Yarik Kryvoi, 'Key Concepts of International Arbitration' in Anna Petrig and Yarik Kryvoi (eds),
The Anatomy of International Arbitration (Routledge, draft chapter, forthcoming, 2025).

Chapter 2
Key Concepts of International Arbitration

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1. Background and History

Arbitration is a dispute resolution process in which parties agree to submit a disagreement to a non-governmental decision-maker, rather than a domestic or international court, who provides a binding decision based on law. International arbitration has evolved over centuries into a widely used mechanism for resolving conflicts. It has become a crucial tool in addressing disputes not only between private parties but also among sovereign States and state-created entities such as intergovernmental organisations. The 20th century has witnessed the emergence of specialized arbitration mechanisms for many types of disputes, for example, investor-state, sports, maritime, commodities and business and human rights disputes. Despite shared features, these arbitration mechanisms differ. Key concepts of international arbitration,[1] which are introduced in this chapter, pave the way for more in-depth discussions in following chapters.

1.1. Evolution

Arbitration has a long history. When in the Medieval and Renaissance periods, traders engaged in cross-border transactions facing unfamiliar legal systems abroad, they turned to local trade associations for informal dispute resolution, bypassing state courts.[2] For example, between the 13th and 17th centuries, the Hanseatic League, a confederation of merchant guilds in Northern Europe, played a key role in trade facilitation. The league established an arbitration system to resolve disputes among its members.[3]

Subsequently, bilateral and multilateral treaties began to include arbitration clauses to address disputes between States. Notable examples include the Jay Treaty between the United States and Great Britain in 1794, which established a commission for resolving claims.[4] The first

[1] According to the comparative grid presented in Chapter 1 of this book, these are arbitration agreement and consent, jurisdiction, key procedural elements, adjudicators, applicable law, awards and enforcement and relationship between arbitration tribunals and domestic/international courts.

[2] Martin Hunter, 'Arbitration Procedure in England: Past, Present and Future' (1985) 1(1) Arbitration International 84.

[3] Margrit Schulte Beerbühl, 'Networks of the Hanseatic League' (*European History Online*, 13 January 2012) http://ieg-ego.eu/en/threads/european-networks/economic-networks/margrit-schulte-beerbuehl-networks-of-the-hanseatic-league accessed 6 January 2024.

[4] Treaty of Amity, Commerce, and Navigation, between His Britannick Majesty and the United States of America, 19 November 1794 (entered into force 29 February 1796).

significant institutionalization of international arbitration occurred with the creation of the Permanent Court of Arbitration (PCA) in 1899 in the Hague, Netherlands.[5]

Arbitration under general international law, predates arbitration conducted by specialised institutions. States used mixed claims commissions, particularly in the early to mid-20th century, to arbitrate disputes arising after armed conflicts. These commissions allowed private individuals to directly pursue claims against states, expanding the scope of arbitration beyond interstate disputes.[6] In many instances, these commissions also permitted private individuals to pursue direct claims against States.[7]

In 1899, the Permanent Court of Arbitration (PCA) emerged to facilitate arbitration and other forms of dispute resolution between states.[8] Subsequently, the PCA has developed into a modern arbitral institution resolving disputes not only between states but also with involvement of private parties.

After World War I, the newly established League of Nations promoted the use of arbitration and established the Permanent Court of International Justice (PCIJ) in 1920.[9] The PCIJ heard cases submitted by states and advisory opinions, contributing to the development of international law,[10] subsequently succeeded by the International Court of Justice (ICJ).[11] The PCIJ and ICJ assumed their positions as major international courts in the early to mid-twentieth century, but arbitration remained relevant.

1.2. Development of International Arbitration in the Modern Context

The use of arbitration as a dispute resolution in the field of international commercial transactions has grown significantly following the adoption of the New York Convention[12] in 1958, now ratified by over 170 States. This convention facilitates the enforcement of arbitral awards in different countries, contributing to the widespread acceptance of arbitration as a preferred method of dispute resolution. The United Nations Commission on International Trade Law (UNCITRAL) developed the Model Law on International Commercial Arbitration in

[5] Permanent Court of Arbitration, 'History' <https://pca-cpa.org/en/about/introduction/history> accessed 5 January 2024.

[6] Rudolf Dolzer, 'Mixed Claims Commissions' in Anne Peters and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Public International Law* (2024), para. 7.

[7] Ibid. Also, Yarik Kryvoi, 'The Path of Investor-State Disputes: From Compensation Commissions to Arbitral Institutions' (2018) 33(3) ICSID Review - Foreign Investment Law Journal 743–765.

[8] Permanent Court of Arbitration, 'About Us' <https://pca-cpa.org/en/about> accessed 5 January 2024.

[9] The Permanent Court of International Justice (PCIJ) served as the predecessor to the International Court of Justice (ICJ) and was established through the Statute of the Permanent Court of International Justice. Statute of the Permanent Court of International Justice (16 December 1920, entered into force 20 August 1921) 6 LNTS 389 (Statute of the PCIJ). PCIJ operated as a court for judicial settlement rather than as an arbitration institution.

[10] The PCIJ dealt with 29 contentious cases between States and issued several judgments and advisory opinions between 1922-1940.

[11] Statute of the PCIJ (n 9).

[12] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) 330 U.N.T.S. 38 (New York Convention 1958).

1985,[13] which provided a framework for domestic legislation on arbitration, which over 123 jurisdictions and 90 states have adopted.[14]

Businesses around the world use private arbitral institutions in various countries such as the International Arbitration Court of the International Chamber of Commerce,[15] the London Court of International Arbitration,[16] and the Singapore International Arbitration Centre.[17] As the number of disputes resolved by arbitration grows, so does the number and geography of international arbitral institutions. The establishment of specialised arbitral institutions including the International Centre for Settlement of Investment Disputes[18] in 1966, and the Court of Arbitration for Sport[19] in 1984 offered new possibilities for resolving international disputes through arbitration. The users of arbitration include not only businesses but also states, individuals, intergovernmental organisations and other organisations.

2. Jurisdiction of Arbitral Tribunals

2.1. Introduction

Consent serves as the basis of any arbitration – an arbitral tribunal may only settle issues that the parties have agreed to resolve through arbitration.[20] The parties give a tribunal the authority to resolve disputes between them, and the arbitral tribunal must take care to abide within the boundaries of that authority, also known as *jurisdiction*.

National legislation and international arbitration treaties highlight the importance of an arbitral tribunal not exceeding its jurisdiction. For example, the UNCITRAL Model Law provides that an arbitral award can be set aside in domestic courts if it deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on

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[13] UNCITRAL Model Law on International Commercial Arbitration (1985) UN Doc A/40/17, Annex I (UNCITRAL Model Law 1985).

[14] UNCITRAL, 'Ratification Status of UNCITRAL Model Law on International Commercial Arbitration 2006' <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status> accessed 6 January 2024.

[15] The International Arbitration Court of the ICC, founded in 1919 and based in Paris, is a leading institution in the field of international commercial arbitration. International Arbitration Court of the International Chamber of Commerce (ICC), 'Our mission, history and values' <https://iccwbo.org/about-icc-2/our-mission-history-and-values/#:~:text=ICC%20was%20founded%20in%201919,spirit%20of%20hope%20and%20cooperation> accessed 11 January 2024.

[16] The LCIA, established in 1892 and headquartered in London, is a leading international institution for commercial dispute resolution. London Court of International Arbitration (LCIA), 'History' <https://www.lcia.org/LCIA/history.aspx> accessed 11 January 2024.

[17] SIAC, founded in 1991 and based in Singapore, is a prominent arbitration institution for commercial dispute resolution in Asia. Singapore International Arbitration Centre (SIAC), 'About us' <https://siac.org.sg/about-us> accessed 12 January 2024.

[18] ICSID, established in 1966 and headquartered in Washington, D.C., is the world's leading institution devoted to investor-state dispute settlement. International Centre for Settlement of Investment Disputes (ICSID), 'About ICISD' <https://icsid.worldbank.org/about> accessed 10 January 2024.

[19] CAS, founded in 1984 and based in Lausanne, Switzerland, is an international quasi-judicial body that resolves disputes related to sports through arbitration. Court of Arbitration for Sport (CAS), 'History of the CAS' <www.tas-cas.org/en/index.html> accessed 14 January 2024.

[20] See, e.g., UNCITRAL Model Law 1985 (n 13), Art. 16; LCIA Arbitration Rules 2020 (LCIA Rules), Art. 23(1); UNCITRAL Arbitration Rules 2021 (UNCITRAL Rules), Art. 23.

matters beyond the scope of the submission to arbitration.[21] National laws of most jurisdictions follow this approach.[22] The New York Convention provides that recognition and enforcement of an award may be refused by domestic courts if the award addresses issues outside the scope of the submission to arbitration.[23] As discussed in more detail in section 9, domestic courts typically do not play a significant role when it comes to defining the boundaries of jurisdiction in state-state disputes governed by public international law.

2.2. Types of Jurisdiction

The jurisdiction of arbitral tribunals typically covers the following aspects: subject matter jurisdiction, personal jurisdiction and temporal jurisdiction.

Subject matter jurisdiction refers to the authority of the arbitral tribunal to hear and decide a particular type of dispute determined by the arbitration agreement between the parties (e.g., 'all disputes arising' out of a particular contract or a treaty).[24] For example, for disputes concerning the law of the sea, subject matter jurisdiction can pose a crucial challenge. In these instances, the arbitral tribunal must possess the authority to address matters concerning maritime boundaries, seabed resource exploration, and other UNCLOS-related issues.[25]

The tribunal's *personal jurisdiction* defines whom jurisdiction extends to, typically these are parties named in the arbitration agreement. In some cases, parties should meet particular characteristics (e.g., in investor-state arbitration the personal jurisdiction extends to any legal dispute arising from an investment between a contracting State that has agreed to submit investment disputes to arbitration under the terms of the treaty and a national of another contracting State).[26] Generally, the tribunal has authority to render binding awards only in relation to those who have agreed to arbitrate.

Temporal jurisdiction concerns the time frame during which the arbitral tribunal has authority to adjudicate a dispute. The agreement between the parties may specify the relevant time periods or events. For example, in commercial arbitration arbitral tribunals typically have jurisdiction over disputes that arise during the course of the contractual relationship or within a specified period after the termination of the contract. In investor-state arbitration, periods relevant to the effect of treaties may become relevant. For example, tribunals might hesitate to address pre-agreement and post termination breaches unless expressly outlined in the treaty.[27]

2.3. Challenges to Jurisdiction

Challenges to jurisdiction can arise when one party contests the authority of the arbitral tribunal to hear a particular dispute. For example, a construction contract might stipulate that any disputes regarding extra work must first be reviewed and determined by an engineer before

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[21] UNCITRAL Model Law 1985 (n 13), Art. 34(2).

[22] In France, for example, an award may be contested if the arbitral tribunal either erroneously affirmed or rejected jurisdiction. French Code of Civil Procedure (French CCP), Art. 1520.1.

[24] Ibid.

[25] United Nations Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 397 (UNCLOS).

[26] ICSID Convention (n 24), Art. 25.

[27] See, e.g., *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award (6 November 2008), paras 125 and 129; *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v Kingdom of Belgium*, ICSID Case No ARB/12/29, Award (30 April 2015), para 193, 200.

proceeding to arbitration. If a party brings claims without seeking the engineer's decision, the opposing party may contend that this failure results in arbitration claims are inadmissible or outside of the jurisdiction of the arbitral tribunal.[28] While admissibility deals with the suitability of a claim for arbitration at a specific time, such as being time-barred or requiring certain preconditions to be fulfilled, jurisdiction focuses on the tribunal's authority to make decisions on matters within the agreed scope of the arbitration clause.[29]

Challenges to jurisdiction may be partial or total. A partial challenge typically arises from the interpretation of arbitration agreements and may hinge on whether the matter referred to arbitration aligns with the scope the arbitration agreement. Conversely, a total challenge to jurisdiction poses a more fundamental inquiry into the existence of a valid arbitration agreement. Grounds for a total challenge often involve core elements of arbitration clauses, such as disputes regarding consent, the form of the arbitration agreement, arbitrability under the applicable law, time-barred claims, or unmet preconditions to arbitration.[30]

Arbitral rules and national arbitration laws often provide procedures for resolving challenges to jurisdiction. Except in inter-state arbitration, national courts play an important role in settling jurisdictional matters, typically allowing intervention only after the arbitral tribunal has made its jurisdictional decision.[31] For example, in jurisdictions like England, national courts also have the power to address questions to determine the substantive jurisdiction of the tribunal at the preliminary stage.[32] Apart from challenging the arbitral award directly in the jurisdiction where the arbitration took place, a party retains the option to subsequently contest the award during the enforcement phase.[33] This highlights the importance for a party to examine the relevant national laws applicable at the seat of arbitration when drafting arbitration agreements.

It must be noted, in inter-state arbitration domestic courts usually do not have any involvement in jurisdictional challenges and tribunals have a final say on jurisdictional issues.[34]

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[28] Similarly, a challenge can also be based on admissibility e.g., *Burlington Resources, Inc. v Ecuador*, ICSID Case No. ARB 08/5, Jurisdictional Decision, 2 June 2010.

[29] See, generally, Jan Paulsson, 'Jurisdiction and admissibility' (2010) Global Reflections on International Law, Commerce and Dispute Resolution 601.

[30] These statutes highlight grounds for total challenge such as invalidity due to incapacity or lack of consent, lack of jurisdiction by the tribunal over the dispute or parties, procedural errors like improper notice, and substantive grounds i.e., UNCITRAL Model Law 1985 (n 13), Art. 34(2)(a); Swedish Arbitration Act 2019 (Swedish AA), Sec. 34; English Arbitration Act 1996 (English AA), Sec. 30(1); Indian Arbitration Act 1996 (Indian AA), Sec. 34(2).

[31] Examples of provisions on intervention by national courts include Swedish AA (n 30), Sec. 2(2); French CCP (n 22), Art. 1448.1; International Arbitration Act 1994 (Singapore AA), Sec. 10(3).

[32] English AA (n 30), Sec. 32(1).

[33] Various countries have distinct perspectives on determining the validity of an arbitration agreement under Article V(1)(a) of the New York Convention 1958. *The Kabab-Ji SAL (Lebanon) v. Kout Food Group (Kuwait)* [2021] UKSC 48 case highlights notable differences in approaches. The key issue was whether the parties had made an express choice of English law, as opposed to an implied choice of French law, to govern their arbitration agreement. One of the parties had initiated proceedings in France, the jurisdiction where the arbitration was seated, seeking the annulment of the award. The Paris Court of Appeal dismissed this challenge and upheld the award's validity under French law. Later, the UK Supreme Court held that the arbitration agreement was governed by English law, rather than French law, thereby holding KFG not a party to the arbitration clauses in the FDA.

[34] Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between two states (PCA Optional Rules), Art. 21.

3. Vital Statistics, Caseload Trends and Geography of Arbitration

3.1. Statistics on Decided Cases

Every year, arbitration helps to resolve thousands of disputes around the world. In 2022, over 17,000 disputes were administered under some of the most-known arbitration rules, as the table below demonstrates. In addition, the workload of some lesser-known institutions continues to grow. The chart below gives an idea about the number of disputes resolved annually by some arbitral institutions.

Table 1. Number of Cases Administered by Arbitral Institutions (2022)

	Rules	Cases administered
1.	American Arbitration Association (AAA)	10,273[35]
2.	China International Economic and Trade Arbitration Commission (CIETAC)	4,086[36]
3.	London Maritime Arbitrators Association (LMAA)	1,807[37]
4.	International Chamber of Commerce (ICC)	710[38]
5.	Singapore International Arbitration Centre (SIAC)	357[39]
6.	International Centre for Settlement of Investment Disputes (ICSID)	346[40]
7	Hong Kong International Arbitration Centre	344[41]
8.	The London Court of International Arbitration (LCIA)	327[42]
9.	Permanent Court of Arbitration (PCA)	204[43]
10.	Stockholm Chamber of Commerce (SCC)	143[44]

[35] AAA, '2022 AAA-ICDR B2B Case Statistics' (*AAA*, 2023) <www.adr.org/sites/default/files/document_repository/AAA_2022_Annual_Report_and_Financial_Statements.pdf> accessed 11 January 2024.

[36] CIETAC, 'CIETAC 2022 Work Report and 2023 Work Plan' (*CIETAC*, 2023) <http://www.cietac.org/index.php?m=Article&a=show&id=18848&l=en> accessed 11 January 2024.

[37]LMAA, 'Statistics of Appointments and Awards' (*LMAA*, 2023) <https://lmaa.london/statistics-of-appointments-awards> accessed 12 January 2024.

[38] James Clanchy, 'Arbitration statistics 2022: ad hoc strengthens as institutions recede' (*Lexis Nexus*, 1 November 2023) <www.lexisnexis.co.uk/blog/research-legal-analysis/arbitration-statistics-2022-ad-hoc-strengthens-as-institutions-recede> accessed 13 January 2024.

[39] During the year 2022, SIAC saw the submission of 357 new cases. Out of these, SIAC administered 336 cases (94%), while parties handled the remaining 21 cases (6%) through ad hoc appointments. Out of these, SIAC managed the administration of 336 cases (94%), while the remaining 21 cases (6%) were handled through ad hoc appointments. SIAC, 'Annual Report 2022' (*SIAC*, 2023) <https://siac.org.sg/wp-content/uploads/2023/04/SIAC_AR2022_Final-For-Upload.pdf> accessed 12 January 2024.

[40] In the fiscal year 2022, ICSID recorded 50 newly registered cases, with the predominant majority involving arbitrations initiated under the ICSID Convention (48 cases), and two cases invoking the Additional Facility Rules. ICSID, 'Annual Report 2022' (*ICSID*, 2023) <http://icsid.worldbank.org/sites/default/files/publications/ICSID_AR.EN.pdf> accessed 12 January 2024.

[41] A total of 515 cases were submitted to HKIAC in 2022. Of those cases, 344 were arbitrations, 10 were mediations and 161 were domain name disputes. HKIAC, '2022 Statistics' (*HKIAC*, 2023) <www.hkiac.org/about-us/statistics> accessed 12 January 2024.

[42] In 2022, the LCIA saw 293 cases referred for LCIA Arbitration, constituting 88% of the total referrals. Among these LCIA Arbitrations were two cases conducted in accordance with the LCIA-MIAC Rules. LCIA, 'Annual Casework Report 2022' (*LCIA*, 2023) <www.lcia.org/lcia/reports.aspx> accessed 12 January 2024.

[43] PCA, '122nd Annual Report' (*PCA*, 2023) <https://docs.pca-cpa.org/2023/07/341817ff-pca-annual-report-2022.pdf> accessed 12 January 2024.

[44] During 2022, the SCC recorded 143 fresh cases, with 47% categorized as international disputes and 53% as Swedish disputes. SCC, 'SCC statistics' (*SCC*, 2023) <https://sccarbitrationinstitute.se/en/about-scc/scc-statistics#:~:text=The%20SCC%20appointed%2050%20arbitrators,and%20the%20already%20appointed%20arbitrators> accessed 12 January 2024.

Another type of arbitration includes inter-state cases, which, while rare, often relate to significant conflicts carrying diplomatic and political weight. For example, the South China Sea Arbitration involves the Philippines and China, addressing issues like historic rights, maritime entitlement origins, and the status of specific sea features. This dispute holds substantial geopolitical significance due to the region's strategic importance. In 2022, the PCA facilitated registry services in 204 cases, including four inter-State arbitrations.[45]

3.2. Relevant Economic Sectors

Statistical insights from leading arbitral institutions shed light on the number of disputes in various economic sectors. We can categorize the predominant caseload into the following key sectors:

Commodities: Commodity disputes encompass conflicts arising from international commodity transactions, such as grain, oil, sugar or metals. These conflicts involve a broad spectrum of issues, including breach of contract, non-performance, non-payment, and other legal matters that may emerge throughout a commodity transaction. [46]

Transport: The transport sector has increasingly become a focal point in international arbitration, particularly in addressing disputes related to trade. This encompasses a broad spectrum of issues, including the transportation of commodities and agricultural products.[47] Disputes in this sector encompass conflicts concerning charter parties within shipping contracts, disputes over the quality or quantity of delivered goods, and tensions arising from delays or damages during commodity transportation.

Maritime and shipping: Arbitral rules such as SIAC[48] and LMAA[49] help to handle a notable proportion of maritime disputes, underscoring the significance of the shipping sector in international arbitration. Examples of disputes in this sector involve collisions or damage to vessels, disputes arising from charter parties or bills of lading, and conflicts over maritime insurance coverage.

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[45] PCA (n 43).

[46] Various institutions offer specialized commodities arbitration rules to efficiently address the unique challenges and intricacies of such disputes, including the International Cotton Association Arbitration Rules (ICA Rules), https://ica-ltd.org/wp-content/uploads/2024/01/ICA-BR-Complete-Jan-2024-Ver-2-Edited-23.1.2024.pdf, the Grain and Feed Trade Association Arbitration Rules 2022 (GAFTA Rules), https://www.gafta.com/write/MediaUploads/Contracts/2023/Sept2023/125_SEPT_2023.pdf and the Federation of Oils, Seeds and Fats Associations International Arbitration Rules 2018 (FOSFA Rules) <www.fosfa.org/product/rules-of-arbitration-and-appeal/> accessed 7 January 2024.

[47] For instance, the LCIA reported a notable increase in transport and commodities cases, constituting 37% of the caseload in 2022 compared to 14% in 2021, indicating a growing trend in arbitration related to transportation. LCIA (n 42).

[48] Maritime disputes constituted 13% of cases at SIAC in 2022, highlighting the presence of shipping-related matters in arbitration proceedings. SIAC (n 39).

[49] Disputes administered by the LMAA further highlighting the breadth of industries addressed through arbitration mechanisms. LMAA (n 37).

Energy and resources: Institutions like the LCIA[50] and ICSID[51] resolve a significant number of disputes in this sector. Disputes often deal with disagreements over the interpretation of production sharing agreements, resource allocation, and conflicts stemming from environmental regulations affecting energy projects.

Construction: The construction sector feature prominently across various arbitral institutions, including ICSID,[52] CIETAC, [53] and SIAC.[54] Disputes in this sector include claims for delays or disruptions to construction schedules, disputes over payment terms or contract specifications, defects in workmanship or materials.

Banking and finance: Institutions such as the LCIA[55] and CIETAC[56] observe a significant portion of their caseload originating from disputes in the banking and finance sector. This includes conflicts arising from loan agreements, interbank disagreements, and derivatives.[57]

Besides the sectors previously mentioned, international arbitration has seen disputes emerge across a spectrum of other industries (e.g., digital business, healthcare and pharmaceuticals, and professional services) in recent decades confirming the demand for arbitration as an effective dispute resolution mechanism.

3.3. Geography of International Arbitration

3.3.1. International Arbitration Treaties and the Model Law

Enforcement treaties and agreements integrating arbitration clauses for dispute resolution are vital elements of the global legal structure. They provide mechanisms for ensuring adherence to treaty commitments and settling disputes. These instruments are crucial for bolstering compliance with international norms, fostering collaboration, and preserving global harmony and order.

Specific treaties incorporate arbitration provisions as mechanisms for dispute resolution, affording parties a flexible and unbiased avenue for resolving conflicts outside customary judicial fora. Illustrative instances encompass the UNCLOS,[58] the Regional Comprehensive

[50] The LCIA observed a decrease in the proportion of energy and resources cases from 25% in 2021 to 11% in 2022, indicating a potential shift in the arbitration landscape within this sector. LCIA (n 42).

[51] ICSID proceedings in FY2022 continued to be dominated by extractives and energy sectors, comprising a significant portion of new cases. ICSID (n 40).

[52] ICSID observed disputes related to construction contributing to 12% of cases in 2022, indicating the significance of this sector in arbitration proceedings ibid.

[53] CIETAC managed disputes in construction projects, suggesting a considerable presence of construction-related arbitration cases. CIETAC (n 36).

[54] SIAC observed disputes related to construction contributing to 11% of cases in 2022, indicating the significance of this sector in arbitration proceedings. SIAC (n 39).

[55] The LCIA reported a notable shift in its caseload, with banking and finance cases decreasing from 26% in 2021 to 15% in 2022, reflecting fluctuations in this sector's arbitration activity. LCIA (n 42).

[56] CIETAC effectively managed disputes in equity investment and financial securities, indicating a notable presence of financial matters in arbitration. CIETAC (n 36).

[57] There is also a specialised P.R.I.M.E. Finance arbitration institution and rules. See P.R.I.M.E. Finance, https://primefinancedisputes.org.

[58] UNCLOS (n 25).

Economic Partnership Agreement, uniting 15 Asia-Pacific nations, incorporates arbitration provisions directed at resolving disputes arising within the framework of the agreement.[59] Additionally, Bilateral Investment Treaties (BITs) represent another avenue wherein arbitration is codified within international compacts.[60] Hundreds of instruments referring to the PCA have been concluded between states, intergovernmental organizations, and private parties.[61] They cover diverse subject matter including international development cooperation, environmental protection, investment protection, and functioning of international organizations.

In addition, there are important treaties dealing with enforcement of arbitration awards. For example, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly referred to as the New York Convention, subsequently superseded these agreements.[62] Besides the New York Convention, distinct conventions cover different regions of the world or establish a different enforcement regime. A leading example is the Panama Convention (Inter-American Convention on International Commercial Arbitration), established in 1975 among the United States and most South American nations.[63] In the context of investor-state arbitration, the ICSID Convention focuses on resolving investor-state disputes. An impressive array of 158 Contracting States have ratified it.[64]

3.3.2. Arbitration Seats, Governing Law and Language

The flexible nature of international arbitration means that under most rules, parties can determine the seat of arbitration and the governing law. One survey identified London, Singapore, Hong Kong, Paris, and Geneva as the top five seats for international arbitration.[65] London maintained its stronghold as the world's most favoured arbitration seat, hosting a significant majority of cases, a figure consistent with the previous years.

Parties often choose these cities as arbitration seats because of arbitration-friendly laws and practices and the presence of leading arbitral institutions. For instance, LCIA is headquartered in London, making it a popular choice for arbitration proceedings administered under these rules. Similarly, Singapore hosts SIAC, while Hong Kong is home to HKIAC, contributing to prominence of these cities as arbitration seats. Miami has recently emerged as a seat of arbitration, particularly for Latin American disputes.

However, the city of the headquarters does not always define the seat of arbitration. For example, in one year, according to LCIA statistics, beyond London, twelve other cities were selected as seats of LCIA arbitrations, and national laws of nineteen jurisdictions served as

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[59] Regional Comprehensive Economic Partnership Agreement (2022).

[60] Netherlands–Bahrain BIT (2007), Art. 9; China–Nigeria BIT (2001), Art. 9.

[61] Permanent Court of Arbitration, 'Instruments Referring to PCA' <https://pca-cpa.org/en/resources/instruments-referring-to-the-pca> accessed 20 April 2024.

[62] New York Convention 1958 (n 12).

[63] Inter-American Convention on International Commercial Arbitration, concluded at Panama City on 30 January 1975 14 I.LM. 336.

[64] ICSID Convention (n 24).

[65] Queen Mary and White & Case, '2021 International Arbitration Survey: Adapting Arbitration to a Changing World' <www.whitecase.com/publications/insight/2021-international-arbitration-survey> accessed 20 April 2024.

substantive governing law in LCIA arbitrations.[66] It is notable that English law continues to be the prevailing selection not only for LCIA arbitration[67] but across all ICC cases.[68]

Turning to SCC cases, a notable majority of disputes had their seat in Sweden. This jurisdiction also saw a prevalence of decisions rendered in Swedish, English, and Russian, with Swedish law emerging as the most commonly applied governing law.[69] SIAC's caseload reflects disputes governed by the laws of a significant number of jurisdictions, with Singaporean law taking the lead at over half of cases. English Law and Indian Law feature prominently in governing law preferences in SIAC cases.[70]

In inter-state arbitrations, the geography of disputes is different. For example, the PCA is based in the Hague, which attracts many disputes to this city. The International Tribunal for the Law of the Sea is seated in Hamburg. However, depending on the applicable rules, the parties can decide to have a seat of their arbitration in other cities.

Parties can also choose the language of arbitration. English remains the dominant language of international business. For example, for ICC arbitrations around 80% of proceedings and awards are in English, the same is true for many other institutions around the world.[71] In some areas, however, other languages also play a prominent role. For example, in ICSID proceedings sixty four percent of the cases were conducted in English and seven percent of all cases were conducted either only in Spanish or in Spanish and English simultaneously.[72] Other languages often used in international arbitration include French (in Europe and Francophone Africa), Portuguese (in Europe and Brazil) and Russian (in some former Soviet Union states).[73]

4. Arbitration Agreement and Consent

4.1. Consent: Formal Requirements

Obtaining consent for arbitration involves establishing that both parties agreed to arbitration. This agreement can take various forms, including arbitration clauses in the underlying

[66] LCIA (n 42).

[67] Ibid.

[68] Choice-of-law clauses were included in substantive contractual provisions in 95% of all cases registered in 2020. These covered the laws of 127 different nations, states, provinces and territories – the highest number to date. In 2020, the most frequently selected governing law for contracts was English law with 122 cases (13% of all cases registered), the laws of a US state (104 cases),17 followed by Swiss law (66 cases), French law (56 cases), and the laws of Brazil (42 cases). ICC, 'ICC Dispute Resolution 2020 Statistics' (*ICC*, 2021) <https://nyiac.org/wp-content/uploads/2021/09/ICC-Dispute-Resolution-2020-Statistics.pdf> accessed 12 January 2024.

[69] SCC (n 44).

[70] SIAC (n 39).

[71] ICC (n 68). Also see, ICSID (n 40) nearly 64 percent cases were conducted in English in ICSID Arbitrations and SCC (n 44) nearly 50 percent of the cases were conducted in English for SCC Arbitrations.

[72] ICSID (n 40).

[73] ICSID (n 40).

contract,[74] compromises,[75] or expression of consent[76] in domestic laws and treaties. The validity of such agreements depends on meeting both formal requirements, as dictated by applicable laws or agreed standards, and substantive criteria, ensuring clarity and mutual understanding of the arbitration process.

It must be noted that an arbitration clause within a contract is considered a separate agreement, independent of the other contractual terms. If the arbitral tribunal determines that the contract is null and void, it does not automatically render the arbitration clause invalid.[77] In some jurisdictions, it is known as the doctrine of separability.[78]

Previously, international conventions such as the New York Convention of 1958 and the UNCITRAL Model Law mandated that arbitration agreements were only 'in writing'.[79] A significant transformation in communication has occurred in recent years. Telegrams, once commonplace, are now considered outdated artifacts, replaced by diverse forms of written electronic communication. The UNCITRAL Model Law's Option 1 in 2006 explicitly broadened the definition of 'writing' to encompass various forms, including electronic communication.[80]

Despite the relaxation of formality, a minimum requirement for a permanent record remains. Option 1 explicitly mandates written agreements, a stance that the majority of states and the New York Convention adhere to. For instance, the Netherlands Arbitration Act 1986 mandates proof of the arbitration agreement through a written instrument expressly or impliedly accepted by the parties.[81] Similarly, Swiss law stipulates that the arbitration agreement must be in writing or through a communicative means allowing textual evidence.[82]

Likewise, in inter-state and investor state-arbitrations, consent is typically expressed in accordance with the relevant agreement, a BIT, an investment chapter of an FTA. When it

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[74] An arbitration clause is a provision in a contract that stipulates that parties will resolve any dispute arising from the contract through arbitration rather than through traditional litigation. Standard contract clauses are pre-written terms and conditions that parties include in a contract. They often use these in various contracts to ensure that certain key provisions are included. See, *Adriano Gardella v. Ivory Coast*, 1 ICSID Reports 287; *AGIP v. Congo*, 1 ICSID Reports 313; *Amco v. Indonesia*, 1 ICSID Reports 392.

[75] A compromise (or *compromis*) in the context of arbitration refers to the settlement of a dispute by the mutual agreement of the parties, with the assistance of a neutral third party. This agreement is often formalized and is binding on the parties. A typical example of where the parties may agree a *compromis* is when a dispute has arisen between the parties but they do not wish to go to court. Instead 'after the event' of the dispute arising they agree the terms of submission to arbitration in the form of a *compromis*.

[76] In arbitration, an expression of consent signifies that the parties agree to submit their disputes to arbitration rather than litigating them in court. This consent can take various forms, such as a written arbitration agreement or clause within a contract, a documented record of mutual consent, or an agreement to arbitrate after a dispute arises. In the context of investor-state arbitration, consent can also be expressed in domestic law. See, e.g., Albanian Law on Foreign Investment 1993, Art. 8(2); Greater Colombo Economic Commission Law 1978, Sec. 26(1).

[77] Ibid.

[78] See, e.g., *Fiona Trust & Holding Corp v. Privalov*, [2007] UKHL 40.

[79] New York Convention 1958 (n 12), Art. 2(2).

[80] UNCITRAL Model Law 1985 (n 13), Art. 7(2) (The same has been adopted by Singapore in Singapore AA (n 31), Sec. 2A).

[81] Netherlands Arbitration Act 1986, Sec. 1021.

[82] Swiss Private International Law 1987 (SPIL), Art. 178(1).

comes to the form of consent, some investment treaties, or agreements, like NAFTA, mandate written consent without specifying the exact formulation.[83] However, Option II of the Model Law does not mandate written arbitration agreements, thus recognising oral agreements as valid.[84] In other words, states may opt not to require a written form of arbitration agreement in domestic laws.

4.2. Arbitrability of Subject Matter

The notion of arbitrability concerns whether a dispute can be resolved through arbitration. The New York Convention and the Model Law apply to disputes 'capable of settlement by arbitration'.[85] States can limit the types of disputes suitable for arbitration reflecting their policy preferences.[86] Certain matters reserved for national courts are outside the scope of arbitration due to their public nature. In other words, domestic courts should adjudicate such disputes.

Despite the growing trend towards permitting arbitration of traditionally non-arbitrable matters, the specific categories of disputes eligible for arbitration can vary significantly across jurisdictions.[87] For instance, disputes related to specific subjects like family law, criminal matters, consumer law, patents, competition law, and insolvency are generally not considered arbitrable.[88]

The question of arbitrability can arise during arbitration proceedings or after the tribunal renders an award. Arbitral tribunals have authority to decide on arbitrability based on the law governing the arbitration agreement[89] or the laws of the seat of arbitration (*lex arbitri*).[90] According to the New York Convention, the law of the country where recognition or enforcement is sought

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[83] NAFTA, Canada Mexico United States, 17 December 1992, 32 I.L.M. 289 (1993), Arts. 1121(3), 1122(2). Also see, *B-Mex, LLC Deana Anthone, Neil Ayervais, Douglas Black and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019, paras 52, 56, 120.

[84] General Assembly Resolution A/RES/61/33 (On 4 December 2006, the Model Law was amended pursuant to General Assembly Resolution 61/33 to include notable changes to Art. 7 on the writing requirement.)

[85] UNCITRAL Model Law 1985 (n 13), Art. 34(2)(b)(i) and 36(1)(b)(i); New York Convention 1958 (n 12), Art. 2(1) and Art. 5(2)(a).

[86] *Egerton v. Brownlow* [1853] 4 HLC 1 (the Supreme Court of England and Wales once characterized public policy as the legal principle stating that no individual can lawfully engage in actions that may be harmful to the public or contrary to the common good); *Parsons & Whittemore Overseas v. Société Générale de L'Industrie du Papier* (RAKTA), 508 F.2d 969, 974 (1974) (U.S.) (US courts have defined public policy as encompassing the fundamental concepts of morality and justice within the jurisdiction where the legal proceedings are held.)

[87] For example, French law delineates certain topics that are not open to arbitration within the jurisdiction of France. These include issues concerning personal status, such as capacity, marriage, and divorce, disputes involving public entities or administrations (with limited exceptions for commercial activities authorized by decree), and cases involving the breach of public order. French CCP (n 22), Art. 2060. Also, the Italian law outlines the scope of arbitrable matters while explicitly excluding disputes concerning 'non-disposable rights.' This provision broadly permits arbitration, with exceptions including disputes detailed in articles 409 and 442 CCP, issues pertaining to personal status and marital separation, and matters involving rights that cannot be subject to negotiation. Italian Code of Civil Procedure, Art. 806; Indian courts have identified non-arbitrable disputes, including criminal offenses, matrimonial, guardianship, insolvency, testamentary, intellectual property, and tenancy matters. Indian AA (n 30), Sec. 2(2).

[88] Ibid.

[89] ICC case no 6719, *Arnaldez Derains Hascher*, ICC Awards 1991-1995; ICC case no 6149 *Arnaldez Derains Hascher*, ICC Awards 1991-1995.

[90] ICC case no 6162, *Consultant v Egyptian Local Authority*, XVII YBCA 153 (1992); ICC case no 4604, X YBCA 973 (1985) 975, *French original in Jarvin Derains Arnaldez*, ICC Awards 1986-1990, 545.

determines arbitrability.[91] As a result, domestic courts often treat post-award challenges based on arbitrability in conformity with applicable law.

5. Key Procedural Elements

5.1. *Ad hoc* and Institutional Arbitration

Arbitration, as a dispute resolution mechanism, provides parties with the flexibility to tailor their proceedings to their needs. The choice between *ad hoc* or institutional arbitration significantly shapes the procedural elements of arbitration. In *ad hoc* arbitration, parties directly manage the arbitration process without the involvement of an administering institution (or with a limited involvement). They may draft their own rules and procedures or choose to follow established rules such as the UNCITRAL Arbitration Rules.[92] Some institutions additionally provide model rules that parties can use for *ad hoc* arbitration.[93]

In institutional arbitration, a recognized institution (e.g., ICC, LCIA, SIAC, PCA) administers the procedure. The institution provides administrative support, rules, or appoints arbitrators. This can add a level of structure and efficiency to the process. It must be noted, however, that many arbitration mechanisms are on the spectrum from being run completely independently of arbitral institutions (pure *ad hoc*) to run in accordance with detailed mandatory rules of an arbitral institution as discussed in more detail in Chapter [_] of this book.

The decision of choosing between institutional and *ad hoc* arbitration depends on factors such as the nature of the dispute and the preferences of the parties. Institutional arbitration provides several benefits such as detailed arbitration rules, administrative support from a secretariat, or assistance in selecting qualified arbitrators. However, institutional arbitration entails potential drawbacks such as high administrative costs and short timelines.

On the other hand, *ad hoc* arbitration usually proves more cost-effective since it does not require paying fees to arbitration institutions. It suits various claim sizes and offers flexibility in choosing procedural rules tailored to parties' needs. However, challenges include potential disagreements on procedures and arbitrator selection, dealing with arbitrator fees, and handling greater responsibilities for organizing arbitration.[94] Moreover, *ad hoc* awards may be difficult to enforce in some jurisdictions.[95]

5.2. Initiation and Conduct of Proceedings

[91] New York Convention 1958 (n 12), Art. V(2)(a).

[92] The UNCITRAL Code provides a default procedure for the appointment of arbitrators in the absence of an agreement by the parties, majority of the arbitral institutes provide these services e.g., SIAC, 'Ad Hoc Appointment Services' <https://siac.org.sg/ad-hoc-appointment-services> accessed 12 January 2024. UNCITRAL Rules (n 20), Art. 6. Also, the English Legislation allows parties to apply to the court for assistance in matters of procedural and evidential issues. English AA (n 30), Sec. 44(2).

[93] UNCITRAL Rules (n 20); Institute for Dispute Resolution Rules for Non-Administered Arbitration of International Disputes and Commentary 2018; LMAA Terms and Procedures (LMAA Rules) 2021.

[94] See, e.g., Yarik Kryvoi, 'UK and International Experience in the Admission, Regulation and Operation of Arbitral Institutions' (Great Britain China Centre, 2021) <https://ssrn.com/abstract=3827454> accessed 7 January 2024.

[95] Ibid.

The arbitration process typically begins with the initiation of proceedings by one party sending a notice of arbitration to the other or to the institution.[96] This document typically outlines the claims, identifies the arbitrators or the method for their appointment, and sets the stage for the arbitration.

Additionally, parties in international arbitration may agree (whether through the adoption of particular rules or otherwise) to sign terms of reference which represent a contractual instrument endorsed by both parties and arbitrators. The purpose is to establish precise parameters of the dispute (in particular the issues in dispute, identifying claims and counterclaims) and its procedural elements (governing law, language, timeline, etc.)[97]

The proceedings typically involve various stages, including the exchange of statements of claim and defence,[98] the presentation of evidence,[99] witness examinations,[100] and legal arguments.[101] The tribunal manages the process, ensuring fairness and efficiency.

5.3. Seat of Arbitration

Parties often agree on the *seat of the arbitration*, which determines the legal framework for the arbitration, including the applicable procedural law (*lex arbitri*)[102] and the authority of local courts to intervene and support arbitration.[103] The *physical place of arbitration*, i.e., the actual location where arbitration hearings and proceedings occur does not always coincide with the seat of arbitration. After the Covid-19 pandemic many arbitration proceedings increasingly take place fully or partially in a remote (online) format,[104] which should have no impact on the *lex arbitri*. It is the seat of arbitration, which determines the applicable procedural framework and the courts with supervisory jurisdiction.[105]

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[96] See, e.g., SIAC Rules 2016 (SIAC Rules), Art. 3(1); UNCLOS (n 25), Annex VII, Art. 1.

[97] ICC Rules 2021 (ICC Rules), Art. 23.

[98] Examples of provisions on exchange of statements of claim and defence include UNCITRAL Rules (n 20), Art. 20, 21; LCIA Rules (n 20), Art. 15.

[99] Examples of provisions on presentation of evidence include UNCITRAL Rules (n 20), Art. 27; ICC Rules (n 97), Art. 25; LCIA Rules (n 20), Art. 15.

[100] Examples of provisions on witness examinations include UNCITRAL Rules (n 20), Art. 27, 28; ICC Rules (n 97), Art. 25; LCIA Rules (n 20), Art. 20.

[101] Examples of provisions on legal arguments include UNCITRAL Rules (n 20), Art. 28; ICC Rules (n 97), Art. 26; LCIA Rules (n 20), Art. 19.

[102] National legislations clarifying the link between the seat of arbitration and *lex arbitri* see, e.g., SPIL (n 82), Art. 176(1); Indian AA (n 30), Sec. 2(2); Malaysian Arbitration Act 2005, Sec. 3(3); German Code of Civil Procedure 2005 (German CCP), Sec. 1, § 1025(1).

[103] See, e.g., *International Standard Electric Corporation (US) v Bridas Sociedad Anonima Petrolera (Argentina)* (1992) VII YBCA 639; *Bharat Aluminium Co. v Kaiser Aluminum Technical Service*, Inc., Civil Appeal No. 7019 of 2005 (courts in various countries have consistently ruled that the authority to oversee arbitration proceedings is exclusively vested in the jurisdiction where the arbitration is seated).

[104] For instance, in 2023 Sixty-six percent of all hearings and sessions combined remote and in- person features. ICSID, 'Annual Report 2023' (*ICSID*, 2024) <https://icsid.worldbank.org/sites/default/files/publications/ICSID_AR2023_ENGLISH_web_spread.pdf> accessed 13 January 2024.

[105] *Union of India v McDonnell Douglas Corporation* [1993] 2 Lloyd's Rep 48.

The *lex arbitri* also determines the legal requirements for setting aside (also known as 'annulling' or 'vacating') an award and enforcement in that particular jurisdiction.[106] Therefore, it is crucial to carefully consider various factors when selecting the seat. One survey of practitioners as discussed above suggests that the five most preferred seats for arbitration are London, Singapore, Hong Kong, Paris and Geneva.[107]

5.4. Powers of Arbitral Tribunals

The powers of arbitral tribunals are linked to the so-called *Kompetenz-Kompetenz* principle. According to this principle, the tribunal has authority to rule on its own jurisdiction, including any challenges to jurisdiction. Most institutional arbitration rules, contemporary arbitration statutes, and the principal international arbitration treaties recognise this principle.[108] The UNCITRAL Model Law[109] provides that the arbitral tribunal has the authority to decide on its own jurisdiction, addressing objections related to the existence or validity of the arbitration agreement.

In many domestic legal systems, arbitral tribunals have the power to rule on their own jurisdiction before the national courts intervene. This principle underscores the arbitrators' ability to determine the extent of their authority. The state court has to refrain from hearing arguments against the arbitrators' jurisdiction until the arbitrators themselves have had a chance to do so.[110] However, it is important to note, that there are certain limitations to the tribunal's jurisdiction.[111] Otherwise, tribunals autonomously decide on their own competence.

Arbitral tribunals have the authority to decide procedural matters, hear evidence, and render final awards.[112] One such procedural matter is the costs of the arbitration, which include arbitrator fees, administrative fees (for institutional arbitrations), legal fees (e.g., counsel fees), and other expenses (e.g., relating to the hearing venue, translators, transcription services and electronic 'hearing platform' costs). Arbitrators often address the allocation of costs in the final award, although separate costs awards are also common after the tribunal has issued an award

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[106] *Bridas Sociedad* (n 103); *Bharat Aluminium* (n 103) (courts in various countries have consistently ruled that the authority to oversee arbitration proceedings is exclusively vested in the jurisdiction where the arbitration is seated).

[107] QMUL, 2021 (n 65).

[108] See, e.g., UNCITRAL Model Law 1985 (n 13), Art. 16; SPIL (n 82), Art. 186(1); Swiss Rules of International Arbitration 2021 (SRIA Rules), Art. 23(1); ICC Rules (n 97), Art. 6(3); LCIA Rules (n 20), Art. 23(1); International Centre for Dispute Resolution International Arbitration Rules (ICDR Rules), Art. 19(1); UNCLOS (n 25), Annex VII, Art. 9; PCA Optional Rules (n 34), Art. 21.

[109] UNCITRAL Model Law 1985 (n 13), Art. 16(1).

[110] For example, French law grants arbitral tribunals priority to decide on its jurisdiction. French CCP (n 22), Art. 1466. Likewise, in jurisdiction such as Sweden and England, the competence of an arbitral tribunal to rule on its own jurisdiction is established in their respective legislations. English AA (n 30), Sec. 30(1); Swedish AA (n 30), Sec. 2.

[111] See, e.g., *Superior Court of Justice, Recurso Especial No. 1,602,076/SP*, 15 September 2016 (Brazil's highest court ruled that a national court has the authority to declare the nullity of an arbitration agreement if it is clearly and manifestly illegal, even before the conclusion of the arbitration proceedings.) Also, a Swiss court before which an action is brought shall decline jurisdiction unless it finds that the arbitration agreement is invalid, inoperable, or incapable of being performed. SPIL (n 82), Art. 7.

[112] Examples of provisions on the authority to decide procedural matters, hear evidence, and render final awards include UNCITRAL Model Law 1985 (n 13), Art. 16; SPIL (n 82), Art. 186(1); SRIA Rules (n 108), Art. 23(1); ICC Rules (n 97), Art. 6(3); LCIA Rules (n 20), Art. 23(1); ICDR Rules (n 108), Art. 19(1).

on the main claims. The specifics of arbitral jurisdiction vary based on the arbitration rules chosen by the parties and the applicable national laws.[113]

5.5. Interim Measures

In arbitration, both the arbitral tribunal and domestic courts may issue *interim measures* (also known as provisional measures) to protect the parties' rights by preventing actions that may lead to immediate or impending harm or undermine the integrity of arbitral proceedings. Tribunals adopt such measures before the final award. Some examples of interim measures include appointment of an emergency arbitrator, stay of parallel proceedings, security of costs, and immediate protection of rights or property.[114]

Interim measures are granted according to particular criteria outlined in the relevant applicable rules. A recent study concluded that urgency, necessity to avoid risk of harm or prejudice, existence of the right, proportionality, *prima facie* jurisdiction and a *prima facie* case on merits as the most widely used criteria.[115]

Most arbitration rules explicitly confer authority upon the tribunal to order binding interim measures upon a party's request.[116] The ICSID Rules differ in this respect by characterizing the tribunal's power as 'recommending' provisional measures.[117] In practice, however, such orders are usually seen as binding.[118]

5.6. Emergency Arbitrators

Arbitration rules often provide for the appointment of emergency arbitrators to grant interim relief before the constitution of the full tribunal.[119] These procedures offer parties a mechanism to secure interim relief through a promptly appointed emergency arbitrator (typically within one or two business days) before the formal establishment of the arbitral tribunal.[120] This alternative provides a way to obtain interim measures without resorting to seeking relief from domestic courts. This allows parties to seek urgent remedies to preserve the *status quo*, prevent the other party from hiding assets or on other issues. Unlike a court, however, the emergency Arbitrator has no power to issue an order that binds a third party to the arbitration, should such relief be sought.

5.7. Expedited Proceedings

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[113] Ibid.

[114] Examples of provisions on interim measures include UNCITRAL Rules (n 20), Art. 26(2); ICSID Arbitration Rules 2022 (ICSID Rules), Rule 47(1); LCIA Rules (n 20), Art. 25(1); Also see, Swedish AA (n 30), Sec. 25; Singapore AA (n 31), Sec. 11; Indian AA (n 30), Sec. 9, 17; PCA Optional Rules (n 34), Art. 26.

[115] See, e.g., David Goldberg, Yarik Kryvoi and Ivan Philippov, 'Provisional Measures in Investor-State Arbitration' (BIICL & White & Case, 2023) <www.biicl.org/documents/157_provisional-measures-in-investorstate-arbitration-2023.pdf> accessed 7 January 2024.

[116] Examples of provisions on interim measures upon party's request include ICC Rules (n 97), 28(1); UNCITRAL Rules (n 20), Art. 26(2); LCIA Rules (n 20), Art. 25(1); PCA Optional Rules (n 34), Art. 26.

[117] ICSID Rules (n 114), Rule 47(1).

[118] BIICL 2023 (n 115).

[119] Examples of provisions on appointment of emergency arbitrators include ICC Rules (n 97), Art. 29 and Appendix V; ICDR Rules (n 108), Art. 6; SCC Rules 2023 (SCC Rules), Appendix II; HKIAC Rules 2018 (HKIAC Rules), Sch. 4; SIAC Rules (n 96), Sch. 1; LCIA Rules (n 20), Art. 9B; UNCLOS (n 25), Art. 290(5).

[120] Ibid.

Certain arbitration rules also provide for expedited mechanisms, whether for the whole or part of the arbitral process.[121] A leading example of 'full' expedited arbitration procedures are the Expedited Arbitration Rules of the ICC.[122]

The swift formation of an arbitral tribunal involves a simplified process to expedite arbitration proceedings. Within this framework, submitting a written application to the institution, with copies provided to all parties involved in the arbitration, is a pivotal initial step in commencing the accelerated arbitration procedure. In some cases, the arbitral institution has the authority to reduce the prescribed time frames for the tribunal's establishment at its discretion.[123]

5.8. Transparency and Confidentiality

The level of transparency and confidentiality of arbitral proceedings and related documents determines the extent to which non-parties can access information about proceedings. In practice, the parties themselves can usually tailor the extent of transparency suitable for their case. Balancing transparency and confidentiality allows parties to safeguard their interests in arbitral proceedings and may also have a significant impact on the legitimacy of arbitration. Maintaining confidentiality in commercial arbitration is widely regarded essential to safeguard the reputations and relationships of the parties involved.

In the context of commercial arbitration, the private nature of the process allows parties to keep their disputes confidential, but this can vary depending on the governing law and the parties' agreement.[124] In arbitrations involving States (e.g., State-State or investor-State arbitration), in most cases the awards and proceedings are public, although it may also be possible to change it.[125] Although confidentiality remains a common feature of commercial arbitration, increasingly, there is a trend toward greater transparency in international arbitration.[126] Some institutional rules require the publication of redacted awards.[127]

The calls for more transparency in commercial arbitration arise from the arguments that despite being private disputes, the implications of commercial arbitration affect the non-disputing as well.[128] The Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration,[129] signed in 2015, serves as a notable illustration of efforts aimed at facilitating the implementation of UNCITRAL Rules on Transparency[130] in investor-state arbitration.

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[121] Examples of provisions on expediated mechanisms include LCIA Rules (n 20), Art. 22(5); SIAC Rules (n 96), Rule 5; HKIAC Rules (n 119), Art. 41; SRIA Rules (n 108), Art. 37.

[122] ICC Rules (n 97), Appendix VI.

[123] Ibid.

[124] ICSID Rules (n 114), Rule 62(1)(3); CAS Rules (n 24), Rule 59; LMAA Rules (n 93) 2021, Art. 29.

[125] For a comparative overview of various approaches to transparency see Yarik Kryvoi, 'Private or Public Adjudication? Procedure, Substance and Legitimacy' (2021) Leiden Journal of International Law 110-13.

[126] Stefan Pislevik, 'Precedent and Development of Law: Is It Time for Greater Transparency in International Commercial Arbitration?' 34 Arbitration International 2 (2018); Philip Wimalasena, 'The Publication of Arbitral Awards as A Contribution to Legal Development: A Plea for More Transparency' 37 ASA Bulletin 2 (2019) 281.

[127] See, e.g., SIAC Rules (n 96), Art. 32(12); LCIA Rules (n 20), Art. 30(3); ICDR Rules (n 108), Art. 40(4); VIAC Rules 2021, Art. 41.

[128] Wimalasena (n 126).

[129] UNCITRAL, U.N. Convention on Transparency in Treaty-based Investor-State Arbitration, G.A. Res. 69/116, U.N. Doc. A/69/496 (10 December 2014) (United Nations Transparency Convention).

[130] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, U.N. Doc. A/68/109.

However, only nine States have ratified this convention at the time of writing,[131] which suggests that states are not that eager to make their investor-State arbitrations more transparent in accordance with this convention. Notably, in domains such as business and human rights disputes, where public interest strongly advocates for transparency, comprehensive transparency provisions are delineated, as evidenced by the far-reaching transparency rules articulated in The Hague Rules on Business and Human Rights.[132]

6. Arbitrators

Arbitrators are independent individuals appointed to settle a dispute in accordance with an arbitral procedure. They play the central role in arbitral proceedings by deciding procedural questions and resolving the dispute on the merits. Arbitrators are typically appointed based on the agreement of the parties, which specifies the number of arbitrators (a sole arbitrator, a panel of three or more arbitrators) and the method of their appointment.

Arbitrators can be appointed in various ways, most commonly by means of party appointment (each party appoints its arbitrator, and the appointed arbitrators select a neutral presiding arbitrator) or institutional appointment (institutional rules provide mechanisms for the appointment of arbitrators, either by the institution itself or by a designated appointing authority). [133]

The qualifications and background of arbitrators can vary, and parties may agree on specific qualifications in their arbitration agreement.[134] Many arbitrators have legal expertise, industry knowledge, or experience relevant to the dispute. Increasingly, arbitral institutions and policymakers promote diversity in arbitral tribunals. This includes gender diversity, geographical diversity, and diversity in professional backgrounds. Some institutional rules encourage parties to consider diversity when appointing arbitrators.[135]

Arbitrators must be impartial and independent. They must disclose any potential conflicts of interest and comply with ethical guidelines set forth in institutional rules or applicable laws.[136]

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[131] UNCITRAL, 'Status: United Nations Convention on Transparency in Treaty-based Investor-State Arbitration' <https://uncitral.un.org/en/texts/arbitration/conventions/transparency/status> accessed 13 January 2024.

[132] The Hague Rules on Business and Human Rights Arbitration 2019.

[133] ICC Rules (n 97), Art. 13; LCIA Rules (n 20), Art. 5; UNCITRAL Rules (n 20), Art. 8, 9, 10.

[134] Examples of provisions on qualifications and background of arbitrators include Swedish AA (n 30), Sec. 7; Singapore AA (n 31), Sec. 11; Indian AA (n 30), Sec. 11; English AA (n 30), Sec. 24(1); PCA Optional Rules (n 34), Art. 8.

[135] Examples of provisions on diversity of arbitrators include Belgian Centre for Arbitration and Mediation Rules 2023, Art. 15; Scottish Arbitration Centre Rules 2023, Art. 8(1); ICC Note to National Committees and Groups on the Proposal of Arbitrators, para. 40.

[136] Examples of provisions on conflict of interest include UNCITRAL Model Law 1985 (n 13), Art. 12(1); UNCITRAL's Code of Conduct for Adjudicators in Investor–State Dispute Settlement, Art. 11; LCIA Rules (n 20), Art. 5(4); PCA Optional Rules (n 34), Art. 9.

Failure to comply with ethical and legal obligations may result in challenges to arbitrators[137] or to the arbitral award itself.[138]

When it comes to arbitrators' remuneration the parties may agree on a fee structure or refer to institutional rules that provide guidance on arbitrators' compensation.[139]

Parties typically define the term of service for arbitrators in the arbitration agreement or rely on default procedures in institutional rules. According to the principle '*functus* officio' (a Latin term that means "having performed his or her office) once an arbitrator or arbitral tribunal has rendered a final award, their mandate and authority over the subject matter of the dispute comes to an end.[140] Challenges aim at the replacement or disqualification of arbitrators, as provided in relevant institutional rules or arbitration laws.[141]

Grounds for disqualification may include bias, lack of impartiality, or failure to disclose relevant information.[142] At the same time, arbitrators generally enjoy immunity from legal action for acts performed in the course of their duties as arbitrators. This immunity is essential to ensure arbitrators can make decisions without fear of personal liability.[143]

7. Applicable law

7.1. Introduction

The term *applicable law* refers to norms relevant to various aspects of arbitration. In contrast to domestic arbitration, international arbitration typically encompasses multiple legal systems or sets of legal principles. The identification of the applicable law stands as a crucial element within the arbitration proceedings.

The parties to an arbitration agreement often have the freedom to choose the applicable law governing the substance of their dispute.[144] This choice is typically expressed in the arbitration agreement or through subsequent agreement during the arbitration process. If the parties do not specify the applicable law, or if there is ambiguity in the choice of law, the arbitral tribunal may

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[137] Examples of provisions on ethical and legal obligations that may result in challenges include UNCITRAL Model Law 1985 (n 13), Art. 34(2)(a)(iv); New York Convention 1958 (n 12), Art. V(1)(d).

[138] PCA Optional Rules (n 34), Art. 10. In cases where there is evidence of corruption by an ICSID arbitrator, the arbitral award may potentially be annulled under Article 52(1)(b) of the ICSID Convention (n 24), which allows challenges based on corruption on the part of one of the members of the Tribunal.

[139] ICC Rules (n 97), Appendix III, Art. 3, 2(2); LCIA Schedule of Arbitration Costs 2020; ICSID Schedule of Fees 2023.

[140] See more about his principle: Greg Fullelove, 'Functus Officio' in Julio Cesar Betancourt (ed), *Defining Issues in International Arbitration: Celebrating 100 Years of the Chartered Institute of Arbitrators*, ch. 24 (OUP 2016).

[141] Examples of provisions on challenges include UNCITRAL Rules (n 20), Art. 12; LCIA Rules (n 20), Art. 10; ICSID Convention (n 24), Art. 57; ICC Rules (n 97), Art. 14; ICDR Rules (n 108), Art. 14(1); SCC Rules (n 119), Art. 19; HKIAC Rules (n 119), Art. 11(6). Also see, Swedish AA (n 30), Sec. 8; French CCP (n 22), Art. 1463; Singapore AA (n 31), Sec. 12; Indian AA (n 30), Sec. 12.

[142] Ibid.

[143] Examples of provisions on immunity of arbitrators include ICC Rules (n 97), Art. 41; LCIA Rules (n 20), Art. 31(1); ICDR Rules (n 108), Art. 38; HKIAC Rules (n 119), Art. 46. Also see, English AA (n 30), Sec. 29; Kenyan Arbitration Act 1995, Sec. 16B.

[144] Brazilian Arbitration Act 1996, Sec. 2; English AA (n 30), Sec. 46(1); French CCP (n 22), Art. 1511; German CCP (n 102), Art. 1051(10); Russian International Arbitration Law 1993, Sec. 28; SPIL (n 82), Art. 187(1).

determine the applicable law.[145] Tribunals often consider the substantive law chosen by the parties, the law of the contract, and other relevant legal principles.[146] A separate set of laws can apply to the agreement to arbitrate itself, either because the parties choose to do so or as a result of application of conflict of law rules.[147]

The applicable law in international arbitration can include domestic and international law. In some cases, especially in international commercial arbitration, the tribunal may apply *lex mercatoria* (autonomous customary rules and procedures developed within business communities).[148] In some instances, the parties may agree to resolve their dispute based on the principles of fairness (*amiable compositeur* or *ex aequo et bono*).[149]

The law of the seat of arbitration determines matters such as arbitrability, the enforceability of the arbitration agreement, the conduct of proceedings, and the grounds for challenging or setting aside awards.[150] Because enforcement of arbitral awards often involves jurisdictions outside of the seat of arbitration, a separate set of laws governs the enforcement of the arbitral award. In inter-state arbitration, the significance of the seat may vary compared to other arbitration mechanisms because domestic courts usually have no authority to annul or set aside awards. It is usually possible to agree on holding hearings at a location separate from the arbitration's seat, without changing the seat or the place from which the award is issued.

7.2. Limitations on Chosen Law and Precedent's Influence on Arbitral Tribunals

While precedent usually does not bind arbitral tribunals in the same way as courts, previous arbitral tribunals' decisions, especially those addressing similar legal issues, may influence and be considered by arbitral tribunals.[151] This is particularly true in areas with a wealth of public awards, such as investor-state arbitration or inter-state arbitration and less so in areas where

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[145] See, e.g., *Kabab-Ji SAL* (n 33) (the arbitration tribunal determined that French law, being the governing law of the seat, was applicable to the arbitration agreement.); UNCLOS (n 25), Art. 293 (when no agreed applicable law is present, a tribunal vested with jurisdiction must adhere to this Convention and other principles of international law that are not in conflict with it.)

[146] See, e.g., *Sulamerica CIA Nacional De Seguros SA and others v Enesa Engenharia SA and others* [2012] EWHC 42 (Comm) (To ascertain the governing law for the arbitration agreement, the court established a dual-pronged methodology. Firstly, it rejected the presumption that the applicable law of the arbitration agreement automatically mirrors the law of the contnract. Instead, the court advocated for a structured 'three-stage enquiry' involving considerations of (i) express choice, (ii) implied choice, and (iii) the closest and most real connection.); Nigel Blackaby, Constantine Partasides, *Redfern and Hunter on International Arbitration* (7th edn, Oxford University Press 2023) ch 3; Enka v Chubb [2020] UKSC 38.

[147] Julian D.M. Lew, 'Relevance of Conflict of Law Rules in the Practice of Arbitration', in Albert Jan van den Berg (ed), *ICCA Congress Series No. 7* (Vienna 1994).

[148] Pierre Mayer, 'The UNIDROIT Principles in Contemporary Contract Practice' (2002) ICC Bulletin (Special Supplement) 111.

[149] See, e.g., UNCITRAL Rules (n 20), Art. 33(2).

[150] See, e.g., *Bridas Sociedad* (n 103); *Bharat Aluminium* (n 103) (Courts in various countries have consistently ruled that the authority to oversee arbitration proceedings is exclusively vested in the jurisdiction where the arbitration is seated).

[151] See, e.g., *Saipem S.p.A. v. Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction (21 March 2007) (the tribunal asserted that previous decisions did not bind it but must pay due consideration to earlier decisions of international tribunals, unless it has "compelling contrary grounds" not to do so); *Caratube International Oil Company LLP v. Kazakhstan*, ICSID Case No. ARB/08/12, Decision on Provisional Measures (31 July 2009) (the arbitral tribunal relied on legal rules to confer legal effects on previous decisions, considering them as supplementary means of interpretation, although stating that previous decisions do not bind arbitrators).

confidentiality prevails (e.g., international commercial arbitration). In other words, tribunals tend to follow precedents for issues pertaining to jurisdiction and procedure, such as the timeliness of raising objections to jurisdiction and the authority of the tribunal to prescribe interim measures.[152]

Even when the parties have chosen a specific law to govern their contract, tribunals may refuse to apply provisions that violate public policy or mandatory rules of the enforcement jurisdiction.[153] For example, the Belgian Court of Cassation ruled that disputes arising from the unilateral termination of an exclusive distributorship agreement cannot be resolved through arbitration. Hence, the court declined to recognise an arbitration award issued in Switzerland at the seat of arbitration.[154]

The arbitration agreement, the choice of law by the parties, the law of the seat, and the law of the enforcement jurisdiction collectively shape the legal framework within which the arbitral tribunal operates. Tribunals aim to strike a balance between respecting party autonomy and applying principles that ensure a fair and just resolution of the dispute.

8. Awards and enforcement

8.1. Types of Awards

An award in the context of arbitration refers to the final binding decision issued by an arbitral tribunal. An award can cover various issues,[155] including jurisdiction, merits, and quantum (determining the amount of compensation). These may further be classified as provisional, interim or final. Additionally, awards may involve either monetary compensation or non-monetary redress (e.g. returning goods in kind).

While all awards in arbitration are generally considered binding and 'final' as to dispositive of the issues decided within them, parties typically reserve the term 'final award' for decisions that conclude the tribunal's mission.[156] Upon the delivery of a final award, the tribunal loses jurisdiction over the dispute, terminating its special relationship with the parties. However, the tribunal still has some 'residual' jurisdiction (e.g., to correct an award) even after it has issued its final award. To avoid premature final awards, especially leaving unresolved matters, the tribunals may issue a separate award explicitly labelled as a partial award. The power to issue partial awards may lead to potential time and cost savings for all parties involved. Issuing a

[152] The study suggests that, in commercial arbitrations, tribunals are less inclined to attribute precedential importance to other awards, whereas sport arbitrations exhibit a significant dependence on precedents. Investment arbitration involves the gradual establishment of rules by examining past cases. Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse? The 2006 Freshfields Lecture' (2007) 23 Arbitration International LCIA 361; Mayer (n 148).

[153] See, e.g., *Marketing Displays International Inc. v VR Van Raalte Reclame BV*, Case Nos 04/694 and 04/695, 24 March 2005 (Dutch Court of Appeal affirmed a lower court's denial of exequatur for three US arbitral awards. The authority denied the awards, considering them incompatible with Article 81 of the Treaty establishing the European Community of 2002, thereby contravening public policy); also see *Soleimany v Soleimany* [1999] QB785, p. 800.

[154] Cass Belgium, 28 June 1979, Pas I, 1260, 1979 R.C.J.B 332.

[155] Examples of provisions on types of award include ICC Rules (n 97), Art. 2v; UNCITRAL Rules (n 20), Art. 34(1); SIAC Rules (n 96), Art. 32(5).

[156] UNCITRAL Rules (n 20), Art. 34(2); PCA Optional Rules (n 34), Art. 32.

partial award may make a particular sense where it is possible to separate liability issues from those related to quantum and other issues (e.g., jurisdiction, liability, or quantum).[157]

Parties can request additional awards to address unresolved issues left by the initial tribunal decision. Many arbitration rules allow for such requests, and even without explicit provisions for obtaining additional awards.[158]

If the parties manage to resolve their agreement amicably and reach a settlement, they might opt to formalize terms in a consent award for enforcement benefits.[159] Regardless of the type of award, it should be possible to enforce it on the basis of the New York Convention.

Figure 1. Map of States, which have ratified the 1958 New York Convention.

8.2. Requirements as to the Form of Award

Parties primarily determine the form of the award through the arbitration agreement and the applicable law. The arbitration agreement, including chosen institutional rules, may specify formalities. For instance, the UNCITRAL Rules and PCA Optional Rules for inter-state arbitration mandate a written award with stated reasons, signed by the arbitrators, and including relevant details.[160] The ICSID Rules provide a comprehensive set of requirements for writing an award, encompassing party designations, procedural details, factual summaries, and cost considerations, which emphasizes the significance of adhering to institutional rules.[161] As discussed in more detail below, some institutional rules, most famously perhaps the ICC,

[157] ICC Rules (n 97), Art. 2v; UNCITRAL Rules (n 20), Art. 26; SIAC Rules (n 96), Art. 32(5); PCA Optional Rules (n 34), Art. 32.

[158] Examples of provisions on issuance of additional awards include UNCITRAL Model Law 1985 (n 13), Art. 33(1)(b); English AA (n 30), Sec. 57(3)(b); LCIA Rules (n 20), Art. 27; UNCITRAL Rules (n 20), Art. 39; PCA Optional Rules (n 34), Art. 37.

[159] UNCITRAL Model Law 1985 (n 13), Art. 30; ICC Rules (n 97), Art. 33.

[160] UNCITRAL Rules (n 20), Art. 34(3); PCA Optional Rules (n 34), Art. 32.

[161] ICSID Rules (n 114), Rule 59.

provide for scrutiny by the institution itself to ensure the award meets certain formal requirements.[162]

Domestic laws, such as the Swiss Code of Civil Procedure[163] or the English Arbitration Act,[164] may also impose specific form requirements, often centred on the award being in writing, reasoned, dated, and signed. Complying with these requirements is crucial for arbitral tribunals to ensure the validity and enforceability of their awards.

8.3. Internal Review Mechanisms in Arbitration

Internal review mechanisms in arbitration refer to procedures that allow parties to challenge arbitral awards within the framework of the arbitral process. Arbitral tribunals design these mechanisms to address specific issues that may arise during or after the arbitration, providing a form of internal check on the fairness and validity of the arbitral proceedings.

In institutional arbitration, the arbitral institution may provide internal review mechanisms.[165] The ICC Rules provide for an internal review of all draft awards by the ICC's International Court of Arbitration (the 'scrutiny' process referred to above), which may 'lay down modifications as to the form of the award' and draw a tribunal's 'attention to points of substance'.[166] Every ICC award must be approved by the ICC Court 'as to its form' before it can be rendered by a tribunal. The SIAC rules provide for a similar internal review process.[167]

The ICSID Convention provides for a mechanism for annulment of awards.[168] Parties can request annulment on specific grounds, such as a serious departure from a fundamental rule of procedure or a manifest excess of powers.[169] Similarly, certain institutional rules allow for appeals on points of law.[170] However, such mechanisms are relatively rare in international commercial arbitration, where the finality of awards is generally prized.

Lastly, arbitration rules may provide procedures for correcting clerical or typographical errors in the award or seeking an interpretation of specific points in the award. These procedures do not aim to challenge the substance of the award but to address minor issues.[171]

8.4. External Review Mechanisms in Arbitration

If a party, due to genuine concerns or strategic considerations, concludes that an issue affecting the award cannot be rectified by the arbitral tribunal and if there is no provision for internal

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[162] LCIA Rules (n 20), Art. 26; ICC Rules (n 97), Art. 34; CAS Rules (n 24), Rule 47.

[163] Swiss Code of Civil Procedure, Art. 384.

[164] English AA (n 30), Sec. 52.

[165] Examples of provisions on internal review mechanisms include Paris Maritime Arbitration Chamber 2022, Art. XVII; GAFTA Rules (n 46), Art. 10,11,12; FOSFA Rules (n 46), Rules 7,8,9.

[166] ICC Rules (n 97), Art. 33.

[167] SIAC Rules (n 96), Art. 33.

[168] ICSID Convention (n 24), Art. 52.

[169] Ibid. For an empirical study of annulment under the ICSID Convention see Yarik Kryvoi, Johannes Koepp and Jack Biggs, 'Empirical Study: Annulment in ICSID Arbitration' (BIICL & Baker Botts, 2021) <www.biicl.org/documents/10899_annulment-in-icsid-arbitration190821.pdf> accessed 7 January 2024.

[170] CAS Rules (n 24), Rule 47.

[171] ICC Rules (n 97), Art. 36; LCIA Rules (n 20), Art. 27(2); ICDR Rules (n 108), Art. 36(3); HKIAC Rules (n 119), Art. 38; SRIA Rules (n 108), Art. 37; PCA Optional Rules (n 34), Art. 36(1).

review under the applicable rules, that party may turn to domestic courts to set aside the award, either in its entirety or in part. Arbitral awards may be subject to setting aside proceedings before the seat's domestic courts.[172] Setting aside proceedings typically involve grounds such as procedural irregularities, lack of jurisdiction, or public policy violations.[173] In addition, it is possible to resist enforcement of arbitral awards, where courts in the enforcement jurisdiction may decline to recognise and enforce a foreign arbitral award.

9. Relationship between Arbitration Tribunals and Domestic/International Courts

While parties design arbitration to be an alternative to traditional litigation, there are certain instances where they find it necessary to involve courts. The key issues where domestic courts can intervene include determining jurisdiction, appointment and challenges of arbitrators, provisional measures, setting aside awards, appeals on points or law and recognition and enforcement of awards.

It must be noted that the role of domestic courts is more limited in case of inter-state disputes governed by public international law, because of the principle that courts of one State cannot have jurisdiction over another State (as states are regarded as equal in the eyes of international law).[174] However, even in state-state arbitration domestic courts can be relevant (e.g. to enforce provisional measures).

Arbitral tribunals have the primary authority to rule on their own jurisdiction, a principle known as *Kompetenz-Kompetenz*.[175] However, parties may bring issues related to jurisdiction before domestic courts, particularly when a party challenges the tribunal's authority or when there are disputes over the existence or validity of the arbitration agreement.[176]

Parties usually determine the process of appointing and challenging arbitrators through the arbitration agreement, concluded within the framework of relevant institutional rules and the law of the seat. In some cases, if parties are unable to agree on the appointment of an arbitrator, domestic courts may have a role in appointing an arbitrator.[177] As discussed in more detail above, arbitral tribunals have the authority to grant interim relief from domestic courts,

[172] UNCITRAL Model Law 1985 (n 13), Art. 34(2)(a)(i); Swedish AA (n 30), Sec. 34; Indian AA (n 30), Sec. 34.

[173] Examples of provisions on grounds for setting aside include UNCITRAL Model Law 1985 (n 13), Art. 34(2)(a)(i); Swedish AA (n 30), Sec. 34; English AA (n 30), Sec. 30(1); Indian AA (n 30), Sec. 34.

[174] See, e.g., United Nations Convention on Jurisdictional Immunities of States and Their Property GA Res. 59/38, annex (2 December 2004), Art. 5.

[175] Examples of provisions on the principle of *Kompetenz-Kompetenz* include UNCITRAL Model Law 1985 (n 13), Art. 16; SPIL (n 82), Art. 186(1); SRIA Rules (n 108), Art. 23(1); ICC Rules (n 97), Art. 6(3); LCIA Rules (n 20), Art. 23(1); ICDR Rules (n 108), Art. 19(1); UNCLOS (n 25), Annex VII, Art. 9; PCA Optional Rules (n 34), Art. 21.

[176] Examples of provisions on challenges the tribunal's authority include French CCP (n 22), Art. 1448.1; Singapore AA (n 31), Sec. 6.

[177] Examples of provisions on role of domestic courts in appointment of arbitrators include Swedish AA (n 30), Sec. 10; Indian AA (n 30), Sec. 11; English AA (n 30), Sec. 24.

especially when urgency is a factor.[178] Courts can issue injunctions or other measures to preserve assets or maintain the status quo pending the arbitration.[179]

Lastly, as discussed in more detail previously, domestic courts play a critical role in enforcing awards within their jurisdictions.

10. Future outlook

As the landscape of international arbitration evolves, practitioners, institutions, policymakers, and other stakeholders continue to explore how to enhance the efficiency and legitimacy. Efficiency and legitimacy are critical to the success of international arbitration. Efforts to streamline procedures, enhance transparency, and ensure diversity among arbitrators contribute to the perceived efficiency and legitimacy of the process.[180] Striking the right balance between expeditious resolution and ensuring due process remains a challenge.

Arbitral tribunals are increasingly prioritizing diversity and inclusion. Efforts to enhance gender and regional representation are gaining momentum, with institutions and practitioners acknowledging the value of diverse perspectives in decision-making.[181] This focus on diversity extends beyond gender and region, encompassing a broader range of backgrounds and expertise.

The adoption of digital tools and technology in arbitration is likely to further affect the development of arbitration. Online case management, virtual hearings, and the use of artificial intelligence for document review are among the trends that could enhance efficiency and reduce costs. [182]

Furthermore, there is a growing emphasis on integrating environmental, social, and governance considerations into arbitration. Parties and arbitrators are increasingly mindful of the broader societal, environmental and governance impacts of disputes.[183] With the increasing focus on climate change and sustainability, the field of international arbitration may see a rise in disputes related to environmental issues and sustainable development. This trend emphasizes the need

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[178] UNCITRAL Rules (n 20), Art. 26(2); ICSID Rules (n 114), Rule 47(1); LCIA Rules (n 20), Art. 25(1); HKIAC Rules (n 119), Art. 23; ICC Rules (n 97), Art. 28; PCA Optional Rules (n 34), Art. 26.

[179] SPIL (n 82), Art. 183(1), Art. 183(2).

[180] Stephan Schill, 'Conceptions of Legitimacy of International Arbitration' in David Caron and others (eds), *Practising Virtue: Inside International Arbitration* (Oxford 2015); Simson C, 'Chapter 17: The Link Between Transparency and Legitimacy in International Arbitration' in Cavinder Bull and Loretta Malintoppi (eds), *ICCA Congress Series No. 21* (Kluwer Law International 2023).

[181] See, e.g., ICCA, 'Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings' (ICCA, 2022); Yves Fortier, 'Diversity in International Arbitration' (2023) 39(2) Arbitration International 226.

[182] ICC Commission on Arbitration and ADR, 'Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceedings' (ICC, 2022); Queen's Mary University of London, '2018 International Arbitration Survey: The Evolution of International Arbitration' (QMUL, 2018); ICC Commission on Arbitration and ADR. 'Information Technology in International Arbitration' (ICC, 2017).

[183] ESG Subcommittee of the IBA Arbitration Committee, 'Report on use of ESG contractual obligations and related disputes' (IBA, 2023).

for arbitrators to possess expertise in diverse areas, including environmental law and sustainable business practices.[184]

The use of third-party funding[185] in arbitration is a topic of ongoing discussion. Regulatory developments and ethical considerations surrounding third-party funding may shape its future role in international arbitration.[186] Striking a balance between promoting access to justice and addressing potential conflicts of interest remains a focal point of this discourse.

Recent global events, such as the COVID-19 pandemic, have highlighted the importance of flexibility and adaptability in dispute resolution mechanisms.[187] The ability of arbitration to respond to unforeseen challenges and crises will likely be a focus for future developments.

The international arbitration community continually explores ways to enhance the efficiency and fairness of the process. Proposals for reform include revising institutional rules, addressing issues related to costs and duration of proceedings, and adapting to evolving legal and business landscapes.[188] Collaborative efforts across jurisdictions and sectors, in some cases coordinated by intergovernmental organisations such as UNCITRAL and ICSID, will be pivotal in ensuring that international arbitration remains a desirable and legitimate method of dispute resolution.

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[184] PCA offers specialized environmental rules for arbitration and conciliation, providing a comprehensive set of procedures for resolving environmental disputes. PCA – Optional Rules for Arbitration of Disputes relating to Natural Resources and/or the Environment. Also see., *Iron Rhine Arbitration (Belgium v. Netherlands)*, PCA Case No. 2003-02 (The Iron Rhine railway connects the port of Antwerp in Belgium to the Rhine basin in Germany through the Netherlands. Its inception dates back to the 1839 Treaty of Separation, which granted specific transit rights to Belgium. After World War II, sections of the Iron Rhine gradually became inactive, and in the 1990s, the Netherlands initiated legal measures to designate nature reserves situated along its path.)

[185] Third-party funding in arbitration involves a financial agreement where a third party, often a financial institution or individual, provides capital to support a party's participation in arbitration. The funding covers arbitration expenses like legal fees and expert charges. In return, the funder receives a share of the final arbitral award if the funded party prevails. This arrangement is typically non-recourse, relieving the funded party of repayment if the claim is unsuccessful.

[186] ICCA, 'Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration' (ICCA, 2018); UNCITRAL, Working Group III (Investor-State Dispute Settlement Reform), Forty-third session (Vienna, 5–16 September 2022), 'Possible reform of investor-State dispute settlement (ISDS), Draft provisions on procedural reform', Note by the Secretariat, 11 July 2022 (A/CN.9/WG.III/WP.219).

[187] The International Chamber of Commerce (ICC) and other arbitration institutions have adopted electronic-only submissions, which have proven to be efficient and environmentally friendly. ICC Commission 2022 (n 182).

[188] Various institutions have made it significantly easier to conduct multi-party arbitrations and have expanded the scope of expedited and reduced-cost arbitral proceedings, thereby addressing cost and time-saving measures i.e., the updated ICC Rules of January 2021, have broadened the application of expedited arbitration by raising the threshold for opting out from $2 million to $3 million. Furthermore, the ICSID Rules allow parties to voluntarily choose expedited arbitration, The LCIA Rules of October 2020, explicitly acknowledge tribunals' power to promptly dismiss claims lacking merit, with the aim of shortening the time it takes for tribunals to deliver their awards by setting an eight-month deadline from the conclusion of arguments.