A GUIDE TO INTERNATIONAL ARBITRATION
International arbitration is an increasingly important part of complex cross-border transactions, but there are still some misconceptions about it. One is that it is only for settling disputes when they arise, when it is really a crucial tool for managing business relationships from their inception.

That’s its great advantage over litigation. Litigation is a reaction to a dispute, and not only is it expensive and inflexible, but it can destroy business relationships. Careful crafting of dispute resolution agreements at the start of a transaction acknowledges that disputes can arise, focuses attention on future options, and thus encourages consideration of how to resolve potential issues and to avoid or minimise their effects. Efficient and fair procedures for dispute resolution can be devised at the drafting stage when your relationship is unaffected by disputes, rather than if you wait until a dispute arises.

Clayton Utz’ A Guide to International Arbitration is a straightforward explanation of international arbitration. In it, you will learn when to use international arbitration – and when not to. It shows you how it can help manage cross-border transactions and relationships, and explains the arbitration procedure and enforcement of any awards.

Finally, other forms of arbitration are discussed. Clayton Utz’ International Arbitration team hopes that this guide proves useful when you are next considering entering into a cross-border transaction. If you would like to know more about international arbitration, or explore using it as part of your business, we would like to talk to you.

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This publication states the position as at September 2012.
It is intended to provide general information on the laws of international arbitration and is current at the time of printing. The contents do not constitute legal advice and should not be relied upon as such. Specialist legal advice should be sought in particular matters.
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Introduction to international arbitration
Arbitration is based on an agreement between the parties

What is international arbitration?
International commercial arbitration is a process by which parties from different States can have their disputes determined by an impartial tribunal appointed by a commonly agreed method. The outcome is a binding award that can be enforced in other countries as a result of an international law called the New York Convention. The authority of an arbitrator derives from an agreement between the parties while a judge is appointed by the State. Because arbitration rests on agreement, the parties can choose a tribunal which suits their specific needs. They may select one or three arbitrators and can specify the qualification of the arbitrators. Parties also have great flexibility to designate the procedure for the arbitration. Today arbitration is the preferred method for resolving business disputes of an international character.

Features of international arbitration

Flexibility
In arbitration parties have enormous flexibility to tailor the procedure to suit their particular contract and needs.

Final and binding
International arbitral awards are final and binding. Alternative dispute resolution procedures such as mediation and conciliation are consensual and will not result in a resolution of the dispute unless the parties agree on an outcome. Litigation produces a binding determination, but may be subject to appeal. International arbitration awards on the other hand are generally not subject to appeal.

Enforceability
In international litigation, parties must generally resolve their dispute in the national courts of one of the parties. If the unsuccessful party has no assets in that country, the successful party might need to enforce the judgment in another country. This will depend on the existence of enforcement provisions in that country and can be expensive, time-consuming and sometimes ineffective. In contrast, a simple procedure for enforcing arbitration awards internationally is provided by the 1958 New York Convention on the Recognition and
Enforcement of Foreign Arbitral Awards (‘New York Convention’) which is in force in some 145 countries.

**Neutrality**

Neutrality of the forum is an important difference between international arbitration and international litigation. Although judges in litigation are expected to be impartial and are thus neutral in that sense, the reference to neutrality in the context of international disputes concerns the nationality of the decision maker.

In international litigation the judge is likely to have the same nationality as one of the parties. The mere perception that the judge shares an important characteristic, nationality, with one of the parties may of itself be enough to cause concern to the other party. In international arbitration sole arbitrators will almost invariably be of a different nationality to the parties. Where the tribunal consists of three arbitrators the chairman of the tribunal will be a person from a third country.

Further, in the international arena, the prospect of prosecuting or defending a case through a foreign court system, using unfamiliar laws and procedures before a judge of the same nationality as the opponent, is perceived as a major disadvantage. International arbitration allows for a neutral, agreed or known procedure and a decision of a nationally neutral arbitrator.

**Confidentiality**

Both the procedure and outcome of an international arbitration are (or can be made by agreement of the parties) private and confidential. Court proceedings are usually public.

**Speed and costs**

Arbitral proceedings can be commenced, and the dispute resolved, faster than litigation if an appropriate procedure is used. In arbitration, in contrast to litigation, the parties have to pay the fees and expenses of the decision makers. However, arbitration is as cost-efficient as the parties allow it to be. By designing and managing the procedure effectively, cost can be managed. This allows and encourages the parties and the tribunal to focus on the key issues at an early stage, and can avoid the process taking precedence over the real issues in dispute, a common perception in litigation. It can also provide great cost-effectiveness for smaller disputes. Further, it is becoming increasingly common for the successful party to be awarded all or part of its costs of the arbitration, without having to resort to a cumbersome taxation process which is common in some States.
When should international arbitration be considered?

International arbitration should be considered in relation to all international transactions and disputes. The key advantages are neutrality, procedural flexibility and international enforceability of awards. Other possible advantages are preservation of business relationships and confidentiality.

However, international arbitration is not suitable for all transactions and disputes. Some involve matters which may only be determined by national courts, in particular disputes involving public laws, criminal law and sometimes intellectual property. Disputes involving multiple parties can raise jurisdictional problems and may not be suitable for arbitration.

Looking ahead

Drafting dispute resolution agreements focuses the attention of the parties on possible future disputes, encouraging consideration of how to resolve them and also how to avoid or minimise their effects. Forward thinking at the drafting stage, when the parties’ relationship is unaffected by disputes, has the greatest prospect of finding efficient and fair procedures, which can assist in preserving business relationships even after a dispute arises.

Drafting arbitration agreements

General considerations

Use of model or standard clauses Most arbitral institutions provide model or standard arbitration agreements for inclusion in contracts. These are generally well drafted and tested and therefore less likely to be defective or inoperative. However, they are generic and may need to be modified to suit the particular circumstances of a contract. It is for this reason that standard clauses should primarily be used only for simple contracts or where time or negotiation constraints prevent the drafting of a tailored clause.

Dispute risk analysis

The drafting of an arbitration clause ought to begin with a precise risk analysis of the contract and the commercial relationship. This should include the possible nature and quantum of potential disputes, the parties involved (including third parties) and how and where the award may have to be enforced.
Formal requirements

A valid arbitration agreement must be in writing. Some jurisdictions now consider fax and email sufficient, while others may still require a more traditional form of written agreement. Some laws specify that the agreement must be signed. Capacity and authority of the parties The question whether a person has the legal capacity to enter into an arbitration agreement is usually determined by his or her national law.

Incorporation by reference

Instead of including an arbitration clause in their contract, parties may conclude a separate arbitration agreement. This is common in large projects where several interrelated contracts all refer to the same separate arbitration agreement. An arbitration agreement may also be included in general conditions which are incorporated into a contract. However, this type of reference is sometimes ineffective.

Scope of reference

Parties need to consider which types of disputes they would like to refer to arbitration. Unless there is a reason to do otherwise, the reference should be drafted as widely as possible so as to include all disputes relating to the transaction such as trade practices and tort claims as well as contractual claims.

Arbitrability

As a matter of law, some claims may not be capable of settlement by arbitration. For example, matters of criminal law cannot be settled by arbitration. In a commercial context, some countries do not allow arbitration of disputes relating to intellectual property, anti-trust or employment issues.

In international arbitration the question of arbitrability may need to be examined under the laws of several countries, including the law governing the arbitration agreement and the law of the place where enforcement of an award is sought.

Ad hoc or institutional arbitration

The parties can choose either ad hoc or institutional arbitration. Institutional arbitration is particularly useful when the parties desire administrative and supervisory assistance. It is important that any chosen arbitral institution is accurately identified in the agreement. On the other hand institutional rules are sometimes less flexible than ad hoc procedures. Further, institutions charge administration fees which add to the costs of the arbitration.
Some state and government authorities may be unwilling to submit their dispute to institutional arbitration.

The UNCITRAL Arbitration Rules provide an excellent and well tested procedure *ad hoc* arbitration.

A list of arbitral institutions, offering varying degrees of institutional support, appears on page 16.

**Arbitration procedure**

The arbitration procedure is determined by agreement of the parties or, failing such agreement, by the arbitrator(s) in consultation with the parties. The incorporation into the arbitration agreement of a set of ad hoc or institutional arbitration rules is not essential, but may save time and costs by providing a framework for conducting the arbitration. An alternative is for the arbitration procedure to be fully set out in the arbitration agreement.

Any chosen procedural rules should be clearly stated in the arbitration agreement. For example, “[…] arbitration rules of the London Court of International Arbitration (LCIA)” or “[…] UNCITRAL Arbitration Rules”. Some institutions (e.g. the Australian Centre for International Commercial Arbitration) provide a number of different arbitration rules. In such cases, the desired rules should be specifically named.

**Seat and venue**

The seat of arbitration (also called place of arbitration) refers to the legal, rather than physical, location of the arbitration. Many factors are relevant in selecting the seat of an arbitration, especially the laws in place at the seat. These may have a direct effect on the conduct of the arbitration. The seat should be in a country that is a party to the New York Convention (see page 19 for a list of signatories). Arbitration awards rendered in a non-convention country might not be enforceable in other countries.

Hearings often physically take place in the seat but sometimes the parties and arbitral tribunal find it convenient to hold hearings elsewhere. The ‘venue’ is where the hearing physically takes place.

**Number of arbitrators**

Most disputes are referred to either one or three arbitrators. Some countries permit an even number of arbitrators, but this is not desirable because the tribunal may not be able to agree and in consequence there will be no majority opinion. There are obvious cost advantages of opting for a single arbitrator. However, in large or complex disputes the participation
of three arbitrators might be preferable. Further, three arbitrators can bring to the tribunal diverse areas of expertise as well as different cultural backgrounds. It is not always necessary to determine the number of arbitrators in the arbitration clause. This can be agreed once the dispute has arisen. If the parties cannot agree, some institutional rules (such as those of the ICC International Court of Arbitration) provide that the institution will decide the number of arbitrators based on the particular circumstances of the dispute.

**Mechanism for appointing for the arbitrator(s)**

Most arbitral rules contain detailed provisions for selecting the arbitral tribunal. These usually include time constraints, default provisions (if parties cannot agree on the identity of the arbitrators, or a party simply refuses to participate) and sometimes special provisions for multi-party disputes. The parties may vary the appointment mechanism by agreement.

**Confidentiality**

Confidentiality may be an important consideration, especially when resolution of a dispute requires disclosure of sensitive information. Parties wanting to ensure confidentiality should make express provision in their arbitration agreement. This will not be necessary if the parties select arbitral rules which themselves contain a confidentiality obligation.

**Language**

The arbitration clause should designate the language of the arbitration. Bilingual proceedings are not recommended.

**Interim measures/conservatory measures**

Under most arbitration rules, arbitral tribunals are empowered to issue certain provisional measures, such as measures to preserve the subject matter of the dispute. Parties may wish to specify the extent of the powers of the arbitral tribunal in this regard, and also whether the arbitral tribunal’s power should be exclusive or whether a party may also seek interim relief from the courts.

Further, the tribunal may be empowered to issue interim measures in the form of an award (interim or partial award), so that it can be enforced under the New York Convention.

**Multi-party disputes**

Unlike courts, arbitral tribunals cannot generally order third parties to be joined to arbitral proceedings. Unless the third party is a party to the arbitration agreement, it may be
impossible to do so. This problem may be overcome by forward planning. An arbitration agreement can provide for joinder of a third party. This would necessitate all parties (including the third party) consenting to the joinder. Where there are to be more than two parties, the procedure for appointing arbitrators must accommodate this.

**Punitive damages**

The award of punitive or exemplary damages by arbitrators is restricted in some jurisdictions. Some institutional rules specifically provide that by adopting their rules, parties have waived the right to claim punitive damages (eg. the rules of the American Arbitration Association). It is therefore wise to insert a clause permitting or removing the ability to award punitive damages.

**Fast track arbitration**

‘Fast track’ arbitration refers to an accelerated procedure for the arbitration. Although international arbitration proceedings are often faster than litigation, proceedings can still be lengthy. Parties may prefer a very fast decision for various reasons, including cash flow and avoidance of disruption to business. Parties may specify a fast track procedure in the contractual arbitration agreement or agree to it later, after a dispute has arisen. Considerable care needs to be taken in drafting fast track rules.

Alternatively, institutions such as ACICA have developed Expedited Arbitration rules to fast track proceedings. Parties may agree to conduct an arbitration according to these rules.

**Applicable law and ‘equity clauses’**

The contract should specify its governing law. This will avoid later arguments about it. Parties can also authorise the arbitrator(s) to act as amiable compositeur or ex aequo et bono. This empowers the arbitrator(s) to decide the matter according to principles of equity and fairness rather than strictly in accordance with the law.

**State immunity**

When a State is contracting in its capacity as a public authority, it is important to include a clause whereby the State waives any sovereign immunity which it may possess.
Conducting arbitral proceedings

Commencing proceedings

When a dispute arises which cannot be resolved amicably, the contractual dispute resolution provisions need to be examined carefully. Failure to comply with contractual preconditions to arbitration may prevent the commencement of an arbitration. A failure to comply with requirements as to the conduct or commencement of an arbitration might also mean an arbitral award will not be enforceable.

The procedure for commencing an arbitration depends on the arbitration agreement, and in particular on whether it provides for ad hoc or institutional arbitration. In both instances it is usually necessary to deliver a notice of arbitration to commence the arbitration process. The notice is served on the opposing party or parties but in the case of some institutional arbitrations, such as under the ICC Court’s Rules of Arbitration, the notice of arbitration is served on the arbitral institution itself. In ICC cases, the ICC then delivers the notice of arbitration to the other party or parties.

Most arbitration rules and procedural laws specify the contents of the notice of arbitration. In any case, it is wise for the claimant party to include proposals on the appointment of the arbitrator(s) in its notice of arbitration. This may include the claimant’s nomination of one of the arbitrators. Notices should also contain the usual formalities such as the full names and addresses of the parties, a summary of the nature and circumstances of the dispute, a statement of the relief sought, and a copy of the arbitration agreement forming the basis of the notice of arbitration. If the place of arbitration has not already been determined in the arbitration agreement, the claimant should also indicate its preference in this regard.

Subject to any requirement for the respondent to answer the notice of arbitration, various procedural matters must be resolved before the arbitration can proceed. One of these is the establishment of the tribunal.

Selecting an arbitrator

The quality of the arbitral process is dependent on the expertise of the arbitrator or arbitrators.

How are arbitrators chosen?

One of the key differences between arbitration and litigation is that in arbitration the parties may choose the decision makers. Although the best arbitral tribunal may be one entirely
chosen by the parties, once a dispute has arisen the parties may be unable to agree. A properly drafted arbitration agreement should provide a mechanism for a third party to nominate the arbitrator(s) upon default of appointment by the parties.

It is possible for the arbitration agreement itself to state the names of the arbitrator(s). However, this is unusual and may be problematic. For example, the chosen arbitrator(s) may be unavailable, unwilling to act or may no longer be regarded as independent. An alternative is to nominate a panel of arbitrators in the arbitration agreement, from which the arbitrator or arbitrators may be selected either by agreement between the parties or by nomination by a third party such as the arbitral institution. Provision should always be made for the appointment of alternative arbitrators in the event that the persons specified cannot be appointed. In the absence of an appointment mechanism in the arbitration agreement, the mechanism set out in the chosen arbitration rules or applicable arbitration law will operate.

Who may act as an arbitrator?

There is a strict rule in international arbitration that all of the arbitrators, even those nominated by a party, must be and remain impartial and independent.

Most modern arbitral laws and rules do not impose any further restrictions on who can act as arbitrator, but there are some national laws which impose restrictions and require, for example, that a lawyer be appointed.

Who should a party choose as arbitrator?

The choice of an arbitrator will depend on the nature of the case. This choice should be made in consultation with expert arbitration practitioners. Arbitration experts will be aware of the qualifications and performance of different arbitrators and are able to recommend appropriate candidates. Important considerations involved with the choice of an arbitrator include professional qualifications, language abilities, nationality and place of residence.

Terms of reference and procedural timetable

The terms of reference is a document that the parties and the arbitral tribunal prepare in the very early stages of the arbitration. It sets out the scope of the arbitral proceedings and the mission of the arbitral tribunal. Drafting terms of reference is compulsory under the rules of the ICC International Court of Arbitration and under the rules of the CEPANI Arbitration Institute in Belgium. It is uncommon for terms of reference to be prepared in arbitrations under other rules and ad hoc arbitrations.
Terms of reference may overcome discrepancies or fill gaps in the arbitration agreement. In some cases the terms of reference have been relied upon as constituting a new submission to arbitration, thus supplementing the original arbitration agreement.

Also in the early stages of an arbitration, the tribunal and parties will prepare a procedural order and timetable. This will specify the pleadings or submissions and the procedure for submitting evidence.

**Hearings, venues, witnesses and representation**

**Hearings**

Usually arbitral proceedings will involve at least one face-to-face hearing. However, the parties and arbitral tribunal can agree that a hearing is not necessary. In such cases the dispute can be decided, and the award delivered, solely on the basis of documents.

The benefits of dispensing with a hearing are the time and cost savings. Generally this will only be appropriate for small disputes.

**Where are hearings held?**

Hearings may or may not be held at the seat of arbitration. They will be held in some place that is convenient to the parties, the witnesses and the arbitral tribunal. Usually hearings are held in a hotel or arbitration centre. Generally, the proceedings will be recorded and a transcript made.

There is a rapidly growing use of communications technologies in international arbitration. Sometimes, witnesses are heard through video conferencing or teleconferencing facilities. Indeed, it is possible to conduct an entire arbitration without anybody leaving their place of residence.

**Representation in arbitral proceedings**

Parties may be represented by lawyers in arbitration proceedings in much the same way as in litigation. However, in litigation parties are usually restricted to representation by lawyers qualified in that jurisdiction. This requirement is uncommon in international arbitration. However, some arbitration laws may specify that a party is only entitled to legal representation in particular circumstances, or that a party may only be represented by a lawyer qualified to practice at the seat. In large arbitrations, parties are usually represented by law firms with specialised international arbitration practices.
Witnesses

Witnesses give evidence in international arbitrations as they do in litigation. However, an arbitrator is only able to make orders with respect to the parties to the arbitration and cannot compel a witness to attend. Normally, it is the responsibility of the party calling a witness to ensure that the witness attends. If the witness refuses to attend, a court may be requested to assist.

The award

The award is the decision of the arbitral tribunal and is similar in some respects to a court judgment. The remedies or orders that an arbitral tribunal may make are much the same as those that may be made by a court but there are some differences. Arbitral tribunals can only make orders with respect to the parties to the arbitration agreement. Further, under some laws the arbitral tribunal may only be able to award limited remedies.

Arbitral tribunals are empowered to, and often do, make several awards in one arbitration.

Types of award

There are broadly four types of arbitral awards. “Interim” awards deal with an issue in dispute on a temporary basis and may be revisited later. For example, an interim award may be granted to prevent a party disposing of assets that are the subject of the dispute before a final award can be rendered. A “partial” award deals finally with one or more of the issues in the arbitration. For example, an arbitral tribunal may render a partial award deciding the applicable law or resolving an issue of jurisdiction. Alternatively, a large dispute may be split into several stages and an award rendered for each.

A “final” award is the last award in an arbitration. A final award will deal with all, or all of the remaining, issues in dispute.

Another type of award is an “award by consent”. These are appropriate when the parties have reached a settlement or agreement and request the settlement to be recorded in the form of an award. The award by consent will be enforceable, in the same way that any other arbitration award is enforceable, under the New York Convention.

Arbitration awards should be distinguished from orders of the arbitral tribunal. Orders usually relate to procedural matters and are generally not enforceable in the same way as an award. Further, procedural orders are not subject to the same formal and substantive requirements to which awards are subjected.
How decisions of arbitral tribunals are made

When there is more than one arbitrator, the tribunal may issue an arbitral award by majority. Where there is no majority, some arbitration rules provide that the chairperson’s award will prevail.

Formal requirements for arbitral awards

There are various formal and substantive requirements. For example, the award may have to be in writing, it may have to be issued within a certain time, it may have to be signed in a certain place, and it may have to state the seat of the arbitration. Experienced arbitration lawyers and arbitrators should ensure that these formalities are complied with so that the award is enforceable.

Most arbitration laws require the arbitral tribunal to give reasons for the award.

Delivery and effect of arbitral awards

Once an award is finalised it must be delivered to the parties. Under the ICC Rules of Arbitration, the award will first be submitted to the ICC International Court of Arbitration so that it can scrutinise the award prior to it being notified to the parties. Such scrutiny helps to ensure that the award complies with the necessary formalities for enforcement.

Arbitration awards are final and binding on the parties. They are also immediately enforceable and are often implemented without the need for further enforcement proceedings. If a party refuses to comply, enforcement proceedings may be commenced in a court.

Procedures after the award: Enforcement and challenge

Correction and Interpretation

If an arbitral award is ambiguous, or contains errors, such as clerical or mathematical errors, a party may be able to seek correction or interpretation of the award under the applicable rules or law.

Enforcement

When a party refuses to comply with its obligations arising out of an international arbitral award, the award may be enforced in the place where it is made or in another country under the New York Convention. There are now some 146 parties to the New York Convention (see page 19 for a list of signatories).
Article III of the New York Convention deals with enforcement, and requires each member State to recognise foreign arbitral awards as binding and to enforce them according to local rules of procedure. They must not impose any substantially more onerous conditions or higher fees or charges than are imposed on the recognition and enforcement of domestic arbitral awards.

Unlike in litigation, an award cannot be denied recognition and enforcement on the ground that the arbitral tribunal made an error of fact or law. Only limited grounds are prescribed in the New York Convention for refusing the recognition and enforcement of an arbitral award. These primarily relate to the invalidity of the arbitration agreement, lack of jurisdiction, lack of natural justice (due process) and improper composition of the arbitral tribunal. Recognition and enforcement can also be refused if the subject matter of the dispute is not capable of settlement by arbitration or if recognition and enforcement of an award would be contrary to public policy. But, subject to these defences, an enforcing court cannot in general review the merits of the arbitral tribunal’s decision.

Recourse against an award

Generally, the grounds for challenging an award are limited and many countries do not permit appeals from the decision of an arbitral tribunal. In countries that have adopted the UNCITRAL Model Law on International Commercial Arbitration (see the list of Model Law countries on page 18), awards can only be challenged by seeking their ‘annulment’ at the seat of the arbitration. Awards may also be challenged by resisting their enforcement in a place where the successful party seeks to enforce them. Even if an award is annulled, or if enforcement is refused, this may not necessarily prevent it from being enforced in another country.

Other forms of arbitration

There are various conventions, treaties and institutions set up to cater for special types of arbitral proceedings.

The International Centre for the Settlement of Investment Disputes (ICSID) was established primarily to facilitate cross-border investment by giving foreign investors a special regime to determine disputes against host states. ICSID offers a unique dispute resolution alternative in that it provides an option to arbitrate without a specific agreement. Citizens of countries which have ratified the ICSID Convention may commence arbitral proceedings against a foreign Convention State without having concluded an arbitration agreement with that State.
ICSID is invaluable for parties dealing with contracts signed directly by a State, and although these are rare, the use of ICSID proceedings has increased with the rise in popularity of investment promotion laws and Bilateral and Multilateral Investment Treaties (BITs). This simplifies action against State parties.

The World Intellectual Property Organisation (WIPO) is a United Nations specialised agency based in Geneva. It was set up in 1967 to encourage the protection of intellectual property and assist in technology transfer and intellectual creativity. It administers various intellectual property related conventions. One of its current functions is as the major Dispute Resolution Service Provider under the ICANN Rules for Uniform Domain Name Dispute Resolution Policy, which is intended to combat cybersquatting. This empowers WIPO to administer internet domain name disputes, which are a type of arbitration proceeding.
# List of arbitral institutions

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<th><strong>Asia-Pacific</strong></th>
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<td>Australian Centre for International Commercial Arbitration (ACICA)</td>
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<td>Korean Commercial Arbitration Board (KCAB)</td>
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<td>London Court of International Arbitration Australian Chapter</td>
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<td>Deutsche Institution für Schiedsgerichtsbarkeit e.v. (DIS) (German Institution for Arbitration)</td>
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<td>International Court of Arbitration of the International Chamber of Commerce (ICC)</td>
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<td>International Commercial Arbitration Court Chamber of Commerce and Industry of the Russian Federation</td>
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<td>Permanent Court of Arbitration (PCA) International Bureau</td>
<td><a href="http://www.pca-cpa.org">www.pca-cpa.org</a></td>
</tr>
<tr>
<td>Swiss Chambers’ Arbitration Institution</td>
<td><a href="http://www.swissarbitration.org">www.swissarbitration.org</a></td>
</tr>
<tr>
<td>World Intellectual Property Organisation (WIPO) Arbitration and Mediation Center</td>
<td><a href="http://www.arbiter.wipo.int">www.arbiter.wipo.int</a></td>
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</tbody>
</table>
List of Model Law countries

Legislation based on the UNCITRAL Model Law on International Commercial Arbitration has been enacted in the following States:

Armenia          Honduras          Republic of Korea
Australia          Hong Kong          Russian Federation
Austria          Hungary          Rwanda
Azerbaijan          India
Bahrain          Iran (Islamic Republic of)
Bangladesh          Ireland
Belarus          Japan
Bermuda          Jordan
Bulgaria          Kenya
Cambodia          Lithuania
Canada          Macau
Chile          Madagascar
Costa Rica          Malta
Croatia          Mauritius
Cyprus          Mexico
Denmark          New Zealand
Dominican Republic          Nicaragua
Egypt          Nigeria
Estonia          Norway
Georgia          Oman
Germany          Paraguay
Greece          Peru
Guatemala          the Philippines
        Poland

This list is valid as at the end of September 2012.
List of parties to the New York Convention

Afghanistan  Cameroon  Gabon
Albania  Canada  Georgia
Algeria  Central African Republic  Germany
Antigua and Barbuda  Chile  Ghana
Argentina  China  Greece
Armenia  Colombia  Guatemala
Australia  Cook Islands  Guinea
Austria  Costa Rica  Haiti
Azerbaijan  Côte d’Ivoire  Holy See
Bahamas  Croatia  Honduras
Bahrain  Cuba  Hungary
Bangladesh  Cyprus  Iceland
Barbados  Czech Republic  India
Belarus  Denmark  Indonesia
Belgium  Djibouti  Iran (Islamic Rep. of)
Benin  Dominica  Ireland
Bolivia  Dominican Republic  Israel
Bosnia and Herzegovina  Ecuador  Italy
Botswana  Egypt  Jamaica
Brazil  El Salvador  Japan
Brunei Darussalam  Estonia  Jordan
Bulgaria  Fiji  Kazakhstan
Burkina Faso  Finland  Kenya
Cambodia  France  Kuwait
Kyrgyzstan
Lao People’s Democratic Republic
Latvia
Lebanon
Lesotho
Liberia
Liechtenstein
Lithuania
Luxembourg
Madagascar
Malaysia
Mali
Malta
Marshall Islands
Mauritania
Mauritius
Mexico
Monaco
Mongolia
Montenegro
Morocco
Mozambique
Nepal
Netherlands
New Zealand
Nicaragua
Niger
Nigeria
Norway
Oman
Pakistan
Panama
Paraguay
Peru
Philippines
Poland
Portugal
Qatar
Republic of Korea
Republic of Moldova
Romania
Russian Federation
Rwanda
Saint Vincent and the Grenadines
San Marino
Saudi Arabia
Senegal
Serbia
Singapore
Slovakia
Slovenia
South Africa
Spain
Sri Lanka
Sweden
Switzerland
Syrian Arab Republic
Thailand
The former Yugoslav Republic of Macedonia
Trinidad and Tobago
Tunisia
Turkey
Uganda
Ukraine
United Arab Emirates
United Kingdom of Great Britain and Northern Ireland
United Republic of Tanzania
United States of America
Uruguay
Uzbekistan
Venezuela
Vietnam
Zambia
Zimbabwe

This list is valid as at the end of September 2012.
Glossary: General terms in international arbitration


ACICA – *Australian Centre for International Commercial Arbitration*, based in *Melbourne and Sydney*. ACICA provides a wide range of international commercial dispute resolution services with a particular focus on and expertise in the *Asia-Pacific Region*.

Administered arbitration – See institutional arbitration.

ADR: Alternative Dispute Resolution (or in the case of the ICC ADR Rules, ‘Amicable Dispute Resolution’).

Ad hoc arbitration – An arbitration which is not administered by an arbitral institution.

AIDC – *Australian International Disputes Centre* based in *Sydney*.

Amiable compositeur – A tribunal authorised to act as amiable compositeur will not necessarily be bound to apply strict legal principles. However, the tribunal will continue to be bound by general notions of fairness, such as equal treatment of the parties. The tribunal will only have this power if expressly authorised by agreement of the parties.

Appointing authority – An authority designated by the parties (or sometimes designated by the arbitral institution) to appoint the arbitrator(s).

Arbitrability – The extent to which a dispute is capable of being settled by arbitration.

Arbitration agreement – An agreement between two or more parties to refer disputes to arbitration.

Arbitration clause – An arbitration agreement in the form of a clause in a contract.

Arbitral tribunal – The arbitrators (usually three or one).

Attachment order – An order by the tribunal to freeze certain assets (eg. asset protection orders or ‘freezing orders’).

Award – The decision of the arbitral tribunal on one or more of the disputed issues. Awards should be distinguished from ‘orders’, which deal with procedural matters only and do not resolve the issues in dispute.
Award on agreed terms – See consent award.

CEPANI – Belgian Centre for Arbitration and Mediation, based in Bruges.

CIArb – Chartered Institute of Arbitrators.

CIETAC – China International Economic and Trade Arbitration Commission.

Challenge of an award/arbitrator – Procedure to have the award set aside, or the arbitrator removed.

Chairman of the tribunal – The presiding arbitrator. Often the chairman will be chosen by the two co-arbitrators.

Co-arbitrator – An arbitrator other than the chairman. When nominated or appointed by a party, a co-arbitrator is sometimes called a ‘party appointed arbitrator’.

Competence-competence – See Kompetenz-Kompetenz.

Conciliation – A non-binding form of ADR similar to mediation where an independent third party assists the parties in reaching a settlement agreement.

Conflict of laws – A complex set of legal principles by which the applicable law may be determined. It also deals with principles governing the recognition and enforcement of foreign judgments and awards.

Consent award – An award rendered by the arbitral tribunal based on settlement terms agreed by the parties. Parties often prefer their settlement agreement to be recorded and issued as a consent award, in order to have the benefit of simplified enforcement procedures under the New York Convention.

Consolidation – The merging of two or more arbitration proceedings.

Correction or interpretation of an award – An award may be corrected by the same tribunal that issued the award. Such corrections are generally limited to errors in syntax or calculation (also called slip rule).

Deposit of an award – The filing of the award with a registered authority, normally a court (also called registration).

Discovery/disclosure of documents – A process whereby parties obtain or exchange documents in the possession of the other side which are relevant to the dispute. The use and scope of discovery procedures in international arbitration depends on the will of the parties and the legal background and inclination of the arbitrators.
Dispute review board – An ADR tool comprising of a panel of independent technical experts whose aim is to make a recommendation to the parties on how they ought to settle their dispute. This is generally non-binding and may be a precursor to arbitration.

Domain name arbitration – A specialised administrative dispute resolution system set up by ICANN in 1999 to combat cyber-squatting. The principal domain name dispute resolution administrator under the ICANN Policy is WIPO. See also WIPO.

Domestic arbitration – An arbitration defined as domestic (as opposed to international) by the law of the seat of arbitration. Very different laws may apply to domestic arbitrations. See also international arbitration.

DIS – Deutsche Institution für Schiedsgerichtsbarkeit (German Institution of Arbitration), based in Cologne, Germany.

Dissenting opinion – The opinion of an arbitrator who disagrees with aspects, or the entirety, of the award. Although not many arbitration rules specifically mention dissenting opinions, they are generally accepted in international arbitration. However, only the majority opinion counts as affecting the rights of the parties.

Enforcement of the award – Recognition and permission to give the award the force of the law in a particular jurisdiction.

Equity clause – A contractual clause that empowers the tribunal to act as amiable compositeur or ex aequo et bono. See also amiable compositeur.

Ex aequo et bono – See amiable compositeur.

Exclusion agreement – Agreement to exclude certain remedies, such as a right to challenge an award.

Expert determination – An ADR mechanism in which disputes are referred to experts as an alternative or precondition to arbitration. Expert witness – A party or arbitral tribunal appointed expert called to give an opinion or assessment based on his/her experience and qualifications.

Fast track arbitration – An arbitration which is conducted in accordance with expedited procedures.

Forum – The legal environment determined by the seat of the arbitration.
HKIAC – Hong Kong International Arbitration Centre.

IBA Rules of Evidence – Optional Rules for the Taking of Evidence in International Commercial Arbitration published by the International Bar Association (most recently in 1999). They are based on both civil law and common law principles of evidence gathering, and attempt to balance the various approaches used in those legal systems. They only apply if specifically adopted by the parties. However, arbitrators may use them for guidance.

ICA – Indian Council of Arbitration. ICA is also commonly used as an abbreviation for International Commercial Arbitration. It is also occasionally incorrectly used as an abbreviation for the International Court of Arbitration of the ICC.

ICC – International Chamber of Commerce. With its headquarters in Paris, the ICC has National Committees in more than 85 countries.

ICC Court – International Court of Arbitration of the International Chamber of Commerce. The ICC Court is the largest arbitration institution in the world. It offers a highly supervised form of institutional arbitration. The ICC Court does not settle disputes itself, but appoints or confirms appointment of independent arbitral tribunals in accordance with the ICC Rules of Arbitration.


ICSID – International Centre for the Settlement of Investment Disputes (overseen by the World Bank).

Impartiality and independence – It is a mandatory requirement in international arbitration that arbitrators be and remain independent and impartial of the parties. That is, they cannot be, or appear to be, biased.

Interim measures – An order or award made by the arbitral tribunal that is temporary in nature, and may be revisited later in the proceedings (eg. asset preservation orders).

International arbitration – Arbitration proceedings defined as international according to the law of the place in which they are held. The Model Law defines as ‘international’ an arbitration where the parties have, at the time of the conclusion of their agreement, their places of business in different States; or one of the following places is situated outside the State in which the parties have their places of business: (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.

**Interpretation of an award** – See correction or interpretation of an award.

**Institutional arbitration** – Arbitration proceedings organised and administered
by an arbitration institution (eg. ICC or LCIA arbitration proceedings).

**JCAA** – Japan Commercial Arbitration Association, based in Tokyo.

**Joinder of a party** – The addition of a new party to an arbitration. This usually
must be ordered by a court, or agreed by the parties.

**KCAB** – Korean Commercial Arbitration Board based in Seoul.

**Kompetenz-Kompetenz** – A legal doctrine enshrined in most international
arbitration laws and rules according to which an arbitral tribunal is empowered
to rule on the question of its own jurisdiction.

**KLRCA** – Kuala Lumpur Regional Centre for Arbitration.

**LCIA** – London Court of International Arbitration.

**Lex arbitri** – The law governing the arbitration proceedings. Generally the
arbitration law at the seat of the arbitration. See also seat of arbitration.

**Lex fori** – The law of the forum of a dispute. Some consider that international
arbitration proceedings have no lex fori.

**Lex mercatoria** – A body of international commercial law based on general
principles common to and extracted from the world’s major legal systems.

**Majority award** – The decision of the majority of the members of the arbitral
tribunal on the disputed issues. Arbitration rules usually provide a mechanism
for the situation where there is no majority.

**Mandatory provision** – A provision of law, or of a set of rules, that cannot be
varied by agreement of the parties.

**Model Law** – Model law on International Commercial Arbitration adopted by
UNCITRAL in 1985 as a precedent for use by countries wishing to reform their
arbitration legislation. The Model Law may be accepted in its entirety or
modified by the particular State adopting it.
Mediation – A form of flexible, non-binding dispute resolution in which the mediator assists the parties to reach a settlement.

Multi-party arbitration – An arbitration which has more than two parties.


Nomination of arbitrator – When a party puts forward the name of a prospective member of the arbitral tribunal. Depending on the particular arbitration the candidate may need to be accepted by the opposing party or confirmed by the arbitral institution before he or she is finally appointed.

Notice of arbitration – A first document produced by the claimant party to an arbitration agreement in order to trigger the commencement of proceedings. It gives notice of the proceedings to the opponent and provides basic information about the dispute. Properly serving of a notice of arbitration on the respondent is usually a precondition to arbitration.

Ordre public – See public policy.

Panama Convention – 1975 Inter-American Convention on International Commercial Arbitration. Similarly to the New York Convention, the Panama Convention deals with the enforcement of arbitral awards.

Partial award – An award that deals finally with some but not all of the issues in dispute.

Party autonomy – A general principle fundamental to international arbitration stipulating that the parties are free to determine the procedure of the arbitration and the applicable law.

Party appointed arbitrator – An arbitrator appointed by a party. See also co-arbitrator.

Permanent Court of Arbitration – Based in the Peace Palace at The Hague, the PCA is an arbitral institution mainly for commercial disputes involving at least one government party. It also acts as an appointing authority under the UNCITRAL Arbitration Rules.

Pathological clause – A defectively drafted arbitration clause which may result in a dispute about its operation. Common defects are ambivalent wording as to whether binding arbitration is intended, ambiguity in the identification of an arbitral institution and nomination of an arbitrator who is for some reason unable to act.
Place of arbitration – See seat of arbitration.

Public policy – A country’s basic notions of morality and justice, including principles of law so fundamental that they override otherwise applicable law. A country’s public policy may impose mandatory provisions of local law, may affect arbitrability and may provide grounds for resisting the enforcement of an award.

Recognition of award – A national court’s acknowledgement of the authenticity of a foreign arbitration award.

Remission – The return of an arbitral award to the arbitral tribunal for reconsideration of one or more issues. This is rarely permitted under arbitration rules. See also Correction or interpretation of an award.

Request for arbitration – A type of notice of arbitration that is served on the arbitral institution rather than directly on the respondent. Requests for arbitration are used in arbitrations conducted under the ICC Rules of Arbitration. See also notice of arbitration.

Res judicata – The principle that once a matter is decided by a competent tribunal it cannot be revisited. This applies only when the cause of action, parties and persons concerned are the same as in the original action.

Seat of arbitration – Also called the place of arbitration. This refers to the legal, rather than physical, location of the arbitration proceedings. An arbitration legally exists under the legal framework of the seat of arbitration and any award rendered is deemed to be made in the seat.

Separability – The principle enshrined in most arbitration rules and laws that the arbitration agreement is distinct in law and existence from the contract of which it forms a part, or the agreement in which it appears. This is particularly important in relation to allegations that the main contract is void or does not exist.

Setting aside – The annulment of an award by a national court in the place where it was made, that is the seat of arbitration. Setting aside does not necessarily mean the award is void of any effect; it may still be enforceable in some jurisdictions.

SIAC – Singapore International Arbitration Centre.

Slip rule – See correction or interpretation of an award.
Sole arbitrator – An arbitral tribunal consisting of one arbitrator.

Sovereign immunity – A principle of public international law pursuant to which States and their authorities are immune from the jurisdiction of municipal courts. If contracting with State parties a waiver of this immunity should be sought.

Statement of claim/statement of defence – Also called ‘brief’ or ‘memorandum’ of claim/defence. A party’s statement of argument, usually presenting not only allegations of fact, but also evidence and relevant provisions of law. The arbitral tribunal often decides on how these document have to be structured, and what issues should be addressed.

Stay of court proceedings – The delay or suspension of a court action on the grounds that there may be a valid arbitration agreement between the parties.

Stop-clock arbitration – Also known as ‘chess clock arbitration’ whereby each party has a fixed maximum time to present its case at the hearing. Stop-clock arbitration proceedings are a particular way to increase speed and effectiveness of the proceedings. See also fast track arbitration.

Submission agreement – An agreement to refer an existing dispute to arbitration. A submission agreement will be necessary if parties have not agreed to arbitration before the dispute has arisen. See also arbitration agreement.

Terms of reference – A document prepared in the early stages of the arbitration setting out the scope of the arbitral tribunal’s mission. This may include a description of the parties, scope of claims, remedies sought and a list of issues in dispute. Terms of Reference are compulsory under the ICC Court and the CEPANI rules of arbitration.

Truncated arbitral tribunal – A tribunal which continues the proceedings despite the fact not all of its originally appointed members are taking part, either due to their death, removal or resignation.

UNIDROIT – The United Nations Institute for the Unification of Private Law, based in Rome. This institute issued the UNIDROIT Principles of International Commercial Contracts in 1994 which is said to be a codification of the lex mercatoria. See also lex mercatoria.


Disputes Between States and Nationals of Other States, Washington 1965 (ICSID), formulated by the World Bank.

**WIPO** – World Intellectual Property Organisation. A UN specialised agency set up in 1967 to deal with the protection of intellectual property and technology transfer matters. WIPO is based in Geneva.

Our international arbitration team
The Clayton Utz International Arbitration team comprises pre-eminent and experienced international arbitration and alternative dispute resolution practitioners. We have advised and represented clients in major international transactions, projects and disputes throughout the world under all of the major arbitration rules and regimes.

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