

CHAPTER 1

Introduction to international commercial arbitration

Key issues	1
[1.05] Overview of this book	1
[1.10] Introduction	5
[1.15] What is international commercial arbitration?	7
[1.15] International	7
[1.20] Commercial	7
[1.30] Arbitration	8
[1.35] Choosing between different dispute resolution methods	9
[1.40] History and development of arbitration	11
[1.45] Statutory approaches and developments in the Asia-Pacific region.....	15
[1.50] Australia	15
[1.55] Hong Kong	16
[1.60] Singapore	18
[1.65] Malaysia	20
[1.70] China	21
[1.75] Researching international commercial arbitration.....	22
Further reading	22
Useful Web links for researching international commercial arbitration	23

KEY ISSUES

- What is arbitration?
- What makes an arbitration “international” and “commercial”?
- Why use arbitration to resolve an international commercial dispute?
- How has international commercial arbitration developed?
- Which statutory rules and regulations apply?
- How can documents on international commercial arbitration be located?

OVERVIEW OF THIS BOOK

[1.05] This chapter introduces international commercial arbitration, distinguishes it from other methods of dispute resolution available to parties in an international commercial dispute, and introduces the main concepts and content discussed throughout the book.

Chapter 2 covers agreements to arbitrate. As mentioned in the introductory section, parties may agree to arbitrate after a dispute has arisen, but, more commonly, parties include an arbitration clause in their commercial agreement. That clause may be considered separately from the commercial contract, meaning that a valid arbitration agreement may exist even where there are issues as to the

validity of the commercial contract itself. To be a valid arbitration agreement, there must be reference to resolving future disputes that arise out of a defined legal relationship, involving a subject matter which is capable of resolution by arbitration, and the agreement must be in writing. The agreement is activated when a dispute arises.

Parties may draft an arbitration clause themselves (a drafting practice exercise is included in Chapter 2), or it may be included as a standard term and condition of sale or purchase. Institutions offering dispute resolution facilities in support of arbitration typically have a model clause that they recommend parties to use, and parties may also decide to include a tiered clause which provides for arbitration only where settlement negotiations are unsuccessful. When parties agree to arbitrate, they must decide, *inter alia*, where arbitration will take place and what procedures should be adopted. This is important because arbitrators are bound to follow procedures agreed between the parties.

Chapter 3 covers applicable laws, and the concept of the arbitral “seat”. In accordance with the principle of party autonomy, the parties may choose the law that applies to determine their rights and obligations under their international commercial agreement. The law may be that of a certain state, or it may be principles of international commercial law, referred to as *lex mercatoria* or *law merchant*. In the absence of an express choice of applicable law, regard will be had to any implied choice, failing which the rules of private international law are used. These rules seek to apply the law that has the closest and most real connection to the dispute. It may, for example, be the law of the place where the contract was to be performed. Alternatively, the parties may avoid application of any particular law to the substance of the dispute and instead authorise the arbitral tribunal to decide the dispute on the basis of fairness, referred to as *ex aequo et bono* or as *amiable compositeurs*.

Parties must consider not only the law that applies to the substance of the dispute, but also the procedural law. Although the parties may adopt a set of arbitral rules which set out the procedure for the arbitration to be conducted, and that procedure may be unattached to any particular jurisdiction, every international arbitration must be localised in the sense of having a juridical base or home.¹ This is because the common law “does not recognise the concept of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law”.² The juridical base of the arbitration is variously referred to as the arbitral seat, the *lex arbitri*, the procedural law, and the curial law of the arbitration. The arbitral seat is typically the place in which the arbitration is held, but, in practice, if various parts in the arbitral process are conducted in other places (such as the place where a teleconference is held) this will not move the seat. The laws of the seat will determine, for example, whether an arbitral award is valid, and the courts of the seat may make that determination.

1 It has been held that the use of the word “juridical” in qualifying the seat of an arbitration, “means and connotes the administration of justice so far as the arbitration is concerned. It implies that there must be a country whose job it is to administer, control or decide what control there is to be over an arbitration”: *Braes of Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Ltd* [2008] EWHC 426 (TCC) at [15].

2 See *Bank Mellat v Helliniki Techniki SA* [1984] 1 QB 291 per Kerr LJ at 301.

Chapter 4 explains the difference between ad hoc arbitration, where the parties administer the arbitration themselves, and institutional arbitration, where an arbitral institution assists in administering the arbitration, including providing facilities and assisting the parties in the appointment of arbitrators. Under an ad hoc arbitration, the parties may have agreed exhaustively on the procedures to be followed, where the hearing takes place, and so on. Or they may simply incorporate the UNCITRAL Arbitration Rules into their contract, which were designed with this purpose in mind.

Under an institutional arbitration, the institution will have a set of rules which apply to all arbitrations it administers. For example, the Australian Centre for International Commercial Arbitration (ACICA) has the ACICA Arbitration Rules. The arbitral institutions considered in this book are those available in the jurisdictions under consideration – Australia, Hong Kong, Singapore, Malaysia and China. They include:

- Australian Centre for International Commercial Arbitration (ACICA);
- Hong Kong International Arbitration Centre (HKIAC);
- Singapore International Arbitration Centre (SIAC);
- Kuala Lumpur Regional Centre for Arbitration (KLRCA);
- China International Economic and Trade Arbitration Commission (CIETAC);
- London Court of International Arbitration (LCIA), which has an Australian chapter as part of its Asia-Pacific Users Council;
- International Chamber of Commerce (ICC), which has offices in the Asia-Pacific region; and
- Chartered Institute of Arbitrators (CIArb), which has an Australian chapter.

The objectives of most of the international arbitral institutions are broadly the same: to support and facilitate international arbitration. They usually maintain a panel of international arbitrators and a list of experienced arbitration practitioners. Arbitral institutions supply information on arbitration agreements, arbitration rules and law, and can assist with hearing rooms, transcription and information technology services. Usually they are also involved in educational activities, including seminars and conferences to enhance knowledge and understanding of international arbitration.

Chapter 5 and 6 cover the arbitral tribunal: Chapter 5 deals with formation of the tribunal and challenges to arbitrators, and Chapter 6 with the jurisdiction of the tribunal and its powers. In relation to formation, there will typically be a process for the appointment of arbitrators agreed to by the parties. It may, for example, simply be stated that the parties are to agree on the appointment of the arbitrator, and if they cannot agree, a third party, such as the chair of an industry body, will decide. Alternatively, there may be three arbitrators: each party selects one arbitrator and both parties choose, together, the third arbitrator who chairs the tribunal. Arbitral institutions often also provide a process for the appointment of the arbitral tribunal. If a party considers an arbitrator to be unsuitable by reason, for example, of a conflict of interest, the parties may challenge the appointment, first to the tribunal itself and otherwise to the courts in the arbitral seat. Once a tribunal is properly formed, the arbitral tribunal's jurisdiction and power is limited to that set out in the arbitration agreement. This is because the arbitral tribunal derives its power from the agreement. Arbitrators typically have the

power to take evidence, hold hearings, make interim orders for protection of assets as between the parties, and issue an award.

Chapter 7 covers arbitral procedures. As discussed above, if the arbitration is being administered by an institution, there may be rules setting out the procedure to be followed. The parties who selected the institution for the arbitration are taken to have agreed to the institution's procedures being followed. The parties may also agree on their own procedure, or on variations to the standard procedure, such as agreeing to arbitrate on documents only, instead of holding an oral hearing. Typically, however, the procedure involves a preliminary conference, there is an exchange of written submissions in the form of a claim, defence, reply and, if relevant, a cross-claim, defence to the cross-claim, and reply. Experts are often used, and a hearing takes place (often by teleconference). The tribunal deliberates and renders a joint, final award. Issues arise at each point in the process, and these are covered in Chapter 7.

Chapter 8 deals with confidentiality in arbitration. The ability to keep arbitral proceedings and outcomes confidential is a benefit over court adjudication where hearings are often held in open court and judgments are made publicly available. Parties may agree expressly that the arbitration be confidential, or the duty of confidentiality may be implied. They must consider exactly what they are keeping confidential – is it trade secrets and commercially sensitive information, is it the documents and witness statements, the award, or the fact that there is a dispute which is being arbitrated? What happens if a party breaches confidentiality – what is the remedy? There is interest in the award being widely available, because a consistent approach to international commercial arbitration is desirable. For this reason, abstracts of arbitral awards, with identifying matter removed, are often published.

Chapter 9 relates to interim measures and awards. These are important, for example, if the subject matter of the dispute is perishable (as is the case in fresh food) or depreciates quickly (as is the case with technological goods). They are also important if a party fears that assets or money may be moved outside the jurisdiction. The arbitral tribunal has power to issue interim awards that bind the parties, but if action is necessary by a third party outside the arbitration, such as a bank, the parties must have recourse to the courts. Chapter 10 covers this and other circumstances of court involvement in arbitral proceedings, including staying proceedings in favour of arbitration, resolving issues regarding the appointment or composition of the tribunal, taking of evidence, removing or replacing an arbitrator (as a result of arbitrator inaction, death or misconduct), and setting aside or enforcing arbitral awards.

Chapter 11 covers arbitral awards, including orders for the payment of damages, interest, costs, and the currency payable. Awards are issued in writing, usually with reasons, and if there are three arbitrators a single award is issued (unlike court judgments where there may be a majority and minority judgment). Awards may be made on questions of jurisdiction, interim measures, partial awards that cover some but not all issues in dispute, awards by consent of the parties (where a settlement negotiation running in tandem with the arbitral proceeding is successful) and final awards, disposing finally of all issues for determination.

Chapter 12 covers the end point of an arbitral process – recovering what has been awarded. After deciding which jurisdiction the losing party has assets in, there are two fundamental steps in the process. The first entails seeking recognition of the award in a court in that jurisdiction, and the second entails seeking enforcement against the losing party's assets. Awards are relatively easy to enforce in international arbitration, owing to the existence of the widely adopted New York Convention 1958. The enforcement procedure pursuant to the New York Convention is contained in Art III, which provides:

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

For example, if an award was issued in Singapore, and the losing party had most of its assets in Australia, the winning party would commence an action in a state Supreme Court that would check the requirements in the New York Convention 1958 had been met and formally recognise the award, which means that the award is treated as if it were a judgment of that court. The winning party may then seek an order of enforcement against assets in any State or Territory in Australia. If enforcement is sought in the very court in which recognition is made, in practice the two steps take place together.

Chapter 13 covers specialist forms of arbitration, including arbitration of investment disputes under the ICSID Convention 1966, resolution of disputes between states in the World Trade Organization (WTO), and arbitration before the Court of Arbitration for Sport (CAS). In relation to investor-state arbitration, corporate investors may pursue claims against states (and state-owned enterprises) in the context of bilateral investment treaties and free trade agreements. This promotes international investment because, historically, states were able to avoid prosecution owing to the doctrine of sovereign state immunity, and investors were reluctant to proceed in the states' own courts due to concerns about independence and impartiality. The WTO resolves international trade disputes between states using a panel procedure, with arbitral processes also used during the compliance phase. Similarly, the CAS is an institution based in Switzerland which uses arbitral processes to resolve sports-related disputes.

INTRODUCTION

[1.10] Arbitration is a consensual method of dispute resolution that involves a neutral third party making a final determination which is binding on the parties to the disputes. It has been described as the private enterprise counterpart of the court system. The identity of the neutral third party is either agreed upon between the parties, or they are appointed according to a process agreed to between the parties in the commercial agreement. The power of the neutral third party adjudicator derives from an agreement between parties to submit their dispute to arbitration.

An arbitration agreement can be entered into when the dispute arises, or it can be included as a clause in a commercial agreement (main underlying contract) providing that, in the event of disagreement, some or all of the matters arising

between the parties will be referred to arbitration. This means that, for arbitration to occur, the clause is triggered by a dispute arising out of the contract between the parties, with one of the parties giving notice of an intention to proceed to arbitration as provided for in that clause to the contract. Also, the general agreement to arbitrate contained in the clause typically provides that any award rendered is final and binding, and constrains the parties from commencing litigation over the subject matter of the dispute.

International commercial arbitration raises interesting issues as to the law that should be applied, the procedure that should be followed, and the place the arbitration should be located. In a domestic commercial arbitration, where two parties located within a jurisdiction enter a contract, there will be little difficulty in applying domestic laws and in the procedures of domestic courts. However, if one of the parties is located in a foreign jurisdiction, as is almost universal in import and export trade, the foreign party is generally not subject to domestic laws.

Let us say that party A, being a legal entity in one state, makes an agreement with party B, located in another state, to manufacture goods which party B will supply to party A in the first state. If a dispute arises between A and B, how is it to be determined? What is the “natural” forum? In which state’s public interest is the resolution of a dispute between the parties most important? Which entity will be used to decide upon the facts and law, and render a decision? What laws are to be applied? What procedure is to be followed? How long will it take? What remedies can be obtained? Can legal costs and interest be recovered? What means will the successful party have to enforce the outcome of the process against the losing party?

Each sovereign state will generally have processes and judicial bodies available and capable of determining disputes which may arise in an international context, but they are subject to severe limitations. For example, there may be no jurisdiction in the courts of a particular sovereign state to deal with a dispute between party A (being a national of a different sovereign state) against party B (being a national of a separate and different sovereign state). In addition, party A may be outside the reach of a particular sovereign state and all relevant events and transactions may have occurred in yet another sovereign state. Even if it is assumed that the courts of one sovereign state have jurisdiction and there is authority of the courts in that sovereign state to proceed against party B, it may be a pyrrhic victory if all of party B’s assets are located in another sovereign state whose laws do not recognise any judgment obtained by party A in different sovereign state.³

Additionally, public interest is at stake. In domestic disputes, the state concerned has an interest in the peaceful resolution of all disputes arising within its territory, which involve its people. The interests in international commerce, however, are not based on the particular public interest of any one sovereign state.

3 Problems of recognition of foreign judgments were highlighted in *Murakami v Wiryadi* [2006] NSWSC 1354 at [31] where the court stated that “[b]ecause Indonesia does not recognize foreign judgments other countries are loathe to recognize Indonesian judgments”. This shows that recognition is typically on a reciprocal basis – a state will enforce the judgments of another state if that other state will enforce theirs. See also the matter on appeal at [2010] NSWCA 7. See also *XPlore Technologies Corp of America v Tough Corp Pty Ltd* [2008] NSWSC 1267, involving an allegation of fraud in obtaining judgment.

Yet, “[a]n ordered efficient dispute resolution mechanism leading to an enforceable award or judgment by an adjudicator, is an essential underpinning of commerce”.⁴ Accordingly, those nations involved in international trade and commerce have an interest in fostering and supporting international commercial arbitration. This interest has been borne out in state support for international commercial arbitration, through the entering of treaties, the enactment of model laws in domestic legislation and applying to international arbitration, and in courts supporting arbitration through, for example, staying court proceedings where one party has ignored a valid agreement to arbitrate.

WHAT IS INTERNATIONAL COMMERCIAL ARBITRATION?

“International”

[1.15] “International” arbitration refers to the resolution of cross-border transaction disputes. Article 1(3) of the 1985 *United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration* (the Model Law) provides that an arbitration is international if:

- (a) the parties which have their places of business in different states; or
- (b) the place of arbitration, or the substantial part of performance of the contract, or the place the subject matter of the dispute is most closely connected, is in another state.

“Commercial”

[1.20] The word “commercial” is referred to in Art 1 of the Model Law, which states that the law “applies to international commercial arbitration, subject to any agreement in force between this State and any other State or States”. A footnote is provided, which states:

The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods and services; distribution agreements; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business corporation; carriage of goods or passengers by air, sea, rail or road.

In the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958* (the New York Convention 1958), “commercial” is not defined but Art 1(3) allows a contracting state to declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not “which are considered as commercial under the national law of the State making such declaration”. For example, China, which acceded to the New York Convention 1958 in 1987, declared that it “will apply the Convention only [to disputes] which are considered as commercial under [its] national law”.

4 *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45; [2006] FCAFC 192 per Allsop J at [191]; see also [194].

Case Example

Zhang v Shanghai Wool & Jute Co Ltd [2006] VSCA 133 (Supreme Court of Victoria, Court of Appeal)

[1.25] Shanghai Wool & Jute Co Ltd (Jute) commenced proceedings in the County Court of Victoria, Australia, seeking payment under a contract of sale of worsted fabric produced in China and supplied to the buyer in Australia. The buyer sought a stay in the proceedings, relying on the following arbitration clause:

All disputes arising out of the performance of or relating to this contract shall be settled through amicable negotiations. In case no settlement can be reached through negotiation, the case shall then be submitted to the Foreign Economic and Trade Arbitration Commission of the China Council for the Promotion of International Trade, Beijing, China for arbitration in accordance with its Provisional Rules of Procedures. The arbitral award is final and binding upon both parties.

The seller argued that the convenient forum was in Victoria as the goods were delivered there, not in China, and the evidence was substantially in Victoria. Meanwhile, the buyer commenced arbitration in China pursuant to the arbitration clause in the contract of sale. Although the County Court refused the stay, it was granted on appeal to the Court of Appeal of the Supreme Court of Victoria. There, the seller argued that the arbitration clause did not apply because the dispute was not a “commercial” dispute under Chinese law. The Court held that the argument was “plainly misconceived” as it was “inconceivable” that a dispute which arose out of a commercial contract would not meet the definition of “commercial dispute”. It also referred to the arbitral institution accepting the reference to arbitration as acknowledgement of its commercial nature.

“Arbitration”

[1.30] A dictionary definition of “arbitration” is “the hearing or determining of a dispute between parties by a person chosen, agreed between the parties, or appointed by virtue of a statutory obligation”.⁵ A thesaurus provides the following alternatives for “arbitration”: “adjudgement, arbitrament, adjudication, decision, determination, ruling, opinion, order, pronouncement and resolution”.⁶ Our definition of arbitration is:

A method of settling private disputes between two or more parties by the reference of the dispute to some neutral third party of their choosing, for that third party’s final and binding decision in the form of an arbitral award by which the disputing parties have previously contracted to abide.

How do we know if a process which resolves a dispute comes within the definition of arbitration? Attributes which must be present include that:

- there is an enforceable agreement between the parties to refer dispute(s) to a tribunal;
- the tribunal is appointed consensually or by a consensual process;
- the tribunal is impartial;

5 Macquarie Dictionary online.

6 Macquarie Dictionary online.

- a dispute is in existence at the time the arbitrator(s) are appointed;
- the process will determine the substantive rights and obligations of the parties;
- the determination is intended to be final and binding; and
- the tribunal is not a court of a state.

CHOOSING BETWEEN DIFFERENT DISPUTE RESOLUTION METHODS

[1.35] Arbitration is a form of alternative dispute resolution (ADR) where the “alternative” means alternative to court adjudication. Alternative dispute resolution embraces a plethora of methods involving a neutral third party, some of which give the third party the power to make a binding decision. Examples of ADR include certification (an engineer’s decision), expert determination, the use of dispute boards, dispute adjudication boards and dispute review boards, mediation, arbitration and med-arb. These are all conflict management processes, varying in degree of formality, cost and finality. However, not all of them meet the definition of arbitration.

Certification, in its simplest form, involves the reference of a dispute to the contract engineer/superintendent to make a determination. It is usually provided for in the underlying contract and is a reviewable decision. However, certification is often viewed with suspicion by parties to the contract because the engineer is seen to be a partial player whose decisions will tend towards or be in favour of the employer/principal.

Expert determination is the reference of a dispute to an expert selected by the parties in advance (sometimes stipulated in the contract). It is generally used to decide on a specific matter of contract or other law or on disputed facts or financial valuations. Usually, the expert investigates and reports on the issue and does not necessarily rely exclusively on submissions made by the parties.⁷ The decision is generally binding and cannot be appealed.

A *dispute board* is an independent committee established by the parties to construction contracts. Dispute boards are usually provided for in the contract and thus are in place from the commencement of the project. They usually comprise three members: one chosen by each party and the third chosen by the two nominees. The *dispute review board* (DRB) can hold informal hearings and produce non-binding recommendations. DRBs are a roving band of reporters charged with acting impartially and independently, dealing with problems as they arise. A *dispute adjudication board* (DAB), on the other hand, deals with matters that are in dispute. The procedure adopted by a DAB is usually more formal and structured than a DRB, containing provisions such as time stipulations for notices. A DAB’s decision is immediately binding unless challenged by a notice of dissatisfaction. Both the recommendations of a DRB and the decision of a DAB may be admitted before an arbitrator, if the dispute proceeds to that stage.

7 A recent decision of the Queensland Court of Appeal confirmed the inquisitorial powers available to an expert in an expert determination: *Northbuild Constructions Pty Ltd v Discovery Beach Project Pty Ltd* [2008] QCA 160, where the experts held a hearing and permitted cross-examination of witnesses.

Mediation, on the other hand, is a flexible confidential process involving a neutral third party assisting the parties in working together towards the negotiated settlement of a dispute or difference over which process the parties have ultimate control. The decision to settle and the terms of the resolution are controlled by the parties. Typically, the third party selected to mediate international commercial disputes is a person respected by the parties who has expert knowledge of the relevant industry. It may, for example, be a member or office holder of an industry body.

Med-arb is a process that gives the parties the opportunity to use mediation to reach a settlement, but should the mediation not produce a successful outcome, the mediator then converts into the role of an arbitrator and makes a binding determination. This process encourages parties to create their own best settlement in the knowledge that an arbitrator will, otherwise, impose a decision – they have both autonomy and finality from the process. The difficulty is that the parties may, in a confidential mediation proceeding, make certain admissions or compromises which they would not have done before an arbitrator, and the mediator-arbitrator may have discussed some matters during the mediation phase with one party separately which may mean the other party has not been heard on an issue in the dispute; accordingly, procedural fairness will not have been fully observed.

How, then, do parties to international commercial disputes decide whether to select arbitration as their ADR method? Arbitration offers the following benefits:

- The parties can choose the arbitral tribunal, typically one or three people whom the parties believe are impartial and have the relevant expertise (which can be extremely important in some industries where operational matters are highly technical).
- The parties have the flexibility to decide on the procedure followed by the arbitral tribunal, including, for example, dispensing with oral hearings – referred to as “documents only” arbitration, this is a cheaper and quicker alternative where the dispute is clearly evidenced in documents.
- Awards are relatively easy to enforce against assets in other foreign jurisdictions.
- The decision can be reached in a shorter time and with less cost and complexity than litigation.
- The process is guaranteed to reach a binding determination which can be agreed to be final (although an appeal on the basis of bias or breach of procedural fairness cannot be ruled out).
- Confidentiality can be maintained.

Therefore, arbitration should be used where these matters are of importance to the parties. As stated by the House of Lords in the United Kingdom:

People engaged in commerce choose arbitration in order to be outside the procedures of any national court. They frequently prefer the privacy, informality and absence of any prolongation of the dispute by appeal which arbitration offers.⁸

This view is supported in the findings of a report by Queen Mary, University of London and PricewaterhouseCoopers, which states the major perceived benefits

8 *West Tankers Inc v RAS Riunione Adriatica di Sicurtà SpA* [2007] UKHL 4 per Lord Hoffman at [17].

of international arbitration as the enforceability of arbitral awards, the flexibility of the procedures and the ability to select experienced arbitrators.⁹

When is it *not* appropriate to select arbitration as a dispute resolution method in an international commercial arbitration setting?

- if a company wishes to obtain a precedent (this may occur, for example, if an insurance company was facing several claims relating to refusal to pay under their policy and they wanted a clear ruling which they could apply to all claimants) – in this instance, litigation would be preferable;
- if either party is emotionally charged and unlikely to maintain an ongoing commercial relationship – in this instance, mediation would be preferable, because through a dialogue between the parties the underlying issues and emotions may be addressed, making it more likely that an ongoing commercial relationship will be possible; and
- if damages would not be a suitable remedy (this may occur, for example, if the claimant wants the respondent to make an admission of liability and apologise, which an arbitral tribunal cannot order them to do) – in this instance, mediation would be preferable.
- if the other party's assets are in a jurisdiction not party to the New York Convention 1958, making it difficult to achieve enforcement – in this instance, litigation may be preferable.

In terms of *when* the choice of dispute resolution method should be made, the best time is when the agreement is being entered. Even though the main focus at the time of entering a contract is getting the deal completed, taking the time to frame a suitable clause stating the applicable law and referring any future disputes which may arise between the parties to arbitration can save problems later when a dispute arises and one party commences litigation in their own courts. As will be seen in Chapter 10, when the parties make a clear choice of arbitration, courts will usually support that choice through preventing a party from proceeding with litigation.

HISTORY AND DEVELOPMENT OF ARBITRATION

[1.40] Arbitration is far from a “new” method of dispute resolution. As long ago as 350 BC, Plato referred to the formal settlement of private disputes which had evolved quite separately from the legal system of the state:

Contracts: If a man fails to fulfil an agreed contract ... an action should be brought in the tribal courts if the parties have not previously been able to reconcile their differences before arbitrators (their neighbours that is).¹⁰

The first arbitration legislation was passed in England in 1698, the preamble to which stated:

Whereas it hath been found by experience, that references made by Rule of Court have contributed much to the ease of the subject, in the determination of

9 See “International Arbitration: Corporate Attitudes and Practices” [2004] 15 Am Rev Int'l Arb 525 at 542.

10 Plato, *The Laws*, translated by Jaunders (London: Penguin Books, 1980).

controversies, because the parties become thereby obliged to submit to the award of arbitrators ... now, for ... rendering the award of arbitrators more effectual be it enacted.¹¹

However, arbitration was recognised under the common law of England and Wales prior to the *Arbitration Act 1698*. From reports, it is evident that arbitration was in common use. It appears to have had then, as remains so centuries later, certain advantages in that disputing parties obtained a quick settlement of their differences, the parties had chosen their own judge and they had no need to turn to the court. For example, in the case of *Wotting v Algor*,¹² the sheriff was directed to secure a jury at Westminster to enquire whether in fact the parties had entered into an arbitration and, if so, whether they had agreed to abide by the award of the arbitrator.¹³

The problem of enforcing awards was overcome by returning the award to the court and enforcing it as a court judgment. This remedy was in the form of a “rule of court” whereby once the award was registered with the court, the parties were bound to honour it because to do otherwise would have been contempt of court.

A special form of dispute resolution for merchants was recognised in Britain as elsewhere in Europe, namely for international traders travelling between the markets in Europe. These merchants needed assistance with the resolution of disputes based on the customs and practices of the merchants, which would allow for swift justice. It is known as *lex mercatoria*, law merchant.

As late as the 17th century, no action could be commenced in the courts in a case where an arbitration agreement existed unless the arbitration had been concluded. Arbitrators were charged to decide the case “... according to their opinion and judgement as honest men”.¹⁴

Under the *Arbitration Act 1854* in England, the courts were given express power to review an arbitration award:

Any arbitration or umpirage procured by corruption or undue means shall be judged and esteemed void of none effect.¹⁵

The French Revolution and the Napoleonic wars resulted in a declaration that arbitration was “the most reasonable means of determining disputes between citizens”.¹⁶ In the *Napoleonic Code of 1804*, agreements to submit future disputes to arbitration were outlawed and the parties were presumed to have accepted rights of appeal on both facts and law unless they expressly excluded it.

By the mid-19th century, England, the main trading power in the world at that time, adopted its modern arbitration statutes starting with the limited provisions of the *Common Law Procedure Act 1854* (UK) and culminating in the *Arbitration Act 1889* (UK), much of which is the foundation of modern arbitration law in England and of the Commonwealth. During all this time, there appears to have been a degree of hostility towards arbitration on the part of the courts – a sense that their

11 9 & 10 William II, c 15.

12 *Wotting v Algor* [1405] Coram Rege Roll 575.

13 A F Cornish, “Arbitration at Common Law before the First (English) Arbitration Act 1698” (1990) (Aug) 56(3) *Journal of Chartered Institute of Arbitrators*.

14 Anon, *Arbitrium Redivivum (The Law of Arbitration)*, (London: Isaac Cleeve, 1694).

15 9 & 10 William III, CAP XV, 1698, s 22.

16 Article 1 of the *Loi Sur L’Organization Judicaire (Judicial Organisation Act)* of 24 August 1790.

jurisdiction was being impaired by this instance of private-enterprise justice. The 1854 Act enacted a great revision of the law of arbitration and gave express recognition to arbitration as an alternative means of dispute resolution.

The *Arbitration Act 1854* (UK) also contained an important provision which empowered the courts to stay an action where there was an arbitration clause. This followed the House of Lords judgment in the case of *Scott v Avery*,¹⁷ which upheld the validity of a provision to the effect that determination by arbitration of disputes was to be a condition precedent to a court action. Section 4 of the *Arbitration Act 1889* (UK) confirmed the discretionary power of the courts to stay proceedings where an arbitration clause existed.

The modern arbitration movement in Europe stems essentially from the carnage of World War I. The foundation of the League of Nations in 1919 and the short-lived idealism that followed led politicians to see arbitration as a means of driving peace and international trade. The result was the *General Protocol on Arbitration Clauses 1923*,¹⁸ which dealt with the enforcement of agreements to arbitrate, and the *Convention on the Execution of Foreign Arbitral Awards 1927* (the 1927 Convention), which dealt with the execution of foreign arbitral awards.¹⁹ This flurry of activity in the 1920s also coincided with the establishment of the International Chamber of Commerce (ICC) in Paris in 1919 and a variety of other bodies, a significant part of whose activities involved the promotion of arbitration. Modifications to the *Arbitration Act 1889* (UK) resulted in the *Arbitration Act 1934* (UK).

After World War II, the level of enthusiasm of 1918 was repeated. Various congresses debated resolutions suggesting ways to reform arbitration laws in the 1940s and 1950s. The ICC put forward a blueprint in 1953 for a revision of the 1927 Convention. It resulted in the United Nations convening a convention, which produced the *New York Convention for the Recognition and Enforcement of Arbitral Awards in 1958* (the New York Convention 1958).²⁰

Further efforts to harmonise national laws on arbitration, and the acceptance of the proposition in many legal systems that international arbitration possesses different characteristics from domestic commercial arbitration and should be subject to different rules, resulted in a working group of the United Nations Commission on International Trade Law (UNCITRAL). This working group was given the task of developing a model law as the source of procedural law to govern international commercial arbitration.

In 1976, UNCITRAL prepared and adopted the UNCITRAL Arbitration Rules, and, in 1980, the UNCITRAL Conciliation Rules, for independent, amicable settlement efforts as a viable alternative to adversarial proceedings.²¹ The Model

17 *Scott v Avery* [1853] LJ Ex 308.

18 *General Protocol on Arbitration Clauses 1923*, available online at http://www.interarb.com/vl/g_pr1923 (cited 2 July 2010).

19 *Convention on the Execution of Foreign Arbitral Awards 1927*, available online at http://www.interarb.com/vl/g_co1927 (cited July 2010).

20 *New York Convention for the Recognition and Enforcement of Arbitral Awards in 1958*, available online at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html (cited July 2010).

21 Note that conciliation and mediation are synonymous in some parts of the world, while in others conciliation is seen as a facilitative process whereas mediation involves a more active role for the mediator, including proposing and drawing up settlement terms.

Law was concluded in 1985, and amended in 2006 in order for it to take into account the many implications of technological and practical advancement. The central aim of UNCITRAL in developing the Model Law is the harmonisation of law through the provision of an internationally agreed legal framework for the conduct of international commercial arbitration with an emphasis on party autonomy and restriction of interference by the courts of the place of arbitration.

The Model Law has been widely adopted, thereby largely removing the problems associated with the disparity of arbitration laws.²² The Model Law is the framework most commonly used in the Asia-Pacific Region, including Australia, New Zealand, Hong Kong, Singapore and Malaysia. China is the only jurisdiction covered in this book which has not adopted the UNCITRAL Model Law. When Australia adopted the Model Law, in 1991, a working group report put forward the following reasons for its adoption:

- It provides an internationally agreed legal framework for the conduct of international arbitration.
- It could therefore assist Australia's efforts to establish itself as a centre for international commercial arbitration.
- It complements the UNCITRAL Arbitration Rules, which are becoming increasingly used in the conduct of international ad hoc arbitrations.
- It compliments and expands on parts of existing Australian international arbitration laws.
- While the Model Law recognises the supportive and corrective role to be played by the court, it unites judicial intervention and supervision of an arbitration.
- In a more general context, party autonomy is respected and facilitated by the Model Law – parties are not frustrated by unknown provisions of national laws, which may conflict with their intentions in respect of their arbitration.

The development of the Model Law coincided with a worldwide trend reflected in legislative activity and a change in judicial attitudes to favour the limiting of court involvement in international commercial arbitration as opposed to domestic. The traditional view of courts towards international commercial arbitration was one of competition – they were reluctant to surrender control over disputes involving their own state's nationals and wanted to maintain their jurisdiction over the development of business via commercial law within their boundaries. They were also deeply suspicious of contracts involving nationals of other states, which referred disputes to their courts. The change in attitude in the past few decades, from one of jealous competition between the courts and arbitration tribunals to that of favouring a complementary approach, has been dramatic as evidenced by the statements of eminent jurists such as Lord Donaldson of the English Court of Appeal, who expressed the following opinion of the relationship between judges and arbitrators: "Working together as partners we seek to provide a service to the world".²³

22 The current status of the Model Law, listing countries that have adopted it, is available online at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (cited June 2010).

23 Donaldson LJ, "Relationship between the Courts and Arbitrator under the European Common Law Systems", paper presented to the European Arbitration Conference (October 1980) (1981) 47 *Arbitration* 73.

Arbitration is the single most preferred method of dispute resolution in international commerce, recognised by the international business community as providing a flexible and effective alternative to costly and time-consuming litigation. Its use is continuing to grow, not only because of its advantages over other alternatives to resolving international commercial disputes, but also because of the sheer growth in international trade, fuelled by rapid advances in communications, technology and transport. With increased international trade and commerce come increased international commercial disputes. However, arbitration is not without its complications, and the decision to include an arbitration clause in a contract, or to rely on arbitration in the case of a dispute involved in an investment, should be an informed commercial choice with due consideration given to the nature of the transaction, the nationality of the assets against which an award may be enforced, the place or places where resort may be had to the courts, and the process of arbitration being considered for adoption.

STATUTORY APPROACHES AND DEVELOPMENTS IN THE ASIA-PACIFIC REGION

[1.45] The focus in this book is on five jurisdictions in the Asia-Pacific region: Australia, Hong Kong, Singapore, Malaysia and China. This section considers the statutory approaches and recent developments in each of these jurisdictions.

Australia

[1.50] Australia has a strong arbitration culture, both domestically and internationally. In being an English-speaking, common law jurisdiction in the Asia-Pacific region, it has been able to take advantage of the opening up and expansion of the Asian economies in the 1990s. Australia offers an established and hospitable environment for international commercial arbitration. It has been a signatory to the New York Convention 1958 since 1975, and was one of the first countries to adopt the UNCITRAL Model Law. Australia is also party to a number of free trade agreements (FTAs), such as the Singapore–Australia Free Trade Agreement in 2003, and many bilateral investment treaties (BITs) which provide for the arbitration of disputes. Australian courts support international commercial arbitration by granting stays of court proceedings to give maximum effect to arbitration agreements, and by enforcing valid foreign arbitral awards.

The key statute in Australian law relating to international commercial arbitration is the *International Arbitration Act 1974* (Cth). The legislation incorporates the New York Convention 1958 (without reservations), the Model Law (including the amendments of 2006), and the *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1966* (the ICSID Convention 1966), each of which are annexed to the Act. The implementation of the Model Law in Australia was the *lex specialis*²⁴ of international law in relation to arbitrations which may properly be characterised as “international” and “commercial”, but it originally left the existing domestic laws on arbitration unaffected.

24 Translation: A special or specific law.

Although Australia has adopted the Model Law, there are various “opt in” and “opt out” provisions which the parties need to include or exclude expressly in their arbitration agreement. For instance, s 23C of the *International Arbitration Act 1974* (Cth), is an opt-in provision that deals with the disclosure of confidential information. It will only apply if the parties provide for it. This may be contrasted with the opt-out provisions which will apply unless they are excluded; for example, s 27 of the *International Arbitration Act 1974* (Cth), which deals with the arbitral tribunal’s power to award costs.

The Australian legal structure, derived from the English common law system, is a complex interaction of legislation and the common law. As with other common law jurisdictions, the relevant legislation does not attempt to provide a comprehensive and exhaustive code governing all aspects of arbitration. While the legislation establishes rules which construct a framework for the initiation, conduct and court supervision of the arbitration, these are given in outline only with the details supplied by reference to the common law.

Recent amendments to the *International Arbitration Act 1974* (Cth), enact four major changes to its application:

- the clarification of how interim measures, with the exclusion of “preliminary” (specifically, *ex parte*) orders, are to be dealt with. These are now governed by the 2006 amended version of the Model Law;
- express provision that states that the Model Law “covers the field” – this amendment was intended to clarify the position that parties who adopt procedural rules are not to be held as having opted out of the Model Law;²⁵
- the conferring of (concurrent) jurisdiction on the Federal Court of Australia to be involved in the application of the Model Law;²⁶ and
- outlines a prescribed appointing authority under the Model Law.

Hong Kong

[1.55] In 1997, British rule ended in Hong Kong and control of the territory was returned to the People’s Republic of China (PRC). Under the Sino-British Joint Declaration,²⁷ however, Hong Kong has been guaranteed a high degree of autonomy from the PRC for 50 years as a special administrative region (SAR) of the PRC under the principle of “one country, two systems”. Thus, Hong Kong continues to use a common law legal system based closely on English law and will do so until at least 2047.

The principal statute governing arbitration in Hong Kong is currently the *Arbitration Ordinance* (HK).²⁸ It provides for two distinct regimes:

- the domestic regime, which is based largely on the English Arbitration Acts of 1950, 1975, 1979 and 1996; and

25 This arises from the decision of *Eisenwerk v Australian Granites Ltd* [2001] 1 Qd R 461, which was generally regarded as being clearly wrong and has not been followed in New South Wales: see *Cargill International SA v Peabody Australia Mining Ltd* [2010] NSWSC 887, where the court described *Eisenwerk* as ‘plainly wrong’ and should not be followed.

26 Previously, only the Supreme Courts of the States and Territories had jurisdiction.

27 An Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Future of Hong Kong signed on 19 December 1984.

28 *Arbitration Ordinance*, Chapter 341 of the Laws of Hong Kong

- the international regime that, since 1990, has been based on the UNCITRAL Model Law (see the Fifth Schedule to the *Arbitration Ordinance* (HK)).

Article 1(3) of the Model Law sets out the criteria for deciding when an arbitration will be considered international:

- (3) 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.

Arbitrations that do not satisfy these criteria are regarded as domestic arbitrations. Parties can, however, opt into either regime: parties to a domestic agreement may, after a dispute has arisen, agree in writing to have the dispute arbitrated as an international arbitration, and parties to an international arbitration agreement may agree in writing before (that is, this can be stipulated in the underlying arbitration clause or agreement) or after a dispute has arisen to have the arbitration conducted under the domestic regime.

As with other jurisdictions, the significant difference between the two regimes is that the domestic regime provides the Hong Kong courts with additional powers to intervene in and assist with the arbitration process which are not available under the international regime. By contrast, the international regime, based as it is on the Model Law, follows the principle that the Hong Kong courts should support, but not interfere with, the arbitration process.

In 1998, the Hong Kong Institute of Arbitrators (HKI Arb) established the Committee on Hong Kong Arbitration Law in co-operation with the HKIAC (HK Committee). The HK Committee was established to consider further and to take forward proposed reforms identified in 1996 by an earlier HKIAC committee. The HK Committee published its report in April 2003. Its primary recommendations were:

- to abolish the distinction between domestic and international arbitrations;
- to establish a unitary regime for arbitration law in Hong Kong;
- the Model Law should continue to be scheduled to the Ordinance and to have the force of law in Hong Kong subject only to necessary amendments; and
- the Ordinance should follow the order and chapter headings of the Model Law and the Model Law and additional provisions should be set out in the main body of the Ordinance, to make it as user-friendly as possible.

In addition, the review of the legislation undertaken over the past few years recommended that the parties should still be able to agree to provisions similar to those which are part of the current domestic regime (*Arbitration Ordinance* (HK)):

- section 6B (consolidation of arbitrations by the court);

- section 23A (obtaining the courts' opinion on a preliminary point of law); and
- section 23 (relating to an appeal on a point of law arising under an arbitration award).
- A new Arbitration Bill was published in the Hong Kong Gazette on 26 June 2009. It is expected to come into force in November 2010. Importantly, it adopts the 2006 amendments to the Model Law, including the provisions concerning interim measures, costs and the broadened definition of an arbitration agreement "in writing". The Legislative Council brief describes the Bill as follows:

The proposed reform on the law of arbitration in Hong Kong is to create a unitary regime of arbitration on the basis of the UNCITRAL Model Law on International Commercial Arbitration [...] adopted by the United Nations Commission on International Trade Law [...] for all types of arbitration, thereby abolishing the distinction between domestic and international arbitrations under the current Ordinance.

The purpose of the Bill is to implement the proposed reform which will make the law of arbitration more user friendly to arbitration users both in and outside Hong Kong. It will enable the Hong Kong business community and arbitration practitioners to operate an arbitration regime which accords with widely accepted international arbitration practices and development.

Singapore

[1.60] Singapore is also a hospitable jurisdiction for international commercial arbitration. Its judiciary takes a highly pro-arbitration stance. This is borne out by the recent case of *Tjong Very Sumito v Antig Investments Pte Ltd*,²⁹ in which the Singapore Court of Appeal set out and summed up the judicial policy as regards arbitration in Singapore:

[28] ... An unequivocal judicial policy of facilitating and promoting arbitration has firmly taken root in Singapore. It is now openly acknowledged that arbitration, and other forms of alternative dispute resolution such as mediation, help to effectively unclog the arteries of judicial administration as well as offer parties realistic choices on how they want to resolve their disputes at a pace they are comfortable with. More fundamentally, the need to respect party autonomy (manifested by their contractual bargain) in deciding both the method of dispute resolution (and the procedural rules to be applied) as well as the substantive law to govern the contract, has been accepted as the cornerstone underlying judicial non-intervention in arbitration. In essence, a court ought to give effect to the parties' contractual choice as to the manner of dispute resolution unless it offends the law.

[29] There are myriad reasons why parties may choose to resolve disputes by arbitration rather than litigation. The learned authors of Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, 4th Ed, 2004) offer two principal reasons: first, the opportunity to choose a "neutral" forum and a "neutral" tribunal (since parties to an international commercial contract often come from different countries); and second, international enforceability of arbitral awards under treaties such as the New York Convention. Under these treaties, an arbitral award, once made, is immediately enforceable both nationally and internationally in all treaty states. One would imagine that parties might be equally motivated to choose arbitration by other crucial considerations such as confidentiality, procedural flexibility and the choice of arbitrators with particular technical or legal expertise better suited to grasp the intricacies of the particular dispute or the choice of law.

29 *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] SGCA 41.

Another crucial factor that cannot be overlooked is the finality of the arbitral process. Arbitration is not viewed by commercial persons as simply the first step on a tiresome ladder of appeals. It is meant to be the first and only step. Courts should therefore be slow to find reasons to assume jurisdiction over a matter that the parties have agreed to refer to arbitration. It must also be remembered that the whole thrust of the IAA [International Arbitration Act] is geared towards minimising court involvement in matters that the parties have agreed to submit to arbitration. Concurrent arbitration and court proceedings are to be avoided unless it is for the purpose of lending curial assistance to the arbitral process. Jurisdictional challenges must be dealt with promptly and firmly. If the courts are seen to be ready to entertain frivolous jurisdictional challenges or exert a supervisory role over arbitration proceedings, this might encourage parties to stall arbitration proceedings. This would, in turn, slow down arbitrations and increase costs all round. In short, the role of the court is now to support, and not to displace, the arbitral process.

The main legislation in Singapore is the *International Arbitration Act* (Sing). Amendments to this legislation, proposed by the Singapore Ministry of Law, have recently been passed by the Singapore Parliament. The amendments which came into effect on 1 January 2010 are similar to those amendments to the Australian legislation and cover the 2006 amendments to the UNCITRAL Model Law. There are three main areas of change.

The first area of change is the introduction of a new s 12A into the *International Arbitration Act* (Sing), which will confer powers on the Singapore courts to make interim orders in aid of international arbitrations, including freezing parties' assets. The proposed extension of such powers will not include the power to make orders for discovery, interrogatories and security for costs, as these are procedural matters within the arbitral tribunal's purview. Nonetheless, bearing in mind that the purpose of such powers is to aid and not interfere in arbitral proceedings, it is provided that the discretion should only be exercised by the court: where it is appropriate to do so in the circumstances and, more importantly, only if the foreign arbitral tribunal has no power or is at present unable to act effectively; or where the foreign tribunal has power to make an interim order but that order cannot otherwise be enforced in Singapore, apart from an application made under the Chapter 143A. As a further safeguard, the application for the interim order must be urgent, failing which the court may only grant an interim order if the following conditions are satisfied:

- the applicant has given notice of the application to the other parties of the arbitration proceedings and the arbitral tribunal; and
- the application has been made with the permission of the arbitral tribunal, or there is an agreement in writing with all other parties of the arbitration proceedings.

The second main area of change to the *International Arbitration Act* (Sing) is the broadening and updating of the definition of "arbitration agreement" in s 2 to include "an agreement made by electronic communications if the information contained therein is accessible so as to be useable for subsequent reference", thereby recognising modern forms of communication. The amendment will also introduce new terms such as "data messages" and "electronic communications", in line with the definitions found in option I of Art 7 of the 2006 amendments to the Model Law.

The third area of legislative amendment seeks to remove procedural difficulties in authenticating Singapore arbitral awards for enforcement in foreign jurisdictions. Typically, a party seeking to enforce an arbitral award outside Singapore under the New York Convention 1958 is required to submit to the foreign court an authenticated original award or a certified true copy, and the original arbitration agreement or a certified true copy. A new s 19C to the *International Arbitration Act* (Sing) would empower the minister to appoint any person holding office in an arbitral institution or other organisation to authenticate the award or arbitration agreement, or to certify true copies of the award for the purposes of enforcing an award outside Singapore under the New York Convention 1958.

Malaysia

[1.65] International commercial arbitration is less established in Malaysia than it is in Australia, Hong Kong and Singapore. The *Arbitration Act 2005* (MY) came into force in March 2006. A review has since been proposed by the Bar Council in Malaysia, which is under consideration by the Attorney-General. There are five main areas of amendment proposed.

First, the proposed amendments seek to eliminate the proviso to s 10 of the *Arbitration Act 2005* (MY) dealing with the grant of a mandatory stay of proceedings in favour of arbitration. Currently, the proviso empowers the court to refuse a stay where there is no dispute between the parties with regard to the matters to be referred. The proposed amendment seeks to do away with the proviso, which is not in line with the UNCITRAL Model Law. In addition, the New York Convention 1958 requires contracting states to make it mandatory to refer parties to arbitration unless the arbitration agreement is null, void, inoperative or incapable of being performed.³⁰

Second, in line with the 2006 amendments to the Model Law, an amendment to s 11 of *Arbitration Act 2005* (MY), which deals with interim measures by the Malaysian High Court, has been proposed. The intention is to limit the court's power to grant interim measures to the following circumstances:

- where it is satisfied that the arbitral tribunal is not yet fully constituted or for some reason unable to exercise its own power to grant interim relief within the required timeline;
- that in acting, the High Court will not encroach on the powers of the arbitrator; or
- if such intervention is necessary to support the arbitral process or to render the arbitral award more effective.³¹

Third, the amendments include a proposal regarding the application of interlocutory orders to foreign arbitrations. Presently, ss 10 and 11 of the *Arbitration Act 2005* (MY), which deal with stay of proceedings and interim measures, apply only to arbitrations where the seat is in Malaysia. It has been

³⁰ See UNCITRAL Model Law, Art 8; the New York Convention 1958, Art 11(3).

³¹ This proposed amendment is intended to codify the principles laid down by Lord Mustill in the *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 to ensure that the power to grant interim relief given to the national court is used to support and not obstruct arbitration.

proposed that ss 10 and 11 ought to apply equally to foreign arbitrations where the seat is not in Malaysia. This will bring Malaysia in line with the Model Law and Malaysia's treaty obligations under the New York Convention 1958 and give the Malaysian courts jurisdiction to grant a stay of proceedings or interim relief to aid a foreign arbitration.

Fourth, the proposed amendments seek to prevent the use of technical objections taken at the eleventh hour giving rise to delay. Although s 7 of the *Arbitration Act 2005* (MY) seeks to address this problem by providing for the waiver of the right to object, an amendment has been proposed to introduce a deeming provision. The deeming provision would represent a finetuning of s 7, requiring a party to raise its objection at the earliest opportunity or be deemed to have waived its right to object if it knows or is deemed to know of any provision of the 2005 Act or the arbitration agreement which the party believes has not been complied with. The deeming provision is proposed to import an objective reasonable diligence standard. This proposed amendment is intended to give effect to the Model Law, which requires technical objections to be taken at the earliest opportunity.³²

Finally, there is a proposed amendment in relation to the recognition of arbitral awards by the courts in s 38 of the *Arbitration Act 2005* (MY). A drafting error has meant that only domestic awards and awards from foreign states may be enforced, not international arbitrations made in Malaysia. The proposed amendments allow for all awards, both where the seat of the arbitration is within Malaysia and otherwise, to be recognised as binding and being enforced under the *Arbitration Act 2005* (MY).

China

[1.70] China is not a Model Law country but is a signatory to the New York Convention 1958. The principal legislation in China relating to arbitration is the *Arbitration Law of the People's Republic of China 1994* (*Arbitration Law of the PRC 1994*) (CN). Unlike the other jurisdictions examined in this book, China is a civil law country. Precedent established by case law does not, therefore, have the same effect or influence as it does in countries with a common law tradition, such as Australia. Thus the law in China refers only to codified legislation and subordinate regulations. However, comprehensive judicial interpretations, namely opinions from the Supreme People's Court, provide rules relevant to various areas.³³ For instance, the *Opinions Concerning Several Issues in the Course of Application of the Civil Procedure Law of the People's Republic of China* (CPL Interpretation 1992) provides valuable guidance on commercial arbitration in China, even though it predates the *Arbitration Law of the PRC 1994* (CN). The other relevant statute is the *Contract Law of the People's Republic of China 1999* (CN).

³² See UNCITRAL Model Law, Art 4.

³³ Under the Chinese Constitution, the Supreme People's Court has the power to issue judicial interpretations. However, an unintended effect of these judicial interpretations is that they have assumed a de facto legislative power such that they are regarded as "law". Perhaps this is an adjunct of the common law process of development of law as interpreted in case law that is being made to an otherwise civil law structure.

RESEARCHING INTERNATIONAL COMMERCIAL ARBITRATION

[1.75] A large majority of documents relating to international commercial arbitration are available online, which is fortunate for practitioners researching in the area. However, some online materials are accessible only by paid subscription. Links to useful research materials is provided in Annexure 1, which is indicative rather than exhaustive. It is also important to understand the differences between various instruments relating to international commercial arbitration:

- Treaties and Conventions are signed and ratified by state parties. Typically, a state's executive arm of government signs treaties, and parliament then enacts legislation giving force to them.
- Model laws are developed as a sample piece of internationally acceptable legislation, for states to "cut and paste" into domestic legislation. The more states that do this, the greater international conformity on laws in relation to international trade and commerce.
- Rules, in the international commercial arbitration context, are created by bodies such as UNCITRAL and arbitral institutions establishing procedures for the conduct of arbitration. They have force by way of incorporation into a contract or other agreement between commercial parties.
- Guidelines, notes and recommendations serve an explanatory purpose, assisting users to understand an instrument and recommending particular actions.

Therefore, each of these sources of law must be read in conjunction with domestic legislation and cases.

Further reading

D Roebuck, "A Short History of Arbitration", in N Kaplan, J Spruce and M Moser, *Hong Kong and China Arbitration—Cases and Materials* (Hong Kong: Butterworths, 1994).

A Connerty, "The Role of ADR in the Resolution of International Disputes" (1996) 12 *Arbitration International* 47.

R C Brown, *Understanding Chinese Courts and Legal Process: Law with Chinese Characteristics* (The Hague: Kluwer Law International, 1997).

W W Park and A Yanos, "Treaty Obligations and National Law: Emerging Conflicts in International Arbitration" (2006) 58 *Hastings Law Journal* 251.

G Johnston and S Kou, "The Latest Incremental Reform of Chinese Arbitration Law" (2007) 1 *Asian Dispute Review* 14.

C C Dykes, *The Wide World of Laws: A Quick-Start Guide to International Legal Research*, available online at http://www.aallnet.org/products/pub_sp0812/pub_sp0812_Wide.pdf.

The Guide to International Legal Research, George Washington University International Law Review (LexisNexis, 2007).

USEFUL WEB LINKS FOR RESEARCHING INTERNATIONAL COMMERCIAL ARBITRATION

Treaties, Conventions and related documents

<p><i>Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)</i> (New York Convention 1958)</p> <p>Preparatory materials (<i>Travaux préparatoires</i>) to the New York Convention 1958</p> <p>Recommendation regarding the interpretation of Arts II(2) and VII(1) of the New York Convention 1958 (2006)</p> <p>Preparatory materials (<i>travaux préparatoires</i>) to the Recommendation regarding the interpretation of Arts II(2) and VII(1) of the New York Convention 1958</p>	<p>http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/1958_NYC-CTC-e.pdf</p> <p>http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_travaux.html</p> <p>http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/A2E.pdf</p> <p>http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2006recommendation_travaux.html</p>
<p><i>IBA Rules on the Taking of Evidence in International Commercial Arbitration</i> (1999)</p> <p><i>IBA Guidelines on the Conflict of Interest in International Arbitration</i> (2004)</p>	<p>http://www.int-bar.org/images/downloads/IBA%20rules%20on%20the%20taking%20of%20Evidence.pdf</p> <p>http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx</p>
<p><i>International Convention for the Settlement of Investment Disputes (ICSID Convention) (1966)</i></p> <p>International Centre for Settlement of Investment Disputes (ICSID) <i>Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings</i></p> <p>ICSID <i>Rules of Procedure for Arbitration Proceedings</i></p> <p>ICSID database of bilateral investment treaties</p>	<p>http://www.icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partA.htm (current version as amended 2006)</p> <p>http://www.icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partD.htm (current version as amended 2006)</p> <p>http://www.icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partF.htm (current version as amended 2006)</p> <p>http://www.icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewBilateral&reqFrom=Main</p>
<p><i>United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules (1976)</i></p>	<p>http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf (original text) and http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf (revised, 2010)</p>
<p><i>United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules (1976)</i></p> <p>Preparatory materials (<i>travaux préparatoires</i>) to the UNCITRAL Arbitration Rules</p> <p>Recommendations to assist arbitral institutions and other interested bodies with regard to arbitrations under the UNCITRAL Arbitration Rules (UNCITRAL Arbitral Recommendations) (1982)</p>	<p>http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf (original text) and http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf (revised, 2010)</p> <p>http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules_travaux.html</p> <p>http://www.uncitral.org/pdf/english/texts/arbitration/arb-recommendation/arb-recommendation-e.pdf</p>

International Commercial Arbitration

Preparatory materials (<i>travaux préparatoires</i>) to the UNCITRAL Arbitral Recommendations	http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1982Recommendations_travaux.html
UNCITRAL <i>Model Law on International Commercial Arbitration (the Model Law) (1985)</i>	http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf (original text) and http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (with 2006 amendments)
Preparatory materials (<i>travaux préparatoires</i>) to the Model Law (both to the original 1985 text and the 2006 amendments)	http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_travaux.html
UNCITRAL <i>Notes on Organizing Arbitral Proceedings</i> (1996)	http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf
Preparatory materials (<i>travaux préparatoires</i>) to the UNCITRAL <i>Notes on Organizing Arbitral Proceedings</i>	http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1996Notes_travaux.html
International Institute for the Unification of Private Law (UNIDROIT) <i>Principles of International Commercial Contracts</i> (1994, updated in 2004)	http://www.unidroit.org/english/principles/contracts/principles2004/blackletter2004-english.pdf (rules only) or http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf (integral version)
Preparatory work on the UNIDROIT <i>Principles of International Commercial Contracts</i>	http://www.unidroit.org/english/principles/contracts/principles2004/study50-archive1998-2004.htm
World Trade Organization Analytical Index, <i>Guide to WTO Law and Practice</i> , prepared and regularly updated by the WTO Secretariat, summarising cases relating to each Article in each of the WTO Agreements	http://www.wto.org/english/res_e/booksp_e/analytic_index_e/analytic_index_e.htm
World Trade Organization, Uruguay Round Agreement, <i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i> (1995) (Dispute Settlement Understanding)	http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm
World Trade Organization dispute-related documents, searchable by subject matter, year, parties involved, and document number	http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#disputes

Arbitral institutions and their rules

Australian Centre for International Commercial Arbitration (ACICA)	http://www.acica.org.au/
ACICA Arbitration Rules	http://www.acica.org.au/acica-services/acica-arbitration-rules
China International Economic and Trade Arbitration Centre (CIETAC). For CIETAC Arbitration Rules, click on "Rules"	http://www.cietac.org/index.cms
Hong Kong International Arbitration Centre (HKIAC)	http://www.hkiac.org/content.php
HKIAC Administered Arbitration Rules	http://www.hkiac.org/show_content.php?article_id=375
International Chamber of Commerce (ICC)	http://www.iccwbo.org/
ICC International Court of Arbitration	http://www.iccwbo.org/court/arbitration/

ICC Arbitration Rules	http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf
London Court of International Arbitration (LCIA) LCIA Arbitration Rules	http://www.lcia.org/ http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx
Singapore International Arbitration Centre (SIAC) SIAC Arbitration Rules	http://www.siac.org.sg/cms/ http://www.siac.org.sg/cms/images/stories/documents/rules/SIAC_Rules_2010-revised_200710.pdf

Arbitral awards and case law

Awards rendered by arbitral tribunals in ICSID proceedings are available at	http://www.icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=Main&actionVal=ViewAllCases
<i>Case Law on UNCITRAL Texts</i> (CLOUT) contains abstracts from court decisions and arbitral awards relating to the Model Law, the New York Convention 1958, etc. CLOUT abstracts are available at	http://www.uncitral.org/uncitral/en/case_law/abstracts.html where they are provided in document and year order. However, a better tool to use is the search facility at http://www.uncitral.org/clout/showSearchDocument.do
Cases and arbitral decisions relating to the UNIDROIT <i>Principles of International Commercial Contracts</i> are available from the UNILEX database	http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=14311
Westlaw International has a subscription package on international commercial arbitration law which includes arbitration awards databases from the ICC, WTO, ICSID, CIETAC, and others.	
<i>Yearbook Commercial Arbitration</i> is a subscription-only resource by Kluwer International which includes excerpts from arbitration awards from ICSID, the ICC and other arbitral bodies, and some court decisions on arbitration from around the world	

Domestic laws

Australia	<i>International Arbitration Act 1974</i> (Cth)	http://www.austlii.edu.au/au/legis/cth/consol_act/iaa1974276/
China	<i>Arbitration Law of the People's Republic of China 1994</i> (<i>Arbitration law of the PRC 1994</i>) (CN)	http://www.lehmanlaw.com/resource-centre/laws-and-regulations/general/arbitration-law-of-peoples-republic-of-china-1994.html
	<i>Contract Law of the People's Republic of China 1999</i> (<i>Contract Law of the PRC 1999</i>) (CN)	http://www.novexcn.com/contract_law_99.html
Hong Kong	<i>Arbitration Ordinance</i> See also the new <i>Arbitration Bill 2009</i> (HK)	http://www.hkllii.org/hk/legis/en/ord/341/ http://www.doj.gov.hk/eng/public/pdf/2007/arbitration.pdf (see Annex A which contains the text of the bill)

Malaysia	<i>Arbitration Act 2005</i> (MY)	http://www.eurasialegalnetwork.com/library/pdfs/nl_ArbitrationAct2005.pdf
Singapore	<i>International Arbitration Act</i> (Sing)	http://www.statutes.agc.gov.sg/non_version/cgi-bin/cgi_retrieve.pl?actno=REVED-143A&doctitle=INTERNATIONAL%20ARBITRATION%20ACT%0a&date=latest&method=part

Journals

American Review of International Arbitration (Juris Publishing, Huntington NY, USA)

Arbitration (Chartered Institute of Arbitrators (CIArb), London)

Arbitration International (Kluwer Law International, The Hague, Netherlands)

Arbitration Journal (American Arbitration Association, New York, USA)

ICC International Court of Arbitration Bulletin (subscription required) is available in the ICC Dispute Resolution Library: <http://www.iccdri.com>

ICSID Review: Foreign Investment Law Journal (ICSID, John Hopkins University Press, Baltimore MD, USA)

International Arbitration Law Review (Sweet & Maxwell, London, UK)

Journal of International Arbitration (Kluwer Law International, The Hague, Netherlands)

The Arbitrator (Society of Maritime Arbitrators, Inc, New York, USA)

The Arbitrator & Mediator (Institute of Arbitrators & Mediators Australia)

Vindobona Journal of International Commercial Law (Moot Alumni Association, Austria)

World Arbitration and Mediation Review (Juris Publishing, Huntington NY, USA)

World Arbitration Reporter (Juris Publishing, Huntington NY, USA)

Other sources

American Society for International Law (ASIL) *ASIL Guide to Electronic Resources for International Law* is a free resource with eleven principal subject areas, one of which is international commercial arbitration: <http://www.asil.org/arb1.cfm>

Electronic Information System for International Law (EISIL) is a free online research tool provided by ASIL which includes a section on international dispute settlement covering arbitration: http://www.eisil.org/index.php?sid=127465857&cat=790&t=sub_pages

Arbitration CD-ROM: Resources on International Commercial Arbitration (Kluwer Law International, Netherlands) contains Treaties, Conventions, legislation, rules, arbitral awards, cases and commentary on international commercial arbitration

ArbitrationLaw Online is a subscription-based database provided by Juris Publishing (USA) with Treaties, Conventions, legislation, arbitral and judicial decisions, commentary and journals related to international commercial arbitration

International Comparative Legal Guide series, at http://www.iclg.co.uk/index.php?area=4&show_chapter=3791&ifocus=1&kh_publications_id=152

M S Jacobs, *International Commercial Arbitration in Australia: Law and Practice* (Sydney: Law Book Company, 1992)

H Smit and V Pechota (eds), *Smit's Guides to International Arbitration* (Huntington, NY: Juris Publishing) has nine volumes containing arbitration-related Treaties, laws, rules, list of arbitrators, and so on.

