Chapter 2: Agreements to Arbitrate

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The parties' agreement to arbitrate not only reflects but also gives effect to the cardinal characteristic of arbitration: party autonomy. (1) Of course, the freedom that parties enjoy to draft a bespoke arbitration agreement comes with an important responsibility: to craft it properly. A well-drafted arbitration agreement tends to ensure that any contract disputes will be resolved efficiently and effectively. However, a poorly drafted agreement will, at best, mire the parties in further disputes about the arbitration procedure, with an associated increase in costs and delays. At worst, a so-called pathological arbitration clause may be found by a court to be so deficient as to be unenforceable. In this chapter we review (i) key preliminary considerations for drafting an arbitration agreement; (ii) the essential elements of an enforceable arbitration agreement, without which the parties' dispute may have to be resolved by a competent court; (iii) certain critical provisions on fundamental matters which, if not specified in the arbitration agreement, will be decided by the arbitral tribunal or institution; and (iv) several optional provisions which the parties may wish to include in their arbitration agreement to supplement, or deviate from, the applicable arbitration regime.

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§2.01 PRELIMINARY CONSIDERATIONS

Party agreement is the cornerstone of arbitration. In commercial arbitration, the parties' consent to arbitrate is usually evidenced in and by a written arbitration agreement, whether in a specific clause in the parties' contract containing their agreement to resolve all future disputes by arbitration (i.e., an *arbitration clause*) or in a separate contract between the parties after their dispute has arisen submitting an existing dispute to arbitration (i.e., a *submission agreement*, *clause compromissoire*). Of course, investor-state arbitration can also be based on an agreement between a State or a State-owned enterprise and an investor to submit their disputes to arbitration. In either case, in the absence of a valid and enforceable arbitration clause or submission agreement, the parties' disputes would have to be resolved by litigation in the courts of competent jurisdiction. (2) The importance of drafting an effective and enforceable arbitration clause, therefore, is not be underestimated.

While oral agreements to arbitrate may be enforceable in some jurisdictions, this is not common. (3) Further, it should be noted that the New York Convention applies only to written arbitration agreements. An arbitration agreement must be in writing if it is to be afforded recognition under Article II(1) of the New York Convention. (4) The 1985 version of the UNCITRAL Model Law on International Commercial Arbitration also requires that an arbitration agreement be in writing. (5) In its 2006 amendment to the Model Law, UNCITRAL revised the writing requirement by adopting two options. Under the first option, which retains the requirement that an arbitration agreement be in writing, "[a]n arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means." (6) Under the second option, the writing requirement is dispensed with altogether (Option II). (7) Nevertheless, the majority of States that have adopted the UNCITRAL Model Law have adopted the 1985 version. (8) Thus, the requirement for a writing is widely reflected in national legislation dealing with arbitration, including, for example, section 5(1) of the English Arbitration Act 1996

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(providing that Part 1 of the Act will "apply only where the arbitration agreement is in writing"); English Arbitration Act 1996, 1996 c. 23, § 5(1) (June 17, 1996); Swiss Federal Private International Law Act (PILA), Article 178(1) (December 18, 1987, as amended until July 1, 2014); US Federal Arbitration Act, 9 U.S.C. § 2. Under Article 1442 of the French Arbitration Act, which entered into force on May 1, 2011, a domestic arbitration

agreement must be in writing (*A peine de nullité, la convention d'arbitrage est ecrité.*). [(9)] However, this requirement is not included in the section of the Act dealing with international arbitration. [(10)]

[A] Arbitration Clause or Submission Agreement

A threshold question that often arises is whether to include an arbitration clause in the parties' agreement or wait until a dispute has arisen and then negotiate an appropriate submission agreement. Generally, the former is preferable. Once a dispute has arisen and litigation strategies have developed, it may be impossible for the parties to agree on the procedures through which to resolve their dispute, although they would not be precluded from doing so if they considered this to be in their mutual best interests. A predispute clause provides certainty regarding how problems will be resolved and can expedite the dispute resolution process. Accordingly, the arbitration of most disputes takes place as a result of the inclusion of an arbitration clause in the parties' underlying commercial contract. [(11)]

[B] Due Diligence under Potentially Applicable Laws

Contract negotiators and their advisors should investigate whether there are any mandatory or formal requirements that might affect the parties' agreement to arbitrate future disputes under the legal regimes potentially applicable to the arbitration. In international arbitration, these may include: (i) the national laws of the respective home jurisdictions of the parties; (ii) the arbitration law of the legal seat of the arbitration; and (iii) the law of each jurisdiction where enforcement of the arbitral award may be sought.

While it is not possible to identify all of the relevant areas that should be considered, typical areas of inquiry include the following: (i) whether each party to the agreement has the formal capacity or authority to agree to arbitration. For the most part, this is not an issue where private parties are concerned; however, questions can arise regarding the capacity of sovereign state parties or state-controlled entities to

agree to arbitration; (ii) whether there are any relevant limitations on the types of disputes that can be submitted to arbitration as a result of applicable mandatory laws; (iii) whether an agreement may validly be made to arbitrate future disputes; (iv) whether an arbitration clause may be incorporated by reference from another agreement; (v) whether there are any required formalities regarding the form or content of the agreement to arbitrate.

[C] Institutional Versus Ad Hoc Arbitration

An arbitration conducted pursuant to a set of procedural rules offered by an institutional dispute resolution service provider and administered by the institution whose rules were incorporated by reference into the parties' agreement is referred to as "institutional arbitration."

Arbitrations conducted without the administrative supervision of an arbitral body are commonly referred to as ad hoc arbitrations. Such arbitrations may be conducted according to procedures developed and agreed by the parties themselves on the basis of their perception of their specific circumstances; alternatively, they can proceed pursuant to a set of formal rules designed specifically for "nonadministered" arbitrations, such as those promulgated by UNCITRAL.

Although institutional arbitration entails administrative costs attributable to the fees charged by the institution, typically parties receive considerable benefits in return. These benefits include: (i) an administrative and supervisory infrastructure, which can provide assistance with serving the request for arbitration and other submissions; (ii) transparent and predictable arbitrator fee schedules; (iii) lists of approved and qualified arbitrators; (iv) the appointment and removal of arbitrators; (v) the resolution of arbitrator conflicts of interest; (vi) a trained staff focused on the efficient administration of the arbitration; (vii) assistance in organizing hearings; (viii) an independent framework for resolving contentious issues that might arise before the constitution of the arbitral tribunal; (ix) the review of arbitral awards for form and consistency; and (x) the availability of a tried and tested set of procedural rules that provide a known and predictable structure. By incorporating an institution's procedural rules into their dispute resolution agreement, parties can obviate the need to spell out a myriad of procedural matters in their contract. In addition, the role of the designated arbitral institution in dealing with the costs and fees associated with the arbitration—including administration of the payments to be made to the arbitrators—significantly limits the scope for any impropriety and helps to preserve the perception of neutrality of the arbitral tribunal.

Parties who choose ad hoc arbitration typically do so for one of the following reasons: (i) they wish to resolve their disputes according to rules that are specifically tailored to suit their business relationship; (ii) they assume it will be less costly than institutional arbitration, as there will be no need to pay any administrative fees; or (iii) they are unable to agree on an institutional mechanism. Because ad hoc arbitration is conducted without the administrative supervision of an institutional dispute resolution service provider, the involvement of national courts in the arbitral process—either

those of the place of arbitration or those of the parties' respective jurisdictions—can be more direct and extensive. Thus, for example, if the parties are unable to agree on a procedure for the appointment of an arbitral tribunal, or on the identity of a sole arbitrator, or the tribunal's presiding member, recourse is required to a court of competent jurisdiction to address the parties' default, or to an appointing authority if

the parties have agreed on one. Where the default appointment is made by the court, this will be with reference to the national arbitration law [(12)] at the seat of the arbitration. More often than not, the resulting appointment is not of the same quality as would have been the case if it had been made by a qualified arbitral institution or as a result of party agreement. The additional expense and delay of having invoked the assistance of the court is seldom justified.

§2.02 ESSENTIAL ELEMENTS

Although the number of issues that can be included in and regulated through an arbitration clause is many, there are two fundamental elements that simply must be included. These are, first, a precise definition of the scope of disputes that may be submitted to arbitration and, second, a clear indication of the applicable arbitration rules. Absent these elements, a court may decline to refer the parties' dispute to arbitration. All of the arbitral regimes under consideration provide a model arbitration clause containing suggested language to satisfy these two essential elements. However, the parties may wish to modify the suggested language as discussed below.

[A] Scope of the Arbitration Clause

MODEL LANGUAGE—SCOPE

Broad Form/No Exclusions: *Any and all disputes, claims, controversies or differences arising out of, or relating to or in connection with, this Agreement (including its formation, existence, validity, performance, termination, interpretation or breach), or the subject matter of this Agreement, shall be finally resolved by binding arbitration …*

Exclusion of Defined Claims: … *except for Excluded Claims. Excluded Claims shall include only those listed below, and shall not be resolved by arbitration pursuant to the terms of this clause. Any disagreement between the Parties regarding whether a dispute, claim, controversy or disagreement is an Excluded Claim shall be decided by the Arbitral Tribunal.*

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The model arbitration clauses of the arbitral regimes under consideration use various terms to define the scope of application of the parties' arbitration agreement. The CIETAC, ICSID, LCIA, SCC, and SIAC model clauses simply refer to "any dispute." The ICC Model Clause similarly refers to "all disputes." The SCC and UNCITRAL Rules add to "any dispute" any "controversy or claim." The HKIAC Rules further add to these terms any "difference." Uniquely, the ICDR Model Clause dispenses with the term "any dispute" in favor of only "any controversy or claim." It may be said that the use of the term "claim" in addition to terms like "controversy" or "difference," or the use of the sole, broad term "dispute," clarifies that the parties may submit not only a formal legal claim to arbitration but also other disagreements which may disrupt the course of their business dealings or investment.

The foregoing terms are always qualified by additional terms defining a requisite nexus between the dispute (or controversy, claim or difference) and the parties' contract. All of the model clauses under consideration employ the term "arising" out of (or from) the contract. The ICDR, HKIAC, ICSID, and UNCITRAL model clauses additionally cover disputes "relating to" the contract, while the CIETAC, ICC, LCIA, SCC, and SIAC model clauses instead use the term "in connection with." These terms might generally be considered interchangeable, since "relate" is commonly defined in terms of a logical or causal connection, while "connection" is commonly defined as a logical or causal relation. [(13)] However, different interpretations may be possible with reference to a particular arbitration agreement and dispute. In either case, the use of such terms in addition to "arising out of" tends to broaden the scope of disputes that may be submitted to arbitration—and thereby militates against submitting any particular dispute to the courts.

Also, the HKIAC, LCIA, and SIAC model clauses variously specify that the connection or relationship between the dispute and the contract *includes* (but, ergo, is not limited to) disputes about the existence, validity, interpretation, performance, breach, or termination of the contract. Similarly, the ICDR, SCC, and UNCITRAL model clauses indicate that the arbitration agreement applies to disputes related or connected to the contract *or* disputes specifically concerning breach (or termination or invalidity) of the contract itself. Therefore, these model clauses suggest that a broader scope of disputes may be submitted to arbitration, in addition to pure contract claims, so long as those disputes are related or connected to the contract. On this point, the HKIAC Rules expressly clarify that any dispute regarding "noncontractual obligations" arising out of or relating to the contract shall be settled by arbitration. Once again, these model clauses employ language tending to broaden their reach and to preclude a court from exercising jurisdiction over a particular dispute. Note, however, that an arbitration agreement of the breadth of the HKIAC model clause could encounter limitations based on the *lex loci arbitri* concerning the nonarbitrability of certain disputes. [(14)]

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In light of the foregoing analysis, parties seeking to draft a broad arbitration agreement may wish to use the model clause of their selected institution. On the other hand, parties seeking to narrow the scope of their arbitration agreement could do so theoretically by modifying the language to the effect that only legal "claims" (not "all disputes") concerning the breach of the contract (not "relating to the contract, including breach") shall be submitted to arbitration. However, such efforts to shrink the scope of the arbitration agreement leaves a range of potential disputes concerning the same transaction or investment that will have to be submitted to the courts. Consequently, any complex dispute that overlaps that which is to be arbitrated and that which is to be adjudicated will generate parallel proceedings, additional costs and delays, and possibly inconsistent outcomes. And, even a simple dispute that straddles the line between the two will likely mire the

parties in jurisdictional arguments and postpone any resolution. [(15)] The better practice is to use a broad arbitration clause so that all related disputes can be arbitrated (an all or nothing approach). In case the parties wish to exclude specific types of disputes (e.g., applications for interim injunctive relief, or disputes concerning ownership and validity of intellectual property rights), such "carveouts" should be defined precisely as "excluded claims."

Model clauses dealing with the scope of arbitration agreements are set out in Table 2.1.

Table 2.1 Scope of Arbitration Agreement: Model Clauses

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AAA-ICDR	
Future Disputes	*Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration [...]. [...]*
CIETAC	
Future Disputes	*1. Any dispute arising from or in connection with this Contract shall be submitted [...] for arbitration [...]. [...]*
HKIAC	
Future Disputes	*Any dispute, controversy, difference or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration [...]. [...]*
ICC	
Future Disputes	*All disputes arising out of or in connection with the present contract shall be finally settled [...] by [...] arbitrators [...]. [...]*
ICSID	
Future Disputes	The [Government]/[name of constituent subdivision or agency] of name of Contracting State (hereinafter the "Host State") and name of investor (hereinafter the "Investor") hereby consent to submit [...] any dispute arising out of or relating to this agreement for settlement by [conciliation]/[arbitration]/[conciliation followed, if the dispute remains unresolved within the time limit of the communication of the report of the Conciliation Commission to the parties, by arbitration] pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter the "Convention").
LCIA	
Future Disputes	*Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration [...]. [...]*
SCC	
Future Disputes	*Any dispute, controversy or claim arising out of or in connection with this contract, or the breach, termination or invalidity thereof, shall be finally settled by arbitration [...]. [...]*
SIAC	
Future Disputes	*Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration [...]. [...]*
UNCITRAL	
Future Disputes	*Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration [...]. [...]*

[B] Applicable Arbitration Rules

MODEL LANGUAGE—ARBITRAL RULES

... in accordance with [specify official name of arbitral institution and desired rules as described by the institution] (the "Rules") ... in effect as of the effective date of this Agreement [or] in effect as of the date of the commencement of arbitration.

The arbitration clause must clearly indicate the applicable arbitration rules. The rules should be identified by their full title, rather than an acronym or other short form that third parties might not recognize or that might give rise to ambiguity. An unintelligible

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or inaccurate indication of the rules or institution may cause the tribunal to decline jurisdiction or a court to find that the arbitration agreement is unenforceable. The safest way to ensure proper identification of the arbitration rules in the arbitration clause is to consult the rules of the institution selected.

Next, it is important to clarify in the arbitration clause which version of the arbitral regime will apply to the parties' dispute: the rules in force at the time of the parties' agreement, or the rules in force when arbitration is commenced. All of the regimes under consideration have undergone periodic revisions; for example, the current version of the SIAC Rules is the sixth edition since the institution was founded in 1991. The latest revisions of the arbitral regimes under consideration in this book are as follows: AAA-ICDR (2014), CIETAC (2014), HKIAC (2018), ICC

(2017), ICSID (2006), LCIA (2014), SCC (2017), SIAC (2016), and UNCITRAL (2010). In this book, all references to these arbitral regimes are to these most recent versions unless otherwise indicated. And yet still further revisions to these regimes can be expected. At the time of this writing, ICSID is undertaking a process of modernizing its arbitration rules.

Fortunately, most of the major arbitral regimes contain provisions that clarify which version of the rules will govern the parties' dispute if this is not specified in the arbitration agreement (Table 2.2). Unless the parties have agreed otherwise, under the HKIAC, ICC, ICDR, LCIA, SCC, and SIAC Rules, the rules applicable to a given dispute are those in force on the date of commencement of the arbitration, rather than those in effect at the time the parties entered into the agreement to arbitrate. (16) This introduces a degree of uncertainty, as any eventual dispute may be governed by a new version of the rules. Although any new version will usually be designed to enhance efficiency, fairness, and best practices in global arbitration law and practice, parties are always free to include language in their arbitration clause indicating that the rules "in effect on the date of this agreement" will apply to any future arbitration rather than any subsequent version. (17)

The UNCITRAL Rules take a slightly different approach. The 2010 version of the rules states that, unless the parties have specified otherwise, they are presumed to have referred in their agreement to the rules in effect on the date of commencement of arbitration—but only if the agreement is one that was concluded after August 15, 2010. (18) Thus, if the agreement was concluded before this date, the 1976 version of the rules would govern, absent party agreement to the contrary. Moreover, the previously mentioned presumption "does not apply where the arbitration agreement has been concluded by accepting after 15 August 2010 an offer made before that date." (19) This nuance addresses the not-uncommon situation in which an applicable treaty containing a state's offer to arbitrate disputes entered into force *before* August 15, 2010, but where consent to arbitrate was not perfected until *after* that date by way of an investor's acceptance of the offer to arbitrate (e.g., in a notice of arbitration). In such

a case, the 1976 UNCITRAL Rules would govern the arbitration although nothing would prevent the parties from subsequently agreeing to the application of the 2010 rules.

Under the ICSID Rules, the applicable rules are those "in effect on the date on which the parties consented to arbitration." (20) Under Article 44 of the ICSID Convention, this will usually be the date on which one of the parties (typically the investor) submits its request for arbitration to the ICSID Secretariat, thereby signifying its acceptance of the State party's standing offer to arbitrate. Such a standing offer may be contained in an instrument of consent, such as an applicable investment protection and promotion treaty, or an investment law. The date of consent, however, will normally be different where an investment agreement is concerned, as the date of the effectiveness of the agreement, and hence of the agreement to arbitrate, will precede the date on which a dispute is submitted to arbitration. (21)

Only the CIETAC Rules do not address which version of the rules applies. CIETAC's model arbitration clause indicates that the version of the rules in force on the date of the application for arbitration is the version that will apply. (22) If the parties do not choose to use the CIETAC model clause, it will be important to clarify this point in the arbitration agreement. The model language suggested at the beginning of this section may be used for an arbitration clause electing CIETAC Rules or for other rules in instances where the parties wish to deviate from the default provisions concerning the version of the rules that will apply to their dispute.

Table 2.2 Applicable Version of Rules

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AAA-ICDR	
Article 1. Scope of These Rules	*1. Where parties have agreed to arbitrate disputes under these International Arbitration Rules ("Rules"), or have provided for arbitration of an international dispute by the International Centre for Dispute Resolution (ICDR) or the American Arbitration Association (AAA) without designating particular rules, the arbitration shall take place in accordance with these Rules as in effect at the date of commencement of the arbitration, subject to modifications that the parties may adopt in writing. The ICDR is the Administrator of these Rules.*
CIETAC	
Article 4. Scope of Application	*1. These Rules uniformly apply to CIETAC and its sub-commissions/arbitration centers.* *2. Where the parties have agreed to refer their dispute to CIETAC for arbitration, they shall be deemed to have agreed to arbitration in accordance with these Rules.* *3. Where the parties agree to refer their dispute to CIETAC for arbitration but have agreed on a modification of these Rules or have agreed on the application of other arbitration rules, the parties' agreement shall prevail unless such agreement is inoperative or in conflict with a mandatory provision of the law applicable to the arbitral proceedings. Where the parties have agreed on the application of other arbitration rules, CIETAC shall perform the relevant administrative duties.*

4. Where the parties agree to refer their dispute to arbitration under these Rules without providing the name of the arbitration institution, they shall be deemed to have agreed to refer the dispute to arbitration by CIETAC.

5. Where the parties agree to refer their dispute to arbitration under CIETAC's customized arbitration rules for a specific trade or profession, the parties' agreement shall prevail. However, if the dispute falls outside the scope of the specific rules, these Rules shall apply.

HKIAC

Article 1. Scope of Application

1.1 These Rules shall govern arbitrations where an arbitration agreement (whether entered into before or after a dispute has arisen) either: (a) provides for these Rules to apply; or (b) subject to Articles 1.2 and 1.3 below, provides for arbitration "administered by HKIAC" or words to similar effect.

1.2 Nothing in these Rules shall prevent parties to a dispute or arbitration agreement from naming HKIAC as appointing authority, or from requesting certain administrative services from HKIAC, without subjecting the arbitration to the provisions contained in these Rules. For the avoidance of doubt, these Rules shall not govern arbitrations where an arbitration agreement provides for arbitration under other rules, including other rules adopted by HKIAC from time to time.

1.3 Subject to Article 1.4, these Rules shall come into force on 1 November 2013 and, unless the parties have agreed otherwise, shall apply to all arbitrations falling within Article 1.1 in which the Notice of Arbitration is submitted on or after that date.

1.4 The provisions contained in Articles 23.1, 28, 29 and Schedule 4 shall not apply if the arbitration agreement was concluded before the date on which these Rules came into force, unless otherwise agreed by the parties.

ICC

Article 6. Effect of the Arbitration Agreement

1. Where the parties have agreed to submit to arbitration under the Rules, they shall be deemed to have submitted ipso facto to the Rules in effect on the date of commencement of the arbitration, unless they have agreed to submit to the Rules in effect on the date of their arbitration agreement.

ICSID

ICSID Convention, Article 44. Powers and Functions of the Tribunal

Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

LCIA

Preamble

Where any agreement, submission or reference howsoever made or evidenced in writing (whether signed or not) provides in whatsoever manner for arbitration under the rules of or by the LCIA, the London Court of International Arbitration, the London Court of Arbitration or the London Court, the parties thereto shall be taken to have agreed in writing that any arbitration between them shall be conducted in accordance with the LCIA Rules or such amended rules as the LCIA may have adopted hereafter to take effect before the commencement of the arbitration and that such LCIA Rules form part of their agreement (collectively, the "Arbitration Agreement"). These LCIA Rules comprise this Preamble, the Articles and the Index, together with the Annex to the LCIA Rules and the Schedule of Costs as both from time to time may be separately amended by the LCIA (the "LCIA Rules").

SCC

Preamble

Under any arbitration agreement referring to the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the "Arbitration Rules") the parties shall be deemed to have agreed that the following rules, or such amended rules, in force on the date of the commencement of the arbitration, or the filing of an application for the appointment of an Emergency Arbitrator, shall be applied unless otherwise agreed by the parties.

SIAC

Rule 1. Scope of Application and Interpretation

1.1 Where the parties have agreed to refer their disputes to SIAC for arbitration or to arbitration in accordance with the SIAC Rules, the parties shall be deemed to have agreed that the arbitration shall be conducted pursuant to and administered by SIAC in accordance with these Rules.

1.2 These Rules shall come into force on 1 August 2016 and, unless otherwise agreed by the parties, shall apply to any arbitration which is commenced on or after that date.

UNCITRAL

Article 1. Scope of Application

1. Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Arbitration Rules, then

such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree.

2. The parties to an arbitration agreement concluded after 15 August 2010 shall be presumed to have referred to the Rules in effect on the date of commencement of the arbitration, unless the parties have agreed to apply a particular version of the Rules. That presumption does not apply where the arbitration agreement has been concluded by accepting after 15 August 2010 an offer made before that date.

§2.03 HIGHLY RECOMMENDED PROVISIONS

Albeit not required for an arbitration agreement to be considered valid and enforceable, parties should identify in their arbitration agreement the place of arbitration; the number, method of appointment, and nationality of the arbitrators; the language of the arbitration; and the applicable law. The arbitral regimes reviewed in this book provide default rules to make these determinations in the absence of party agreement. However, in our experience, these issues are so critical to the conduct and outcome of the proceedings that the parties must not leave them to be decided at a later date or by a third party. The model arbitration clauses of the regimes under consideration variously suggest or recommend that the parties make indications on these issues in their arbitration agreements. We address each of these provisions further below in Table 2.3.

Table 2.3 Model Arbitration Clauses

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AAA-ICDR

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules.

The parties should consider adding:

Future Disputes

(a) The number of arbitrators shall be (one or three);

(b) The place of arbitration shall be [city, (province or state), country]; and

(c) The language(s) of the arbitration shall be _____.

CIETAC

1. Any dispute arising from or in connection with this Contract shall be submitted to China International Economic and Trade Arbitration Commission (CIETAC) for arbitration which shall be conducted in accordance with the CIETAC's arbitration rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties.

Future Disputes

2. Any dispute arising from or in connection with this Contract shall be submitted to China International Economic and Trade Arbitration Commission (CIETAC) Sub-Commission (Arbitration Center) for arbitration which shall be conducted in accordance with the CIETAC's arbitration rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties.

HKIAC

Future Disputes

Any dispute, controversy, difference or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Rules in force when the Notice of Arbitration is submitted.

The law of this arbitration shall be ... (Hong Kong law).

The seat of arbitration shall be ... (Hong Kong).

The number of arbitrators shall be ... (one or three). The arbitration proceedings shall be conducted in ... (insert language).

We, the undersigned, agree to refer to arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules any dispute, controversy, difference or claim (including any dispute regarding non-contractual obligations) arising out of or relating to:

(Brief description of contract under which disputes, controversies, differences, or claims have arisen or may arise.)

Existing Disputes

The law of this arbitration agreement shall be ... (Hong Kong law).

The seat of arbitration shall be ... (Hong Kong).

The number of arbitrators shall be ... (one or three).

The arbitration proceedings shall be conducted in ... (insert language).

ICC

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

If the parties wish to exclude any recourse to the Emergency Arbitrator Provisions, they must expressly opt out by adding the following wording to the clause above:

The Emergency Arbitrator Provisions shall not apply.

If the parties wish to exclude the application of the Expedited Procedure Provisions, they must expressly opt out by adding the following wording to the clause above:

Future Disputes

The Expedited Procedure Provisions shall not apply.

The parties may also wish to stipulate in the arbitration clause:

- *the law governing the contract;*
- *the number of arbitrators;*
- *the place of arbitration;*
- *and/or the language of the arbitration.*

ICSID

Future Disputes

The [Government]/[name of constituent subdivision or agency] of name of Contracting State (hereinafter the "Host State") and name of investor (hereinafter the "Investor") hereby consent to submit to the International Centre for Settlement of Investment Disputes (hereinafter the "Centre") any dispute arising out of or relating to this agreement for settlement by [conciliation]/[arbitration]/[conciliation followed, if the dispute remains unresolved within time limit of the communication of the report of the Conciliation Commission to the parties, by arbitration] pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter the "Convention").

Existing Disputes

The [Government]/[name of constituent subdivision or agency] of name of Contracting State (hereinafter the "Host State") and name of investor (hereinafter the "Investor") hereby consent to submit to the International Centre for Settlement of Investment Disputes (hereinafter the "Centre") for settlement by [conciliation]/[arbitration]/[conciliation followed, if the dispute remains unresolved within time limit of the communication of the report of the Conciliation Commission to the parties, by arbitration] pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, the following dispute arising out of the investment described below: ...

LCIA

	Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Rules of the LCIA, which Rules are deemed to be incorporated by reference into this clause. *The number of arbitrators shall be [one/three].*
Future Disputes	*The seat, or legal place, of arbitration shall be [City and/or Country].* *The language to be used in the arbitral proceedings shall be [ ].* *The governing law of the contract shall be the substantive law of [ ].*
	A dispute having arisen between the parties concerning [], the parties hereby agree that the dispute shall be referred to and finally resolved by arbitration under the LCIA Rules. *The number of arbitrators shall be [one/three].*
Existing Disputes	*The seat, or legal place, of arbitration shall be [City and/or Country].* *The language to be used in the arbitral proceedings shall be [].* *The governing law of the contract [is/shall be] the substantive law of [].*
SCC	
	Any dispute, controversy or claim arising out of or in connection with this contract, or the breach, termination or invalidity thereof, shall be finally settled by arbitration in accordance with the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce. *Recommended additions:*
Future Disputes	*The arbitral tribunal shall be composed of three arbitrators / [a sole arbitrator].* *The seat of arbitration shall be [...].* *The language to be used in the arbitral proceedings shall be [...].* *This contract shall be governed by the substantive law of [...].*
SIAC	
	In drawing up international contracts, we recommend that parties include the following arbitration clause:
Future Disputes	*Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre ("SIAC") in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") for the time being in force, which rules are deemed to be incorporated by reference in this clause. The seat of the arbitration shall be [Singapore].* The Tribunal shall consist of _____** arbitrator(s). The language of the arbitration shall be _____.* *Parties should also include an applicable law clause. The following is recommended:* *This contract is governed by the laws of _____.**** _____ ** Parties should specify the seat of arbitration of their choice. If the parties wish to select an alternative seat to Singapore, please replace "[Singapore]" with the city and country of choice (e.g., "[City, Country]").* *** State an odd number. Either state one, or state three.*

*** State the country or jurisdiction.

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules.

Note: Parties should consider adding:

(a) The appointing authority shall be ... [name of institution or person];

Future Disputes

(b) The number of arbitrators shall be ... [one or three];

(c) The place of arbitration shall be ... [town and country];

(d) The language to be used in the arbitral proceedings shall be [...].

[A] Place of the Arbitration

MODEL LANGUAGE—PLACE OF ARBITRATION

The place of arbitration shall be [specify city and official name of country].

The place of arbitration is often one of the most hotly negotiated elements of an international arbitration clause. The so-called situs or seat of arbitration has important legal, strategic, and practical implications for the dispute. The legal implications of the parties' choice of seat are far-reaching, first, because the arbitration proceedings typically will be governed by the national arbitration law of the seat, known as the *lex loci arbitri*. The national arbitration law usually prescribes the basic powers of the tribunal, indicates minimum standards for the conduct of the arbitration, and provides for judicial recourse in case of irregularities. [(23)] Consequently, the rules of the arbitration

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must operate within the bounds established by the *lex loci arbitri*. For example, the ICDR and UNCITRAL Rules expressly acknowledge that where the arbitration rules are in conflict with a mandatory provision of the law applicable to the arbitration, the latter shall prevail. [(24)] The LCIA Rules also recognize "the law applicable to the proceedings." [(25)] The LCIA Rules are unique in expressly providing that the *lex loci arbitri* applies not only to the arbitration but also to the arbitration agreement. They also uniquely allow the parties to agree on a law applicable to the arbitration other than the law of the seat, so long as the law of the seat permits such a choice. [(26)] The CIETAC, HKIAC, ICC, ICSID, SCC, and SIAC Rules are silent as to their relationship with the *lex loci arbitri*, reflecting the established convention that the arbitration rules will apply unless in conflict with the law of the place of arbitration. [(27)]

Since States are free to modify the UNCITRAL Model Law in drafting their own legislation, important variations can occur in the law of the seat of arbitration among the various Model Law countries. Some of these variations may include the following:

- The *lex loci arbitri* may not permit parties to contract out of various fundamental questions concerning judicial supervision of the arbitral process. [(28)]
- The law of the arbitral seat may specify mandatory rules that must be applied by an arbitral tribunal regarding statutes of limitation, choice-of-law rules, or other procedural issues. [(29)]
- In certain jurisdictions, the local public policies and mandatory laws of the arbitral seat will determine whether certain issues or claims may be submitted to arbitration (i.e., the "arbitrability" of those issues).
- Mandatory rules at the arbitral seat can determine whether parties may be represented by counsel not qualified to practice law in that jurisdiction. Until January 1, 2019, the State of California, for example, only permitted California-qualified lawyers to appear as counsel in arbitrations seated in California. [(30)]

Also, absent party agreement on issues concerning arbitrators, governing law, or rules of evidence, a tribunal may look to the law of the place of arbitration to supply rules of decision. Therefore, parties will do well to check these and other features of the

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law of any potential seat of arbitration before specifying that seat in their arbitration clause.

Second, the courts of the seat of arbitration will have jurisdiction to supervise the arbitration according to the *lex loci arbitri*. While the courts in many jurisdictions (e.g., England, France, Switzerland, the U.S.) will normally enforce agreements to arbitrate, decide in favor of the arbitrability of claims, (31) and otherwise refrain from interfering in the arbitral process, this type of "proarbitration" attitude is not universal. Local court interference in international arbitrations sited within the court's jurisdiction can take many forms, including declining to enforce arbitration agreements, making appointments of unqualified arbitrators, enjoining arbitral proceedings, and overturning arbitral awards. (32)

Third, in enforcement or set-aside proceedings, a court will deem the arbitral award to have been made at the seat of arbitration. An arbitral award that is rendered outside of the jurisdiction in which that award is to be enforced may be subject to different procedural requirements for enforcement purposes than an award that was rendered in the enforcement jurisdiction. (33) As discussed in Chapter 9 (The Award: Form, Effect, and Enforceability), a party seeking to set aside an award will typically do so before the courts of the seat, because a successful petition will usually cause the award to be unenforceable in all other Member States of the New York Convention and/or other applicable treaty. (34) Because there are varying standards under national law for the review of arbitral awards, the choice of arbitral seat can, therefore, have significant consequences for the award.

In addition to the foregoing legal considerations, practical considerations may bear on the selection of the seat. First, parties may perceive a certain "home court" advantage if the arbitration can be seated in their principal place of business or domicile. Second, party-appointed arbitrators and appointing authorities may opt to choose an arbitrator from among local arbitration specialists at the seat of the arbitration. On the one hand, such a person would tend to have knowledge of the *lex loci arbitri*; on the other, that person may approach the arbitration based on the judicial style of that jurisdiction (which may not be preferred by the parties). Third, where the

arbitration takes place can have a material effect on the costs of arbitration. These include travel and visas and room and board. While major arbitration centers like New York or Geneva may be more costly, they typically have state-of-the-art arbitration facilities, qualified interpreters and stenographers, reliable telecommunications, etc. on location, which may offset other costs.

It is possible to obtain the legal benefits of a particular seat of arbitration and the practical benefits of a different location for meetings and hearings. Most of the rules contain very similar provisions regarding the ability of the tribunal to hold conferences and meetings and to conduct hearings at any location it deems appropriate (not just at the arbitral seat). (35) Such provisions reflect the practical reality that, for reasons mostly related to geographic convenience, the legal seat need not necessarily coincide with the physical location of the proceedings. (36) Of those rules, some require the tribunal to consult with the parties before scheduling a hearing and/or otherwise ordering that a procedural act occur at a location other than the seat, presumably to protect the parties from possible abuses. (37) Some rules provide the parties with the option to limit, by agreement, the tribunal's ability to hold hearings and/or meetings in places other than the seat of the arbitration. (38) As to the tribunal's deliberations, however, the ICC, LCIA, SCC, and UNCITRAL Rules make clear that there is no need to consult with the parties and that the parties may not suppress the tribunal's freedom to hold deliberations wherever it deems appropriate. (39) The ICDR Rules empower the tribunal to "meet at any place it deems appropriate for *any purpose*, including to conduct hearings, hold conferences, hear witnesses, inspect property or documents, or deliberate"; the tribunal need not consult with the parties and is not limited by any prior agreement of the parties. (40)

Taking the foregoing considerations together, the following guidelines may assist parties to make an informed choice of the arbitral seat in the context of contractual negotiations or to evaluate any such recommendations that may be offered by a counterparty.

Guidelines for Selecting Arbitral Seat

- **New York Convention Jurisdictions.** Select only those jurisdictions that have acceded to the New York Convention, as this increases the likelihood that the arbitration agreement and/or arbitration award will be enforced. In order for an arbitration award to be subject to the New York Convention's enforcement regime, it must have been made in a State that is a party to the Convention. In certain circumstances, if the State is not a party to the New York Convention, an inquiry should be made to determine whether the State is a party to other multilateral agreements, such as the Inter-American Convention on International Commercial Arbitration (Panama Convention), which might facilitate the enforcement of an arbitral award. If there are no applicable bilateral or multilateral treaties, it is unwise to choose that forum as the seat of the arbitration.

- **Well-developed National Arbitration Laws.** Select jurisdictions that have a national arbitration law that is well-developed and predictable, but that is not overly intrusive and is still supportive of the arbitral process. Several such jurisdictions are identified in the table below. In addition, with one very important caveat, there are other jurisdictions that have adopted (in full or in modified form) the United Nations Commission on International Trade Law's Model Law on International Arbitration (UNCITRAL Model Law), which may also be considered as falling within this category. However, even if a jurisdiction has adopted or based its arbitration law on the UNCITRAL Model Law, ultimately it is local judges and courts that must give effect to the law's provisions. Their ability to do so will depend on a variety of factors, including the degree of development of the State and of its court system; the independence of the courts from political influence; the extent of familiarity of national judges with arbitral processes, both domestic and international; and national public policy considerations.

- **Doctrine of Separability**. Select a jurisdiction where the national arbitration law and courts recognize the doctrine of the separability of the arbitration agreement and are otherwise inclined to enforce arbitration agreements. The separability doctrine provides for the continuing validity of an arbitration clause, even if the underlying contract in which the clause is embedded is somehow found to be invalid or unenforceable. In practice, because of the separability doctrine, a challenge to the parties' underlying contract (e.g., on the grounds that the contract was fraudulently induced, void for lack of consideration or superseded) will not affect their arbitration agreement, which is considered to be a separate contract with separate legal effect. Accordingly, a tribunal's award on the merits will be valid even if it finds that the parties' substantive agreement is void. Exceptions to the application of the separability doctrine are limited, for example, where the parties have expressly excluded its application or where the basis for challenging jurisdiction is fraud tainting the arbitration agreement itself. All of the major arbitral institution rules recognize the separability doctrine. (41)

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- **Arbitrability**. Avoid jurisdictions where it is unclear whether particular claims or categories of claims are arbitrable or not.

- **Choice of Arbitrator**. Avoid jurisdictions that seek to regulate who a party may appoint as arbitrator, or who may serve as sole arbitrator or as the presiding member of a three-member tribunal. (42)

- **Inexperienced Courts**. Avoid jurisdictions where the courts are inclined to take an active role in supervising arbitrations within their jurisdiction, or lack experience in the interpretation and application of the national arbitration law.

- **Award Review**. Avoid jurisdictions where there is a predilection on the part of the courts to review the substance of arbitral awards.

- **Choice of Counsel**. Avoid jurisdictions that restrict the role of non-locally qualified counsel in representing a party to an arbitration.

Some of the more popular arbitral venues selected by parties because of (1) their friendly attitude toward arbitration and (2) the availability of developed facilities for arbitral proceedings (e.g., developed air, ground and rail transportation system; ease of access; business hotels; political stability; court reporters; interpreters) are identified in the table below.

Jurisdiction	Arbitral Law
New York, New York, USA	Federal Arbitration Act, 9 USC sec. 1 et seq; New York Arbitration Law, Art. 75, Civil Law and Practice Rules
Miami, Florida, USA	Federal Arbitration Act, 9 USC sec. 1 et seq; Chapter 682, Florida Statutes
Paris, France	Décret No 2011-48, 13 Jan. 2011
London, England	Arbitration Act 1996
Geneva or Zurich, Switzerland	Federal Private International Law Act (18 Dec. 1987 as amended up to 1 July 2014), Chapter 12
Dubai International Financial Center	DIFC Law No. 1 of 2008
Hong Kong	Chapter 609, Arbitration Ordinance
Singapore	International Arbitration Act (amended most recently in 2012)

As mentioned above, the national arbitration legislation of an increasing number of States is based on the UNCITRAL Model Law. The principal objective of the UNCITRAL Model Law is to make international arbitration agreements and awards more readily, predictably, and uniformly enforceable and to minimize the potential for judicial interference in international arbitration proceedings. The main features of the UNCITRAL Model Law are summarized below:

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SALIENT FEATURES OF THE UNCITRAL MODEL LAW

- An arbitration is "international" under the Model Law if "the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States" (Article 1(3)), or if the place of arbitration, the place of contract performance, or the place of the subject-matter of the dispute is situated in a State other than where the parties have their place of business, or if the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

- No clear definition is provided regarding the term "commercial." A note to Article 1 calls for "a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not." The footnote to Article 1 then provides an illustrative list of relationships that are to be considered commercial.

- Court involvement is envisaged in the following instances: Appointment, challenge and termination of the mandate of an arbitrator (Articles 11, 13 and 14), jurisdiction of the arbitral tribunal (Article 16), setting aside of the arbitral award (Article 34), taking evidence (Article 27), recognition of the arbitration agreement, including its compatibility with court-ordered interim measures of protection (Articles 8 and 9), and recognition and enforcement of arbitral awards (Articles 35 and 36). Beyond the foregoing, "[i]n matters governed by this Law, no court shall intervene except where so provided in this Law." (Article 5).

- Chapter II of the Model Law (comprising Articles 7-9) deals with the arbitration agreement, including its recognition by courts. The provisions of the 1985 version of the Model Law follow closely Article II of the New York Convention, with a number of useful clarifications added. Article 7(1) recognizes the validity and effect of a commitment by the parties to submit to arbitration an existing dispute ("*compromis*") or a future dispute ("*clause compromissoire*"). While oral arbitration agreements are found in practice and are recognized by some national laws, Article 7(2) of the 1985 version follows the New York Convention in requiring written form. It widens and clarifies the definition of written form of Article II(2) of that Convention by adding "telex or other means of telecommunication which provide a record of the agreement," by covering the situation of "an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another," and by providing that "the reference in a contract to a document" (e.g., general conditions) "containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract." Article 7 of the 2006 revised version offers two options, which reflect two different approaches on the question of definition and form of arbitration agreement. The first option is similar in structure to the 1985 version and, like the 1985 version and the New York Convention, requires that the arbitration agreement be in written form. However, it allows for the arbitration agreement to be entered into in any form (e.g. including orally) as long as the content of the agreement is recorded "in any form"; it regards a record of the contents as equivalent to a traditional writing. The second option takes a completely different approach and dispenses with the writing requirement altogether.

- Articles 8 and 9 deal with two important aspects of the complex issue of the relationship between the arbitration agreement and resort to courts. Modeled on

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Article II(3) of the 1958 New York Convention, Article 8(1) of the Model Law obliges any court to refer the parties to arbitration, regardless of the place of arbitration, if seized with a claim on the same subject-matter unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. Article 9 expresses the principle that a request for interim measures of protection from a court will not be considered incompatible with an arbitration agreement, regardless of the place of arbitration. Wherever a request for interim relief is made, it may not be relied upon, under the Model Law, as an objection against the existence or effect of an arbitration agreement.

- Chapter III (Articles 10-15) contains a number of detailed provisions on the appointment, challenge, termination of mandate and replacement of an arbitrator. The Model Law recognizes the freedom of the parties to determine, by reference to an existing set of arbitration rules or by an ad hoc agreement, the procedures to be followed, subject to fundamental requirements of fairness and justice. Articles 11, 13 and 14 provide for assistance by courts or other authorities in the event the parties are unable to proceed by agreement.

- Article 16(1) adopts the principles of "*Kompetenz-Kompetenz*" and of separability of the arbitration clause. The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause shall be treated as an agreement independent of the other terms of the contract, and a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

- The Model Law empowers the arbitral tribunal, unless otherwise agreed by the parties, to order any party to take an interim measure of protection in respect of the subject-matter of the dispute, if so requested by another party (Article 17). The 2006 revision to the Model Law establishes a comprehensive framework governing interim measures. It specifies appropriate circumstances for granting interim measures (Article 17A), empowers the tribunal to issue preliminary orders "directing a party not to frustrate the purpose of the interim measure requested" (Articles 17B and 17C), sets forth the conditions for suspension and modification of orders granting interim relief (Article 17D), establishes a regime for recognition and enforcement of interim measures (Articles 17H and 17I), and delineates the grounds upon which a domestic court can set aside orders granting interim measures.

- Chapter V (Articles 18-27) provides the legal framework for a fair and effective arbitral procedure. Article 18 embodies the basic principle that the parties shall be treated with equality and each party shall be given a full opportunity to present its case.

- Article 19 guarantees the parties' freedom to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings, subject to a few mandatory provisions on procedure, and empowers the arbitral tribunal, failing agreement by the parties, to conduct the arbitration in such a manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

- Article 20 addresses the place of arbitration and Article 22 the language of the proceedings.

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- Article 24(1) provides that, unless the parties have validly agreed that no oral hearings for the presentation of evidence or for oral argument be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

Article 24(3) provides that all statements, documents and other information supplied to the arbitral tribunal by one party shall be communicated to the other party, and that any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties. In order to enable the parties to be present at any hearing and at any meeting of the arbitral tribunal for inspection purposes, they shall be given sufficient notice in advance (Article 24(2)).

- Another fundamental right of a party of being heard and being able to present his case relates to evidence by an expert appointed by the arbitral tribunal. Article 26(2) obliges the expert, after having delivered his written or oral report, to participate in a hearing where the parties may put questions to him and present expert witnesses in order to testify on the points at issue, if such a hearing is requested by a party or deemed necessary by the arbitral tribunal.

- Under the Model Law, the arbitral proceedings may be continued in the absence of a party only if due notice was given. This applies, in particular, to the failure of a party to appear at a hearing or to produce documentary evidence without showing sufficient cause for such failure (Article 25l). The arbitral tribunal may also continue the proceedings where the respondent fails to communicate its statement of defence, while there is no need for continuing the proceedings if the claimant fails to submit his statement of claim (Articles 25(a), (b)).

- Article 28 deals with the substantive law aspects of arbitration. Under paragraph (1), the arbitral tribunal decides the dispute in accordance with such "rules of law" as may be agreed by the parties. However, when the parties have not designated the applicable law, the arbitral tribunal shall apply the national law that it considers applicable as determined by relevant conflict-of-laws rules. According to Article 28(3), the parties may authorize the arbitral tribunal to decide the dispute *ex aequo et bono* or as *amiables compositeurs.* Paragraph (4) makes clear that in all cases, *i.e.* including an arbitration *ex aequo et bono*, the arbitral tribunal must decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

- In its rules on the making of the award (Articles 29-31), the Model Law pays special attention to the rather common case that the arbitral tribunal consists of a plurality of arbitrators (in particular, three). It provides that, in such case, any award and other decision shall be made by a majority of the arbitrators, except on questions of procedure, which may be left to a presiding arbitrator. The majority principle applies also to the signing of the award, provided that the reason for any omitted signature is stated.

- Article 31(3) provides that the award shall state the place of arbitration and that it shall be deemed to have been made at that place. As to this presumption, it may be noted that the final making of the award constitutes a legal act, which in practice is not necessarily one factual act but may be done in deliberations at various places, by telephone conversation or correspondence; above all, the award need not be signed by the arbitrators at the same place.

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- The arbitral award must be in writing and state its date. It must also state the reasons on which it is based, unless the parties have agreed otherwise or the award is an award on agreed terms, *i.e.* an award which records the terms of an amicable settlement by the parties. It may be added that the Model Law neither requires nor prohibits "dissenting opinions."

- *Setting Aside of Arbitral Award:* An application for setting aside under Article 34 must be made within three months of receipt of the award. The Model Law contains an exclusive list of limited grounds on which an award may be set aside. This list, which mirrors Article 36(1), derives from the grounds listed in Article V of the 1958 New York Convention: lack of capacity of parties to conclude arbitration agreement or lack of valid arbitration agreement; lack of notice of appointment of an arbitrator or of the arbitral proceedings or inability of a party to present his case; award deals with matters not covered by submission to arbitration; composition of arbitral tribunal or conduct of arbitral proceedings contrary to effective agreement of parties or, failing agreement, to the Model Law; non-arbitrability of subject-matter of dispute and violation of public policy, which would include serious departures from fundamental notions of procedural justice. Although the grounds for setting aside are almost identical to those for refusing recognition or enforcement, two practical differences should be noted. Firstly, the grounds relating to public policy, including non-arbitrability, may be different in substance, depending on the State in question (*i.e.*, State of setting aside or State of enforcement). Secondly, and more importantly, the grounds for refusal of recognition or enforcement are valid and effective only in the State (or States) where the winning party seeks recognition and enforcement, while the grounds for setting aside have a different impact: The setting aside of an award at the place of origin may bar enforcement of that award elsewhere by virtue of Article V(1)(e) of the 1958 New York Convention and Article 36(1)(a)(v) of the Model Law. The grounds on which recognition or enforcement may be refused under the Model Law are identical to those listed in Article V of the New York Convention, but under the Model Law, they are relevant not merely to foreign awards but to all awards rendered in international commercial arbitration.

- *Recognition and Enforcement of Arbitral Awards*. The eighth and final chapter of the Model Law deals with recognition and enforcement of awards. Its provisions reflect the significant policy decision that the same rules should apply to arbitral awards whether made in the country of enforcement or abroad, and that those rules should follow closely the 1958 New York Convention. Under Article 35(1), any arbitral award, irrespective of the country in which it was made, shall be recognized as binding and enforceable, subject to the provisions of Article 35(2) and of Article 36 (which sets forth the grounds on which recognition or enforcement may be refused). Based on the above consideration of the limited importance of the place of arbitration in international cases and the desire of overcoming territorial restrictions, reciprocity is not included as a condition for recognition and enforcement.

The countries that have adopted the UNCITRAL Model Law, either in full or in modified form, as of the date of this work, are identified in the table below.

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UNCITRAL MODEL LAW JURISDICTIONS	
Jurisdictions That Have Adopted the UNCITRAL Model Law with or Without Modification	*Armenia, Australia (Australian Capital Territory, New South Wales, Northern Territory, Queensland, South Australia, Tasmania, Victoria, Western Australia), Austria, Azerbaijan, Bahrain, Bangladesh, Belarus, Belgium, Brunei, Bulgaria, Cambodia, Canada (Alberta, British Colombia, Manitoba, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, Ontario, Prince Edward Island, Quebec, Saskatchewan, Yukon), Chile, China (Hong Kong SAR and Macao SAR), Costa Rica, Croatia, Cyprus, Denmark, Dominican Republic, Egypt, Estonia, Fiji, Georgia, Germany, Greece, Guatemala, Honduras, Hungary, India, Iran, Ireland, Jamaica, Japan, Jordan, Kenya, Lithuania, Macedonia, Madagascar, Malaysia, Malta, Mauritius, Mexico, Mongolia, Montenegro, Myanmar, New Zealand, Nicaragua, Nigeria, Norway, Oman, Paraguay, Peru, Philippines, Poland, Qatar, Republic of Korea, Russian Federation, Rwanda, Serbia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Thailand, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland (Bermuda, British Virgin Islands, Scotland), U.S.A. (California, Connecticut, Florida, Georgia, Illinois, Louisiana, Oregon, Texas), Venezuela, Zambia, Zimbabwe* [43]

Since the seat of arbitration is so important, all of the rules under consideration allow the parties to agree on the seat of the arbitration. However, if no such agreement is made, the ICC Rules and SCC Rules provide that the seat of the arbitration will be fixed by the arbitral institution. [44] The ICDR Rules also follow this model, but with a very important difference in that the Administrator may initially determine the place of arbitration, subject to the tribunal's final determination. [45] Under the LCIA regime, the default seat is London, unless the arbitral tribunal decides that another place would be more appropriate in view of the circumstances and after having given the parties a reasonable opportunity to make written submissions on this point. [46] The HKIAC Rules are similar to the LCIA Rules—the default seat is Hong Kong unless the tribunal determines another seat would be more appropriate given the circumstances of the case. [47] The SIAC Rules do not indicate a default seat and only provide that the seat will be determined by the tribunal. [48] Under the ICSID Rules, which are based on a multilateral treaty, the default place of arbitration is Washington, D.C. [49] Under the CIETAC Rules, the default place of arbitration is Beijing or the domicile of the CIETAC

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subcommission/center administering the case, unless CIETAC considers that another place would be more appropriate. [50]

None of the rules indicate precisely how the arbitral institution or the arbitrators are to determine the seat of the arbitration. Most of the rules only require that the determination of the seat of the arbitration be made with regard to the circumstances of the case, and in the case of the LCIA Rules, the contentions of the parties. [51] In practice, arbitral institutions and tribunals take into account several factors, such as, the nationality of the parties and of the arbitrators, the parties' choice of substantive law, the locus of the dispute or key locations within the contract, the geographic location of the witnesses, the geographic location of the parties, the adequacy of local services and infrastructure required for meetings and hearings, and the extent to which a particular place may be said to be proarbitration based on its legislative framework for, and judicial treatment of, international arbitration. [52]

Table 2.4 below reproduces the relevant provisions of the arbitration rules offered by the arbitral institutions discussed in this book, which relate to the place of arbitration absent party agreement. We have also included the provisions of the rules concerning the *lex loci arbitri*, as well as those addressing where hearings may be held.

Table 2.4 Seat of Arbitration

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AAA-ICDR	
Article 1. Scope of These Rules	*2. These Rules govern the arbitration, except that, where any such rule is in conflict with any provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.*
Article 17. Place of Arbitration	*1. If the parties do not agree on the place of arbitration by a date established by the Administrator, the Administrator may initially determine the place of arbitration, subject to the power of the arbitral tribunal to determine finally the place of arbitration within 45 days after its constitution.* *2. The tribunal may meet at any place it deems appropriate for any purpose, including to conduct hearings, hold conferences, hear witnesses, inspect property or documents, or deliberate, and, if done*

	elsewhere than the place of arbitration, the arbitration shall be deemed conducted at the place of arbitration and any award shall be deemed made at the place of arbitration.
CIETAC	
Article 2. The Structure and Duties	*6. The parties may agree to submit their disputes to CIETAC or a sub-commission/arbitration center of CIETAC for arbitration. Where the parties have agreed to arbitration by CIETAC, the Arbitration Court shall accept the arbitration application and administer the case. Where the parties have agreed to arbitration by a sub-commission/arbitration center, the arbitration court of the sub-commission/arbitration center agreed upon by the parties shall accept the arbitration application and administer the case. Where the sub-commission/arbitration center agreed upon by the parties does not exist or its authorization has been terminated, or where the agreement is ambiguous, the Arbitration Court shall accept the arbitration application and administer the case. In the event of any dispute, a decision shall be made by CIETAC.*
Article 7. Place of Arbitration	*1. Where the parties have agreed on the place of arbitration, the parties' agreement shall prevail.* *2. Where the parties have not agreed on the place of arbitration or their agreement is ambiguous, the place of arbitration shall be the domicile of CIETAC or its sub-commission/arbitration center administering the case. CIETAC may also determine the place of arbitration to be another location having regard to the circumstances of the case.* *3. The arbitral award shall be deemed as having been made at the place of arbitration.*
Article 36. Place of Oral Hearing	*1. Where the parties have agreed on the place of an oral hearing, the case shall be heard at that agreed place except in the circumstances stipulated in Paragraph 3 of Article 82 of these Rules.* *2. Unless otherwise agreed by the parties, the place of oral hearings shall be in Beijing for a case administered by the Arbitration Court or at the domicile of the sub-commission/arbitration center administering the case, or if the arbitral tribunal considers it necessary and with the approval of the President of the Arbitration Court, at another location.*
Article 82. Arbitration Fees and Costs	*3. Where the parties have agreed to hold an oral hearing at a place other than the domicile of CIETAC or its relevant sub-commission/arbitration center, they shall advance a deposit for the actual costs such as travel and accommodation expenses incurred thereby. In the event that the parties fail to do so within the time period specified by CIETAC, the oral hearing shall be held at the domicile of CIETAC or its relevant sub-commission/arbitration center.*
HKIAC	
Article 2. Interpretation of Rules	*2.14. References in the Rules to the "seat" of arbitration shall mean the place of arbitration as referred to in Article 20.1 of the UNCITRAL Model Law on International Commercial Arbitration.*
Article 14. Seat and Venue of the Arbitration	*14.1. The parties may agree on the seat of arbitration. Where there is no agreement as to the seat, the seat of arbitration shall be Hong Kong, unless the arbitral tribunal determines, having regard to the circumstances of the case, that another seat is more appropriate.* *14.2. Unless the parties have agreed otherwise, the arbitral tribunal may meet at any location outside of the seat of arbitration which it considers appropriate for consultation among its members, hearing witnesses, experts or the parties, or the inspection of goods, other property or documents. The arbitration shall nonetheless be treated for all purposes as an arbitration conducted at the seat.*
ICC	
Article 18. Place of the Arbitration	*1. The place of the arbitration shall be fixed by the Court, unless agreed upon by the parties.* *2. The arbitral tribunal may, after consultation with the parties, conduct hearings and meetings at any location it considers appropriate, unless otherwise agreed by the parties.* *3. The arbitral tribunal may deliberate at any location it considers appropriate.*
Article 19. Rules Governing the Proceedings	*The proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.*
Appendix II. Internal Rules of the International Court of Arbitration, Article 6. Scrutiny of Arbitral Awards	*When the Court scrutinizes draft awards in accordance with Article 34 of the Rules, it considers, to the extent practicable, the requirements of mandatory law at the place of the arbitration.*
ICSID	
ICSID Convention, Article 2.	*The seat of the Centre shall be at the principal office of the International Bank for Reconstruction and Development (hereinafter called the Bank). The seat may be moved to another place by decision of the*

	Administrative Council adopted by a majority of two-thirds of its members.
ICSID Convention, Article 62. Place of Proceedings	*Conciliation and arbitration proceedings shall be held at the seat of the Center except as hereinafter provided.*
	Conciliation and arbitration proceedings may be held, if the parties so agree,
ICSID Convention, Article 63. Place of Proceedings	*(a) at the seat of the Permanent Court of Arbitration or of any other appropriate institution, whether private or public, with which the Center may make arrangements for that purpose; or*
	(b) at any other place approved by the Commission or Tribunal after consultation with the Secretary-General.
Arbitration Rules, Rule 13. Sessions of the Tribunal	*3. The Tribunal shall meet at the seat of the Center or at such other place as may have been agreed by the parties in accordance with Article 63 of the Convention. If the parties agree that the proceeding shall be held at a place other than the Center or an institution with which the Center has made the necessary arrangements, they shall consult with the Secretary-General and request the approval of the Tribunal. Failing such approval, the Tribunal shall meet at the seat of the Center.*
Administrative and Financial Regulations, Regulation 26. Place of Proceedings	*1. The Secretary-General shall make arrangements for the holding of conciliation and arbitration proceedings at the seat of the Center or shall, at the request of the parties and as provided in Article 63 of the Convention, make or supervise arrangements if proceedings are held elsewhere.*
	2. The Secretary-General shall assist a Commission or Tribunal, at its request, in visiting any place connected with a dispute or in conducting inquiries there.
LCIA	
	16.1. The parties may agree in writing the seat (or legal place) of their arbitration at any time before the formation of the Arbitral Tribunal and, after such formation, with the prior written consent of the Arbitral Tribunal.
	16.2. In default of any such agreement, the seat of the arbitration shall be London (England), unless and until the Arbitral Tribunal orders, in view of the circumstances and after having given the parties a reasonable opportunity to make written comments to the Arbitral Tribunal, that another arbitral seat is more appropriate. Such default seat shall not be considered as a relevant circumstance by the LCIA Court in appointing any arbitrators under Articles 5, 9A, 9B, 9C and 11.
Article 16. Seat(s) of Arbitration and Place(s) of Hearings	*16.3. The Arbitral Tribunal may hold any hearing at any convenient geographical place in consultation with the parties and hold its deliberations at any geographical place of its own choice; and if such place(s) should be elsewhere than the seat of the arbitration, the arbitration shall nonetheless be treated for all purposes as an arbitration conducted at the arbitral seat and any order or award as having been made at that seat.*
	16.4. The law applicable to the Arbitration Agreement and the arbitration shall be the law applicable at the seat of the arbitration, unless and to the extent that the parties have agreed in writing on the application of other laws or rules of law and such agreement is not prohibited by the law applicable at the arbitral seat.
SCC	
	The Board takes decisions under these Rules, including deciding:
	[...]
Article 11. Decisions by the Board	*(viii) on the seat of arbitration pursuant to Article 25*
	1. Unless agreed upon by the parties, the Board shall decide the seat of arbitration.
	2. The Arbitral Tribunal may, after consulting the parties, conduct hearings at any place it considers appropriate. The Arbitral Tribunal may meet and deliberate at any place it considers appropriate. The arbitration shall be deemed to have taken place at the seat of arbitration regardless of any hearing, meeting, or deliberation held elsewhere.
Article 25. Seat of Arbitration	*3. The award shall be deemed to have been made at the seat of arbitration.*
SIAC	
Rule 21. Seat of Arbitration	*21.1. The parties may agree on the seat of the arbitration. Failing such an agreement, the seat of the arbitration shall be determined by the Tribunal, having regard to all the circumstances of the case.*

21.2. The Tribunal may hold hearings and meetings by any means it considers expedient or appropriate and at any location it considers convenient or appropriate.

UNCITRAL	
Article 1. Scope of Application	*3. These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.*
Article 18. Place of Arbitration	*1. If the parties have not previously agreed on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case. The award shall be deemed to have been made at the place of arbitration.* *2. The arbitral tribunal may meet at any location it considers appropriate for deliberations. Unless otherwise agreed by the parties, the arbitral tribunal may also meet at any location it considers appropriate for any other purpose, including hearings.*

[B] Number of Arbitrators

MODEL LANGUAGE—NUMBER OF ARBITRATORS

The Arbitral Tribunal shall consist of [a sole arbitrator] or [three arbitrators].

In the absence of party agreement on the number of arbitrators, the ICDR, HKIAC, ICC, LCIA, SCC, and SIAC Rules provide that the institution will determine whether the tribunal shall consist of one or three arbitrators, depending on its assessment of the size, complexity, amount in dispute, or other circumstances of the case. (53) Under the

CIETAC Rules, ICSID Convention, and UNCITRAL Rules, the default tribunal comprises three arbitrators. (54) However, under the UNCITRAL Rules, if a party proposes a sole arbitrator and the other party does not respond to the proposal and does not appoint a second arbitrator, the tribunal may consist of a sole arbitrator. (55) The rules concerning the number of arbitrators are presented and discussed in full in section §4.04 (Appointment of Arbitrators). Also, some arbitral regimes (HKIAC, ICC, ICDR, SCC, and SIAC) provide for the application of expedited procedures to disputes that fall below specified monetary thresholds (unless otherwise indicated by the parties), including the appointment of a sole arbitrator. These monetary thresholds are presented and discussed in full in section §10.01 (Expedited Procedures).

Parties who want to be certain that their dispute will be heard by a sole arbitrator, or by a multimember tribunal, must include such a provision in their arbitration agreement. The common practice is for parties to agree on either one or three arbitrators, although parties have been known to designate two or five (where this is permitted under the arbitration laws of the seat and by the institutional rules that have been selected); the former number risks deadlock and the latter unnecessary delay and expense. (56) Thus it is best for the parties to indicate either a sole arbitrator or a three-member tribunal.

The advantages of a sole arbitrator include easier planning and logistics (as fewer schedules need to be taken into account), lower arbitrator fees and costs, and frequently a quicker path to a final decision than with a three-member arbitral tribunal. However, while a three-member tribunal may take longer to issue an award and the arbitrator fees involved can be as much as three times higher, the risk of an erroneous award is considerably lower. In addition, the three members of the tribunal can bring diverse perspectives, skills, and expertise to ensure that the whole tribunal truly understands the parties' cases, notwithstanding the various languages, legal traditions, and technical concepts inherent in every international arbitration.

Likewise, the parties may wish to make provision for one arbitrator for amounts in controversy falling below a certain threshold and three arbitrators above that threshold. Parties who choose the HKIAC, ICC, ICDR, SCC, or SIAC Rules, which include default provisions to this effect, may nevertheless wish to indicate a different monetary threshold. Alternatively, the parties could defer their agreement on the number of arbitrators until after a dispute has arisen. This would allow them to take into account the nature and complexity of the actual dispute when deciding how many arbitrators should constitute the tribunal. However, while such flexibility can be advantageous, it is often offset by the delay and additional expense that may result from having to make an application to the relevant arbitral institution, or, if none is chosen, to a court, to make the determination.

[C] Method of Appointment

MODEL LANGUAGE—METHOD OF APPOINTMENT

The Arbitral Tribunal shall consist of [a sole arbitrator] or [three arbitrators].

All of the appointment mechanisms offered by the major arbitral regimes are reasonably effective and efficient in ensuring the prompt appointment of a sole arbitrator or a three-member arbitral tribunal. For a sole arbitrator, most regimes permit the parties to agree on whom to select within a fixed period of time. Absent agreement by the parties, the institution or appointing authority will make the appointment. However, the ICDR, CIETAC, and UNCITRAL Rules provide for the institution or appointing authority to attempt to facilitate party agreement through the use of a list method of arbitrator selection. For a three-member tribunal, the regimes generally provide for each party to select an arbitrator, and for the institution or appointing authority to make the selection on behalf of a party who fails to do so. Thereafter, the regimes variously provide for the two arbitrators, the parties or the institution to select the third, presiding arbitrator. Where there are more than two parties from the outset of the arbitration, the regimes generally provide for each "side" jointly to select an arbitrator, and for the institution or appointing authority to make the selection on behalf of a side that fails to do so. Where additional parties join an arbitration after it has commenced, the regimes generally provide that any arbitrator appointments will be revoked and the institution or appointing authority will appoint the tribunal. A full presentation and discussion of the rules concerning the method of appointing the arbitral tribunal is presented in section §4.04 (Appointment of Arbitrators).

If the parties do not select an arbitral regime, or chose one but wish to deviate from its default provisions for appointing the tribunal, they may include their own method of appointment in their arbitration agreement. If the parties do not indicate clearly in their arbitration agreement the method of appointing the tribunal, whether by bespoke provisions or by reference to an arbitral regime, then the competent courts may be called upon to determine the method. (57) This can lead to judicial proceedings in multiple jurisdictions, inconsistent outcomes, and, after considerable delay, expense, and frustration, the appointment of an arbitral tribunal that does not include all of the attributes that would have been chosen had the parties come to a prior agreement.

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[D] Nationality of Arbitrators

MODEL LANGUAGE—ARBITRATOR NATIONALITY

[The sole arbitrator [shall not] [may] share the nationality or citizenship of any of the Parties] or [The presiding arbitrator [shall not] [may] share the nationality or citizenship of any of the Parties.]

The risk that an arbitrator will not be able to remain impartial based on shared nationality with one of the parties can be eliminated in the parties' arbitration agreement, if not also in the law of the seat and the applicable arbitration rules. Typical contract language on this point precludes the appointment of a sole or presiding arbitrator who shares the same nationality as any of the parties. Less common is language requiring that none of the arbitrators shares the same nationality as any of the parties.

Under almost all of the regimes, the parties are free to agree on an arbitrator of any nationality, whether or not he or she is of the same nationality as any of the parties. Most of the arbitral regimes under consideration, however, provide for strict nationality requirements in the event of default appointments by the institution.

The LCIA Rules come the closest to an absolute prohibition on a sole or presiding arbitrator sharing the nationality of one of the parties. They provide that where the parties are of different nationalities, neither a sole arbitrator nor the tribunal chairman can share the nationality of any of the parties, absent agreement in writing by all parties who are not of the same nationality. For example, in a multiparty arbitration involving an American claimant and two Pakistani respondents, absent agreement by both Pakistani respondents that the presiding or sole arbitrator may have American nationality, under the LCIA Rules the appointment of a national of a third country is mandatory. Thus, the LCIA Rules are unique in that they remove all uncertainty that may occur where an arbitral institution is vested with discretion in making a default appointment.

The LCIA Rules further clarify that the nationality of a party includes "that of controlling shareholders or interests," but say nothing about what law will apply in respect of determining the scope or application of this restriction. In addition, they provide that a person with citizenship in two or more states will be treated as a national of each State. Under the LCIA Rules, citizens of the European Union are treated as nationals of its different Member States, which is a stipulation unique to the LCIA. The LCIA Rules further provide that "a citizen of a State's overseas territory shall be treated as a national of that territory and not of that State; and a legal person incorporated in a State's overseas territory shall be treated as such and not (by such fact alone) as a national of or a legal person incorporated in that State." (58)

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The HKIAC Rules prohibit the appointment of a sole or presiding arbitrator with the same nationality as any party. (59) This prohibition is waived either if the parties have otherwise agreed in writing, or in appropriate circumstances provided none of the parties object within a time limit set by HKIAC. (60) An example of "appropriate circumstances" might be if the pool of arbitrators is too narrow and needs to be widened by waiving the nationality requirement. (61) It should be noted that the nationality requirement does not apply to party-appointed arbitrators.

The ICC Rules also prohibit the appointment of a presiding arbitrator or sole arbitrator having the same nationality as any of the parties, but this provision "has been interpreted as being applicable only when the Court is appointing arbitrators. It does not apply, for example, to sole arbitrators or presidents nominated jointly by the parties or to a tribunal president nominated jointly by the co-arbitrators." (62) Even in the

context of default appointments by the ICC Court, however, the ICC Rules allow for the possibility that a sole or presiding arbitrator share the nationality of one or more of the parties "in suitable circumstances," unless the parties object within the time limit fixed by the ICC Court. (63)

Under the 1998 ICC Rules, where the default is by one party rather than both, the ICC Court will attempt to make the appointment based on the proposal of the ICC National Committee of the country of which the defaulting party is a national. (64) Typically, therefore, the default appointee will share the defaulting party's nationality, except if the Court does not find the National Committee's proposal acceptable, or there is no National Committee, or the National Committee fails to act within the time limits imposed by the Court. In these circumstances, the ICC Court "shall be at liberty to choose any person whom it regards as suitable." (65) The Court will, however, be guided by the nationality restrictions and conditions set out in the ICC Rules. This provision has been revised so that the ICC Court is no longer required to seek the input of the National Committee of the country of the party that failed to make an appointment. Rather, the ICC Court is free to determine which National Committee (or, in the 2017 and 2012 Rules, "Group") would be most appropriate. (66)

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The SCC Rules prohibit the appointment of a presiding arbitrator or a sole arbitrator of the same nationality as one of the parties unless the parties agree to such an appointment or unless the SCC Board otherwise deems it appropriate. (67) The SCC Rules thus presumptively require that a sole or presiding arbitrator be of a different nationality than either of the parties. They are, however, less categorical than the LCIA or ICC Rules in that they vest discretion in the SCC Board to disregard this presumption even if the parties have not so agreed.

The ICSID Rules contain the most detailed nationality-based restrictions of all of the arbitral regimes, which is not unexpected given the focus of this arbitral regime on the resolution of investment disputes between nationals of one Contracting Party of the ICSID Convention and another Contracting Party. Indeed, the issue of a party's nationality is central to the jurisdiction of ICSID and has been the subject of considerable jurisprudence and commentary. (68)

Unless the parties have agreed otherwise, Article 39 of the ICSID Convention requires that a majority of the arbitrators not share the nationality of either of the parties to the dispute; that is, two of the arbitrators in the case of a three-member tribunal and three in the case of a five-member tribunal. However, Article 38 of the ICSID Convention provides that, where a default appointment is to be made by ICSID, no default appointee can be of the same nationality as either of the parties to the dispute. Where the consent to arbitration is based on a treaty, that instrument may also contain rules regarding the appointment of the tribunal, as well as nationality requirements applicable to the arbitrators. (69)

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Neither the ICDR Rules nor the UNCITRAL Rules exclude the possibility that a sole or presiding arbitrator or other default appointee may share the nationality of one or more of the parties. The ICDR Rules provide that "[a]t the request of any party or on its own initiative, the Administrator may appoint nationals of a country other than that of any of the parties." Under the ICDR system, therefore, absent a specific request from a party, there is a risk that a sole or presiding arbitrator could share the nationality of one of the parties. Arguably, this risk is also present even where a party requests a national of a third country.

The UNCITRAL Rules provide that in making a default appointment, the appointing authority "shall take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties." There is no express prohibition, therefore, under the UNCITRAL system that a presiding or sole arbitrator could share the nationality of one of the parties.

The only rules under consideration here which make no reference to the nationality of the arbitrators are the SIAC Rules. The 2005 CIETAC Rules also omitted reference to arbitrator nationality, consistent with that institution's inclination to appoint Chinese tribunals without regard to the nationality of the parties. However, the 2012 and 2015 CIETAC Rules both include the nationality of the parties as one of the factors to be taken into account by the institution in making arbitrator appointments. (70)

The relevant rules are set out in Table 2.5.

Table 2.5 Arbitrator Nationality

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AAA-ICDR

Article 12. Appointment of Arbitrators	*4. In making appointments, the Administrator shall, after inviting consultation with the parties, endeavor to appoint suitable arbitrators, taking into account their availability to serve. At the request of any party or on its own initiative, the Administrator may appoint nationals of a country other than that of any of the parties.*
CIETAC	
Article 30. Considerations in Appointing Arbitrators	*When appointing arbitrators pursuant to these Rules, the Chairman of CIETAC shall take into consideration the law applicable to the dispute, the place of arbitration, the language of arbitration, the nationalities of the parties, and any other factor(s) the Chairman considers relevant.*
HKIAC	
Article 11. Qualifications and Challenges of the Arbitral Tribunal	*11.2. Subject to Article 11.3, as a general rule, where the parties to an arbitration under these Rules are of different nationalities, a sole arbitrator or the presiding arbitrator of an arbitral tribunal shall not have the same nationality as any party unless specifically agreed otherwise by all parties in writing.* *11.3. Notwithstanding the general rule in Article 11.2, in appropriate circumstances and provided that none of the parties objects within a time limit set by HKIAC, the sole arbitrator of the arbitral tribunal may be of the same nationality as any of the parties.*
Article 13. Appointment and Confirmation of the Arbitrators	*1. In confirming or appointing arbitrators, the Court shall consider the prospective arbitrator's nationality, residence and other relationships with the countries of which the parties or the other arbitrators are nationals and the prospective arbitrator's availability and ability to conduct the arbitration in accordance with the Rules. The same shall apply where the Secretary General confirms arbitrators pursuant to Article 13(2).* *[...]* *5. The sole arbitrator or the president of the arbitral tribunal shall be of a nationality other than those of the parties. However, in suitable circumstances and provided that none of the parties objects within the time limit fixed by the Court, the sole arbitrator or the president of the arbitral tribunal may be chosen from a country of which any of the parties is a national.*
ICSID	
ICSID Convention, Article 13. The Panels	*1. Each Contracting State may designate to each Panel four persons who may but need not be its nationals.* *2. The Chairman may designate ten persons to each Panel. The persons so designated to a Panel shall each have a different nationality.*
ICSID Convention, Article 38. Constitution of the Tribunal	*If the Tribunal shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary-General in accordance with paragraph (3) of Article 36, or such other period as the parties may agree, the Chairman shall, at the request of either party and after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed. Arbitrators appointed by the Chairman pursuant to this Article shall not be nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute.*
ICSID Convention, Article 39. Constitution of the Tribunal	*The majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute; provided, however, that the foregoing provisions of this Article shall not apply if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the parties.*
Arbitration Rules, Rule 1. General Obligations	*3. The majority of the arbitrators shall be nationals of States other than the State party to the dispute and of the State whose national is a party to the dispute, unless the sole arbitrator or each individual member of the Tribunal is appointed by agreement of the parties. Where the Tribunal is to consist of three members, a national of either of these States may not be appointed as an arbitrator by a party without the agreement of the other party to the dispute. Where the Tribunal is to consist of five or more members, nationals of either of these States may not be appointed as arbitrators by a party if appointment by the other party of the same number of arbitrators of either of these nationalities would result in a majority of arbitrators of these nationalities.*
Arbitration Rules, Rule 3. Appointment of Arbitrators to a Tribunal Constituted in Accordance with Convention Article 37(2)(b)	*1. If the Tribunal is to be constituted in accordance with Article 37(2)(b) of the Convention:* *(a) either party shall in a communication to the other party: (i) name two persons, identifying one of them, who shall not have the same nationality as nor be a national of either party, as the arbitrator appointed by it, and the other as the arbitrator proposed to be the President of the Tribunal; and (ii) invite the other party to concur in the appointment of the arbitrator proposed to be the President of the Tribunal and to appoint another arbitrator;* *(b) promptly upon receipt of this communication the other party shall, in its reply: (i) name a person as the arbitrator appointed by it, who shall not have the same nationality as nor be a national of either party; and (ii) concur in the appointment of the arbitrator proposed to*

be the President of the Tribunal or name another person as the arbitrator proposed to be President;

(c) promptly upon receipt of the reply containing such a proposal, the initiating party shall notify the other party whether it concurs in the appointment of the arbitrator proposed by that party to be the President of the Tribunal.

LCIA	
Article 5. Formation of Arbitral Tribunal	*5.9. The LCIA Court shall appoint arbitrators with due regard for any particular method or criteria of selection agreed in writing by the parties. The LCIA Court shall also take into account the transaction(s) at issue, the nature and circumstances of the dispute, its monetary amount or value, the location and languages of the parties, the number of parties and all other factors which it may consider relevant in the circumstances.*
Article 6. Nationality of Arbitrators	*6.1. Where the parties are of different nationalities, a sole arbitrator or the presiding arbitrator shall not have the same nationality as any party unless the parties who are not of the same nationality as the arbitral candidate all agree in writing otherwise.* *6.2. The nationality of a party shall be understood to include those of its controlling shareholders or interests.* *6.3. A person who is a citizen of two or more States shall be treated as a national of each State; citizens of the European Union shall be treated as nationals of its different Member States and shall not be treated as having the same nationality; a citizen of a State's overseas territory shall be treated as a national of that territory and not of that State; and a legal person incorporated in a State's overseas territory shall be treated as such and not (by such fact alone) as a national of or a legal person incorporated in that State.*
SCC	
Article 17. Appointment of Arbitrators	*6. If the parties are of different nationalities, the sole arbitrator or the Chairperson of the Arbitral Tribunal shall be of a different nationality than the parties, unless the parties have agreed otherwise or the Board otherwise deems it appropriate.* *7. When appointing arbitrators, the Board shall consider the nature and circumstances of the dispute, the applicable law, the seat and language of the arbitration and the nationality of the parties.*
SIAC	
Rule 13. Qualifications of Arbitrators	*13.2. In appointing an arbitrator under these Rules, the President shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations that are relevant to the impartiality or independence of the arbitrator.*
UNCITRAL	
Article 6. Appointment of Arbitrators	*7. The appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.*

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[E] Language of the Arbitration

MODEL LANGUAGE—LANGUAGE OF ARBITRATION

The official language of the arbitration shall be [specify].

For parties requiring greater specificity: *Documentary evidence submitted by a Party that is not in the official language of the arbitration shall be accompanied by a translation into the official language of the arbitration. Such translations [shall] [need not] be certified. Any disputes regarding the accuracy of a translation shall be decided by the Arbitral Tribunal. A fact or expert witness shall testify in the language used in his or her written testimony. A simultaneous written transcript shall be maintained of all proceedings before the Arbitral Tribunal in the official language of the arbitration and in the language in which a witness testifies.*

In an international contractual relationship, the parties should always specify the language to be used in any arbitral proceedings. This may eliminate the need to use interpreters and translators where all parties concerned share a common language. More importantly, the language chosen affects who can be considered to serve as an arbitrator. When choosing the language of the arbitration, the parties should consider the applicable law of the contract, the place of arbitration, the language of the contract, and the language of the other principal

documents, among other factors. It is not advisable to agree on more than one official language of the arbitration, which can result in unnecessary inefficiencies and costs. In case the parties fail to specify a language for the arbitration, all of the major arbitration rules indicate the means for selecting a language. In the absence of party agreement, the language of the arbitration will be determined with reference to the "language(s) of the documents containing the arbitration agreement" (ICDR), in the arbitral tribunal's judgment (HKIAC and SIAC); the "language of the contract" (ICC); or the "language or prevailing language of the Arbitration Agreement" (LCIA); and of course other relevant circumstances such as the nationalities of the parties and witnesses, the preferred language(s) in which witnesses may testify, the place of arbitration, and the nationalities of the arbitrators.

Under the CIETAC Rules, in the absence of party agreement, the language of the arbitral proceedings will be Chinese unless CIETAC determines otherwise based on the circumstances of the case. It is unclear whether CIETAC will accept party submissions in this regard, although normally such a best practice would be expected.

The ICSID Rules also specify default languages, these being the official languages of the World Bank—English, French, and Spanish. [(71)] In any event, absent specific

agreement between the parties, each party to the dispute may choose to present its case in one of these official languages. If the parties agree on a language that is other than one of ICSID's official languages, they must first obtain the ICSID Secretary-General's approval, which is normally granted.

Lastly, most of the rules (ICDR, CIETAC, HKIAC, ICC, ICSID, LCIA, SCC, SIAC, and UNCITRAL) contemplate the possibility of the arbitration proceedings being conducted in more than one language. As such, the rules reflect the practical reality that parties will often make submissions in one language, but produce documents, submit witness statements, and have witnesses testify in a different language. The extent to which translations into the language of arbitration will be provided will depend to a large extent on what the parties agree or the tribunal directs. [(72)] To that end, with the exception of the ICC Rules, all of the referenced rules include a specific provision authorizing the tribunal to order the parties to provide translations of documents produced in a language other than that of the arbitration. [(73)] In practice, ICC tribunals will make an order in appropriate circumstances that translations should be provided.

The relevant rules are collected in Table 2.6.

Table 2.6 Language of the Arbitration

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AAA-ICDR	
Article 18. Language of Arbitration	*If the parties have not agreed otherwise, the language(s) of the arbitration shall be the language(s) of the documents containing the arbitration agreement, subject to the power of the arbitral tribunal to determine otherwise. The tribunal may order that any documents delivered in another language shall be accompanied by a translation into the language(s) of the arbitration.*
CIETAC	
Article 81. Language	*1. Where the parties have agreed on the language of arbitration, their agreement shall prevail. In the absence of such agreement, the language of arbitration to be used in the proceedings shall be Chinese. CIETAC may also designate another language as the language of arbitration having regard to the circumstances of the case.* *2. If a party or its representative(s) or witness(es) requires interpretation at an oral hearing, an interpreter may be provided either by the Arbitration Court or by the party.* *3. The arbitral tribunal or the Arbitration Court may, if it considers it necessary, require the parties to submit a corresponding translation of their documents and evidence into Chinese or other languages.*
Article 82. Arbitration Fees and Costs	*4. Where the parties have agreed to use two or more than two languages as the languages of arbitration, or where the parties have agreed on a three-arbitrator tribunal in a case where the Summary Procedure shall apply in accordance with Article 56 of these Rules, CIETAC may charge the parties for any additional and reasonable costs.*
HKIAC	
Article 15. Language	*15.1. Subject to agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages of the arbitration. This determination shall apply to the Statement of Claim, the Statement of Defence, any further written statements, any award, and, if oral hearings take place, to the language or languages to be used in such hearings.*

15.2. The arbitral tribunal may order that any documents annexed to the statement of claim or statement of defence, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

15.3. The arbitral tribunal may order that any supporting materials submitted in their original language shall be accompanied by a translation, in whole or in part, into the language of the arbitration as agreed by the parties or determined by the tribunal.

ICC

Article 20. Language of the Arbitration

In the absence of an agreement by the parties, the arbitral tribunal shall determine the language or languages of the arbitration, due regard being given to all relevant circumstances, including the language of the contract.

ICSID

Arbitration Rules, Rule 20. Preliminary Procedural Consultation

1. As early as possible after the constitution of a Tribunal, its President shall endeavor to ascertain the views of the parties regarding questions of procedure. For this purpose he may request the parties to meet him. He shall, in particular, seek their views on the following matters:

[...]

(b) the language or languages to be used in the proceeding [...].

Arbitration Rules, Rule 22. Procedural Languages

(1) The parties may agree on the use of one or two languages to be used in the proceeding, provided, that, if they agree on any language that is not an official language of the Center, the Tribunal, after consultation with the Secretary-General, gives its approval. If the parties do not agree on any such procedural language, each of them may select one of the official languages (i.e., English, French and Spanish) for this purpose.

(2) If two procedural languages are selected by the parties, any instruments may be filed in either language. Either language may be used at the hearings, subject, if the Tribunal so requires, to translation and interpretation. The orders and the award of the Tribunal shall be rendered and the record kept in both procedural languages, both versions being equally authentic.

LCIA

Article 17. Language(s) of Arbitration

17.1. The initial language of the arbitration (until the formation of the Arbitral Tribunal) shall be the language or prevailing language of the Arbitration Agreement, unless the parties have agreed in writing otherwise.

17.2. In the event that the Arbitration Agreement is written in more than one language of equal standing, the LCIA Court may, unless the Arbitration Agreement provides that the arbitration proceedings shall be conducted from the outset in more than one language, determine which of those languages shall be the initial language of the arbitration.

17.3. A non-participating or defaulting party shall have no cause for complaint if communications to and from the LCIA Court and Registrar are conducted in the initial language(s) of the arbitration or of the arbitral seat.

17.4. Following the formation of the Arbitral Tribunal, unless the parties have agreed upon the language or languages of the arbitration, the Arbitral Tribunal shall decide upon the language(s) of the arbitration after giving the parties a reasonable opportunity to make written comments and taking into account the initial language(s) of the arbitration and any other matter it may consider appropriate in the circumstances.

17.5. If any document is expressed in a language other than the language(s) of the arbitration and no translation of such document is submitted by the party relying upon the document, the Arbitral Tribunal may order or (if the Arbitral Tribunal has not been formed) the Registrar may request that party to submit a translation of all or any part of that document in any language(s) of the arbitration or of the arbitral seat.

SCC

Article 26. Language

1. Unless agreed upon by the parties, the Arbitral Tribunal shall determine the language(s) of the arbitration. In so determining, the Arbitral Tribunal shall have due regard to all relevant circumstances and shall give the parties an opportunity to submit comments.

	2. The Arbitral Tribunal may request that any documents submitted in languages other than those of the arbitration be accompanied by a translation into the language(s) of the arbitration.
SIAC	
	22.1. Unless otherwise agreed by the parties, the Tribunal shall determine the language to be used in the arbitration.
Rule 22. Language of the Arbitration	*22.2. If a party submits a document written in a language other than the language(s) of the arbitration, the Tribunal, or if the Tribunal has not been constituted, the Registrar, may order that party to submit a translation in a form to be determined by the Tribunal or the Registrar.*
UNCITRAL	
	1. Subject to an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the statement of claim, the statement of defence, and any further written statements and, if oral hearings take place, to the language or languages to be used in such hearings.
Article 19. Language	*2. The arbitral tribunal may order that any documents annexed to the statement of claim or statement of defence, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.*

[F] Governing Law

MODEL LANGUAGE—GOVERNING LAW

This Agreement (including the Parties' agreement to arbitrate as set out in [identify arbitration clause]) shall be construed in accordance with and governed by the substantive law of [specify jurisdiction], without reference to the conflicts of law or choice of law rules thereof.

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Typically, parties specify the substantive law applicable to the parties' contractual and other relationships in a choice-of-law or governing law clause. (74) Whether included under a separate heading or as part of the dispute resolution clause, a governing law clause provides enhanced predictability regarding the interpretation and enforcement of the parties' contractual obligations and, as such, should be prioritized in contract negotiations. Key points to keep in mind for the negotiation and drafting of a governing law clause are the following:

- It is important to ensure that the scope of the governing law clause reflects that of the dispute resolution clause. Thus, if the dispute resolution clause is drafted to include both contractual and noncontractual claims (e.g., those sounding in tort or delict), the choice-of-law clause should also be drafted to include such claims. Similarly, if the dispute resolution clause is drafted to include questions of contract interpretation and construction, enforceability, validity, performance, questions of tort and other noncontractual rights, and statutory claims, these questions should also be encompassed by the choice-of-law clause.

- It should be clear that it is the substantive laws of the chosen jurisdiction and not the conflict of laws rules of that jurisdiction that will apply.

- Any effort to include "procedural" matters within the scope of the choice-of-law clause can result in confusion and ambiguity, as such rules may conflict with the laws of the seat of the arbitration or the institutional rules that the parties may have selected to govern the arbitration. A choice-of-law clause normally will not be considered as extending to such matters as pleading requirements, discovery, joinder of parties, and consolidation of proceedings. It is questionable whether such matters as statutes of limitations or prescription periods, burdens of proof, rights to legal expenses, and interest will be considered substantive or procedural. The practicality of requiring an international arbitral tribunal to apply procedural rules of a particular jurisdiction is also questionable. (75)

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- It is important to check whether the proposed governing law conflicts with any applicable principles of public policy or mandatory rules contained within the national law of the parties or of the jurisdictions where the award may need to be enforced; public policy and mandatory principles at the place of arbitration may also be relevant. Generally speaking, public policy principles or mandatory rules of national law cannot be overridden by any conflicting or contrary principles in the substantive law chosen by the parties. (76)

- There should be no ambiguity as to whether the governing law agreed by the parties to govern their substantive rights and obligations also applies to the interpretation, scope, and effect of the arbitration clause. Thus, for example, if disputes arise as to the effect of the arbitration clause, there should be no debate as to whether the scope and effect of the clause is to be determined with reference to the

substantive law of the contract, or the law of the place of arbitration. Ultimately, both may lead to the same result. However, considerable time, effort, and expense will be wasted by the parties in addressing an issue that could have been avoided with more conscientious contractual negotiations and drafting.

All of the arbitral rules under consideration recognize the principle of party autonomy with respect to parties' ability to choose the law applicable to the merits of the dispute, subject to limitations imposed by mandatory law at the place of arbitration and, in some instances, the requirement that the tribunal also apply trade usages, custom, principles of international law, or international practice. This latter requirement can have significant implications, as we discuss below.

In addition, under most rules, absent the parties' agreement, the arbitral tribunal is empowered to apply the law that it deems to be appropriate. As a general matter, the rules listed above do not provide specific criteria to assist the arbitrators in making their determination. Instead, the language chosen by the drafters of these rules provides the arbitrators with wide discretion (by stating that the tribunal shall apply the laws which "it determines to be appropriate," or "as the Arbitral Tribunal may determine to be applicable," among other formulations). In addition, under most rules, the arbitrators are free to choose the applicable law directly (the so-called *voie directe*) without reference to any local choice-of-law rules.

The ICDR, LCIA, SCC, and SIAC Rules provide that the tribunal is to apply the "substantive law(s) or rules of law" designated by the parties, or failing such a designation, the substantive law(s) or rules of law determined by the tribunal to be appropriate. (77) The distinction made in the rules between substantive law and rules of law demonstrates the fact that, while parties typically designate the substantive law of a particular jurisdiction to govern their dispute, they may also simply specify general, nonjurisdiction-specific "rules of law" (e.g., "UNIDROIT Principles," "principles of international law," or "general rules of commercial law"). In recognition of this fact,

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these rules vest arbitral tribunals with the discretion to make a similar choice by specifically conferring upon the tribunal the authority to designate rules of law, rather than any specific national law, to govern resolution of the dispute. (78) The 2010 UNCITRAL Rules take a slightly different approach in that they allow parties the flexibility to designate "rules of law" as applicable to the substance of their dispute but, failing such a designation, require the tribunal to apply "the law which it determines to be most appropriate." (79)

The HKIAC Rules, too, differ slightly in their approach to applicable law. Like the UNCITRAL Rules, in the absence of specification by the parties, the tribunal will apply "the rules of law which it determines to be appropriate." (80) If the parties have specified applicable law, the tribunal is to apply the rules of law agreed upon by the parties but these laws "shall be construed, unless otherwise expressed, as directly referring to the substantive law of that jurisdiction and not to its conflict of laws rules." (81) This reference to conflicts of law rules was first added in the 2013 update and is rare among the rules considered in this book. (82) Only the SCC rules mirror HKIAC in excluding the conflicts of laws rules of the applicable law while the ICSID Convention takes the opposite approach and includes the conflicts of laws rules in its considerations. (83)

Where the dispute is in connection with or arises out of a contract, the ICDR, HKIAC, SIAC, and UNCITRAL Rules also instruct the tribunal to decide the dispute in accord with the terms of the contract and to take into account relevant trade usages. (84) The ICC Rules, by contrast, provide that the tribunal need only "take account of the provisions of the contract … and of any relevant trade usages." (85) To what extent this difference is of any material and practical effect will depend on the attitude of the arbitrators and the views put before them by the parties.

The CIETAC Rules contain similar standards in different terms. The CIETAC Rules require the tribunal to make its award "based on the facts of the case and the terms of the contract" and "in accordance with the law." (86) The CIETAC Rules, however, go on to instruct the tribunal to make its decision "with reference to

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international practices." (87) In addition, the 2015 CIETAC Rules require every CIETAC award to be "fair and reasonable." (88)

The ICSID regime uniquely requires the tribunal also to decide the parties' dispute in accordance with international law. (89) The LCIA and SCC Rules make no mention of either the terms of the contract or trade usages, but rather simply instruct that the tribunal should decide the parties' dispute in accordance with the law(s) or rules of law chosen by the parties or, absent such a choice, those selected by the tribunal. (90)

Rules relevant to governing law are reproduced in Table 2.7.

Table 2.7 Governing Law

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AAA-ICDR	
Article 31. Applicable Laws and Remedies	*1. The arbitral tribunal shall apply the substantive law(s) or rules of law agreed by the parties as applicable to the dispute. Failing such an agreement by the parties, the tribunal shall apply such law(s) or rules of law as it determines to be appropriate.* *2. In arbitrations involving the application of contracts, the tribunal shall decide in accordance with the terms of the contract and shall take into account usages of the trade applicable to the contract.* *3. The tribunal shall not decide as amiable compositeur or ex aequo et bono unless the parties have expressly authorized it to do so.*
CIETAC	
Article 49. Making of Award	*1. The arbitral tribunal shall independently and impartially render a fair and reasonable arbitral award based on the facts of the case and the terms of the contract, in accordance with the law, and with reference to international practices.* *2. Where the parties have agreed on the law applicable to the merits of their dispute, the parties' agreement shall prevail. In the absence of such an agreement or where such agreement is in conflict with a mandatory provision of the law, the arbitral tribunal shall determine the law applicable to the merits of the dispute.*
HKIAC	
Article 36. Applicable Law, Amiable Compositeur	*35.1. The arbitral tribunal shall decide the substance of the dispute in accordance with the rules of law agreed upon by the parties. Any designation of law or legal system of a given jurisdiction shall be construed, unless otherwise expressed, as directly referring to the substantive law of that jurisdiction and not to its conflict of laws rules. Failing such designation by the parties, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.* *35.2. The arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorized the arbitral tribunal to do so.* *35.3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract(s) and may take into account the usage of trade applicable to the transaction(s).*
ICC	
Article 21. Applicable Rules of Law	*1. The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.* *2. The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages.* *3. The tribunal shall assume the powers of an amiable compositeur or decide ex aequo et bono only if the parties have agreed to give it such powers.*
ICSID	
ICSID Convention, Article 42. Powers and Functions of the Tribunal	*1. The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.* *2. The Tribunal may not bring in a finding of non liquet on the ground of silence or obscurity of the law.* *3. The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute ex aequo et bono if the parties so agree.*
LCIA	
Article 14. Conduct of Proceedings	*14.5 The Arbitral Tribunal shall have the widest discretion to discharge these general duties, subject to such mandatory law(s) or rules of law as the Arbitral Tribunal may decide to be applicable; and at all times the parties shall do everything necessary in good faith for the fair, efficient and expeditious conduct of the arbitration, including the Arbitral Tribunal's discharge of its general duties.*

Article 22. Additional Powers	*22.3. The Arbitral Tribunal shall decide the parties' dispute in accordance with the law(s) or rules of law chosen by the parties as applicable to the merits of their dispute. If and to the extent that the Arbitral Tribunal decides that the parties have made no such choice, the Arbitral Tribunal shall apply the law(s) or rules of law which it considers appropriate.* *22.4. The Arbitral Tribunal shall only apply to the merits of the dispute principles deriving from "ex aequo et bono," "amiable composition" or "honourable engagement" where the parties have so agreed in writing.*
SCC Article 27. Applicable Law	*1. The Arbitral Tribunal shall decide the merits of the dispute on the basis of the law(s) or rules of law agreed upon by the parties. In the absence of such agreement, the Arbitral Tribunal shall apply the law or rules of law which it considers to be most appropriate.* *2. Any designation by the parties of the law of a given state shall be deemed to refer to the substantive law of that state, not to its conflict of laws rules.* *3. The Arbitral Tribunal shall decide the dispute ex aequo et bono or as amiable compositeur only if the parties have expressly authorised it to do so.*
SIAC Rule 31. Applicable Law, *Amiable Compositeur* and *Ex Aequo et Bono*	*31.1. The Tribunal shall apply the law or rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the Tribunal shall apply the law or rules of law which it determines to be appropriate.* *31.2. The Tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorised it to do so.* *31.3. In all cases, the Tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any applicable usage of trade.*
UNCITRAL Article 35 Applicable Law, Amiable Compositeur	*1. The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate.* *2. The arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorized the arbitral tribunal to do so.* *3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any usage of trade applicable to the transaction.*

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§2.04 OPTIONAL PROVISIONS

There are a number of optional provisions that the parties may wish to include in their arbitration agreement. Many of these issues are addressed by the arbitral regimes under consideration and discussed in detail in other chapters of this book. To the extent that the parties may prefer a different rule on a particular point or wish to otherwise customize their own procedures in certain areas, this chapter identifies the options. The parties' elections as to any optional provisions will vary depending on the circumstances of the underlying transaction and their commercial relationship, as well as their own preferences and experiences. We advise, in any event, that parties should take care not to overregulate procedural issues in their arbitration clause, or they risk losing the flexibility that is one of the key advantages of arbitration. The parties may have a chance to make further specifications regarding some of these issues at the initial procedural conference, discussed in Chapter 5 (Initial Procedural Conference).

[A] Arbitrator Qualifications

In some cases, the parties may wish to specify in the arbitration clause the qualifications and characteristics required of the arbitrators. The appointment of an arbitrator with technical expertise in the matter at hand can reduce the need for, and cost of, an expert opinion. The parties may also find they need to spend less time and resources educating the arbitrator on the underlying industry or certain technical aspects of the facts of the case. However, parties should weigh these advantages against those associated with an arbitrator who is a dispute resolution specialist. Such an arbitrator will likely be better able to keep the proceedings on track and produce an enforceable award. In addition, technical requirements for the arbitrator set forth in the arbitration agreement may not be relevant, or at least not necessary, for

resolving the particular dispute that actually arises. Lastly, experience has shown that notwithstanding the parties' ability to agree on the requisite qualifications or characteristics of the arbitrators, they are often unable to agree as to whether the candidates proposed by each side satisfy the contractual criteria.

Aside from specific technical or professional qualifications, it is not uncommon to find language in arbitration clauses requiring arbitrators to be of a particular nationality or to be fluent in particular languages. Depending on the nature of the parties' underlying contractual relationship, addressing such issues in the arbitration agreement can sometimes be helpful. That said, care should be taken not to be excessively specific as to the qualifications required of arbitrators as this may unnecessarily limit the number of candidates for appointment to the tribunal. It is also important, however, that any required qualifications are very carefully and precisely defined to avoid unnecessary uncertainty, delay, and expense.

Lastly, parties will occasionally seek to name particular arbitrators in their agreement. While this practice can hasten the appointment of an arbitral tribunal, especially where the parties are submitting an existing dispute to arbitration, this approach should be used with extreme caution. A named individual may not be

available to serve as an arbitrator when the parties' dispute arises, for example, because of incapacity, or conflict of interest, or scheduling conflicts. The person named in the arbitration clause may also not be the most appropriate or best qualified to decide the dispute that may eventually arise. Lastly, well-reputed lawyers who are experienced arbitrators will be reluctant to have their names included in an arbitration agreement, as this may give rise to conflicts of interest in their practice, which may prevent them from accepting other appointments with no guarantee that any dispute will ever arise requiring their services. If an arbitrator is specifically named, whether in an arbitration clause or submission agreement, it is advisable to specify an alternative appointment procedure and appointing authority as a contingency in the event that a named individual is unable or unwilling to serve for whatever reason.

None of the rules under consideration require that an arbitrator have any particular qualifications. For example, there are no requirements that the arbitrators be fluent in any particular language (although arbitral institutions take language proficiency into account when making appointments). Neither is expertise in particular fields nor particular legal qualification a requirement under any of the above rules. Even the ICSID regime, which is slightly more specific, merely provides that arbitrators shall be recognized "in the fields of law, commerce, industry *or* finance." (91) Competence in the field of law, while "of particular importance" for arbitrators, is not indispensable. (92) However, when making an appointment under the SIAC Rules, the President is required to give due regard to any qualifications of the arbitrator established in the parties' arbitration agreement. (93)

Few institutional regimes impose a meaningful limitation on the parties' autonomy to select the arbitrators by requiring that the arbitrators be identified by the parties from a list maintained by the arbitral institution. Among the institutional regimes considered in this work, only CIETAC requires the parties to nominate arbitrators from the Panel of Arbitrators approved by CIETAC; any arbitrator nominated from outside of CIETAC's panel must be confirmed by the Chairman of CIETAC. (94) This is a relatively uncommon practice today, although a number of institutions, including the ICDR and ICSID, continue to maintain lists from which they will select a sole or presiding arbitrator in the absence of party agreement.

[B] Evidentiary Procedure

Since most arbitration rules leave evidentiary issues to the discretion of the arbitrators, the parties may desire to specify in their arbitration agreement the availability and scope of document production and witness testimony. In this regard, the parties may incorporate specific procedural rules, such as the International Bar Association (IBA)

Rules of Evidence. (95) Parties should examine the rules concerning evidentiary procedure under their chosen arbitral regime in case they wish to make any deviations, or incorporate the IBA Rules of Evidence to fill gaps. The rules concerning evidentiary procedure are addressed in detail in Chapter 6 (Evidentiary Procedure).

[C] Expedited and Emergency Procedures

Some of the arbitral regimes under consideration make provision for expedited procedures for smaller claims, interim measures of protection ordered by the tribunal or by an emergency arbitrator, and for consolidation of multiple claims, parties, and arbitrations. The parties to an arbitration agreement should take note of these rules which will automatically apply to these special circumstances in the absence of an agreement to the contrary. With respect to smaller claims, some of the rules set specific monetary thresholds that will trigger expedited proceedings with only one arbitrator, shortened time frames for written submissions, and possibly no hearing. The parties may wish to establish in their arbitration agreement a different monetary threshold or deadlines, or a requirement for a hearing.

With respect to interim measures, an application for interim relief from a court of competent jurisdiction will not ordinarily result in a waiver of the parties' arbitration agreement. While seeking interim measures from a court has a more immediate and certain effect than requesting a court to enforce such an order issued by an arbitral tribunal, seeking interim measures from a court may complicate the matter by introducing a second authority on potentially overlapping legal issues and evidence. With this consideration in mind, the parties may wish to

specify that interim measures may be sought only from the arbitral tribunal (if permitted by the *lex loci arbitri*), especially if the applicable arbitral rules contain provisions allowing for emergency interim relief.

The provisions in some of the rules permitting an emergency arbitrator to order interim measures are "opt-out" provisions, meaning that they will apply unless the parties expressly make provision to the contrary in their arbitration agreement. In emergency situations, parties have traditionally sought relief from a court and may wish to continue that practice notwithstanding this innovation in some of the rules.

Finally, the rules concerning complex proceedings allow the tribunal to join multiple claims, parties, and arbitrations into one proceeding in certain situations. The parties may wish to deviate from these default rules by indicating that certain claims, parties, or arbitrations shall remain separate. A full examination and discussion of the rules concerning these scenarios can be found in Chapter 10 (Special Procedures and Procedural Innovations).

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[D] Ex Parte Communications

The issue of private, or ex parte, communications between a party and an arbitrator does not receive uniform treatment in the rules; it is an issue that parties may wish to take into consideration when selecting an arbitral regime. Given the varying degree to which parties to a dispute may observe the prohibition on ex parte arbitrator communications, parties should take care to ensure that any lacunae in the arbitral rules are clearly and comprehensively addressed in the parties' agreement to arbitrate. Thus, for example, parties agreeing to arbitrate pursuant to the ICC Rules (which do not address this subject) may wish to include language in their arbitration clause reflecting the prohibition on ex parte communications set out in the ICDR Rules. A detailed analysis of the rules concerning ex parte communications can be found in section §4.03 (Ex Parte Communications).

[E] Confidentiality and Privacy

Confidentiality and privacy are commonly cited as among the main advantages of arbitration. "Privacy" refers to the fact that, in most cases, arbitral hearings are held in camera and without public access. (96) By contrast, "confidentiality" refers to the parties' and arbitrators' respective duties not to disclose the nature of, documents related to, or events that occur during the proceedings. (97) While certain arbitration rules and laws do address such matters as the confidentiality of the existence of the arbitration, disclosures made during the arbitral proceedings, and the arbitral award, there is little consistency among regimes (*see* Table 2.8). In addition, in light of the limited availability of sanctions or other remedies, parties have been known to exploit any ambiguities as to the extent of the obligation of confidentiality and privacy to their advantage.

Accordingly, depending on the arbitral regime that is chosen and the law applicable to the arbitration, it may be advisable for parties to include additional language clarifying the degree of confidentiality and privacy that is to be applied to the existence of the arbitration, information disclosed in the context of the arbitration, and the arbitral award. The range of provisions relating to confidentiality demonstrates the need to give this issue careful consideration as part of the drafting process. While the tribunal appointed under any of these rules is bound by a strict obligation of confidentiality, it is apparent that the same is not always true in relation to the parties themselves.

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The issue of confidentiality in investor-State arbitration is often controversial, given the issues of public concern which are frequently at issue in such arbitration. Indeed, there is a growing trend toward transparency in investor-State arbitration. Some investment treaties and free trade agreements specifically require that certain information be publicly available—with some even requiring that hearings be open to the public.

This emphasis on the importance of transparency and public access to information in investment arbitration is reflected in the UNCITRAL ad hoc regime. The 2010 UNCITRAL Rules were revised in 2013 to add a provision to Article 1 that specifically incorporates the UNCITRAL Rules on Transparency for investor-State arbitration initiated pursuant to a treaty providing for the protection of investments or investors. (98) The UNCITRAL Transparency Rules, which came into effect on April 1, 2014, provide for transparency in treaty-based investor-State arbitration, (99) and they apply to (i) disputes arising out of treaties concluded prior to April 1, 2014, when the treaty parties agree to their application and (ii) disputes arising out of treaties concluded on or after April 1, 2014, when investor-State arbitration is initiated under the UNCITRAL Arbitration Rules, unless the parties otherwise agree. Investment arbitration disputes under previous versions of the UNCITRAL Rules, as well as under the SCC Rules, are far more likely to remain confidential. The applicable rules are excerpted below. Further discussion of privacy of hearings can be found in Chapter 7 (Written and Oral Proceedings), confidentiality of documents in Chapter 6 (Evidentiary Procedure), and confidentiality of the arbitration and the award in Chapter 9 (The Award: Form, Effect, and Enforceability).

Table 2.8 Confidentiality and Privacy

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AAA-ICDR

Article 21. Exchange of Information

5. The tribunal may condition any exchange of information subject to claims of commercial or technical confidentiality on appropriate measures to protect such confidentiality.

Article 23. Hearing

6. Hearings are private unless the parties agree otherwise or the law provides to the contrary.

Article 30. Time, Form, and Effect of Award

3. An award may be made public only with the consent of all parties or as required by law, except that the Administrator may publish or otherwise make publicly available selected awards, orders, decisions, and rulings that have become public in the course of enforcement or otherwise and, unless otherwise agreed by the parties, may publish selected awards, orders, decisions, and rulings that have been edited to conceal the names of the parties and other identifying details.

Article 37. Confidentiality

1. Confidential information disclosed during the arbitration by the parties or by witnesses shall not be divulged by an arbitrator or by the Administrator. Except as provided in Article 30, unless otherwise agreed by the parties or required by applicable law, the members of the arbitral tribunal and the Administrator shall keep confidential all matters relating to the arbitration or the award.

2. Unless the parties agree otherwise, the tribunal may make orders concerning the confidentiality of the arbitration or any matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.

CIETAC

Article 38. Confidentiality

1. Hearings shall be held in camera. Where both parties request an open hearing, the arbitral tribunal shall make a decision.

2. For cases heard in camera, the parties and their representatives, the arbitrators, the witnesses, the interpreters, the experts consulted by the arbitral tribunal, the appraisers appointed by the arbitral tribunal and other relevant persons shall not disclose to any outsider any substantive or procedural matters relating to the case.

HKIAC

Article 22. Evidence and Hearings

22.7. Hearings shall be held in private unless the parties agree otherwise. The arbitral tribunal may require any witness or expert to leave the hearing room at any time during the hearing.

Article 45. Confidentiality

45.1. Unless otherwise agreed by the parties, no party or party representative may publish, disclose or communicate any information relating to:

(a) the arbitration under the arbitration agreement; or

(b) an award or Emergency Decision made in the arbitration.

45.2. Article 45.1 also applies to the arbitral tribunal, any emergency arbitrator, expert, witness, tribunal secretary and HKIAC.

45.3. Article 45.1 does not prevent the publication, disclosure or communication of information referred to in Article 45.1 by a party or party representative:

(a) (i) to protect or pursue a legal right or interest of the party; or

(ii) to enforce or challenge the award or Emergency Decision referred to in Article 45.1; in legal proceedings before a court or other authority; or

	(b) to any government body, regulatory body, court or tribunal where the party is obliged by law to make the publication, disclosure or communication; or
	(c) to a professional or any other adviser of any of the parties, including any actual or potential witness or expert; or
	(d) to any party or additional party and any confirmed or appointed arbitrator for the purposes of Articles 27, 28, 29 or 30; or
	(e) to a person for the purposes of having, or seeking, third party funding of arbitration.
	45.4. The deliberations of the arbitral tribunal are confidential.
	45.5. HKIAC may publish any award, whether in its entirety or in the form of excerpts or a summary, only under the following conditions:
	(a) all references to the parties' names and other identifying information are deleted; and
	(b) no party objects to such publication within the time limit fixed for that purpose by HKIAC. In the case of an objection, the award shall not be published.
ICC	
Article 22. Conduct of the Arbitration	*3. Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.*
Article 26. Hearings	*3. The arbitral tribunal shall be in full charge of the hearings, at which all the parties shall be entitled to be present. Save with the approval of the arbitral tribunal and the parties, persons not involved in the proceedings shall not be admitted.*
Appendix II, Article 1. Confidential Character of the Work of the International Court of Arbitration	*8. Any documents, communications or correspondence submitted by the parties or the arbitrators may be destroyed unless a party or an arbitrator requests in writing within a period fixed by the Secretariat the return of such documents, communications or correspondence. All related costs and expenses for the return of those documents shall be paid by such party or arbitrator.*
ICSID	
ICSID Convention, Article 48.	*5. The Center shall not publish the award without the consent of the parties.*
Arbitration Rules, Rule 6. Constitution of the Tribunal.	*2. Before or at the first session of the Tribunal, each arbitrator shall sign a declaration in the following form:* *"[...] I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any award made by the Tribunal.* *[...]."*
Arbitration Rules, Rule 15. Deliberations of the Tribunal	*1. The deliberations of the Tribunal shall take place in private and remain secret.* *2. Only members of the Tribunal shall take part in its deliberations. No other person shall be admitted unless the tribunal decides otherwise.*
Arbitration Rules, Rule 32. The Oral Procedure	*1. The oral procedure shall consist of the hearing by the Tribunal of the parties, their agents, counsel and advocates, and of witnesses and experts.* *2. Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.* *3. The members of the Tribunal may, during the hearings, put questions to the parties, their agents, counsel and advocates, and ask them for explanations.*
Arbitration Rules, Rule 37. Visits and Inquiries; Submissions of	*2. After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "non-disputing party") to file a written submission with the Tribunal*

Non-disputing Parties	*regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:* *(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;* *(b) the non-disputing party submission would address a matter within the scope of the dispute;* *(c) the non-disputing party has a significant interest in the proceeding.* *The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.*
Arbitration Rules, Rule 48. Rendering of the Award	*4. The Center shall not publish the award without the consent of the parties. The Center may, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal.*
Administrative and Financial Regulations, Regulation 22. Publication	*1. The Secretary-General shall appropriately publish information about the operation of the Center, including the registration of all requests for conciliation or arbitration and in due course an indication of the date and method of the termination of each proceeding.* *2. If both parties to a proceeding consent to the publication of:* *(a) reports of Conciliation Commissions;* *(b) arbitral awards; or* *(c) the minutes and other records of proceedings,* *the Secretary-General shall arrange for the publication thereof, in an appropriate form with a view to furthering the development of international law in relation to investments.*
Administrative and Financial Regulations, Regulation 23. The Registers	*1. The Secretary-General shall maintain, in accordance with rules to be promulgated by him, separate Registers for requests for conciliation and requests for arbitration. In these he shall enter all significant data concerning the institution, conduct and disposition of each proceeding, including in particular the method of constitution and the membership of each Commission, Tribunal and Committee. On the Arbitration Register he shall also enter, with respect to each award, all significant data concerning any request for the supplementation, rectification, interpretation, revision or annulment of the award, and any stay of enforcement.* *2. The Registers shall be open for inspection by any person. The Secretary-General shall promulgate rules concerning access to the Registers, and a schedule of charges for the provision of certified and uncertified extracts therefrom.*
LCIA	
Article 19. Oral Hearings	*19.4. All hearings shall be held in private, unless the parties agree otherwise in writing.*
Article 30. Confidentiality.	*30.1. The parties undertake as a general principle to keep confidential all awards in the arbitration, together with all materials in the arbitration created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain, save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a state court or other legal authority.* *30.2. The deliberations of the Arbitral Tribunal shall remain confidential to its members, save as required by any applicable law and to the extent that disclosure of an arbitrator's refusal to participate in the arbitration is required of the other members of the Arbitral Tribunal under Articles 10, 12, 26 and 27.* *30.3. The LCIA does not publish any award or any part of an award without the prior written consent of all parties and the Arbitral Tribunal.*
SCC	

Article 3. Confidentiality	*Unless otherwise agreed by the parties, the SCC, the Arbitral Tribunal and any administrative secretary of the Arbitral Tribunal shall maintain the confidentiality of the arbitration and the award.*
Article 32. Hearings	*3. Unless otherwise agreed by the parties, hearings will be held in private.*
SIAC	
Rule 24. Hearings	*24.4. Unless otherwise agreed by the parties, all meetings and hearings shall be in private, and any recordings, transcripts, or documents used in relation to the arbitral proceedings shall remain confidential.*
Rule 32. The Award	*32.12. SIAC may, with the consent of the parties and the Tribunal, publish any Award with the names of the parties and other identifying information redacted.*
Rule 39. Confidentiality	*39.1. Unless otherwise agreed by the parties, a party and any arbitrator, including any Emergency Arbitrator, and any person appointed by the Tribunal, including any administrative secretary and any expert, shall at all times treat all matters relating to the proceedings and the Award as confidential. The discussions and deliberations of the Tribunal shall be confidential.* *39.2. Unless otherwise agreed by the parties, a party or any arbitrator, including any Emergency Arbitrator, and any person appointed by the Tribunal, including any administrative secretary and any expert, shall not, without the prior written consent of the parties, disclose to a third party any such matter except:* *(a) for the purpose of making an application to any competent court of any State to enforce or challenge the Award;* *(b) pursuant to the order of or a subpoena issued by a court of competent jurisdiction;* *(c) for the purpose of pursuing or enforcing a legal right or claim;* *(d) in compliance with the provisions of the laws of any State which are binding on the party making the disclosure or the request or requirement of any regulatory body or other authority;* *(e) pursuant to an order by the Tribunal on application by a party with proper notice to the other parties; or* *(f) for the purpose of any application under Rule 7 or Rule 8 of these Rules.* *39.3. In Rule 39.1, "matters relating to the proceedings" includes the existence of the proceedings, and the pleadings, evidence and other materials in the arbitral proceedings and all other documents produced by another party in the proceedings or the Award arising from the proceedings, but excludes any matter that is otherwise in the public domain.* *39.4 The Tribunal has the power to take appropriate measures, including issuing an order or Award for sanctions or costs, if a party breaches the provisions of this Rule.*
UNCITRAL	
Article 1. Scope of Application *2013 revision, effective 1 April 2014	*4. For investor-State arbitration initiated pursuant to a treaty providing for the protection of investments or investors, these Rules include the UNCITRAL Rules on Transparency in Treaty based Investor-State Arbitration ("Rules on Transparency"), subject to article 1 of the Rules on Transparency.*
Article 28. Hearings	*3 Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses, including expert witnesses, during the testimony of such other witnesses, except that a witness, including an expert witness, who is a party to the arbitration shall not, in principle, be asked to retire.*
Article 34. Form and Effect of the Award	*5. An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect of pursue a legal right or in relation to legal proceedings before a court or other competent authority.*

[F] *Amiable Compositeur* or *Ex Aequo Et Bono*

In some cases, a tribunal may act as an *amiable compositeur* and decide the case in equity, or *ex aequo et bono*, without being bound by strict rules of law or the precise terms of the parties' agreement, but only if the parties so agree. [(100)] It is relatively rare to see a contract selecting these methods of dispute resolution, largely because of the uncertainty that it may create as to the rules that the tribunal might

adopt to resolve the claim. However, there may be circumstances where no consensus can be reached on the governing substantive law making this option appropriate.

As shown in Table 2.9, under the rules of the major arbitral institutions, an arbitrator may only decide a dispute as *amiable compositeur* or *ex aequo et bono* if the parties have specifically agreed to allow them to do so. The CIETAC Rules make no mention of the principle of *amiable compositeur* or *ex aequo et bono*. That said, it bears noting that Article 43 of the 2005 CIETAC Rules reflects principles that potentially overlap with the powers conferred upon an arbitrator that is authorized to decide as an *amiable compositeur* or *ex aequo et bono*: "The arbitral tribunal shall … make its arbitral award … in compliance with the principles of fairness and reasonableness." (101) Using a somewhat different formulation, the 2012 and 2015 CIETAC Rules require that the arbitrator "independently and impartially render a fair and reasonable arbitral award on the basis of the facts in accordance with the law and the terms of the

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contracts." (102) This topic is discussed further in relation to the tribunal's duty to decide the dispute in accord with applicable law, in Chapter 9 (The Award: Form, Effect, and Enforceability).

Table 2.9 Ex Aequo Et Bono

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AAA-ICDR	
Article 31. Applicable Laws and Remedies	*1. The arbitral tribunal shall apply the substantive law(s) or rules of law agreed by the parties as applicable to the dispute. Failing such an agreement by the parties, the tribunal shall apply such law(s) or rules of law as it determines to be appropriate.* *2. In arbitrations involving the application of contracts, the tribunal shall decide in accordance with the terms of the contract and shall take into account usages of the trade applicable to the contract.* *3. The tribunal shall not decide as amiable compositeur or ex aequo et bono unless the parties have expressly authorized it to do so.*
CIETAC	
	Not explicitly mentioned in 2005, 2012, or 2015 Rules.
HKIAC	
Article 36 Applicable Law, Amiable Compositeur	*36.1. The arbitral tribunal shall decide the substance of the dispute in accordance with the rules of law agreed upon by the parties. Any designation of the law or legal system of a given jurisdiction shall be construed, unless otherwise expressed, as directly referring to the substantive law of that jurisdiction and not to its conflict of laws rules. Failing such designation by the parties, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.* *36.2. The arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorized the arbitral tribunal to do so.* *[…]*
ICC	
Article 21. Applicable Rules of Law	*1. The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.* *2. The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages.* *3. The arbitral tribunal shall assume the powers of an amiable compositeur or decide ex aequo et bono only if the parties have agreed to give it such powers.*
ICSID	
ICSID Convention, Article 42. Powers and Functions of the Tribunal	*1. The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.* *2. The Tribunal may not bring in a finding of non liquet on the ground of silence or obscurity of the law.*

	3. The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute ex aequo et bono if the parties so agree.
LCIA	
Article 22. Additional Powers	*22.3. The Arbitral Tribunal shall decide the parties' dispute in accordance with the law(s) or rules of law chosen by the parties as applicable to the merits of their dispute. If and to the extent that the Arbitral Tribunal decides that the parties have made no such choice, the Arbitral Tribunal shall apply the law(s) or rules of law which it considers appropriate.* *22.4. The Arbitral Tribunal shall only apply to the merits of the dispute principles deriving from "ex aequo et bono," "amiable composition" or "honourable engagement" where the parties have so agreed in writing.*
SCC	
Article 27. Applicable Law	*1. The Arbitral Tribunal shall decide the merits of the dispute on the basis of the law(s) or rules of law agreed upon by the parties. In the absence of such agreement, the Arbitral Tribunal shall apply the law or rules of law that it considers most appropriate.* *2. Any designation by the parties of the law of a given state shall be deemed to refer to the substantive law of that state, not to its conflict of laws rules.* *3. The Arbitral Tribunal shall decide the dispute ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so.*
SIAC	
Rule 31. Applicable Law, *Amiable Compositeur* and *Ex Aequo et Bono*	*1. The Tribunal shall apply the law or rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the Tribunal shall apply the law or rules of law which it determines to be appropriate.* *2. The Tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorised it to do so.* *3. In all cases, the Tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any applicable usage of trade.*
UNCITRAL	
Article 35. Applicable Law, Amiable Compositeur	*1. The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate.* *2. The arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorized the arbitral tribunal to do so.* *3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any usage of trade applicable to the transaction.*

[G] Impartiality and Independence of Arbitrators

The vast majority of national arbitration laws and the procedural rules of all of the leading arbitral institutions contain requirements that arbitrators should be independent and/or impartial and should conduct themselves in a manner that will ensure that the parties to the arbitration are treated equally. The parties may wish to emphasize these duties, particularly if they have agreed to ad hoc arbitration in a country where the ethical standards for arbitrators are not thought to be sufficiently stringent or adequately clear.

Both the American Bar Association (ABA) and the IBA publish rules of ethics applicable to arbitrators, and these can usefully be adopted in the parties' arbitration agreement to ensure that these standards will be adhered to. [(103)] These duties are analyzed in detail in section §4.02 (Independence, Impartiality, and Disclosure).

[H] Costs

Arbitration costs under each of the rules include administrative and arbitrators' fees, reasonable legal fees and expenses, and other incidental costs such as the hire of facilities for the arbitration hearing, expert witness fees, interpreters, travel and accommodation for the parties, their witnesses, and the tribunal. The controversial issue is what proportion of those costs should be borne by each of the parties. Some regimes (such as the LCIA and UNCITRAL Rules) adopt the English law presumption that the loser should pay the successful party's reasonable costs. All of the other rules under consideration in this book leave the issue as a matter to be decided by the tribunal within its discretion.

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Whichever approach is reflected in the arbitration rules selected to govern any dispute, the parties are at liberty to agree to adopt a different approach to costs. It is therefore sensible to consider whether an agreement on cost allocation would be either possible or advantageous when drafting the arbitration agreement. The rules concerning costs under the various arbitral regimes are discussed in detail in Chapter 8 (Costs and Fees).

[I] Appeals

Most arbitration rules contain express or implied limitations on the right to appeal from arbitral awards and, as such, there is often no need for an express waiver of the right to appeal in the parties' arbitration agreement. Nonetheless, doing so can provide additional assurance that an eventual award will be treated as final. That said, even if the parties waive their rights to any appeal against an arbitration award, there can be no guarantee that this waiver will be respected. In addition, appeals relating to due process concerns cannot be waived. And, of course, New York Convention challenges will remain available during the course of enforcement proceedings.

In any case, if the parties wish to derogate from the limitations imposed under the arbitration rules—including, for example, by *expanding* the scope of judicial review, subject to limitations imposed by the law applicable to the arbitration—it will be necessary to include specific language to that effect in the arbitration agreement. Grounds for judicial review of arbitral awards are discussed in detail in Chapter 9 (The Award: Form, Effect, and Enforceability).

[J] Effect of the Award

MODEL CLAUSE—ENFORCEMENT

The parties agree that judgment upon any award rendered by the arbitral tribunal may be entered in any court having jurisdiction thereof.

Where the designated procedural rules do not clarify the parties' agreement as to the effect to be given to the arbitral tribunal's award, it is advisable to include language in the arbitration clause concerning "entry of judgment" or "enforcement of judgment" whenever enforcement proceedings are anticipated in U.S. courts. This issue arises because of ambiguity in the language of the U.S. Federal Arbitration Act (FAA) as to whether party consent is required for confirmation of an arbitration award. (104) The FAA, like many other national arbitration laws, has a strong presumption for the validity of arbitral awards. (105) Like the New York Convention, however, these laws give

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national courts discretion to refuse to enforce an award in limited circumstances. (106) Thus, it is to the parties' benefit to ask the tribunal to include the "entry" or "enforcement of judgment" language in the award to limit the losing party's ability to challenge enforcement proceedings in national court. Enforcement of arbitral awards is discussed in detail in Chapter 9 (The Award: Form, Effect, and Enforceability).

[K] Representatives

Historically, there were restrictions in some jurisdictions as to who could act as a representative of a party to arbitration proceedings. Most commonly, these restrictions required that a party representative be qualified to practice law in the jurisdiction. (107) This is rarely the case today, as most countries have adopted a liberal approach regarding the selection of representatives as a matter for the parties themselves to decide. Even so, many international arbitration rules confirm that parties are free to be represented by whomever they choose. As such, there is little need to include language in a dispute resolution clause clarifying parties' freedom of choice insofar as their representatives are concerned. This general statement, however, does not apply to the question of the proof of authority that a chosen representative may have to provide to a tribunal, an arbitral institution, or the opposing party. It is not uncommon in the regional arbitration centers for the parties to be required to submit a Power of Attorney authorizing their representatives to act on their behalf. This practice is reflected in the CIETAC Rules. (108) The HKIAC, LCIA, SIAC, and UNCITRAL Rules provide tribunals with discretion to request proof of authority in any form they determine (*see* Table 2.10). (109)

The arbitration rules traditionally have not addressed the standard of behavior to which party representatives must adhere throughout the arbitration. In 2013, the IBA issued Guidelines on Party Representation in International Arbitration. The Guidelines "are inspired by the principle that party representatives should act with integrity and honesty and should not engage in activities designed to produce unnecessary delay or expense, including tactics aimed at obstructing the arbitration proceedings." (110) Like other guidelines and rules promulgated by the IBA, they apply only where the parties

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have so agreed or the tribunal has otherwise decided to apply them. (111) Nevertheless, they reflect increasing attention paid to the importance of governing the conduct of party representatives in international arbitration in recent years.

The LCIA and ICDR Rules reflect increasing attention to this area as well. The LCIA Rules require each party to "ensure that all its legal representatives have agreed to comply with the general guidelines contained in the Annex to the LCIA Rules, as a condition of appearing by name before the Arbitral Tribunal." (112) The Annex delineates the expected standards of ethical conduct including, among other things, the avoidance of any activities "intended unfairly to obstruct the arbitration or jeopardize the finality of any award" and refraining from knowingly making "any false statement to the Arbitral Tribunal." (113) The LCIA Rules also provide for the imposition of sanctions in the event that the tribunal determines that a provision has been violated. (114) Possible sanctions include written reprimand, reference to the legal representative's regulatory body, and "[a]ny other measure necessary to maintain the general duties of the Arbitral Tribunal." (115) The ICDR Rules do not go so far, merely providing that "[t]he conduct of party representatives shall be in accordance with such guidelines as the ICDR may issue on the subject." (116) No such guidelines have been issued as of the time of this writing. Therefore, parties may wish to include reference to the IBA Guidelines on Party Representation in their arbitration clause.

Table 2.10 Representatives

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AAA-ICDR	
Article 16. Party Representation	*Any party may be represented in the arbitration. The names, addresses, telephone numbers, fax numbers, and email addresses of representatives shall be communicated in writing to the other party and to the Administrator. Unless instructed otherwise by the Administrator, once the arbitral tribunal has been established, the parties or their representatives may communicate in writing directly with the tribunal with simultaneous copies to the other party and, unless otherwise instructed by the Administrator, to the Administrator. The conduct of party representatives shall be in accordance with such guidelines as the ICDR may issue on the subject.*
CIETAC	
Article 22. Representation	*A party may be represented by its authorized Chinese and/or foreign representative(s) in handling matters relating to the arbitration. In such a case, a Power of Attorney shall be forwarded to the Arbitration Court by the party or its authorized representative(s).*
HKIAC	
Article 13. General Provisions	*13.6. The parties may be represented by persons of their choice, subject to Article 13.5. The names, addresses, telephone and facsimile numbers, and/or email addresses of party representatives shall be communicated in writing to the other parties, HKIAC, any emergency arbitrator, and the arbitral tribunal once constituted. The arbitral tribunal, emergency arbitrator or HKIAC may require proof of authority of any party representatives.*
ICC	
Article 26. Hearings	*4. The parties may appear in person or through duly authorized representatives. In addition, they may be assisted by advisers.*
ICSID	
Rule 18. Representation of the Parties	*1. Each party may be represented or assisted by agents, counsel or advocates whose names and authority shall be notified by that party to the Secretary-General, who shall promptly inform the Tribunal and the other party.* *2. For the purposes of these Rules, the expression "party" includes, where the context so admits, an agent, counsel or advocate authorized to represent that party.*
LCIA	
Article 18. Legal Representatives	*1. Any party may be represented in the arbitration by one or more authorised legal representatives appearing by name before the Arbitral Tribunal.* *2. Until the Arbitral Tribunal's formation, the Registrar may request from any party: (i) written proof of the authority granted by that party to any legal representative designated in its Request or Response; and (ii) written confirmation of the names and addresses of all such party's legal representatives in the arbitration. After its formation, at any time, the Arbitral Tribunal may order any party to provide similar proof or confirmation in any form it considers appropriate.*

3. Following the Arbitral Tribunal's formation, any intended change or addition by a party to its legal representatives shall be notified promptly in writing to all other parties, the Arbitral Tribunal and the Registrar; and any such intended change or addition shall only take effect in the arbitration subject to the approval of the Arbitral Tribunal.

4. The Arbitral Tribunal may withhold approval of any intended change or addition to a party's legal representatives where such change or addition could compromise the composition of the Arbitral Tribunal or the finality of any award (on the grounds of possible conflict or other like impediment). In deciding whether to grant or withhold such approval, the Arbitral Tribunal shall have regard to the circumstances, including: the general principle that a party may be represented by a legal representative chosen by that party, the stage which the arbitration has reached, the efficiency resulting from maintaining the composition of the Arbitral Tribunal (as constituted throughout the arbitration) and any likely wasted costs or loss of time resulting from such change or addition.

5. Each party shall ensure that all its legal representatives appearing by name before the arbitral tribunal have agreed to comply with the general guidelines contained in the Annex to the LCIA Rules, as a condition of such representation. In permitting any legal representative so to appear, a party shall thereby represent that the legal representative has agreed to such compliance.

6. In the event of a complaint by one party against another party's legal representative appearing by name before the Arbitral Tribunal (or of such complaint by the Arbitral Tribunal upon its own initiative), the Arbitral Tribunal may decide, after consulting the parties and granting that legal representative a reasonable opportunity to answer the complaint, whether or not the legal representative has violated the general guidelines. If such violation is found by the Arbitral Tribunal, the Arbitral Tribunal may order any or all of the following sanctions against the legal representative: (i) a written reprimand; (ii) a written caution as to future conduct in the arbitration; and (iii) any other measure necessary to fulfil within the arbitration the general duties required of the Arbitral Tribunal under Articles 14.4(i) and (ii).

LCIA Rules Annex

General Guidelines for the Parties' Legal Representatives

(Articles 18.5 and 18.6 of the LCIA Rules)

Paragraph 1. These general guidelines are intended to promote the good and equal conduct of the parties' legal representatives appearing by name within the arbitration. Nothing in these guidelines is intended to derogate from the Arbitration Agreement or to undermine any legal representative's primary duty of loyalty to the party represented in the arbitration or the obligation to present that party's case effectively to the Arbitral Tribunal. Nor shall these guidelines derogate from any mandatory laws, rules of law, professional rules or codes of conduct if and to the extent that any are shown to apply to a legal representative appearing in the arbitration.

Paragraph 2. A legal representative should not engage in activities intended unfairly to obstruct the arbitration or to jeopardise the finality of any award, including repeated challenges to an arbitrator's appointment or to the jurisdiction or authority of the arbitral tribunal known to be unfounded by that legal representative.

Paragraph 3. A legal representative should not knowingly make any false statement to the Arbitral Tribunal or the LCIA Court.

Paragraph 4. A legal representative should not knowingly procure or assist in the preparation of or rely upon any false evidence presented to the Arbitral Tribunal or the LCIA Court.

Paragraph 5. A legal representative should not knowingly conceal or assist in the concealment of any document (or any part thereof) which is ordered to be produced by the Arbitral Tribunal.

Paragraph 6. During the arbitration proceedings, a legal representative should not deliberately initiate or attempt to initiate with any member of the Arbitral Tribunal or with any member of the LCIA Court making any determination or decision in regard to the arbitration (but not including the Registrar) any unilateral contact relating to the arbitration or the parties' dispute, which has not been not disclosed in writing prior to or shortly after the time of such contact to all other parties, all members of the Arbitral Tribunal (if comprised of more than one arbitrator) and the Registrar in accordance with Article 13.4.

Paragraph 7. In accordance with Articles 18.5 and 18.6, the Arbitral Tribunal may decide whether a legal representative has violated these general guidelines and, if so, how to exercise its discretion to impose any or all of the sanctions listed in Article 18.6.

SCC

Not specifically addressed.

SIAC

	1. Any party may be represented by legal practitioners or any other authorised representatives. The Registrar and/or the Tribunal may require proof of authority of any party representatives.
Rule 23. Party Representatives	*2. After the constitution of the Tribunal, any change or addition by a party to its representatives shall be promptly communicated in writing to the parties, the Tribunal and the Registrar.*
UNCITRAL	
Article 5. Representation and Assistance	*Each party may be represented or assisted by persons chosen by it. The names and addresses of such persons must be communicated to all parties and to the arbitral tribunal. Such communication must specify whether the appointment is being made for purposes of representation or assistance. Where a person is to act as a representative of a party, the arbitral tribunal, on its own initiative or at the request of any party, may at any time require proof of authority granted to the representative in such a form as the arbitral tribunal may determine.*

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[L] Waiver

Parties to an arbitration clause may elect to include language to the effect that a party's failure to invoke rights under the agreement will *not* be considered a waiver of those rights. Absent such language, most arbitration rules require parties to exercise their rights within a reasonable period of time or else be deemed to have waived those rights. The purpose of these rules is to prevent a party from guarding silence as to an objection and then raising that objection to resist enforcement of an unfavorable award. Most regimes apply the waiver rule to situations known to the party; however, under the CIETAC, HKIAC, and ICSID Rules waiver applies as well to situations that a party should have known (*see* Table 2.11). [(117)] Parties may wish therefore to clarify in their arbitration agreement whether and to what extent the waiver rule will apply to any eventual arbitration.

Table 2.11 Waiver

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AAA-ICDR	
Article 28. Waiver of Rules	*A party who knows of any non-compliance with any provision or requirement of the Rules or the arbitration agreement, and proceeds with the arbitration without promptly stating an objection in writing, waives the right to object.*
CIETAC	
Article 10. Waiver of Right to Object	*A party shall be deemed to have waived its right to object where it knows or should have known that any provision of, or requirement under, these Rules has not been complied with and yet participates in or proceeds with the arbitral proceedings without promptly and explicitly submitting its objection in writing to such non-compliance.*
HKIAC	
Article 32. Waiver	*32.1 A party who knows or ought reasonably to know that any provision of, or requirement arising under, these Rules (including the arbitration agreement) has not been complied with and yet proceeds with the arbitration without promptly stating its objection to such non-compliance, shall be deemed to have waived its right to object.*
ICC	
Article 40. Waiver	*A party which proceeds with the arbitration without raising its objection to a failure to comply with any provision of the Rules, or of any other rules applicable to the proceedings, any direction given by the arbitral tribunal, or any requirement under the arbitration agreement relating to the constitution of the arbitral tribunal or the conduct of the proceedings, shall be deemed to have waived its right to object.*
ICSID	
Arbitration Rules, Rule 27. Waiver	*A party which knows or should have known that a provision of the Administrative and Financial Regulations, of these Rules, of any other rules or agreement applicable to the proceeding, or of an order of the Tribunal has not been complied with and which fails to state promptly its objections thereto, shall be deemed –subject to Article 45 of the Convention—to have waived its right to object.*
LCIA	
Article 32. General Rules	*1. A party who knows that any provision of the Arbitration Agreement has not been complied with and yet proceeds with the arbitration without promptly stating its objection as to such non-compliance to the Registrar (before the formation of the Arbitral Tribunal) or the Arbitral Tribunal (after its formation), shall be treated as having irrevocably waived its right to object for all purposes [...].*
SCC	
Article 36. Waiver	*A party, who during the arbitration, fails to object without delay to any failure to comply with the arbitration agreement, these Rules or other rules applicable to the proceedings, shall be deemed to have waived the right to object to such failure.*
SIAC	

Rule 41. General Provisions	*41.1 Any party that proceeds with the arbitration without promptly raising any objection to a failure to comply with any provision of these Rules, or of any other rules applicable to the proceedings, any direction given by the Tribunal, or any requirement under the arbitration agreement relating to the constitution of the Tribunal or the conduct of the proceedings, shall be deemed to have waived its right to object.*
UNCITRAL	
Article 32. Waiver of Right to Object	*A failure by any party to object promptly to any non-compliance with these Rules or with any requirement of the arbitration agreement shall be deemed to be a waiver of the right of such party to make such an objection, unless such party can show that, under the circumstances, its failure to object was justified.*

[M] Multitiered or Single-Step Dispute Resolution Clause

Parties may choose to include in their dispute resolution clause a requirement that their representatives attempt to negotiate a solution to their differences prior to submitting the dispute to arbitration. They might also include, either instead of a negotiation clause or in addition to it, a mediation clause or a provision for a Dispute Adjudication Board (DAB). Adding such a precondition, or preconditions, creates a multitiered process with certain advantages and some potential disadvantages.

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The addition of a negotiation provision as a precondition to arbitration has become increasingly common in international contracts for several reasons. First and foremost, if a negotiated solution can be reached, it precludes the time and expense of an arbitration. Indeed, with such a clause in place, the parties will naturally compare the costs of resolving the dispute through negotiation versus arbitration, which creates an incentive for them to use best efforts to achieve a resolution through the former, less expensive, means. Second, a negotiated solution tends to preserve the parties' relationship. This is particularly important in cases involving long-term investments, joint venture projects, and public-private partnerships, in which most of the value at stake lies in the continuation of the project. Many bilateral investment treaties and investment contracts contain a negotiation requirement, commonly referred to as a "cooling-off period," for this reason. By contrast, parties to a one-off commercial transaction do not have quite the same incentive to preserve a relationship through a negotiation or mediation, though they may wish to adopt a multitiered clause for the other reasons given here. Third, a negotiation tends to focus on the issues in dispute and draw out relevant information and evidence. Through the negotiation process, the strengths and weaknesses of the parties' positions become clearer, and the parties may be able to negotiate a resolution to at least some of the issues in dispute—and to bring a less complicated case before an arbitral tribunal.

Notwithstanding the foregoing, there may be disadvantages to including a negotiation clause in the arbitration agreement. In case of an intractable dispute, a "cooling-off" period only prolongs the conflict, adding to the parties' costs. A party who attempts to commence arbitration knowing negotiations would be futile will still likely face jurisdictional objections from the other side. Even after the cooling-off period has run, a party seeking to delay the commencement of the arbitration might challenge the jurisdiction of the tribunal on grounds that the other party failed to negotiate in good faith or that certain issues in dispute were not addressed in the negotiation. Parties may wish to draft a single-tier arbitration clause to avoid these potential pitfalls.

The advantages and disadvantages of an agreement to mediate before proceeding to arbitrate—sometimes known as a "med-arb" clause—are the same as for an agreement to negotiate prior to arbitration. However, mediation has certain features that merit some additional discussion. Mediation is essentially a negotiation facilitated by a third-party neutral. Most of the criticism of "med-arb" concerns situations where the mediator and arbitrator are one and the same person. The neutral must be experienced in both mediation and arbitration; able to switch from the role of a facilitator to that of a decision-maker; and able to disregard in the arbitration any confidential information that she learned during the mediation—requirements that some view as very difficult if not impossible to satisfy. These criticisms may be overstated, and in any event, they may be overcome by specifying in the med-arb clause that the parties will appoint a different neutral for each phase. (118) Mediation or conciliation combined with arbitration is discussed in more detail in section §10.02 (Mediation-Arbitration).

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A final option for multitiered dispute resolution clauses is to submit highly technical disputes, such as disputes concerning sophisticated construction projects, to a standing, on-site DAB that can resolve disagreements quickly with little to no disruption to the project. In the rare event that a party does not accept a decision of the DAB, it can, pursuant to the dispute resolution clause, "appeal" the decision in an arbitration. Such was the case in a recent high-profile dispute arising out of a project to expand the Panama Canal. The parties' agreement provided a three-tiered dispute settlement mechanism: first, negotiation; second, dispute resolution before a DAB; and third, binding ICC arbitration. The parties in that case made use of all three tiers. (119)

FURTHER READING

Gary B. Born, *Drafting International Arbitration Agreements*, in *International Arbitration and Forum Selection Agreements* (Kluwer Law International 2016).

Marcel Fontaine & Fillip de Ly, *Drafting International Contracts: An Analysis of Contract Clauses* (Brill 2015).

Paul Friedl, Chapter Six: *Drafting an Effective Arbitration Agreement*, in *Arbitration Clauses for International Contracts* (2d. ed., Juris 2007).

William Fox, Chapter Four: *Drafting International Commercial Agreements,* in *International Commercial Agreements*: *A Primer on Drafting Negotiating and Resolving Disputes* (Springer 1994).

Michael McIlwrath & John Savage, Chapter One: *The Elements of an International Dispute Resolution Agreement*, in *International Arbitration and Mediation*: *A Practical Guide* (Kluwer Law International 2010).

Albert Jan Van den Berg, *Improving the Efficiency of Arbitration Agreements and Awards*: *40 Years of Application of the New York Convention* (Kluwer Law International 1999).

Thomas E. Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, in *Carbonneau on International Arbitration: Collected Essays* (JurisNet 2011).

Marcel Fontaine & Fillip de Ly, *Drafting International Contracts: An Analysis of Contract Clauses* (Brill 2015).

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Michael McIlwrath & John Savage, *The Elements of an International Dispute Resolution Agreement*, in *International Arbitration and Mediation*: *A Practical Guide* (Kluwer Law International 2010).

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Andrew Tweeddale & Keren Tweeddale, *Arbitration of Commercial Disputes* (Oxford University Press 2007).

Albert Jan Van den Berg, *Improving the Efficiency of Arbitration Agreements and Awards*: *40 Years of Application of the New York Convention* (Kluwer Law International 1999).

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References

1) Arbitration is commonly referred to as a "creature of contract." *United Steel Workers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 569 (1960) (Brennan, J., concurring). It is the contractual expression of the parties' desire to arbitrate their dispute rather than submit it to litigation in domestic courts. As such, the parties are free to craft their arbitration agreement in any way they choose. Most international arbitration conventions, national laws, and institutional rules give parties wide discretion to agree upon both the substantive and procedural rules that will apply to their dispute. This includes the substantive law pursuant to which the dispute will be decided, as well as the degree of formality and complexity that they wish to ascribe to the proceedings themselves. *See also* Thomas E. Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, in *Carbonneau on International Arbitration: Collected Essays* 417, 419-420 (JurisNet 2011) ("Freedom of contract … is at the very core of how the law regulates arbitration. What the contracting parties provide in the agreement generally becomes the controlling law."); Nigel Blackaby, Constatine Partasides, Alan Redfern & J. Martin Hunter, *Redfern and Hunter on International Arbitration*, 85 (5th ed., Oxford University Press 2009) (Arbitration agreements "record[] the consent of the parties to submit [their dispute] to arbitration"; therefore, the interpretation of such agreements "attach[es] great importance to the wishes of the parties—*l'autonomie de la volunté*").

2) *See* Blackaby, *supra* n. 1, at 89 ("A valid agreement to arbitrate excludes the jurisdiction of national courts. …").

3) *See also* Lawrence Boo, *The Enforcement of Arbitration Agreements under Article 8 of the Model Law*, in *The UNCITRAL Model Law after 25 Years: Global Perspectives on International Commercial Arbitration*, 29, 35 (Frédéric Bachand and Fabien Gélinas eds., Juris 2013) ("To date, New Zealand and Sweden remain the only states that have taken the route of permitting fully oral agreements."); Friedland, *Arbitration Clauses for International Contracts*, 59-60 ("While certain national laws recognize an oral agreement to arbitrate, as a matter of practice, it is evident that prudent parties and counsel will not rely on the prospect of testimony to prove an arbitration agreement"); *Id.*, at note 150 ("In the United States, oral agreements to arbitrate are enforceable in some jurisdictions based on common law. … Oral agreements to arbitrate are not enforceable in Switzerland.").

4) New York Convention, Art. II(1), 1958, 330 UNTS 38.

5) UNCITRAL Model Law, Art. 7(2), 24 ILM 1302 ("The arbitration agreement shall be in writing.").

6) *Id.*, at Arts. 7(2)-7(3) (Option I).

7) *Id.*, at Art. 7.

8) *See* UNCITRAL, Status, UNCITRAL Model Law on International Commercial Arbitration (1985, with amendments as adopted in 2006), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model _arbitration_status.html.

9) Decree No. 2011-48 Reforming the Law Governing Arbitration, Art. 1442 (Jan. 13, 2011).

10) *See id.*, at Arts. 1506, 1507.

11) *See also* Gary B. Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*, 36 (4th ed., Kluwer Law International 2013). *See also* Gary B. Born, *International Commercial Arbitration*, 72 (2d ed., Kluwer Law International 2014) ("In practice, almost all international commercial arbitrations occur pursuant to arbitration clauses contained within underlying business contracts."); Michael McIlwrath & John Savage, *International Arbitration and Mediation: A Practical Guide*, 11 (Kluwer Law International 2010); Blackaby, *supra* n. 1, at 86; Friedland, *supra* n. 3, at 57, note 142.

12) National laws can vary significantly with respect to these matters. For example, the national arbitration law of Germany establishes a default rule that an arbitral tribunal is to consist of three arbitrators if the parties are unable to reach agreement on this issue. German Arbitration Law 98 § 1034(1), http://www.dis-arb.de/en/51/materials /german-arbitration-law-98-id3 (accessed Feb. 1, 2018). In contrast, the national arbitration law of Singapore provides for the appointment of a sole arbitrator in such a situation. Singapore International Arbitration Act (Cap. 143A) 2012 § 9A, http://www.siac.org.sg/images/stories/articles/rules/Singapore_IAA_with_2012_Amendments.pdf (accessed Feb. 1, 2018).

13) *Relate, Connection,* Merriam-Webster Dictionary, retrieved Aug. 11, 2018, from http://www.merriam-webster.com/dictionary/relate; http://www.merriam-webster.com/dictionary/connection.

14) *See* Loukas A. Mistelis, *Arbitrability—International and Comparative Perspectives, Is Arbitrability a National or an International Law Issue?*, in *Arbitrability: International and Comparative Perspectives* 10 (Loukas A. Mistelis & Stavros L. Brekoulakis eds., Kluwer Law International 2009) ("Indeed, every national law determines which types of disputes are reserved for the exclusive domain of national courts and which can be referred to arbitration. This differs from state to state, reflecting the political, social and economic prerogatives of the state, as well as its general attitude towards arbitration.").

15) Friedland, *supra* n. 3, at 62 ("An arbitration clause that provides ambiguously for arbitration of a set of disputes that is less than the universe of disputes arising out of or in connection with the contract is an invitation to litigation about the scope of the arbitrators' jurisdiction. Even where a narrow clause is drafted properly and is without ambiguity, there is still often room for dispute about whether a certain fact pattern falls within or without its coverage").

16) ICDR Rules, Art. 1; HKIAC Rules, Art. 1; ICC Rules, Art. 6; LCIA Rules, Preamble; SCC Rules, Preamble.

17) Friedland, *supra* n. 3, at 95-96.

18) UNCITRAL Rules, Art. 1.

19) *Id.*

20) ICSID Convention, Art. 44.

21) *See* Francisco Orrego Vicuña, *Arbitrating Investment Disputes*, in *The Leading Arbitrators' Guide to International Arbitration* 712 (Lawrence W. Newman & Richard D. Hill eds., 2d ed., Juris Publishing, Inc., 2008) (consent by investors under investment agreements "happens typically when consent by the investor is given in a direct agreement with the State concerned.").

22) *See* CIETAC Model Arbitration Clauses (providing that the arbitration "shall be conducted in accordance with the CIETAC's arbitration rules in effect at the time of applying for arbitration"), available at http://www.cietac.org/index.php?m=Page&a=index&id=188&l=en (accessed Aug. 13, 2018).

23) This does not mean that the procedural rules applicable in local court proceedings in the jurisdiction in which the arbitration is sited will apply to the arbitral proceedings. This is an important distinction. The procedural framework applicable to the arbitration is determined by the parties' agreement and the arbitration rules that they may have agreed upon within the bounds of the law of the seat.

24) ICDR Rules, Art. 1(2); UNCITRAL Rules, Art. 1(3). For a list of examples of mandatory laws, *see* McIlwrath & Savage, *supra* n. 11, at 25-26.

25) LCIA Rules, Art. 16.4.

26) *Id.*

27) On a related point, the ICC Rules recognize that the tribunal may refer to the *lex loci arbitri* to supply rules for an issue in the proceedings not otherwise covered by the ICC Rules and the parties' agreement. ICC Rules, Art. 19.

28) UNCITRAL Model Law, Art. 11(4)-(5).

29) *Id.*

30) This restriction was introduced by the California Supreme Court's judgment in *Birbrower, Montalbano, Condon & Frank PC v, Sup. Ct.* (1998) 17 C4th 119; 70 CR2d 304. This was followed by the adoption of California Code of Civil Procedure s. 1282.4, which allowed a party to arbitration in California to be represented by lawyers admitted in any other U.S. state, but did not address the participation of foreign attorneys in those proceedings. With effect from Jan. 1, 2019, California expressly permits non-U.S. qualified lawyers to appear in arbitrations with their seat in California. California Code of Civil Procedure, Art. 1.5, ss 1297.185 et seq.

31) The term "arbitrability" is used here to refer to those substantive claims that, under national laws, are considered to be capable of resolution by private arbitration. In the U.S., the term "arbitrability" is frequently used to refer to the power of a tribunal to decide upon its own jurisdiction, without the need for intervention by national courts.

32) *See* McIlwrath & Savage, *supra* n. 11, at 27 ("The line between supporting and interfering with arbitration is what, in practice, separates an arbitration-friendly place from an arbitration-unfriendly one, and the main reason why great care should be taken when choosing the seat of arbitration.").

33) For a detailed discussion of the legal framework surrounding the enforcement of domestic and foreign arbitral awards, *see* Ch. 9 of this book.

34) There are rare exceptions to this rule. Art. V(1)(e) of the New York Convention provides that "a court *may* refuse to enforce an award if that award had been set aside by a competent authority in the country where the award was rendered" [emphasis added]. Enforcement may be allowed in circumstances where the enforcing court considers it would be contrary to public policy to recognize the court decision setting aside the award. This principle was recognized in *Yukos Capital s.a.r.l. v. OAO Rosneft (Netherlands Court of Appeal 2009)*, Yearbook Commercial Arbitration XXXIV (Netherlands No. 31) at 703-714.

35) ICDR Rules, Art. 17; CIETAC Rules, Art. 7; HKIAC Rules, Art. 14; ICC Rules, Art. 18; ICSID Convention, Arts. 62-63; LCIA Rules, Art. 16; SCC Rules, Art. 25; SIAC Rules, Art. 21; UNCITRAL Rules, Art. 18.

36) *See* Martin F. Gusy et al., *A Guide to the ICDR International Arbitration Rules* 144 (Oxford 2011). To that end, the 2014 ICDR Rules, as well as the 2014 and 1998 LCIA Rules, clarify that even if the tribunal meets at a location other than the place of arbitration, the arbitration will be deemed conducted at the place of arbitration and any award shall be deemed made at the place of arbitration. ICDR Rules, Art. 17.2. The LCIA Rules extend this principle to include orders as well as awards. However, "[i]t should be kept in mind that, no matter where hearings and meetings are actually held, the arbitral tribunal remains bound by and subject to the relevant arbitration law at the place of the arbitration." Jason Fry et al., *The Secretariat's Guide to ICC Arbitration* 207 (ICC 2012).

37) *See* SIAC Rules, Rule 24.2; ICC Rules, Art. 18; LCIA Rules, Art. 16; SCC Rules, Art. 25.

38) ICC Rules, Art. 18(2); CIETAC Rules, Art. 35, SCC Rules, Art. 25(1); UNCITRAL Rules, Art. 18(1).

39) ICC Rules, Art. 18(3); LCIA Rules, Art. 16.3; SCC Rules, Art. 25(2); UNCITRAL Rules, Art. 18(2).

40) ICDR Rules 2014, Art. 17(2) (emphasis added). The 2009 ICDR Rules contain a similar formulation but do not make express provision for hearings. *See* ICDR Rules 2009, Art. 13.2.

41) *See* Gary B. Born, *International Commercial Arbitration* 204, 349 (2d ed., Kluwer Law International 2014) ("The separability presumption is one of the conceptual and practical cornerstones of international arbitration.").

42) *See id.*, at 2058 ("[T]he choice of the arbitral seat will often have material influences on the selection of the parties' arbitrators … . [L]egislation in a few states imposes idiosyncratic nationality or religion requirements on arbitrators in locally-seated arbitrations.").

43) UNCITRAL, Model Law.

44) ICC Rules, Art. 18(1); SCC Rules, Art. 25(1); UNCITRAL Rules, Art. 18(1).

45) ICDR Rules, Art. 17(1).

46) LCIA Rules, Art. 16.2.

47) HKIAC Rules, Art. 14.1.

48) SIAC Rules, Rule 21.1.

49) ICSID Convention, Art. 2.

50) CIETAC Rules, Art. 7(2).

51) HKIAC Rules, Art. 14.1; ICC Rules, Art. 18(2); LCIA Rules, Art. 16.2; SCC Rules, Art. 25(2); SIAC Rules, Rule 21.1; UNCITRAL Rules, Art. 18(1). Like the LCIA Rules, the 2009 ICDR Rules, Art. 13(1) requires the tribunal to determine the seat "having regard for the contentions of the parties and the circumstances of the arbitration." Although this language was eliminated in the 2014 version of the rules, in practice ICDR tribunals will typically determine the default seat having consulted with the parties or received their submissions. *See* ICDR Rules, Art. 17.

52) Gusy, *supra* n. 36, at 142. *See also* Yves Derains & Eric A. Schwartz, *Guide to the ICC Rules of Arbitration* 213 (Kluwer Law International 2005).

53) ICDR Rules, Art. 11; HKIAC Rules, Art. 6.1; LCIA Rules, Art. 5.8.

54) CIETAC Rules, Art. 25; ICSID Convention, Art. 37(2)(b); UNCITRAL Rules, Art. 7(1).

55) UNCITRAL Rules, Art. 7(1).

56) Only the ICSID Convention and LCIA Rules permit tribunals of more than three arbitrators. ICSID Convention, Art. 37(2)(a); LCIA Rules, Art. 5.8.

57) *See*, e.g., English Arbitration Act 1996, ss 16-18; Swiss Federal PILA (Dec. 18, 1987 as amended until July 1, 2014), Art. 179(2); U.S. Federal Arbitration Act, 9 U.S.C. ss 5, 206; UNCITRAL Model Law, Art. 11(4)-(5).

58) LCIA Rules 2014, Art. 6(3). The 1998 LCIA Rules did not specifically address the situation in which a party may be from a colony or otherwise dependent territory, but the general LCIA practice under those Rules has been not to appoint an arbitrator who is a citizen of the "mother" country. Simon Nesbitt, *LCIA Arbitration Rules, Article 6 on Nationality of Arbitrators*, in *Concise International Arbitration* 416 (Loukas A. Mistelis ed., Kluwer Law International 2010).

59) HKIAC Rules, Art. 11.2.

60) HKIAC Rules, Art. 11.3.

61) *See* Michael Moser & Chiann Bao, *A Guide to the HKIAC Arbitration Rules*, ¶ 7.164 (Oxford University Press 2017).

62) Fry, *supra* n. 36, at 168.

63) In reality, the ICC Court applies this provision strictly and typically considers it suitable to appoint a sole or presiding arbitrator with the same nationality as one of the parties under two sets of circumstances. First, where all parties share the same nationality, "such that the appointment cannot be said to favour one or more parties over the others." Second, where it appears to the Secretariat that the parties may be expecting an arbitrator to have the same nationality as one of them. The Secretariat provides the following example: case involving an English party and a German party where the place of arbitration is Frankfurt, applicable law is German, language of the arbitration is German, and the nationality of counsel selected by the parties as well as co-arbitrators appointed by the parties is German. Fry, *supra* n. 36, at 168.

64) ICC Rules 1998, Art. 9(6).

65) *Id.*

66) ICC Rules 2017, Art. 13(3); *see* ICC Rules 2012, Art. 13(3). In certain territories (e.g., Hong Kong, Macau, and Palestine), the ICC has not been able to establish a national committee because they are not recognized as sovereign states or for other reasons.

67) In 2011, the English Supreme Court confirmed its view that these rules do not contravene European antidiscrimination regulations. *Jivraj v. Hashwani* (2011) UKSC 40.

68) Article 25 of the ICSID Convention sets forth the nationality requirements for parties to ICSID proceedings. It provides for ICSID jurisdiction over legal disputes arising out of an investment between a "Contracting State" and a "national of another Contracting State." Article 25(2) provides a further definition for "a national of another Contracting State." While this requirement may appear to be straightforward at first glance, the issue of nationality is complex. Indeed, numerous ICSID arbitrations have resulted in interesting and varying findings on the matter. *See* Robert Wisner & Nick Gallus, *Nationality Requirements in Investor-State Arbitration*, 5 J. World Investment & Trade 927, 927 (2004); *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction (Apr. 29, 2004) (finding Tokios Tokeles had standing under the Ukraine-Lithuania BIT as a Lithuanian company despite that it was almost entirely controlled by Ukrainian nationals); *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Award (July 7, 2004) (finding that Soufraki did not have Italian citizenship and therefore did not have standing under the Italy-United Arab Emirates BIT despite a declaration from the Italian Foreign Affairs Minister that Soufraki was indeed a citizen and could claim under the BIT). For further commentary on the effectiveness of ICSID nationality requirements, *see* David D. Caron, *Are the ICSID Rules Governing Nationality and Investment Working?—A Discussion*, in *Investment Treaty Arbitration and International Law*, 119-141 (TJ Gierson Weiler, ed., Juris, 2008). For an analysis of ICSID cases discussing nationality requirements and, in particular, on the effectiveness of "nationality planning" by investors, *see* Christoph Schreuer, *Nationality Planning*, in *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* , 15 (Arthur W. Rovine ed., Martinus Nijhoff Publishers, 2012).

69) *See*, e.g., NAFTA, 32 ILM 289, Arts. 1115-1138.2. Pursuant to NAFTA Art. 1123, arbitral tribunals shall be composed of three arbitrators, one chosen by each party, and another appointed. NAFTA, Art. 1123. If the parties cannot agree upon an arbitrator, the Secretary-General of ICSID will have appointing authority and will choose arbitrators who are not nationals of either party. NAFTA, Art. 1124(1)-(4). Other treaties contain similar provisions. *See also*, e.g., ECT, 2080 UNTS 95, Art. 27 (providing that, in an ad hoc settlement of disputes between contracting parties, one of three arbitrators must not be a national of either party); CAFTA-DR, Arts. 20.6-20.10 (providing guidelines for the appointment of an arbitral panel).

70) CIETAC Rules, Art. 30.

71) The ICSID Arbitration Rules nominally limit the conduct of the arbitral proceedings to two languages. It is conceivable, however, that an ICSID arbitration could be conducted in three languages. For example, in a case involving a Latin American respondent state, a U.S.-based parent company, and a French subsidiary of that U.S. company, the languages of the arbitration could be Spanish, English, and French. ICSID Rules.

72) Gusy, *supra* n. 36, at 149.

73) CIETAC Rules, Art. 81(3); HKIAC Rules, Art. 15.3; ICDR Rules, Art. 18; ICSID Rules, Art. 22(2); LCIA Rules, Art. 17; SCC Rules, Art. 26(2); SIAC Rules, Rule 22.2; UNCITRAL Rules, Art. 19(2).

74) It is not possible within the scope of this text to provide any definitive guidelines regarding the substantive law that should be chosen to govern the parties' relationship, as this choice will be predicated on a variety of factors, including the parties' identities, the strength of their respective negotiating positions, the subject matter of the underlying transaction, the specifics of the potentially applicable national laws, and the extent to which there is actually a conflict of legal principles that could result in different outcomes. As a general matter, it is advisable to make reference to a well-developed body of commercial, contractual, corporate, or intellectual property law. It is also important to insist on a law with which the parties are familiar or the content of which they are able to ascertain with reasonable ease and certainty. Formulations that refer to "general principles of law," "*lex mercatoria*," "international law and trade usages," and the like should be avoided as these are insufficiently well defined.

75) *See* Friedland, *supra* n. 3, at 90 ("While every international contract should contain a clause which provides for the governing substantive law ... and most do, there are few contracts that contain a choice of governing arbitration law [i.e. procedural law], and there is rarely a need to do so"). For a list of the potential options open to those parties who *do* wish to select a specific procedural law to govern their arbitration, *see* W. Laurence Craig et al., *International Chamber of Commerce Arbitration* 107 (3d ed., Oceana 2000).

76) UNCITRAL Model Law, Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, at 33.

77) *See* ICDR Rules, Art. 31(1); LCIA Rules, Art. 22.3; SCC Rules, Art. 27; SIAC Rules, Rule 31.1.

78) *See* Craig, *supra* n. 75, at 300 ("By declining to make an explicit adoption of national procedural norms, the arbitrators retain a maximum degree of discretion to adopt procedures which are consistent with the requirements of international commerce and which may differ from the procedures normally in force.").

79) UNCITRAL Rules 2010, Art. 35(1). In any case, "while the discretion accorded to the tribunal is less than that accorded to the parties under the principle of party autonomy," in this regard, the revised 2010 formulation accords the tribunal more flexibility to determine the

applicable law by eliminating the requirement in Art. 33.1 of the 1976 UNCITRAL Rules that the tribunal "choose" the law in accordance with the "conflict of laws principles which it considers applicable." David D. Caron & Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* , 118-119 (2d ed., Oxford 2013).

80) HKIAC Rules, Art. 36.1.

81) *Id.*

82) *Compare* HKIAC Rules 2008, Art. 31.1.

83) *See* SCC Rules, Art. 27(2); ICSID Convention, Art. 42(1).

84) ICDR Rules, Art. 31(2); HKIAC Rules, Art. 36.3; SIAC Rules, Rule 31.3; UNCITRAL Rules, Art. 35(3).

85) ICC Rules 2017, Art. 21(2).

86) CIETAC Rules 2015, Art. 49(1).

87) *Id.*

88) *Id.*

89) ICSID Rules, Art. 42(1).

90) LCIA Rules, Art. 14.5; SCC Rules, Art. 27.

91) ICSID Convention, Art. 14(1) (emphasis added).

92) *Id.*

93) SIAC Rules, Rule 13.2.

94) CIETAC Rules, Art. 26(1)-(2).

95) IBA Rules of Evidence.

96) *See*, e.g., ICC Rules, Art. 26(3) ("Save with the approval of the arbitral tribunal and the parties, persons not involved in the proceedings shall not be admitted."); UNCITRAL Rules, Art. 28(3) ("Hearings shall be held in camera unless the parties agree otherwise").

97) *See*, e.g., LCIA Rules, Art. 30(1) ("The parties undertake as a general principle to keep confidential all awards in the arbitration, together with all materials in the arbitration created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain, save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a state court or other legal authority.").

98) The revised UNCITRAL Arbitration Rules incorporating the provision on transparency also came into effect on Apr. 1, 2014. In all other respects, the Rules are identical to the UNCITRAL 2010 Rules. UNCITRAL, *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, http://www.uncitral.org/uncitral/uncitral_texts /arbitration/2014Transparency.html (accessed July 20, 2018).

99) *See id.*

100) *See* Andreas F. Lowenfeld, *A Primer on International Arbitration*, in *Lowenfeld on International Arbitration: Collected Essays over Three Decades* 14 (Juris 2005). *See also Black's Law Dictionary* (8th ed., 2009) ("A decision-maker ... who is authorized to decide *ex aequo et bono* is not bound by legal rules and may instead follow equitable principles."); Leon Trakman, *Ex Aequo et Bono: Demystifying an Ancient Concept*, 8(2) Chi. J. Int'l. L. 621 (2008).

101) CIETAC Rules 2005, Art. 43(1).

102) CIETAC Rules, Art. 49(1); CIETAC Rules 2012, Art. 47(1).

103) Note that Rules 3 and 4 of the IBA Rules of Ethics (on impartiality and independence) have been superseded in part by the IBA Guidelines on Conflicts of Interest in International Arbitration. However, they "remain in effect as to subjects that are not discussed in the Guidelines." IBA, *IBA Guidelines on Conflicts of Interest in International Arbitration* 5, http://www.ibanet.org/ENews_Archive/IBA_July_2008_ENews_ArbitrationMultipleLang.aspx (accessed June 23, 2018).

104) 9 U.S.C. § 9 (1947) provides that a court may confirm an arbitration award, "[i]f the parties in their agreement have agreed that a judgment of the court shall be entered upon the award ... ."

105) *See Diapulse Corp. of Am. v. Carba, Ltd.* 626 F.2d 1108 (2d Cir. 1980). *See*, e.g., Swiss Law on Private International Law, Arts. 190, 194; Belgian Judicial Code, §1717; Italian Code of Civil Procedure, Art. 829. *See also* Gary B. Born, *International Arbitration: Law and Practice* 311-374 (2d ed., Kluwer Law International 2015).

106) *See* New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. V (listing the seven reasons a national court should not recognize and enforce an arbitral award).

107) For example, some U.S. jurisdictions, such as Utah, require out-of-state attorneys to obtain *pro hac vice* admission before they may represent clients in arbitral proceedings within that state. *See* Utah Rules of Professional Conduct, Rule 5.5(a), Utah Supreme Court Rules of Professional Practice, Rule 14-802(b)(2)(B) and Advisory Committee Note. By default, this also implies that non-attorneys may not represent parties in arbitral proceedings in Utah.

108) CIETAC Rules, Art. 22.

109) HKIAC Rules, Art. 13.6; LCIA Rules, Art. 18.2; UNCITRAL Rules, Art. 5.

110) International Bar Association, *Practice Rules and Guidelines*, http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (accessed July 20, 2018).

111) Tom Cummins, *The IBA Guidelines on Party Representation in International Arbitration—Levelling the Playing Field?*, 30 Arb. Int'l 429 (2014).

112) LCIA Rules, Art. 18.5.

113) LCIA Rules, Annex: General Guidelines for the Parties' Legal Representatives, paras. 2 and 3.

114) *Id.*, at para. 7.

115) LCIA Rules, Art. 18.6.

116) ICDR Rules, Art. 16.

117) CIETAC Rules, Art. 10; HKIAC Rules, Art. 32; ICSID Rules, Rule 27.

118) Martin C. Weisman, *Med-Arb: The Best of Both Worlds*, 19(3) Disp. Res. Magazine (Spring 2013).

119) *See* Ryan Mellske, *Grupo Unidos por el Canal v. Autoridad del Canal de Panamá, Dispute Adjudication Board Decision*, A contribution by the ITA Board of Reporters (Kluwer Law International Dec. 31, 2014).