This book aims to provide an introduction to international arbitration – including international commercial arbitration, international investment arbitration and state-to-state arbitration. The book focuses on the basic legal framework for international arbitration and the contemporary practice of international arbitration. Throughout, the emphasis is on introducing the key legal principles and customary practices in an accessible and straightforward manner, tailored to the needs of general practitioners, law students and others seeking an introduction to the international arbitral process.


The body of the book is divided into three main parts, structured on the chronology of an international arbitration. Part I addresses international arbitration agreements, including their formation, enforcement and interpretation; Part II address international arbitral proceedings, examining how arbitrations are conducted in practice; and Part III addresses international arbitral awards, including their recognition and enforcement. All three Parts focus principally on international commercial arbitration, with comparisons where useful to international investment or state-to-state arbitration.

Chapter 18 of the book provides an overview of investment and state-to-state arbitrations, focusing in particular on distinctions between these forms of arbitration and international commercial arbitration. Among other things, the chapter introduces the International Centre for the Settlement of Investment Disputes (“ICSID”) and the network of international investment treaties (including bilateral investment treaties or “BITs”) which are central to the contemporary process of international investment arbitration.

This book is not meant to replace more detailed treatments of international arbitration in lengthier treatises and commentaries. These authorities are referred to in the notes accompanying Chapter 1 and the book’s three Parts and readers should consult these materials for more detailed discussions of the subject.

As already noted, this book contains mistakes and oversimplifications, for which the author apologizes. Future editions will seek to correct these shortcomings and readers are encouraged to provide comments, criticisms and queries by email to bornbookcomments@wilmerhale.com.

Gary Born
London, England
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Like international arbitration itself, this book is a work in progress. It addresses a complex field that is continuously evolving in response to changing conditions and needs. The book inevitably contains errors, omissions and confusions, which will require correction, clarification and further development in future editions, to keep pace with the field. Corrections, comments and questions are encouraged, by email to bornbookcomments@wilmerhale.com.


Part I: International Arbitration Agreements

The foundation of almost every international arbitration – and of the international arbitral process itself – is an international arbitration agreement. In the words of one commentator, "[o]bviously, no arbitration is possible without its very basis, the arbitration agreement." Absent a valid agreement to arbitrate, there are generally no legal grounds for requiring a party to arbitrate a dispute or for enforcing an arbitral award against a party. "Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit." International arbitration agreements can be drafted in countless different ways. Typically, an arbitration agreement is a provision in an underlying commercial contract, requiring arbitration of any future disputes relating to the contract. Such a provision can be either short and standardized or longer and tailor-made for a particular transaction. As models of brevity, if not prudence, European commentators sometimes cite clauses that provided "English law – arbitration, if any, London according ICC Rules," and "Arbitration – Hamburg, Germany." A U.S. counterpart read: "Arbitration; if required in New York City." At the opposite end of the spectrum are multi-paragraph arbitration provisions, recommended by assiduous practitioners for inclusion in commercial contracts, or specially-drafted for a particular transaction. It is also possible for entire agreements to be devoted exclusively to the arbitration of disputes under a series of related contracts, typically involving multiple parties. Falling between these extremes are model clauses promulgated by leading international arbitral institutions, including the International Chamber of Commerce ("ICC"), London Court of International Arbitration ("LCIA") and International Centre for Dispute Resolution ("ICDR"), which provide generic, but typically concise and well-tested, formulae. Whatever form they take, international arbitration agreements are...
vitaly important to the international arbitral process. Properly drafted, they can provide the basis for a relatively smooth and efficient arbitration; less carefully drafted, they can give rise to a host of legal and practical issues; badly drafted, arbitration agreements can be pathological, either incapable of enforcement or precursors to uncertain and costly litigation in national courts.

The Chapters which follow in this Part explore the principal legal and practical issues arising from international arbitration agreements. Chapter 2 discusses the legal framework for international arbitration agreements, including the jurisdictional requirements for the New York Convention and national arbitration legislation, the presumptive validity of international arbitration agreements, the separability of arbitration agreements, the competence-competence doctrine, the choice of law governing the arbitration agreement and the effects of international arbitration agreements.

Chapter 3 discusses the substantive rules governing the formation, validity and legality of international arbitration agreements. It addresses the formal validity of international arbitration agreements, including requirements for a “writing,” as well as the rules of substantive law applicable to issues of formation, including standards of proof and consent, and to issues of capacity and substantive validity, including fraud, unconscionability, duress, mistake, waiver, termination and illegality. The Chapter also considers the so-called “non-arbitrability” doctrine and related issues of public policy.

Chapter 4 addresses the interpretation of international arbitration agreements. In particular, it considers the rules applicable to interpreting the scope of arbitration agreements which have been developed in different national legal systems.

Chapter 5 discusses issues relating to parties bound by international arbitration agreements. It examines the various legal theories that have been used to give binding effect to arbitration agreements vis-à-vis non-signatories, including agency, alter ego status, the group of companies theory, estoppel, guarantor relations, third party beneficiary rights and miscellaneous other grounds. The Chapter also examines the choice of law governing the foregoing issues and the allocation of competence to decide such disputes between national courts and arbitral tribunals.

Chapter 1: Introduction to International Arbitration

International arbitration provides an efficient and effective means of resolving international disputes – including international commercial, investment and state-to-state disputes. This Chapter summarizes the legal framework for international commercial arbitration, which is addressed in greater detail in Chapters 2 through 17. It also introduces investor-state arbitration and state-to-state arbitration, which are discussed in greater detail in Chapter 18.

Key words

Source

§1.01. Definition of International Arbitration

As discussed below, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") and most national arbitration statutes prescribe an effective "pro-arbitration" regime that ensures the enforceability of international arbitration agreements and awards. In general, this legal regime applies only if the parties have made an agreement to resolve their disputes by "international arbitration" – as opposed to an agreement for some other form of dispute resolution (such as expert determination or mediation).

There is a surprising lack of guidance on what constitutes an "arbitration agreement." Article II(1) of the New York Convention refers to an agreement to arbitrate as "an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not." Similarly, Article 7(1) of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration ("UNCITRAL Model Law") provides that "[a]n arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not."

These definitions are minimally useful. They make clear that an arbitration agreement involves a contractual relationship between parties; that this agreement deals with disputes, either future or existing; and that these disputes will be submitted to and resolved by "arbitration." At the same time, these definitions provide little guidance in determining precisely what constitutes an "arbitration" agreement, as distinguished from an agreement concerning other forms of dispute resolution. This has left national courts, arbitral tribunals and commentators with the task of defining what constitutes "arbitration."

[A]. What Is "Arbitration"?

Preliminarily, the label adopted by the parties for a dispute resolution mechanism is not decisive in defining the true character of that mechanism. Parties are free to call a forum selection clause or an expert determination mechanism an "agreement to arbitrate," but this (mis-)label does not alter the mechanism's nature. It is still necessary to examine the substance of a dispute resolution provision to determine, objectively, whether it constitutes an agreement to arbitrate under applicable law. Nonetheless, as a practical matter, if the parties' agreement provides for something labeled "arbitration," it is likely that this will be categorized as an arbitration agreement.

There is general agreement on what the term "arbitration" means. With some variations, virtually all authorities accept that arbitration is – and only is – a process by which parties consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudicatory procedures affording each party an opportunity to present its case. Most authorities have adopted similar definitions:

- "Consistent with the traditional notion of private arbitration, one may define [the arbitration clause] as an agreement according to which two or more specific or determinable parties agree in a binding way to submit one or several existing or future disputes to an arbitral tribunal, to the exclusion of the original competence of state courts and subject to a (directly or indirectly) determinable legal system." [2]

- "A contractual method of resolving disputes. By their contract the parties agree to entrust the differences between them to the decision of an arbitrator or panel of arbitrators, to the exclusion of the Courts, and they bind themselves to accept that decision, once made, whether or not they think it right." [3]

- "An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." [4]

Each of the various elements of these definitions of arbitration is important.

[1]. Consensual Means to Resolve Disputes
It is elementary that “arbitration” is a consensual process that requires the agreement of the parties. Article II of the New York Convention applies only to an “agreement … under which the parties undertake to submit to arbitration,”(5) while Article 8 of the UNCITRAL Model Law applies only when there is “an agreement by the parties to submit to arbitration all or certain disputes.”(6) Similarly, national courts uniformly hold that “arbitration is a creature that owes its existence to the will of the parties alone,”(7) and that “arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.”(8)

[2]. Non-Governmental Decision-Maker Selected by or for the Parties

Another fundamental attribute of “arbitration” is that it involves the submission of disputes to a non-governmental decision-maker selected by or for the parties. A defining characteristic of arbitration is the selection of particular “arbitrators” to resolve a dispute, or defined category of disputes; typically, arbitrators are chosen by the parties themselves or, in the absence of agreement by the parties, by an arbitral institution chosen by the parties.(9) In contrast, “arbitration” does not extend to forum selection agreements, where parties agree to submit their disputes to a specified national court.(10)

[3]. Final and Binding Decision

A third defining characteristic of arbitration is that it produces a binding award that decides the parties’ dispute in a final manner and is subject only to limited grounds for challenge in national courts. Arbitration does not produce a non-binding, advisory recommendation, which the parties are free to accept or reject; it also is not merely a process of negotiation, during which the parties are free to agree (or not) to settle their disputes. Instead, arbitration results in a final and binding decision by a third-party decision-maker – the arbitrator – that can be coercively enforced against the unsuccessful party or its assets.(11)

[4]. Use of Adjudicatory Procedures

Finally, a defining characteristic of “arbitration” is the use of impartial adjudicative procedures which afford each party the opportunity to present their views (e.g., valuation, where the decision-maker proceeds with an independent investigation) do not generally constitute arbitration.(12) Similarly, contractual provisions that give one party the right to unilaterally decide a particular issue do not constitute arbitration.

[B]. Forum Selection Clauses and National Courts

In practice, international contracts frequently contain “forum selection” or “choice of court” agreements. These provisions provide either that (a) specified disputes may be resolved in a specified court, without excluding litigation in other forums (so-called “jurisdiction” or “prorogation” agreements); or (b) specified disputes must be resolved exclusively in the specified courts (so-called “exclusive jurisdiction” or “derogation” agreements). A forum selection clause is not an arbitration agreement, and vice versa: this is because a forum selection clause provides for resolution of disputes by litigation in a national court, not by arbitration before a non-governmental arbitrator selected by or for the parties.(13)

EXCLUSIVE FORUM SELECTION CLAUSE:

“The courts of ________ shall have exclusive jurisdiction over all disputes relating to this Agreement.”

NON-EXCLUSIVE FORUM SELECTION CLAUSE:

“The parties submit to the non-exclusive jurisdiction of the courts of ________ for any disputes relating to this Agreement.”

Forum selection agreements do not benefit from the protections of
the “pro-arbitration” legal regime established by the New York Convention and contemporary arbitration legislation. Instead, forum selection agreements are typically subject to national law (or regional regimes such as Regulation 44/2001 in the European Union). The Hague Convention on Choice of Court Agreements, adopted in 2005, may in the future provide international standards for enforcing forum selection agreements; at present, however, only a limited number of states have ratified the Convention and prospects for its successful implementation remain unclear.\(^\text{14}\)

\textbf{[C]. Other Forms of Alternative Dispute Resolution}

Arbitration is only one of many forms of alternative dispute resolution (i.e., mechanisms for resolution of disputes outside of national courts). Other forms of “ADR” adopt a variety of procedural mechanisms, aimed at different types of problems and parties.

\textbf{[1]. Mediation and Conciliation}

Arbitration agreements differ fundamentally from agreements for “conciliation,” “mediation,” early neutral evaluation and the like. These procedures do not provide for a binding decision to be imposed on the parties; rather, they provide for a non-binding process that may (or may not) assist the parties in reaching a consensual settlement.\(^\text{15}\) The mediator or conciliator is not empowered to decide the parties’ dispute, but simply to discuss and negotiate with the parties in an effort to persuade them to reach a mutually agreeable resolution of their dispute. This does not constitute “arbitration” because it does not produce a final third-party decision that resolves the parties’ dispute.

Many leading arbitral institutions have adopted rules of conciliation. These include the International Chamber of Commerce, American Arbitration Association and World Intellectual Property Organization. In some jurisdictions, separate legislation has also been adopted to govern mediation, conciliation and related forms of ADR.\(^\text{16}\) These legislative regimes differ from those governing international arbitration agreements and awards (most notably, they lack any provision for the enforcement of third-party decisions).

\textbf{[2]. Expert Determination}

Commercial contracts may also contain provisions for the resolution of certain categories of disputes by an expert selected by or for the parties and authorized to render a binding decision on an issue.\(^\text{17}\) Such provisions can involve accounting (or other financial) calculations by an accountant; quality assessment by an industry expert; oil and gas reserve estimates by a geologist; or construction evaluations by an architect or engineer.

In many national legal systems, an important distinction is drawn between “arbitration” and binding “expert determination,” “appraisal,” or “valuation.”\(^\text{18}\) The latter do not necessarily require the use of adjudicative procedures, which is a defining feature of arbitration, but instead entail only the decision-maker’s own investigations and use of existing expertise. Moreover, expert determinations frequently involve narrowly-defined and circumscribed factual or technical issues, unlike arbitral proceedings, which seek to resolve broader legal disputes between the parties (e.g., whether a contract or statutory protection has been breached and what consequences flow from that breach).\(^\text{19}\)

\textbf{[3]. Mini-Trials and Neutral Evaluation}

Parties sometimes seek to resolve disputes through “mini-trials,” which typically involve relatively brief presentations of each party's case to a “judge” or panel of “judges,” who are authorized to make an advisory decision or otherwise encourage settlement. Like mediation, the decisions in mini-trials are usually non-binding. Neutral evaluation involves a similar process, in which a third party hears the parties' presentations, on either their dispute or selected issues, and provides a neutral assessment of the strengths and weaknesses of each parties’ position.

\textbf{[4]. “Baseball” or “Final-Offer” Arbitration}

Some forms of ADR narrowly limit the decision-maker's authority to decide the parties’ dispute. So-called “baseball” arbitration refers to a process where, at the conclusion of the parties' submissions, each side submits its “final offer” (or “best offer”) in a sealed envelope.\(^\text{20}\) The tribunal is then authorized only to select one or the
other party’s “offer” in resolution of the dispute, rather than making an independent determination of the “correct” resolution under applicable law. Alternatively, in “high/low arbitration,” the parties agree on the minimum and maximum amounts that the arbitrator can award.

[D]. “International” Arbitration

The New York Convention (and other international arbitration conventions) applies only to arbitration agreements that have some “foreign” or “international” element, and not to purely domestic agreements. The same is true under many national legal regimes, where “international” or “foreign” arbitration agreements are often subject to legislative and/or judicial regimes distinct from those applicable to domestic arbitration agreements. That is true, for example, under the UNCITRAL Model Law, which is limited by Article 1(3) to “international” matters. In these jurisdictions, domestic arbitration agreements, arbitral proceedings and awards are often subject to separate, non-international legal regimes. This is consistent with the purpose of the Convention and the Model Law, which is to facilitate the international arbitral process, without disturbing regulation of domestic arbitration matters.

§1.02. Reasons for International Arbitration

Arbitration is widely regarded as the preferred means of resolving international commercial disputes. That is true for a number of reasons. In summary, international arbitration provides a neutral, speedy and expert dispute resolution process, largely subject to the parties’ control, in a single, centralized forum, with internationally-enforceable dispute resolution agreements and decisions. While far from perfect, international arbitration is rightly regarded as suffering fewer ills than litigation of international disputes in national courts, and as affording parties more practical, efficient and neutral dispute resolution than available in other forums.

Reasons For International Arbitration

– Neutrality
– Centralized Dispute Resolution
– Enforceability of Agreements and Awards
– Commercial Competence and Expertise
– Finality of Decisions
– Party Autonomy and Procedural Flexibility
– Cost and Speed
– Confidentiality or Privacy of Dispute Resolution
– Arbitration Involving States and State-Entities

[A]. Neutrality

One of the central objectives of international arbitration agreements is to provide a neutral forum for dispute resolution, detached from the parties and their respective home-state governments. Parties often begin to negotiate dispute resolution mechanisms with the objective of ensuring that disputes are resolved in the forum they perceive to be the most favorable to them – often the local courts in that party’s principal place of business. These courts will be convenient and familiar to the home-town party; they will also probably be inconvenient and unfamiliar to the counter-party. However, the characteristics that make one party’s local courts attractive to it will often make them unacceptable to counter-parties. As a consequence, outside of lending and similar transactions, it is often impossible for either party to obtain agreement to dispute resolution in its local courts.

In these circumstances, the reaction is almost always to seek agreement on a suitable neutral forum – a forum for dispute resolution that does not favor either party, but affords each the opportunity to present its case to an objective and impartial tribunal. The result, in most instances, is an agreement to arbitrate (or, less frequently, litigate) in a neutral forum. For example, a French and a Mexican company may agree to arbitrate their disputes in Miami, Spain or England, while a U.S. and a Japanese or German company might agree to dispute resolution in Switzerland, England, Canada, or Singapore. Put simply, a party typically does not agree to arbitrate because arbitration is the most favorable possible forum, but because it is the least unfavorable forum that the party can obtain in arm’s length negotiations.
[B]. Centralized Dispute Resolution

Another basic objective of international arbitration is to avoid the jurisdictional disputes, choice-of-law debates and multiplicitous litigation in different national courts that attend international litigation. Instead, international arbitration offers a centralized dispute resolution in a single contractually selected forum. As the U.S. Supreme Court has put it:

Much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction [where jurisdiction could be established]. The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce and contracting.

Empirical findings are to the same effect. At the same time, in cases of pathologically-drafted arbitration agreements, disputes over the validity or scope of the agreement can lead to uncertainty and expense rivaling that in international litigation – illustrating the importance of well-negotiated and drafted international arbitration agreements.

[C]. Enforceability of Agreements and Awards

One of the objectives of contemporary legal regimes for international arbitration is facilitating the enforcement of arbitration agreements and awards. In particular, both international arbitration conventions (particularly, the New York Convention) and arbitration legislation (particularly, the UNCITRAL Model Law) ensure that international arbitration agreements are more readily, expeditiously enforced and more broadly interpreted than forum selection clauses.

In contrast, there are only a few regional arrangements that seek to establish effective international enforcement regimes for forum selection clauses. The most notable is the Brussels I Regulation in the European Union, which provides for the enforceability of forum selection agreements designating an EU Member State's courts, subject to only limited exceptions. There are also a few industry-specific arrangements providing enforcement mechanisms for international forum selection clauses (such as treaties governing carriage of goods by sea). In general, however, forum selection agreements do not benefit from anything comparable to the enforcement mechanism of the New York Convention.

Like agreements to arbitrate, international arbitral awards enjoy the protection of the New York Convention, as well as favorable arbitration legislation in many countries. As discussed below, these instruments provide a “pro-enforcement” regime, with expedited recognition procedures and only limited grounds for denying recognition to an arbitral award.

In contrast, there are again only a few regional arrangements for the enforcement of foreign court judgments (in particular, the Brussels I Regulation), and there is no global counterpart to the New York Convention for foreign judgments. Some major trading states, including the United States, are party to no bilateral or multilateral agreement on the enforceability of foreign judgments. In the absence of international treaties, the recognition of foreign judgments is subject to local law, which often makes it difficult, if not impossible, to effectively enforce them. As a consequence, there is generally a significantly greater likelihood that an arbitral award will be enforced abroad (and thereby conclude the parties’ dispute) than a foreign judgment. Together with the comparatively greater enforceability of arbitration agreements, the more reliable enforceability of arbitral awards is one of the basic objectives, and attractions, of international arbitration.

[D]. Commercial Competence and Expertise

Another essential objective of international arbitration is to provide a competent, expert dispute resolution process. Arbitration was historically favored by users because it offered a more expert, experienced means of resolving commercial disputes. This continues to be the case today, with empirical studies emphasizing the importance of arbitrators’ commercial expertise in decisions to make use of international arbitration. In a survey of users, one respondent summarized the issue as follows:
for a French party, the big advantage is that international commercial arbitration offers “de luxe justice”… instead of having a $600 million dispute before the Commercial Court in Paris, where each party has only one hour for pleading and where you can’t present witnesses and have no discovery; for a dispute of that importance it may well be worth the costs to get a type of justice that is more international and more “luxurious”; what you get is more extensive and thorough examination of witness testimony. (37)

Similarly, in the words of the former President of the French Cour de cassation, explaining why he admired arbitration: “in many fields you are more professional than we are.” (38)

It is a harsh, but undeniable, fact that many national court systems are ill-equipped to resolve international commercial disputes. In many states, local courts have little experience in resolving complex international disputes and face serious challenges in reliably resolving commercial disputes. Moreover, in some states, basic standards of judicial integrity, competence and independence are lacking.

Of course, some national judiciaries include talented judges with considerable international experience. The courts of England, Switzerland, New York, Japan, Singapore and a few other jurisdictions are able to resolve complex transnational disputes with a fairly high degree of reliability. Nevertheless, even in these jurisdictions, local practices (like the jury trial or split legal profession) may obstruct efficient and objective dispute resolution. Moreover, in most legal traditions, judges are randomly assigned to cases, regardless of their experience. Judges are also ordinarily generalists, often without specialization in complex commercial matters, much less a particular type of transaction (e.g., M&A, joint ventures) or industry (e.g., oil and gas, insurance).

In contrast, in international arbitration, the parties are able to participate in the selection of the arbitral tribunal for their dispute. This aspect of the arbitral process is intended to enable the parties – who have the most intimate knowledge of their disagreements and the greatest incentive to choose a capable tribunal – to select arbitrators with the best experience, abilities and availability for their dispute (as discussed below). Moreover, in most substantial international arbitrations, tribunals consist of three members (rather than a single trial judge), permitting a mix of legal and technical experience, as well as extra sets of eyes.

### [E]. Finality of Decisions

Another salient feature of international arbitration is the absence, in most cases, of extensive appellate review of arbitral awards. Judicial review of awards in most developed countries is narrowly confined to issues of jurisdiction, procedural fairness and public policy, and highly deferential to the arbitrators’ substantive decisions (as discussed below). This contrasts markedly with the availability of appellate review of first instance judgments, where national laws allow either de novo or fairly searching review of legal, and often factual, matters.

There are both advantages and disadvantages to the general unavailability of appellate review of awards. Dispensing with appellate review significantly reduces litigation costs and delays (particularly when a successful appeal means that the case must be retried in the first instance court). On the other hand, it also means that a badly wrong arbitral decision cannot readily be corrected. In general, anecdotal and empirical evidence indicate that business users prefer the efficiency and finality of arbitral procedures, even at the expense of appellate rights. (39) There are also some legal systems in which the parties have the possibility, by contracting into or out of judicial review, to obtain a measure of appellate review of the arbitrators’ substantive decisions, or to select a procedure that includes arbitral appeals.

### [F]. Party Autonomy and Procedural Flexibility

A further objective, and perceived advantage, of international arbitration is its facilitation of party autonomy and procedural flexibility. As discussed below, international arbitration conventions and national laws accord parties broad autonomy to agree upon the substantive laws and procedures applicable to “their” arbitrations. (40)

In practice, one of the principal reasons for granting the parties procedural autonomy is to enable them to dispense with the
technical formalities of national court proceedings and instead to tailor the procedures to their particular disputes. Some categories of disputes call for specialized procedures for presenting expert evidence, “fast track” procedures where time is of the essence, or mechanisms designed for particular commercial markets. More generally, parties are typically free to agree upon the timetable for the arbitral process, the existence and scope of disclosure, the modes for presentation of fact and expert evidence, the length of the hearing(s) and other matters. The parties’ ability to adopt flexible procedures is a central attraction of international arbitration – again, as evidenced by empirical findings. (41)

[G]. Cost and Speed

It has long been said that arbitration offers a cheaper, quicker means of dispute resolution than litigation. (42) At the same time, it has become fashionable, at least in some circles, to describe arbitration as a slower, costlier alternative. (43) In reality, both international arbitration and international litigation can involve significant expense and delay, and it is wrong to make sweeping generalizations about which mechanism is necessarily quicker or cheaper.

Although arbitration is sometimes lauded for its speed and cost-effectiveness, it can be an expensive process. This is particularly true in major international disputes, which may involve longer written submissions, more extensive factual and expert evidence, and lengthier hearings than international litigation – in part because, in complex matters, parties often affirmatively want extensive, thorough proceedings. Moreover, in international arbitration, the parties are required (subject to later allocation of costs by the tribunal) to pay the fees of the arbitrator(s) and, usually, an arbitral institution. The parties will also have to pay for renting hearing rooms, travel to the arbitral situs, lodging and the like.

Nonetheless, in actual practice, the expenses of arbitration will often pale in comparison with the costs associated with parallel or multiplicitous proceedings in national courts. This can be the case where the parties have not agreed upon an exclusive forum selection clause, or where such a clause is held unenforceable or inapplicable. Likewise, the expenses of arbitration will typically not approach those associated with relitigating factual issues in national trial and appellate courts. In addition, arbitration is less likely to involve costly, scorched-earth discovery, or prolonged disputes over service, evidentiary matters, immunity and other litigation formalities.

International commercial arbitration is also not always speedy. Outside of some specialized contexts, major commercial disputes can require between 18 and 36 months to reach a final award, with limited possibilities for summary dispositions. Procedural mishaps, challenges to arbitrators and jurisdictional disputes can delay even these fairly stately timetables, as can crowded diaries of busy arbitrators and counsel. It is possible to expedite the proceedings, through drafting a “fast-track” arbitration clause or adroit arbitrator selection and procedural planning, but there are limits to how quickly a major commercial arbitration realistically can be resolved.

Nonetheless, in many jurisdictions, national court proceedings are also subject to significant delays. Judicial dockets in many countries are over-burdened and obtaining a trial date and final decision may take years. Further, as already noted, arbitration rarely involves the delays inherent in appellate proceedings and the risk that new trial proceedings will be required.

On balance, international arbitration does not necessarily have either dramatic speed and cost advantages or disadvantages as compared to national court proceedings. Broadly speaking, the absence of appellate review means that arbitration is usually less slow and less expensive than litigation – and preferable, in part, for that reason. Nonetheless, there will clearly be exceptions to this generalization in particular cases, where arbitrators are unusually slow or particular national courts are especially fast.

[H]. Confidentiality and Privacy of Dispute Resolution

Another objective of international arbitration is to provide a confidential, or at least private, dispute resolution mechanism. Most national court proceedings are not confidential. Hearings and court dockets are open to the public, competitors, press and regulators in many countries, and parties are often free to disclose submissions and evidence to the public. Public disclosure can encourage “trial by press release” and may impede compromises, by hardening
positions, aggravating tensions, or provoking collateral disputes.

In contrast, international arbitration is substantially more private, and often more confidential, than national court proceedings. Arbitral hearings are virtually always closed to the press and public, and in practice the parties' submissions and tribunals' awards often remain confidential. In some (but by no means all) jurisdictions, confidentiality obligations are implied in international arbitration agreements as a matter of law, while some arbitration agreements or institutional arbitration rules impose such duties expressly. In general, most international businesses prefer, and actively seek, the privacy and confidentiality that the arbitral process offers. Confidentiality reduces the risks of aggravating the parties' dispute, limits the collateral damage of a dispute and focuses the parties on an amicable, business-like resolution of their disagreements.

II. Arbitration Involving States and State-Entities

Finally, arbitration offers particular benefits in cases involving states and state-entities. Under most legal systems, a state's agreement to arbitrate constitutes a waiver of state or sovereign immunity – almost always with regard to enforcement of the parties' arbitration agreement and resulting awards and sometimes with regard to enforcement of awards against state assets. Moreover, a neutral international tribunal is often a more appropriate decision-maker than a national court for disputes between states or state-entities and private parties. In practice, therefore, commercial contracts between private parties and foreign states or state-related entities very frequently contain arbitration provisions.

§1.03. Popularity of International Arbitration

The aspirations of the arbitral process to accomplish the various objectives described above lead proponents of international arbitration to proclaim:

In the realm of international commercial transactions, arbitration has become the preferred method of dispute resolution. Arbitration is preferred over judicial methods of dispute resolution because the parties have considerable freedom and flexibility with regard to choice of arbitrators, location of the arbitration, procedural rules for the arbitration, and the substantive law that will govern the relationship and rights of the parties.

Equally vigorous are some critics, including those who regard arbitration as "the slower, more expensive alternative," or conclude that "arbitration sometimes involves perils that even surpass the 'perils of the seas.'"

In fact, the truth about contemporary international commercial arbitration is less clear-cut and lies somewhere between these extremes: "The more enthusiastic of [its] sponsors have thought of arbitration as a universal panacea. We doubt whether it will cure corns or bring general beatitude. Few panaceas work as well as advertised." At bottom, international arbitration is much like democracy; it is nowhere close to ideal, but it is generally a good deal better than the alternatives. Litigation of complex international disputes in national courts is often distinctly unappealing – particularly where litigation occurs in courts that have not been selected in advance for their neutrality, integrity, competence and convenience. Indeed, the risks of corruption, incompetence, or procedural arbitrariness make litigation of commercial disputes in some national courts an unacceptable option. Despite procedural, choice of law and other uncertainties, international arbitration often offers the least ineffective and damaging means to finally settle the disputes that arise when international transactions go awry.

Dispute resolution mechanisms must fulfill difficult, often thankless, tasks, particularly in international disputes: parties who are often bent upon (mis-)using every procedural and other opportunity to disadvantage one another simultaneously demand rapid, expert and objective results at minimal cost. Despite these generally unrealistic expectations, arbitration has for centuries been perceived as the most effective – if by no means flawless – means for resolving international commercial disputes. That perception has not diminished, but rather been strengthened, in recent decades. In the words of one authority: arbitration is "the ordinary and normal method of settling disputes of international trade."
The enduring popularity of international arbitration as a means of dispute resolution is reflected by a number of developments. These include steadily increasing case-loads at leading arbitral institutions, with the number of reported cases increasing between three and five-fold in the past 25 years.

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Similarly, the use of arbitration as a means of resolving new (previously "un-arbitrated") categories of disputes, including investment treaty claims, on-line disputes, class actions, tax disputes and human rights claims, attests to its enduring and increasing popularity.

§1.04. Contemporary International Arbitration Conventions

International commercial arbitration is governed by a complex legal regime. That regime includes (a) international arbitration conventions, particularly the New York Convention, (b) national arbitration legislation, particularly local enactments of the UNCITRAL Model Law, (c) institutional arbitration rules, incorporated by parties' arbitration agreements, and (d) arbitration agreements, given effect by international arbitration conventions and national arbitration legislation.

![Diagram of the legal regime for international arbitration]

These various elements of the legal regime for international arbitration, and representative examples of each of these elements, are summarized in the following sections.

[A]. New York Convention

The first modern international commercial arbitration conventions were the 1923 Geneva Protocol on Arbitration Clauses in
Commercial Matters and the 1927 Geneva Convention page 18 for the Execution of Foreign Arbitral Awards. The Protocol provided for the recognition of international commercial arbitration agreements, requiring contracting states to refer parties to such agreements to arbitration. The Convention, on the other hand, provided for the recognition of arbitral awards made in other contracting states (subject to a number of exceptions). In part because of the outbreak of WWII, the Protocol and Convention had limited practical impact.

The Geneva Protocol and Convention were succeeded by the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Generally referred to as the "New York Convention," the Convention is the most significant contemporary legislative instrument relating to international commercial arbitration. It provides a universal constitutional charter for the international arbitral process, whose expansive terms have enabled both national courts and arbitral tribunals to develop durable, effective means for enforcing international arbitration agreements and awards.

The Convention was adopted – like many national arbitration statutes – to address the needs of the international business community, and in particular to improve the legal regime provided by the Geneva Protocol and Geneva Convention. The Convention was negotiated principally at a three-week conference – the United Nations Conference on Commercial Arbitration – attended by 45 states in the Spring of 1958. The conference resulted in a document – the New York Convention – a radically innovative instrument that created for the first time a comprehensive legal regime for the international arbitral process.

The Convention is set forth in English, French, Spanish, Russian and Chinese texts, all of which are equally authentic. The Convention is only a few pages long, with the instrument's essential substance contained in five concise provisions (Articles I through V). Despite its brevity, the Convention is widely regarded as "the cornerstone of current international commercial arbitration." In the apt words of Judge Stephen Schwebel, "It works."

It is often said that the Convention did not provide a detailed legislative regime for all aspects of international arbitration (as, for example, the 1985 UNCITRAL Model Law would later do). Rather, the Convention's provisions focused on the recognition and enforcement of arbitration agreements and arbitral awards, without specifically regulating the conduct of the arbitral proceedings or other aspects of the arbitral process.

A key objective of the Convention was uniformity: the Convention's drafters sought to establish a single set of international legal standards for the enforcement of arbitration agreements and awards. In particular, the Convention's provisions prescribe uniform international rules that: (a) require national courts to recognize and enforce foreign arbitral awards (Articles III and IV), subject to a limited number of specified exceptions (Article V); (b) require national courts to recognize the validity of arbitration agreements, subject to specified exceptions (Article II); and (c) require national courts to refer parties to arbitration when they have entered into a valid agreement to arbitrate that is subject to the Convention (Article II(3)). The permissible exceptions to the obligation to recognize foreign awards are limited to issues of jurisdiction, procedural regularity and fairness, compliance with the parties' arbitration agreement and public policy; they do not include review by a recognition court of the merits of the arbitrators' substantive decision.

The New York Convention made a number of significant improvements in the regime of the Geneva Protocol and Geneva Convention for international arbitration. Particularly important were the Convention's shifting of the burden of proving the invalidity of arbitral awards to the party resisting enforcement, its recognition of substantial party autonomy with respect to choice of arbitral procedures and law applicable to the arbitration agreement, and its abolition of the previous "double exequatur" requirement (which required that awards be confirmed in the arbitral seat before being recognized abroad).

Despite the Convention's brevity and focus on arbitration agreements and awards, the significance of its terms can scarcely be exaggerated. The Convention's provisions effected a fundamental restructuring of the legal regime for international commercial arbitration, combining the separate subject matters of the Geneva Protocol and Geneva Convention into a single instrument which provided a legal framework that covered international arbitrations from their inception (the arbitration agreement) until their conclusion (the award). In so doing, the Convention established for the first time
a comprehensive international legal framework for international arbitration agreements, arbitral proceedings and arbitral awards.

Despite its present significance, the New York Convention initially attracted few ratifications. Over time, however, states from all regions of the globe reconsidered their position, and today 146 nations have ratified the Convention. The Convention's parties include virtually all major trading states and many Latin American, African, Asian, Middle Eastern and former socialist states. During the past decade, numerous states (including a number in the Middle East and Latin America) have overcome traditions of distrust of international arbitration and ratified the Convention. The Convention has thus realized its drafters' aspirations and come to serve as a global charter or constitution for international arbitration.

Article VII of the New York Convention provides that the Convention does not affect the validity of any bilateral or other multilateral arrangements concerning the recognition and enforcement of foreign arbitral awards (except the Geneva Protocol and Geneva Convention, which are page terminated as between Contracting States). Article VII(1) also provides that the Convention "shall not deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or treaties of the country where such award is sought to be relied upon." Article VII has been interpreted in a "pro-enforcement" fashion, to permit agreements and awards to be enforced under either the Convention, or another treaty, or national law, if more favorable than the Convention.

In virtually all Contracting States, the Convention has been implemented through national legislation. The practical effect of the Convention is therefore often dependent on both the content of such national legislation and the interpretations given by national courts to the Convention and national implementing legislation. In some states, the Convention may also have direct (or self-executing) effects in national courts, without the need for implementing legislation.

As noted above, an important aim of the Convention's drafters was uniformity. The fulfillment of that aim is dependent upon national legislatures and courts, in different Contracting States, to adopt uniform interpretations of the Convention. In general, national courts have risen to this challenge. That process has accelerated in recent decades, as national court decisions have become increasingly available in foreign jurisdictions and national courts have increasingly cited authorities from foreign and international sources in interpreting the Convention.

[B]. Inter-American Convention

In the early years of the 20th century, much of South America turned its back on international arbitration. Despite this, in 1975 the United States and most South American nations negotiated, and later ratified, the Inter-American Convention on International Commercial Arbitration ("Inter-American Convention"), also known as the "Panama Convention." Like the New York Convention, the Inter-American Convention provides for the presumptive validity and enforceability of arbitration agreements and arbitral awards, subject to specified exceptions similar to those in the New York Convention.

The Inter-American Convention introduces significant innovations, not present in the New York Convention. It does so by providing (in Article 3) that, where the parties have not agreed to any institutional arbitration rules, the rules of the "Inter-American Commercial Arbitration Commission" ("IACAC") will govern. In turn, the Commission has adopted rules that are almost identical to the UNCITRAL Arbitration Rules. The Convention also introduces provisions (again, in Article 3) regarding the constitution of the arbitral tribunal and the parties' freedom to appoint arbitrators of their choosing (regardless of nationality). Less desirably, the Inter-American Convention departs from the New York Convention by omitting provisions prohibiting the courts of Contracting States from entertaining suits brought in breach of an international arbitration agreement.

[C]. European Convention

The 1961 European Convention on International Commercial Arbitration entered into force in 1964, and 31 states are currently party to it. Most European states (but not the United Kingdom, the Netherlands, or Finland) are party to the Convention, while some ten non-EU states are party, including Russia, Cuba and Burkina
The Convention consists of 19 articles and an annex. The Convention addresses the three principal phases of the international arbitral process – arbitration agreements, arbitral procedure and awards. With regard to arbitration agreements, the Convention does not expressly provide for their presumptive validity, but instead (in Articles V and VI) confirms the arbitrators' competence-competence and the authority of national courts to consider jurisdictional objections on an interlocutory basis. With regard to the arbitral procedure, Articles III-VII of the Convention confirm the autonomy of the parties and the arbitrators (or arbitral institution) to conduct the arbitral proceedings. With regard to awards, the Convention is designed to supplement the New York Convention, dealing in Article IX only with the effects of a judicial decision annulling an award in the arbitral seat in other jurisdictions (and not with other obligations of courts to recognize awards). In practice, the Convention's impact has been modest, owing to the limited number of Contracting States, all of whom are also party to the New York Convention.

§1.05. Contemporary National Arbitration Legislation

It is essential to the effective functioning of the arbitral process, and the realization of the parties' objectives in agreeing to arbitrate, that national courts give effect to arbitration agreements and awards, and provide support for the arbitral process. The enactment of legislation accomplishing these ends has been a major objective – and achievement – of developed states over the past 50 years. These national arbitration statutes generally implement the New York Convention (and other international arbitration conventions) and provide the basis for national court decisions dealing with international arbitration agreements and awards.

Particularly in civil law jurisdictions, arbitration legislation often took the form of a chapter in the national Code of Civil Procedure (for example, in Germany, France, Italy, the Netherlands and Austria). In common law jurisdictions, the tendency has been to enact separate legislation dealing specifically with arbitration (for example, in the United States, England, Singapore and Australia). The growing popularity of the UNCITRAL Model Law has made the latter approach of stand-alone arbitration legislation increasingly common.

As discussed below, in many cases, national arbitration statutes are applicable only to international (not domestic) arbitrations, or contain separate parts for domestic and international arbitration. This approach has been adopted to permit “pro-arbitration” rules in the international context, which may not (for historical or other reasons) be appropriate for domestic matters. Nevertheless, a number of countries (e.g., England, Germany and Spain) have adopted the same legislation for both domestic and international arbitrations with different provisions for particular subjects.

Broadly speaking, there are two categories of arbitration legislation: statutes which are supportive of the arbitral process (increasingly, but not always, modeled on the UNCITRAL Model Law) and statutes which are not supportive of the arbitral process. Both types of legislation are discussed below.

[A]. Supportive National Arbitration Legislation

Most states in Europe, North America and Asia have adopted legislation that provides effective support for the arbitral process. In many cases, states have progressively refined their national arbitration statutes, adopting either amendments or new legislation to make their arbitration regimes maximally supportive for the international arbitral process. Thus, over the past 40 years, virtually every developed country has substantially revised or entirely replaced its international arbitration legislation, in every case, to facilitate the arbitral process and promote the use of international arbitration.

Paralleling the New York Convention, the pillars of modern arbitration statutes are provisions that affirm the freedom of parties to enter into valid and binding agreements to arbitrate future commercial disputes, provide mechanisms for the enforcement of such agreements by national courts (through orders to stay litigation or compel arbitration), prescribe procedures for confirming or annulling awards and require the recognition and enforcement of foreign awards. In many cases, arbitration statutes also authorize limited judicial assistance to the arbitral process; this assistance can include selecting arbitrators, enforcing a tribunal's orders for evidence-taking and granting provisional relief in aid of arbitration. In addition, most modern arbitration legislation affirms the parties'
autonomy to agree upon arbitral procedures and, sometimes, the
substantive law governing the parties’ dispute, while limiting the
power of national courts to intervene in the arbitral process, either
when arbitral proceedings are pending or in reviewing awards.

The central objective of contemporary international arbitration
statutes has been to facilitate international trade and investment by
providing more secure means of dispute resolution. Recognizing that
international transactions are subject to unique legal uncertainties
and risks, states have sought to promote the use of arbitration as a way of mitigating such risks. In the words of the
Indian Supreme Court, “[t]o attract the confidence of the international
commertial community and the growing volume of India’s trade and
commercial relationship with the rest of the world … [the] Indian
Parliament was persuaded to enact the Arbitration and Conciliation
Act of 1996 in UNCITRAL Model.” (78)

[B]. 1985 UNCITRAL Model Law and 2006 Revisions

The 1985 UNCITRAL Model Law is the single most important
statutory instrument in the field of international commercial
arbitration. It has been adopted in a substantial (and growing)
number of jurisdiction and served as a model for legislation in many others. Recent revisions to the Model Law (in 2006) sought to
improve its legislative framework.

The Model Law was preceded by extensive consultations involving
states, the business and international arbitration community, and
regional organizations (e.g., Asian-African Legal Consultative
Committee). These discussions produced the current draft of the
Model Law, which UNCITRAL approved in a resolution in 1985; the
Model Law was approved by a U.N. General Assembly resolution
later the same year. (79)

The Model Law was designed to be implemented by national
legislatures, with the objective of harmonizing the treatment of
international commercial arbitration in different countries. The Law
consists of 36 articles, which deal comprehensively with the
international arbitral process. Among other things, the law contains
provisions concerning the enforcement of arbitration agreements
(Articles 7–9), appointment of and challenges to arbitrators (Articles
10–15), jurisdiction of arbitrators (Article 16), provisional measures
(Article 17), conduct of the arbitral proceedings, including language,
seat of arbitration and procedures (Articles 18–26), evidence-taking
(Article 27), applicable substantive law (Article 28), arbitral awards
(Articles 29–33), setting aside awards (Article 34), and recognition
and enforcement of foreign awards, including bases for non-
recognition (Articles 35–36).

Under the Model Law, written international arbitration agreements
are presumptively valid and enforceable, subject to limited, specified
exceptions. (80) Article 8 of the Law provides for the enforcement of
valid arbitration agreements, regardless of the arbitral seat, by way
of a dismissal or stay of national court litigation. The Law also
adopts the separability doctrine (Article 16), and grants arbitrators
authority (competence-competence) to consider their own
jurisdiction (also in Article 16).

Article 5 of the Model Law prescribes a principle of judicial non-
intervention in arbitral proceedings. The Law also affirms the parties’
autonomy (subject to due process limits) with regard to the arbitral
procedures (Article 19(1)) and, absent agreement between the
parties, the tribunal’s authority to prescribe such procedures (Article
19(2)). The basic approach of the Model Law – the arbitral proceedings is to define a basic set of procedural rules which
– subject to a very limited number of mandatory principles of
fairness, due process and equality of treatment (81) – the parties are
free to alter by agreement. The Law also provides for judicial
assistance to the arbitral process in prescribed and limited
respects, including provisional measures, constitution of a tribunal and evidence-taking (Articles 9, 11–13 and 27).

Article 34 of the Model Law mandates the presumptive validity of
international arbitral awards, subject to a limited, exclusive list of
grounds for annulment of awards in the arbitral seat; these grounds
parallel those available under the New York Convention for non-
recognition of an award (i.e., lack or excess of jurisdiction, non-
compliance with arbitration agreement, due process violations,
public policy, non-arbitrability). In a parallel provision, Articles 35 and
36 of the Model Law require the recognition and enforcement of
foreign awards (made in arbitral seats located outside the
recognizing state), again on terms identical to those prescribed in the
Convention.

In 2006, UNCITRAL adopted a limited number of amendments to the
1985 Model Law. The principal revisions were made to Article 2 (the addition of general interpretative principles), Article 7 (written form of arbitration agreement), Article 17 (the availability of and standards for provisional measures from arbitral tribunals and national courts) and Article 35 (procedures for recognition of awards).

The Model Law does not have independent legal effect and must instead be adopted by individual national legislatures. Some 50 jurisdictions have adopted legislation based on the Model Law, including Australia, Bermuda, Bulgaria, Canada, Cyprus, Germany, Hong Kong, India, Mexico, New Zealand, Nigeria, Norway, Russia, Scotland, Singapore, Spain, Tunisia and various U.S., Canadian and Australian states or provinces. At least as important, the Model Law has set the agenda for reform of arbitration statutes even in countries such as England, France and Switzerland where it was not adopted. Moreover, decisions by courts in jurisdictions that have adopted the Model Law are beginning to produce a reasonably uniform international body of precedent concerning its meaning.

[C]. Less Supportive National Legislation

Some nations regarded international arbitration with a mixture of suspicion and hostility during much of the 20th century. This hostility arose from a reluctance to compromise perceived principles of national sovereignty and from doubts concerning the neutrality and efficacy of international arbitration. Although distrust for international arbitration has waned substantially in recent decades, it has not entirely disappeared and continues intermittently to influence legislation and judicial decisions in a few countries.

Historically, some developing countries refused to enforce agreements to arbitrate future disputes. This was particularly true in Latin America and the Middle East. Some states took the position that arbitration agreements were an unjustifiable infringement upon national sovereignty, which was to be vigorously resisted. In many cases, arbitration agreements were valid only if they concerned an existing (not a future) dispute, which was the subject of a submission agreement committing the parties to resolve the dispute by arbitration.

In 19th century Latin America, the Calvo doctrine declared that foreign nationals were mandatorily subject to the jurisdiction of local courts, which could not be ousted by arbitration agreements. The doctrine was incorporated into national legislation, which not infrequently rendered international arbitration agreements per se invalid. Political declarations also reflected the hostility of some developing states towards international arbitration well into the 20th century.

Against this background, arbitration legislation in a few developing states still does not provide effective enforcement of agreements to arbitrate future disputes; these agreements are sometimes revocable at will or unenforceable in broad categories of disputes. Similarly, in a number of states, arbitral awards are subject to either de novo judicial review or to similarly rigorous scrutiny on other grounds. Finally, some national courts have interfered in the international arbitral process – for example, by purporting to remove arbitrators, to resolve “preliminary” issues, or to enjoin arbitrations.

Nonetheless, during the last 20 years, a number of states that once distrusted international arbitration have ratified the New York Convention and/or enacted legislation supportive of the arbitral process. This includes India, China, Saudi Arabia, Argentina, Algeria, Bahrain, Brazil, Tunisia, Turkey, Nigeria, Peru, Russia and (at least for a time) Ecuador and Venezuela. Although there has been limited practical experience with the application of arbitration legislation in such states, these statutes have the potential for providing a more stable framework for international arbitration.

Unfortunately, even where national law may appear to support the international arbitral process, some national courts have displayed a readiness to hold arbitration agreements or awards invalid or to interfere with the arbitral process. That is particularly true when national courts are requested to do so by local parties or state entities. Moreover, the early years of the 21st century have seen a modest resurgence of ideological opposition to the international arbitral process, questioning the legitimacy of aspects of the process. It remains to be seen whether this trend will continue, although it has thus far attracted little interest outside a limited number of states.
International arbitrations may be either “institutional” or “ad hoc.” There are important differences between these two forms of arbitration, both theoretical and practical.

Institutional arbitrations are conducted pursuant to institutional arbitration rules, which have been incorporated by the parties’ arbitration agreement (and which, absent such incorporation, have no independent legal effect). Institutional arbitrations are conducted pursuant to institutional rules and in practice are almost always overseen by an appointing authority with responsibility for constituting the arbitral tribunal, fixing the arbitrators’ compensation and similar matters. In contrast, ad hoc arbitrations are conducted without the benefit of an appointing authority or (generally) pre-existing arbitration rules, subject only to the parties’ arbitration agreement and applicable national arbitration legislation.

[A]. Institutional Arbitration

Institutional arbitrations are administered by specialized arbitral institutions. A number of organizations provide institutional arbitration services for international users, sometimes tailored to particular commercial or other needs. The best-known international commercial arbitration institutions are the International Chamber of Commerce (“ICC”), the American Arbitration Association (“AAA”) and its International Centre for Dispute Resolution (“ICDR”), the London Court of International Arbitration (“LCIA”) and the Singapore International Arbitral Centre (“SIAC”).

These (and other) arbitral institutions have promulgated sets of procedural rules that apply where parties have agreed to arbitration pursuant to such rules, typically by incorporating such rules in their arbitration agreements. These rules set out the basic procedural framework for arbitral proceedings and typically authorize the arbitral institution to assist in selecting arbitrators in particular disputes (that is, to serve as “appointing authority”), to resolve challenges to arbitrators, to designate the place of arbitration, to fix the fees payable to the arbitrators and (sometimes) to review the arbitrators’ awards to reduce the risk of unenforceability. Each institution has a staff, with the size varying significantly from one institution to another, and a decision-making body.

It is fundamental that arbitral institutions do not themselves arbitrate the merits of the parties’ dispute. This is the responsibility of the individuals selected by the parties or institution as arbitrators. In practice, arbitrators are almost never employees of the arbitral institution, but instead are private persons selected by the parties. If parties cannot agree upon an arbitrator, most institutional rules provide that the host institution will act as an “appointing authority,” to choose the arbitrators in the absence of the parties’ agreement.

[B]. Ad Hoc Arbitration

Ad hoc arbitrations are not conducted under the auspices or supervision of an arbitral institution. Instead, parties simply agree to arbitrate, without designating any institution to administer their arbitration. Ad hoc arbitration agreements often select an arbitrator or arbitrators to resolve the dispute without institutional supervision. The parties will sometimes also select a pre-existing set of procedural rules designed for ad hoc arbitrations. For international commercial disputes, UNCITRAL has published a set of such rules, the UNCITRAL Arbitration Rules, which are discussed below.

In ad hoc arbitrations, parties usually designate an appointing authority to select the arbitrator(s) if the parties cannot agree and to consider any subsequent challenges to members of the tribunal. If the parties fail to select an appointing authority, then arbitration statutes in many states permit national courts to appoint arbitrators, but this may be less desirable than having an experienced appointing authority do so.

[C]. Relative Advantages and Disadvantages of Institutional and Ad Hoc Arbitration

Both institutional and ad hoc arbitration have strengths. Institutional arbitration is conducted under a standing set of procedural rules and supervised by professional staff. As a practical matter, this reduces the risks of procedural breakdowns, particularly at the beginning of the arbitral process, and of technical defects in the arbitration proceedings and award. The institution’s involvement can be particularly constructive in the appointment of arbitrators, challenges
to arbitrators, selection of an arbitral seat and fixing of arbitrators’ fees, where specialized staff provide better service than ad hoc decisions by national courts with little experience in such matters. Equally important, many institutional rules contain provisions that make the arbitral process more effective. This includes provisions concerning competence-competence, separability, provisional measures, disclosure, arbitrator impartiality, corrections and challenges to awards, replacement of arbitrators and costs.

On the other hand, ad hoc arbitration is arguably more flexible and potentially more confidential than institutional arbitration. Moreover, the growing size and sophistication of the international arbitration bar and the efficacy of legal regimes for arbitration arguably reduce the advantages of institutional arbitration. Nonetheless, most users prefer the more predictable character of institutional arbitration, the benefits of institutional rules and appointment mechanisms and the reduced roles of national courts, at least absent unusual circumstances.

[D]. UNCITRAL Arbitration Rules

The UNCITRAL Arbitration Rules occupy an important position in contemporary arbitration practice. The objective of the Rules was to create a predictable procedural framework for international arbitrations which was acceptable to common law, civil law and other legal systems, as well to capital-importing and exporting interests. The Rules, which were first promulgated by the U.N. General Assembly in December 1976, were revised in 2010.

Like most institutional rules, the UNCITRAL Rules prescribe a basic procedural framework for arbitrations. This includes provisions for initiating an arbitration (Articles 3 and 4), selection and challenge of arbitrators (Articles 7–16), conduct of the arbitral proceedings (Articles 17–32), choice of applicable law (Article 35), awards (Articles 33–39) and arbitration costs (Articles 40–43). The Rules also contain provisions (in Article 23) confirming the separability of the arbitration clause and the tribunal’s power (competence-competence) to consider jurisdictional objections. Under the Rules, the PCA serves a sui generis function of designating an appointing authority when requested, unless the parties have agreed to a different appointment mechanism.

The UNCITRAL Rules were revised in 2010. The revised Rules allow for more liberal joinder of parties and specify that the tribunal’s power includes the authority to grant injunctions and order the preservation of evidence. In a departure from the approach of other arbitration rules, the revised Rules give the parties the option to waive recourse against an award (while most other sets of rules provide for such waivers as a default rule).

[E]. Leading International Arbitral Institutions

If institutional arbitration is desired, the parties must choose a particular arbitral institution and refer to it and its rules in their arbitration clause (often by using an institution’s model clause). In practice, parties ordinarily rely on one of a few established institutions. This avoids the uncertainty that comes from inexperienced arbitrator appointments and administrative efforts.

All leading international arbitral institutions are prepared to, and routinely do, administer arbitrations seated almost anywhere in the world, and not merely in the place where the institution itself is located. There is therefore no need to select an institution headquartered in the parties’ desired arbitral seat (e.g., the LCIA or Vienna International Arbitral Centre can readily administer an arbitration seated in Paris or New York, while the AAA can administer arbitrations seated in Vienna or London).

The services rendered by professional arbitration institutions come at a price, which is in addition to the fees of the arbitrators. Every institution has a fee schedule that specifies what that price is. The amounts charged by institutions for particular matters vary significantly, as does the basis for calculating such fees. For example, some institutions use hourly charges while others charge based upon a percentage of the amount in dispute.

Based in Paris, with a branch office in Hong Kong, the International
Chamber of Commerce ("ICC") is, by most accounts, the world's leading international arbitration institution. The ICC has promulgated a set of ICC Rules of Arbitration (which are periodically revised, most recently as of 2012) as well as the ICC Rules of Optional Conciliation and the ICC Rules for Expertise. Under the ICC Arbitration Rules, the ICC (through its International Court of Arbitration ("ICC Court")) is extensively involved in the administration of arbitrations. Despite its name, the ICC Court is not a "court" and does not act as an arbitrator. Rather, the ICC Court is an administrative body that acts in a supervisory and appointing capacity; it is the arbitrators that the ICC Court appoints that decide cases, not the ICC Court itself.

Under the ICC Rules, the ICC Court and its Secretariat are responsible for service of the initial Request for Arbitration (Articles 4–5); fixing advances on costs of the arbitration (Article 36); confirming parties' nominations of arbitrators (Articles 11–13); appointing arbitrators if the parties are unable to agree upon a presiding arbitrator or sole arbitrator (Article 13); considering challenges to the arbitrators (Article 14); approving so-called "Terms of Reference," which define the issues in the arbitration (Article 23); reviewing tribunals' draft awards for defects (Article 33); and fixing the arbitrators' fees (Article 37).

The ICC Rules are similar to the UNCITRAL Rules in providing a broad procedural framework for arbitral proceedings. As with most institutional rules, only a skeletal procedural framework is provided, with the parties and arbitrators accorded substantial freedom to adopt procedures tailored to particular disputes. Unusually, the ICC Rules require a "Terms of Reference" and procedural timetable to be adopted by the tribunal at the outset of proceedings and that an award be rendered within six months (absent extensions, which are freely granted). Also unusually, the ICC Rules provide for the ICC Court to review draft awards before they are finalized.

The ICC Rules were extensively revised as of 2012, with the objective of making the arbitral process more efficient. Under the revised Rules, tribunals are required to conduct a case management conference and granted express authority to conduct the arbitration efficiently (Articles 22, 24). The revised Rules also streamline the process of constituting the tribunal (Articles 11–13) and establish an "Emergency Arbitrator" mechanism to deal with interim relief prior to constitution of the tribunal (Article 29). In addition, the 2012 Rules permit liberal joinder of parties and consolidation of disputes (Articles 7–10).

The ICC's annual case load was roughly 300 cases per year during much of the 1990s, increasing to more than 600 cases per year in the following decade, with 793 new cases being filed in 2010. Most of these cases are international disputes, many involving very substantial sums. The ICC's caseload of 1485 pending cases in 2010 involved disputes with parties from 140 countries or territories. ICC arbitrations are conducted throughout the world. In 2010, for example, ICC arbitrations were conducted in 53 countries. The ICC do not maintain a list of arbitrators and its Secretariat instead selects arbitrators with the assistance of local "National Committees" in individual countries—often, that of the arbitral seat.

The ICC's administrative fees and the fees of the arbitrators are based principally on the amount in dispute between the parties. The ICC Rules require (in Article 36) that the parties pay an advance on the costs of the arbitration calculated by the ICC Court. The advance on costs is equally divided between the claimant and the respondent, although one party may pay the full amount in order to enable the arbitration to proceed if the other party defaults.

The ICC Rules have sometimes been criticized as expensive and cumbersome, although recent amendments reflect concerted efforts to address this concern. Despite criticism, the ICC clearly remains the institution of preference for many sophisticated commercial users.

[2]. London Court of International Arbitration

Founded in 1892, the LCIA is, by many accounts, the second most popular European institution for international commercial arbitration. The LCIA's annual caseload has exceeded 200 disputes in recent years, with 246 disputes referred to arbitration in 2010. The LCIA has made a largely successful effort in recent years to overcome perceptions that it is a predominantly English institution. In recent years, fewer than 20% of the LCIA's cases have involved a U.K. party, with the number declining to 17% in 2010.

The LCIA administers a set of arbitration rules, the LCIA Arbitration
Rules, which were extensively revised in 1998. Although identifiably English in drafting style and procedural approach, the LCIA Rules provide a sound basis for international dispute resolution, particularly for parties desiring common law procedures (e.g., disclosure, security for costs). Broadly speaking, LCIA arbitrations are administered in a less comprehensive fashion than ICC cases. Among other things, the LCIA Rules contain no Terms of Reference procedure and do not provide for institutional review of draft awards.

Most LCIA arbitrations are seated in London. Absent contrary agreement by the parties, London will ordinarily be selected as the arbitral seat under Article 16(1) of the LCIA Rules. A particular procedural advantage of the LCIA Rules is their provision for expedited formation of the tribunal. The LCIA Rules also permit intervention of third parties in arbitrations, subject to prescribed conditions (Article 22(1)(h)). Unusually, the LCIA publishes decisions of the LCIA Court on challenges to arbitrators (in a redacted form), providing enhanced predictability about arbitrator challenges.

Like the ICC, the LCIA does not maintain a standing list of arbitrators. The LCIA’s appointments of arbitrators have been drawn predominantly from the English bar and retired judiciary, in part because many LCIA cases have involved contracts governed by English law. In 2010, roughly 60% of the arbitrators nominated by the LCIA were U.K. nationals. The LCIA calculates arbitrators' fees according to the time expended by arbitrators at the hourly rates published by the LCIA and fixed by agreement between the arbitrators and the LCIA.

The AAA is the leading U.S. arbitral institution, and reportedly handles one of the largest numbers of arbitral disputes in the world. The primary arbitration rules administered by the AAA are the AAA Commercial Arbitration Rules; these rules are used in a large number of domestic U.S. arbitrations.90

In recent years, the AAA has taken steps aimed at enhancing its position as an international arbitral institution. In 1996, the AAA established an International Centre for Dispute Resolution (“ICDR”), with responsibility for administering international arbitrations. The ICDR International Dispute Resolution Procedures (“ICDR Rules”) are applied where parties have agreed to them or have agreed to an AAA arbitration in an “international” dispute, but without specifying a particular set of AAA rules. Where the parties have agreed to a different set of AAA rules, such as the AAA Commercial Rules, that choice will prevail.

The AAA’s case load has increased significantly over recent decades. In 1997, it reported a total case load of 11,130 cases (under its Commercial Rules), rising to 15,232 cases in 1998 and to 20,711 in 2007. Similar growth is reported in international cases, from 453 international cases filed in 1999 to 888 new international filings in 2010.100

The ICDR Rules are based on the UNCITRAL Rules. Under all versions of AAA rules, the AAA/ICDR administrative staff plays a less significant supervisory role than does the ICC Secretariat. Among other things, the AAA/ICDR does not receive or serve initial requests for arbitration; does not require a Terms of Reference; and plays a less significant role in setting the arbitrators’ fees. The AAA’s administrative charges are based on the amount in dispute. With respect to the arbitrators’ fees, arbitrators fix their own rates, which are provided for parties to consider when receiving a list of potential arbitrators. Compensation under the ICDR Rules (Article 32) is based on the arbitrators’ “amount of service,” taking into account their stated rates and the “size and complexity of the case.”

In practice, most ICDR appointments of arbitrators are based on a list procedure, with names drawn from a list of some 500 names maintained by the ICDR and presented to the parties for expressions of preference. Although the AAA’s lists have historically been dominated by U.S. practitioners, the ICDR increasingly seeks to appoint arbitrators with international experience. Nonetheless, some users have found the AAA/ICDR appointment procedures and selections patchy, with less involvement of experienced international practitioners than other leading institutions.

[4]. Singapore International Arbitral Centre
The Singapore International Arbitration Centre ("SIAC") was established in 1990, initially focused on disputes arising out of construction, shipping, banking and insurance. In recent years, the SIAC has taken steps to enhance its international reputation and, by many accounts, is now the leading Asian international arbitral institution. The SIAC’s case load saw a substantial increase over the past decade, rising from 59 in 2000 to 198 cases filed in 2010. The SIAC Rules are based largely on the UNCITRAL Rules, and the most recent version came into force on 1 July 2010.

[5]. ICSID

The International Centre for Settlement of Investment Disputes ("ICSID") administers arbitrations and conciliations pursuant to the so-called "ICSID Convention" or "Washington Convention" of 1965. As discussed below, ICSID jurisdiction is confined generally to "investment" disputes, involving claims by foreign investors against host states; investment disputes typically arise under contracts containing ICSID arbitration clauses or pursuant to bilateral investment treaties (discussed below). ICSID's case load has increased significantly over the past several decades, rising from roughly 1 case filed per year in the 1970s to roughly 30 cases per year in 2010 and 2011.

[6]. Permanent Court of Arbitration

The PCA in the Hague was founded under the Hague Convention of 1899 on the Pacific Settlement of Disputes, initially to administer state-to-state arbitrations. The PCA has promulgated several sets of rules based largely on the UNCITRAL Rules, applicable to disputes between both states and (more recently) private parties. A limited number of state-to-state arbitrations, including several very significant disputes, have been conducted under the auspices of the PCA. The PCA is also designated under the UNCITRAL Rules as the default mechanism for choosing an appointing authority in the event the parties are unable to agree upon the choice of arbitrators or appointing authority.

[7]. Other International Arbitral Institutions

There are a number of other international arbitral institutions, typically with either a regional or industry focus. Regional institutions include the Arbitration Institute of the Stockholm Chamber of Commerce, Japan Commercial Arbitration Association, Hong Kong International Arbitration Centre, Swiss Chambers’ Arbitration Institution, German Institution of Arbitration, Vienna International Arbitral Centre, China International Economic and Trade Arbitration Commission, Cairo Regional Centre for International Commercial Arbitration, Australian Centre for International Commercial Arbitration, Kuala Lumpur Regional Centre for Arbitration and Indian Council of Arbitration.

§1.07. Elements of International Arbitration Agreements

As already discussed, international arbitration is almost always consensual; arbitration generally occurs pursuant to an arbitration agreement between the parties. Parties are largely free to draft their arbitration agreements in whatever terms they wish and in practice this freedom is liberally exercised. Like other contractual clauses, the terms of arbitration agreements are largely a product of the parties’ interests, negotiations and drafting skills.

Article 7(1) of the UNCITRAL Model Law provides that “[a]n arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.” Using this freedom, parties draft arbitration agreements that are either clauses within underlying commercial contracts or stand-alone “arbitration agreements,” and that are either very short, very long, or somewhere in between. National courts have upheld arbitration clauses that are as brief as “English law – arbitration, if any, London according ICC
Rules," or “arbitration – Hamburg, Germany.” At the other extreme, arbitration agreements in large transactions sometimes take the form of separately-executed documents running to dozens of pages and (purportedly) addressing every procedural eventuality.

[A]. Submission Agreement versus Arbitration Clause

It is possible for parties to agree to submit a dispute that has already arisen between the parties to arbitration. The resulting agreement is called a “submission agreement” or “compromise.” When an existing dispute is submitted to arbitration, the parties’ agreement must define that dispute and will also typically select the arbitrators and procedures for resolving the dispute. Typically, it is difficult to negotiate a submission agreement once a dispute has arisen and litigation tactics have been explored. As a consequence, the overwhelming majority of international arbitration agreements take the form of clauses included in a commercial contract. Arbitration clauses of this character typically apply to future disputes related to the parties’ contract. The arbitration clause provides a mechanism for resolving future disputes, which have not yet arisen (and may, hopefully, never arise).

[B]. Critical Elements of International Arbitration Agreements

International arbitration agreements ordinarily address: (a) the agreement to arbitrate; (b) the scope of disputes submitted to arbitration; (c) the use of an arbitral institution and its rules; (d) the seat of the arbitration; (e) the method of appointment, number and qualifications of the arbitrators; (f) the language of the arbitration; and (g) a choice-of-law clause.

Critical Elements of International Arbitration Agreement
1. Agreement to Arbitrate
2. Scope of Disputes Submitted to Arbitration
3. Institutional Arbitration Rules
4. Arbitral Seat
5. Arbitrators’ Number, Qualifications and Selection
6. Language of Arbitration
7. Choice-of-Law Clause

Other Provisions of International Arbitration Agreements
1. Allocation of Legal Costs
2. Interest and Currency of Award
3. Disclosure
4. Fast-Track or Other Procedures
5. Multi-Tier Dispute Resolution
6. State/Sovereign Immunity
7. Confidentiality
8. Waiver of Annulment

[1]. The Agreement to Arbitrate

It seems tautological – but not always the case in practice – that any arbitration clause must set forth the parties’ agreement to arbitrate. As a drafting matter, this means that arbitration agreements should (and usually do) expressly refer disputes to “arbitration” – and not to expert determination, mediation, “ADR,” or some other form of dispute resolution. These other forms of alternative dispute resolution are not categorized as “arbitration” under many international treaties and arbitration statutes, and will often not qualify for the “pro-enforcement” safeguards provided by these instruments. Accordingly, a critical element of any international arbitration agreement is the parties’ undertaking that “all disputes shall be finally resolved by arbitration ….”

Similarly, most arbitration agreements provide that disputes should be referred to arbitration for a “binding” or “final” disposition (and not to an advisory recommendation). In addition, arbitration clauses should treat arbitration as mandatory and not a possible future option, applicable if the parties so agree after a dispute arises. Thus, arbitration clauses usually (and should) provide that “all disputes shall be finally resolved by arbitration ….”

[2]. Scope of Arbitration Agreement
Critical to any arbitration clause is its “scope” – that is, the categories of disputes that will be subject to arbitration. For example, an agreement to arbitrate may provide that all disputes between the parties, bearing any connection to their contractual relations, are subject to arbitration. Alternatively, the parties may agree that only contract claims that arise under the express terms of their agreement (or particular provisions of that agreement) will be arbitrated or that particular types of claims are to be excluded from an otherwise broad arbitration agreement. Alternatively, in the case of a submission agreement, parties may agree to arbitrate only a single, pre-existing dispute.

As a general rule, parties draft arbitration clauses broadly, to cover all disputes having any connection with the parties' dealings. Doing so avoids the expense arising from parallel proceedings (where certain contractual disputes are arbitrated and other contractual, or non-contractual, disputes are litigated). It also avoids the uncertainties resulting from potentially inconsistent judgments and jurisdictional disputes over the scope of the various proceedings.

There are a handful of formulae that are commonly used to define the scope of arbitration clauses. These formulae include “any” or “all” disputes: (i) “arising under this Agreement”; (ii) “arising in connection with this Agreement”; or (iii) “relating to this Agreement.” Alternative formulations include: (iv) “all disputes relating to this Agreement, including any question regarding its existence, validity, breach or termination”; or (v) “all disputes relating to this Agreement or the subject matter hereof.”

Even where the parties have agreed in principle to a broad arbitration clause, there may be claims or disputes that one party does not want submitted to arbitration. This can include matters such as intellectual property rights or payment obligations, which are sometimes excluded or carved out of the scope of the arbitration clause. It is often better to avoid efforts to exclude particular types of disputes from arbitration, except in unusual circumstances. Such exclusions can lead (undesirably) to parallel proceedings in both the arbitral forum and national courts, and to jurisdictional disputes over the application of a clause to particular claims.

[3]. Institutional Arbitration Rules

As discussed above, institutional arbitration is conducted pursuant to procedural rules of a particular arbitral institution. If institutional arbitration is desired, the parties' arbitration agreement must select and refer to an arbitral institution and its rules. In general, every arbitral institution provides its own model arbitration clause (with examples below); parties wishing to invoke the institution's rules should ordinarily use this clause as the basis for their agreement, departing from it only with care and for considered reasons.

Model ICC Arbitration Clause

“All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.”

Model UNCITRAL Arbitration Clause

“All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.”

In cases where the parties do not desire institutional arbitration, they will sometimes select a pre-existing set of procedural rules designed for ad hoc arbitrations (such as the UNCITRAL Rules). Arbitration clauses frequently do so by references such as “all disputes shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules ….”

[4]. Seat or Place of the Arbitration

Another vital element of any international arbitration agreement is designation of the “seat” (or “place”) of the arbitration. This is the state where the arbitration has its formal legal or jurisdictional seat, and where the arbitral award will formally be made. The text of contractual provisions selecting the arbitral seat is not complex, usually providing only “The seat of the arbitration shall be [Singapore].”

As discussed below, there are a number of legal and practical consequences that follow from selection of an arbitral seat, making
this one of the most important aspects of any international arbitration agreement. These consequences include the selection of the procedural law of the arbitration and the national courts responsible for applying that law, the national courts responsible for issues relating to constitution of the tribunal and the national courts responsible for (and arbitration law applicable to) annulment of arbitral awards. All of these issues are of substantial importance to the arbitral process in international matters.

[5]. Number, Method of Selection and Qualifications of Arbitrators

It is common for arbitration agreements to address the number, means of appointment and qualifications of the arbitrators. Selection of the arbitrators is one of the most critical issues in any arbitration. Addressing this issue in the arbitration agreement is vitally-important to the effectiveness of the process.

Arbitration clauses often specify the number of persons who will comprise the tribunal in the event of future disputes. If the parties do not agree upon the number of arbitrators, institutional rules generally grant the institution power to do so; otherwise, national courts will have the power to decide, pursuant to default rules in arbitration legislation. Nonetheless, relying on a judicial or institutional decision regarding the number of arbitrators can result in delays or disputes. As a consequence, parties often specify the number of arbitrators (usually one or three) in their arbitration clause.

It is also important for an arbitration clause to include a method for selecting the arbitrator(s). Some clauses identify a specific individual as arbitrator (e.g., “The arbitrator shall be George Martin.”). The most common provision for selection of the arbitrator is designation of an “appointing authority,” which will select a sole arbitrator or presiding arbitrator in the event that the parties cannot do so; in three-person tribunals, many arbitration clauses permit each party to select a party-nominated arbitrator, with the appointing authority choosing the presiding arbitrator. Most institutional rules provide for such a role by the sponsoring institution when parties agree to arbitrate under the institution’s rules, and no special wording (aside from adopting the institution’s rules) is necessary to select the institution as appointing authority.

[6]. Language of the Arbitration

Arbitration clauses also frequently specify the language (or languages) of the arbitral proceedings and award. This is a point of vital importance, which can have a profound practical effect on the selection of the arbitrators and character of the arbitral proceedings.

Absent the parties’ agreement, institutional rules usually authorize the tribunal to select a language (or languages) of the arbitration. This will often be the language of the underlying contract, although some regional institutional rules provide that the default language of the arbitration shall be that of the country where the institution is based (e.g., for CIETAC, Chinese). Even if institutional rules do not address the issue, national law will ordinarily give the tribunal authority to select a language for the arbitration. Nonetheless, there is seldom any reason to leave this issue to chance, particularly given the simplicity of a provision to the effect that “the language of the arbitration shall be [English].”

[7]. Choice-of-Law Clauses

International arbitration can give rise to tortuous choice-of-law questions. As a consequence, many arbitration agreements are accompanied by a choice-of-law clause, specifying the substantive law applicable to the parties’ contract and related disputes. A common formulation is “This Agreement will be governed by, and all disputes relating to or arising in connection with this Agreement shall be resolved in accordance with, the laws of [State X].”

[C]. Other Provisions of International Arbitration Agreements

Many arbitration agreements also contain other provisions, in addition to the elements discussed above. The character of these provisions varies from case to case, depending on the parties’ interests. The most common additional elements include: (a) legal costs; (b) interest and currency of award; (c) disclosure powers of
tribunal; (d) fast-track or other procedural rules, including so-called
escalation clauses; (e) state/sovereign immunity waivers; (f) confidentiality; and (g) waivers of rights to seek annulment of an
award.\(^{[113]}\)

§1.08. Overview of Choice of Law in International Commercial Arbitration

Choice-of-law issues play an important role in international commercial arbitration. It is necessary to distinguish between four
choice-of-law issues that can arise in connection with an international arbitration: (a) the substantive law governing the merits
of the parties’ underlying contract and other claims; (b) the substantive law governing the parties’ arbitration agreement; (c) the
law applicable to the arbitral proceedings (also called the “procedural law of the arbitration,” the “curial law” or the “lex arbitri”); and (d) the
conflict of laws rules applicable to select each of the foregoing laws. Although not common, it is possible for each of these four issues to be
governed by a different national (or other) law.

Choices of Law in International Arbitration

1. Substantive Law Governing Merits of Parties’ Dispute (Including Underlying Contract)
2. Substantive Law Governing Arbitration Agreement
3. Procedural Law Applicable to Arbitral Proceedings
4. Conflict of Laws Rules

Each of the foregoing choice-of-law issues can have a vital influence on international arbitral proceedings. Different national laws provide
different – sometimes dramatically different – rules applicable at different stages of the arbitral process. Understanding which national
rules will potentially be applicable can therefore be critical.

[A]. Law Applicable to the Substance of the Parties’ Dispute

The parties’ underlying dispute will ordinarily be resolved under the rules of substantive law of a particular national legal system. In
the first instance, it will usually be the arbitrators who determine the substantive law applicable to the parties’ dispute. As discussed in
detail below, international arbitral awards typically give effect to the parties’ agreements concerning applicable substantive law (“choice-of-law clauses”).\(^{[115]}\) The principal exception is where mandatory national laws or public policies
override contractual arrangements.

Where the parties have not agreed upon the substantive law governing their dispute, the arbitral tribunal must select such a law.
In so doing, the tribunal will sometimes refer to national or international conflict of laws rules (which may select different laws for the parties’ arbitration agreement and underlying contract).

[B]. Law Applicable to the Arbitration Agreement

As discussed elsewhere, arbitration agreements are universally regarded as presumptively “separable” from the underlying contract in
which they appear. One consequence of this is that the parties’ arbitration agreement may be governed by a different national law than
that of the underlying contract. The governing law may be chosen by the parties or determined by applying conflict of laws rules (which may select different laws for the parties’ arbitration agreement and underlying contract).

As described below, four alternatives for the law governing an arbitration agreement are of particular importance: (a) the law chosen by the parties to govern the arbitration agreement itself; (b) the law of the arbitral seat; (c) the law governing the parties’ underlying contract; and (d) international principles, either applied as a substantive body of contract law (as in France) or as rules of non-discrimination (as in most U.S. authority).\(^{[117]}\)

[C]. Procedural Law Applicable to the Arbitral Proceedings

The arbitral proceedings themselves are subject to legal rules, governing both “internal” procedural matters and “external” relations
between the arbitration and national courts. In most instances, the law governing the arbitral proceeding is the arbitration statute of the
Among other things, the law of the arbitral seat typically deals with such issues as the appointment and qualifications of arbitrators, the qualifications and professional responsibilities of parties’ legal representatives, the extent of judicial intervention in the arbitral process, the availability of provisional relief, the procedural conduct of the arbitration, the form of an award and standards for annulment of an award. Different national laws take different approaches to these various issues. In some countries, national law imposes significant limits or requirements on the conduct of the arbitration and local courts have broad powers to supervise arbitral proceedings. Elsewhere, and in most developed jurisdictions, local law affords international arbitrators virtually unfettered freedom to conduct the arbitral process – subject only to basic requirements of procedural regularity (“due process” or “natural justice”).

In many jurisdictions, parties are free to select the procedural law of the arbitration (as discussed below). This includes, in some jurisdictions, the freedom to agree to the application of a different procedural law than that of the arbitral seat. This occurs only in very rare cases and is ordinarily avoided because of the uncertainties it creates, including as to which national courts may select and remove arbitrators or annul awards.

[D]. Choice of Laws Rules Applicable in International Arbitration

Selecting each of the bodies of law identified in the foregoing three sections – the law applicable to the merits of the underlying contract, the arbitration agreement and the arbitral proceedings – ordinarily requires application of conflict of laws rules. In order to select the substantive law governing the parties’ dispute, for example, the tribunal must ordinarily apply a conflict of laws system. A tribunal must therefore decide at the outset what set of conflicts rules to apply to select each of these systems of law. The practice of tribunals in selecting the law applicable to each of the foregoing issues varies significantly. As discussed in greater detail below, approaches include application of (a) the arbitral seat’s conflict of laws rules; (b) “international” conflict of laws rules; (c) successive application of the conflict of laws rules of all interested states; and (d) “direct” application of substantive law (without any express conflicts analysis).

§1.09. Investor-State Arbitration

Most international arbitrations are international commercial arbitrations, arising from commercial dealings between private parties. Another significant, if less common, category of international arbitration involves “investor-state” or “investment” arbitrations, usually conducted pursuant to the arbitration provisions of a specialized multilateral or bilateral investment treaty, or, less frequently, pursuant to the arbitration clauses in state contracts.

Investment arbitrations involve “investment disputes” between foreign investors and host states. As discussed in Chapter 18 below, investment disputes usually involve claims of expropriation without full compensation, unfair or inequitable treatment, or discriminatory treatment of a foreign investor by a host state. In most cases, investment arbitrations involve only claims by investors against the host state (and not counterclaims against the investor).

[A]. ICSID Convention

As noted above, the ICSID Convention is a specialized international treaty (with 147 Contracting Parties from all regions of the world) designed to facilitate the settlement of “investment disputes” (i.e., “legal dispute[s] arising directly out of … investment[s]”)). The ICSID Convention provides a stand-alone legal regime for ICSID arbitration agreements and arbitral awards (which are generally not subject to the New York Convention or generally-applicable national arbitration legislation). Arbitrations under the ICSID Convention are administered by ICSID, a specialized arbitral institution, which has promulgated the ICSID Arbitration Rules (and related conciliation rules). The ICSID Convention and Arbitration Rules are discussed in greater detail below.

[B]. Bilateral Investment Treaties

Investment arbitrations can also arise under Bilateral Investment Treaties (“BITs”), which became common during the 1980s and
1990s as a means of encouraging capital investment in developing markets. More than 2,800 BITs are presently in force, with additional BITs being concluded each year.\(121\)

As discussed below, most BITs provide significant substantive protections for investments made by foreign investors, including guarantees against expropriation and denials of fair and equitable treatment. BITs also frequently contain dispute resolution provisions which permit foreign investors to require international arbitration (typically referred to as “investor-state arbitration”) of specified categories of investment disputes with the host state;\(122\) these provisions permit investors to require arbitration of investment disputes in the absence of a traditional contractual arbitration agreement with the host state (so-called “arbitration without privity”).\(123\) Unlike ICSID arbitrations, BIT arbitral awards are often subject to the New York Convention and general national arbitration legislation. The role of BITs in investor-state arbitration is discussed in Chapter 18 below.

§1.10. State-to-State Arbitration

An even more specialized category of international arbitration involves “state-to-state” or “interstate” arbitrations, also discussed in Chapter 18 below. Interstate arbitrations typically involve disputes between two states or state-like entities and often raise issues of public international law. Many state-to-state arbitrations involved boundary disputes (involving either land or maritime boundaries).\(124\)

Many state-to-state arbitrations are ad hoc and conducted pursuant to specially-negotiated procedural rules. Alternatively, some interstate arbitrations are conducted pursuant to the PCA’s rules for arbitrations between states (discussed above). Interstate arbitration agreements and awards are, in many cases, not subject to enforcement under the New York Convention, in large part because of reservations limiting the Convention to “commercial” matters, or national arbitration legislation. Nonetheless, where states or state entities arbitrate commercial or financial disputes, arbitral awards are in principle subject to recognition and enforcement under the New York Convention and legislation in many states.

\(^1\) See Benson Pump Co. v. S. Cent. Pool Supply, Inc., 325 F.Supp.2d 1152, 1155 (D. Nev. 2004) (“no magic words such as ‘arbitrate’ … are required to obtain the benefits of the FAA … [i]f the parties have agreed to submit a dispute for a decision by a third party, they have agreed to arbitration”); Taylor v. Yielding (1912) 56 Sol Jo 253 (Ch.) (“you cannot make a valuer an arbitrator by calling him so, or vice versa”).

\(^2\) Judgment of 21 November 2003, DFT 130 III 66, cons. 3.1 (Swiss Federal Tribunal).

\(^3\) Motunui Ltd v. Methanex Spellman [2004] 1 NZLR 95 (Auckland High Court).


\(^5\) New York Convention, Arts. II(1) & II(3) (emphasis added).

\(^6\) UNCITRAL Model Law, Arts. 8(1) & 7(1) (emphasis added).

\(^7\) Dell Computer Corp. v. Union des consommateurs, 2007 SCC 34, at ¶51 (Canadian S.Ct.).

\(^8\) Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (U.S. S.Ct. 2002) (quoting Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (U.S. S.Ct. 1960)). See Judgment of 8 July 2003, DFT 129 III 675, 679 (Swiss Federal Tribunal) (“The statute does not define the minimal content of an arbitration agreement. It results from the purpose of the arbitration agreement that the intent of the parties must be expressed to submit certain existing or future disputes to an arbitral tribunal, i.e. not a state court.”).

\(^9\) See infra pp. 121–29. In cases when no agreement on either the arbitrator(s) or an institutional appointing authority is possible, national courts can provide a default mechanism for appointment of arbitrators. See infra pp. 129.

\(^10\) See infra pp. 45, 70–73.

\(^11\) See, e.g., Judgment of 17 June 2004, Le Parmentier v. La Société Miss France, XXX Y.B. Comm. Arb. 119, 123–124 (Paris Cour d'appel) (2005) (Uniform Domain Name Resolution Policy dispute resolution proceeding is not arbitration because it “allows for a recourse to state courts to have the dispute re-adjudged, both before the administrative proceeding is commenced and after it is concluded and, … during the proceeding.”); Salt Lake Tribune
Users of international arbitration identify neutrality as one of the key features that must necessarily pertain to a process to render it an arbitration that is the third party's decision will settle the dispute. \(^{12}\) *Walkinshaw v. Diniz* \(^{2000}\) 2 All E.R. (Comm.) 237 (Q.B.) (agreement "must contemplate that the tribunal which carries on the process will make a decision which is binding on the parties.").

See, e.g., *Portland Gen. Elec. Co. v. U.S. Bank Trust Nat'l Ass'n*, 218 F.3d 1085, 1090 (9th Cir. 2000) ("arbitration agreements permit arbitrators to resolve pending disputes generally through adversary hearings at which evidence is admitted and the arbitrator plays a quasi-judicial role"); *Walkinshaw v. Diniz* \(^{2000}\) 2 All E.R. (Comm.) 237 (Q.B.) ("it is a characteristic of arbitration that the parties should have a proper opportunity of presenting their case.").

See *Omni Tech Corp. v. MPC Solutions Sales, LLC*, 432 F.3d 797, 799 (7th Cir. 2005) ("many contracts have venue or forum-selection clauses. These do not call for arbitration but are routinely enforced."); *Sonalutch Petroleum Corp. (BVI) v. Ferrall Int'l Ltd* [2002] 1 All E.R. (Comm.) 627 (Q.B.) (agreement to arbitrate must establish the parties' objective intention to arbitrate rather than refer disputes to national courts).


See, e.g., *Portland Gen. Elec. Co. v. U.S. Bank Trust Nat'l Ass'n*, 218 F.3d 1085, 1090 (9th Cir. 2000) (appraisal provision "did not attempt to usurp the judiciary's power to resolve the case as a whole, but is] typically limited to ministerial determinations such as the ascertainment of quality or quantity of items, the ascertainment of loss or damage to property or the ascertainment of the value of property"); *Judgment of 9 November 1999, Syndicat des Copropriétaires du 35, rue Jouvent v. Halpern* [2001 Rev. arb. 159 (Paris Cour d'appel)] (expert's determinations were not to resolve dispute but only to "perfect a compromise").

The name is derived from a form of dispute resolution used in fixing the salaries of professional athletes in the United States. See G. Born, *International Commercial Arbitration* 244–46 (2009).

As discussed below, by virtue of Article I(1), the New York Convention is applicable to specified categories of "foreign" or "non-domestic" arbitral awards. *See supra* pp. 370–73. The Convention does not define expressly the arbitration agreements to which it applies: it is best interpreted as applying to all "international" arbitration agreements, whenever they are seated, rather than to purely domestic arbitration agreements. See G. Born, *International Commercial Arbitration* 275–77 (2009).

Article I(3) of the Model Law provides: "An arbitration is international if (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or (b) one of the following places is situated outside the State in which the parties have their places of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) 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 (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country." Similar definitions apply in the United States, France, England, and elsewhere. G. Born, *International Commercial Arbitration* 284–99 (2009).

In a few jurisdictions, arbitration legislation applies to both domestic and international arbitrations. For example, England, Spain and Germany's enactments of the UNCITRAL Model Law deleted provisions limiting the legislation's application to "international" arbitrations, extending it to all arbitrations. German ZPO, §1025; English Arbitration Act, 1996, §2. Even then, such legislation often has specific provisions that treat international and domestic arbitration differently with regard to particular subjects. See G. Born, *International Commercial Arbitration* 109–10 (2009).


23 Sometimes parties will not agree upon any dispute resolution provisions, leaving it to post-dispute litigation to determine the place (or places) where their dispute will be resolved. That approach is usually disfavored by commercial parties because it produces substantial uncertainties and inefficiencies.

24 G. Born, International Commercial Arbitration 73 (2009). As discussed below, international arbitration agreements are typically drafted expansively and given broad effect, including to preclude the parallel litigation of the same or similar claims in national courts.

25 This facilitates the parties’ objective of centralizing their disputes in a single forum for prompt, efficient resolution. See infra pp. 62–67.


28 As discussed below, Article II of the New York Convention and Article 8 of the UNCITRAL Model Law provide for the presumptive validity and enforceability of international arbitration agreements. See infra pp. 48–49.


33 The draft Hague Convention on Choice of Court Agreements would prescribe broadly-applicable international standards applicable to the recognition and enforcement of judgments based on forum selection agreements. G. Born & P. Rutledge, International Civil Litigation in United States Courts 468 & 1085 (5th ed. 2011). This is, however, conditional on ratification of the Convention by significant numbers of states, which has not yet occurred. Even if it did, the Convention is subject to important exceptions and limitations, which will likely detract materially from its efficacy. At least for the foreseeable future, like arbitration agreements, arbitral awards will therefore enjoy a substantial “enforceability premium” as compared to national court judgments.


35 Naimark & Keer, International Private Commercial Arbitration – Expectations and Perceptions of Attorneys and Business People, in C. Drahozal & R. Naimark, Towards a Science of International Arbitration: Collected Empirical Research 45, 49 (2005) (expertise as one of several significant objectives); PriceWaterhouseCoopers, International Arbitration: Corporate Attitudes and Practices 6 (2006), available at [www.pwc.com/arbitrationstudy] (“The ability of parties to select arbitrators with the necessary skills and expertise and who are well suited to the appropriate cultural and legal context was also ranked highly.”).


40 CPR Institute for Dispute Resolution Comm’n on the Future of Arbitration, Commercial Arbitration at its Best: Successful
Strategies for Business Users xxiii (2000) ("Ultimately, many business users regard control over the process – the flexibility to make arbitration what you want it to be – as the single most important advantage of binding arbitration and other forms of ADR.").


43 Lyons, Arbitration: The Slower, More Expensive Alternative, The American Lawyer 107 (Jan./Feb. 1985); Blue Tee Corp. v. Koehring Co., 999 F.2d 633 (2d Cir. 1993) ("This appeal … makes one wonder about the alleged speed and economy of arbitration in resolving commercial disputes.").

44 See infra pp. 196-202. Even where such obligations exist, they are subject to exceptions which have the effect that arbitral awards are sometimes made public, either in enforcement actions or otherwise.


46 Under some national laws, agreements to arbitrate are regarded as waivers of foreign state immunity. This is true, for example, under the Foreign Sovereign Immunities Act in the United States. (28 U.S.C. § 1605(a)(6)). Nonetheless, it is prudent to include express sovereign immunity waivers in commercial contracts with foreign states and their companies. See G. Born, International Arbitration and Forum Selection Agreements: Drafting and Enforcing 101 (2d ed. 2006).

47 Investment contracts” between foreign investors and their host state are discussed in Chapter 18 below. See infra pp. 411-439.


50 In re Canadian Gulf Line, 98 F.2d 711, 714 (2d Cir. 1938) (Learned Hand, J.).

51 Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 987 n.32 (2d Cir. 1942).


60 See infra pp. 24–25.


62 See New York Convention, Arts. III, IV, V; infra pp. 377–79. The shift in the burden of proof was accomplished by Articles III and V, which required the award-creditor to present only minimal evidence in support of recognition of an award (in Article III), while specifying only limited grounds, which needed affirmatively to be proven, that could result in non-recognition (in Article V). See infra pp. 375–79.

63 See New York Convention, Arts. VI(1)(a), 1(d); supra pp. 13–14 & infra pp. 148–49.

64 See supra pp. 19–20 & infra pp. 275, 381.

65 See www.uncitral.org for a list of states that have ratified the Convention.

66 In ratifying the Convention, many states have attached
reservations that can have significant consequences in private disputes. These reservations frequently deal with reciprocity and limiting the Convention's applicability to disputes arising from "commercial" relations. See infra pp. 45–46.


68 New York Convention, Arts. VII(1), VII(2).


73 Inter-American Convention, Arts. 1, 4, 5.

74 Compare New York Convention, Art. II(3); infra pp. 62–67.


80 UNCITRAL Model Law, Arts. 7–8; infra pp. 48–49, 77–81. The original 1985 Model Law's "writing" requirement for arbitration agreements is broadly similar to, but somewhat less demanding than, Article II of the New York Convention. See UNICTRAL Model Law, Art. 7(2). The 2006 revisions include options that substantially reduce or eliminate any writing requirement.

81 UNCITRAL Model Law, Art. 18 ("The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."). infra pp. 152–54.


Colombia).


As discussed below, national courts will generally have the power, under most developed arbitration statutes, to assist the arbitral process by appointing arbitrators, considering challenges to arbitrators and fixing compensation of arbitrators (where not otherwise agreed). See infra pp. 126–127, 129, 140–41; G. Born, *International Commercial Arbitration* 150 (2009).


UNCITRAL Rules, Art. 7; infra pp. 126–29. The parties can specify an arbitral institution (like the ICC, AAA, or LCIA) or individual as appointing authority (without adopting that institution's rules more generally).


Fifty percent of parties were from Europe, 24% from the Americas, 20% from Asia and the Pacific (with a record of 36 parties from Asia), and 6% from Africa. ICC Statistical Report 2010, available at www.icccfi.com.


See www.adr.org/sp.asp?id=22440. Numerous other sets of AAA arbitration rules also exist, in particular for specialized types of disputes (such as construction, energy, health care, insurance, securities, labor and intellectual property), and can be selected in the parties' arbitration agreement. See www.adr.org/sp.asp?id=28780.


Among other things, the PCA administered arbitrations between Sudan and the Sudan People's Liberation Movement/Army and Ethiopia and Eritrea, available at www.pca-cpa.org/showpage.asp?spid=1025.

There is a small, but important, category of cases in which international investment arbitrations may result without a consensual agreement, by virtue of provisions in international investment protection or other conventions or legislation. This category of arbitrations (without "privity") is unusual, however, and underscores the essential requirement that international arbitration is consensual in character. See infra pp. 42, 415–16.


See infra pp. 308 & 311.

See infra pp. 124–38.

The text of provisions designating the number of arbitrators is
not complex. For example, a typical clause would provide: “Any dispute shall be finally resolved under the [– Rules] by [three arbitrators][one arbitrator] appointed in accordance with the said Rules.” An alternative provides “the number of arbitrators shall be [three][one].”

See infra p. 128. An institution will also appoint an arbitrator on behalf of a party which fails to exercise its right under the parties’ arbitration agreement to do so.


Parties sometimes agree to permit arbitrators to resolve their dispute without reference to law, that is, ex aequo et bono or as amiable compositeur, see infra pp. 255–56, or by reference to a non-national legal system, see infra pp. 253–55.

See infra pp. 244–46; UNCITRAL Model Law, Art. 28(1); UNCITRAL Rules, Art. 33(1).

See infra pp. 237–42.

See infra pp. 152–54.

See infra pp. 111–14.

ICSID Convention, Art. 25(1). As discussed below, investment disputes are defined as controversies that arise out of an “investment” and are between a Contracting State or state entity (but not merely a private entity based in a Contracting State) and a national of another Contracting State. See infra pp. 420–27.


See infra p. 415.


See infra pp. 439–44. Other interstate arbitrations involve sui generis disputes, such as the France-New Zealand arbitration over the Rainbow Warrior, U.S.-France arbitrations over air transport issues or arbitrations involving financial claims. See G. Born, International Arbitration: Cases and Materials 92–93 (2011).


Chapter 2: International Arbitration Agreements: Legal Framework

Although parties frequently agree to arbitrate, in practice they also sometimes reconsider that commitment after disputes arise. In particular, notwithstanding their agreement to arbitrate, parties may seek either to litigate their dispute in local courts or to obstruct the arbitral process. Ultimately, the efficacy of an arbitration agreement often depends on the parties’ ability to enforce that agreement.

The legal framework for enforcing international arbitration agreements has undergone important changes over the past century, evolving from a position of relative disfavor to one of essentially universal support. That legal regime consists of international conventions (principally the New York Convention), national law (such as the UNCITRAL Model Law) and institutional arbitration rules. When their jurisdictional requirements are satisfied, these instruments provide a robust and highly effective framework for enforcing international arbitration agreements.

§2.01. Disputes Concerning International Arbitration Agreements

Disputes over the enforceability of international arbitration agreements can take a variety of forms (e.g., to the existence, validity and scope of the arbitration agreement). They can also arise in different procedural settings, including both arbitral proceedings and national courts.
Commercial Arbitration Agreements

There are a variety of possible challenges to the enforceability of an international commercial arbitration agreement. These challenges include (a) claims by a party that it never consented to any agreement, including any arbitration agreement, with its counterparty, and therefore that no agreement to arbitrate exists; (b) claims that any arbitration agreement between the parties is invalid, either on grounds of formal invalidity (i.e., failure to satisfy requirements for a written form) or substantive invalidity (i.e., unconscionability, termination, frustration, fraud); or (c) claims that, while the parties agreed to arbitrate some disputes, they did not agree to arbitrate the dispute which has actually arisen (e.g., the parties’ arbitration agreement covers disputes relating to a lease agreement, but not claims for libel or unfair competition).

[B]. Procedural Settings for Jurisdictional Objections

Challenges to the existence, validity or scope of an international arbitration agreement can arise in a variety of different procedural settings.

[1]. Consideration of Jurisdictional Objections by Arbitrators

In some cases, the respondent in an arbitration will raise a jurisdictional objection in the arbitration itself, arguing to the arbitrators that it is not bound by a valid arbitration agreement or that the arbitration agreement does not encompass the parties’ dispute. As discussed below, it is universally recognized that arbitrators have the authority to consider such jurisdictional objections and to make a decision on them (as provided, for example, by Article 16 of the UNCITRAL Model Law and parallel provisions of other arbitration statutes). In practice, tribunals will resolve jurisdictional disputes conducted in proceedings much like those to resolve substantive disputes – with written submissions, evidentiary hearings and witness testimony, followed by a decision of the arbitrators. If the arbitral tribunal upholds the jurisdictional objection, it will dismiss the claimant’s claims and the arbitration will conclude (with the arbitrators’ negative jurisdictional award potentially subject to judicial review). Conversely, if the tribunal rejects the objections, it will make a positive jurisdictional award (which will potentially be subject to judicial review) and the arbitration will proceed to the merits.

[2]. Consideration of Jurisdictional Objections by National Courts

In other cases, one of the parties to a dispute may commence litigation in a national court (often its own home courts), notwithstanding its putative agreement to arbitrate. In that event, the other party will often invoke the arbitration agreement, requesting that the national court stay any litigation and “refer” the parties to arbitration. As discussed below, this relief is contemplated by Article II of the New York Convention and Article 8 of the UNCITRAL Model Law (and parallel provisions of other national arbitration statutes). In determining whether or not to refer the parties to arbitration, a national court will generally consider whether the parties are bound by a valid arbitration agreement which encompasses their dispute.

Alternatively, a party may choose not to appear in the arbitral proceedings or to commence parallel litigation, and instead subsequently either seek annulment of any arbitral award or resist enforcement of any award (in both cases, on jurisdictional grounds, as provided for by Articles 34(2)(a)(i) and (iii) and 36(1)(a)(i) and (iii) of the Model Law). In each case, a national court will be required to consider whether the parties are bound by a valid arbitration agreement which encompassed their dispute.

§2.02. Jurisdictional Requirements of International and National Commercial Arbitration Regimes

The New York Convention and most national arbitration statutes are “pro-arbitration,” providing robust mechanisms for enforcing international arbitration agreements and awards. In particular, Article II of the Convention imposes obligations on Contracting States to recognize international arbitration agreements and enforce them by referring the parties to arbitration, like many other arbitration statutes, Articles 7, 8 and 16 of the Model Law provide a parallel
Both international arbitration conventions and national arbitration statutes contain jurisdictional requirements that define which arbitration agreements are (and are not) subject to these instruments' substantive rules. These jurisdictional requirements have important consequences, because they determine when the pro-enforcement regimes of the New York Convention and many arbitration statutes are applicable – rather than other means of enforcement, which are sometimes archaic and often ineffective.

There are many arbitration agreements to which the New York Convention does not apply. In particular, seven jurisdictional requirements must be satisfied for an agreement to be subject to the Convention; there must be: (1) an agreement to “arbitrate”; (2) a difference arising out of “commercial” relationships; (3) a “dispute” or “difference”; (4) an agreement to arbitrate differences which “have arisen or which may arise”; (5) an agreement “in respect of a defined legal relationship, whether contractual or not”; (6) an international arbitration agreement or, alternatively, an agreement that would produce a “foreign” or “non-domestic” award; and (7) a showing that any reciprocity requirement must be satisfied.

Like the Convention, most international arbitration statutes contain jurisdictional limitations. These jurisdictional requirements have substantial practical importance, because they determine when the generally “pro-arbitration” provisions of contemporary arbitration legislation apply to arbitration agreements (and arbitral awards). The jurisdictional requirements of national arbitration statutes vary from state to state. In general, however, these limits are broadly similar to those contained in the Convention.

[A]. “Arbitration” Agreement Requirement

As discussed above, Article II(1) and II(2) of the New York Convention limit the Convention's coverage to “arbitration agreement[s]” and “arbitral clause[s].” Article 7 of the Model Law contains a similar requirement, as do other arbitration statutes. These requirements for an “arbitration” agreement are discussed above. As a consequence, the Convention and most national arbitration legislation only apply to agreements to arbitrate, as distinguished from other agreements (e.g., mediation agreements, forum selection clauses).

[B]. “Commercial” Relationship Requirement

The Convention and many arbitration statutes potentially apply only to “commercial” relationships. Article 1(3) of the Convention provides that Contracting States may declare that the Convention applies only to “relationships … which are considered as commercial under the national law of the State making [the] declaration.” A number of nations, including the United States, have made declarations under Article 1(3). Similarly, many arbitration statutes are limited to “commercial” matters. Article 1(1) of the Model Law limits the Law's application to “international commercial arbitration,” while §1 of the FAA is limited to arbitration agreements in “transactions involving commerce.” In general, national courts have adopted broad definitions of the “commercial” requirement, including almost any profit-making activity within its scope.

[C]. “Disputes” or “Differences” Requirement

Article II(1) of the Convention and Article 7 of the Model Law (like many other arbitration statutes) applies to agreements to arbitrate “disputes” or “differences.” These provisions impliedly require that a real “dispute” or “difference” exists before an arbitration agreement may be enforced. In general, national courts and arbitral tribunals have found this requirement satisfied when a party seeks relief that its counter-party refuses to comply with.

[D]. “Existing or Future” Disputes Requirement

Article II(1) of the Convention provides for the recognition of agreements to arbitrate “differences which have arisen or may arise”; Article 7 of the Model Law contains a similar requirement. These provisions are more in the nature of clarifications than limitations; by confirming that arbitration agreements may apply to either “existing or future” disputes, these provisions supersede the historic reluctance of courts in some jurisdictions to enforce agreements to arbitrate future disputes.
[E. “Defined Legal Relationship” Requirement]

Article II(3) of the Convention requires that an arbitration agreement be “in respect of a defined legal relationship, whether contractual or not”. Article 7 of the Model Law contains a parallel requirement. In virtually all cases, arbitration agreements relate to a written contract and Article II(3)’s requirement is clearly satisfied. Indeed, it is difficult to envisage circumstances in which an arbitration agreement would not arise in connection with a “defined legal relationship.” The requirement is more relevant in confirming that international arbitral tribunals may decide non-contractual, as well as contractual, disputes.

[F. “Foreign” or “International” Arbitration Agreements Requirement]

Both the Convention and most statutes that regulate international arbitration apply only to arbitration agreements that have some sort of “foreign” or “international” connection. This requirement is consistent with the purpose of both types of instruments, which is to facilitate the international arbitral process, without disturbing domestic arbitration matters.

New York Convention

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

Article I(1) of the Convention provides a definition of the arbitral awards to which the Convention applies. Under that definition, the Convention is applicable only to awards that: (i) are “made” in a state other than the Contracting State where recognition is sought, or (ii) are “not considered as domestic awards” under the law of the recognizing state. In contrast, the Convention does not provide any equivalent definition of those arbitration agreements to which it applies. Different approaches have been adopted to defining the scope of the Convention as applied to arbitration agreements. Some authorities have applied Article I(1) by analogy to arbitration agreements, holding that Article II applies only to arbitration agreements with a foreign seat (outside the state asked to enforce the agreement), while other authorities have correctly extended the Convention more broadly to any “international” arbitration agreements (even if the arbitration is seated in the relevant Contracting State).

The limitation of the Convention to international arbitration agreements is paralleled by similar jurisdictional requirements in many arbitration statutes. For example, Article 1(1) of the Model Law provides that the Law applies only to “international commercial arbitration”; in turn, Article 1(3) defines “international” to include almost any agreement or relationship involving parties from different states or conduct in different states. Most other national laws adopt similarly broad definitions.

[G. Reciprocity Requirements]

Article I(3) of the Convention permits Contracting States to make “reciprocity reservations,” undertaking the Convention’s obligations only towards other Contracting States. Nearly two-thirds of Contracting States have made reciprocity reservations. The U.S. reservation provides that the United States will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of “only those awards made in the territory of another Contracting State.” Other reciprocity reservations are similar. In addition, Article XIV of the Convention contains a separate, more general reciprocity provision, limiting a Contracting State’s rights under the Convention to those it “is itself bound to apply.” In practice, because almost all trading states have ratified the Convention (except Taiwan, Libya and Ethiopia), the reciprocity exception has very limited importance.
One of the main objectives of the New York Convention was to overturn historic mistrust of arbitration and render international arbitration agreements more readily enforceable. Thus, Article II of the Convention (and parallel provisions of other arbitration conventions) provides that international arbitration agreements are presumptively valid and shall be recognized. This rule is subject to an exclusive and limited number of bases for invalidity, where agreements are “null and void,” “inoperative,” or “incapable of being performed.”

Most states have enacted legislation that parallels the Convention. Examples include Article 8 of the UNCITRAL Model Law and §2 of the FAA. Like Article II of the Convention, this legislation typically provides that arbitration agreements are presumptively valid and shall be recognized, subject only to defined grounds for challenging the validity of such agreements. This skepticism was first overcome in the 1923 Geneva Protocol on Arbitration Clauses in Commercial Matters (and the related 1927 Geneva Convention for the Execution of Foreign Arbitral Awards), which provided for the presumptive validity of international arbitration agreements (and arbitral awards).

[A]. Historic Rules of Unenforceability

It is frequently said that arbitration agreements were historically disfavored. The U.S. view in the 19th century was that “the judgment of arbitrators is but rusticum judicium,” and that arbitration agreements were not specifically enforceable. Similar views prevailed in France, England (except where overridden by statute) and elsewhere. These views reflect a skepticism about arbitration that prevailed in many jurisdictions until the early 20th century.

[B]. New York Convention

The New York Convention confirmed the abandonment of historic obstacles to the enforcement of arbitration agreements and instead provided for the presumptive validity and enforceability of agreements to arbitrate. In particular, Article II(1) of the Convention set forth a mandatory obligation that Contracting States “shall recognize” agreements in writing under which the parties undertake “to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.” This obligation extends to all material terms of an agreement to arbitrate (including, for example, the parties’ selection of the arbitral seat, the scope of the arbitration clause, the selection of the arbitrators, the designation of institutional rules and the like).

The Convention went on to provide an enforcement mechanism for agreements to arbitrate in Article II(3), requiring specific performance of such agreements, subject only to a limited set of enumerated exceptions based on generally-applicable contract law principles: “The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall … refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.” In so doing, the Convention permitted non-recognition of arbitration agreements only in limited cases – where they are “null and void, inoperative or incapable of being performed” or where they concern a “subject matter not capable of settlement by arbitration”; the Convention’s drafters left no room for national courts to invent additional bases for holding an international arbitration agreement invalid.

[C]. National Arbitration Legislation

Legislation in most states also provides for the presumptive validity of agreements to arbitrate and the mandatory recognition of such agreements. Paralleling Article II(3) of the Convention, Article 8(1) of the Model Law provides: “A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests … refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.” Courts have uniformly interpreted Article 8 as imposing a mandatory obligation to specifically enforce arbitration agreements, subject only to limited and specific exceptions.

Legislation in developed jurisdictions that have not adopted the
Model Law similarly guarantees the presumptive validity of international arbitration agreements, typically subject only to generally-applicable contract defenses. In the United States, §2 of the FAA provides that arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” Applying §206 of the second chapter of the FAA, U.S. courts have underscored the narrow grounds that are available for challenging the validity or enforceability of international arbitration agreements.(18) Similarly, courts in most civil law jurisdictions apply generally-applicable rules of contract formation and validity to international arbitration agreements, typically construing exceptions to the presumptive validity of such agreements narrowly.(19)

§2.04. Separability of International Arbitration Agreements

[A]. Separability Presumption

In the international context, arbitration clauses are presumptively “separable” or “severable” from the contract within which they are found (sometimes termed the “main” or “underlying” contract). The “separability presumption” is provided for by legislation or judicial decisions in virtually all jurisdictions, and by leading institutional arbitration rules. The separability presumption provides that an arbitration agreement, even though included in and related closely to an underlying commercial contract, is presumptively a separate and autonomous agreement. According to a leading arbitral award: “the arbitral clause is autonomous and juridically independent from the main contract in which it is contained ….”(20)

[B]. Rationale for Separability Presumption

The rationale for the separability presumption is that the parties’ agreement to arbitrate consists of promises that are independent from the underlying contract: “the mutual promises to arbitrate [generally] form the quid pro quo of one another and constitute a separable and enforceable part of the agreement.”(21) The presumption is also supported by practical justifications, including insulating the arbitration agreement and arbitrators’ jurisdiction from challenges to the underlying contract. These rationales have provided the basis for provisions in many national arbitration statutes, confirming the presumptive separability of arbitration agreements; Article 16(1) of the Model Law is representative, providing that “an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.”(22)

[C]. Consequences of Separability Presumption

The separability presumption is correctly seen as having vital consequences for the arbitral process. Among other things, the presumption is understood as providing for (a) the validity of an arbitration clause notwithstanding defects in or termination of the parties’ underlying contract; (b) the potential validity of the underlying contract, notwithstanding defects in the arbitration clause; (c) the potential application of different substantive laws to the arbitration agreement and the underlying contract; and (d) the potential application of different form requirements to the arbitration agreement and the underlying contract.

Separability Presumption: Consequences

1. Invalidity or non-existence of underlying contract does not necessarily mean invalidity or non-existence of arbitration agreement.
2. Invalidity of arbitration agreement does not necessarily mean invalidity of main or underlying contract.
3. Law governing main or underlying contract is not necessarily the same as law governing arbitration agreement.
4. Different form requirements for main or underlying contract and arbitration agreement.

Suppose, for example, that two parties conclude a sale agreement, containing an arbitration clause, and disputes arise, leading to termination of the contract; thereafter, one party claims damages, alleging breach of the contract (e.g., because the goods were defective or payment was not made). Notwithstanding termination of
the underlying sales contract, the separability presumption provides for the continued validity of the arbitration agreement, with the arbitral tribunal having jurisdiction to decide claims regarding termination of the underlying contract; it also provides for the possible application of a different law to the arbitration agreement (for example, the law of the arbitral seat), than to the underlying contract.

Similarly, if one party claims that the parties' underlying contract was procured by fraud (e.g., misrepresentations about quality of goods or assets in a sales contract), the separability presumption provides that this claim does not impeach the validity of the separable arbitration agreement, and is for resolution by the arbitrators. Conversely, a claim that the parties' arbitration agreement itself is invalid (for example, because its terms give one party an unconscionably disproportionate influence on choice of the arbitrators or arbitral procedure) does not affect the validity of the underlying contract.

§2.05. Allocation of Competence to Decide Disputes Over Existence, Validity and Interpretation of International Arbitration Agreements

Another basic issue affecting the enforceability of international arbitration agreements is the allocation of authority between arbitrators and national courts to decide disputes over the interpretation, validity and enforceability of arbitration agreements, including the “competence-competence” doctrine.

[A]. Competence-Competence Doctrine

The competence-competence doctrine is almost universally accepted in arbitration legislation, judicial decisions and other authorities. Under this doctrine, an arbitral tribunal presumptively possesses jurisdiction to consider and decide on its own jurisdiction.

Arbitration legislation in many states specifically provides for the arbitrators' competence-competence. Article 16 of the UNCITRAL Model Law is entitled “Competence of arbitral tribunal to rule on its jurisdiction,” and grants arbitrators competence-competence to consider challenges to their own jurisdiction, including challenges to the arbitration agreement: “The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.” Arbitration legislation, or judicial authority, in other states uniformly recognizes the same principle. In practice, the competence-competence doctrine means that, if a party argues to the arbitral tribunal that it lacks jurisdiction (i.e., because the arbitration agreement is invalid or terminated), the tribunal presumptively has the authority to consider and rule upon the jurisdictional challenge, subject to at least a measure of subsequent judicial review of the arbitrators' decision.

Leading institutional rules also almost uniformly recognize the competence-competence of arbitrators. The UNCITRAL Rules are representative, providing in Article 21(1) that: “The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.” Other institutional rules are similar.

[B]. Allocation of Competence to Decide Jurisdictional Disputes

A related issue is the allocation of competence between national courts and arbitrators to decide disputes over the interpretation, validity and enforceability of arbitration agreements. In particular, a critically-important issue is whether, when a jurisdictional objection is raised, a national court must initially decide the issue or, alternatively, whether an arbitral tribunal may initially decide the jurisdictional objection, subject to at least a measure of subsequent judicial review of the arbitrators' decision.

[1]. France: Prima Facie Jurisdiction

In France, statutory provisions and judicial authority recognize a “prima facie” approach to challenges to arbitral jurisdiction. If a jurisdictional objection is raised in a French court (e.g., if a party seeks to litigate a claim allegedly subject to arbitration), the court will refer the parties to arbitration unless the putative arbitration agreement is “manifestly null”; if an arbitral tribunal has already
been constituted, a French court will not even consider whether the arbitration clause is manifestly null, and will instead simply refer the parties to arbitration – where the jurisdictional objection may be raised before the tribunal. The arbitrators’ jurisdictional decision is later subject to de novo review in French courts – but those courts will virtually never initially decide a jurisdictional objection.


In the United States, the FAA generally permits interlocutory judicial determination of jurisdictional objections, with the court making a binding decision on such issues. Thus, if a party seeks to refer a claim, asserted in litigation, to arbitration, a U.S. court will ordinarily make a final decision whether or not the claim is subject a valid arbitration agreement before referring the parties to arbitration. If a court decides that no valid arbitration agreement exists, or that the agreement does not apply to the parties’ dispute, then it will not refer the parties to arbitration and will instead allow litigation of the parties’ dispute to proceed.

The allocation of competence to decide jurisdictional disputes in the United States is significantly affected by the separability presumption. As discussed above, the separability presumption provides that an arbitration agreement is separable from the underlying contract and that challenges to the validity of the underlying contract do not affect or impeach the validity of the contract’s arbitration clause. As a consequence, where a party challenges the validity of the underlying contract (e.g., on the grounds that it is void for fraud, unconscionability or mistake), but does not specifically challenge the validity of the arbitration clause itself, U.S. courts hold that there is no jurisdictional challenge and that the parties’ dispute over the validity of the underlying contract must be referred to arbitration.

For example, the U.S. Supreme Court held in Buckeye Check Cashing, Inc. v. Cardegna that claims challenging the legality of the parties’ underlying contract were for initial resolution by the arbitrators: “because respondents challenge the [underlying] Agreement, and not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract,” and “should therefore be considered by an arbitrator, not a court.” Consistent with this analysis, U.S. courts have held that claims of invalidity (e.g., unconscionability, mistake), illegality, or termination are for judicial determination only when they are “specifically” directed at the arbitration agreement itself, and not when they are directed at the underlying contract or generally at both the underlying contract and the arbitration agreement.

A more difficult category of cases involves challenges to the existence (as distinguished from the validity) of the underlying contract. The Supreme Court noted this issue in Buckeye Check Cashing, reasoning that: “The issue of the contract’s validity is different from the issue of whether any agreement between the alleged obligor and obligee was ever concluded.” The Court referred in particular to lower court decisions holding that “it is for courts to decide whether the alleged obligor ever signed the contract, whether the signed lacked authority to commit the alleged principal and whether the signor lacked the mental capacity to assent.” Applying this analysis, U.S. courts have generally held that, where a party denies that any contract was ever concluded, the challenge may be resolved initially by the court and must not first be referred to arbitration.

The foregoing rules regarding the allocation of competence under the FAA are subject to an important exception, where parties have agreed to arbitrate jurisdictional disputes. The U.S. Supreme Court held, in First Options of Chicago, Inc. v. Kaplan, that parties may validly agree to submit jurisdictional disputes to final resolution by an arbitral tribunal, but that such an agreement will be found only where there is “clear and unmistakable” evidence of the parties’ intention. If such an agreement exists, U.S. courts will refer the parties’ jurisdictional objections to arbitration and subject the resulting decision to only minimal judicial review. In many cases, arbitration agreements incorporating institutional arbitration rules will be treated as clear and unmistakable evidence of an agreement to arbitrate jurisdictional disputes.

[3]. UNCITRAL Model Law: Diversity of Approaches

It is uncertain how competence to decide jurisdictional objections is allocated under the UNCITRAL Model Law. Article 8(1) of the Model Law provides that, where a suit is brought “in a matter which is the
subject of an arbitration agreement," the national court "shall . . . refer the parties to arbitration," unless "it finds that the agreement is null and void, inoperative, or incapable of being performed." The ordinary meaning of this language suggests that the court's mission under Article 8(1) includes making a final determination ("finding") whether or not the agreement is valid.\(^{(27)}\)

Despite the language of Article 8, courts in several Model Law jurisdictions have held that only a "prima facie inquiry" into jurisdiction should be conducted by a court before referring parties to arbitration. Under this analysis, if there is any plausible argument that a valid arbitration agreement exists, the arbitrators should be permitted initially to resolve the jurisdictional issue (subject to subsequent judicial review); only if it is clear that there is no valid arbitration agreement, may a claim be litigated.\(^{(38)}\) It is uncertain which approach to the allocation of jurisdictional competence under the Model Law will ultimately prevail.

\section*{§2.06. Law Applicable to Formation, Validity and Interpretation of International Arbitration Agreements}

The law applicable to the formation, validity and interpretation of an arbitration agreement may be different from both the law applicable to the substance of the parties' underlying contract and the law applicable to the arbitral procedure.\(^{(39)}\) Given the separability presumption, a separate choice of law analysis is required to determine the law governing the substantive validity of the arbitration agreement itself (as distinguished from the underlying contract). Five options exist: (a) the law of the forum where judicial enforcement of the agreement is sought; (b) the law expressly or impliedly chosen by the parties to govern the arbitration agreement itself; (c) the law of the arbitral seat; (d) a "validation" principle; and (e) international law.

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<th>Law Applicable to Substantive Validity of Arbitration Agreement</th>
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\section*{[A]. Law of Judicial Enforcement Forum}

Historically, many authorities held that an arbitration agreement was governed by the law of the judicial forum where enforcement of the agreement was sought (typically the forum in which one party sought to litigate the parties' dispute, leading its counter-party to invoke the arbitration clause). That approach regarded the validity of an arbitration agreement as a "procedural" or "remedial" matter. Application of the law of the judicial enforcement forum has been largely superseded by alternative choice-of-law rules.

\section*{[B]. Law Chosen by Parties}

There is almost uniform acceptance of the parties' autonomy to choose the law governing an international arbitration agreement. This position is reflected in Article V(1)(a) of the New York Convention, which permits non-recognition of an arbitral award only if the parties' agreement to arbitrate is invalid "under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made"; the same rule is reflected in Articles 34(2)(a)(i) and 36(1)(a)(i) of the UNCITRAL Model Law.\(^{(40)}\) Most authorities have applied this rule – which governs the recognition of awards – to disputes over recognition of arbitration agreements.

It is uncertain when parties will be found to have selected the law governing an arbitration agreement. In most cases, parties do not agree upon a choice-of-law clause specifically applicable to their arbitration agreement (e.g., "This arbitration agreement (Article X) shall be governed by [X] law."); and instead agree only to a general choice-of-law clause, applicable to their underlying contract (e.g., "This contract shall be governed by [X] law."). In these circumstances, some authorities have held that the parties' choice-of-law clause does not extend to the "separable" agreement to arbitrate; other authorities have held that the choice-of-law clause necessarily extends to all the provisions of the parties' contract, including its arbitration agreement.\(^{(41)}\)
[C]. Law of Arbitral Seat

If the parties have not selected a law to govern their arbitration agreement, many authorities adopt a default rule applying the law of the putative arbitral seat. This rule is again contained in Article V(1)(a) of the Convention, providing that, in the absence of a choice-of-law agreement, the “law of the country where the award was made” shall apply; the same rule is adopted in Articles 34(2)(a)(i) and 36(1)(a)(i) of the Model Law. Other authorities have reached the same result by concluding that the parties’ choice of the arbitral seat reflects an implied choice of the law of the seat to govern the arbitration agreement. Alternatively, applying the separability presumption, some authorities have held that the seat has the closest connection to the agreement to arbitrate (as distinguished from the underlying contract) and that the law of the seat should therefore govern the arbitration agreement.

[D]. “Validation” Principle

Some authorities hold that traditional choice of law rules are ill-suited to international arbitration agreements and have instead applied a “validation” principle. The validation principle provides that, if the arbitration agreement is valid under any of several laws which are potentially applicable to it, then the agreement will be upheld. Examples of the validation principle include Article 178(2) of the Swiss Law on Private International Law, providing that an arbitration agreement will be given effect if it is valid under any of the laws chosen by the parties, the law applicable to the underlying contract, or Swiss law.

[E]. International Law

Some national courts and arbitral tribunals hold that international arbitration agreements are not subject to national law and are instead governed by international law. French courts hold that international arbitration agreements are autonomous from national legal systems and subject to “international law,” which gives effect to the parties’ intentions (subject only to very limited, overriding rules of public policy). U.S. courts adopt a comparable approach, holding that the New York Convention permits application only of “internationally neutral” rules of general contract law – not idiosyncratic domestic rules that invalidate agreements to arbitrate. Like the validation principle, application of rules of international law serves to maximize the enforceability and efficacy of international commercial arbitration agreements.

[F]. Other Choice-of-Law Issues

Article V(1)(a) of the New York Convention and Articles 34(2)(a)(i) and 36(1)(a)(i) of the Model Law apply to the formation, substantive validity and interpretation of arbitration agreements. Different choice-of-law rules are applicable to other issues.

[1]. Formal Validity

The formal validity of arbitration agreements is typically governed by separate choice-of-law rules. As discussed below, Articles II(1) and II(2) of the Convention are interpreted as prescribing a uniform international rule, imposing a maximum form requirement which Contracting States may not supplement with additional requirements. Similarly, Article 7 of the 1985 Model Law (and revised Article 7 of the 2006 Model Law) imposes a rule of formal validity applicable to agreements subject to the Law. These provisions prescribe substantive rules and specialized choice-of-law rules for formal validity, which differ from the choice-of-law rules applicable to the substantive validity of arbitration agreements.

[2]. Capacity

The capacity of parties to conclude valid international arbitration agreements is also governed by separate choice-of-law rules, which differ from those applicable to the substantive (and formal) validity of such agreements. Article V(1)(a) of the Convention provides that an arbitral award may be denied recognition if “the parties to the [arbitration agreement] were, under the law applicable to them, under some incapacity.” Article V(1)(a) has generally been interpreted as requiring application of the national law of the party’s domicile or place of incorporation to questions of capacity.
[3]. Non-Arbitrability

As discussed below, the New York Convention and most arbitration statutes provide that, in exceptional cases, an otherwise valid arbitration agreement may be denied enforcement because the parties’ dispute is “not capable of settlement by arbitration” – i.e., the dispute is “non-arbitrable.” The law applicable to questions of non-arbitrability is addressed, with respect to recognition of awards, in Article V(2)(a) of the Convention, which provides that an award need not be recognized in a Contracting State if “the subject matter of the dispute is not capable of settlement by arbitration under the law of that country.” The same rule is contained in Article 36(1)(b)(i) of the Model Law. Most authorities have applied this rule by analogy to the enforcement of arbitration agreements, holding that a state may apply its own non-arbitrability rules in deciding to refer a dispute to arbitration. (49)

[4]. Non-Signatory Issues

As discussed below, arbitration agreements are sometimes argued to apply to non-signatories (i.e., parties that did not sign the arbitration agreement, but who are nonetheless bound by it). A non-signatory may be subject to an arbitration agreement on various legal theories, including alter ego, agency, succession, and estoppel. (50) When one of these grounds is asserted as the basis for subjecting a non-signatory to an arbitration agreement, choice-of-law issues are raised.

In many instances, the law governing a particular issue (e.g., merger, alter ego status) will be different from that governing the agreement to arbitrate. For example, if A (incorporated in State A) and B (incorporated in State B) agree to arbitrate in State C, the effect of a merger between A and D (also incorporated in State A) on the parties’ arbitration agreement will often be subject to the law of State A, and, specifically, State A’s merger legislation. Similarly, if A were alleged to be the alter ego or agent of D, the law governing the alter ego or agency relationship might differ from that governing the validity of the arbitration agreement.

§2.07. Effects of International Arbitration Agreements

A valid arbitration agreement produces important legal effects for its parties. These effects are both positive and negative: the positive effects include an obligation to participate in good faith in the arbitration of disputes pursuant to the arbitration agreement, while the negative effects include an obligation not to pursue litigation in national courts or similar fora.

An important aspect of these legal effects is the mechanism to enforce them. During some historical periods, arbitration agreements were rendered ineffective because they were not susceptible to enforcement through orders for specific performance and because monetary damages provided inadequate disincentives for breaches. (51) Contemporary arbitration regimes have altered this, making it possible to obtain orders of specific performance from national courts of both the negative and positive obligations imposed by arbitration agreements. These remedies vary among legal systems, but, in developed jurisdictions, provide highly effective means of enforcing international arbitration agreements: these means include stays of litigation, orders to compel arbitration, anti-suit injunctions, actions for monetary damages and non-recognition of judgments.

[A]. Positive Effects of Arbitration Agreement: Obligation to Arbitrate in Good Faith

The most fundamental effect of an arbitration agreement is to obligate the parties to participate in good faith in the arbitration of their disputes. This obligation is a sui generis one – requiring parties whose underlying commercial or other relations have deteriorated to the point of litigation to cooperate together, in good faith, in an adjudicatory procedure that will finally resolve their disputes, either for or against one of the parties.

[1]. Source of Positive Obligations to Arbitrate

The positive obligations imposed by an arbitration agreement have their source in that agreement itself, which is given effect by the New York Convention and national law. In agreeing to arbitrate, the parties do not merely negatively waive their access to judicial remedies, but also affirmatively agree to participate in the resolution
of their disputes through the arbitral process. This positive obligation to participate cooperatively in a mutually-established, adjudicative dispute resolution process is central to the arbitration agreement.

In turn, the New York Convention requires Contracting States to "recognize" agreements by which parties have undertaken "to submit to arbitration" specified disputes. The parties' positive obligation to participate in arbitrating their differences is also given effect by national legal systems, which parallel and implement the approach taken by the Convention. Thus, Article 7(1) of the UNCITRAL Model Law defines an arbitration agreement as "an agreement by the parties to submit to arbitration all or certain disputes," while Article 8 requires that agreements to arbitrate be enforced by "referring" the parties to arbitration. Other arbitration legislation deals similarly with the positive obligations imposed by an agreement to arbitrate.

[2]. Content of Positive Obligation to Arbitrate

The content of the positive obligation to arbitrate is dealt with under the Convention and national arbitration legislation by giving effect to the parties' agreement – that is, by requiring "recognition" of that agreement – rather than by stating a generally-applicable and abstract "obligation to arbitrate." This approach to the positive duty to arbitrate is consistent with the contractual character of the arbitral process. As discussed elsewhere, party autonomy is one of the essential characteristics of international arbitration. This autonomy, and hence the contents of the positive obligation to arbitrate, extend to the disputes to be arbitrated, the parties to the arbitration, the page constitution of the arbitral tribunal, the selection of the arbitral seat, the arbitral procedures and the choice of the applicable law(s).

The positive obligation to arbitrate includes duties to participate in good faith and cooperatively in the arbitral process. An arbitration agreement is not merely a negative undertaking not to litigate, but a positive obligation to take part in a sui generis process which requires a substantial degree of cooperation (e.g., in constituting a tribunal, paying the arbitrators, agreeing upon an arbitral procedure, obeying the arbitral procedure and complying with the award). When a party agrees to arbitrate, it impliedly agrees to participate cooperatively in all of these aspects of the arbitral process.

In a few jurisdictions, these obligations are contained in national arbitration legislation. Even absent such legislative provisions, national courts have emphasized that an arbitration agreement imposes obligations to make use of, and participate cooperatively in, the arbitral process. For example, it is well settled under English law that there is an implied term in an agreement to arbitrate that the parties must cooperate in the conduct of the arbitration:

[The obligation is, in my view, mutual: it obliges each party to cooperate with the other in taking appropriate steps to keep the procedure in the arbitration moving ... [I]t is in my view a necessary implication from their having agreed that the arbitrator shall resolve their dispute that both parties, respondent as well as claimant, are under a mutual obligation to one another to join in applying to the arbitrator for appropriate directions to put an end to the delay.]

A Swiss Federal Tribunal decision adopted similar conclusions, emphasizing the parties' obligations of good faith: "One of the aims of arbitration is to come to a fast resolution of the disputes submitted to it. The parties who agree to arbitration are bound by the rules of good faith to avoid any conduct which might delay without absolute necessity the normal conduct of the arbitral proceedings."

The precise contours of the obligation to participate cooperatively in the arbitral process are unsettled. They have been held to include participating in the constitution of the tribunal, paying the arbitrators' fees, cooperating in relation to procedural matters, not obstructing the arbitral process, obeying confidentiality obligations relating to the arbitration and complying with disclosure requests and other orders. As with other aspects of the arbitral process, these obligations are the subject of party autonomy, and can be altered by agreement.

[3]. Remedies for Breach of Positive Obligation to Arbitrate
As noted above, Article II(3) of the New York Convention and Article 8(1) of the UNCITRAL Model Law provide that, if a valid arbitration agreement exists, courts shall “refer the parties to arbitration.” The wording of these provisions indicate an obligation on national courts affirmatively to direct the parties to proceed with the arbitration of their dispute (rather than merely an obligation not to permit litigation to proceed). Despite that, virtually none of the Convention’s Contracting States or Model Law’s adherents enforce arbitration agreements by way of orders affirmatively directing a party to arbitrate; rather, the consistent approach is to dismiss or stay (i.e., suspend) litigation brought in breach of an agreement to arbitrate.\(^\text{(59)}\)

The only major exception to this approach is the United States, where the FAA provides for the issuance of orders compelling arbitration (under §4 and §206 of the FAA).\(^\text{(60)}\) These provisions empower U.S. courts to grant orders requiring parties to arbitrate pursuant to their arbitration agreements. In the words of one U.S. lower court, a request under §4 (or §206) “is simply a request for an order compelling specific performance of part of a contract.”\(^\text{(61)}\)

Pursuant to §§4 and 206 of the FAA, U.S. courts have frequently ordered parties to comply with the positive obligations under their arbitration agreements. In so doing, they have emphasized that the issuance of such an order is not a matter of discretion, but a mandatory legal right (guaranteed by the FAA):

So long as the parties are bound to arbitrate and the district court has personal jurisdiction over them, the court is under an unflagging, nondiscretionary duty to grant a timely motion to compel arbitration and thereby enforce the New York Convention as provided in chapter 2 of the FAA, even though the agreement in question requires arbitration in a distant forum.\(^\text{(62)}\)

U.S. courts have issued orders compelling arbitration in both arbitrations seated in the United States and in other states.\(^\text{(63)}\) In contrast, as already noted, most states do not provide for specific performance of the positive obligations of arbitration agreements. Instead, the mechanism for enforcing such obligations is through a stay or dismissal of litigation, thereby allowing a party to commence and proceed with an arbitration, potentially obtaining a default award without its counter-party’s participation.

[B]. Negative Effects of Arbitration Agreement: Obligation Not to Litigate

An arbitration agreement also has negative effects, which are almost precisely the mirror-image of its positive effects. That is, with regard to virtually all of the disputes that a party is obligated positively to resolve by arbitration, a comparable negative obligation forbids litigation of such matters.\(^\text{(64)}\)

[1]. Negative Obligations under Agreement to Arbitrate

As discussed above, Articles II(1) and II(3) of the New York Convention provide for Contracting States to “recognize” agreements to arbitrate and to “refer the parties to arbitration.”\(^\text{(65)}\) These provisions enforce the negative effects of an arbitration agreement, by requiring either the stay or dismissal of national court litigation. Any other action by a national court, dealing with the substance of an arbitrable dispute, is contrary to the obligation to “refer the parties to arbitration.” Where the Convention applies, many authorities hold that Article II(1) and II(3) impose a mandatory (not discretionary) obligation to give effect to arbitration agreements.\(^\text{(66)}\)

Most arbitration legislation gives identical effect to the negative obligations imposed by arbitration agreements. Article 8(1) of the Model Law is representative, requiring that courts “refer the parties to arbitration.” Article 8(1) impliedly precludes a national court from entertaining a dispute on the merits if the parties have agreed to arbitrate it, and instead requires that the parties be referred to arbitration. National courts have consistently held that this obligation is mandatory.\(^\text{(67)}\) As with Article II(3) of the Convention, Article 8 applies to agreements providing for arbitration seated abroad, as well as locally.\(^\text{(68)}\) Other national arbitration legislation is similar.\(^\text{(69)}\)

Although arbitration clauses typically do not provide expressly that “all disputes shall be resolved by arbitration, to the exclusion of national courts,” this negative obligation is the clear intent of virtually all arbitration agreements. One of the fundamental purposes of international arbitration agreements is to centralize the
parties’ disputes in a single forum for final resolution – an objective that would be frustrated if parallel litigation was permitted. A party’s commencement of litigation on claims, subject to an arbitration agreement, is therefore a breach of that agreement and, in particular, its negative obligations. That breach, like other violations of contractual obligations, entitles the non-breaching party to relief, including specific enforcement through a stay or dismissal of the litigation, and exposes the breaching party to contractual liability or injunctive and other remedies.

[2]. Remedies for Breach of Negative Obligation Not to Litigate Arbitrable Disputes: Stay or Dismissal of Litigation

As discussed above, some courts historically refused to stay litigation of arbitrable disputes, either holding that arbitration agreements were revocable or not subject to specific performance. In contrast, the principal contemporary remedies for breach of an arbitration agreement’s negative obligation not to litigate arbitrable disputes are either dismissal of the improperly-commenced litigation or a mandatory stay of that litigation.

As discussed above, Article II(3) of the Convention provides for the dismissal or stay of proceedings in national courts brought in breach of an arbitration agreement. Article II(3) does not leave courts with any discretion to deny a dismissal or stay of judicial proceedings where an arbitration agreement is enforceable under the Convention. Rather, it mandatorily requires that national courts “shall” refer parties to arbitration.\(^{(70)}\)

Some arbitration legislation expressly provides for a stay of litigation brought in violation of an arbitration agreement, including in the United States, England, Canada, Singapore and other common law jurisdictions.\(^{(71)}\) In other countries (principally civil law jurisdictions, including France, Switzerland and Germany), legislation requires courts to decline jurisdiction over arbitrable disputes.\(^{(72)}\) Whether through a stay or a dismissal of litigation, it is the almost uniform practice of national courts to refuse to hear the merits of claims, initiated in litigation, which are properly subject to arbitration. As one national court put it:

>The [FAA] “leaves no room for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to an arbitration on issues as to which an arbitration agreement has been signed.”\(^{(73)}\)

The imposition of this obligation on courts to order specific performance of the negative duties imposed by international arbitration agreements, which were historically often not enforceable\(^{(5)}\), in this manner, was one of the central achievements of the New York Convention and modern arbitration statutes.

As already discussed, the negative effects of an arbitration agreement are almost precisely the mirror-image of the positive effects of such an agreement. Accordingly, insofar as an arbitral tribunal is vested with jurisdiction to hear disputes, then national courts must cease to exercise parallel jurisdiction to decide such disputes (save for their roles in supporting the arbitral process or reviewing an award). Where one jurisdictional ambit stops (e.g., the court’s) then the other (e.g., the arbitral tribunal’s) generally begins.\(^{(74)}\)

[3]. Remedies for Breach of Negative Obligation Not to Litigate Arbitrable Disputes: Anti-suit Injunction

A party’s ability to obtain a stay of litigation is not always sufficient to effectively enforce an arbitration agreement. That is because a party may be able to pursue litigation of the underlying dispute in a national court which does not honor, or fully honor, its undertakings in the New York Convention. In that event, a stay of the underlying litigation in one (or several) national courts, which do honor the Convention, may ultimately be an ineffective remedy for fully enforcing the arbitration agreement.

Accordingly, some states permit additional means of enforcement of the negative obligation to refrain from litigating arbitrable disputes. In particular, courts in some common law jurisdictions are prepared to issue “anti-suit injunctions” to prohibit litigation in a foreign forum. Anti-suit orders are directed against the parties to a litigation (not the foreign court), but are intended to preclude a litigation from proceeding in the foreign court.\(^{(75)}\) In practice, antisuit injunctions can be powerful tools for compelling compliance with an agreement to arbitrate.
English courts have long been prepared to enjoin foreign litigations brought in violation of an arbitration agreement. Under English law, an injunction may ordinarily be granted against a foreign litigation if (a) the English forum has a sufficient interest in the matter, (b) the foreign proceeding causes sufficient prejudice to the applicant, and (c) the antisuit injunction would not unjustly deprive the claimant in the foreign court of a legitimate advantage. One English decision affirmed the existence of this power in emphatic terms, reasoning:

in my judgment there is no good reason for diffidence in granting an injunction to restrain foreign proceedings [brought in violation of an arbitration agreement] on the clear and simple ground that the defendant has promised not to bring them. … I cannot accept the proposition that any Court would be offended by the grant of an injunction to restrain a party from invoking a jurisdiction which he had promised not to invoke and which it was its own duty to decline. 

Courts in other common law jurisdictions, including Singapore, Canada, Bermuda and Australia, have also issued antisuit orders to enforce the negative obligations of arbitration agreements. The Singapore High Court explained the rationale for these orders as follows:

[An antisuit order] is entirely consistent with the principle that parties be made to abide by their agreement to arbitrate. Furthermore, the New York Arbitration Convention obliges state parties to uphold arbitration agreements and awards. Such an agreement is often contravened by a party commencing an action in its home courts. Once this Court is satisfied that there is an arbitration agreement, it has a duty to uphold that agreement and prevent any breach of it.

U.S. courts have also been prepared to grant antisuit injunctions prohibiting parties from proceeding with foreign litigation in violation of a valid arbitration agreement, but subject to greater restrictions than in other common law jurisdictions. Some U.S. courts will grant an antisuit injunction based upon only a showing of serious inconvenience or risk of inconsistent judgments, while others are more demanding and require a clear showing that the foreign litigation would threaten the jurisdiction or public policies of the U.S. forum. Even U.S. courts that are reluctant to issue anti-suit injunctions will sometimes do so where foreign litigation is brought in violation of the parties' agreement to arbitrate, based on U.S. policies favoring international arbitration:

The enjoining forum's strong public policy in favor of arbitration, particularly in international disputes, would be threatened if [the respondent] were permitted to continue to pursue the [action in its home courts], particularly in light of the court's decision herein granting [the plaintiff's] motion to compel arbitration.

In contrast to the common law approach, civil law jurisdictions have generally refused to grant antisuit orders, whether to enforce arbitration agreements or otherwise. In most cases, civil law courts are not even requested to issue antisuit orders, because it is clear that no such remedy is available.

[4]. Remedies for Breach of Negative Obligation Not to Litigate Disputes: Damages for Breach of Obligation Not to Litigate

Another means of enforcing the negative effects of an arbitration agreement is damages for breaches of the undertaking not to litigate disputes that have been submitted to arbitration. Indeed, in historical contexts when arbitration agreements were not capable of specific performance, damages were the only remedy for their breach.

It was frequently (and correctly) remarked that damages for breach of an arbitration agreement are an uncertain and inadequate remedy (because calculating the quantum of damages is speculative). While inadequate when considered alone, damages for breach of an
arbitration agreement can be an appropriate supplementary means of enforcing arbitration agreements, by increasing the disincentives for such conduct. A few contemporary judicial decisions in the United States and England have either awarded damages for the breach of an arbitration agreement or indicated that the possibility for doing so existed. (56)

[5]. Remedies for Breach of Negative Obligation Not to Litigate Disputes: Non-Recognition of Judgments

If a party pursues litigation in breach of a valid arbitration agreement, then the resulting judgment should not be entitled to recognition. Indeed, it would violate the New York Convention for a Contracting State to enforce a judgment obtained in breach of a valid agreement to arbitrate, which is subject to the Convention. Contracting States are committed under Articles II(1) and II(3) of the Convention to recognize arbitration agreements and to refer parties to such agreements to arbitration. Where a judgment is obtained in breach of an agreement protected by the Convention, a Contracting State would violate these commitments by giving effect to that judgment, rather than ordering the parties to arbitrate their disputes, as Article II requires. A Singapore court explained this rationale:

By virtue of [the parties’ agreement, the respondent] had agreed to submit disputes to arbitration in Singapore upon election by any party and the Plaintiffs have so elected. In the circumstances it would be manifestly against public policy to give recognition to the foreign judgment at the behest of the Defendants who have procured it in breach of an order emanating from this Court. (87)

Similarly, Swiss courts have held that they will not recognize foreign judgments that are obtained in a litigation that violated the Convention. In one decision, the Swiss Federal Tribunal refused to annul an award on the grounds that it conflicted with a foreign judgment, reasoning that the judgment had been issued in proceedings conducted in breach of an arbitration agreement:

A foreign state court which, notwithstanding the presence of the conditions of Art. II of the Convention, does not refer the parties to arbitration but takes the dispute into its own hands lacks thus indirect jurisdiction [necessary for recognition of a foreign judgment] and its decision cannot be recognized in Switzerland, unless the lack of jurisdiction of the arbitral tribunal is determined by the tribunal itself or in the context of a review by a state court. (89)

Other courts have also made it clear that they will not recognize judgments rendered in breach of a valid arbitration agreement. In particular, both U.S. and English courts have refused to recognize foreign judgments made in violation of an arbitration agreement. (89)

[C]. Anti-Arbitration and Anti-Suit Orders

In rare cases, courts may issue “anti-arbitration” injunctions, forbidding a party from pursuing its claims in arbitral proceedings. Such orders generally rest on the court’s conclusion that there is no valid arbitration agreement providing a basis for the arbitration to proceed. There are doubts as to the legitimacy of anti-arbitration injunctions (because they interfere with the arbitral tribunal’s competence-competence). (90) Conversely, in even rarer cases, an arbitral tribunal may issue an “antisuit” order, forbidding one party from pursuing arbitrable claims in a litigation. Again, the basis for such orders is usually a conclusion that the parties are bound to arbitrate, not litigate, their dispute.

1 See infra pp. 52.
2 See infra pp. 63–64.
3 See supra p. 35.
See infra pp. 370–73.


10 There is divergent authority on the meaning of Article XV, including on the question whether it applies in litigation between private parties. See G. Born, International Commercial Arbitration 303–05 (2009).


14 There is divergent authority on the meaning of Article XIV, including on the question whether it applies in litigation between private parties. See G. Born, International Commercial Arbitration 277–84 (2009).


16 There is divergent authority on the meaning of Article XIV, including on the question whether it applies in litigation between private parties. See G. Born, International Commercial Arbitration 277–84 (2009).


21 See Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S., 9 F.3d 1060, 1063 (2d Cir. 1993) (policy in favor of arbitration "is even stronger in the context of international transactions").

22 See supra pp. 50–51.

23 See supra pp. 50–51.

24 See supra pp. 50–51.

25 See supra pp. 50–51.

26 See supra pp. 50–51.

27 See supra pp. 50–51.

28 See supra pp. 50–51.

29 See supra pp. 50–51.

30 See supra pp. 50–51.

31 See supra pp. 50–51.

32 See supra pp. 50–51.

33 See supra pp. 50–51.

34 See supra pp. 50–51.

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67 See supra pp. 50–51.

68 See supra pp. 50–51.

69 See supra pp. 50–51.

70 See supra pp. 50–51.

71 See supra pp. 50–51.

72 See supra pp. 50–51.

73 See supra pp. 50–51.

74 See supra pp. 50–51.

75 See supra pp. 50–51.

76 See supra pp. 50–51.

77 See supra pp. 50–51.

78 See supra pp. 50–51.

79 See supra pp. 50–51.

80 See supra pp. 50–51.

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103 See supra pp. 50–51.

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105 See supra pp. 50–51.

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107 See supra pp. 50–51.

108 See supra pp. 50–51.

109 See supra pp. 50–51.

110 See supra pp. 50–51.

111 See supra pp. 50–51.

112 See supra pp. 50–51.

113 See supra pp. 50–51.

114 See supra pp. 50–51.

115 See supra pp. 50–51.

116 See supra pp. 50–51.

117 See supra pp. 50–51.

118 See supra pp. 50–51.

119 See supra pp. 50–51.

120 See supra pp. 50–51.

121 See supra pp. 50–51.

39 The law governing an arbitration agreement is applicable to the agreement’s: (a) formation; (b) substantive validity; and (c) interpretation. As discussed below, issues of formal validity, non-arbitrability and the effects of the arbitration agreement on non-signatories are subject to different choice-of-law rules.

40 See infra pp. 304–05.


42 See infra pp. 312–28.


52 In the words of Article II(1), Contracting States “shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences.” The premise of Article II(1) is that the parties’ obligation to arbitrate includes the affirmative duty to accept the submission of their disputes to arbitration (“undertake to submit”) and to participate cooperatively in arbitral proceedings to resolve such disputes.


55 See, e.g., English Arbitration Act, 1996, §40(1) (“The parties shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings.”); Victoria Commercial Arbitration Act, §37 (“The parties to an arbitration agreement shall at all times do all things necessary for the proper and expeditious conduct of the arbitral proceedings.”) (emphasis added).


60 U.S. FAA, 9 U.S.C. §206 (“A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for….”). See G. Born, International Commercial Arbitration 380 (2d ed. 2001).


62 InterGen NV v. Grina, 344 F.3d 134, 142 (1st Cir. 2003).


64 There are very limited exceptions to this principle, involving provisional measure and jurisdictional issues, where the possibility of concurrent jurisdiction or proceedings in national courts exists. See supra pp. 52–54 & infra pp. 213–17.

65 See supra pp. 59–61.

66 See Judgment of 7 September 2005, XXXI Y.B. Comm. Arb. 791, 794–95 (Israeli S.Ct.) (2006) (“Article II(3) of the Convention states in mandatory language that the court ‘shall … refer’ the parties to arbitration, unless one of the exceptions listed in the section is present … If one of the three exceptions mentioned in Article II(3) does not appear, the court is as a rule required to order a stay of the proceedings …”); Lonrho Ltd v. Shell Petroleum Co., IV Y.B. Comm. Arb. 320 (Ch.) (1979) (“the effect of Section I [of the English Arbitration Act, 1975, implementing Article II(3)] is to deprive the court of any discretion whether a claim within a non-domestic arbitration agreement should be arbitrate or litigated … The Section is mandatory.”).


68 See supra pp. 59–61.

69 See Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (U.S. S.Ct. 1985) (terms of §3 “leave no place for the exercise of discretion by a district court, but instead … mandate that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed”); Asghar v. Legal Serv. Comm’n [2004] EWHC 1803 (Ch) (investigation by the Legal Services Commission stayed in respect of all matters which under contract should be referred to arbitration); G. Born, International Commercial Arbitration 1022–23 (2009).

70 See supra p. 61; InterGen NV v. Grina, 344 F.3d 134, 141 (1st Cir. 2003) (“Given this regime, it clearly appears that enforcing arbitration clauses under the New York Convention is an obligation, not a matter committed to district court discretion.”); Hi-Fert Pty Ltd v. Kukiang Maritime Carriers Inc., 86 FCR 374, 393 (N.S.W. Dist. 1998) (“the Court must stay the proceedings and refer the parties to arbitration”).


74 Nonetheless, as discussed below, there are limited circumstances where both arbitral tribunals and national courts simultaneously possess jurisdiction to consider and decide particular matters (e.g., jurisdictional issues or a request for provisional measures). See supra pp. 52–54 and infra pp. 213–17. In these circumstances, the jurisdiction of the arbitrators does not cease where that of national courts begin.


78 World Pride Shipping Ltd v. Dalichi Chuo Kisen Kaisha [1984] 2 Lloyd’s Rep. 489 (Q.B.) (“the American court has not yet ruled on the joint motion for continuance [of litigation]. … It seems to me that in those circumstances it would be much better that the [U.S.] District Court should itself rule on the motion for continuance and, if it thinks fit, stay all further proceedings on [the counterclaim] rather than that I should seek to preempt, and perhaps even seem to dictate the decision of a foreign Court.”).


81 See, e.g., Karaha Bodas Co. v. Perusahaan Pertambangan Miomak Den Gas Bumi Negara, 335 F.3d 357 (5th Cir. 2003); MacPhail v. Oceaneering Int’l, Inc., 302 F.3d 274 (5th Cir. 2002); Keapa, Inc. v. Achilles Corp., 76 F.3d 624 (9th Cir. 1996).

Chapter 3: Formation and Validity of International Arbitration Agreements

A central issue in the enforcement of international arbitration agreements concerns the standards for formation and validity. These standards play an essential role in ensuring that international arbitration agreements are enforced in an effective and efficient manner and are of substantial practical importance in the arbitral process.

§3.01. Formation of International Arbitration Agreements

Arbitration agreements, like other categories of contracts, give rise to questions of contract formation (particularly issues of consent). An agreement to arbitrate cannot be recognized or enforced unless it has been validly formed. The formation of arbitration agreements raises several related issues: (a) consent to the agreement to arbitrate; (b) the essential terms required for an arbitration agreement; and (c) defects in the arbitration agreement (or so-called “pathological” arbitration clauses).

[A]. Consent to Arbitration Agreement

In order for an arbitration agreement to exist, the parties must have validly consented to that agreement. The question whether parties have validly consented to an arbitration agreement is governed in most legal systems by generally-applicable principles of contract law, and specifically, contract formation.

In practice, consent in international commercial transactions is usually evidenced by written instruments, typically with the execution of a formal contract with a corporate officer’s signature. Nonetheless, other modes of establishing consent are also frequently encountered, including by less formal writings, exchanges of writings (including electronic or other communications), oral communications and conduct or acquiescence. Note that there is a distinction between the existence of consent to an
arbitration agreement (evidenced, for example, by oral communications) and the formal validity of the arbitration agreement (which may require a writing or signature).\(^{(3)}\)

In most cases, consent to an arbitration clause will be evidenced by consent to the parties’ main or underlying contract (containing the arbitration clause); notwithstanding the separability presumption, a party’s acceptance of the underlying contract will almost always entail consent to the arbitration clause in that contract. Nonetheless, cases arise in which one party argues either that (a) in consenting to the main or underlying contract, it did not also consent to the arbitration clause (for example, because it was unaware of the clause or because it indicated nonacceptance of the clause); or (b) while the underlying contract was never executed, the parties agreed separately to the arbitration clause (for example, to cover disputes involving conduct in contractual negotiations). In these instances, courts and arbitral tribunals consider whether the parties sufficiently manifested their consent to the separable arbitration agreement, regardless of their consent to the underlying contract.

A party’s commencement of arbitral proceedings, or its participation without protest in such proceedings, can be the basis for finding valid consent to an arbitration agreement. Article 16(2) of the UNCITRAL Model Law requires that any objection to a tribunal’s jurisdiction be raised no later than the statement of defense, failing which the jurisdictional objection is waived. Other national laws are similar. Under these authorities, a party’s tacit acceptance of its counterpart party’s initiation of arbitration, through participation in the arbitral proceedings without raising a jurisdictional objection, can provide the basis for an agreement to arbitrate.\(^{(4)}\) As a practical matter, waivers of jurisdictional objections frequently occur, providing a valid basis for subsequent arbitral proceedings and arbitral awards.

[B]. Standard of Proof for International Arbitration Agreements

Different approaches have been taken to the standard of proof required to establish the existence of an arbitration agreement. Some authorities have required a heightened standard of proof, as compared to other contracts, holding that the parties’ agreement to arbitrate must be clearly demonstrated or that waiver of access to national courts must be express. Other authorities have required a relaxed standard of proof, relying on the pro-arbitration policies of the New York Convention and national arbitration legislation. Finally, a few authorities apply the same standard of proof required for the formation of other types of contracts.\(^{(5)}\)

[C]. Essential Terms of Arbitration Agreements

In order for a valid international arbitration agreement to be formed, the parties must reach agreement on a core of essential issues. Absent agreement on these essential terms, the arbitration agreement will generally be void for indefiniteness or uncertainty.

[1]. Agreement to Arbitrate

The essential core of an arbitration agreement is simple: it consists of nothing more than an obligation to resolve certain disputes with another party by “arbitration” and the right to demand that such disputes be resolved in this fashion. These rights and duties can be contained in nothing more than the word “arbitration,” included in a contract, letter, or email, by which the parties commit to resolve disputes relating to their transaction by arbitration; alternatively, the essential terms of an arbitration agreement are contained in the phrase “All disputes shall be finally resolved by arbitration.”

[2]. Incidental Terms

As discussed above, international arbitration agreements typically do, and should, contain additional important terms, including the scope of the obligation to arbitrate, the arbitral seat, institutional rules, language and the like.\(^{(6)}\) Nonetheless, failure to include these terms does not render the arbitration clause indefinite. Rather, in almost all jurisdictions, rational law provides default mechanisms that will give effect to the parties’ agreement (i.e., by providing for judicial selection of arbitrators and by authorizing the arbitral tribunal to perform various functions, such as selecting the arbitral seat and language).

[3]. Blank Clauses
Some authorities hold that a so-called “blank clause,” which does not specify either the arbitral seat or the means of choosing the arbitrators, is indefinite and void. These authorities reason that a blank clause provides no means for either selecting an arbitral tribunal (absent agreement by the parties) or the seat (at which judicial assistance to appoint arbitrators can be sought). Other authorities hold that a blank clause impliedly authorizes the claimant to designate the arbitral seat.\(7\)

[D]. Pathological Arbitration Clauses

Although model arbitration clauses are readily available from most arbitral institutions (or other sources\(8\) in practice, parties not infrequently include so-called “pathological” arbitration clauses in their contracts. These provisions contain a variety of defects, which are often argued to render the arbitration agreement invalid.

“Pathological” Arbitration Clauses

– “Jurisdiction. In case of disputes, the parties undertake to submit them to arbitration as provided for by the Fédération Française de la Publicité. In case of disputes, the Tribunal de la Seine would have exclusive jurisdiction.”
– “The parties may refer any dispute under this agreement to arbitration.”
– “Any dispute may be resolved by arbitration under the ICC Rules, applying the UNCITRAL Arbitration Rules.”
– “The arbitration shall be seated in Miami; the seat of the arbitration shall be at the ICC in Paris.”

[1]. Indefinite Arbitration Agreements

Parties frequently draft arbitration agreements that lack specificity (for example, agreeing on “Arbitration – New York”). National courts and arbitral tribunals generally seek to give effect to arbitration agreements lacking specificity, holding that only the essential requirement of an agreement to arbitrate is required, with incidental terms either being implied or provided by national law.\(9\) For example, one court cited the “general principle that Courts should uphold arbitration, by striving to give effect to the intention of parties to submit disputes to arbitration, and not allow any inconsistencies or uncertainties in the wording or operation of the arbitration clause to thwart that intention.”\(10\)

[2]. Arbitration Agreements Referring to Non-Existent Arbitral Institutions, Arbitration Rules, or Arbitrators

National courts and arbitral tribunals have also generally upheld arbitration clauses that refer to non-existent arbitral institutions or appointing authorities (e.g., referring to an institution that has never existed, such as the “Transnational Arbitration Institute”). Some authorities have deleted references to non-existent entities as surplusage, while others have sought to correct or supplement inaccurate references. In the words of one court: “an agreement on a non-existent arbitration forum is the equivalent of an agreement to arbitrate which does not specify a forum; since the parties had the intent to arbitrate even in the absence of a properly designated forum.”\(11\) Alternatively, a Swiss arbitral tribunal construed a reference to the “international trade association organization in Zurich” (there is none) to mean arbitration under the Zurich Chamber of Commerce International Arbitration Rules.\(12\)

A related set of problems concerns arbitration clauses that select arbitral institutions that once existed, but have ceased operations; that select arbitrators who once were competent, but have since become incapacitated or passed away; or that select appointing authorities which refuse to fulfill the contemplated functions. Again, most courts endeavor to preserve the parties’ basic agreement to arbitrate, even if the particular mechanics that they have chosen to implement this agreement cannot function or cannot function as intended.

[3]. Internally Contradictory Arbitration Agreements

A similar set of issues arises from internally contradictory arbitration provisions. These can involve clauses that select two different arbitral seats (i.e., “The arbitration shall be seated in Miami; the seat
of the arbitration shall be at the ICC in Paris”), or two different institutions or mechanisms for selecting arbitrators (i.e., “The arbitration shall be conducted in accordance with the ICC Rules and under the auspices of the LGA”), or agreements that appear to provide for both arbitration and litigation of the same disputes.

As with indefinite or ambiguous clauses, tribunals and courts have generally found ways to enforce these provisions, either by deleting language as surplusage or by reconciling inconsistent terms through liberal interpretation. In the words of one award, “when inserting an arbitration clause in their contract the intention of the parties must be presumed to have been willing to establish an effective machinery for the settlement of disputes covered by the arbitration clause.”[13]

For example, if an agreement provides for both arbitration and litigation in a specified court, decisions have generally construed the forum selection clause narrowly, to apply only to litigation in support of the arbitration.[14]

[4]. “Optional” or Non-Mandatory Arbitration Agreements

Parties sometimes agree to provisions that appear only to treat arbitration as an optional means of dispute resolution, but not to require mandatory submission of future disputes to arbitration (e.g., “the parties may elect to submit disputes to arbitration”). Most courts and arbitral tribunals treat even ambiguously-drafted provisions as “mandatory,” thereby either obliging parties to submit their disputes to arbitration (and to refrain from litigation of arbitrable disputes) or granting either party the option to initiate arbitration (such that, if the option is exercised by either party, both parties are then bound to arbitrate[15]). The basis for this conclusion is that it would make little sense for parties to agree to optional arbitration in an entirely non-mandatory sense, leaving both parties free to decide when disputes arise whether or not they wish to arbitrate.

[E]. Formal Validity of International Arbitration Agreements

Like other types of contracts, international arbitration agreements are subject to form requirements. The most significant and prevalent of these is the “writing” or “written form” requirement, together with related requirements for a “signature” and/or an “exchange” of written communications, which is contained in the New York Convention. In addition, some national laws purport to impose other form requirements, including requirements concerning the size and location of type in which the arbitration clause is printed, the need for separate execution of arbitration agreements, the need for a selection of arbitrators and the like.

[1]. Written Form Requirement – New York Convention

The most universal written form requirement for international arbitration agreements is imposed by the Convention. As provided in Article II(1), the Convention applies only to “agreements in writing,” which are then defined by Article II(2) to include “an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”

Article II(2) does not merely require that arbitration agreements be in “written” form, but also that such agreements be either “signed by the parties” or contained in an “exchange of letters or telegrams.” Under Article II(2), not merely a written record of the parties’ agreement, but also a contract that is signed or contained in an exchange of writings is required. Article II(2) has generally been held to exclude not just oral agreements, but also arbitration agreements involving oral or tacit acceptance of written instruments and unsigned, but orally agreed written contracts. On the other hand, a few courts have held that Article II(2) is satisfied by tacit acceptance of a written offer containing an arbitration provision, particularly where performance of contractual obligations is also accepted.

Authorities are divided over the relationship between Articles II(1) and II(2). Some authorities have held that Article II(2) provides an exhaustive definition of Article II(1)’s requirement for an agreement in “writing”: only if an agreement satisfies the Article II(2) definition will it be formally valid under the Convention. In contrast, other authorities hold that Article II(2) only lists representative examples of written arbitration agreements and that Article II(1) can also be satisfied by other types of writings (without a signature or exchange). The latter view is adopted by an UNCITRAL Recommendation, discussed below.

[2]. Written Form Requirement – National Arbitration Legislation
Most national arbitration legislation imposes some sort of written form requirement on arbitration agreements. Many statutes parallel Article II(2) of the Convention, although often modernizing the Convention's approach by reference to email and other modern communications; other jurisdictions have taken steps to minimize the role of form requirements, in some cases eliminating (e.g., France, Sweden) or virtually eliminating (e.g., England) any written form requirement at all for international arbitration agreements.\(^\text{[16]}\)

**[3]. UNCITRAL Model Law, Article 7 (and Revisions)**

The Model Law originally contained a writing requirement that was similar to that of Article II(2) of the Convention. Article 7(2) of the original 1985 Model Law provided:

The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telexes, telegrams or other means of telecommunications which provide a record of the agreement, or in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another.

Like Article II(2), Article 7(2) requires either a signed written contract or an exchange of written communications that record the arbitration agreement. This excludes oral agreements and purely tacit acquiescence to one party's written proposal of an arbitration agreement. Under Article 7(2), the "writing" requirement is a condition of contractual validity.

The 2006 Revisions to the Model Law adopt two "Options" for Article 7, which materially reduce or eliminate any writing requirement. Option I provides that an "arbitration agreement" is "an agreement to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not." The effect of Option I is to eliminate any written form requirement, leaving only substantive issues of consent; under Option I, oral and tacit consent would both be sufficient for a valid arbitration agreement.

Option II for Article 7 is less sweeping. It retains the requirement that the "[a]n arbitration agreement shall be in writing," but then provides a liberalized definition of a writing: "an arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means." This provision eliminates any requirements for an "exchange" of writings or for "signatures," and merely requires that there be a written record of the agreement to arbitrate (even if that agreement is concluded orally or tacitly). For example, Option I would be satisfied where a party had, in an internal email, recorded the terms of what had been agreed orally.

**[4]. Relationship between New York Convention and National Law**

The relationship between the writing requirements in the Convention and national arbitration legislation is complex. Authorities uniformly hold that Article II of the Convention prescribes a mandatory "maximum" form requirement, which Contracting States may not exceed. Thus, if a State purported to impose a heightened form requirement (e.g., arbitration agreements must be in a separate contract, in capital letters), this requirement would be contrary to and superseded by the Convention's maximum form requirement.

Authorities are divided as to whether the Convention also prescribes a mandatory "minimum" form requirement. Some authorities hold that an arbitration agreement is invalid if it does not comply with Article II's form requirement -- even if it satisfies the reduced form requirement of national law applicable to the arbitration clause (e.g., Article 7 of the 2006 Model Law); these authorities reason that the Convention supersedes less demanding national form requirements. The weight of authority adopts a different position, holding that Contracting States are free to adopt less demanding form requirements (by virtue of Article VII of the Convention). This view is adopted by the UNCITRAL Recommendations, discussed below.

**[5]. 2006 UNCITRAL Recommendations**

In 2006, UNCITRAL adopted two "Recommendations" for interpretation of the New York Convention's writing requirement.\(^\text{[17]}\) The first Recommendation provided that Article II(2) of the
Convention should be interpreted in a non-exhaustive manner. Under the Recommendation, Article II(1)'s writing requirement can be satisfied by agreements that do not comply with Article II(2)'s requirements for a signature or exchange of letters (e.g., by an unsigned written contract recording the parties' agreement).

2006 UNCITRAL Recommendations
The United Nations Commission on International Trade Law,

1. Recommends that article II, paragraph 2, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, be applied recognizing that the circumstances described therein are not exhaustive;

2. Recommends also that article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.

Under UNCITRAL's second Recommendation, Article VII(1) of the Convention should be interpreted to permit less demanding national form requirements than that under Article II of the Convention. Thus, the Convention would not impose a "minimum" form requirement, but would instead permit Contracting States to adopt legislation (like the 2006 Revisions to the Model Law) eliminating or relaxing the form requirement of Article II of the Convention.

[6]. Incorporation of Arbitration Agreement

International contracts frequently seek to incorporate arbitration agreements or rules from other instruments, including other contracts (between the same or different parties), trade association rules or by-laws, or one party's standard terms and conditions. For example, a sales contract may provide "all disputes arising under this contract shall be resolved by arbitration pursuant to Article XI of the Master Agreement" or "all disputes shall be resolved pursuant to Articles X to XIII of the [relevant trade association's rules]." Provisions incorporating arbitration clauses from other instruments give rise to issues of both formal and substantive validity.

The formal validity of incorporated arbitration agreements usually involves straightforward issues: the "writing" requirements of the Convention and national law are simply applied to the incorporating instrument (e.g., to determine whether it has a signature or is an exchange of letters). In addition, some national laws contain provisions specifically addressing the formal validity of incorporated arbitration agreements. For example, Article 7(2) of the 1985 Model Law provides "The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract." The provision confirms that the incorporated arbitration provisions need not separately satisfy requirements for a signature or exchange of letters (although it must be contained in a "document").

[F]. Substantive Validity of International Arbitration Agreements

An arbitration agreement, like other contracts, also gives rise to issues of substantive validity. The categories of substantive invalidity of arbitration agreements contained in the Convention and most arbitration legislation are limited to cases where such agreements are invalid on generally-applicable contract law grounds (e.g., mistake, fraud, unconscionability, waiver). These grounds for challenging the substantive validity of arbitration agreements are exclusive: they provide exceptions to the presumptive validity of agreements to arbitrate.

In addition, special rules of unenforceability apply to some categories of disputes. These rules are reflected in the language of Articles II(1) and V(2)(a) of the Convention, which provide that certain categories of disputes are "not capable of settlement by arbitration." These "non-arbitrability" rules are discussed separately below.\(^{18}\)

[1]. "Null and Void," "Inoperable" and "Incapable of Being Performed"

Article II(3) of the Convention and Article 8(2) of the UNCITRAL Model Law provide that an arbitration agreement need not be recognized and enforced if it is "null and void," "inoperable," or "incapable of being performed." Similar provisions exist in other
jurisdictions. These categories of substantive invalidity have been interpreted by reference to traditional rules of general contract law. The term “null and void” permits defenses based on unconscionability, fraud, mistake, lack of capacity and illegality. The term “inoperative” permits defenses based on termination, waiver, changed circumstances and repudiation. The term “incapable of being performed” refers to impossibility and similar defenses.

Each of these defenses focuses, by reason of the separability presumption, on the arbitration agreement itself, rather than the underlying contract. For example, in considering claims of unconscionability, the only relevant question is whether the terms of the arbitration clause – not the commercial terms of the underlying contract – are oppressive and unconscionable. Similarly, in considering claims of impossibility, the relevant question is whether it is possible to perform the agreement to arbitrate – not to perform the underlying commercial contract. Finally, in considering each of these defenses, the governing law is that applicable to the agreement to arbitrate, not necessarily the law applicable to the underlying contract.

Unconscionability and Duress

Basic principles of contract law provide that unconscionable agreements are invalid. Although formulations of unconscionability vary, unconscionability generally requires grossly unfair substantive terms of an agreement and an abuse of significantly stronger bargaining power.

As a consequence of the separability presumption, courts and tribunals almost always hold that claims that the parties’ underlying contract is unconscionable do not implicate the validity of the associated arbitration clause. Unconscionability is a ground for challenging an agreement to arbitrate only in cases where a party challenges the terms of the arbitration agreement itself (e.g., a grossly unfair seat, biased means of selecting the arbitral tribunal, grossly one-sided arbitral procedures) and/or the manner in which the arbitration agreement was negotiated (e.g., undue pressure tactics or deception); unconscionable commercial terms in the underlying contract (e.g., price) are generally irrelevant to these inquiries.

Courts are generally skeptical of unconscionability challenges directed at arbitration agreements in commercial settings. The fact that an arbitration clause was included in a form contract or general terms and conditions; the fact that there was a disparity of bargaining power; and the fact that the contract was in a foreign language are virtually never grounds for finding unconscionability. In rare cases, often involving individuals or small businesses, courts have found that grossly one-sided arbitration procedures are invalid as unconscionable (for example, clauses permitting one party to unilaterally select the arbitrator(s)).

A few courts have held that so-called “asymmetrical” or “non-mutual” arbitration agreements are void on unconscionability or lack of mutuality grounds. These agreements provide that one party, but not the other, has the option of requiring arbitration of the parties’ disputes. The weight of authority takes a contrary view and upholds asymmetrical arbitration clauses.

Asymmetrical Arbitration Agreement

“The courts of [England] shall have exclusive jurisdiction to resolve all disputes relating to this Agreement, provided that [Party A] shall have the option of submitting any such dispute for resolution by arbitration under the UNCITRAL Arbitration Rules.”

The validity of arbitration agreements may also be challenged on the grounds of duress (or wrongful threat). Duress has generally required the showing of a wrongful act or threat compelling involuntary submission. In practice, most efforts to meet this standard for arbitration agreements in commercial settings have failed, although there are exceptions (particularly in cases involving individuals). Claims of duress must, in principle, be directed at the agreement to arbitrate itself, as opposed to the underlying contract; in some instances, however, it is difficult to distinguish between duress directed at the arbitration clause and duress directed at the underlying contract (i.e., signature of a contract at gunpoint).

Fraudulent Inducement or Fraud

[3]. Fraudulent Inducement or Fraud
Fraud and fraudulent inducement are not specifically mentioned as grounds for non-enforcement of an arbitration agreement in the Convention or most arbitration statutes. Nonetheless, courts and arbitral tribunals have uniformly concluded that fraud and fraudulent inducement are bases for holding an arbitration agreements invalid or null and void.

Under the separability presumption, claims that the parties’ underlying contract was fraudulently induced do not affect the validity of an arbitration clause included in the contract. The fact that one party may have fraudulently misrepresented the quality of its goods, services, or balance sheet generally does not impeach the parties’ separable dispute resolution mechanism. As a consequence, only fraud directed at the agreement to arbitrate itself will impeach that agreement. These circumstances seldom arise: in practice, it is very unusual that a party will seek to procure an agreement to arbitrate by fraud.

[4]. Impossibility and Frustration

Impossibility and frustration are grounds for challenging the substantive validity of arbitration agreements. As with other generally-applicable contract law defenses, the relevant issue is whether the separable agreement to arbitrate has been frustrated, not whether the underlying contract has become impossible to perform. Claims of impossibility or frustration typically arise where an arbitrator, named specifically in the arbitration agreement, dies or becomes unable to fulfill his or her mandate; alternatively, the arbitral institution specified in the parties’ agreement may cease to exist or be merged into another institution. In both cases, courts have generally been reluctant to find frustration or impossibility, often appointing a substitute arbitrator or holding that another institution (or ad hoc arbitration) implements the parties’ basic agreement to arbitrate.

[5]. Illegality

It is elementary in most jurisdictions that an illegal agreement is not enforceable. In most instances, courts and tribunals rely on the separability presumption to conclude that claims attacking the legality of the underlying contract do not affect the arbitration agreement. In rare cases, courts have suggested that some types of illegality of the underlying contract may also render the associated arbitration agreement invalid: “The English court would not recognize an agreement between ... [page 79] highwaymen to arbitrate their differences any more than it would recognize the original agreement to split the proceeds.” Claims of illegality are also sometimes directed at the parties’ arbitration agreement itself. These claims typically involve the doctrine of “non-arbitrability,” discussed below.

[6]. Lack of Capacity

The existence of capacity to conclude an arbitration agreement is a requirement in most legal systems for the validity of the resulting agreement. Article V(1)(a) of the New York Convention permits a national court to deny recognition of an award if the parties to the arbitration agreement “were, under the law applicable to them, under some incapacity.” Although Article II of the Convention does not refer expressly to incapacity as a defense, it has been held to incorporate Article V(1)(a)’s reference to a lack of capacity. Articles 8, 34(2)(a)(i) and 36(1)(a)(i) of the UNCITRAL Model Law contain parallel provisions.

Neither the Convention nor the Model Law prescribe additional substantive or choice-of-law rules with regard to capacity. In the absence of legislative guidance, the requirement that a party have capacity to enter into an arbitration agreement is often identical to requirements for capacity for other contracts. For example, generally-applicable contract defenses going to capacity – such as mental incompetence, minority and limitations in constitutive corporate documents – apply to arbitration agreements, just as they do to other acts.

A recurrent issue arises from agreements entered into by states or state-related entities. In some instances, states attempt to disavow their international arbitration agreements, citing provisions of national law restricting the power of government entities to conclude such agreements. Most authorities disfavor such efforts, providing that a state may not invoke its own law to deny its capacity to have made a binding agreement to arbitrate.

[7]. Termination and Repudiation
An agreement to arbitrate may be challenged on grounds of termination or repudiation. Like other issues of validity, questions of termination and repudiation must be considered in the context of the separability presumption. Most courts and tribunals have held that the termination, expiration, rescission, or repudiation of the underlying contract does not affect the separable arbitration agreement. In the words of a leading Swiss decision:

the arbitration agreement does not necessarily share … the outcome of the main contract. … [T]his also applies where the parties terminate the principal contract by mutual agreement, but in that case, as a general rule, one should accept that insofar as the parties have not expressly provided otherwise, they also intend to retain their arbitration agreement for disputes concerning the consequences of the termination of the contract.28

Although termination of the underlying contract does not terminate the separable arbitration clause, it is possible for parties to separately terminate an arbitration agreement. Doing so typically requires express agreement by both parties.

In some legal systems, an arbitration agreement may also be terminated by a repudiation, or a repudiatory breach, which is accepted; of course, the repudiation must involve the arbitration agreement, not the underlying contract. In general, only the commencement of litigation in deliberate breach of an agreement to arbitrate will constitute a repudiatory breach; lesser breaches, such as failure to comply with a tribunal’s procedural directions, will not ordinarily constitute a repudiatory breach of the arbitration agreement (although it may result in the arbitral tribunal imposing procedural sanctions against the non-complying party).29

[8]. Waiver of Right to Arbitrate

It is clear that rights to arbitrate may be waived, just as other contractual rights may be waived. The Convention does not expressly refer to waiver of the right to arbitrate, but Article II(3) arguably includes waiver when referring to arbitration agreements that are “inoperable.”

Article 8(1) of the Model Law is more specific, providing for the enforcement of arbitration agreements by national courts (through a stay of litigation), subject to the requirement that the party invoking the agreement has requested its enforcement “not later than when submitting his first statement on the substance of the dispute” in the national court proceedings. Article 8 establishes a reasonably definite definition of waiver, which applies regardless of the intentions of the “waiving” party or prejudice to the “non-waiving” party. Failure to comply with Article 8(1)’s requirement has frequently been held to result in the loss of a party’s right to invoke the arbitration agreement with regard to a particular dispute.

Some legal systems are more reluctant to find the waiver of an arbitration agreement. For example, the FAA has been interpreted by U.S. courts as disfavoring waivers of a party’s right to arbitrate. A finding of waiver under the FAA typically requires knowledge of a right to arbitrate, actions inconsistent with that right (typically, commencement of litigation or protracted delay) and (less clearly) prejudice to the adverse party. Moreover, the party seeking to establish waiver bears a heavy burden of proof under the FAA and doubts are resolved against finding a waiver.

[9]. Inconvenient Arbitral Seat

An arbitration agreement will sometimes select an arbitral seat that is (or becomes) highly inconvenient to one party. It is occasionally suggested that this inconvenience provide sufficient grounds for challenging the validity of the arbitration agreement, including on the basis of unconscionability or mistake. In practice, national courts and arbitral tribunals have virtually always rejected such claims (at least outside the consumer context), frequently questioning whether applicable international or national instruments even recognize such a basis for challenging the validity of an arbitration agreement.30 In contrast, where national hostilities or radical political changes result in serious doubts about the impartiality of courts in the arbitral seat, the contractual specification of the seat is more likely to be invalidated.31
§3.02. The Non-Arbitrability Doctrine

As described above, the New York Convention contains various exceptions to the general obligation, set forth in Article II, to enforce written arbitration agreements. One of these exceptions is the so-called non-arbitrability doctrine, which provides that certain types of disputes may not be arbitrated, notwithstanding an otherwise valid arbitration agreement.

[A]. Basis for Non-Arbitrability Doctrine

Article II(1) of the Convention provides an exception to the presumptive obligation of Contracting States to recognize arbitration agreements. Under Article II(1), a state is not obligated to refer disputes to arbitration if they are not “capable of settlement by arbitration.” Similarly, Article V(2)(a) provides that an award need not be recognized if “[t]he subject matter of the difference is not capable of settlement by arbitration under the law” of the state where recognition is sought. Together, these provisions permit the assertion of non-arbitrability defenses to both arbitration agreements and awards under the Convention.

Like the Convention, legislation in most states treats some categories of claims as incapable of resolution by arbitration. The Model Law is representative, with Article 1(5) providing that specified types of disputes may be treated as not capable of settlement by arbitration (or “non-arbitrable”). Virtually all states have provided, by legislation or judicial decisions, that certain categories of disputes are non-arbitrable: even if the parties have concluded a valid arbitration agreement, which extends to a dispute, the agreement will not be enforceable as applied to these “non-arbitrable” matters.

[B]. Applications of Non-Arbitrability Doctrine

The types of disputes that are non-arbitrable differ from nation to nation. In general, disputes or claims are deemed “non-arbitrable” because of their public importance or a perceived need for judicial protections. Among other things, various nations refuse to permit arbitration of at least some disputes concerning criminal law, labor grievances; intellectual property; real estate; bankruptcy; and domestic relations.

The non-arbitrability doctrine was frequently invoked during the 20th century. National courts concluded that a variety of claims were non-arbitrable, applying expansive, sometimes ill-defined, conceptions of public policy. More recently, courts in most developed jurisdictions have materially narrowed the non-arbitrability doctrine, typically applying it only where statutory provisions expressly require. In most instances, this has involved a limited set of “mandatory law” claims, which parties are not free to contract out of in advance and which fairly clearly require resolution in judicial or other specialized forums.

[1]. Competition and Antitrust Claims

During the mid-20th century, many national courts sometimes held antitrust and competition claims non-arbitrable. More recently, that approach has been rejected by U.S., EU and other courts; as a consequence, many categories of civil antitrust claims are now arbitrable. Thus, in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., the U.S. Supreme Court held that federal antitrust claims were arbitrable, provided that they arose from an “international” transaction. The Court reasoned that “[t]he utility of the [New York] Convention in promoting the process of international commercial arbitration depends upon the willingness of national courts to let go of matters they normally would think of as their own.” A similar approach has been taken by the European Court of Justice, which declared in Eco Swiss China Time Ltd v. Benetton Int’l NV, that an arbitration agreement could validly be given effect with respect to EU competition claims. Courts in EU Member States have also held that EU and Member State competition law claims may validly be the subject of an international arbitration agreement.

[2]. Securities Claims

Like competition claims, claims arising from securities regulations were historically regarded as non-arbitrable in many jurisdictions. In the United States, early decisions held that private civil claims under U.S. securities laws were non-arbitrable, at least in domestic
transactions. In Scherk v. Alberto-Culver Co., however, the U.S. Supreme Court held that claims under the securities laws were arbitrable, again provided they arose from an “international” transaction. The Court reasoned that “[a] parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate [the Convention’s] purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages.” approaches in other jurisdictions are mixed, with some states providing that arbitration agreements are unenforceable as applied to future disputes arising under domestic securities regulatory legislation; in other jurisdictions, securities claims may be the subject of a valid agreement to arbitrate.

[3]. Bankruptcy

In most jurisdictions, only courts (often specialized courts) have the authority to commence, administer and conclude bankruptcy cases, including proceedings that liquidate a bankrupt company, reschedule its debts, operate it under some form of receivership, or distribute pro rata payments to creditors. Disputes concerning these “core” bankruptcy functions are almost universally considered non-arbitrable, whether in domestic or international arbitrations. It is much more controversial, however, whether disputes merely involving a bankrupt entity as a party (e.g., a dispute arises between the debtor and a counter-party, under a contract containing an arbitration clause) or raising questions of bankruptcy law (e.g., the continued effect of a contract), may be resolved in arbitration. Different legislative regimes reach different conclusions about these types of disputes. In many such cases, the desirability of a centralized, usually “pro-debtor,” forum for resolving all or most disputes involving the debtor is weighed against that entity’s pre-existing commitment to resolve disputes by international arbitration, with different legal systems adopting different resolutions. The weight of authority supports narrow non-arbitrability rules in this context, with international arbitration agreements of bankrupt entities often being given effect.

[4]. Employment Contracts

Historically, many legal systems treated some employment-related claims as non-arbitrable. Despite the evolution of the non-arbitrability doctrine in other contexts, that remains the case in a number of jurisdictions, including Belgium, Italy and Japan. In contrast, U.S. law affirmatively encourages arbitration of many labor disputes, while imposing only limited non-arbitrability restrictions on employer-employee disputes. Thus, §1 of the U.S. FAA excludes from the Act’s coverage agreements arising from a limited range of employment relations – involving “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” Consistent with its text, this exclusion has been limited exclusively to transportation workers.

[5]. Consumer Disputes

As with employment disputes, different legal systems take different approaches towards the arbitration of “consumer” disputes. U.S. law currently recognizes the validity of agreements to arbitrate between consumers and businesses and permits the arbitration of both existing and future consumer disputes, subject to fairly limited restrictions based on principles of unconscionability and due notice. The FAA has been interpreted as extending to agreements between consumers and merchants, with the U.S. Supreme Court repeatedly upholding both the validity of such agreements and the arbitrability of consumer claims. In contrast, other jurisdictions forbid or regulate (through statutory provisions) agreements to arbitrate future consumer disputes. Under the EU’s Unfair Terms in Consumer Contracts Directive, a provision in a standard form consumer contract is prima facie invalid if it “requires the consumer to take disputes exclusively to arbitration not covered by legal provision.” Various EU Member States have implemented this provision by adopting legislation that deems arbitration clauses in standard form contracts unfair (and therefore invalid) if they require binding arbitration of future disputes involving claims for less than specified sums (e.g., approximately $10,000). Legislation in other jurisdictions, including Quebec, Ontario, New Zealand and Japan, also provides for the unenforceability of specified categories of consumer contracts.

[6]. Other Non-Arbitrable Disputes
Legislation in other states provides for a variety of categories of non-arbitrable disputes, although these are usually limited in scope and practical importance. Virtually all states regard criminal matters as non-arbitrable (in the sense that arbitrators may not impose criminal sanctions, although in deciding civil disputes they may consider allegations of conduct that would amount to a criminal offense). A few states treat limited issues of intellectual property law as non-arbitrable (e.g., patent validity), while allowing other civil disputes over IP rights to be arbitrated (e.g., royalty disputes, infringement claims). Other states treat disputes arising from trade sanctions or embargoes as non-arbitrable, although the more frequent approach is to treat such disputes in the same manner as antitrust disputes.

[C]. Choice of Law Governing Non-Arbitrability

The law applicable to questions of non-arbitrability is addressed in Article V(2)(a) of the Convention, which provides that an award need not be recognized in a Contracting State if “the subject matter of the dispute is not capable of settlement by arbitration under the law of that country.” The same rule is reflected in Article 36(1)(b)(i) of the Model Law. As discussed above, most authorities have applied this rule by analogy to the enforcement of arbitration agreements, holding that, when a court is requested to refer a dispute to arbitration, it may apply its own non-arbitrability rules.\(^\text{42}\)

[D]. Non-Arbitrability Issues in Annulment or Enforcement of Awards

The non-arbitrability doctrine is also relevant at the stage of enforcing arbitral awards. In particular, as discussed below, awards may be either annulled or denied recognition if they concern a matter that is non-arbitrable (“not capable of settlement by arbitration”).\(^\text{43}\)

Although national courts have held that competition, securities and other mandatory law claims are arbitrable, they have also suggested that awards dealing with these matters may be subject to heightened judicial review. In \(\textit{Mitsubishi Motors}\), for example, the U.S. Supreme Court held that U.S. courts would take a “second look” at an arbitrator’s decision applying the antitrust laws at the stage of award enforcement: “Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed.”\(^\text{44}\) The \(\textit{Eco Swiss}\) decision of the ECJ attached the same caveat to the enforcement of an arbitration agreement with regard to EU competition claims. Similar approaches have been adopted in other contexts.\(^\text{45}\)

The level of judicial review of awards dealing with mandatory law claims has been relatively limited. Courts have sometimes scrutinized the substance of the arbitrators’ decisions, but typically afforded awards a substantial measure of discretion, even in deciding mandatory law claims.\(^\text{46}\)

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1. Article II of the New York Convention applies only to an “agreement … under which the parties undertake to submit to arbitration,” while Article 8 of the Model Law applies only where there is an “arbitration agreement,” defined as requiring “an agreement by the parties to submit to arbitration all or certain disputes.” These provisions require the existence of a validly-formed agreement to arbitrate, failing which there will be nothing for national courts or arbitrators to enforce.
7. G. Born, \textit{International Commercial Arbitration} 659–60 (2009). Some national arbitration legislation permits judicial assistance in selecting an arbitral tribunal even for a blank clause, provided the
Agreements to arbitrate are endlessly varied. As a practical matter, arbitration clauses can be very short (a few words) or quite long; they may be drafted in various languages and with varying degrees of skill and linguistic proficiency. Arbitration agreements may incorporate model clauses, either in whole or part, or start from scratch; they may provide for arbitration of some contractual disputes, all contractual disputes, or virtually all disputes (contractual, tort, or otherwise) connected to the parties’ relationship; they may provide for ad hoc or for institutional arbitration; they may designate an arbitral seat; and they may otherwise structure the arbitral process.

The variety of arbitration agreements frequently gives rise to questions of interpretation. Questions of interpretation most often concern the “scope” of arbitration clauses, but can also include other topics (such as the incorporation of institutional rules or the treatment of procedural provisions). The interpretation of arbitration agreements also gives rise to questions regarding the allocation of competence between national courts and arbitral tribunals.

§4.01. Scope of Arbitration Agreements

The most frequent, and important, issue that arises in the interpretation of arbitration agreements concerns the “scope” of the agreement; that is, assuming that the parties are bound by a valid arbitration agreement, what categories of disputes or claims have the parties agreed to submit to arbitration? In particular, are particular contract claims, or non-contractual claims based upon tort or statutory protections, subject to arbitration pursuant to the parties’ arbitration agreement or not?

“Scope” of Arbitration Agreement
All disputes arising under this First Sales Agreement shall be finally resolved by arbitration...

Seller's fraudulent misrepresentation of quality of goods delivered under Agreement

Seller's failure to provide goods that comply with statutory product quality and safety regulations

Unfair competition and/or slander/libel claims because buyer publicly criticized seller's goods

Claims for breach of Second Sales Agreement

[A]. Rules of Construction

General rules of interpretation and presumptions about the parties' intent play an important role in ascertaining the meaning of arbitration agreements. In most jurisdictions, the starting point for the interpretation of international arbitration agreements is generally-applicable contract law and its principles of contract interpretation. In the words of an Australian court, "[a]rbitration clauses are contractual provisions ... and are governed by the ordinary rules of contractual interpretation." These principles typically include the contra preferentem rule, specific terms prevailing over general terms, giving effect to all parts of the parties' agreement, and trade usage of terms. In addition to these generally-applicable rules, some states apply rules of construction relevant specifically to international arbitration agreements.

[1]. Pro-Arbitration Rules of Construction

In many jurisdictions, national law provides that international arbitration agreements should be construed in light of a "pro-arbitration" presumption. This presumption provides that an arbitration clause should be interpreted expansively and, in cases of doubt, extended to encompass disputed claims. That is particularly true where an arbitration clause encompasses some of the parties' disputes and the question is whether the clause also applies to related disputes, so that all such controversies can be resolved in a single proceeding (rather than in multiple proceedings in different forums).

In the United States, the Supreme Court has declared that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." In England, the House of Lords reasoned similarly: "The proposition that any jurisdiction or arbitration clause in an international commercial contract should be liberally construed promotes legal certainty. It serves to underline the golden rule that if the parties wish to have issues as to the validity of their contract decided by one tribunal and issues as to its meaning or performance decided by another, they must say so expressly. Otherwise they will be taken to have agreed on a single tribunal for the resolution of all such disputes." Courts in other states adopt similar presumptions.

[2]. Anti-Arbitration Rules of Construction

A few authorities have held that arbitration clauses must be interpreted restrictively, resolving doubts about the coverage of particular disputes against coverage. The "restrictive" presumption is generally explained on the grounds that arbitration is a derogation from otherwise available access to civil justice, and that such derogations must be construed narrowly. Thus, in an older decision, a French appellate court declared that "[t]he arbitration agreement must be strictly interpreted as it departs from the norm — and in particular from the usual rules as to the jurisdiction of the courts." This anti-arbitration interpretative presumption is archaic and generally not applied in contemporary decisions.

[B]. Recurrent Issues

In practice, a number of issues recur in interpreting the scope of arbitration agreements. These issues involve the application of a number of relatively standard contractual formulae.

[1]. Commonly-Used Formulae in Arbitration Agreements

The most common terms used in arbitration agreements include (a) "all" or "any"; (b) "disputes," "differences," "claims," or "controversies"; (c) "arising out of," "in connection with," "under," or "relating to"; (d) the parties' "agreement," "contract," the "works," or
some broader set of contractual arrangements between the parties.

Model ICC Arbitration Clause

“All disputes arising out of or in connection with the present contract shall be finally settled under the [ICC] Rules.”

Model UNCITRAL Clause

“All disputes arising out of or in connection with the present contract shall be finally settled under the [UNCITRAL] Rules.”

Some arbitration clauses provide for arbitration of “all” or “any” disputes or differences without any further qualification or description. For example, an agreement may provide “[a]ll disputes relating to this contract shall be decided by arbitration.” In contrast, other arbitral clauses refer only to “disputes” (as in, “Disputes relating to this contract …”). Some authorities have interpreted the “all disputes” or “any disputes” formulæ more broadly than a simple reference to “disputes,” concluding that these terms extend to all disputes having any plausible factual or legal relation to the parties’ agreement or dealings.

Most arbitration clauses refer to “disputes” and “differences.” A few courts have held that a “dispute” does not exist unless there is a genuine controversy between the parties, sometimes examining the merits of the parties’ positions and holding that an arbitrable “dispute” does not exist where one party’s position is frivolous. In contrast, most courts have adopted broad interpretations of the terms “dispute,” “difference” and “controversy,” and refused to inquire into the reasonableness or plausibility of either party’s position.

Many arbitration agreements use the phrase “relating to” (as in “disputes relating to this contract”). Courts in most jurisdictions have held that this term extends an arbitration clause to a broad range of disputes. U.S. courts have repeatedly concluded that the “relating to” formula encompasses non-contractual, as well as contractual, claims and that it reaches any disputes that “touch” or have a factual relationship to the parties’ contract. Courts in other jurisdictions have also interpreted the phrase “relating to” broadly. Similar conclusions have been reached with respect to the phrase “in connection with.”

 Authorities have reached divergent interpretations of agreements to arbitrate all disputes “arising under” or “arising out of” a contract. Some courts have concluded that clauses using the formulation “arising under” or “arising out of” are broad (comparable to “relating to”) while other courts have held that the formulation is “narrow.” In the latter category, some courts have concluded that the “arising under” formula does not encompass tort claims that did not directly invoke application of the parties’ contractual commitments, claims based on pre-contractual conduct, or claims about contract formation.

[2]. “Broad” versus “Narrow” Arbitration Clauses

Some U.S. courts have distinguished between “broad” and “narrow” arbitration clauses. Among other things, some courts have said that a “broad” (but not a “narrow”) clause will attract a “pro-arbitration” rule of construction and grant the arbitrators competence-competence to decide disputes over the clause’s scope. Other authority holds that a sharp distinction between “broad” and “narrow” clauses is difficult to justify and that the general pro-arbitration approach to construction of arbitration agreements should apply in all cases.

[3]. Tort Claims

There is no prohibition in most jurisdictions against the arbitration of non-contractual claims. On the contrary, Article II(1) of the New York Convention (and many arbitration statutes) defines an arbitration agreement as including differences arising from a relationship “whether contractual or not.” National courts have generally approached the question whether a particular non-contractual claim falls within an arbitration clause by applying the pro-arbitration presumptions and other rules of construction that are used in other contexts.
(such as fraud, defamation, or unfair competition). The “pro-arbitration” presumption under most national laws is generally applicable to these tort claims. In addition, it is frequently said that a party may not defeat an arbitration clause by casting its claims in tort, rather than contract. Taking this approach, many decisions have held on particular facts that various tort claims were within the scope of particular arbitration agreements. In other cases, tort claims have been held to fall outside the scope of the parties’ arbitration agreement.

[4]. Statutory Claims

There is also generally no prohibition against arbitration of claims based on statutory protections. The U.S. Supreme Court has also held that the application of arbitration clauses to statutory claims should be subject to no different rules of interpretation than contract claims. The Court declared in Mitsubishi Motors that “[t]here is no reason to depart from these [pro-arbitration interpretative] guidelines where a party bound by an arbitration agreement raises claims founded on statutory rights.” A number of courts have also said that the scope of an arbitration clause is determined by reference to the factual allegations underlying the parties’ claims, regardless of the “legal labels” for those claims.

On the other hand, some national courts have remarked that “an arbitration clause is no doubt designed primarily to cover claims for breach of contract.” This view is archaic, and reflects a minority position that is no longer followed in most jurisdictions.

[5]. Multiple Contracts

A recurrent factual setting involves the same parties entering into a series of contracts related to a single enterprise, some of which contain dispute resolution provisions. In these cases, the question arises whether an arbitration clause in one agreement covers disputes under other agreements. In general, so long as the parties to the contracts are the same, and the underlying contracts relate to a single project, courts have usually held that an arbitration clause in one agreement extends to related agreements (e.g., Contract A with an LCA arbitration clause; Contract B with no dispute resolution clause) – provided that the other agreements do not contain inconsistent arbitration or forum selection clauses (e.g., Contract A with an ICC arbitration clause; Contract B with a New York forum selection clause). Despite this, where the agreements lack a sufficiently close relationship, then an arbitration clause in one contract is likely to be held inapplicable to disputes under the other contract.

Different conclusions apply if the identities of the parties to related contracts differ. In these circumstances, except where all parties can be bound through non-signatory principles to an arbitration agreement (as discussed in Chapter 5 below), there is little prospect for applying an arbitration clause in one agreement to disputes under a different contract with different parties.

Similarly, the existence of dissimilar arbitration provisions in related agreements has generally been held to be strong evidence that disputes under the various agreements were meant to be resolved under different dispute resolution provisions. This is particularly true where different contracts contain different arbitration clauses (e.g., Contract A with an ICC clause and Contract B with an AAA clause; Contract A with a Swiss arbitral seat and Contract B with a Tokyo seat). Even where an identical arbitration clause is repeated verbatim in multiple contracts, that clause is sometimes said not to be the “same” clause, giving rise to the possibility of separate arbitrations (and arbitral tribunals) under each separate substantive contract, with each arbitration limited to a single, specific agreement. Arbitral tribunals have often sought to avoid this latter result, at least where different contracts involve the same parties.

A related factual scenario involves successive contracts entered into at different times between the same or similar parties (as distinguished from related contracts entered into at the same time). Where one, but not all, of the successive contracts contains an arbitration clause, questions can arise as to whether such a clause extends to disputes under subsequent (or earlier) contracts. As in other contexts, courts have looked to the language and relationship of the parties’ agreements in order to determine their intent, while presuming that the parties desired a single, efficient dispute resolution mechanism. In general, courts have held that an arbitration clause in the earlier of two or more related agreements extends to disputes under the later contracts, provided that there is
a sufficiently close connection between the agreements; if the subsequent contracts have their own different, inconsistent dispute resolution provisions, the opposite conclusion is much more likely.

§4.02. Incorporation of Institutional Arbitration Rules

As discussed elsewhere, arbitration clauses frequently refer to institutional arbitration rules and provide that the arbitration shall be conducted in accordance with those rules. The incorporation of institutional rules by reference is in principle effective in all developed jurisdictions: parties that agree to arbitrate under institutional rules are bound by those rules.

Many institutional rules grant the administering institution the power to interpret and apply its rules, typically with an exclusion of judicial review. Courts have generally afforded arbitral institutions broad discretion in interpreting their own rules. In limited instances, exclusions of judicial review may be ineffective (e.g., precluding judicial consideration of challenges to arbitrators on grounds of partiality).

A recurrent practical question is whether a general reference to a set of institutional arbitration rules (e.g., “All disputes shall be resolved by arbitration under the ICC Arbitration Rules”) refers to the version of the institutional rules in force at the time the contract was concluded or the version in force at the time the arbitration is commenced. Some institutional rules specifically address the issue (often providing for application of the version of institutional rules in force at the time an arbitration is commenced). Absent such language, courts and arbitrators reach divergent results.

§4.03. Allocation of Competence to Interpret International Arbitration Agreements

As discussed above, different legal systems take different approaches to the allocation of competence to decide jurisdictional disputes. The same rules that apply generally to the allocation of jurisdictional competence also apply to interpretation of the scope of arbitration agreements.

As discussed above, U.S. courts have held that parties may agree to submit jurisdictional disputes to the arbitrators for final resolution, applying the standard adopted by the U.S. Supreme Court in First Options v. Kaplan. Most courts have held that an agreement to arbitrate under institutional rules, which grant the arbitrators competence to decide their own jurisdiction, satisfies the First Options requirement for “clear and unmistakable” evidence, particularly for disputes over the scope of a concededly valid arbitration clause. In the words of one U.S. court, when “parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate [jurisdictional disputes] to an arbitrator.”

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2. Mitsubishi Motors, 473 U.S. at 626.
5. The intent of most model institutional arbitration clauses is to expansively encompass all disputes relating to a particular contract, regardless of legal formulation. That is consistent with the practical objective of providing a single, neutral and expert forum for efficiently resolving the parties’ disputes.
6. Most arbitration clauses provide for arbitration of all “disputes” or “differences,” while some clauses also (or instead) refer to “claims” or “controversies.” These formulations encompass any sort of disagreement, dispute, difference, or claim that may be asserted in arbitral proceedings.

See, e.g., Pennzoil Explor. and Prod. Co. v. Ramco Energy Ltd, 139 F.3d 1061 (5th Cir. 1998) (“relating to” language in arbitration agreement is “broad”; clause reaches claims that “touch” matters covered by the contract); McDonnell Douglas Corp. v. Kingdom of Denmark, 807 F.Supp. 1016, 1019 (E.D. Mo. 1993) (“relating to” is generally regarded as broad rather than narrow language).


See, e.g., Ferro Corp. v. Garrison Indus., Inc., 142 F.3d 926, 927–18 (6th Cir. 1998) (refusing to interpret arbitration agreement to exclude fraudulent inducement claims); Mar-Len of La., Inc. v. Parsons-Gilbane, 773 F.2d 633, 637 (5th Cir. 1985) (arbitration agreement covering “any dispute arising under” the agreement or “with respect to the interpretation or performance of” the agreement held to cover duress claims); Ulysses Compania Naviera SA v. Huntingdon Petroleum Serv., The Ermoupolis [1990] 1 Lloyd’s Rep. 160 (Q.B.).


As discussed above, in limited circumstances, claims based on mandatory law protections may be treated as non-arbitrable, but these are exceptions.

Mitsubishi Motors, 473 U.S. at 626.

J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, SA, 863 F.2d 315, 319 (4th Cir. 1988); Osteomed, LP v. Kobe Indus., LP, 2006 U.S. Dist. LEXIS 48369, at *3 (N.D. Tex. 2006) (“whether a claim is subject to the arbitration clause depends on the factual allegations contained in the complaint, not the causes of action asserted”).


See also B. Hanotiau, Complex Arbitrations ¶281 (2005).


See, e.g., ICC Rules 2012, Art. 1(2); LCIA Rules, Art. 29(1); ICCDR Rules, Art. 36.

See, e.g., Koch Oil, SA v. Transocean Gulf Oil Co., 751 F.2d 551 (2d Cir. 1985) (AAA Commercial Rules give AAA reasonable discretion to interpret time limits in Rules); Reeves Bros., Inc. v. Capital-Mercury Shirt Corp., 962 F.Supp. 408 (S.D.N.Y. 1997) (“Where … the parties have adopted [institutional] rules, the parties are also obligated to abide by the [relevant institution’s] determinations under those rules.”); Judgment of 15 May 1965, Raffinerie de pétrole d’Homs et de Baninas v. Chambre de commerce internationale, 1965 Rev. arb. 141 (Paris Cour d’appel) (“the provisions of the [ICC Rules], which constitute the law between the parties, must be applied to the exclusion of all other rules”).

E.g., UNCITRAL Rules, Art. 1(2); LCIA Rules, Preamble.


For example, a number of decisions rely on Article 6(3) of the 2012 ICC Rules (or its predecessors), which provides that “any question of jurisdiction … shall be decided directly by the arbitral tribunal.” See Qualcomm, Inc. v. Nokia Corp., 466 F.3d 1366, 1374 (Fed. Cir. 2006) (“the parties clearly and unmistakably intended to delegate arbitrability questions to an arbitrator as evidenced by their incorporation of the AAA Rules”); Shaw Group Inc. v. Triplefine Int’l Corp., 322 F.3d 115, 118 & 125 (2d Cir. 2003) (ICC arbitration clause “clearly and unmistakably evidences the parties’ intent to arbitrate questions of arbitrability”).
As discussed above, international arbitration is fundamentally consensual. As a consequence, an arbitration agreement binds (and benefits) only the agreement's parties, and not others. Presumptively, and in most instances, the parties to an arbitration agreement are its formal signatories. Nonetheless, there are circumstances in which non-signatories may be held to be parties to — and consequently both bound and benefited by — an arbitration agreement.

§5.01. Non-Signatories to Arbitration Agreements

As already noted, the parties to an arbitration agreement are usually its formal signatories. Conversely, it is also clear that entities that have not formally executed an arbitration agreement, or the underlying contract containing an arbitration clause, may be bound by the agreement to arbitrate. As one court explained: “Arbitration is consensual by nature …. It does not follow, however, that … an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision. … A non-signatory party may be bound to an arbitration agreement if so dictated by the ‘ordinary principles of contract and agency.’”

A variety of legal theories have been invoked under different legal systems to bind entities that have not executed an arbitration agreement. These include alter ego, agency (actual and apparent), “group of companies,” estoppel, legal succession, third-party beneficiary, guarantor, ratification, assignment and assumption theories. In each instance, non-signatories of a contract can be bound by, and may invoke, the contract's arbitration clause.

Bases for Subjecting Non-Signatory to Arbitration Agreement

1. Agency
2. Alter Ego and Veil-Piercing
3. “Group of Companies”
4. Succession (Merger, Business Combination)
5. Assignment or Transfer
6. Estoppel
7. Corporate Officers and Directors
8. Other

[A]. Agency

The simplest circumstance in which a non-signatory is bound by an arbitration agreement is when an agent executes a contract for its principal. It is well-settled, in most legal systems, that one party (an “agent”) may in certain circumstances legally bind another party (a “principal”) by its acts. Among other things, an agent may enter into contracts, including arbitration agreements, which will be legally-binding on its principal, although not necessarily on the agent. For the most part, general principles of agency law have been applied in the specific context of international arbitration agreements. In the words of one court, “[t]he theories under which non-signatories may be bound to the arbitration agreements of others . . . arise out of common law principles of contract and agency law.”

Closely related to agency is the doctrine of ostensible or apparent authority. Under this doctrine, a party may be bound by another entity's acts, even where those acts were unauthorized, if the putative principal created the appearance of authorization, leading a counter-party reasonably to believe that an agency relationship existed. The theory of apparent authority can bind the “apparent” principal to a contract (including an arbitration agreement) entered into putatively on its behalf by the “apparent” agent.

[B]. Alter Ego and Veil-Piercing

Many authorities hold that a party who has not assented to a contract containing an arbitration clause may nonetheless be bound by the clause if that party is an “alter ego” of an entity that did execute, or was otherwise a party to, the agreement. The alter ego doctrine is referred to in German as “Durchgriff,” in French as “levee du voile social” and in some English language contexts as “veil-piercing” or “lifting the corporate veil.”

Definitions of “alter ego” vary widely and are applied in a number of different contexts. In the context of arbitration agreements,
demonstrating an “alter ego” relationship in most legal systems
requires convincing evidence that one entity dominated the day-to-
day actions of another and that it exercised this power to work fraud
or other injustice on a third party or to evade statutory or other
obligations. The alter ego doctrine differs from principles of
agency, in that the parties’ intentions are not decisive; rather, the
doctrine rests on overriding considerations of fairness and equity,
which mandate disregarding an entity’s separate legal identity in
specified circumstances. Courts are circumspect in applying the
alter ego doctrine: an alter ego relationship may generally be found
only in exceptional cases, where the corporate form is abused to
evade mandatory legal obligations or frustrate legitimate third party
rights.

[C]. Group of Companies

A significant, but controversial, basis for binding non-signatories to
an arbitration agreement is the “group of companies” doctrine. Under
this principle, non-signatories of a contract may be deemed parties
to the associated arbitration clause based on factors which are
roughly comparable to those relevant to alter ego analysis. In
particular, where a company is part of a corporate group, is subject
to the control of (or controls) a corporate affiliate that has executed a
contract, and is involved in the negotiation or performance of that
contract, then it may in some circumstances invoke or be subjected
to an arbitration clause contained in that contract, notwithstanding
the fact that it has not executed the contract.

A seminal group of companies decision was Interim Award in ICC
Case No. 4131. There, an arbitral tribunal concluded that
“irrespective of the distinct juridical identity of each of its members,
a group of companies constitutes one and the same economic
reality,” and that the arbitration clause bound all of the companies in
a corporate group, which, “by virtue of their role in the conclusion,
performance, or termination of the contracts containing said
clauses, and in accordance with the mutual intention of all parties to
the proceedings, appear to have been veritable parties to these
contracts or to have been principally concerned by them and the
disputes to which they may give rise.” Other awards (and in a few
cases, court decisions) have adopted similar conclusions.

In contrast, a number of national courts have rejected the group of
companies doctrine, albeit often with limited analysis. One English
court held that “the Group of Companies doctrine … forms no part of
English law” and other courts have annulled awards which relied
on the group of companies doctrine to hold a non-signatory party
bound by an arbitration agreement.

[D]. Succession

An entity that does not execute an arbitration agreement may
become a party thereto by way of legal succession. The most
common means of such succession is by a company’s merger or
combination with the original party to an agreement. In many states,
the consequence of a “merger” between two companies is that the
“surviving” entity will be the owner of all the assets and liabilities
(including contract rights and obligations) of the previously-existing
entities. When such a combination occurs, most national laws
provide that the surviving entity succeeds by operation of law as a
party to the contracts, including the arbitration agreements, of the
previously-existing entities. Thus, if A and B enter into a contract,
containing an arbitration clause, and B later merges into C, then C
ordinarily becomes a party to both the contract and the arbitration
agreement, by operation of law.

[E]. Assignment or Transfer

Contracts are frequently transferred from one party to another by
way of assignment, novation, or assumption. Some early decisions
suggested that arbitration agreements were not capable of being
transferred, apparently on the theory that they were “personal”
obligations, which were binding upon only the original parties.
These decisions have been superseded, and it is now universally
accepted that parties have the contractual autonomy to transfer or
assign arbitration agreements, just as they have the power to
transfer other types of contracts.

In principle, the assignment of a contract should have the effect of
conveying the arbitration clause associated with the underlying
contract to the assignee (at least absent a contractual or legal prohibition that renders the assignment ineffective). Thus, in many jurisdictions, there is a presumption of “automatic” assignment of the arbitration clause together with the underlying contract.

There are often contractual limits on assignment in commercial agreements that may forbid one party from assigning the underlying contract, either absolutely or without its counter-party’s consent. If the assignment of the underlying contract and the arbitration clause are in violation of a contractual restriction, then the putative assignee arguably has no rights under the arbitration clause (since the contract and arbitration clause were arguably never assigned).

[F]. Estoppel

A number of authorities have recognized estoppel or related doctrines as a basis for either permitting a non-signatory to invoke an arbitration agreement or holding that a non-signatory is bound by an arbitration agreement. These authorities have held that, where a non-signatory claims or exercises rights as a party under a contract, which contains an arbitration clause, the non-signatory will typically be estopped from denying that it is a party to the arbitration clause. As one U.S. court put it: "In short, [plaintiff] cannot have it both ways. It cannot rely on the contract when it works to its advantage and ignore it when it works to its disadvantage." Similarly, where a party invokes an arbitration clause in national court proceedings, claiming rights under that clause, it will ordinarily be estopped from subsequently denying that it is bound by the arbitration agreement in other proceedings.

Some U.S. courts have gone further, adopting a theory of “equitable estoppel” and holding that a party that receives a “direct benefit” under a contract is estopped from denying that it is a party to the contract’s arbitration clause. Outside the United States, courts are often more reluctant to apply estoppel principles broadly in the context of arbitration agreements.

[G]. Corporate Officers and Directors

Some U.S. courts have permitted the officers and directors of a corporate party to invoke the arbitration clause in that party’s underlying commercial contracts, notwithstanding the fact that individual officers and directors are not parties to the underlying contract under ordinary contractual principles; for example, if Company A and Company B conclude an arbitration agreement, then the Chief Executive of Company B may be permitted to invoke the agreement if he or she is sued personally by Company A. Decisions in a few other jurisdictions adopt similar reasoning.

These decisions are not unanimously followed even in the United States. One U.S. court rejected them on the following grounds: “courts must not offer contracts to arbitrate to parties who failed to negotiate them before trouble arrives. To do so frustrates the ability of persons to settle their affairs against a predictable backdrop of legal rules – the cardinal principle to all dispute resolution.” Outside the United States, and a few other jurisdictions, this approach of permitting corporate employees or agents to invoke arbitration agreements, to which they are not parties, has not been widely considered.

§5.02. Formal Validity and Non-Signatories

Application of an arbitration agreement to a non-signatory raises questions of formal requirements, under many legal regimes, for a “written” arbitration agreement. Those authorities which have addressed the issue have adopted a variety of means of satisfying or avoiding applicable form requirements in non-signatory contexts.

There is no rule forbidding an agreement from being signed by one entity on behalf of another entity (most obviously, in the case of agency relations). For example, although Article II(c) of the New York Convention requires an arbitration agreement “signed by the parties,” it is clear that a “party’s” signature can be provided by another entity on its behalf (most obviously, an agent, alter ego or merger partner). To the same effect, one may also reason that the “writing” requirement of the Convention and most national laws can be satisfied by the existence of a written arbitration agreement, which is consented to by a non-signatory via an “exchange” of writings (e.g., guarantees, assignments, agency agreements, other written communications). More broadly, some authorities have held that form requirements apply only to the initial arbitration agreement.
§5.03. Choice of Law Governing Non-Signatory Issues

The choice of law governing non-signatory issues is poorly-defined. Some authorities have held that non-signatory issues are governed by the law governing the existence and substantive validity of the arbitration agreement.\(^{(15)}\)

In many instances, however, courts and tribunals have not applied the law governing the substantive validity of the arbitration agreement to non-signatory issues. Instead, courts and tribunals have frequently applied international principles to claims made under the group of companies, estoppel and alter ego doctrines. In other contexts, involving issues of agency, assignment, merger and guarantee/ratification, courts and tribunals have generally applied national law to non-signatory issues—typically applying a national law chosen to govern the agency, assignment, succession or guarantee relationship itself, rather than the law governing the substantive validity of the arbitration agreement.

§5.04. Allocation of Competence to Decide Non-Signatory Issues

Determining the identities of the parties to an arbitration agreement gives rise to questions concerning the allocation of jurisdictional competence between courts and arbitrators. Consistent with the competence-competence doctrine, courts and arbitral tribunals have uniformly concluded that arbitrators have the authority to consider whether the arbitration agreement was binding on particular entities (under Article 16 of the Model Law and equivalent provisions in other arbitration statutes\(^{(20)}\)). Similarly, courts have applied generally-applicable principles of national law to the allocation of competence between courts and tribunals to decide non-signatory issues.\(^{(21)}\) In practice, arbitral tribunals frequently consider and resolve claims that non-signatories are subject to their jurisdiction, hearing evidence and argument in the same manner that other jurisdictional and substantive issues are considered.

§5.05. Non-Signatory Issues and Institutional Arbitration Rules

Non-signatory issues often arise in the course of institutional arbitrations, particularly at the outset of arbitral proceedings. Some institutional rules contain provisions regarding selection of arbitrators in multi-party cases or consolidation and intervention,\(^{(22)}\) which can affect the handling of non-signatory issues. Moreover, some institutional rules contain provisions regarding institutional review of prima facie jurisdiction, which can also affect the handling of non-signatory issues.\(^{(24)}\) For the most part, however, it is the arbitral tribunal, rather than the arbitral institution, that has the authority to address non-signatory issues in institutional arbitrations, as well as in ad hoc arbitrations.

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[Continued with footnotes and references...]


10 See, e.g., Judgment of 16 October 2001, 2002 Rev. arb. 753 (Swiss Federal Tribunal). In some jurisdictions, however, an assignment in breach of a contractual prohibition is presumptively not invalid, even if it is wrongful, but rather is effective while giving rise to a damages claim for breach of the anti-assignment provision. See, e.g., *Bel-Ray Co. v. Chemrite Ltd*, 181 F.3d 435 (3d Cir. 1999) (following “general rule that contractual provisions limiting or prohibiting assignment operate only to limit a party’s right to assign the contract, but not their power to do so, unless the parties manifest an intent to the contrary with specificity”; assignment in violation of contractual provision ordinarily “remains valid and enforceable against both the assignor and the assignee”).


13 See, e.g., *Hirschfeld Prod. Inc. v. Mirvich*, 88 N.Y.2d 1054 (N.Y. 1996); *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110 (3d Cir. 1993) (company can only act through employees and officers, and “an arbitration agreement would be of little value if it did not extend to them”).


15 See, e.g., *Westmoreland v. Sadoux*, 299 F.3d 462, 467 (5th Cir. 2002).


21 See, e.g., 2012 ICC Rules, Art. 6(3–7); ICSID Convention Art. 36 (3).