

# INTERNATIONAL ARBITRATION – AN OVERVIEW

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## 1. Arbitration defined

- 1.1.1 “Arbitration” has both contractual and judicial elements. It is a private and consensual form of adjudicative dispute resolution based on an agreement between parties. An arbitration agreement refers a current or future dispute between parties that arises from a defined legal relationship to an impartial third party (the arbitral tribunal), typically appointed by the parties. The arbitral tribunal is tasked with settling the parties’ dispute in a judicial manner after hearing both sides and the parties agree to be bound by the result.
- 1.1.2 Pursuant to the Model Law (1985)<sup>1</sup> promulgated by UNCITRAL, an arbitration may be defined as an “international” arbitration if:
- the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states; or
  - one of the following places is situated outside the state in which the parties have their places of business:
    - the place of arbitration if determined in, or pursuant to, the arbitration agreement;
    - any 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; or
    - the parties have agreed expressly that the subject matter of the arbitration agreement relates to more than one country.<sup>2</sup>

## 2. Institutional and ad hoc arbitration

### 2.1 Institutional arbitration

- 2.1.1 An “institutional” arbitration is an arbitration conducted under the auspices and pursuant to the rules of an established arbitral institution. In institutional arbitrations, certain procedural steps, for example the appointment of the arbitral tribunal or service of documents, may involve or be administered by the president or secretariat of the arbitral institution (see further below).
- 2.1.2 In the area of international commercial arbitration, there are a number of leading international arbitral institutions, such as the International Chamber of Commerce

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<sup>1</sup> See CMS Guide to Arbitration, vol II, appendix 2.1.

<sup>2</sup> See generally E Gaillard and J Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (1999) s 78 et seq; J Lew, L Mistelis and S Kröll, *Comparative International Commercial Arbitration* (2003) s 4.28 et seq; and N Blackaby, C Partasides, A Redfern and J M H Hunter, *Redfern and Hunter on International Arbitration* (5th Edition, 2009) s 1.23–1.24.

**(ICC)**,<sup>3</sup> the London Court of International Arbitration **(LCIA)**,<sup>4</sup> the Swiss Chambers of Commerce and Industry,<sup>5</sup> the German Institution of Arbitration **(DIS)**<sup>6</sup> and others.

- 2.1.3 In addition, most countries have their own commercial arbitral institutions which deal both with domestic and international arbitrations.
- 2.1.4 There are also a number of specialist trade associations which administer their own arbitration schemes, dealing with disputes concerning, for example, particular internationally traded commodities, or shipping. Leading examples of such specialist arbitration schemes are those set up by the Grain and Feed Trade Association **(GAFTA)**,<sup>7</sup> the Waren-Verein der Hamburger Börse e.V.,<sup>8</sup> the London Metal Exchange **(LME)**,<sup>9</sup> the German Maritime Arbitration Association **(GMAA)**<sup>10</sup> and the London Maritime Arbitrators Association **(LMAA)**.<sup>11</sup> Many countries also have arbitral institutions which deal primarily with disputes in the construction industry.<sup>12</sup>
- 2.1.5 Most arbitral institutions have published their own arbitration rules, which parties may incorporate into their arbitration agreements by reference, using standard form arbitration clauses suggested by these arbitral institutions. Sample clauses recommended by selected leading arbitral institutions are set out in Volume II, Appendix 5 to this Guide and the arbitration rules of the main arbitral institutions in force on 31 January 2012 are set out in Volume II, Appendix 3.
- 2.1.6 If institutional arbitration rules are adopted by the parties in their arbitration agreement, these rules replace (to the extent permitted by the substantive law governing the arbitration agreement and the procedural law governing the arbitral

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<sup>3</sup> See: [<http://iccwbo.org/>] (accessed 23 January 2012).

<sup>4</sup> See: [<http://www.lcia.org/>] (accessed 23 January 2012).

<sup>5</sup> See: [<http://www.cci.ch/>] (accessed 23 January 2012).

<sup>6</sup> See: [<http://www.dis-arb.de/>] (accessed 23 January 2012).

<sup>7</sup> See: [<http://www.gafta.com/>] (accessed 23 January 2012).

<sup>8</sup> See: [<http://www.waren-verein.de/>] (accessed 23 January 2012).

<sup>9</sup> See: [<http://www.lme.com/>] (accessed 23 January 2012).

<sup>10</sup> See: [<http://www.gmaa.de/>] (accessed 23 January 2012).

<sup>11</sup> See: [<http://www.lmaa.org.uk/>] (accessed 23 January 2012).

<sup>12</sup> J Jenkins and J Stebbings, *International Construction Arbitration Law* (2006); and E H W Chan and C K L Chan, et al., "Construction Industry Adjudication: A Comparative Study of International Practice", *Journal of International Arbitration* (2005) pp 363–374.

proceedings, and to the extent that the parties have not agreed otherwise) the non-mandatory statutory arbitration procedure provided for by the national arbitration laws of the country where the arbitration has its “seat”. Most arbitral institutions also have a secretariat which, in return for payment of a fee, will assist the parties with the administration of their arbitral proceedings and with constituting an arbitral tribunal by appointing arbitrators where this cannot be achieved by agreement between the parties.<sup>13</sup>

2.1.7 Agreeing to the rules of an international arbitral institution, and thereby benefiting from the services provided by that arbitral institution in relation to any arbitration which arises, may provide the following advantages:

- the arbitration will take place within an internationally recognised and established procedural framework;
- the arbitration will take place pursuant to comprehensive, clear and tested arbitration rules;
- the arbitration will take place with the administrative assistance of an experienced secretariat, which will be able to help the parties and the arbitral tribunal on a large variety of procedural issues;
- the arbitral institution can assist the parties with respect to the appointment of arbitrators and is well-suited to make a default appointment if a party fails to appoint an arbitrator or if it is not possible to agree on an arbitrator;
- some arbitral institutions (in particular the ICC) carry out quality control over the work of the arbitral tribunals appointed under their auspices (e.g. by reviewing draft awards prior to their publication) and monitor the progress of the proceedings;
- disputes between the parties about the application of statutory arbitration procedures of the country where the arbitration has its seat can be avoided so long as the provisions are not mandatory; and
- in international commercial arbitration, institutional arbitration is often regarded as a “neutral choice”.

2.1.8 The disadvantages of institutional arbitration are that:

- additional costs are incurred by the parties in the form of fees for the administrative services provided by the arbitral institution; taking into account the overall costs of arbitral proceedings, however, these fees are modest in most cases (a very low percentage of a party’s overall legal expenditure when conducting arbitral proceedings); and
- the involvement of a secretariat may delay the arbitral proceedings.

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<sup>13</sup> J Lew, L Mistelis and S Kröll, *Comparative International Commercial Arbitration* (2003) s 10.51 et seq.

## 2.2 Ad hoc arbitration

- 2.2.1 An “ad hoc” arbitration is an arbitration pursuant to an arbitration agreement between the parties which does not specify an arbitral institution to provide administrative services and/or the procedural rules pursuant to which an arbitration shall be conducted. When agreeing to an ad hoc arbitration, the parties can either design their own arbitral procedure to suit their particular requirements, refer to “non-institutional” arbitration rules such as the UNCITRAL Arbitration Rules (2010),<sup>14</sup> or simply rely on the arbitration law of the country where the arbitration has its seat to provide the procedural framework for their arbitral proceedings.
- 2.2.2 In some circumstances, there may be advantages to opting for an ad hoc arbitration. Ad hoc arbitration offers increased flexibility by permitting the parties to agree the dispute resolution procedures themselves (although this process is likely to be easier if the procedure is agreed before a dispute arises). This added flexibility may be used, for example, to allow the parties to impose or control the speed with which the arbitration progresses to an award and the costs of the arbitration. In contrast, in an institutional arbitration, the parties may be subject to rules that impose longer deadlines or require lengthy, time consuming procedures (e.g. English-style disclosure). Similarly, the arbitral institution will set the costs of the arbitration and apply its own administration costs for its work, whereas in an ad hoc arbitration, for example, the arbitrators and the parties may negotiate directly the arbitrators’ fees and avoid the arbitral institution’s administration fees (although it is noted that these costs savings may be diminished from having to incur the costs to agree the terms of the ad hoc arbitration rules between the parties).
- 2.2.3 There are advantages and disadvantages connected with both institutional and ad hoc arbitration. However, despite the advantages of ad hoc arbitration discussed above, as a general rule, parties are well-advised to agree on arbitration administered by one of the leading arbitral institutions. The main international arbitral institutions regularly revise and update their rules and they are generally keen to ensure that the parties, having chosen their arbitral institution, benefit from the advantages outlined above. For example, unlike in ad hoc arbitral proceedings, the arbitral institution may exercise some informal control over the speed at which the arbitrators deal with the matter and the fixing of the arbitrators’ fees.<sup>15</sup>

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<sup>14</sup> See CMS Guide to Arbitration, vol II, appendix 3.2.

<sup>15</sup> See Report from the ICC Commission on Arbitration (ICC Publication 843), *Techniques for Controlling Time and Costs in Arbitration*, 2007; and see CMS Guide to Arbitration, vol II, appendix 4.3.

- 2.2.4 This Guide will explore the national arbitration laws applicable in a large variety of jurisdictions including some of the leading European and Asian arbitration centres, as well as Australia, China, South America and New York, and provides selected reference materials on international commercial arbitration.

### **2.3 The importance of national arbitration legislation**

- 2.3.1 Even in an international context, national arbitration legislation remains relevant. First, it provides back-up procedures, which apply if the parties have not adopted a specific set of institutional arbitration rules in their arbitration agreement, or have not included in their arbitration agreement tailored rules dealing with the specific procedural issues which arise. Second, there are a number of important areas in which the application of national arbitration law is mandatory even where the parties have agreed upon an ad hoc procedural framework or to subject their arbitration to institutional arbitration rules.<sup>16</sup>
- 2.3.2 In addition to the national arbitration laws of the country in which the arbitration has its seat, parties may also need to consider the national arbitration laws of countries where (parts of) the arbitral proceedings take place, where relevant evidence or assets are located, or where an award is to be enforced. In addition to the national arbitration laws of the seat, these other legal regimes may apply and may confer jurisdiction on national courts other than those where the arbitration has its seat.
- 2.3.3 National arbitration law continues to determine, in particular, issues such as:
- the validity and scope of the arbitration agreement;
  - the arbitrability of disputes;
  - mandatory rules of law;
  - the remedies that the arbitral tribunal may grant;
  - the right of the parties to invoke the jurisdiction of the courts in arbitration; and
  - applications, including appeals and challenges to awards, before national courts.
- 2.3.4 Most of the European countries (and many non-European countries) covered in this Guide have in recent years reformed their national arbitration legislation to a greater or lesser extent on the basis of or by reference to the UNCITRAL Model Law on International Commercial Arbitration, which was first published by

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<sup>16</sup> M Blessing, "Mandatory Rules of Law versus Party Autonomy in International Arbitration", *Journal of International Arbitration* (1997) pp 23–40; G C Moss, *International Commercial Arbitration – Party Autonomy and Mandatory Rules* (1999); and J Sicard-Mirabal, "Mandatory Rules: What's a Lawyer to Do?", in A J van den Berg (ed), *Arbitration Advocacy in Changing Times, ICCA Congress Series* (2010) pp 348–361.

UNCITRAL in 1985 (Model Law (1985)) and in an amended version in 2006 (Model Law (2006)).<sup>17</sup> The Model Law (1985) (as amended by the Model Law (2006)) is increasingly accepted internationally as the model to which countries look when it comes to updating their arbitration legislation. As a result, the emerging similarity of approach makes arbitration laws increasingly more uniform and arbitration more attractive as a means of resolving international business disputes.<sup>18</sup>

### 3. The arbitration process

- 3.1.1 Because arbitration is based on the consent of the parties to submit their dispute to arbitration instead of state courts, arbitration can be described as “privatised court proceedings”. Court and arbitral proceedings are essentially adjudicative processes and a number of key features of arbitral proceedings are similar to court procedures. Following the constitution of the arbitral tribunal, the parties file submissions. Thereafter, they produce evidence upon which they rely (which may be documentary, written or oral, or a combination of all three). There will usually be one or more hearings before the arbitral tribunal, providing the parties their “day in court”, although it is possible to have a “documents only” arbitration. Following the substantive hearing, the arbitral tribunal will deliver its award, which may then be enforced in the same way as a court judgment.
- 3.1.2 It is important that due process considerations are satisfied when parties set out to resolve their disputes by arbitration. Ensuring procedural fairness is an important concern of arbitration laws discussed in this Guide.<sup>19</sup> However, in most cases and, in particular, in an international dispute, it would come as a surprise and prove unsatisfactory if the arbitral tribunal simply copied court procedures. Such an approach does not make use of the principal advantage of arbitration over court litigation: procedural flexibility. A party aware of the potential flexibility of arbitral proceedings may have an advantage over its opponent by seeking to agree or asking the arbitral tribunal to adopt procedures appropriate to the nature of the dispute in question.
- 3.1.3 One of the key features of the arbitration laws discussed in this Guide is that they provide the parties with a large degree of autonomy in the conduct of their arbitral

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<sup>17</sup> See Guide to Arbitration, vol II, appendix 2.1 and 2.2.

<sup>18</sup> F Weigand, *Practitioner's Handbook on International Commercial Arbitration* (2nd Edition, 2009) ch. 1, recital 1.99 *et seq.*

<sup>19</sup> See, for example, B Hanotiau and O Caprasse, “Arbitrability, Due Process, and Public Policy Under Article V of the New York Convention”, *Journal of International Arbitration* (2008) pp 721–741.

proceedings,<sup>20</sup> and the arbitral tribunal with wide-ranging procedural powers, to ensure that the conduct of any arbitration is proportionate and appropriate to the issues in dispute, subject only to such safeguards as are necessary in the public interest.

## 4. Arbitration distinguished

### 4.1 Arbitration/litigation

4.1.1 Litigation seeks to resolve disputes between parties in public proceedings before a judge in a court of competent jurisdiction provided by the state; the judge obtains his or her authority to act in the proceedings between the parties from the state.

4.1.2 Arbitration, by contrast, is a private (and, at least in principle, confidential)<sup>21</sup> form of dispute resolution based on an agreement between the parties to refer a current or future dispute between them to arbitration. Instead of a judge, the parties appoint an arbitral tribunal (usually consisting of one or three arbitrators) as an impartial third party to resolve their dispute in a judicial manner after hearing both sides. The parties agree to be bound by the result. The arbitral tribunal obtains its authority to act in the arbitration from the agreement of the parties to refer their dispute to arbitration. Unless otherwise agreed, the members of the arbitral tribunal usually need not be lawyers or legally qualified and may be selected for their specialist knowledge of particular fields in commerce, industry, science, etc.

### 4.2 Arbitration/ADR

4.2.1 The term Alternative Dispute Resolution (**ADR**) covers a wide range of dispute resolution techniques ranging from structured negotiation, through mediation and conciliation to adjudication, early neutral evaluation, expert determination, mini trial and many others.

4.2.2 The common characteristic of mediation and conciliation, in particular, is that they aim to produce an amicable settlement between the parties while avoiding formal proceedings, and thereby to create a “win/win” solution to the dispute from which both parties benefit without there necessarily being a winner and a loser. These methods seek to neutralise the adversarial nature of formal legal proceedings.

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<sup>20</sup> Cf M Pyles, “Limits to Party Autonomy in Arbitral Procedure”, *Journal of International Arbitration* (2007) pp 327–339; J Lew, L Mistelis and S Kröll, *Comparative International Commercial Arbitration* (2003) s 1.11; and N Blackaby, C Partasides, A Redfern and J M H Hunter, *Redfern and Hunter on International Arbitration* (5th Edition, 2009) s 1.73.

<sup>21</sup> See section 5.6 below.

- 4.2.3 Although ADR can be a useful tool to deploy either before or during arbitral proceedings, the success of ADR is dependent on the continuing co-operation and goodwill of the parties: they need to be prepared to settle their dispute by agreement because no solution can be imposed upon them and ADR will not result in an enforceable and binding decision. However, once a substantial dispute has arisen between the parties, the scope for party co-operation may often already have been exhausted. In such circumstances, there must be a mechanism, as a last resort, by which one party can enforce its rights as against the other and obtain a binding and enforceable ruling from an impartial tribunal. Only litigation or arbitration can provide this protection of the rights of a party.

## 5. The comparative advantages and disadvantages of arbitration and litigation

### 5.1 The arbitral tribunal

- 5.1.1 In arbitration the parties are free to choose their own arbitral tribunal and can appoint an arbitrator with special technical or commercial qualifications, expertise and knowledge of the subject matter of their dispute, of the technical terminology and of the customs of their trade (while also having the relevant legal expertise as necessary). This can contribute to the overall efficiency, speed and cost-effectiveness of the dispute resolution process because an arbitrator chosen for his or her specialist knowledge or experience of a trade, industry, product or process does not need lengthy technical explanations of such matters, as a judge may do. Also, an arbitrator's award may be better reasoned because of a more thorough understanding of the issues underlying the dispute.
- 5.1.2 Having said this, in addition to factual issues, the crucial issues in dispute between the parties may also raise difficult questions of law. In such a situation, it may be more prudent for the parties to appoint legally qualified arbitrators, who may also have the relevant expertise to assess the factual issues of the case. In many areas of law where specialist know-how is required in order to be able properly to determine the dispute (examples are international construction projects or post M&A disputes), arbitration can offer advantages over state court proceedings, because the parties can ensure that the members of the arbitral tribunal are experienced in this area of law. A further advantage of arbitration in this respect is that there is continuity in the composition of the arbitral tribunal appointed to settle the dispute. This differs to court proceedings in many countries where a number of different judges may be involved in a case at its various stages. An arbitrator is, in principle, appointed to deal with a particular dispute from beginning

to end. This continuity enables the arbitrator to get to know the parties, their advisers and the case as it develops. Should the opportunity arise, he or she is therefore well placed to guide the parties in developing a suitable procedure for resolving their dispute (and perhaps in reaching a negotiated settlement in the course of the proceedings).

- 5.1.3 On the other hand, the powers which may be exercised by an arbitral tribunal are more limited than those conferred on a court of law. Should it become necessary for an arbitral tribunal to take enforcement steps (for example, in relation to interim protective measures, or compelling the attendance of witnesses to give evidence before it), such action can generally only be taken indirectly by the arbitral tribunal with the assistance of the courts.

## 5.2 Representation

- 5.2.1 In arbitration the parties can also decide whether they want to be represented in the proceedings by a lawyer, or by a technical expert, or by any other person of their choice, or whether they prefer to dispense with representation altogether. Generally in court proceedings, parties are required to be represented by advocates qualified in the jurisdiction of the relevant court.

## 5.3 Flexibility and party autonomy

- 5.3.1 A major advantage of arbitration is its flexibility.<sup>22</sup> Arbitration does not need to follow narrow court rules and can, therefore, take better account of the fact that the resolution of different disputes may require different approaches.
- 5.3.2 The parties to an arbitration are given wide autonomy and are able to exercise greater control over the dispute resolution process than in court proceedings. They may design the arbitration process so that it is best suited and appropriate to dispose of the issues in dispute between them or in order to meet commercial or other requirements.
- 5.3.3 In particular, in international disputes with parties from different jurisdictions and legal cultures, this flexibility provides a major advantage of arbitration, as the parties and the arbitral tribunal are able (and in fact expected) to adapt the arbitral proceedings to the individual circumstances of the case, taking into account the different legal backgrounds of the parties.<sup>23</sup>

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<sup>22</sup> E Gaillard and J Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (1999) s 53.

<sup>23</sup> For details see section 5.8 below.

- 5.3.4 A further advantage of the flexibility of international arbitration is that the parties may agree on measures to reduce costs and to speed up the arbitral proceedings.<sup>24</sup> For example, they may do the following:
- adopt fast track procedures aimed at resolving the dispute as quickly as possible;
  - limit the evidence which may be presented to the arbitral tribunal; and
  - limit the extent of disclosure of documents (in jurisdictions which provide for disclosure of documents, such as England).
- 5.3.5 Often, by adopting the rules of arbitration of an international arbitral institution in their arbitration agreement, the parties will enable themselves to benefit in the above respects, as those rules will authorise the arbitral tribunal to adopt such measures if it considers them to be appropriate.
- 5.3.6 Furthermore, the parties may also agree to make the arbitration process more convenient by holding hearings in unconventional places (for example, on a construction site, on board a ship or indeed in cyberspace (i.e. so-called ‘online arbitration’),<sup>25</sup> or at unconventional times (for example, by making use of video-link facilities while bridging different time zones), or by communicating by e-mail.
- 5.3.7 Finally, the parties may choose the substantive law to be applied by the arbitral tribunal, or they may agree that the arbitral tribunal does not have to make its decision based on the law but on other principles, such as trade usage, or even *ex aequo et bono* (i.e. on the basis of equitable principles of fair dealing), or under the principles of the *lex mercatoria* (i.e. internationally recognised principles of merchant law and trade customs).

## 5.4 Speed

- 5.4.1 Arbitral proceedings have the potential to be speedier than court proceedings, particularly in countries with over-burdened court systems. The parties can control the procedure applied to the arbitral proceedings, may agree a more or less strict timetable and have only limited bases for challenging awards of the arbitral tribunal.<sup>26</sup> Nevertheless, there is no guarantee that arbitration will necessarily save time compared to litigation. Arbitration is, to a certain extent, consent-driven and the arbitral tribunal has less robust armoury in the face of a recalcitrant party than

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<sup>24</sup> On techniques for reducing time and costs of proceedings see CMS Guide to Arbitration, vol II, appendix 4.3.

<sup>25</sup> A J van den Berg, “Organizing an international Arbitration: Practice Pointers” in L Newman and R Hill (eds), *The Leading Arbitrators’ Guide to International Arbitration* (2nd Edition, 2008) ch 9 IX; and see in general M Hwang and F L Cheng, “Relevant Considerations in Choosing the Place of Arbitration”, *Asian International Arbitration Journal* (2008) pp 195–220.

<sup>26</sup> See Model Law (1985), art 34 (see CMS Guide to Arbitration, vol II, appendix 2.1).

a court judge. An obstructive party can sometimes seek to delay the arbitral proceedings by invoking the supervisory jurisdiction of the courts at the seat of the arbitration.<sup>27</sup>

- 5.4.2 Quicker and cheaper proceedings, such as summary proceedings to enforce payment of liquidated debts, are sometimes available in the courts. In the early stages of any dispute the immediacy of arbitration may be less than that of court proceedings because it may take time for the arbitral tribunal to be constituted. However, some arbitral institutions (e.g. LCIA and ICC) offer the possibility of expedited arbitral proceedings or the appointment of an emergency arbitrator.<sup>28</sup> Furthermore, in some jurisdictions the courts are so over-burdened that even this impediment may result in a significantly earlier award than any court judgment. This is particularly the case if the judgment rendered by a state court is subject to an appeal on facts and law as this may significantly extend the duration of the proceedings before a final judgment is rendered.

## 5.5 Costs

- 5.5.1 Arbitrating a dispute rather than taking it to court may result in a saving of costs, but arbitration is not necessarily a cheaper method of resolving disputes than litigation.<sup>29</sup> In arbitral proceedings the fees and expenses of the arbitrators must be paid by the parties. It may also be necessary to pay the administrative fees and expenses of an arbitral institution. In particular, the fees and expenses of the arbitral tribunal can be considerable. Rooms for meetings and hearings and other services also have to be paid for by the parties to arbitral proceedings.
- 5.5.2 In litigation, the services of the judge and court officers, and the premises for hearings, are provided by the state and covered by the court fees (which tend to be lower but may be considerable as well).

## 5.6 Confidentiality

- 5.6.1 Arbitration is frequently a confidential process and hearings are normally conducted in private, while court hearings are generally held in public. In commercial arbitration the documents produced by the parties, and the arbitral tribunal's award, generally remain confidential. It is, therefore, easier for the parties to avoid damaging publicity, to preserve trade secrets and to protect sensitive commercial

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<sup>27</sup> On delaying tactics in arbitral proceedings, see A Frécon, "Delaying Tactics in Arbitration", *59 Dispute Resolution Journal* (2004) pp 40–52.

<sup>28</sup> See, for example, LCIA Arbitration Rules, art 9 (CMS Guide to Arbitration, vol II, appendix 3.12).

<sup>29</sup> C R Drahozal, "Arbitration Costs and Forum Accessibility: Empirical Evidence", *41 University of Michigan Journal of Law Reform* (2008) pp 813–841.

information. The confidentiality of arbitration may also help to maintain a valuable business relationship between the parties for the future.

- 5.6.2 Not all jurisdictions in which an arbitration may take place hold that arbitration is confidential as a matter of principle and not all institutional rules impose confidentiality on arbitrations administered pursuant to their rules. If there is any doubt, confidentiality provisions can (and often should) be built into the arbitration agreement or enshrined in a separate confidentiality agreement. Such provisions are usually upheld in most jurisdictions.<sup>30</sup>

## 5.7 Certainty

- 5.7.1 Arbitration may more quickly result in the rendering of a definitive decision than litigation proceedings. Under modern arbitration statutes, the award is normally final and binding, with only limited grounds for any challenge of the award. In certain jurisdictions, the right to appeal or challenge an award may be further restricted in the arbitration agreement. In a commercial environment, where all parties need to know where they stand as soon as possible, this can be a considerable advantage of arbitration over litigation where obstructive parties can delay the final outcome of a dispute for years by pursuing a protracted series of appeals. If necessary, an award can in most circumstances readily be enforced through the courts in the same way as a final court judgment.

## 5.8 International disputes

- 5.8.1 Arbitration has particular advantages in relation to disputes with an international element. When agreeing to arbitration, a claimant does not have to submit the dispute to the jurisdiction of a foreign court,<sup>31</sup> which will frequently be a court in the respondent's home country (e.g. under the rules of international civil procedure as established, for example, in the EU Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments (**Regulation 44/2001**) or the 1988 Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (**Lugano Convention**)).<sup>32</sup>

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<sup>30</sup> See M Pyles, "Confidentiality", in L Newman and R Hill (eds), *The Leading Arbitrators' Guide to International Arbitration* (2nd Edition, 2008) ch 24 II D for examples of institutional confidentiality clauses; N Blackaby, C Partasides, A Redfern and J M H Hunter, *Redfern and Hunter on International Arbitration* (5th Edition, 2009) s 1.96; and E Gaillard and J Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (1999) s 1132.

<sup>31</sup> Arbitration is expressly excluded from the application of Regulation 44/2001 and the Lugano Convention. See Art. 1(2)(d) of Regulation 44/2001 and the Lugano Convention.

<sup>32</sup> On the recent discussion regarding relation between Regulation 44/2001 and arbitration in light of the West Tankers case, see J Grierson, Comment on *West Tankers Inc. v. RAS Riunione Adriatica di Sicurta S.p.A. (The Front Comor)*, *Journal of International Arbitration* (2009) pp 891–901; N Blackaby, C Partasides, A Redfern and J M H Hunter, *Redfern and Hunter on International Arbitration* (5th Edition, 2009) s 5.133 *et seq*; and see in terms of a revision of the regulation G Carducci, "Arbitration, Anti-suit Injunctions and Lis Pendens under the European Jurisdiction Regulation and the New York Convention", *Arbitration International* (2011) pp 171–197.

- 5.8.2 An international arbitral tribunal does not represent the home court of any party and a “neutral” country can be selected as the seat of, and venue for, the arbitration. This can be of particular relevance if a foreign state or foreign state entity is involved in the dispute as a party, and sovereignty considerations prevent submission under the jurisdiction of the courts of another country.<sup>33</sup> The parties are also free to agree on the language (or languages) of the arbitration.
- 5.8.3 A total of 146 states<sup>34</sup> – including most of the leading trading nations – have now ratified the New York Convention<sup>35</sup> and other multilateral conventions or bilateral treaties providing for the recognition and enforcement of awards between signatory states. It is, therefore, generally possible to enforce an award in another jurisdiction more easily than a foreign court judgment. Enforcement of awards will be addressed in more detail in the country chapters. A list of the signatories to the New York Convention on 31 January 2012 is in Volume II, Appendix 1.3 to this Guide.
- 5.8.4 In international disputes arbitral tribunals can, within the (broad) limits provided for by the applicable procedural law of the seat,<sup>36</sup> adopt procedures recognising that the parties may come from different legal systems. Those procedures can – and, in many cases, in fact do – represent a compromise reflecting a middle course between the parties’ legal systems or an entirely different approach to the parties’ national courts. As mentioned above, the flexibility of arbitration as a dispute resolution mechanism is a major advantage in this context.<sup>37</sup>

## 5.9 Limitations on arbitration

- 5.9.1 Arbitration is a contract-based process, therefore the submission of disputes to arbitration is usually limited to disputes arising between the contracting parties and limited to the scope of the arbitration agreement. This principle of contractual privity can give rise to problems in multi-party situations where the rights of third parties may be affected by a dispute.<sup>38</sup> However, such circumstances can often be anticipated and appropriate provision be made in the arbitration agreement at the

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<sup>33</sup> See generally on arbitral proceedings involving states: K Hobér, “Arbitration involving states”, in L Newman and R Hill (eds), *The Leading Arbitrators’ Guide to International Arbitration* (2nd Edition, 2008) ch 29; and R H Kreindler, “Perspectives on state Party Arbitration: The Future of BITs – The Practitioner’s Perspective”, *Arbitration International* (2007) pp 43–62.

<sup>34</sup> See [[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html)] (accessed 23 January 2012).

<sup>35</sup> See CMS Guide to Arbitration, vol II, appendix 1.1.

<sup>36</sup> Which will, in many cases, be in France, Switzerland, the United Kingdom, the United States and Germany. See W L Craig, W W Park and J Paulsson, *International Chamber of Commerce Arbitration* (3rd Edition, 2000) s 1.07, p 11.

<sup>37</sup> See section 5.3 above.

<sup>38</sup> With respect to arbitration in multi-party situations, see G Born, *International Commercial Arbitration* (2009) pp 2073 *et seq*; and N Blackaby, C Partasides, A Redfern and J M H Hunter, *Redfern and Hunter on International Arbitration* (5th Edition, 2009) s 1.105 *et seq*.

contract drafting stage. Some national arbitration laws and institutional arbitration rules expressly address specific problems to which multi-party disputes may give rise.

- 5.9.2 Absent agreement between all parties involved, it may not be possible to consolidate multi-party disputes before the same arbitral tribunal; whereas in court litigation all relevant parties can usually be joined in one action and multiple proceedings concerning the same parties or subject matter can be consolidated on application so that they can be heard (and decided) at the same time. Moreover, unless all the issues arising between the parties are within the scope of the arbitration agreement, it may be necessary to resolve the outstanding issues in separate but parallel court and/or arbitral proceedings, which may give rise to an inherent risk of conflicting decisions in relation to the subject matter of the dispute.
- 5.9.3 Finally, certain civil and commercial disputes (e.g. disputes relating to personal status and insolvency issues) are often regarded as not arbitrable as a matter of national public policy. Such disputes may, therefore, have to be resolved in litigation.

## 5.10 International investment arbitration

- 5.10.1 An important additional aspect of international arbitration is international investment arbitration.<sup>39</sup> International investment arbitrations are proceedings brought by foreign investors against the state in which they invested (the host state) to settle claims arising directly out of their investment pursuant to an international investment treaty.<sup>40</sup> There are now over 2,500 international investment treaties and the growth in this form of dispute resolution in the last two decades has been exponential. The most important arbitral institution for the settlement of investment arbitration is the International Centre for the Settlement of Investment Disputes,<sup>41</sup> based on the Washington Convention (**ICSID**),<sup>42</sup> and which provides comprehensive rules for the initiation and conduct of investment arbitral proceedings.<sup>43</sup> Because of the involvement of state parties, investment arbitration differs from arbitration between private entities, which is often referred to as commercial arbitration. The focus of the present Guide is on commercial arbitration between private entities.

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<sup>39</sup> Cf for details R D Bishop, J Crawford *et al*, *Foreign Investment Disputes* (2005); and R Dolzer and C Schreuer, *Principles of International Investment Law* (2008).

<sup>40</sup> For details regarding international investment treaties see A Newcombe and L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009).

<sup>41</sup> On ICSID arbitration see L Reed, J Paulsson and N Blackaby, *Guide to ICSID Arbitration* (2010).

<sup>42</sup> See CMS Guide to Arbitration, vol II, appendix 1.2.

<sup>43</sup> See *ibid*, 3.9.

## 5.11 Common law and civil law traditions

### *An introduction*

- 5.11.1 The common law and civil law systems are the two main streams of western legal tradition. They are historically defined primarily by reference to their sources of law. On the one hand, there is the common law system, with its judge made law and doctrines of judicial precedent (*stare decisis*); and on the other hand, there is the civil law, with its pronounced Roman law roots and the great codifications of the nineteenth century, such as the French *Code Civil* and the *Code de Procédure Civile*, and the German *Bürgerliches Gesetzbuch* and *Zivilprozessordnung*.
- 5.11.2 All this is familiar ground to legal historians,<sup>44</sup> but how relevant is this distinction still today? What is left of the differences between common law and civil law in everyday legal practice in an age of global markets and how does it affect arbitration? Are there today more similarities than differences between the systems?
- 5.11.3 Perhaps one of the more surprising revelations of modern European comparative law is how the classical distinctions and differences between common law and civil law have become less and less clear.<sup>45</sup> In the civil law countries the code-based law can today hardly be understood or applied in practice without recourse to an ever-increasing body of case law, which interprets the codes and adapts them in a continuing process to the ever changing requirements of modern society. In common law countries, on the other hand, most areas of the law are today either directly governed by statute law or are, at least indirectly, affected by primary or secondary legislation.
- 5.11.4 Whilst in practical terms the boundaries between both systems become more and more blurred and both systems are, in addition, increasingly suffused and harmonised by an increasing volume of supranational regulations (for example, those regulations and directions enacted in the EU over its Member States), differences nevertheless remain in two important areas: legal methodology (i.e. the way lawyers think and work) and the way in which court litigation is conducted. We shall look below in more detail at some of the main differences in the way court proceedings are conducted in civil law and common law jurisdictions and at the way in which this affects arbitration. Nevertheless, even in relation to court proceedings, the civil justice reforms in England and Wales in the late 1990s, and

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<sup>44</sup> J H Merryman and R Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*, (3rd Edition, 2007) pp 6–15.

<sup>45</sup> J H Merryman, "On the Convergence (and Divergence) of the Civil Law and the Common Law", 17 *Stanford Journal of International Law* (1987) p 357.

the reforms to the Civil Procedure Rules that were introduced as a result, have adopted concepts into English procedural law that are clearly derived from continental European procedural practice.<sup>46</sup>

- 5.11.5 This Guide is concerned with arbitration rather than litigation in the state courts, but the legal system of a country and, in particular, its civil procedure, may colour the perceptions and expectations of the parties, their legal representatives and some arbitrators as to the way disputes should be resolved and their understanding of due process and procedural fairness. Understanding the differences between legal (and business) cultures helps parties to arbitral proceedings, and their legal representatives, to bridge this cultural gap, and to identify and agree cost and time-efficient procedures which, no matter what the outcome of the proceedings, provides an opportunity to put forward arguments, and have those arguments duly considered by the arbitral tribunal, ideally resulting in a fair and just award.

*Codification and judicial precedent*

- 5.11.6 In common law countries, the law consists of a mixture of common law and legislation. Judges can create new law by the decisions they make and lower courts are bound by the doctrine of precedent to follow the judgments of higher courts unless the case before them can be distinguished on the facts. Law text books are, save for a handful of exceptional treatises, not recognised as authoritative sources of the law in court proceedings. Legislation is generally passed by the legislature in a piecemeal fashion to deal with specific issues as and when they arise. Acts of the legislature are generally interpreted by the courts in a strict manner, having regard to the meaning of the words used rather than to the underlying purpose or spirit of the legislation (although recent years have seen a move away from this literal approach).<sup>47</sup> In civil law countries, the law is traditionally found primarily in a series of codes. These are intended to be comprehensive and are normally written in broader and more conceptual language than common law statutes. The courts interpret the codes having

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<sup>46</sup> "The New Civil Rules of Procedure in England: The Woolf Reforms" in (ed) *ASA Bulletin* (Association Suisse de l'Arbitrage, 1999) pp 230–232.

<sup>47</sup> See the comparison of the EU Treaty with English legislation by Lord Denning, Court of Appeal (Civil Division): The Treaty is quite unlike any of the enactments to which we have become accustomed. The draftsmen of our statutes have striven to express themselves with the utmost exactness. They have tried to foresee all possible circumstances that may arise and to provide for them. They have sacrificed style and simplicity. They have forgone brevity. They have become long and involved. In consequence, the judges have followed suit. They interpret a statute as applying only to the circumstances covered by the very words. They give them a literal interpretation. If the words of the statute do not cover a new situation – which was not foreseen – the judges hold that they have no power to fill the gap. (...) How different is this Treaty! It lays down general principles. It expresses its aims and purposes. All in sentences of moderate length and commendable style. But it lacks precision. It uses words and phrases without defining what they mean. An English lawyer would look for an interpretation clause, but he would look in vain. There is none. All the way through the Treaty there are gaps and lacunae. These have to be filled in by the judges, or by Regulations or directives. It is the European way. *HP Bulmer Ltd v. J Bollinger SA* (No.2) [1974] Ch. 401, p 425.

regard to the purpose of the law and seek to give effect to their underlying legislative intention.<sup>48</sup> Decisions of higher courts are not necessarily binding on lower courts but they are persuasive, especially those of the supreme courts.<sup>49</sup> Academics play a greater role in civil law countries than they do in common law countries and their views on the interpretation of statute law can sometimes have a similar influence as the judgments of higher courts.

*"Inquisitorial" versus "adversarial" court procedure*

- 5.11.7 In order to compare the differences between the civil law and the common law system, proceedings in the courts of civil law countries are sometimes described as "inquisitorial" rather than as "adversarial", which is the description normally given to court procedure in common law countries. This can be explained by looking at the following procedural differences between the systems.

*Statements of case*

- 5.11.8 While the focus of civil law court procedure is on written proceedings in order to enable the judge to play a proactive role from the beginning of the case, common law proceedings place a much greater importance on the oral hearing. Therefore, in common law countries, statements of case remain formal written submissions served by the parties and pled at court setting out the facts of the case but not normally covering in detail the evidence or law on which the parties intend to rely, or the arguments which they intend to raise at the hearing.<sup>50</sup>

- 5.11.9 In civil law jurisdictions, the parties' submissions tend to set out their respective cases much more fully and to contain submissions on the relevant facts, evidence and law. The documents on which the parties rely in support of their submissions are normally exhibited to the pleadings and in the submissions the witnesses will be named together with the facts on which they are able to provide testimony.

*Disclosure*

- 5.11.10 Under the common law system, the parties do not normally exhibit the documents which are relevant to the dispute to their statements of case. Instead, there is a procedure known in England as "disclosure" and in the United States as "discovery", by which the parties must disclose to each other in the form of lists all relevant documents in their control – an obligation that is very widely defined and also includes documents which are detrimental to that party's own case or

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<sup>48</sup> See, with reference to the German tradition, H M Pawlowski, *Methodenlehre für Juristen* (3rd Edition, 1999) s 359 *et seq.*

<sup>49</sup> See, with reference to the German tradition, K Larenz, *Methodenlehre der Rechtswissenschaft* (6th Edition, 1991) pp 429 *et seq.*

<sup>50</sup> On the differences regarding written proceedings see S H Elsing and J M Townsend, "Bridging the Common Law-Civil Law Divide in Arbitration", *Arbitration International* (2002) pp 59 *et seq.*

support the opposing party's case. These lists may have to be verified under oath. The documents on the list can subsequently be inspected and copied by the other party. A party can ask the court to order further specific disclosure if it believes full disclosure of all relevant documents has so far not been made.

- 5.11.11 Documents which are detrimental to a party's own case, or documents on which a party does not rely in support of its case, are not normally produced by that party in civil law proceedings unless the court makes a specific order for disclosure of individual, clearly identified documents. All other documents which the parties consider relevant to their respective cases will have already been exhibited to their submissions.<sup>51</sup>

#### *Witnesses*

- 5.11.12 Under common law procedure, detailed written statements of the witnesses' evidence are taken and exchanged before trial. The parties are witnesses in their own cause.<sup>52</sup>
- 5.11.13 In civil law jurisdictions, written witness statements are not frequently used and there is no general procedure for the exchange of such statements before trial. Before civil law courts, parties cannot normally give evidence in their own cause.
- 5.11.14 In a common law trial, witnesses are examined orally although their written statement may stand as their evidence in chief. The witness is then cross-examined by the opposing parties' lawyers. The judge will ask few (if any) questions, mainly to clarify the evidence which a witness has given, rather than to elicit further evidence. In a civil law trial, the judge plays a much more proactive role.<sup>53</sup> Based on the extensive written submissions, the judge will decide on which issues he or she will need to hear (witness) evidence in order to be able to decide the case. It is also the judge who will do the main questioning of the witnesses, with the parties' lawyers asking additional questions thereafter, which does not usually amount to a cross-examination of witnesses in the common law sense.

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<sup>51</sup> Cf W G O Morgan, "Discovery in Arbitration", *Journal of International Arbitration* (1986) pp 9–26; and P R Griffin, "Recent Trends in the Conduct of International Arbitration – Discovery Procedures and Witness Hearings", *Journal of International Arbitration* (2000) pp 19–30.

<sup>52</sup> For further information on the differences regarding witness evidence see P R Griffin, "Recent Trends in the Conduct of International Arbitration – Discovery Procedures and Witness Hearings", *Journal of International Arbitration* (2000) pp 19–30; and S H Elsing and J M Townsend, "Bridging the Common Law-Civil Law Divide in Arbitration", *Arbitration International* (2002) p 59.

<sup>53</sup> On the different role of the judge see F-J Semler, "Schnelligkeit und Wirtschaftlichkeit in Schiedsverfahren", *Zeitschrift für Schiedsverfahrensrecht/German Arbitration Journal (SchiedsVZ)* (2009) pp 149 *et seq*; and N Blackaby, C Partasides, A Redfern and J M H Hunter, *Redfern and Hunter on International Arbitration* (5th Edition, 2009) s 6.85.

*Court-appointed versus party-appointed experts*

- 5.11.15 In civil law proceedings, experts are typically appointed by – and report to – the court. Parties may appoint their own experts, but less weight is usually attributed to the evidence of party-appointed experts.<sup>54</sup>
- 5.11.16 In contrast, in common law proceedings it is traditional for each party to appoint its own expert (witness); expert reports are exchanged between the parties before trial and agreed between the experts in so far as possible. However, in England and Wales, the new Civil Procedure Rules make provision for court appointed experts and clarify that the duty of experts (whether appointed by a party or by the court) is to the court.<sup>55</sup>

**5.12 The hearing and the role of the judge**

- 5.12.1 In particular in common law proceedings, the trial, i.e. the oral hearing, is the main forum for the parties to present all of their evidence and arguments to the court.<sup>56</sup> The judge appointed to preside over the trial will not necessarily be familiar with the case and will receive short written summaries of each party's case ("skeleton arguments") and a reading list for the main statements of case and evidence (witness and documentary) only shortly before the hearing. The judge may have had no more than a brief review of the document bundles prior to the hearing.
- 5.12.2 The parties are fully in charge of preparing the case for trial (albeit subject to the court's case management powers) and are also the main actors at trial. Judges in the common law system traditionally take the role of the passive umpire in a match between two opposing parties and declare the winner at the end. The judge is not concerned so much with taking an active part in ascertaining the truth but rather in deciding which of the parties' cases he or she finds more convincing. Indeed, the judge's active role only really starts after the parties have made their final closing submissions. However, common law proceedings can often involve a very thorough examination of the facts and background to a dispute if either party chooses to adopt that approach.

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<sup>54</sup> For further information on the use of party-appointed compared to court-appointed experts see M Kantor, "A Code of Conduct for Party-Appointed Experts in International Arbitration – Can One be Found?", *Arbitration International* (2010) pp 323 *et seq.*

<sup>55</sup> Civil Procedure Rules, Part 35.3.

<sup>56</sup> For details see W L Craig, W W Park and J Paulsson, *International Chamber of Commerce Arbitration* (3rd Edition, 2000) s 23.03; and for details with respect to oral evidence see L Levy and V V Veeder, *Arbitration and Oral Evidence* (2006).

5.12.3 In civil law systems, the court plays a proactive role.<sup>57</sup> It takes charge of the case when proceedings are first issued, and thereafter (normally the same judge) remains actively involved in the management of the case. The focus of civil law proceedings lies on the written submissions, where the parties have to set out their case in full. On the basis of these written submissions the judge, who will ultimately have to decide the dispute before him or her, determines on which issues he or she will need to take evidence in order to render a decision. As the judge also plays a proactive role with respect to the examination of witnesses and with respect to (court-) appointed experts, oral hearings in civil law proceedings are generally much shorter than in common law proceedings.

### **5.13 The impact of the differences between common law and civil law on arbitration**

5.13.1 The background of the parties and their lawyers involved in international arbitral proceedings has an impact on the expectations of how arbitral proceedings should be conducted in the interest of justice and fairness.

5.13.2 Parties and lawyers from common law countries will normally expect there to be disclosure of documents, and that detailed witness statements will be prepared and exchanged between the parties, followed by cross-examination of witnesses at the main hearing. In such cases, the arbitral tribunal will, therefore, be confronted with a much larger volume of factual material than would be the case in arbitrations involving only parties and lawyers from civil law countries with more limited disclosure of documents. Equally, arbitrators from common law countries will often consider this the most appropriate procedure and will also put more weight on oral hearings than an arbitral tribunal composed of civil lawyers, who can normally be expected to rely to a greater extent on written submissions and to reduce the number and length of oral hearings. At the same time, arbitrators from civil law countries are more likely to take an active part in the management of the arbitral proceedings than their common law colleagues, including an involvement in settlement discussions between the parties.

### **5.14 Getting the best of both worlds**

5.14.1 As stated above, the advantages of arbitration are flexibility<sup>58</sup> and the possibility to adapt the procedure to the individual circumstances of the case. It is possible to have a “civil law arbitration” in a case involving a French and a German party,

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<sup>57</sup> F-J Semler, “Schnelligkeit und Wirtschaftlichkeit in Schiedsverfahren”, *Zeitschrift für Schiedsverfahrensrecht/German Arbitration Journal (SchiedsVZ)* (2009) pp 149 et seq; and see generally on the differences P Brand and J Getzler *Judges and Judging in the History of the Common Law and Civil Law: From Antiquity to Modern Times* (2012).

<sup>58</sup> See section 5.3 above.

while an arbitration between an English and an Austrian party is likely to be a compromise between civil law and common law proceedings. In a dispute between parties from England and the United States, the flexibility of arbitration allows the parties and the arbitral tribunal to tailor the proceedings as a compromise between English- and US-style arbitral proceedings. Thus arbitration allows the parties to combine procedural aspects from different legal systems and thereby tailor the arbitral procedure to the circumstances of the individual case.<sup>59</sup>

- 5.14.2 In recent years, certain standards for the conduct of arbitral proceedings involving parties from common law and civil law countries have developed as a form of “best practice” for such proceedings.<sup>60</sup> In such international arbitral proceedings, the parties will be expected to prepare comprehensive written submissions addressing the underlying facts, the relevant evidence (exhibiting to the submissions copies of any relevant documents) and the legal argument. In an early first hearing before the arbitral tribunal, procedural issues will be discussed and the parties will be encouraged to narrow down the substantive issues in dispute and to agree a procedural order and timetable for the further conduct of the proceedings.
- 5.14.3 With respect to the taking of evidence in such international arbitral proceedings, the IBA Rules on the Taking of Evidence which were adopted by the International Bar Association (**IBA**) in 1999, and which were adapted in a revised version in 2010, play an important role.<sup>61</sup> Their intention is to bridge the gap between civil law and common law with respect to the taking of evidence and to strike a balance between the different approaches. For example, they encourage a limited approach to documentary disclosure (by reference to specific categories of documents) and require that the party requesting disclosure identify why such documents and material are relevant to the case and to its outcome.
- 5.14.4 In international proceedings, written witness statements will usually be prepared and exchanged and will then stand as evidence in chief at the hearing. While the arbitral tribunal will play a more proactive role in the preparation of the hearing and also during the hearing, the parties will usually have the opportunity to cross-examine witnesses, even though cross-examinations in international arbitrations are likely to be shorter than in pure common law proceedings.<sup>62</sup>

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<sup>59</sup> See *ibid*, 5.8.

<sup>60</sup> See N Blackaby, C Partasides, A Redfern and J M H Hunter, *Redfern and Hunter on International Arbitration* (5th Edition, 2009) s 1.247.

<sup>61</sup> See CMS Guide to Arbitration, vol II, appendix 4.1.

<sup>62</sup> M Carlson, “The Examination and Cross-Examination of Witnesses”, in A J van den Berg (ed), *Arbitration Advocacy in Changing Times, ICCA Congress Series* (2010) pp 202–206. For further information on oral evidence see generally L Levy and V V Veeder, *Arbitration and Oral Evidence* (2006).

## 6. Drafting the arbitration agreement

- 6.1.1 Commercial disputes can only be referred to, and resolved by, arbitration if the parties enter into an arbitration agreement. An arbitration agreement can be made at any time – even after a dispute has arisen – although it may, by that stage, be more difficult to achieve a consensus between the parties. Normally, the arbitration agreement is concluded at the same time as the main commercial contract to which it relates and simply forms a clause in that main contract (albeit that the arbitration agreement remains technically a separate or severable contract).
- 6.1.2 The arbitration agreement sets out the terms on which the parties agree to refer defined disputes to arbitration. The main purpose of an arbitration agreement is to establish a practical, efficient and objectively fair method of dispute resolution and to ensure that the arbitral tribunal’s decision can be widely enforced. An effective and well-considered arbitration agreement is essential for a successful arbitration. The arbitral institutions offer standard arbitration clauses. A number of selected arbitration clauses can be found in Volume II, Appendix 5 to this Guide. The advantage of these standard agreements is that they have been tested in practice and their adoption, therefore, reduces the risk of later disputes about the validity or the scope of the arbitration agreement.<sup>63</sup>
- 6.1.3 As a general rule, the parties should ensure that the arbitration agreement sets out:
- that the parties agree to submit specific disputes arising from a defined legal relationship to arbitration for final resolution;
  - what disputes the arbitral tribunal has jurisdiction to decide;
  - in most cases it is advisable to provide that all disputes arising out of or in connection with a specific contract fall under the arbitration agreement. However, should the parties only want to submit specific disputes to arbitration, while all other disputes are to be resolved by state courts, it is important to provide a precise and unambiguous definition of which disputes fall within the arbitration agreement;
  - what rules of arbitration the arbitral tribunal should follow (if any);
  - if the parties agree on institutional arbitration, it is essential to refer correctly and unambiguously to the administering arbitral institution in order to avoid the risk of disputes in this respect and in particular the risk that the arbitration agreement is invalid;<sup>64</sup>

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<sup>63</sup> S R Bond, “How to Draft an Arbitration Clause”, *Journal of International Arbitration* (1989) pp 69–70 uses an ICC standard clause to point out the essential elements of an enforceable agreement to arbitrate.

<sup>64</sup> On invalid “pathological” arbitration agreements see M Pyles, “The Kaplan Lecture 2009 – When is an Arbitration Agreement Waived?”, *Journal of International Arbitration* (2010) pp 105–139; and P Shaughnessy, “Promoting Effective Arbitration through Legal Assistance Programmes”, *Arbitration International* (2006) pp 315 *et seq*, pp 325–326.

- the number of arbitrators and how they are to be appointed;
- the seat of the arbitration;
- the language of the arbitral proceedings; and
- the law to be applied by the arbitral tribunal to the substance of the dispute.

6.1.4 Further aspects the parties may wish to take into consideration in order to tailor the arbitration agreement to the circumstances of the specific contract are:

- a multi-tier dispute resolution clause, i.e. a clause which provides for an escalating sequence of dispute resolution methods such as negotiations, which in case of failure are followed by mediation and subsequently arbitration;
- expedited proceedings;
- the exclusion or limitation of disclosure;
- any specific procedural powers granted to the arbitral tribunal;
- any specific remedies which the arbitral tribunal may award; and
- the extent to which parties may seek interim relief from the court.

6.1.5 The parties should be aware that an overly complicated arbitration agreement also increases the risk of later disputes regarding the meaning, scope and validity of the arbitration agreement.

6.1.6 It is, therefore, recommended that parties seek legal advice when drafting an arbitration agreement, particularly in complex transactions, in order to ensure that it is valid, that it reflects the intentions of the parties and that it limits the scope for future jurisdictional challenges.

## 7. Selecting your arbitrator

7.1.1 The selection and appointment of the arbitrator is crucial to the effectiveness of the arbitral proceedings. Selecting the right arbitrator is a complex and difficult task that involves a large variety of considerations and requires a profound knowledge of the underlying dispute and wide experience in the field of arbitration.

7.1.2 When selecting an arbitrator, the parties should be aware that all arbitrators, including the party-appointed arbitrators, should be independent and impartial. Contrary to a misconception on the part of some parties, the party-appointed arbitrator is not an advocate for the appointing party's case within the arbitral tribunal, but under a duty to remain impartial (as is the chair or sole arbitrator).<sup>65</sup>

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<sup>65</sup> A A de Fina, "The Party Appointed Arbitrator in International Arbitrations – Role and Selection", *Arbitration International* (1999) pp 381, 385–386; D E McLaren, "Party-Appointed vs. List-Appointed Arbitrators: A Comparison", *Journal of International Arbitration* (2003) pp 233–245; and Swiss Federal Supreme Court, 29 October 2010, Decision 4A\_234/2010, commented by M Scherer, *ASA Bulletin* (Issue 1/2011) pp 73–79.

There is a significant risk that an obviously biased party-appointed arbitrator will be quickly identified by the other arbitrators and will lose credibility with the other members of the arbitral tribunal.

7.1.3 When approaching a potential (party-appointed) arbitrator, the following issues can and should be discussed, in particular:<sup>66</sup>

- the independence and impartiality of the arbitrator;
- knowledge in certain legal or technical areas (such questions, however, may only be asked in general terms; see paragraph 7.1.4 below): for example, in certain cases it may be helpful to appoint a person with a technical background rather than a lawyer as arbitrator;
- if the arbitration, or relevant evidence, is to be in more than one language, the language skills of the arbitrator play a role in the proceedings: it may, for example, be necessary or at least helpful if the arbitrators are able to read documents in a language other than the language of the proceedings as this may considerably reduce translation costs;
- cultural experience:<sup>67</sup> if parties and counsel come from different legal backgrounds it is helpful to appoint arbitrators who are familiar with these different legal backgrounds or, at least, have some experience of similar inter-cultural issues. In a dispute between a party from a common law jurisdiction and one, for example, from a civil law jurisdiction, the arbitrator should be familiar with the different expectations of the parties regarding, for example, disclosure of documents; and
- availability: in practice, many arbitrators accept more appointments than they are able to handle since many will settle without the need for significant involvement by the arbitrator. Against this background, a potential arbitrator should confirm that he or she is available and will be able to devote sufficient time to the arbitral proceedings in question.

7.1.4 It is permissible to contact and to meet potential arbitrators in order to discuss the issues mentioned above – namely the questions of qualification, availability and independence and impartiality – prior to the appointment of the arbitrator. However, these topics may only be discussed in general terms. It is not permissible to discuss the individual circumstances of the dispute in question or the arbitrator’s views on specific issues that are likely to be relevant in this context. Parties should be aware that most arbitrators will, if appointed, make detailed disclosure regarding the contents of such an interview.<sup>68</sup>

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<sup>66</sup> T H Webster, “Selection of Arbitrators in a Nutshell”, *Journal of International Arbitration* (2002) pp 261–274.

<sup>67</sup> See, in detail, *ibid*.

<sup>68</sup> See *ibid* further details on interviews of arbitrators and in particular the limits of such interviews see above at footnote 66 and paragraph 7.1.4.

## 8. Conclusion

- 8.1.1 Arbitration can have clear advantages over litigation as a means of settling commercial disputes. It is important to appreciate that there may be a choice between litigation and arbitration and that the most appropriate dispute resolution mechanism should always be determined on a case-by-case basis, depending on the particular circumstances of each case. The nature of the dispute, the identities of the parties, the courts which might otherwise have jurisdiction and the location of assets are only some of the many factors that should be taken into account when deciding which form of dispute resolution to agree. In the absence of an express dispute resolution agreement, the only certainty is that any dispute will end up before a court somewhere. The risk is that this court, for a variety of reasons, may not have been the first choice of one or more of the parties to the resulting litigation.

