrees, give the institution power to appoint arbitrators and to replace them in defined circumstances; to administer the arbitration, particularly during the early stages before the tribunal is appointed; to control the arbitrators' remuneration and, sometimes, limited power to scrutinise awards. Some institutional rules (GAFTA, ICSID) provide full supervision of awards through an internal process of appeal or review.

C: CONDUCTING PROCEEDING UNDER ARBITRATION RULES

11. These notes focus on a few of the numerous arbitration rules published for use in international commerce, the UNCITRAL Arbitration Rules 1976, the 1998 ICC Rules and the 1998 LCIArb Rules.

12. Commencing proceedings and constituting the tribunal

UNCITRAL - Article 3: The party having recourse to arbitration (claimant) gives the other party (respondent) a notice of arbitration in the required form. Proceedings commence when received.
Article 5: Three arbitrators unless one agreed. Article 6, procedure for appointing a sole arbitrator. Article 7, procedure for appointing three arbitrators. Article 8, procedure for applying for an appointment.
Article 39: Provisions governing the tribunal's remuneration. Note also Article 40.4.

LCIA - Article 1: Party wishing to commence arbitration sends a request for arbitration to the LCIA Court. The arbitration commences when this is received by the LCIA. Article 2: The response.
Article 5: Appointment procedure, including requirements for impartiality and independence of arbitrators. Article 6: Nationality of sole arbitrators, and chairpersons should, generally, be different from that of either party. Article 7: Arbitrators agreed by parties are nominated. The LCIA decides. Article 9: Expedited appointment procedure.

ICC - Article 4: Party wishing recourse to arbitration (claimant) submits a request for arbitration to the Secretariat in the required form. The arbitration commences when the ICC receives this. Article 5: Provision and periods for respondent's answer, including any counterclaim and for the claimant to a reply to the answer. .
Article 8: Procedures where three arbitrators and where a sole arbitrator, the latter being the presumption if the parties have not agreed a number. Parties nominate, but ICC court must confirm (may reject).

Article 9: Appointment procedure: Court requires a statement of independence before confirming a nomination. If appointing a sole arbitrator or a chairperson they should, generally, be of a different nationality to either party.

Nominating an arbitrator

Best to select after the dispute has arisen to ensure suitability/availability (having regard to curial law restrictions). Consider expertise, nationality and domicile, as well as culture (civilian or common law), adaptability and language. Sole arbitrators and chairpersons should, ordinarily, be of different nationalities to either party.

Choosing a party arbitrator who is too closely associated with that party may be counterproductive. They will have less influence in eyes of chairman.

Preparing a request

The request must contain the required information, and be served on the right person, to start proceedings. If not, delays are likely before proceedings are validly commenced. Because of limitation or other issues, it may be in the other party's interest to exacerbate these delays.

Are the parties properly described. If they did not sign an arbitration agreement, how does it bind them? What should be the language of the request?

Are relevant agreements (in particular the arbitration agreement) attached. Does the notice sufficiently describe the dispute and identify the relief sought. ICC expects more than the LCIA. ICC will expect more than a general endorsement, the factual and legal information should be sufficient to enable the respondent to file an answer.

Need an arbitrator be named (proposed), or a type of tribunal (as in the ICC Rules, where the constitution of the tribunal not agreed by the parties).

Preparing a response

If the respondent considers that the request is invalid because, for instance, it is not a party to the arbitration agreement, it can do nothing (unwise), put in a response disputing jurisdiction, with sufficient material show that it is not a party (note: the possibility of a ruling on prima facie jurisdiction under ICC art 6(2)) or, if available, seek a jurisdiction ruling from a state court. If the right to arbitrate is not disputed, but the request is considered defective, it may be better to reserve the objection for consideration by the tribunal, when appointed.

If there is a positive defence (avoidance) or counterclaim, has the basis for it and the relief sought been sufficiently identified? What comments, if any, does the respondent have on the claimant's proposals for the number of arbitrators and its choice. Is there a need to name/nominate an arbitrator?

Replies and rejoinders. These may be needed to ensure that the full dispute is before the nominating institution at the time it appoints the tribunal.

13. Joinder of parties and introduction of new claims in existing proceedings

UNCITRAL - Article 19(2). Counterclaims or set-offs arising out of the same contract are admissible. Note Article 20, giving the tribunal wide power to allow amendment to statements of case.

LCIA - Article 8: The LCIA may appoint the tribunal in multi-party proceedings governed by the same arbitration agreement where, otherwise, each party has the right to nominate an arbitrator and they have not agreed to form two separate sides.

Article 22.1(h): The tribunal may allow, on application of a party, joinder of third parties provided that applicant and third party have consented.

ICC - Article 10: Where multiple parties, and provision for three arbitrators, the multiple claimants and multiple respondents each appoint one. If fail to do so, the ICC appoints the tribunal.
Article 19: The tribunal can admit new claims not encompassed by the terms of reference.

Contrast: CIMAR, Rule 3: This provides for automatic consolidation of disputes notified before the tribunal is appointed. Thereafter, joinder is at the discretion of the tribunal, both in respect of different disputes between the same parties and related arbitral proceedings on the same project involving common issues, irrespective of the parties to those proceedings. In disputes between the same parties, joinder is affected by consolidation; in the case of arbitrations between different parties, by concurrent hearings unless all parties agree to consolidation. There are procedures under Rule 2 that require the appointing body to facilitate joinder by appointing, where appropriate, the same arbitrator in all the related proceedings.

Joinder issues

Joinder can be a problem on multi-contract transactions, such as construction projects, and on string commodity contracts. Without it, there is the risk of inconsistent decisions between different tribunals or of unfairness if the same tribunal is appointed in different disputes concerning the same project.

Eduado Silva-Romero, sometime Deputy-Secretary of the ICC, considering the example of an infrastructure project involving a number of different contracts between a private company and an employer (often a state or state offshoot) has suggested that the ICC Court will regard the *prima facie* test in art 6(2) of the ICC Rules as satisfied, and appoint a single tribunal in the following circumstances. The parties to each of the contracts are identical, the contracts are linked to the same project and the arbitration agreements in all the contracts are consistent with each other.

14. Jurisdictional challenges

UNCITRAL - Article 21: The tribunal can rule on objections to its own jurisdiction, including objections to the validity of the arbitration agreement or the validity or existence of the contract, objections to be made no later than in a statement of defence, and to be dealt with, ordinarily, as a preliminary question.

LCIA - Article 23: The tribunal can rule on its own jurisdiction, including any objection to the existence, validity or effectiveness of the arbitration agreement; such objections to be made no later than in a statement of defence, unless admitted out of time by the tribunal, and to be dealt with by award as to jurisdiction or on the merits. The parties not to have recourse to the court for relief concerning the tribunal's jurisdiction until after the tribunal's award on the question, without the agreement of all, or the authorisation of the tribunal.

ICC - Article 6: The ICC Court may, if a party disputes the existence, validity or scope of the arbitration agreement, decide that the arbitration shall proceed if it is *prima facie* satisfied that an arbitration agreement under the Rules may exist. If the ICC Court advises that the arbitration cannot proceed, either party may ask a competent state court whether there is a binding arbitration agreement. If the arbitration does proceed, the tribunal decides its jurisdiction, and does not cease

to have jurisdiction merely because of a claim that the contract is void or non-existent.

Jurisdictional issues

Apart from disputes about the existence or validity of the arbitration agreement, jurisdictional objections may concern a party's capacity to arbitrate, whether non-signatories are bound, and whether particular disputes can be arbitrated under the agreement. In deciding these questions, the focus will be on the wording of the agreement to arbitrate, and national laws governing capacity to arbitrate and arbitrability.

Where a state party is involved, the question of arbitrability may be affected by that state's national laws reserving certain challenges to the state's conduct to an administrative court and whether the tribunal should apply such mandatory laws in deciding the scope of its mission or regard them as capable of being waived.

15. The tribunal's management powers

UNCITRAL - Article 15: The tribunal has wide powers to conduct the proceedings as it considers appropriate, but must allow hearings if requested by either party.
Articles 16 and 17: The place and language of the proceedings to be determine by the tribunal, unless agreed by the parties.
Articles 18, 19 20: Procedures for exchange of statements of case and defence (including counterclaims) and their amendment.
Article 22: The tribunal has power to order further written statements; Article 23: Periods for exchange of statement of case to be, ordinarily, 45 days maximum.
Articles 24 and 25: Procedures for managing evidence, including disclosure, and at hearings. See also Article 29, closure and re-openings of hearings.
Article 27: The tribunal's power to appoint experts and the procedures for doing so.
Article 33: The tribunal to apply the law designed by the parities, or if not so designated, the law determined by the conflict of law rules it considers applicable. The tribunal's power to proceed as *amicable compositeur* or *ex aequo et bono* where the parties agree and the curial law allows.

LCIA - Article 14: Subject to the parties' agreement and the requirements of procedural natural justice and cost effective justice, the tribunal has a wide discretion to conduct the proceedings as it considers fit.
Article 15: Procedures, including default time limits of 30 days, for the submission of case statements (The written stage of the proceedings is generally done through the LCIA, but applications for extension of time are dealt with by the tribunal (see Art 15.1).
Article 22.1: The tribunal's powers in respect of amendments, extending time, disclosure and evidential matters.
Articles 16, 17 and 18: Seat of the arbitration (to be determined by the LCIA Court, if not agreed by the parties), but tribunal may meet anywhere; language of the proceedings to be decided by the tribunal unless agreed by the parties; parties' rights to representation, but may be asked for poof of authority.
Article 19: Procedure relating to hearings. Either party has a right to a hearing unless they have agreed otherwise.
Article 20: Procedures for witness evidence (note parties' right to question witnesses giving oral evidence).
Article 21: The tribunal's powers to appoint experts and procedure for doing so
Articles 22.3 and 22.4: The applicable law(s) to be that agreed by the parties or, failing such agreement, that which the tribunal considers appropriate. The

tribunal power to proceed as *amicable compositeur* or *ex aequo et bono*, or similar where the parties agree.

ICC - Article 13: Transmission of file to the tribunal (see also article 18(1)).
Article 15: Proceedings are governed by the Rules and, where the rules are silent, rules that the parties or, failing them, the tribunal may settle on. But in all case the tribunal must act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.
Articles 16 and 17: In the absence of agreement the tribunal to decide the language and applicable law. Under Article 17 the tribunal can proceed as *amicable compositeur or ex aequo et bono* where the parties agree.
Article 18: The tribunal to prepare terms of reference, which are then signed by the parties, if possible, and transmitted to the ICC (within 2 months). The tribunal to prepare, at the same time, a provisional time table for the conduct of the arbitration and provide this to the ICC and the parties, amendments also to be communicated. Note Article 18(4): Only when the terms of reference are signed or, if not signed by a party, are approved by the ICC Court, does the arbitration proceed (note 6 month time scale, unless extended by the Court).
Article 20: The tribunal has wide powers to establish the facts of the case but must do so in as short a time as possible. It must hold hearings if requested by either party. The tribunal can hear witnesses appoint experts, and require a party to provide additional evidence.
Article 21: Procedure for hearings, if ordered. Note Article 22, closing the proceedings and power to re-open.

<u>Purpose and preparation of ICC terms of reference (art 18)</u>
The principal purpose of the terms of reference is to define the tribunal's mandate. Subject to the admission of new claims by the tribunal (art. 19), it (in particular the summary of claims and relief) defines the tribunal's jurisdiction. The terms of reference also provide the basis for scrutiny of the tribunal's award by the ICC Court, and review by local courts on grounds of *infra* or *ultra petita* (failure to deal with all issues/excess of jurisdiction).

The terms of reference should be prepared by the tribunal, principally on the basis of the material in the file sent to it by the ICC Secretariat (art 13. 18(1)). If too sketchy, this material may need to be supplemented by further material from the parties.

The tribunal should send a draft to the parties for comment before finalisation. Party drafting of the terms of reference is not recommended. In many cases, it is best to finalise the draft at a meeting (or telephone conference) and, if at a meeting, get signatures at that time.

Barriers to a party signing should, if possible, be removed. If, a party will not sign, and the terms of reference have to be submitted to the ICC Court for approval, any provisions that can only be included by agreement of the parties should be removed.

The terms of reference should be a self-contained document, avoiding wording that is too prescriptive. They should not, unless agreed by the parties, go beyond the scope of the arbitration agreement and the claims and issues presented by the parties. Within this framework, there are different views as to how much detail should be provided.

The minimalist view: State the parties' and the arbitrators' names and addresses for communications; identify the seat of the arbitration; summarise the parties' pleadings (briefs) including relief claimed and any preliminary or jurisdictional issues to be considered. Say as little as possible about issues and procedure in the terms of reference themselves.

The "maximalist" view: Terms of reference provide a vehicle by which the tribunal can assist the parties to present their claims in a way appropriate to the award wanted and to define the what the tribunal must, subject to allowed amendments, decide. The process of agreeing terms of reference can be used to air issues of fact, law and procedure that are best resolved sooner than later and to design a tailor made procedure, rather than on based on the litigation culture of the parties' lawyers. The terms of reference can also be used to establish protocols for matters such as manner and method of communications between parties and tribunal and within tribunal (for instance the extent of allowable contact between party and (its) arbitrator), delegation of procedural decision making to the chairperson.

Procedural directions (ICC, art 18(4): provisional timetable)

Procedural directions and a time table should be prepared in consultation with the parties (in an ICC arbitration at the same time as the terms of reference are drawn up, or as soon as possible afterwards).

Adopted procedures should comply with any mandatory provisions of the curial law and the parties' agreement to avoid the risk of annulment. Consideration should also be given to avoiding the risk of possible grounds for refusing enforcement under the New York Convention.

Municipal procedural codes are largely irrelevant. They may not be understood by one or more of the participants or arbitrators. They can, if adopted, lead to unfairness and confusion. What is required is a procedure based on international standards and common principles. Preferably one that, after consultation, is expressly consented to by the parties.

Although the directed procedure should be relatively flexible, it will need to be clear and comprehensive as to what is required of the parties under each step. Terminology that is familiar to one party or its advisors (eg. "witness statement", statement of claim", discovery", may mean little or nothing to the other and representative's codes of professional conduct may differ as to what constitutes acceptable compliance.

Matters, such as the following, may have to be dealt with in procedural directions at (if not, in the case of an ICC arbitration, covered in the terms of reference) include.

General issues

- Applicable arbitration rules (if any).
- Applicable substantive and procedural law.
- Language of proceedings (translation/interpreters).
- Location of hearings.
- Administrative assistance to the tribunal.
- Deposit in respect of fees (amount, administration).
- Method of communication between the parties and the tribunal.
- Confidentiality of proceedings and material engendered.
- Tribunal power to grant conservatory and interim measures.
- Requirements, if any, for filing and delivery of award.

Parties' cases, documents and evidence

- Arrangements for exchange of case statements/briefs (structure, form, content, annexed material, sequence for exchange).
- Procedures for defining and narrowing issues.
- Exchange of documentary evidence (with case statement or not, what is to be produced, how authenticated, how managed).
- Arrangements for presentation of real evidence (other than documents).

- Arrangements for presentation of witness (fact/opinion) evidence (with case statements or not, numbers of witnesses, structure and form of statements, method of appointment of experts and mission).
- Pre-hearing contact with witnesses (some domestic laws and codes of ethics preclude this, unrealistic in international arbitration).

Hearing procedure
- Procedures for testing evidence (manner and form of any questioning, presence of witnesses in hearing room), transcription.
- Number, purpose, location duration and dates/times of hearings, if any.
- Venue arrangements, site visits, inspections.
- Time-tabling of witnesses and submissions, including time for the tribunal to deliberate after close of hearing.
- Post hearing submissions (briefs) or oral submissions.

In complex arbitrations some of these matters will be dealt with in procedural directions given after the parties have exchanged case statements and evidence.

16. Conservatory and interim measures, and sanctions

UNCITRAL - Article 26: The tribunal may order interim measures of protection in respect of the subject matter of the dispute, including for the conservation of goods and can do so by interim award. The tribunal may order security in connection with such measures.
Article 28: The tribunal's powers to deal with default by one or other of the parties: terminating the proceedings if the claimant does not submit its claim; proceeding *ex parte*: and making its award on the evidence before it if a party fails to provide documents it was "duly invited to produce".

LCIA - Article 25: The tribunal's power to order interim and conservatory measures. These include the power to order a respondent to provide security for the amount in dispute (with possible cross-indemnity), to order a claimant to provide security for costs (but note cross-indemnity), to make orders in respect of property relating to the subject matter of the proceedings and to make orders for relief on a provisional basis.
Article 15.8: The tribunal's power to proceed in the face of party default.

ICC - Article 23: The tribunal's power to order, or award, interim or conservatory measures once the file is transmitted to it and to do so subject to the granting of security. Note: before then, such measures can be sought from a local court.
Article 18(3): If a party refuses to sign the terms of reference, they are sent to the ICC court for approval.
Article 20(2): The tribunal's power to proceed *ex parte*, if a party fails to appear at a hearing without valid excuse.

Conservatory and interim measures: issues
Should applications for these be addressed to the local court or to the tribunal. Before constitution of the tribunal there is no choice. Once the tribunal is constituted consider the Rules and the local law.

If application is made to the tribunal, it must be satisfied that the law of the seat empowers it to issue such orders. National laws differ significantly from the liberal approach under Swiss and English Law, to the restrictive approach in Italy, and several Scandinavian countries, where such matters are reserved to the local courts.

What is the status of any order made? The general view is that orders for conservatory or interim measures are not awards and are not enforceable under the New York Convention. Nevertheless, in some jurisdictions, support may be available from the local court.

Delays at the commencement stage

In administered arbitration, there may be significant delays between the commencement of proceedings and the appointment of the tribunal. One reason for this is because of the need for the respondent to submit an answer to the request and, for instance if a counterclaim, for further exchanges before the tribunal commences work. Another is that commencement of work by the tribunal may be dependent on its receipt, or receipt by the administrative body, of an advance on fees.

Sanctions available to the tribunal

Only in a few jurisdictions are the relatively weak sanctions available to the tribunal under institutional rules augmented by the curial law (compare AA1996, s. 41 with the Model Law, art 25)

There is, in international arbitration, a tension between the desire to minimise delay and disruption by a party and the need to produce an award which can be enforced, possibly in that party's home state. Some consider that the former should take second place to the latter. If so, the principle of giving a party a full/reasonable opportunity to be heard may lead to the admission of late submissions and re-opened hearings. Also, even if proceeding *ex parte* (after due notice), the tribunal must still deal with the dispute on the merits.

17. Costs and fees

UNCITRAL - Article 38: The tribunal's power to fix the costs of the arbitration by award (these include its fees and expenses and the reasonable costs of the successful party).
Article 39: The tribunal's fees to be reasonable having regard to the appointing authority's scales, if any, the amount in dispute, complexity time taken and other relevant considerations.
Article 40: The tribunal's power to apportion the costs of the arbitration and principles to apply.
Article 41: The tribunal may make orders for advance deposits in respect of its costs and the costs of tribunal appointed experts.

LCIA - Article 28: The tribunal's power to allocate and determine the costs of the arbitration, by award. The LCIA fixes the tribunal's remuneration.
Article 24: The LCIA's power to order deposits against fees. See also the LCIA Schedule of Fees and Costs. Any arbitrator appointed by the LCIA has to agree to these.

ICC - Article 31: The tribunal's fixes, by award, the costs of the arbitration and how they should be born between the parties.
Article 30: The ICC's power to order the claimant/counter-claimant to pay an advance to cover the cost of the arbitration up until the terms of reference are drawn up and to require the parties to provide security for the tribunal's fees. The ICC publishes scales of administrative expanses and arbitrator's fees. If the ordered sums are not paid, the Secretary General of the ICC may direct the tribunal to suspend work and set a time limit on expiry of which the relevant claims or counterclaim shall be considered as withdrawn.

Costs and fees, issues

It may be difficult to assess what are reasonable or allowable costs in International Arbitration, since the cost of resources may vary between different countries. This can also cause difficulties when remunerating individual members of the arbitral tribunal.

The ICC has the most elaborate system for ensuring payment for its administration and the tribunal is secured in advance. Under most other rules, it is for the tribunal to make its own arrangements, in accordance with the applicable rules, to secure its fees and expenses.

18. Awards and Orders

UNCITRAL - Article 31: Majority prevails where a tribunal of three. On procedural matters, when there is no majority or where the arbitral tribunal authorises, the chairperson may decide on their own, but subject to any revision by the tribunal.
Article 32: Tribunal's power to make final, interim, interlocutory, or partial awards. The tribunal to give reasons for its award unless otherwise agreed by the parties. Formalities for making an award.
Article 34: Tribunal's powers on settlement, may record terms in an agreed award.
Article 35, 36 and 37: Procedures for the tribunal to correct or provide interpretations of its award, or to make additional awards in respect of omitted claims.

LCIA - Article 26: The tribunal's power to make final awards, awards on different issues, and consent awards. Provisions relating to the making and notification of awards, including the requirement for reasons (if reasons are not required, the tribunal should give privileged reasons).
Article 27: The tribunal's power to correct errors in its award, and to make an additional award to deal with omitted claims.

ICC - Article 24: Time limits for making an award, generally six months from signing the terms of reference (but ICC Court may extend).
Article 25: Making awards where three arbitrators, majority or, if no majority, chairperson prevails; reasons required. Deemed to be made at place of arbitration.
Article 26: Making an award by consent, if requested.
Article 28: Procedure for depositing Award with the Secretariat and for its subsequent release (after scrutiny) to the parties.
Article 29: The tribunal's power to correct clerical, etc. errors in its award and to give interpretations of its award; procedure for doing so.

19. Institutional supervision of the tribunal and its awards

UNCITRAL - Article 10: Grounds for challenging an arbitrator: want of impartiality or independence, but in the case of a party appointed arbitrator only for reasons of which the party became aware after appointment (note duty to disclose in art. 9).
Articles 11 and 12: Procedures for challenging arbitrators, and periods for doing so. Such challenges are determined by the relevant appointing body. Procedures for replacing arbitrators removed on challenge.
Article 13: Procedure for removing and replacing arbitrators who fail to act or cannot (*de jure* or *de facto*) act and for replacing arbitrators who resign.
Article 14: Extent to which matters have to be repeated if an arbitrator is replaced (only compulsory where the chairperson is).

LCIA - Article 10: Procedure for the LCIA to revoke the authority of arbitrators who wish to resign, become ill, unable or unfit to act, including where the act in

deliberate violation of the parties' arbitration agreement, or who do not act fairly and impartially between the parties or do not conduct or participate in the arbitral proceeding with reasonable diligence, avoiding unnecessary delay and expense. Procedures for challenging arbitrators on grounds of want of impartiality or independence before the LCIA, including timescales.
Article 11: Procedure for replacing arbitrators by the LCIA.
Article 12: Where one arbitrator, of a three arbitrator tribunal, refuses or persistently fails to participate in its deliberation, the tribunal can continue, subject to complying with the stated procedures.
Article 26.9: Waiver of rights of challenge or appeal to court, in so far as possible.
Article 29: Decisions of the LCIA are procedural.

ICC - Article 11: Challenges to arbitrators on grounds of want of independence, or otherwise, to be made to the Secretariat and determined by the ICC Court; timscales for challenges.
Article 12: Procedure for replacing arbitrators by the ICC where removed by it and also in the event of matters such resignation, death or where not fulfilling their functions in accordance with the Rules or within prescribed time limits, or where prevented *de jure* or *de facto* from fulfilling their functions.
Article 27: Scrutiny of award by the ICC.
Article 28.6: Waiver of right to challenge or appeal and award, in so far as possible.

BPP PROFESSIONAL EDUCATION
INTERNATIONAL COMMERCIAL ARBITRATION

SESSION 4 – AWARDS AND ENFORCEMENT

A: THE FORMAL REQUIREMENTS FOR AN AWARD

1. The formal requirements for an award are determined principally by the curial law, the parties' arbitration agreement. But the possibility of requirements being imposed by the law of the place of enforcement should not be overlooked.

   The curial law, some examples
   France: NCCP, arts 1471, 1472, 1473. In absence of party agreement (art. 1495), an award shall summarise the respective claims and arguments of the parties, and be reasoned and contain the names of the arbitrators, the date and place it was rendered, the full names/corporate denominations of the parties and their domicile or social seat; the names of their lawyers or of person who represented or assisted them. It must be signed by all the arbitrators unless a minority refuses to sign, in which case this must be mentioned.

   Swiss PILA, art 189, in absence of party agreement, awards may be rendered by majority or, in the absence of a majority, by the presiding arbitrator alone. They shall be in writing, supported by reasons, dated and signed (the signature of the presiding arbitrator being sufficient).

   The Model Law: Art 31. Award must be in writing, signed by the arbitrators, or a majority of them provided the reason for the omitted signature is stated. It mast be reasoned (unless parties agree otherwise, or an agreed award) and must indicate the date on which rendered and the place of the arbitration (the award being deemed to be made at that place).

   The parties' arbitration agreement
   Institutional rules tend to impose requirement on the form of awards. Some of these have been considered previously.

   The law of the place of enforcement
   This may impose requirements, such as concerning the way in which an award is authenticated and time limits for enforcement. It may be important to establish whether there are such requirements in likely places of enforcement, and advise the tribunal of these before the award is made.

2. Leaving aside differences of style and ability, an award, whether prepared by a civilian or common law tribunal, can be expected to contain the following: A summary of procedure (notification of disputes, appointment of the tribunal, procedure adopted and significant procedural orders, material and submissions provided), a recital of the facts and the parties' contentions, the tribunal's discussion and conclusions, and its rulings and decisions, in a form, where appropriate, that is enforceable.

B: OBTAINING RECOGNITION AND ENFORCEMENT OF AN AWARD OTHER THAN AT THE SEAT OF ARBITRATION (THE NEW YORK CONVENTION)

3. The need for recognition arises where a court is asked to dismiss proceedings before it on the grounds that the claims or issues in those proceedings have already been determined by arbitral award. This raises questions of *res judicata*. The need for enforcement arises where

an award is not complied with voluntarily, and a court in a place where the loosing party has assets is asked to order that the award to be complied in that jurisdiction. If it is not, there will then be a need for execution of the court's order against those assets, though, for example, seizure or charging.

4. The principal international treaty concerned with the recognition and enforcement of arbitral awards, the New York Convention, says nothing about execution.

5. What awards are encompassed by the New York Convention
(Article 1) For an award to be susceptible to recognition and enforcement under the New York Convention, the State in which recognition and enforcement is sought (the enforcing State) must have ratified (or acceded to) the Convention (a Contracting State) and (art. 1):

- It must be an arbitral award. Consider Splosna Plovba v. Agrelak Steamship (Australia) YB Comm Arb I, 204.

- It must be made in the territory of a State other than the State where recognition and enforcement is sought or, for some other reason, not be considered as a domestic award under the law of the latter State.

- It must arise out of differences between persons whether physical or legal.

- (Where the enforcing State has made such a reservation at the relevant time) It must be made in the territory of another Contracting State.

- (Where the enforcing State has made such a reservation at the relevant time) The differences must arise out of a legal relationship, whether contractual or not, which is considered as commercial under the law of the enforcing State. See, for example, on what might be regarded as commercial or not; RM Investment v. Boeing (India) YB Comm Arb XXII, 710; Taie Haddad v. Société d'Investisment Kal (Tunisia) YB Comm Arb XXIII, 770.

Nothing in the Convention expressly prevents a party forum shopping on enforcement proceedings; for instance, seeking enforcement in more than one jurisdiction or, having failed in one State, seeking enforcement in another. There are, however, unresolved conceptual problems with this, such as concerning doctrines of merger of judgements, and issue estoppel. Consider Karaha Boas Co v. Perusahaan Pertambangan, etc (Hong Kong) YB Comm Arb XXVIII, 752; Karaha Boas Co v. Perusahaan Pertambangan, etc. (United States) YB Comm Arb XXVIII, 908,

6. Pre-conditions to recognition and enforcement.
(Article IV) The party seeking recognition and enforcement must supply at the time of its application (with certified translations if not in an official language of the enforcing country):

- The duly authenticated original award or a duly certified copy of it.

- The original agreement referred to in article II or a duly certified copy of it.

Article II(1) provides that Contracting States shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. Agreement in writing being defined, in article II(2), as including an arbitral clause in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams. This extremely narrow definition does not, however, preclude the enforcing court from assessing

the requirement for writing in the light of more relaxed formalities, if applicable under the local law (art. VII)(1)).

It is generally accepted that it is for the party seeking enforcement to satisfy the requirement of article IV, in order for the court to have (subject matter) jurisdiction to consider the application. But there is an unresolved debate as to how articles IV and II interrelate to each other and to article V(1)(a).

> At one end of the spectrum are those jurisdictions that do not regard establishing compliance with article II as relevant on enforcement proceedings. Consider China Minmetals v. Chi Mei Corporation (USA) 334 F 3d 274; Sarhank Group v. Oracle Corp (New York State) YB Comm Arb XXVIII, 1043; Dardana Ltd v. Yukos Oil Co [2002] 2 Lloyd's Rep 327 (CA).
>
> At the other, are those jurisdictions that require the enforcing party to satisfy the formal and/or substantive requirements of articles IV and II, in particular articles II(1) and II(2). This raises the further difficulty (considered previously) as to which law should apply in determine the formal and/or substantive validity of the arbitration agreement. Consider A Ltd v. BAG (Switzerland) YB Comm Arb XXVIII, 835; Peter Cremer GmbH & Co v. Co-operative Molasses Traders Ltd [1985] ILRM 564; Planavergne SA v. Kalle Bergander (Sweden) YB Comm Arb XXVII, 554.

Enforcement and recognition may be refused where there are problems with the identity of a party. But this may also raise issues which are not readily encompassed by the article II(2) requirements. For instance because they concern laws of agency, succession, or concepts, such as the group of companies doctrine accepted in some legal system. Whatever law applies to decide these issues, it is difficult to see why these are matters for the law of the enforcing state?

7. Rebutting the presumption in favour of recognition and enforcement

Article V of the New York Confession sets out a number of grounds on which recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked. These are for the party resisting enforcement to prove.

Incapacity of the parties or invalidity of the arbitration agreement

Article V(1)(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.

> Difficulties with this provision include its relationship between article II, and whether disputes as to the (initial) existence of the agreement and compliance with formalities are matters for this article or article IV or II. Also, whether questions of capacity to arbitrate are to be determined under the law of the place of domicile/nationality (possible under article IV or II) or the law of the arbitration agreement or the curial law of the arbitration (as under this article).
>
> Consider refusals of enforcement in, for example: Agrimpex SA v. JF Braun, YB Comm Arb IV, 269 (Greece) Lack of a written power of attorney to conclude the arbitration agreement; IMP v. Aeroimp, YB Comm Arb XXIII, 745 (Russia) Arbitration agreement not validly assigned to the claimant; Fougerolle v. Syria, YB Comm Arb XV (1990) 515 (Syria) Syrian Ministry lacked capacity to agree to arbitration, since it had not

obtained prior advice on the referral of the dispute to arbitration as required under Syrian law (Note: if a matter for the curial law, the doctrine of waiver might preclude this defence); Creighton v. Qatar YB Comm Arb XXV, 1001 (USA) Quarter held not to have waived sovereign immunity by agreeing to arbitrate in France (Qatar not a signatory to the Convention).

Consider enforcement in, for example, X v. Y (Germany) YB Comm Arb XXVIa, 645 (agreement valid because it complied with the requirements for writing under the curial law, AA1996, s. 5(1); Sarhank Group v. Oracle Corp (United States: YB Comm Arb XXVIII, 1043 Arbitration agreement bound party found, under Egyptian law, to be in partnership with a signatory to it.

Violation of due process

Article V(1)(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.

Note Parsons v. Société Générale, YB Comm Arb I, 205 (USA) "This provision essentially sanctions the application of the forum state's standards of due process"; Bauer v. Fratelli, YB Comm Arb X, 461 (Italy). Enforcement refused on grounds that a notice period of one month given to the Italian respondent to attend the hearing in Vienna was insufficient (during this period, the place were respondent based was hit by major earthquake; GWL Gersten v. Société Comerciale, YB Comm Arb XIX, 708 (Neterhlands). The claimant submitted a statement of claim to tribunal without it being copied to Dutch defendant either by Claimant or by tribunal. This violated a fundamental procedural right, award not enforced.

Excess of jurisdiction

Article V(1)(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 recognised and enforced.

General Organization v. SpA Simer, YB Comm Arb VIII, 386 (Italy). Syrian award not enforced in part, because it dealt with both technical and not technical matters although arbitration agreement provided that only non-technical matters were to be arbitrated in Syria; technical matters to be arbitrated under ICC in Paris; Paklito v. Klockner, YB Comm Arb XIX, 664 (Hong Kong). Award of damages for failing to open a letter of credit not enforced, as arbitral agreement only encompassed quality disputes.

Improperly constituted tribunal and procedural irregularity

Article V(1)(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.

Rederi v. Srl Temarea, YB Comm Arb IV, 294 (Italy). English award by tribunal of two not enforced as agreement provided for tribunal of three; Metex v. Turkiye Electrik YB Comm Arb XXIII, 807 (Turkey) Award not enforced because arbitrators had failed to apply the agreed procedural law.

Pending or successful challenges at the seat of arbitration

Article V(1)(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. Note article VI (if a pending challenge at the seat, the enforcing court

can suspend the application to enforce and can order the party resisting enforcement to give security),

> There is an ongoing debate as to whether an award which as been set aside (nullified) on a challenge at the seat of arbitration can nevertheless be enforced under the Convention or under a more favourable enforcement regime, if available.
>
> The norm is not to enforce: Claud Clair v. Louis Berardi, YB Comm Arb VII, 319 (France). Enforcement of a Geneva award refused as had been set aside in Geneva on ground that it was arbitrary (a valid ground to set aide under Swiss law, at the time); Maritime International v. Guinea, YB Comm Arb XII, 514 (Switzerland) (award not binding so not enforceable); Creighton v. Qatar YB Comm Arb XXI, 751 (USA). Enforcement of an award that was subject to a pending application to set aside at the seat, Paris, refused. Contrast Soleh Boneh Int v. Republic of Uganda [1993] 2 Lloyds' Rep 298. If invalidity of award subject to a pending challenge is seriously arguable, order security rather than enforcement.
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> In a few exceptional cases enforcement has been allowed: Hilmarton Ltd v. Omnium de Traitement YB Comm Arb 655 (France) Swiss award set aside by court in Switzerland granted *exequatur*, annulment not a ground for not doing so under NCCP, art 1502; Chromalloy v. Egypt YB Comm Arb XXII, 1001 (USA) Egyptian award that had been set aside in Egypt on ground that the tribunal had made a mistake of or misapplication of the law, this being an allowable ground for setting aside under the applicable Egyptian law, enforced. Chromalloy v. Egypt YB Comm Arb XXII, 691 (France) award also enforced there.

8. The enforcing court may, in two cases, refuse to recognise and enforce an award of its own motion.

Article V(2)(a): Where the court finds that the subject matter of the difference is not capable of settlement by arbitration under the law of that country (the law of the enforcing state).

> SG Agima v. Smith Industries, YB Comm Arb VIII, 360 (Belgium) Award not enforced where the issue it decided was reserved to the national courts by statute.

Article V(2) (b): The recognition or enforcement of the award would be contrary to the public policy of that country (the enforcing state).

> There is a growing tendency for enforcing courts to look to international rather than domestic public policy when deciding whether these grounds are made out, but this is not universally accepted, given the wording of this provision.
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> A v. B YB Comm Arb X 421 (Austria). Enforcement of Dutch award because it violated Austrian law prohibiting purchase on margin and, thus, Austrian public policy; COSID v. Steel Authority of India, YB Comm Arb XI, 502 (India). The court rejected the distinction between domestic and international public policy and refused to enforce and English award on grounds of public policy because the tribunal had rejected the Indian Party's defence of *force majeure* arising from Indian export prohibition (enforcement had been granted in England). Note also Eco Swiss China Time v. Benetton International (1999) 14 Mealey's Int Arb Rep 6. (ECJ). European antitrust law is part of the public policy of member states which, where relevant to the decision, must be applied by arbitrators.
