Commercial Arbitration, International

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A. Notion

1. The Concept of International Commercial Arbitration

1 International commercial → arbitration is a method of dispute resolution by which the parties to the dispute grant one or more neutral third parties—the arbitrators—the power to decide a commercial dispute by means of a final and binding award. In other words, the award represents the final determination of the dispute and, if not carried out voluntarily, may be enforced by legal proceedings against the losing party. The award binds the parties, subject to any right of challenge or to set aside, which, depending normally on the law at the place of arbitration, or l’œil arbitral, may exist.

2 Within the scope of a valid arbitration agreement, arbitration is a surrogate for litigation and other forms of alternative dispute resolution. It differs from litigation insofar as a private person or persons chosen by the parties or, as the case may be, the institution or court of appropriate jurisdiction will determine the outcome of the dispute in contrast to a judge. Unlike in the case of → mediation and → conciliation, the arbitrator not only assists the parties in finding a resolution for their dispute, but also decides the dispute, comparable to a judge in litigation. In some situations, a mediator might also accept the office of arbitrator after the conclusion of the mediation, so-called mediation-arbitration.

3 Disputes adjudicated in international commercial arbitration typically arise from a variety of business arrangements falling primarily within the scope of private law. These include, for example, merger and acquisition contracts, construction and infrastructure contracts, investment or concession agreements, intellectual property agreements, as well as other types of commercial arrangements, such as agency, distributorship, or purchase and sale agreements. Arbitration as a form of dispute resolution has also become more prevalent in some sectors of the financial services industry, for example with respect to disputes relating to financial derivatives and financings in emerging markets.

4 Arbitration can be considered to be international as opposed to domestic arbitration when the parties, facts or the legal issues underlying the dispute extend beyond a single jurisdiction. At the same time, there is no internationally agreed definition of ‘international’ arbitration. According to the definition adopted by the UNCITRAL Model Law on International Commercial Arbitration of 1985 (UNCITRAL Model Law); → United Nations Commission on International Trade Law (UNCITRAL), an arbitration will be considered to be international in the following cases: first, if the parties to the arbitration agreement have their respective place of business in different States (Art. 1 (3) (a) UNCITRAL Model Law) or, second, if the dispute itself is international, that is, if the place of arbitration, the place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected is situated outside the State in which the parties have their places of business or, alternatively, if the parties themselves have agreed that the subject-matter of the arbitration agreement relates to more than one country (Art. 1 (3) (b) UNCITRAL Model Law). However, despite such a definition, each State may have its own—sometimes differing—test for establishing when an arbitration will be considered being ‘domestic’ or ‘international’. France, for example, regards a domestic award as ‘international’ if it involves the interests of ‘international trade’ (Art. 1482 Nouveau code de procédure civil).

5 The distinction between domestic and international arbitration is of vital importance when it comes to a petition for enforcement of an arbitral award. If the award is considered by that court to be a domestic award, it will be subject to the requirements of the relevant national law for domestic awards. If the award is considered non-domestic, it will be given a national status and, depending on that status, may be subject to a particular treaty, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention); → Recognition and Enforcement of Foreign Arbitral Awards—if the enforcing State is a party to that convention—or else the forum’s procedural law.
2. Advantages of Arbitration

6 In practice, international commercial arbitration is chosen by the parties because, at least in theory and often in practice, it offers a number of significant potential benefits over both local State court litigation and the above-mentioned alternative dispute resolution mechanisms. These potential benefits may generally be classified as procedural and as deriving from the nature and consequences of obtaining a final and binding arbitral award.

7 In comparison to litigation in particular, arbitration potentially offers the parties, inter alia, the following significant procedural advantages:

a) The parties are free to agree upon a method of dispute resolution tailored to meet their precise logistical, linguistic and/or substantive needs. In particular, the parties may select the place—or "seat"—of the arbitration. By virtue of its triggering the application of any arbitration legislation or law applicable at the seat of the arbitration, the seat or place of arbitration—in addition to any institutional rules agreed between the parties—will generally determine the applicable procedural law of the arbitration.

b) As a general proposition, members of arbitral tribunals are also required to be independent and impartial. This aspect is particularly important where the dispute involves parties of different nationalities who wish to ensure a "neutral" determination of the dispute. Where parties from different countries pursue a legal dispute before the State courts, their recourse will in most cases lie with the national courts of appropriate jurisdiction of one of the parties.

c) Furthermore, arbitral proceedings are usually conducted in a private forum in which the nature of the dispute and the identities of the parties can remain confidential. The confidentiality of arbitral proceedings is set forth in the procedural rules of certain—but not all—of the world’s leading arbitral institutions. For example, with respect to the → World Intellectual Property Organization (WIPO), Arts 52, 53 and 73–76 WIPO Arbitration Rules of 2002 contain extensive provisions respecting both the privacy of proceedings—that is, the limitation of the rights of persons other than the tribunal, the parties and their witnesses to attend meetings and hearings and to know about the arbitration—, as well as the confidentiality of the arbitration, disclosures made during the arbitral and the arbitral award. Despite the differing degrees of express protection in various institutional rules, privacy and confidentiality have in the past been widely taken for granted as fundamental principles inherent to international commercial arbitration. However, the existence of an implied duty of confidentiality has come under fire as a result of several crucial court judgments in a variety of jurisdictions during the last two decades. In Australia (Esso Australia Resources Ltd and Others v The Honourable Sidney James Plowman [High Court of Australia (Canberra 7 April 1995) 183 Commonwealth Law Reports 10]), the United States (United States v Panhandle Eastern Corp and Others [United States Court of Appeals (3rd Cir, 21 March 1988) 842 F 2d 685]; Contrust Containerlines Ltd v PPG Industries, inc [United States District Court, Southern District of New York (17 April 2003) WL 1948807]; Caringle v Karzenia Shipping Ltd [United States District Court of Louisiana (24 January 2001) 108 F. Supp. 2d 651]; and Sweden (Bulgarian Foreign Trade Bank Ltd v A I Trade Finance Inc [Swedish Supreme Court (27 October 2000) 2001 II YBCA 29]), an implied duty of confidentiality has to varying degrees been derived as a result of decisions in the United States. In England, on the other hand, the position that there is a general obligation of confidentiality by implication of law has been reaffirmed, subject to certain exceptions (Emmott v Michael Wilson & Partners Ltd [Court of Appeal (London 12 March 2008) (2008) WLR (Daily) 62]; All Shipping Corp v Shipyard Trogeo [Court of Appeal (London 19 December 1997) (1998) 2 All ER 138]; Esso Australia Resources Ltd and Others v The Honourable Sidney James Plowman [High Court of Australia (Canberra 7 April 1995) 183 Commonwealth Law Reports 10]). Judicial authority in Singapore has adopted the English view of implied confidentiality obligations (Myanmar Young Chi Ch Ch Co v Win Win Nl [Singapore High Court (31 March 2003) SLR 547]), French courts have also held that there is an implied obligation of confidentiality with respect to arbitral proceedings and awards (Aïta v Ojjeh [Paris Cour d'Appel (18 February 1986) Rev arbo 583]). There is therefore no internationally accepted rule that an agreement to arbitrate imposes an implied duty of confidentiality on the parties to that agreement. As a result, parties should not assume that the evidence and arguments submitted in arbitration or, indeed, the ensuing arbitral award(s) are confidential. Rather, they need to ensure such duties of confidentiality are spelled out in the arbitration agreement, either in the form of explicit elaboration in the agreement itself or, alternatively, with reference to appropriate institutional rules.

d) Furthermore—unlike State court proceedings—there is generally, with few exceptions in few jurisdictions, no right of appeal from an arbitral award. Instead, recourse against such award is in most cases limited, by application of the law applicable at the agreed or stipulated place of arbitration, to certain narrowly defined circumstances, and often pursuant to relatively strict filing deadlines and other pleading constraints. As for the focus of any recourse proceedings against the award, the increasing acceptance of the so-called "territoriality principle" has meant that an award can generally be set aside or nullified only at the place of arbitration.

e) This finally can make arbitral proceedings more cost- and time-efficient when compared to multi-appellate proceedings before State courts, which is another gain compared to court litigation.

f) Finally, the cross-border recognition and enforcement of an arbitral award is facilitated by a set of international → treaties, such as the New York Convention of 10 June 1958 (see paras 13 and 14 below). These treaties, as multinational instruments, have much greater acceptance and recognition internationally than treaties for the reciprocal enforcement of court judgments, which are either bilateral or regional in scope. Indeed, judgments of national State courts require an order of execution prior to any enforcement and even when such order of execution has been obtained, the effects of such an order can be uncertain (→ Recognition and Enforcement of Foreign Judgments; see also → Hague Conventions on Private International Law and on International Civil Procedure). As a result, a foreign arbitral award may in most cases be more easily enforced than a judgment of a foreign court.

8 When compared to the above-mentioned alternative dispute resolution mechanisms, the benefits of arbitration derive from the nature and consequences of the final and binding arbitral award. Unlike arbitration, the settlement of the parties’ dispute as a result of these forms of alternative dispute resolution is not binding in the sense of a judgment or title, and therefore not readily enforceable on such basis, until specifically agreed to—in a formal agreement—by the parties.

9 Recent years have seen a growing interest in the use of arbitration as a means of resolving disputes in the financial services sector, a field where court jurisdiction has traditionally been favoured by market participants. This trend has been driven by the perceived advantages of arbitration mentioned above, in particular the superior enforcement mechanisms for arbitration awards (as compared to court judgments) under the New York Convention. The growing popularity of arbitration as a dispute resolution option for finance transactions is reflected in the consultation by the International Swaps and Derivatives Association ("ISDA") on the use of arbitration under its master agreements, which began in January 2011 and has now concluded. It is also illustrated in the establishment of the Panel of Recognised International Market
Experts in Finance (‘PRIME Finance’), a specialist arbitration forum targeting complex financial disputes.

3. Disadvantages

10 Potential disadvantages associated with arbitration can be the following:

a) The relaxed procedural and technical aspects of arbitration can lead to a more streamlined process, but it can also lead to delays and unpredictable results. Unlike a court trial, the arbitrators may be reluctant to reprimand improper behavior of a party, which makes it difficult to compel the parties to adhere to arbitration rules or punish unethical behavior. An arbitral tribunal generally has limited powers to grant pre-emptive remedies (such as freezing orders or interim injunctions) (see para. 38 below). Where urgent or necessary, an application may have to be made to the court for an order to be effective in any event.

b) While parties usually welcome that arbitration is a private process and can be a confidential one, confidentiality comes at the price of a lack of transparency which may make the process more likely to be tainted or biased, which is especially troublesome because arbitration decisions are infrequently reviewed by the courts. In addition, when the losing party does not voluntarily comply with the award the party wishing to enforce the award has to rely on the help of the public court system, where confidentiality eventually could be lost.

c) Whilst the fact that arbitral awards are, by their nature, final and binding and that there is normally a very limited right of appeal, is usually rightly presumed to be a major advantage of arbitration over litigation, it also means that a badly wrong arbitral decision cannot readily be corrected.

d) In addition, arbitration has been criticized for being more costly than litigation. That is not necessarily true and will depend on the nature of the case, the behavior of the parties, and the dynamism and availability of the tribunal. However, costs related to arbitration may be substantial, particularly in complex cases. Some costs are unique to arbitration, such as the arbitrators’ fees and venue hire costs. Also, in arbitration proceedings parties typically submit expert reports, particularly on decisive legal issues as well as the quantum of damages, which can also be a major driver of costs.

e) Arbitration may not be suitable where there are several parties to a dispute, at least when the arbitration agreement is not geared towards a multi-party dispute. This is common in construction claims where a single dispute may involve an employer, a contractor, subcontractors, suppliers, and consultants. If some of the contracts stipulate arbitration but some do not, problems often arise when trying to force parties into parallel disputes in different forums with potentially different results. Further, even if all the contracts contain an arbitration agreement, it is not normally possible to join other parties to an arbitration unless this is expressly provided for.

B. Historical Evolution of Legal Rules


11 The first of the modern international conventions was the Protocol on Arbitration Clauses (‘Geneva Protocol’) of 1923, which was drawn up at the initiative of the →International Chamber of Commerce (ICC) under the auspices of the →League of Nations. The object of the Geneva Protocol was to ensure that arbitration agreements were enforceable internationally and that arbitral awards rendered pursuant to such agreements would be enforced in the States in which they were made.

12 Four years later, in 1927, the Convention on the Enforcement of Foreign Arbitral Awards (‘Geneva Convention’) was drawn up. The objective of the Geneva Convention was to broaden the scope of the Geneva Protocol by ensuring the recognition and enforcement of Geneva Protocol awards within the territory of contracting States, as opposed to the State in which the award was made. However, a party seeking to enforce an award under the Geneva Convention was nonetheless confronted with the so-called ‘double exequatur’ problem of having to prove that the conditions for enforcement had been satisfied. In order to show that the award had become final in the country of its origin, the party seeking enforcement had to first seek a declaration in the courts of the country where the award was made that the award was enforceable in that country.

2. The New York Convention

13 The most important international treaty relating to international commercial arbitration, the New York Convention of 1958, sets forth a simplified procedure for the enforcement of arbitral awards almost anywhere in the world. The New York Convention as implemented in national laws establishes a set of uniform and exhaustive grounds upon which national courts may refuse to recognize and/or enforce foreign arbitral awards (→Unification and Harmonization of Laws). In addition, the New York Convention provides the fundamental basis for the recognition and enforcement of arbitral agreements internationally, requiring the courts of contracting States to refuse to allow a dispute that is subject to a valid, operative and implementable arbitration agreement to be litigated before its courts, if an objection to such litigation is raised by a party to the arbitration agreement.

14 To date the New York Convention has been acceded to by 146 States and replaces the Convention on the Execution of Foreign Arbitral Awards of 1927 as between States that are parties to both conventions. Most of the world’s major trading nations have acceded to the New York Convention, thus ensuring a high degree of uniformity in both the recognition and enforcement of foreign arbitral awards and arbitration agreements between and among States which have signed and ratified the treaty.

3. The UNCITRAL Model Law

15 A further important step towards uniformity—or, at least, harmonization—of arbitration law came some years later, in large part by the efforts of the UNCITRAL, which adopted the UNCITRAL Model Law in June 1985. A recommendation of the General Assembly of the United Nations commending the UNCITRAL Model Law to Member States followed in December 1985.

16 The UNCITRAL Model Law’s explicit aim is to harmonize and unify national arbitration laws in order to meet the demands of
international arbitral practice. It provides a regulatory framework for the arbitration process and represents a legislative proposal for the domestic implementation of internationally acceptable standards of arbitral procedure (→ International Law and Domestic [Municipal] Law). The chief features of the UNCITRAL Model Law, which has also been adopted by some countries for their domestic arbitration legislation, include:

a) Safeguarding the functioning of proceedings. As discussed above, parties to an arbitration may design the rules of procedure to meet the particular needs of their case. This is usually done by individual agreement or by reference to a set of standard arbitration rules. Where the parties fail to make use of their party autonomy on these issues, the UNCITRAL Model Law confers powers on the arbitral tribunal to ensure the smooth functioning of the proceedings. Likewise, the UNCITRAL Model Law authorizes the national courts to support arbitral proceedings in cases where the tribunal lacks coercive powers.

b) Mandatory laws to ensure fair and efficient proceedings. The UNCITRAL Model Law contains several mandatory provisions restricting the autonomy of the parties and the arbitrators to ensure fair and efficient proceedings. Most importantly, in this context, Art. 18 UNCITRAL Model Law provides that the parties shall be treated equally and shall be given a full opportunity to present their case.

c) Limitation on judicial intervention. The UNCITRAL Model Law provides that a court shall intervene in matters governed by the UNCITRAL Model Law only if so provided in that Law (Art. 5 UNCITRAL Model Law). This provision ensures that parties will not face unanticipated judicial intervention on the basis of an unknown or unexpected principle of national procedural law. The Model Law foresees judicial involvement in certain narrowly defined circumstances, such as the appointment of arbitrators (Art. 11 (3) and (4) UNCITRAL Model Law), the challenge of an arbitrator (Art. 13 (3) UNCITRAL Model Law), termination of an arbitrator's mandate (Art. 14 UNCITRAL Model Law), a prior determination by the arbitral tribunal of its jurisdiction as a preliminary question (Art. 16 (3) UNCITRAL Model Law), or the application by a party to set aside the arbitral award (Art. 34 (2) UNCITRAL Model Law).

d) Lex specialis. The UNCITRAL Model Law, if implemented by a State, prevails over any domestic law that deals with the same subject. Outside the scope of the UNCITRAL Model Law, domestic laws remain applicable. Thus areas not regulated by the UNCITRAL Model Law, such as questions of arbitrability, capacity of the parties to enter into the arbitration agreement, cessation of running of the limitation period, liability of arbitrators—to name just a few—continue to be governed by national law. At the same time, Art. 1 (1) UNCITRAL Model Law provides that international treaties in force between the enacting State and any other State(s) prevail over any conflicting provisions of UNCITRAL Model Law (→ Treaties, Conflict Clauses).

17 Since 1985, more than 65 States have implemented the UNCITRAL Model Law (either in whole or in part) in their respective national arbitration legislation, among them notably Japan, India, Hong Kong and the United Arab Emirates (UAE) in 2008. In addition, the incorporation of the UNCITRAL Model Law into national laws inspired some arbitral institutions to revise their arbitration rules, such as the Deutsche Institution für Schiedsgerichtsbarkeit ("DIS", German Institute of Arbitration). As such, the UNCITRAL Model Law has become one of the most important texts in the field of international commercial arbitration. Most recently, on 24 June 2013, the Belgian legislature enacted a new arbitration law based on the UNCITRAL Model Law (for jurisdictions having adopted the UNCITRAL Model Law see <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html> [14 April 2014]).

C. Current Legal Situation

1. Laws Applicable in International Arbitration

18 Any single international commercial arbitration may—precisely because of its international character—at various stages require reference to as many as the following four sets of laws: a) the law that determines the recognition and enforcement of the arbitration agreement; b) the procedural law that regulates the arbitration proceedings, also called lex arbitri or curial law; c) the substantive law which the arbitral tribunal must apply to the underlying dispute; and d) the law governing the recognition and enforcement of the award rendered by the arbitral tribunal.

19 The law applicable to the formation, validity and interpretation of the arbitration agreement (ie questions of consent) may be different from both the law applicable to the substance of the parties’ underlying contract and the law applicable to the arbitral procedure. Art. V (1) (a) New York Convention stipulates that the question whether the parties validly agreed to submit the dispute to arbitration is governed by the law chosen by the parties or, failing an indication thereof, by the law of the country where the award was made (law of the seat). However, when the parties have failed to expressly select the law governing the arbitration agreement, different approaches are taken by different authorities. Some authorities adopt the default rule contained in Art. V (1) (a) New York Convention providing that in absence of a choice the law of the country where the award was made (ie law of the seat of the arbitration) shall apply. Other authorities have reached the same result by concluding that the parties’ choice of the seat reflects an implied choice. Since (unless a submission agreement exists) the arbitration clause is only one of many clauses in a contract, others find it reasonable that the law chosen by the parties to govern the underlying contract also governs the arbitration clause applying the so-called closest and real connection test. Other authorities adopt an approach known as lex fori or lex arbitri in general conflict of laws theory. For example, Art. 178 (2) Swiss Federal Statute of Private International Law provides that in the absence of a submission agreement, the arbitration agreement shall be valid if it conforms either to the law chosen by the parties, or the law governing the subject matter of the dispute, in particular the law governing the main contract, or if it conforms to Swiss law. Under this provision, even an explicit choice of law by the parties may be disregarded when its application would invalidate the arbitration agreement. Contrary to the Swiss rule, Art. V (1) (a) New York Convention establishes a hierarchy between party autonomy, to which it attaches primary importance, and the law of the place (seat) of arbitration, which applies in those cases where the parties have not chosen the law applicable to the arbitration agreement. Other legal systems apply international principles (eg France and the United States) in order to give effect to agreements to arbitrate that the parties’ choice-of-law clause (typically in their underlying contract) would invalidate.

20 The procedural law that governs the arbitrations from the beginning of the arbitration to the challenge of an arbitral award derives from three different sources:

a) the party agreement;

b) the set of rules incorporated in the agreement; and
c) the national law of the seat chosen by the parties.

21 In this hierarchy of norms, the mandatory rules of the national law of the seat rank highest, guaranteeing a minimum standard of justice and fairness in arbitration. They normally cannot be derogated from and form a limit to the otherwise predominant concept of party autonomy in arbitration. The national law of the seat usually is not elaborated in great detail, and these gaps are filled in by institutional rules or UNCITRAL Arbitration Rules, if the parties refer to such a set of rules. The rules form part of the party agreement and thus can be overturned by a common party will. A notable exception to this concept of party autonomy is Art. 5 (1) ICC Rules of Arbitration. The agreement itself might— but need not— specify further procedural requirements, such as the language of the proceedings or the number of arbitrators. Thus, an arbitration can be conducted with a minimum of regulations and constraints on the procedure, which accounts for the flexibility of arbitration.

22 With regard to the applicable procedural law or rules, the New York Convention provides that to ensure enforceability the arbitration procedure need only conform to whatever procedures may have been agreed upon by the parties (Art. V (1) (d) New York Convention). In the absence of agreement, including by any reference to institutional or ad hoc rules, the arbitral tribunal shall decide on the procedure subject to the mandatory provisions of law at the place of arbitration (lex loci arbitrti). Noteworthy, the choice of a procedural law other than the law of the seat of arbitration creates the possibility that a foreign court, other than a court in the arbitral seat, may annul the award, since Art. V (1) (e) New York Convention provides that an award may be set aside by the court of the country in which, or under the law of which, the award was made.

23 The substantive law or laws applicable to the underlying dispute must be distinguished from the law governing the arbitration agreement and the procedural law or rules which govern the arbitral proceedings. As a general proposition, the parties have the right to choose the substantive law which will apply to their dispute provided that the application of such law does not contravene public policy (→ Private Law /Public Policy). In most cases, the parties will agree on a particular body of national law or laws to apply. In some cases, however, the parties may grant the arbitrator(s) the power to decide on the basis of equity (→ Equity in International Law) or the so-called → lex mercatoria. When the parties fail to agree on the substantive law, the arbitrator or arbitrators must rely on the applicable conflict of laws rules in order to determine which law or laws apply, including with respect to any initial objections as to jurisdiction, admissibility, standing, etc.

24 In some cases, the four sets of laws will be one and the same. However, in many cases, they will be different and, at times, conflicting. As a result, the creation of a uniform or in any event harmonized international regulatory framework— particularly as it relates to the recognition and effect given to the agreement to arbitrate and the resulting arbitral award— has been a subject of a number of different efforts at the international and regional levels such as the New York Convention and the UNCITRAL Model Law, as discussed in parts 13–17 above. Furthermore, various other conventions have been ratified on a regional level, eg the European Convention on International Commercial Arbitration of 1961 ("European Convention") or the Arab Convention on Commercial Arbitration of 1987, as implemented in national legislations, influencing the manner statutes regulate arbitration on a national level. Most European States (but not the United Kingdom, the Netherlands or Finland) as well as some ten non-EU states (including Russia and Cuba) are currently party to the European Convention. However, importantly the European Convention does not deal with the recognition and enforcement of awards. This is left to the New York Convention to which the European Convention may be seen as a supplement. In practice, the European Convention's impact has been modest, owing to the limited number of contracting states, all of whom are also a party the New York Convention.

2. Drafting and Enforcing the Arbitration Agreement

25 The importance of a valid, operative and functioning agreement by the parties to submit their dispute to arbitration is recognized by both national laws and international treaties. In particular, both Art. V (1) (d) New York Convention and Art. 36 (1) (a) (i) UNCITRAL Model Law stipulate that recognition and enforcement may be refused, inter alia, if the parties to the arbitration agreement were under some incapacity, or if the agreement was not valid under its governing law.

26 Agreements to arbitrate may be entered into either before or after a dispute has arisen (→ Compromise). In most cases, the parties include an arbitration clause in the underlying commercial agreement. In some cases, however, the arbitration agreement may be contained in a separate so-called "submission to arbitration". In either case, there must be written evidence of the agreement to arbitrate. This evidentiary requirement is important since by agreeing to arbitrate the parties waive their right to bring the merits of a future dispute before the respective national State courts (→ Waiver). Accordingly, the New York Convention will not recognize an arbitration agreement only if it is "in writing". The term "in writing" is defined under the New York Convention 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" (Art. II (2) New York Convention. The Revised Articles of the UNCITRAL Model Law on International Commercial Arbitration ("UNCITRAL Model Law Revised") of 2006, provides a more modern definition of the term 'in writing' insomuch as it recognizes a record of the 'contents of the arbitration agreement in any form' as equivalent to the traditional 'writing', including orally or by email. It also contains a second adoptable approach which defines the arbitration agreement in a manner that omits any form requirement (Art. 7 UNCITRAL Model Law Revised).

27 The specific conduct of future arbitral proceedings clearly depends on the exact wording of the arbitration clause in question. The parties are generally well advised to agree at the outset—before a dispute arises—on such crucial elements as the number of arbitrators, the language and place of the arbitration, as well as the law to govern the dispute. In their agreement, the parties may also provide for either institutional or ad hoc arbitration.

28 In the case of institutional arbitration, the parties submit their dispute to the administration of a specific institution. In international disputes, the procedural rules of institutions such as the ICC, London Court of International Arbitration ("LCIA"), American Arbitration Association ("AAA"), China International Economic and Trade Arbitration Commission ("CIETAC"), DIS, Stockholm Chamber of Commerce Arbitration Institute ("SCC"), or Singapore International Arbitration Centre ("SIAC") are frequently relied on, to name only a few. These rules generally have proved to work well in practice. Parties who agree to submit their dispute to arbitration in accordance with the rules of a particular institution effectively incorporate that institution's detailed rules into their arbitration agreement. The various institutional rules contain different provisions in a number of important areas. For example, only some rules— including, for example, the ICC Rules of Arbitration— provide for scrutiny of the draft arbitral award by the administering institution before it is notified in approved form to the parties. In almost all cases, however, the various institutional rules contain procedures of varying nature for both the appointment of the arbitrators—in the event the parties or party-appointed arbitrators cannot agree—and for the challenge of arbitrators by the parties with a request for their removal.

29 Ad hoc arbitral proceedings comprise all other arbitrations in which the parties do not utilize the administrative services of a particular arbitral institution. In such proceedings, the rules of a particular arbitral institution may still be adopted, for example for purposes of appointment of the arbitral tribunal. Most commonly, however, the tribunal in an ad hoc arbitration will rely on the procedural framework...
Relationship between Arbitration and State Courts

Generally speaking, arbitration proceeds and should proceed without any court interference, as it is merely a private dispute resolution mechanism. For this purpose, the arbitral tribunal is invested with numerous powers either by party agreement, the chosen set of rules or the lex arbitri. In particular, the tribunal is competent to decide on its own jurisdiction in the event of an alleged invalidity of the arbitration agreement, as discussed in para. 40 below. The arbitral tribunal is also granted authority to determine, inter alia, the conduct of the arbitration, the place of arbitration, the language of proceedings or the law applicable to the substance of the dispute where the parties have failed to agree on these matters (Arts 19, 20, 22 and 28 (2) UNCITRAL Model Law, respectively). This authority enables the tribunal to act independently of State courts to the widest degree possible.
There are situations, though, where one party attempts to resort to disruptive manoeuvres and to boycott the arbitral proceedings. In these instances, court interference is necessary to support the arbitral proceedings, as a tribunal has no coercive powers over a party. A court can render assistance at all stages of arbitration. At the beginning, a court can become active with regard to enforcement of the arbitration agreement (as discussed below) and with regard to the establishment of the tribunal. Most State laws and Art. 11 (3) UNCITRAL Model Law authorize the competent court to nominate an arbitrator in the event that the parties cannot agree on or refuse to nominate an arbitrator. During the proceedings, court assistance might be necessary with regard to interim measures. In particular, until the tribunal is constituted, there is no prospect of obtaining provisional relief from it. In addition, the powers of a tribunal are limited to the parties which agreed to arbitration. As a consequence, where provisional measures binding third parties urgent—e.g. addressed to a bank holding deposits of a party, or having issued a guarantee for the benefit of a party—arbitral tribunals cannot provide effective relief. Moreover, it is controversially discussed whether interim measures ordered by a tribunal qualify for enforcement as ‘awards’, since they, by definition, do not finally resolve the dispute. Moreover, many arbitration laws do not provide for the possibility of ex parte application, that is, seeking provisional relief without giving prior notice to the other party, which is essential, for example, where there is a risk of dissipation of assets or of important evidence being destroyed. Hence, arbitration legislation generally provides courts with concurrent power to order interim measures in aid of an international arbitration (absent agreement to the contrary). Under the UNCITRAL Model Law Revised of 2006, a court can order interim measures or enforce interim measures ordered by the arbitral tribunal (Arts 17 (1) and 17 (1) UNCITRAL Model Law Revised). Furthermore, Art. 27 UNCITRAL Model Law enables the court to assist in the taking of evidence. Finally, the court is authorized to enforce the award.

When it comes to disclosure and taking of evidence relevant to resolve the matter in dispute, questions about the scope of the arbitrators’ authority do not only arise with respect to third parties as a consequence of the consensual nature of arbitration. In international commercial arbitration, the matter of discovery will vary dependent on the chosen rules of the arbitration and also on the question whether the lex arbitri permits the enforcement of arbitrators’ orders regarding discovery. In particular, there have historically been, and still remain, important differences between civil law and common law approaches to discovery and disclosure. Document disclosure under the common law systems has the meaning of disclosure of all relevant documents. It is seen as an obligation for a party to produce every single relevant and admissible document in its possession to the court, not merely the ones that support its case but also the ones that might damage its case, and the failure to comply with a disclosure order in litigation proceedings may lead to severe sanctions. By contrast, most civil law jurisdictions do not provide for party-initiated disclosure of documents and it is not necessary for the parties to disclose to the opposing parties the documents that might be detrimental for them (although they may, of course, engage in fraud by misstating or omitting facts) or to respond to broad or searching requests for documents. The evolving common practice in international commercial arbitration is reflected in the IBA Rules on the Taking of Evidence in International Arbitration (‘IBA Rules’), which were drafted by a working group comprised of both common law and civil law experts. The IBA Rules aim to bridge the gap between the common law and the civil law approach. While they generally allow the party to request the other party to produce some additional documents to the tribunal, they also recognize that expansive documentary discovery is generally inappropriate in international arbitration and maintain the requirement that requests for documents must identify with sufficient particularity the description, relevance, and materiality of each document or narrow category of documents.

One of the most important principles in arbitration law is the principle of ‘competence-competence’, granting the arbitral tribunal the power to rule on its own jurisdiction. As a result, any challenge to the existence or validity even of the arbitration agreement itself will most often, except in certain narrow cases of manifest fraud, not prevent the arbitral tribunal from proceeding with the arbitration at least to affirm or deny its jurisdiction. The arbitrator is the first judge of the tribunal’s jurisdiction, subject to the final review of the competent court, eg when deciding on the challenge of an award. The principle of competence-competence is considered to be an inherent power of the arbitral tribunal. It is granted by the appointment of the tribunal even in the absence of the frequent express stipulations in national laws (such as Art. 30 (1) Arbitration Act 1996 c 23 [Eng]) or institutional rules (eg Art. 25 (1) Arbitration Rules of the SIAC).

In the vast majority of cases, this results in a concerted interaction between courts and tribunals, whereby courts do not interfere unless warranted. In rare cases only—in the few States that are not arbitration-friendly or not yet familiar with international arbitration—the reverse might be true and courts might support disruptive manoeuvres attempted by the parties. Mostly, this involves cases where a State itself is a party to the proceedings.

5. Expedited Procedures

As mentioned above one advantage of international commercial arbitration is that it is said to be a quicker, simpler, and more effective resolution to disputes than court litigation. However, depending on the complexity of the case arbitration can be as time-consuming and costly as litigation which has led to criticism from the international business community. In order to solve the problem of delays involved between the start of an international commercial arbitration and the eventual delivery of the award, numerous arbitral organizations offer some form of expedited arbitration, which reduces the time limits of the arbitral proceedings and can impose other procedural limitations, as an alternative to traditional arbitration. Expedited proceedings have always been possible under the ICS Rules. In addition, the AAA, the SCC, the LCIA, the Hong Kong International Arbitration Centre (‘HKIAC’), the CPR and the WIPO all offer some form of expedited arbitration. Although the procedures vary, all shorten the time limits for arbitral proceedings.

6. Costs

Most national arbitration legislation is silent regarding awards of legal costs in international arbitration. Also the UNCITRAL Model Law does not expressly address this question. However, in the absence of contrary agreement, international arbitrators are generally presumed to have the authority to fully resolve the parties’ disputes, which includes the power to make a decision on the costs. That follows from the basic principle that the right to compensation for wrongful damage includes the costs of righting that damage.

In addition, the most commonly used institutional rules allow and require a tribunal in an international commercial arbitration conducted under the auspices of those rules to make an award on costs. The majority of institutional rules also contain some suggestion as to how costs are to be apportioned. Unlike parties to litigation or domestic arbitration proceedings in jurisdictions such as those in the United States where, in the absence of a specific contractual provision to the contrary, the parties are generally expected to bear their own legal and other costs (ie, the fees and expenses of the lawyers and experts, witness expenses, and any internal costs) with only minimum court costs being awarded, parties to international commercial arbitration proceedings may be liable not only for their own costs, but also for a percentage of their opposite number’s costs. Arts 42 (1) and (2) UNCITRAL Arbitration Rules provide that ‘the costs in arbitration shall in principle be borne by the unsuccessful party’, except that, in fixing the costs of legal representation, ‘the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case’.

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D. Arbitration under Investment Treaties

The increase over the last several decades of foreign investment by largely private investors in third-party States has given rise to a significant number of conflicts between such private investors and the national governments of the relevant third-party State. Increasingly, political, economic, and investor concerns appear to be weighing in favour of States’ decisions to participate in arbitral proceedings or honour arbitral awards. In the case of investment disputes, there are now more than 2,500 bilateral investment treaties (‘BITs’) and a number of multilateral treaties in effect. Germany is the leader in this field, to date being the signatory to 147 BITs, and having signed the first ever BIT in 1959 with Pakistan. In most such treaties, States agree to submit disputes which qualify as investment disputes under such treaties to one or another form of international arbitration. Depending on the legal regime that the investment arbitration is subject to, the States effectively waive their sovereign immunity against jurisdiction, enforcement and execution for the particular dispute. They do so either by implied or express waiver or by operation of the national laws of the enforcing States (eg the Foreign States Immunities Act 1966 No 196 [Aus]; or the State Immunity Act 1978 c 33 [Eng]; → State Immunity). In most cases, the dispute resolution clauses of such BITs or multilateral treaties are triggered by the relevant State’s alleged breach of an obligation arising under the treaty or under → customary international law; for example, a breach of an obligation to grant most favoured nation status (see also → Most-Favoured-Nation Clause), to ensure fair and equitable treatment or provide just → compensation in the case of expropriation. Such arbitrations are brought by investors on the basis of an arbitration agreement between States in a BIT or a multilateral treaty, and thus without direct contractual privity between the investor and the State sued. In some cases, there is in fact an additional direct contractual relationship between the investor and the State, eg when the investment arises in the context of a public procurement.

Arbitral proceedings involving a State or State entity may take place under a variety of ad hoc or institutional arbitration rules frameworks, including those discussed in paras 18–41 above. However, there are also two international institutions—the → International Centre for Settlement of Investment Disputes (ICSID) and the → Permanent Court of Arbitration (PCA)—that are primarily concerned with disputes where one of the parties is a State or State entity.

ICSID awards are more easily, and more widely, enforceable than arbitral awards which have to be enforced under the New York Convention. Under the ICSID framework, the contracting States undertake to recognize an award rendered pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (‘ICSID Convention’) as binding and to enforce the obligations imposed by any such award within their respective territories as if it were a final judgment by a court in that State. Furthermore, an ICSID award is enforceable in a contracting State without any recourse to review or revision (Art. 51 (1) ICSID Convention). Instead, the remedies available for an ICSID award are limited to those set forth in the ICSID Convention itself: interpretation of the meaning or scope of the award (Art. 50 ICSID Convention), revision on the basis of discovery of a previous unknown fact of decisive importance (Art. 51 ICSID Convention), and notably annulment by an ad hoc committee, not a national court (Art. 52 ICSID Convention). To date, 149 States have ratified the ICSID Convention and the number of arbitrations under the ICSID framework has increased sharply in recent years. Recent notable accesses to the ICSID Convention include Canada, Serbia and Syria, notable non-adherents include the Russian Federation and Latin American States such as Brazil and Mexico.

Investment arbitration is to some extent different in its nature from commercial arbitration. A State is necessarily a party to an investment arbitration, whereas a commercial arbitration is normally conducted between private parties with the caveat that under certain circumstances a State might also be party to a commercial arbitration. Hence, commercial arbitration is solely a private matter between the parties, subject to the principle of confidentiality as elaborated in para. 7 above. The involvement of States on the other hand entails political interests and public coffers, making the arbitration a matter of public interest. The main distinction, though, refers to the law applicable to the merits. In commercial arbitration, the tribunal predominantly applies the national law of a State whereas investment arbitration is invariably a playing field for public → international law: To be precise, sometimes as many as four different sources of law can be distinguished in investment arbitration: first, principles of public international law; second, the terms of the applicable BIT; third, the contractual provisions between the State and the investor; and fourth, the domestic law of the party involved. The interplay between these different sources of law is of a complex nature and is reflected, by way of example, in cases such as the → Maffezini v Spain Case; → SGS v Pakistan and SGS v Philippines Cases, → Vivendi (Compañía de Aguas del Aconcagua) v Argentina Case, and → Wena v Egypt Case.

In recent years, debate has sparked over the applicability of BITs in respect of sovereign debt instruments and protection against sovereign debt default, which—by its nature—possibly involves a large number of claimants, such as in the case of the debt default by Argentina. Typically, BITs do not explicitly exclude sovereign debt from the scope of these treaties. Conversely, it is by no means clear that debt restructuring issues are or should be covered by the ‘investment’ definition of BITs. This debate has attained new significance since 2009, when the EU obtained the exclusive competence for foreign direct investment within the scope of Arts 206 and 207 TFEU as part of the common commercial policy. In Europe, in the context of the financial crisis in the Euro area, the question of whether sovereign debt falls within the scope of intra-EU BITs has been raised, although the same limitations concerning the definition of ‘investment’ apply with respect to extra-EU BITs.

Arts 206 and 207 TFEU have raised fundamental questions as to whether this new power of the EU to regulate foreign direct investment must necessarily imply that BITs between Member States have become incompatible with EU law and will have to be terminated. The European Commission has clearly expressed this view and has intervened in arbitrations in support of the position that the arbitral tribunal lacked jurisdiction to hear the dispute because the claim to jurisdiction was based on an intra-EU BIT. One such matter was → Eurokraft v Slovakia. When Slovakia challenged an interim award confirming the jurisdiction of the tribunal, the case was brought before the Frankfurt Court of Appeals (Oberlandesgericht), which upheld the award. This decision was recently challenged before the German Federal Supreme Court (Bundesgerichtshof) which issued a procedural order according to which the proceedings currently before it have become moot. Notwithstanding the challenge to the interim award in the German courts, the arbitral tribunal proceeded with the arbitral proceedings. On 7 December 2012 it issued an award in favour of Eurokraft. Thus, no substantive decision on the unconfined effectiveness of intra-EU BITs has yet been rendered.

With respect to the status of BITs entered into by EU Member States and non-EU States (‘extra-EU BITs’) following the Lisbon Treaty, some clarity is provided to investors by EU Regulation No 1219/2012 of 12 December 2012. It confirms that extra-EU BITs signed before 1
E. Evaluation

Arbitration has traditionally played an important role as the preferred mechanism of dispute resolution in the field of international business transactions. The reasons for this lie essentially in the advantages which arbitration potentially offers over proceedings before national courts or alternative dispute resolution mechanisms. The most compelling of these are arbitration's neutrality and the worldwide enforceability of arbitral awards, as well as the flexibility of the arbitral proceedings themselves, achieved partly through the ability of the parties to directly select the arbitral tribunal.

The success of the arbitral process is, however, highly dependent on, among other elements, the arbitral tribunal itself and national systems of law. In this context, international conventions such as the New York Convention and model legislative instruments, such as the UNCITRAL Model Law, have played an increasingly important role in ensuring a harmonization in national arbitration legislation, thereby in turn effecting a certain convergence in national caselaw and facilitating the recognition and enforcement of both international arbitration agreements and arbitral awards. Other international treaties and the arbitrations which they have spawned, particularly in the field of international foreign investment, are a testament to the ever-increasing importance of arbitration in resolving international commercial disputes involving private and State parties.

Select Bibliography

RH Kreindler JK Schäfer and R Wolff Schiedsgerichtsverfahren: Kompendium für die Praxis (Verlag Recht und Wirtschaft Frankfurt am Main 2006)
E Gaillard Aspects philosophiques du droit de l'arbitrage international (Nijhoff Leiden 2008).
J-P Lachmann Handbuch für die Schiedsgerichtspraxis (3rd edn Verlag Dr Otto Schmidt Köln 2008).
F Namfour Droit et pratique de l'arbitrage interne et international (3rd edn Bruylant Bruxelles 2000).
JH Nieden and AB Herzberg Praxis der Internationalen Auslands-Arbitrage (Verlag Dr Otto Schmidt Köln 2013).

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Select Documents

Arbitration Rules of the Singapore International Arbitration Centre (SIAC Rules) (1 April 2013)
Convention on the Execution of Foreign Arbitral Awards (signed 26 September 1927, entered into force 25 July 1929) 92 LNTS 301.
International Chamber of Commerce Rules of Arbitration (ICC Rules) (in force as from 1 January 2012)
Sapphire International Petrleums Ltd v National Iranian Oil Company (1963) 35 ILR 130.